U.S. Court of International Trade

Slip Op. 17–172

LF USA, Inc., Plaintiff, v. United States, Defendant.

Before: Claire R. Kelly, Judge
Court No. 16–00087

[Denying Plaintiff's motion for summary judgment and granting Defendant's cross-motion for summary judgment.]

Dated: December 22, 2017
Amended: January 22, 2018

John Blaise Pellegrini, McGuireWoods, LLP, of New York, NY, for LF USA, Inc.

Jamie L. Shookman, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, International Trade Field Office, of New York, NY, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of Counsel on the brief was *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Kelly, Judge:

The action before the court concerns the classification of imported children's clogs. Plaintiff, LF USA, Inc., moves for summary judgment, requesting the court to find as a matter of law that Plaintiff's imports are properly classified within subheading 6401.99.80, Harmonized Tariff Schedule of the United States (2014) ("HTSUS"),[1] and requesting the court to order United States Customs and Border Protection ("CBP") to reliquidate the subject entries as such and refund the excess duties paid with interest. Pl.'s Mot. Summary J., July 7, 2017, ECF No. 21; Pl.'s Mem. Supp. Mot. Summary J., July 7, 2017, ECF No. 21–1 ("Pl.'s Br."). Defendant opposes the motion and cross-moves for summary judgment, requesting the court to find as a

[1] All references to the HTSUS refer to the 2014 edition, the most recent version of the HTSUS in effect at the time of the last entries of subject merchandise. *See* Pl.'s Statement of Material Facts Not In Dispute ¶ 1, July 7, 2017, ECF No. 21–2; Def.'s Resp. Pl.'s Rule 56.3 Statement of Material Facts to Which There Is No Genuine Dispute ¶ 1, Aug. 14, 2017, ECF No. 25–1. The 2011 and 2013 editions of the HTSUS, in effect respectively when Plaintiff entered the rest of the subject merchandise, are the same in relevant part to the 2014 edition.

matter of law that the imports are properly classified within subheading 6402.99.31, HTSUS, within which CBP classified and liquidated the subject entries. Def.'s Cross Mot. Summary J., Aug. 14, 2017, ECF No. 25; Mem. Opp'n Pl.'s Mot. Summary J. and Supp. Def.'s Cross-Mot. Summary J., Aug. 14, 2017, ECF. No. 25 ("Def.'s Br."). For the reasons that follow, Plaintiff's motion is denied and Defendant's motion is granted.

BACKGROUND

At issue is the proper classification of six entries of children's clogs. Pl.'s Statement of Material Facts Not In Dispute ¶ 1, July 7, 2017, ECF No. 21–2 ("Pl.'s 56.3 Statement"); Def.'s Resp. Pl.'s Rule 56.3 Statement of Material Facts to Which There Is No Genuine Dispute ¶ 1, Aug. 14, 2017, ECF No. 25–1 ("Def.'s Resp. Pl.'s 56.3 Statement"). CBP classified and liquidated the subject entries under subheading 6402.99.31, HTSUS, Pl.'s 56.3 Statement ¶ 2; Def.'s Resp. Pl.'s 56.3 Statement ¶ 2, which provides:

> Other footwear with outer soles and uppers of rubber or plastics: Other footwear: Other: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having a foxing or a foxing-like band applied or molded at the sole and overlapping the upper and except footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather): Other: Other.

Subheading 6402.99.31, HTSUS, dutiable at 6 percent.

Plaintiff timely filed administrative protests challenging CBP's classification of the subject merchandise under subheading 6402.99.31, HTSUS, and asserting that the proper classification for the entries is subheading 6401.99.80, HTSUS. Pl.'s 56.3 Statement ¶ 3; Def.'s Resp. Pl.'s 56.3 Statement ¶ 3. Subheading 6401.99.80, HTSUS, provides:

> Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Other footwear: Other: Other: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper).

Subheading 6401.99.80, HTSUS, duty free. CBP denied Plaintiff's protests. Pl.'s 56.3 Statement ¶ 4; Def.'s Resp. Pl.'s 56.3 Statement ¶ 4.

Plaintiff commenced this action to contest CBP's denial of its protests. Summons, May 25, 2016, ECF No. 1; Compl., July 20, 2016, ECF No. 6. Plaintiff alleges that the subject merchandise was improperly classified within subheading 6402.99.31, HTSUS, and is instead classifiable within subheading 6401.99.80, HTSUS. Compl. ¶¶ 12–13. Specifically, Plaintiff alleges that the subject merchandise is classifiable within subheading 6401.99.80, HTSUS, *id.* at ¶ 13, because the shoes are waterproof and complete and fully functional without the back strap, such that the strap is not an essential element of the upper. Pl.'s Br. 3, 7–13. Plaintiff contends that the shoe's backstrap is an "auxiliary element of the shoe," *id.* at 3, which does not assemble the upper, as would preclude classification within subheading 6401.99.80, HTSUS. *Id.* at 3, 8–10. Defendant contends that the shoes are not classifiable within subheading 6401.99.80, HTSUS, because they are not waterproof for classification purposes, the rubber strap is an essential part of the upper rather than an attachment, and the upper is assembled by riveting. *See* Def.'s Br. 7–19. Defendant argues that the shoes are precluded from classification within subheading 6401.99.80, HTSUS, and are accordingly properly classified within subheading 6402.99.31. *Id.* at 19–20.

JURISDICTION AND STANDARD OF REVIEW

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

The court will grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). In order to raise a genuine issue of material fact, it is insufficient for a party to rest upon mere allegations or denials, but rather that party must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

UNDISPUTED FACTS

The subject merchandise, six entries of imports of children's clogs, entered at the port of Los Angeles between 2011 and 2014. Pl.'s 56.3 Statement ¶ 1; Def.'s Resp. Pl.'s 56.3 Statement ¶ 1. The clogs have a closed toe and open heel. Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8. The clogs have "an upper and outer sole of rubber or plastics" and "a separate rubber or plastics heel strap," which is "attached" by "single rubber or plastic rivet at each end of the strap." Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8. "The strap may be moved forward to rest on the front of the clog."[2] Pl.'s 56.3 Statement ¶ 9; Def.'s Resp. Pl.'s 56.3 Statement ¶ 9. The subject merchandise "does not provide protection against water, oil, grease, or chemicals or cold or inclement weather." Pl.'s 56.3 Statement ¶ 14; Def.'s Resp. Pl.'s 56.3 Statement ¶ 14.

DISCUSSION

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

[2] Plaintiff contends that "[t]here is agreement that the clog is complete and usable as footwear without the strap or with the strap moved forward to rest on the front of the clog." Pl.'s Br. 9. However, Defendant does not admit as an undisputed fact that the clog is complete and usable without the strap in place at the back of the heel. *See* Def.'s Resp. Pl.'s 56.3 Statement ¶ 12. Specifically, Defendant

> [a]vers that it is unclear what is meant by "complete" and "useable," as these terms are not defined. Admits that a user could wear the imported footwear without the rubber strap or with the strap moved forward to rest on the front of the clog, but avers that the strap is an essential part of the imported footwear because it "can be used to secure the shoe to the foot," and because a user's foot might slip out of the imported footwear if that person were to wear it without the strap, or with the strap moved forward to rest on the front of the clog.

Id. (citations omitted). Accordingly, the court does not consider the parties to be in agreement as to whether the clog is "complete and usable as footwear without the strap" in place at the back of the heel, despite Plaintiff's statement to the contrary. *See* Pl.'s Br. 9. This disagreement is not relevant to the court's determination of the case.

A. The Meaning of the Tariff Terms

Classification of merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation ("GRIs") and the Additional United States Rules of Interpretation. *See Roche Vitamins, Inc. v. United States*, 772 F.3d 728, 730 (Fed. Cir. 2014). The GRIs are applied in numerical order beginning with GRI 1 which provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes," *La Crosse Technology, Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013), which are part of the HTSUS statute. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). The Additional U.S. Notes included within the Chapter Notes "'are legal notes that provide definitions or information on the scope of the pertinent provisions or set additional requirements for classification purposes.'" *Del Monte Corp. v. United States*, 730 F.3d 1352, 1355 (Fed. Cir. 2013) (quoting *What Every Member of the Trade Community Should Know About: Tariff Classification* 32 (U.S. Customs & Border Prot. May 2004). These Additional U.S. Notes are also part of the legal text of the HTSUS, *see* Preface at 1 n.2, HTSUS, and are accordingly "statutory provisions of law." *Del Monte Corp.*, 730 F.3d at 1355 (internal quotation marks omitted).

The terms of the HTSUS are "construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). The court defines HTSUS tariff terms relying upon its own understanding of the terms and "may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc.*, 195 F.3d at 1379 (citation omitted). The court may also be aided by the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes") to help construe the relevant chapters where appropriate. *See StoreWALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011). Although the "Explanatory Notes are not legally binding, [they] may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision." *Roche Vitamins*, 772 F.3d at 731.

Heading 6402, HTSUS, under which CBP liquidated Plaintiff's merchandise, covers "Other footwear with outer soles and uppers of rubber or plastics." Heading 6402, HTSUS. Heading 6401, HTSUS, covers "Waterproof footwear with outer soles and uppers of rubber or plastics." Heading 6401, HTSUS. No other heading applies to foot-

wear with outer soles and uppers of rubber or plastics. *See* Chapter 64, HTSUS. Heading 6402 is an "other" category for footwear with outer soles and uppers of rubber or plastics not classifiable within heading 6401.

The court must first look to the words of the tariff to discern its meaning. Plaintiff's preferred heading 6401, HTSUS, covers "[w]aterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. Note 3 of the Additional U.S. Notes to Chapter 64 provides that "[f]or the purposes of heading 6401, 'waterproof footwear' means footwear specified in the heading, designed to protect against penetration by water or other liquids, whether or not such footwear is primarily designed for such purposes."[3] Additional U.S. Note 3, Chapter 64, HTSUS. Therefore, waterproof footwear must protect the foot by not allowing water or other liquid to penetrate the shoe. Plaintiff suggests a much narrower interpretation of the phrase "waterproof footwear." *See* Pl.'s Br. 7–8; *see also* Pl.'s Sur-Reply 2, Oct. 27, 2017, ECF No. 32–1. Plaintiff argues that the tariff language "the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes" suggests that the term "waterproof footwear" refers only to the method of assembling the footwear. Pl.'s Br. 7–8 ("The limited scope of the prohibition strongly suggests that 'waterproof' refers to the means of assembly. It is not intended to mean that footwear must be impervious to water.").

In the phrase "waterproof footwear," the word "waterproof" modifies "footwear," not assembly or construction.[4] Therefore the footwear is

[3] Several dictionary definitions aid the court in discerning the common and commercial meaning of "waterproof." *See Waterproof, Oxford English Dictionary* Vol. XIX, 1003 (J.A. Simpson & E.S.C. Weiner eds., Oxford University Press, 2nd ed. 1989) (*Waterproof*: impervious to water; capable of resisting the deleterious action of water.); *Waterproof, Webster's Third New International Dictionary* 2584 (Philip Babcock Gove, Ph.D. and Merriam-Webster Editorial Staff eds., Merriam-Webster, Incorporated 1993) (*Waterproof*: 1a: impervious to water: as covered or treated with a material (as a solution ofrubber) to prevent permeation by water.); *Waterproof*, oed.com, *available at* http://www.oed.com/view/Entry/226269?rskey=D3Xshs&result=1&isAdvanced=false#eid (last visited Dec. 19, 2017) (*Waterproof*: Impervious to water, impermeable; That is not damaged or washed away by water.); *Waterproof*, Merriam-Webster.com, *available at* https://www.merriamwebster.com/dictionary/waterproof (last visited Dec. 19, 2017) (*Waterproof*: Impervious to water; Especially: covered or treated with a material (such as a solution of rubber) to prevent permeation by water.).

[4] Further, the Explanatory Notes clarify that heading 6401 covers footwear "of rubber . . . , plastics or textile material with an external layer of rubber or plastics being visible to the naked eye . . ., *provided* the uppers are neither fixed to the sole nor assembled by the processes named in the heading." Explanatory Note 64.01 to Chapter 64 (2014) (emphasis in original). This phrasing also clarifies that the waterproof requirement does not refer to the method of assembly.

what protects, not what is protected. Further, contrary to Plaintiff's position, the words of the heading indicate that the drafters envisioned two requirements for footwear covered within heading 6401: 1) that the footwear is waterproof, and 2) that the uppers are neither fixed to the sole nor assembled by any of the enumerated processes. *See* Heading 6401, HTSUS. This interpretation is reinforced by the accompanying Explanatory Notes, which provide that "[n]on-waterproof footwear [of rubber or plastics] produced in one piece (for example, bathing slippers)" are classifiable within heading 6402. Explanatory Note 64.02(f) to Chapter 64 (2014). By identifying "non-waterproof footwear" of rubber or plastics produced in one piece as a category distinct from waterproof footwear, the clarification indicates that, even if footwear is made of rubber or plastics and is of single piece construction (in which case the uppers are neither fixed to the sole nor assembled by any of the enumerated processes), the footwear must still also be waterproof to be classifiable within heading 6401. The Explanatory Note therefore confirms that there are two separate requirements to classification within heading 6401. It indicates that "waterproof footwear" means something more than footwear made of plastics or rubber. *See* Heading 6401, HTSUS. Accordingly, Plaintiff's more narrow interpretation of "waterproof footwear" is unpersuasive.[5]

Plaintiff also argues that a narrow interpretation of heading 6401 is necessary, contending that, without such an interpretation, subheading 6401.99, which provides for footwear "[d]esigned to be worn over, or in lieu of other footwear as a protection against water," would not make sense. *See* Pl.'s Br. 8. Plaintiff's theory seems to be that if all subheadings within heading 6401 were meant to be impervious to water, then this subheading would not be necessary. Plaintiff's argument ignores the fact that subheading 6401.99, HTSUS, identifies a special subset of waterproof footwear, i.e., footwear that is "designed to be worn over, or in lieu of, other footwear as protection against water, oil, grease or chemicals or cold or inclement weather." *See* Subheading 6401.99, HTSUS. Contrary to Plaintiff's suggestion, it is not illogical that there may be some footwear which is specifically designed to provide protective properties for the user, and that those styles of footwear would also be considered "waterproof footwear." Furthermore, Additional U.S. Note 3 to Chapter 64 specifies that

[5] The court rejects Plaintiff's argument that "waterproof footwear" cannot mean "impervious to water" because "Heading 6401 includes HTSUS subheadings 6401.99.80 and 6401.99.90, both cover footwear that does not provide protection against water, *i.e.*, footwear that is not impervious to water," *see* Pl.'s Br. 8, because it assumes the answer to the question at issue here: whether subheadings 6401.99.80 and 6401.99.90, HTSUS, require that the footwear be impervious to water.

"waterproof footwear" refers to footwear that is "designed to protect against penetration by water or other liquids, whether or not such footwear is primarily designed for such purposes." *See* Additional U.S. Note 3, Chapter 64, HTSUS. This phrasing recognizes that some waterproof footwear is primarily designed for waterproof protection while other waterproof footwear is not designed primarily to protect the wearer from water or other liquids, but nonetheless is designed to be waterproof.

Heading 6401 also requires that footwear be made of plastic or rubber uppers which are "neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. The HTSUS does not define "uppers," and the parties both proffer definitions for the term. Defendant supplied several sources to support its interpretation of "upper" as

> '. . . part of the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole. An "Upper" can cover the whole leg, thigh, hips, and chest (e.g., fishermen's chest waders) or can consist simply of straps, laces or thongs (e.g., Roman sandals).' This definition is confirmed by dictionaries, which define the "upper" as the part of the shoe above the sole that covers the top and sides of the foot.

Def.'s Br. 9 (quoting *Footwear Definitions*, Treasury Decision 93–88, 27 Cust. B. & Dec. 312, 312 (Oct. 25, 1993) ("Treasury Decision 93–88"); other citations omitted). Plaintiff "asserts that the upper is that part of a shoe covering the top and sides of the foot when the upper and sole are a unit." Pl.'s Reply Mem. Supp. Its Mot. Summary J. & Opp'n Def.'s Cross Mot. Summary J. 3, Sept. 14, 2017, ECF No. 26. Plaintiff quotes Treasury Decision 93–88 for the interpretation that "'[t]he "upper" is[]that portion of the shoe which covers the sides and top of the foot if there is no separate sole.'" *Id.* The definitions provided by Plaintiff and Defendant are not at odds. The upper is the part of the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole. Footwear within heading 6401 must have uppers that are "neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. This language means that footwear covered by heading 6401 is not created using any of the prohibited processes to affix the sole to the upper or to assemble various parts of the upper.

Heading 6402, HTSUS, covers "[o]ther footwear with outer soles and uppers of rubber or plastics." Heading 6402, HTSUS. Heading 6401, HTSUS, covers waterproof footwear with outer soles and up-

pers of rubber or plastics. Heading 6401, HTSUS. As heading 6402 is an "other" category for footwear not classifiable within heading 6401, the meaning of the tariff term is dependent upon the meaning of heading 6401. "Other footwear with outer soles and uppers of rubber or plastics" refers to footwear with outer soles and uppers (the part of the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole) of rubber or plastics, which do not meet the definitions above for the tariff terms within heading 6401, HTSUS.

B. The Merchandise at Issue

Here, there is no dispute as to the nature of the subject merchandise. The parties agree that the merchandise is children's clogs that have a closed toe and open heel. Pl.'s 56.3 Statement ¶¶ 6, 8; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 6, 8. The parties also agree that the footwear has "an upper and outer sole of rubber or plastics" and "a separate rubber or plastics heel strap," which is "attached" by a "single rubber or plastic rivet at each end of the strap," Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8, which "may be moved forward to rest on the front of the clog." Pl.'s 56.3 Statement ¶ 9; Def.'s Resp. Pl.'s 56.3 Statement ¶ 9. It is undisputed that the footwear "does not provide protection against water, oil, grease, or chemicals or cold or inclement weather." Pl.'s 56.3 Statement ¶ 14; Def.'s Resp. Pl.'s 56.3 Statement ¶ 14.

C. The Proper Classification of the Goods

The first requirement of footwear covered within heading 6401, HTSUS, is that the footwear is waterproof. As discussed above, "waterproof footwear" is footwear that protects the foot by not allowing water or other liquid to penetrate the shoe. It is undisputed that "the subject footwear does not provide protection against water, oil, grease, or chemicals or cold or inclement weather." Pl.'s 56.3 Statement ¶ 14; Def.'s Resp. Pl.'s 56.3 Statement ¶ 14. Accordingly, the subject merchandise does not fit within the definition of "waterproof footwear," and, as a matter of law, the subject footwear is not classifiable as "[w]aterproof footwear" within heading 6401, HTSUS.

Additionally, footwear covered by heading 6401, HTSUS, must have uppers of plastics or rubber "which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. An "upper" is the part of the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole. The court does not need to reach the issue as to whether the subject merchandise is footwear having "uppers of plastics or rubber which are neither fixed

to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes" because the court has found that the subject merchandise does not fit within definition of "waterproof footwear" such that it is not classifiable within heading 6401.[6]

CONCLUSION

For the foregoing reasons, the subject merchandise at issue in this case is properly classifiable within subheading 6402.99.31, HTSUS. Therefore, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted. Judgment will enter accordingly.

Dated: December 22, 2017
New York, New York

Amended: January 22, 2018
New York, New York

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

[6] Although the court does not reach the issue here, the court has serious concerns about whether, even if the footwear were determined to be waterproof, the subject merchandise would be classifiable within heading 6401 because of the heel strap. Footwear classifiable within heading 6401 must have uppers that are "neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. The court interprets this phrase to mean that footwear covered by heading 6401 does not use any of the prohibited processes to either affix the sole to the upper or to assemble various parts of the upper. The upper is that portion of the shoe which covers the sides and top of the foot. It is undisputed that the subject merchandise has a plastic or rubber upper with "a separate rubber or plastics heel strap," which is "attached" by "single rubber or plastic rivet at each end of the strap." Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8. The strap appears to be part of the upper. It is undisputed that the strap is attached with riveting, *see* Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8, and it is therefore likely that the strap would preclude the clog being classified in plaintiff's preferred subheading.

Slip Op. 18–3

ITOCHU BUILDING PRODUCTS CO., INC., TIANJIN JINGHAI COUNTY HONGLI INDUSTRY & BUSINESS CO., LTD., HUANGHUA JINHAI HARDWARE PRODUCTS CO., LTD., TIANJIN JINCHI METAL PRODUCTS CO., LTD., SHANDONG DINGLONG IMPORT & EXPORT CO., LTD., TIANJIN ZHONGLIAN METALS WARE CO., LTD., HUANGHUA XIONGHUA HARDWARE PRODUCTS CO., LTD., SHANGHAI JADE SHUTTLE HARDWARE TOOLS CO., LTD., SHANGHAI YUEDA NAILS INDUSTRY CO., LTD., SHANXI TIANLI INDUSTRIES CO., LTD., MINGGUANG ABUNDANT HARDWARE PRODUCTS CO., LTD., CHINA STAPLE ENTERPRISE (TIANJIN) CO., LTD., and CERTIFIED PRODUCTS INTERNATIONAL INC., Plaintiffs, .v. UNITED STATES, Defendant, MID CONTINENT NAIL CORPORATION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 13–00132
PUBLIC VERSION

[Commerce's final remand redetermination results in antidumping duty administrative review sustained.]

Dated: January 18, 2018

Bruce M. Mitchell, Andrew Thomas Schutz, Dharmendra Narain Choudhary and *Ned Herman Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, and Washington, D.C., for plaintiffs Itochu Building Products Co., Inc., Tianjin Jinghai County Hongli Industry & Business Co., Ltd., Huanghua Jinhai Hardware Products Co., Ltd., Tianjin Jinchi Metal Products Co., Ltd., Shandong Dinglong Import & Export Co., Ltd., Tianjin Zhonglian Metals Ware Co., Ltd., Huanghua Xionghua Hardware Products Co., Ltd., Shanghai Jade Shuttle Hardware Tools Co., Ltd, Shanghai Yueda Nails Industry Co., Ltd., Shanxi Tianli Industries Co., Ltd., Mingguang Abundant Hardware Products Co., Ltd., China Staple Enterprise (Tianjin) Co., Ltd., and Certified Products International Inc.

Sosun Bae, Lead Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Also on the brief was *Tara Kathleen Hogan*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice. Of counsel on the brief was *Jessica Rose DiPietro*, Attorney, International Trade Administration, U.S. Department of Commerce.

Adam Henry Gordon, and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for defendant-intervenor Mid Continent Nail Corporation.

OPINION

Restani, Judge:

In this action, Plaintiffs Itochu Building Products Co., Inc., Tianjin Jinghai County Hongli Industry & Business Co., Ltd., Huanghua Jinhai Hardware Products Co., Ltd., Tianjin Jinchi Metal Products Co., Ltd., Shandong Dinglong Import & Export Co., Ltd., Tianjin Zhonglian Metals Ware Co., Ltd., Huanghua Xionghua Hardware Products Co., Ltd., Shanghai Jade Shuttle Hardware Tools Co., Ltd., Shanghai Yueda Nails Industry Co., Ltd., Shanxi Tianli Industries

Co., Ltd., Mingguang Abundant Hardware Products Co., Ltd., China Staple Enterprise (Tianjin) Co., Ltd., and Certified Products International Inc. (collectively "Itochu"), challenge the U.S. Department of Commerce ("Commerce")'s final redetermination results pursuant to *Itochu Building Products Co., Inc. v. United States*, Slip Op. 17–66, 2017 WL 2438835 (CIT June 5, 2017) ("*Itochu I"). Final Results of Redetermination Pursuant to Itochu Building Products Co., Inc. v. United States Court No. 13–132, Slip Op. 17–66 (Ct. Int'l Trade June 5, 2017)*, A-570–909, Remand (Dep't Commerce August 21, 2017) ("*Remand Results*"). Itochu requests that the court hold Commerce's redetermination decision, to value wire rod based on Global Trade Atlas ("GTA") import data from Thailand rather than Metal Expert data from Ukraine, is not supported by substantial evidence. Accordingly, Itochu requests that Commerce select Metal Expert data, instead of Thai GTA import data, to value the principal input in subject nails – steel wire rods – whether or not Ukraine is ultimately selected as the primary surrogate country. The court suggested that this might be the appropriate result if the primary input value was from the Ukraine. *Itochu I* at *7. Conversely, Defendant, the United States, requests the court sustain Commerce's *Remand Results*.

BACKGROUND

On October 3, 2011, Commerce initiated a third administrative review of the antidumping duty order on certain steel nails from the People's Republic of China ("China"), covering the period of review ("POR") from August 1, 2010 through July 31, 2011. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 76 Fed. Reg. 61,076, 61,076–84 (Dep't Commerce October 3, 2011). On March 18, 2013, Commerce published the final results from that review. *See Certain Steel Nails From the People's Republic of China; Final Results of Third Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 16,651, 16,651–54 (Dep't Commerce March 18, 2013) ("*Final Results"); see also Certain Steel Nails From the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Third Antidumping Duty Administrative Review* A-570–909, POR 08/01/2010–07/31/2011 (Dep't Commerce March 5, 2013) ("*I&D Memo*").[1] Specifically, Itochu challenged Commerce's selection of

[1] Because Commerce considers China a non-market economy ("NME"), Commerce creates a hypothetical market value for steel nails in conducting its review. *See Downhole Pipe & Equip. LP v. United States*, 887 F. Supp. 2d 1311, 1320 (CIT 2012) (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999)). To construct such a value, Commerce relies on data from a market economy or economies to provide surrogate values

surrogate financial statements and surrogate valuation for steel wire rod, the main input in steel nails, arguing that: (1) GTA steel wire rod import data from Thailand were not the best available; and (2) financial statement data from Thai companies were not the best available.[2] *See Itochu I* at *2–*7.

On June 5, 2017, the court remanded the *Final Results* for Commerce to reconsider its selection of Thai import data as a surrogate value for steel wire rod, specifically directing Commerce to make two determinations: (1) whether Thai GTA import data, Ukrainian GTA import data, and Ukrainian Metal Expert data are "comparably specific"; and (2) whether diameter or carbon content is a more important factor in determining whether a surrogate source provides prices specific to the steel wire rod used by respondents. *Itochu I* at *7–*8. In the *Remand Results*, Commerce found that Thai import data were still the best available, and provided revised rationale for this conclusion. *Remand Results* at 1.

On remand, Commerce reconsidered its evaluation of the surrogate valuation of the main input, steel wire rod. *Id.* Specifically, Commerce reconsidered two factors in determining the relative specificity of Ukrainian Metal Expert, Ukrainian GTA, and Thai GTA data sets: wire rod diameter and carbon content of the steel. *Id.* at 4. Commerce determined, contrary to its previous conclusion, that the three data sources for valuing steel wire rod are not comparably specific to the wire rod input. *Id.* at 3. Commerce first considered whether the data were: (1) publically available; (2) contemporaneous with the period of review; (3) representative of a broad-market average; (4) from an approved surrogate country; and (5) tax- and duty-exclusive. *Id.* at 4–5. Commerce determined that Thai and Ukrainian GTA import data met each of these criteria, but on reexamination found that

for the various factors of production used to manufacture the subject merchandise. *See* 19 U.S.C. § 1677b(c)(1)(B). In addition, Commerce uses financial statements from producers of identical or comparable merchandise to yield surrogate financial ratios to calculate "general expenses and profit" for inclusion in normal value. *See Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 366 F. Supp. 2d 1264, 1277 n.7, 29 CIT 288, 303 n.7 (2005).

[2] Commerce identified six potential surrogate countries on the record that were at a level of economic development comparable to China and were significant producers of comparable merchandise, but only two countries, Thailand and Ukraine, had record data for sourcing surrogate values. *Certain Steel Nails From the People's Republic of China: Preliminary Results and Partial Rescission of the Third Antidumping Administrative Review*, 77 Fed. Reg. 53,845, 53,848 (Dep't Commerce September 4, 2012). Of these, Commerce determined that Thailand provided the best opportunity to use quality, publicly available data, and that Thai financial statements were usable, unlike Ukrainian financial statements. Thus, Commerce selected Thailand as the primary surrogate country and used the audited, publicly available Thai data to value respondents' inputs. I&D Memo at 12–13.

Ukrainian Metal Expert data were not exclusive of taxes. *Id.* at 5–6. Commerce then reviewed Thai and Ukrainian GTA data sets to determine which was more specific to respondents'[3] steel wire rod input, finding the Thai data set superior. *Id.* at 15–16.

Commerce also addressed the court's concerns with respect to the importance of carbon content in determining whether certain data are specific to the inputs utilized. *Id.* at 8–10. As an initial matter, Commerce explained that rod diameter and carbon content are two physical characteristics of steel wire rod, the main input used by respondents. *Id.* at 8. Accordingly, Commerce stated that a data source more specific to *both* of these physical characteristics is generally more specific to the input. *Id.* at 9. Additionally, Commerce stated that carbon content is more important than diameter because "carbon content is the only characteristic to remain intact/unchanged during the production process from the steel wire rod input to the steel nail output." *Id.*

Commerce determined that Ukrainian GTA data and Thai data are preferable to Ukrainian Metal Expert data because Ukrainian Metal Expert data were not tax exclusive and do not include diameter-specific data corresponding to the input of one of the respondents. *Id.* at 6–7. Because record evidence demonstrates that Thai GTA data are more specific to the carbon content of wire rod consumed by respondents than Ukrainian GTA data, Commerce determined that Thai GTA data was more specific on both physical characteristics. *Id.* at 10–11. Commerce thus determined that Thai GTA data constitutes the best available evidence to value Itochu's wire rod input and the principal surrogate country would remain Thailand. *Id.* at 11.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

Itochu alleges Commerce's *Remand Results* are deficient in four respects. First, Thai GTA import data (which combines steel rods and

[3] The examined mandatory respondents were Tianjin Jinghai County Hongli Industry & Business Co., Ltd. ("Hongli"), and Stanley Black & Decker, Inc., The Stanley Works (Langfang) Fastening Systems Co., Ltd., and Stanley Fastening Systems LP ("Stanley"). *I&D Memo* at 1. Only Hongli received a positive rate. *Final Results*, 78 Fed. Reg. at 16,653. Thus, its rate became the rate for all respondents who established that they were separate from the China-wide entity, such as Itochu. *See* id.

steel bars) is not product-specific, unlike Ukrainian Metal Expert data (which is limited to steel wire rod). Pl. Comments at 4–11. Second, Metal Expert data is significantly less distorted and more specific than Thai GTA data in terms of the diameter of steel wire rod consumed by the respondents. *Id.* at 11–17. Third, carbon content is not only a less important physical attribute as compared to the diameter of steel wire rod, but it has no discernible influence on the price of steel wire rod, which is priced and commercially traded based on its diameter. *Id.* at 17–23. And finally, the record provides all information necessary to compute a tax exclusive value for steel wire rod from Metal Expert data. *Id.* at 23–24.

The court begins by observing the general principle that Commerce is granted "considerable discretion in choosing the 'best available information' on the record." *Changshan Peer Bearing Co., Ltd. v. United States*, 44 F. Supp. 3d 1399, 1407 (CIT 2015) (citing *Nation Ford*, 166 F.3d at 1377–78; *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011).

I. Thai GTA Data Is Not Rendered Unusable By The Potential Inclusion of Steel Bars

In its opinion ordering remand, the court noted a seemingly important difference between Thai GTA data and Metal Expert data, that: "Metal Expert data reports prices for wire rods with a diameter of 6.5 mm to 8 mm, whereas GTA import data reports prices for wire rods *and bars* with a diameter of 14 mm and under." *Itochu I* at *4 (emphasis added). The court questioned whether "a category which also covers bars is even probative." *Id.*

In its redetermination, Commerce reviewed whether the Thai HTS category used was distortive. Itochu argued that the six-digit HTS for Ukraine includes bar, and thus bar must be included in the eleven-digit Thai tariff code. *Remand Results* at 15; *First Surrogate Value Submission: Third Antidumping Duty Administrative Review of Certain Steel Nails From the People's Republic of China*, A-570–909, POR 08/01/10–07/31/11, at Ex.4, p.104 (April 30, 2012) ("Itochu Surrogate Value Submission") (English-language description for Ukrainian HTS categories reading: "bars and rods, in irregularly wound coils, of iron or non-alloy steel: Of circular cross-section measuring less than 14 mm in diameter: Other"). Commerce determined that the record does not definitively demonstrate that the more specific HTS categories it used contain steel bar.[4] *Remand Results* at 15. Commerce

[4] The four Thai HTS categories, which Commerce averaged, include: "(1) HTS 7213.91.0010 "Wire Rod Less Than 14 mm in Diameter, Containing By Weight Not More Than 0.08% of Carbon"; (2) HTS 7213.91.00.20 "Wire Rod Less Than 14 mm in Diameter, Containing By Weight More Than 0.08% But Not More Than 0.10% Of Carbon"; (3) HTS 7213.91.00.30

explained that "[t]he record does not contain the full description of the Thai HTS classifications," but contains only references to carbon content. *Remand Results* at 15. *See Certain Steel Nails From the People's Republic of China: Submissions of Surrogate Values*, A-570–909, POR 08/01/2010–07/31/2011 at Ex.1, p.3 (April 30, 2012) (Thai GTA data from Mid-Continent Nail Corporation). Moreover, it appears to the court that the carbon specific categories of small round stock Commerce now states it used are unlikely to contain unrelated product.

Itochu asserts that Commerce failed to share its alleged analysis of product descriptions under specific Thai HTS subheadings – six digits and beyond – with the parties to the original *Final Results*, and insists it is unclear why Commerce concluded that all Thai HTS subheadings used in the *Final Results* did not include both bars and rods. Pl. Comments at 10. According to Itochu, at a minimum, Commerce should have specified at least one Thai HTS subheadings used in the *Final Results* that was specific and exclusive to rod, and not bar. *Id.* Rather than performing a comprehensive analysis, considering all record evidence including that which detracted from its findings, Itochu claims Commerce instead chose to offer an unsupported conclusion that is contrary to substantial record evidence. *Id.*

First, the notice issue with regard to exactly which HTS categories were used was rectified during the remand proceedings. *I&D Memo* at 17. Second, there is no actual evidence that the HTS categories used contained bar. *See id*; Surrogate Value Memo at Attach. 2. Finally, the potential inclusion of bar is not necessarily determinative as to whether the categories are sufficiently probative as to input value. Ultimately, Commerce found the diameter and carbon content specifications of the Thai GTA data sufficient. *Remand Results* at 15–17. The record data does not require a different result, as will be discussed further *infra*.

II. Substantial Evidence Supports Commerce's Finding That Ukrainian GTA Data And Thai GTA Data Are More Probative Than Metal Expert Data, Even As To Diameter

Commerce's determination on remand that GTA data are more specific than Ukrainian Metal Expert data is supported by substantial evidence. Commerce found that Ukrainian Metal Expert data is only partially specific to the steel wire rod inputs used by respon-

"Wire Rod Less Than 14 mm in Diameter, Containing By Weight More Than 0.10% But Not More Than 0.18% Of Carbon"; and (4) HTS 7213.91.00.40 "Wire Rod Less Than 14 mm in Diameter, Containing By Weight More Than 0.18% But Less Than 0.25% Of Carbon." *I&D Memo* at 17. *See also Antidumping Administrative [sic] at Certain Steel Nails From the People's Republic of China: Surrogate Values for the Final Results*, A-570–909, POR 08/01/2010–07/31/2011, at Attach.2 (Dep't Commerce March 5, 2013) ("Surrogate Value Memo").

dents, while both Ukrainian and Thai GTA import data sets are specific in the sense that all wire rod diameters used by respondents fall within Ukrainian and Thai GTA import data. *Remand Results* at 3. In support of its findings, Commerce noted that because "one of the respondents [[( )]][5] reported consumption of steel wire rod with diameters outside of this range [[ ]] . . . we find that the Ukrainian Metal Expert data are only partially specific as the data are not diameter-specific with regard to certain of the wire rod input consumed by [[ ]] respondents." *Id.* at 7.[6]

Itochu argues that Ukrainian Metal Expert data are "less imperfect and more probative of the input utilized by the respondents." Pl. Comments at 16. Itochu makes three arguments: (1) the "Metal Expert data covers exclusively steel wire rods;" (2) "Metal Expert also provides an additional level of specificity, i.e., it provides prices of the specific grade of steel rod"; and (3) "*missing* price data of [certain] wire rods" is better than a "diameter range . . . too wide" because "it is reasonable to infer that [Metal Expert] prices would be in close proximity of the steel wire rod prices reported." *Itochu's Comments pursuant to Draft Remand Determination in the Third Administrative Review of Certain Steel Nails From the People's Republic of China*, A-570–909, Remand at 8–9 (August 16, 2017).

Itochu maintains that Commerce's findings are unpersuasive because [[ ]] of steel nails produced from wire rod and sold by the mandatory respondents, Hongli and Stanley, during the POR were produced from rod of [[ ]] diameter. Pl. Comments at 12. Accordingly, Itochu argues Metal Expert data for steel wire rod of 6.5 to 8 mm diameter range is specific by diameter for [[ ]] of steel wire rod consumed by Hongli and Stanley during the POR. *Id.* Furthermore, Itochu insists that the mere fact that [[ ]] steel wire rods outside of the diameter range of 6.5 to 8 mm were used by respondents, by itself, fails to support Commerce's conclusion that Thai and Ukrainian GTA import data are more diameter-specific than Ukrainian Metal Expert data. *Id.*

Commerce addressed the relative specificity of Ukrainian Metal Expert data and GTA data in its remand redetermination with respect to each respondent, rather than aggregating the experiences of both respondents, as does Itochu. *See Remand Results* at 7, 15–16; *see also* Pl. Comments at 14–15 ("The above chart shows that in the aggregate . . ."). Thus, Itochu's percentage figure is not as probative as Itochu suggests.

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[5] Confidential information is indicated by double brackets.

[6] [[ ]]

Although GTA data cover a wider range of diameters, i.e., less than 14 mm, the inputs of both mandatory respondents are covered. The record supports Commerce's finding that Ukrainian Metal Expert data only report aggregated spot prices with a diameter range of 6.5 to 8 mm, excluding diameters of wire rod input [[ ]].[7] Remand Results at 7; Itochu Surrogate Value Submission at Ex.5, p.3, 19–21; [[ ]]. Thus, Ukrainian Metal Expert data are only specific to one of the respondents, whereas GTA data covered the diameters consumed by both respondents. Despite not insignificant arguments against Commerce's choice, the choice of GTA data is supported by substantial evidence.

III. Substantial Evidence Supports Commerce's Determination That The Carbon Content of Wire Rod – The Primary Input in Steel Nails – Should Be Afforded More Emphasis Than Diameter in its Surrogate Value Choice

In its opinion ordering remand in the context of Commerce's previous determination of equal specificity, the court directed Commerce to determine whether carbon content is more important than wire rod diameter in selecting a surrogate value. *See Itochu I* at *4. Itochu argues Commerce "misconstrued the question [of] whether the carbon content has a greater impact on the price of steel wire rod than does the rod's diameter" and that Commerce's assertion that carbon content is more important is not based on substantial evidence. Pl. Comments at 20–21.

Itochu argues there is no record evidence that the carbon content of the steel wire rod input plays a role in determining the price of the input. *Id.* Itochu asserts that "[t]he fact that carbon content is not mentioned on the [Ukrainian Metal Expert or Indian JPC steel wire rod] price lists indicates that as compared to the diameter, carbon content has a minimal influence (if at all) on the market price of steel wire rod." *Id.*

Despite Itochu's argument, Commerce was not required to find diameter determinative as to specificity. The record evidence actually demonstrates carbon content is at least as important as wire rod diameter in evaluating the specificity of HTS categories. Specifically, purchase invoices and mill certificates from the purchaser and producer of steel nails identify both the carbon content and diameter. *Response Pertaining to Stanley's Second Supplemental Section C and D Questionnaire*, A-570–909, POR 08/01/2010–07/31/2011, at

[7] [[ ]]

Ex.SSCD-7 (July 25, 2012); *Response Pertaining to Hongli's Supplemental Section C Questionnaire*, A-570–909, POR 08/01/2010–07/31/2011, at Ex.SC5–8 (June 8, 2012)). Additionally, while not of enormous weight, carbon content is identified as part of the steel grade or type, which from the outset has been one of the physical characteristics aligned with Commerce's product matching control number. *Remand Results* at 9. Further, the court cannot say that the HTS division, first by diameter and then by carbon content, must drive Commerce's decision. In making a surrogate value determination, Commerce does not have the exact same concerns as do Customs' classifiers. *See Jiasheng Photovoltaic Technology Co., Ltd. v. U.S.*, 28 F. Supp. 3d 1317, 1334 (CIT 2014).

Commerce also explained that the record evidence demonstrates "carbon content weighs more heavily than diameter" because the producer requires a "carbon-specific input to produce a particular carbon-specific output." *Remand Results* at 9. Further, Commerce noted that although the diameter of the wire rod may change throughout the production process, rendering the initial diameter less important, carbon content is the only characteristic to remain unchanged during the production process. *Id.* Record evidence demonstrates that respondents produced several different diameter outputs from the same diameter input. *Id.* at 10 (citing Hongli's Section C&D Response at Ex.D–2A, p.1 ("As the rod is drawn through different size dies that reduce the wire rod to the desired diameter . . .")).

Commerce's determination that the mutability of the wire rod input and substitutability of stock of different diameters lessens the importance of diameter, is adequately supported. Ultimately, the choice of greater reliance on carbon content than diameter specificity is within the range of choices permitted by the discretion afforded to Commerce. *See, e.g., Jacobi Carbons AB v. United States*, 992 F. Supp. 2d 1360, 1370–71 (CIT 2014) ("[T]he court finds that plaintiffs are correct, that the factors of production *actually used* by a respondent are important, if not controlling, when determining normal value.") (emphasis added). Thus, the choice to use Thai GTA data, which covered respondents' actual experience is reasonable.

CONCLUSION

Commerce's determination that Thai GTA data are the best available information to value steel wire rod is supported by substantial evidence. On remand, Commerce reasonably determined: (1)

Ukrainian Metal Expert data is not tax- and duty- exclusive[8] and is not superior as to physical specificity to GTA data; and (2) Thai and Ukrainian GTA data provide information for both diameter and carbon content, but Thai GTA data are more specific to respondents' actual production processes, Hongli's Section C&D Response at 3–4 and Stanley's Section C Response at 11–12, Exhibit C-5 (Jan. 19, 2012) (showing use of medium and low carbon content inputs), while Ukrainian GTA do not specifically refer to medium-content carbon, *see* Itochu Surrogate Value Submission at Ex.4, p.104. Finally, because Ukraine did not provide better data for the main input, wire rod, and Commerce did not reconsider its selection of the primary surrogate country, issues as to financial ratios derived from Ukraine data did not affect the remand determination.

Accordingly, Commerce's *Remand Results* are based on substantial evidence and are in accordance with the law. For the foregoing reasons, the court sustains Commerce's *Remand Results* and enters final judgment in favor of the United States.

Dated: January 18, 2018
New York, New York

/*S*/ *Jane A. Restani*
JANE A. RESTANI
JUDGE

[8] Because Commerce did not have VAT data for the POR, the "simple" adjustments suggested by Itochu actually present a more substantial challenge than Itochu acknowledges. But had the Ukrainian Metal Expert data been clearly more specific, Commerce might have been required to take the additional steps. It was not.

Slip Op. 18–5

PROSPERITY TIEH ENTERPRISE CO., LTD., Plaintiff, and YIEH PHUI ENTERPRISE CO., LTD, Plaintiff, v. UNITED STATES, Defendant, and AK STEEL CORP., NUCOR CORP., STEEL DYNAMICS, INC., CALIFORNIA STEEL INDUSTRIES, INC., ARCELORMITTAL USA LLC, and UNITED STATES STEEL CORP., Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 16–00138

[Remanding to the agency a determination in an antidumping duty investigation of certain corrosion-resistant steel products from Taiwan]

Dated: January 23, 2018

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OPINION AND ORDER

Stanceu, Chief Judge:

In this consolidated action,[1] plaintiffs contest an administrative decision issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to conclude an antidumping duty investigation on certain corrosion-resistant steel products ("CORE") from Taiwan (the "subject

[1] Consolidated under *Prosperity Tieh Enterprise Co. v. United States* (Ct. No. 16–00138) is *Yieh Phui Enterprise Co. v. United States* (Ct. No. 16–00154). Order (Oct. 20, 2016), ECF No. 47.

merchandise").[2] The court remands the determination to Commerce for further consideration and redetermination.

I. BACKGROUND

A. The Parties in this Litigation

Plaintiffs Prosperity Tieh Enterprise Co., Ltd. ("Prosperity") and Yieh Phui Enterprise Co. Ltd. ("Yieh Phui") are Taiwanese producers and exporters of CORE. AK Steel Corporation, Nucor Corporation, Steel Dynamics, Inc., California Steel Industries, Inc., ArcelorMittal USA LLC, and United States Steel Corporation were petitioners in the investigation and are each defendant-intervenors in this consolidated action (together, the "defendant-intervenors").

B. The Contested Decision

Challenged in this litigation is *Certain Corrosion-Resistant Steel Products From India, Italy, the People's Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 Fed. Reg. 48,390 (Int'l Trade Admin. July 25, 2016) ("*Amended Final Determination*"). The Amended Final Determination modified the Department's decision in *Certain Corrosion-Resistant Steel Products From Taiwan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 Fed. Reg. 35,313 (Int'l Trade Admin. June 2, 2016) ("*Final Determination*"). The period of investigation ("POI") was April 1, 2014 through March 31, 2015. *Id*. at 35,313.

C. Proceedings before Commerce

A petition filed in June 2015 sought an antidumping duty order on imports of CORE from Italy, India, China, Korea, and Taiwan. *See Certain Corrosion-Resistant Steel Products From Italy, India, the People's Republic of China, the Republic of Korea, and Taiwan: Initiation of Less-Than-Fair-Value-Investigations*, 80 Fed. Reg. 37,228 (Int'l Trade Admin. June 30, 2015). Following initiation, Commerce selected Yieh Phui and Prosperity as the Taiwanese mandatory

[2] The investigation covered "flat-rolled steel products, either clad, plated, or coated with corrosion-resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel-or iron-based alloys, whether or not corrugated or painted, varnished, laminated, or coated with plastics or other non-metallic substances in addition to the metallic coating." *Certain Corrosion-Resistant Steel Products From Taiwan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 Fed. Reg. 35,313, 35,315 (Int'l Trade Admin. June 2, 2016).

respondents for individual investigation. *Selection of Respondents for the Antidumping Duty Investigation on Certain Corrosion-Resistant Steel Products from Taiwan* at 4 (July 20, 2015) (P.R. Doc. 62).[3]

Commerce published a preliminary determination on CORE from Taiwan on January 4, 2016. *See Certain Corrosion-Resistant Steel Products from Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 72 (Int'l Trade Admin. Jan. 4, 2016) ("*Prelim. Determination*"); *see also Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from Taiwan*, A-583–856, (Dec. 22, 2015) (P.R. Docs. 262–263), *available at* https://enforcement.trade.gov/frn/summary/taiwan/201532761–1.pdf (last visited Jan. 18, 2018) ("*Prelim. Decision Mem.*"). In the Preliminary Determination, Commerce treated Yieh Phui and Synn Industrial Co., Ltd. ("Synn") as a single entity (the "Yieh Phui/Synn" entity).[4] *Prelim. Decision Mem.* at 4. Commerce did not include Prosperity within the Yieh Phui/Synn entity. *Id*. Commerce calculated a preliminary zero percent dumping margin for both Prosperity and the Yieh Phui/Synn entity and preliminarily determined that CORE from Taiwan was not being, and is not likely to be, sold in the United States at less than fair value. *Prelim. Determination*, 81 Fed. Reg. at 72–73.

In the Final Determination, Commerce found that CORE from Taiwan was being, or was likely to be, sold in the United States at less than fair value. *Final Determination*, 81 Fed. Reg. at 35,313; *see also Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from Taiwan*, A-583–856, (May 26, 2016) (P.R. Doc. 372), *available at* https://enforcement.trade.gov/frn/summary/taiwan/2016–12975–1.pdf (last visited Jan. 18, 2018) ("*Final Decision Mem.*"). In reaching this determination, Commerce treated Yieh Phui, Prosperity, and Synn as a single entity (the "Yieh Phui/Prosperity/Synn" entity). *Final Determination*, 81 Fed. Reg. at 35,314; *Final Decision Mem.* at 24–28. In the Final Determination, Commerce declined to make downward adjustments to Yieh Phui's and Synn's home market sales prices to account for certain rebates granted to

[3] While the court relies only on public documents (including public versions of business proprietary, *i.e.*, "confidential" documents) in this Opinion and Order, citations are provided to both the public and business proprietary versions of the cited document where possible. Public documents are identified by "P.R. Doc. __." Confidential documents are identified by "C.R. Doc. __."

[4] Synn Industrial Co., Ltd. ("Synn") is a Taiwanese producer of subject merchandise. Synn did not make any export sales to the United States during the period of investigation. *Commerce's Sales Verification Report for Synn* at 7 (Apr. 13, 2016) (P.R. Doc. 345) (C.R. Doc. 571) ("*Sales Verification Rep. for Synn*").

their respective home market customers. *Final Decision Mem*. at 20–24. Commerce further determined that Prosperity failed to report properly the yield strength of certain sales of CORE and applied facts otherwise available, with an adverse inference, to the costs of the sales found to have been misclassified. *Id*. at 11–19. Commerce assigned the Yieh Phui/Prosperity/Synn entity a weighted-average dumping margin of 3.77%. *Final Determination*, 81 Fed. Reg. at 35,314.

Following a ministerial error allegation, Commerce published an amended final determination that increased the weighted-average dumping margin assigned to the Yieh Phui/Prosperity/Synn entity from 3.77% to 10.34%. *Amended Final Determination*, 81 Fed. Reg. at 48,391, 48,393.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, *as amended*, 28 U.S.C. § 1581(c), which provides the court jurisdiction to review a final affirmative determination of sales at less than fair value in an action brought under section 516A(a)(2) of the Tariff Act of 1930 (the "Tariff Act"); *see* 19 U.S.C. §§ 1516a(a)(2)(A), (a)(2)(B)(i).[5] In reviewing a final determination, the court will hold unlawful any finding, conclusion, or determination not supported by substantial record evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

B. Commerce Unlawfully Failed to Adjust the Prices in Home Market Sales for Rebates

Commerce determines an antidumping duty margin by comparing the normal value of the subject merchandise to the export price (or constructed export price) at which the subject merchandise is sold in the United States. 19 U.S.C. § 1673. Normal value ordinarily is determined from the "price at which the foreign like product is first sold . . . for consumption in the exporting country," with certain adjustments. *Id*. § 1677b(a)(1)(B). In pertinent part, the Department's regulation, 19 C.F.R. § 351.401(c), provides as follows:

[5] All citations to the United States Code herein are to the 2012 edition and all citations to the Code of Federal Regulations herein are to the 2016 edition.

> *Use of price net of price adjustments*. In calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary will use a price that is net of any price adjustment, as defined in § 351.102(b), that is reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable).

19 C.F.R. § 351.401(c). "'Price adjustment' means any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are [*sic*] reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38).

Yieh Phui and Synn provided their home market customers what they called "quantity rebates" or "purchase rewards rebates." The terms and conditions for these rebates were not established prior to the time of sale. Rather, Yieh Phui and Synn would consider, on a customer-by-customer basis, the total quantity shipped, market conditions, and the potential for future orders in determining the rebates.

Yieh Phui claims that Commerce violated 19 C.F.R. § 351.401(c) when it failed to make corresponding downward adjustments in the starting prices Commerce used in determining normal value, *i.e*., the prices at which Yieh Phui and Synn sold the foreign like product in its home market. Mem. of P. & A. in Supp. of Pl. Yieh Phui Enterprise Co., Ltd.'s Rule 56.2 Mot. for J. on the Agency R. 1–15 (Dec. 15, 2016), ECF Nos. 52 (conf.), 53 (public) ("Yieh Phui's Br."); Reply Br. of Pl. Yieh Phui Enterprise Co., Ltd. 2–7 (May 24, 2017), ECF No. 67 ("Yieh Phui's Reply Br."). According to Yieh Phui, Commerce acted contrary to the plain meaning of the pertinent regulations and improperly required it to "prove customer knowledge of an adjustment at any particular point relative to the date of sale." Yieh Phui's Br. 8. For the reasons discussed below, the court finds merit in this claim.

In the Final Determination, Commerce disallowed monthly home market rebates reported by Yieh Phui and Synn. *Final Decision Mem*. at 20–24. Commerce based this conclusion, in part, on its finding that the terms of these rebates "were not fixed at or before the date of sale." *Id*. at 21. Commerce explained that the Department "only adjust[s] normal value to account for rebates when the terms and conditions of the rebate are known to the customer prior to the sale and the claimed rebates are customer-specific." *Id*. Commerce also based its decision to reject Yieh Phui's and Synn's reported rebate adjustments on a finding that these rebates were issued with the purpose of limiting antidumping duty liability. *Id*. at 21–22. In the Final Decision Memorandum, Commerce also indicated its

disagreement with this Court's holding in *Papierfabrik August Koehler AG v. United States*, 38 CIT __, 971 F. Supp. 2d 1246 (2014) ("*Koehler*"). *Id*. at 22. In *Koehler*, this Court, interpreting 19 C.F.R. § 351.102(b)(38), disallowed the Department's rejection of certain price adjustments on the premise that the respondent's customers lacked knowledge of the terms and conditions of the rebates at the time of sale. *Koehler*, 38 CIT at __, 971 F. Supp. 2d at 1259. In the Final Decision Memorandum, Commerce opined "that *Koehler* conflicts with other CIT decisions that affirmed the Department's positions to reject claims for price adjustments." *Final Decision Mem.* at 22 (citations omitted).

In this case, Commerce did not reach a finding that the rebates reported by Yieh Phui and Synn were not actually paid to the companies' home market customers. Commerce did not question that the rebates were actually "reflected in the purchaser's net outlay," *see* 19 C.F.R. § 351.102(b)(38), or whether the rebates were "reasonably attributable" to sales of the "foreign like product" within the meaning of 19 C.F.R. § 351.401(c). *See Final Decision Mem*. at 20–24. To the contrary, Commerce verified the home market rebates reported by Yieh Phui and Synn and found no discrepancies or inconsistencies with the rebate information reported. *Verification of the Sales Responses of Yieh Phui Enterprise Co., Ltd.* at 10 (Apr. 14, 2016) (P.R. Doc. 343) (C.R. Doc. 569); *Verification of the Sales Responses of Synn Industrial Co., Ltd.* at 11 (Apr. 13, 2016) (P.R. Doc. 345) (C.R. Doc. 571).

On their face, the regulations require Commerce to recognize a reduction in the purchaser's net outlay for the foreign like product that satisfies the definition of a "price adjustment" in § 351.102(b)(38). 19 C.F.R. § 351.401(c) ("In calculating . . . normal value (where normal value is based on price), the Secretary *will use* a price that is net of *any* price adjustment, as defined in § 351.102(b) . . . ." (emphasis added)). As Yieh Phui notes, "[t]he regulations state that Commerce 'will' (not 'may') use U.S. and comparison market prices net of '*any* price adjustment' so long as the adjustment is reasonably attributable to the subject merchandise (or the foreign like product) and falls within the 'price adjustment' definition." Yieh Phui's Br. 7 (emphasis in original). Giving as examples "discounts, rebates and post-sale price adjustments," the regulations set forth a broad definition of "price adjustment" encompassing "any change in the price charged for . . . the foreign like product" that "are reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38). In the situation presented here, § 351.401(c) did not permit Commerce to

use a home market price for the foreign like product that was *not* net of a price adjustment satisfying the § 351.102(b)(38) definition.

In reaching the opposite conclusion, Commerce made a number of irrelevant findings, including that the terms of Yieh Phui's and Synn's home market rebates "were not established prior to shipment and invoicing." *Final Decision Mem*. at 24. Similarly irrelevant is the Department's finding that neither company had any "established standards or policies, written or unwritten, that specify the amount and the possibility" of rebates. *Id*. at 23–24. The Department's finding that the home market rebates "could not have issued . . . without [antidumping] duty liability in mind" is also extraneous and irrelevant. *Id*. at 23. These findings are all directed to the wrong question. Under the regulations, the question is not whether the rebates were made according to a "program" that satisfied the various prerequisites Commerce identified in the Final Decision Memorandum, or whether they were made for a reason acceptable to Commerce, but whether the monthly rebates were actually reflected in purchasers' net outlays.

In reaching conclusions from its findings, the Department's reasoning is erroneous in several respects. First, the Final Decision Memorandum misapplies the Department's regulations in declining to adjust the home market prices for the monthly rebates. As discussed above, Commerce did not conclude that the monthly rebates were not "reflected in the purchaser's net outlay" within the meaning of § 351.102(b)(38) or that the rebates were not "reasonably attributable to the...foreign like product" within the meaning of § 351.401(c). In addition, as the court has pointed out, Commerce successfully verified that the monthly rebates issued by Yieh Phui and Synn were in fact paid to home market customers. In the circumstances presented by the Department's own findings, the regulations require Commerce to treat these rebates as post-sale price adjustments. Although § 351.401(b) provides that "[t]he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment," Commerce was not empowered by this general provision, which applies to all adjustments, not merely price adjustments, to ignore the specific standard established by § 351.401(c), according to which the Secretary must recognize a "price adjustment" as defined in § 351.102(b)(38). Here, Commerce made no findings stating or suggesting that the price adjustments did not occur.

The Final Decision Memorandum also misconstrues the Department's discussion of its regulations in the preamble that accompanied

promulgation of the regulations at issue (the "Preamble"). *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,344 (Int'l Trade Admin. May 19, 1997) ("*Final Rule*"). Contrary to defendant's argument, the Preamble does not support a regulatory interpretation under which Commerce was free to disregard rebates such as those at issue in this case. Rather, the pertinent discussion in the Preamble reveals that in promulgating the final rule Commerce intended for reductions, including post-sale reductions, in the price of the foreign like product to result in adjustments to the starting prices used to determine normal value if they are reflected in the purchaser's net outlay.

The Preamble explained that § 351.401(c) "restated the Department's practice with respect to price adjustments, such as discounts and rebates." *Final Rule*, 62 Fed. Reg. at 27,344. In proposing § 351.401, Commerce described the Department's practice as follows: "Under paragraph (c), the Department will continue its practice of adjusting reported gross prices for discounts, rebates and certain post-sale adjustments to price that affect the net price." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,329 (Int'l Trade Admin. Feb. 27, 1996) (notice of proposed rulemaking).

The Preamble further explained that Commerce took "several steps aimed at alleviating" confusion concerning the proposed § 351.401(c), and price adjustments generally, that Commerce believed to have been reflected in the comments to the proposed rule. *Final Rule*, 62 Fed. Reg. at 27,344. The Preamble explained that the Department included in the promulgated § 351.102 a new definition of the term "price adjustment." *Id.* Concerning the term "price adjustment" and its definition, the Preamble adds that "[t]his term is intended to describe a category of changes to a price, such as discounts, rebates and post-sale price adjustments, that affect the net outlay of funds by the purchaser" and that "such price changes . . . are changes that the Department *must take into account* in identifying the actual starting price." *Id*. at 27,300 (emphasis added). This Preamble discussion, like the regulation itself, makes clear that Commerce intended to apply a uniform definition of "price adjustment" when determining a starting price for calculating normal value. *Id.*

The Final Decision Memorandum misconstrues the language and the intent of the Preamble in concluding that "[w]hile the Department's regulations provide for post-sale price adjustments that are reasonably attributable to the subject merchandise, the Preamble indicates that exporters or producers should not be allowed 'to eliminate dumping margins by providing price adjustments 'after the

fact."" *Final Decision Mem*. at 21–22 (quoting *Final Rule*, 62 Fed. Reg. at 27,344). The passage in the Preamble from which the Final Decision Memorandum drew this conclusion reads as follows:

> One commenter suggested that, at least for purposes of normal value, the regulations should clarify that the only rebates Commerce will consider are ones that were contemplated at the time of sale. This commenter argued that foreign producers should not be allowed to eliminate dumping margins by providing "rebates" only after the existence of margins becomes apparent.
>
> The Department has not adopted this suggestion at this time. We do not disagree with the proposition that exporters or producers will not be allowed to eliminate dumping margins by providing price adjustments "after the fact." However, as discussed above, the Department's treatment of price adjustments in general has been the subject of considerable confusion. In resolving this confusion, we intend to proceed cautiously and incrementally. The regulatory revisions contained in these final rules constitute a first step at clarifying our treatment of price adjustments. We will consider adding other regulatory refinements at a later date.

Final Rule, 62 Fed. Reg. at 27,344. No substantive amendments were made to the text of § 351.401(c) or § 351.102(b)(38) between the promulgating of the final rule in 1997 and the investigation at issue.[6] When read in the entirety and in conjunction with the Department's regulations, the Preamble does not support the reasoning by which Commerce disregarded Yieh Phui's and Synn's monthly rebates.

Before the court, defendant and defendant-intervenors make a number of arguments in support of the Department's exclusion of Yieh Phui's and Synn's home market rebates, most of which parallel the erroneous reasoning of the Final Decision Memorandum. *See* Def.'s Opp'n to Pl.'s and Consolidated Pl.'s Mots. for J. upon the Agency R. 45–58 (Apr. 26, 2017), ECF Nos. 63 (conf.), 66 (public) ("Def.'s Opp'n"); Resp. Br. of Def.-Ints. in Opp'n to Pls.' Mot. for J. on the Agency R. 34–39 (Apr. 26, 2017), ECF Nos. 64 (conf.), 65 (public)

[6] Following the decision in *Papierfabrik August Koehler AG v. United States*, 38 CIT __, 971 F. Supp. 2d 1246 (2014), Commerce amended its regulations. *See Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings*, 81 Fed. Reg. 15,641 (Int'l Trade Admin. Mar. 24, 2016). The amended regulations alter § 351.102(b)(38) and § 351.401(c) to state that the Department will not accept a price adjustment that is made after the time of sale "unless the interested party demonstrates, to the satisfaction of the Secretary, its entitlement to such an adjustment." *Id*. at 15,645–46. The amended regulations do not apply to the investigation that gave rise to this action.

("Def.-Ints.' Opp'n"). First, defendant argues that the Department's regulations do not define the term "rebates" and that, accordingly, it is free to develop a reasonable interpretation to fill this gap. Def.'s Opp'n 50–51. This argument is specious because the definition of the term "rebate" is not the issue in this case. The applicable regulation, 19 C.F.R. § 351.401(c), left no room for interpretation in requiring downward adjustments to the starting price for normal value for any "price adjustment" made to the home market price of the foreign like product within the meaning of 19 C.F.R. § 351.102(b)(38). The latter provision defined "price adjustment" broadly and directly contrary to the interpretation Commerce advanced in the Final Decision Memorandum. *See* 19 C.F.R. § 351.102(b)(38) ("'Price adjustment' means *any* change in the price charged for subject merchandise or the foreign like product, *such as* discounts, rebates and post-sale price adjustments, *that are reflected in the purchaser's net outlay*.") (emphasis added). Whether or not Commerce considers the post-sale price adjustments at issue in this case to be "rebates" is irrelevant to the question presented.

Next, defendant and defendant-intervenors argue that Yieh Phui's reliance on this Court's decision in *Koehler* is incorrect. Def.'s Opp'n 52–54; Def.-Ints.' Opp'n 36. Before the court, Yieh Phui relies on *Koehler* to support its argument that Commerce acted unlawfully in failing to make downward adjustments in the starting prices Commerce used to determine normal value. Defendant and defendant-intervenors assert that *Koehler* conflicts with other decisions and that it was wrongly decided. Def.'s Opp'n 52–54; Def.-Ints.' Opp'n 36. In arguing that *Koehler* conflicts with other decisions, defendant directs the court to a pair of cases that were considered in *Koehler*. Def.'s Opp'n 53–54 (citing *Koening & Bauer-Albert AG v. United States*, 22 CIT 574, 15 F. Supp. 2d 834 (1998), *aff'd in part, vacated on other grounds*, 259 F.3d 1341 (Fed. Cir. 2001) and *Nachi-Fujikoshi Corp. v. United States*, 19 CIT 914, 890 F. Supp. 1106 (1995)). As explained in *Koehler*, both *Koening & Bauer-Albert AG* and *Nachi-Fujikoshi Corp.* arose from administrative determinations made prior to the June 18, 1997 effective date of the final rule that instituted the versions of § 351.401(c) and § 351.102(b)(38) that are at issue in this action. *See Koehler*, 38 CIT at __, 971 F. Supp. 2d at 1256. The court notes that the Department's interpretation of the relevant regulations is also inconsistent with this Court's opinion in *Tension Steel Industries Co., Ltd. v. United States*, 40 CIT __, 179 F. Supp. 3d 1185 (2016). *See also Tension Steel Indus. Co., Ltd. v. United States*, 41 CIT __, 236 F. Supp. 3d 1361 (2017), *appeal docketed*, No. 17–2526 (Fed. Cir. Nov. 8, 2017).

Because the Department's decision in the Final Determination not to make downward adjustments to Yieh Phui's and Synn's home market sales prices to account for rebates granted to their home market customers violated its own regulations, Commerce must correct this error in the redetermination it reaches in response to this Opinion and Order.

C. The Department's Determination to "Collapse" Prosperity with the Yieh Phui/Synn Entity is Based on Certain Findings Not Supported by Substantial Evidence

Prosperity and Yieh Phui challenge the Department's decision to treat Prosperity as a single entity in combination with the Yieh Phui/Synn entity and thereby assign this entity a single antidumping duty margin in the Final Determination. Mot. of Pl. Prosperity Tieh Enterprise Co., Ltd. for J. upon the Agency R. 1, 2–3, 13–14, 15–25 (Dec. 15, 2016), ECF Nos. 54 (conf.), 55 (public) ("Prosperity's Br."); Yieh Phui's Br. 1, 24–27; Pl. Prosperity Tieh's Reply in Supp. of its Mot. for J. upon the Agency R. 2–9 (May, 25, 2017), ECF Nos. 71 (conf.), 72 (public) ("Prosperity's Reply Br."); Yieh Phui's Reply Br. 1–2, 11–13. As explained below, certain findings upon which Commerce relied in making the challenged decision are unsupported by substantial evidence on the record.

Treating two related entities as a single entity is referred to colloquially as "collapsing," and is intended to address the possible manipulation of dumping margins by affiliated companies.[7] *See Viraj Grp. v. United States*, 476 F.3d 1349, 1356 (Fed. Cir. 2007). The Department's regulations permit Commerce to treat 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).

Commerce discussed its decision in a "Collapsing Memorandum," in which it first determined that Prosperity, Yieh Phui, and Synn were all affiliated within the meaning of section 771(33) of the Tariff Act, 19 U.S.C. § 1677(33). *Final Affiliation and Collapsing Memorandum* at 3–4 (June 2, 2016) (C.R. Doc. 595) (P.R. Doc. 379) ("*Collapsing Mem.");*

[7] The Department's decision to "collapse" Yieh Phui Enterprise Co., Ltd. ("Yieh Phui") with Synn is unchallenged.

see also Final Determination, 81 Fed. Reg. at 35,314; *Final Decision Mem.* at 24–28.[8] The Department then found that because Prosperity, Yieh Phui, and Synn each already manufactured merchandise within the scope of the investigation, the producers have "production facilities for similar or identical products and do not require substantial retooling of their facilities in order to restructure manufacturing priorities." *Collapsing Mem*. at 5–6 (citing 19 C.F.R. § 351.401(f)(1)). No party challenges these aspects of the Department's collapsing analysis.

Commerce next considered whether "a significant potential for the manipulation of price or production" existed between the three companies. *See* 19 C.F.R. § 351.401(f)(2). The Department's regulation lists three factors that may be considered in determining whether there is a "significant potential for manipulation" of dumping margins by affiliated companies. These factors are:

(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). This list of factors is non-exhaustive and reflects the Department's position that collapsing determinations are highly fact-specific and are to be made on a case-by-case basis. *Final Rule*, 62 Fed. Reg. at 27,345–46.

In evaluating the first factor identified in § 351.401(f)(2), the level of common ownership, Commerce determined that a significant level of common ownership existed between Prosperity and Synn based on Prosperity's having been a shareholder in Synn. *Collapsing Mem.* at 6–7. Commerce rejected Prosperity's argument that this § 351.401(f)(2) factor weighed against collapsing due to Prosperity's having sold its ownership interest in Synn subsequent to the POI, noting that "the Department is obligated to consider information concerning circumstances that existed and events that occurred only during the POI." *Id*.

[8] Commerce presented its analysis for its decision to combine Prosperity Tieh Enterprise Co., Ltd. ("Prosperity") with the Yieh Phui/Synn entity in a separate memorandum, incorporated by reference, because of the presence of business proprietary information.

Commerce next analyzed the second § 351.401(f)(2) factor, "the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm." *Collapsing Mem.* at 7. Commerce found that the service of Prosperity's chairman as one of Synn's three board members constituted significant managerial overlap between Prosperity and Synn during the POI. *Id*.[9]

Commerce then turned to the final factor in § 351.401(f)(2), the extent to which the operations of Prosperity and Synn were intertwined. *Collapsing Mem.* at 7. Commerce detailed the extent to which galvanizing services performed by Prosperity for Synn pursuant to a tolling agreement accounted for Synn's overall production of CORE during the POI. *Id*. Commerce further noted how this "tolling/galvanizing contract" granted Synn certain access to Prosperity's books and records. *Id*. Next, Commerce detailed cold-rolling services that Synn performed for Prosperity pursuant to a purchase and sale agreement during the POI. *Id*. Commerce calculated the percentage that these cold-rolling services represented of the "overall cold-rolling services Synn Industrial provided to all customers." *Id*. Finally, Commerce noted the extent to which Synn's financial statements reflected sales to Prosperity and purchases from Prosperity during the POI. *Id*. at 8–9.

Commerce found that the "[t]olling arrangements and purchase and sale agreements between Prosperity Tieh and Synn Industrial [were] indicative" of intertwined operations. *Id*. at 7. Commerce concluded that Prosperity, "by means of ownership, overlapping management, and intertwined operations between itself and Synn Industrial, [was] in a position to manipulate price or production." *Id*. at 8.

Prosperity challenges the Department's decision to collapse Prosperity with the Yieh Phui/Synn entity by arguing, in part, that certain of the Department's "intertwined operations" findings are not supported by substantial evidence. Prosperity's Br. 21; Prosperity's Reply Br. 7–9. Prosperity points to record evidence that certain facts relied on by Commerce were based on data for calendar year 2014, rather than on data covering the POI (April 1, 2014 through March 31, 2015), as the Department had claimed. Prosperity's Br. 21; Prosperity's Reply Br. 7–9. Prosperity also highlights record evidence showing that the entirety of the cold-rolling services provided by Synn for Prosperity took place prior to the POI, rather than during it, as Commerce had concluded in the Collapsing Memorandum. Prosperity's Br. 21; Prosperity's Reply Br. 8.

[9] This information was treated as confidential at the administrative level. However, Prosperity's brief before the court discloses this information to the public. *See* Prosperity's Br. 18.

Regarding the timing of the cold-rolling services that Synn performed for Prosperity, defendant admits that Commerce incorrectly stated in the Collapsing Memorandum that the cold-rolling services Synn provided for Prosperity occurred during the POI. Def.'s Opp'n 43 (acknowledging that "Prosperity is correct that this figure did not pertain to the period of investigation"). Defendant also acknowledges that the data detailing Synn's sales to Prosperity and its purchases from Prosperity were for calendar year 2014, rather than for the POI, as found by Commerce. *Id*. at 44. Defendant further acknowledges that had Commerce examined the purchases and sales that took place between Synn and Prosperity during the POI rather than during the 2014 calendar year, the significance, in percentage terms, of these purchases and sales "may have been lower." *Id*. at 44–45. While defendant acknowledges only that the significance of the purchases and sales "may have been lower during the overall period of investigation," *id*., record evidence demonstrates the purchases and sales between Synn and Prosperity were in fact less significant over the POI than over calendar year 2014. *See* Prosperity's Br. 21. Thus it cannot be said that using calendar year data, as opposed to POI data, had no potential to affect the final determination.

Defendant argues that, despite the errors it acknowledges, the court should rule that the substantial record evidence still supports the Department's collapsing determination. Def.'s Opp'n 33–45. Defendant argues that "even disregarding the information that was outside the period of investigation, there was significant evidence supporting intertwined operations on the record." *Id*. at 40–41 (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)). The court disagrees. Because this Court, like any court reviewing an agency action, must conduct its review according to the findings of fact and the reasoning the agency puts forth, the Department's collapsing decision cannot be sustained according to the applicable standard of review. *See SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947). Because the collapsing decision was based on erroneous findings of fact, the court must order Commerce to reconsider that decision and reach a new determination based on findings that are supported by substantial evidence on the record of the investigation.

D. Commerce Applied Facts Otherwise Available, and an Adverse Inference, Based on an Invalid Finding that Prosperity Misclassified the Yield Strength of Certain CORE Sales

Through questionnaires issued during the investigation, Commerce sought to ascertain the physical characteristics of the respondents' subject merchandise, including the yield strength of each individual product. *See generally Initial Antidumping Duty Questionnaire for Prosperity Tieh Enterprise Co., Ltd.* at B-11 to B-12, C-9 to C-10 (Aug. 7, 2015) (P.R. Doc. 97); *see also Memorandum Regarding Correction to Yield Strength Field of Initial Questionnaire* (Aug. 14, 2015) (P.R. Doc. 102) ("*Yield Strength Mem.*"). Commerce used the reported physical characteristics in applying product-specific model-matching criteria that it then used when comparing U.S. price to normal value.

Under section 776(a)(2) of the Tariff Act, 19 U.S.C. § 1677e(a)(2), Commerce is directed generally to use "facts otherwise available in reaching the applicable determination under this subtitle" if a party:

> (A) withholds information that has been requested by the administering authority . . . under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title[.]

19 U.S.C. § 1677e(a)(2). Relying upon clauses (B) and (D), Commerce found that Prosperity failed to submit certain information within applicable time limits and failed to provide verifiable information. *Final Decision Mem*. at 18 ("Thus, we determine, based on our findings at the sales verification, that PT [*i.e.*, Prosperity] failed to submit the requested information within the applicable time limits, and failed to provide information that could be verified.").[10]

[10] Commerce found that Synn also misreported yield strength for certain of its home market sales. *Final Decision Mem.* at 19; *Sales Verification Rep. for Synn* at 9. In the Final Determination, Commerce applied facts otherwise available with an inference adverse to Synn for the sales it found to have been misreported. *Final Decision Mem.* at 19. As facts otherwise available with an adverse inference, Commerce "assigned to Synn, in the cost database, the costs associated with the highest TOTCOM [*i.e.*, total cost of manufacturing] for certain sales in the group of incorrectly coded sales." *Id*. The issue of alleged misreporting by Synn is not before the court. Synn is not a party to this action, and neither Prosperity nor Yieh Phui challenged the Department's decision to apply facts otherwise available with an adverse inference to Synn's home market sales that Commerce found to have been improperly reported.

This issue arose from the way in which Prosperity classified, within one of six categories defined in the Department's questionnaire, certain of its CORE products according to yield strength. *Id*. at 11–19. Commerce interpreted its own instructions to mean that respondents must classify products according to minimum yield strength as specified by an applicable industry standard, where one pertained to the product being reported. *See id*. at 13. The reporting of yield strength was to be in units of pounds per square inch ("psi"), converted where necessary. *See Yield Strength Mem.* at 1–2. At verification, Commerce found that Prosperity had misclassified certain of its products in reporting sales in the databases by placing these products in the wrong yield strength category. *Final Decision Mem*. at 13; *Verification of the Sales Responses of Prosperity Tieh Enterprise Co., Ltd.* at 9 (Apr. 13, 2016) (P.R. Doc. 341) (C.R. Doc. 568). Commerce found, further, that "[b]ecause the quantity and costs of the mix of products included in the weighted-average mix of the misreported CONNUMs [*i.e.*, control numbers] were incorrect, the reported cost was distorted for those CONNUMs." *Ministerial Error Memorandum Concerning the Final Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from Taiwan* at 1–2 (July 19, 2016) (P.R. Doc. 386) ("*Ministerial Error Mem.*"); *see also Final Decision Mem.* at 19 (explaining that "because the costs for the CONNUMs with '6' and '7' minimum specified yield strengths are incorrectly comingled, we lack the information necessary to recode the costs for the miscoded group of CONNUMs").

Commerce additionally found that Prosperity did not cooperate to the best of its ability in responding to the Department's information request and, based on that finding, used an adverse inference under 19 U.S.C. § 1677e(b) in selecting from the facts otherwise available. *Final Decision Mem*. at 19. As an adverse inference, Commerce assigned, in the cost database, the costs associated with the highest variable and total cost of manufacturing from the population of all CONNUMs affected by the alleged misclassification as substitute information in calculating the weighted-average dumping margin. *Id.; Ministerial Error Mem*. at 5.

Before the court, Prosperity claims that the Department's finding that Prosperity misclassified the yield strength of certain sales of CORE is not supported by substantial evidence. Prosperity's Br. 25–29; Prosperity's Reply Br. 10–16. Prosperity argues that Commerce, therefore, did not have authority under 19 U.S.C. § 1677e(a)(2) to use facts otherwise available or an adverse inference. Prosperity's Br. 32–43; Prosperity's Reply Br. 20–23. Prosperity contends that it permissibly interpreted the Department's instructions to allow it to

classify each of its CORE products according to one of its own internal specifications for yield strength. Prosperity's Br. 26–29; Prosperity's Reply Br. 11–16. Prosperity submits that it took this approach whenever an internal minimum specification for yield strength existed in its Product Coding System, rather than a yield strength minimum specified by a standards organization. Prosperity's Reply Br. 10. According to Prosperity, the only instances in which it did not use the yield strength as specified in its own internal Product Coding System was where its internal system did not specify a minimum yield strength. *Id*. Prosperity states that in those instances it reported the yield strength using the minimum yield strength specified in a standard to which the product conformed, as set by an international standards organization. *Id*.

Responding to the Department's questionnaire, Prosperity submitted information regarding its U.S. market and home market sales of CORE. *See Prosperity Tieh Enterprise Co., Ltd.'s Sections B-D Questionnaire Responses* (Oct. 14, 2015) (P.R. Docs.136–40) (C.R. Docs. 95–113). In its questionnaire responses, Prosperity explained the Product Coding System that it used in the normal course of business. *Id*. at B-10 to B-11, C-6 to C-7 (explaining that the Product Coding System is used to designate various product characteristics, including the mechanical characteristics (such as yield strength), of Prosperity's production).[11] Prosperity also stated that "the yield strength of the subject merchandise sold in each home market sale has been reported in the 'CSTRENH' [*i.e.*, yield strength] field in the home market database, in accordance with the above methodology [*i.e.*, the Yield Strength Memorandum]." *Id*. at B-17 to B-18; *see also id*. at C-13 to C-14 (reporting yield strength of U.S. market sales in the same fashion). Prosperity provided Commerce, pursuant to the Department's instructions, a computer file and print out detailing Prosperity's U.S. and home market sales during the POI. *See id*. at Ex. B-1 (Prosperity's home market sales file layout and sample print).

1. Record Evidence Does Not Support the Department's Finding that Prosperity Misreported the Yield Strength of Certain Sales of CORE

Resolving the issue before the court requires examination of the instructions Commerce issued to Prosperity to ascertain whether the Department's factual finding that Prosperity "misreported" yield

[11] Prosperity submitted for the record a copy of its Product Coding System in its Section A questionnaire responses. *Prosperity Tieh Enterprise Co., Ltd.'s Section A Questionnaire Responses* at Ex. A-24 (Sept. 16, 2015) (P.R. Docs. 121–22) (C.R. Docs. 43–63).

strength is a valid one, *i.e.*, one supported by substantial record evidence. The court concludes that it is not a valid finding. The Department's instructions do not preclude a respondent from reporting (*i.e.*, "coding") yield strength according to manufacturer's specifications rather than an external, established industry standard. To illustrate this point, the court sets forth below the instructions Commerce issued pertaining to the reporting of yield strength and analyzes each paragraph therein.

FIELD NUMBER 3.7: YIELD STRENGTH

FIELD NAME: CSTRENH/U

DESCRIPTION: Yield Strength

1 = Minimum specified yield strength under 25,000 psi

3 = Minimum specified yield strength of >= 25,000 psi but < 35,000 psi

4 = Minimum specified yield strength of >= 35,000 psi but <= 50,000 psi

5 = Minimum specified yield strength of > 50,000 psi but < 65,000 psi

6 = Minimum specified yield strength of >= 65,000 psi but <= 80,000 psi

7 = Minimum specified yield strength over 80,000 psi

For example, under ASTM A1079, the minimum specified yield strength for "Designation CP grade 780T/500Y" is 500 MPa, which converts to approximately 72,519 psi, so for that product, you would report code "6."

Where no minimum yield strength is required, but a typical minimum is identified within the specification from a standards organization such as ASTM (e.g., under ASTM A653, the typical range of yield strengths for "Designation CS Type A" is identified as 25,000 psi to 55,000 psi, yielding a typical minimum of 25,000 psi, which in turn falls under reporting code "3").

If no such requirements or guidance on minimum specified yield strength is identified in the specification for the product in question, explain in detail your rationale for using one of the above reporting codes to report this field for the product (do not create additional reporting codes).

> Finally, provide a chart that identifies all of the specifications/ grades/ types/designations in your comparison market and U.S. market sales databases. After identifying in the first column the complete specification/grade/type/designation identification (*e.g.*, "ASTM A653 Designation SS grade 230"), identify in subsequent columns the allowable range of carbon content, the minimum specified yield strength (in pounds per square inch), the minimum specified tensile strength (in pounds per square inch), and the minimum specified elongation percentage. For those values in this chart that are based on non-mandatory guidance provided in the specification (such as for the minimum yield strength for the ASTM A653 CS Type A products referenced above), place three asterisks next to the value in question (*e.g.*, "25,000***").

Yield Strength Mem. at 1–2.[12] The fault Commerce found with Prosperity's reporting was confined to a group of sales of CORE that Prosperity classified as code 7 based on the above instructions ("Minimum specified yield strength over 80,000 psi") instead of code 6 ("Minimum specified yield strength of >= 65,000 psi but <= 80,000 psi"), which Commerce believed was the correct response.[13] *Final Decision Mem.* at 13. Commerce found that this occurred where the CORE at issue had a minimum specified yield strength of exactly 80,000 psi, when yield strength was determined according to the specifications in an established international standard. *Id*. (concluding that the misreporting of minimum specified yield strength occurred "at the cusp of the CONNUM cutoff"). The sales Commerce found to have been misreported as code 7 involved merchandise classified in Prosperity's internal Product Coding System as having a mechanical property grade of "Structural (YS>80 Ksi)," *i.e.*, as having a minimum specified yield strength *greater* than 80,000 psi. *See* Prosperity's Br. 9–11, 27–28.

The first problem with the Department's misclassification finding is that Commerce did not define in its questionnaire the meaning of the term "Minimum specified yield strength" as used in its table of yield

[12] Seven days after the Initial Antidumping Questionnaire was issued to Prosperity, Commerce issued the Yield Strength Memorandum, which made a minor revision to the table on yield strength. *See Memorandum Regarding Correction to Yield Strength Field of Initial Questionnaire* (Aug. 14, 2015) (P.R. Doc. 102). The revision does not affect the court's analysis.

[13] The industry specifications pertaining to the CONNUMs that Commerce determined were incorrectly classified in code 7 instead of code 6 were AS1397/G550, ASTM A653/SS80, ASTM A755/SS80, ASTM A792/SS80, ASTM A792/SS80Cl, and ASTM A792M/SS550. *See Ministerial Error Memorandum Concerning the Final Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from Taiwan* at 1 (July 19, 2016) (P.R. Doc. 386).

strength categories ("codes"). *See Yield Strength Mem.* at 1–2. As a result, this term could be read to refer to the yield strength as "specified" by the manufacturer or as "specified" by a standards organization. Second, the four paragraphs that follow do not narrow the meaning of the term "Minimum specified yield strength" in the way that Commerce assumed. The court is not aware of any other record information that did so, and defendant points to none.

The first paragraph that follows the table consists of a single sentence: "For example, under ASTM A1079, the minimum specified yield strength for 'Designation CP grade 780T/500Y' is 500 MPa, which converts to approximately 72,519 psi, so for that product, you would report code '6'." *Yield Strength Mem.* at 2. While this sentence refers to an industry standard, ASTM A1079, it does so only as an example, not as a directive to classify products using only yield strength specifications obtained from industry standards. Instead, the example is directed to the conversion of MPa (megapascals) to pounds per square inch. The sentence does not state that only the use of yield strength specifications in established international industry standards, not manufacturer's specifications, are acceptable.

The second paragraph fails to communicate that only external standards will suffice because it is not even a complete sentence. *See id.* ("Where no minimum yield strength is required, but a typical minimum is identified within the specification from a standards organization such as ASTM (e.g., under ASTM A653, the typical range of yield strengths for 'Designation CS Type A' is identified as 25,000 psi to 55,000 psi, yielding a typical minimum of 25,000 psi, which in turn falls under reporting code '3')."). Even were the court to overlook the grammatical problem, it still would conclude that the text does not address the question this case poses. The example in the parenthetical addresses how to report a "typical minimum" yield strength where only a "typical range," and not an identified required minimum yield strength, is given. There is no discussion of what constitutes a permissible specification within the universe of possible specifications.

The third paragraph, a single sentence, instructs that "[i]f no such requirements or guidance on minimum specified yield strength is identified in the specification for the product in question, explain in detail your rationale for using one of the above reporting codes to report this field for the product (do not create additional reporting codes)." *Id*. This sentence is directed to a situation in which a product specification contained no minimum yield strength specification or guidance. Here, minimum yield specifications existed in the manufacturer's specification and that of the industry standard, and,

therefore, this sentence is inapplicable to, and does not resolve, the issue before the court. Moreover, in using the unspecific phrase "identified in the specification for the product in question," the sentence suggests that Commerce intended a broad meaning to the word "specification."

The fourth and final paragraph contains two references to industry standards, but each reference is presented only as an example. *See id*. Like the preceding paragraphs, it does not indicate an intent to prohibit a respondent from using a manufacturer's specification for yield strength.

It might be argued that the examples given in the fourth paragraph and the first two paragraphs suggest that only specifications published by international standards bodies were intended. But even if that interpretation of the instructions were considered, *arguendo*, to be the more reasonable interpretation, it would not suffice to justify the adverse action Commerce took against Prosperity. The lack of specificity arising from the breadth of the terms Commerce used (*e.g.*, "Minimum specified yield strength" and "specification for the product in question") and from the absence of definitions for those terms convinces the court that Prosperity's interpretation of the Department's reporting instructions was not unreasonable. It follows that Commerce, on this record, was not justified in resorting to the use of the facts otherwise available. Having not requested yield strength information only in the form of yield strength as specified by a standards organization, Commerce was not supported by substantial evidence on the record when it found, per 19 U.S.C. § 1677e(a)(B), that Prosperity failed to provide requested yield strength information. For the same reason, Commerce could not permissibly find that the information Prosperity submitted "could not be verified" within the meaning of 19 U.S.C. § 1677e(a)(D). Because the decision to resort to the facts otherwise available was incorrect, so too was the decision to invoke an adverse inference based on an alleged failure by Prosperity "to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce, *id*. § 1677e(b). Simply stated, Prosperity complied with the instructions as Commerce wrote them.

The Department's reasoning that Prosperity could have consulted Commerce for clarification of the information request, *see Final Decision Mem.* at 13, does not convince the court that Commerce acted properly in using the facts otherwise available or an adverse inference. Because Commerce did not effectuate in its instructions its claimed intention to confine yield strength reporting to yield strength specifications in established industry standards, Prosperity did not

act unreasonably in interpreting the Department's instructions to allow it to use manufacturer's specifications for this purpose or in not requesting clarification.

Defendant-intervenors argue, similarly, that Prosperity was "at the very least negligent" by "failing to confirm its understanding" of the instructions for reporting yield strength with Commerce and that it was Prosperity's "responsibility to look behind its internal product coding system and report physical characteristics for each sale based on Commerce's model match." Def.-Ints.' Opp'n 30. Because the instructions on their face did not require Prosperity to code its products for yield strength based on an established industry standard, the court rejects defendant-intervenors' notion that Prosperity was required in this circumstance to seek clarification. If Commerce is to take an action adverse to a party for an alleged failure to comply with an information request, it must fulfill its own responsibility to communicate its intent in that request. In this instance, the possibility that a respondent would not interpret the instructions according to the Department's subjective and undisclosed intent was a foreseeable consequence of the way Commerce drafted those instructions.

Defendant and defendant-intervenors argue that the Department's instructions did not permit Prosperity to use producer-specific codes for reporting yield strength. Def.'s Opp'n 18–24; Def.-Ints.' Opp'n 13–15, 16–18. According to defendant-intervenors, the Department's questionnaire "instructions very clearly require[d] the reporting of MSYS [*i.e.*, minimum specified yield strength] based on industry specifications published by 'standards organizations such as ASTM.'" Def.-Ints.' Opp'n 13. This argument overlooks the *lack* of clarity in the instructions on that point. Defendant argues that "'in reporting yield strength, as steel products are commonly (if not virtually exclusively) manufactured to various standards, {Prosperity} was required to code yield strength pursuant to the minimum yield strength required of the standard to which the product was produced and not the actual yield strength of the product itself.'" Def.'s Opp'n at 19 (quoting *Final Decision Mem*. at 13). This argument misses the mark because Prosperity, rather than claiming to have reported yield strength based on actual yield strength, claimed that it reported yield strength according to its own manufacturing specifications. *See* Prosperity's Reply Br. 10.

Defendant also argues that Prosperity erroneously "read each paragraph of the instructions in isolation" and failed to consider "whether subsequent paragraphs provided additional information that would clarify a term contained in a prior paragraph." Def.'s Opp'n at 19–20.

The court's individual analysis of the four instructional paragraphs, presented above, demonstrates the flaw in this textual argument.

2. Commerce Must Correct Its Error in the Redetermination upon Remand

Because Commerce invoked its authority to use facts otherwise available and an adverse inference according to an invalid finding that misreporting on the part of Prosperity occurred, Commerce must take appropriate corrective action and revise accordingly the affected weighted-average dumping margin (*i.e.*, either a margin for the combined Yieh Phui/Prosperity/Synn entity or, should it be necessary or appropriate for Commerce to reverse its collapsing decision, for Prosperity).[14] In doing so, Commerce may not use facts otherwise available as a substitute for information that is now on the administrative record of the investigation. Subject to these requirements, the type of corrective action is a matter for Commerce to decide.[15]

IV. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court remands to Commerce the decision published as *Certain Corrosion-Resistant Steel Products From Taiwan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 Fed. Reg. 35,313 (Int'l Trade Admin. June 2, 2016) ("*Final Determination*"), *as amended, Certain Corrosion-Resistant Steel Products From India, Italy, the People's Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 Fed. Reg. 48,390 (Int'l Trade Admin. July 25, 2016). In its new determination, Commerce must: (1) correct its erroneous decision not to make adjustments in Yieh Phui's and Synn's home market sales prices to account for rebates granted to the companies' home market customers; (2) reconsider its decision to collapse Prosperity with the Yieh Phui/Synn entity and ensure that any new decision is based on findings supported by substantial record evidence; and (3) correct the errors resulting from the Department's unlawful decision to use the facts otherwise available and an adverse

[14] Commerce is not required to make any corrective action to the Department's use of facts otherwise available with an adverse inference for claimed errors by Synn in reporting yield strength. Synn has not appeared in this action, and neither Prosperity nor Yieh Phui contest the application of facts available with an adverse inference to certain of Synn's home market sales.

[15] The court leaves it to Commerce to determine whether it is essential to reopen the record to solicit additional cost information.

inference pertaining to the yield strength classification and coding of Prosperity's home market and U.S. market sales.

Therefore, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Final Determination be, and hereby is, set aside as unlawful and remanded for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce shall file, within 90 days from the date of this Opinion and Order, a new determination upon remand ("Remand Redetermination") that conforms to this Opinion and Order and redetermines margins as necessary; it is further

ORDERED that plaintiffs and defendant-intervenors each may file comments on the Remand Redetermination within 30 days of the filing of the Remand Redetermination; and it is further

ORDERED that defendant may respond to the aforementioned comments within 15 days from the date on which the last comment is filed.

Dated: January 23, 2018
New York, New York

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