

# U.S. Customs and Border Protection



## **APPLICATION FOR WITHDRAWAL OF BONDED STORES FOR FISHING VESSELS AND CERTIFICATE OF USE (CBP FORM 5125)**

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

**ACTION:** 30-Day notice and request for comments; extension without change of an existing collection of information.

**SUMMARY:** U.S. Customs and Border Protection, Department of Homeland Security, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than August 1, 2022) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (87 FR 13303) on March 09, 2022, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Application for Withdrawal of Bonded Stores for Fishing Vessels and Certificate of Use.

**OMB Number:** 1651-0092.

**Form Number:** CBP Form 5125.

**Current Actions:** Extension without change of an existing information collection.

**Type of Review:** Extension (without change).

**Affected Public:** Carriers.

**Abstract:** CBP Form 5125, *Application for Withdrawal of Bonded Stores for Fishing Vessel and Certificate of Use*, is used to request the permission of the CBP port director for the withdrawal and lading of bonded merchandise (especially alcoholic beverages) for use on board fishing vessels involved in international trade. The applicant must certify on CBP Form 5125 that supplies on board were either consumed, or that all unused quantities remain on board and are adequately secured for use on the next voyage. CBP uses this form to collect information such as the name and identification number of the

vessel, ports of departure and destination, and information about the crew members. The information collected on this form is authorized by 19 U.S.C. 1309 and 1317 and is provided for by 19 CFR 10.59(e) and 10.65. CBP Form 5125 is accessible at: <https://www.cbp.gov/newsroom/publications/forms?title=5125>.

**Type of Information Collection:** CBP Form 5125.

**Estimated Number of Respondents:** 500.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 500.

**Estimated Time per Response:** 20 minutes (0.33 hours).

**Estimated Total Annual Burden Hours:** 165.

Dated: June 28, 2022.

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

[Published in the Federal Register, July 1, 2022 (85 FR 39540)]

**QUARTERLY IRS INTEREST RATES USED IN  
CALCULATING INTEREST ON OVERDUE ACCOUNTS AND  
REFUNDS ON CUSTOMS DUTIES**

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

**ACTION:** General notice.

**SUMMARY:** This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will increase from the previous quarter. For the calendar quarter beginning July 1, 2022, the interest rates for overpayments will be 4 percent for corporations and 5 percent for non-corporations, and the interest rate for underpayments will be 5 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

**DATES:** The rates announced in this notice are applicable as of July 1, 2022.

**FOR FURTHER INFORMATION CONTACT:** Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298-1107.

**SUPPLEMENTARY INFORMATION:**

**Background**

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2022-11, the IRS determined the rates of interest for the calendar quarter beginning July 1, 2022, and ending on September 30, 2022. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (2%) plus three percentage points (3%) for a total of five percent (5%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (2%) plus two percentage points (2%) for a total of four percent (4%). For overpayments made by non-corporations, the rate is the Federal short-term rate (2%) plus three percentage points (3%) for a total of five percent (5%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties are increased from the previous quarter. These interest rates are subject to change for the calendar quarter beginning October 1, 2022, and ending on December 31, 2022.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1-1-99) (percent)
070174 .....	063075	6	6	.....
070175 .....	013176	9	9	.....
020176 .....	013178	7	7	.....
020178 .....	013180	6	6	.....
020180 .....	013182	12	12	.....
020182 .....	123182	20	20	.....
010183 .....	063083	16	16	.....
070183 .....	123184	11	11	.....
010185 .....	063085	13	13	.....
070185 .....	123185	11	11	.....
010186 .....	063086	10	10	.....
070186 .....	123186	9	9	.....
010187 .....	093087	9	8	.....
100187 .....	123187	10	9	.....
010188 .....	033188	11	10	.....
040188 .....	093088	10	9	.....
100188 .....	033189	11	10	.....
040189 .....	093089	12	11	.....
100189 .....	033191	11	10	.....
040191 .....	123191	10	9	.....
010192 .....	033192	9	8	.....
040192 .....	093092	8	7	.....
100192 .....	063094	7	6	.....
070194 .....	093094	8	7	.....
100194 .....	033195	9	8	.....
040195 .....	063095	10	9	.....
070195 .....	033196	9	8	.....
040196 .....	063096	8	7	.....
070196 .....	033198	9	8	.....
040198 .....	123198	8	7	.....
010199 .....	033199	7	7	6
040199 .....	033100	8	8	7
040100 .....	033101	9	9	8
040101 .....	063001	8	8	7
070101 .....	123101	7	7	6
010102 .....	123102	6	6	5
010103 .....	093003	5	5	4
100103 .....	033104	4	4	3
040104 .....	063004	5	5	4

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1-1-99) (percent)
070104 .....	093004	4	4	3
100104 .....	033105	5	5	4
040105 .....	093005	6	6	5
100105 .....	063006	7	7	6
070106 .....	123107	8	8	7
010108 .....	033108	7	7	6
040108 .....	063008	6	6	5
070108 .....	093008	5	5	4
100108 .....	123108	6	6	5
010109 .....	033109	5	5	4
040109 .....	123110	4	4	3
010111 .....	033111	3	3	2
040111 .....	093011	4	4	3
100111 .....	033116	3	3	2
040116 .....	033118	4	4	3
040118 .....	123118	5	5	4
010119 .....	063019	6	6	5
070119 .....	063020	5	5	4
070120 .....	033122	3	3	2
040122 .....	063022	4	4	3
070122 .....	093022	5	5	4

Dated: June 28, 2022.

JEFFREY CAINE,  
*Chief Financial Officer,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, July 5, 2022 (85 FR 39847)]

# U.S. Court of Appeals for the Federal Circuit

SHANXI HAIRUI TRADE CO., LTD., SHANXI PIONEER HARDWARE INDUSTRIAL CO., LTD., SHANXI YUCI BROAD WIRE PRODUCTS CO., LTD., DEZHOU HUALUDE HARDWARE PRODUCTS CO., LTD., XI'AN METALS & MINERALS IMPORT & EXPORT CO., LTD., Plaintiffs-Appellants v. UNITED STATES, MID CONTINENT STEEL & WIRE, INC., Defendants-Appellees

Appeal No. 2021–2067, 2021–2068, 2021–2070

Appeals from the United States Court of International Trade in No. 1:19-cv-00072-LMG, Senior Judge Leo M. Gordon.

Decided: July 6, 2022

STEPHEN W. BROPHY, Husch Blackwell LLP, Washington, DC, argued for plaintiffs-appellants Shanxi Hairui Trade Co., Ltd., Shanxi Pioneer Hardware Industrial Co., Ltd., Shanxi Yuci Broad Wire Products Co., Ltd., Xi'an Metals & Minerals Import & Export Co., Ltd. Shanxi Hairui Trade Co., Ltd., Shanxi Pioneer Hardware Industrial Co., Ltd., Shanxi Yuci Broad Wire Products Co., Ltd. also represented by JEFFREY S. NEELEY.

BRITTNEY RENEE POWELL, Fox Rothschild LLP, Washington, DC, argued for plaintiff-appellant Dezhou Hualude Hardware Products Co., Ltd. Also represented by LIZBETH ROBIN LEVINSON, RONALD MARK WISLA.

GREGORY S. MENEGAZ, DeKieffer & Horgan, PLLC, Washington, DC, for plaintiff-appellant Xi'an Metals & Minerals Import & Export Co., Ltd. Also represented by JAMES KEVIN HORGAN, ALEXANDRA H. SALZMAN.

SOSUN BAE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, JEANNE DAVIDSON, PATRICIA M. MCCARTHY, AYAT MUJAIS, International Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

ADAM H. GORDON, The Bristol Group PLLC, Washington, DC, argued for defendant-appellee Mid Continent Steel & Wire, Inc. Also represented by LAUREN FRAID, JENNIFER MICHELE SMITH.

Before MOORE, Chief Judge, NEWMAN and STOLL, Circuit Judges.

MOORE, Chief Judge.

Appellants challenge two aspects of the Court of International Trade's decision affirming the Department of Commerce's ninth administrative review of its antidumping order regarding certain steel nails from China. *Shanxi Hairui Trade Co. v. United States*, 503 F. Supp. 3d 1307 (Ct. Int'l Trade 2021). Shanxi Yuci Broad Wire Products Co., Shanxi Hairui Trade Co., Shanxi Pioneer Hardware Industrial Co., (collectively, Shanxi) and Xi'an Metals & Minerals Import &

Export Co. (Xi'an) appeal Commerce's calculation of the all-others rate applicable to separate-rate exporters. Dezhou Hualude Hardware Products Co. (Dezhou) and Xi'an appeal Commerce's application of partial adverse facts available (AFA) to Dezhou. For the following reasons, we affirm.

### BACKGROUND

In its ninth administrative review of its antidumping order regarding certain steel nails from China, Commerce lied on AFA in calculating antidumping rates for two mandatory respondents. For Shandong Dinglong Import & Export Co. (Shandong Dinglong), Commerce relied on total AFA to compute a rate of 118.04% because Shandong Dinglong did not cooperate at all with Commerce's investigation. For Dezhou, Commerce relied on partial AFA to compute a rate of 69.99% because it found that Dezhou's supplier engaged in a fraudulent transshipment scheme and that this misconduct was attributable to Dezhou.

Commerce then used those AFA-based rates to compute its all-others rate (i.e., the rate applied to all exporters of the subject merchandise who requested a separate rate but whom Commerce did not select as mandatory respondents). The Trade Court affirmed. Appellants appeal. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

### DISCUSSION

We apply the same standard of review as the Trade Court, upholding determinations by Commerce that are supported by substantial evidence and otherwise in accordance with law. *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1341 (Fed. Cir. 2016) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)).

Appellants challenge Commerce's determination of the all-others rate, arguing it was improper to base that rate in part on total AFA. Appellants further challenge Commerce's determination of Dezhou's individual rate. They argue Dezhou's supplier did not engage in a fraudulent transshipment scheme, and, even if it did, such misconduct does not warrant the use of AFA against Dezhou. We affirm Commerce's determinations.

### I

Ordinarily, Commerce determines an individual dumping margin for each known exporter of merchandise subject to antidumping duties. 19 U.S.C. § 1677f-1(c)(1). If, however, that is impracticable because there is a large number of exporters, Commerce may instead limit its examination to a subset of exporters it refers to as mandatory

respondents. 19 U.S.C. § 1677f–1(c)(2). For exporters who are not examined, Commerce assigns an all-others dumping margin based on the margins Commerce determines for the mandatory respondents.

During an initial investigation, Commerce must generally set the all-others rate equal to the weighted average of the mandatory respondents' individual dumping margins, “*excluding any... margins determined entirely [on AFA].*” 19 U.S.C. § 1673d(c)(5)(A) (emphasis added). No such provision exists in the statutes governing administrative reviews, however. *See* 19 U.S.C. §§ 1675–1675c.

Here, Commerce interpreted the statutory scheme to permit the use of AFA-based margins to calculate the all-others rate in administrative reviews. We review Commerce's interpretation and application of statute under the two-step framework set forth in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At *Chevron* step one, we determine “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842. “If the intent of Congress is clear,” we give effect to that intent. *Id.* at 842–43. But if “the statute is silent or ambiguous with respect to the specific issue,” we proceed to step two of the *Chevron* framework, where we determine “whether the agency's answer is based on a permissible construction of the statute.” *Id.* at 843.

#### A

At *Chevron* step one, we conclude that Congress has not directly spoken to whether Commerce may use AFA-based margins to compute all-others rates in administrative reviews. While § 1673d(c)(5)(A) expressly applies to investigations, the statute is silent with regard to administrative reviews and non-market economy (NME) exporters. *See* 19 U.S.C. § 1673d(c)(5)(A); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1377–78 (Fed. Cir. 2013) (recognizing that § 1673d does not apply to NME proceedings). Moreover, § 1673d(c)(5)(A) states that its restriction on using AFA-based margins is “[f]or purposes of *this subsection* and *section 1673b(d)* of this title.” 19 U.S.C. § 1673d(c)(5)(A) (emphases added). Those sections concern determinations made during investigations, not administrative reviews. And the statute governing administrative reviews contains no such restriction. *See* 19 U.S.C. §§ 1675–1675c. By not extending § 1673d(c)(5)(A)'s restriction on using AFA-based margins to administrative reviews, Congress “left a gap for [Commerce] to fill.” *See Chevron*, 467 U.S. at 843. Thus, under *Chevron* step one, we

conclude that the statute is silent,<sup>1</sup> and we turn to *Chevron* step two to determine if the agency's gap filling is reasonable.

## B

At *Chevron* step two, we ask whether Commerce reasonably filled the gap Congress left open as to the appropriate methodology for calculating the all-others rate in an administrative review. In answering that question, we recognize that Commerce is the “master of antidumping law” and has technical expertise in the “complex economic and accounting decisions” required in administering the statutory scheme. *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 764 (Fed. Cir. 2012) (internal citation omitted). We therefore defer to its interpretation of the statute when implementing its antidumping duty methodology unless it is “arbitrary, capricious, or manifestly contrary to statute.” *Id.* (quoting *Chevron*, 467 U.S. at 843–44). We also presume Commerce's methodology used in its calculations is correct. *Id.* (internal citation omitted). We conclude that Commerce's methodology for calculating the all-others rate was not contrary to statute and reasonable.

In 2013, Commerce promulgated a new policy for calculating all-others rates in administrative reviews for NME entities. Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings, 78 Fed. Reg. 65,963–64 (Nov. 4, 2013). Under the new policy, Commerce calculates the all-others rate based on the individual dumping margins not of the largest-volume exporters, as Commerce had historically done under § 1677f–1(c)(2)(B), but rather of a representative sample of exporters selected under § 1677f–1(c)(2)(A). Commerce explained that the largest-exporter method “effectively . . . excluded from individual examination” small-volume exporters, which “creates a potential enforcement concern . . . because, as exporters accounting for smaller volumes of subject merchandise become aware that they are effectively excluded from individual examination . . . , they may decide to lower their prices.” *Id.* at 65,964. Commerce further explained that “[s]ampling such companies under section [1677f–1(c)(2)(A)] . . . address[es] this enforcement

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<sup>1</sup> Appellants cite *Albemarle Corp. & Subsidiaries v. United States* in which we stated “the statutory framework contemplates that Commerce will employ the same methods for calculating a *separate* rate in periodic administrative reviews as it does in initial investigations.” 821 F.3d 1345, 1352 (Fed. Cir. 2016). But *Albemarle* recognized that “§ 1673d applies on its face *only to investigations, not periodic administrative reviews*” and only to investigations of companies in market economies. *Id.* at 1352 & n.6 (emphasis added). To the extent that our decision in *Albemarle* speaks at all to *Chevron* step one, it recognizes that the statute is silent.

concern.” *Id.*

Commerce’s findings in the eight administrative reviews preceding the present one confirmed its enforcement concerns. Commerce consistently found that respondents other than Stanley, one of the largest exporters, “either obtained a much higher calculated margin, did not qualify for a separate rate, or were otherwise non-cooperative and received a margin based on total AFA.” J.A. 393. Indeed, during those reviews, it calculated an average margin of 7.02% for Stanley and 105.71% for all other respondents. *Id.* That “large disparity,” in Commerce’s view, reinforced the need to follow the new policy and base the all-others rate on a representative sample of exporters, rather than the largest-volume exporters. *Id.* We cannot say that was unreasonable.

Nor can we say it was unreasonable for Commerce to rely on AFA-based margins in implementing the new policy. Commerce correctly noted that in other contexts the statutes it administers permit using AFA-based margins to calculate all-others rates. J.A. 395 (citing 19 U.S.C. § 1673d(c)(5)(B)). It also reasoned that “excluding AFA rates from the sample rate would give respondents the ability to manipulate the all[-]others rate,” as evidenced by the large disparity between Stanley’s 3.94% rate and the other mandatory respondents’ rates. *Id.*; see J.A. 436. As mentioned, Commerce found in previous reviews that Stanley is not a representative exporter of the subject merchandise. And it reiterated that concern here. J.A. 397 (“Commerce finds that it is appropriate in this review to include all rates to address concerns that the average . . . dumping margins for the largest exporter (i.e., Stanley) differs from the remaining exporters.”). Under these circumstances, Commerce’s use of AFA-based margins to calculate the all-others rate was reasonable.

*Albemarle* is also distinguishable at step two and does not control here. There, Commerce used data from a second review to impose an above de minimis margin to separate rate exporters in a third review despite Commerce’s determination of de minimis margins for the mandatory respondents in the third review. 821 F.3d at 1353–56. We concluded that it was unreasonable to deviate from Congress’ “preferred” method of calculating separate rates using contemporaneous de minimis rates where Commerce had “no evidence . . . that averaging the de minimis margins . . . in the third review . . . would not have been reflective of” the separate rate exporters. *Id.* at 1354–56. In this case, Commerce has demonstrated that averaging the largest exporters and excluding AFA-based rates instead of sampling and including AFA-based rates would not be reflective of the economic realities of the export activity. Indeed, Commerce adopted a new

sampling methodology because it found that smaller exporters were behaving differently than larger exporters and that AFA-based margins yield an all-others rate representative of the exporters as a whole. *See, e.g.*, J.A. 397. Therefore, Commerce’s use of AFA here was reasonable based on the evidence that its method was reflective of the export behavior. *See Albemarle*, 821 F.3d at 1359 (explaining that Commerce could have deviated from de minimis method if it had “some evidence” that data from previous reviews continued to be reflective of current practices).

## II

We turn now to Commerce’s use of partial AFA against Dezhou. Commerce found that Dezhou’s supplier, Tianjin Lingyu (Lingyu), engaged in a fraudulent transshipment scheme by falsely labeling the country of origin on its products. As a result, Commerce found that neither Lingyu nor Dezhou cooperated with the review and applied partial AFA in computing Dezhou’s individual dumping margin under 19 U.S.C. § 1677e(a), (b). Appellants argue that Lingyu did not commit fraud and, even if it did, that Lingyu’s conduct cannot be attributed to Dezhou for purposes of the dumping margin calculation. We conclude Commerce’s finding that Lingyu engaged in a fraudulent transshipment scheme while in a significant supplier-customer relationship with Dezhou is supported by substantial evidence, and Commerce’s calculation of Dezhou’s dumping margin based on partial AFA is reasonable.

If Commerce finds that an exporter (1) provided information that cannot be verified or significantly impeded the examination, and (2) that exporter “failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce may rely on AFA. 19 U.S.C. § 1677e(a)(2)(C)–(D), (b)(1)(A); *see Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1378–79 (Fed. Cir. 2016). Failing to cooperate may be found if the respondent fails “to do the *maximum* it is able to do.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (emphasis added).

Substantial evidence supports Commerce’s determination that Lingyu impeded a proceeding and provided unverifiable information, as well as failed to cooperate with the proceedings. During a verification tour of one of Lingyu’s facilities, Commerce photographed boxes of nails destined for the United States mislabeled “[m]ade in Thailand.” J.A. 365–69, 405. This is evidence of a fraudulent transshipment scheme, which supports Commerce’s determination that

Lingyu impeded the proceeding. *Papierfabrik*, 843 F.3d at 1379 (holding that evidence of transshipment scheme caused “omission that impeded investigation”). Further, the transshipment scheme directly undermines the reliability of *all* information Lingyu provided to commerce regarding Dezhou so that it cannot be verified under 19 U.S.C. § 1677e(a)(2)(D). See *Papierfabrik*, 843 F.3d at 1379 (“[F]raudulent responses as to *part* of submitted data may suffice to support a refusal by Commerce to rely on *any of that data* in calculating the antidumping duty.” (emphases added)).

It was reasonable for Commerce to attribute Lingyu’s transshipment fraud to Dezhou and determine that Dezhou failed to cooperate with Commerce because of their significant supplier-customer relationship. See *Mueller Comercial de Mexico v. United States*, 753 F.3d 1227, 1233 (Fed. Cir. 2014) (holding that Commerce may attribute uncooperative supplier’s conduct to cooperating respondent’s dumping margins). Based on sales data provided to Commerce, there is substantial evidence that Dezhou’s purchases account “for a significant portion of . . . Lingyu’s total production quantity”; and Lingyu’s supply of nails accounts for a significant portion of Dezhou’s sales. J.A. 405. And Commerce’s conclusion that Dezhou did not cooperate to the best of its ability by failing to leverage its relationship with Lingyu to prevent transshipment fraud was not unreasonable. *Mueller*, 753 F.3d at 1233; see *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1356 (Fed. Cir. 2015) (affirming a determination that misrepresentations call into question accuracy of remaining information). Indeed, Commerce’s attribution of Lingyu’s transshipment fraud to Dezhou, who is the party best suited to influence compliance, promotes Commerce’s directive to remedy dumping harms and to protect the administrative process. See *Mueller*, 753 F.3d at 1235. In sum, substantial evidence supports Commerce’s findings regarding Lingyu’s conduct and its relationship to Dezhou. And Commerce’s partial-AFA determination for Dezhou’s dumping margin based on those findings is reasonable.

### CONCLUSION

Commerce did not err. Commerce’s use of AFA rates to determine the all-others rate was reasonable. And it reasonably applied partial-AFA rates to mandatory respondent Dezhou based on substantial evidence that Dezhou’s supplier had engaged in a fraudulent transshipment scheme. We affirm the Court of International Trade’s decision sustaining Commerce’s dumping order.

**AFFIRMED****COSTS**

Appellants shall bear costs.

# U.S. Court of International Trade

Slip Op. 22–64

WILMAR TRADING PTE LTD., PT WILMAR BIOENERGI INDONESIA, AND WILMAR OLEO NORTH AMERICA LLC, Plaintiffs, and P.T. MUSIM MAS AND GOVERNMENT OF THE REPUBLIC OF INDONESIA, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and NATIONAL BIODIESEL BOARD FAIR TRADE COALITION, Defendant-Intervenor.

Before: Richard K. Eaton, Judge  
Consol. Court No. 18–00121  
**PUBLIC VERSION**

Final Determination is remanded.

Dated: June 9, 2022

*Devin S. Sikes*, Akin Gump Strauss Hauer & Feld LLP, of Washington, D.C., argued for Plaintiffs Wilmar Trading Pte Ltd., PT Wilmar Bioenergi Indonesia, and Wilmar Oleo North America LLC. With him on the brief was *Bernd G. Janzen*.

*Lynn G. Kamarck*, Hughes Hubbard & Reed LLP, of Washington, D.C., argued for Consolidated Plaintiff the Government of the Republic of Indonesia. With her on the brief were *Matthew R. Nicely* and *Julia K. Eppard*.

*Edmund W. Sim*, Appleton Luff Pte Ltd., of Washington, D.C., argued for Consolidated Plaintiff P.T. Musim Mas. With him on the brief were *Kelly A. Slater* and *Jay Y. Nee*.

*Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Jessica R. DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Myles S. Getlan*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for Defendant-Intervenor the National Biodiesel Board Fair Trade Coalition. With him on the brief were *Jeffery B. Denning*, *Jack A. Levy*, *Ulrika K. Swanson*, and *James E. Ransdell*.

## **OPINION AND ORDER**

### **Eaton, Judge:**

This consolidated action involves a challenge to antidumping duties imposed on imports of biodiesel<sup>1</sup> from the Republic of Indonesia, following the U.S. Department of Commerce’s (“Commerce” or the

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<sup>1</sup> Biodiesel “is a fuel comprised of mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, including biologically-based waste oils or greases, and other biologically-based oil or fat sources.” *Biodiesel From Indon.*, 83 Fed. Reg. 8,835, 8,836 (Dep’t Commerce Mar. 1, 2018). It is “a commodity product that is used almost exclusively in blends for use as transportation fuel or heating oil.” Pet’n, vol. I (Mar. 23, 2017) at 100, PR 2.

“Department”) determination that the subject biodiesel was sold into the United States at less than fair value during the period of investigation, *i.e.*, from January 1 through December 31, 2016.<sup>2</sup> *See Biodiesel From Indon.*, 83 Fed. Reg. 8,835 (Dep’t Commerce Mar. 1, 2018) (“Final Determination”) and accompanying Issues and Decision Mem. (Feb. 20, 2018) (“Final IDM”), PR 303.

By their motions for judgment on the agency record, Plaintiffs Wilmar Trading Pte Ltd. (“Wilmar”), PT Wilmar Bioenergi Indonesia, and Wilmar Oleo North America LLC, together with Consolidated Plaintiffs P.T. Musim Mas (“Musim Mas”) and the Government of the Republic of Indonesia (collectively, “Plaintiffs”) primarily contest the Department’s determination of normal value, *i.e.*, the price at which Wilmar sold biodiesel in its home market of Indonesia, and ask the court to remand the Final Determination. *See* Pls.’ & Consol. Pls.’ Mem. Supp. Jt. Mot. J. Agency R., ECF No. 30 (“Pls.’ Br.”); Pls.’ & Consol. Pls.’ Reply Br., ECF No. 55 (“Pls.’ Reply”); Consol. Pl.’s Mem. Supp. Mot. J. Agency R., ECF No. 31–1 (“Musim Mas’s Br.”); Consol. Pl.’s Reply Br., ECF No. 56.

The antidumping statute provides that a “particular market situation” may render a respondent’s home market sales, or its cost of production, outside the ordinary course of trade, and therefore unusable for purposes of determining normal value. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III) (sales), (e) (costs) (2018). Plaintiffs challenge Commerce’s determination that it could not use Wilmar’s home market sales to determine normal value. They thus dispute Commerce’s finding of two particular market situations in Indonesia—(1) a “sales-based particular market situation”<sup>3</sup> and (2) a “cost-based particular market situation.”<sup>4</sup>

<sup>2</sup> In a parallel proceeding, Commerce imposed countervailing duties on shipments of Indonesian biodiesel made by the same respondents during the same period. *See Biodiesel From the Republic of Indon.*, 82 Fed. Reg. 53,471 (Dep’t Commerce Nov. 16, 2017) and accompanying Issues and Decision Mem. (Nov. 6, 2017). The appeal of that decision came before this Court in *Wilmar Trading Pte Ltd. v. United States*, Consol. Court No. 18–00006. The Court sustained in part and remanded, for further explanation, the Department’s final countervailing duty determination in *Wilmar Trading Pte Ltd. v. United States*, 44 CIT \_\_\_, 466 F. Supp. 3d 1334 (2020) (“*Wilmar CVD*”). Ultimately, the Court sustained Commerce’s remand redetermination in *Wilmar Trading Pte Ltd. v. United States*, No. 18–00006, 2020 WL 7048910, at \*1 (CIT Dec. 1, 2020).

<sup>3</sup> A particular market situation that takes home market sales outside the ordinary course of trade, rendering them unusable as a basis for normal value, will be referred to in this opinion as a “sales-based particular market situation.” *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III); *see also* 19 C.F.R. § 351.404(c)(2)(i) (2019).

<sup>4</sup> A particular market situation that causes “the cost of materials and fabrication or other processing of any kind . . . not [to] accurately reflect the cost of production in the ordinary course of trade,” will be referred to in this opinion as a “cost-based particular market situation.” 19 U.S.C. § 1677b(e). When a cost-based particular market situation prevents the determination of constructed value (as normal value), the Department “may use another calculation methodology under this part or any other calculation methodology.” *Id.*

Plaintiffs also dispute an adjustment that the Department made to constructed value (as normal value) to take into account the tradeable credits that a purchaser generates by the importation of biodiesel into the United States.<sup>5</sup>

For its part, Musim Mas contends that Commerce erred when it disregarded all of the company's reported information, and used facts otherwise available, because of alleged deficiencies in its home market sales, cost of production, and U.S. sales information. Musim Mas also contends that the Department erred when it applied an adverse inference to the facts available based on its finding that the company failed to cooperate to the best of its ability with the investigation.

The United States ("Defendant"), on behalf of Commerce, and Petitioner and Defendant-Intervenor the National Biodiesel Board Fair Trade Coalition ask the court to sustain the Final Determination as supported by substantial evidence and otherwise in accordance with law. *See* Def.'s Resp. Pls.' Mots. J. Agency R., ECF No. 50 ("Def.'s Resp."); Def.-Int.'s Resp. Opp'n Pls.' Mots. J. Agency R., ECF No. 49.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(i).

For the following reasons, the court remands the Department's finding that one or more particular market situations existed with respect to home market sales that Wilmar made *outside* of a government-subsidized grant program.<sup>6</sup> Commerce must either support its particular market situation finding with substantial evidence or use the price paid for Wilmar's non-program sales to determine normal value. The court also remands Commerce's decision to adjust constructed value (as normal value) with instructions to establish the statutory and regulatory basis for its authority to make this adjustment. Finally, Commerce's findings on remand regarding the determination of normal value for Wilmar, may, in turn, impact its dumping analysis, including the calculation of the "highest transaction-specific margin" that Commerce assigned to Musim Mas as adverse facts available. Accordingly, the court reserves decision on Musim Mas's challenges to Commerce's use of adverse facts available until the results of redetermination are before the court.

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<sup>5</sup> The credits, called Renewable Identification Numbers, or RINs, are explained later in the opinion.

<sup>6</sup> The program, called the Public Service Obligation program, aimed to promote the production of Indonesian biodiesel. It is discussed later in the opinion.

## BACKGROUND

### I. Government Programs in Indonesia that Impact the Biodiesel Industry

#### A. Direct Payments Through Indonesia's Biodiesel Subsidy Fund

In 2015, Indonesia implemented a regulatory scheme intended to support its biodiesel industry. *See Wilmar CVD*, 44 CIT at \_\_, 466 F. Supp. 3d at 1338–39. One part of the plan created the Biodiesel Subsidy Fund (the “Fund”). *See id.* at \_\_, 466 F. Supp. 3d at 1339. In accordance with the law giving rise to the Fund, when biodiesel producers, such as Wilmar and Musim Mas, made sales through Indonesia’s Public Service Obligation program (the “Program”), they received payments from the Fund in addition to a government-mandated amount that Program-designated purchasers paid. That is, Wilmar and Musim Mas received payments for Program sales in two parts: (1) a payment from the purchaser in a government-mandated amount designated to match the market price for petrodiesel—a cheaper fuel than biodiesel (the “Petrodiesel Price”); and (2) a payment from the Indonesian government (through the Fund) intended to make up the difference between the Petrodiesel Price and what the Indonesian government estimated as the “market price” for biodiesel (the “Fund Payment”). *See Wilmar’s Resp. Suppl. Secs. B & C Quest.* (Aug. 21, 2017) at 5 & Ex. S-6, PR 169. As for the purchasers, they paid a price for the biodiesel that was lower than its market price. Thus, the aim of the Program was to promote the production of Indonesian biodiesel by allowing Wilmar and Musim Mas to receive a competitive price for their biodiesel, even though their purchasers paid the lower Petrodiesel Price. *See Wilmar CVD*, 44 CIT at \_\_, 466 F. Supp. 3d at 1343.

In *Wilmar CVD*, the Court sustained Commerce’s determination that Fund Payments were countervailable subsidies: “Commerce was reasonable in its finding that these Fund transfers, clearly distinct from the price paid by the actual purchasers, were financial contributions in the form of grants.” *Id.* at \_\_, 466 F. Supp. 3d at 1345. Thus, for each sale of biodiesel through the Program, the Court upheld Commerce’s finding that *only the payment made by the customers* represented the selling price.

## **B. Export Restraints on Crude Palm Oil (Biodiesel Input)**

At the same time the Biodiesel Subsidy Fund was created, Indonesia enacted the 2015 Export Levy, at \$50 per metric ton on all exports of crude palm oil, the primary biodiesel input. *See Wilmar CVD*, 44 CIT at \_\_, 466 F. Supp. 3d at 1339. As a result of the levy, more crude palm oil was available for purchase in the Indonesian market, and less was present in the world market. Moreover, the world market price of Indonesian crude palm oil increased, and the price of crude palm oil fell for domestic consumers, including biodiesel producers such as Wilmar and Musim Mas. *See id.* at \_\_, 466 F. Supp. 3d at 1352. Crude palm oil is the primary input in Wilmar’s and Musim Mas’s biodiesel fuel.

In *Wilmar CVD*, the Court sustained Commerce’s determination that, by artificially lowering domestic crude palm oil prices, the 2015 Export Levy “resulted in indirect financial contributions [subsidies] to Wilmar and Musim Mas in the form of goods provided for less than adequate remuneration.” *Id.* at \_\_, 466 F. Supp. 3d at 1350. Thus, the Court found that the Department reasonably countervailed the effects of Indonesia’s artificial lowering of crude palm oil prices on Wilmar’s and Musim Mas’s U.S. sales of biodiesel.

## **II. Commerce’s Antidumping Investigation**

In April 2017, Commerce initiated an antidumping investigation on imports of biodiesel from Indonesia in response to a petition filed by Defendant-Intervenor the National Biodiesel Board Fair Trade Coalition. *See Biodiesel From Arg. and Indon.*, 82 Fed. Reg. 18,428 (Dep’t Commerce Apr. 19, 2017) (initiation notice). Commerce selected Wilmar and Musim Mas as mandatory respondents because they were the two largest, publicly-identifiable Indonesian exporters of biodiesel, by volume, to the United States during the period of investigation. *See Respondent Selection Mem.* (May 3, 2017), PR 47.

In both the Preliminary and Final Determinations, Commerce concluded that it could not make a “fair comparison,” as directed by the antidumping statute, between the price at which Wilmar sold biodiesel in Indonesia (*i.e.*, “normal value” or the home market sales price) and the price at which it sold biodiesel in the United States (*i.e.*, export or constructed export price).<sup>7</sup> Commerce reached this conclusion based on its finding that none of Wilmar’s home market sales

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<sup>7</sup> “In determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value.” 19 U.S.C. § 1677b(a).

were made within the ordinary course of trade.<sup>8</sup> *See Biodiesel From Indon.*, 82 Fed. Reg. 50,379, 50,380 (Dep’t Commerce Oct. 31, 2017) (“Preliminary Determination”) and accompanying Preliminary Decision Mem. (Oct. 19, 2017) (“PDM”) at 17, PR 244; *see also* Final IDM at 11.

Wilmar made two kinds of home market sales during the period of investigation: Program sales, for which it received payment in two parts (*i.e.*, the Petrodiesel Price and the Fund Payment), and non-Program sales, which were not subject to the two-part payment system. *See* Final IDM at 11–16. Commerce found that both kinds of sales were made “outside the ordinary course of trade” because of the two particular market situations. *See* Final IDM at 12–13. Put another way, Commerce believed that neither the Program sales prices nor the non-Program sales prices were the result of market forces, and thus rejected using any of Wilmar’s home market sales to determine normal value.

#### **A. Commerce’s Rejection of Program Sales Because of a Sales-Based Particular Market Situation**

For Program sales, Commerce found that the terms of the Program, including the two-part payment scheme, created a sales-based particular market situation that prevented a fair comparison between normal value and export price because the Program sales prices were not set by market conditions. *See* Final IDM at 13 (“The [Program] is operated under a government mandate whereby the total compensation offered to producers for biodiesel is made up of two components: . . . the [P]etrodiesel [P]rice [set by Indonesian governmental agencies] . . . [and] the complete biodiesel price [which is calculated using] a [crude palm oil] price, a conversion cost and logistics expenses. . . . From the sum total of [the] second component, the price of petrodiesel . . . is subtracted, and the balance is invoiced to [and paid by] the [Fund].”). Commerce considered the price paid by the designated purchasers (the Petrodiesel Price) to be the “price” of biodiesel sold in the home market—not the supplemental Fund Payment, since the Indonesian government received nothing in return for its contribu-

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<sup>8</sup> Though both Wilmar and Musim Mas were mandatory respondents, Commerce calculated an antidumping duty rate only for Wilmar. Regarding Musim Mas, Commerce concluded that necessary information was missing from the record as to the company’s home market sales, cost of production, and U.S. sales, and that it had failed to cooperate to the best of its ability. *See* Preliminary Decision Mem. (Oct. 19, 2017) at 6–8, PR 244; *see also* Final IDM at 52–53. Accordingly, Commerce replaced all of Musim Mas’s information with facts available, applying an adverse inference. Commerce, thus, did not calculate an antidumping duty rate for Musim Mas based on the company’s own information, but instead, ultimately assigned it a rate based on Wilmar’s highest transaction-specific margin. *See* Final IDM at 54.

tion. *See* Final IDM at 14–15 (“The focus of a dumping analysis is *only* the price that the home market customer pays the respondent for biodiesel.”).

In the Final Results, Commerce examined the two sources of payment and further found that it was “clear that *neither* component of [Program] pricing is subject to negotiation, regardless of supply and/or demand.” Final IDM at 13 (emphasis added). Thus, Commerce reached the conclusion that Wilmar’s Program sales were not made in the ordinary course of trade based on its finding that “[b]oth components of the biodiesel price,” *i.e.*, the Petrodiesel Price and the Fund Payment, “are set by the [Indonesian government].” Final IDM at 13.

### **B. Commerce’s Rejection of Non-Program Sales Because of a Sales-Based Particular Market Situation and a Cost-Based Particular Market Situation**

As to Wilmar’s non-Program sales, Commerce concluded that, because most Indonesian biodiesel sales were made through the Program (including the majority of Wilmar’s sales), even sales made outside it were affected. *See* Final IDM at 15 (“[G]overnment mandated [Program] sales comprise the vast majority of Indonesian biodiesel consumption which is a clear indication that all Indonesian biodiesel prices are distorted due to the [sales-based particular market situation created by the Program].”). In other words, according to Commerce, because of the overwhelming presence of non-market sales in the marketplace, even sales prices that might otherwise have been determined by market forces were distorted.

In addition, Commerce rejected using Wilmar’s non-Program sales as the basis of normal value on another ground: its finding that the cost of biodiesel’s main input, crude palm oil, was itself distorted by a particular market situation. This cost-based particular market situation finding resulted from the existence of export restraints on crude palm oil—specifically, that the Indonesian government “imposes export taxes and levies on [crude palm oil] that impede external trade and competitive pricing for [crude palm oil].” Final IDM at 22. These “taxes and levies” included the 2015 Export Levy that Commerce determined, in its countervailing duty investigation, had resulted in indirect subsidies to Wilmar and Musim Mas. *See Wilmar CVD*, 44 CIT at \_\_, 466 F. Supp. 3d at 1350; *see also* PDM at 22.

For purposes of evaluating whether Wilmar’s non-Program sales were in the ordinary course of trade (and thus affected normal value), Commerce stated that “the prices of [non-Program] sales are also based on . . . the distorted price of domestic [crude palm oil]. The price of [crude palm oil] comprises the vast majority of the cost to produce

biodiesel in Indonesia,” and thus the non-Program sales “also are outside the ordinary course of trade.” Final IDM at 15.

Therefore, in the Final Determination, Commerce rejected Wilmar’s Program sales because of a sales-based particular market situation, and rejected its non-Program sales because of a sales-based particular market situation *and* a cost-based particular market situation. Since it rejected these sales, the Department looked for another means to determine normal value.

### **C. Commerce’s Adjustment of Constructed Value to Account for Renewable Identification Numbers (RINs)**

Having determined that particular market situations prevented “a proper comparison [between normal value and] export price or constructed export price,” the Department calculated Wilmar’s anti-dumping margin using constructed value as normal value. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III) & (a)(4). The process of determining constructed value (as normal value) involves putting a price or value on the subject merchandise’s inputs.

Here, Commerce determined that Wilmar’s actual costs for biodiesel’s main input, crude palm oil, were distorted by the cost-based particular market situation created by Indonesia’s export tax scheme, and thus, those costs were outside the ordinary course of trade. *See* Final IDM at 21–24. Accordingly, Commerce did not use Wilmar’s reported crude palm oil costs, but rather constructed normal value using a world market price for crude palm oil “as adjusted for transportation and other costs.” *See* Final IDM at 24.

In addition, Commerce adjusted constructed value (as normal value) by accounting for the value of Renewable Identification Numbers (“RINs”) associated with Wilmar’s U.S. sales of biodiesel.<sup>9</sup> *See* Final IDM at 6–8. As will be discussed more fully, RINs are “tradeable

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<sup>9</sup> Plaintiffs primarily challenge Commerce’s adjustment of constructed value for RINs. They also challenge Commerce’s decision *not* to “deduct international freight from [the] world market price” for crude palm oil. *See* Pls.’ Br. at 29. In the Final Determination, Commerce declined to make this adjustment because “no information on the record” demonstrated that “the world market [crude palm oil] price is for [crude palm oil] that originated in Malaysia or Indonesia.” Final IDM at 24. In other words, the record in this proceeding did not support the adjustment. Plaintiffs disagree that *no* evidence supports the adjustment and point to an exhibit that was attached to the petitions in both the countervailing and dumping investigations, labeled Exhibit CVD-IND-35. *See* Particular Market Situation Allegation (July 25, 2017), Ex. 15, PR 116. Plaintiffs assert that “[i]n the companion CVD investigation, based on [Exhibit CVD-IND-35] *and additional record evidence*, Commerce concluded that ‘the CIF Rotterdam prices . . . represent shipments from Malaysia’ and made the adjustment Commerce declined to make here.” Pls.’ Reply at 12 (emphasis added) (quoting *Biodiesel From the Republic of Indon.*, 82 Fed. Reg. 53,471 (Dep’t Commerce Nov. 16, 2017) (final determination) and accompanying Issues and Decision Mem. (Nov. 6, 2017) at 22). For Plaintiffs, Commerce acted arbitrarily by failing to make the adjustment here when it found

credits [created] pursuant to a U.S. regulatory scheme administered by the Environmental Protection Agency.” *Vicentin S.A.I.C. v. United States*, 43 CIT \_\_, \_\_, 404 F. Supp. 3d 1323, 1328 (2019) (“*Vicentin I*”). When adjusting constructed value to account for RINs, Commerce acknowledged that RINs were a feature of U.S. regulatory law and were entirely independent of Indonesian law. *See* Final IDM at 6.

#### **D. Commerce’s Use of Adverse Facts Available for Musim Mas**

As for Musim Mas, Commerce found that it could not determine the normal value of the company’s sales in Indonesia or its U.S. sales prices because the company had failed to provide necessary information in response to the Department’s questionnaires, warranting the use of facts available. *See* Final IDM at 49–55. Specifically, the Department found that the record was missing a home market sales reconciliation, CONNUM-specific production quantities sought as a part of the company’s cost of production information, and estimated RIN values for Musim Mas’s U.S. sales. *See* Final IDM at 49.

Commerce further found that Musim Mas failed to cooperate to the best of its ability with the Department’s requests for information. *See* Final IDM at 53–54. Accordingly, applying “total” adverse facts available,<sup>10</sup> the Department did not calculate an individual antidumping duty rate for Musim Mas, but instead, in the Preliminary Determination, assigned Wilmar’s 50.71 percent rate to Musim Mas. *See* PDM at 9 (preliminarily assigning “the calculated estimated weighted-average dumping margin calculated for Wilmar, 50.71 percent, to Musim Mas as an [adverse facts available] rate”).

In the Final Determination, Commerce made certain changes to Wilmar’s and Musim Mas’s antidumping duty rates. The final rate for Wilmar was 92.52 percent. *See* Final Determination, 83 Fed. Reg. at 8,836. The final adverse facts available rate for Musim Mas was 276.65 percent, *i.e.*, Wilmar’s “highest transaction-specific margin.” *See* Final IDM at 55.

it could make the adjustment in the countervailing duty case. It is difficult to see how Exhibit CVD-IND-35, on its own, could support Plaintiffs’ desired freight adjustment. The exhibit consists essentially of two separate charts of crude palm oil prices, one of which sets out Malaysian prices. It simply does not indicate that the world market price used by Commerce was for crude palm oil that originated in Malaysia. Plaintiffs do not claim that the “additional record evidence” that Commerce found supported the adjustment in the countervailing duty case is on the record here. Thus, the court cannot find Commerce acted unreasonably in declining to make a freight adjustment here.

<sup>10</sup> “Total adverse facts available” is not defined by statute or agency regulation. Commerce uses this term “to refer to [its] application of adverse facts available . . . to the facts respecting *all of respondents’ production and sales information that the Department concludes is needed for an investigation or review.*” *Nat’l Nail Corp. v. United States*, 43 CIT \_\_, \_\_, 390 F. Supp. 3d 1356, 1374 (2019) (emphasis added) (citation omitted).

## STANDARD OF REVIEW

The court will sustain a determination by Commerce 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).

## LEGAL FRAMEWORK

Under the antidumping statute, Commerce determines if merchandise is being sold, or is likely to be sold, in the United States at less than fair value by comparing a respondent’s sales price in its home market (normal value) and its sales price in the United States (export price). *See* 19 U.S.C. §§ 1673, 1677b(a). The margin between the two is used to calculate an antidumping duty rate imposed on dumped U.S. imports of subject merchandise. *Id.* § 1677(35)(A). Commerce’s normal value determination is at issue here.

Normal value is defined by the antidumping statute as “the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities<sup>11</sup> and *in the ordinary course of trade* and, to the extent practicable, at the same level of trade as the export price or constructed export price.” 19 U.S.C. § 1677b(a)(B)(i) (emphasis added); *see also* 19 C.F.R. § 351.404(a) (“[I]n most circumstances sales of the foreign like product in the home market are the most appropriate basis for determining normal value.”). “Ordinary course of trade” means “the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.” 19 U.S.C. § 1677(15).

Under the statute, Commerce “shall consider the . . . sales and transactions [enumerated in the statute], among others, to be outside the ordinary course of trade,” where a “particular market situation prevents a proper comparison” with U.S. price. *Id.* § 1677(15)(C) (emphasis added). “Particular market situation” is not defined by the statute or Commerce’s regulations. The Statement of Administrative

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<sup>11</sup> [When determining whether to use a respondent’s home market sales as the basis of normal value, Commerce must determine the viability of that market. A market is “viable” if “sales of the foreign like product in that country are of sufficient quantity to form the basis of normal value,” *i.e.*, if “the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5 percent or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States.” 19 C.F.R. § 351.404(b)(1)-(2).]

Action accompanying the Uruguay Round Agreements Act (“SAA”),<sup>12</sup> however, gives guidance as to how Commerce may determine if one exists. The SAA provides:

[A] “particular market situation” . . . might exist . . . where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. It also may be the case that a particular market situation could arise from differing patterns of demand in the United States and in the foreign market. For example, if significant price changes are closely correlated with holidays which occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to prices to the United States.

SAA at 822, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4162; *see also* *Nesteel Co. v. United States*, 28 F.4th 1226, 1234 (Fed. Cir. 2022) (citing SAA examples). Thus, while the statute does not mention the idea that prices must be competitively set to avoid a finding of a “particular market situation,” the SAA does.

Where Commerce determines that a particular market situation renders a respondent’s home market sales prices outside the ordinary course of trade (a “sales-based particular market situation”), and thus unusable as a basis for normal value, Commerce may construct normal value based on a respondent’s production costs. *See* 19 U.S.C. § 1677b(a)(4) & (a)(1)(B)(ii)(III); *see also* 19 C.F.R. § 351.404(c)(2)(i). The statute defines “constructed value” as the sum of “the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade” and “the actual amounts incurred and realized by the specific exporter or producer being examined . . . for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country.” 19 U.S.C. § 1677b(e)(1)-(2)(A).

A particular market situation (specifically, a “cost-based particular market situation”) can also render a respondent’s costs outside the

<sup>12</sup> The SAA was adopted by Congress with the Uruguay Round Agreements Act. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, Vol. 1, 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040; *see also* 19 U.S.C. § 3511(a) (approving the SAA). By statute, the SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. § 3512(d).

ordinary course of trade. Where “the cost of materials and fabrication or other processing of any kind . . . [do] not accurately reflect the cost of production in the ordinary course of trade,” and are therefore unusable to determine constructed value, the statute provides that the Department “may use another calculation methodology under this part or any other calculation methodology.” *See id.* § 1677b(e).

## DISCUSSION

### **I. Commerce’s Decision to Rely on Constructed Value (as Normal Value) Based on Its Particular Market Situation Findings Is Sustained as to Program Sales, and Remanded as to Non-Program Sales**

Plaintiffs first challenge Commerce’s finding that none of Wilmar’s home market sales—*i.e.*, neither the company’s Program sales nor its non-Program sales—were made in the ordinary course of trade, and therefore could not be used as a basis for normal value.<sup>13</sup> *See* Pls.’ Br. at 13–29.

#### **A. Wilmar’s Program Sales**

In the Final Determination, Commerce found that a sales-based particular market situation was created through the implementation of the Program because the Indonesian government “control[ed] the Indonesian biodiesel market to such an extent that no home market prices [could] be considered to have been competitively set and, therefore, [were] outside the ordinary course of trade.” *See* Final IDM at 13. Commerce based this finding on the record evidence demonstrating that under the Program, participating producers, including Wilmar, sold biodiesel to designated purchasers in quantities, and at a price, set by the Indonesian government. *See* Final IDM at 12 (“It is undisputed and verified that Wilmar (or any other biodiesel producer) has no discretion to modify the prices or the volume [of biodiesel] to be supplied as mandated by the government.”).

Plaintiffs argue that Wilmar’s Program sales should have been used as the basis for normal value (1) “because government intervention alone cannot serve as the basis for a [particular market situation] finding,” *i.e.*, Commerce unlawfully failed to determine whether the government’s control had any effect on pricing; (2) because the

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<sup>13</sup> Because Commerce determined that the use of facts available, applying an adverse inference, was warranted to disregard all of Musim Mas’s information, it did not address Musim Mas individually in its particular market situation analysis. Before the court, Musim Mas “incorporates by reference” Wilmar’s arguments addressed here, challenging Commerce’s particular market situation determinations. *See* Musim Mas’s Br. at 11 (“[S]hould this Court order a remand, it should direct Commerce to use the actual home market sales and costs of both Wilmar and [Musim Mas].”).

Department ignored “substantial record evidence that the [P]rogram in fact based biodiesel prices on market indices”; and (3) because Commerce decided, without evidence, that the second component of the Program payments, *i.e.*, the Fund Payment, was not market-based. *See* Pls.’ Br. at 13.

Commerce’s finding that a sales-based particular market situation rendered Wilmar’s Program sales outside the ordinary course of trade, and therefore unusable as a basis for normal value, is supported by substantial evidence and otherwise in accordance with law.

The SAA provides that a particular market situation might exist “where there is government control over pricing *to such an extent* that home market prices cannot be considered to be competitively set.” SAA at 822 (emphasis added). Here, Commerce reasonably found that, through the Program, “the government’s interventions have had a direct effect on biodiesel prices and production in Indonesia during the [period of investigation]” that justified finding the existence of a sales-based particular market situation. *See* Final IDM at 13. Commerce found that “neither component of [Program] pricing [*i.e.*, the Petrodiesel Price or the Fund Payment] is subject to negotiation, regardless of supply and/or demand,” and “[b]oth components of the biodiesel price are set by the [Indonesian government].” Final IDM at 13. The record supports this finding.

As an initial matter, there can be no serious argument that the Fund Payment component of the Program pricing is competitively set. In *Wilmar CVD*, this Court sustained Commerce’s finding that the Fund Payments are subsidies in the form of grants from the Indonesian government. *See* 44 CIT at \_\_\_, 466 F. Supp. 3d at 1344 (“The Government, through the Fund, [paid] to Wilmar and Musim Mas roughly the difference between the payment they had received [from sales of their biodiesel at the *Petrodiesel Price* ] and the domestic market price for biodiesel.”). Indeed, Wilmar itself concedes that the price paid by the purchasers was not a market price for biodiesel or “normal in trade,” because it acknowledges that the Fund Payment is necessary to make biodiesel producers “whole.” *See* Pls.’ Br. at 20–21 (emphasis added) (“[T]he [Indonesian government] does not confer ‘supplemental payments’ on [Program] sales, but rather pays *one portion of the biodiesel sales price*.”). Thus, Fund Payments cannot be said to have been determined by the market.

Additionally, with regard to the Petrodiesel Price component, Commerce cited record evidence showing that the Petrodiesel Price per metric ton of biodiesel—that is, the “price” for Program sales—was significantly lower than the price for biodiesel sold *outside* the Pro-

gram in Indonesia.<sup>14</sup> See *Wilmar Prelim. Analysis Mem.* (Oct. 19, 2017) at 3 & attach. 4, CR 289, 297, PR 246 (“Prelim. Analysis Mem.”). Here too, the Petrodiesel Price was set by the Indonesian government. See *Final IDM* at 12.

Because both the Fund Payment and the Petrodiesel Price are determined by the Indonesian government, the payments made for petrodiesel were not competitively set. The court, therefore, sustains Commerce’s decision to exclude Wilmar’s Program sales from its normal value determination.

### B. Non-Program Sales

Plaintiffs insist that even if the court should find that the Petrodiesel Price and Fund Payments resulted in home market sales prices that were not based on market forces, Wilmar’s non-Program sales could provide a usable price because they were made in the ordinary course of trade. Plaintiffs argue that (1) the prices and terms of Wilmar’s non-Program sales were negotiated at arm’s length; (2) non-Program sales “constitute[d], in both quantity and value terms, more than five percent of the volume of Wilmar’s U.S. sales,” and thus the home market was “viable” under Commerce’s regulations; and (3) prices of domestic crude palm oil were not distorted, but even if they were, Commerce violated the statute by turning to the question of input costs (*i.e.*, an aspect of constructed value) before evaluating Wilmar’s sales (*i.e.*, normal value based on price). See *Pls.’ Br.* at 21–22.

The court remands Commerce’s determination that Wilmar’s non-Program sales were not made in the ordinary course of trade, and therefore could not serve as a basis for normal value. Arriving at this conclusion, however, is not entirely straightforward. As an initial matter, the court notes that in *Wilmar CVD*, the Court upheld Commerce’s determination regarding attribution<sup>15</sup> — *i.e.*, that the Fund “provided grants that were tied (*i.e.*, attributed) to all sales of biodiesel by Wilmar . . . not just those made in the Indonesian market.” 44 CIT at \_\_, 466 F. Supp. 3d at 1347. The basis for this determination, which the Court found reasonable, was Commerce’s finding that “the purpose of the Fund was to subsidize biodiesel *as a product*,

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<sup>14</sup> The average price per metric ton of biodiesel sales under the Program was roughly half the average price per metric ton of sales made outside of the Program. See *Prelim. Analysis Mem.* at 3.

<sup>15</sup> Under Commerce’s regulations, “[a]ttribution means that, if the Department finds that a subsidy is ‘tied to a particular market,’ it will ‘attribute the subsidy only to the products sold by the [respondent] to that market.’” *Wilmar CVD*, 44 CIT at \_\_, 466 F. Supp. 3d at 1342 (quoting 19 C.F.R. § 351.525(b)(4)). “On the other hand, if a subsidy is ‘tied to a particular product,’ it will be attributable to all sales of that product,” including exports to the United States. *Id.* at \_\_, 466 F. Supp. 3d at 1342 (citing 19 C.F.R. § 351.525(b)(5)(i)).

whether sold domestically or exported.” *Id.* at \_\_\_, 466 F. Supp. 3d at 1347. In other words, the benefit of the Fund Payments applied to *all* of Wilmar’s domestic sales, irrespective of whether they were Program or non-Program sales because the grants were paid to the company, and although they were paid on account of the Program sales, the result was that all sales, Program and non-Program, benefitted. *See id.* at \_\_\_, 466 F. Supp. 3d at 1347–48 (“Commerce [was] right that the Fund subsidies should be attributed to all of Wilmar’s . . . sales of biodiesel (*i.e.*, in Indonesia and the United States) during the period of investigation.” (citation omitted)).

Against this backdrop, and considering the facts of record in this case, it is entirely possible that Commerce might be able to find a price effect on the non-Program sales resulting from the grants. Even considering this possibility, though, Commerce has not adequately explained and supported with evidence its decision to disregard Wilmar’s non-Program sales. *See NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Commerce, of course, found that “[Program] sales comprise the vast majority of Indonesian biodiesel consumption at the country-wide level, with a significant portion allocated to Wilmar.” Final IDM at 12. The record appears to support this finding.<sup>16</sup> *See* Prelim. Analysis Mem. at 2 (“Record information shows that biodiesel procured by the [crude palm oil] subsidy fund totaled 2,132,289 metric tons for the period November 2015 through October 2016, whereas the estimated total consumption of biodiesel in Indonesia was projected at 1,958,225 metric tons for 2016. This indicates that the [Program] sales comprised the vast majority of Indonesian biodiesel sales.”).

Despite record evidence that Commerce might have been able to cite of a price effect on non-Program sales resulting from Program sales, it has failed to do so. It has merely made a claim and stated it as a fact. *See* Final IDM at 15 (“[G]overnment mandated [Program] sales comprise the vast majority of Indonesian biodiesel consumption which is a clear indication that all Indonesian biodiesel prices are distorted due to the [sales-based particular market situation created by the Program].”). Remand is thus required for Commerce to provide the necessary explanation and support it with substantial evidence.

Turning to Commerce’s second reason for finding that non-Program sales were not competitively set, substantial evidence supports the finding that the cost of crude palm oil—the main input in biodiesel—was distorted by the particular market situation created by Indonesia’s export taxes and levies, including the 2015 Export Levy. In the

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<sup>16</sup> With respect to Wilmar, in particular, the evidence showed that “of Wilmar’s total home market sales 89 percent was sold under the [Program].” Prelim. Analysis Mem. at 3.

Final Determination, Commerce compared the world market price for crude palm oil with the average Indonesian price for crude palm oil and found that, on average, “during the [period of investigation], the world market price for [crude palm oil] was \$681/MT, while the average price in Indonesia was \$649/MT”—a roughly \$30 difference per metric ton. *See* PDM at 23. That is, “Indonesian [crude palm oil] prices were below world market prices in each month since the imposition of the levy (including each month of the [period of investigation]).” PDM at 23 (noting that the Indonesian government’s levy “lower[ed] the cost of [crude palm oil] for the production of biodiesel by increasing the supply of [crude palm oil] available in the domestic market,” Commerce compared “the prices paid by Wilmar for Indonesian [crude palm oil] to the world market price, and determined that such a price differential exists.”). Thus, it was not necessarily unreasonable for Commerce to assume that a cost-based particular market situation contributed to non-Program sales being outside the ordinary course of trade. *See Nexteel*, 28 F.4th at 1234 (“[A] quantitative comparison showing a difference between costs incurred and costs in the ordinary course of trade could be substantial evidence supporting the existence of a particular market situation.”).

The problem is that here Commerce has failed to show just how the price paid for the biodiesel sold in non-Program sales was affected by the distorted cost of crude palm oil or that the non-Program price was not determined by the market. Again, Commerce has made a statement but failed to explain and support it with substantial evidence. *See* Final IDM at 15 (“[T]he prices of [non-Program] sales are also based on . . . the distorted price of domestic [crude palm oil]. The price of [crude palm oil] comprises the vast majority of the cost to produce biodiesel in Indonesia,” and thus the non-Program sales “also are outside the ordinary course of trade.”).

On remand, the Department shall either support with substantial evidence a finding that one or more particular market situations existed with respect to the non-Program sales or use the price paid for these sales in its normal value determination.

## **II. The Legal Authority for Commerce’s Adjustment to Constructed Value (as Normal Value) to Account for Renewable Identification Numbers (RINs) Requires Explanation**

Next, Plaintiffs challenge the manner in which the Department adjusted constructed value to account for RINs associated with Wilmar’s U.S. sales. As noted above, RINs are

tradeable credits pursuant to a U.S. regulatory scheme administered by the [Environmental Protection Agency, or “EPA”]. The EPA requires that biodiesel producers or importers (“obligated parties”) meet an annual “renewable volume obligation,” pursuant to which obligated parties must submit RINs equal to the number of gallons of renewable fuel comprising their renewable volume obligation. RINs are generated through biodiesel production in the United States or importation of biodiesel. The obligated party that generates RINs may use them to satisfy its renewable volume obligation, or it may trade or sell them to other obligated parties.

*Vicentin I*, 43 CIT at \_\_, 404 F. Supp. 3d at 1328. At the time they are created, RINs have no denominated dollar value. When certain biodiesel is imported into the United States, the purchaser of the biodiesel receives an amount of RINs in addition to the biodiesel itself. Despite having no denominated value, since the RINs have actual value and can be traded, the purchaser receives something of value in addition to the fuel.

In the Final Determination, Commerce found that it was necessary to inflate constructed value (as normal value) to ensure a proper comparison with U.S. price, although RIN values were embedded in U.S. prices, not Indonesian prices. Commerce cited as authority for its adjustment 19 C.F.R. § 351.401(c). *See* Final IDM at 7 (“In order to account for this upward adjustment in the RIN-inclusive [U.S.] sales, an offsetting addition to [normal value] is appropriate under 19 CFR 351.401(c) to match the adjustment already embedded or included in the U.S. price.”). Subsection 351.401(c) of Commerce’s regulations states:

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

19 C.F.R. § 351.401(c). Subsection 351.102(b) defines “price adjustment” as “a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale (see § 351.401(c)), that is reflected in the

purchaser's net outlay." *Id.* § 351.102(b)(38). Simply put, Commerce's regulations permit adjustments to U.S. price and normal value to enable it to make an apples-to-apples comparison between the two.

The Department insists it has the authority to make an addition to constructed value (as normal value) to account for the value of the RINs. Because, however, Commerce has failed to explain adequately the reason why it made the adjustment to constructed value, rather than export price or constructed export price, or cite sufficient legal authority for the adjustment, remand is required.

This Court addressed circumstances like those present here in *Vicentin I*, where Commerce made a price adjustment to constructed value (as normal value) to account for RIN values embedded in U.S. prices. *See* 43 CIT at \_\_, 404 F. Supp. 3d at 1332–34. At the preliminary determination stage of both *Vicentin I* and this case, Commerce adjusted for RIN values by making a “circumstances of sale” adjustment to normal value, pursuant to 19 U.S.C. § 1677b(a)(6)(C)(iii) and 19 C.F.R. § 351.410. *See id.* at \_\_, 404 F. Supp. 3d at 1332–34; *see also* Final IDM at 6. At the final determination stage of both *Vicentin I* and the present case, however, Commerce changed its analysis and adjusted normal value based on 19 C.F.R. § 351.401(c) (price adjustments). *See Vicentin I*, 43 CIT at \_\_, 404 F. Supp. 3d at 1332; *see also* Final IDM at 6.

The *Vicentin I* Court remanded the case to Commerce because it could not find statutory authority for Commerce's determination that the adjustment for RINs could be made to normal value instead of to export price. *See* 43 CIT at \_\_, 404 F. Supp. 3d at 1333 (footnote omitted) (“[E]ven if it were reasonably discernable that Commerce relied upon 19 C.F.R. § 351.401(c) [price adjustments] to offset an embedded RIN adjustment, Commerce has not explained why it can adjust the normal value as opposed to the U.S. price.”). In other words, the Court found that the Department had not clearly tied its normal value adjustment to the law. *Id.* at \_\_, 404 F. Supp. 3d at 1334 (“In light of Commerce's failure to clearly explain the statutory authority empowering it to adjust normal value for RIN values . . . the court remands Commerce's determination for further consideration or explanation.”).

On remand, after *Vicentin I*, Commerce modified its determination and “accounted for RINs by decreasing export and constructed export price,” a determination that was sustained by the Court because Commerce had supported with substantial evidence its authority to adjust export price for RIN values. *See Vicentin S.A.I.C. v. United States*, 44 CIT \_\_, \_\_, 466 F. Supp. 3d 1227, 1230 (2020).

The court finds that Commerce’s adjustment to constructed value (as normal value) is similarly unexplained here. In the Final Determination, Commerce cited no provision in the statute or in its own regulations authorizing the addition of an amount to constructed value (as normal value) to account for increases in U.S. price. Subsection 351.401(c) of Commerce’s regulations permits adjustments for “a change that is made after the time of sale,” provided that “the interested party demonstrates, to the satisfaction of the Secretary, its entitlement to such an adjustment,” but does not authorize adjusting normal value where the change in price affected *U.S. sales*. See 19 C.F.R. §§ 351.102(b)(38), 351.401(c). Rather, the regulation expressly authorizes the adjustment of normal value where normal value is based on price. See 19 C.F.R. § 351.401(c) (emphasis added) (“In calculating export price, constructed export price, and normal value (*where normal value is based on price*), the Secretary normally will use a price that is net of price adjustments . . .”). Here, Commerce stated by way of explanation that “by not affecting the U.S. sales denominator, an addition to [normal value] results in a dumping margin based on a denominator that is proportional to entered value, which is inclusive of the RIN markup.” Final IDM at 7. This explanation, however, does not demonstrate why Commerce left U.S. sales unaffected in its calculations, when those are the sales that actually contain RIN values. As in *Vicentin I*, Commerce’s decision fails to establish the necessary legal authority for applying a price adjustment to normal value when the factual basis for its adjustment concerned U.S. price. It is worth noting that the statutory path for an adjustment to export price (U.S. price) appears to be clear.

Accordingly, this issue is remanded for the Department to establish the statutory and regulatory basis for its authority to adjust constructed value (as normal value) for RINs. In the event that Commerce can provide no such justification, and chooses to make an alternative adjustment (such as an adjustment to U.S. price), its determination must be supported by substantial evidence and in accordance with law. “[T]he path of Commerce’s decision must be reasonably discernable to [the] reviewing court.” *NMB Sing.*, 557 F.3d at 1319 (citation omitted).

### CONCLUSION AND ORDER

Based on the foregoing, it hereby

**ORDERED** that the court reserves decision on Musim Mas’s challenges to Commerce’s use of adverse facts available until the results of redetermination are before the court; it is further

**ORDERED** that the Final Determination is sustained in part and remanded; it is further

**ORDERED** that Commerce shall submit a redetermination upon remand that complies in all respects with this Opinion and Order; it is further

**ORDERED** that Commerce shall either support with substantial evidence a finding that one or more particular market situations existed with respect to Wilmar's non-Program sales or use the price paid for these sales in its normal value determination; it is further

**ORDERED** that Commerce shall establish the statutory and regulatory basis for its authority to adjust constructed value (as normal value) for RINs. In the event that Commerce can provide no such justification, and chooses to make an alternative adjustment (such as an adjustment to U.S. price), its determination must be supported by substantial evidence and in accordance with law; and it is further

**ORDERED** that the remand results shall be due ninety (90) days following the date of this Opinion and Order; any comments to the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be due fifteen (15) days following the filing of the comments.

Dated: June 9, 2022

New York, New York

*/s/ Richard K. Eaton*  
JUDGE

Slip Op. 22-76

FORMER EMPLOYEES OF AT&T SERVICES, INC., THROUGH COMMUNICATIONS WORKERS OF AMERICA LOCAL 4123 Plaintiff, v. U.S. SECRETARY OF LABOR, Defendant.

Before: M. Miller Baker, Judge  
Court No. 20-00075

[The court grants judgment on the agency record for Defendant.]

Dated: June 30, 2022

*Bernd G. Janzen, Devin S. Sikes, and Tebsy Paul*, Akin Gump Strauss Hauer & Feld LLP of Washington, DC, on the briefs for Plaintiff.

*Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Claudia Burke*, Assistant Director; and *Antonia R. Soares*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the brief for Defendant. Of counsel on the brief was *Tecla A. Murphy*, Attorney Advisor, Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor of Washington, DC.

## OPINION

### **Baker, Judge:**

After two previous remands, this trade adjustment assistance case brought by former AT&T workers through their union returns to the court for its third visit. In the first visit, the court found the Department of Labor failed to address the workers' evidence and—insofar as Labor relied on certain noncertified information submitted by the company—violated the Department's statutory duty to explain why it had a reasonable basis to do so. *See generally Comm'cns Workers of Am. Local 4123 ex rel. Former Emps. of AT&T Servs., Inc. v. U.S. Sec'y of Labor*, 518 F. Supp. 3d 1342 (CIT 2021) (*Former AT&T Employees I*).

On the second visit, the court found that once again Labor failed to explain—insofar as the Department relied on AT&T's noncertified data—why Labor had a reasonable basis to do so. *See generally Comm'cns Workers of Am. Local 4123 ex rel. Former Emps. of AT&T Servs., Inc. v. U.S. Sec'y of Labor*, Ct. No. 20–00075, Slip Op. 22–2, 2022 WL 43292 (CIT Jan. 5, 2022) (*Former AT&T Employees II*). Now, on the third try—and on the eve of the program's lapse absent further Congressional authorization—the Department (finally) gets it right. The court therefore grants judgment on the agency record in favor of the Defendant. *See* USCIT R. 56.1(b).

### **Background**

The former AT&T call center workers seek trade adjustment assistance benefits, alleging that the company offshored their jobs to foreign call centers. After an investigation that included receiving information from AT&T, Labor denied relief. AR154–62.<sup>1</sup> After granting reconsideration, and after obtaining additional information from the company, *see Former AT&T Employees I*, 518 F. Supp. 3d at 1348 & n.5, the Department again denied relief. The workers then brought this suit.

*Former AT&T Employees I* held that Labor's denial of benefits suffered from two flaws. First, the Department failed to identify the particular evidence produced by AT&T that the certifying officer found persuasive—the ruling simply stated, “AT&T officials have confirmed the work remained in the United States.” *Id.* at 1351 (quoting AR160). The court explained why such a general finding was problematic:

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<sup>1</sup> Citations to “AR” refer to the public version of the administrative record, ECF 15.

While the Court can reasonably discern that she found AT&T's evidence convincing, that fact alone is not enough because portions of AT&T's evidence (its questionnaire responses) were certified pursuant to 19 U.S.C. § 2272(d)(3)(A)(i) while other portions (the e-mail exchanges between AT&T's in-house counsel and Labor's investigator) were not. . . . *[T]he upshot is that the Court is unable to determine whether, or to what extent, the certifying officer relied upon AT&T's noncertified evidence.* The Court must remand so that Labor can do so . . . .

*Id.* (emphasis added).

Second, Labor failed to acknowledge the evidence submitted by the workers, and further failed to explain why the certifying officer credited AT&T's explanations over that evidence. *Id.* at 1351–52. The court reasoned that the workers' evidence, "fairly read, at least allows for an inference that the closure of the call centers in question will result in the offshoring of job functions previously performed in those facilities." *Id.* at 1352. That inference, in turn, could detract from Labor's conclusion.

After concluding that Labor's determination on reconsideration suffered from the same defects as the original, *see id.* at 1355–56, the court remanded with these instructions:

1. "[A]ddress [the workers'] evidence and . . . weigh it against AT&T's evidence in determining whether [their] job losses were caused by a shift in those services to, or an acquisition of those services from, foreign countries, as described in 19 U.S.C. § 2272(a)(2)," ECF 31, at 1;

2. "[I]nsofar as Labor relies on AT&T's non-certified evidence, the Department shall either find that it 'has a reasonable basis for determining that such information is accurate and complete without being certified,' 19 U.S.C. § 2272(d)(3)(A)(ii), and explain the basis for that finding, or else require AT&T to certify its evidence," ECF 31, at 1–2; and

3. If Labor's remand determination found the workers' evidence convincing, "Labor must then address whether the shift to, or acquisition from, foreign countries 'contributed importantly' to [the workers'] job losses, as described in 19 U.S.C. § 2272(a)(2)(B)(ii) . . . ." ECF 31, at 2.

When the matter returned following Labor's first remand determination, *Former AT&T Employees II* held that the Department adequately addressed the workers' evidence "but fail[ed] to adequately address the question of why AT&T's evidence was satisfactory with-

out statutory certification.” Slip Op. 22–2, at 9, 2022 WL 43292, at \*3. The court remanded again on the certification issue:

*Labor’s remand determination still does not state whether the certifying officer relied on the questionnaire responses, the non-certified e-mail communications, or both.* The decision does cite various administrative record pages. The court has reviewed these administrative record materials [and found that some were certified and some were not].

Page 17 of the remand determination contains string citations that include both questionnaire responses and noncertified e-mail communications. The court therefore concludes that the certifying officer relied on both types of material. But as with the original and reconsideration determinations, Labor’s remand determination does not reveal to what extent the certifying officer relied on the certified questionnaire responses or the noncertified e-mail communications. Thus, the court still cannot discern whether the certifying officer believed the questionnaire responses alone would have been enough and the noncertified e-mail communications simply provided additional corroborating evidence—or whether, instead, the certifying officer regarded the e-mail communications as essential to her analysis.

*Id.* at 12–13, 2022 WL 43292, at \*5 (emphasis added).

The court further explained that the Department’s conclusion that AT&T’s noncertified information was accurate and credible was “not supported by substantial evidence in the administrative record and [did] not fairly meet the statute’s requirement.” *Id.* at 19, 2022 WL 43292, at \*8. The court directed as follows:

On remand, *if Labor relies on noncertified evidence*, it must reasonably explain why it finds that noncertified evidence accurate and complete. To the extent that it relies on noncertified evidence but cannot state a reasonable basis for finding it accurate and complete, the Department must direct AT&T to certify the relevant evidence as described in 19 U.S.C. § 2272(d)(3)(A)(ii).

*Id.*, 2022 WL 43292, at \*8 (emphasis added).

Labor accordingly once again reexamined the workers’ claims. In so doing, the Department explained as follows:

*The certified information collected from AT&T during the initial investigation established that the worker group eligibility criteria set forth in Section 222 of the Act, 19 U.S.C. § 2272, were not*

*met.* However, based on information submitted by Petitioner and to confirm accuracy and completeness of all BDR [certified questionnaire] responses, the Department collected additional non-certified information from AT&T AVP–SLC #1–2 for clarification purposes, during both the initial investigation and the reconsideration.

ECF 49, at 18 (emphasis added).

As directed, Labor also explained why the certifying officer found AT&T’s noncertified information reliable. *Id.* at 19–26. Finally, the Department reaffirmed its conclusion that the workers are not eligible for benefits because the evidence shows that the company did not offshore their jobs—rather, AT&T consolidated those jobs into other domestic call centers. *Id.* at 26–29.

### Standard of Review

The court reviews Labor’s denial of trade adjustment assistance benefits for “substantial evidence.” *See* 19 U.S.C. § 2395(b). “Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. A reviewing court must consider the record as a whole, including that which fairly detracts from its weight, to determine whether there exists such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (cleaned up).

Labor’s decision is also subject to the default standard of the Administrative Procedure Act, which allows a reviewing court to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also Former Emps. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1362 (Fed. Cir. 2003) (stating, in trade adjustment case, that “[t]he Court of International Trade also has the authority under the Administrative Procedure Act to set aside the decision as contrary to law or arbitrary and capricious”).

### Discussion

Labor’s second remand determination belatedly answers the question the court asked twice before in this matter: On what specific information from AT&T did the Department *rely* in denying the workers’ benefits claim?

Labor (finally) explained that, in fact, it relied on AT&T’s certified information. *See* ECF 49, at 18 (“The *certified information . . . established* that the worker group eligibility criteria . . . were not met.”) (emphasis added). The Department further explained in detail that

AT&T's certified responses established that the company "had not shifted to a foreign country, or acquired from a foreign country, services like or directly competitive with the activities performed by workers at" the relevant call centers and that "AT&T had not imported services like or directly competitive to the activities performed by workers at" those call centers. *Id.* at 15–17.

Labor then stated that it viewed the company's noncertified information as either clarificatory or corroborative. *Id.* at 18. The administrative record reflects that the noncertified e-mail communications merely reiterated that the workers' jobs were transferred to other call centers within the United States, *see, e.g.*, AR296, AR301, and also provided additional detail about how AT&T determines where customer calls are routed and how that in turn affects staffing needs, *see, e.g.*, AR309.

In considering whether substantial evidence supports the Department's denial of benefits, the court must consider Labor's cumulative analysis. *Former AT&T Employees II* found that Labor's first remand determination satisfactorily addressed the workers' evidence. *See* Slip Op. 22–2, at 9–10, 2022 WL 43292, at \*\*3–4 (noting that the Department "addresse[d] the jobs report and explain[ed] why the certifying officer concluded that its implications, which were based on very general allegations, were rebutted by more specific evidence provided by AT&T").

*Former AT&T Employees II* explained that Labor's original, reconsideration, and first remand determinations conflated the analysis of AT&T's certified and noncertified information such that the court could not understand the precise basis for the Department's denial of benefits. Slip Op. 22–2, at 10–13, 2022 WL 43292, at \*\*4–5. The second remand determination solves that problem, as Labor reasonably explained that it did not rely on the company's noncertified information.<sup>2</sup> Thus, substantial evidence supports the Department's determination that AT&T's certified information, when weighed against the workers' evidence, establishes that their jobs were not offshored. In view of that conclusion, the court need not analyze Labor's explanation for why it found the noncertified information reliable.<sup>3</sup>

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<sup>2</sup> Both of the court's remand orders gave the Department the option of explaining that it did not rely on noncertified evidence. *See Former AT&T Employees II*, Slip Op. 22–2, at 19, 2022 WL 43292, at \*8 ("On remand, if Labor relies on noncertified evidence . . .") (emphasis added); ECF 31 (remand order in *Former AT&T Employees I*), at 1 ("[I]nsofar as Labor relies on AT&T's non-certified evidence . . .").

<sup>3</sup> On June 16, 2022, the government moved for a stay of further proceedings because of the looming termination of the trade adjustment assistance program on June 30, 2022, absent legislative reauthorization of the program. ECF 56. The government's motion explained

Accordingly, the court **SUSTAINS** the Department of Labor's second remand determination, **DENIES** the workers' motion for judgment on the agency record, and **GRANTS** judgment on the agency record to Defendant. *See* USCIT R. 56.1(b). A separate judgment will enter. *See* USCIT R. 58(a).

Dated: June 30, 2022  
New York, NY

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

Slip Op. 22–77

PRODUCTOS LAMINADOS DE MONTERREY S.A. DE C.V., Plaintiff, v. UNITED STATES, Defendant, and NUCOR TUBULAR PRODUCTS INC., ATLAS TUBE, A DIVISION OF ZEKELMAN INDUSTRIES, AND SEARING INDUSTRIES, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge  
Court No. 20–00166

[Sustaining an agency determination responding to the court's order in an action contesting results of an antidumping duty proceeding.]

Dated: July 6, 2022

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that due to the imminent end of the program—of which the court was not previously advised—petitions not certified by Labor by June 30, 2022, would become moot absent further action by Congress. After a status conference the same day, the court denied the motion and ordered the government to reply to the workers' second remand comments as scheduled on June 23, 2022. ECF 59. The court further ordered the government and the workers to address, by that same date, whether, if the court determined that Labor's second remand results were deficient, the court could order (provided it did so by June 30) the Department to certify the workers' petition. *Id.* The parties complied and filed careful and thoughtful responses to the court's question. *See* ECF 60, 61. Because the court sustains Labor's second remand results, the court has no need to address its authority to order certification. Nevertheless, the court wishes to thank counsel for their exemplary professionalism in providing such high-quality briefing on an expedited basis.

## OPINION

### Stanceu, Judge:

Plaintiff Productos Laminados de Monterrey S.A. de C.V. (“Prolamsa”) is a Mexican producer and exporter of heavy walled rectangular carbon welded steel pipes and tubes. This class or kind of merchandise (referred to herein as “HWR” or “HWR<sup>T</sup>”) is subject to an anti-dumping duty order issued in 2016.

This litigation arose from the final determination the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) issued to conclude the second periodic administrative review (“second review”) of the antidumping duty order (the “Order”), which assigned to Prolamsa a weighted average dumping margin of 7.47%.

Before the court is a “Remand Redetermination” that Commerce submitted in response to the court’s Opinion and Order granting plaintiff’s motion for judgment on the agency record. The Remand Redetermination determined a revised margin of 0.89% for Prolamsa. Plaintiff supports the Remand Redetermination, and defendant United States requests that the court enter judgment to sustain it. Defendant-intervenor Nucor Tubular Products Inc. (“Nucor”) is opposed. Defendant-intervenors Atlas Tube, a Division of Zekelman Industries, and Searing Industries did not submit comments to the court on the Remand Redetermination and, therefore, have raised no objection to this result. The court sustains the Remand Redetermination.

### I. BACKGROUND

The contested agency determination (the “Final Results”) was published as *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From Mexico: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017–2018*, 85 Fed. Reg. 41,962 (Int’l Trade Admin. July 13, 2020) (“*Final Results*”). In the Order, Commerce described the subject merchandise as “certain heavy walled rectangular welded steel pipes and tubes of rectangular (including square) cross section, having a nominal wall thickness of not less than 4 mm.” *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea, Mexico, and the Republic of Turkey: Antidumping Duty Orders*, 81 Fed. Reg. 62,865, 62,865 (Int’l Trade Admin. Sept. 13, 2016) (“*Order*”). These products, which typically are supplied in lengths, commonly from 20 to 42 feet, to manufacturers who further process them, “are used in construction for support and for load-bearing purposes, as well as in

transportation, farm, and material handling equipment.” *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea, Mexico, and Turkey*, Inv. Nos. 701-TA-539, 731-TA-1280–1282, USITC Pub. 4633, at I-12 (Sept. 2016) (Final).

In response to Prolamsa’s claim, the court issued an Opinion and Order remanding the Final Results to Commerce for reconsideration. *Productos Laminados de Monterrey S.A. de C.V. v. United States*, 45 CIT \_\_, \_\_, 554 F. Supp. 3d 1355, 1365 (2021) (“*Prolamsa I*”). *Prolamsa I* provides background information on this litigation. *Id.*, 45 CIT at \_\_, 554 F. Supp. 3d at 1356–58.

Commerce submitted its decision in response to *Prolamsa I* on April 7, 2022. *Final Results of Redetermination pursuant to Court Remand*, ECF No. 61–1 (“*Remand Redetermination*”). Defendant-Intervenor Nucor Tubular Products, Inc. (“Nucor”) commented in opposition on May 9, 2022. Def.-Int. Nucor Tubular Products, Inc.’s Comments on Remand Redetermination, ECF Nos. 64 (conf.), 65 (public) (“Nucor’s Comments”).<sup>1</sup> Following Prolamsa’s submission of comments in support, Comments in Resp. to Comments on Remand Redetermination (May 24, 2022), ECF Nos. 69 (conf.), 70 (public), defendant replied to the comments, advocating that the court sustain the Remand Redetermination. Def.’s Resp. to Comments on Remand Redetermination (May 26, 2022), ECF No. 71.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c),<sup>2</sup> pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1516a, including an action contesting a final determination Commerce issued to conclude an administrative review of an antidumping duty order.

In reviewing an agency decision such as the Remand Redetermination, the court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C.

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<sup>1</sup> The information disclosed in this Opinion is included in public versions of record documents, public versions of the parties’ submissions, and other information subsequently made public in issuances by Commerce. All citations to record documents are to the public versions of those documents. All citations to “J. App.” are to the public version of the Joint Appendix (June 25, 2021), ECF No. 47–1 (public).

<sup>2</sup> All citations to the United States Code herein are to the 2018 edition and all citations to the Code of Federal Regulations herein are to the 2020 edition.

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

### **B. Prolamsa’s Claim that the Final Results Were Contrary to Law**

In contesting the Final Results, Prolamsa claimed that Commerce unlawfully denied its request for a “level-of-trade” (“LOT”) adjustment under section 773(a)(7) of the Tariff Act, 19 U.S.C. §1677b(a)(7), that would apply to certain of its sales of the foreign like product in its home market of Mexico.

Plaintiff described its home market (“HM”) sales during the period of review (“POR”), September 1, 2017 to August 31, 2018, as having been made through four channels of distribution, three of which it described as “commercial” sales and one of which (the “HM Channel 4” sales) it described as “industrial” sales. As the court stated in *Prolamsa I*:

Prolamsa contrasted its HM Channel 4 sales, to which it referred as its “industrial” sales, with those sold through its other three channels of distribution, to which it referred as its “commercial” sales of HWR pipes and tubes, and which it described as follows: direct sales to unaffiliated customers from inventory stored at its plants (“HM Channel 1”); direct sales to unaffiliated customers from inventory stored at its warehouses (“HM Channel 2”); and sales to unaffiliated resellers, which products subsequently were resold to unaffiliated home market customers (“HM Channel 3”).

*Prolamsa I*, 45 CIT at \_\_, 554 F. Supp. 3d at 1360 (citation omitted). Prolamsa described its Channel 4 sales as “sales of custom-designed parts that were made from HWR pipes and tubes and that were produced for, and sold to, original equipment manufacturers (‘OEMs’).” *Id.* (citation omitted).

As the court recounted, “Prolamsa argued that all of its U.S. sales were more similar, in terms of characteristics and selling functions, to its HM Channels 1, 2, and 3 sales, i.e., its ‘commercial’ sales, than they were to its ‘industrial’ sales of HM Channel 4.” *Id.* (citation omitted). “Prolamsa contended that its U.S. sales should be compared to HM Channels 1–3, and that HM Channel 4 sales should not be used for comparison purposes unless sales in HM Channels 1–3 are unavailable, and that in such an instance Commerce should make a

level-of-trade adjustment.” *Id.*, 45 CIT at \_\_\_, 554 F. Supp. 3d at 1361 (citation omitted). In reaching the preliminary results of the second review (“Preliminary Results”), Commerce agreed, finding that Prolamsa had sold the foreign like product at two levels of trade in the home market. *Id.* (citation omitted). “Commerce used Prolamsa’s HM Channel 4 sales for price comparisons with U.S. sales only when no HM Channel 1, 2, or 3 sales were available for comparison with U.S. sales, and when it used an HM Channel 4 sale for that purpose, it made an adjustment, i.e., a reduction, in normal value to account for the difference in level of trade.” *Id.* In the Preliminary Results, Commerce calculated for Prolamsa a preliminary weighted average dumping margin of 0.8%. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018*, 84 Fed. Reg. 63,610, 63,610 (Int’l Trade Admin.) (“Preliminary Results”). For the Final Results, Commerce changed its position and treated all home market sales of the foreign like product as having been made at a single level of trade, which change (along with other changes not contested in this litigation) resulted in the final weighted average dumping margin of 7.47%. *Final Results*, 85 Fed. Reg. at 41,963.

### **C. The Court’s Decision in *Prolamsa I***

The court identified two shortcomings in the Department’s level-of-trade analysis for the Final Results, both of which involved a finding or conclusion not supported by substantial evidence on the administrative record of the second review.

First, the court rejected as unsupported by the record evidence the Department’s finding that none of the documents provided by Prolamsa during the second review proceedings demonstrated what Commerce termed “direct quantitative support” for Prolamsa’s contention that home market sales occurred at two distinct levels of trade. *Prolamsa I*, 45 CIT at \_\_\_, 554 F. Supp. 3d at 1362–63. The court identified in the record “quantitative data illustrating differences between the staffing and expenses [Prolamsa] incurred in making its home market ‘industrial’ sales, i.e., its OEM sales of parts made from HWR pipe and tube in HM Channel 4, and its sales of standard HWR pipe and tube in the other three channels,” with the former being “proportionally higher by a substantial amount.” *Id.*, 45 CIT at \_\_\_, 554 F. Supp. 3d at 1362 (citation omitted). The court noted, also, that “Prolamsa provided a second set of quantitative data on inventory turnover to illustrate that the industrial sales involved substantially longer average inventory turnover periods than the commercial

sales.” *Id.*, 45 CIT at \_\_\_, 554 F. Supp. 3d at 1363.

Second, the court found fault with the Department’s finding that “the totality of record evidence contains inadequate support for Prolamsa’s LOT claims,” *id.* (citation omitted), a conclusion Commerce described as resulting from its “analytical framework” under a 2018 change of practice, in which it required quantitative evidence to support level-of-trade claims. The court viewed this finding as “entirely conclusory” and unexplained in light of specific factual findings, which Commerce stated in the Preliminary Results, that were “grounded in record evidence” and not identified as reversed or abandoned in the Final Results. *Id.* Among those findings were that Prolamsa had provided documentation “adequately demonstrating that it performed 9 out of 14 selling activities for its HM Channel 4 sales at a high level of intensity.” *Id.* (citing *Decision Memorandum for the Preliminary Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico* 14 (Int’l Trade Admin. Nov. 6, 2019) (P.R. 147, J. App. at 482) (footnote omitted) (“*Prelim. Decision Mem.*”).) Also among those findings were that Prolamsa performed certain “OEM-specific” selling activities for its Channel 4 “industrial” sales, which were “sales of custom ‘HWR pipe and tube parts,’” that it did not perform for its commercial sales in the other three channels, which were “of ‘standard HWR pipe and tube.’” *Id.*, 45 CIT at \_\_\_, 554 F. Supp. 3d at 1364 (citing *Prelim. Decision Mem.* at 14, J. App. at 482 (footnote omitted)). “Commerce found, specifically, that [c]ritical to these sales is the successful completion of the Production Parts Approval Process (PPAP), an industry-specific qualification process that ensures quality and established processes for OEM customers to certify manufacturers on a custom “part” basis.” *Id.* (citing *Prelim. Decision Mem.* at 14, J. App. at 482 (footnote omitted)).

#### **D. The Remand Redetermination**

In *Prolamsa I*, the court directed Commerce to “reconsider its decision finding a single home market level of trade” and “declining to make a level of trade adjustment.” 45 CIT at \_\_\_, 554 F. Supp. 3d at 1365. Upon re-examining the record evidence, Commerce reversed the two findings the court found in *Prolamsa I* to be unsupported by substantial record evidence. Commerce stated in the Remand Redetermination that, in response to the court’s order in *Prolamsa I*, it “has reconsidered the facts on the record” and “finds that Prolamsa made its home market (HM) sales at two LOTs.” *Remand Redetermination* at 1–2.

Among the Department's specific factual findings were that "Prolamsa provided evidence demonstrating that it performed the selling activities for its HM channel 4 sales at a higher level of intensity than its HM channel 1–3 sales." *Id.* at 7. Commerce highlighted evidence showing that Prolamsa performed unique selling activities to meet the "PPAP" production qualification requirements of its HM Channel 4 (OEM) customers. *Id.* at 7–8. In addition to qualification activities, Commerce identified selling activities unique to the Channel 4 sales that pertained to training services, technical support (including engineering and re-engineering services), after-sales service, logistical services (including just-in-time delivery and inventory maintenance), and complex order processing.

Regarding its requirement for "quantitative" evidence to support a claimed level-of-trade adjustment, Commerce found that "Prolamsa adequately provided certain quantitative metrics in support of its channel-specific selling functions and corresponding intensities" and cited a chart showing that "the total indirect selling expenses Prolamsa incurred for its industrial sales were substantially higher as a proportion of the revenue earned when compared to its commercial sales." *Id.* at 11 (footnote omitted). "Moreover, the costs Prolamsa incurred for salaries and benefits paid to its industrial sales team were substantially higher in relation to the revenue earned on industrial products when compared to the same metric calculated with respect to Prolamsa's commercial sales." *Id.* (footnote omitted). Commerce found, further, that "while Prolamsa's industrial sales accounted for a small portion of overall sales, the corresponding headcount of its industrial sales team represents a higher percentage of its overall headcount (*i.e.*, covering both of Prolamsa's commercial and industrial sales teams)." *Id.* (footnote omitted).

### **E. Nucor's Opposition to the Remand Redetermination**

In its opposition, Nucor characterizes the Remand Redetermination as "an overcorrection to the Court's remand order." Nucor's Comments 2. According to Nucor, "the information on the record is insufficient to justify a LOT adjustment," the Remand Redetermination "ignores information that fairly detracts from its conclusion," and "Commerce's finding of two LOTs relies on inferences that are vague and conclusory." *Id.*

Nucor bases its "insufficiency" argument on its view that "Commerce failed to connect any differences in the sales expenses—demonstrated by the data the Court highlighted—to a difference in sales prices." *Id.* at 9. Arguing that the burden was on Prolamsa, Nucor asserts that Prolamsa "has not connected" the differences in

selling expenses between HM Channel 4 and HM Channels 1–3 to the differences in sales prices between the products in Channel 4 and those of the other three Channels. *Id.* at 12. Nucor submits that differences between the channels as to inventory costs have not been quantified or been shown to contribute to “price incompatibility.” *Id.* at 13. According to Nucor, Prolamsa “failed to demonstrate how the difference in sales expenses affected the price differences sufficiently to merit a LOT offset,” *id.* at 12, and that “[w]hile there may be differences in the cost of manufacturing to account for the . . . price difference, those costs of manufacturing would be accounted for in a difference in merchandise (‘DIFMER’) adjustment not a LOT adjustment,” which “are not the same thing and should not be treated in the same way,” *id.* at 14.

As for its contention that Commerce ignored “information that fairly detracts from its conclusion,” *id.* at 2, Nucor argues that “Prolamsa’s HM price differences between channels are due to the fact that the more expensive product of HM Channel 4 is custom-made and commands a price premium. The price differences are not due to an advanced LOT or additional significant selling activities.” *Id.* at 15.

Finally, Nucor argues that Commerce drew “inferences that are vague and conclusory” regarding inventory carrying costs and “regarding the reason and relative weight of the differences in price for Prolamsa HM Channel 4 sales.” *Id.* at 17. According to Nucor, “[t]he remand redetermination fails to engage with the deficiencies in that data [*sic*] and does not explain its reasons for departing from its final determination.” *Id.* at 18.

#### **F. The Court Must Sustain the Remand Redetermination**

The Tariff Act imposes as a guiding principle that “a *fair comparison* shall be made between the export price or constructed export price and normal value.” 19 U.S.C. § 1677b(a) (emphasis added). Where, as here, normal value is based on the price of the foreign like product in the home market (in this case, Mexico), Commerce determines normal value beginning with the price (often referred to as the “starting price”) “at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, *to the extent practicable, at the same level of trade* as the export price or constructed export price.” *Id.* § 1677b(a)(1)(B)(i) (emphasis added). If it is not practicable to compare the export price or constructed export price with prices in home market sales made at the same level of trade, it may be necessary for Commerce to make adjustments to the home market price,

i.e., to the “starting price” Commerce uses in determining normal value, to ensure a fair comparison with export price or constructed export price.

One of the possible adjustments is a “level-of-trade” adjustment, which Commerce must make according to 19 U.S.C. § 1677b(a)(7) under certain conditions. When calculating normal value, Commerce is required to make an upward or downward adjustment to the starting price “to make due allowance for any difference (or lack thereof) between the export price or constructed export price” and the starting price “(other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value” if both of two conditions are met. *Id.* § 1677b(a)(7)(A).

The first condition is met if the difference in the level of trade between the export price or constructed export price and normal value “involves the performance of different selling activities.” *Id.* § 1677b(a)(7)(A)(i). The second condition is met if the difference in the level of trade between the export price or the constructed export price and normal value “is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.” *Id.* § 1677b(a)(7)(A)(ii). The statute provides that “[i]n a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.” *Id.*

The issue of “fair comparison” arose in the second review of the Order because Prolamsa’s home market sales were of two distinct types, i.e., the “industrial” sales made in HM Channel 4, which were of custom-made parts for OEM customers, and the “commercial” sales of the other three home market channels. In the Final Results, these higher-priced Channel 4 sales were compared, along with the sales in the other three channels, to the U.S. sales, which did not include the type of custom-made products that characterized the sales in HM Channel 4. *See Remand Redetermination* at 13 (“ . . . we determine that sales to the HM non-OEM customers (i.e., in HM channels 1 through 3) during the POR were not made at a different LOT than sales to the United States.”). Nucor objects that the higher prices obtained for the products in the Channel 4 sales were due to higher costs of manufacturing these custom-made products and “not due to an advanced LOT or additional significant selling activities,” Nucor’s Comments 15, but substantial evidence supported the Department’s findings that additional, and unique, selling activities also character-

ized these sales and that the sales activities for Channel 4 sales were associated with expenses that were substantially higher as a proportion of revenue earned than those of the other three channels. Substantial record evidence supports the Department's finding that the first condition required for a level-of-trade adjustment was satisfied, i.e., the difference in the level of trade between the export price or constructed export price and normal value involved the performance of different selling activities. 19 U.S.C. § 1677b(a)(7)(A)(i).

The second condition for a level-of-trade adjustment is met if the difference in the level of trade between the export price or the constructed export price and normal value "is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined." *Id.* § 1677b(a)(7)(A)(ii). Nucor does not contest that the HM Channel 4 sales occurred at higher prices and instead argues that the price premium was due to the higher cost of manufacturing these products and "not due to an advanced LOT or additional significant selling activities." Nucor's Comments 15. Nucor's insistence that the significantly higher selling expenses had no effect on the relative price differences is entirely speculative, if not illogical.

Nucor's argument that Prolamsa, as well as Commerce, failed to connect the differences in the sales expenses to the difference in sales prices, *id.* at 9, 12, presupposes that the record as a whole does not support the Department's finding, based on the totality of the evidence, that the criterion of 19 U.S.C. § 1677b(a)(7)(A)(ii) was satisfied on this record. Contrary to the premise underlying Nucor's various arguments, the provision, while requiring a finding of a "pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined," does not require the type of particularized analysis Nucor is demanding. On this record, which contained qualitative and quantitative data showing different selling activities and significantly higher selling expenses, Commerce was presented with record evidence that, considered on the whole, allowed it to find that the criterion of 19 U.S.C. § 1677b(a)(7)(A)(ii) had been met. Nucor's view that Commerce ignored detracting evidence and drew conclusory inferences is, therefore, misguided. Commerce permissibly could conclude on this record that a LOT adjustment was required to satisfy the statutory obligation to ensure a fair comparison between export price or constructed export price and normal value. *See Remand Redetermination* at 13 ("In instances where we were unable to make price-to-price comparisons

at the same LOT (*i.e.*, comparisons involving OEM sales in HM channel 4), we made an LOT adjustment.”).

Nor is the court convinced by Nucor’s argument that Prolamsa could have pursued a DIFMER adjustment but is not entitled to a LOT adjustment. Defendant argues that Nucor did not exhaust its remedies by presenting this argument during the review. Def.’s Resp. 10. Because Nucor’s argument is baseless, the court need not consider the exhaustion requirement. Nothing in the Tariff Act or the Department’s regulations provides that Prolamsa’s not pursuing a DIFMER adjustment precludes its receiving a level-of-trade adjustment, should the statutory criteria for a LOT adjustment be satisfied, as they were on this record.

### III. CONCLUSION

The Department’s decision to employ a level-of-trade adjustment to achieve a fair comparison between export price or constructed export price, and normal value, was based on findings and conclusions supported by substantial evidence on the record of the second review. Therefore, the court will enter judgment sustaining the Remand Redetermination.

Dated: July 6, 2022

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU, JUDGE

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