U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF TEN RULING LETTERS, MODIFICATION OF FOUR RULING LETTERS, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF TRAINING PANTS

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

ACTION: Notice of revocation of ten ruling letters, modification of four ruling letters, and of revocation of treatment relating to the tariff classification of training pants.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking or modifying fourteen ruling letters concerning tariff classification of training under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 58, No. 36, on September 11, 2024. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 12, 2025.

FOR FURTHER INFORMATION CONTACT: Tanya J. Secor, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0062.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 58, No. 36, on September 11, 2024, proposing to revoke or modify fourteen ruling letters pertaining to the tariff classification of training pants. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N244949, dated August 26, 2013, CBP classified unisex training pants in heading 6108, HTSUS as girls' garments or 6111, HTSUS, as babies' garments. CBP has reviewed NY N244949, NY N237226, and NY N212877, and has determined the ruling letters to be in error. It is now CBP's position that training pants are properly classified, in heading 9619, HTSUS, specifically in subheading 9619.00.64, HTSUS, which provides for "Sanitary pads (towels) and tampons, diapers (napkins), diaper liners and similar articles, of any material: Other, of textile materials: Knitted or crocheted: Of man-made fibers."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N244949, NY N237226, NY N212877, NY N189364, NY N051615, NY N047756, Headquarters Ruling Letter ("HQ") 965891, HQ 962542, NY E85902, and NY E85172, modifying NY I89181, NY I83963, HQ 960319, and NY A86147, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H325601, set forth as an attachment to this notice. Additionally, pursuant to 19

U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Yuliya A. Gulis,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H325601
December 18, 2024
OT:RR:CTF:FTM H325601 TJS
CATEGORY: Classification
TARIFF NO.: 9619.00.61; 9619.00.64; 9619.00.74

Ms. Shirley Murdock
Bummis Inc.
4300 Boulevard St. Laurent, Suite 200
Quebec, H2W 1Z3 Canada

RE: Revocation of NY N244949, NY N237226, NY N212877, NY N189364, NY N051615, NY N047756, HQ 965891, HQ 962542, NY E85902, and NY E85172; Modification of NY I89181, NY I83963, HQ 960319, and NY A86147; Revoked or Modified by Operation of Law; Tariff classification of training pants

Dear Ms. Murdock:

This is in reference to New York Ruling Letter ("NY") N244949, issued to you on August 26, 2013, concerning the tariff classification of unisex training pants, identified as "Potty Pants", under the Harmonized Tariff Schedule of the United States ("HTSUS"). In that ruling, U.S. Customs and Border Protection ("CBP") classified the training pants depending on the size, under either heading 6108, HTSUS, as girls' garments, or under heading 6111, HTSUS, as babies' garments. We have since reviewed NY N244949 and determined the classification of the training pants to be incorrect. Similarly, we have reviewed NY N237226, dated January 17, 2013, and NY N212877, dated April 25, 2012, and determined them to be in error. It is now CBP's position that the training pants that are the subject of NY N244949, NY N237226, and NY N212877 are classified in heading 9619, HTSUS. For the reasons set forth below, we hereby revoke NY N244949, NY N237226, and NY N212877.

Finally, we are also revoking or modifying eleven additional rulings by operation of law, as discussed below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on September 11, 2024, in Volume 58, Number 36, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

The merchandise in NY N244949 was described as follows:

> The submitted sample, "Potty Pants" is a pair of X-large (3–4 years) unisex toddler training pants. The potty pants will also be imported in toddler size large (2–3 years) and infant sizes small (12–18 months) and medium (18–24 months).
>
> The item resembles panties and is constructed with four layers. The outer layer or shell has three panels. The middle outer layer panel extends from the front waistband under the crotch to the rear waistband. The outer shell panel is constructed of 100% polyester knit interlock fabric laminated with polyester urethane coating. The side outer shell panels are

> constructed from the same material as the outer shell except for the inner laminate coating. There are two interior layer absorption materials. One absorbent layer is made of 100% cotton knit terry fabric. The other absorbent layer is made of a 100% knit polyester microfiber. The interior lining is made of knit fabric that is 40% cotton 60% hemp. The item features elasticized waistband and leg openings. The essential character is imparted by the polyester microfiber fabric liner which holds the moisture in.

In NY N244949, CBP classified the "Potty Pants" that were toddler-sized training pants under heading 6108, HTSUS, and specifically, in subheading 6108.22.90, HTSUS, which provides for "Women's or girls' slips, petticoats, briefs, panties, night dresses, pajamas, negligees, bathrobes, dressing gowns, and similar articles, knitted or crocheted: Briefs and panties: Of man-made fibers: Other." The infant-sized training pants were classified under heading 6111, HTSUS, and specifically, in subheading 6111.30.50, HTSUS, which provides for "Babies' garments and clothing accessories, knitted or crocheted: Of synthetic fibers: Other."

The merchandise in NY N237226 was described as follows:

> Style 22747–3TB, Stay Dry Training Pants, is a size 3T unisex training pant. It will also be available in sizes 2T, 4T and 6. The outershell is constructed of 100% cotton knit fabric and the lining is constructed of a 100% polyester knit mesh fabric. An absorbent 75% cotton/25% polyester knit terry fabric with a polyurethane coating has been inserted between the outershell and the lining. The undergarment features flatlock stitching at the seams, capped, elasticized leg openings and an enclosed elasticized waistband. The essential character of the garment is imparted by the absorbent knit terry fabric.

In NY N237226, CBP classified the training pant under heading 6108, HTSUS, and specifically, in subheading 6108.21.00, HTSUS, which provides for "Women's or girls' slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles, knitted or crocheted: Briefs and panties: Of cotton."

The merchandise in NY N212877 was described as follows:

> Style GD303 is a 2T to 4T unisex brief styled training pant. The outer layer is constructed of 92% cotton and 8% spandex knit jersey fabric. The inner layer is constructed of a plastic material and a 100% polyester non woven absorbent pad under a lining at the crotch. The waistband and leg openings are capped and elasticized and there is a triple adjustable hook and eye closure on each side of the training pant. The component which imparts the essential character of the garment is the absorbent non-woven polyester pad.

In NY N212877, CBP classified Style GD303 under heading 6208, HTSUS, and specifically, in subheading 6208.92.00, HTSUS, which provides for "Women's or girls' singlets and other undershirts, slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles: Other: Of man-made fibers."

ISSUE:

What is the tariff classification of the training pants at issue under the HTSUS?

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. Pursuant to GRI 6, classification at the subheading level uses the same rules, *mutatis mutandis*, as classification at the heading level.

The 2024 HTSUS provisions under consideration are as follows:

6108:	Women's or girls' slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles, knitted or crocheted:
	Briefs and panties:
6108.21.00	Of cotton...
	* * * * *
6111:	Babies' garments and clothing accessories, knitted or crocheted:
6111.30:	Of synthetic fibers:
6111.30.50:	Other...
	* * * * *
6208:	Women's or girls' singlets and other undershirts, slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles:
	Other:
6208.92.00:	Of man-made fibers...
	* * * * *
9619.00:	Sanitary pads (towels) and tampons, diapers (napkins), diaper liners and similar articles, of any material:
	Other, of textile materials:
	Knitted or crocheted:
9619.00.61:	Of cotton...
9619.00.64:	Of man-made fibers...
	Other:
9619.00.74:	Of man-made fibers...
	* * * * *

GRI 3(a) and (b) provide as follows:

> When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded

as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

* * * * *

Note 1(u) to Section XI, HTSUS, provides:

1. This section does not cover:

...

(u) Articles of chapter 96 (for example, brushes, travel sets for sewing, slide fasteners, typewriter ribbons, sanitary pads (towels) and tampons, diapers (napkins) and diaper liners)

* * * * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the "official interpretation of the Harmonized System" at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). While not legally binding nor dispositive, the ENs "provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system." *See id*.

The EN to GRI 3(b) states, in pertinent part:

(VI) This second method relates only to:

(i) Mixtures.

(ii) Composite goods consisting of different materials.

(iii) Composite goods consisting of different components.

(iv) Goods put up in sets for retail sales.

It applies only if Rule 3 (a) fails.

(VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.

(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

(IX) For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

* * * * *

The EN to heading 96.19 states, in pertinent part:

> This heading covers sanitary towels (pads) and tampons, napkins (diapers) and napkin liners and similar articles, including absorbent hygienic nursing pads, napkins (diapers) for adults with incontinence and pantyliners, of any material.
>
> In general, the articles of this heading are disposable. Many of these articles are composed of (a) an inner layer (e.g., of nonwovens) designed to wick fluid from the wearer's skin and thereby prevent chafing; (b) an absorbent core for collecting and storing fluid until the product can be disposed of; and (c) an outer layer (e.g., of plastics) to prevent leakage of fluid from the absorbent core. The articles of this heading are usually shaped so that they may fit snugly to the human body. This heading also includes similar traditional articles made up solely of textile materials, which are usually re-usable following laundering.
>
> This heading **does not cover** products such as disposable surgical drapes and absorbent pads for hospital beds, operating tables and wheelchairs or non-absorbent nursing pads or other non-absorbent articles (in general, classified according to their constituent material).

* * * * *

Training pants have historically been classified in Chapter 61 or 62, HTSUS, as articles of apparel. *See, e.g.*, NY N189364 (Nov. 4, 2011); NY N051615 (Feb. 12, 2009); NY I83963 (July 22, 2002); NY E85902 (Aug. 20, 1999); and NY E85172 (Aug. 20, 1999). However, heading 9619 was introduced into the HTSUS in 2012, providing for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material."[1] Since Note 1(u) to Section XI, HTSUS, provides that Section XI, which includes Chapters 61 and 62, HTSUS, does not cover articles of Chapter 96, HTSUS, we must first consider whether the training pants at issue are classifiable in Chapter 96, HTSUS.

The training pants at issue are not any of the articles named in heading 9619, HTSUS, (i.e., sanitary pads (towels), tampons, diapers (napkins), or diaper liners). The question therefore is whether the training pants are similar to these named articles. The term "and similar articles" appearing after a list of articles, invokes the rule of *ejusdem generis*, which means "of the same kind." In tariff classification cases, "*ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms." *Sports Graphics, Inc., v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994) (citing *Nissho-Iwai Am. Corp. v. United States*, 10 Ct. Int'l Trade 154, 157, 641 F. Supp. 808, 810 (1986)).

The EN are informative in understanding what constitutes "similar articles" under heading 9619, HTSUS. The EN for heading 9619, HTSUS, explains that many of the articles in this heading are composed of three layers: "(a) an inner layer (e.g., of nonwovens) designed to wick fluid from the wearer's skin and thereby prevent chafing; (b) an absorbent core for collecting and storing fluid until the product can be disposed of; and (c) an outer layer (e.g., of plastics) to prevent leakage of fluid from the absorbent core." The ENs

[1] In 2022, the heading description was changed to "Sanitary pads (towels) and tampons, diapers (napkins), diaper liners and similar articles, of any material."

indicate that heading 9619, HTSUS, provides for absorbent articles. Furthermore, articles of heading 9619, HTSUS, are usually shaped so that they may fit snugly to the human body.

We find that the training pants at issue fit the description provided by the EN as articles that are classifiable in heading 9619, HTSUS. First, all three training pants at issue are composed of three layers, including, importantly, an absorbent core. The training pants in NY N244949, "Potty Pants", are constructed with four layers: an outer shell of 100% polyester knit interlock fabric laminated with polyester urethane coating, an absorbent layer of 100% cotton knit terry fabric, another absorbent layer of 100% knit polyester microfiber, and an interior lining of 40% cotton and 60% hemp knit fabric. The training pants in NY N237226, Style 22747–3TB, consist of an outer shell of 100% cotton knit fabric, an inner lining of 100% polyester knit mesh fabric, and an absorbent 75% cotton and 25% polyester knit terry fabric with a polyurethane coating between the lining and outer shell. Lastly, the training pants in NY N212877, Style GD303, consist of an inner layer of a plastic material, a 100% polyester nonwoven absorbent pad under a lining at the crotch, and an outer layer of 92% cotton and 8% spandex knit jersey fabric. Furthermore, each training pants style has an elastic waistband and elastic leg openings which help the product fit snugly to the wearer. We conclude, therefore, that all three styles are classifiable in heading 9619, HTSUS, as "similar articles."

The eight-digit subheadings within heading 9619, HTSUS, are divided according to material composition. To determine the appropriate subheading for the subject merchandise, GRI 6 refers us to GRI 1 through 5. Since each training pants style is comprised of different materials, specifically various textiles, the appropriate subheading for the subject merchandise cannot be determined pursuant to GRI 1. Per GRI 2(b), "[t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." Applying GRI 3(a) in the context of the subheading, we find that more than two subheadings refer to only part of the materials that comprise the subject merchandise. As such, we refer to GRI 3(b), which states that "[m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

In Headquarters Ruling Letter ("HQ") H271286, dated April 4, 2017, we stated that the absorbent component is essential for articles of heading 9619, HTSUS. Further, in HQ H301362, dated April 24, 2019, we confirmed that the essential character of diapers under GRI 3(b) was the material that absorbs the fluids away from the body, i.e., the absorbent core. More recently, in HQ H304671, dated March 28, 2022, we held that the essential character of babies' swimwear of subheading 9619.00, HTSUS, was based on the absorbent component. Likewise, here, the absorbent core imparts the essential character of the training pants at issue and the training pants will therefore be classified at the eight-digit subheading level according to the constituent material of the absorbent component.

In NY N244949, the absorbent component of "Potty Pants" is a layer of 100% cotton knit terry fabric and another layer of 100% knit polyester microfiber. NY N244949 determined that the essential character was imparted by the polyester microfiber fabric liner which holds the moisture in.

Accordingly, we find that the toddler-sized and infant-sized "Potty Pants" are classified in subheading 9619.00.64, HTSUS, which provides for "Sanitary pads (towels) and tampons, diapers (napkins), diaper liners and similar articles, of any material: Other, of textile materials: Knitted or crocheted: Of man-made fibers."

In NY N237226, the absorbent component of Style 22747–3TB is 75% cotton and 25% polyester knit terry fabric with a polyurethane coating. The essential character of the training pant is imparted by the absorbent knit terry fabric, which is predominately of cotton. Therefore, Style 22747–3TB is classified in subheading 9619.00.61, HTSUS, which provides for "Sanitary pads (towels) and tampons, diapers (napkins), diaper liners and similar articles, of any material: Other, of textile materials: Knitted or crocheted: Of cotton."

In NY N212877, the component that imparts the essential character of Style GD303 is the absorbent 100% polyester nonwoven pad. Since polyester is a man-made textile material, Style GD303 is classified in subheading 9619.00.74, HTSUS, which provides for "Sanitary pads (towels) and tampons, diapers (napkins), diaper liners and similar articles, of any material: Other, of textile materials: Other: Of man-made fibers."

For the aforementioned reasons, eleven rulings issued prior to the 2012 establishment of heading 9619, HTSUS, and concerning substantially similar articles are revoked or modified by operation of law. The articles in those rulings that are subject to revocation or modification by operation of law included an absorbent core that imparted the essential character of the articles.

HOLDING:

By application of GRI 1, 3(b), and 6, the "Potty Pants" are classified under heading 9619, HTSUS, and specifically, in subheading 9619.00.64, HTSUS, which provides for "Sanitary pads (towels) and tampons, diapers (napkins), diaper liners and similar articles, of any material: Other, of textile materials: Knitted or crocheted: Of man-made fibers." The 2024 column one, general rate of duty is 14.9% *ad valorem*.

By application of GRI 1, 3(b), and 6, Style 22747–3TB is classified under heading 9619, HTSUS, and specifically, in subheading 9619.00.61, HTSUS, which provides for "Sanitary pads (towels) and tampons, diapers (napkins), diaper liners and similar articles, of any material: Other, of textile materials: Knitted or crocheted: Of cotton." The 2024 column one, general rate of duty is 10.8% *ad valorem*.

By application of GRI 1, 3(b), and 6, Style GD303 is classified under heading 9619, HTSUS, and specifically, in subheading 9619.00.74, HTSUS, which provides for "Sanitary pads (towels) and tampons, diapers (napkins), diaper liners and similar articles, of any material: Other, of textile materials: Other: Of man-made fibers." The 2024 column one, general rate of duty is 16% *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N244949, dated August 26, 2013, NY N237226, dated January 17, 2013, and NY N212877, dated April 25, 2012, are REVOKED.

NY N189364, dated November 4, 2011, NY N051615, dated February 12, 2009, NY N047756, January 6, 2009, HQ 965891, dated November 6, 2002, HQ 962542, July 9, 2001, NY E85902, August 20, 1999, and NY E85172, dated August 20, 1999, are REVOKED by operation of law.

With respect to the classification of the training pants, NY I89181, dated December 4, 2002, NY I83963, dated July 22, 2002, HQ 960319, dated September 23, 1997, and NY A86147, dated August 23, 1996, are MODIFIED by operation of law.

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

Sincerely,

Yuliya A. Gulis,
Director
Commercial and Trade Facilitation Division

RECEIPT OF APPLICATION FOR "LEVER-RULE" PROTECTION

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

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

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Church & Dwight Co., Inc. ("Church & Dwight") seeking "Lever-Rule" protection for certain non-medicated dry shampoo products bearing the federally registered and recorded "BATISTE" trademark that are intended for sale outside of the United States.

FOR FURTHER INFORMATION CONTACT: Christopher Chen, Intellectual Property Enforcement Branch, Regulations & Rulings, (202) 325–0195.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Church & Dwight seeking "Lever-Rule" protection for one of its non-medicated dry shampoo hair preparation products. Protection is sought against importations of 200ml/120g cans of dry shampoo that bear the "BATISTE" (U.S. Trademark Registration No. 2,874,522, CBP Recordation No. TMK 24–03694) trademark and are intended for sale outside the United States in countries such as Argentina, Australia, Austria, Belize, Bermuda, Bulgaria, Canada, Chile, China, Cyprus, Czech Republic, Dominican Republic, Estonia, France, Georgia, Germany, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Kuwait, Madagascar, Malaysia, Malta, Mexico, Moldova, Morocco, Myanmar, Netherlands, New Caledonia, New Zealand, Norway, Panama, Peru, Poland, Serbia, Reunion, Romania, Saudi Arabia, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Tanzania, Turkey, Tokelau Islands, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Venezuela, and Vietnam.

In the event that CBP determines that the dry shampoo product under consideration is physically and materially different from the product authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant to 19 CFR 133.2(f), indicating that the above-referenced trademarks are entitled to "Lever-Rule" protection with respect to those physically and materially different dry shampoo products.

Dated: January 24, 2025

ALAINA VAN HORN
Chief, Intellectual Property
Enforcement Branch
Regulations and Rulings, Office of Trade

U.S. Court of International Trade

Slip Op. 25–08

COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, Plaintiff, and FONTAINE INC., ET AL., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and FONTAINE INC., ET AL., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 19–00122
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's remand results in the countervailing duty expedited review of certain softwood lumber products from Canada; denying Plaintiff's motion to strike; granting Plaintiff's alternative motion for leave to file a reply]

Dated: January 21, 2025

Sophia J.C. Lin, *Andrew W. Kentz*, *David A. Yocis*, *Nathanial M. Rickard*, *Whitney M. Rolig*, and *Zachary J. Walker*, Picard Kentz & Rowe LLP, of Washington, DC, for Plaintiff Committee Overseeing Action for Lumber International Trade Investigations or Negotiations.

Mark B. Lehnardt, Davis & Leiman PLLC, of Washington, DC, for Consolidated Plaintiff/Defendant-Intervenor Fontaine Inc.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. On the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Elizabeth A. Speck*, Senior Trial Counsel. Of counsel on the brief were *Ian A. McInerney*, Senior Attorney, and *Jesus N. Saenz*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Edward M. Lebow, Haynes and Boone, LLP, of Washington, DC, for Defendant-Intervenors Les Produits Forestiers D&G Ltée and Les Produits Forestiers Portbec Ltée.

OPINION AND ORDER

Barnett, Chief Judge:

This case comes before the court on the final results of redetermination pursuant to court remand in the countervailing duty ("CVD") expedited review of certain softwood lumber products from Canada. The U.S. Department of Commerce ("Commerce" or "the agency") filed the redetermination following this court's decision in *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations v. United States* (*Coalition VII*), 48 CIT __, 701 F. Supp.

3d 1334 (2024).[1] *See* Final Results of Redetermination Pursuant to Ct. Remand (Sept. 10, 2024) ("Remand Results"), ECF No. 255–1. The Remand Results modify Commerce's determination in *Certain Softwood Lumber Products From Canada*, 84 Fed. Reg. 32,121 (Dep't Commerce July 5, 2019) (final results of CVD expedited rev.) ("*Final Results*"), ECF No. 99–5, and accompanying Issues and Decision Mem., C-122–858 (June 28, 2019) ("I&D Mem."), ECF No. 99–6.[2]

In *Coalition VII*, the court sustained Commerce's *Final Results* in part and remanded in part. 701 F. Supp. 3d at 1362–63. Relevant to this opinion, the court remanded to the agency for reconsideration or further explanation its determination not to account for subsidies received by unaffiliated suppliers of lumber to certain Defendant-Intervenors (respondents in the underlying proceeding)[3] and Commerce's use of Fontaine, Inc.'s ("Fontaine") fiscal year ("FY") 2014 tax returns to perform benefit calculations for the 2015 period of review. *Id.* On remand, Commerce determined to account for subsidies received by unaffiliated lumber suppliers and recalculated D&G/Portbec's and Rustique's respective subsidy rates accordingly. Remand Results at 7–11. Commerce also determined to use Fontaine's FY 2015 financial statements to calculate tax-related benefits. *Id.* at 11–13.

Plaintiff, Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("Plaintiff" or "the Coalition"), filed comments in opposition to Commerce's method of calculating D&G/Portbec's revised subsidy rate. Confid. Pl.'s Cmts. on [Remand Results] ("Pl.'s Cmts."), ECF No. 257.[4] No party objected to Commerce's Remand Results with respect to the rates calculated for Rustique or Fontaine. Defendant United States ("the Government"), D&G/Portbec, and Fontaine filed comments in support of the Remand Results. Def.'s Resp. to Cmts. on Remand Redetermination ("Def.'s Cmts."), ECF No. 263; Cmts. of Def.-Ints. [D&G/Portbec] in Supp. of

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[1] *Coalition VII* contains additional background information, familiarity with which is presumed. That background information includes the prior opinions in this case by this court and by the U.S. Court of Appeals for the Federal Circuit. *See Coalition VII*, 701 F. Supp. 3d at 1339–44.

[2] The administrative record for the Remand Results is contained in a Confidential Remand Record ("CRR"), ECF No. 256–1, and a Public Remand Record ("PRR"), ECF No. 256–2. Plaintiff submitted joint appendices containing record documents cited in parties' remand comments. Confid. Remand J.A. ("CRJA"), ECF No. 275; Public Remand J.A., ECF No. 276. The court references the confidential record documents unless otherwise specified.

[3] Those Defendant-Intervenors consist of Les Produits Forestiers D&G Ltée ("D&G") and its affiliate Les Produits Forestiers Portbec Ltée ("Portbec"), and Mobilier Rustique (Beauce) Inc. ("Rustique"). Remand Results at 2.

[4] The court granted the Coalition's motion for errata to correct record citations in its comments on the Remand Results without physical substitution because the corrections are minor. Order (Nov. 27, 2024), ECF No. 274.

[Remand Results] ("D&G/Portbec's Cmts."), ECF No. 264; Cmts. Supporting the [Remand Results] ("Fontaine's Cmts."), ECF No. 265.

Plaintiff moved to strike portions of D&G/Portbec's brief that Plaintiff claims raise untimely argument in opposition to one aspect of Commerce's Remand Results, or in the alternative, Plaintiff seeks leave to file a reply to D&G/Portbec's comments. Mot. to Strike Certain Portions of Def.-Ints. [D&G/Portbec's] Cmts. in Supp. of [Remand Results] or Alt. Mot. for Leave to File Reply to [D&G/Portbec's] Cmts. in Supp. of [Remand Results] ("Pl.'s Mot. to Strike or File Reply"), ECF No. 271. D&G/Portbec opposed Plaintiff's motion. Reply of Def.-Ints. [D&G/Portbec] to Pl.'s [Mot. to Strike or File Reply] ("D&G/Portbec's Resp. Mot. to Strike"), ECF No. 279.[5]

For the following reasons, the court will remand Commerce's determination for reconsideration or further explanation regarding the agency's calculation of D&G/Portbec's subsidy rate. Commerce's Remand Results will be sustained in all other respects. The court will deny Plaintiff's motion to strike and will grant Plaintiff leave to file a reply.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(D) (2018 & Supp. II 2020). *See Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States (Coalition II)*, 43 CIT __, 413 F. Supp. 3d 1334 (2019) (ascertaining the proper jurisdictional basis for challenges to CVD expedited reviews); *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States (Coalition V)*, 66 F.4th 968, 976 n.4 (Fed. Cir. 2023) (affirming section 1581(i) jurisdiction). The court reviews an action commenced pursuant to 28 U.S.C. § 1581(i) in accordance with the standard of review set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, as amended. 28 U.S.C. § 2640(e); *see also Coalition V*, 66 F.4th at 976 n.4. Section 706 directs the court, *inter alia*, to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

[5] Additionally, several Defendant-Intervenors filed a motion seeking refunds of CVD cash deposits based on the court's prior granting of their motion to reinstate the parties' exclusion from the underlying order. Mot. to Explicitly State Obligation to Refund [CVD] Cash Deposits Est. by Slip Op 23–163, ECF No. 262; *see also Certain Softwood Lumber Prods. From Can.*, 83 Fed. Reg. 347 (Dep't Commerce Jan. 3, 2018) (am. final aff. CVD determination and CVD order) ("*CVD Order*"). That motion remains pending before the court.

DISCUSSION

I. Supplier Subsidies

A. Additional Background

In the underlying *Final Results*, Commerce calculated a *de minimis* overall subsidy rate for D&G/Portbec. Remand Results at 2. Commerce calculated an above-*de minimis* overall subsidy rate for Rustique. *Id.*

During the period of review, D&G, Portbec, and Rustique purchased subject merchandise (lumber) from unaffiliated Canadian suppliers and exported that lumber to the United States sometimes with and other times without further processing. *Id.* at 4. During the review, the Coalition urged Commerce to account for subsidies received by those unaffiliated suppliers of subject merchandise by establishing combination rates pursuant to 19 C.F.R. § 351.107(b)[6] or by cumulating the subsidies the suppliers received with those received by the exporters pursuant to 19 C.F.R. § 351.525(c).[7] *Id.*[8] Commerce declined both suggestions, citing the Coalition's failure to submit an upstream subsidy allegation, the lack of record evidence regarding the unaffiliated suppliers' receipt of subsidies, and the small amount of resales relative to the respondents' total sales. *See id.* at 4–5.

The court remanded with instructions for Commerce to reconsider its position. *Coalition VII*, 701 F. Supp. 3d at 1349–54. The court first remanded Commerce's "determination to require an upstream subsidy allegation for purchases of lumber that is within the class or kind of covered merchandise." *Id.* at 1350. The court explained that this determination lacked any explanation as to why "inputs that otherwise are subject merchandise may be considered 'upstream' to the

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[6] Section 351.107(b)(1)(i) provides:

> (b) Cash deposit rates for nonproducing exporters—
>
> > (1) Use of combination rates—(i) In general. In the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, the [agency] may establish a 'combination' cash deposit rate for each combination of the exporter and its supplying producer(s).

[7] Section 351.525(c) provides:

> (c) Trading companies. Benefits from subsidies provided to a trading company which exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company, regardless of whether the trading company and the producing firm are affiliated.

[8] The court cites to the 2018 version of the Code of Federal Regulations in effect when Commerce issued the *Final Results*.

subject merchandise exported to the United States" for purposes of 19 U.S.C. § 1677–1(a)(1) (2018)[9] and differed from prior agency statements on subsidies received by suppliers of subject merchandise. *Id.* at 1351–52.

Regarding Commerce's regulations, the court first noted that, contrary to Commerce's claimed lack of record information, the administrative record contained a company-specific subsidy rate for one of Rustique's suppliers. *Id.* at 1352–53 & n.38. The court also found that Commerce had failed to "account for the unusual circumstances of CVD expedited reviews" in which the period of review overlaps with "the period of investigation for the original determination" such that "Commerce has subsidy rates for every producer in Canada—either an individually determined rate or the all-others rate." *Id.* at 1353. Lastly, the court explained that Commerce's reliance on the assertedly small resale amount overlooked that "subsidies to the respondents' suppliers . . . might otherwise be the difference between zero or *de minimis* subsidy rates and subsidy rates above *de minimis*." *Id.*

On remand, Commerce reconsidered and clarified its positions with respect to the foregoing legal authorities. Those findings are detailed below.

1. Trading Company Regulation and Commerce's Calculations Pursuant Thereto

On remand, Commerce elected to treat D&G, Portbec, and Rustique as trading companies pursuant to 19 C.F.R. § 351.525(c) with respect to lumber purchased from unaffiliated suppliers, regardless of whether the respondents further processed that lumber. Remand Results at 9. Commerce stated that it would cumulate the benefits from subsidies provided to the respondents with the benefits from subsidies provided to the suppliers using "the cash deposit rate applicable to those suppliers from the investigation." *Id.* at 9–10.

For D&G/Portbec, Commerce calculated a revised overall subsidy rate in the amount of 0.70 percent, which is considered *de minimis*.[10] *Id.* at 23; *see also* Final Results of Redetermination Calculations for [D&G/Portbec], C-122–858, Attach. (Sept. 11, 2024) ("Agency Calc. Sheet"), CRR 12, PRR 13, CRJA Tab 12. Commerce calculated this subsidy rate by first determining D&G's and Portbec's respective

[9] Section 1677–1(a)(1) states that an "'upstream subsidy' means any countervailable subsidy, other than an export subsidy, that—(1) is paid or bestowed by an authority . . . with respect to a product (hereafter in this section referred to as an 'input product') that is used in the same country as the authority in the manufacture or production of merchandise which is the subject of a countervailing duty proceeding."

[10] Commerce calculated a revised overall subsidy rate in the amount of 2.07 percent for Rustique. Remand Results at 23. No party contests that rate here and it will be sustained.

shares of their combined total sales,[11] and then multiplying each company's purchases of lumber from unaffiliated Canadian suppliers by that company's respective shares of combined sales.[12] *See* Remand Results at 19; Agency Calc. Sheet. Commerce then determined each company's unaffiliated lumber purchases as a percentage of the combined total sales,[13] to which Commerce applied the all-others rate of 14.19 percent.[14] Agency Calc. Sheet. Summing those two values with D&G/Portbec's own subsidy rate of 0.21 percent resulted in the overall subsidy rate of 0.70 percent. *Id.*

In response to Commerce's draft redetermination,[15] the Coalition argued to Commerce that the agency had "'double-weighted' the value of Portbec and D&G's purchases of unaffiliated suppliers' lumber" and recommended Commerce use a different calculation method. Remand Results at 18 (citing Cmts. on Draft [Remand Results] (July 25, 2024) ("Pl.'s Cmts. on Draft Remand") at 3–9, CR 9, PR 11, CRJA Tab 9). The Coalition argued that a portion of each company's unaffiliated lumber purchases were "not accounted for in the subsidy calculation" because Commerce reduced the amount of such purchases based on each company's share of the combined total sales. *See* Pl.'s Cmts. on Draft Remand at 6. The Coalition proposed that Commerce should instead "divid[e] Portbec's (and D&G's) purchase of unaffiliated lumber [by] Portbec and D&G's total sales." *Id.*; *see also id.*, Attach. I (providing detailed calculations demonstrating the Coalition's proposed methodology). The Coalition alleged that its proposed methodology would result in an above-*de minimis* overall subsidy rate for D&G/Portbec. *See id.* at 7, Attach. I. Commerce disagreed with the Coalition's proposed methodology, explaining that "D&G and Portbec purchased meaningfully different volumes of lumber from unaffiliated producers and had notably different sales levels for 2015" and Commerce's methodology "best reflects that portion of the unaffiliated

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[11] For D&G, that share of combined sales is [[ ]] percent; for Portbec, the share is [[ ]] percent.

[12] Specifically, Commerce multiplied D&G's unaffiliated lumber purchases in the amount of [[ ]] Canadian Dollars ("C$") by D&G's [[ ]] percent of sales, resulting in C$[[ ]], and multiplied Portbec's lumber purchases in the amount of C$[[ ]] by Portbec's [[ ]] percent of sales, resulting in C$[[ ]].

[13] For D&G, the result is [[ ]] percent; for Portbec, the result is [[ ]] percent.

[14] Commerce calculated subsidy rates based on unaffiliated supplier purchases for D&G in the amount of [[ ]] percent and for Portbec in the amount of [[ ]] percent.

[15] In a remand proceeding, Commerce issues a draft redetermination and, when necessary, draft calculations in order to afford interested parties the opportunity to present arguments regarding the issues addressed therein. *See, e.g.*, Draft Results of Redetermination Pursuant to Ct. Remand (July 16, 2024), PRR 3, CRJA Tab 6; Draft Results of Redetermination Calculations for [D&G/Portbec], C-122–858, Attach. (July 16, 2024), CRR 4, PRR 4, CRJA Tab 11. Commerce's draft calculations used the same methodology as the final calculations, however, Commerce adjusted the sales values for the Remand Results.

lumber producers' subsidies that D&G and Portbec each received based on their own particular quantity of lumber purchased and sales made during 2015." Remand Results at 18–19.

2. Upstream Subsidy Provision

Commerce found any reconsideration of the need for an upstream subsidy allegation to be moot in light of the agency's application of 19 C.F.R. § 351.525(c). *Id.* at 10. However, in response to arguments on the draft redetermination from D&G/Portbec, Commerce further explained that "regardless of the level of processing" performed on lumber purchased from unaffiliated suppliers, those exports of "subject merchandise [were] produced by unaffiliated Canadian suppliers." *Id.* at 15; *cf. Coalition VII*, 701 F. Supp. 3d at 1349–50 (calling into question Commerce's apparent "determination to treat the [respondents] as the producers and exporters of this merchandise"). Commerce characterized the lumber purchased from unaffiliated suppliers as "subject merchandise (rather than an input into subject merchandise)." Remand Results at 16. No party challenges this aspect of Commerce's Remand Results.

3. Combination Rate Regulation

With respect to 19 C.F.R. § 351.107(b)(1)(i), the agency explained that a combination rate is appropriate with respect to D&G/Portbec because, after accounting for their suppliers' subsidies, D&G/Portbec's overall subsidy rate remained *de minimis*. *Id.* at 10.[16] Commerce chose not to assign a combination rate to Rustique because that company's overall subsidy rate remained above *de minimis*. *Id.* Commerce explained that, for "CVD proceedings," the agency "assign[s] cash deposit rates to companies on a 'producer and/or exporter basis,'" such that an importer can use Rustique's cash deposit rate "regardless of whether Rustique is considered the producer or the exporter." *Id.* at 10–11. Furthermore, Commerce noted, this issue is moot with respect to Rustique "because its cash deposit rate has been superseded" by the results of subsequent administrative reviews. *Id.* at 11. No party challenges this aspect of the Remand Results.

B. Parties' Contentions

While the Coalition supports Commerce's application of the trading company regulation to D&G/Portbec and Rustique, Plaintiff contends

[16] Commerce noted, however, that it did not include D&G/Portbec's "unaffiliated Canadian suppliers of lumber in such a combination rate because of the small relative volume/value of lumber purchased from these unaffiliated Canadian lumber suppliers by D&G/Portbec during the [period of review]" and because D&G/Portbec's subsidy rate remains *de minimis*. Remand Results at 10.

that Commerce erred in calculating the amount of the supplier subsidies attributable to D&G/Portbec. Pl.'s Cmts. at 1–2, 4–7. The Coalition provides two alternative methodologies for calculating an accurate overall subsidy rate. *Id.* at 4–5. Those methodologies are:

> **Approach A**: Calculate separate subsidy rates for D&G and Portbec as if the two companies were independent and separate from one another, using each company's total sales as the denominator and that company's supplier lumber purchases (multiplied by 14.19 percent) as the numerator. Add up these two subsidy rates after weighting them based on . . . each company's sales level in relation to total sales of the two companies combined.
>
> **Approach B**: Calculate one subsidy rate for D&G and Portbec using the two companies' combined total sales as the denominator and their combined supplier lumber purchases (multiplied by 14.19 percent) as the numerator.

Id.[17]

The Government contends that the Coalition did not raise Approach A before the agency and thereby failed to exhaust its administrative remedies with respect to that methodology. Def.'s Cmts. at 9–10. Nevertheless, regarding Approach A, the Government argues that the approach "disregards the uncontested finding that D&G and Portbec are cross-owned producers of softwood lumber" and "Commerce's practice for cross-owned companies," which "is to combine their total sales (minus inter-company sales) to calculate a single subsidy rate." *Id.* at 10. The Government argues that Approach B "is flawed because it treats D&G and Portbec the same and assumes that both companies had similar purchase values of lumber from unaffiliated suppliers, and that both companies had similar sales during the [period of review]" *Id.* Commerce's methodology, the Government contends, "accounts for the fact that, while D&G is a much larger company than Portbec in terms of sales, it purchases a relatively small amount of lumber from unaffiliated suppliers, while Portbec purchased a significant amount of lumber from unaffiliated suppliers and has a relatively small amount of sales." *Id.* at 11.

D&G/Portbec echo the Government's arguments. *See* D&G/Portbec's Cmts. at 2. They further contend that if the court remands

[17] In the remand proceeding, the Coalition proposed a slight variation of Approach B. Instead of proposing that Commerce divide D&G's and Portbec's *combined* lumber purchases (multiplied by the all-others rate) by their combined total sales, the Coalition proposed dividing *each company's* lumber purchases by the combined total sales, multiplying each resulting value by the all-others rate, and summing those values. *See* Pl.'s Cmts. on Draft Remand, Attach. I. The result from that calculation methodology is, however, almost identical to Approach B.

the Remand Results, any "recalculation would need to take into account Commerce's prior, verified determination that . . . the vast majority of D&G/Portbec's transactions involve purchasing Canadian lumber on a duty paid basis in the United States and reselling the lumber to buyers in the United States." *Id.* at 3 (citation and emphasis omitted). D&G/Portbec assert that they "made this point in [their] comments to Commerce on the [draft] Remand Redetermination" and the agency, "perhaps inadvertently, used the figure comprising the total of all Portbec's purchases of lumber from unaffiliated suppliers." *Id.* According to D&G/Portbec, correcting this error would result in a *de minimis* overall subsidy rate even if Commerce used one of the Coalition's proposed methodologies. *Id.* D&G/Portbec request that, "[t]o the extent that Commerce is unable to distinguish between U.S. and Canadian lumber purchases by D&G/Portbec, it should be instructed to collect the requisite data to complete a fair and accurate calculation." *Id.* at 4.

D&G/Portbec's comments precipitated the Coalition's motion to strike or, in the alternative, for leave to file a reply. *See* Pl.'s Mot. to Strike or File Reply at 3. The Coalition contends that D&G/Portbec's argument regarding lumber purchased in the United States constitutes untimely opposition to this aspect of the Remand Results. *Id.* at 3–4. The Coalition further contends that D&G/Portbec did not in fact raise this argument on remand but instead made a passing reference to the issue in their argument on "a different point." *Id.* at 5. The Coalition requests the court to strike the relevant parts of page three of D&G/Portbec's comments or grant Plaintiff's motion for leave to file a reply. *Id.* at 8. The Coalition appended the proposed reply to its motion. *Id.*, Attach. ("Pl.'s Reply Cmts."), ECF No. 271–1. In the reply, the Coalition argues that D&G/Portbec failed to exhaust this argument before the agency or develop the argument before the court. Pl.'s Reply Cmts. at 2. D&G/Portbec respond that they only "became aware of the need to call Commerce's data error to the court's attention" after Plaintiff filed its comments in opposition to the Remand Results. D&G/Portbec's Resp. Mot. to Strike at 2.

C. Analysis

The court will remand Commerce's overall subsidy calculation with respect to D&G/Portbec and sustain Commerce's Remand Results as to Rustique. The court will further deny the Coalition's motion to strike and grant leave to file the reply.

The Coalition does not dispute that "D&G and Portbec 'purchased meaningfully different volumes of lumber from unaffiliated producers and had notably different sales levels for 2015.'" Pl.'s Cmts. at 4 (quoting Remand Results at 18–19). At issue is the calculation methodology Commerce should use to account for these differences. In responding to the Coalition's arguments on remand, however, Commerce merely restated what the agency did in the draft remand and its view that "this calculation best reflects that portion of the unaffiliated lumber producers' subsidies that D&G and Portbec each received based on their own particular quantity of lumber purchased and sales made during 2015." Remand Results at 19.

"Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). On this issue, Commerce's Remand Results fail that requirement. Commerce did not address the Coalition's concerns regarding double-weighting of lumber purchases. Commerce also failed to explain why the agency considered its methodology better than the proffered alternative, instead merely declaring it "best." Remand Results at 19. That assertion does nothing to explain why Commerce attempted to account for D&G's and Portbec's different purchase and sales activities by applying the all-others rate to what appears to be a reduced share of each company's lumber purchases.

The Government's arguments fail to clarify Commerce's decision-making. Contrary to the Government's contention that Approach B treats D&G and Portbec the same, Def.'s Cmts. at 10, this methodology appears to avoid the problem of weighting because it spreads the aggregate amount of unaffiliated supplier purchases subject to the all-others rate over the combined total sales to arrive at a single subsidy rate, *see* Pl.'s Cmts. at 5. Approach B is different from Approach A,[18] which requires weighting based on D&G's and Portbec's respective share of the combined total sales because Commerce would first calculate each company's separate purchases subject to the all-others rate and cannot simply sum those rates. *See id.* at 4–5. (Approaches A and B, however, result in an almost identical subsidy rate.) The Government's contention that Approach A disregards Commerce's practice of calculating a single subsidy rate for cross-owned companies, Def.'s Cmts. at 10, is not persuasive because that is precisely what Approach A does after weighting the individual rates,

[18] The Coalition did not exhaust its administrative remedies with respect to Approach A and, as such, that proposed methodology is not an independent basis for remanding Commerce's calculations. *See* 28 U.S.C. § 2637(d); *cf. Coalition VII*, 701 F. Supp. 3d at 1355 n.41 (discussing administrative exhaustion in a case governed by the APA). However, because this issue must be remanded based on Commerce's failure to explain adequately its chosen methodology, the Coalition may choose to raise, and Commerce is free to consider, other methodologies on remand, including this one.

see Pl.'s Cmts. at 4–5; *cf.* Def.'s Cmts. at 10 (responding to the first step in Approach A but not the second step). Moreover, the Agency Calculation Sheet confirms that, on remand, Commerce indeed calculated rates for each company before adding them together. Accordingly, this issue will be remanded for reconsideration or further explanation.[19]

With respect to the Coalition's motion to strike, USCIT Rule 12(f) provides that the court may strike "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The court has "broad discretion in disposing of motions to strike." *Beker Indus. Corp. v. United States*, 7 CIT 199, 200, 585 F. Supp. 663, 665 (1984). Nevertheless, "motions to strike are not favored by the courts and are infrequently granted." *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986) (citation omitted). Granting a motion to strike is an "extraordinary remedy," and should only occur when "there has been a flagrant disregard of the rules of court." *Id.*

Striking is inappropriate here because D&G/Portbec's argument regarding the claimed inclusion of lumber purchases made in the United States identifies an issue contingent on any further remand, rather than an independent basis for remanding Commerce's current determination. *See* D&G/Portbec's Cmts. at 3. However, D&G/Portbec's request for the court to instruct Commerce to collect relevant data if "Commerce is unable to distinguish between U.S. and Canadian lumber purchases," D&G/Portbec's Cmts. at 4, goes a step further by effectively asking the court to validate their position.[20] As such, while striking is not warranted, the court will grant the Coalition's request for leave to file a reply to respond to D&G/Portbec.[21] *See* Pl.'s Reply Cmts. at 2–6.

The court declines D&G/Portbec's request for an instruction. It is for Commerce, on remand, to determine whether it is appropriate to entertain D&G/Portbec's argument at this stage of the proceeding or

[19] The court is not directing Commerce to use either of Plaintiff's proffered methodologies but to reconsider the agency's methodology in light of those alternatives and provide a clear rationale for whichever methodology it elects to rely upon in its determination.

[20] D&G/Portbec qualify this request in their opposition to Plaintiff's motion, stating that their comments constituted "an ancillary request" for the court to "allow Commerce to supplement its record" rather than a request "to order that particular data be included in such calculation." D&G/Portbec's Resp. Mot. to Strike at 2. The court considers Plaintiff's motion in light of D&G/Portbec's request contained in its comments on the Remand Results.

[21] Absent leave of court, parties may not file a reply to a non-dispositive motion. *See* USCIT Rule 7(d); *Volkswagen of Am. v. United States*, 22 CIT 280, 282, 4 F. Supp. 2d 1259, 1261 n. 1 (1998) (leave of court is required before filing a reply in support of a non-dispositive motion).

to reopen the record to collect additional data. *See, e.g.*, *POSCO v. United States*, 46 CIT __, __, 557 F. Supp. 3d 1290, 1299 (2022) (reserving to Commerce's discretion whether to reopen the record on remand).

II. Date of Receipt of Tax Benefits

The period of review for the CVD expedited review is January 1, 2015, through December 31, 2015. I&D Mem. at 27. Fontaine's FY 2015 ended on October 31, 2015. *Id.* at 94. For the *Final Results*, however, Commerce used Fontaine's FY 2014 tax returns to calculate certain tax-related benefits based, in large part, on Fontaine's filing of that tax return in calendar year 2015. *See id.* at 93–94.[22] The court remanded Commerce's determination based on record evidence demonstrating that "Fontaine made FY 2014 payments in 2014 and FY 2015 payments in 2015" and, as such, this case appeared to be one in which the date of payment did not align with the date of filing for purposes of applying 19 C.F.R. § 351.509(b)(1). *Coalition VII*, 701 F. Supp. 3d at 1362.

On remand, Commerce reconsidered its determination and found "sufficient evidence . . . that Fontaine was required to pay, and did pay, its final tax liabilities for FY 2015 by the end of the 2015 calendar year." Remand Results at 12. Commerce therefore elected to use Fontaine's FY 2015 tax returns to calculate Fontaine's benefits for the period of review. *Id.* at 13. That change resulted in a change to Fontaine's overall subsidy rate to 0.88 percent, which is considered *de minimis*. *Id.* at 23.[23]

Fontaine filed comments in support of Commerce's determination. Fontaine's Cmts. at 4–5. No party opposes Commerce's Remand Re-

[22] Commerce's regulation regarding the measurement of benefit from the exemption of a direct tax states:

> (b) Time of receipt of benefit—(1) Exemption or remission of taxes. In the case of a full or partial exemption or remission of a direct tax, the Secretary normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission. Normally, this date will be the date on which the firm filed its tax return.

19 C.F.R. § 351.509(b)(1).

[23] Commerce stated that upon the issuance of "a final conclusive decision from [this court]," the agency intends to instruct U.S. Customs and Border Protection ("CBP") to exclude Fontaine and its cross-owned affiliates from the *CVD Order*; "to discontinue the suspension of liquidation and the collection of cash deposits of estimated countervailing duties on all shipments of softwood lumber produced and exported by Fontaine" during the period of review; and "to liquidate, without regard to countervailing duties, all suspended entries of shipments of softwood lumber produced and exported by Fontaine, and to refund all cash deposits of estimated countervailing duties collected on all such shipments." Remand Results at 22. Fontaine's comments indicate its desire for the court to order CBP to provide pre-liquidation refunds of CVD cash deposits on entries from Fontaine. Fontaine's Cmts. at 5–8. As noted above, the pending motion regarding pre-liquidation refunds filed by other Defendant-Intervenors remains under consideration. *See supra* note 5.

sults with respect to Fontaine's date of receipt of tax benefits. In the absence of any such challenge, and Commerce's determination being otherwise supported by substantial evidence and in accordance with the law, the court will sustain that determination.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Remand Results are remanded in part for the agency to reconsider or further explain its subsidy calculations with respect to D&G/Portbec; it is further

ORDERED that Commerce's Remand Results are sustained in all other respects; it is further

ORDERED that Commerce shall file its remand redetermination on or before April 21, 2025; it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); it is further

ORDERED that any comments or responsive comments must not exceed 3,000 words; and it is further

ORDERED that Plaintiff's motion to strike (ECF No. 271) is **DENIED** and Plaintiff's motion in the alternative for leave to file a reply is **GRANTED**.

Dated: January 21, 2025
New York, New York

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

Slip Op. 25–10

APIÁRIO DIAMANE COMERCIAL EXPORTADORA LTDA AND APIÁRIO DIAMANTE PRODUÇÃO E COMERCIAL DE MEL LTDA, Plaintiffs, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION AND THE SIOUX HONEY ASSOCIATION, Defendant Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 22–00185

[Sustaining an agency decision submitted in response to court order in an action contesting a final determination concluding an antidumping duty investigation]

Dated: January 24, 2025

Pierce J. Lee, Crowell & Moring LLP, of Washington, D.C., for plaintiffs Apiário Diamante Comercial Exportadora Ltda and Apiário Diamante Produção e Comercial de Mel Ltda. With him on the brief was *Daniel J. Cannistra*.

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

R. Alan Luberda, Kelley Drye & Warren LLP, of Washington, D.C., for defendant-intervenors American Honey Producers Association and the Sioux Honey Association. With him on the brief were *Elizabeth C. Johnson*, *Melissa M. Brewer*, and *Maliha Khan*.

OPINION

Stanceu, Judge:

Plaintiffs Apiário Diamante Comercial Exportadora Ltda (“Apiário Export”) and Apiário Diamante Produção e Comercial de Mel Ltda (“Apiário Produção”) (collectively, “Apiário,” operating jointly under the trade name “Supermel”) contested an affirmative “less-than-fair-value” determination (“Final Determination”) that the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) issued to conclude an antidumping duty investigation on imported raw honey from several countries. *Raw Honey From Brazil: Final Determination of Sales at Less Than Fair Value*, 87 Fed. Reg. 22,182 (Int’l Trade Admin. Apr. 14, 2022), P.R. 358, ECF No. 31–2 (“*Final Determination*”).[1] The court previously ordered Commerce to reconsider its Final Determination. *Apiário Diamante Comercial Exportadora Ltda. v. United States*, 48 CIT ___, ___, 705 F. Supp. 3d 1398, 1420 (2024) (“*Apiário I*”).

Before the court is the Department’s “Remand Redetermination,” issued in response to the court’s opinion and order in *Apiário I*. Final Results of Redetermination Pursuant to Court Remand (Int’l Trade Admin. Aug. 26, 2024), ECF No. 41–1 (“*Remand Redetermination*”).

The court sustains the Remand Redetermination.

I. Background

Background for this case is presented in the court’s prior opinion and is supplemented herein. *Apiário I*, 48 CIT at ___, 705 F. Supp. 3d at 1401–02.

A. The Contested Decision

On November 23, 2021, Commerce issued a “Preliminary Determination” after its antidumping investigation of raw honey from Brazil for the time period (the “period of investigation” or “POI”) of April 1, 2020 through March 31, 2021, in which it assigned a 29.61% estimated dumping margin to Supermel and a 20.19% dumping margin

[1] Citations to documents from the Joint Appendix (Apr. 18, 2023), ECF Nos. 30 (conf.), 31 (public) (supplemented by ECF Nos. 33 (conf.), 34 (public), filed on Nov. 16, 2023) are referenced herein as “P.R. __” for public versions. Citations to documents from the Remand Joint Appendix (Nov. 1, 2024), ECF Nos. 51 (conf.), 52 (public), are referenced herein as “P.R.R. __ ” for public versions.

to all other exporters and producers. *Raw Honey From Brazil: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 86 Fed. Reg. 66,533, 66,533–34 (Int'l Trade Admin. Nov. 23, 2021), P.R. 292, ECF No. 31–31 ("*Preliminary Determination*"); *Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Raw Honey from Brazil* 17, 21 (Int'l Trade Admin. Nov. 17, 2021), P.R. 288, ECF No. 31–30 ("*Prelim. I&D Mem.*"). On December 17, 2021, having corrected ministerial errors in the Preliminary Determination pursuant to 19 C.F.R. § 351.224(f), Commerce issued an "Amended Preliminary Determination," in which it assigned a 10.52% estimated dumping margin to Supermel and a 9.38% estimated dumping margin to all other exporters and producers. *Raw Honey From Brazil: Amended Preliminary Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 71,614, 71,615 (Int'l Trade Admin. Dec. 17, 2021), P.R. 313, ECF No. 31–34 ("*Amended Preliminary Determination*").

On April 14, 2022, Commerce issued the Final Determination, which incorporated by reference a "Final Issues and Decision Memorandum." *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Raw Honey from Brazil* (Int'l Trade Admin. Apr. 7, 2022), P.R. 354, ECF No. 31–3 ("*Final I&D Mem.*"). In the Final Determination, Commerce assigned Supermel an estimated dumping margin of 83.72% *ad valorem* by invoking "facts otherwise available" under Section 776(a) of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1677e(a), and an "adverse inference" under Section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b), provisions to which Commerce often refers in the aggregate as "adverse facts available" or "AFA." *Final Determination*, 87 Fed. Reg. at 22,182–83.[2] Commerce found that Supermel "significantly impeded the proceeding by not substantiating" the reported cost of production of raw honey and therefore applied "total AFA" to assign the 83.72% rate to Supermel. *Final I&D Mem.* 12, 18–20. Following an affirmative injury determination by the U.S. International Trade Commission, Commerce issued an antidumping duty order on raw honey from Argentina, Brazil, India, and the Socialist Republic of Vietnam (the "Order"). *Raw Honey From Argentina, Brazil, India, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 87 Fed. Reg. 35,501 (Int'l Trade Admin. June 10, 2022), P.R. 362, ECF No. 31–1.

[2] Citations to the U.S. Code herein are to the 2018 edition. Citations to the Code of Federal Regulations herein are to the 2022 edition.

B. The Court's Prior Opinion and Order

In *Apiário I*, the court held that the Department's total application of facts otherwise available with an adverse inference "was based on multiple findings of fact for which the record does not contain substantial evidence" and remanded the Final Determination to Commerce for a "redetermination . . . that reconsiders, based on the existing record, the Department's determination on the application of 19 U.S.C. § 1677e to Supermel; that determines a new estimated dumping margin for Supermel; and that is in accordance with this Amended Opinion and Order." 48 CIT at ___, 705 F. Supp. 3d at 1420.

Commerce based its total application of facts otherwise available and an adverse inference on several factual findings, each of which the court found to be unsupported by substantial record evidence. Commerce set aside Supermel's entire cost of production and comparison market databases as unverifiable, based on its findings that Supermel provided insufficient responses regarding its purchases of raw honey from its beekeeper suppliers, that Supermel did not provide sufficient documentation supporting its purchase database, and that Supermel did not demonstrate how its purchase database "tied" to its accounting system. *Id.*, 48 CIT at ___, 705 F. Supp. 3d at 1406–19. The court held these findings to be unsupported on the record considered as a whole, as the record either rendered insignificant the purported deficiencies Commerce identified or contradicted them altogether. *Id.* The court further found that Commerce failed to bring certain deficiencies to Supermel's attention and provide Supermel an opportunity to remedy them, as required by 19 U.S.C. § 1677m(d). *Id.*, 48 CIT at ___, 705 F. Supp. 3d at 1409–11.

While granting relief in the form of ordering a remand of the Final Determination, the court denied relief on plaintiffs' claim that Commerce "acted unlawfully" when, in its "Preliminary Issues & Decision Memorandum," *Prelim. I&D Mem.* 18, it contemplated applying adverse inferences in future administrative reviews if it did not receive accurate, verifiable cost information. Concluding that the claim was not based on a present injury in fact and sought what would be an advisory opinion, the court denied relief. *Id.*, 48 CIT at ___, 705 F. Supp. 3d at 1419–20.

C. Submission of the Remand Redetermination and Comments

In response to the court's opinion and order in *Apiário I*, Commerce submitted the Remand Redetermination to the court on August 26, 2024. Plaintiffs commented in favor of the Remand Redetermination on September 24, 2024. Pls.' Comments on Remand Results (Sept. 24, 2024), ECF No. 43. Defendant-intervenors, the American Honey Producers Association and the Sioux Honey Association, commented in opposition on September 25, 2024. Def.-Int.'s Comments in Opp. to the Commerce Dep't's Remand Redetermination (Sept. 25, 2024), ECF Nos. 46 (conf.), 47 (public) ("AHPA Comments"). The government filed its response on October 18, 2024, requesting "that the Court sustain Commerce's remand redetermination and enter judgment in favor of the United States." Def.'s Comments in Support of Remand Redetermination 9 (Oct. 18, 2024), ECF No. 50.

II. Discussion

A. Jurisdiction and Standard of Review

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

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

B. Use of Facts Otherwise Available and Adverse Inferences under 19 U.S.C. § 1677e

When "an interested party or any other person" withholds requested information, 19 U.S.C. § 1677e(a)(2)(A), or "significantly impedes a proceeding," *id.* § 1677e(a)(2)(C), or when the information offered "cannot be verified as provided in section 1677m(i) of this title [19 U.S.C. § 1677m(i)]," *id.* § 1677e(a)(2)(D), Commerce resorts to facts otherwise available. If Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply 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." *Id.* § 1677e(b)(1)(A).

C. The Remand Redetermination

In the Remand Redetermination, Commerce reported that it "re-analyzed Supermel's honey acquisition costs" and "determined on remand that the complete reconciliation of Supermel's data to its suppliers' reported data is immaterial to the analysis of Supermel's data, based on other reliable and verifiable evidence on the record." *Remand Redetermination* 6. Rejecting defendant-intervenors' arguments that Commerce should continue applying adverse facts available and should deny a claimed offset to Supermel's direct material costs from two tax credits, Commerce adopted the 10.52% preliminary estimated weighted-average dumping margin calculated for Supermel in the Amended Preliminary Determination. *Id.* at 6–12. Commerce assigned a 9.38% estimated weighted-average dumping margin to all other respondents. *Id.* at 12.

D. The First Administrative Review

In the Remand Redetermination, Commerce noted that "the rate assigned to Supermel in this remand determination for cash deposit purposes will soon be overtaken by" the "forthcoming" final results of the first administrative review of the Order covering the subject merchandise, which "will set the liquidation rate for that period of review and a new cash deposit rate" that "will supersede any cash deposit rate set by this remand determination." *Id.* Defendant-intervenors do not contest this statement.

Commerce initiated an administrative review of the Order on August 3, 2023, in accordance with section 751(a) of the Tariff Act, 19 U.S.C. § 1675(a), and 19 C.F.R. §§ 351.213, 351.221. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 Fed. Reg. 51,271, 51,273 (Int'l Trade Admin. Aug. 3, 2023). Commerce selected two mandatory respondents for individual examination, Apis Nativa Agroindustrial Exportadora Ltda. ("Apis Nativa") and Melbras Importadora E Exportadora Agroindustrial Ltda. ("Melbras"), and published its "Preliminary Results" on July 5, 2024. *Raw Honey From Brazil: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2021–2023*, 89 Fed. Reg. 55,582, 55,582 (Int'l Trade Admin. July 5, 2024). Commerce preliminarily assigned the following weighted- average dumping margins for the period of review November 23, 2021 through May 31, 2023: Apis, 0%; Melbras, 2.31%; all non-examined companies (including Supermel), 2.31%. *Id.* at 55,582–84.

The court agrees with Commerce that the final dumping margin assigned to Supermel in the first administrative review will supplant the estimated cash deposit rate determined in the Remand Redetermination. Once that occurs, defendant- intervenors' claims contesting the cash deposit rate assigned to Supermel in the Remand Redetermination will become moot. *See Torrington Co. v. United States*, 44 F.3d 1572, 1577 (Fed. Cir. 1995).

E. Defendant-Intervenors' Objections to the Remand Redetermination

Defendant-intervenors raise five claims in contesting the Remand Redetermination. First, they contend that the court applied the incorrect standard in *Apiário I* when reviewing the Department's findings on facts otherwise available and an adverse inference. AHPA Comments 20–21, 26. Second, in a related argument, they argue that the Department's use of "total AFA" in the Final Determination was supported by substantial evidence. *Id.* at 11–14, 16–17, 20–26. Third, they allege that what they view as additional deficiencies in Supermel's questionnaire responses during the investigation compel Commerce to apply total adverse facts available. *Id.* at 5–11, 16–18. Fourth, they claim that a tax offset to Supermel's direct material costs is not sufficiently supported by documentation on the record. *Id.* at 31–34. Finally, they claim that Commerce did not explain adequately its reasoning for its Remand Redetermination and that Commerce did not address their arguments before the court in *Apiário I* and in their comments on the draft remand redetermination. *Id.* at 28–31.

The court rejects each of these arguments. The first two arguments—that the court previously applied an incorrect standard and that the use of total AFA was supported by the record of the investigation—are improper attempts to relitigate issues already litigated and decided in *Apiário I*. The proper way to raise these issues was through the filing of a motion for reconsideration under USCIT Rule 60(b), which provides for relief from an "order[] or proceeding" for reasons that include "mistake, inadvertence, surprise, or excusable neglect," or "any other reason that justifies relief."

The court is unconvinced by defendant-intervenors' third argument, i.e., that what defendant-intervenors now consider to be additional deficiencies in Supermel's questionnaire responses during the investigation, AHPA Comments 5–11, 16–18, compelled Commerce to reinstate a decision to apply total AFA.

Defendant-intervenors' arguments fail to persuade the court that Commerce, despite the considerable discretion inherent in any exercise of authority under 19 U.S.C. § 1677e, was *obligated* to base the Remand Redetermination on facts otherwise available with an adverse inference. Notably, Commerce did not submit the Remand Redetermination under protest and, accordingly, reached on its own, independently of any directive of the court, its finding that it had sufficient record information to support a 10.52% estimated weighted average dumping margin. Defendant-intervenors argue, to the contrary, that the court, in directing Commerce to determine a new dumping margin, "reweighed factual findings," "substituted its judgment for that of Commerce" and in effect denied "Commerce discretion to reconsider or further explain its rationale for application of AFA." AHPA Comments 26. These arguments are specious and misread the court's opinion and order in *Apiário I*, which disallowed certain findings as unsupported by the record evidence but did not preclude new findings related to the use of facts otherwise available or adverse inferences, if supported by the existing record. Commerce examined that record and permissibly exercised its discretion, reversing its previous determination under 19 U.S.C. § 1677e. As discussed below, defendant-intervenors have failed to meet their burden of showing that Commerce lacked a basis in substantial record evidence for this course of action.

Defendant-intervenors direct, essentially, five objections based on what they now characterize as Supermel's failure to submit adequate responses to the Department's questionnaires. First, they argue that Supermel "failed to provide accurate sales reconciliations" "of its reported sales with its financial statements" and that Supermel did not provide sufficient supporting documentation. AHPA Comments 5–6. Second, they contend that Supermel submitted misreported payment dates, gross unit prices, packing expenses and materials with their honey sales. *Id.* at 7–10. Third, they argue that Supermel misclassified sales of honey by failing "to corroborate its purported sales of organic honey, relevant certification expenses, and certain critical product characteristics." *Id.* at 10. Finally, they claim Supermel failed to verify its sales and cost information. *Id.* at 16–18.

The Remand Redetermination responded to all of these objections by explaining that "Supermel's data is otherwise reliable and verifiable on the basis of other information available on the record. Because these data are reliable and verifiable on the basis of other information available on the record, AFA is not warranted in this case." *Remand Redetermination* 9.

Defendant-intervenors, while identifying what they claim are deficient responses, AHPA Comments 5–11, 16–18, fail to perfect their claim by demonstrating that Commerce exceeded its discretion under 19 U.S.C. § 1677e, and they make no attempt to show, in particular, how their claimed deficiencies affected the Department's margin calculation. Their five objections amount to little more than a general, unsupported contention that Commerce should have conducted additional verification and, had it done so, would have been compelled to conclude that there were inadequate "reconciliations," "supporting documentation," and corroborations. Upon reviewing the analysis it conducted and concluded in the Preliminary Determination, Commerce rejected this unsupported contention. In advocating for a new, total use of an adverse inference and urging the court to order another remand to Commerce for that purpose (the result of which would be moot), defendant-intervenors essentially argue that Commerce must conduct a new investigation. In light of the entire, lengthy record of this proceeding and the Department's reasonable exercise of its discretion in preparing the Remand Redetermination, the court declines to do so.

The court also rejects defendant-intervenors' fourth claim that Supermel failed to support its offset for a tax credit. Under "Brazilian law, a manufacturer can claim a tax credit equal to the amount of the PIS [Program of Social Integration] and COFINS [Contribution for the Financing of Social Security] [taxes] paid on the raw materials," based on a percentage of the invoice value. *Antidumping Duty Investigation of Raw Honey From Brazil: Supermel's Sections A–C Supplemental Questionnaire Response* 16 (Oct. 6, 2021), P.R. 224–26, ECF No. 52. Commerce "evaluated the information provided" by Supermel regarding the "PIS/COFINS" tax credit and found that Supermel "answered in full" what it characterizes as "several follow-up questions." *Remand Redetermination* 10. Commerce rejected defendant-intervenors' argument that Supermel's claimed offset value should be denied because Supermel did not tie it to its accounting records because, for example, "the sample supplier invoices do not separately identify amounts for PIS/COFINS taxes." *Id.* at 10–11. In rejecting that argument, Commerce explained "the amount of PIS and COFINS taxes paid may not be separately identified on the invoices received in connection with domestic input purchases" and "the taxes are embedded in the actual amount paid." *Id.* at 11 (footnote and internal quotation marks omitted). "Regarding the petitioners' assertion that the offset value in the cost reconciliation was not associated with any corresponding trial balance account number," Commerce found that "Supermel in its normal books and records does not have a separate account for PIS/COFINs offset or tax credits" and stated that that it "did not request either in the initial or supplemental questionnaires that Supermel specifically reconcile the offset value to its accounting records." *Id.* at 10–11.

Defendant-intervenors do not contest the Department's finding, *see id.* at 11, that PIS and COFINS taxes may not appear as a separate line item on an invoice. Nor do they contest the Department's finding that under the Brazilian tax system, PIS and COFINS taxes "are embedded in the actual amount paid." *Id.* Instead, defendant-intervenors argue ineffectually that "[i]t is the respondent's burden to populate the record with relevant information and to demonstrate that a claimed offset is warranted." AHPA Comments 32. Commerce reviewed the record in response to defendant-intervenors' allegation and concluded, based on substantial record evidence, that Supermel qualified for the offset.

The court also rejects defendant-intervenors' final argument, i.e. that Commerce, in its Remand Redetermination, "failed to adequately explain its reasoning and failed to address arguments raised by defendant-intervenors" in their brief submitted to the court in *Apiário I* and in their comments on the draft remand redetermination. AHPA Comments 28.

Defendant-intervenors' contention that Commerce should have addressed the arguments raised in their Rule 56.2 brief before the court in *Apiário I* is nonsensical, as the Rule 56.2 briefs were submitted for consideration by the court. As to their claim that Commerce failed to address their draft comments, 19 U.S.C. § 1677f(i)(3) requires Commerce to provide an explanation of the basis for its findings and to address the relevant arguments made by interested parties. Explaining the basis of its findings does not require Commerce to address every argument presented by interested parties. "Existing law . . . instead requires that issues material to the agency's determination be discussed so that the path of the agency may reasonably be discerned by a reviewing court." Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 892 (1994) (internal quotations and citations omitted). Commerce addressed some of defendant-intervenors' lengthy arguments only generally rather than address every argument with particularity. That is not a basis upon which the court may reject the Remand Redetermination.

III. CONCLUSION

The Department's decision in the Remand Redetermination to assign an estimated dumping margin of 10.52% to Supermel is supported by substantial evidence and adequately explained. Commerce reasonably exercised its discretion in remedying the deficiencies the court identified in *Apiário I*.

The court will enter judgment sustaining the Remand Redetermination.

Dated: January 24, 2025
New York, New York

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

Slip Op. 25–11

Hoa Phat Steel Pipe Co., Ltd., Plaintiff, v. United States, Defendant, and Atlas Tube Inc.; Bull Moose Tube Company; Maruichi American Corporation; Searing Industries; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC; Vest Inc.; and Nucor Tubular Products Inc., Defendant-Intervenors.

Before: Timothy M. Reif, Judge
Consol. Court No. 23–00248

[Granting plaintiff's motion for judgment on the agency record and remanding for Commerce to accept plaintiff's initial questionnaire responses into the record and to reconsider Commerce's determination regarding plaintiff's ability to participate in the certification process.]

Dated: January 27, 2025

Daniel L. Porter and *Ana Maria Amador Gil*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for plaintiff Hoa Phat Steel Pipe Co., Ltd. With them on the briefs was *Katherine R. Afzal*.

Kristin E. Olson, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *JonZachary Forbes*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Jeffrey D. Gerrish, Schagrin Associates, of Washington, D.C., argued for defendant-intervenors Atlas Tube Inc.; Bull Moose Tube Company; Maruichi American Corporation; Searing Industries; Vest Inc.; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC. With him on the brief were *Roger B. Schagrin* and *Nicholas C. Phillips*.

Alan H. Price, *Robert E. DeFrancesco III*, *Jake R. Frischknecht* and *Kimberly A. Reynolds*, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor Nucor Tubular Products Inc.

OPINION AND ORDER

Reif, Judge:

This action concerns the final affirmative determinations ("final determinations") by the U.S. Department of Commerce ("Commerce") of circumvention of the antidumping duty ("AD") and countervailing duty ("CVD") orders on light-walled rectangular pipe and tube ("LWRPT") from Korea, Taiwan and China. *Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 88 Fed. Reg. 77,266 (Dep't of Commerce Nov. 9, 2023); *Light-Walled Welded Rectangular Carbon Steel Tubing from Taiwan: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 88

Fed. Reg. 77,274 (Dep't of Commerce Nov. 9, 2023); *Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 88 Fed. Reg. 77,283 (Dep't of Commerce Nov. 9, 2023). In the circumvention inquiries, Commerce denied or granted in part the fourth, fifth and sixth requests of plaintiff Hoa Phat Steel Pipe Co., Ltd. ("plaintiff") for extension of time to file plaintiff's responses to Commerce's initial questionnaires ("questionnaire responses"). Memorandum from Commerce Re Rejection of Hoa Phat Initial Questionnaire Response (Nov. 17, 2022) ("Rejection Mem."), KPR 116, TPR 109, CPR 118.[1] Commerce then rejected as untimely plaintiff's questionnaire responses. *Id.* Because Commerce concluded that plaintiff "failed to provide timely information in the form and manner requested," Commerce based its circumvention analysis for plaintiff on the facts available. Issues and Decision Memorandum for the Final Affirmative Circumvention Determination (Nov. 2, 2023) ("IDM") at 17, KPR 223, TPR 219, CPR 236.[2] Commerce then determined that an adverse inference was warranted because plaintiff "failed to cooperate by not acting to the best of its ability." *Id.* In applying adverse facts available ("AFA"), Commerce concluded that plaintiff "produced or exported LWRPT" and that "the criteria for finding circumvention with respect to [plaintiff]" were met. *Id.* As part of Commerce's application of AFA, Commerce determined also that plaintiff was not eligible to certify that specific entries of merchandise were not manufactured using hot-rolled steel ("HRS") from Korea, Taiwan or China. *Id.* at 21; Preliminary Decision Memorandum for the Circumvention Inquiry on the Antidumping Duty Order (Apr. 6, 2023) ("PDM") at 5–6, KPR 147, TPR 140, CPR 160.

Plaintiff challenges (1) Commerce's decision to reject as untimely plaintiff's questionnaire responses and (2) Commerce's application of AFA to exclude plaintiff from participation in the certification process. *See* Pl.'s Br. in Supp. of its Mot. for J. on the Agency R. ("Pl. Br."), ECF No. 41.

For the reasons that follow, the court remands Commerce's final affirmative findings of circumvention.

BACKGROUND

On May 17, 2022, domestic interested parties filed with Commerce requests for circumvention inquiries to determine whether imports of

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[1] The court adopts the method used by parties when citing to the record. "KPR" refers to the record in the Korea proceeding, "TPR" refers to the record in the Taiwan proceeding and "CPR" refers to the record in the China proceeding.

[2] Citations to the PDM and IDM will cite to the page number of the PDM and IDM in the Korea proceeding, for ease of reference.

LWRPT completed in Vietnam using HRS inputs from Korea, Taiwan and China were circumventing AD and CVD orders on LWRPT from China, Korea and Taiwan. Domestic Interested Parties' Request for Circumvention Inquiry (May 17, 2022), KPR 1, TPR 1, CPR 1.

On August 4, 2022, Commerce published initiation notices for simultaneous inquiries to determine whether imports of LWRPT from Vietnam were circumventing the AD and CVD orders on LWRPT from China, Korea and Taiwan. Initiation of Circumvention Inquiries on the Antidumping and Countervailing Duty Orders (Aug. 4, 2022), KPR 27, TPR 17, CPR 25.

On August 30, 2022, Commerce selected as mandatory respondents two companies: plaintiff and Vina One Steel Manufacturing Corp. ("Vina One"). Memorandum from Commerce Re Respondent Selection (Aug. 30, 2022), KPR 39, TPR 34, CPR 38. On September 6, 2022, Commerce issued to the two mandatory respondents Commerce's initial questionnaires. Circumvention Inquiry Initial Questionnaire (Sept. 6, 2022), KPR 43, TPR 35, CPR 39. The initial questionnaires contained 15 pages (plus four appendices), consisted of 55 questions and requested data with respect to purchases of plaintiff and its affiliates of HRS for a period of five years, from January 1, 2017, through December 31, 2021. *See id.* Commerce set the deadline for September 20, 2022, giving respondents 14 days to respond to the initial questionnaires. *Id.* at 1.

The following day, on September 7, 2022, plaintiff filed a pro se letter requesting a six-week extension of time until November 1, 2022, to file its responses to the entire questionnaires. Hoa Phat's Extension Request for Submission of Responses to Circumvention Inquiry Initial Questionnaire (Sept. 7, 2022), KPR 45, TPR 39, CPR 41. Plaintiff explained in that letter that the additional time would allow plaintiff to "collect data and information from its database and unaffiliated suppliers and prepare the response for the period of five years." *Id.* at 1.

On September 14, 2022, Commerce granted plaintiff's request in part and extended the deadline by one week for a new deadline of September 27, 2022. Letter from Commerce Re Hoa Phat Extension Request (Sept. 14, 2022), KPR 50, TPR 41, CPR 45.

On September 21, 2022, plaintiff filed its second request for an extension of time, seeking a one-week extension of time only with respect to question 46 and appendix IV of the questionnaires. Hoa Phat's Request for Extension of Initial Questionnaire (Sept. 21, 2022), KPR 57, TPR 48, CPR 53. Plaintiff explained that the extension was necessary for two principal reasons. First, as to question 46, the question requested information concerning the purchases of raw materials of not only plaintiff but also its affiliates, and that one of plaintiff's affiliates was "unable to respond with the information until September 28, 2022." *Id.* at 2. Second, plaintiff stated that responding to appendix IV, which pertained to factors of production, was "very complex and time-and [sic] resource-intensive" and involved a high volume of information and "complex calculations." *Id.*

On September 23, 2022, Commerce issued a memorandum to all interested parties addressing certain extension requests and also requests to modify reporting requirements. Memorandum from Commerce Re Response to Modification and Extension Requests (Sept. 23, 2022), KPR 59, TPR 50, CPR 55. In the memorandum, Commerce granted all parties a one-week extension to 5:00 pm ET on October 4, 2022. *Id.* at 3. Also in that memorandum, Commerce stated: "We note that although Hoa Phat's request for a one-week extension pertained only to Question 46 and Appendix IV (Factors of Production) of the IQ, because we are granting a one-week extension to all interested parties, Hoa Phat's response to all sections of the IQ is due no later than 5:00 p.m. ET, October 4, 2022." *Id.* at 4.

On September 30, 2022, plaintiff filed its third request for extension of time, asking for a three-day extension to October 7, 2022, to file its responses to the entire initial questionnaire.[3] Hoa Phat's Request for Extension of Initial Questionnaire (Sept. 30, 2022), KPR 62, TPR 53, CPR 58. In that letter, plaintiff stated that the extension of time was necessary because "[p]reparation of such a large volume of data is very time- and resource-intensive." *Id.* at 2. Commerce granted the extension in full, setting the new deadline at 5:00 pm ET on October 7. Letter from Commerce Re Hoa Phat Third Extension Request (Oct. 3, 2022), KPR 65, TPR 56, CPR 61.

On October 5, 2022, plaintiff filed its fourth[4] extension request, seeking an additional week to file its responses. Hoa Phat's Request for Extensions of the Initial Questionnaire (Oct. 5, 2022), KPR 67, TPR 58, CPR 63. Plaintiff cited among other reasons the volume of information requested, which "cover[ed] the company's corporate structure and affiliations, sales, business operations of the company and its affiliates, and production information." *Id.* at 2. Plaintiff stated also that counsel had become ill and had not yet fully recovered. *Id.* at 3. Plaintiff explained in addition that counsel was also representing mandatory respondents in other proceedings before

[3] In the extension request of September 30, plaintiff stated incorrectly that the then-current deadline for the initial questionnaires was October 3. *See* Hoa Phat's Request for Extension of Initial Questionnaire (Sept. 30, 2022) at 1, KPR 62, TPR 53, CPR 58.

[4] Plaintiff stated incorrectly in this extension request that it was plaintiff's third extension request. It was plaintiff's fourth. *See* Hoa Phat's Request for Extensions of the Initial Questionnaire (Oct. 5, 2022) at 2, KPR 67, TPR 58, CPR 63.

Commerce with looming deadlines. *Id.* For those reasons, plaintiff sought an extension until October 14.[5] *Id.* at 3–4.

On October 6, 2022, Commerce denied plaintiff's request. Letter from Commerce Re Hoa Phat Fourth Extension Request (Oct. 6, 2022) ("Commerce Response to Pl. Fourth Extension Request"), KPR 69, TPR 60, CPR 65. Commerce stated: "Because Commerce must conduct these circumvention inquiries within time limits required by U.S. law, Commerce is denying Hoa Phat's extension request." *Id.* at 2.

That day, Commerce spoke by phone with plaintiff's counsel. Rejection Mem. at 3. In that phone conversation, plaintiff's counsel stated that she was not certain that the responses could be filed by the 5:00 pm deadline on October 7. *Id.* Commerce responded that counsel should begin filing its responses early. *Id.*

At approximately 12:30 pm on October 7, 2022, counsel for plaintiff contacted Commerce for clarification on filing the response in multiple segments. *Id.* In that conversation, Commerce once again recommended that counsel begin filing its responses as soon as possible, as the deadline was only hours away. *Id.* Counsel repeated that plaintiff would not be able to meet the 5:00 pm deadline and sought a one-business day extension. *Id.*

Then, at 1:30 pm, counsel for plaintiff again contacted Commerce. *Id.* Soon thereafter, plaintiff submitted to Commerce another extension request. Hoa Phat's Request for Extension of the Initial Questionnaire (Oct. 7, 2022), KPR 71, TPR 62, CPR 67. In that request, plaintiff asked that Commerce extend the deadline to 10:00 am, Tuesday, October 11. *Id.* at 2. The reason for the requested extension was the large volume of the submissions and the need to convert using "OCR" and "flatten"[6] the responses, which counsel stated would take several hours. *Id.* Plaintiff concluded: "Granting this reasonable, short extension will allow us to file the complete response in a timely fashion and manage any difficulties encountered during the OCR, document flattening, and filing processes." *Id.* at 2–3.

At approximately 2:30 pm, Commerce contacted plaintiff's counsel to inquire as to the reasons that counsel needed more time to submit

[5] Also on October 5, 2022, Vina One requested an extension of time until October 14, 2022, because "the time presently permitted is simply inadequate." Vina One's Fourth Extension Request for Response (Oct. 5, 2022) at 1, KPR 66, TPR 57, CPR 62.

[6] "OCR" stands for "optical character recognition" and refers to converting a scanned PDF page into a searchable format. Rejection Mem. at 6, n.6. To "flatten" a PDF document means to remove transparency information and convert images to a format that a printer or scanner can read. *Id.* at 6, n.7.

plaintiff's questionnaire responses. Rejection Mem. at 3. According to Commerce, counsel for plaintiff stated that extending the deadline to midnight on October 7 would give plaintiff sufficient time to submit the questionnaire responses. *Id.*

At approximately 3:11 pm, Commerce issued a letter extending the deadline for plaintiff to submit the questionnaire responses from 5:00 pm to 11:59 pm on October 7. *Id.* at 4; Letter from Commerce Re Hoa Phat Fifth Extension Request (Oct. 7, 2022) ("Commerce Response to Pl. Fifth Extension Request"), KPR 72, TPR 63, CPR 68. Commerce declined plaintiff the requested one-business day extension because Commerce was "obliged to conduct th[e] circumvention inquiry within time limits required by U.S. law." Commerce Response to Pl. Fifth Extension Request at 2. In that letter, Commerce stated in reference to the telephone conversation with plaintiff's counsel: "Based on a conversation with the undersigned, this will provide sufficient time to address any OCR, document flattening, and filing process issues." *Id.*

However, this final extension did not prove sufficient for plaintiff. At approximately 11:46 pm, counsel for plaintiff submitted its sixth extension request. Rejection Mem. at 4; Hoa Phat's Request for Extension of the Initial Questionnaire (Oct. 12, 2022) ("Pl. Sixth Extension Request"), KPR 83, TPR 74, CPR 79. This request was submitted with the incorrect case segment listed on the document. Pl. Sixth Extension Request at 1–2. The request explained that counsel continued to experience difficulty with OCR and flattening of documents and that, "despite Herculean efforts," plaintiff did not expect to complete the filing by the 11:59 pm deadline. *Id.*, Ex. 2 at 2. Plaintiff cited also the volume of the information, covering multiple affiliates and spanning five years, which plaintiff stated was "an enormous effort that the company has accomplished within the deadlines set by Commerce." *Id.* Plaintiff specified that the "problems that [it] encountered" on that day were "technical in nature." *Id.* The letter request stated also that "the client completed their response and sent all documents to counsel well in advance of the deadline." *Id.*, Ex. 2 at 3. As a result, plaintiff's counsel requested that Commerce deem plaintiff's submissions timely "even in the wee hours of the night." *Id.* Because counsel filed the extension request in the incorrect case segment, counsel received a denial on October 11, 2022. *Id.* at 1; Rejection Mem. at 6.

Plaintiff did not complete filing by the 11:59 pm deadline on October 7. Rejection Mem. at 4–5. However, plaintiff did complete filing in all three inquiries before 8:30 am on the following business day, which was Tuesday, October 11.[7] *Id.* In the Taiwan inquiry, plaintiff began submitting its response at 11:57 pm on October 7, and completed submission on Saturday, October 8. *Id.* at 4. In the Korea inquiry, plaintiff began submitting its response at 11:47 pm on October 7, and completed submission on Monday, October 10. *Id.* In the China inquiry, plaintiff began submitting its response at 11:15 pm on October 7, and completed submission on Saturday, October 8.[8] *Id.* at 5.

On October 7, 2022, the other mandatory respondent, Vina One, timely submitted its response to Commerce's initial questionnaire. IDM at 15.

On November 17, 2022, Commerce issued a memorandum in which Commerce: (1) concluded that plaintiff did not "establish[] good cause to have extended the deadline beyond the 11:59 p.m. deadline," even assuming that the sixth extension request had been filed in the correct case segment; and (2) rejected plaintiff's questionnaire responses. Rejection Mem. at 7.

On November 29, 2022, plaintiff requested that Commerce reconsider its decision to reject plaintiff's initial questionnaire responses. Hoa Phat's Request for Reconsideration re Initial Response (Nov. 29, 2022) ("Pl. Reconsideration Request"), KPR 119, TPR 112, CPR 121. On December 13, 2022, Commerce denied plaintiff's request. Letter from Commerce Denying Hoa Phat's Request for Reconsideration (Dec. 13, 2022), KPR 121, TPR 115, CPR 128.

On April 12, 2023 — 183 days after plaintiff's final requested deadline of October 11, 2022, and 146 days after Commerce issued the rejection memorandum — Commerce issued the preliminary determinations. *See, e.g.*, *Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Preliminary Affirmative Determination of Circumvention of the Antidumping Duty Order*, 88 Fed. Reg. 22,002 (Dep't of Commerce Apr. 12, 2023); PDM. Commerce preliminarily determined to base its circumvention analysis for plaintiff on facts available with an adverse inference "because Hoa Phat failed to provide timely information in the form and manner requested, and significantly

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[7] Commerce was closed on Monday, October 10, in observance of Columbus Day.

[8] The "one-day lag rule" allows a party to submit only a business proprietary version of a document by the deadline with a notice that bracketing of business proprietary information is not final for one business day after date of filing. 19 C.F.R. § 351.303(d)(2)(v). The party then has one extra business day to double-check its designations of confidential information and then to file a final confidential submission together with a redacted public version. *Id.* § 351.303(c)(2)(i)-(iii). The party may make no changes to the final submission other than adjusting bracketing and removing the notice about bracketing not being final. *Id.* § 351.303(c)(2)(ii). The court notes that plaintiff completed filing its BPI final versions and public versions before 5:00 pm on October 11. *See* Rejection Mem. at 4–5.

impeded this circumvention inquiry." PDM at 5. In the PDM, Commerce stated also that "by failing to provide the requested information in a timely manner, Hoa Phat failed to cooperate by not acting to the best of its ability by not complying with a request for information." *Id.* Commerce concluded for that reason that "an adverse inference is warranted, in selecting from among the facts otherwise available." *Id.* After applying AFA, Commerce reached three conclusions with respect to plaintiff: (1) plaintiff produced LWRPT subject to the circumvention inquiry that was subsequently imported into the United States and the criteria for finding circumvention had been met; (2) the production process of plaintiff was "representative of the experience of other producers of LWRPT in Vietnam" warranting a "country-wide determination" to "prevent further circumvention" by "non-examined producers"; and (3) importers and exporters could certify that "specific entries of LWRPT" were "not manufactured using" Korea-, Taiwan- or China-origin HRS, but entries of LWRPT produced and/or exported by plaintiff were not eligible for certification. *Id.* at 16–17.

On May 4, 2023, plaintiff submitted its administrative case brief, in which plaintiff argued that Commerce abused its discretion in denying plaintiff's extension requests and that Commerce lacked statutory authority to deny plaintiff access to the certification process. Hoa Phat's Set One Case Brief (May 4, 2023), KPR 165, TPR 160, CPR 180. On July 26, 2023, parties held a hearing via videoconference. Hearing Transcript, KPR 210, TPR 205, CPR 223.

On November 2, 2023, Commerce issued its IDM for the final affirmative circumvention determinations of the AD and CVD orders on LWRPT from Korea, Taiwan and China. IDM. On November 9, 2023, Commerce issued the final determinations. *See, e.g.*, *Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 88 Fed. Reg. 77,266 (Dep't of Commerce Nov. 9, 2023). Commerce did not modify the conclusions that it reached in the PDM, stating: "We have determined, based on AFA, that imports of LWRPT produced or exported by Hoa Phat are circumventing the *Order* and are subject to cash deposits as outlined in the accompanying *Federal Register* notice." IDM at 25. Specifically with respect to plaintiff, Commerce concluded that: (1) its denial of plaintiff's extension request of October 7, 2022, was not an abuse of discretion; and (2) Commerce had the statutory authority to deny plaintiff a certification process.[9] *Id.* at 14–26. As to (2), Commerce stated that the "decision to bar an uncooperative respondent from the certification process is an agency practice affirmed by the CIT, is not impermissibly punitive, and minimizes the impact of AFA findings on parties not found to be circumventing, while ensuring that Commerce's AFA finding encourages cooperation, consistent with Commerce's established practice." *Id.* at 21.

On November 29, 2023, plaintiff filed three complaints, each corresponding to one of the three circumvention inquiries. Complaint, ECF No. 6. On March 22, 2024, the court granted the motion of defendant-intervenors Atlas Tube Inc., Bull Moose Tube Company, Maruichi American Corporation, Searing Industries, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Vest Inc. and Nucor Tubular Products Inc. (collectively, "defendant-intervenors") to consolidate the three actions. Order, ECF No. 35.

On April 25, 2024, plaintiff filed its motion for judgment on the agency record, asking that the court remand to Commerce with instructions that it: (1) accept plaintiff's initial questionnaire responses into the record of the circumvention proceedings; and (2) reconsider its determination regarding plaintiff's ability to participate in the certification process. Pl. Br.

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[9] In the PDM, Commerce stated with respect to certification:

> In order to administer this preliminary country-wide affirmative determination of circumvention, Commerce has established importer and exporter certifications that provide for specific entries of LWRPT to not be subject to suspension of liquidation or the collection of cash deposits pursuant to this preliminary country-wide affirmative determination of circumvention if the merchandise was not manufactured using [Korea-, Taiwan- or China-origin HRS] . . . . Accordingly, companies can certify as to whether their products are subject to suspension of liquidation or the collection of cash deposits, based on the requirements and process described in the accompanying *Federal Register* notice.

PDM at 17.

"Where no certification is provided for an entry, and AD/CVD orders from [the] three countries (China, Korea, or Taiwan) potentially apply to that entry," Commerce will "instruct [U.S. Customs and Border Protection] to suspend the entry and collect cash deposits at the rates applicable to the AD and CVD orders on LWRPT" from Korea, Taiwan and China. *See, e.g.*, *Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Preliminary Affirmative Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 88 Fed. Reg. 21,985, 21,986 (Dep't of Commerce Apr. 12, 2023). Commerce added:

> U.S. entries of inquiry merchandise made on or after August 4, 2022, that are ineligible for certification based on the failure of Hoa Phat to cooperate . . . shall remain subject to suspension of liquidation until final assessment instructions on those entries are issued, whether by automatic liquidation instructions, or by instructions pursuant to the final results of an administrative review.

Id.

On December 11, 2024, the court held oral argument. Oral Arg., ECF No. 55; Oral Arg. Tr., ECF No. 56.

JURISDICTION AND STANDARD OF REVIEW

28 U.S.C. § 1581(c) grants to this Court "exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930." Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(B)(vi),[10] in turn provides for judicial review of "[a] determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order."

The court will hold unlawful any determination, finding or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

Substantial evidence constitutes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," but it requires "more than a mere scintilla." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

For a reviewing court to "fulfill [its] obligation" to determine whether a determination of Commerce is supported by substantial evidence and in accordance with law, Commerce is required to "examine the record and articulate a satisfactory explanation for its action." *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (quoting *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013)); *see also Risen Energy Co. v. United States*, 46 CIT __, __, 570 F. Supp. 3d 1369, 1376 (2022).

Further, "the Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (citing *Heveafil Sdn. Bhd. v. United States*, 25 CIT 147, 149 (2001)), *aff'd sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App'x 797 (Fed. Cir. 2003). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)).

[10] Further citations to the Tariff Act of 1930 are to Title 19 of the U.S. Code, 2018 edition.

Finally, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)).

DISCUSSION

I. Whether Commerce abused its discretion or acted arbitrarily in rejecting plaintiff's questionnaire responses

The court concludes that Commerce's decision to reject plaintiff's questionnaire responses was an abuse of discretion. For that reason, the court remands to Commerce with instructions to consider plaintiff's questionnaire responses in the circumvention inquiries.

A. Legal Framework

19 C.F.R. § 351.301(a) requires that Commerce specify in its request to an interested party for a response to a questionnaire "[t]he time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit the requested information in the requested form and manner by the date specified may result in use of the facts available under section 776 of the Act and § 351.308."

Section 351.302(b) provides that "[u]nless expressly precluded by statute, the Secretary may, for good cause, extend any time limit established by this part." Subparagraph (c) states that "[b]efore the applicable time limit established under this part expires, a party may request an extension pursuant to paragraph (b) of this section. . . . The request must be in writing, in a separate, stand-alone submission, filed consistent with § 351.303, and state the reasons for the request."

Section 351.302(d) governs Commerce's "[r]ejection of untimely filed or unsolicited material." Subparagraph (d)(1)(i) states: "Unless the Secretary extends a time limit under paragraph (b) of this section, the Secretary will not consider or retain in the official record of the proceeding[] [u]ntimely filed factual information, written argument, or other material that the Secretary rejects." *See also id.* § 351.301(c)(1). Section 351.302(d)(2) requires that Commerce provide, "to the extent practicable, written notice stating the reasons for rejection."

"Commerce has discretion both to set deadlines and to enforce those deadlines by rejecting untimely filings." *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 122, 815 F. Supp. 2d 1342, 1365 (2012) (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206–07 (Fed. Cir. 1995)). This Court has held that "[s]trict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision." *Maverick Tube Corp. v. United States*, 39 CIT __, __, 107 F. Supp. 3d 1318, 1331 (2015). "But [Commerce's] discretion is not absolute." *Grupo Acerero S.A. de C.V. v. United States*, 48 CIT __, __, 698 F. Supp. 3d 1320, 1332 (2024). "[A]bsent constitutional constraints or extremely compelling circumstances," the court "will defer to the judgment of [the] agency regarding the development of the agency record." *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1351 (Fed. Cir. 2015).

The U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit") and this Court have also stated that "a deadline-setting regulation that 'is not required by statute may, in appropriate circumstances, be waived and must be waived where failure to do so would amount to an abuse of discretion." *Cambria Co. v. United States*, 48 CIT __, __, 705 F. Supp. 3d 1369, 1377 (2024) (quoting *NTN Bearing Corp.*, 74 F.3d at 1207).

"An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (quoting *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005)).

B. Analysis

The question before the court is whether Commerce abused its discretion in rejecting as untimely plaintiff's questionnaire responses.

Plaintiff asserts that Commerce abused its discretion in rejecting plaintiff's untimely questionnaire responses. First, plaintiff argues that the burden placed on Commerce as a result of plaintiff's late filing was outweighed by "[t]he impairment to the accuracy of Commerce's determination" that resulted from the exclusion of plaintiff's questionnaire responses. Pl. Br. at 17. Second, plaintiff contends that Commerce could not permissibly reject plaintiff's untimely filing while also extending Commerce's own deadlines to issue the preliminary and final determinations. *Id.* at 20–21. According to plaintiff, this differential treatment demonstrates that "Commerce's approach to Hoa Phat and the broader proceeding . . . was an abuse of discretion and fundamentally unfair." *Id.* at 1. Third, plaintiff asserts that Commerce's decision to deny or grant in part plaintiff's final three extension requests was unsupported by substantial evidence. *Id.* at 24–25. Fourth, plaintiff argues that Commerce's refusal to accept plaintiff's minimally untimely questionnaire responses was inconsistent with Commerce practice. *Id.* at 26–29.

The court concludes for two reasons that in the specific circumstances of this case Commerce abused its discretion in rejecting plaintiff's questionnaire responses.

1. Commerce's rejection of plaintiff's questionnaire responses and exclusion of plaintiff from the certification process

In the Rejection Memorandum, Commerce rejected plaintiff's submission because, according to Commerce, plaintiff "did not make a good faith effort to submit its questionnaire responses in a timely manner." Rejection Mem. at 7. In reaching that decision, Commerce cited that plaintiff: (1) did not begin filing its responses "until just minutes before the deadline"; (2) requested a one week extension in its second extension request to file in response to only question 46 and appendix IV of the questionnaire; (3) and "stated in a conversation at 2:30 p.m. with Commerce that only a few additional hours would be sufficient to resolve their internal technical challenges and complete the filing." *Id.* at 5–7.

In the PDM, Commerce preliminarily determined to base "its circumvention analysis for Hoa Phat on the facts available" because "Hoa Phat failed to provide timely information in the form and manner requested, and significantly impeded" the circumvention inquiries. PDM at 4–5. In addition, Commerce preliminarily concluded that "by failing to provide the requested information in a timely manner, Hoa Phat failed to cooperate by not acting to the best of its ability" and for that reason determined that "an adverse inference is warranted." *Id.* at 5. As AFA, Commerce determined that plaintiff "produced and/or exported LWRPT subject to [the inquiries] and . . . that the criteria for finding circumvention with respect to Hoa Phat have been met." *Id.* Also as AFA, Commerce determined that plaintiff "is not eligible to certify that specific entries of merchandise were not manufactured using" HRS from Korea, Taiwan and China. *Id.* at 5–6. Commerce did not modify any of these conclusions in the final determinations. *See* IDM at 14–26.

Plaintiff argues that Commerce abused its discretion when it refused to consider plaintiff's questionnaire responses filed prior to the first business day after the deadline and nearly 400 days before

Commerce's final determinations. Pl. Br. at 17. For the reasons that follow, the court concludes that Commerce did abuse its discretion.

19 C.F.R. § 351.302(d)(1)-(2) require that Commerce "not consider . . . [u]ntimely filed factual information" and states that Commerce "will reject such information." "Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits." *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370–71 (2007) (quoting *Reiner Brach GmbH & Co. v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002)).

However, it is well-established that "a regulation which is not required by statute may, in appropriate circumstances, be waived and must be waived where failure to do so would amount to an abuse of discretion." *NTN Bearing Corp.*, 74 F.3d at 1207; *Cambria*, 48 CIT at __, 705 F. Supp. 3d at 1377–78 (holding that Commerce abused its discretion in not waiving its "deadline-setting regulation" where the respondent inadvertently "submitted its [questionnaire] response five hours after" a nonstandard deadline and "forty-five days before the *Preliminary Results*"); *Leco Supply, Inc. v. United States*, 47 CIT __, __, 619 F. Supp. 3d 1287, 1307 (2023).

In *Cambria*, Commerce rejected plaintiff's second supplemental questionnaire response submitted inadvertently five hours after the 10:00 am deadline and 45 days before the preliminary determination. 48 CIT at __, 705 F. Supp. 3d at 1375–76. Commerce rejected also plaintiff's subsequent request to refile the submission, concluding that plaintiff "did not demonstrate the extraordinary circumstances necessary to grant an untimely extension request." *Id.* at __, 705 F. Supp. 3d at 1375; *see* 19 C.F.R. § 351.302(c). There, the Court stated that Commerce "failed to weigh the relevant facts," and that Commerce "'must' waive its extraordinary circumstance standard when 'failure to do so would amount to an abuse of discretion.'" *Cambria*, 48 CIT at __, 705 F. Supp. 3d at 1378 (quoting *NTN Bearing Corp.*, 74 F.3d at 1207). Similarly, the facts and circumstances underlying Commerce's rejection of plaintiff's questionnaire responses offer significant support for the conclusion that Commerce "failed to weigh the relevant facts" by not waiving § 351.302(d) when it appears to have been warranted.

To start, Commerce's reliance on "time limits required by U.S. law," Commerce Response to Pl. Fourth Extension Request, in denying plaintiff's fourth and fifth extension requests was "an unreasonable judgment in weighing [the] relevant factors." *Consol. Bearings Co.*, 412 F.3d at 1269.

This Court has held previously that Commerce's reliance on statutory deadlines is an insufficient basis to reject a respondent's request for extension of time where "there [was] no record evidence" that granting the requested extensions "would have delayed the issuance of the Final Determination." *Celik Halat ve Tel Sanayi A.S. v. United States*, 46 CIT __, __, 557 F. Supp. 3d 1348, 1359 (2022); *see also Ajmal Steel Tubes & Pipes Indus. LLC v. United States*, Slip Op. 22–121, 2022 WL 15943670, at *4 (CIT Oct. 28, 2022) ("Commerce must consider the serious consequences it rests upon parties in the light of the allowances it gives itself."); *Grupo Acerero*, 48 CIT at __, 698 F. Supp. 3d at 1335 ("Commerce's concern with finality rings hollow when one considers it would be nearly three months and three supplemental questionnaires [for the other mandatory respondent] before Commerce issued the Preliminary Results."). In *Celik Halat*, the Court noted that plaintiff — a respondent in an antidumping investigation — had made repeated, timely requests to extend the deadline to file its response to certain sections of the initial questionnaire, and that Commerce, as in the instant case, "was somewhat parsimonious in granting those requests." *Celik Halat*, 46 CIT at __, 557 F. Supp. 3d at 1359. Then, plaintiff requested an additional four-day extension, which Commerce denied due to "statutory deadlines." *Id.* at __, 557 F. Supp. 3d at 1358. The Court stated that Commerce's reliance on "statutory deadlines" in denying the four-day extension was "open to question" because, had Commerce granted the request, Commerce "still would have had 47 days to issue timely the Preliminary Determination." *Id.* at __, 557 F. Supp. 3d at 1359.

This Court's reasoning in *Celik Halat* applies with even greater force in these circumvention inquiries. Contrary to AD and CVD investigations and reviews, the statute does not impose on Commerce in a circumvention inquiry a hard deadline to issue the final determination. *Compare* 19 U.S.C. § 1673d(a)(1), *with id.* § 1677j(f). Commerce has established by regulation certain deadlines to issue the final determination in a circumvention inquiry, but Commerce itself failed to adhere to those deadlines and extended the instant inquiries far beyond that contemplated by the statute and Commerce's regulations. For that reason, Commerce's reliance on "time limits required by U.S. law" — regulatory, not statutory, time limits to which Commerce itself failed to adhere — to support Commerce's decision to deny plaintiff's extension requests and thereby reject plaintiff's questionnaire responses constituted an abuse of discretion.

19 U.S.C. § 1677j(f) provides that Commerce "shall, to the maximum extent practicable, make the determinations under this section

within 300 days from the date of the initiation of a countervailing duty or antidumping circumvention inquiry under this section."

In 19 C.F.R. § 351.226(e), Commerce set out by regulation time limits to issue the preliminary determination and the final determination in a circumvention inquiry. Section 351.226(e)(1) requires that Commerce issue the preliminary determination no later than 150 days after the date of publication of the notice of initiation and allows Commerce to extend that deadline "by no more than 90 additional days." Then, the regulation requires that Commerce issue the final determination "no later than 300 days from the date of publication of the notice of initiation." *Id.* § 351.226(e)(2). However, if Commerce determines that the inquiry is "extraordinarily complicated and additional time is necessary to issue a final circumvention determination, then [Commerce] may extend the 300-day deadline *by no more than 65 days*." *Id.* (emphasis supplied).

Commerce's initial deadline to issue the preliminary determinations was January 3, 2023 — 81 days after the October 14 date requested in plaintiff's fourth extension request and 84 days after the October 11 date requested in plaintiff's fifth and sixth extension requests. Memorandum from Commerce Re Extension of Preliminary Determinations in Circumvention Inquiries (Dec. 9, 2022), KPR 120, TPR 114, CPR 127. However, Commerce later extended that deadline twice before issuing the preliminary determinations on April 12, 2023 — 11 days after the regulatory deadline in § 351.226(e)(1). *Id.*; Memorandum from Commerce Re Second Extension of Preliminary Determinations in Circumvention Inquiries (Mar. 31, 2023), KPR 145, TPR 138, CPR 158; PDM.

Then, Commerce twice extended the deadline to issue the final determinations. In the first such extension, Commerce relied on its authority under § 351.226(e)(2) to extend the deadline "by no more than 65 days" to issue the final determination in a circumvention inquiry and granted itself an additional 65 days. Memorandum from Commerce Re Extension of Deadline for Issuing Final Determinations in Circumvention Inquiries (May 15, 2023), KPR 179, TPR 173, CPR 192. Then, Commerce once again extended its deadline to issue the final determinations beyond the time limit prescribed by Commerce's regulation, this time invoking Commerce's authority under § 351.302 to extend any deadline "for good cause." Memorandum from Commerce Re Extension of Deadline for Issuing Final Determinations in Circumvention Inquiries (July 20, 2023), KPR 209, TPR 204, CPR 222. As in *Celik Halat*, there is no indication in the record that granting plaintiff's fourth, fifth or sixth requests for extension of time would have delayed the issuance of the final determinations.

Further, Commerce's decision in this case had far-reaching consequences, an additional consideration in assessing whether there has been an abuse of discretion. In the circumstances of the instant circumvention inquiries, by rejecting plaintiff's questionnaire response and excluding plaintiff from the certification process, Commerce "attached a consequence that was grossly disproportionate to the mistake that was made," and for that reason, abused its discretion. *Artisan Mfg. Corp. v. United States*, 38 CIT 682, 697, 978 F. Supp. 2d 1334, 1347 (2014).

In *Artisan Manufacturing*, this Court held that Commerce abused its discretion in rejecting plaintiff's "quantity and value" questionnaire response filed before 9:00 am on the first business day following the due date. *Id.* at 699, 978 F. Supp. 2d at 1348–49. There, Commerce rejected the untimely filed questionnaire response and applied AFA to plaintiff. *Id.* at 687–88, 978 F. Supp. 2d at 1339–40. As AFA, Commerce assigned to plaintiff the country-wide CVD rate of 76.53%. *Id.* at 684, 978 F. Supp. 2d at 1337. The Court concluded that Commerce abused its discretion in rejecting the questionnaire response and applying to plaintiff the country-wide rate because, based on a review of the record: (1) the filing of the response one business day after the deadline "could not have delayed the investigation in any meaningful way"; and (2) "[t]he consequence Commerce attached" in applying the country-wide rate "was particularly severe." *Id.* at 694–95, 697, 978 F. Supp. 2d at 1345, 1347.

Similarly in the instant case, and as stated above, there is no indication in the record that "acceptance of [plaintiff's] filing could have interfered" with or "delayed" the instant circumvention inquiries.[11] *Id.* at 695, 978 F. Supp. 2d at 1345. Like in *Artisan Manufacturing*, plaintiff completed the filing prior to the beginning of the first business day following Commerce's deadline. *Id.* at 694–695, 978 F. Supp. 2d at 1345; Rejection Mem. at 4–6. As stated above, plaintiff completed its filing 184 days before Commerce issued its preliminary determinations in the circumvention inquiries. In addition, plaintiff

[11] At oral argument, defendant and defendant-intervenor asserted repeatedly that whether the untimely filing impeded or delayed an investigation or review is not a relevant factor in determining whether Commerce abused its discretion, citing the Federal Circuit's decision in *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343 (Fed. Cir. 2015). Oral Arg. Tr. at 41:25–43:2. However, as described *infra* Section I.B.2, *Dongtai Peak* is inapposite to this case. Moreover, this Court has continued to consider Commerce's "interest in finality" in cases similar to the one before the court. *Grupo Acerero S.A. de C.V. v. United States*, 48 CIT __, __, 698 F. Supp. 3d 1320, 1335 (2024) ("However, Commerce's interest in finality nearly three months before releasing the Preliminary Results was not just at a nadir; it was nearly zero."); *Celik Halat ve Tel Sanayi A.S. v. United States*, 46 CIT __, __, 557 F. Supp. 3d 1348, 1359 (2022); *Bebitz Flanges Works Priv. Ltd. v. United States*, 44 CIT __, __, 433 F. Supp. 3d 1309, 1326 (2020) (concluding in that case that "Commerce struck the proper balance between finality and accuracy" in rejecting untimely submissions and denying extension requests).

completed filing the BPI final versions and public versions of the questionnaire responses before 5:00 pm on October 11, which was earlier even than the other mandatory respondent Vina One. *See* Pl. Reconsideration Request at 13. Therefore, accepting plaintiff's questionnaire responses would have been inconsequential to Commerce's conducting of the investigation. *Artisan Mfg.*, 38 CIT at 694, 978 F. Supp. 2d at 1345.

Also as in *Artisan Manufacturing*, Commerce's decision to exclude plaintiff from the certification process can fairly be characterized as "particularly severe." *Id.* at 697, 978 F. Supp. 2d at 1347. All other Vietnamese exporters were able to participate in the certification process, including Vina One, which did not submit the BPI final versions and public versions of its questionnaire responses until after plaintiff. Commerce's application of AFA "cannot be 'punitive, aberrational, or uncorroborated'" and should "reflect[] the seriousness of the non-cooperating party's misconduct." *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1301 (Fed. Cir. 2019) (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). The record demonstrates that each of plaintiff's extension requests was timely and that plaintiff was diligent in communicating to Commerce the challenges that plaintiff faced in meeting Commerce's October 7 deadline to submit its questionnaire responses across the three circumvention inquiries. Given that plaintiff's submission of the questionnaire responses prior to 8:30 am on the following business day had no apparent impact on Commerce's ability to conduct the circumvention inquiries, such a consequence was "grossly disproportionate to the mistake that was made."[12] *Artisan Mfg.*, 38 CIT at 697, 978 F. Supp. 2d at 1347.

Consequently, Commerce's decision to reject plaintiff's questionnaire responses was an abuse of discretion.

2. Application of the preamble to 19 C.F.R. § 351.302 to plaintiff's final extension request of October 7, 2022

Finally, the preamble to 19 C.F.R. § 351.302 and decisions of this Court demonstrate that Commerce has an established practice of extending automatically a deadline to 8:30 am the following business

[12] Defendant asserts in its briefing that Commerce's decision to exclude plaintiff from the certification process cannot be considered punitive because Commerce explained in the IDM "that '[a]n uncooperative respondent retains the right, and has the opportunity, to participate in a future review [of the relevant order] and, thus, to remedy its uncooperative status and gain eligibility to participate in the certification regime." Def. Br. at 31 (alterations in original) (quoting IDM at 33). However, in the circumstances of these inquiries and in light of the foregoing analysis, the court does not find this explanation persuasive.

day where Commerce is unable to respond to a timely extension request before the deadline to submit a response has expired.[13]

In 2013, Commerce issued a new final rule modifying and clarifying certain aspects of Commerce's regulations addressing the extension of time limits. *Extension of Time Limits*, 78 Fed. Reg. 57,790 (Dep't of Commerce Sept. 20, 2013). In addressing the comments of interested parties, Commerce stated in the preamble:

> Concerning when the time limit expires, if a submission is due on Monday, December 2, 2013, for example, the submission must be received by 5:00 p.m. Eastern Time on that date. If a party requests an extension of that time limit, the party's extension request must be received before 5:00 p.m. on Monday, December 2, 2013, or it will be considered untimely. On the other hand, if the Department specifies that a submission is due on Monday, December 2, 2013, at 12:00 noon, the party's extension request must be received before 12:00 noon on Monday, December 2, 2013, or it will be considered untimely.
>
> Parties should be aware that the likelihood of the Department granting an extension will decrease the closer the extension request is filed to the applicable time limit because the Department must have time to consider the extension request and decide on its disposition. Parties should not assume that they will receive an extension of a time limit if they have not received a response from the Department. *For Submissions that are due at 5:00 p.m., if the Department is not able to notify the party requesting the extension of the disposition of the request by 5:00 p.m., then the submission would be due by the opening of business (8:30 a.m.) on the next work day.*

Id. at 57,792 (emphasis supplied).[14]

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[13] As this Court has observed, this practice has never been codified by regulation even though "[i]n the real world, such a last-minute extension request is virtually certain to obtain at least a 15 1/2-hour extension for completing a filing." *Oman Fasteners, LLC v. United States*, Slip Op. 23–17, 2023 WL 2233642, at *5 (CIT Feb. 15, 2023).

[14] Elsewhere in the preamble, Commerce elaborated on the reason for the modification:

> Prior to the modification, the Department frequently encountered the situation in which a party filed an extension request so close to the time limit that the Department did not have the opportunity to respond to the request before the time limit expires. These last-minute extension requests often resulted in confusion among the parties, difficulties in the Department's organization of its work, and undue expenditures of Departmental resources, which impeded the Department's ability to conduct AD and CVD proceedings in a timely and orderly manner. After consideration of the comments, and as discussed below, the Department considers that an extension request is untimely if it is filed after the applicable time limit expires.

Extension of Time Limits, 78 Fed. Reg. 57,790, 57,791 (Dep't of Commerce Sept. 20, 2013).

The instructions to the initial questionnaires referenced this practice also and indicated that the practice exists to accommodate respondents that face technical challenges when filing on the day of the deadline:

> Scenario 2: I experienced difficulties yet was able to file an extension request right before the deadline. However, it is now after 5:00 pm on the due date, and I still haven't received a response.
>
> If you could not meet the deadline because of ACCESS filing difficulties *or other technical issues*, you automatically get until 8:30 am the next business day to file your submission.

Pl. Reconsideration Request, Ex. 1 (emphasis supplied).

In the IDM, Commerce addressed plaintiff's invocation of the preamble's automatic extension and concluded for two reasons that the practice did not apply to plaintiff's circumstances. First, Commerce stated that the practice applied only to deadlines of 5:00 pm. IDM at 16. Second, Commerce determined that the preamble "does not speak to a scenario where (as here) Commerce acted on a timely extension request before 5:00 p.m. and a filer sought a further extension minutes before the extended filing deadline" of 11:59 pm on that day. *Id.*

Commerce's decision not to apply to plaintiff's circumstances the practice as reflected in the preamble was unreasonable. Specifically, this practice exists to accommodate respondents in precisely plaintiff's circumstances: where Commerce is unavailable or unable to respond to a timely extension request that was filed by a respondent facing technical challenges prior to a deadline. *See Oman Fasteners, LLC v. United States*, Slip Op. 23–17, 2023 WL 2233642, at *5 (CIT Feb. 15, 2023) ("[I]t is an abuse of discretion for Commerce to require a showing of 'extraordinary circumstances' to support a retroactive extension request . . . where . . . the filing is completed after 5:00 p.m. but prior to 8:30 a.m. the following work day—that is, when the filing is completed within the automatic window that Commerce's rulemaking comment response authorizes.").

In plaintiff's sixth and final request for an extension of time — filed prior to the 11:59 pm deadline — plaintiff reiterated the difficulty in filing information from five affiliates covering several years of data. Pl. Sixth Extension Request at 2. Moreover, plaintiff added that it now faced additional challenges that were "solely technical and due to the strain on computers to process in the format required by ACCESS (principally the OCR and flattening process)," which "[took] longer than expected." *Id.* at 2–3.

Commerce did not respond to this extension request prior to the 11:59 pm deadline. Plaintiff continued to file its responses throughout the weekend and completed its filings across all three inquiries prior to 8:30 am on the following workday. Rejection Mem. at 4–5. In the context of this case, the court does not find a meaningful basis for Commerce to draw the conclusion it did on the basis of a distinction between the instant deadline of 11:59 pm — as opposed to a deadline at 5:00 pm. Commerce was unavailable to respond to plaintiff's timely extension request. In addition, that Commerce had previously granted in part plaintiff's extension request and provided an additional seven hours did not foreclose the possibility that plaintiff would confront technical challenges in filing its voluminous responses on the evening of the 11:59 pm deadline.

Because plaintiff encountered technical challenges on the evening of the deadline, and because Commerce was unavailable to respond to plaintiff's extension request, Commerce's refusal to apply the practice to plaintiff's circumstances was an abuse of discretion.

Defendant relies on cases in which this Court and the Federal Circuit sustained decisions of Commerce to reject untimely questionnaire responses and apply to that respondent AFA. The court considers each in turn and concludes that none is apposite. In *Bebitz Flanges Works Private Ltd. v. United States*, 44 CIT __, 433 F. Supp. 3d 1297 (2020), the respondent submitted a deficient initial questionnaire response, which required that Commerce issue a supplemental questionnaire. After Commerce granted multiple extension requests, plaintiff filed a final extension request 20 minutes before the 5:00 pm deadline, and then failed to file the supplemental response before 8:30 am on the following business day. *Id.* at __, 433 F. Supp. 3d at 1301–02. In *Bebitz Flanges Works Private Ltd. v. United States*, 44 CIT __, 433 F. Supp. 3d 1309 (2020), the Court sustained Commerce's rejection of a supplemental response submitted four hours after the deadline. However, there, the Court noted that plaintiff "had nearly five months from the issuance of the original questionnaire to provide the information requested by Commerce" and failed to provide useable information after more than eight questionnaires. *Id.* at __, 433 F. Supp. 3d at 1326–27 ("Bebitz did not fail just once or even twice to fulfill [Commerce's] requests; rather, Bebitz failed to provide usable information to Commerce after more than eight questionnaires, each with extended deadlines, representing multiple opportunities for Bebitz to provide timely and accurate information."). Moreover, in contrast with the instant case, Commerce provided "extensive reasons for its full denials" of plaintiff's extension requests. *Id.* at __, 433 F. Supp. 3d at 1325. In addition, and also in contrast with the instant circumvention inquiries, the Court noted that "Congress has imposed strict statutory deadlines upon Commerce in AD investigations." *Id.* As a consequence, the Court concluded that "Commerce struck the proper balance between finality and accuracy" in denying the extension requests, rejecting the untimely submissions and applying to the respondent AFA. *Id.* at __, 433 F. Supp. 3d at 1326.

In *Tau-Ken Temir LLP v. United States*, 46 CIT __, __, 587 F. Supp. 3d 1346, 1355 (2022), plaintiff failed to file a "full written explanation" and instead submitted a "5-line barebones extension request." Moreover, plaintiff did not file its responses prior to 8:30 am the following business day after Commerce did not respond to plaintiff's extension request filed minutes before the deadline. *Id.* at __, 587 F. Supp. 3d at 1350–51.

In *Dongtai Peak*, 777 F.3d at 1350, the Federal Circuit concluded that Commerce properly exercised its discretion in rejecting plaintiff's extension requests and supplemental questionnaire response. There, the Federal Circuit relied on a previous decision of that court and stated that "[i]t is fully within Commerce's discretion to 'set and enforce deadlines' and [the] court 'cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered." *Id.* at 1352 (quoting *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760–61 (Fed. Cir. 2012)). However, in *Dongtai Peak*, the facts recited by the court suggest a circumstance highly distinct from the instant case: There, plaintiff failed to file a timely extension request and failed to "demonstrate why the company was unable to file timely its extension request" until two days *after* the deadline for submission. *Id.* at 1351. Moreover, in that case plaintiff submitted the supplemental questionnaire response *10 days* after the deadline. *Id.* at 1347.

In contrast to the cases on which defendant relies, in the instant case plaintiff submitted timely extension requests with a "full written explanation" of the numerous difficulties that plaintiff faced in submitting by Commerce's deadline the initial questionnaire responses across the three separate circumvention inquiries. *Tau-Ken Temir LLP*, 46 CIT at __, 587 F. Supp. 3d at 1355. Moreover, plaintiff sought to extend the deadline to respond to Commerce's initial questionnaires — which represented all of plaintiff's information on the record — and was proactive and diligent in communicating to Commerce via phone conversations and extension requests the challenges that it faced in complying with Commerce's deadlines — challenges that

Commerce ignored. Finally, plaintiff filed its questionnaire responses prior to 8:30 am on the following workday — prior to the deadline created by operation of the regulatory preamble's automatic extension. For those reasons, the cases that defendant cites to support Commerce's decision to reject plaintiff's questionnaire responses are inapposite.[15]

The court is acutely mindful of the time pressures and resource constraints under which Commerce typically operates. The court is further mindful that under many possibly even most circumstances, even small delays after Commerce has granted an extension can impede the timely and thorough completion of an administrative proceeding. For those reasons, "Commerce has 'broad discretion [over] the establishment and enforcement of time limits.'" *Maverick Tube Corp. v. United States*, 39 CIT __, __, 107 F. Supp. 3d 1318, 1331 (2015) (quoting *Reiner Brach GmbH*, 26 CIT at 559, 206 F. Supp. 2d at 1334). However, the court regards the facts and circumstances of this set of circumvention inquiries to be distinct from a normal circumstance, and for the reasons set out above, to constitute an instance in which Commerce abused its discretion.

In sum, Commerce's decision to reject plaintiff's questionnaire responses and apply to plaintiff AFA to exclude plaintiff from the certification process was an abuse of discretion.

CONCLUSION

For the reasons provided above, it is hereby

ORDERED that plaintiff's Rule 56.2 Motion for Judgment on the Agency Record (Apr. 25, 2024), ECF No. 41, is granted; it is further

ORDERED that on remand Commerce is to accept plaintiff's initial questionnaire responses into the record of this proceeding; it is further

ORDERED that Commerce, upon consideration of the questionnaire responses, shall reconsider its determination regarding plaintiff's ability to participate in the certification process established for this case; it is further

ORDERED that Commerce, within 45 days from the issuance of this Opinion and Order, shall submit a redetermination upon remand that complies with this Opinion and Order; it is further

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[15] Defendant cites to other cases in support of its position, and these too are inapposite. *Ferrostaal Metals Gmbh v. United States*, 45 CIT __, 518 F. Supp. 3d 1357 (2021) (sustaining Commerce's decision to reject a submission filed nine days after the deadline without explanation for the delay and where plaintiffs did not even request an extension); *Yantai Timken Co. v. United States*, 31 CIT 1741, 521 F. Supp. 2d 1356 (2007) (sustaining Commerce's rejection of new factual information filed 10 months after the deadline); *Maverick Tube Corp. v. United States*, 39 CIT __, 107 F. Supp. 3d 1318 (2015) (sustaining Commerce's rejection of petitioner's untimely extension request and untimely filed submission that "failed to comply with Commerce's regulations").

ORDERED that should the parties consider the allotted 45 days insufficient for Commerce to submit its remand redetermination, parties shall notify the court within seven days of this Opinion and Order of the number of days absolutely necessary to complete the remand redetermination; it is further

ORDERED that plaintiff and defendant-intervenors shall have 20 days from the filing of the remand redetermination in which to submit comments to the court; and it is further

ORDERED that should plaintiff or defendant-intervenors submit comments, defendant shall have 10 days from the date of the filing of the last comment to submit a response.

Dated: January 27, 2025
New York, New York

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

Slip Op. 25–12

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

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

[Sustaining an agency decision submitted in response to court order in an action contesting a final determination concluding an antidumping duty investigation]

Dated: January 28, 2025

Daniel J. Cannistra, *Simeon Yerokun*, and *Pierce J. Lee*, Crowell & Moring LLP, of Washington, D.C., for plaintiff Siemens Gamesa Renewable Energy.

Stephen Carl Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Fee Pauwels*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor Wind Tower Trade Coalition. With him on the brief were *Robert E. DeFrancesco, III*, *Laura El-Sabaawi*, *Derick G. Holt*, and *John Allen Riggins*.

OPINION

Stanceu, Judge:

Plaintiff Siemens Gamesa Renewable Energy S.A. ("Siemens Gamesa") brought this action to contest a "less-than-fair-value" determination ("Final LTFV Determination") by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") concluding an antidumping duty ("AD") investigation of certain wind towers from Spain (the "subject merchandise"). The court twice has ordered Commerce to reconsider its Final LTFV Determination. *Siemens Gamesa Renewable Energy v. United States*, 47 CIT __, 621 F. Supp. 3d 1337 (2023) ("*Siemens Gamesa I*"); *Siemens Gamesa Renewable Energy v. United States*, 47 CIT __, 659 F. Supp. 3d 1343 (2023) ("*Siemens Gamesa II*").

Before the court is the Department's "Second Remand Redetermination," issued under protest in response to the court's opinion and order in *Siemens Gamesa II*. Final Results of Redetermination Pursuant to Second Court Remand (Int'l Trade Admin. June 21, 2024), ECF No. 77–1 ("*Second Remand Redetermination*"). The Second Remand Redetermination calculates an estimated dumping margin of 28.55% for an entity consisting of Siemens Gamesa and related companies. *Id.* at 56.

Defendant-intervenor Wind Tower Trade Coalition (the "Coalition" or the "WTTC"), the petitioner in the antidumping duty investigation, opposes the Second Remand Redetermination on various grounds. Defendant-Intervenor Wind Tower Trade Coalition's Comments on Second Remand Redetermination (July 22, 2024), ECF Nos. 81 (conf.), 82 (public) ("Def.-Int.'s Comments"). Defendant asks the court to sustain the Second Remand Redetermination. Defendant's Comments in Support of Remand Redetermination (Aug. 21, 2024), ECF No. 85 ("Def.'s Resp."). Plaintiff did not submit comments.

The court sustains the Second Remand Redetermination.

I. BACKGROUND

Background for this case is presented in the court's prior opinions and is supplemented herein. *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1339–40; *Siemens Gamesa II*, 47 CIT at __, 659 F. Supp. 3d at 1345–48.

A. The Contested Decision

The Final LTFV Determination was published as *Utility Scale Wind Towers From Spain: Final Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 33,656 (Int'l Trade Admin. June 25, 2021), P.R. 152, ECF No. 41 ("*Final LTFV Determination*").[1] Commerce incorporated by reference an accompanying "Issues and Decision Memoran-

[1] Documents in the Joint Appendix (May 26, 2022), ECF Nos. 41 (public), 42 (conf.), are cited as "P.R. __" (for public documents). Documents from the first remand proceeding, Remand Joint Appendix (Sept. 8, 2023), ECF Nos. 65 (public), 66 (conf.), are cited as "P.R.R. __" (for public documents). Documents from the second remand proceeding, Remand Joint Appendix (Sept. 6, 2024), ECF Nos. 88 (public), 87 (conf.), are cited as "2P.R.R. __" (for public documents).

dum." *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain* (Int'l Trade Admin. June 14, 2021), P.R. 149, ECF No. 41 ("*Final I&D Mem.*").

The Final LTFV Determination concluded an antidumping duty investigation of utility scale wind towers from Spain covering a period of investigation ("POI") of July 1, 2019, through June 30, 2020. *Final LTFV Determination*, 88 Fed. Reg. at 33,656.

1. Respondent Selection in the Investigation

During the investigation, Commerce issued "Quantity and Value" ("Q&V") questionnaires to nineteen known exporters and producers of the subject merchandise and received thirteen responses, including a response from Siemens Gamesa. *Siemens Gamesa II*, 47 CIT at __, 659 F. Supp. 3d at 1346; *Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain: Response to Quantity and Value Questionnaire* 1 & Attachment 1 (Dec. 7, 2020), P.R. 84, ECF No. 41. Commerce selected Vestas Eolica S.A.U. ("Vestas Eolica") as the sole "mandatory" respondent, i.e., a respondent Commerce would investigate individually, but Vestas Eolica declined to participate in the investigation. *Siemens Gamesa II*, 47 CIT at __, 659 F. Supp. 3d at 1347. Siemens Gamesa requested, on behalf of itself and its affiliate Windar Renovables S.A. ("Windar"), to be investigated individually as a mandatory respondent, but Commerce rejected its request. *Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain: Request for Mandatory Respondent Selection* 1 (Feb. 17, 2021), P.R. 128, ECF No. 41; Utility Scale Wind Towers from Spain: Request to Select Replacement Mandatory Respondent 1 (Int'l Trade Admin. Mar. 5, 2021), P.R. 132, ECF No. 41.

2. Assignment of a 73.00% Rate to All Respondents

In the Final LTFV Determination, Commerce reached a decision based entirely on "facts otherwise available" under Section 776(a) of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1677e(a), and an "adverse inference" under Section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b), provisions to which Commerce often refers in the aggregate as "adverse facts available" or "AFA."[2] *Final LTFV Determination*, 86 Fed. Reg. at 33,656–57. Under these provisions, Commerce assigned Vestas Eolica, along with six other companies, including Windar, a 73.00% dumping margin, "the sole dumping margin alleged in the [p]etition," for failing to cooperate in the investigation

[2] Citations to the U.S. Code herein are to the 2018 edition. Citations to the Code of Federal Regulations herein are to the 2021 edition.

by not responding to the Q&V questionnaire. *Id.* Commerce adopted the 73.00% rate as the "all others" rate, i.e., the rate to be applied to all other exporters and producers of the subject merchandise that it did not individually examine, including Siemens Gamesa. *Id*. at 33,657.

B. *Siemens Gamesa I*

Siemens Gamesa contested the Final LTFV Determination, claiming that the Department's assignment of the 73.00% rate to it was unlawful on two grounds. *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1344. It argued, first, that Commerce unlawfully refused to examine it individually and, second, that Commerce unlawfully adopted the 73.00% rate as the "all others" rate, which was not based on the actual data of any exporter. *Id.* (citations omitted).

In *Siemens Gamesa I*, the court granted plaintiff's motion for judgment on the agency record under USCIT Rule 56.2 and remanded the Final LTFV Determination to Commerce. *Id.*, 47 CIT at __, 621 F. Supp. 3d at 1349. The court held that the Department's individual examination of a single respondent, Vestas Eolica, was unlawful under the binding decision in *YC Rubber Co. (N. Am.) LLC v. United States*, No. 21–1489, 2022 WL 3711377 (Fed. Cir. Aug. 29, 2022), and that the assignment of the 73.00% "all others" rate to Siemens Gamesa did not satisfy the "reasonable method" required by Section 735(c)(5)(B) of the Tariff Act, 19 U.S.C. § 1673d(c)(5)(B). *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1344–47. The court directed Commerce to conduct an individual investigation of Siemens Gamesa, the sole respondent in the investigation that is a party in this litigation. *Id.*, 47 CIT at __, 621 F. Supp. 3d at 1348–49.

C. The First Remand Redetermination

In the remand redetermination Commerce issued in response to *Siemens Gamesa I* (the "First Remand Redetermination"), Commerce reopened the record and "individually investigated SGRE [referring to plaintiff Siemens Gamesa]." Final Results of Redetermination Pursuant to Court Remand 1, 4 (Int'l Trade Admin. June 16, 2023), ECF No. 53–1 ("*First Remand Redetermination*"). During the first remand proceeding, Commerce issued a "Collapsing Memorandum" in which it explained its preliminary determination to treat Siemens Gamesa, Windar, and five wholly owned Windar subsidiaries (the "Windar Manufacturing Subsidiaries") as a single "collapsed" entity ("SGRE/

Windar") pursuant to 19 C.F.R. § 351.401(f).[3] *Id.* at 1–2, 1 n.3, 2 n.4, 6; *Remand for the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers: Preliminary Affiliation and Collapsing Memorandum for Siemens Gamesa Renewable Energy S.A. and Windar Renovables S.A.* 1, 8–9 (Int'l Trade Admin. Apr. 25, 2023), P.R.R. 69, ECF No. 65–9 ("*Collapsing Memorandum*"). Commerce collapsed Siemens Gamesa with Windar and the Windar Manufacturing Subsidiaries "because their operations with respect to the sale and production of subject merchandise are intertwined." *First Remand Redetermination* 2. Commerce maintained its preliminary collapsing decision in the First Remand Redetermination and assigned the collapsed entity, based on the total application of facts otherwise available and an adverse inference, an estimated weighted average dumping margin of 73.00%, a rate Windar did not challenge in the underlying investigation and which Commerce deemed final.[4] *Id.* at 2, 6, 8, 22, 26. Commerce assigned a 73.00% rate as the all-others rate, again based on the rate alleged in the petition. *Id.* at 9, 36–38.

D. *Siemens Gamesa II*

In *Siemens Gamesa II*, the court concluded that "the First Remand Redetermination was contrary to law in three major respects." 47 CIT at __, 659 F. Supp. 3d at 1350.

First, the court held that the Department's conclusion that the unchallenged 73.00% adverse inference rate assigned to Windar in the underlying investigation was final and controlling was incorrect, because if the court were to sustain a rate for the collapsed entity, that collapsed entity rate "necessarily would render null and void" and "would supplant" the original 73.00% rate when it went into effect. *Id.*

Second, the court held that Commerce was not permitted to resort to "facts otherwise available" under 19 U.S.C. § 1677e(a) and an adverse inference under 19 U.S.C. § 1677e(b) in assigning a 73.00%

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[3] The five wholly-owned Windar subsidiaries in the collapsed entity are Tadarsa Eolica S.L., Windar Offshore S.L., Windar Wind Services S.L., Aemsa Santana S.A., and Apoyos Metalicos S.A. Final Results of Redetermination Pursuant to Court Remand 2 n.4 (Int'l Trade Admin. June 16, 2023), ECF No. 53–1 ("*First Remand Redetermination*").

[4] Commerce applied facts otherwise available and an adverse inference according to the following findings: (1) Windar failed to respond to the Department's "Quantity and Value" questionnaire in the underlying investigation, permitting an adverse inference; (2) Windar did not challenge the 73.00% rate in the Final LTFV Determination, such that the rate was final and Commerce could apply it to Siemens Gamesa as part of the collapsed entity; (3) Commerce could not "revisit" its "final/unchallenged decision" applying the 73.00% AFA rate to Windar on remand because the court "did not require (or even permit)" it in its prior opinion, *Siemens Gamesa Renewable Energy v. United States*, 47 CIT __, 621 F. Supp. 3d 1337 (2023); and (4) the assignment of the 73.00% rate to the collapsed entity was consistent with "long-standing" agency practice. *First Remand Redetermination* 8, 22, 26–27.

rate to Siemens Gamesa. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1350, 1352–54. Substantial record evidence did not "support the Department's finding that the absence of a response by Windar to the Q&V questionnaire in the underlying investigation impaired the Department's ability to investigate Siemens Gamesa individually and assign it an estimated dumping margin in the remand proceeding." *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1350.

The court concluded, third, that Commerce unlawfully selected a 73.00% "all-others rate" because it again did not satisfy the "reasonable method" requirement of the Tariff Act, 19 U.S.C. § 1673d(c)(5)(B). *Siemens Gamesa II*, 47 CIT at __, 659 F. Supp. 3d at 1350, 1359. The court recognized, nevertheless, that plaintiff, having been investigated individually for the First Remand Redetermination, lacked standing to contest the all-others rate assigned in that determination. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1359.

In ordering a second remand proceeding, the court presented Commerce with "a choice between two options": Commerce could either (i) "submit a new determination that would apply to Siemens Gamesa alone and allow to stand as 'final' the uncontested, 73.00 percent rate it assigned to Windar in the Final LTFV Determination," which "would foreclose any collapsing of Siemens Gamesa with Windar," or (ii) "substitute for Windar's existing rate a new rate that it would apply to a collapsed entity." *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1351.

E. Submission of the Second Remand Redetermination and Comments

In response to the court's opinion and order in *Siemens Gamesa II*, Commerce submitted the Second Remand Redetermination on June 21, 2024. Defendant-intervenor filed comments on July 22, 2024, and the government responded on August 21, 2024.

II. DISCUSSION

A. Jurisdiction and Standard of Review

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

In reviewing an agency determination, including one made upon remand to the agency, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19

U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. Nat'l Lab. Rels. Bd.*, 305 U.S. 197, 229 (1938)).

B. The Second Remand Redetermination

In the Second Remand Redetermination, Commerce reached its determination of a 28.55% estimated weighted-average dumping margin by again collapsing Siemens Gamesa, Windar, and the five Windar Manufacturing Subsidiaries into a single entity (the "SGRE/Windar" entity), conducting an individual examination of that entity, and performing a verification. *Second Remand Redetermination* 1–2, 5, 56. Commerce decided, "given the degree of affiliation among the parties and the intertwined nature of their operations," that collapsing was "the only viable option." *Id.* at 5.

In calculating normal value for its determination of an estimated weighted-average dumping margin, Commerce applied "partial" facts otherwise available with an adverse inference for certain information it considered to have been misreported. *Id.* at 10. Specifically, Commerce used facts otherwise available with an adverse inference for what it considered to be a failure to report, according to "theoretical weights" as instructed by Commerce, certain weight information for wind towers sold in the comparison market of Sweden. *Id.* at 7–13. Commerce also used facts otherwise available with an adverse inference for what it found to be a failure "to accurately describe its payment process for sales to its customers in both Sweden and the United States." *Id*. at 7, 9–11, 13–14.

To calculate U.S. price, Commerce resorted to constructed export price because the foreign seller and U.S. importer were related parties. *Id.* at 21–22. Further, because individual wind towers were sold in the United States only as components of wind turbine projects, Commerce calculated constructed export prices for the subject merchandise by allocating, according to relative cost, the total revenue realized from those projects between the subject merchandise and the other elements (components and services) of the wind turbine projects. *Id.* at 21, 44, 46–48.

Commerce assigned the 28.55% estimated dumping margin to all other producers and exporters pursuant to section 735(c)(5)(A) of the Tariff Act, 19 U.S.C. § 1673d(c)(5)(A). *Id.* at 2, 15.

C. Defendant-Intervenor's Objections to the Second Remand Redetermination

In opposing the Second Remand Redetermination, the Wind Tower Trade Coalition takes the position that Commerce, instead of assigning the 28.55% rate to the collapsed entity, should have "reinstated Windar's original 73.00 percent margin." Def.-Int.'s Comments 19. The Coalition maintains that "Commerce's decision to investigate SGRE S.A., a non-producing holding company, as a 'producer' of subject merchandise is inconsistent with 19 U.S.C. § 1677f-1(c)(1) and not supported by substantial evidence." *Id.* at 5.

The Coalition argues, further, that "because SGRE S.A. is not a producer or exporter of subject merchandise, Commerce's decision to continue collapsing SGRE S.A. and Windar is inconsistent with Commerce's regulations." *Id*. Asserting that Windar, as a producer and exporter of the subject merchandise, should be the respondent in the investigation, the Coalition submits that Windar's failure to respond to the Q&V questionnaire in the original investigation requires Commerce to reinstate the 73.00% margin it originally assigned to Windar, on the basis of facts otherwise available and an adverse inference. *Id*. at 19 ("In light of the fully developed record in the second remand, it became apparent that SGRE S.A. cannot be considered a producer for the purposes of respondent selection or collapsing. At that point, Commerce should have reversed its decision to collapse SGRE S.A. and Windar, reinstated Windar's original 73.00 percent margin, and found that it cannot investigate SGRE S.A.").

In the alternative, the Coalition contests the 28.55% margin by opposing the Department's constructed export price for individual wind towers, arguing that "[t]o the extent that the Court finds Commerce's decision to calculate a margin for the SGRE S.A./Windar collapsed entity is appropriate, Commerce's selection of the revenue figure used to allocate the gross unit prices of the subject merchandise is not supported by substantial evidence." *Id.* at 5.

Rejecting each of defendant-intervenor's arguments, defendant advocates that the court sustain the Second Remand Redetermination. Def.'s Resp. 1, 6–18.

D. Refusal to Rescind the Investigation of Siemens Gamesa

Defendant-intervenor argues that Siemens Gamesa Renewable Energy S.A. (to which it has referred as "SGRE S.A" and Commerce has referred as "SGRE"), which is "the sole plaintiff in this investigation" and "the entity that Commerce was instructed to investigate in the second remand," was not lawfully investigated. Def.-Int.'s Comments 6 ("Commerce's decision to select this company as a respondent is based on the agency's misreading of the record and incorrect interpretation of the statute's requirement to investigate producers of subject merchandise."). The Coalition maintains that this company "is a holding company, supervising the equity of other entities," and that it "has no production facilities and does not participate in the day-to-day operations or sales decisions of the entities for which it supervises." *Id.* at 11. According to defendant-intervenor, Siemens Gamesa "cannot reasonably be considered a producer or exporter, and therefore, is not qualified to be a respondent under 19 U.S.C. § 1677f-1(c)(1)." *Id.* at 10 (footnote omitted).

In support of its argument, defendant-intervenor states that "[p]laintiff's extreme lack of precision when referring to the individual Siemens Gamesa entities muddles which entity is subject to this investigation." *Id.* at 6. It adds that "[t]hroughout the various remands, plaintiff has used the 'SGRE' initialism to refer to various entities and groups of entities relevant to this proceeding," including in its questionnaire responses. *Id.* at 6–7. According to the Coalition, "SGRE S.A.'s lack of specificity has made it difficult to understand which entities were performing each function—a key fact in determining whether the plaintiff is a 'producer'" and, in turn, a viable mandatory respondent. *Id.* at 6–9. Defendant-intervenor submits that this "extreme lack of precision" has "caused Commerce to fall into the same trap" of conflating multiple Siemens Gamesa affiliates in its investigation, contrary to the court's instructions in *Siemens Gamesa II* to investigate Siemens Gamesa individually. *Id.* at 8–9.

In the Second Remand Redetermination, Commerce rejected the Coalition's argument that it must rescind the investigation of Siemens Gamesa. *Second Remand Redetermination* 32 ("Because we continue to examine the single entity of SGRE/Windar which, collectively, produces and exports wind towers from Spain, there is no basis to rescind the investigation with respect to SGRE."). In support of its decision not to rescind the investigation and also to collapse Siemens Gamesa with Windar and its five wholly-owned manufacturing subsidiaries, Commerce cited, *inter alia*, record evidence of "SGRE's ownership of 32 percent of Windar and indirect ownership of Windar's manufacturing subsidiaries, as well as the companies' overlapping boards of directors and managers and their intertwined operations." *Id*. Referring to its earlier "decision to consider SGRE, Windar, and Windar's manufacturing subsidiaries as a single entity" based on the record as it existed at that time, Commerce concluded that "none of the information submitted since that decision undermines that finding." *Id*. at 33.

Defendant-intervenor does not dispute the Department's findings, *id.* at 32, that Siemens Gamesa owned 32% of Windar and, indirectly, Windar's wholly-owned manufacturing subsidiaries and that there were overlapping boards of directors. While no party disputes that Siemens Gamesa is a holding company, defendant-intervenor makes the blanket assertion that "SGRE S.A. is a holding company *that is not involved in the production, sales, or export of subject merchandise*." Def.-Int.'s Comments 10 (emphasis added).

In support of its argument that Siemens Gamesa was improperly investigated, the Coalition directs the court's attention to a common definition of the term "holding company." *Id*. at 11 (quoting *Black's Law Dictionary* (12th ed. 2024) ("A company formed to control other companies, usu. confining its role to owning stock and supervising management. It does not participate in making day-to-day business decisions in those companies.")). This argument is not persuasive. Even were it assumed, *arguendo*, that Siemens Gamesa did not participate in the "day-to-day" production, sales, or export decisions of Windar and the Windar Manufacturing Subsidiaries, it would not necessarily follow that Siemens Gamesa had no involvement in the production, sales, or export of the subject merchandise such that Commerce was required to rescind the investigation of Siemens Gamesa. By broadly defining the term "exporter or producer" as "the exporter of the subject merchandise, the producer of the subject merchandise, or both," 19 U.S.C. § 1677(28), the Tariff Act largely left it up to Commerce to decide whether a foreign entity's activities are sufficient to qualify it as an exporter, producer, or both for the purpose of conducting an antidumping duty investigation. Commerce reasonably looked at Siemens Gamesa's relationships with the Windar companies and the record evidence as a whole in rejecting the Coalition's position that it must rescind the investigation of Siemens Gamesa. Defendant-intervenor points to nothing in the statute or the Department's regulations that would have compelled Commerce to accede to the Coalition's position in the Second Remand Redetermination.

Defendant-intervenor cites a decision of this Court, *Hyundai Steel Co. v. United States*, 45 CIT __, __, 518 F. Supp. 3d 1309, 1332 (2021), Def.-Int.'s Comments 16, but that case lends no support to its position. The issue in the case was whether Commerce erred in denying an untimely request of the petitioner to rescind the review of a freight company that was affiliated with a mandatory respondent and that Commerce itself found, on record evidence, not to have been a producer or exporter but instead to have transported raw materials to the mandatory respondent's production facility and finished product to customers. *Hyundai Steel Co.*, 45 CIT at __, 518 F. Supp. 3d at 1312, 1329. Commerce also concluded that collapsing the affiliate with the mandatory respondent was inappropriate. *Id.*, 45 CIT at __, 518 F. Supp. 3d at 1329–30. Reasoning that the untimeliness of the petitioner's request was not a sufficient justification for the refusal to rescind the review, this Court held that Commerce, upon determining that the freight company was neither an exporter nor a producer, should have rescinded the review of the freight company "on its own initiative." *Id.*, 45 CIT at __, 518 F. Supp. 3d at 1332.

The court agrees with the Coalition that questionnaire responses by plaintiff in the first remand proceeding present inconsistencies as to the intended meaning of various references therein to "SGRE." Commerce sent Siemens Gamesa its "Section A Questionnaire," dated February 17, 2023, following the February 16, 2023 issuance of the court's decision in *Siemens Gamesa I*. *Request for Information, Antidumping Duty Investigation, Siemens Gamesa Renewable Energy* (Int'l Trade Admin. Feb. 17, 2023), P.R.R. 1, ECF No. 65–3. Plaintiff's response, dated March 10, 2023, states as follows:

> Contractually, SGRE is responsible for manufacturing the tower sections and delivering the tower sections to the site. The customers are responsible for installation, while SGRE provides on-site technical assistance. SGRE negotiates directly with raw material suppliers in Spain, and sub-contracts its affiliate tower producer Windar Renovables ("Windar") to manufacture the tower sections, with coordination, consultation, and supervision by SGRE.

Antidumping Duty Investigation of Utility Scale Wind Towers from Spain: Siemens Gamesa Renewable Energy Section A Questionnaire Response 2 (Mar. 10, 2023), P.R.R. 8–40, ECF No. 65–4 ("*Section A Questionnaire Response*"). The "Certification in Accordance with 19 C.F.R. § 351.303(g)(l)," included at the beginning of that questionnaire response, states as follows:

> I, Domenico Barger, currently employed by Siemens Gamesa Renewable Energy, Inc. (SGRE), certify that I prepared or otherwise supervised, on behalf of SGRE and its affiliates (collectively, "SGRE"), the preparation of the attached submission of SGRE's Section A response concerning Utility Wind Towers from Spain, dated March 10, 2023, pursuant to the Antidumping Orders on Utility Wind Towers from Spain (A-469–823).

Id. at Certification. As shown in this excerpt, the certification uses the abbreviation "SGRE" to refer not only to the U.S. affiliate, Siemens

Gamesa Renewable Energy, Inc., but also to "SGRE and its affiliates (collectively, 'SGRE')," which would include Siemens Gamesa Renewable Energy S.A.

The questionnaire response also uses the abbreviation "SGRE" to refer solely to Siemens Gamesa Renewable Energy S.A., *see*, *e.g.*, *id.* at 9 (describing "SGRE" as "a publicly traded company" with shares listed on Spanish stock exchanges), but it uses the same abbreviation to refer more broadly to a group of companies that includes the producer "Windar/SGRE" as well as the U.S. importer, Siemens Gamesa Renewable Energy, Inc.: "During the period of investigation, SGRE imported Windar/SGRE produced wind tower sections into the United States, then incorporated those wind towers into sales of wind turbines." *Id.* at 4. The questionnaire response states: "SGRE is part of the Siemens Gamesa group of companies owned by Siemens Gamesa Renewable Energy, SA." *Id.* at 6. On the same page, it states that:

> In a few regions, SGRE is also engaged in project development. SGRE is present in more than 90 countries around the world, and its turbines are installed in more than 70 countries. It operates more than 15 manufacturing plants in over 10 countries and has approximately 40 sales offices (as of June 30, 2020).

Id.[5]

Despite the confusing references in the questionnaire response, the court does not view the record evidence, considered on the whole, as sufficient to have compelled Commerce to reach a finding, as the Coalition advocates, Def.-Int.'s Comments 10, that Siemens Gamesa had no role whatsoever in the production, sale, or export of the subject merchandise. In addition to the evidence of Siemens Gamesa's ownership interests in the Windar companies and the overlapping boards of directors, Commerce noted evidence of intertwined operations. *Second Remand Redetermination* 32 & n.91 (citing *Collapsing Memorandum* 7); *Section A Questionnaire Response* 13, 15, 16 & Exhibit A-4S. Commerce found also that "SGRE performs an essential role in the production of the wind towers" in that "it designs the towers and provides the technical drawings and specifications to Windar and its

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[5] There are similarly confusing references in Siemens Gamesa's questionnaire responses from the second remand proceeding, following the court's decision in *Siemens Gamesa Renewable Energy v. United States*, 47 CIT __, 659 F. Supp. 3d 1343 (2023). *See, e.g.*, *Antidumping Duty Investigation of Utility Scale Wind Towers from Spain: Siemens Gamesa Renewable Energy Sections B–E Questionnaire Response* C-17 (Oct. 16, 2023), 2P.R.R. 5–6, ECF No. 88–3 (referring to "wind tower sections exported and imported by SGRE" without defining "SGRE").

manufacturing subsidiaries to fabricate them." *Second Remand Redetermination* 34 (citing *Section A Questionnaire Response* 28 ("Windar generally fabricates towers in accordance with the designs provided by the customer (OEMs). Specifically, Windar receives a complete documentation package which includes the detail drawings and specifications and the fabrication.")).[6] Defendant-intervenor contests this finding, arguing that the record reveals that "SGRE S.A. is not involved in the relevant sales or production decisions," and that these functions instead were performed by affiliates of Siemens Gamesa that are not companies in Spain. Def.-Int.'s Comments 12–13. Commerce permissibly found to the contrary. *See*, *e.g.*, *Second Remand Redetermination* 37 n.117 ("Insofar as the petitioner's arguments are that agreements between parties involve SGRE affiliates not located in Spain, the agreements cover SGRE and are applicable to it."). The possibility that two opposite findings could be drawn from the same record evidence does not compel the conclusion that the agency's decision was unsupported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

In summary, Commerce acted on the uncontested findings that Siemens Gamesa owned 32% of Windar and, indirectly, the Windar Manufacturing Subsidiaries and that there were overlapping boards of directors. While defendant-intervenor contests the Department's findings that Siemens Gamesa had a role in the production of wind towers, Commerce reasonably considered the evidence on the whole in rejecting the Coalition's position that Commerce had no alternative to rescinding the investigation as to Siemens Gamesa.[7]

E. The Decision to Collapse Siemens Gamesa with Windar and the Windar Manufacturing Subsidiaries

The Coalition argues that collapsing Siemens Gamesa with Windar and the Windar Manufacturing Subsidiaries was impermissible because Siemens Gamesa, in its view, does not qualify as a "producer." Def.-Int.'s Comments 16–19. The court rejects this argument for the reasons discussed previously. It now considers the Coalition's sepa-

[6] Siemens Gamesa is a customer of Windar because it makes "purchases from Windar Renovables." *See Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain: Response to Quantity and Value Questionnaire* Attachment 1 (Dec. 7, 2020), P.R. 84, ECF No. 41.

[7] Defendant argues that the Coalition has waived its objection to the Department's investigating Siemens Gamesa and its related objection to the Department's including Siemens Gamesa in the collapsed entity. Defendant's Comments in Support of Remand Redetermination 6–7 (Aug. 21, 2024), ECF No. 85 (citing Def.-Int.'s Wind Tower Trade Coalition's Comments on Remand Redetermination (July 17, 2023), ECF No. 59, in which defendant-intervenor commented in support of the investigation of Siemens Gamesa and the collapsing determination). Because Commerce addressed both issues on the merits in the Second Remand Redetermination, the court does not decide either issue on the ground of waiver.

rate argument that, the investigation issue aside, collapsing was improper under the Department's regulation, 19 C.F.R. § 351.401(f), because Siemens Gamesa does not exercise "significant leverage over Windar's operations," because it "has no facilities that could be retooled for production," and because it "does not set the prices or oversee day-to-day operations of the companies in which it holds equity as a minority shareholder." *Id.* at 17–18.

In paragraph (1) of section 351.401(f), the Department's regulation contains "general" provision as follows:

> *In general*. In an antidumping proceeding under this part, the Secretary [of Commerce] will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

19 C.F.R. § 351.401(f)(1). This "general" provision is notable for what it does *not* say: it does not provide that the situation described in paragraph (1) is the *only* situation in which the Secretary will collapse two or more affiliated producers. Commerce permissibly has interpreted § 351.401(f) to allow for collapsing even when an entity lacks production facilities, stating in the Second Remand Redetermination that "Commerce can, and frequently does, collapse resellers and other non-producing entities (*i.e.*, those without production facilities) into single entities that are subject to individual examination." *Second Remand Redetermination* 35 (footnote omitted).

Paragraph (2) of section 351.401(f) provides as follows:

> *Significant potential for manipulation*. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include: (i) The level of common ownership; (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

19 C.F.R. § 351.401(f)(2).

The Coalition acknowledges that Commerce has a practice of collapsing producers with "non-producers," but it does not challenge this practice *per se*. *See* Def.-Int.'s Comments 16–17. Instead, it argues that the practice, as the Coalition interprets it, should not have been applied in the situation presented. *Id.* at 17. According to its interpretation of the Department's practice, "[t]he circumstances in which Commerce will collapse producers with non-producers is limited to instances where the companies unquestionably have sufficiently intertwined operations presenting a concern that there may be a 'significant potential for the manipulation of price or production' and in situations where 'the non-producer could nonetheless behave like a producer.'" *Id.* at 17 n.4 (citing *Rebar Trade Action Coal. v. United States*, 43 CIT __, __, 398 F. Supp. 3d. 1359, 1369 (2019) (in turn citing 19 C.F.R. § 351.401(f)(2)(i)–(ii))). In the Coalition's view, "[s]uch concerns are not apparent in the instant case as SGRE S.A. is demonstrably uninvolved in the production and sale of the wind towers at issue, and no record evidence demonstrates a desire on the behalf of SGRE S.A. for future involvement in such endeavors." *Id.*

The court rejects defendant-intervenor's argument that Commerce exceeded the bounds of its own practice. As the court explained previously, the record evidence did not compel Commerce to find, as the Coalition advocates, Def.-Int.'s Comments 10, that Siemens Gamesa had no role whatsoever in the production, sale or export of the subject merchandise. Commerce disagreed with the Coalition's position that Siemens Gamesa was "demonstrably uninvolved in the production and sale of the wind towers at issue," *id*. at 17 n.4, and the record evidence supports Commerce in that regard. Commerce found a "significant potential for the manipulation of price or production," 19 C.F.R. § 351.401(f), based in part on the uncontested findings that Siemens Gamesa owned 32% of Windar during the POI, that "the companies had overlapping managers and boards of directors," that there was "significant representation of SGRE on Windar's board," and that the Windar Manufacturing Subsidiaries are "governed by top management within the Windar group." *Collapsing Memorandum* 7–8, 7 n.37. Commerce reached a general conclusion that "the operations of SGRE and Windar were intertwined." *Id.* at 7, 8. While defendant-intervenor maintains that Siemens Gamesa "would have to overcome significant barriers (*i.e.*, set up production facilities, hire a work force, retain a customer base, and procure machinery, raw materials, and other supplies) to establish itself as a producer," Def.-Int.'s Comments 17 n.4, the Department's criteria are addressed to the "significant potential for the manipulation of *price* or production," 19 C.F.R. § 351.401(f) (emphasis added). Based on the record evidence considered on the whole, Commerce concluded that Siemens Gamesa, Windar, and the Windar Manufacturing Subsidiaries should be treated "as a single entity for purposes of [its] analysis in this proceeding." *Collapsing Memorandum* 9.

F. Determination of Constructed Export Price

Under section 731 of the Tariff Act, 19 U.S.C. § 1673, an antidumping duty is 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." 19 U.S.C. § 1673. Section 773(a) requires that Commerce make a "fair comparison" between the U.S. price, i.e., the export price or constructed export price, and the normal value of the subject merchandise. *Id.* § 1677b(a).

The Tariff Act defines "export price" as "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 subsection (c)." *Id.* § 1677a(a). Constructed export price is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d)." *Id.* § 1677a(b). Stated generally, subsections (c) and (d), read together, require the deduction from the starting price of, *inter alia*, freight, selling expenses, cost of further manufacture or assembly, and profit. *Id.* § 1677a(c)–(d).

The decision whether to use an export price or constructed export price as the U.S. price depends on whether the sale in the United States, by or for the account of the foreign exporter or producer, was a sale to an unaffiliated purchaser. If it was not, then Commerce must determine U.S. price by the constructed export price method. Because the U.S. sales of the subject merchandise to unaffiliated parties were made by a U.S. affiliate of the combined SGRE/Windar entity (Siemens Gamesa Renewable Energy, Inc.), Commerce used constructed export price in the Second Remand Redetermination. *Second Remand Redetermination* 21–22, 35.

There is no dispute that Commerce was required to use constructed export price in the investigation. The dispute pertains instead to the Department's method of determining the constructed export price of the subject wind towers. This dispute arose because of the absence of individual prices for the resale of subject wind towers to unaffiliated U.S. purchasers, the wind towers having been supplied only as components in complete wind turbine projects. *Id.* at 22. To address this problem, Commerce performed a complex set of calculations, which the court describes below.

During the remand proceeding, Commerce directed plaintiff, using what Commerce termed "granular project worksheets" (the "Worksheets") to allocate the total revenue received by the U.S. affiliate for the wind turbine projects "to the individual components of the wind turbines" on the basis of cost. *Id.* at 47–48. As Commerce described its questionnaire: "Because SGRE/Windar sells complete projects (*i.e.*, multiple assembled wind turbines) to unaffiliated U.S. customers, . . . [w]e instructed SGRE/Windar to use the granular project worksheets, which contain project costs by component (some of which are based on transfer price) and project revenue" to perform the allocation. *Id.* at 48. Commerce instructed that the total "project cost" for each wind turbine project should be allocated "to both 'the relevant components (*e.g.*, tower, blades, nacelle) and services (*e.g.*, delivery, commissioning)'" and "did not instruct SGRE/Windar to specifically exclude any items from the allocation." *Id.* (quoting *Second Sections ABC Supplemental Questionnaire* 5 (Int'l Trade Admin. Dec. 29, 2023)).[8]

Commerce explained that to avoid the use of transfer prices for wind towers that were supplied by the SGRE/Windar entity, i.e., subject merchandise, it did not use the costs associated with the subject wind towers as reported on the Worksheets. *Id.* at 46–47. Instead, Commerce used cost of production ("COP") data for the individual wind tower "sections" identified by control number ("CONNUM"), each of which had its own individual cost of production, stating that it "revised the gross unit price used in our margin calculations to be based on a CONNUM-specific, COP-based ratio." *Id.* at 47. It did so in response to the Coalition's comments on a draft version of the results of the second remand. *Id.* Commerce explained, further, that it used transfer prices for "wind towers and wind tower accessories" that the U.S. affiliate, Siemens Gamesa Renewable Energy, Inc. ("SGRE Inc."), purchased from "unaffiliated suppliers," which it "combined . . . with its purchases of SGRE/Windar's wind towers/accessories for some of the cost elements in its project sheets." *Id.* at 48 n.150. Commerce added that "[i]n such cases, we accepted SGRE Inc.'s data, as reported." *Id.* For the subject wind tower components supplied by the SGRE/Windar entity, Commerce indicated that it used a "revised COP calculated in the comparison market program."

[8] The questionnaire is missing from the record the parties submitted to the court.

Id. at 47 n.147. Commerce stated that its "revised methodology allows Commerce to differentiate the prices for each wind tower section type, by assigning a higher percentage of the price to those products for which SGRE/Windar incurs greater costs." *Id.* at 47. Commerce described its calculation method as follows:

> To do this, we summed the reported total COP for each of the section types for each U.S. project to obtain a total COP for the entire wind tower (*i.e.*, the complete multi-section wind tower as sold to the unaffiliated U.S. customer). We then determined the ratio that each section type was of the total wind tower COP. Using the total revenue attributable to the wind towers for each U.S. project . . . , we applied the individual CONNUM cost ratios for the section type categories to the total tower revenue. We then divided the resulting value by the number of sections of that CONNUM sold in each U.S. project to arrive at a price per section.

Id. at 47–48. Commerce explained, further, that it made pre-allocation deductions from the gross revenue shown on the wind turbine invoices only for freight and "logistics." *Id.* at 49.

Defendant-intervenor claims that the Department's constructed value determination is unsupported by substantial evidence, Def.-Int.'s Comments 20–28, but clarifies that it is not objecting to the general calculation method described above, *id.* at 20 ("As an initial matter, WTTC supports the general calculation methodology of the gross unit price of the subject merchandise.").

The Coalition objects, instead, to the use of the invoice prices for the wind turbine projects to calculate the constructed export price of the subject wind towers, arguing that "[d]ue to [the] use of the total revenue received by SGRE Inc. for the wind turbine projects, the dumping margin calculated for SGRE S.A./Windar for the Second Final Remand Results was arbitrarily deflated." *Id.* at 20. Maintaining that "Commerce's current calculation contains revenue not attributable to the subject merchandise," *id.* at 23, the Coalition argues that "Commerce's use of the total invoice price (which includes services and components that do not relate to wind tower sections) as the figure used to allocate the CONNUM-specific gross unit prices of the subject merchandise" should be held "to be unsupported by substantial evidence," *id.* at 27–28.

The Coalition advocates that Commerce should have used an alternative method to determine constructed export price, arguing that Commerce was required "to consider relevant evidence which demonstrated that the appropriate revenue figures could be ascertained from specific line items to the wind turbines on the granular project worksheets." *Id.* at 21. According to the Coalition's view of the record evidence, the Worksheets identified revenue attributed to subject wind towers and thereby provided "a more appropriate revenue line item for calculating gross unit prices," *id.* at 22, that is "the only appropriate revenue figure on the record to establish the gross unit prices of the subject merchandise," *id.* at 23.

The Coalition does not make out a *prima facie* claim that the Department's method of determining constructed export prices for subject wind towers was impermissible. The Coalition is correct that the total revenue shown on the invoices for the wind turbine projects included some revenue realized from the inclusion in the projects of various components and services that were unrelated to the subject wind towers. Nevertheless, the wind turbine invoices were only the starting point for the Department's analysis. Described in general terms, the second step in the analysis was the allocation, based on relative cost, of revenue between subject merchandise (on a "section-type" basis) and the other individual elements on the wind turbine invoices. The Coalition does not back up its claim with a demonstration from record evidence that this second step was a misallocation. Absent such a demonstration, the court cannot conclude that the Department's method resulted in a constructed export price calculation that, as the Coalition argues, *id.* at 23, was unlawful due to "revenue not attributable to the subject merchandise" or that the Department's method "presents a significant problem because of the diminished accuracy of the calculation," *id.* at 23–24.

Instead of making pre-allocation deductions for components and services unrelated to the wind tower sections, Commerce relied upon the Worksheets to allocate revenue to the non-subject components, and to the services, on the basis of relative cost. In doing so, Commerce made no pre-allocation deductions from the revenue shown on the wind turbine invoices other than those for freight and other logistics related to the wind turbines as a whole (which deductions it made to derive "the equivalent of an ex-works price"). *Second Remand Redetermination* 49 ("Given that the freight expenses differ, sometimes markedly, between the wind towers and the other components, we find that it is more accurate to remove the freight expenses from the project price before performing the allocation."). Rather than show that this method necessarily misallocated the revenue realized from the wind tower projects, defendant-intervenor argues that its alternative method not only would have been superior to the method

Commerce employed but also was the only permissible method available. The reasons it offers are not persuasive.

The Coalition identifies various items as unrelated to the subject wind towers, Def.-Int.'s Comments 21–22, giving as examples "elevators" and characterizing another item (the "SCADA Power Manager") as "not related to the *sale* of the wind towers to the unaffiliated customer," *id.* at 22 (emphasis added). This objection is unconvincing not only in failing to place the unrelated items in the context of the second step in the Department's analysis but also in overlooking that there *was* no individual sale of the wind towers to the unaffiliated customer. Had there been such a sale, Commerce would not have had occasion to resort to an allocation method. Lacking actual resale prices to unrelated purchasers for the subject wind towers or the individual wind tower sections, Commerce reasonably began its calculation using revenue shown on the wind turbine project invoices. Unlike the line items on the Worksheets listing revenue associated with subject wind towers, which the Coalition argues Commerce should have used, the revenue shown on the wind turbine project invoices was found by Commerce to be revenue that actually was realized in sales to unrelated purchasers. *See Second Remand Redetermination* 47 n.147 (rejecting the Coalition's alternative method because it "uses a price that is not the verified, invoiced project price to the unaffiliated U.S. customer"); *see also* Def.'s Resp. 16 (contrasting actual revenue from payments to SGRE Inc. with "an internal profit worksheet").

Defendant-intervenor's method and the one used by Commerce differ in the treatment of profit. Defendant-intervenor's alternative method would use the revenue allocations to subject merchandise as shown on the Worksheets while the Department's method would use a uniform profit rate. The Coalition does not demonstrate that its method is superior in that respect. By beginning with the total project revenue and making allocations of that revenue based on relative cost, Commerce made a methodological choice to assume a uniform profit. *See Second Remand Redetermination* 48 (stating that Commerce "did not instruct SGRE/Windar to specifically exclude any items from the allocation"). As defendant describes this method, "Commerce did not ascertain varying rates of profit among the different components; that is, the allocation assumed a consistent rate of profit across the turbine projects." Def.'s Resp. 18. Commerce stated that use of the total invoice price as the starting price for the constructed export price calculation foreclosed a possibility that profits could be shifted from some items in the wind turbine projects to others. *Second Remand Redetermination* 47 n.147.

The Coalition argues that "[i]n the instant situation there is no evidence that profits were shifted to attribute additional profit to the wind towers," Def.-Int.'s Comments 27, but this objection misses the point. In the situation presented, in which the wind towers were not sold individually to an unrelated purchaser in the United States, Commerce made a reasonable methodological choice to use a uniform profit rate that was grounded in record evidence of actual revenue, i.e., the wind turbine invoices. That choice made it unnecessary for Commerce to consider whether the revenue line items on the Worksheets, which the Coalition argues Commerce should have used, were distorted by misallocated profit. On a record that did not include resales of subject merchandise to unrelated purchasers in the United States, it was reasonable for Commerce to obtain and apply a uniform profit rate.

In summary, the Coalition presents an alternative method of determining constructed export price without demonstrating that the method Commerce chose instead was unreasonable on the record before it. Courts afford Commerce considerable deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature," *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996), although to be afforded judicial deference Commerce still must provide an adequate explanation and its ultimate determination must be lawful and supported by substantial evidence, *see Vicentin S.A.I.C. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1227, 1235 (2020). The court concludes that Commerce provided a reasoned explanation for its method of determining constructed export price for the subject wind towers. In contesting this method, defendant-intervenor does not show that the Department's determination of constructed export price was unsupported by substantial record evidence or otherwise contrary to law.

III. CONCLUSION

The court sustains the Department's decision in the Second Remand Redetermination assigning a dumping margin of 28.55% to the entity comprised of Siemens Gamesa, Windar, and the Windar Manufacturing Subsidiaries.

The Second Remand Redetermination remedied the deficiencies the court identified in *Siemens Gamesa I* and *Siemens Gamesa II*. For the reasons discussed above, the court rejects defendant-intervenor's claims that Siemens Gamesa should not have been investigated, that it unlawfully was collapsed with Windar and the Windar Manufacturing Subsidiaries, and that Commerce unlawfully determined the constructed export price of the subject merchandise.

The court will enter judgment sustaining the Second Remand Redetermination.

Dated: January 28, 2025
New York, New York

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

Slip Op. 25–13

HONEYWELL INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Court No. 17–00256

[Court grants Plaintiff's motion for summary judgment and denies Defendant's cross-motion for summary judgment because subject imports are correctly classified under subheading 8803.20.00 of the Harmonized Tariff Schedule of the United States.]

Dated: January 30, 2025

Wm. Randolph Rucker, Faegre Drinker Biddle & Reath, LLP, of Chicago, IL, argued for Plaintiff Honeywell International, Inc.

Edward F. Kenny, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for Defendant United States. On the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney in Charge, International Trade Field Office, and *Aimee Lee*, Assistant Director. Of counsel on the brief was *Yelena Slapek*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Barnett, Chief Judge:

Plaintiff Honeywell International, Inc. ("Honeywell") commenced this case to contest the denial of three protests challenging U.S. Customs and Border Protection's ("Customs" or "CBP") liquidation of Honeywell's radial, web, and chordal segments (the "imported segments" or "segments") under subheading 6307.90.98 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as "[o]ther made up articles, including dress patterns," dutiable at seven percent *ad valorem*. Summons, ECF No. 1; Second Am. Compl., ECF No. 34.[1] Plaintiff alleges that the segments are properly classified pursuant to HTSUS subheading 8803.20.00 as "[p]arts of goods of heading 8801 or 8802: . . . [u]ndercarriages and parts thereof," a duty-free provision applicable to parts of aircraft. Second Am. Compl. ¶ 30. Honeywell seeks summary judgment accordingly. Pl.'s Mot. for Summ. J., and

[1] All citations to the HTSUS are to the 2015 version, as determined by the date of importation of the merchandise. *See LeMans Corp. v. United States*, 660 F.3d 1311, 1314 n.2 (Fed. Cir. 2011).

accompanying Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem."), ECF No. 43.[2] Defendant United States ("the Government") has cross-moved for summary judgment, seeking classification of the segments pursuant to HTSUS subheading 6307.90.98.[3] Def.'s Cross-Mot. for Summ. J., and accompanying Mem. in Opp'n to Pl.'s Mot. for Summ. J and in Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s Cross-Mem."), ECF No. 54. For the reasons discussed herein, the court will enter judgment for Plaintiff.

BACKGROUND

I. Material Facts Not In Dispute

A party moving for summary judgment must show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." U.S. Court of International Trade ("USCIT") Rule 56(a). Parties submitted separate statements of undisputed material facts with their respective motions and responses to the opposing party's statements. Confid. Pl.'s Statement of Material Facts Not In Dispute ("Pl.'s SOF"), ECF No. 42; Def.'s Resp. to Pl.'s Statement of Material Facts Not In Issue ("Def.'s Resp. Pl.'s SOF"), ECF No. 54; Def.'s Statement of Undisputed Material Facts ("Def.'s SOF"), ECF No. 54; Pl.'s Resp. to Def.'s Statement of Undisputed Material Facts ("Pl.'s Resp. Def.'s SOF"), ECF No. 60. Upon review of the Parties' facts (and supporting exhibits),[4] the court finds the following undisputed and material facts.

[2] Plaintiff initially filed Exhibits A, B, and D appended to its motion for summary judgment under seal. *See* ECF Nos. 42–1, 42–2, 42–4. Plaintiff later sought, and obtained, leave to unseal those exhibits. *See* Order (June 10, 2024), ECF No. 52; ECF Nos. 53, 53–1, 53–2 (Pl.'s Exhibits A, B, and D, respectively). In the filings accompanying Plaintiff's motion to unseal, Plaintiff labeled Exhibits A, B, and D as Exhibits 1, 2, and 3. For consistency with the parties' references to the exhibits in their briefs, the court refers to the exhibits as Exhibits A, B, and D.

[3] Defendant is not seeking deference for Customs' basis for rejecting heading 8803 as a potential classification and advances different arguments in that regard. Oral Arg. at 1:23:05–1:23:20 (time stamp from the recording), https://www.cit.uscourts.gov/audio-recordings-select-public-court-proceedings; *see also United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (the court affords deference to CBP's classification rulings relative to their "power to persuade") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

[4] The Government submitted physical samples of the segments, a needled preform, and aircraft brake discs for the court's review. *See* Def.'s Form 23, ECF No. 56. The physical samples are designated as Defendant's Physical Exhibits 2 (chordal segment), 3 (radial segment), 4 (web segment), 18 (needled preform), 19 (densified carbon-carbon aircraft brake disc (stator)), and 20 (densified carbon-carbon aircraft brake disc (rotor)). "A rotor is a rotating disc used in an aircraft brake assembly that is keyed to the wheel assembly and provides friction and heat absorption during braking." Pl.'s SOF ¶ 30; *see also* Def.'s Resp. Pl.'s SOF ¶ 30 (admitting without waiving objection as to cited authority). A stator, including auxiliary stators referred to as the pressure plate and the backing plate, "is a stationary disc used in an aircraft brake assembly that is keyed to the torque tube and provides friction and heat absorption during braking." Pl.'s SOF ¶ 31; Def.'s Resp. Pl.'s SOF ¶ 31.

Honeywell is the importer of record for the segments and made the subject entries through the ports of Minneapolis, Charlotte, and Atlanta in 2015 and 2016. Pl.'s SOF ¶¶ 1–3; Def.'s Resp. Pl.'s SOF ¶¶ 1–3. At the time of entry, Honeywell classified the segments under either subheading 6307.90.98 or 8803.20.00. Def.'s Resp. Pl.'s SOF ¶ 4 (citing Customs documentation filed pursuant to USCIT Rule 73.1); *see also* Pl.'s SOF ¶ 4 (averring entry classification under subheading 6307.90.98). Customs liquidated the segments under subheading 6307.90.98. Pl.'s SOF ¶ 5; Def.'s Resp. Pl.'s SOF ¶ 5.

The segments are made from nonwoven polyacrylonitrile ("PAN") fiber fabric material that is cut to a specific shape and size as described in one of three Engineering Material Specifications: EMS-182, EMS-183, or EMS-270. Pl.'s SOF ¶¶ 11–12; Def.'s Resp. Pl.'s SOF ¶¶ 11–12; *see also* Pl.'s SOF ¶ 21; Def.'s Resp. Pl.'s SOF ¶ 21 (admitting that "the segments are cut to a specific inner radius and outer radius").

The below diagram, taken from patents for the segments, depicts the shape of the segments in relation to the PAN fiber fabric material from which the segments are cut:

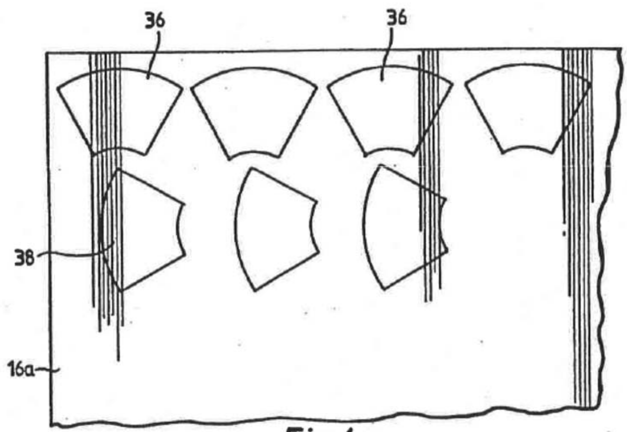

Fig.4.

Pl.'s Ex. D at 4, ECF No. 53–2.

As shown above, the segments are arc shaped. *Id.*; Pl.'s SOF ¶¶ 15, 18; Def.'s Resp. Pl.'s SOF ¶¶ 15, 18. The court's inspection of the segments indicates that each segment is approximately ten and a half inches across at its widest portion, approximately five inches along its radius, and approximately one eighth of an inch thick. Def.'s Physical Exs. 2–4; *see also* Def.'s SOF ¶ 3; Pl. Resp. Def.'s SOF ¶ 3 (averring that the segments are manufactured to specific dimensions but that any dispute regarding numerical specifications is immaterial). "The segments . . . look and feel like fabric material," and may be folded or crumpled by hand. Def.'s SOF ¶ 4; Pl. Resp. Def.'s SOF ¶ 4 (stating "the samples speak for themselves"); *see also* Pl.'s Ex. A, Dep. of Mark A. Brown (Mar. 2, 2023) ("Brown Dep.") at 16:18–21 (agreeing that the segments may be described as fabric-like).

The radial and chordal segments are "[d]uplex [s]egments" that are "manufactured by needling web and unidirectional tow fabrics together to form a duplex fabric," which can be made to a "specific areal weight and width." Pl.'s SOF ¶ 13; Def.'s Resp. Pl.'s SOF ¶ 13 (admitting that the duplex segments can be made to a specified areal weight and width "within a certain tolerance"). The radial and chordal segments are cut into arc shapes from the duplex assembly in such "manner that results in either a radial or chordal orientation of the unidirectional fibers," respectively. Pl.'s SOF ¶ 15; Def.'s Resp. Pl.'s SOF ¶ 15.

Web segments are manufactured by "needling tows of oxidized PAN fiber in a manner that results in a web of fibers." Pl.'s SOF ¶ 18; Def.'s Resp. Pl.'s SOF ¶ 18. Additionally, "[t]he number of tows and the width of the web are designed to achieve the required areal weight and width." Pl.'s SOF ¶ 18; Def.'s Resp. Pl.'s SOF ¶ 18. The web segments are "cut into arc shapes with a specific outer radius, a specific inner radius and an arc angle," and have a web orientation. Pl.'s SOF ¶ 18; Def.'s Resp. Pl.'s SOF ¶ 18.

Web, chordal, and radial segments are generally not interchangeable. Pl.'s SOF ¶ 22; Def.'s Resp. Pl.'s SOF ¶ 22. The imported segments have part numbers based on the segment type, part names indicating, when appropriate, whether the segment is for use in a stator or rotor disc, and a specified aircraft program use. Pl.'s SOF ¶ 10; Def.'s Resp. Pl.'s SOF ¶ 10.[5]

After importation, the segments are first used to produce needled preforms. To that end, following importation the segments are delivered to Honeywell's contractor, Bethlehem Advanced Materials, Inc.

[5] The Government admits that filings in this case include information as to part number, part name, and segment type. Def.'s Resp. Pl.'s SOF ¶ 10. Regarding aircraft program use, the Government avers that Honeywell has designated certain segments "for *both* aircraft and automotive use." Def.'s Resp. Pl.'s SOF ¶ 19 (citing Pl.'s Ex. B, Pl.'s Ans. to Def.'s First Interrogs.) (emphasis added). The Government thus admits the information as to aircraft use but avers that Plaintiff's factual representation is incomplete as to automotive use. Deposition testimony indicates that, up until 2013, certain segments that are not among the entries at issue in this case were "used in specialty automotive racing applications." Brown Dep. at 54:18–19; *see also id.* at 54:9–56:24; Pl.'s Ex. B at 5 (containing a chart including "Brembo" as an additional program use for certain parts, with "Brembo" identifying automotive use). As part of that program, Honeywell used certain aerospace brake discs and "cut them into pieces" to be used "for those racing applications." Def.'s Ex. 16, Dep. of Chris Matheis (Mar. 2, 2023) at 11:9–12, ECF No. 54–13. Honeywell no longer develops brakes for automotive use. *Id.* at 11:13–12:8.

("BAM") in Knoxville, Tennessee. Def.'s SOF ¶ 6; Pl.'s Resp. Def.'s SOF ¶ 6.[6] To create the needled preforms, BAM personnel identify the specific preform to be manufactured and prepare the appropriate segments (radial, chordal, or web) and the needling machines. Def.'s SOF ¶ 11; Pl.'s Resp. Def.'s SOF ¶ 11. Each layer of the preform contains "six segments of the same type." Def.'s SOF ¶ 14; Pl.'s Resp. Def.'s SOF ¶ 14. "[T]he needling machine automatically creates an additional layer of six segments of a different type than the first, and possibly another layer of six segments of a third type, depending on the requirements correlating with the preform requested by the purchase order." Def.'s SOF ¶ 15; Pl.'s Resp. Def.'s SOF ¶ 15. The needling machine picks and lays the segments in a donut formation while it "jab[s] the needles into and out of the segments" to connect the layers. Def.'s SOF ¶ 16; Pl.'s Resp. Def.'s SOF ¶ 16. The completed needled preform is assigned a serial number. Def.'s SOF ¶ 17; Pl.'s Resp. Def.'s SOF ¶ 17.

Thereafter, multiple needled preforms are gathered and stacked into a furnace with spacers in between. Def.'s SOF ¶ 19; Pl.'s Resp. Def.'s SOF ¶ 19. A weighted load applies pressure from the top of the stack. *See id.* The stacks are heated for three-and-a-half to four days as part of the carbonization cycle, during which time gases are released. Def.'s SOF ¶¶ 21–22; Pl.'s Resp. Def.'s SOF ¶¶ 21–22. Upon completion of the carbonization cycle, the now carbonized preform has lost 50 percent of its needled preform weight and has shrunk in size. Def.'s SOF ¶ 24; Pl.'s Resp. Def.'s SOF ¶ 24. The preform has gone through a molecular change and is considered a carbon material instead of a PAN material, no longer exhibiting the fabric quality of the imported segments and instead becoming rigid, solid, and inflexible. Def.'s SOF ¶¶ 23, 25; Pl.'s Resp. Def.'s SOF ¶¶ 23, 25.

The carbonized preforms are returned to Honeywell for further processing. Def.'s SOF ¶ 26; Pl.'s Resp. Def.'s SOF ¶ 26. At Honeywell's facility, the carbonized preforms undergo "a densification process involving chemical vapor infiltration (CVI) and [a] chemical vapor deposition (CVD) process which deposits additional carbon on and around the carbonized preform." Def.'s SOF ¶ 27; Pl.'s Resp. Def.'s SOF ¶ 27. The densification process involves months of cyclical heating in the furnace totaling hundreds of hours, increasing the weight of the preforms. Def.'s SOF ¶¶ 30–31; Pl.'s Resp. Def.'s SOF ¶¶ 30–31. The manufacturing process for a densified carbon-carbon pre-

[6] BAM "is an advanced materials company that specializes in the processing and manufacturing of carbonized products through its use of high-temperature furnace systems." Def.'s SOF ¶ 7; Pl.'s Resp. to Def.'s SOF ¶ 7. Honeywell contracted with BAM to create needled preforms which are then processed into carbonized preforms out of the PAN fabric segments. Def.'s SOF ¶¶ 8–25; Pl.'s Resp. Def.'s SOF ¶¶ 8–25.

form "can take up to six months, with the CVD/CVI densification process being the longest portion of that process." Def.'s SOF ¶ 32; Pl.'s Resp. Def.'s SOF ¶ 32.

The densified carbon-carbon preforms are manufactured into aircraft brake discs by means of "a final machining operation." Def.'s SOF ¶ 33; Pl.'s Resp. Def.'s SOF ¶ 33. As part of that machining operation, "the friction surfaces are ground to specific dimensions, the inner and outer dimensions are machined and the other parts such as lugs, grooves and holes are machined and antioxidant [is] applied." Def.'s SOF ¶ 33; Pl.'s Resp. Def.'s SOF ¶ 33. The resulting product takes on desired characteristics of brake discs including high strength, thermal capabilities, heat transfer and absorption, and friction generation. Def.'s SOF ¶ 34; Pl. Resp. Def.'s SOF ¶ 34.

"[A]ircraft brake discs used in aircraft landing gear are parts of aircraft braking systems." Def.'s Resp. Pl.'s SOF ¶ 26; *see also* Pl.'s SOF ¶ 26. "Aircraft braking systems are parts of aircraft." Pl.'s SOF ¶ 25; Def.'s Resp. Pl.'s SOF ¶ 25.[7]

II. Procedural History

In 2017, Honeywell filed three protests[8] challenging CBP's classification and claiming classification under Heading 8803. *See* Pl.'s SOF ¶ 7; Def.'s Resp. Pl.'s SOF ¶¶ 4, 7. On May 19, 2017, Customs issued Headquarters Ruling Letter H243798 and concluded therein that radial and chordal brake segments imported by Honeywell are properly classified under subheading 6307.90.98. *See* Pl.'s SOF ¶ 6; Def.'s Resp. Pl.'s SOF ¶ 6.[9] Customs subsequently denied all three protests. Pl.'s SOF ¶ 7; Def.'s Resp. Pl.'s SOF ¶ 7.

On October 23, 2017, Honeywell commenced this case. Summons. Honeywell filed its complaint on October 29, 2021. Compl., ECF No. 13.[10] The Government answered the complaint. Ans., ECF No. 18.

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[7] Whether an article is classifiable pursuant to a parts provision is a legal question (when no dispute exists regarding material facts). However, the court understands the parties to agree that aircraft brake discs and aircraft braking systems would be classifiable as parts of aircraft. This makes sense given the reference to "and parts thereof" in the subheadings falling within heading 8803. *See, e.g.*, HTSUS Subheading 8803.20.00 ("Undercarriages and parts thereof."); Explanatory Note ("EN") 88.03(II)(5) (describing "undercarriages" as "brakes and brake assemblies").

[8] Honeywell filed Protest No. 1704–17–101113 on February 21, 2017, Protest No. 350117–100099 on March 31, 2017, and Protest No. 1704–17–101346 on May 1, 2017. *See* Summons at 1, 3–5.

[9] Honeywell's ruling request did not include web segments. H243798 at 1.

[10] Pursuant to USCIT Rule 83(a), (c), an action commenced under 28 U.S.C. § 1581(a) is placed on the Customs Case Management Calendar for an initial 24-month period with the possibility of extension upon motion by the plaintiff. An action may not remain on the Customs Case Management Calendar for more than 48 months and may be removed from the Customs Case Management Calendar following the filing of a complaint. USCIT Rule 83(b), (d).

Honeywell filed two amended complaints. First Am. Compl., ECF No. 31; Second Am. Compl. The Government answered the second amended complaint. Ans. 2nd Am. Compl., ECF No. 39. Following briefing on the cross-motions for summary judgment, the court heard oral argument on December 11, 2024. Docket Entry, ECF No. 66.

JURISDICTION AND STANDARD OF REVIEW

The court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1581(a) (2018). The court decides classification cases *de novo*. 28 U.S.C. § 2640(a)(1). The court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). It is "the court's duty . . . to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

DISCUSSION

I. Legal Framework

The court may grant summary judgment when "there is no genuine issue as to any material fact," and "the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); USCIT Rule 56(a).

Classifying an imported good involves two steps: (1) determining the meaning of the relevant tariff provisions and (2) determining whether the product at issue falls within a particular tariff provision. *Gerson Co. v. United States*, 898 F.3d 1232, 1235 (Fed. Cir. 2018). The first step is a question of law; the second is a question of fact. *Id.* When there is no factual dispute as to the nature of the product, the two-step analysis is "entirely . . . a question of law." *Id.* (citation omitted).

The General Rules of Interpretation ("GRIs") accompanying the HTSUS govern the court's classification of goods under the HTSUS. *See RKW Klerks Inc. v. United States*, 94 F.4th 1374, 1378 (Fed. Cir. 2024). The court "appl[ies] the GRIs in numerical order." *Gerson*, 898 F.3d at 1235. GRI 1 states that "classification shall be determined according to the terms of the headings and any [relevant] section or chapter notes." The court considers chapter and section notes of the HTSUS because they are statutory law, not interpretive rules. *See*

Aves. in Leather, Inc. v. United States, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (citing 19 U.S.C. § 1202).[11]

When an "imported article is described in whole by a single classification heading or subheading, then that single classification applies, and the succeeding GRIs are inoperative." *Gerson*, 898 F.3d at 1235 (citation omitted). When necessary to resolve classification, GRI 2(a) states that "[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article." When "goods are, *prima facie*, classifiable under two or more headings," GRI 3(a) states that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." In that case, "we look to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). In addition to the headings and section or chapter notes, courts also may consult the World Customs Organization's Explanatory Notes, which are not legally binding but "are 'persuasive' and are 'generally indicative' of the proper interpretation." *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1375 (Fed. Cir. 2016).

II. Competing Tariff Provisions

At liquidation, Customs classified the segments under subheading 6307.90.98. That subheading describes:

6307	Other made up articles, including dress patterns:
6307.90	Other
6307.90.98	Other.

Subchapter 1 of Chapter 63, which includes heading 6307, "applies only to made up articles, of any textile fabric." HTSUS Ch. 63 Note 1. For purposes of heading 6307, "the expression 'made up' means," *inter alia*, "[c]ut otherwise than into squares or rectangle." HTSUS Section XI Note 7(a) (underline omitted).[12] Heading 6307 "covers made up articles of any textile material which are not included more specifically in other headings of Section XI or elsewhere in the Nomenclature." EN 63.07.

[11] Pursuant to Section 1202, "[t]he Harmonized Tariff Schedule of the United States, which replaced the Tariff Schedules of the United States, is not published in the Code. A current version of the Harmonized Tariff Schedule is maintained and published periodically by the United States International Trade Commission."

[12] The section notes provide seven alternate definitions of the phrase "made up," as indicated by the disjunctive "or" separating Note 7(f) and (g).

Honeywell contends that the segments are instead described by subheading 8803.20.00. That subheading covers:

8803	Parts of goods of heading 8801 or 8802:
8803.20.00	Undercarriages and parts thereof.

Heading 8802 covers "Other aircraft (for example, helicopters, airplanes); spacecraft (including satellites) and suborbital and spacecraft launch vehicles." Accordingly, heading 8803 effectively covers parts of aircraft, including parts of airplanes.[13]

Chapter 88 falls within Section XVII of the HTSUS. Section XVII Note 2 excludes certain "[p]arts of general use. . . of base metal . . . or similar goods of plastics" as defined elsewhere in the tariff. HTSUS Section XVII Note 2(b). "References in chapters 86 to 88 to 'parts' or 'accessories' do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those chapters." HTSUS Section XVII Note 3. Similarly, Additional U.S. Rules of Interpretation ("ARI") 1(c) states that "a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for 'parts' or 'parts and accessories' shall not prevail over a specific provision for such part or accessory."

The Explanatory Notes accompanying heading 8803 provide examples of parts of aircraft covered by this provision. Those examples include:

> (1) Fuselages and hulls; fuselage or hull sections; also their internal or external parts (radomes, tail cones, fairings, panels, partitions, luggage compartments, floors, instrument panels, frames, doors, escape chutes and slides, windows, port-holes, etc.).
>
> (2) Wings and their components (spars, ribs, cross-members).
>
> (3) Control surfaces, whether or not movable (ailerons, slats, spoilers, flaps, elevators, rudders, stabilisers, servo-tabs, etc.).
>
> (4) Nacelles, cowlings, engine pods and pylons.
>
> (5) Undercarriages (including brakes and brake assemblies) and their retracting equipment; wheels (with or without tyres); landing skis.
>
> (6) Seaplane floats.

[13] The subheadings under heading 8803 are organized by various aircraft parts, such as "[p]ropellors and rotors and parts thereof" in subheading 8803.10.00; "[u]ndercarriages and parts thereof" in subheading 8803.20.00; or "[o]her parts of airplanes or helicopters" in subheading 8803.30.00. HTSUS heading 8803.

(7) Propellers (airscrews), rotors for helicopters and gyroplanes; blades for propellers and rotors; pitch control mechanisms for propellers and rotors.

(8) Control levers (control columns, rudder-bars and various other operational levers).

(9) Fuel tanks, including auxiliary fuel tanks.

EN 88.03(II).

III. Classification of the Segments Under Heading 8803

A. Overview and Parties' Contentions

"In adjudicating a tariff classification dispute, the court first considers whether 'the government's classification is correct, both independently and in comparison with the importer's alternative.'" *Shamrock Bldg. Materials, Inc. v. United States*, 47 CIT __, __, 619 F. Supp. 3d 1337, 1342 (2023) (quoting *Jarvis Clark*, 733 F.2d at 878). Because Customs' classification turned on its conclusion that heading 8803 does *not* cover the segments, the court begins with an examination of that classification. There is no dispute over the plain meaning of the relevant tariff terms. As discussed above, heading 8803 covers parts of aircraft. At issue is whether the segments meet the requirements for classification as parts of aircraft.

This case stands apart from other classification cases involving parts of articles. The imported segments are not installed directly on an aircraft. Instead, the segments are imported into the United States as an upstream product for the production of the aircraft brake discs, an article the parties agree constitutes a part of an aircraft. Thus, the issue in this case involves the extent to which a part of a part is a part for tariff purposes.[14] The parties agree that the "subpart rule" may apply to articles within the aircraft parts supply chain—no

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[14] "In the field of [C]ustoms jurisprudence it is a well-recognized principle that a part of a part is a part for tariff purposes." *American Schack Co. v. United States*, 1 CIT 1, 5 (1980); *cf., e.g.*, *Honda of Am. Mfg., Inc. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010) (observing that subject oil bolts facially meet heading 8708 as parts of an automobile "because they are 'parts and accessories' of vehicle power trains" or "of vehicle 'brakes and servo-brakes'"). While this case presents an unusual circumstance with respect to the relationship between the claimed part (the segments) and the downstream product (the aircraft), there is some analogous precedent. *See Gallagher & Ascher Co. v. United States*, 63 Cust. Ct. 223, 224–28, C.D. 3899 (1969) (finding that a lock cylinder plug is a part of a locking gas tank cap and, thus, part of a motor vehicle, and further finding that keys, which were "necessary parts of the cylinder plugs," were also dutiable as parts of motor vehicles). *Gallagher & Ascher* involved the Tariff Schedule of the United States ("TSUS"), the predecessor to the HTSUS. Cases interpreting the TSUS may be instructive but are not dispositive. *See JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1355 (Fed. Cir. 2000).

matter how far upstream—provided those articles meet the requirements for a part (or a part of a part, as the case may be) and are not otherwise excluded from classification as a part by relevant section and chapter notes. Oral Arg. at 02:00–03:50 (colloquy with Plaintiff's counsel); *id.* at 45:15–45:39 (colloquy with Defendant's counsel).[15]

At first glance, the segments do not look like parts of aircraft. As discussed above, the relationship between the segments as imported and the article of which they are claimed to be a part requires that the segments undergo substantial post-importation processing in the manufacturing of needled preforms, carbonized preforms, carbon-carbon preforms and, finally, aircraft brake discs. The question that arises in this case is whether this degree of processing removes the segments from classification as aircraft parts notwithstanding the segments' principal, and perhaps sole, use in the production of aircraft brake discs.

Honeywell contends that the segments are classifiable under heading 8803 because they are parts of aircraft brake discs that, in turn, are parts of aircraft braking systems used in aircraft landing gear. Pl.'s Mem. at 21–25. Plaintiff avers that the segments "are fully finished parts" ready for use "in the manufacture of brake discs." *Id.* at 34; *see also* Pl.'s Resp. in Opp'n to Gov't's Cross-Mot. for Summ. J. and Reply in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Resp.") at 6, ECF No. 60. At oral argument, Honeywell argued that the segments may also be considered parts of the needled preform, stating that whether the segments are considered parts of the preforms or parts of the brake discs is "a distinction without a difference" after application of the subpart rule. Oral Arg. at 28:00–31:00.

The Government contends that the segments are not finished parts or subparts of an aircraft. Def.'s Cross-Mem. at 15. Emphasizing the post-importation processing that occurs in the manufacturing of aircraft brake discs, the Government argues that the segments are not sufficiently advanced "to be recognized as a part." Def.'s Reply Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. and in Further Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s Reply") at 6, ECF No. 63. The Government contends that the segments are not "attached to an existing item," but are instead subject to "extensive post-importation

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[15] The Government's filings do not explicitly address the subpart rule. At oral argument, the following exchange occurred:

> Court: "Just so I'm clear, you don't disagree with [counsel for Honeywell] that essentially [the subpart rule] goes all the way up the supply chain except as otherwise limited by ARI 1(c), Section Note 3, etc." Mr. Kenny: "*Yes*. It has to be capable of being a part and not elsewhere specifically found in the HTSUS and it has to meet Section Note 17 in this case."

Oral Arg. at 45:15–45:39 (emphasis added). The court understands the reference to Section Note 17 to mean Section XVII Note 3.

manufacturing" that results in "a wholly new article, *i.e.*, the brake disc." Def.'s Reply at 12.[16] At oral argument, the Government acknowledged that the segments are first manufactured into needled preforms but averred that the segments are not parts of preforms. Oral Arg. at 59:47–1:02:17.

B. The Segments are Classifiable as Parts of Aircraft

In briefing the issues relevant to this case and as summarized above, the parties focus on the relationship between the segments and the aircraft brake discs, perhaps because they agree that aircraft brake discs constitute parts of aircraft for purposes of heading 8803. Plaintiff argues the segments are parts of brake discs and are, thus, likewise classifiable as parts of aircraft; Defendant argues the segments are mere materials out of which the brake discs are made and are not classifiable as parts of brake discs. Nevertheless, the parties agree that the potential breadth of the subpart rule obviates any basis for treating aircraft brake discs as an arbitrary cut-off point whereby products further upstream cannot be considered aircraft parts despite their dedicated use in aircrafts. The subpart rule, however, is not dispositive of the segments' classification in light of the additional processing by both BAM and Honeywell and judicially recognized distinctions between parts and materials. The following principles are relevant to the court's analysis.

Whether something is a part for tariff purposes is governed by relevant section and chapter notes and caselaw. The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has recognized two tests for determining whether merchandise may be classified as a "part" of another article. Application of those tests depends on the facts of the particular case. *RKW Klerks*, 94 F.4th at 1378.

First, an item may be a part for tariff purposes if the item is "dedicated solely for use with another article and is not a separate and distinct commercial entity." *Id.* (quoting *Bauerhin Techs. Ltd. P'ship v. United States*, 110 F.3d 774, 779 (Fed. Cir. 1997)). In *Bauerhin*, the Federal Circuit classified imported canopies as parts of

[16] The Government further avers that the segments are not unfinished aircraft brake discs for purposes of GRI 2(a). Def.'s Reply at 19–27. According to the Government, GRI 2(a) is relevant to discerning finished parts from unfinished parts, *id.* at 19–20, but asserts that the segments do not "possess the essential character of the aircraft brake system of which they claim to be a part, i.e., the densified carbon-carbon aircraft brake disc," *id.* at 20. Honeywell contends that GRI 2(a) is inapplicable because this case is resolved by GRI 1. Pl.'s Resp. at 20. Because the court finds that the segments satisfy the parts test, the court does not address the unfinished parts arguments or whether GRI 2(a) applies to a subpart analysis. *See* GRI 2(a) ("Any reference *in a heading* to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article.") (emphasis added).

child safety seats and not as made-up textiles when they "serve[d] no function or purpose that is independent of" child safety seats. 110 F.3d at 779. Similarly, in *United States v. Pompeo*, the Federal Circuit's predecessor court, the U.S. Court of Customs and Patent Appeals, classified an imported supercharger as a part of an automobile because it was "dedicated solely for use upon automobiles." 43 C.C.P.A. 9, 14 (1955). In both *Bauerhin* and *Pompeo*, "the items at issue were considered parts because they could not serve a function apart from being a component of the larger article." *RKW Klerks*, 94 F.4th at 1379.

Second, an item may be considered a part if it "is an 'integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article.'" *RKW Klerks*, 94 F.4th at 1378 (citation omitted); *see also United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933) (stating the "integral, constituent, or component part" test and noting the "well-established rule that a 'part' of an article is something necessary to the completion of that article"). While the two tests consider similar factors, each addresses a different situation, and both do not have to be satisfied. *See Bauerhin*, 110 F.3d at 779 (finding that the "integral, constituent, or component part" test was not exclusive and that the "dedicated solely for use" test applied instead); *Trans Atl. Co. v. United States*, 48 C.C.P.A. 30, 32–33, C.A.D. 758 (1960) (stating that the *Willoughby* test is not "dispositive" when the imported items "have but one commercial use").

Courts have applied varying tests, also suited to the circumstances of each case, to determine whether a subject import is classifiable as a part or as material from which finished parts are subsequently produced. Distinctions between parts and materials may be relevant when an imported article is not dedicated for use in the downstream article because the imported article has a variety of applications, or when the imported article must be modified after importation in order to be usable as a finished part. These considerations are reflected in HTSUS Section XVII Note 3 (something may be a part if it is both "suitable for use" with an article and "solely or principally" used with the article).

One example of these distinctions is found in *Baxter Healthcare Corp. of Puerto Rico v. United States*, in which the Federal Circuit addressed "[w]hether an imported item that is made into multiple parts after import is classifiable as 'parts' of other articles under the HTSUS." 182 F.3d 1333, 1338 (Fed. Cir. 1999). In that case, the plaintiff imported Oxyphan® in 10-kilometer spools and claimed classification as part of an oxygenator. *Id.* at 1335. Each spool contained sufficient product for roughly four oxygenators, though "the exact length of membrane required per oxygenator [wa]s not fixed." *Id.*

Citing *Bauerhin* and *Willoughby*, the Federal Circuit first considered whether the imported product was "dedicated solely or principally for use in" the making of membrane oxygenators and had no other "substantial . . . commercial uses" and found those requirements to be met. *Id.* at 1338–39. This first consideration reflects the "parts" tests set forth above. Second, the court explained that "if the item as imported can be made into *multiple* parts of articles, the item must identify and fix with certainty the individual parts that are to be made from it." *Id.* at 1339. On this point, a majority of the panel concluded that the Oxyphan® material was not classifiable as a part, reasoning:

> At the time of import, the individual parts cannot be discerned from the roll, and the roll nowhere marks or otherwise identifies the individual parts to be made from it. Rather, Baxter individually cuts lengths of Oxyphan® from a roll and custom-fits them around a steel bellows. The exact length needed per oxygenator is not known until the oxygenator is made.

Id. at 1339.[17] Likewise focusing on the post-importation cutting to size, the dissenting opinion noted that "[a]pplying the panel majority's rationale, Oxyphan® would be a 'part' if it were simply repackaged so that each roll held one-fourth its capacity." *Id.* at 1340 (Newman, J., dissenting).

In another example that involved post-importation processing other than being cut to size, the Federal Circuit considered whether the imported item was "sufficiently processed to be dedicated for use" in the downstream article. *E.M. Chems. v. United States*, 920 F.2d 910, 914 (Fed. Cir. 1990). In that case, the appellate court affirmed this court's finding that liquid crystals' "dedicated use in [liquid crystal displays ("LCDs")] was fixed with sufficient certainty without further processing to qualify them as parts" despite post-importation mixing of the chemicals and addition of a twist agent. *Id.*

In yet another example, in a case involving Canadian lumber, the Federal Circuit explained that for the cut lumber to qualify as "rec-

[17] For this consideration, the majority cited *Harding Co. v. United States*, 23 C.C.P.A. 250 (1936). *See Baxter*, 182 F.3d at 1339 (citing *Harding*, 23 C.C.P.A. at 253). *Harding* observed that "[t]o be a part of an automobile, that is a brake lining," the subject import "must be more than mere material for making a brake lining." The *Harding* court concluded that although the imported merchandise had "but one use . . . in the manufacture of brake lining for automobiles," the merchandise was not classifiable as a part of an automobile because the identity of the individual article had not yet been fixed with certainty (i.e., it was not cut to size or marked for cutting as a particular brake lining). 23 C.C.P.A. at 252–53.

ognizable unassembled pieces" (i.e., parts) of wooden trusses, the cut lumber "must be 'dedicated solely or principally for use in those articles'" and "must be more than just basic material generally suitable for use in the finished article." *Millenium Lumber Distrib. Ltd. v. United States*, 558 F.3d 1326, 1329 (Fed. Cir. 2009) (quoting *Baxter*, 182 F.3d at 1339). The Federal Circuit found that "[b]ecause the merchandise maintained its identity and usefulness as *general* sawn lumber for potentially *numerous purposes*, it was not sufficiently advanced at the time of importation to be classified under 4418" as parts of wood trusses. *Id.* at 1330 (emphases added) (citation omitted); *cf. Ludvig Svensson (U.S.) Inc. v. United States*, 23 CIT 573, 580–84, 62 F. Supp. 2d 1171, 1178–81 (1999) (holding that imported screens must be classified as parts of agricultural equipment because they were an integral part of and dedicated for use in greenhouses, had "no other commercial uses," and were "in an advanced state of manufacture" despite some post-importation processing incident to installation).[18]

The foregoing cases reflect judicial consideration of case-specific facts as to whether an imported article 1) is dedicated for use in the downstream article; 2) must be cut to size to be used for its particular purpose; or 3) otherwise requires substantial additional processing before being identifiable for its intended purpose. While the foregoing cases are instructive, they are not dispositive in light of the unique circumstances of this case. Unlike those cases that relied on post-importation cutting to size or other modification of *the imported article* to find that the article was not classifiable as a part, here, the segments, as imported, are cut-to-size and identified for the production of a brake disc for a particular type of aircraft. *See* Pl.'s SOF ¶¶ 10–12; Def.'s Resp. Pl.'s SOF ¶¶ 10–12. The imported segments are used in their condition as imported to produce the needled preforms that are, thereafter, used in the manufacturing of aircraft brake discs. Def.'s SOF ¶¶ 11–33; Pl.'s Resp. Def.'s SOF ¶¶ 11–33. In other words, notwithstanding the post-importation processing that is required as part of the production process, the imported segments are identifiable to the downstream article and are used for no other purpose. Thus,

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[18] Specifically, the *Ludvig Svensson* court found:

> The screens are the product of high technology, design and planning and are not simple products; they are complex screens incorporating several different types of materials, manufactured for the specific goal of controlling the various aspects of a greenhouse environment. Moreover, each type of screen may only be used for the purpose for which it was manufactured and the function and purpose of each screen is clearly identifiable upon importation.

23 CIT at 582, 62 F. Supp. 2d at 1179.

taking account of the considerations deemed relevant in the foregoing cases, the court finds that the imported segments are classifiable as parts of aircraft.

Whether considered in light of the language of HTSUS Section XVII Note 3 or the judicially recognized tests for parts, the segments are recognizable parts of the needled preforms. Upon importation, the segments are suitable for use in the needled preforms, requiring no further processing prior to such use. *See* Def.'s SOF ¶¶ 6, 8, 11–17; Pl.'s Resp. Def.'s SOF ¶¶ 6, 8, 11–17. Additionally, the segments are dedicated to that use and had no other substantial commercial application.[19] The segments may also be considered integral, constituent, and component parts of the needled preforms because each of those preforms are *made from* various combinations of the segments. Simply put, without the segments, there would be no needled preforms. *See Willoughby*, 21 C.C.P.A. at 324 (describing a part as "something necessary to the completion of that article").

That the segments are not joined to the preforms in the manner of an attachment but are instead combined to form the preform in the needling operation does not preclude classification of the segments as parts. *See* Def.'s SOF ¶¶ 14–16; Pl.'s Resp. Def.'s SOF ¶¶ 14–16. In *E.M. Chemicals. v. United States*, 13 CIT 849, 851, 858, 728 F. Supp. 723, 725, 730 (1989), *aff'd*, 920 F.2d 910 (Fed. Cir. 1990), the court classified liquid crystals as parts of LCDs when, after importation, the liquid crystals were "sandwiched between two 'plates.'" This finding undercuts the Government's argument that the line separating

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[19] Honeywell's earlier participation in the specialty automotive business is immaterial. The segments involved in that program were used to produce certain aircraft brake discs that were subsequently modified for automotive use. *See supra* note 5 (discussing relevant evidence). Moreover, HTSUS Section XVII Note 3 does not require sole use with an article; principal use is sufficient. To the extent the automotive use is relevant, it is enough that the segments were principally used in aerospace applications, and since 2013, that has been their sole use. Additionally, the parts of general use exclusion considered dispositive in *Honda of America* is inapplicable here. In *Honda of America*, the Federal Circuit acknowledged that the subject oil bolts facially met Honda's proposed subheadings as "parts and accessories" of vehicles or motorcycles. 607 F.3d at 773. The court concluded that the oil bolts were correctly classified under subheading 7318.15.80, which covers "screws, bolts, nuts, . . . and similar articles, or iron and steel," *id.* 772, based on an exclusion from headings of chapter 87 for "[p]arts of general use. . . of base metal . . . or similar goods of plastics" as defined in HTSUS Section XV Note 2(a), *id.* at 773–76; HTSUS Section XVII Note 2(b). The imported segments are not covered by that exclusion.

parts from raw material is separability from the downstream article. Oral Arg. at 52:50–54:26.[20]

The Government's additional arguments that the segments constitute mere materials are also misplaced. At its core, the Government's argument against classification of the segments as parts of aircraft rests on the degree of processing involved in the production of aircraft brake discs. Def.'s Cross-Mem. at 25–26; Oral Arg. at 1:02:07–1:03:59 (in response to the court's question whether the segments are integral to the brake discs, arguing that "there's too much baking of the cake . . . there's too much manufacturing"). That argument, however, discounts the segments' dedicated use *in the production of* aircraft brake discs and relies instead on the complex nature of that production to remove the segments from classification as parts. The Government, however, nowhere explains why the complexity of this production materially changes the outcome. Moreover, the Government's attempt to analogize the facts of this case to those in *Baxter* are premised on the Government's mistaken reliance on a GRI 2(a) analysis. *See* Def.'s Cross-Mem. at 27 ("The PAN segments' identity, therefore, cannot be considered fixed with certainty upon importation, as it does not have the essential character of the final carbon-carbon brake discs . . . ."); Def.'s Reply at 6 ("[T]he fabric segments are not advanced enough in manufacture to be recognized as a part, *i.e.* brake discs."). The question is not, however, whether the segments are recognizable as aircraft brake discs, finished or unfinished. Rather, the question is whether the segments are finished or unfinished parts at the time of importation in relation to a downstream article that constitutes a part of an aircraft, which, by operation of the subpart rule, may be a part of the brake disc.

Furthermore, the Government's assertion that the "segments' identity . . . cannot be considered fixed with certainty upon importation," Def.'s Cross-Mem. at 27, is factually incorrect. The analysis of whether an imported good's identity is fixed with certainty is in-

[20] During oral argument, the Government cited *Rollerblade, Inc. v. United States*, 282 F.3d 1349 (Fed. Cir. 2002), for this proposition. In *Rollerblade*, the Federal Circuit observed that the term "part" may be defined as "an essential element or constituent; integral portion which can be separated, replaced, etc." 282 F.3d at 1353 (quoting *Part*, Webster's New World Dictionary 984 (3d College Ed. 1988)). *Rollerblade* is, however, inapposite. That case involved the classification of inline roller-skating protective gear to be used with inline roller skates. *Id.* at 1350–51. The appellate court considered the dictionary definition relevant to its conclusion that a part "must have a direct relationship to the primary article, rather than to the general activity in which the primary article is used," *id.* at 1353, and to the court's corresponding conclusion that the protective gear was not classifiable as parts of skates, *id.* at 1353–54. The Federal Circuit did not seek to limit the definition of parts for all purposes to separable or removable articles, and the Government's reliance on *Rollerblade* for that proposition runs counter to that court's holding in *E.M. Chemicals* given the lack of indication that the liquid crystals may be separated from, or replaced in, their respective LCDs once applied to that use.

tended to ascertain whether the identity of *the individual part* is fixed at the time of importation. *See Baxter*, 182 F.3d at 1339 (stating that when "the item as imported *can be made into multiple parts of articles*, the item must identify and fix with certainty *the individual parts* that are to be made from it") (emphases added). As discussed above, the imported spools of Oxyphan® at issue in *Baxter* are not analogous to the imported segments, each of which is identifiable as a radial, web, or chordal segment, cut to size for the production of, and identified by part number for, the production of a brake disc for a particular type of aircraft. Recognition of the imported merchandise as a part is not precluded simply because the article of which the import *is* a part undergoes further processing *provided* the import meets the requirements for classification as a part, is not mere material for a part, and is not excluded by operation of the section and chapter notes. For the reasons discussed above, the segments as imported meet these requirements. Accordingly, the court finds that the segments are *prima facie* classifiable as parts of aircraft.

IV. Classification of the Segments Under Heading 6307

The parties do not dispute that the segments are *prima facie* classifiable in heading 6307. However, the Government seeks classification of the segments under heading 6307 even if the court finds the segments classifiable under heading 8803. Def.'s Cross-Mem. at 28–29. The Government argues that heading 6307 more specifically describes the imported segments. *See id.* at 29. According to the Government, "both headings 8801 and 8802 . . . include a basket element in addition to named articles," for example, "heading 8802 includes 'Other Aircraft.'" *Id.* at 30.

Honeywell disputes the Government's arguments regarding specificity. *See* Pl.'s Resp. at 19. Honeywell argues that neither heading 8801 nor 8802 is a basket provision because they each cover a specific type of aircraft by name, namely, powered or non-powered. *See id.* The Government offers no arguments in response. *See* Def.'s Reply at 19–20 (merely stating that "because [P]laintiff's classification is inapplicable, classification under subheading 6307.90.98, HTSUS, is appropriate").

As an initial matter, the imported segments are *prima facie* classifiable in heading 6307. The imported segments consist of a nonwoven

PAN fiber fabric, i.e., a textile.[21] Pl.'s SOF ¶¶ 11–12; Def.'s Resp. Pl.'s SOF ¶¶ 11–12; *see also* HTSUS Ch. 63 Note 1. The segments have the "look and feel" of "fabric material," Def.'s SOF ¶ 4; Pl. Resp. Def.'s SOF ¶ 4; Def.'s Physical Exs. 2–4. They are "arc-shaped," Def.'s SOF ¶ 3; Pl. Resp. Def.'s SOF ¶ 3, and, thus, "made up" for purposes of heading 6307, *see* HTSUS Section XI Note 7(a). Accordingly, the segments are *prima facie* classifiable under heading 6307. However, heading 6307 covers only those articles "which are not included more specifically in other headings of Section XI or elsewhere in the Nomenclature." EN 63.07.[22]

To that end, the court disagrees with the Government's argument that heading 6307 more specifically describes the segments. The court has previously recognized that heading 6307 is a basket provision because it covers "Other made up articles, including dress patterns." *See Allstar Mktg. Grp., LLC v. United States*, 41 CIT __, __, 211 F. Supp. 3d 1319, 1337 n.26 (2017).[23] Heading 8803 covers "Parts of goods of heading 8801 or 8802." While the court has used the shorthand, "parts of aircraft," in reference to heading 8803 to incorporate the language of heading 8802, the latter heading specifically covers "Other aircraft (for example, helicopters, airplanes); spacecraft (including satellites) and suborbital and spacecraft launch vehicles." While heading 8802 uses the term "other," it also specifies examples of what those "other" aircraft are, and that includes "airplanes." When "goods are, *prima facie*, classifiable under two or more headings," GRI 3(a) requires classification in the heading that contains "the most specific description" of the article rather than in a heading that contains a "more general description." The phrase "other made up articles" is more general than a heading that effectively provides for parts of "other aircraft," particularly when those "other aircraft" are specified in the heading to include airplanes. Moreover, the requirements of heading 8803 are more difficult to satisfy. *See Orlando Food Corp.*, 40 F.3d at 1441 (stating the rule). The Government's vague references to "basket elements" in headings 8801 and 8802 and

[21] "When the HTSUS does not define a tariff term, the term receives its 'common and popular meaning,'" for which the "court may consult 'dictionaries, scientific authorities, and other reliable information sources.'" *Rollerblade*, 282 F.3d at 1352 (citations omitted). The term "textile" may be defined as "any cloth or goods produced by weaving, knitting, or felting." *Textile*, Dictionary.com, https://www.dictionary.com/browse/textile (last visited Jan. 30, 2025).

[22] Pursuant to ARI 1(c), a parts provision "shall not prevail over a specific provision for such part."

[23] In *Allstar*, the court declined to consider heading 6307 as an alternative classification after finding that GRI 3(a) would require classification under heading 6301 as the more specific provision. 211 F. Supp. 3d at 1337 n.26. Here, however, the court considers heading 6307 in light of the Government's argument that heading 6307 is more specific to the segments than heading 8803.

the dictates of "logic" unsupported by citations to authority do not persuade the court to find otherwise. Accordingly, the segments must be classified in heading 8803.[24]

CONCLUSION

The court finds that the imported segments must be classified under heading 8803. In the absence of any dispute as to the proper subheading, the court further finds that the imported segments must be classified under subheading 8803.20.00. The court will grant Plaintiff's motion for summary judgment and will deny the Government's cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: January 30, 2025
New York, New York

/s/ Mark A. Barnett
Mark A. Barnett, Chief Judge

[24] The court independently considered other tariff classifications, including heading 5603 discussed in the Government's moving brief. *See* Def.'s Cross-Mot. at 15 n.8. The court agrees that classification in Chapter 56 is precluded by Section XI Note 8, which states that Chapter 56 does not apply to goods that are "made up within the meaning of" Section XI Note 7. The segments are "made up" for purposes of Note 7(a).

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