# U.S. Court of International Trade

Slip Op. 16–4

CALGON CARBON CORPORATION, AND CABOT NORIT AMERICAS, INC., Plaintiffs, v. UNITED STATES, Defendant, ALBEMARLE CORPORATION, NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., NINGXIA GUANGHUA CHERISHMET ACTIVATED CARBON COMPANY, LTD., CARBON ACTIVATED CORPORATION, JACOBI CARBONS AB, AND JACOBI CARBONS, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00326

***OPINION***

[Commerce's final results in antidumping duty periodic review are remanded.]

Dated: January 20, 2016

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*Melissa M. Devine*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Michael T. Gagain*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

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**Restani, Judge:**

This action challenges the Department of Commerce's ("Commerce") final results of the sixth administrative review of the antidumping ("AD") duty order on certain activated carbon from the People's Republic of China ("PRC"), covering the period of review ("POR") of April 1, 2012 through March 31, 2013. *Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 79 Fed. Reg. 70,163, 70,163 (Dep't Commerce Nov. 25, 2014) ("*Final Results*"). Before the court is a motion for judgment on the agency record pursuant to U.S. Court of International Trade ("USCIT" or "CIT") Rule 56.2 filed by Calgon Carbon Corporation ("Calgon") and Cabot Norit Americas, Inc. ("Cabot") (collectively, "petitioners" or "domestic industry"). Pls.' Mot. for J. on the Agency R., ECF No. 52. Also before the court is a motion for judgment on the agency record pursuant to USCIT Rule 56.2 filed by importer Carbon Activated Corporation ("CAC"). Pl.'s Mot. for J. on the Agency R., ECF No. 53. For the reasons stated below, Commerce's *Final Results* are remanded.

## BACKGROUND

Commerce initiated the sixth administrative review of certain activated carbon from the PRC, which it considers a non-market economy ("NME"). *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 33,052, 33,054–56 (Dep't Commerce June 3, 2013) ("*Initiation Notice*"). In the *Initiation Notice*, Commerce stated its policy that, when dealing with an NME, Commerce "begins with a rebuttable presumption that all companies within the country are subject to government control ...[and] assign[s] all exporters . . . in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate." *Id.* at 33,053. Commerce also clarified that all companies seeking separate rate status "must complete, as appropriate, either a separate rate application or certification," and Commerce included Shanxi DMD Corporation ("Shanxi DMD") as one of the firms required to follow this procedure. *Id.* at 33,053, 33,056. Commerce limited its review to the two largest exporters/producers by volume of certain activated carbon, Jacobi Carbons AB ("Jacobi") and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. ("Cherishmet"), basing its selection on U.S. Customs and Border Protection ("Customs") entry data. Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Certain Activated Carbon from the People's Republic of China at 3–4, A-570–904, (May 16, 2014), *available at* http://enforcement.trade.gov/ frn/summary/prc/2014–11892–1.pdf (last visited Jan. 6, 2016) ("*Preliminary I&D Memo*").

In calculating a dumping margin for products from an NME country, Commerce compares the goods' normal value,[1] derived from factors of production ("FOPs") as valued in a surrogate market economy ("ME") country, to the goods' export price.[2] 19 U.S.C. § 1677b(c)(1)(B) (2012). Commerce must use the "best available information" in selecting surrogate data for which to value FOPs. *Id.* The surrogate data must "to the extent possible" be from an ME country that is "at a level of economic development comparable to that of the nonmarket economy country" and is a "significant producer[] of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(A)–(B).

On May 22, 2014, Commerce published its preliminary results. *Certain Activated Carbon from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012–2013*, 79 Fed. Reg. 29,419, 29,419 (Dep't Commerce May 22, 2014) ("*Preliminary Results*"). In calculating normal value, Commerce selected the Philippines as the primary surrogate country.[3] *Preliminary I&D Memo* at 17. Commerce relied on Global Trade Atlas ("GTA") data to value certain FOPs, disregarding prices from NME countries, prices that may have been dumped or subsidized, and imports originating from unspecified countries. *Id.* at 24. Based on this methodology, Commerce calculated a surrogate value ("SV") of $1.19 per kilogram for anthracite coal (the main input), relying on contemporaneous with the present sixth POR ("POR6-contemporaenous") GTA data from the Philippines under HTS number 2701.11 ("Anthracite Coal, Whether or Not Pulverized, But Not Agglomerated"). Surrogate Values for the Preliminary Results at 4, PD 266–67 (May 16, 2014) ("Preliminary SV Memo"); *see also* Pet'rs' Surrogate Values for the Preliminary Results at Ex. 2A, PD 161–65 (Nov. 20, 2013) ("Pet'rs SV Cmts.").

In the *Final Results*, Commerce departed from its decision in the

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[1] Normal value is

> the 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,

and "at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." *See* 19 U.S.C. § 1677b(a)(1)(A), (B)(i) (2012).

[2] Export price is "the price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a).

[3] Commerce had previously determined that the Philippines, Indonesia, Thailand, Colombia, South Africa, and Costa Rica were all countries at a comparable level of economic development to the PRC. Commerce's Letter re: Deadlines for Surrogate Country and Surrogate Value Cmts. at 1–3, PD 73 (Aug. 2, 2013).

*Preliminary Results* to value anthracite coal at $1.19 per kilogram based on POR6-contemporaneous Philippine GTA data. Certain Activated Carbon from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Sixth Antidumping Duty Administrative Review at 37–38, A-570–904, (Nov. 18, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/2014–27926–1.pdf (last visited Jan. 6, 2016) ("*I&D Memo*"). Instead, Commerce relied on the SV derived from Philippine GTA data used in the fifth administrative review, which is data that was contemporaneous with the fifth POR ("POR5-contemporaneous"), rather than on an SV derived from data contemporaneous with the present POR. *Id.* Commerce noted that "no parties contested that SV in the previous review." *Id.* The new SV relied upon in the *Final Results* was $0.05 per kilogram, Surrogate Values for the Final Results at Attach. 1, PD 314 (Nov. 18, 2014), which was then "inflated to the current POR using Philippine producer price index information[,]" *I&D Memo* at 38. In so doing, Commerce rejected petitioners' arguments that the POR6-contemporaneous Philippine GTA data should be used or alternatively "an average of the anthracite coal SVs from Indonesia, Thailand, and Colombia," determining that the POR6-contemporaneous Philippine GTA data was not specific to the type of anthracite coal used by the mandatory respondents. *Id.* at 35–37. Commerce relied on publically available data from two trade information services, Port Import/Export Reporting Service ("PIERS") and ZEPOL Corporation ("ZEPOL"), to find that 94 percent of the POR6-contemporaneous Philippine GTA data was filtration anthracite (called "Leopold Underdrain" and produced by Xylem, Inc. ("Xylem")), which Commerce concluded is different from the bulk anthracite coal consumed by the respondents. *Id.* at 31–32, 35. Commerce also rejected arguments by certain respondents that U.S. Energy Information Association ("EIA") data, which provides United States domestic prices, should be used to value anthracite coal, because Commerce's preference is to use surrogate data from countries at a level of economic development comparable to that of the NME country. *Id.* at 36.

As a result, on November 25, 2014, Commerce published its *Final Results*, assigning AD duty rates of $0.04 per kilogram to Jacobi, $0.04 per kilogram to Cherishmet, $0.04 per kilogram to exporters separate from the PRC-wide entity (the "all-others rate"), and $2.42 per kilogram to the PRC-wide entity. *Final Results*, 79 Fed. Reg. at 70,165. Those rates represented a change from the *Preliminary Results*, in which Commerce assigned AD duty rates of $3.77 per kilogram to Jacobi, $2.05 per kilogram to Cherishmet, $3.13 per kilogram as the all-others rate, and $2.42 per kilogram to the PRC-wide entity.[4] *Preliminary Results*, 79 Fed. Reg. at 29,420. With regard to the separate rate status of certain respondents, Commerce stated in the *Final Results* that it "ha[d] received no comments or argument since the issuance of the *Preliminary Results* that provides a basis for reconsideration." *Id.* at 70,164. As a result, it continued to find that "[t]he PRC-wide entity includes Shanxi DMD Corporation and Tangshan Solid Carbon Co., Ltd." *Id.* at 70,164 n.26; *see also Preliminary Results*, 79 Fed. Reg. at 29,420 n.5.

In the present appeal, CAC challenges Commerce's *Final Results* on several grounds. First, CAC argues that Commerce's policy in AD proceedings to presume that all exporters in the PRC are under state control is arbitrary and capricious in the light of its treatment of the PRC in countervailing duty ("CVD") cases and that Commerce's presumption of state control was unsupported by substantial evidence in this review. Consol. Pl. Carbon Activated Corp. Mem. in Supp. of Mot. for J. on the Agency R. 8–14, ECF No. 53–2 ("CAC Br."). Second, CAC challenges the AD duty rate, which was the PRC-wide rate, assigned to Shanxi DMD as not supported by substantial evidence because Shanxi DMD is entitled to the all-others rate.[5] *Id.* at 14–16. Third, CAC argues that the rate assigned to Shanxi DMD was punitive and not reflective of Shanxi DMD's commercial reality. *Id.* at 16–18.[6]

The government and petitioners respond that CAC failed to exhaust the entirety of its arguments at the administrative level. Def.'s Opp'n to Mots. For J. upon the Agency R. 11–23, ECF No. 66 ("Gov. Br."); Domestic Industry's Resp. in Opp'n to Consol. Pl.'s Mot. for J. on

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[4] In the *Preliminary Results*, Commerce noted that in the second administrative review it had "determined that it would calculate per-unit assessment and cash deposit rates for all future reviews," rather than *ad valorem* rates. *Certain Activated Carbon from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012–2013*, 79 Fed. Reg. 29,419, 29,420 n.2 (Dep't Commerce May 22, 2014) ("*Preliminary Results*").

[5] CAC also argues that Commerce's assignment of the PRC-wide rate to Shanxi DMD is not in accordance with 19 U.S.C. § 1673d(c)(5), the provision which defines the all-others rate. Consol. Pl. Carbon Activated Corp. Mem. in Supp. of Mot. for J. on the Agency R. 14, ECF No. 53–2 ("CAC Br."). This argument appears to misconstrue the nature of the rate assigned to the PRC-wide entity, which received its own specific rate and not the all-others rate. In any event, to the extent that CAC is asserting something different, its argument is underdeveloped and unexplained.

[6] CAC also argues that Commerce's application of a dollar per kilogram assessment rate, rather than an *ad valorem* rate as a remedy for potential duty absorption, was unlawful because Commerce did not perform a duty absorption analysis under 19 U.S.C. § 1675(a)(4). CAC Br. at 19–20.

the Agency R. 1–7, ECF No. 65 (“Pet’rs Resp. Br.”). CAC contends that it cannot be charged with failure to exhaust its arguments because of the change to the all-others rate from $3.13 per kilogram in the *Preliminary Results*, which would have been adverse for CAC, to $0.04 per kilogram in the *Final Results*, which would have been advantageous. Reply of Carbon Activated Corp. 1–6, ECF No. 79 (“CAC Reply Br.”).

Petitioners challenge Commerce’s *Final Results* based on Commerce’s selection of the SV derived from POR5-contemporaneous Philippine GTA data for anthracite coal, arguing that the resulting value is aberrantly low and that the POR6-contemporaneous Philippine GTA data or data from another economically comparable country should have been used. Mem. of Law in Supp. of Pls.’ Mot. for J. on the Agency R. 18–37, ECF No. 52–1 (“Pet’rs Br.”). The government, supported by defendant-intervenors, responds that the selection of the SV for anthracite coal derived from POR5-contemporaneous Philippine GTA data was proper because that resulting value is not aberrational, the POR6-contemporaneous Philippine GTA data were not specific to the anthracite coal used by the mandatory respondents, and the decision aligned with Commerce’s policy of selecting SVs from one primary surrogate country. Gov. Br. at 28– 42; Def.-Intvnr. Jacobi Carbons’ Resp. to Calgon Carbon Corp. and Cabot Norit Americas’ Br. in Supp. of Their Mot. for J. on the Agency R. 1–13, ECF No. 67 (“Jacobi Resp. Br.”); Cherishmet’s Opp’n to Pls.’ Rule 56.2 Mot. for J. upon the Agency R. 9–30, ECF No. 68 (“Cherishmet Resp. Br.”); Resp. Br. of Def.-Intvnrs. in Opp’n to Pls.’ Rule 56.2 Mot. for J. upon the Agency R. 12–26, 30–37, ECF No. 64 (“Albemarle and Huahui Resp. Br.”).

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce’s final results in an administrative review of an AD duty order are upheld unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Exhaustion of Administrative Remedies and CAC’s Appeal

The government and petitioners argue that CAC was required to exhaust the entirety of its arguments at the administrative level, failed to do so, and that none of the recognized exceptions to the exhaustion requirement excuse CAC’s actions in this case. Gov. Br. at

9–26; Pet'rs Resp. Br. at 1–7.[7] The government and petitioners strangely do not address the merits of CAC's appeal, presumably unjustifiably confident that CAC may be charged with failure to exhaust its administrative remedies. CAC concedes that it did not challenge, in its administrative case brief, the finding of state-ownership or the resulting rate assigned to Shanxi DMD after the *Preliminary Results*. *See* CAC Reply Br. at 1. CAC, however, claims that the doctrine of exhaustion does not apply because, relative to the rates assigned to the mandatory respondents and the all-others rate, Shanxi DMD received a more favorable rate in the *Preliminary Results* and was therefore not required to act against its interests by filing a brief contesting Shanxi DMD's PRC entity-based rate. *Id.* at 4–10.

Congress has granted the court discretion to "where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d); *see Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1196 (2004) (recognizing that Congress' inclusion of the phrase "where appropriate" grants the court discretion, thereby clarifying that the exhaustion requirement is not jurisdictional). The exhaustion doctrine provides "that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (quoting *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998)).

The government incorrectly believes that CAC had a full opportunity to challenge the PRC-wide rate at the administrative level because the rate was unchanged from the *Preliminary Results* to the *Final Results*. *See* Gov. Br. at 19. The government looks to the PRC-wide rate in a vacuum and fails to consider the actual context (i.e., the other rates) in which CAC determined whether it was appropriate for it to challenge the rate assigned in the *Preliminary Results*. It was reasonable for CAC to rely on the rates assigned in the *Preliminary Results* to determine what arguments to include in its administrative case brief. *See Qingdao Taifa Grp. Co. v. United States*, 33 CIT 1090,

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[7] The government argues that CAC is barred from arguing in its reply brief that exceptions to the exhaustion doctrine apply, because CAC's opening brief accompanying its Rule 56.2 motion does not acknowledge that it failed to exhaust its arguments at the administrative level or list which exceptions to exhaustion apply. Def.'s Opp'n to Mots. For J. upon the Agency R. 13, ECF No. 66 (citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1378 n.4 (Fed. Cir. 2007)). The argument is without merit. As CAC correctly notes, before this court exhaustion is a defense that should be raised by the defendant. CAC Reply Br. at 12–13. The government's citation, to a situation where an appellant at the Court of Appeals for the Federal Circuit failed to raise a new exception to the exhaustion doctrine in its reply brief, is not applicable here. *See Corus Staal*, 502 F.3d at 1378 n.4.

1093, 637 F. Supp. 2d 1231, 1236–37 (2009). For instance, in *Qingdao Taifa*, Taifa's rate increased from 3.82% in the preliminary results to 383.60% in the final results, because Commerce applied adverse facts available. *Id.* The court held that Taifa did not fail to exhaust because it was able to rely on Commerce's preliminary results. *See id.* at 1092–93, 1236–37 ("Taifa is not required to predict that Commerce would accept other parties' arguments and change its decision."). There is no support for the contention that an interested party in CAC's position is required to challenge the application of a more favorable rate and make arguments that it should have a less favorable rate. Indeed, CAC was not required to anticipate that Commerce would accept certain arguments resulting in a drastic decrease in other companies' rates. *See Boomerang Tube LLC v. United States*, Slip Op. 15–140, 2015 WL 9272840, at *4 (CIT Dec. 17, 2015) (refusing "to conclude that plaintiffs should have predicted that Commerce might accept [an interested party's constructed value profit argument] . . . and should have raised, in their case briefs, potential arguments against that possibility.").[8]

CIT Rule 56.2 states that "the briefs submitted on the motion . . . [including those] supporting the agency determination, must include . . . the issues of law presented together with the reasons for . . . supporting the administrative determination . . . [and] must include the authorities relied on and the conclusions of law deemed warranted by the authorities." USCIT R. 56.2(c)(1)–(2). The government and petitioners, in their response briefs, chose not to address the merits of CAC's arguments, which were raised by CAC in its opening brief supporting its CIT Rule 56.2 motion. Any argument, therefore, defending Commerce's selection of a $2.42 per kilogram rate to Shanxi DMD, is waived, as CAC claimed in its reply brief. *See United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."); *cf. Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th Cir. 2000) (affirming a grant of summary judgment based on waiver and recognizing that the non-moving party failed to make certain arguments in its opposition brief). The government and petitioners had ample opportunity

[8] The court notes, however, that CAC was required to exhaust its argument regarding Commerce's application of a dollar per kilogram assessment rate. *See* CAC Br. at 19–20. In the *Preliminary Results*, Commerce calculated dollar per kilogram assessment rates for all exporters, including those found to be within the PRC-wide entity. *See Preliminary Results*, 79 Fed. Reg. at 29,420. Commerce has instituted this same methodology since the second administrative review of certain activated carbon. *Id.* at 29,420 n.2. Unlike with CAC's other challenges to Commerce's *Final Results*, CAC was equally incentivized in both the *Preliminary Results* and the *Final Results* to challenge Commerce's application of a dollar per kilogram rate and should have done so in an administrative case brief.

to address the arguments CAC made in its opening brief, but they made a decision not to do so.[9] It would not be proper to allow these parties, after full briefing and oral argument, the belated opportunity to defend their position or address CAC's arguments on the merits. Further, Commerce and petitioners do not seem to desire that opportunity. That is, the court permitted the parties two weeks in which they could have taken some action to demonstrate no intentional waiver, after the court opined at oral argument that there appeared to be waiver. The parties did not seek to file supplemental briefs or request remand to address the merits. Rather, the parties advised that nothing was conceded and the court should decide the matter as it stood. *See* Status Report, ECF No. 88. Thus, while in some cases the proper procedure may be for the court *sua sponte* to order the agency to address the new matter, the court does not find that course appropriate where all sides to the controversy do not desire it.

Here, CAC's opening brief successfully argues that the presumption of state control was unsupported by substantial evidence in this case, pointing to Commerce's inconsistent practice in CVD cases involving the PRC and an internal Commerce memorandum noting in part that "market forces now determine the prices of more than 90 percent of products traded in China." CAC Br. at 8–14 (quoting Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy

[9] The government and the petitioners filed their response briefs on July 29, 2015, or seventy-one days after CAC filed its opening brief on May 19, 2015. Notably, CAC's amended complaint raising these very issues was deemed filed on June 18, 2015, or forty-one days prior to the date the government and petitioners filed their response briefs. *See* Second Am. Compl., ECF No. 61. The government's opposition to amendment on failure to exhaust grounds was not successful. *See* Def.'s Resp. in Opp'n to Pl.'s Mot. for Leave to Amend its Compl., ECF No. 57. The court granted CAC's motion to amend its complaint. Order, ECF No. 60. The court did so for various reasons, including: (1) there was no prejudice because there was ample time to brief the key issues, *see* Pl.'s Partial Consent Mot. to Amend Compl. a Second Time 2, ECF No. 51 ("CAC's Mot. to Amend Compl."); (2) although the government opposed amendment based on exhaustion, the exhaustion issue was not likely to be resolved in its favor, *see* Resp. to Ct. Order re Exhaustion of Remedies 3–9, ECF No. 59 ("CAC's Exhaustion Resp."); (3) generally, unfair trade cases do not require carefully drawn factual allegations, so pleadings are not usually of importance (e.g., because an answer is not required), *see* CAC's Mot. to Amend Compl. at 2; and (4) a CIT Rule 15 amendment is favored and doubly so when Commerce's policy of issuing liquidation instructions fifteen days after a determination, when the statute allows thirty days to file a summons and sixty days to file a complaint, 19 U.S.C. § 1516a(a)(2), forces plaintiffs to decide too quickly on their claims, *see* CAC's Exhaustion Resp. at 11. Neither the government nor petitioners ever sought an extension of time to file their response briefs after CAC filed its 56.2 brief or its amended complaint. Thus, it appears both parties intentionally (or perhaps strategically) chose not to challenge the merits of CAC's arguments.

at 5, C-570–907, (Mar. 29, 2007), *available at* http://enforcement.trade.gov/download/nme-sep-rates/prc-cfsp/china-cfs-georgetown-applicability.pdf (last visited Jan. 7, 2016)). The government and petitioners, alternatively, have not provided the court with any merits-based argument, legal or factual, to review, thereby abandoning any such arguments. The record is devoid of any evidence, let alone substantial evidence, supporting Commerce's presumption of state control in this case, and the government further does not even attempt to remedy this deficiency by requesting a remand to supplement the record or to address CAC's claims. Thus, not only did CAC not have an opportunity to exhaust administrative remedies, but also CAC is correct that Commerce's *Final Results* are not supported by substantial evidence. This is not to say that, in a future review or in another case, Commerce could not make the proper showing to justify its continued presumption of state control even in contemporary circumstances, such as by placing the necessary evidence on the record or offering appropriate argument. The government simply chose not to seek the opportunity to do so here.[10]

Commerce, on remand, shall assign Shanxi DMD the all-others rate. Such treatment of Shanxi DMD is not inequitable or unreasonable, given that in the fifth and seventh reviews (i.e., the reviews immediately preceding and following the present review) Shanxi DMD was treated as separate from the PRC-wide entity and was assigned the all-others rate.[11] *See Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 80 Fed. Reg. 61,172, 61,174 (Dep't Commerce Oct. 9, 2015); *Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011–2012*, 78 Fed. Reg. 70,533, 70,535 (Dep't Commerce Nov. 26, 2013).

## II. Commerce's Selection of a Surrogate Value for Anthracite Coal

Petitioners challenge Commerce's selection of the $0.05 per kilogram value for anthracite coal derived from the POR5-contemporaneous Philippine GTA data, arguing that Commerce im-

[10] Because the court decides in favor of CAC on its argument that the presumption of state control in this case was unsupported by substantial evidence, thereby affording CAC the relief it desires by assigning its exporter, Shanxi DMD, the all-others rate, CAC's argument that the PRC-wide rate was aberrant and punitive is moot. *See* CAC Br. at 16–18.

[11] Instead, given Shanxi DMD's designation as separate from the PRC-wide entity in both the fifth and seventh reviews, its failure to file a separate rate certification in the sixth review appears to be, if anything, a technical failure. Such a technical failure may justify assignment of a PRC-wide rate where Commerce's procedure, based on a supported presumption, is upheld. This is not such a case.

properly disregarded the $1.19 per kilogram value derived from POR6-contemporaneous Philippine GTA data as not product specific, that Commerce should have used a contemporaneous value, and that the $0.05 per kilogram value was aberrational. Pet'rs Br. 18–37. The government and defendant-intervenors refute each of petitioner's arguments, contending that Commerce properly rejected the value derived from the POR6-contemporaneous Philippine GTA data and selected the value derived from POR5-contemporaneous Philippine GTA data. Gov. Br. at 28–42; Jacobi Resp. Br. at 2–13; Cherishmet Resp. Br. at 10–30; Albemarle and Huahui at 12–37.

When valuing FOPs, Commerce is required to use the "best available information" from, to the extent possible, "one or more" surrogate ME countries. 19 U.S.C. § 1677b(c)(1), (4). "Commerce has broad discretion to determine what constitutes the best available information, as this term is not defined by statute." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014). Commerce's discretion, however, is limited by the statute's objective of "obtain[ing] the most accurate dumping margins possible," meaning Commerce's choice of the best available information "must evidence a rational and reasonable relationship to the factor of production it represents" to be supported by substantial evidence. *Hebei Metals*, 28 CIT at 1191.

Commerce's practice is, to the extent practicable, to select SVs that are (1) publicly available, (2) specific to the input to be valued, (3) reflective of broad market averages, (4) contemporaneous with the POR, and (5) tax and duty exclusive. *Qingdao Sea-Line*, 766 F.3d at 1386; *QVD Food Co. v. United States*, 34 CIT 1166, 1168, 721 F. Supp. 2d 1311, 1315 (2010), *aff'd*, 658 F.3d 1318 (Fed. Cir. 2011); *see also I&D Memo* at 34. Commerce's stated preference is "to satisfy the breadth of the aforementioned selection criteria." *I&D Memo* at 34. On review, the court evaluates "whether a reasonable mind could conclude that Commerce chose the best available information." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)).

A. *Product Specificity*

Petitioners contend that the filtration anthracite, on which the POR6-contemporaneous Philippine GTA data is based, is the type of anthracite coal consumed by the mandatory respondents, both of which are crushed and sorted. Pet'rs Br. at 27–28; Pls.' Reply Br. at 3–11, ECF No. 80 ("Pet'rs Reply Br."). Petitioners argue that the two products are physically similar, that Commerce's conclusory finding that the filtration anthracite is "processed" is insufficient to differentiate the two, and that Commerce's reliance on end-use applications is improper. Pet'rs Br. at 29–31.

The government and Cherishmet respond that the POR6-contemporaneous Philippine value was based on two entries and the PIERS and ZEPOL data confirmed that 94 percent of the entries were filtration anthracite coal, which is not the type of bulk anthracite coal used by the mandatory respondents. Gov. Br. at 35–36; Cherishmet Resp. Br. at 18–22. The government contends that Commerce made this determination based on the facts that 87,090 kilograms of the product were entries of Leopold Underdrain by Xylem and that record evidence showed that Leopold Underdrain is a "filter product made from anthracite . . . processed to produce a 'low uniformity coefficient' to extend the life and efficiency of water filters." Gov. Br. at 36 (quoting *I&D Memo* at 35–36). Jacobi argues that product specificity should be evaluated before other SV factors, Jacobi Resp. Br. at 4, and argues that its certified questionnaire responses and both the test reports and photographs provided by its suppliers all show that its suppliers used only generic anthracite coal (i.e., raw lump anthracite coal from the mine), *id.* at 5–8; *see also* Gov. Br. at 38. Albemarle and Huahui similarly argue that Commerce "undertook a detailed analysis in concluding that the filtration anthracite was not specific to the anthracite coal consumed by the respondents," that no record evidence detracts from Commerce's conclusion regarding the Leopold Underdrain product, and that Commerce was not required to speculate on potential similarities. Albemarle and Huahui Resp. Br. at 14–15.

As a preliminary matter, Commerce properly determined, after consulting the PIERS and ZEPOL data, that 94 percent (i.e., 87,090 kilograms) of POR6-contemporaneous Philippine GTA data consisted of one entry of Leopold Underdrain, produced by Xylem. *Compare* Preliminary SV Memo at Attach. 2a, *with* Jacobi's Surrogate Value Cmts. Ex. SV-3 at 71, PD 135–51 (Nov. 20, 2013)[12] ("Jacobi's SV Cmts."), *and* Cherishmet's Surrogate Value Ex. 3B, PD 152–60 (Nov. 20, 2013) ("Cherishmet's SV Cmts."). It was reasonable for Commerce in this case to rely on the PIERS and ZEPOL data to identify the specific entry because both sets of data identified the exact same quantity as the POR6-contemporaneous Philippine GTA data for the single entry by Xylem. *See I&D Memo* at 35.

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[12] The page numbers referenced in citations to Jacobi's November 20, 2013 Surrogate Value Comments Exhibit SV-3 are based on the page numbers listed in the version of Jacobi's exhibit included in petitioners' appendix. *See* App. to Pls.' Mem. of Law in Supp. of Mot. for J. on the Agency R. 107–312, ECF No. 54–54–2.

Commerce's decision to reject the POR6-contemporaneous Philippine GTA data, as "not bulk anthracite coal used by the respondents, but a processed anthracite product," was supported by substantial evidence on the record. *I&D Memo* at 35. In determining that filtration anthracite is a different product, Commerce explained that the

> information placed on the record by Cherishmet and Jacobi indicates that this [Leopold] product has no relation to the production of activated carbon and is a different product than the bulk anthracite coal used by respondents. Specifically, information on the record indicates that the Leopold product is produced from anthracite coal which has been processed to produce a "low-uniformity coefficient" to extend the life and efficiency of water filters. . . . Further, record evidence demonstrates that the Leopold product is unrelated to the production of activated carbon.

*Id.* at 35–36 (footnotes omitted). Jacobi and Cherishmet submitted information from Xylem "where product information explains that Leopold Underdrain is used to improve water drainage, water filtering and is manufactured to specific utility coefficients." *I&D Memo* at 35 & n.139 (citing Jacobi's SV Cmts. Ex. SV-3; Cherishmet's SV Cmts. Ex. 3B), 36 n.144 (citing Jacobi's SV Cmts. Ex. SV-3; Cherishmet's SV Cmts. Ex. 3C).

The record supports Commerce's determination that the mandatory respondents used raw or bulk anthracite coal as an input in the production of activated carbon. Jacobi's certified questionnaire demonstrates that one of its suppliers starts with "raw lump anthracite coal from the mine," which then undergoes the following stages: carbonization, activation, sieving/crushing, and acid washing/impregnation. Jacobi's Resp. to the Department's Suppl. Sec. D Quest. for Ningxia Huahui Activated Carbon Co., Ltd. 2–3, PD 233 (Feb. 12, 2014) ("Jacobi's Suppl. Sec. D Resp."). That supplier indicated that "products destined for Jacobi do not have complex packing materials. Instead they are simply poured into bulk sacks and shipped to Jacobi in Tianjin." *Id.* at 3. Jacobi's other supplier, similarly, starts with "anthracite and energy (lump) coal," continues "by crushing the coal," which is then "mixed with tar and water and pressed into pellets . . . [and] placed in a kiln and heated to produce carbonized material," before being activated. Jacobi's Resp. to the Department's Sec. D Quest. D-4, PD 104 (Aug. 23, 2013) ("Jacobi Sec. D. Resp."). Depending on customer specifications, the final activated carbon may be "sieved into different granular or pellet sized products," "washed by acid solution or impregnated with chemicals," and packaged. *Id.* at D-5. Cherishmet, the other mandatory respondent, also reported that "[n]ormally" its activated carbon "is processed from anthracite coal through grinding, mixing/extruding, carbonization, activation and screening." Cherishmet Resp. to Sec. C & D Quest. 3–4, PD 114 (Sept. 3, 2013) ("Cherishmet's Sec. C & D Resp.").[13]

The record also supports Commerce's determination that the Xylem filtration anthracite media is a more processed product, designed for end-use, rather than the raw material used by the respondents. The PIERS and ZEPOL data provide that Xylem exported Leopold Underdrain, specifically "64 Pkgs of Filter Anthracite," from the United States into the Philippines. Jacobi's SV Cmts. Ex. SV-3 at 71; Cherishmet's SV Cmts. Ex. 3B. Xylem's own product information states that "Leopold Engineered Filter Media anthracite is produced from the highest quality anthracite available to assure the physical characteristics of hardness, durability, and performance. We purchase our feedstock directly from select mines chosen for the quality of their anthracite." Jacobi's SV Cmts. Ex. SV-3 at 81. Then, the filter anthracite is "processed in a unique, state-of-the-art facility specifically designed to produce low-UC [uniformity coefficient] filter media." *Id.* Xylem even "[r]educe[s] the moisture in the raw feedstock . . . to produce ten distinct anthracite media sizes." *Id.* Xylem undergoes this process so that its filter anthracite media may achieve "[s]uperior filtration qualities, [i]ncreased filter run volumes, and [r]equires less water to thoroughly backwash." Cherishmet's SV Cmts. Ex. 3C at 9. In fact, Xylem's Leopold product is designed to meet or exceed the American Water Works Association ("AWWA") requirements for granular filter products. Jacobi SV Cmts. Ex. SV-3 at 81. Therefore, it is clear from the record that Xylem's product is of a high-grade and is processed to be ready to achieve certain filtration-specific results. It was reasonable, then, for Commerce to infer from this record evidence that such a processed product is not the same as the raw or bulk product used by respondents. Indeed, Commerce explicitly based its decision that the Leopold product is a "processed anthracite product," on its statement that "product information explains that Leopold Underdrain is used to improve water drainage, water filtering and is manufactured to specific utility coefficients." *I&D Memo* at 35 & n.139, 36 n.144

The petitioners argue that consideration of applications in which the Xylem product is used is "irrelevant to the physical comparability" of the two products and should be disregarded. Pet'rs Br. at 31.

[13] Cherishmet did not provide more information on its anthracite input. Much of the analysis in the parties' briefs focuses on the differences between Xylem's product and Jacobi's input.

Consideration of applications in which the two products are used is relevant, in so far as it speaks to whether one product is the type of product that a foreign producer of activated carbon would use in its production process. A product too far downstream in the production process, as appears to be the case here, may not be substitutable for a raw material, e.g., due to a prohibitively high cost of the input. Petitioners argue only that the products are physically comparable because "both . . . involve crushed anthracite coal that has been sorted to size." Pet'rs Reply Br. at 10. The record does not indicate that the respondents' lump coal undergoes a crushing or sorting process similar to Xylem's, which is specifically designed to achieve a low-uniformity coefficient. *See* Jacobi's SV Cmts. Ex. SV-3 at 81. Regardless, petitioner's argument is insufficient, in this case, to conclude that Commerce's decision is unsupported by substantial evidence as there is ample record evidence supporting Commerce's determination that the Xylem product is a downstream processed product and not the input product at issue here.

### B. *Anthracite Coal Value from the Fifth Period of Review*

Petitioners also argue that Commerce should have relied on POR6-contemporaneous data from the other countries found to be economically comparable to the PRC, challenging Commerce's seemingly unyielding preference for selecting SVs from a single, primary surrogate country. Pet'rs Br. at 31–36. Petitioners contend that because the average unit value of anthracite coal undergoes "significant fluctuations" year-to-year, it is even more important for Commerce to select a POR-contemporaneous value rather than trying to select all SVs from the same surrogate ME country, the Philippines. *Id.* at 33–36.

The government responds that Commerce is not required to select a POR-contemporaneous value over its preferred method of selecting SVs from the same primary surrogate country. Gov. Br. at 39–42; *see also* Albemarle and Huahui Resp Br. at 22–26. The government also contends that Commerce's use of an inflator to the POR5-contemporaneous Philippine GTA data was sufficient to address the petitioners' concerns regarding yearly fluctuations and the fluctuations are likely due to the fact that the values are based on different types of coal. Gov. Br. at 40–42. Moreover, Cherishmet, as well as Albemarle and Huahui, submit that the Indonesian, Thai, and Colombian GTA data, which are all POR6-contemporaneous, are all unreliable. Cherishmet Resp. Br. at 27–30; Albemarle and Huahui Resp. Br. at 18–22. Albemarle and Huahui also argue that Commerce's rejection of the POR6-contemporaneous data from the other economically comparable countries was proper because it determined that the SV derived from the POR5-contemporaneous Philippine GTA data was reliable. Albemarle and Huahui Resp. Br. at 17–18.

Commerce has promulgated a regulation providing that "the Secretary normally will value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2). This "preference," however, carries the day only when it is used to "support a choice of data as the best available information where the other available data 'upon a fair comparison, are otherwise seen to be fairly equal.'" *Peer Bearing Co.-Changshan v. United States*, 804 F. Supp. 2d 1337, 1353 (CIT 2011) (quoting *Peer Bearing Co.-Changshan v. United States*, 752 F. Supp. 2d 1353, 1373 (CIT 2011)).

Commerce, by relying on its single surrogate country preference and nothing more, improperly rejected other SVs for anthracite coal derived from POR6-contemporaneous data from other countries. First, the POR5-contemporaneous Philippine GTA data cannot be said on this record to be "fairly equal" to the POR6-contemporaneous GTA data from these other countries because it is not contemporaneous with the POR. Even Commerce has acknowledged that one of the five factors that helps determine the best available information to factor FOPs is whether the data are contemporaneous with the POR. *See I&D Memo* at 38; *Qingdao*, 766 F.3d at 1386. The need for Commerce to apply an inflator to the POR5-contemporaneous Philippine GTA data to adjust the old data to reflect POR6 prices demonstrates that non-contemporaneous data is not *ipso facto* equal to contemporaneous data. Second, the POR5-contemporaneous Philippine GTA data may not be as reliable as some of the POR6-contemporaneous GTA data from other countries. There is no supporting data on the record of this review for the POR5-contemporaneous Philippine value. Commerce simply imported the SV wholesale from the earlier review. Effectively, the selection is unreviewable. Publically available information, however, shows that the POR5-contemporaneous Philippine value of $0.05 per kilogram was derived from just slightly more than 160,000 kilograms of imports. *See* Fifth Administrative Review of Certain Activated Carbon from the People's Republic of China: Surrogate Values for the Preliminary Results at 4 & Attachs. 1, 2a–2b, A-570–904, (May 2, 2013) (ACCESS bar code 3135971–01). Some of the other values on the record, such as the values for South Africa (over 80,000,000 kilograms) and the Ukraine (nearly 15,000,000 kilograms), are based on much higher quantities of imports and thereby likely provide more reliable data upon which to calculate an SV. Cherishmet's SV Cmts.

at Exs. 3D–3E. As indicated, Commerce did not place information on the record relating to the POR5-contemporaneous Philippine GTA data.

Because it relied on a single country surrogate, Commerce never addressed the reliability of the POR6-contemporaneous record GTA data for anthracite coal from Indonesia, Colombia, Thailand, or South Africa, all four of which were determined by Commerce to be at a comparable level of economic development as the PRC. *See* Commerce's Letter re: Deadlines for Surrogate Country and Surrogate Value Cmts. at 1–3, PD 73 (Aug. 2, 2013); *see also* Pet'rs SV Cmts. at Ex. 2A (Indonesia); Pet'rs' Final Submission of Surrogate Value Data at Attach., PD 258 (Apr. 21, 2014) (Thailand and Colombia); Cherishmet's SV Cmts. at Ex. 3E (South Africa).[14] Commerce also did not address the reliability of POR6-contemporaneous Ukrainian data, which was on the record, Cherishmet's SV Cmts. at Exs. 3D, 3G, along with information comparing Ukraine's level of economic development to the PRC's, *id.* at Ex. 3J.[15] Commerce rejected these data only stating that it "has a demonstrated preference of valuing inputs using data from the primary surrogate country," *I&D Memo* at 37–38, but as indicated the preference on its own is not a sufficient reason to reject superior data. *See Peer Bearing*, 804 F. Supp. 2d at 1353. Instead, here Commerce was required to explain based on the record evidence why it rejected such data before selecting the SV derived from the POR5-contemporaneous Philippine GTA data, assuming such a value can be adequately supported.

Although the government asserts that using a methodology, in which Commerce selects SVs from different surrogate countries, may cause distortion in constructing normal value, it is hard to believe that such a distortion, if any at all, would be equal to or more significant than the distortion caused by not using contemporaneous SVs here.[16] Thus, Commerce improperly selected the SV derived from the POR5-contemporaneous Philippine GTA data (1) without placing

[14] It is possible that these data suffer from usability or reliability concerns, but such concerns have not yet been addressed by Commerce.

[15] The court is not in a position to decide whether Ukraine is at a similar level of economic development as the PRC and what impact a negative finding would have. Depending on what other information is usable, Commerce may have to address this issue.

[16] At oral argument, the parties acknowledged that surrogate financial ratios account for one of the largest factors in constructing normal value, but the financial ratios used are not based on data from the POR. In this review, Commerce relied on the financials of five Philippine companies to calculate average surrogate financial ratios. Certain Activated Carbon from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Sixth Antidumping Duty Administrative Review at 39, 42, A-570–904, (Nov. 18, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/2014–27926–1.pdf (last visited Jan. 6, 2016). Four of those companies' financials covered "the period ending 12/31/2012" and the fifth covered "the period ending 6/3/2012," representing

any of the underlying data on the record to support the value and (2) without addressing contemporaneous surrogate data on the record from non-primary surrogate country sources.[17]

## CONCLUSION

For the foregoing reasons, Commerce's *Final Results* are remanded for Commerce to assign Shanxi DMD the all-others rate. In addition, Commerce shall reconsider its selection of an SV for anthracite coal, in accordance with this opinion. Commerce shall have until March 21, 2016, to file its remand results. The parties shall have until April 20, 2016, to file objections, and the government shall have until May 4, 2016, to file its response.

Dated: January 20, 2016
New York, New York

*/s/ Jane A. Restani*
Jane A. Restani
*Judge*

Slip Op. 16–5

Meridian Products, LLC, Plaintiff, v. United States, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00018

## OPINION

[Sustaining third results of remand of scope determination related to anti-dumping and countervailing duty orders on aluminum extrusions from the People's Republic of China.]

periods that do not perfectly overlap with the POR of April 2012 to March 2013. *See* Surrogate Values for the Preliminary Results at Attach. 6, PD 266–67 (May 16, 2014). Therefore, the government's concern about potential slight distortions from using non-Philippine data is unwarranted and fails to acknowledge the imperfections in Commerce's methodology due to time-based distortions.

[17] Because the court has determined that Commerce, in relying only on its preference for a primary surrogate country, improperly selected the non-contemporaneous $0.05 per kilogram value, the court does not need to reach petitioners' argument that the value was aberrantly low. *See* Mem. of Law in Supp. of Pls.' Mot. for J. on the Agency R. 18–26, ECF No. 52–1. As the court noted, however, there is nothing in this record to support the value. In conducting its redetermination, Commerce should carefully consider Cherishmet's and Albemarle and Huahui's arguments impeaching the reliability of the data from Indonesia, Thailand, and Colombia. *See* Cherishmet's Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Agency R. 27–30, ECF No. 68; Resp. Br. of Def.-Intvnrs. in Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Agency R. 18–22, ECF No. 64. Commerce should disregard unreliable data and rely only on record data that promotes the statute's goal of calculating the most accurate dumping margins by using the best available information.

Dated: January 20, 2016

*Daniel Cannistra* and *Richard P. Massony*, Crowell & Moring LLP, of Washington DC, for the plaintiff.

*Aimee Lee*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. On the joint status report were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*,Assistant Director. Of counsel was *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington DC.

**Musgrave, Senior Judge:**

This opinion addresses the *Final Results of Redetermination Pursuant to Court Remand, Meridian Products, LLC v. United States*, Court No. 13–0018 (Oct. 29, 2015) ("Third Remand" or "RR") of the International Trade Administration of the U.S. Department of Commerce ("Commerce"), pursuant to *Meridian Products, LLC v. United States*, Court No. 13–00018, Slip Op. 15–67 (June 23, 2015) ("*Meridian IV*"), familiarity with which is presumed. The Third Remand results readdress whether the plaintiff's "Trim Kits" are within the scope of the unfair trade *Orders* on subject merchandise.[1] On remand, Commerce determined that the Trim Kits were excluded from the *Orders* as finished goods kits because at the time of importation they contained all the parts necessary to assemble a final finished good. Commerce did so under protest "because it appears that the [c]ourt's instructions resulted in a tension between the [c]ourt's holding and the plain language of the scope of the *Orders*." RR at 10–11; *see also* RR at 12. For the following reasons, the Third Remand results will be sustained.

Following *Meridian IV*, the analysis of the Third Remand begins by quoting the scope language of the *Orders*,[2] then quoting the finished goods kit exclusionary language,[3] and then quoting the "fasteners

[1] *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30650 (May 26, 2011) and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30653 (May 26, 2011) ("*Orders*").

[2] "Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation."

[3] "The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a 'finished goods kit.' A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product."

exception" language to the finished goods kit exclusion.[4] Commerce's respectful disagreement with *Meridian IV* is that its interpretation of the fasteners exception "renders this language nearly null", RR at 13, in that (1) it goes without saying that an aluminum extrusion product that does not otherwise meet the scope-exclusion requirements cannot be considered a finished goods kit, regardless of whether the product includes fasteners, and (2) in order "[t]o give meaning to the fasteners exception[,] there must be some importance [attached] to whether or not the product merely includes fasteners along with an aluminum extrusion product as it relates to the finished goods kit exclusion", RR at 13, which is indeed the import of *Meridian IV*. Commerce interprets this "to mean that the inclusion of fasteners alone cannot convert an aluminum extrusion product that is not already a 'combination of parts' into a 'combination of parts' that qualifies for the finished good kits exception." *Id*. That is true. However, from that proposition Commerce then makes the curious case that

> [u]nder this interpretation, an "aluminum extrusion product" within the meaning of the fasteners exception would mean an aluminum extrusion product that is not a "combination of parts," *i.e.*, possibly is a single part. Such an interpretation renders the fasteners exception nearly null given such limited application.

RR at 13–14.

The court fails to understand why that would be the case, *i.e.*, why it would be reasonable to argue that a single part shipped with mere fastener(s) is a "kit"?

Commerce also voices concern that merchandise in assembled form that is covered under the scope of the *Orders* should, all else being equal, also be subject to the *Orders* upon entry in kit form, and it argues that *Meridian IV* "reads out of the scope language that subject extrusions include such merchandise as door thresholds and carpet trim as well as other merchandise, such as heat sinks (that do not meet the finished heat sink exclusionary language) and fence posts, that consist of extruded aluminum profiles, regardless of whether such products are 'ready for use at the time of importation.' " RR at 14. Whether it would ever be reasonable to determine such explicitly named products, if imported unassembled, as "finished goods kits" is not the subject of this case, the subject here being to give effect to the

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[4] "An imported product will not be considered a 'finished goods kit' and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product."

full and plain language of the scope of the *Orders* without rendering the finished goods kit exception "nearly null."

Commerce issued draft remand results to the parties and incorporated their comments in the final results. At this point, the parties' joint status report indicates that no party wishes to file comments on the Third Remand and that the parties agree that the appropriate action to conclude this matter is to sustain Commerce's final results of redetermination. Judgment to that effect will therefore be entered.

*/s/ R. Kenton Musgrave*

R. KENTON MUSGRAVE, SENIOR JUDGE

DATED: JANUARY 20, 2016
NEW YORK, NEW YORK

Slip Op. 16–6

THE CONTAINER STORE, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 09–00327

## *OPINION*

[Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted.]

Dated: January 21, 2016

*Robert B. Silverman* and *Robert F. Seely*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP of New York, NY, argued for plaintiff. With them on the brief was *Alan R. Klestadt*.

*Marcella Powell*, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief was *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Paula Smith*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

**Barnett, Judge:**

Before the Court are cross-motions for summary judgment. Plaintiff the Container Store ("Plaintiff" or "Container Store") contests the denial of protests challenging U.S. Customs and Border Protection's ("Customs") liquidation of the subject imports, elfa® top tracks and hanging standards made of epoxy-bonded steel, under subheading 8302.41.60 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as base metal mountings suitable for buildings. (*See generally* Pl.'s Mot. for Summ. J. ("Pl.'s MSJ"), ECF No. 36.) The Container Store contends that Customs should have classified the subject imports in subheading 9403.90.80, HTSUS, as parts of furniture. Defendant United States ("Defendant" or "United States") abandons Customs' original classification of the goods and contends that the proper classification of subject imports falls within subheading 8302.42.30, HTSUS. (Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s Cross-MSJ") at 2, ECF No. 41; Def.'s Reply Mem. in Further Supp. of Cross Mot. for Summ. J. ("Def.'s Reply") at 7, ECF No. 58.)

No genuine issue of material fact exists regarding the physical properties of the subject imports or their function.[1] Thus, the sole issue before the Court is the correct classification of the subject merchandise, elfa® top tracks and hanging standards made of steel. For the reasons discussed below, the Court holds that the subject imports are properly classified under subheading 8302.42.30, HTSUS, as base metal mountings, fittings, and similar articles suitable for furniture. Accordingly, the Court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment.

## BACKGROUND AND PROCEDURAL HISTORY

### I. Overview of the Subject Merchandise

The subject merchandise is the Container Store's top tracks and hanging standards, two components of its patented elfa® system.[2] (Am. Compl. ¶¶ 5, 26, ECF No. 27; Answer to Am. Compl. ("Answer") ¶¶ 5, 26, ECF No. 28.) Consumers typically purchase and assemble elfa® systems to provide storage for their homes and offices. (Am. Compl. ¶¶ 28, 32; Answer ¶¶ 28, 32.) They can assemble the elfa® system's components in a variety of configurations to create a customized, modular storage unit. (Am. Compl. ¶ 32; Answer ¶ 32.)

There are two articles at issue: top tracks and hanging standards, both of which are elongated rectangular strips of hardware made of

[1] The Container Store contends that the facts agreed upon between the parties in a previous case before this court with the same subject merchandise—*Container Store v. United States*, 35 CIT __, 800 F. Supp. 2d 1329 (2011) (hereafter "*Container Store I*")— bind the parties in this litigation. (Pl.'s MSJ at 2.) The Container Store submitted as facts in this case "a brief recitation of the relevant facts from [Container Store I]." (Pl.'s MSJ at 3.) Apparently relying on facts from *Container Store I*, parties' briefs incorrectly allege that the subject merchandise was liquidated pursuant to two different classifications. Upon review of the entry papers and Summons, the Court notes that the subject merchandise was liquidated under one classification. (*Compare* Pl.'s MSJ at 2 and Def.'s Cross-MSJ at 2 *with* Summons at 2, ECF No. 1.) Accordingly, this case is distinct from *Container Store I*. The Court relies on the facts found in the entry papers and court documents of this case in reaching its decision.

[2] Defendant points out that the record only contains a patent for the top tracks and not the hanging standards. (*See* Oral Arg. Tr. at 42, ECF No. 63.)

epoxy-bonded steel.[3] (Def.'s Cross-MSJ, Ex. C, ECF No. 41–2 ("Ex. C Physical Sample"); Am. Compl. ¶ 26; Answer ¶ 26.) A top track has top and bottom edges that are angled at about 45 degrees and a flat back which consumers affix horizontally with anchors or screws to a vertical surface, such as a door or wall. (Am. Compl. ¶ 33; Answer ¶ 33.) The top and bottom edges of the top track protrude and respectively bend downward and upward to form the track's upper and lower lips. (Am. Compl. ¶ 34; Answer ¶ 34.) A hanging standard consists of three sides with an open back and flat front that has rows of evenly spaced slots which allow the consumer to attach accessories or brackets for the accessories. (Ex. C Physical Sample.) A hanging standard is suspended from a top track by means of notches on the top end of the standard that slide into the top track's lower lip. (Am. Compl. ¶ 35; Answer ¶ 35.) Once inserted into the lower lip of the top track, the hanging standard suspends from the top track without additional hardware and remains in place due to the "overhanging design of the upper lip" of the top track. (Am. Compl. ¶¶ 35, 37; Answer ¶¶ 35, 37.) A consumer may then attach additional elfa® components, such as drawers, baskets, and shelves, to the hanging standards in customized configurations. (Am. Compl. ¶¶ 39–40; Answer ¶¶ 39–40.) By design, consumers may only use top tracks and hanging standards with other elfa® system components. (Am. Compl. ¶¶ 28, 31; Answer ¶¶ 28, 31.) On their own, top tracks and hanging standards do not organize or store anything. (Am. Compl. ¶ 41; Answer ¶ 41.)

## II. Procedural History

This case involves two entries of merchandise,[4] consisting of top tracks and hanging standards, which the Container Store imported through the Port of Houston, Texas, in October 2007 and January 2008. (Summons, ECF No. 1; Am. Compl. Ex. A.) Customs originally liquidated the entries at issue under subheading 8302.41.60, HTSUS, a provision for "[b]ase metal mountings, fittings and similar articles, and parts thereof: [s]uitable for buildings: [o]f iron or steel." (Summons at 2.) In December 2008, the Container Store, the importer of record, timely filed protests challenging the classification of its merchandise and seeking reclassification under subheading 9403.90.80, HTSUS, as parts of furniture. (Summons Schedule; Am. Compl. ¶¶ 2–3; Answer ¶¶ 2–3.) In February 2009, Customs denied the protests and reaffirmed that the top tracks and hanging standards fall under

[3] Defendant provided a physical sample of a top track and hanging standard as an exhibit to its cross-motion. (Def.'s Cross MSJ, Ex. C, ECF No. 41–2, physical sample filed manually as ECF No. 42; Am. Compl. ¶ 26; Answer ¶ 26.)

[4] The entry numbers in this case are 125–1712897–6 and 125–1710359–9. (Summons Schedule.)

heading 8302, HTSUS.[5] (*See* Summons; *see also* Def.'s Cross-MSJ at 2.) In response, in August 2009, the Container Store commenced this action.

This case was then placed on the Reserve Calendar, pending the outcome of another case filed in this court by the Container Store involving identical merchandise, *Container Store v. United States*, 35 CIT __, 800 F. Supp. 2d 1329 (2011) (hereafter "*Container Store I*"). (Def.'s Cross-MSJ at 2 n.4; Pl.'s MSJ at 7.) In *Container Store I*, the court followed a decision of the Court of Appeals for the Federal Circuit ("Federal Circuit") regarding the classification of functionally similar merchandise—storeWALL wall panels and locator tabs—however, those products were notably made of plastic. 35 CIT at __, 800 F. Supp. 2d at 1332–33 (citing *storeWALL, LLC v. United States*, 644 F.3d 1358 (Fed. Cir. 2011). Applying the *storeWALL* analysis, the *Container Store I* court held that the Container Store's elfa® top tracks and hanging standards were properly classified under subheading 9403.90.80, HTSUS. (*Id*. at 1331.) Customs appealed the decision but then abandoned the appeal. (Pl.'s MSJ at 1 (citing Answer ¶ 10).)

On December 10, 2013, the Container Store filed the Complaint in this action (ECF No. 20), and on March 24, 2014, filed an Amended Complaint (ECF No. 27). On March 28, 2014, Defendant filed its answer. (ECF No. 28.) The Container Store moved for summary judgment on October 29, 2014 (ECF No. 36), and the United States responded with a cross-motion for summary judgment on February 9, 2015 (ECF No. 41). Oral argument was held on September 10, 2015. (ECF No. 61.) Subsequent to oral argument, the Container Store moved to supplement, in writing, its answer to Question 1 contained in the Court's letter dated September 4, 2015 (ECF No. 60), and both parties were given the opportunity to file supplemental briefs (Pl.'s Suppl. Resp. to Question 1 ("Pl.'s Suppl. Br."), ECF No. 65; Def.'s Resp. to Pl.'s Suppl. Resp. to Question 1 ("Def.'s Suppl. Br."), ECF No. 70). The parties have fully briefed the issues and the Court now rules on the parties' respective motions.

## JURISDICTION AND STANDARD OF REVIEW

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a). It may grant summary judgment when "there is no genuine issue as to any material fact," and "the moving party is entitled to

[5] Customs denied the Container Store's protests based on a Customs ruling, HQ 966458, that was issued to the Container Store and classified its top tracks and hanging standards in subheading 8302.41.60, HTSUS. (Def.'s Cross MSJ at 2; HQ 966458 (2003).)

judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); USCIT R. 56(a).

The court's review of a classification decision involves two steps. First, it must determine the meaning of the relevant tariff provisions, which is a question of law. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citation omitted). Second, it must determine whether the merchandise at issue falls within a particular tariff provision as construed, which is a question of fact. *Id.* (citation omitted). When no factual dispute exists regarding the merchandise, resolution of the classification turns solely on the first step. *See id.* at 1365–66; *see also Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999).

The court reviews classification cases *de novo*. *See* 28 U.S.C. §§ 2640(a), 2643(b). While the court accords deference to Customs classification rulings relative to their "'power to persuade,'" *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), it has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms," *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)). It is "the court's duty to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (emphasis in original).

## DISCUSSION

### I. Parties' Proposed Tariff Classifications

Customs liquidated the subject imports under subheading 8302.41.60, HTSUS, as base metal mountings suitable for buildings.[6] (*See* Summons at 2.) In this litigation, however, Defendant argues that the correct classification is subheading 8302.42.30, HTSUS, which covers:

| | |
|---|---|
| **8302** | Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof: |

[6] Defendant originally asserted in its cross-motion that subject merchandise is also classifiable in this tariff provision. (Def.'s Cross-MSJ at 1.) During the course of litigation, Defendant dropped its assertion that this tariff provision is proper. (Def.'s Reply at 7.) Pursuant to its duty under *Jarvis Clark*, the Court considered subheading 8302.41.60, HTSUS and found it inapplicable because it applies to goods suitable for buildings rather than for furniture.

| | | |
|---|---|---|
| 8302.42 | Other, suitable for furniture: | |
| 8302.42.30 | Of iron or steel, of aluminum or of zinc .......................... | 3.9% |

(Def.'s Cross-MSJ at 1 n.1; Def.'s Reply at 7). Defendant's proposed classification carries a 3.9% duty.

The Container Store alleges that both of Customs' proposed subheadings are incorrect. (Pl.'s MSJ at 6, 22–26.) Rather, Plaintiff contends that its top tracks and hanging standards are correctly classified in subheading 9403.90.80, HTSUS, which is a duty-free provision, relying on *Container Store I*.(*Id*. at 6–7, 15–21.) Plaintiff's proposed provision covers:

| | | |
|---|---|---|
| **9403** | Other furniture and parts thereof: | |
| 9403.90 | Parts: | |
| 9403.90.80 | Other: ...................................................................... | FREE |

## II. Application of *Container Store I* to Open Cases and Pending Protests

The Container Store urges the Court to direct Customs to apply the decisions in *Container Store I* and *storeWALL* to "pending protests and open cases"[7] which allegedly involve entries of identical merchandise.[8] (Pl.'s MSJ at 1–2 n.1, 11–14.) The Container Store argues that *Container Store I* and *storeWALL* control this case and the related pending cases because of the doctrine of *stare decisis*.(*Id*. at 2.) Plaintiff proffers four reasons why the doctrine of *stare decisis* applies to this case:

(1) there is a Federal Circuit interpretation of the subheading claimed by Plaintiff (*i.e.*, 9403.90.80, HTSUS);

(2) there were no clear errors by the court in the prior case;

(3) there has been no intervening change in the law since these decisions; and

(4) the government's claims were fully litigated by the parties in the prior action.

[7] The open cases are court numbers: 05–00684 (Dec. 22, 2005), 06–00239 (July 21, 2006), 06–00404 (Nov. 6, 2006), 07–00197 (June 7, 2007), 07–00388 (Oct. 17, 2007), 07–00400 (Oct. 24, 2007), 08–00130 (Apr. 16, 2008), and 08–00249 (Aug. 14, 2008). (Pl.'s MSJ at 1–2 n.1.). These cases have been removed from the Reserve Calendar since the commencement of this case and are currently assigned to another judge on the court.

[8] Neither this action nor *Container Store I* was designated as a test case, and none of the cases have been consolidated.

*Id*. The Container Store further purports that regulations compel Customs to follow controlling judicial precedent. (*Id*. at 11–12.) The Container Store avers that, pursuant to 19 C.F.R. § 152.16(a) and 19 C.F.R. § 177.10(d), Customs must issue a limiting decision as to later-imported entries if it wishes to depart from judicial precedent. (*Id*. at 11–13.) The Container Store points out that Customs did not issue a limiting decision following the court's decisions in *Container Store I* and *storeWALL* and, thus, the Container Store insists that Customs acted arbitrarily and capriciously in failing to apply those judicial decisions to the open cases and pending protests of identical merchandise. (*Id*. at 1, 7, 11–14.) Plaintiff asks the court to order Customs to classify, in HTSUS heading 9403, not only the entries of identical merchandise at issue in this case but also in related cases and pending protests, pursuant to *Container Store I* and *storeWALL*.(*Id*.)

### A. The Summons Limits the Scope of the Court's Review

A summons is the initial pleading in a federal action. *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1317–18 (Fed. Cir. 2006). "As a general matter, the initial pleading in a federal court action serves two purposes: (1) [i]t establishes the court's jurisdiction over the action; and (2) [i]t puts the adverse party on notice of the commencement and subject-matter of the suit." *Id.* at 1317 (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1205, at 109, § 1215, at 173 (3d ed. 2004)). In classification matters, a summons must identify the protest(s) at issue in the litigation.[9] *Id.* at 1320; *see also Kahrs Int'l, Inc. v. United States*, 33 CIT 1316, 1321–22, 645 F. Supp. 2d 1251, 1263 (2009). As the Court of Appeals for the Federal Circuit ("Federal Circuit") explained:

> The plain language of the pertinent statutes establishes that the Court of International Trade has jurisdiction only to review 'the denial of *a protest*,' and that each protest denial is the basis of a separate claim. Thus, the filing of a protest is a jurisdictional requirement. . . . Because each protest forms the basis for a separate cause of action, the summons must establish the Court of International Trade's jurisdiction as to each protest. The essential jurisdictional fact—the denial of the protest—simply

[9] A summons need not include the protest number to commence a lawsuit if the protest can be identified by other means, such as when the summons includes the relevant entry number. *DaimlerChrysler Corp. v. United States*, 28 CIT 2105, 2107, 350 F. Supp. 2d 1339,1341 (2004) (holding that "if the entries were listed and it was possible for the United States to relate the entry to the protest, . . . then jurisdiction would also attach") (internal citation omitted), *aff'd*, 442 F.3d 1313 (Fed. Cir. 2006).

> cannot be affirmatively alleged without specifically identifying each protest involved in the suit.

*DaimlerChrysler*, 442 F.3d at 1319 (citations omitted) (emphasis in original); *see also* 28 U.S.C. § 1581(a) (establishing the court's jurisdiction over "'[a] civil action contesting the denial, in whole or in part, of *a protest*'") (emphasis added). Thus, the protests listed in a summons define the scope of the court's review in that case.[10]

The summons in this case identifies only two protests.[11] (Summons Schedule.) The summons does not include any of the protests in the other cases that the Container Store asks the court to decide. (*Id.*) Further, this is neither a designated test case nor have any other cases been stayed pending the outcome of this case. Therefore, the Court declines the Container Store's invitation to issue an order relating to protests in any other case but the one at bar. Denied protests that are not referenced in the summons of this action constitute distinct causes of action that the Container Store must adjudicate separately.

### B. The Court Lacks Subject Matter Jurisdiction Over Pending Protests

The court has exclusive subject matter jurisdiction over all civil actions commenced under § 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515, to contest protests denied by Customs. *See* 28 U.S.C. § 1581(a). Before a party may initiate a civil action as to a denied protest, it must exhaust all administrative remedies, as described in 28 U.S.C. § 2637. That statute states, in relevant part:

> A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a surety's obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.

[10] *See Kahrs Int'l*, 33 CIT at 1321–22, 645 F. Supp. 2d at 1263 ("[T]his Court has jurisdiction *only* over the entries that are the subject of this challenge to a denied protest, pursuant to § 1581(a), as indicated in the summons filed with this action.") (emphasis in original); *see also DaimlerChrysler Corp. v. United States*, 28 CIT at 2107, 350 F. Supp. 2d at 1341–42. ("But if there is no entry number on or attached to the summons and no protest number on or attached to the summons at the time it is filed, the general understanding that DaimlerChrysler intended to pursue this issue as to all possibly affected entries will not suffice.").

[11] The protest numbers in this case are 5301–08–150014 and 5301–08–150015. (*See* Summons Schedule.)

28 U.S.C. § 2637(a). Accordingly, "the denial of a protest" is a prerequisite for this court's jurisdiction over classification of import entries. 28 U.S.C. § 2637(a); *see Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1550 (Fed. Cir. 1983) ("[T]he statutory requirements that a protest must be filed . . . or that duties must be paid before commencing a civil action involving the protest [may not be waived]."); *Dexter v. United States*, 78 Cust. Ct. 179, 181 (1977) ("[T]his court has no jurisdiction" over any entries "[u]ntil the entries are liquidated and [the] protests [are] denied.").

The Container Store asks that the Court order Customs to classify, under HTSUS heading 9403, entries of top tracks and hanging standards in all pending protests. (Pl.'s MSJ at 1–2 & n.1, 11–14.) Because these protests are pending, Customs has yet to deny them. Defendant indicates that all pending protests dealing with top tracks and hanging standards have been suspended and will remain so for the duration of this litigation, as is Customs' practice. (Def.'s Cross-MSJ at 2 n.4; Pl.'s MSJ at 7.) Accordingly, the Court cannot order Customs to classify pending protests of elfa® top tracks and hanging standards under any tariff provision because it lacks jurisdiction over protests that have not been denied.

### C. Customs Did Not Arbitrarily and Capriciously Ignore Regulations

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), a court may hold invalid agency actions "where they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." "Under this standard, it is clear that an agency's determination cannot be upheld where it fails to acknowledge applicable law." *Former Employees of Murray Engineering, Inc. v. Chao*, 28 CIT 1873, 1875, 358 F. Supp. 2d 1269, 1272 (2004) (citations omitted). Thus, the court may not affirm an agency determination that is not in accord with the agency's own rules or regulations. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

In relevant part, Customs regulation 19 C.F.R. § 152.16, states:

> The following procedures apply to changes in classification made by decision of either the United States Court of International Trade or the United States Court of Appeals for the Federal Circuit, except to the extent otherwise provided in a ruling published in the Customs Bulletin pursuant to § 177.10(a) of this chapter:
>
> . . . .

> (e) Other decisions adverse to Government. Unless the Commissioner of Customs otherwise directs, the principles of any court decision adverse to the Government . . . shall be applied to unliquidated entries and protested entries which have not been denied in whole or in part and in which the same issue is involved as soon as the time within which an application for a rehearing or review may be filed has expired without such application having been made.

The Container Store argues that Customs acted arbitrarily and capriciously in failing to follow 19 C.F.R § 152.16(e) after this court's decision in *Container Store I* and the Federal Circuit's decision in *storeWALL*. The Container Store asserts that this regulation required Customs to classify entries of elfa® top tracks and hanging standards at issue in this case under HTSUS heading 9403, unless Customs issued a limiting decision pursuant to 19 C.F.R. § 177.10(d), which the Container Store avers Customs failed to do. (Pl.'s MSJ at 1, 7, 11–13.) On that basis, the Container Store requests that the court order Customs to treat the entries at issue in this case consistently with its regulations.[12] (*Id.*)

Preliminarily, the Court notes that the Container Store confuses the subsection of 19 C.F.R. § 177.10 to which 19 C.F.R. § 152.16 refers. The chapeau to 19 C.F.R. § 152.16 refers to 19 C.F.R. § 177.10(a), not 19 C.F.R. § 177.10(d). Pursuant to 19 C.F.R. § 177.10(d), Customs may issue limiting rulings with respect to certain judicial decisions.[13] In contrast, 19 C.F.R. § 177.10(a) requires Customs to publish in the Customs Bulletin interpretive decisions that Customs makes relating to prospective, current, or completed transactions under the Tariff Act of 1930.[14] The Container Store does not address the relevance of 19 C.F.R. § 177.10(a) to this case.

[12] The Container Store also asks the court to find that Customs acted arbitrarily and capriciously in failing to classify entries of identical merchandise at issue in pending protests and open cases under HTSUS 9403 consistent with *Container Store I* and *storeWALL*. As already noted, the Court lacks subject matter jurisdiction to rule on pending protests and is limited to deciding matters pertaining to the protests listed in the summons commencing the case at bar. *See supra.* The Court therefore expresses no opinion as to Customs' actions with respect to pending protests and open cases.

[13] 19 C.F.R. § 177.10(d), states, in relevant part:

> Limiting rulings. A published ruling may limit the application of a court decision to the specific article under litigation, or to an article of a specific class or kind of such merchandise, or to the particular circumstances or entries which were the subject of the litigation.

[14] 19 C.F.R. § 177.10(a) states:

> Generally. Within 90 days after issuing any interpretive decision under the Tariff Act of 1930, as amended, relating to any Customs transaction (prospective, current, or completed), the Customs Service shall publish the decision in the Customs Bulletin or otherwise make it available for public inspection. For purposes of this paragraph an

The Court need not parse 19 C.F.R. § 177.10's subsections, however. The Container Store's argument centers on 19 C.F.R. § 152.16(e), which allegedly requires Customs to apply adverse judicial decisions with limited exceptions. Without reaching whether Customs needed to issue a limiting decision or interpretative ruling pursuant to 19 C.F.R. § 177.10, the Court finds that 19 C.F.R. § 152.16(e) did not compel Customs to apply *Container Store I* or *storeWALL* to the protests at issue in this case. The regulation requires Customs to apply adverse judicial decisions only "to unliquidated entries and protested entries *which have not been denied* in whole or in part." 19 C.F.R. § 152.16(e) (emphasis added). Customs denied the two protests at issue in this case on February 25, 2009. (Summons Schedule.) The Federal Circuit issued its decision in *storeWALL* on March 31, 2011, *see generally* 644 F.3d 1358, and this Court issued *Container Store I* on October 26, 2011, *see generally* 35 CIT __, 800 F. Supp. 2d 1329. Thus, Customs had denied the protests more than two years before the decisions in *Container Store I* and *storeWALL*. Consequently, Customs did not act arbitrarily and capriciously in failing to follow 19 C.F.R. § 152.16(e) with respect to the protests at issue in this case because Customs' denial of the protests predates the decisions in *storeWALL* and *Container Store I* and, therefore, the regulation does not apply.

## III. Doctrine of *Stare Decisis*

"*Stare decisis* means 'not to disturb what is settled.'" *Warner-Lambert Co. v. United States*, 32 CIT 222, 226, 545 F. Supp. 2d 1345, 1349 (2008) (citation omitted). The doctrine of *stare decisis* "in essence 'makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decision.'" *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993) (internal quotation and citation omitted); *see also R.J. Saunders & Co. v. United States*, 45 C.C.P.A. 87, 89 (1958) ("[I]t is not the province of a lower court to set aside the ruling of an appellate court."). The doctrine of *stare decisis* "'protects the legitimate expectations of those who live under the law' and prevents 'an arbitrary discretion in the courts.'" *Deckers Corp. v. United States*, 752 F.3d 949, 955 (Fed. Cir. 2014) (quoting *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (citation omitted)).

### A. Parties' Contentions

The Container Store contends that the doctrine of *stare decisis* mandates that the Court classify the subject imports under heading

interpretive decision includes any ruling letter, internal advice memorandum, or protest review decision.

9403, HTSUS, because prior decisions of this court and the Federal Circuit create binding authority on the issue. (Pl.'s MSJ at 2.) The Container Store urges that this court's result in *Container Store I* and the Federal Circuit's decision in *storeWALL* are controlling precedent on the classification of its elfa® top tracks and hanging standards in this case. (*Id.* at 9–11.)

Defendant responds that the doctrine of *stare decisis* does not compel the Court to follow *Container Store I* because decisions of trial court judges generally do not bind other trial court judges. (Def.'s Cross-MSJ at 6–8.) Defendant further explains that the Federal Circuit's conclusion in *storeWALL* does not govern the classification of the subject merchandise at issue in the instant case because the legal issues differ. (*Id.* at 24.) Specifically, the *storeWALL* court considered different competing headings. (*Id.* at 23.) Defendant argues that here "proper classification . . . is dependent on the analysis of competing provisions that have corresponding mutually exclusive legal notes." (*Id.* at 23–24.) Defendant alternatively argues that, even if a prior decision is binding on the Court, the United States is entitled to submit evidence that the decision was clearly erroneous. (*See id.* at 4, 7–8.)

### B. *Stare Decisis* and *StoreWALL*

Federal Circuit decisions are binding on this court pursuant to the doctrine of *stare decisis*. In classification cases, the Federal Circuit has stated that "[a]lthough an importer is free to challenge anew a previous classification of merchandise . . ., we have decided that the importer is burdened by the doctrine of *stare decisis*." *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1331 (Fed. Cir. 2005) (internal quotation and citation omitted). The Court is bound by the Federal Circuit's legal determinations as to questions of law, and specifically as to interpretation of tariff provisions that are applicable. *Id.* ("[T]he doctrine of *stare decisis* applies to only legal issues and not issues of fact."). Accordingly, the Court will follow the *storeWALL* court's legal construction of the heading 9403, HTSUS, which is one of the headings at issue in this case, to the extent that it is applicable, pursuant to the doctrine of *stare decisis.*

The doctrine of *stare decisis,* however, only applies if the legal issues are the same. Thus, the Federal Circuit's *storeWALL*decision is not dispositive as to this case, because there are factual and legal distinctions between *storeWALL* and this case. Defendant asserted during oral argument that "there are a lot of issues that [were] raised in all of these notes that did not arise in *storeWALL*, or were not argued in *storeWALL*." (Oral Arg. Tr. at 38, ECF No. 63.) These notes were not at issue in *storeWALL* because, as previously noted, the subject merchandise in *storeWALL* was made of plastic, while the subject merchandise in this case is made of metal. Accordingly, the tariff provisions at issue in *storeWALL*, and the interactions of the tariff provisions with each other, via the section and chapter notes, differ from the provisions considered in this case.

Specifically, Section XV, which covers "base metals and articles of base metal," and the headings in that section, such as heading 8302, which covers "base metal mountings, fittings and similar articles suitable for furniture" were not considered by the *storeWALL* court because that section and its headings covering base metals were not applicable to the plastic merchandise at issue in *storeWALL*. Furthermore, in construing heading 9403 HTSUS, the Federal Circuit did not consider the relevance of the exclusion of "parts of general use" as defined in Note 2(c) to Section XV, pursuant to Chapter 94, Note 1(d), because, as noted above, it was considering an item of plastic, rather than one of base metal.

The *storeWALL* court considered two basket provisions, HTSUS heading 9403, a provision for furniture and parts thereof, and HTSUS heading 3926, a broad basket provision for "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914." The language of heading 3926, HTSUS, explicitly indicates that it only covered articles of plastic not specified elsewhere. On appeal, the *storeWALL* court determined that the subject imports did not fall under HTSUS heading 3926 because the subject imports were specified elsewhere, *i.e.*, under HTSUS heading 9403, as parts of unit furniture.

The Federal Circuit's construction of heading 3926, HTSUS, in *storeWALL* is not relevant to the subject merchandise at issue. Since the instant subject merchandise is made of base metal, tariff provisions for plastic articles, such as heading 3926, HTSUS, are not applicable in the instant case. Moreover, Defendant's proposed HTSUS heading 8302 in this case is not a broad basket provision as was the case with the defendant's proposed HTSUS heading 3926 in *storeWALL*. Finally, and perhaps most relevant, is that, as discussed in more detail below, there are section and chapter notes that speak to the interactions between HTSUS headings 8302 and 9403 that were not relevant to, and, therefore, not considered by, the Federal Circuit in *storeWALL*. Accordingly, *storeWALL* does not bind the Court in this case regarding the proper classification of elfa® top tracks and hanging standards made of epoxy-bonded steel.

### C. *Stare Decisis* and *Container Store I*

The law is well-settled that trial courts, such as this court, are not bound by the decisions of other trial court judges. *Algoma Steel Corp. v. United States*, 865 F.2d 240 (Fed. Cir. 1989) (holding specifically that a judge at the CIT is not bound by another judge's decision at the CIT); *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 1729, 662 F. Supp. 2d 1337,1343 (2009) (noting that this court is not bound by a decision of another judge of the same court). The court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand. *Jarvis Clark*, 733 F.2d at 878. Accordingly, the doctrine of *stare decisis* does not compel the Court to follow the analysis in *Container Store I*, particularly when that decision did not address the same issues and legal arguments raised herein; including, specifically, whether the subject merchandise meets the definition of parts of general use. In this case, the Court arrives at a different conclusion than the one achieved in *Container Store I* based upon an analysis of the definition of parts of general use and the other statutory exclusionary notes.

## IV. GENERAL RULES OF INTERPRETATION ("GRI")

The Court must assess whether the elfa® top tracks and hanging standards properly fall within the scope of HTSUS headings 9403 or 8302. The Container Store urges that the correct classification for its product is heading 9403, HTSUS, as "[o]ther furniture and parts thereof," based on the plain language of the heading, the relevant section, chapter, and explanatory notes, and the construction of the heading that the Federal Circuit adopted in *storeWALL*. (Pl.'s MSJ at 15–17.) Plaintiff further contends that the subject imports fall outside the scope of heading 8302, HTSUS, because they are essential components of the elfa® system and, therefore, are not parts of general use, as that heading contemplates. (*Id*. at 22.)

The United States concedes that elfa® top tracks and hanging standards are *prima facie* classifiable under heading 9403. (Def.'s Cross-MSJ at 12.) Defendant contends, however, that they are also *prima facie* classifiable under heading 8302, HTSUS, as "base metal mountings, fittings and similar articles suitable for furniture." (*Id*. at 12–15 & n.7.) The United States argues, however, that the Court must classify the goods under the more specific of the alternative headings. (*Id*. at 15–16.) The United States avers that heading 8203 is more specific than heading 9403. (*Id*. at 9–11, 15–16.) Further, Defendant explains Note 1(d) to Chapter 94[15] excludes the subject imports from heading 9403. (*Id*. at 16.)

### A. GRI Application

The General Rules of Interpretation ("GRIs") govern classifications and are applied in numerical order. *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). Section and chapter notes "are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202." *Avenues in Leather,* 423 F.3d. at 1333 (internal citation omitted). While not statutory law, the ENs "may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *Millenium Lumber Dist. Ltd. v. United States*, 558 F.3d 1326, 1329 (Fed. Cir. 2009) (quoting *N. Am. Processing*, 236 F.3d at 698).

"Under GRI 1, the Court must determine the appropriate classification 'according to the terms of the headings and any relative section or chapter notes' . . . [with] terms of the HTSUS . . . construed . . . to their common commercial meaning." *Id*. at 1328–29. If the application of GRI 1 provides the proper classification, the inquiry ends there. When goods "are *prima facie* classifiable under two or more headings or subheadings of HTSUS" under a GRI 1 analysis, then the court must turn towards GRI 3 to resolve the classification. *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) (quoting *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1365 (Fed. Cir. 2011)). GRI 3(a),[16] known as the rule of specificity, dictates that an article *prima facie* classifiable in two or more headings should be classified under the heading that provides "the most specific description of the goods." *CamelBak*, 649 F.3d at 1365; *Riddell, Inc. v. United States*, 754 F.3d 1375, 1380 (Fed. Cir. 2014) (stating when "the provisional conclusion from applying GRI 1" is that the subject imports are "'*prima facie* classifiable under two or more headings,' we turn [ ] to . . . GRI 3(a)'s 'rule of specificity'") (internal quotation and citation omitted).

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[15] 1(d) to Chapter 94 states, "This chapter does not cover . . . . (d) parts of general use as defined in note 2 to section XV, of base metal (section XV) . . . ." Note 2 to Section XV states that "[t]hroughout the tariff schedule, the expression 'parts of general use' means . . . [a]rticles of . . . heading 8302."

[16] GRI 3(a) states:

> The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

### B. Statutory Law

The subject merchandise at issue is the Container Store's elfa® top tracks and hanging standards, two components of its patented elfa® system. (Am. Compl. ¶¶ 5); Answer ¶¶ 5.) These top tracks and hanging standards "may or may not be imported together." (Pl.'s MSJ at 4, ¶ 12.) The Court now turns to the two applicable headings proposed by the parties.

Relying on the relevant section and chapter notes, Defendant contends that the headings are "mutually exclusive," such that merchandise classifiable in one heading is not classifiable in the other. (Def.'s Cross-MSJ at 4, 7, 9–11; Def.'s Reply at 8.) Defendant argues that because the subject imports are *prima facie* classifiable under both headings, the court must resort to GRI 3(a)'s rule of specificity to determine that the heading 8302, HTSUS, more specifically describes the subject merchandise. (Def.'s Cross-MSJ at 11, 15–16.) The Container Store disagrees with Defendant that the subject imports are classifiable under heading 8302, HTSUS. (*See generally* Pl.'s MSJ.) Rather, the Container Store urges that the plain language of heading 8302 and related notes instruct that this heading covers only parts of general use, and not products like elfa® top tracks and hanging standards, which are essential components of the complete article of furniture. (Pl.'s MSJ at 15–18.)

#### 1. Relevant Section, Chapter and Headings

The first relevant section is Section XV, which covers "Base Metals and Articles of Base Metal." Section XV includes Chapter 83, which covers "miscellaneous articles of base metal." Chapter 83 includes heading 8302, which covers "base metal mountings, fittings and similar articles suitable for furniture." The second relevant section is Section XX, which covers "Miscellaneous Manufactured Articles." Section XX includes Chapter 94, which covers, among other things, "furniture, bedding, mattresses, mattress supports . . . illuminated signs, illuminated nameplates and the like; prefabricated buildings." Chapter 94 includes heading 9403, which covers "[o]ther furniture and parts thereof."

Pursuant to GRI 1, the Court first considers the terms of the proposed headings. Terms are construed based on their common and commercial meaning. *Millenium Lumber Dist.*, 558 F.3d at 1328–29. Taking the headings in numerical order, HTSUS heading 8302 includes "[b]ase metal mountings, fittings and similar articles suitable for furniture." Note 3 to Section XV defines "base metals" as, *inter alia*, "iron and steel." The top tracks and hanging standards are comprised of epoxy-bonded steel and are, therefore, made of "base metal" for purposes of heading 8302. (*See* Am. Compl. ¶ 27; Answer ¶ 27). The subject merchandise also qualifies as "mountings, fittings and similar articles suitable for furniture" applying the common commercial definitions. The common meaning of "mounting" is "a frame or support that holds something."[17] The common meaning of "fitting" is "a small often standardized part."[18] These terms are met because elfa® top tracks and hanging standards serve as the frame or support structure in a complete elfa® system. (Am. Compl. ¶¶ 30, 39–40; Answer ¶¶ 30, 39–40.) The subject imports are also "suitable for furniture." The word "suitable" means "adapted to a use or purpose."[19] The Court finds that the elfa® top tracks and hanging standards can fit within the terms of heading 8302, HTSUS.

The Court next considers the terms of HTSUS heading 9403, which encompasses "[o]ther furniture and parts thereof." The HTSUS does not define the term furniture, but the Court uses the definition of "furniture" from the Federal Circuit, which included "unit furniture" as a type of "furniture." *storeWALL,* 644 F.3d at 1363 (citing *storeWALL, LLC v. United States*, 33 CIT 1791, __, 675 F. Supp. 2d 1200, 1204 (2009)). The Federal Circuit found the storeWALL "system's versatility and adaptability" to be "characteristics that are the hallmark of unit furniture." *Id.* at 1364. The Container Store's elfa® top racks and hanging standards are functionally equivalent to the storeWALL system.[20] Following *storeWALL*'s definition of unit furniture to construe the terms in heading 9403, HTSUS, the Court finds that the elfa® top tracks and hanging standards can also fit within the terms of heading 9403, HTSUS.

A GRI 1 analysis, however, requires the court to construe the terms of the headings in light of the relative section and chapter notes, and also consult the ENs, as appropriate, to ascertain the scope of the provisions. These section and chapter notes, which also are statutory

[17] *Available at* http://www.merriam-webster.com/dictionary/mounting (last visited January 14, 2016).

[18] *Available at* http://www.merriam-webster.com/dictionary/fitting (last visited January 14, 2016).

[19] *Available at* http://www.merriam-webster.com/dictionary/suitable (last visited January 14, 2016).

[20] The Court recognizes that elfa® top tracks and hanging standards are designed to be used with the elfa® system (Am. Compl. ¶¶ 28, 31; Answer ¶¶ 28, 31), which, when complete, would appear to meet the court's definition of "unit furniture" in *storeWALL*. 644 F.3d at 1364. HTSUS heading 8302 contemplates that its articles are suitable for furniture and, therefore, the fact that the merchandise in question may be parts of unit furniture is consistent with the *storeWALL* analysis of unit furniture. Further, the subject merchandise at issue is only the two parts, top tracks and hanging standards, and not an entire elfa® system.

law, may determine if the subject merchandise is properly classifiable in both parties' proposed headings.

### 2. Relevant Section and Chapter Notes

The Court must consider, and analyze the interplay among, the relevant provisions of statutory law. The Court first looks at the sections and then the chapters in which the respective proposed headings fall and considers relevant notes, if any, which are binding statutory law. Section XV has notes that provide statutory law pertinent to this case. Section XV has two possible relevant section notes—Note 1(k) and Note 2(c). Section XX does not have any section notes, however, Chapter 94 has two relevant chapter notes—Note 1(d) and Note 2.[21] This case turns on the interplay among these section and chapter notes.[22]

#### *a. Section XV notes*

Note 1(k) to Section XV states that the section "does not cover . . . (k) Articles of chapter 94 (for example, furniture)." In its supplemental brief, the Container Store focuses on the parenthetical "for example" in Note 1(k) and explains that "for example" is "illustrative" and the note "simply lists exemplars." (Pl.'s Suppl. Br. at 1–2.) Plaintiff asserts that Note 1(k) "is not limited to the named exemplars, but covers all articles of Chapter 94." (*Id*. at 2.) Defendant counters that "the purpose of Note 1(k) is to exclude from Section XV a class of goods that are classifiable in Chapter 94, HTSUS" and instead focuses on the term "articles" in Note 1(k). (Def.'s Suppl. Br. at 3.) Defendant asserts that "articles" does not include a reference to "parts." (*Id*.) Note 2(c) explains that, "[t]hroughout the tariff schedule, the expression '*parts of general use*' means: . . . (c) Articles of heading . . . 8302."

The two relevant notes in Section XV must be read together and reconciled to the extent they appear to contradict each other. Note 1(k) states that Section XV does not cover articles of Chapter 94, "for example, furniture." The phrase "for example" is illustrative, as the Container Store contends. While Defendant argues that only complete articles, such as furniture of Chapter 94, are covered by this

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[21] Again, the *storeWALL* court did not consider the relationship between Chapter 94 and Chapter 83 and the relevant Section XV and Chapter 83 notes because the subject merchandise in that case was plastic and these provisions apply to articles and parts of base metal.

[22] The Court also considered the Note 1 to Chapter 83, which provides that "[f]or the purposes of this chapter, parts of base metal are to be classified with their parent articles." On its face, Note 1 is specific to Chapter 83, and classification in a heading within Chapter 83; therefore, it does not help the Court resolve a classification issue between Chapter 83 and Chapter 94.

note, the Court need not reach this issue. Note 2(c) defines "parts of general use" to include those articles specifically identified in heading 8302, HTSUS, and, as discussed below, such parts are expressly excluded from Chapter 94 by Note 1(d) thereto. Thus Note 1(k) has no bearing on the classification of the subject imports, because the top tracks and hanging standards are parts of general use as described in Note 2(c) (and, as discussed immediately below, Note 1(d) to Chapter 94).

#### *b. Chapter 94 notes*

The Court's reading of the Section XV notes is reinforced by the notes to Chapter 94. Note 1(d) to Chapter 94 states that "[t]his chapter does not cover . . . (d) Parts of general use as defined in note 2 to section XV," *i.e.*, the "[a]rticles of heading . . . 8302." Note 2 to Chapter 94 provides:

> The articles (other than parts) referred to in heading[ ] . . . 9403 are to be classified in [that] heading[ ] only if they are designed for placing on the floor or ground.
>
> The following are, however, to be classified in the above-mentioned headings even if they are designed to be hung, to be fixed to the wall or to stand one on the other:
>
> (a) Cupboards, bookcases, other shelved furniture (including single shelves presented with supports for fixing them to the wall) and unit furniture.

Reading these chapter notes together, Chapter 94 covers articles that are designed to be placed on the floor, and certain other articles, such as unit furniture, that are designed to be hung on the wall. Chapter 94, however, does not cover parts, as defined in Note 2 to Section XV (*i.e.*, parts of general use). Therefore, the Court concludes that Chapter 94 Note 1(d) provides that base metal "parts of general use" are not included in Chapter 94.

Additional U.S. Rules of Interpretation ("ARI") 1(c) to the GRIs supports this conclusion. This is an interpretative rule, which provides:

> 1. In the absence of special language or context which otherwise requires— . . .
>
> (c) a provision for parts of an article covers products solely or principally used as part of such articles but a provision for "parts" or "parts and accessories" shall not prevail over a specific provision for such part or accessory.

Plaintiff recites and relies on only the first half of ARI 1(c)—"a provision for parts of an article covers products solely or principally used as part of such articles." (Pl.'s MSJ at 19.) The ARI, however, must be read in its entirety. The second half of the ARI is applicable and its application is consistent with the Court's reconciliation of the notes to Chapters 83 and 94—"a provision for 'parts' or 'parts and accessories' shall not prevail over a specific provision for such part or accessory." Applying ARI 1(c) to the headings at issue, the specific provision of "base metal mountings, fittings and similar articles suitable for furniture" in heading 8302, HTSUS, prevails over the general provision for "parts of furniture" in heading 9403, HTSUS.

### c. *Interplay between Section XV and Chapter 94 notes*

The Court reads the relevant section and chapter notes together, in order to avoid creating contradictions in the statutory language where none is necessary. In so doing, Chapter 94 Note 1(d) reinforces Section XV Note 2(c). Chapter 94 Note 1(d) excludes parts of general use from Chapter 94, while Section XV Note 2(c) specifically places parts of general use into heading 8302, HTSUS. The interplay between the section and chapter notes dictates that if the subject merchandise fits the definition of a part of general use, then it stays in heading 8302 even if it is a part of furniture or unit furniture. Further, heading 8302's "suitable for furniture" language actually contemplates that its articles may be used as parts of furniture. Therefore, the Court finds that the Container Store's top tracks and hanging standards fit the definition of a part of general use and are classified in heading 8302, HTSUS.

The Court is unpersuaded by the Container Store's arguments that its top tracks and hanging standards cannot be considered "parts of general use" because they are designed for use in its elfa® system. In making these arguments, the Container Store appears to rely on a common usage of the term "general use," suggesting that the part in question must have multiple uses. In this instance, the phrase "parts of general use" is expressly defined, for purposes of the tariff schedule, in Note 2(c) to Section XV, and it is specifically listed *eo nomine* in heading 8302, HSTUS. Thus, the Court considers this to be a defined, short-hand term of reference for articles of heading 8302, HTSUS, without regard to type or number of uses of the article. *Lonza, Inc. v. U.S.*, 46 F.3d 1098, 1106 (Fed. Cir. 1995) ("where a term is defined by statute, the court need not undertake a common-meaning inquiry, for the statutory definition is controlling") (internal citation omitted). Because the top tracks and hanging standards in question are covered by the terms of heading 8302, HTSUS, they are "parts of general use" even if they are designed for use in a particular furniture system.[23]

### C. Explanatory Notes

While not binding, the Explanatory Notes ("EN") may provide interpretative guidance in a classification analysis. The Court considers the ENs as guidance insofar as they are germane and do not conflict with the statutory law.[24] To the extent that the relevant ENs appear to contradict statutory provisions, the Court disregards the ENs. To the extent the relevant ENs appear to contradict each other, the Court considers and assigns appropriate weight to their persuasive value.

The first relevant EN is the EN to Section XV, which provides guidance as to how to classify "parts of articles" that are "presented separately." Section XV EN "(C) Parts of Articles" provides:

> [p]arts of general use (as defined in Note 2 to this Section) presented separately are **not** considered as parts of articles, but are classified in the headings of this Section appropriate to them. This would apply, for example, in the case of bolts specialized for central heating radiators or springs specialized for motor cars. The bolts would be classified in heading 73.18 (as bolts) and not in heading 73.22 (as parts of central heating radiators). The springs would be classified in heading 73.20 (as springs) and not in heading 87.08 (as parts of motor vehicles).

This EN thus explains that "parts of general use . . . presented separately are **not**" to be classified with the articles to which they belong. Rather, parts of general use are to be classified in their appropriate *eo nomine* provision. This rule stands even if the parts are "specialized" for particular types of goods, such as springs for motor cars or bolts for central heating radiators. Reading Note 2 to Section XV, which defines the parts of heading 8302 as "parts of general use," together with this section EN, supports a finding that separately presented parts of HTSUS heading 8302 are properly classified in that heading rather than as parts of the article for which they may be intended.

[23] While the parties disagree about whether these top tracks and hanging standards are parts of general use, this disagreement is a legal conclusion regarding the interpretation and application of Section XV Note 2(c), not a genuine issue of material fact regarding the physical property of the subject imports or their function.

[24] The Court looked carefully at the ENs in their entirety and discussed them with the parties, but in the end, the Court finds the ENs of limited assistance. Further, the Court finds that some parts of the ENs are inconsistent with the section and chapter notes. Thus, the Court relies on the ENs only insofar as they are pertinent, helpful, and do not contradict statutory law.

The EN to Chapter 94,[25] by contrast, specifies that "[a]rticles of furniture presented **disassembled** or **unassembled** are to be treated as assembled articles of furniture, **provided** the parts are presented together" (emphasis in original). The operative term in this EN is "provided," as indicated by the original emphasis. Thus, the Chapter 94 EN also supports classifying these top tracks and hanging standards in HTSUS heading 8302. As the Container Store indicated, the "top tracks and hanging standards may or may not be imported together, and may or may not be imported with other elfa® components." (Pl.'s MSJ at 4, ¶ 12.) In this case, the top tracks and handing standards were not presented as part of a set used to create any particular elfa® system. Thus, the EN to Chapter 94 does not support classifying the merchandise at issue in Chapter 94.

The Court next turns to the ENs related to headings 8302 and 9403, HSTUS, for an interpretation of the headings' respective scopes. The EN to heading 8302, HTSUS, also provides guidance about general classes of goods, even when these goods are designed for particular uses:

> This heading covers general purpose classes of base metal accessory fittings and mountings such as are used largely on furniture . . . . Goods within such general classes remain in this heading even if they are designed for particular uses (e.g., door handles or hinges for automobiles). The heading **does not**, however, **extend** to goods forming an essential part of the structure of the article, such as window frames or swivel devices for revolving chairs. (Emphasis in original.)

This EN suggests that general purpose classes of base metal mountings included in heading 8302, HTSUS, are not removed from the class merely because they are designed for a particular use. The Container Store asserts that elfa® top tracks and hanging standards are designed to be used with the elfa® system and are an essential part of the structure of such a system. (Am. Compl. ¶¶ 28, 31; Answer ¶¶ 28, 31.)

Applying EN to heading 8302, HTSUS, to the case at bar, the fact that elfa® top tracks and hanging standards were designed only to work with the elfa® system does not remove these top tracks and hanging standards from the general class of base metal mountings that are used largely on furniture. Although these top tracks and hanging standards are designed for use with elfa® systems, they fall within the general class of mountings, fittings and similar articles suitable for furniture based on the terms of the headings and the Court's analysis of the relevant section and chapter notes.

[25] Section XX has no explanatory notes.

The EN to heading 9403, HTSUS, states that this heading "covers furniture and parts thereof not covered by previous headings." This EN supports reading heading 9403 as covering furniture parts that are not otherwise covered by a lower numbered heading. Heading 8302, HTSUS, is an applicable lower numbered heading and, as discussed herein, covers the subject top tracks and hanging standards.

**D. Proper Classification**

The proper classification of top tracks and hanging standards may be decided pursuant to GRI (1).[26] Heading 8302, HTSUS, covers all base metal mountings, fittings, and similar articles suitable for furniture, specifically including articles of heading 8302 that are parts of general use, even if they are designed to be used in a patented shelving system. Heading 9403, HTSUS, covers parts of furniture but specifically excludes parts of general use, and also excludes disassembled parts that are not presented together. Upon consideration of the terms of the headings, relevant section and chapter notes, and germane explanatory notes, the Court finds that the elfa® top tracks and hanging standards are classifiable in heading 8302, HTSUS, the appropriate *eo nomine* provision for base metal mountings, fittings, and similar articles suitable for furniture. Accordingly, the subject merchandise is not classifiable in heading 9403, HTSUS, because they are excluded by the chapter notes as parts of general use.

After reaching the proper heading, the Court determines the proper subheading. *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1250 (Fed. Cir. 2004) ("The court must first look to headings, then subheadings, to determine proper classification."). As noted *supra*, subheading 8302.41, HTSUS, applies to base metal articles suitable for buildings, which is inapplicable to the subject imports. Subheading 8302.42, HTSUS, applies to base metal articles suitable for furniture, which is applicable. Finally, the proper eight digit subheading is 8302.42.30, HTSUS, which applies to mountings, fittings, and similar articles suitable for furniture made of iron or steel. The Court holds that the proper classification of the elfa® top tracks and hanging standards is tariff provision 8302.42.30, HTSUS.

**CONCLUSION**

For the reasons discussed above, the Court holds that the subject imports are properly classified in tariff provision 8302.42.30, HTSUS. Thus, the Court denies the Container Store's motion for summary

[26] The case will be decided under a GRI 1 analysis and therefore the Court need not reach a specificity analysis under GRI 3(a).

judgment and grants the United States' cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: January 21, 2016
New York, New York

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

Slip Op. 16–7

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Court No. 13–00346

## *OPINION*

[affirming the Department of Commerce's redetermination on remand]

Dated: January 21, 2016

*Andrew W. Kentz*, *Jordan C. Kahn, and Roop K. Bhatti, Picard Kentz & Rowe LLP, of Washington, DC, for the Plaintiff.*

*Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson, Director, and Patricia M. McCarthy, Assistant Director. Of counsel on the brief was Melissa M. Brewer, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.*

**Pogue, Senior Judge:**

This action arises from the seventh administrative review by the U.S. Department of Commerce ("Commerce") of the antidumping duty order ("the order") on certain frozen warmwater shrimp from the People's Republic of China ("PRC" or "China").[1] In this seventh review, Commerce determined to revoke the order with respect to respondent Zhanjiang Regal Integrated Marine Resources Company, Limited ("Regal").[2]

Adjudicating appeals from Plaintiff Ad Hoc Shrimp Trade Action Committee ("AHSTAC") – an association of domestic warmwater

[1] *See Certain Frozen Warmwater Shrimp from the [PRC]*, 78 Fed. Reg. 56,209 (Dep't Commerce Sept. 12, 2013) (final results of administrative review; 2011–2012) ("*AR7 Final Results*") and accompanying Issues & Decision Mem., A-570–893, ARP 11–12 (Sept. 12, 2013) ("*AR7 I&D Mem.*").

[2] *AR7 Final Results*, 78 Fed. Reg. at 56,209–10.

shrimp producers that participated in this seventh review[3] – this Court remanded Commerce's determination to revoke the order as to Regal, ordering the agency to reconsider certain surrogate value data used to determine Regal's normal value.[4] The agency's *Remand Results* are now before the court.[5]

The parties now raise two issues. First, Commerce protests an aspect of the court's holding in ordering remand in *AHSTAC I*.[6] Second, AHSTAC challenges Commerce's selection, in the *Remand Results*, of a certain surrogate value for one of the factors of production used to construct Regal's normal value.[7]

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[8] and 28 U.S.C. § 1581(c) (2012).

As explained below, Commerce's redeterminations on remand are supported by a reasonable reading of the record evidence, and are therefore sustained.

## BACKGROUND

Antidumping duty orders are imposed on imported merchandise that is sold at prices below normal value (i.e., "dumped").[9] "[N]ormal value" is usually the price at which a foreign producer's like products are sold in the exporting country or, for merchandise originating in non-market economies ("NMEs"), a value calculated using appropriate surrogate market economy data.[10] Such orders are regularly administratively reviewed by Commerce, such that the agency determines producer/exporter-specific dumping margins, covering discrete (typically one-year) time periods, by making contemporaneous normal value to export price comparisons.[11] Pursuant to a regulation in effect at the time of the administrative review at issue here, Commerce was authorized to revoke the order with respect to particular

[3] *See* Compl., ECF No. 2, at ¶ 7.

[4] *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __,70 F. Supp. 3d 1328 (2015) ("*AHSTAC I*"). While relevant background is summarized below, familiarity with *AHSTAC I* is presumed.

[5] Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 65 ("*Remand Results*").

[6] *Id.* at 1, 7.

[7] Pl. [AHSTAC]'s Comments on Final Results of Redetermination Pursuant to Ct. Order, ECF No. 70 ("Pl.'s Br.").

[8] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[9] *See* 19 U.S.C. §§ 1673; 1677(34); 1677(35)(A); 1677b.

[10] *See id*. at §§ 1677b(a)(1)(B)(i), 1677b(c).

[11] *See id.* at § 1675(a).

exporters/producers if Commerce found, *inter alia*, that such an exporter/producer had not "sold the merchandise at . . . less than normal value for a period of at least three consecutive years."[12] Here, Regal requested company-specific revocation pursuant to this regulation.[13]

By the time of Commerce's decision regarding Regal's request, Regal had been individually examined in the sixth and seventh reviews, and received zero percent dumping margins in both proceedings.[14] Regal was not, however, individually examined in the fifth review;[15] rather, it was assigned a zero percent dumping margin based on its individually-calculated zero percent rate in the previous (fourth) review.[16] Because Regal was not individually examined in the fifth review, Commerce, in the seventh review, requested from Regal in-

[12] 19 C.F.R. § 351.222(b)(2)(i)(A) (2012). This regulatory provision was subsequently revoked for administrative reviews initiated on or after June 20, 2012. *Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 77 Fed. Reg. 29,875, 29,876 (Dep't Commerce May 21, 2012). As the review at issue here was initiated on April 30, 2012, the regulation was still in effect. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 25,401, 25,403 (Dep't Commerce Apr. 30, 2012).

[13] *See AR7 I&D Mem.*, *supra* note 1, cmt. 2 at 6.

[14] Where it is not practicable to make individual weighted average dumping margin determinations for each known exporter and producer of the subject merchandise for whom review was requested, Commerce may limit its individualized examination to a smaller number of companies, 19 U.S.C. § 1677f-1(c)(2), and assign to the remaining respondents the "all-others" rate (calculated in accordance with 19 U.S.C. § 1673d(c)(5)) or, where appropriate, the NME countrywide rate. *See Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*,__ CIT __, 28 F. Supp. 3d 1317, 1339–40 n.107 (2014). Regal was individually examined in the sixth and seventh administrative reviews of this order. *Certain Frozen Warmwater Shrimp from the [PRC]*, 77 Fed. Reg. 12,801, 12,801 (Dep't Commerce Mar. 2, 2012) (preliminary results, partial rescission, extension of time limits for the final results, and intent to revoke, in part, of the sixth antidumping duty administrative review) (explaining that Commerce selected Regal for individual examination in the sixth review) (unchanged in 77 Fed. Reg. 53,856 (Dep't Commerce Sept. 4, 2012) (final results, partial rescission of sixth antidumping duty administrative review and determination not to revoke in part) and accompanying Issues & Decision Mem., A-570893, ARP 10–11 (Aug. 27, 2012) ("*AR6 I&D Mem.*")); Decision Mem. for Prelim. Results, Partial Rescission of Antidumping Duty Admin. Review, *Certain Frozen Warmwater Shrimp from the [PRC]*, A-570–893, ARP 11–12 (Mar. 12, 2013) ("*AR7 Prelim. Decision Mem.*") at 3 (explaining that Commerce selected Regal for individual examination in the seventh review) (adopted in 78 Fed. Reg. 15,696, 15,696 n.1 (Dep't Commerce Mar. 12, 2013)(preliminary results of administrative review; 2011–2012)(unchanged in *AR7 Final Results*, 78 Fed. Reg. 56,209)).

[15] *Certain Frozen Warmwater Shrimp from the [PRC]*, 76 Fed. Reg. 8338, 8341 (Dep't Commerce Feb. 14, 2011) (preliminary results and preliminary partial rescission of fifth antidumping duty administrative review) (explaining that Commerce selected only one company for individual examination in the fifth review, which was not Regal) (unchanged in 76 Fed. Reg. 51,940 (Dep't Commerce Aug. 19, 2011) (final results and partial rescission of [fifth] antidumping duty administrative review) ("*AR5 Final Results*")).

[16] *See AR5 Final Results*, 76 Fed. Reg. at 51,942.

formation and sales data from the time period covered by that fifth review,[17] "to confirm that Regal did not dump [subject merchandise] during that time,"[18] and hence to confirm that Regal did not dump for three consecutive years, as required for revocation eligibility under the regulation.[19]

Because Commerce considers China to be a non-market economy, the agency generally calculates normal value for China-originating merchandise using "the value of the factors of production utilized in producing the merchandise," including "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses" (collectively, the "FOPs"), from a surrogate market economy country.[20]

As this Court explained in AHSTAC I:

> Because Commerce's selection of an appropriate surrogate market economy must be such that the chosen dataset provides the best available information for approximating the NME producers' experience, Commerce chooses a primary surrogate country that is economically comparable to the NME country (measured in terms of the countries' comparative per capita gross national income ('GNI')), is a significant producer of comparable merchandise, and provides publicly-available, reliable, and relevant data.[21]

Commerce originally chose India as the appropriate surrogate market economy country for China during the period covered by the fifth

[17] The period of review for that proceeding was February 1, 2009, through January 31, 2010. *Id*. at 51,940.

[18] *AR7 I&D Mem*., *supra* note 1, cmt. 2 at 6.

[19] *See* 19 C.F.R. § 351.222(b)(2)(i)(A).

[20] *See* 19 U.S.C. § 1677b(c)(1); [Commerce's] Post-Prelim. Analysis for [Regal] and [Another Resp't], *Certain Frozen Warmwater Shrimp from the [PRC]*, A-570–893, ARP 11–12 (May 20,2013), *reproduced in* App. to Def.'s Resp. in Opp'n to Pl.'s Mot. for J. Upon the Agency R., ECF Nos. 55 (conf. version) & 56(pub. version) at Tab 7 ("*Regal Post-Prelim. Mem*.") at 3 (unchanged in the *AR7 Final Results*, 78 Fed. Reg. at 56,210).Although the statute permits Commerce to source its data from multiple surrogate market economies, *see* 19 U.S.C.§ 1677b(c)(1), Commerce normally values all factors of production using reliable data from a single surrogate market economy country, if possible, *see* 19 C.F.R. § 351.408(c)(2); *Clearon Corp. v. United States*, Slip Op. 13–22, 2013 WL 646390, at *6 (CIT Feb. 20, 2013) (noting that Commerce's regulatory "preference for the use of a single surrogate country" is reasonable because, "as Commerce points out, deriving the surrogate data from one surrogate country limits the amount of distortion introduced into its calculations") (quotation marks and citation omitted).

[21] *AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1336 (quotation marks and citations omitted).

review.[22] Although AHSTAC successfully challenged that choice of surrogate for the fifth review,[23] the issue was subsequently rendered moot and accordingly was ultimately not revisited in that proceeding.[24] And when, in the context of Regal's seventh review revocation request, Commerce analyzed whether Regal sold subject merchandise at less than normal value during the fifth review period, Commerce again – despite the Court's decision in *China Shrimp AR5* – used India as the surrogate country for its analysis of Regal's fifth review data.[25]

However, as this Court also explained in *AHSTAC I*:

> In *China Shrimp AR5*, this Court held that Commerce acted arbitrarily in the fifth review by disregarding the concern that India's per capita GNI was nearly a third of China's during the relevant time period, whereas Thailand's per capita GNI was nearly identical thereto, despite the record evidence that the quality of the available datasets from these two potential surrogates was nearly indistinguishable. . . . Disregarding the court's holding in *China Shrimp AR5*, Commerce did not consider or weigh the effect of the significant divergence between India and Thailand's respective economic comparability to China when determining, based on reasoning reiterated from the fifth review, that while the record provided adequate surrogate FOP datasets from both potential surrogates, the Indian dataset provided the best available information.[26]

The court therefore remanded Commerce's seventh review analysis of Regal's fifth review period sales. By continuing to use Indian surrogate data to arrive at the comparison normal values for that period, based on reasoning reiterated from the original fifth review:

> [Commerce] ignore[d] this Court's repeated holdings that where, as here, adequate data is available from more than one country that is both at a level of economic development comparable to

[22] Issues & Decision Mem., *Certain Frozen Warmwater Shrimp from the [PRC]*, A-570–893, ARP 09–10 (Aug. 12, 2011) (adopted in *AR5 Final Results*, 76 Fed. Reg. at 51,940) ("*AR5 I&D Mem.*") cmt. 2 at 10.

[23] *See Ad Hoc Shrimp Trade Action Comm. v. United States*,__ CIT __, 882 F. Supp. 2d 1366, 1376 (2012) ("*China Shrimp AR5*") (holding that "Commerce's stated reasoning regarding the surrogate country selection in [the fifth] review [did] not comport with a reasonable reading of the record").

[24] *AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1333–34 (providing further detail in this regard).

[25] *AR7 I&D Mem.*, *supra* note 1, cmt. 2 at 6.

[26] *AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1336–37 (quotation and alteration marks and citations omitted).

> the NME and a significant producer of comparable merchandise, Commerce must weigh the relative merits of such potential surrogates' datasets in a way that does not arbitrarily discount the accuracy-enhancing value of sourcing surrogate data from a market economy whose economic development is as close as possible to that of the NME, and in that regard may provide the best available information.[27]

On remand here, Commerce reconsidered its surrogate country choice for the fifth review period, and "determined to select Thailand as the primary surrogate country [in light of] the proximity of Thailand's per capita GNI to the PRC's GNI and because the Thai surrogate value . . . data used to value Regal's [FOPs] is superior."[28] With respect to one of the inputs, however – shrimp feed – the agency found that the Thai values were aberrational, and therefore unreliable, and accordingly determined to use alternative data from a secondary surrogate country – Indonesia.[29] AHSTAC now challenges this latter determination.[30]

Because Commerce protests *AHSTAC I*,[31] the court will first review

[27] *Id.* at 1337–38 (quotation marks, footnote, and citations omitted); *see also id*. at 1338–39, 42 ("During the fifth review, Commerce found that both India and Thailand fell within a range of GNI values comparable to the per capita GNI of China, that both of these potential surrogates were significant producers of comparable merchandise, and that there existed on the record sufficient, publicly available surrogate factor information for the majority of FOPs from both India and Thailand that was of roughly equal specificity, and that otherwise satisfied the agency's usual data-quality standards. But in deciding which of these two datasets would provide the best available information, Commerce (both in the original fifth review and in examining Regal's fifth review pricing as part of its revocation analysis) categorically and formulaically disregarded the evidence that the Indian data came from a country whose per capita GNI was barely a third of China's, whereas the Thai data was from an economy whose per capita GNI was virtually identical to China's. Commerce's refusal to account for the accuracy-enhancing value of relative GNI proximity when evaluating the relative merits of alternative satisfactory datasets, to determine which set constitutes the best available surrogate value information, is arbitrary and, therefore, unreasonable. . . . Accordingly, the agency's reliance in this revocation proceeding upon its original fifth review analysis of surrogate dataset alternatives is not supported by substantial evidence, and must therefore be remanded for reconsideration.") (internal quotation and alteration marks, footnote, and citations omitted).

[28] *Remand Results*, ECF No. 65, at 1; *see also id*. at 7 ("[A] comparison of the [fifth review period] per capita GNI of India, $1,070, Thailand, $2,840, and the PRC[,] $2,940, indicates that Thailand's per capita GNI is closer to the PRC's per capita GNI than India's per capita GNI. For this reason, and for the data considerations explained below, we now rely on Thai [surrogate value] data to value Regal's inputs in [the fifth review period].").

[29] *Id.* at 11–13.

[30] Pl.'s Br., ECF No. 70, at 6–14.

[31] *See Remand Results*, ECF No. 65, at 1 ("[P]ursuant to [*AHSTAC I*], we have, under protest, reconsidered the information on record and determined to select Thailand as the primary surrogate country . . . .") (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371,

its prior holding.[32] Accordingly, following a brief statement of the relevant standard of review, this opinion will discuss *AHSTAC I* in light of the *Remand Results*. The court will then address AHSTAC's challenge to the *Remand Results*.

## STANDARD OF REVIEW

The court upholds Commerce's antidumping determinations on remand if they are in accordance with law, consistent with the court's remand order, and supported by substantial evidence.[33] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"[34] and the substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'"[35]

## DISCUSSION

### *I. AHSTAC I and the Remand Results*

In making its protest, Commerce mischaracterizes the court's holding in *AHSTAC I*. According to Commerce, *AHSTAC I* requires the agency, in all instances, to "consider the relative GNI differences of potential surrogate countries that [Commerce] considers to be at the same level of economic comparability."[36] Instead what the court held in *AHSTAC I* is that, on the particular record presented here – i.e., where both India and Thailand satisfied the statutory criteria of economic comparability to the PRC and significant production of comparable merchandise, and where the quality and specificity of the respective Indian and Thai potential surrogate datasets were materially indistinguishable – Commerce unreasonably concluded that

1376 (Fed. Cir. 2003)); *id*. at 7("[Commerce] respectfully disagrees with the Court's holding that the Department must consider the relative GNI differences of potential surrogate countries . . . .").

[32] *Cf. GPX Int'l Tire Corp. v. United States*, __ CIT __, 942 F. Supp. 2d 1343, 1348 n.2 (2013) ("The only legitimate purpose of registering a protest in a remand determination is to preserve a particular issue for appeal where the agency has been compelled to take a particular step that results in an outcome not of its choosing.").

[33] *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, __ CIT __, 968 F. Supp. 2d 1328, 1334 (2014).

[34] *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted).

[35] *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (citation omitted, alteration in the original); *On-Line Careline, Inc. v. America Online, Inc.*, 229 F.3d 1080,1085 (Fed. Cir. 2000) ("The substantial evidence standard requires the reviewing court to ask whether a reasonable person might find that the evidentiary record supports the agency's conclusion.") (citations omitted).

[36] *See Remand Results*, ECF No. 65, at 7.

relative per capita GNI proximity to the PRC was entirely irrelevant when choosing between these otherwise indistinguishable datasets.[37]

As the court explained in *AHSTAC I*, Commerce's conclusion "that significant 'differences of quality of data sources' adequately support the agency's selection of Indian rather than Thai surrogate values" was not supported by the record evidence.[38] Specifically, as Commerce acknowledges, "the record contain[ed] publicly available [fifth review period] surrogate factor information for the majority of FOPs from both India and Thailand," and "the Indian and Thai import statistics did not allow [the agency] to distinguish between data from the two countries."[39] Nevertheless, claiming an unfounded lack of specificity in the Indian data, Commerce determined, in the original fifth review, that the Indian data provided the "best available information."[40] Commerce then adopted this fifth review reasoning when analyzing Regal's fifth review sales in the context of the seventh review revocation proceeding.[41] In this context, the court held that

[37] *AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1337–42.

[38] *Id*. at 1339 (quoting *AR7 I&D Mem*., *supra* note 1, cmt. 2 at 10).

[39] *Remand Results*, ECF No. 65, at 8 (citing *AR5 Final Results*, 76 Fed. Reg. 51,940, and accompanying *AR5 I&D Mem., supra* note 22, cmt. 2); *see also AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1338 ("During the fifth review, Commerce found that both India and Thailand fell within a range of GNI values comparable to the per capita GNI of China, that both of these potential surrogates were significant producers of comparable merchandise, and that '[t]here exist[ed] on the record sufficient, publicly available surrogate factor information for the majority of FOPs from both India and Thailand' that was 'of roughly equal specificity,' and that otherwise satisfied the agency's usual data-quality standards.") (quoting *AR5 I&D Mem., supra* note 22, cmt. 2 at 7 (alterations in *AHSTAC I*)).
Indeed the two datasets were so nearly indistinguishable that Commerce resorted to "minute, seemingly hair-splitting differences" to determine the Indian data to be superior –finding that the Indian data for shrimp larvae (the critical input used by the sole mandatory respondent in the original fifth review but not used at all by Regal), though also of very similar quality to the Thai shrimp larvae data, did not specify the species of shrimp to which they pertained, whereas the Thai data were specific to a species of shrimp that the mandatory respondent in the fifth review did not produce. *AHSTAC I*,__ CIT at __, 70 F. Supp. 3d at 1340.
Commerce also attempted to distinguish the two datasets by determining that the Indian financial statement on record more closely approximated Regal's experience, which was that of an integrated producer (i.e., a shrimp farmer as well as shrimp processor). *Id*. at 1341. But as the court noted in *AHSTAC I*, and as Commerce acknowledged in the *Remand Results*, this distinction between the datasets was not supported by the record because in fact the record contained evidence that the Thai financial statement was also from an integrated producer. *Id*.; *Remand Results*, ECF No. 65, at 9–10.

[40] *See AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1336, 1338–40;19 U.S.C. § 1677b(c)(1).

[41] *See AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1336–37("Defendant argues that, in revisiting the issue in the context of Regal's revocation request, Commerce recognized that the Court had previously remanded Commerce's fifth review primary surrogate country selection, and that Commerce therefore reconsidered its surrogate country selection for the limited purpose of evaluating Regal's revocation request. But in fact the agency itself

Commerce acted unreasonably when, *in choosing between otherwise essentially indistinguishable datasets*, the agency "completely (and categorically) ignored the *biggest* difference in quality between the two datasets, which is that the Thai data was from a market economy that very nearly mirrored China's level of economic development . . ., whereas the Indian data reflected values present in an economy whose per capita GNI was multiple orders of magnitude lower than China's."[42] Thus while Commerce is correct that the statute does not require the agency to choose surrogate FOP data from a country that is *most* economically comparable to the NME[43] – because the most economically comparable country will not necessarily always provide the best available information – nevertheless where the competing datasets are otherwise indistinguishable, Commerce acts unreasonably if it "arbitrarily discount[s] the accuracy-enhancing value of sourcing surrogate data from a market economy whose economic development is as close as possible to that of the NME, and in that regard may provide the 'best available information.'"[44]

In protesting (its own misinterpretation of) the court's holding, Commerce emphasizes its policy of "sequential consideration" of the surrogate country eligibility criteria.[45] Specifically, Commerce's policy is that the agency first considers economic comparability, creating a list of potential surrogates that are all "at a level of economic

explicitly states that Commerce did *not* reconsider this matter. Specifically, Commerce explained that because it ultimately was not required to respond to the surrogate country issue, *Commerce did not reexamine the issue of surrogate country selection and therefore continues to find India to be a reliable source for surrogate values* for the calculation of normal value for the period covered by the fifth review.") (emphasis in *AHSTAC I*.) (quotation and alteration marks and citations omitted).

[42] *Id*. at 1341 (emphasis in original); *see also id*. at 1341 n.67 (noting Commerce's policy that "'the closest country to [an NME]'s level of economic development' is the country whose per capita GNI most closely approximates that of the NME") (quoting *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13,246, 13,247 (Dep't Commerce Mar. 21, 2007) (alteration in *AHSTAC I*)).

[43] *Remand Results*, ECF No. 65, at 5–6 (relying on 19 U.S.C.§§ 1677b(c)(1), (4)).

[44] *AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1337–38 (quoting 19 U.S.C. § 1677b(c)(1)) (additional citations and footnote omitted); *see also id*. at 1336 ("*In China Shrimp AR5*, this Court held that Commerce acted arbitrarily in the fifth review by disregarding the concern that India's per capita GNI was nearly a third of China's during the relevant time period, whereas Thailand's per capita GNI was nearly identical thereto, despite the record evidence that the quality of the available datasets from these two potential surrogates was nearly indistinguishable.") (quotation and alteration marks and citations omitted).

[45] *Remand Results*, ECF No. 65, at 5 (quoting Import Admin., U.S. Dep't Commerce, *Non–Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* enforcement.trade.gov/policy/bull04–1.html (last visited Jan. 15, 2016) ("*Commerce Policy* 4.1")).

development comparable to that of the [NME],"[46] as required by statute.[47] Next, Commerce analyzes which of the countries on that list produce comparable merchandise to that covered by the proceeding in question.[48] Then, the agency determines which of those countries are "significant" producers of such merchandise.[49] And finally, "if more than one country has survived the selection process to this point," then Commerce will choose from among the survivors "the country with the best [FOP] data."[50]

As applied here, *Commerce Policy 4.1* directs the agency to categorically disregard the relative per capita GNI differences among the potential surrogates once the initial list of countries satisfying the threshold economic comparability criterion is generated.[51] In particular, this policy requires the agency to continue to disregard the potential surrogates' relative per capita GNI proximity to the per capita GNI of the NME even where, as in *China Shrimp AR5* and *AHSTAC I*, not only did more than one country survive all of the steps of the policy's sequential analysis, but the quality of those countries' respective FOP datasets was materially indistinguishable. In such cases, the categorical application of *Commerce Policy 4.1* leads to the unreasonable result rejected by the court in *AHSTAC I* and *China Shrimp AR5* where, forced to choose among two potential surrogates on the basis of data quality distinctions alone, "Commerce concluded that Indian data were superior to Thai data essentially based on a finding that a subset of the Indian data [was] more vague than its counterpart within the Thai data"[52] (because, although the Indian data likely also pertained to a different species of shrimp than the one produced by the sole mandatory respondent in the original fifth review, the Indian data, unlike the Thai data, did not explicitly confirm this[53]), while entirely disregarding "the concern that India's per

[46] 19 U.S.C. § 1677b(c)(4)(A).

[47] *See Commerce Policy 4.1*, *supra* note 45, at "Economic Comparability."

[48] *Id*. at "Comparable Merchandise."

[49] *Id*. at "Significant Producer"; *see* 19 U.S.C. § 1677b(c)(4)(B).

[50] *Id*. at "Data Considerations."

[51] *See id*. at "Economic Comparability" (providing that once the agency generates the "list of potential surrogate countries that are at a comparable level of economic development to the NME country," the countries on this list should thereafter "be considered equivalent in terms of economic comparability") (footnotes omitted). Commerce's sole exception to this sequence is not relevant here. *See id*. at "Exceptions to the Sequencing Procedure."

[52] *China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 1376 (citation omitted).

[53] *See id.* at n.15.

capita GNI was nearly a third of China's, whereas Thailand's per capita GNI was nearly identical thereto."[54] In such cases, the categorical application of *Commerce Policy 4.1* may therefore lead the agency to a choice of surrogate FOP values that does not comport with a reasonable reading of the record evidence, which is precisely what this Court held in *China Shrimp AR5* and *AHSTAC I*. Accordingly, in cases where a strict application of *Commerce Policy 4.1* would lead to an unreasonable result – such as where more than one potential surrogate satisfies all threshold criteria and their respective FOP datasets are materially indistinguishable – Commerce must consider all important aspects of what constitutes "the best available information"[55] including, where appropriate, the potential surrogates' relative GNI proximity to the NME.

Despite its protest, however, on remand Commerce reexamined the fifth review period Indian and Thai surrogate FOP datasets and found that, unlike the original fifth review (where the datasets were compared to the production experience of the mandatory respondent in that proceeding), when the datasets are evaluated based on *Regal's* production experience, the two are no longer materially indistinguishable, because in fact the available Thai data better approximate Regal's production factors.[56] Specifically, as the court noted in *AHSTAC I*, the critical input in Regal's production of subject merchandise during the fifth review period was a different FOP than the input used by the mandatory respondent in the original fifth review analysis.[57] Whereas the fifth review mandatory respondent's key input was shrimp larvae, for which the fifth review Indian and Thai data were

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[54] *Id*. at 1376 (citation omitted).

[55] 19 U.S.C. § 1677b(c)(1); *cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (stating that an agency acts arbitrarily when it fails to "consider an important aspect of the problem").

[56] *Remand Results*, ECF No. 65, at 8–9; *see AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1336 (noting that Commerce did not initially reconsider its original fifth review surrogate country analysis in the context of Regal's company-specific revocation proceeding); id. at 1340 (holding that "Commerce's reasoning that its original analysis in the fifth review supports its conclusion here that the Indian data [are] superior to the Thai data because the former more closely match[] Regal's own FOPs and production process is not supported by a reasonable reading of the evidence") (citation omitted).

[57] *AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1340; *see Remand Results*, ECF No. 65, at 8 ("In the underlying *AR5 Final Results*,. . . [Commerce] evaluated the surrogate factor information for valuing shrimp larvae because shrimp larvae was the critical input in the production of the subject merchandise for . . . the sole mandatory respondent in that review. As noted by the Court, Regal does not purchase shrimp larvae; rather, it uses broodstock as its key physical input.") (citations omitted).

very nearly indistinguishable,[58] Regal's key input was broodstock, an FOP for which the only available data on record was from Thailand.[59]

Finding that broodstock accounts for a significant portion of Regal's fifth review normal value calculation, and that the Thai data were most specific with regard to this input, Commerce therefore concluded on remand that the fifth review Thai surrogate data offered the best available information,[60] because Thailand satisfied the threshold statutory criteria of economic comparability to China and significant production of comparable merchandise,[61] and because "the specificity offered by the Thai import data with respect to Regal's broodstock is more specific to the input than any other [surrogate value] data on the record."[62]

Accordingly, *AHSTAC I*'s holding – that Commerce acts unreasonably when, faced with two or more potential surrogate datasets that are otherwise materially indistinguishable, the agency categorically refuses to consider their relative GNI proximity to the NME as a criterion for choosing among them – is no longer implicated here, because Commerce no longer considers the two datasets involved here to be materially indistinguishable. Commerce's protest is therefore irrelevant. Moreover, because Commerce's conclusion – that Thailand offers the best available surrogate FOP information for calculating Regal's fifth review normal value because it satisfies the threshold statutory criteria and presents the most specific data with regard to a significant portion of Regal's normal value – comports with a reasonable reading of the law and evidentiary record, it is sustained.

### *II. AHSTAC's Challenge to the Remand Results*

AHSTAC challenges Commerce's selection, on remand, of a surrogate value for shrimp feed in its calculation of Regal's normal value

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[58] *See AHSTAC I*, __ CIT at __, 70 F. Supp. 3d at 1340.

[59] *See id.*; *Remand Results*, ECF No. 65, at 8 ("The only available [surrogate value] data on the record for broodstock is from Thailand.") (citation omitted). As noted in *AHSTAC I*, Commerce also selected Thailand as the primary surrogate country for the following sixth and seventh reviews, __ CIT at __,70 F. Supp. 3d at 1340 n.60 (citations omitted), in which Regal was a mandatory respondent, *see supra* note 14 (providing relevant background and citations).

[60] *See Remand Results*, ECF No. 65, at 8–9 (explaining that "[Commerce] favors one country over another on the basis of surrogate value specificity where a surrogate value from one country representing a significant portion of normal value is more specific to a respondent's input," and choosing Thailand as "the appropriate surrogate country" because Regal's "key physical input" was broodstock and only Thai data was available for that FOP) (citations omitted).

[61] *Id.* at 5 n.16, 6–7; *see* 19 U.S.C. § 1677b(c)(4).

[62] *Remand Results*, ECF No. 65, at 9.

for the fifth review period.[63] With regard to this FOP, Commerce concluded that all available Thai values on the record were aberrational and thus unreliable,[64] and accordingly determined to use alternative data from a secondary surrogate country – Indonesia – to value this FOP.[65] AHSTAC challenges this determination, arguing that Commerce instead should have used Thai shrimp feed data from the fourth review period, adjusted for inflation.[66]

While Commerce normally prefers to source all surrogate FOP values from a single ("primary") surrogate country, the agency will use data from a different surrogate country "if data from the primary surrogate country are unavailable or unreliable."[67] "[W]here no suitable [surrogate value] is available from the primary surrogate country," Commerce uses surrogate data from "other countries that have been found to be significant producers of comparable merchandise and economically comparable to the NME country in question."[68] Here, although the parties agree that Commerce may use secondary surrogate country data when a particular FOP value from the primary surrogate is unreliable/aberrational,[69] AHSTAC claims that Commerce arbitrarily departed from its established practice by valu-

[63] Pl.'s Br., ECF No. 70, at 6–14; *see Remand Results*, ECF No. 65, at 11.

[64] *Remand Results*, ECF No. 65, at 11–12, 16.

[65] *Id.* at 13, 17.

[66] Pl.'s Br., ECF No. 70, at 7–14.

[67] *Remand Results*, ECF No. 65, at 10 (quoting *Jiaxing Bro. Fastener Co. v. United States*, __ CIT __, 11 F. Supp. 3d 1326,[1332–33] (2014) (quoting Issues & Decision Mem., *Sodium Hexametaphosphate from the [PRC]*, A-570–908, ARP 10–11 (Sept. 19, 2012) (adopted in 77 Fed. Reg. 59,375 (Dep't Commerce Sept. 27, 2012) (final results of antidumping duty administrative review)) cmt. I at 4 ("It is [Commerce]'s well established practice to rely upon the primary surrogate country for all surrogate values, whenever possible, and to only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable.") (citations to prior determinations omitted))); *see also* Pl.'s Br., ECF No. 70,at 6 (discussing Commerce's preference for "[u]sing *reliable* data from the primary surrogate" to value all FOPs) (emphasis added) (quoting *Clearon Corp*., 2013 WL 646390, at *5 (quoting the agency's brief in that case))).

[68] *Remand Results*, ECF No. 65, at 12 (citing Issues & Decision Mem., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the [PRC]*, A-570–601, ARP 07–08 (Dec. 28, 2009) (adopted in 75 Fed. Reg. 844 (Dep't Commerce Jan. 6, 2010)(final results of the 2007–2008 administrative review of the antidumping duty order)) ("*TRBs from China*") cmt. 3; Issues &Decision Mem., *Certain Cut-to-Length Carbon Steel Plate from Romania*, A-485–803, ARP 02–03 (Mar. 7, 2005) (adopted in 70 Fed. Reg. 12,651 (Dep't Commerce Mar. 15, 2005) (notice of final results and final partial rescission of antidumping duty administrative review)) cmt. 3).

[69] *See Remand Results*, ECF No. 65, at 11 ("Although import statistics obtained from [the Global Trade Atlas ('GTA')] satisfy [Commerce]'s primary criteria for the suitability of [surrogate values] in antidumping proceedings involving NME countries, [Commerce] disregards GTA data for a certain factor, either in whole or in part, where there is reason to believe that the prices reflected in the import data may be unreliable. [In such cases,]

ing the shrimp feed surrogate FOP for Regal's fifth review normal value calculation using data from Indonesia,[70] and that Commerce's choice of the Indonesian data was not supported by substantial evidence.[71]

*A. Commerce Reasonably Determined That The Fifth Review Thai Value for Shrimp Feed Was Aberrational.*

Both parties agree that Commerce's established practice for determining whether a given surrogate value is aberrational, and therefore unreliable, is to "compare[] the surrogate value in question to the [Gobal Trade Atlas] average unit values calculated for the same period using data from the other potential surrogate countries [that satisfied the threshold statutory eligibility criteria], to the extent that such data are available."[72] Commerce also notes that the agency has previously examined the primary surrogate's data for the FOP value in question "over multiple years[,] to determine if the current data appear aberrational with respect to historical values."[73]

[Commerce] applies certain criteria to determine whether a surrogate value is aberrational.") (citing *TRBs from China*, *supra* note 68, cmt. 3); Pl.'s Br., ECF No. 70, at 6–7 (discussing Commerce's practice "for testing the reliability of surrogate values alleged to be aberrational").

[70] Pl.'s Br., ECF No. 70, at 4–10.

[71] *Id.* at 10–14.

[72] *Remand Results*, ECF No. 65, at 11 (citing Issues & Decision Mem., *Carbazole Violet Pigment 23 from the [PRC]*, A-570–892, ARP 07–08 (June 21, 2010) (adopted in 75 Fed. Reg. 36,630 (Dep't Commerce June 28, 2010) (final results of antidumping duty administrative review)) ("*CVP 23 from China*") cmt. 4; *Certain Lined Paper Products from the [PRC]*, A-570–901, Investigation(Aug. 30, 2006) (adopted in 71 Fed. Reg. 53,079 (Dep't Commerce Sept. 8, 2006) (notice of final determination of sales at less than fair value, and affirmative critical circumstances, in part)) cmt. 5); *see also* Pl.'s Br., ECF No. 70, at 7 (quoting Issues & Decision Mem., *Multilayered Wood Flooring from the [PRC]*, A-570–970, ARP 11–12 (May 9, 2014) (adopted in 79 Fed. Reg. 26,712 (Dep't Commerce May 9, 2014) (final results of antidumping duty administrative review; 2011–2012)) ("*Wood Flooring from China*") cmt. 6 at 42 ("'To test the reliability of the surrogate values alleged to be aberrational, [Commerce] compare[s] the selected surrogate value for each FOP to the [average unit values] calculated for the same period using data from the other surrogate countries [Commerce] designated for this review, to the extent that such data are available.'") (quoting Issues & Decision Mem., *Certain Hot-Rolled Carbon Steel Flat Products from Romania*, A-485–806, ARP 02–03 (June 6, 2005)(adopted in 70 Fed. Reg. 34,448 (Dep't Commerce June 14, 2005)(final results of antidumping duty administrative review)) ("*Hot-Rolled Carbon Steel from Romania*") cmt. 2 at 19)).

[73] *Remand Results*, ECF No. 65, at 11–12 (citing Issues & Decision Mem., *Lightweight Thermal Paper from the [PRC]*, A-570–920, Investigation (Oct. 2, 2008) (adopted in 73 Fed. Reg. 57,329 (Dep't Commerce Oct. 2, 2008) (final determination of sales at less than fair value)) cmt. 10; Issues & Decision Mem., *Saccharin from the [PRC]*, A-570–878, ARP 02–04 (Feb. 13, 2006)(adopted in 71 Fed. Reg. 7515 (Dep't Commerce Feb. 13, 2006)(final results and partial rescission of antidumping duty administrative review)) cmt. 5).

Here, the Thai value for shrimp feed during the period covered by the fifth review was 25.50 U.S. dollars per kilogram ("USD/kg").[74] Of the other potential surrogate countries that satisfied the threshold eligibility criteria, only three provided usable shrimp feed data: Indonesia, which had a value for shrimp feed during the period covered by the fifth review of 1.23 USD/kg; India, which provided a fifth review value of 1.36 USD/kg for this FOP; and the Philippines, which provided a fifth review value of 0.12 USD/kg for this FOP.[75] Additionally, the historical Thai values for this FOP varied significantly; these values were 2.60 USD/kg (during the period covered by the fourth review), 14.50 USD/kg (during the period covered by the sixth review), and 26.83 USD/kg (during the period covered by the seventh review),[76] such that "the Thai [average unit values] for shrimp feed over the periods examined ranged from 2.6[0] to 26.83 USD/kg, while the [average unit values] for the other [potential surrogates satisfying the threshold eligibility criteria] ranged from 0.13–0.51 USD/kg (Philippines), 0.92–1.29 USD/kg (Indonesia)[,] [and] 1.30–1.37 USD/kg (India) during the same periods."[77] Comparing the Thai fifth review shrimp feed FOP value of 25.50 USD/kg to this historical data, as well as to the contemporaneous fifth review values for this FOP from the other potential surrogates, Commerce concluded that the 25.50 USD/kg Thai fifth review value for shrimp feed was aberrational and therefore unreliable.[78]

AHSTAC does not appear to contest Commerce's finding that the Thai shrimp feed value for the fifth review period was aberrational. Instead, AHSTAC argues that Commerce should have taken AHSTAC's suggestion to use the Thai shrimp feed value for the *fourth* review period, 2.60 USD/kg, rather than the contemporaneous fifth review value, and applied the aberration test solely to that value, in

[74] *Id.* at 12 (citing Ex. 2.b to Surrogate Factor Valuations for the Prelim. Results, *Certain Frozen Warmwater Shrimp from the [PRC]*, A-570–893, ARP 11–12 (Mar. 4, 2012), *reproduced in* App. of Docs. in Supp. of Def.'s Resp. to Pl.'s Remand Comments, ECF No. 76 ("Def.'s Remand App.") at Tab 3 ("*AR7 Prelim. SV Mem.*"); [AHSTAC's] Submission of Publicly Available Info. to Value Factors of Production, *Certain Frozen Warmwater Shrimp from the [PRC]*, A-570–893, ARP 11–12 (Sept. 24, 2012), *reproduced in* Def.'s Remand App., ECF No. 76 at Tab 1 ("*AHSTAC's SV Submission*"), at Attach. 2).

[75] *Id.* at 13 (citing Ex. 2.b to *AR7 Prelim. SV Mem.*, ECF No. 76 at Tab 3).

[76] *Id.* at 12 (citing Ex. 2.b to *AR7 Prelim. SV Mem.*, ECF No. 76 at Tab 3; *AHSTAC's SV Submission*, ECF No. 76 at Tab 1, at Attach. 2).

[77] *Id.* at 16 (citing Ex. 2.b to *AR7 Prelim. SV Mem.*, ECF No. 76 at Tab 3; *AHSTAC's SV Submission*, ECF No. 76 at Tab 1, at Attach. 2).

[78] *Id.* at 12 ("[B]ecause the Thai import data for shrimp feed appears to be aberrational based on historical data and contrasting against imports made during the [fifth review period] by [the other potential surrogates], [Commerce] has looked to other potential sources by which to value shrimp feed.").

isolation from the other historical Thai data showing that the Thai feed values were generally unreliably volatile during the relevant historical period - i.e., AHSTAC argues that Commerce should have compared the 2.60 USD/kg fourth review Thai value to the other fourth review values available to find that it was not aberrational, and then used that fourth review Thai value (adjusted for inflation) for the fifth review normal value calculation.[79]

But although AHSTAC contends that "[t]he question confronted by Commerce was whether the Thai [fourth review] shrimp feed value was aberrational,"[80] in fact the question before Commerce was whether the Thai *fifth* review value was aberrational and, if so, which secondary surrogate FOP data provide a reasonably reliable alternative.[81] Here, consistent with AHSTAC's formulation of the agency's practice in this regard, Commerce "compared the [Thai fifth review] surrogate value for [the shrimp feed] FOP to the [average unit values] calculated for the same period using data from the other surrogate countries [that Commerce] designated for this review."[82] Commerce reasonably found that the 25.50 USD/kg Thai fifth review value was aberrational when compared with the other available fifth review surrogate values of 0.12, 1.23, and 1.36 USD/kg.[83] As this finding is both reasonable and uncontested,[84] it is sustained. The next question before the court, therefore, is whether Commerce's choice of the alternative Indonesian surrogate data for this fifth review FOP was reasonable.

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[79] *See* Pl.'s Br., ECF No. 70, at 7–10.

[80] *Id.* at 9.

[81] *See Remand Results*, ECF No. 65, at 11, 14–15; *CVP 23 from China, supra* note 72, cmt. 4 at 13–14 ("[19 U.S.C.§ 1677b(c)(1)] directs [Commerce] to use the 'best available information' on the record when selecting surrogate values with which to value FOPs. In this regard, [Commerce]'s practice is to choose surrogate values that represent[, *inter alia*,] . . .prices that are *contemporaneous with the [period of review]*. . . . If [the record] presents sufficient evidence to demonstrate [that] a particular surrogate value is not viable, *[Commerce] will assess all relevant price information on the record* . . . in order to accurately value the input in question.") (emphasis added); *see also Wood Flooring from China*, *supra* note 72, cmt. 6 (quoted in Pl.'s Br., ECF No. 70, at 7) at 40 (noting that among the "critical elements" of Commerce's test for surrogate FOP data reliability in NME proceedings is "contemporane[ity] with the [period of review]").

[82] *See* Pl.'s Br., ECF No. 70, at 7 (quoting *Wood Flooring from China*, *supra* note 72, cmt. 6 at 42 (quoting *Hot-Rolled Carbon Steel from Romania*, *supra* note 72, cmt. 2 at 19)); *Remand Results*, ECF No. 65, at 12–13.

[83] *See Remand Results*, ECF No. 65, at 12–13.

[84] *See supra* note 79 and accompanying text.

### *B. Commerce's Choice of Indonesian Fifth Review Shrimp Feed Data Was Reasonable.*

Having found the Thai fifth review shrimp feed data to be unreliable, Commerce determined to value this FOP using contemporaneous data from Indonesia, which was the second largest producer of comparable merchandise from the six countries determined to be economically comparable to China, and which provided the median available non-aberrational fifth review value for this FOP.[85] AHSTAC again argues that Commerce should have chosen the fourth review Thai data, rather than the contemporaneous Indonesian data, to substitute for the aberrational fifth review Thai value.[86]

As Commerce has explained its established practice, however, "when a party claims that a particular surrogate is not appropriate to value the FOP in question, [Commerce] has determined that the burden is on that party to prove the inadequacy of said [surrogate value] or, alternatively, to show that another value is preferable."[87] Here, relying on Commerce's regulatory preference for valuing all FOPs using data from the same surrogate country whenever possible,[88] AHSTAC claims that the fourth review Thai value for shrimp feed is preferable to Commerce's chosen contemporaneous Indonesian value because all the other fifth review period surrogate FOP values in this case were from Thailand,[89] and the 2.60 USD/kg fourth review

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[85] *See Remand Results*, ECF No. 65, at 13.

[86] *See* Pl.'s Br., ECF No. 70, at 10–14.

[87] *TRBs from China*, *supra* note 68, cmt. 2 at 17 (citations omitted); *see also Wood Flooring from China*, *supra* note 72, cmt. 6 (quoted in Pl.'s Br., ECF No. 70, at 7) at 40 ("When a party claims that a particular [surrogate value] is not appropriate to value a certain FOP, the burden is on that party to provide evidence demonstrating the inadequacy of the [surrogate value].") (citations omitted).

[88] *See* 19 C.F.R. § 351.408(c)(2) ("[In NME cases, Commerce] the fourth review Thai value for shrimp feed is preferable to normally will value all factors [of production] in a single surrogate country."); Pl.'s Br., ECF No. 70, at 5 (quoting Issues & Decision Mem., *Certain Steel Nails from the [PRC]*, A-570–909, ARP 10–11 (Mar. 5, 2013) (adopted in 78 Fed. Reg. 16,651 (Dep't Commerce Mar. 18, 2013) (final results of third antidumping duty administrative review; 2010–2011)) cmt. 1.D.d [at 13] ("It is most accurate to rely on factor costs from a single surrogate country because sourcing data from a single country . . . enables [Commerce] to capture the complete interrelationship of factor costs that a producer in the primary surrogate country faces. [Commerce] only resorts to other surrogate country information if the record does not contain a value for a factor from the primary surrogate, or if a primary surrogate country value on the record is determined, based on record evidence, to be aberrational or unreliable.") (citation omitted)).

[89] *See, e.g.*, Pl.'s Br., ECF No. 70, at 10 (arguing that given "Commerce's established practice and codified regulatory preference for a single surrogate country," the Thai fourth review value was preferable because "[Commerce] selected Thailand as the surrogate country for purposes of calculating normal values during the [fifth review period] in the remand").

shrimp feed value from Thailand was not aberrational,[90] but "simply at the high end of a wide range of [contemporaneous] values for [the other potential surrogate] countries."[91] Commerce, however, concluded that AHSTAC did not meet its burden to demonstrate that the fourth review Thai value was proferable to the contemporaneous non-aberrational Indonesian value selected by the agency, because the fourth review Thai value was (A) not contemporaneous with the fifth review period under consideration; and (B) "nested in the wider overall pattern of great variability" over the course of the time periods examined (the fourth through the seventh reviews), in stark contrast to "the stability exhibited in the data from the other [potential surrogate] countries" over the same time periods.[92]

Specifically, Commerce "compared the shrimp feed values over the same review periods with respect to the potential surrogate countries relative to Thailand,"[93] comparing the Thai fourth, fifth, sixth, and seventh review data to data from the Philippines, India, and Indonesia (the other potential surrogates satisfying the threshold eligibility criteria) for the fourth, fifth, and sixth review periods.[94] Based on this analysis, Commerce concluded that "Indonesia has the best import prices for shrimp feed during the [fifth review period] from among the potential surrogate countries that are at [a comparable] level of economic development [to] the PRC and are significant producers of comparable merchandise," whereas "the imports of shrimp feed into Thailand for the periods [of the fourth, fifth, sixth, and seventh reviews were] aberrational based on extreme [average unit value] volatility."[95]

Because "the Thai [average unit values] for shrimp feed over the periods examined ranged from 2.6[0] to 26.83 USD/kg, while the [average unit values] for the other [potential surrogates satisfying the threshold eligibility criteria] ranged from 0.13–0.51 USD/kg (Philippines), 0.92–1.29 USD/kg (Indonesia)[,] [and] 1.30–1.37 USD/kg (India) during the same periods,"[96] Commerce determined that given this "overall pattern of great variability, particularly [in light of] the stability exhibited in the data from the other [potential surrogate] countries," the "Thai import data for shrimp feed is unre-

[90] *Id.* at 8, 10–14.

[91] *Id.* at 8.

[92] *Remand Results*, ECF No. 65, at 16–17. 93

[93] *Id.* at 15.

[94] *Id.*

[95] *Id.* at 15–16 (citing Ex. 2.b to *AR7 Prelim. SV Mem.*, ECF No. 76 at Tab 3).

[96] *Id.* at 16 (citing Ex. 2.b to *AR7 Prelim. SV Mem.*, ECF No. 76 at Tab 3; *AHSTAC's SV Submission*, ECF No. 76 at Tab 1, at Attach. 2).

liable as a whole."[97] On the record presented here, this conclusion was not unreasonable.[98] While AHSTAC argues that Commerce "diverge[d] from agency practice" by not considering the fourth review Thai value in isolation from this wider pattern of volatility relative to the other potential surrogates' data,[99] in fact Commerce's practice is to consider all case-specific facts and the totality of the evidence in order to select the surrogate values presenting the best available information when contemporaneous values from the primary surrogate are found to be unreliable.[100] Commerce has done so here, and the record as a whole reasonably supports the agency's conclusion.

Accordingly, Commerce's determination to value the shrimp feed FOP for the fifth review period using surrogate data from Indonesia (as the agency also did with regard to that FOP for the sixth and seventh review periods,[101] determinations that are not contested here) is supported by substantial evidence, and is therefore sustained.

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[97] *Id.* (citing *AR6 I&D Mem.*, *supra* note 14, cmt. 10; *AR7 Prelim. Decision Mem.*, *supra* note 14, at 20–21 (unchanged in *AR7 Final Results*, 78 Fed. Reg. 56,209)).

[98] *See Consol. Edison*, 305 U.S. at 229 ("[Substantial evidence] means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (citations omitted); *cf. Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) ("[Substantial evidence] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (citations omitted).

[99] *See* Pl.'s Br., ECF No. 70, at 8–10, 14.

[100] *Remand Results*, ECF No. 65, at 14–15 ("When presented with sufficient evidence to demonstrate a particular [surrogate value] is aberrational, and therefore unreliable, *[Commerce] will examine all relevant price information on the record* . . . in order to accurately value the input in question.") (emphasis added) (citing Issues & Decision Mem., *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, A-552–801, ARP 11–12 (Mar. 28, 2014) (adopted in 79 Fed. Reg. 19,053 (Dep't Commerce Apr. 7, 2014) (final results of antidumping duty administrate review and new shipper review; 2011–2012)) cmt. V; Issues & Decision Mem., *Polyethylene Terephthalate Film, Sheet, and Strip from the [PRC]*, A-570–924, ARP 12–13 (June 3, 2015) (adopted in 80 Fed. Reg. 33,241 (Dep't Commerce June 11, 2015) (final results of antidumping duty administrative review and final determination of no shipments; 2012–2013)) cmt. 3); *cf., e.g.*, *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1124–25, 502 F. Supp. 2d 1295, 1299 (2007) ("Substantial evidence . . . requires weighing the totality of the evidence, to [make] factual findings [that] are reasonable when viewed in light of that complete record.") (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002); *Nippon Steel*, 458 F.3d at 1351).

[101] *Remand Results*, ECF No. 65, at 12 ("[Commerce also] found the Thai [Global Trade Atlas] values for shrimp feed to be aberrational in [the sixth and seventh reviews].") (citing *AR6 I&D Mem.*, *supra* note 14, cmt. 10; *AR7 Prelim. Decision Mem.*, *supra* note 14, at 20–21 (unchanged in *AR7 Final Results*, 78 Fed. Reg. 56,209)); *id.* at 13 ("[Commerce] used the Indonesian [surrogate value] for feed in [the sixth and seventh reviews].") (citing *AR6 I&D Mem.*, *supra* note 14, cmt. 10; *AR7 Prelim. Decision Mem.*, *supra* note 14, at 20–21 (unchanged in *AR7 Final Results*, 78 Fed. Reg. 56,209)).

## CONCLUSION

For all of the foregoing reasons, Commerce's *Remand Results* are sustained. Judgment will issue accordingly.

Dated: January 21, 2016
New York, NY

*/s/ Donald C. Pogue*
DONALD C. POGUE, SENIOR JUDGE