U.S. Court of International Trade

Slip Op. 20–110

HYUNDAI ELECTRIC & ENERGY SYSTEMS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and ABB Inc., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 19–00058
Public Version

[Sustaining the U.S. Department of Commerce's final results in the fifth administrative review of large power transformers from the Republic of Korea.]

Dated: August 4, 2020

David E. Bond and *Ron Kendler*, White & Case LLP, of Washington, DC, argued for Plaintiff Hyundai Electric & Energy Systems Co., Ltd. With them on the brief was *William J. Moran*.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Melissa M. Brewer and *R. Alan Luberda*, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenor ABB Inc. With them on the brief was *David C. Smith*.

OPINION

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the fifth administrative review of the antidumping duty order on large power transformers ("LPTs") from the Republic of Korea for the period of review ("POR") August 1, 2016, to July 31, 2017.[1] *Large Power Transformers From the Republic of Korea*, 84 Fed. Reg. 16,461 (Dep't Commerce Apr. 19, 2019) (final results of antidumping duty admin. review; 2016–2017) ("*Final Results*"), ECF No. 18–4, and accompanying Issues and Decision Mem., A-580–867 (Apr. 12, 2019) ("I&D Mem."), ECF No. 18–5.

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 18–2, and a Confidential Administrative Record ("CR"), ECF No. 18–3. Parties further submitted joint appendices containing record documents cited in their briefs. *See* Public J.A. ("PJA"), ECF No. 50–1; Confidential J.A. ("CJA"), ECF No. 49–1. Citations are to the confidential joint appendix unless stated otherwise.

Plaintiff Hyundai Electric & Energy Systems Co., Ltd. ("Hyundai") challenges the agency's decisions to: (1) cancel verification; (2) apply total facts otherwise available and (3) use an adverse inference (or "total AFA"). *See* Confidential Rule 56.2 Mot. for J. on the Agency R. on Behalf of Pl. [Hyundai], ECF No. 34, and Confidential Am. Mem. of P&A in Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("Hyundai's Mem."), ECF No. 34–1; *see also* Confidential Reply in Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("Hyundai's Reply"), ECF No. 47.

Defendant United States ("the Government") and Defendant-Intervenor ABB Inc. ("ABB") each filed a response in support of the agency's *Final Results*. *See* Confidential Def.'s Resp. to Pl.'s Mot. For J. on the Agency R. ("Gov't's Resp."), ECF No. 40; Confidential Def.-Int.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("ABB's Resp."), ECF No. 42.

For the reasons discussed below, the court denies Hyundai's motion and sustains Commerce's *Final Results*.

JURISDICTION AND STANDARD OF REVIEW

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) (2018),[2] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

On October 16, 2017, Commerce initiated this fifth administrative review. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 48,051, 48,053 (Dep't Commerce Oct. 16, 2017), PR 8, CJA Tab 1. Commerce selected Hyundai Heavy Industries, Co., Ltd.[3] and Hyosung Corporation as mandatory respondents. Prelim. Decision Mem. at 1. Commerce issued an initial questionnaire and two supplemental questionnaires seeking, in relevant part, information regarding Hyundai's costs of producing and selling LPTs. *See* Request for Information (Dec. 13, 2017) ("Initial Questionnaire"), PR 24, CJA Tab 2; 1st Sec. D Suppl. Questionnaire (May 24, 2018) ("1st Suppl. Questionnaire"), CR 391, PR 175, CJA Tab 4; 2nd Sec. D Suppl. Questionnaire (July 12, 2018) ("2nd Suppl. Questionnaire"), CR 690, PR 249, CJA Tab 9.

---

[2] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition.

[3] Hyundai is the successor in interest to Hyundai Heavy Industries, Co., Ltd. *See* Decision Mem. for Prelim. Results of Antidumping Duty Admin. Review (Aug. 31, 2018) ("Prelim. Decision Mem.") at 1 & n.1, PR 313, CJA Tab 12.

On September 7, 2018, Commerce published its *Preliminary Results*. *Large Power Transformers From the Republic of Korea*, 83 Fed. Reg. 45,415 (Dep't Commerce Sept. 7, 2018) (prelim. results of antidumping duty admin. review; 2016–2017) ("*Prelim. Results*"), PR 314, CJA Tab 13. Therein, Commerce preliminarily determined to assign Hyundai a weighted-average dumping margin of 60.81 percent based on total AFA. *Id.* at 45,416; Prelim. Decision Mem. at 15. When Commerce published the *Preliminary Results*, the agency also informed Hyundai that it would not conduct the previously scheduled verification of Hyundai's data. *See* Ltr. From Commerce to David E. Bond (Oct. 26, 2018) ("Commerce Ltr."), PR 366, CJA Tab 15 (stating that Commerce had cancelled verification pursuant to the *Preliminary Results*).

Hyundai and ABB submitted case briefs concerning Commerce's *Preliminary Results*, *see* I&D Mem. at 3 & n.3 (citations omitted), and Hyundai separately requested that Commerce reconsider its decision to cancel verification, *see* Commerce Ltr. Commerce declined Hyundai's request, stating that the information Hyundai provided, "which [the agency] would rely on for purposes of verification[, was], in fact, not verifiable," and that "verification is not intended to be an opportunity for a respondent to submit new factual information." *Id*.

On April 19, 2019, Commerce published its *Final Results*. As discussed *infra*, Commerce found that Hyundai failed to provide reliable and verifiable cost information with respect to its cost-reconciliation information and its product-specific cost information. *See* I&D Mem. at 9–13, 14–16. Commerce explained that Hyundai's cost information was so incomplete as to be unverifiable.[4] *Id.* at 13; *see also id.* at 18 ("A prerequisite for verification is untainted information on the record with complete responses to all of Commerce's requests for information."). Because Hyundai's reported cost information was not reliable Commerce continued to apply total facts otherwise available. *See id.* at 4.

Commerce made the additional finding that an adverse inference was warranted because: (1) Hyundai did not provide information "which any company should be expected to be able to provide"; and (2) Commerce afforded Hyundai numerous opportunities to provide the "requested explanations and details associated with the deviations from its normal SAP[5] cost accounting system." *Id.* at 23. Thus, the agency continued to rely on total AFA and assigned a weighted-

[4] Commerce also explained that its decision to cancel verification was distinct from its rationale for applying an adverse inference. I&D Mem. at 13.

[5] Hyundai uses SAP as its cost accounting system in the normal course of business. I&D Mem. at 8.

average dumping margin of 60.81 percent to Hyundai. *Final Results*, 84 Fed. Reg. at 16,462; *see also* I&D Mem. at 4.

DISCUSSION

I. Legal Framework

When necessary information is not available on the record, or an interested party withholds information requested by Commerce, fails to provide requested information by the submission deadlines, significantly impedes a proceeding, or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a). Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d) and (e). *Id*. Pursuant to section 1677m(d), if Commerce determines that a respondent has not complied with a request for information, it must promptly inform that respondent of the nature of the deficiency and, to the extent practicable in light of statutory deadlines, provide "an opportunity to remedy or explain the deficiency."

Pursuant to 19 U.S.C. § 1677m(e), Commerce "shall not decline to consider information that is submitted by an interested party" and that satisfies all of the following requirements:

> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties.

Commerce does not violate 19 U.S.C. § 1677m(e) when it rejects information that does not meet all five requirements. *See Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1382–83 (Fed. Cir. 2016).

If Commerce determines that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise avail-

able." 19 U.S.C. § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce may disregard a respondent's information and use total adverse facts available when one of the major categories of information necessary to perform a dumping calculation (U.S. sales, home market sales, cost of production, or constructed value) has not been provided. *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 487, 149 F. Supp. 2d 921, 927–28 (2001).

II. Commerce's Determination to Rely on Facts Available and Cancel Verification

In assessing the reliability of a respondent's cost of production, Commerce "examines and confirms not only that a respondent has [accurately and completely] reported the total pool of costs [that] the respondent reports as being attributable to the merchandise under consideration . . . , but also that the costs are reasonably and accurately allocated to *individual control numbers*." I&D Mem. at 20 & n.85 (emphasis added) (quoting *Sidenor Indus. SL v. United States*, 33 CIT 1660, 1666, 664 F. Supp. 2d 1349, 1356 (2009)). In this case, Commerce determined that Hyundai's normal books and records were not reliable for purposes of reporting Hyundai's cost of production because Hyundai shifted costs between LPT projects[6] in its internal accounting system (i.e., SAP). *See* I&D Mem. at 8–9. Thus, Commerce sought information underlying Hyundai's normal books and records. *See id.* at 9 ("Hyundai is compelled to provide source information on expenses from its SAP© accounting system (*i.e.*, [its normal books and records])."). Relevant to this discussion, Commerce requested information regarding Hyundai's cost-reconciliation[7] and product-specific[8] costs but Hyundai failed to adequately respond to

[6] As indicated in Hyundai's responses, a single LPT project may include multiple LPT units. *See, e.g.*, First Suppl. Sec. D Questionnaire Resp. (June 11, 2018) ("1SDQR"), Attach. SD-3 at ECF pp. 213–15, CR 397–430, PR 196–201, CJA Tab 7 (identifying the CONNUM(s)—defined *infra* note 9—included in certain projects); Second Suppl. Sec. D Questionnaire Resp. (July 23, 2018) ("2SDQR"), Attach. 2SD-1 at ECF p. 420–21, CR 792–819, PR 284–92, CJA Tab 10 (indicating the quantity of LPT units included in sampled projects).

[7] Cost-reconciliation information refers to cost of production information that Commerce requires a party to provide to reconcile the reported costs to the company's audited financial statements. I&D Mem. at 8; *see also* Prelim. Decision Mem. at 17 ("As a part of this analysis, Commerce requires that [a respondent] demonstrat[e] that overall production costs at the aggregate level reconcile to a respondent's records . . . .").

[8] Product-specific cost information relates to the costs that Hyundai incurred in manufacturing each specific LPT unit. Although Commerce sought product-specific costs, Hyundai

those information requests. *See id*. at 9–11 (describing Commerce's questions regarding product-specific costs), 15 (describing Commerce's questions regarding cost-reconciliation information). Commerce explained that it required this information to assess whether: (1) Hyundai's "overall production costs at the aggregate level reconcile to [Hyundai's] records"; and (2) the cost of manufacturing components as reported "also reconcile to its normal records at both the CONNUM-specific and product-specific levels."[9] *Id*. at 21. Absent reliable and fully supported cost data, Commerce "cannot rely on the reported per-unit [cost of production]," *id*, or "perform the dumping calculations," *id*. at 23.

Because Hyundai failed to adequately respond to Commerce's requests for cost information, Commerce relied on total facts otherwise available and cancelled the scheduled cost verification. *See id*. (stating that Hyundai's reported costs are not "actual, verifiable, and reliable"). Whether substantial evidence supports those determinations depends on whether Hyundai provided reliable cost information in response to Commerce's information requests; thus, the court will discuss these issues together.[10]

A. Product-Specific Cost Information

1. Additional Background

Commerce asked Hyundai to explain "how [it] used [its] normal cost and financial accounting records" to allocate and report costs for each LPT project. Initial Questionnaire at D-11 to D-12. Hyundai's initial questionnaire response explained that, in its normal books and re-

reported product-specific cost information on a project-specific basis. *See* Sec. D. Questionnaire Resp. (Jan. 31, 2018) ("DQR") at 27, CR 88–102, PR 71–72, CJA Tab 3. Thus, Commerce referenced both project-specific and product-specific costs. *See, e.g.*, I&D Mem. at 9 (referring to "the reliability of the reported product-specific costs"), 19 (referring to "the project-specific cost[s]"). To avoid confusion, the court refers to this information as "product-specific" cost information.

[9] CONNUM refers to "control number," which is a number designed to reflect the "hierarchy of certain characteristics used to sort subject merchandise into groups" and allow Commerce to match identical and similar products across markets. *Bohler Bleche GmbH & Co. KG v. United States*, 42 CIT ___, ___, 324 F. Supp. 3d 1344, 1347 (2018).

[10] Hyundai and ABB disagree about which standard of review applies to Commerce's decision to cancel verification. Hyundai argues that it is a factual determination reviewed for substantial evidence, *see* Hyundai's Reply at 2–3, and the Government agrees, *see* Oral Arg. at 1:53:15–1:53:25 (time stamp from the recording). ABB argues that Commerce's decision is reviewed for abuse of discretion. ABB's Resp. at 17–18.

Commerce's decision was based on the agency's factual finding that the information was so incomplete that it could not be verified. I&D Mem. at 23. Such determinations are reviewed for substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i); *see also JTEKT Corp. v. United States*, 33 CIT 1797, 1849–50, 675 F. Supp. 2d 1206, 1252 (2009) (explaining that a decision that information is unverifiable is "analyzed as a question of substantial evidence").

cords, Hyundai [[ ]].[11] *See* DQR at 27–29. Commerce and Hyundai thus agreed that Hyundai's normal books and records did not reflect the actual costs associated with producing particular LPTs. I&D Mem. at 8–9; *see also* 19 U.S.C. § 1677b(f)(1)(A) (providing that the agency will generally rely on normal books and records to calculate costs if, among other things, the records "reasonably reflect the costs associated with the production and sale of the merchandise").

Commerce further determined that Hyundai's initial questionnaire response was deficient because it "failed to fully distinguish each quantity and value difference between its SAP© costs and the costs reported to Commerce by cost type." I&D Mem. at 10. Commerce issued a supplemental questionnaire to permit Hyundai to remedy these deficiencies. *See generally* 1st Suppl. Questionnaire.

In the first supplemental questionnaire, Commerce requested that Hyundai provide, "[f]or each reported home market and U.S. sale, [] the total cost recorded in SAP, the total cost reported to the [agency], and an itemization of the materials and related costs making up the difference." 1SDQR at 8. Commerce also instructed Hyundai to explain how it was able to "identify and quantify the costs that were mis[]-recorded in [the] SAP system," and to "show how the adjustments in each project offset each other and reconcile in total." *Id*. In response, Hyundai submitted a "schedule of direct materials" showing three years of material costs, broken down by month, for all LPTs. I&D Mem. at 10; *see also* 1SDQR, Attach. SD-16. Hyundai also provided a table, for a single sample month, outside the POR, showing the differences between each project's SAP bills of materials and actual bills of materials,[12] "but not the differences between [the] SAP© and the reported costs." I&D Mem. at 10.[13]

---

[11] Hyundai explained that it keeps [[ ]] within its material control system (referred to as "[[ ]]"). DQR at 27–28; *see also* Business Proprietary Information on Cost Production and Constructed Value for the Final Results (Apr. 12, 2019) ("COP/CV Mem.") at 6 & n.33, CR 939, PR 414, CJA Tab 20. [[ ]], referred to as the [[ ]], "[[ ]]." DQR at 28. This [[ ]] was not used to [[ ]]." *Id*. The other [[ ]]. *Id*. The [[ ]]. *Id*. Throughout the production process, Hyundai recorded materials consumed in producing an LPT [[ ]]. *Id*. If the total cost of materials consumed in producing an LPT [[ ]]. *Id*. The [[ ]] costs were recorded in the [[ ]] but not the [[ ]]. *Id*.

[12] Hyundai uses the terms "EEMTOS bills of materials" and "actual bills of materials" interchangeably. *See* 1SDQR at 8. For consistency, the court refers to this bill of materials as the "actual bill of materials."

[13] The actual bill of materials is one of several modules used in Hyundai's cost- accounting system to trace costs, *see* DQR at 18, which Hyundai used to [[ ]]; but

In the second supplemental questionnaire, Commerce "listed the deficiencies in Hyundai's previous submissions and detailed the information that was necessary to rectify these deficiencies." *Id*. Commerce instructed Hyundai that, "[f]or each reported home market and U.S. sale," it must "provide the following in a [] schedule":

> a. Total POR costs recorded in SAP and the total POR costs reported to [Commerce]. Ensure the total POR cost reported to [Commerce] agrees [with Hyundai's cost of production] file.
>
> b. For the difference between the SAP costs and the reported costs . . . itemize each specific material and conversion cost item which make up that difference. For example, identify all parts and raw materials that are included or excluded from other LPTs
>
> c. For all SAP and reported cost itemized material and [conversion] cost differences, show which LPT project the itemized items were shifted to / from in SAP.
>
> d. Explain in detail how [Hyundai was] able to identify and [quantify] the costs which were mis[]-recorded in SAP.

2nd Suppl. Questionnaire at 3.

Hyundai partially complied by providing, in its response to subpart (b), a worksheet which split the total cost differences by LPT project into the following categories:

> 1) silicon steel costs;[14]
> 2) other material costs;
> 3) scrap;
> 4) fixed overhead costs;
> 5) material costs incurred after the year of cost of goods sold recognition on the project; and,
> 6) expenses recorded after the year of cost of goods sold recognition for the project.

I&D Mem. at 11. For the *Final Results*, Commerce found that Hyundai provided adequate cost information for only one of those six categories: other material costs. *Id.* at 11.

With respect to silicon steel, Hyundai explained that it "is a significant input into LPT production" and is used to produce the core(s) within an LPT. COP/CV Mem. at 9. Hyundai recorded the consump-

Hyundai's per-unit costs of production were not based solely on the actual bill of materials, DQR at 27 ([[ ]]).

[14] The parties use the terms silicon steel and core steel interchangeably. *See, e.g.*, I&D Mem. at 11. For consistency, the court refers to the input as silicon steel.

tion of silicon steel "differently than other materials." Hyundai's Mem. at 30 (citing DQR at 28). Hyundai reported its consumption and per-unit values for silicon steel by providing Commerce with: (1) silicon steel processing reports providing the amount of silicon steel "consumed" in producing the required amount of "cut core steel," 1SDQR at 9–10; and (2) engineering documents providing "the theoretical [amount of] silicon steel necessary to achieve the desired electrical properties" for a transformer, COP/CV Mem. at 10. Hyundai stated that the difference between the two figures was "yield loss." 1SDQR at 10. While Hyundai also stated that its SAP system records raw material purchases for each transformer, it went on to state, with respect to silicon steel, that "there can be differences between" the purchased amount and the consumed amount due to various factors, including differences in the planned and actual yield loss. *Id*. at 9.

Commerce concluded that Hyundai failed to report reliable silicon steel consumption or explain the per-unit values reported for silicon steel on a project-specific basis because of the unexplained differences between the SAP bill of materials, engineering documents, and silicon steel processing reports. I&D Mem. at 11. Commerce found that Hyundai failed to explain how the silicon steel processing reports reconcile to its SAP system[15] or explain the quantity differences reported in the SAP bill of materials and the engineering documents. *Id.* at 12. Commerce explained that the engineering documents did not corroborate the reported silicon steel consumption because Hyundai "simply attributed the difference in quantities between the silicon steel processing report and the engineering calculations to yield losses, and did not support the quantities and values as requested in the question." COP/CV Mem. at 10. Commerce further found that "Hyundai did not explain how the silicon steel processing reports then reconcile to its SAP system (i.e., normal books and records) and did not explain the quantity differences between the SAP [bills of materials] and the theoretical calculations." *Id*. Commerce concluded that it could not determine whether the "project-specific input quantities and per-unit values" reported to Commerce were supported by Hyundai's financial records. *Id*.

With respect to the fifth and sixth categories of costs (material costs incurred after the year of cost of goods sold recognition for the project and expenses recorded after the year of cost of goods sold recognition for the project), Hyundai provided the aggregate "add back" of expenses and material costs incurred after the year of cost of goods sold

[15] Commerce noted that the silicon steel costs can account for anywhere between [[ ]] percent of the total cost difference for an LPT project. COP/CV Mem. at 10 & n.46 (citing 2SDQR, Attach. 2SD-1 at ECF p. 422).

recognition for each project. 2SDQR, Attach. 2SD-1 at ECF p. 422. However, Commerce found that Hyundai did not indicate the specific LPT projects these expenses and material costs were shifted to or from or itemize the specific expenses or materials that were shifted. *See* I&D Mem. at 12. With respect to fixed overhead and scrap (the third and fourth categories of costs), Hyundai provided the total "recalculated" amounts for each LPT project. *See* 2SDQR, Attach. 2SD-1 at ECF p. 422.

Thus, Commerce concluded that Hyundai's product-specific cost information was not reliable because Hyundai failed to demonstrate the impact of its cost shifting or reverse its effects. I&D Mem. at 13.

2. Substantial Evidence Supports Commerce's Determination that Hyundai Failed to Report Reliable Silicon Steel Costs and Consumption

Hyundai argues that its reported cost information for silicon steel satisfied the agency's information requests. *See* Hyundai's Mem. at 30–34. Hyundai acknowledges that it could not track the "shifting of silicon steel costs from one project to another," *id*. at 31, but claims it provided the agency with the only documents it possessed regarding silicon steel consumption: the silicon steel processing report and engineering documents, *id*. at 32–33.

The Government asserts that Commerce correctly found that the engineering documents do not contain the actual material consumption for silicon steel because they provide only a theoretical calculation of the amount of silicon steel "necessary to achieve the desired electrical properties." Gov't's Resp. at 15; *see also* ABB's Resp. at 11–12. The Government further avers that Hyundai conceded that it does not track actual silicon steel consumption on a project-basis, indicating that such information would not have been obtainable even if Commerce had conducted verification. Gov't's Resp. at 20.

Hyundai's arguments are not persuasive. Hyundai's contention that it provided the agency with the only documents it had regarding silicon steel consumption does not mean that those documents satisfied the agency's information requests. Commerce considered Hyundai's reported documents and reasonably determined that they did not adequately respond to Commerce's information requests. While Hyundai has referred to three sets of figures associated with silicon steel used in each LPT project, Hyundai has failed to explain how any of those figures, or the differences between those figures, reliably represent the amount of silicon steel actually contained and consumed in the production of a given LPT.

Hyundai challenges Commerce's determination that the differences between the amounts reported in the silicon steel processing reports

and the engineering documents are not attributable to yield losses. Hyundai's Mem. at 33. Commerce explained that "[y]ield losses are typically based on the difference between the consumption for the job and the actual amount in the final product." COP/CV Mem. at 10. The asserted yield losses, however, were based on the differences between the "theoretical [quantities] necessary to achieve the desired electrical properties" and the amount consumed at a "preliminary processing stage." COP/CV Mem. at 10; *see also* 1SDQR at 9–10. Hyundai also did not reconcile its silicon steel processing reports to its SAP system (i.e., its normal books and records). COP/CV Mem. at 10. Hyundai has failed to establish that Commerce did not consider certain evidence nor did Hyundai identify an error in Commerce's analysis of Hyundai's yield-loss argument.

The court also is not persuaded by Hyundai's argument that it is being faulted for failing to provide a reconciliation that was never requested. *See* Hyundai's Mem. at 33–34. Commerce instructed Hyundai to provide a schedule that itemized costs for each home market and U.S. sale and to "[e]xplain in detail how [Hyundai was] able to identify and [quantify] the costs which were mis[]-recorded in SAP." 2nd Suppl. Questionnaire at 3. This request sufficiently communicated to Hyundai that it was to explain and provide documentation supporting the differences in the amount of silicon steel consumed and the per-unit values as reported in the silicon steel reports, engineering documents, and SAP bills of materials. Hyundai, as the party that adopted a system of recording costs that shifted them across projects, bore the burden of establishing that it was able to reconcile the information contained in such a system with accurate, product-specific costs reported to Commerce and that, at the aggregate level, all costs associated with subject LPTs were reported. *Cf. QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (stating that the respondent has "the burden of creating an adequate record").

For these reasons, the court finds that substantial evidence supports Commerce's determination that Hyundai failed to report reliable costs for its silicon steel consumption.

3. Substantial Evidence Supports Commerce's Determination that Hyundai Failed to Reliably Report Other Categories of Product-Specific Costs

Because silicon steel is a significant input into LPT production, Hyundai's failure to report reliable costs for that input might have been sufficient to support Commerce's determination to disregard Hyundai's cost reporting; however, Commerce also found that Hyundai failed to provide reliable cost information with respect to four

other cost categories (i.e., scrap; fixed overhead costs; material costs incurred after the year of cost of goods sold recognition for the project; and expenses recorded after the year of cost of goods sold recognition for the project). I&D Mem. at 11. Hyundai challenges these additional findings.

Commerce found that with respect to the latter two categories, Hyundai did not indicate the specific LPT projects these expenses and material costs were shifted to or from or itemize the specific expenses or materials that were shifted. *See id*. at 12. At oral argument, Hyundai contended that it provided a worksheet reporting, on a project-specific basis, the costs that were shifted for each category. Oral Arg. at 29:55–31:20 (discussing the "Details of Adjustment" worksheet, 2SDQR, Attach. 2SD-1 at ECF p. 422). The Government noted that this worksheet represents a "sample" of projects. *Id.* at 41:40–42:05. Commerce did not request a sample of projects; rather, the agency instructed Hyundai to provide a breakdown of each category of costs for *each U.S. and home market sale*. *Id.* at 52:20–53:25; *see also* 2nd Suppl. Questionnaire at 3. Thus, substantial evidence supports Commerce's finding that Hyundai did not provide the detailed information to support its cost shifting with respect to "add back" of expenses and material costs.

Similarly, for fixed overhead and scrap, Hyundai provided the total "recalculated" amounts for each LPT project, but these amounts do not explain how Hyundai identified and quantified these costs in the SAP system or identify the LPTs between which these costs were shifted. *See* 2SDQR, Attach. 2SD-1 at ECF p. 422. Thus, substantial evidence supports Commerce conclusion that Hyundai did not provide adequate responses with respect to these categories of costs.[16]

B. Cost-Reconciliation Information

1. Additional Background

Commerce determined that Hyundai was not able to reconcile its aggregate reported costs of production to its financial statements. I&D Mem. at 16. Commerce recognized that the complex nature and extended production time for LPTs required reporting costs beyond

[16] ABB and Hyundai dispute whether Commerce found that Hyundai's reporting of copper wire consumption provided an additional basis to apply total AFA. *See* ABB's Resp. at 6–7; Hyundai's Reply at 17–18. While Commerce stated that Hyundai reported "contradictory statements about copper wire," such that the agency had concerns "as to the accuracy and appropriateness of [Hyundai's] reporting," COP/CV Mem. at 11–12, Commerce did not state that Hyundai's reporting of copper wire rendered Hyundai's cost information unreliable and the court does not rely on any deficiencies with respect to copper wire reporting as a basis for its holding.

the normal 12-month POR and Commerce accepted Hyundai's adaptation of its "overall cost reconciliation to incorporate these pre- and post-POR costs." *Id*. at 14–15. However, Commerce determined that Hyundai did not provide adequate responses detailing data for each category of merchandise not under consideration in its cost reconciliation for cost of manufacturing. *See id*. at 15.

In the Initial Section D Questionnaire, Commerce requested that Hyundai "illustrate how the costs reported on the financial statement reconcile to the general ledger or trial balance, to the cost accounting system (i.e., the source used to derive the reported costs), and to the reported costs." Initial Questionnaire at D-12 (emphasis omitted). Commerce provided a worksheet for Hyundai to use in reporting this information. *Id.* at D-14.

Hyundai responded by providing a worksheet that purported to reconcile the cost of sales for fiscal years 2016 and 2017 with the aggregate production costs reported to Commerce. DQR, Attach. D-20, ECF p. 144, "Cost Reconciliation - WS 2" (hereinafter referred to as "Worksheet WS2"). Hyundai identified nine categories (or classifications) of costs, and for each category, distinguished between costs associated with "Order[s] including Subject Merchandise" and costs associated with "Non-subject Merchandise."[17] *Id*. However, this worksheet and Hyundai's other reported cost-reconciliation information were not formatted in accordance with the worksheet Commerce provided. *Compare* DQR, Attach. D-20 at ECF pp. 136, 143–45, *with* Initial Questionnaire at D-14.

Commerce found that this response was inadequate. *See* I&D Mem. at 15. Commerce issued a supplemental questionnaire instructing Hyundai to use the format of the worksheet Commerce provided and to "[d]iscuss how [Hyundai] separated cost of sales on [Worksheet] WS2 between [merchandise under consideration] and [merchandise not under consideration]." 1st Suppl. Questionnaire at 6. Commerce further instructed Hyundai to "[d]emonstrate and provide supporting documentation for" its breakout of merchandise under consideration and merchandise not under consideration "for transformers." *Id*.

In response to the supplemental questionnaire, Hyundai reported the same costs for the category "[merchandise not under consideration] from Transformer" that it reported for that category in response to the initial questionnaire. 1SDQR, Attach. SD-23. Similarly, Hyundai reported the same values for the other categories of costs

[17] Costs associated with non-subject merchandise include costs of producing and selling LPTs in fiscal years 2016 and 2017 when the LPT does not qualify as subject merchandise because, for example, it did not enter the United States during the POR or was sold to a third country. *See* I&D Mem. at 15 (describing costs for "merchandise not subject to this review").

reported in Worksheet WS2. *Compare id*., *with* DQR, Attach. D-20 (Worksheet WS2).

In its administrative case brief, Hyundai stated that the line item for costs associated with "[merchandise not under consideration] from Transformer" included the cost of manufacturing for: "1) non-subject merchandise; 2) third-country sales; 3) U.S. shipments that did not enter the United States during the POR; and, 4) home market shipments made outside the POR and window periods."[18] I&D Mem. at 15 & n.60 (citing Hyundai's Case Br. at 20).[19] However, Hyundai did not separately identify these reconciliation items in its questionnaire responses, and Commerce concluded that Hyundai failed to identify adequately and explain each reconciliation item. *Id*. at 15–16. Commerce noted that its need for this reconciling data was particularly acute in this case because, as discussed *supra*, Hyundai's normal books and records did not accurately capture costs on a project-specific basis. *See id*. at 4, 16. Thus, for its *Final Results*, Commerce determined that Hyundai did not provide requested cost reconciliation data despite being "specifically required [to do so] two different times by Commerce." *Id.* at 15.

2. Commerce's Determination that Hyundai Failed to Report Reliable Cost-Reconciliation Information is Supported by Substantial Evidence

Hyundai claims that Commerce's determination that Hyundai did not provide adequate cost-reconciliation information is unsupported by substantial evidence. Hyundai's Mem. at 25–26. Specifically, Hyundai advances two arguments: (1) Hyundai broke out nine categories of merchandise not under consideration consistent with the agency's information request; and (2) the agency did not instruct Hyundai to provide the level of detail that it now faults Hyundai for failing to provide. *Id*. at 26.

Hyundai's first argument lacks merit. As discussed above, the first supplemental questionnaire requested additional cost-reconciliation information and indicated that Hyundai had failed to provide adequate information in its initial questionnaire response. By merely reporting the same information in a different format, Hyundai did not address the agency's concerns with the substance of Hyundai's cost-reconciliation information. Moreover, the worksheet in question con-

[18] The term "window periods" refers to home market sales made up to 90 days before or 60 days after the POR to which U.S. sales may be matched in accordance with 19 CFR § 351.414(f). *See Fischer S.A. Comercio, Industria & Agricultura v. United States*, 36 CIT 1604, 1605, 885 F. Supp. 2d 1366, 1370 (2012)

[19] Page 20 of Hyundai's Case Brief was not included in the joint appendices but was separately filed by Hyundai. *See* Ltr. from David E. Bond, White & Case, LLP, to the Court (June 9, 2020), Attach., ECF No. 54.

tained the line item "[merchandise not under consideration] from Transformer" that Hyundai did not separately break out as requested. *See* I&D Mem. at 15. Because Hyundai did not report "this basic information," the agency could not "explor[e] further the reasonableness of the costs . . . and was impeded from gathering additional data that confirms that no costs were improperly excluded under the guise of 'merchandise not subject to this review.'" *Id.* at 16.

Regarding Hyundai's second argument, Commerce expressly requested Hyundai to explain how it separated merchandise under consideration from merchandise not under consideration in its questionnaire response and, in particular, to demonstrate and provide supporting documentation for the breakout related to transformers. 1st Suppl. Questionnaire at 6. Hyundai's general references to various reconciliation items contained in the classification "[merchandise not under consideration] from Transformer" demonstrates that Hyundai had some ability to report and understanding of the information Commerce requested. *See* Hyundai's Case Br. at 20.

C. Commerce's Determinations to Cancel Verification and Rely on Total Facts Otherwise Available are Supported by Substantial Evidence and in Accordance with the Law

As discussed above, substantial evidence supports Commerce's determination that Hyundai failed to provide requested cost information in response to the agency's requests, both with respect to its product-specific costs and its cost-reconciliation information. Because substantial evidence supports these findings, the court finds that substantial evidence supports Commerce's determination that Hyundai's cost information was so incomplete as to be unverifiable.[20] *See* I&D Mem. at 18 ("The missing explanations, information, and full disclosure in its reconciliation would have formed, in part, the objective of the verification itself and, thus missing from the record, rendered verification meaningless."); *cf. Hyundai Steel Co. v. United States*, 42 CIT ___, ___, 282 F. Supp. 3d 1332, 1350 (2018) (explaining

[20] Hyundai contends that Commerce's cancellation of verification is undermined by the agency's decision to conduct verification of similar information in the original investigation and the second administrative review. Hyundai's Mem. at 21–23 (referencing Evidence to Rebut, Clarify, or Correct Information in ABB's June 29, 2018 Cmts. on Hyundai's Suppl. Sec. D Questionnaire Response (July 10, 2018), Exs. 1 & 2, CR 689, PR 247 CJA Tab 8). Commerce provided a reasoned explanation for finding Hyundai's cost information unreliable and unverifiable in this administrative review. *See* I&D Mem. at 12–13. Particularly with regard to record-based factual findings, each administrative review is a separate exercise of Commerce's authority and allows for different conclusions based on different facts in the record. *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2014). Thus, Commerce was not obligated to attempt to verify Hyundai's information in this review simply because it had conducted verifications in prior segments of the proceeding.

that the crux of an unverifiability determination is whether "Commerce, upon reviewing the submission in question, cannot discern which data is meant to be tested").[21] Again, as is the case here, Commerce is not obligated to consider information that is "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." 19 U.S.C. § 1677m(e)(3); *see also Papierfabrik*, 843 F.3d at 1382–83. Without reliable cost information to determine Hyundai's cost of production, substantial evidence supports Commerce's reliance on total facts otherwise available.[22]

III. Commerce's Use of an Adverse Inference is Supported by Substantial Evidence

Commerce determined that Hyundai's conduct in this case warranted an adverse inference because Hyundai did not satisfy the "best of its ability" standard when it failed to provide basic information that "any company should be expected to be able to provide" despite multiple requests. I&D Mem. at 23. Hyundai argues that Commerce's use of an adverse inference is not supported by substantial evidence. Hyundai's Mem. at 34–37. As discussed more fully below, Hyundai's arguments lack merit.

Hyundai argues that the agency did not make a finding that Hyundai failed to act to the best of its ability to report cost-reconciliation information. Hyundai's Mem. at 35–36. However, Commerce explained that it required both cost-reconciliation information and product-specific information to accurately determine Hyundai's cost

[21] Hyundai argues that Commerce was required to identify inconsistencies in Hyundai's cost information to find it unverifiable. Hyundai's Mem. at 19–20. In *Hyundai Steel,* the court found that "Commerce's cited grounds for unverifiability *included* 'inconsistencies, and . . . multiple unexplained, or insufficiently explained, changes' in Hyundai's data." *Hyundai Steel*, 282 F. Supp. 3d at 1350 (alteration in original) (emphasis added) (citation omitted). While such inconsistencies were sufficient in that case, the court did not find, as a legal matter, that Commerce must identify such inconsistencies in order not to conduct a verification. Congress "left it to Commerce to decide what [] factual circumstances" may permit a finding that information is unverifiable. *JTEKT Corp.*, 33 CIT at 1850, 675 F. Supp. 2d at 1252.

[22] Hyundai argues that, if Commerce had conducted verification, Hyundai could have provided information at verification to support its cost reporting. *See* Hyundai's Mem. at 23–24. However, Commerce considered the amount of information required to conduct verification and determined that "[v]erification is not an appropriate forum in which to collect significant amounts of new explanation and information." I&D Mem. at 13. The purpose of verification is to "verify the accuracy and completeness of *submitted* factual information," 19 C.F.R. § 351.307(d) (emphasis added), not collect new information, *Marsan Gida Sanayi v. Ticaret A.S.*, 37 CIT ___, ___, 931 F. Supp. 2d 1258, 1280 (2013), *as amended* (Aug. 6, 2013). Substantial evidence supports Commerce's finding that Hyundai failed to provide cost-reconciliation information requested by Commerce and the court will not second guess Commerce's assessment that the limited information received provided an insufficient basis to conduct a verification. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (explaining that the court does not reweigh the evidence).

of production. *See* I&D Mem. at 20–21. Thus, contrary to Hyundai's argument, Commerce's finding that "Hyundai failed to provide the basic information necessary to perform the dumping calculations . . . and to substantiate what the actual costs were for its transformers," *id.* at 23, applies to Hyundai's reported cost information *as a whole*. Further, as discussed *supra*, substantial evidence supports Commerce's conclusion that the cost-reconciliation information that Hyundai provided "did not reflect a legitimate attempt to provide Commerce with a 'full and complete' demonstration" that its reported costs of production were accurate. *NSK Ltd. v. United States*, 481 F.3d 1355, 1361 (Fed. Cir. 2007).

Hyundai claims that Commerce's finding that Hyundai did not "act to the best of its ability" does not "take into account the actual limitations of Hyundai's cost accounting system." Hyundai's Mem. at 37. The only accounting "limitations" Hyundai identifies are those associated with its cost shifting (i.e., that Hyundai does not record actual expenses associated with producing LPTs on a project-specific basis). *See id.* at 36–37. While Hyundai claimed to have reversed the effects of its cost shifting, it did not substantiate those claims before Commerce. *See* I&D Mem. at 4 (finding that Hyundai did not "demonstrate how the manipulation of its normal records was reversed"). At the cost-reconciliation level, Hyundai did not break-down the categories of adjustments as Commerce requested so that Commerce could verify that any costs shifted away from subject merchandise were recaptured in Hyundai's reporting methodology. *Id*. at 16 (Commerce could not determine whether "costs were improperly excluded under the guise of 'merchandise not subject to this review'"). Similarly, at the project- and product-specific levels, Hyundai failed to detail each cost adjustment made, denying Commerce another avenue to confirm that all costs associated with subject merchandise had properly been recaptured. *See id.* at 21 (explaining that Commerce requires "[t]he itemization of cost differences and tracing of those differences to each project"). Such detailed information had to be available to Hyundai if it had accurately recaptured all costs—and indeed, in limited instances, Hyundai provided discrete samples detailing the adjustments for short periods of time and for limited categories of expenses, *see* 1SDQR, Attach. SD-16 at ECF pp. 223–28 (breaking down direct material costs for March 2016 by project number, as recorded in the SAP, the EEMTOS, and the difference between the two); 2SDQR, Attach. 2SD-1 at ECF p. 423 (capturing the costs of specific materials shifted between sampled projects for the category

"other material costs")—confirming that Hyundai failed to act to the best of its ability to provide supporting documentation to Commerce, I&D Mem. at 23.

The Government and Hyundai dispute the applicability of *Tung Fong Industrial v. United States*, 28 CIT 459, 474, 318 F. Supp. 2d 1321, 1335 (2004), in which the court determined that a company run by one person could not be expected to provide the detailed information Commerce requested. *See* Hyundai's Mem. at 37; Gov't's Resp. at 18; Hyundai's Reply at 20–21. Citing *Tung Fong*, Hyundai argues that Commerce's application of AFA did not consider Hyundai's "ability to respond to certain requests." Hyundai's Mem. at 34; *see also* Hyundai's Reply at 20. The Government argues that *Tung Fong* is inapplicable because the *Tung Fong* court cited the size of the company as a basis for finding that the agency could not have reasonably expected the respondent to be more forthcoming. Gov't's Resp. at 18 (citing *Tung Fong*, 28 CIT at 477–78, 318 F. Supp. 2d at 1337).

Hyundai's reliance on *Tung Fong* is misplaced. The respondent in *Tung Fong* represented that it was unable to comply with Commerce's information requests due to its small size and time constraints, and Commerce failed to address these circumstances in applying an adverse inference. 28 CIT at 475–76, 318 F. Supp. 2d at 1335–36. By contrast, the only factor that Hyundai cites as preventing it from responding to Commerce's information requests is the limits of its own record keeping system. *See* Hyundai's Mem. at 37. Even if true, the "best of its ability" standard does not condone "inadequate record keeping." *Nippon Steel*, 337 F.3d at 1382; *see also* I&D Mem. at 22–23 (finding that "affirmative evidence of bad faith" is not required to use an adverse inference and Hyundai failed to provide information that "any company should be expected to be able to provide").

For these reasons, the court sustains Commerce's use of an adverse inference.

CONCLUSION

In accordance with the foregoing, Commerce's *Final Results* will be sustained. Judgment will enter accordingly.

Dated: August 4, 2020
New York, New York

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

Slip Op. 20–116

SEA SHEPHERD NEW ZEALAND AND SEA SHEPHERD CONSERVATION SOCIETY, Plaintiffs, v. UNITED STATES, WILBUR ROSS, in his official capacity as Secretary of Commerce, UNITED STATES DEPARTMENT OF COMMERCE, a United States government agency, CHRIS OLIVER, in his official capacity as Assistant Administrator of the National Marine Fisheries Service, NATIONAL MARINE FISHERIES SERVICE, a United States government agency, STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, a United States government agency, CHAD WOLF, in his official capacity as Acting Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a United States government agency, Defendants, and NEW ZEALAND GOVERNMENT, Defendant-Intervenor.

Before: Judge Gary S. Katzmann
Court No. 20–00112

[The court grants the Government's motion for a voluntary remand].

Dated: August 13, 2020

Lia Comerford, Earthrise Law Center at Lewis & Clark Law School, of Portland, OR, argued for plaintiffs. With her on the joint brief were *Danielle Replogle*; and *Brett Sommermeyer Catherine Pruett*, Sea Shepherd Legal, of Seattle, WA.

Stephen C. Tosini, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel *Daniel J. Calhoun*, Assistant Chief Counsel, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Warren E. Connelly Trade Pacific PLLC, of Washington, DC, argued for defendant-intervenor. With him on the brief were *Robert G. Gosselink* and *Kenneth N. Hammer*.

OPINION AND ORDER

Katzmann, Judge:

The critically endangered Maui dolphin (*Cephalorhynchus hectori maui*), residing exclusively in the waters surrounding New Zealand's North Island, has been deemed to be facing an extremely high risk of extinction. *See* Am. Compl. ¶ 38, July 20, 2020, ECF No. 23.[1] The Maui dolphin suffered a precipitous population decline since the 1970s, with an estimated population of around sixty individuals. *See id.* ¶ 1. Plaintiffs Sea Shepherd New Zealand and Sea Shepherd Conservation Society (collectively, "Plaintiffs") bring this suit to chal-

[1] Plaintiffs moved to amend their complaint on July 20, 2020, in order to alter their jurisdictional statement. Pls.' Unopposed Mot. for Leave to File First Am. Compl., July 20, 2020, ECF No. 18. The court granted that order, July 20, 2020, ECF No. 22, and all relevant citations are to the Amended Complaint.

lenge the U.S. Department of Commerce's ("Commerce") failure to implement an import ban on fish and fish products caught with nets that threaten the Maui dolphin as required by the Marine Mammal Protection Act ("MMPA") and a denial of their petition for emergency rulemaking to implement such a ban. *Id.* ¶¶ 84–94. Plaintiffs allege that the decline in the Maui dolphin population is the result of "incidental capture, or bycatch, in gillnet and trawl fisheries within their range." *Id.* ¶ 1. In proceeding under the MMPA and filing a motion for preliminary injunction to compel the Secretary of Commerce to implement an import ban, Plaintiffs are setting forth a legal theory that was presented to this court in recently concluded litigation involving the vaquita, the world's smallest porpoise on the verge of extinction. *See Natural Resources Defense Council, Inc. v. Ross*, No. 18–0055, 44 CIT __, Slip Op. 20–53 (April 22, 2020). *See also Natural Resources Defense Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1338 (2018) ("*NRDC I*"); *Natural Resources Defense Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1381 (2018); *Natural Resource Defense Council, Inc. v. Ross*, 42 CIT __, 348 F. Supp. 3d 1306 (2018).

Plaintiffs have moved this court for a preliminary injunction ordering Defendants to ban the import of commercial fish and products from fish caught using gillnets and trawls in the range of the Maui dolphin. Pls.' Mot. for a Prelim. Inj. on Their First Claim for Relief, July 1, 2020, ECF No. 11. The Defendants, several United States agencies and officials (collectively, "the Government"), have moved to stay the filing of their response to Plaintiffs' pending motion and requested a voluntary remand so that NOAA Fisheries could reconsider Plaintiffs' petition for emergency rulemaking under the MMPA in light of: (1) new fishery measures implemented by the New Zealand Government ("NZG"); (2) "[NZG]'s request for a comparability assessment of its action;" and (3) new factual information presented in connection with those measures. Def.'s Mot. for Voluntary Remand at 5–6, July 17, 2020, ECF No. 17 ("Def.'s Br."). In this motion for remand, the Government is also joined by NZG, as Defendant-Intervenor. *See* Mot. of the NZG for Permissive Intervention as Def.-Inter., July 15, 2020, ECF No. 13; Order Granting Unopposed Mot. to Intervene as Def-Inter., July 21, 2020, ECF No. 24. The court grants that motion so that the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NOAA Fisheries") may address the cited developments in the first instance. The Government is ordered to file the remand determination with this court no later than October 30, 2020.

BACKGROUND

The MMPA created a "moratorium on the taking and importation of marine mammals and marine mammal products," with certain exceptions. 16 U.S.C. § 1371(a) (2012).[2] "Congress decided to undertake this decisive action because it was greatly concerned about the maintenance of healthy populations of all species of marine mammals within the ecosystems they inhabit." *Kokechik Fishermen's Ass'n v. Sec'y of Commerce*, 839 F.2d 795, 801 (D.C. Cir. 1988). In overview, Congress mandated an "immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1371(a)(2); *see also* 16 U.S.C. § 1387(b) (stating the "[z]ero mortality rate goal" that "[c]ommercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994"). To achieve this goal, the MMPA sets specific standards governing and restricting the incidental catch[3] of marine mammals, commonly referred to as "bycatch." *See* 16 U.S.C. §§ 1386–87.

The MMPA standards apply both to domestic commercial fisheries and to foreign fisheries that wish to export their products to the United States. At issue in this litigation is the Imports Provision, 16 U.S.C. § 1371(a)(2), under which, the Government "shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." *See generally NRDC I*, 331 F. Supp. 3d 1338. Primary responsibility for the implementation of the MMPA rests with NOAA Fisheries, which is within the Department of Commerce. *See* 16 U.S.C. § 1362(12)(A)(i). The statute contains multiple provisions, including those which direct NOAA Fisheries to make stock assessments, assess the potential biological removal ("PBR")

[2] Unless otherwise indicated, all citations to statutes are to the 2012 edition of the United States Code, and all references to regulations are to the 2012 edition of the Code of Federal Regulations.

[3] The regulatory definitions pertaining to the MMPA provide that:

> Incidental catch means the taking of a marine mammal (1) because it is directly interfering with commercial fishing operations, or (2) as a consequence of the steps used to secure the fish in connection with commercial fishing operations: *Provided*, That a marine mammal so taken must immediately be returned to the sea with a minimum of injury and further, that the taking of a marine mammal, which otherwise meets the requirements of this definition shall not be considered an incidental catch of that mammal if it is used subsequently to assist in commercial fishing operations.

50 C.F.R. § 216.3.

level, 16 U.S.C. § 1386(a)(6), and effectuate "the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1387(a)(1).

As noted, at the center of this case is the endangered Maui dolphin of New Zealand. Plaintiffs allege that the Maui dolphin's decline and endangerment of extinction is the result of "incidental capture, or bycatch, in gillnet and trawl fisheries within their range." Am. Comp. ¶ 1. For this reason, the "Maui dolphin is listed as critically endangered by the International Union for Conservation of Nature[, which means] the subspecies is considered to be facing an extremely high risk of extinction in the wild." Am. Compl. ¶ 38. Because of the Maui dolphins' "low reproductive rate (calving every 2–4 years) and late onset of sexual maturity (7–9 years)" Maui dolphins have a low population growth rate and thus any human-caused mortality further threatens the species. Am. Compl. ¶ 40. Plaintiffs' allege that the PBR for the Maui dolphin indicates that "only one Maui dolphin roughly every 20 years could be removed from the population while still allowing Maui dolphins to reach or maintain their optimum sustainable population." Am. Compl. ¶ 44. The Government notes that NZG's "risk assessment for Maui dolphins" indicated a PBR of 0.11 or one Maui dolphin death every ten years in order to maintain a sustainable population. Def.'s Br. at 2–3.

NZG has implemented various measures to combat incidental bycatch of the Maui dolphin since 2003. *See* Am. Compl. ¶ 47. According to NOAA Fisheries, NZG implemented a new threat management plan ("TMP") and regulatory regime in 2012 which includes "measures restricting set nets and trawls in certain areas of Maui dolphin habitat, and required increased observer coverage and other monitoring mechanisms." *Notification of the Rejection of the Petition To Ban Imports of All Fish and Fish Products From New Zealand That Do Not Satisfy the Marine Mammal Protection Act*, 84 Fed. Reg. 32,853, 32,854 (NOAA July 10, 2019) ("*Petition Rejection*"). Most recently, NZG implemented new regulatory measures on June 24, 2020, that will go in effect on October 1, 2020, within Maui dolphin habitat to "extend existing, and create new, areas that prohibit the use of commercial and recreational set-nets," "extend the closure to trawl fishing," "put in place a fishing-related mortality limit of one dolphin," and "prohibit the use of drift nets." Def.'s Br., Attach. A at 1.

In 2019, Plaintiffs petitioned NOAA Fisheries "for an emergency rulemaking under the [MMPA], asking [the Government] to ban the import of fish caught in gillnet and trawl fisheries in the Maui dol-

phin's range" because NZG's 2012 regulations were insufficient to protect the Maui dolphin. Pls.' Opp'n to Mot. for Voluntary Remand at 1, July 22, 2020, ECF No. 27 ("Pls.' Br."). *See also* Compl., Attach. 1; *Petition Rejection*. NOAA Fisheries denied this petition after reviewing "the petition, supporting documents, previous risk assessments and threat management plans and New Zealand's 2019 risk assessment and [TMP]." *Petition Rejection*, 84 Fed. Reg. at 32,854. NOAA Fisheries' denial relied on (1) NZG's existing regulatory program; (2) NZG's 2019 risk assessment on the effectiveness of its regulatory program; and (3) additional proposed regulatory measures that would likely further reduce Maui dolphin bycatch. *Id.*

On May 21, 2020, Plaintiffs initiated this suit alleging (1) that NOAA Fisheries' failure to ban imports as required by the MMPA violated 5 U.S.C. § 706(1), which prohibits an agency unlawfully withholding or unreasonably delaying action; and (2) that NOAA Fisheries' denial of its petition was arbitrary and capricious and thus violated 5 U.S.C. § 706(2)(A). Compl., ECF No. 5; Am. Compl. ¶¶ 84–94. On July 1, 2020, Plaintiffs moved for a preliminary injunction. ECF No. 11. Before responding to Plaintiffs' motion for a preliminary injunction, the Government moved for a voluntary remand in order to reconsider Plaintiffs' petition for emergency rulemaking under the MMPA. Def.'s Br. In that and a subsequent motion, the Government requested that the court stay filing deadlines in the case pending decision of the voluntary remand. *Id.*; Mot. to Stay Filing of Ans. and Administrative R., July 20, 2020, ECF No. 20. The court ordered a stay of all pending deadlines in the case until disposition of the Government's motion. July 21, 2020, ECF No. 21. Plaintiffs opposed the Government's motions. Pls.' Br. at 2. The Government and NZG replied in support of the Government's motion. Def.'s Reply, July 27, 2020, ECF No. 31; Reply of NZG to Sea Shepherd's Br. in Opp'n to the Defs.' Mot. for Voluntary Remand, July 31, 2020, ECF No. 33 ("NZG's Reply"). The court held oral argument on August 6, 2020. ECF No. 34. At oral argument, the Government stated that the requested remand determination by NOAA Fisheries would be completed by October 30, 2020. *Id.* Post argument submissions by the parties were filed on August 11, 2020. Def.'s Post-Hr'g Br., ECF No. 35; NZG's Submission in Supp. of the Def.'s Mot. for Voluntary Remand, ECF No. 36; Pls.' Suppl. Br. in Opp'n to Def.'s Mot. for Voluntary Remand, ECF No. 37.

DISCUSSION

The Government argues that a voluntary remand is warranted so that NOAA Fisheries may have the first opportunity to consider NZG's new fisheries measures and to perform a comparability assess-

ment of the NZG's actions related to the Maui dolphin compared to United States standards. Def.'s Br. at 5–6. The Government also states that "the short remand might result in additional Maui dolphin protections after consultation between the United States and New Zealand, or the imposition of MMPA import restrictions," "the last officially recorded confirmed death of a Maui's dolphin from entanglement in commercial fishing gear was February 2002 in set-net gear," and "[n]o Maui dolphin has been confirmed to have been stranded due to entanglement in commercial fishing operations since 2013." Def.'s Post-Hr'g Br. at 2 (citations omitted). Plaintiffs oppose this motion stating that it will delay litigation and a decision on their motion for preliminary injunctive relief. Pls.' Br. at 2. Further, the Plaintiffs argue that the Government's remand request would only address Count Two of their complaint regarding the denial of their petition to NOAA Fisheries and not Count One pursuant to which Plaintiffs seek an injunction under the MMPA. Pls.' Br. at 2. The court concludes that remand, with a tight deadline of October 30, 2020, for reconsideration of Plaintiffs' petition and completion of the comparability assessment is appropriate. The motion for remand is thus granted.

Both parties agree that *SKF USA v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001), states, in relevant part, that a district court has discretion in deciding whether to grant a request for voluntary remand. *See* Def.'s Br. at 5; Pls.' Br. at 5. In *SKF USA*, the Federal Circuit noted that "even if there are no intervening events, [an] agency may request a remand (without confessing error) in order to reconsider its previous position." 254 F.3d at 1029. Further, the Federal Circuit stated that "if the agency's concern is substantial and legitimate, a remand is usually appropriate."[4] *Id.* In applying this standard, this court concluded that an agency's concern is substantial and legitimate where (1) the agency "provided a compelling justification for its remand request," (2) the need for finality "does not outweigh the justification for voluntary remand"; and (3) the "scope of [the] remand request is appropriate." *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1522–26, 412 F. Supp. 2d 1330, 1336–39 (2005). *See also Ad Hoc Shrimp Trade Action Committee v. United States*, 37 CIT 67, 71, 882 F. Supp. 2d 1377, 1381 (2013).

[4] As Plaintiffs note, "a court should reject a request for voluntary remand where reconsideration of the challenged agency action would be unwarranted, abusive, frivolous, or in bad faith." Pls.' Br. at 4 (quoting 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice And Procedure*, § 8383 (3d. ed. 2002)). However, at oral argument, Plaintiffs clarified that they made no such claims against the Government's remand request here. Oral Arg., Aug. 6, 2020, ECF No. 34.

The court concludes that a voluntary remand is warranted based on NOAA Fisheries' substantial and legitimate concern of addressing new developments regarding protection of the Maui dolphin in the first instance. *See SKF USA*, 254 F.3d at 1029. Factual circumstances have changed since NOAA Fisheries denied Plaintiffs' petition, which provides a compelling justification for its request. First, NZG issued new regulations on June 24, 2020, that, within the Maui dolphin's habitat, "extend existing, and create new, areas that prohibit the use of commercial and recreational set-nets," "extend the closure to trawl fishing," "put in place a fishing-related mortality limit of one dolphin," and "prohibits the use of drift nets." Def.'s Br., Attach. A at 1. As the Government notes, NOAA Fisheries "has yet to make any determination . . . that [NZG]'s final fisheries measures warrant an embargo on that country." Def.'s Br. at 6. The Government argues that "NOAA has 'a duty to take a hard look at the proffered evidence'" in the first instance. Def.'s Br. at 6 (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 385 (1989)).

The court notes Plaintiffs' assertion that NOAA Fisheries already considered NZG's new measures in their proposed form when they denied their petition in 2019. Pls.' Br. at 2. However, the court also notes that NZG here argues that it implemented measures above what was proposed in 2019. *See* NZG Reply at 4–5. Further, in attempting to distinguish the relief sought in Count One from that of Count Two, Plaintiffs point out that they now seek an import ban that covers a geographical range larger than what they sought in their petition. Pls.' Br. at 6–7. Plaintiffs explained at oral argument that, since filing their petition, their knowledge of the Maui dolphin's habitat has changed, and thus they now seek a wider ban. Oral Arg. The court agrees with the Government that NOAA Fisheries is best positioned to review these new facts in the first instance. *See* Def.'s Reply at 6; NZG's Reply at 10. Even though NOAA Fisheries had the authority to issue a wider ban based on Plaintiffs' petition and NOAA Fisheries previously reviewed NZG's proposed measures, there is no reason to think that NOAA Fisheries would come to the same conclusion with the benefit of this additional information. If Plaintiffs were unaware of information regarding the Maui dolphin's habitat at the time they submitted their petition, then their petition could not have contained that information and there is no reason to believe that NOAA Fisheries would have possessed or considered that information in denying their petition and in failing to implement an import ban pursuant to the MMPA. Where, as here, the court would have to "conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions," remand is required for further investiga-

tion and explanation by the expert agency. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The court will also direct NOAA Fisheries to allow Plaintiffs to supplement their petition on remand so that NOAA Fisheries has before it all additional information in reconsidering Plaintiffs' petition.

NZG also requested a comparability finding for its new regulations on July 15, 2020. Def.'s Br. at 5–6; Def.'s Br., Attach. B. Plaintiffs argue that NZG's request for a comparability finding is irrelevant to their challenge because the comparability assessment is done pursuant to the MMPA Imports Regulation that does not go into effect until 2022. *See* Pls.' Br. at 8–9. However, should NOAA Fisheries decide that NZG's new measures do not meet U.S. comparability standards, then it may impose a ban pursuant to its MMPA Import regulations that could take effect prior to 2022. *See, e.g.*, *Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act— Notification of Revocation of Comparability Findings and Implementation of Import Restrictions; Certification of Admissibility for Certain Fish Products From Mexico*, 85 Fed. Reg. 13,626 (NOAA Mar. 9, 2020) (implementing a ban on the importation from Mexico of fish and fish products caught with gillnets that threaten the vaquita porpoise after negative comparability findings). As Plaintiffs note, a comparability finding is not required for an import ban under the MMPA, Pls.' Br. at 8 (citing *NRDC I*, 331 F. Supp. 3d at 1353–54); remand may nevertheless result in a ban that would address Count One of Plaintiffs' complaint. Thus, a remand would allow the agency to address both of Plaintiffs' claims pursuant to the MMPA. *See also* NZG's Reply at 13.

Finally, Plaintiffs oppose the Government's request for voluntary remand and subsequent stay during the remand because they argue that remand would delay the necessary protections for the Maui dolphin from their requested preliminary injunctive relief. Pls.' Br. at 6–7, 11–12. However, the court retains jurisdiction over this case and the results of the voluntary remand. By setting October 30, 2020, as the tight deadline by which NOAA Fisheries must file its remand redetermination, the court is granting that agency an appropriate amount of time to consider the new NZG regulations and factual information presented by the Plaintiffs. The parties should be on notice that the court appreciates the urgency of the issues presented in this case and will also move the case forward on an expedited schedule once the results of the voluntary remand are issued. Should NOAA Fisheries agree that a ban is necessary, it could be implemented just as, or more rapidly, than if the court proceeded on the preliminary injunction. Most importantly, NOAA Fisheries will be

able to make this assessment in the first instance based on the technical, factual information that through its expertise it is best positioned to assess. Should NOAA Fisheries not grant Plaintiffs' requested relief, the court will act swiftly to decide Plaintiffs' outstanding motion for a preliminary injunction. Finally, remand would not unduly impact Plaintiffs' desire for finality since, by its nature, a preliminary injunction is not permanent, final relief. *See* Pls.' Br. at 11.

In sum, because of the new factual information available to NOAA Fisheries, NZG's new regulatory regime, and an ability for NOAA to grant all of the relief requested through a decision on these new facts in the first instance on remand, the court grants the Government's motion.

CONCLUSION

The court concludes that the Government's request for a voluntary remand is appropriate. Thus, it is hereby

ORDERED that the Government's motion for voluntary remand is GRANTED; it is further

ORDERED that *Notification of the Rejection of the Petition To Ban Imports of All Fish and Fish Products From New Zealand That Do Not Satisfy the Marine Mammal Protection Act*, 84 Fed. Reg. 32,853 (NOAA July 10, 2019), is remanded to NOAA Fisheries for the purpose of issuing a redetermination on Plaintiffs' petition for emergency rulemaking under the MMPA to ban importation of commercial fish or fish products from fish that have been caught with commercial fishing technology that results in incidental mortality or serious injury of Maui dolphins in excess of United States standards; it is further

ORDERED that, on remand, NOAA Fisheries shall allow Plaintiffs to supplement their petition underlying the challenged determination and consider whether the Hector's and Maui dolphin Threat Management Plan – Fisheries Measures, issued by the New Zealand Minister of Primary Industries on June 24, 2020, results in incidental mortality or serious injury of Maui dolphins in excess of United States standards under the MMPA; it is further

ORDERED that if Plaintiffs supplement their petition underlying the challenged determination by NOAA Fisheries, then Plaintiffs shall submit the petition and any additional information for consideration to NOAA Fisheries within fourteen (14) days of this Order; it is further

ORDERED that, on remand, NOAA Fisheries shall reach a determination on NZG's request of July 15, 2020, to perform a comparability assessment of the New Zealand Threat Management Plan as it relates to Maui dolphins; it is further

ORDERED that all filing deadlines are stayed until October 30, 2020; it is further

ORDERED that Defendants shall file the remand determination with the court by October 30, 2020; and it is further

ORDERED that the parties shall confer and submit a joint proposed briefing schedule on Plaintiffs' motion for preliminary injunction and the remand determination by November 6, 2020.

SO ORDERED.

Dated: August 13, 2020
New York, New York

Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 20–117

GUIZHOU TYRE CO., LTD. AND GUIZHOU TYRE IMPORT AND EXPORT CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 18–00099

[Ordering reconsideration of an agency determination concluding an administrative review of an antidumping duty order on off-the-road tires from the People's Republic of China]

Dated: August 14, 2020

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiffs Guizhou Tyre Co., Ltd., Guizhou Tyre Import and Export Co., Ltd., and GTC North America, Inc. With him on the brief were *James P. Durling* and *Tung A. Nguyen*.

Richard P. Ferrin, Faegre Drinker Biddle & Reath LLP, of Washington, D.C., for plaintiff Valmont Industries, Inc. With him on the brief was *Douglas J. Heffner*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. Of counsel on the brief was *Kristen McCannon*, Attorney, Office of the Chief Counsel For Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiffs contest an administrative determination issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), to conclude the eighth periodic review of an antidumping duty ("AD") order on certain off-the-road ("OTR") tires from the People's Republic of China ("China" or the "PRC").

Before the court are motions for judgment on the agency record challenging various aspects of the contested determination. Also before the court are a motion, and a second request, for remand by defendant United States. The court remands the contested determination for reconsideration by Commerce.

I. BACKGROUND

A. The Contested Determination

The determination contested in this consolidated action[1] (the "Final Results") is *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2015–2016*, 83 Fed.

[1] Consolidated with the lead case, *Guizhou Tyre Co. et al. v. United States*, Court No. 1800099, is *Valmont Industries, Inc. v. United States*, Court No. 18–00110. *See* Order Granting Mot. to Consolidate Cases (June 25, 2018), ECF No. 14.

Reg. 16,829 (Int'l Trade Admin. Apr. 17, 2018) ("*Final Results*"). Incorporated by reference in the Final Results is an "Issues and Decision Memorandum" ("Final I&D Mem.") containing explanatory discussion. *Issues and Decision Memorandum for the Antidumping Duty Administrative Review and New Shipper Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2015–2016* (Int'l Trade Admin. Apr. 11, 2018) (P.R. Doc. 300) ("*Final I&D Mem.*").

B. The Parties to this Consolidated Case

There are four plaintiffs in this consolidated action. Guizhou Tyre Co., Ltd., a Chinese producer of OTR tires, and Guizhou Tyre Import and Export Co., Ltd. ("GTCIE"), a wholly owned subsidiary of GTC Tyre Co., Ltd. (collectively, "GTC"), are plaintiffs; Commerce decided to treat these two companies as a single entity (i.e., a single "exporter-producer") in conducting the eighth review, a decision not contested in this case. *See Final I&D Mem.* at 1 n.2. GTC North America, Inc. ("GTC North America"), a U.S. importer and wholly owned affiliate of Guizhou Tyre Import and Export Co., Ltd., is also a plaintiff, as is Valmont Industries, Inc. ("Valmont"), an unaffiliated U.S. importer.

C. Proceedings Conducted by Commerce that Culminated in the Final Results

Background pertinent to this litigation stems from the administrative proceeding culminating in the contested decision and also from decisions made in previous, related proceedings conducted by Commerce. The court summarizes the procedural background below.

Commerce issued an antidumping duty order on OTR tires from China (the "Order") in 2008. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Int'l Trade Admin. Sept. 4, 2008).

In antidumping duty proceedings involving nonmarket economy ("NME") countries, including China, Commerce has adhered to a practice under which it applies a rebuttable presumption that all companies within the nonmarket economy country are controlled by the government of that country. *See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 Fed. Reg. 22,585, 22,587 (Int'l Trade Admin. May 2, 1994) ("*Silicon Carbide*"); *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Int'l Trade Admin. May 6, 1991). An exporter may overcome the presumption of government control by con-

vincing Commerce that it is subject neither to *de jure* nor to *de facto* control of the government of the NME country. *Silicon Carbide*, 59 Fed. Reg. at 22,587.

In the antidumping duty investigation resulting in the Order, Commerce assigned GTC, and 28 other companies, a "separate rate," which was a rate other than the rate Commerce assigned to exporters and producers it considered to have failed to rebut its presumption of government control. *See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40,485, 40,487 (Int'l Trade Admin. July 15, 2008). Commerce placed those companies it considered to have failed to rebut its presumption within what it called the "PRC-wide" (or "China-wide") "entity," to which it assigned a "PRC-wide" (or "China-wide") rate. *Id*. at 40,488.

In the investigation, GTC was one of the companies individually investigated; Commerce assigned GTC an estimated weighted average dumping margin of 4.08%. *Id.* at 40,489. Concluding that the government of the PRC did not provide requested information, Commerce assigned the PRC-wide entity a rate of 210.48% based on "facts otherwise available" under 19 U.S.C. § 1677e(a) and an "adverse inference" under 19 U.S.C. § 1677e(b). *Id*. at 40,488. Commerce calculated this rate from information it obtained from the petition. *Id.*

In the fifth periodic administrative review of the Order, Commerce selected GTC as one of two mandatory respondents, again determined that GTC was eligible for a separate rate based on demonstrated independence from government control, and assigned GTC a weighted average dumping margin of 11.34%, calculated from GTC's own sales and production data. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 20,197, 20,198–99 (Int'l Trade Admin. Apr. 15, 2015) ("*AR5 Final Results*"). Commerce again selected GTC as a mandatory respondent for the seventh administrative review, but this time Commerce determined that GTC had not demonstrated independence from the PRC government and assigned to GTC the PRC-wide rate of 105.31%. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014 2015*, 82 Fed. Reg. 18,733, 18,735 (Int'l Trade Admin. Apr. 21, 2017) ("*AR7 Final Results*").

The PRC-wide rate of 105.31% that Commerce assigned to GTC in the eighth review was carried over from the final results of the fifth administrative review into subsequent reviews. Commerce deter-

mined this PRC-wide rate in the fifth review by calculating the average of the 210.48% PRC-wide rate prior to the fifth review (determined in the investigation) and a 0.14% rate Commerce calculated for, but did not assign to, a respondent in the fifth review, Double Coin Holdings, Ltd. ("Double Coin"), which is not a party to this case. *See AR5 Final Results*, 80 Fed. Reg. at 20,199. Double Coin challenged the Department's assigning it the 105.31% rate in the fifth administrative review, a rate that was based in part on the application of facts otherwise available and an adverse inference. *See China Mfrs. All., LLC v. United States*, 43 CIT __, __, 357 F. Supp. 3d 1364, 1379–80 (2019).

Commerce initiated the eighth review of the Order by notice ("Initiation Notice") in November 2016. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 78,778, 78,783 (Int'l Trade Admin. Nov. 9, 2016) ("*Initiation Notice*"). The eighth review pertained to entries of subject merchandise made during the period of review ("POR") of September 1, 2015 through August 31, 2016. *Id.*

Commerce published the preliminary results of the eighth review ("Preliminary Results") on October 10, 2017, selecting two companies, GTC and Weihai Zhongwei Rubber Co., Ltd. ("Zhongwei") for individual examination as "mandatory" respondents. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Rescission of New Shipper Review; 2015–2016*, 82 Fed. Reg. 46,965, 46,966 (Int'l Trade Admin. Oct. 10, 2017) ("*Prelim. Results*"). In the Preliminary Results, Commerce preliminarily concluded that GTC had not demonstrated its independence from control by the government of China and, therefore, was ineligible for separate rate status. *Id.* Incorporated by reference in the Preliminary Results is a "Decision Memorandum" containing explanatory discussion. *Decision Memorandum for Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Rescission of New Shipper Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2015–2016* (Int'l Trade Admin. Oct. 2, 2017) (P.R. Doc. 258) ("*Prelim. Dec. Mem.*").

In the Final Results, Commerce concluded that GTC failed to demonstrate independence from the PRC-wide entity and, on that basis, assigned GTC the PRC-wide rate of 105.31%. *Final Results*, 83 Fed. Reg. 16,830–31. Commerce assigned Zhongwei an individually determined weighted average dumping margin of 11.87% and assigned that rate to two separate rate respondents (Qingdao Qihang Tyre Co., Ltd. and Shandong Zhentai Group Co., Ltd). *Id.* at 16,830.

D. Proceedings Before the Court

Before the court is the Rule 56.2 motion for judgment on the agency record of GTC and GTC North America. [GTC's] Mot. for J. on the Agency R. & Br. of [GTC] in Supp. of Mot. for J. on the Agency R. (Sept. 17, 2018), ECF Nos. 22 (conf.), 23 (public) ("GTC's Br."). Valmont also moves for judgment on the agency record, adopting in full the arguments put forth by GTC and GTC North America. Mot. of Consol. Pl. Valmont Indus., Inc. for J. on the Agency R. under Rule 56.2 (Sept. 17, 2018), ECF No. 24. Defendant opposes plaintiffs' motions. Def.'s Resp. to Mots. for J. on the Agency R. (Dec. 17, 2018), ECF No. 28 ("Def.'s Br.").

Defendant has filed two requests for remand. Stating that "Commerce has identified the need to reexamine certain evidence on the record related to the Chinese government's involvement in GTC," defendant requests "that the Court remand the matter to Commerce so that Commerce can revisit the issue of GTC's rate." Def.'s Mot. for Voluntary Remand 1 (July 6, 2018), ECF No. 16. Plaintiffs do not oppose defendant's request *per se* but maintain their challenge to the Department's separate rate decision in the entirety. GTC's Resp. to Def.'s Mot. for Partial Voluntary Remand (July 20, 2018), ECF No. 19 ("GTC's Opp'n Br."). In its brief opposing plaintiffs' motions, defendant also requests a remand to allow Commerce to reconsider, in light of the decision of this Court in *Thuan An Production Trading & Service Co. v. United States*, 42 CIT __, 348 F. Supp. 3d 1340 (2018) ("*Thuan An I*"), the explanation Commerce provided in the Final Results of its statutory authority to apply what it terms "nonmarket economy-wide" (or "NME-wide") rates in proceedings such as this one, in which the exporting country is considered by Commerce to be a nonmarket economy. Def.'s Br. 8–10. Plaintiffs oppose this motion, urging that the court "instead render a decision addressing GTC's argument that Commerce had no authority to assign a PRC-wide AD rate to GTC." Reply Br. of Pls. GTC 5 (Jan. 14, 2019), ECF No. 29 ("Reply of GTC").

The court held oral argument on June 27, 2019. Oral Arg. (June 27, 2019), ECF No. 42.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2012), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act

of 1930 (the "Tariff Act"), *as amended* 19 U.S.C. § 1516a (2012), including an action contesting a final determination that Commerce issues to conclude an administrative review of an antidumping duty order.[2]

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

B. Plaintiffs' Motion for Judgment on the Agency Record

Plaintiffs raise, essentially, four claims in contesting the Final Results.

They claim, first, that Commerce violated the antidumping duty statute in determining, and assigning to GTC, a rate for the PRC-wide entity. GTC's Br. 8–27. They advance several grounds for this claim. They maintain that in an antidumping duty proceeding (as opposed, specifically, to a countervailing duty proceeding), the statute confines Commerce to assigning respondents either an individually determined margin or an "all-others" rate, and that the rate Commerce determined for the PRC-wide entity and assigned to GTC falls into neither of these categories. *Id.* at 11–15. Plaintiffs also argue that the statute, while creating special rules in 19 U.S.C. § 1677(18) for identifying nonmarket-economy countries and in 19 U.S.C. § 1677b(c) for determining normal value in antidumping cases involving such countries, applies the "standard statutory rules" to Chinese entities for other determinations, including the rules for determining U.S. prices and dumping margins, and "does not empower Commerce to write a whole new type of AD margin from scratch for non-market economies." *Id.* at 15–16. Maintaining that Commerce was required to conduct an individual review of GTC, plaintiffs characterize the rate Commerce assigned to the PRC-wide entity, and the PRC-wide entity itself, as "fictitious." *Id.* at 2, 11, 13, 52. Plaintiffs, in effect, challenge the legal basis for the Department's practice of determining and assigning a rate for the PRC-wide entity as applied in the eighth review.

[2] All citations to the United States Code herein are to the 2012 edition and all citations to the Code of Federal Regulations herein are to the 2016 edition, except where otherwise indicated.

Plaintiffs also direct certain arguments to the Department's regulations. They argue that a provision therein, 19 C.F.R. § 351.107(d) ("In an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers."), even if presumed valid (which they do not concede), does not describe what Commerce did in the eighth review, which was create a "third" kind of rate applicable only to the PRC-wide entity. *Id.* at 26–27.

Plaintiffs' second claim is related to their first. They assert that even were Commerce presumed to have authority to invent a new type of rate for the PRC-wide entity, it could not do so by carrying over the 105.31% rate from prior reviews and applying it to GTC, which, they maintain, fully cooperated in the review. *Id.* at 50–53. They argue that Commerce, even under such a presumption, would have been required to calculate a new rate for the PRC-wide entity in the eighth review and was required to do so using GTC-specific data. *Id.* at 50–52. They take issue with the Department's rationale for not reviewing the PRC-wide entity, which was that no review of the PRC-wide entity was requested. *Id.* at 52. They argue that the Department's regulations did not allow them to request a review of the PRC-wide entity, and, further, that they could not have requested such a review without conceding they were part of what they characterize as a "fictitious" entity. *Id.* Further, they maintain that, in any event, the request for the review of GTC should have been deemed sufficient to require Commerce to conduct a review of the PRC-wide entity, under which Commerce should have calculated an individual margin for GTC based on GTC's own data. *Id.* at 52–53.

Plaintiffs claim, third, that Commerce erred in concluding that GTC had not put forth information establishing independence from the Chinese government and, specifically, in determining that the government of the PRC controls GTC's export activities. *Id.* at 28–50. They argue that in making these determinations, Commerce did not follow the correct criteria, *id.* at 28–30, and reached a determination unsupported by substantial evidence on the record of the review, *id.* at 31–50.

Finally, plaintiffs claim that in assigning GTC the rate of 105.31%, Commerce unlawfully refused to make adjustments for subsidies found in the parallel administrative review of a countervailing duty order on OTR tires from China. *Id.* at 53–55.

C. Defendant's Motion that Commerce Be Permitted to Reconsider Its Decision that GTC Is Part of the "PRC-Wide Entity"

Declining to depart from its analysis in the Preliminary Results, Commerce stated that "[f]or the final results, we continue to find, based on record evidence, that GTC is not eligible for a separate rate." *Final I&D Mem.* at 19. Before the court, plaintiffs contest this determination on various factual grounds. Rather than respond substantively to plaintiffs' arguments, defendant "respectfully requests a voluntary remand," without confessing error, for Commerce to reconsider and explain its determination as to whether GTC qualifies for a separate rate according to the Department's criteria. Def.'s Br. 10.

Commerce stated in the Final I&D Mem. that "[t]o demonstrate independence from government control and qualify for a separate rate, exporters must affirmatively demonstrate both the *de jure* and *de facto* absence of government control over their export activities." *Final I&D Mem.* at 19. In the eighth review, Commerce concluded that GTC demonstrated *de jure* independence from government control but failed to demonstrate *de facto* independence under a four-factor test. *Id*. (footnote omitted).[3] Commerce also found that, because GTCIE was a wholly owned subsidiary of Guizhou Tyre Co., Ltd., it too was subject to government control. *Id.* at 20. On that basis, Commerce considered the combined GTC entity subject to government control, *id.* at 19, and assigned it the PRC-wide rate of 105.31%. *Final Results*, 83 Fed. Reg. at 16,830.

Commerce found that GTC's largest shareholder, Guiyang Industry Investment (Group) Co., Ltd. ("GIIG"), a state-owned enterprise, had increased its ownership share of Guizhou Tyre Co., Ltd. from 25.20% during the period of the prior review to 25.33% during the POR and that the next nine largest shareholders decreased their shares to only a combined 4.7% for the POR, "further consolidating Guiyang

[3] The memorandum explains that "Commerce typically considers four factors in evaluating whether a respondent is subject to *de facto* governmental control of its export functions: (1) whether the export prices are set by, or subject to the approval of, a governmental authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the central, provincial, and local governments in making decisions regarding the selection of its management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses." *Issues and Decision Memorandum for the Antidumping Duty Administrative Review and New Shipper Review: Certain New Pneumatic Off the-Road Tires from the People's Republic of China; 2015–2016*, at 19 (Int'l Trade Admin. Apr. 11, 2018) (P.R. Doc. 300) ("*Final I&D Mem.*") (footnote omitted).

SASAC's position as the controlling party." *Final I&D Mem.* at 20 (footnote omitted).[4] Noting that, based on several factors, it had "determined in the prior [seventh] review that GTC had failed to demonstrate the absence of *de facto* government control over its export activities," *id.* at 19, Commerce concluded, further, that GTC failed to present any new information since the prior review that would require Commerce to reconsider its finding of *de facto* government control over GTC's export activities. *Id.* at 21.

According to Commerce, record evidence from the prior review "demonstrated that GIIG circumvented an inclusive board election process to elect members of GTC's board through a shareholder's meeting that was not available to all shareholders." *Id.* at 20. Commerce concluded in that review that "[b]ecause we found that there was no 'practical difference' between the shareholder elections and GIIG 'directly appointing board members by direct decree,' we determined that 'GIIG appointed a majority of the members of GTC's board of directors as evidence in the voting records for the shareholder meetings.'" *Id.* (quoting an "Issues and Decision Memorandum" incorporated by reference in to the *AR7 Final Results*). Commerce also addressed the contention that shareholder voting protections in GTC's Articles of Association, such as cumulative voting and online voting, prevented GIIG from exercising *de facto* control over the election of directors and selection of management. *Id.* Commerce found that, due to a decrease in the relative holdings of other major shareholders in GTC, "GIIG's ability to exert *de facto* control over the management and operational decisions of GTC has been strengthened through the dilution of shares by other shareholders during this POR in relation to the prior POR." *Id.* The evidence further demonstrated, according to Commerce, that GIIG "selected the management and controlled the profit distribution for GTCIE." *Id*. The Final I&D Mem. concluded that "Commerce continues to find that the *de facto* control over GTCIE's selection of management through GIIG and GTC, and GTCIE's profit distribution, is indicative of being a state-controlled entity and precludes GTC from eligibility for a separate rate." *Id.*

---

[4] In using the term "Guiyang SASAC," *Final I&D Mem.* at 20, Commerce referred to China's state-owned Assets Supervision and Administration Commission in Guiyang, China. Commerce incorporated into the Final I&D Mem. by reference its earlier "Preliminary Separate Rate Memorandum," *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Separate Rate Determination for GTC* (Int'l Trade Admin. Oct. 2, 2017) (P.R. Doc. 260) ("*Prelim. Separate Rate Mem.*"). *Final I&D Mem.* at 21. In the Preliminary Separate Rate Memorandum, Commerce found that the Guiyang SASAC owned 100% of Guiyang Industry Investment (Group) Co., Ltd. ("GIIG"), *Prelim. Separate Rate Mem.* at 2; it also found that, after Guiyang SASAC, the next nine largest shareholders previously held a combined 33.99% share (as shown in GTC's 2015 annual report), *id.* at 4.

Before the court, defendant explains that "[o]ne factor that Commerce relied on in [its] analysis was its finding that, GTC elected members of its board of directors 'through a shareholder's meeting that was not available to all shareholders.'" Def.'s Br. 10–11 (quoting *Final I&D Mem.* at 20). Before the court, plaintiffs call that factual finding into question, explaining that "GTC's shareholder meetings are always available to *all* shareholders who wish to attend," including the particular shareholders' meeting that Commerce found was not open to all shareholders. GTC's Br. 34–35. Requesting a remand in this case, defendant explains that because "Commerce's understanding of such record evidence has the potential to impact the analysis concerning whether to grant GTC a separate rate in the underlying review," the Department's concern is "substantial and legitimate," justifying a remand in this case. Def.'s Br. 11 (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("*SKF*")). Plaintiffs do not oppose defendant's request but maintain their challenge to the Department's separate rate decision in the entirety. *See* GTC's Opp'n Br. 1–2.

The court exercises discretion in considering a request for a remand. "[I]f the agency's concern is substantial and legitimate, a remand is usually appropriate." *SKF*, 254 F.3d at 1029. Agreeing that the Department's concern regarding this issue is "substantial and legitimate," the court is entering an order that permits Commerce, if it wishes to do so, to reconsider its separate rate analysis on the issue of government control of the GTC entity.

If Commerce determines that GTC has rebutted its presumption of government control, it must assign GTC, which Commerce selected as a mandatory respondent, an individual weighted average dumping margin. If Commerce decides that GTC has not rebutted the Department's presumption, it must address the other issues plaintiffs raise that are related to the Department's decision not to review GTC in the circumstances of the eighth review. As discussed in the remainder of this Opinion and Order, these are issues Commerce did not address, or failed to address adequately, in the Final Results.

D. Defendant's Request for a Remand on the Issue of Statutory Authority to Apply "NME-Wide Rates"

In support of its request for a remand on the issue of statutory authority to apply NME-wide rates, defendant states that "[t]he Court should grant the Government's request for a voluntary remand for Commerce to reconsider its explanation of its statutory authority to apply NME-wide rates in light of this Court's findings in *Thuan An*

[*I*]." Def.'s Br. 5. The court grants this request but, for the reasons discussed below, does not limit the remand order to the narrow issue defendant identifies.

The court rules that defendant's justification for requesting a remand limited to a narrow issue is unsatisfactory because defendant is seeking a remand order limited to the Department's crafting of a new or revised explanation for its current practice rather than a good faith reexamination of the decision Commerce made in the Final Results not to review GTC and, as a consequence, to assign GTC the rate for the PRC-wide entity that it carried over from the prior review. Such a re-examination is necessary in response to the issues raised by plaintiffs' claims in this litigation. The court considers those issues to include those raised by plaintiffs' claim that the statute did not authorize Commerce to assign a PRC-wide rate and GTC's related claim that the 105.31% rate was not a rate that lawfully could be applied to GTC, even if GTC were considered part of any PRC-wide entity. For the Final Results, Commerce addressed the issues plaintiffs raised during the review, *see Final I&D Mem.* at 7–9, only superficially, relying largely on its own practice rather than an analysis of its statutory and regulatory authority, *see Final I&D Mem.* at 11–12. Even absent a request from defendant, a remand would be required due to the inadequacy of the Department's explanation.

In summary, plaintiffs claim that the Tariff Act did not permit Commerce to apply its practice in the way that it did in the eighth review and, in any event, that doing so was inconsistent in some respects with the Department's own regulations. Some of the issues plaintiffs raise are questions of first impression, i.e., ones the courts have not addressed previously.[5]

Contested in *Thuan An I* were the final results of the twelfth administrative review of an antidumping duty order on certain frozen fish fillets from Vietnam. *Thuan An I*, 42 CIT at __, 348 F. Supp. 3d at 1342. Considering a plaintiff's claim that Commerce lacked authority to impose a Vietnam-wide rate in the final results because such a rate was neither an individual rate nor an all-others rate, *id.* at __,

[5] The Court of Appeals for the Federal Circuit ("Court of Appeals") has reasoned that statutory silence in 19 U.S.C. §§ 1673d and 1677e does not divest Commerce of "its broad authority to devise alternate procedures to carry out the statutory mandate." *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1312 (Fed. Cir. 2017) ("*Diamond Sawblades*"). The Court of Appeals rejected a plaintiff's challenge to the Department's application of the PRC-wide entity rate when Commerce "based that rate on adverse facts available ('AFA')." *Id.* at 1310. *Diamond Sawblades* did not address certain questions presented by this case, including in particular the question of whether Commerce had authority to decline to review GTC in specific circumstances analogous to those of the eighth review of the Order.

348 F. Supp. 3d at 1346–47, the opinion in *Thuan An I* noted that defendant United States attempted to justify the Department's action by relying upon the Department's regulation, 19 C.F.R. § 351.107(d) ("In an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers") while still insisting that the Vietnam-wide rate is neither an individual rate nor an all others rate. *Id.* at __, 348 F. Supp. 3d at 1348 & n.13. The case held that the regulation does not "grant Commerce authority to create a new kind of rate; Commerce may determine individual rates and an all-others rate." *Id.* at __, 348 F. Supp. 3d at 1348 (citing 19 U.S.C. § 1673d(c)(1)(B)(i)(I)–(ii)). The opinion reasoned that these two types of rates are the only two types of rates the statute authorizes for investigations, *id.* at __, 348 F. Supp. 3d at 1345–49, and that this principle applies with equal force to reviews, *id.* at __, 348 F. Supp. 3d at 1346 n.11 (citing *Albemarle Corp. v. United States*, 821 F.3d 1345, 1352 (Fed. Cir. 2016)).

In *Thuan An Production Trading & Service Co. v United States*, 43 CIT __, 396 F. Supp. 3d 1310 (2019) ("*Thuan An II*"), this Court sustained the Department's remand redetermination, which offered a new explanation for the Department's decision. *Id.* at __, 396 F. Supp. 3d at 1319. This Court noted in *Thuan An II* that on remand Commerce identified the NME-entity rate in the underlying investigation as an individually investigated rate and specified that this rate was revised in the tenth review of the antidumping duty order. *Id.* at __, 396 F. Supp. 3d at 1316. This Court reasoned that Commerce was under no obligation to review the Vietnam-wide entity again in the twelfth review when it had not received a request to do so and had not undertaken to self-initiate a review. *Id.* at __, 396 F. Supp. 3d at 1317–18. The *Thuan An* opinions do not indicate that the plaintiff in that litigation contested the Department's conclusion that the plaintiff could have requested a review of the Vietnam-wide entity; as discussed later in this Opinion and Order, plaintiffs in this case argue that the Department's regulations did not permit them to request a review of the PRC-wide entity. GTC's Br. 50–53.

E. On Remand, Commerce Must Reconsider Its Decision Not to Review GTC and Thereby Decline to Assign GTC Its Own Individual Dumping Margin

Plaintiffs' claims raise issues well beyond defendant's request for a voluntary remand. As it did in the *Thuan An* litigation, Commerce must explain on remand whether Commerce considers the PRC-wide rate it assigned to GTC to be an individual dumping margin or, alternatively, an "all-others" rate, and include its reasoning. But in

light of the claims made in this litigation, Commerce also must address on remand the larger question of whether, in the circumstances of the eighth review, Commerce was (as plaintiffs argue) required to review GTC and assign GTC, as a mandatory respondent, GTC's own individual dumping margin, regardless of any treatment Commerce accorded to what it regarded as the PRC-wide entity. That question involves several issues that pertain to the Tariff Act and to the Department's regulations.

The Tariff Act requires generally that Commerce conduct a periodic review of a known exporter or producer of subject merchandise "if a request for such a review has been received." 19 U.S.C. § 1675(a)(1). Commerce nevertheless declined to review GTC, *Final I&D Mem.* at 22, a decision plaintiffs challenge in this litigation, GTC's Br. 50–53.

The Act speaks directly to the issue of how Commerce is to determine margins for exporters and producers for which a periodic review has been requested. In § 1677f–1(c), the statute sets forth a "[g]eneral rule" directing that "[i]n determining weighted average dumping margins under section 1673b(d) [applicable to the preliminary less-than-fair-value determination in the preliminary investigation], 1673d(c) [applicable to the final less-than-fair-value determination in the investigation] or *section 1675(a)* [applicable, as here, to reviews of an antidumping duty order] of this title, the administering authority shall determine the *individual weighted average dumping margin* for *each known exporter and producer* of the subject merchandise." *Id*. § 1677f–1(c)(1) (emphasis added). A related provision, 19 U.S.C. § 1673d(c)(1)(B)(i), directs Commerce, in an antidumping duty investigation, to determine "the estimated weighted average dumping margin for each exporter and producer individually investigated," *id.* § 1673d(c)(1)(B)(i)(I), and "the estimated all-others rate for all exporters and producers not individually investigated," *id.* § 1673d(c)(1)(B)(i)(II). As plaintiffs argue, *see* GTC's Br. 8–11, and as this Court has recognized, the statute authorizes for investigations only these two types of rates, *Thuan An I*, 42 CIT at __, 348 F. Supp. 3d at 1346–49, a limitation this Court has identified as applying with equal force to reviews, *id.* at __, 348 F. Supp. 3d at 1346 n.11 (citing *Albemarle*, 821 F.3d at 1352).

The statute sets forth an "[e]xception" applicable to the general rule requiring Commerce to determine a weighted average dumping margin for each known exporter or producer. 19 U.S.C. § 1677f–1(c)(2). The exception applies only where there is a "large number of exporters or producers involved in the investigation or review." *Id.* Under this exception, Commerce "may determine the weighted average

dumping margins for a reasonable number of exporters or producers by limiting its examination" to a statistically valid sample of "exporters, producers, or types of products," *id.* § 1677f–1(c)(2)(A), or to "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined," *id.* § 1677f–1(c)(2)(B). In the eighth review, Commerce applied the exception in § 1677f–1(c)(2) to limit its individual examination to one exporter/producer (Zhongwei), chosen according to relative export volume. *Final Results*, 83 Fed. Reg. at 16,830 (citing *Prelim. Results*, 82 Fed. Reg. at 46,966). Commerce did not invoke this exception in refusing to assign an individual weighted average dumping margin to GTC.

In § 1677f–1(c), Congress addressed the circumstances in which Commerce may decide not to examine individually a known exporter or producer of the subject merchandise for which a request for review had been received. The provision does not authorize Commerce to decline to *review*, as opposed to examine individually, a known exporter or producer. Rather, the statute addresses the obligation to conduct a review in a related section, § 1675(a)(1) (directing that "the administering authority, if a request for such a review has been received ... shall— ... review, and determine (in accordance with paragraph (2)) the amount of any antidumping duty." 19 U.S.C. § 1675(a)(1). Paragraph (2) imposes the general rule (to which an exception is provided in § 1677f–1(c)(2)) that Commerce must "determine—(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise and (ii) the dumping margin for each such entry." *Id.* § 1675(a)(2)(A).

Interpreted according to plain meaning, the statute contemplates that Commerce, in administering § 1677f–1(c), is to derive the margins it assigns to individually examined exporter/producers from each exporter/producer's own sales, and to derive the margins it assigns to unexamined exporter/producers, or to unexamined sales transactions, from actual examinations of other exporter/producers (or transactions) that it conducts in the review. In the eighth review, Commerce did not assign GTC a rate determined in either of these two ways. Instead, Commerce concluded that GTC was not under review at all. *Prelim. Dec. Mem.* at 16–18. Commerce reasoned that GTC was part of a PRC-wide entity (having decided that GTC failed to rebut its presumption of government control), *id.* at 17, and, further, that the PRC-wide entity was not under review, no one having requested that the PRC-wide entity be reviewed, *id.* at 18; *Final I&D Mem.* at 22.

In the eighth review, Commerce apparently did not regard GTC as a known exporter or producer that it was required to review. Instead,

Commerce treated the PRC-wide entity as a known exporter or producer that could be reviewed (although declining to review it) and assigned it a carry-over rate from the prior review, even though the statute does not expressly provide that such an "entity" qualifies as a "known exporter and producer of the subject merchandise," 19 U.S.C. § 1677f–1(c)(1), that Commerce is to review. Characterizing the PRC-wide rate as "fictitious," GTC's Br. 11, and characterizing the PRC-wide entity as "fictitious" as well, *id.* at 52, plaintiffs challenge this practice as *ultra vires*. Commerce failed to explain for the Final Results how the changing PRC-wide entity could be described as a "known exporter and producer of the subject merchandise" within the meaning of 19 U.S.C. § 1677f–1(c)(1). In fact, Commerce did not expressly characterize the PRC-wide entity as a known exporter or producer of the subject merchandise. And at the time parties were authorized to request a review, the composition of the "PRC-wide entity" was not known, as the composition of the entity is subject to change in each review and determined definitively only upon completion of the review. On remand, Commerce must address this issue of statutory interpretation and respond to the argument plaintiffs make that the Tariff Act, while creating certain special provisions for nonmarket-economy countries (most notably, in the determination of normal value), did not create a special statutory mechanism applying to the method Commerce applied in the eighth review. *See* GTC's Br. 16.

As the court has noted, the Department's discussion of the treatment of the PRC-wide entity as an exporter or producer to which a PRC-wide rate could be assigned was grounded largely in existing practice rather than in specific citations to authority in the Tariff Act or its regulations. *See, e.g.*, *Prelim. Results*, 82 Fed. Reg. at 46,966; *Final I&D Mem.* at 11–12. Applying that practice in the Final Results, Commerce, as discussed in further detail below, identified only three known exporters or producers, one of which was GTC, as being components of the PRC-wide entity for purposes of the eighth review. *Final Results*, 83 Fed. Reg. at 16,830 (citing *Prelim. Results*, 82 Fed. Reg. at 46,966 n.12).

In the Initiation Notice for the review, Commerce stated that "[i]n proceedings involving non-market-economy ('NME') countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate." *Initiation Notice*, 81 Fed. Reg. at 78,779. Commerce then added that "[i]t is the Department's policy to assign all exporters of merchandise subject to

an administrative review 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."[6] *Id*. In the Preliminary Results, Commerce stated as follows:

> The Department's policy regarding conditional review of the PRC-wide entity applies to these reviews. Under this policy, the PRC-wide entity will not be under review unless a party specifically requests, or the Department self-initiates, a review of the entity. Because no party requested a review of the PRC-wide entity in the AR [administrative review] or NSR [new shipper review], the entity is not under review and the entity's rate (i.e., 105.31 percent) is not subject to change. Aside from the separate rate companies discussed above, the Department considers all other companies for which a review was requested, including the mandatory respondent GTC, to be ineligible for a separate rate based on information provided.

Prelim. Results, 82 Fed. Reg. at 46,966 (footnotes omitted). The Final Results indicated no change in these determinations. *See Final Results*, 83 Fed. Reg. at 16,830.

Commerce announced in the Initiation Notice that it had received requests for review of ten exporters and producers.[7] Based on timely withdrawals of review requests, Commerce rescinded the review for three of the companies named in the Initiation Notice.[8] In the Preliminary Results, Commerce stated that "[t]he administrative review

---

[6] It is unclear why Commerce described its practice as one of assigning the NME-wide rate to "all exporters of merchandise *subject to an administrative review* in an NME country" that it deems to have failed to rebut its presumption. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 78,778, 78,779 (Int'l Trade Admin. Nov. 9, 2016) ("*Initiation Notice*") (emphasis added). This appears to be inconsistent with the Final Results, in which Commerce, rather than consider GTC to be "subject to review," refused to review GTC. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2015–2016*, 83 Fed. Reg. 16,829, 16,830 (Int'l Trade Admin. Apr. 17, 2018) (citing *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Rescission of New Shipper Review; 2015–2016*, 82 Fed. Reg. 46,965, 46,966 & n.12 (Int'l Trade Admin. Oct. 10, 2017) ("*Prelim. Results*")).

[7] The ten companies listed in the Initiation Notice are Cheng Shin Rubber Industry Ltd., Guizhou Tyre Co., Ltd., Guizhou Tyre Import and Export Co., Ltd., Qingdao Milestone Tyres Co., Ltd., Qingdao Qihang Tyre Co., Ltd., Shandong Zhentai Group Co., Ltd., Trelleborg Wheel Systems (Xingtai) Co., Ltd., Weihai Zhongwei Rubber Co., Ltd., Weifang Jintongda Tyre Co., Ltd., and Zhongce Rubber Group Co., Ltd. *Initiation Notice*, 81 Fed. Reg. at 78,783. As discussed herein, Commerce later decided to treat Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. as a single exporter/producer, *see Prelim. Results*, 82 Fed. Reg. at 46,965 n.3; therefore, nine companies can be considered to be those for which review was requested.

[8] *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Partial Rescission of the Antidumping Duty Administrative Review; 2015–2016*, 82 Fed.

covers six exporters of the subject merchandise." *Prelim. Results*, 82 Fed. Reg. at 46,965. The six companies remaining in the review after the partial rescission were Cheng Shin Rubber Industry Ltd. ("Cheng Shin"), Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. (treated by Commerce as a single exporter/producer, "GTC"), Qingdao Milestone Tyres Co., Ltd. ("Milestone"), Qingdao Qihang Tyre Co., Ltd. ("Qihang"), Shandong Zhentai Group Co., Ltd. ("Zhentai"), and Weihai Zhongwei Rubber Co., Ltd. ("Zhongwei"). *Prelim. Results*, 82 Fed. Reg. at 46,965–66 & nn.3, 5.

The same six companies remained in the review for the Final Results. *Final Results*, 83 Fed. Reg. at 16,830. They consisted of three respondents Commerce designated as separate rate respondents and three to which it denied separate rate status. *Id.* The three separate rate companies were Zhongwei (one of the two mandatory respondents), Qihang, and Zhentai. *Id.* The other three were Cheng Shin, GTC (the other mandatory respondent), and Milestone. *Id.* Commerce decided that GTC, Cheng Shin, and Milestone (a company Commerce characterized as "non-responsive") had not successfully rebutted the presumption of government control. *Id.* Commerce received a request for review of each of these three companies. *See Initiation Notice*, 81 Fed. Reg. at 78,783. As noted above, Commerce calculated an individual weighted average dumping margin of 11.87% for Zhongwei and also assigned that rate to Qihang and Zhentai. *Final Results*, 83 Fed. Reg. at 16,830. Commerce assigned the China-wide rate of 105.31%, carried over from the previous (seventh) and prior reviews, to Cheng Shin, GTC, and Milestone. *Id.* at 16,831 & n.16 (citing *AR5 Final Results*, 80 Fed. Reg. at 20,199); *see also AR7 Final Results*, 82 Fed. Reg. at 18,735 & n.16 (citing *AR5 Final Results*, 80 Fed. Reg. at 20,199).

Commerce has not addressed the apparent contradiction under which the PRC-wide entity, according to Commerce, was not under review, yet the only three exporter/producers it designated as part of that entity in the eighth review all were the subjects of requests for review—requests that Commerce, despite the statutory directives, believed it was not required to honor. Plaintiffs argue that Commerce, regardless of its findings as to government control, was obligated to determine an individual margin for GTC based on GTC's sales. GTC's Br. 50–53. In the Final Results, Commerce failed to explain why its findings as to potential government control over certain specified activities of GTC, if presumed valid, sufficed to allow Commerce to refuse to review GTC under the controlling statutory and regulatory

Reg. 16,348, 16,348 (Int'l Trade Admin. Apr. 4, 2017). The companies listed in the notice as those for which a request for review was withdrawn are Jintongda Tyre Co., Ltd., Trelleborg Wheel Systems (Xingtai) Co., Ltd., and Zhongce Rubber Group Co., Ltd. *Id.*

schemes, which do not contain provisions addressing an NME-wide entity such as that reflected in the Department's practice.

With respect to the statutory scheme, Commerce relied for support of its practice on section 771(18)(B)(iv)–(v) of the Tariff Act, 19 U.S.C. § 1677(18)(B)(iv)–(v). This reliance is misplaced. Commerce reasoned that "[i]t is within our authority to employ a presumption of state control in an NME country and place the burden on the exporters to demonstrate an absence of central government control." *Final I&D Mem.* at 11 (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997)). Commerce added that "[u]nder section 771(18)(B)(iv)-(v) of the Act, this burden is reasonable, as it recognizes the correlation between NME economies and government price control, resource allocation, and production decisions." *Id.* Because the statutory provision Commerce cites does not authorize Commerce to refuse to review an exporter or producer for which a request for review was received, it is not reasonably construed to grant Commerce authority to do what it did in this case. Instead, the provision defines what is meant by the term "nonmarket economy country" as used in the Tariff Act, 19 U.S.C. § 1677(18)(A), and sets forth factors Commerce is to "take into account" in determining whether a foreign country conforms to that definition, *id.* § 1677(18)(B). The statutory purpose of designating a country as a nonmarket economy country is that the normal value of that country's exports is determined in a different way than it is for exports from other countries. *See* 19 U.S.C. § 1677b(c). This purpose is revealed in the statutory definition of "nonmarket economy country," which is based upon the principle that sales of merchandise in an NME country, not being based on market principles, do not reflect the fair value of the merchandise.[9]

The Department's reliance on *Sigma Corp.* to support its NME practice as applied in the eighth review, *Final I&D Mem.* at 11, is also misplaced. *Sigma Corp.* involved a challenge brought by a Chinese exporter, Guangdong Metals & Materials Import & Export Corporation ("Guangdong"), and five U.S. importers, of iron construction castings from the PRC. *Sigma Corp.*, 117 F.3d at 1404. The importers contested the final results of an administrative review of the antidumping duty order on the iron castings, "asserting that Guangdong was independent of the national Chinese corporation, China National

[9] The statutory definition is as follows:

> The term "nonmarket economy country" means any foreign country that the administering authority [Commerce] determines does not operate on market principles of cost or pricing structures, *so that sales of merchandise in such country do not reflect the fair value of the merchandise*.

19 U.S.C. § 1677(18)(A) (emphasis added).

Metals and Minerals Import and Export Corporation ('China National'), and that Commerce had therefore erred in applying a countrywide antidumping margin to Guangdong." *Id.* at 1405. The Court of Appeals for the Federal Circuit ("Court of Appeals") upheld the Department's employing a presumption of *de jure* and *de facto* government control by an NME government (in that case, China) that a respondent must rebut in order to obtain a separate rate and, upon a finding that Guangdong had not rebutted its presumption, the Department's adopting a "single country-wide margin" that would apply to all exporters. *Id.* at 1405–07.

The practice Commerce followed in the review at issue in *Sigma Corp.*is not the same practice that it followed in the Final Results at issue in this case; to the contrary, it was markedly different and, in an important respect, opposite. In the review at issue in *Sigma Corp.*, Commerce individually reviewed Guangdong, the company it found not to have rebutted its presumption, rather than refusing to do so on the ground that Guangdong was part of a PRC-wide entity that Commerce declined to review. *See Final Results of Antidumping Duty Administrative Review: Certain Iron Construction Castings From the People's Republic of China*, 57 Fed. Reg. 10,644, 10,644 (Int'l Trade Admin. Mar. 27, 1992) ("*Castings*"). Commerce assigned Guangdong an individual margin (92.74%, a margin subsequently modified upon judicial review; *see Sigma Corp.*, 117 F.3d at 1411), based on the surrogate value method of calculating normal value for NME exporters provided for in 19 U.S.C. § 1677b(c). *Castings*, 57 Fed. Reg. at 10,648. Had Commerce followed in this case the practice it followed in *Sigma Corp.*, which the Court of Appeals affirmed, Commerce would have adopted one of the methods plaintiffs are advocating in this case, i.e., assignment of an individual margin to GTC upon review of the PRC-wide entity.

Commerce also relied on *Transcom, Inc. v. United States*, 294 F.3d 1371 (Fed. Cir. 2002) ("*Transcom*"), in support of the NME practice it employed in the eighth review. *Final I&D Mem.* at 11–12. *Transcom* held that Commerce permissibly could apply a rate based on "best information available," imposed under the previous version of 19 U.S.C. § 1677e, to Chinese exporters and producers that did not rebut the Department's presumption of government control. *Transcom*, 294 F.3d at 1373. The practice Commerce followed in the review at issue in *Transcom* also differed from the practice Commerce applied in the review at issue in this case. In the review under which the *Transcom* litigation arose, Commerce placed the PRC-wide entity under review, which it declined to do in this case. *Id.* at 1382 ("[B]ecause some of the companies specifically named in the seventh administrative review

did not establish their independence from the state-controlled entity, Commerce regarded the state-controlled entity as part of the review."). Moreover, this case raises statutory and regulatory issues, as discussed in this Opinion and Order, that were not adjudicated in the *Transcom* litigation.

Regarding the regulatory scheme, the Department's practice pertaining to an NME-wide entity, as applied in the eighth review, is not provided for in the Department's regulations and, to the contrary, receives no specific mention in those regulations. In 19 C.F.R. § 351.107(d), the regulations provide that "[i]n an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers." This regulation does not describe the current Commerce practice, under which only *some* Chinese exporters and producers (not identified definitively until the review is completed) are subjected to the PRC-wide rate. Plaintiffs make this point in their brief. *See* GTC's Br. 17–18. Another provision in the regulations, 19 C.F.R. § 351.401(f) (the "collapsing" regulation), authorizes Commerce, in defined circumstances, to treat affiliated producers as a single producer. Although deciding that GTC, Cheng Shin, and Milestone were part of the PRC-wide entity in the eighth review, *Final Results*, 83 Fed. Reg. at 16,830, Commerce did not explicitly find that these three companies were "affiliated" with each other (and to the contrary decided that GTC was legally ("*de jure*") independent from the government of China, *see Final I&D Mem.* at 12–21), nor did it decide that the criteria of the collapsing regulation had been satisfied.[10] Even were Commerce to have decided that GTC, Cheng Shin, and Milestone should be collapsed according to § 351.401(f), the effect under that regulatory provision would not have been that Commerce could decline to review them.

While in this case, as in the review that was the subject of *Thuan An I* and *II*, Commerce declined to review the PRC-wide entity and concluded that no party requested a review of that entity, *see Final I&D Mem.* at 22, plaintiffs raise an issue not addressed in either of the *Thuan An* opinions. That issue is whether the plaintiffs in this action validly *could have* requested a review of the PRC-wide entity under the Department's regulations. GTC's Br. 51–53. Plaintiffs contend that the Department's regulations did not allow them to do so.

[10] During the eighth review, Commerce summarized an argument made by the petitioners by recounting that the petitioners argued that "Commerce's single-entity NME practice is analogous to its collapsing practice: in both cases, Commerce finds it necessary to treat multiple companies as a single entity for purposes of determining a dumping margin and preventing manipulation of that margin." *Final I&D Mem.* at 11 & n.68. Commerce did not respond to this argument. *See id.* at 11–12.

Id. at 52 ("Commerce has expressly confirmed [that] 'one exporter or producer may not request an administrative review of another exporter or producer.'" (quoting *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,318 (Int'l Trade Admin. May 19, 1997))). Here, as in the *Thuan An* litigation, Commerce has relied on its determination that no party requested a review of the PRC-wide entity in support of its decision to assign GTC the 105.31% PRC-wide rate. *Final I&D Mem.* at 22. But as the court discusses below, that reliance is not justified because the Department's regulations informed the plaintiffs that filing a request for a review of the PRC-wide entity was not a course of action available to them.

While the opinion in *Thuan An* does not indicate that the plaintiff in that case challenged as unlawful the Department's practice of reviewing the Vietnam-wide entity only if requested to do so, plaintiffs in this case specifically *are* challenging that practice in this litigation, *see* GTC's Br. 50–53. They argue not only that they were unauthorized by the regulations to request a review of the nonmarket economy-wide entity (the PRC-wide entity in this case) but also that Commerce could have treated GTC's request that it be reviewed in the instant proceeding as effectively a request that the PRC-wide entity be reviewed "for purposes of recalculating the PRC-wide rate in the underlying review." *Id.* at 52.

In 19 U.S.C. § 1675(a)(1), the Tariff Act provides that Commerce, on each 12-month anniversary date of the publication of an antidumping duty order, is to conduct a review and determine the amount of antidumping duty "if a request for such a review has been received." The Department's regulations, in 19 C.F.R. § 351.213(b), specify who may request a periodic administrative review of an antidumping duty order. The relevant regulations allow for a review of an antidumping duty order to be made in writing by: (1) a domestic interested party or the foreign government of the country in which the subject merchandise was manufactured or from which it was exported, who may request review only of specified individual exporters or producers, 19 C.F.R. § 351.213(b)(1); (2) an individual exporter or producer covered by the antidumping duty order, who may request review of itself but not of any other party, *id.* § 351.213(b)(2); and (3) an importer, who may request review of an exporter or producer of subject merchandise that it imports, *id.* § 351.213(b)(3). As discussed below, none of these categories authorized a plaintiff in this case (whether a producer, exporter, or importer of the subject merchandise) to request a review of what Commerce terms an "NME-wide entity," a type of entity not mentioned in the regulation. *See id.* § 351.213(b).

The Department's regulation provides that requests for a review may be made in writing by a "domestic interested party or an interested party described in section 771(9)(B) of the Act (foreign government),"[11] who may request review "of specified individual exporters or producers covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis), if the requesting person states why the person desires the Secretary to review those particular exporters or producers." *Id.* § 351.213(b)(1). The plaintiffs in this action, being neither domestic interested parties nor the government of the PRC, had no right under this provision to request a review of the PRC-wide entity. And even if it were presumed that GTC could submit a request for review on behalf of the Chinese government, it could not request review of a nonspecific "entity." The provision is limited to requests for review of "specified individual exporters or producers." *Id.*

The next paragraph in the regulation provides that "an exporter or producer covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) may request in writing that the Secretary conduct an administrative review of *only that person*." *Id.* § 351.213(b)(2) (emphasis added). The regulation makes no mention of an entity comprised of an unspecified group of exporters and producers in an NME country over which Commerce, at the end of a review, determines to have conducted certain export-related activities over which the government could have exerted control or potential control. Plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. (treated as one exporter/producer by Commerce, "GTC") could not invoke this provision to request a review of unidentified individual members of the China-wide entity and GTC, not being the China-wide entity itself, could not invoke this provision for the entire entity.[12]

---

[11] Section 771(9)(B) of the Tariff Act defines the term "interested party" to include "the government of a country in which [subject] merchandise is produced or manufactured or from which such merchandise is exported." 19 U.S.C. § 1677(9)(B).

[12] Later in the eighth review, Commerce decided that GTC was included in the PRC-wide entity but did not decide that GTC was the entity itself; to the contrary, Commerce found for the Preliminary Results that GTC had *de jure* independence (but not *de facto* independence) from the government. *Decision Memorandum for Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Rescission of New Shipper Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2015–2016*, at 15, 17 & n.86 (Int'l Trade Admin. Oct. 2, 2017) (P.R. Doc. 258) ("*Prelim. Dec. Mem.*") (citing *Prelim. Separate Rate Mem.*). At the time GTC could submit a request to be reviewed in the eighth review, i.e., September 2016, *see* 19 C.F.R. § 351.213(b)(2), Commerce had not decided that GTC was part of the PRC-wide entity; it did not do so until October 2017. *Prelim. Dec. Mem.* at 17.

The Department's regulations further provide that "an importer of the merchandise may request in writing that the Secretary conduct an administrative review of *only* an exporter or producer (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) of the subject merchandise imported *by that importer*." *Id.* § 351.213(b)(3) (emphasis added). Plaintiffs GTC North America and Valmont, as importers of merchandise produced and exported by Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd., respectively, were not authorized by this provision, when read according to plain meaning, to request a review of the China-wide entity. Commerce did not find as a fact that the merchandise imported by these importers was exported or produced by anyone other than GTC (and had made no relevant finding as of the time review could be requested), and the provision did not notify either of these importers, in the circumstances presented here, that it could seek to place an NME-wide entity under review.

As discussed above, this Court noted in *Thuan An II* that "as Commerce explains, its current practice is to review the NME entity only when it receives a request to do so, or when it chooses to self-initiate such a review." *Thuan An II*, 43 CIT __, 396 F. Supp. 3d at 1317. In the eighth review at issue here, Commerce relied upon the same practice, stating that "[i]t is Commerce's practice to review the China-wide entity only when requested." *Final I&D Mem.* at 22. In making this statement, Commerce cited a Federal Register notice, *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 Fed. Reg. 65,963 (Int'l Trade Admin Nov. 4, 2013) ("*Change in Practice*").

Change in Practice announced that Commerce no longer would consider the "NME entity to be 'conditionally' under review" in administrative reviews of antidumping duty orders involving NME countries. *Id.* at 65,964. The document states that "[i]f interested parties wish to request a review of the entity, such a request must be

Thus, as of the time Commerce published the Initiation Notice in November 2016, Commerce still had not decided the question of GTC's separate rate status as to the review to be initiated. *Initiation Notice*, 81 Fed. Reg. at 78,799–80. Commerce decided GTC was part of the PRC-wide entity in the previous (seventh) review, *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 18,733, 18,735 (Int'l Trade Admin. Apr. 21, 2017), but that decision was not determinative for the eighth review, for which Commerce indicated in the November 2016 Initiation Notice that Commerce would be making the decision anew and invited listed companies, including GTC, to apply for separate rate status. *See Initiation Notice*, 81 Fed. Reg. at 78,779–80.

made in accordance with the Department's regulations." *Id.* One difficulty here is that no such request by these plaintiffs could be made "in accordance with" the regulations. *Change in Practice* did not amend, and did not state it was amending, 19 C.F.R. § 351.213(b).[13] In presuming that such a request for a review of the NME entity could be "made in accordance with the Department's regulations," *id.*, *Change in Practice* is inconsistent with 19 C.F.R. § 351.213(b).

In its response brief, defendant points to *Change in Practice* but argues, without further elaboration, that "[u]nder Commerce's regulations, interested parties must request a review of an NME-wide entity prior to the initiation of an administrative review. *See* 19 C.F.R. § 351.213(b)." Def.'s Br. 12–13. Defendant's argument does not refute plaintiffs' argument that the regulations did not allow these plaintiffs to request a review of the PRC-wide entity.

While it could be argued that *Change in Practice* is valid as a relaxation of a regulatory requirement, even without undergoing ordinary rulemaking and notice and comment procedures, such an argument would not justify the Department's basing its decision to apply the existing PRC-wide rate to GTC on the fact that no request for review of the PRC-wide entity had been received. On the issue of whether the plaintiffs in this case were placed on adequate notice of their right to request a review of the PRC-wide entity, the regulations, not *Change in Practice*, must control where, as here, the two are in conflict. Plaintiffs, who were entitled to rely on the Department's regulation indicating to them that they had no right to request such a review, were adversely affected by the Department's refusal to review GTC. An agency must act consistently with its regulations where failure to do so would cause prejudice to an interested party. *See, e.g.*, *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010). Plaintiffs have demonstrated that Commerce acted inconsistently with its regulations and that, as a result, they incurred obvious prejudice from the loss of any opportunity for GTC to obtain a rate other than the carried-over PRC-wide rate. *See id.* Therefore, in the eighth review it was impermissible for Com-

[13] The Preliminary Results for the eighth review echoed *Change in Practice*:

> The Department's policy regarding conditional review of the PRC-wide entity applies to these reviews. Under this policy, the PRC-wide entity will not be under review unless a party specifically requests, or the Department self-initiates, a review of that entity. Because no party requested a review of the PRC-wide entity in the AR [administrative review] or NSR [new shipper review], the entity is not under review and the entity's rate (i.e., 105.31%) is not subject to change.

Preliminary Results, 82 Fed. Reg. at 46,966 (footnotes omitted). The Final Results indicated no change in these determinations. *See Final Results*, 83 Fed. Reg. at 16,830; *Final I&D Mem.* at 11.

merce to assign the PRC-wide rate to GTC on the proffered justification that parties (including these plaintiffs) had a right to submit a request for a review of the China-wide entity but failed to do so. *See Final I&D Mem.* at 22 (citing *Change in Practice*, 78 Fed. Reg. at 65,963).

F. The Court Will Not Address Plaintiffs' Remaining Claim at this Time

Plaintiffs claim that in assigning GTC the rate of 105.31%, Commerce unlawfully refused to make adjustments for subsidies found in the parallel administrative review of a countervailing duty order on OTR tires from China. GTC's Br. 53–55. The court considers it premature to address this claim at this time because the issue raised by this claim may be mooted by the remand redetermination the court is ordering. Plaintiffs will be in a position to raise this objection anew, if they consider it necessary, once that redetermination has been submitted and is before the court.

III. CONCLUSION AND ORDER

On remand, Commerce may choose to reconsider its decision on whether it considers GTC to have rebutted the Department's presumption of *de facto* government control. If upon reconsideration it decides to reverse its previous decision on that issue, then Commerce, having selected GTC as a mandatory respondent, must calculate an individual margin for GTC.

If Commerce decides not to reconsider its decision on *de facto* government control or once again decides that GTC has not rebutted its presumption, then it must decide the question of whether it is nonetheless required to review GTC. If Commerce decides that review of GTC is required in the particular circumstances of the eighth review of the Order, it must proceed on remand to determine an individual margin for GTC.

Should Commerce, on remand, consider taking the position that it is not required to review GTC, Commerce must be mindful that it is not permissible for it to rely on its earlier rationale that no party requested a review of the PRC-wide entity, a rationale inconsistent with the Department's own regulations. Defendant has not responded to plaintiffs' claims in a way that demonstrates that Commerce lawfully could refuse to review GTC in the particular circumstances of the eighth review, but because defendant has asked for a remand related to this issue, the court will reserve any decision on this issue until it is presented with the Department's position and its reasoning therefor.

In conclusion, upon consideration of the Final Results, defendant's motion and request for remand, all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that Commerce shall reconsider the Final Results as directed by this Opinion and Order and submit a new determination upon remand ("Remand Redetermination") that complies with this Opinion and Order; it is further

ORDERED that Commerce shall submit its Remand Redetermination within 90 days of the date of this Opinion and Order; it is further

ORDERED that any comments of plaintiffs on the Remand Redetermination must be filed with the court no later than 30 days after the filing of the Remand Redetermination; and it is further

ORDERED that any response of defendant to the aforementioned comments must be filed no later than 15 days from the date on which the last comment is filed.

Dated: August 14, 2020
New York, New York

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

Slip Op. 20–119

SPIRIT AEROSYSTEMS, INC., Plaintiff, v. UNITED STATES et al., Defendants.

Before: Claire R. Kelly, Judge
Court No. 20–00094

[Granting plaintiff's motion for leave to file an amended summons, granting defendants' motion to partially dismiss plaintiff's complaint, and granting defendants' motion for an extension of time to respond to plaintiff's complaint.]

Dated: August 17, 2020

William Randolph Rucker, Faegre Drinker Biddle & Reath LLP, of Chicago, IL, for plaintiff Spirit AeroSystems, Inc.

Ethan P. Davis, Acting Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendants. With him on the brief were *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge, and *Alexander Vanderweide*, Trial Attorney. Of counsel was *Mathias Rabinovitch*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court is Plaintiff Spirit AeroSystems, Inc.'s ("Spirit") motion for leave to file an amended summons, Defendants' partial motion to dismiss, and Defendants' motion for an extension of time to respond to Plaintiff's complaint *See* [Pl.'s] Mot. Leave File Am. Summons, Apr. 27, 2020, ECF No. 7 ("Pl.'s Mot."); Defs.' Partial Mot. Dismiss & Resp. Opp'n [Pl.'s Mot.], May. 18, 2020, ECF No. 8 ("Defs.' Partial Mot. Dismiss"); Defs.' Memo. Supp. [Defs.' Partial Mot. Dismiss], May 18, 2020, ECF No. 8 ("Defs.' Br."); Defs.' Mot. Resp. Pl.'s Compl., July 17, 2020, ECF No. 14 ("Defs.' Mot."). Spirit challenges the rejection of its drawback claim by U.S. Customs and Border Protection ("CBP"), following the timely administrative protest and denial of the protest. *See* Compl., Apr. 27, 2020, ECF No. 6. Plaintiff now requests leave to file an amended summons to assert jurisdiction under 28 U.S.C. § 1581(i) in addition to 28 U.S.C. § 1581(a). *See* Pl.'s Mot.; *see also* Pl.'s Memo. Opp'n [Defs.' Partial Mot. Dismiss] & Supp. [Pl.'s Mot.] at 8–9, 15, June 22, 2020, ECF No. 11 ("Pl.'s Resp. Br."). Defendants seek to partially dismiss Plaintiff's complaint with respect to the assertion of jurisdiction under 28 U.S.C. § 1581(i) and oppose Spirit's motion for leave to file an amended summons. *See* Defs.' Br. at 1, 4–10. In light of the contested jurisdictional basis for this action, Defendants request additional time to respond to the

complaint, *see* Defs.' Mot. at 1–2, which Spirit opposes. *See* [Pl.'s] Resp. [Defs.' Mot.], Aug. 6, 2020, ECF No. 16 ("Pl.'s Resp. Defs.' Mot."). For the reasons that follow, the court grants Spirit's motion for leave to file an amended summons, grants Defendants' motion to partially dismiss Spirit's complaint with respect to its assertion of jurisdiction under 28 U.S.C. § 1581(i) (2012),[1] and grants Defendants' motion for an extension of time to respond to the complaint.

BACKGROUND

On December 29, 2018, Spirit filed an unused merchandise drawback claim in CBP's Automatic Commercial Environment ("ACE") system based on the export of unused parts of civil aircraft, classifiable under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 8803.30.0030, "Parts of goods of heading 8801 or 8802: Other parts of airplanes or helicopters: For use in civil aircraft: Other." *See* Summons, Apr. 21, 2020, ECF No. 1; Compl. at ¶¶ 9–15. On January 29, 2020, the ACE drawback module rejected Spirit's claim. Compl. at ¶ 16. Spirit filed an administrative protest on February 13, 2020, which CBP denied on March 14, 2020. *See generally* Summons; *see also* Compl. at ¶ 49.

On April 21, 2020, Spirit initiated this action[2] by filing a summons, which asserts jurisdiction under 28 U.S.C. § 1581(a). *See generally* Summons. However, in its complaint filed on April 27, 2020, Spirit argues that this court has jurisdiction under both 28 U.S.C § 1581(a) and (i). *See* Compl. at ¶¶ 46, 51. That same day, Spirit moved for leave to file an amended summons to assert jurisdiction under subsection 1581(i) and attached a copy of the amended summons to the complaint. *See generally* Pl.'s Mot.

STANDARD OF REVIEW

The party seeking the Court's jurisdiction has the burden of establishing that jurisdiction exists. *See Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

DISCUSSION

I. Motion for Leave to File an Amended Summons

Spirit seeks to amend its summons, which it previously filed on USCIT Form 1 and only designates jurisdiction under 28 U.S.C. §

[1] Further citations to Title 28 of the United States Code are to the 2012 edition.

[2] Spirit challenges CBP's denial of its protest as well as CBP's administration and enforcement of the drawback statute. *See* Compl. at ¶¶ 47, 52–53.

1581 (a), and to file, as its amended summons, USCIT Form 4, which references the concurrently filed complaint that asserts jurisdiction under both 28 U.S.C. § 1581 (a) and (i). *See generally* Pl.'s Mot.[3] Invoking U.S. Court of International Trade ("USCIT") Rule 3(e), Spirit argues that the court should grant leave to file an amended summons and asserts that Defendants would suffer no material prejudice from allowing amendment. *See* Pl.'s Resp. Br. at 8–9. Defendants counter that because Spirit failed to file its initial summons and complaint concurrently, it cannot now amend its summons to include a claim based on 28 U.S.C. § 1581(i), even though it is concurrently filing a complaint with the amended summons. *See* Defs.' Br. at 5–10. For the reasons that follow, the court grants Spirit's motion for leave to file an amended summons.

USCIT Rule 3(e) provides that the court may allow a party to amend a summons "at any time on such terms as it deems just, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed." USCIT R. 3(e). An action under subsection (i) is commenced "by filing concurrently with the clerk of the court a summons and complaint[.]" 28 U.S.C. § 2632(a); *see also* USCIT R. 3(a)(3).

Here, Defendants do not allege material prejudice. *See generally* Defs.' Br.; Defs.' Reply [Pl.'s Resp. Br.], July 13, 2020, ECF No. 12 ("Defs.' Reply Br.").[4] Therefore, the court grants Plaintiff's request to

[3] Defendants are mistaken in asserting that the original and amended summons are identical. *See* Defs.' Br. at 2, 9. The United States Court of International Trade has several model summons forms for litigants to complete fillable, blank fields. Relevant here, Form 1 is used in actions commenced pursuant to 28 U.S.C. § 1581(a) and U.S. Court of International Trade ("USCIT") Rule 3(a)(1), and states, *inter alia*, that "a civil action has been commenced pursuant to 28 U.S.C. § 1581(a) to contest denial of the protest[.]" See USCIT Rules, Appendix of Forms, Form 1; *see also id.* at Specific Instructions – Form 1 ("This form summons is only to be used in those actions described in 28 U.S.C. § 1581(a).") Form 4, by contrast, is a general summons and refers to the complaint. *Id.*, Appendix of Forms, Form 4; *see also id.* at Specific Instructions – Form 4 ("This form of summons is to be used in all actions other than those actions in which the form of summons to be used is Form 1, 2, 03 3."). Here, Spirit filled out the U.S. Court of International Trade Form 1 summons as its original summons; its proposed amended summons includes a Form 4 summons that references the complaint. *See* Am. Summons at 3, Apr. 27, 2020, ECF No. 7–1.

[4] Defendants caution that allowing amendment, such that the amended summons is deemed filed on the same date as the complaint, would circumvent the concurrent filing requirement under 28 U.S.C. § 2632(a). *See* Defs.' Reply. Br. at 5. Yet, by filing an amended summons on the same day that it filed the complaint, Spirit is filing a concurrent summons and complaint. To the extent that circumvention could be an issue, it is not one under the facts of this case. Here, the statute of limitations for Spirit to file an action asserting jurisdiction under 28 U.S.C. § 1581(i) has not yet run, as its drawback claim was rejected on January 29, 2020. *See* Compl. at ¶ 16; *see also* 28 U.S.C. § 2636(i) (providing a two-year of statute of limitations period from the date the action first accrued for civil actions commenced under section 1581(i)). Spirit could have filed commenced an entirely new action by filing a second summons along with a complaint concurrently so to assert jurisdiction under subsection (i) and subsequently moved to consolidate the two cases. However, requiring it to do so would undermine judicial economy.

file an amended summons, because doing so would not materially prejudice Defendants' rights. However, even though the amended summons is deemed filed on the same date as the complaint, the court lacks jurisdiction under 28 U.S.C. § 1581(i) for the reasons explained below.

II. Motions to Partially Dismiss Spirit's Complaint and for an Extension of Time to Respond to the Complaint

Defendants move to partially dismiss Spirit's complaint pursuant to USCIT R. 12(b)(1) with respect to its assertion of jurisdiction under 28 U.S.C. § 1581(i). *See* Defs.' Br. at 4–10. Defendants contend that Spirit cannot invoke jurisdiction under subsection (i) because jurisdiction is available under subsection (a) and the remedy under that subsection is not manifestly inadequate. *See id.* at 4–5. In the alternative, Defendants allege that Spirit has failed to state a claim for which relief could be granted with respect to asserted jurisdiction under subsection (i) and requests dismissal pursuant to USCIT R. 12(b)(6). *Id.* at 1, 3, 8. Because jurisdiction is contested, Defendants request additional time to respond to Spirit's complaint until after the court issues its decision on the partial motion to dismiss. *See* Defs.' Mot. at 1–2.[5] Specifically. if the court grants the motion to dismiss and denies Spirit's motion for leave to amend the summons, Defendants request 30 days from the date of the court's decision on the motion to dismiss to respond to the complaint. *See* id. at 2. Spirit counters that the court has jurisdiction under subsection (i), because jurisdiction under subsection (a) would be manifestly inadequate. *See* Pl.'s Resp. Br. at 4–8. According to Spirit, filing its complaint concurrently with the amended summons satisfies the statutory requirement to commence a case under 28 U.S.C. § 2632(a) for jurisdiction to lay under subsection (i). *Id.* at 10–14. Spirit disagrees that it failed to state a claim for which relief can be granted. *Id.* at 14–15. Finally, Spirit opposes Defendants' request for additional time to respond to the complaint until after the court renders its decision on the motion to dismiss because, in Spirit's view, Defendants could file an answer to the complaint, irrespective of whether the court determines it has jurisdiction under subsection (i). *See* Pl.'s Resp. Defs.' Mot. at 2–3.[6] For the following reasons, because the court lacks jurisdiction under

[5] Defendants explain that, should the court exercise jurisdiction under 28 U.S.C.§ 1581(i), they would be required to file the administrative record concurrently with the filing of their response to the complaint. *See* Defs.' Mot. at 2. Therefore, to conserve resources, Defendants request additional time to respond to the complaint after the court resolves the pending motion to dismiss. *See id.*

[6] Spirit, however, does not oppose an extension of time for Defendants to respond the complaint that is "limited to a specific number of days" and requests any additional time be limited to an additional 30 days from the existing deadline to respond, rather than 30 days

subsection (i), the court grants Defendants' motion to partially dismiss Spirit's complaint and grants the motion for an extension of time to respond to the complaint.

Under section 313 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1313 (2016),[7] CBP will refund up to 99% of duties and fees paid on goods imported into the United States if, *inter alia*, an importer, like Spirit, exports substitute unused merchandise that is commercially interchangeable with the imported goods. 19 U.S.C. § 1313(j)(2), (l). An exporter of substitute unused merchandise may claim that refund, or "drawback," by satisfying the requirements prescribed by statute and regulation. *See generally id.*; 19 C.F.R. § 191.82. If a drawback claim is rejected, an exporter may file a protest, which, if denied, *see* 19 U.S.C. §§ 1514(a)(6), 1515, may be contested before this Court. 28 U.S.C. § 1581(a).

Section 1581 of Title 28 of the U.S. Code enumerates the Court's jurisdictional bases. 28 U.S.C. § 1581. Relevant here, subsection (a) grants the Court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930," *id.* at § 1581(a), which pertains to review of protests denied by CBP. *See* 19 U.S.C. § 1515. Subsection (i) is a "residual" grant of jurisdiction for review of, *inter alia*, the "administration and enforcement" of claims that can be challenged under 28 U.S.C. § 1581(a), *see* 28 U.S.C. § 1581(i)(4),[8] and claims when the remedy under another subsection of 1581 would be manifestly inadequate. *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002) (citations omitted).

Spirit's request for a declaratory judgment and for a writ of mandamus requiring CBP to update its ACE drawback module to allow for unused substitute merchandise drawback claims classifiable under HTSUS 8803.30.0030 lies in a challenge to CBP's denial of a protest. *See* Compl. at ¶¶ 47–50, Request for Relief, 80–86. Spirit concedes that it considers jurisdiction to exist under subsection (a). *See* Pl.'s Mot. at 1–2. Because jurisdiction is available under subsec-

from the issuance of the court's decision on the motion to dismiss. *See* Pl.'s Resp. Defs.' Mot. at 4. Noting that Defendants must file the administrative record concurrently with their response to the complaint, Spirit does not oppose an extension of time for Defendants to file the administrative record until 30 days after the court renders its decision on the motion to dismiss. See id. at 3–4.

[7] All further citations to the Tariff Act of 1930, as amended, are the relevant provisions of Title 19 of the U.S. Code, 2012 edition, except for citations to 19 U.S.C.§ 1313, which are to the 2016 version, as amended pursuant to Section 906 of the TFTEA, Pub. L. No. 114–125, 130 Stat. 122 (2015).

[8] Spirit also invokes jurisdiction under subsection (i)(2), which provides the Court with exclusive jurisdiction over actions challenging "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue[.]" *See* Pl.'s Resp. Br. at 4. Spirit does not elaborate further on this jurisdictional theory. *See generally id.*

tion (a), jurisdiction under subsection (i) is foreclosed. *See Sunpreme, Inc. v. United States*, 892 F.3d 1186, 1191–92 (Fed. Cir. 2018); *Int'l Customs Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006).[9]

Although Spirit contends that the remedy under 28 U.S.C.§ 1581(a) would be manifestly inadequate, the Court is empowered under 28 U.S.C. § 2643 to order "any other form of relief that is appropriate[,]" such as compelling agency action, in an action under subsection (a)—the exact relief Spirit seeks here.[10] *Compare* 28 U.S.C. § 2643(c) *with* Compl. at Request for Relief. Spirit argues CBP rejected Spirit's unused merchandise drawback claim due to an erroneous interpretation of the drawback statute embedded in the ACE drawback module programming. *See* Pl.'s Resp. Br. at 7; *see also* Compl. at ¶¶ 17–45, 63–69. Spirit's complaint alleges that the Trade Facilitation and Enforcement Act of 2015 ("TFTEA") amended the drawback statute, providing drawback can be claimed on unused substitute merchandise if classifiable under the same 8-digit HTSUS subheading as the imported goods. *See* Compl. at ¶¶ 5–8, 23–45 (citing Pub. L. No. 114–125, 130 Stat. 122 (2015); 19 U.S.C. § 1313(j)(5)). However, Spirit contends that if the 8-digit subheading begins with the term "other," drawback can be claimed under the same 10-digit subheading as the imported goods, except if the article description at the 10-digit subheading begins with the term "other." *Id.* at ¶¶ 6–8, 25–26 (citing 19 U.S.C. § 1313(j)). Spirit contends that CBP erroneously rejected Spirit's drawback claim for merchandise classifiable under the 10-digit subheading 8803.30.0030 "Parts of goods of heading 8801 or 8802: Other parts of airplanes or helicopters: For use in civil aircraft: Other" because the 10-digit subheading begins with "For use in civil

[9] This is not a case in which the court lacks jurisdiction; rather, for the reasons recounted above, jurisdiction under 28 U.S.C. § 1581(a) is the appropriate basis to review CBP's rejection of Spirit's drawback claim. *Cf. Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 736, 491 F. Supp. 2d 1273, 1279–80 (2007).

[10] Spirit alleges that because CBP "automatically" rejected its request, CBP did not make a decision that Spirit could protest. *See* Pl.'s Resp. Br. at 7. As support, Spirit cites Carnival Cruise Lines, Inc. v. United States, 18 CIT 1020, 866 F. Supp. 1437 (1994). *See* Pl.'s Resp. Br. at 6–7. However, that case is readily distinguishable and, as a decision of this Court, not binding. In *Carnival Cruise Lines*, the plaintiffs protested harbor maintenance fees and commenced an action before this Court before the protest was approved or denied, alleging that neither the statute nor regulations required a protest before seeking a refund of fees. *See id.*, 18 CIT at 1021, 866 F. Supp. at 1438–39. The court held that the protest remedy was not available for the plaintiffs to seek a refund of fees and, as a result, 19 U.S.C. § 1581(a) could not be the basis of jurisdiction; instead, only jurisdiction under subsection (i) was available. *See id.*, 18 CIT at 1024–25, 866 F. Supp. at 1441–42. Here, as Spirit acknowledges, the protest remedy was available by statute, and Spirit filed a protest, which was denied. *See* Pl.'s Resp. Br. at 6. Whether or not that rejection occurred "automatically," CBP issued a determination, and, by statute, CBP had discretion to approve or deny that protest. 19 U.S.C. § 1515(a).

aircraft" and not the term "other." *Id.* at ¶¶ 32–44, 54–79. As both parties acknowledge, the administration of the TFTEA and CBP's interpretation of the HTSUS subheading 8803.30.0030, which resulted in the rejection of Spirit's drawback claim, are at issue. *See* Pl.'s Resp. Br. at 5–7; *see also* Defs.' Reply Br. at 3. Should the court, in reviewing CBP's rejection of the drawback claim, agree that CBP's interpretation is incorrect, the court may direct CBP to modify the programming code to process Spirit's drawback claim. *See* 28 U.S.C. § 2643(c). Spirit, thus, has a remedy under subsection (a).

Because the court lacks jurisdiction under subsection (i), it does not reach Defendants' argument that the complaint with respect to the assertion of jurisdiction under subsection (i) should be dismissed for failure to state a claim for which relief can be granted. *See* Defs.' Br. at 8. In addition, given that the proposed amendment to the summons generated the motion to dismiss, it is reasonable to provide additional time for Defendants to respond to the complaint, as Spirit acknowledges, *see* Pl.'s Resp. Defs.' Mot. at 3, and, therefore, the court grants Defendants' motion for an extension of time.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Plaintiff's motion for leave to file an amended summons is granted; and it is further

ORDERED that Plaintiff's amended summons, *see* Pl.'s Mot. at Attach., is deemed filed as of April 27, 2020; and it is further

ORDERED that Defendants' partial motion to dismiss is granted with respect to Plaintiff's assertion of jurisdiction under 28 U.S.C. § 1581(i); and it is further

ORDERED that Defendants' motion for an extension of time to respond to Plaintiff's complaint is granted; and it is further

ORDERED that Defendants shall respond to Plaintiff's complaint on or before Wednesday, September 16, 2020.

Dated: August 17, 2020
New York, New York

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

Slip Op. 20–120

ASPECTS FURNITURE INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 18–00222

[Granting Plaintiff's motion for leave to file a first amended complaint. Denying as moot Defendant's motion for judgment on the pleadings and Plaintiff's cross-motion for partial judgment on the pleadings.]

Dated: August 17, 2020

Robert W. Snyder and *Laura A. Moya*, Law Offices of Robert W. Snyder, of Irvine, CA, for Plaintiff.

Marcella Powell, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, *Jeanne E. Davidson*, Director, and *Ethan P. Davis*, Acting Assistant Attorney General. Of counsel on the brief was *Paula Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION AND ORDER

Barnett, Judge:

In this action, Plaintiff Aspects Furniture International, Inc. ("Plaintiff" or "AFI") contests the denial of two protests[1] challenging U.S. Customs and Border Protection's ("CBP" or "Customs") allegedly untimely liquidation of ten entries associated with those protests. *See generally* Compl., ECF No. 2. The matter is before the court on Defendant's ("the Government") motion for judgment on the pleadings pursuant to U.S. Court of International Trade ("USCIT") Rule 12(c), Def.'s Mot. for J. on the Pleadings and accompanying Def.'s Mem. in Supp. of its Mot. for J. on the Pleadings ("Def.'s Mot. J."), ECF No. 35; AFI's cross-motion for partial judgment on the pleadings or, alternatively, for partial summary judgment, Pl.'s Cross-Mot. for Partial J. on the Pleadings or, in the alternative, for Partial Summ. J., and Resp. in Opp'n to Def.'s Mot. for J. on the Pleadings ("Pl.'s Cross-Mot. J."), ECF No. 43; and AFI's motion for leave to file a first amended complaint, Mot. for Leave to File First Am. Compl. ("Pl.'s Mot. Am. Compl."), ECF No. 58. For the reasons discussed herein, AFI's motion for leave to file a first amended complaint is granted. Accordingly, the Government's motion for judgment on the pleadings and AFI's cross-motion for partial judgment on the pleadings is de-

[1] AFI contests the denial of Protest No. 5201–18–100098, covering nine entries (hereinafter, "the nine subject entries"), and Protest No. 5201–18–100100, covering one entry (hereinafter, "the single subject entry"). Summons, ECF No. 1. All ten entries are collectively referred to as "the subject entries."

nied as moot. *See, e.g.*, *Pac. Bell Tele. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 456 n.4 (2009) ("Normally, an amended complaint supersedes the original complaint.").

BACKGROUND

The imported merchandise at issue in this case consists of wooden bedroom furniture from the People's Republic of China. Pl.'s Mot. Am. Compl., Ex.1 ("Proposed Am. Compl.") ¶ 7. AFI is the importer of record. *Id*. ¶ 3. On various dates in January, February, July, and December of 2014, AFI made ten entries of wooden bedroom furniture. *See* Summons (schedule of protests).

On April 11, 2016, the U.S. Department of Commerce ("Commerce") published the final results of its tenth administrative review of the antidumping duty order on wooden bedroom furniture from China. Proposed Am. Compl. ¶ 11 (citing *Wooden Bedroom Furniture From the People's Republic of China*, 81 Fed. Reg. 21,319 (Dep't Commerce Apr. 11, 2016) (final results and final determination of no shipments, in part; 2014 admin. review) ("*Final Results*")). Publication of the *Final Results* "lifted the statutory suspension of liquidation of the [s]ubject [e]ntries." *Id.* ¶ 12. Thereafter, CBP began liquidating subject entries "at the rate of 216.01 [percent]." *Id.* ¶ 13.[2]

On April 27, 2016, the court issued a statutory injunction to enjoin the liquidation of certain entries during a lawsuit filed to challenge the *Final Results*. Proposed Am. Compl. ¶¶ 14–15; *see also Am. Furniture Mfrs. Comm. for Legal Trade, et al. v. United States*, Court No. 16-cv-00070 (CIT Apr. 27, 2016) (hereinafter, "the *AFMC* litigation"). On February 28, 2017, the court held a hearing in connection with the *AFMC* litigation. Proposed Am. Compl. ¶ 17. On March 13, 2017, the court dismissed that lawsuit for lack of subject matter jurisdiction. *Id.* ¶ 18.

On March 29, 2017, CBP published the court's judgment in the *AFMC* litigation in its Customs Bulletin and Decisions Official Reporter. *Id.* ¶ 19. Thereafter, on May 30, 2017, Customs published Message No. 7150306 in its online antidumping and countervailing duty search portal, referred to as "ACE Services," which served to "inform[] CBP port officials that the suspension of liquidation of the [s]ubject [e]ntries had been lifted." *Id.* ¶ 20.

---

[2] Liquidation of subject entries is suspended by operation of law when Commerce publishes an affirmative preliminary determination in an antidumping investigation or an affirmative final determination following a negative preliminary determination. 19 U.S.C. §§ 1673b(d)(2)(A), 1673d(c)(1)(C). The suspension of liquidation remains in place until the timeframe for requesting a periodic review has expired, 19 C.F.R. § 351.212(c)(1), or Commerce issues the final results of any such review, *id.* § 351.212(b)(1).

On November 24, 2017, CBP liquidated the nine subject entries. *Id*. ¶ 21. On December 1, 2017, CBP liquidated the single subject entry. *Id.* ¶ 22. AFI timely protested the liquidations. *Id.* ¶ 23. CBP denied AFI's protests on May 10, 2018. *Id*. ¶¶ 24, 26.

On October 27, 2018, AFI timely commenced this action challenging the denial of its protests. *See* Summons. On June 21, 2019, the court denied the Government's partial motion to dismiss for lack of subject matter jurisdiction. *Aspects Furn. Int'l, Inc. v. United States* ("*AFI*"), 43 CIT ___, 392 F. Supp. 3d 1317 (2019). On July 19, 2019, the Government filed its Answer to Plaintiff's Complaint. Ans., ECF No. 28.

On July 26, 2019, the court entered a scheduling order, pursuant to which "[a]ny motions regarding the pleadings or other preliminary matters" were due by August 9, 2019. Scheduling Order (July 26, 2019) ("Scheduling Order"), ECF No. 31. On January 8, 2020, the Government filed its motion for judgment on the pleadings. Def.'s Mot. J. Shortly thereafter, the court granted the Government's motion to stay discovery. Order (Jan. 14, 2020) ("Stay Order"), ECF No. 40. On February 24, 2020, Plaintiff opposed the Government's motion and filed a cross-motion for partial judgment on the pleadings or, alternatively for partial summary judgment. Pl.'s Cross-Mot. J. Those motions have been fully briefed. *See* Def.'s Reply in Further Supp. of its Mot. for J. on the Pleadings and in Opp'n to Pl.'s Cross-Mot. for Partial J. on the Pleadings or, in the alternative, for Partial Summ. J., ECF No. 55; Pl.'s Reply in Further Supp. of its Cross-Mot. for Partial J. on the Pleadings or, in the alternative, for Partial Summ. J., ECF No. 56. On June 4, 2020, the court held a telephone conference with the parties in connection with the pending motions. *See* Docket Entry, ECF No. 59.

On June 10, 2020, AFI moved for leave to amend its complaint. Pl.'s Mot. Am. Compl. On July 8, 2020, the Government filed its opposition to AFI's motion. Def.'s Mem. in Opp'n to Pl.'s Mot. for Leave to File the First Am. Compl. ("Def.'s Opp'n Am. Compl."), ECF No. 63.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 514(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514(a) (2012),[3] and 28 U.S.C. § 1581(a) (2012).

[3] All references to the United States Code are to the 2012 edition, which was in effect at the time of importation, unless otherwise stated. All references to the Code of Federal Regulations are to the 2014 edition, which was in effect when the last entry at issue here occurred, unless otherwise stated. The 2013 and 2014 versions are the same in all relevant respects.

Pursuant to USCIT Rule 15(a), a plaintiff may amend its complaint more than 21 days after service of a responsive pleading "only with the opposing party's written consent or the court's leave." USCIT Rule 15(a)(2) (applicable to pleadings); *see also* USCIT Rule 7(a)(1) (a complaint is a pleading). Whether to grant leave to amend a complaint is committed to the court's discretion. *See, e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Fuwei Films (Shandong) Co. v. United States*, 35 CIT 1229, 1229, 791 F. Supp. 2d 1381, 1383 (2011). "The court should freely give leave when justice so requires." USCIT Rule 15(a)(2). Leave may be denied when the court finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman*, 371 U.S. at 182.

Once a scheduling order is established, a motion to amend a pleading is subject to any deadline established in that scheduling order. *See* USCIT Rule 16(b)(3)(A). USCIT Rule 16(b)(4), in conjunction with USCIT Rule 6(b)(1), permits a schedule to be modified for good cause with the court's consent. When a motion effectively seeks to extend a deadline that has already passed, it is properly treated as a motion for an extension of time, out of time, and USCIT Rule 6(b)(1)(B) also applies. *See United States v. Horizon Prods. Int'l, Inc.*, 38 CIT ___, ___, 34 F. Supp. 3d 1365, 1367 (2014). In addition to good cause, a motion filed out of time must show "excusable neglect or circumstances beyond the control of the party." USCIT Rule 6(b)(1)(B).

Good cause requires the moving party to show that the deadline for which an extension is sought cannot reasonably be met despite the movant's diligent efforts to comply with the schedule. *See High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1319 (Fed. Cir. 2013) (discussing "good cause" in the context of Federal Rule of Civil Procedure 16(b)); *Horizon Prods.*, 34 F. Supp. 3d at 1367.

The court assesses excusable neglect by considering: "(1) the danger of prejudice to the opposing party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." *Horizon Prods.*, 34 F. Supp. 3d at 1367 (citing *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 392, 395 (1993)). Furthermore, the court may consider "all relevant circumstances surrounding the party's omission." *Home Prods. Int'l, Inc. v. United States*, 31 CIT 1706, 1709, 521 F. Supp. 2d 1382, 1385 (2007) (quoting *Pioneer*, 507 U.S. at 395).

DISCUSSION

I. Legal Framework

When a statutory or court-ordered suspension of liquidation is lifted, Customs shall liquidate an entry "within 6 months after receiving notice of the removal from [Commerce], [an]other agency, or a court with jurisdiction over the entry," otherwise the entry will be deemed liquidated "at the rate of duty, value, quantity, and amount of duty asserted by the importer of record." 19 U.S.C. § 1504(d). Thus, for an entry to be deemed liquidated, "(1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *Cemex, S.A. v. United States*, 384 F.3d 1314, 1321 (Fed. Cir. 2004) (quoting *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)). The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has interpreted the statute to require notice that is unambiguous and public. *See id.*

An entry that liquidated by operation of law may, however, be voluntarily reliquidated by CBP pursuant to 19 U.S.C. § 1501 within the time period provided therein. The version of section 1501 that was in effect at the time of importation provided that

> [a] liquidation made in accordance with section 1500 [i.e., a manual liquidation] or 1504 [i.e., a deemed liquidation] . . . may be reliquidated in any respect by [Customs], notwithstanding the filing of a protest, within ninety days from the date on which notice of the original liquidation is given or transmitted to the importer, his consignee or agent. Notice of such reliquidation shall be given or transmitted in the manner prescribed with respect to original liquidations under section 1500(e) of this title.

19 U.S.C. § 1501;[4] *cf.* 19 C.F.R. § 173.3(a) (providing for voluntary reliquidation "[w]ithin 90 days from the date notice of deemed liquidation . . . is given to the importer").[5] Section 1500(e) directs Customs to "give or transmit, pursuant to an electronic data interchange sys-

[4] On February 24, 2016, Congress amended section 1501, *inter alia*, to provide for reliquidation "within ninety days from the date of the original liquidation." Trade Facilitation and Enforcement Act of 2015 ("TFEA"), Pub. L. No. 114–125, § 911, 130 Stat. 122, 240 (2016). Thus, under the current version of the statute, the 90-day clock begins to run on the date of the manual liquidation or the date on which an entry deemed liquidated, not the date on which notice of such liquidation was provided. *Compare* 19 U.S.C. § 1501 (2012), *with* 19 U.S.C. § 1501 (2018).

[5] Subsection (a) of Customs' regulation was amended in 2017 to provide for reliquidation by the "Center director" rather than the "port director," but otherwise remains unchanged from

tem, notice of such liquidation to the importer . . . in such form and manner as [CBP] shall by regulation prescribe." 19 U.S.C. § 1500(e).

Customs' regulation provides that "[n]otice of liquidation of formal entries will be made on a bulletin notice of liquidation, CBP Form 4333," 19 C.F.R. § 159.9(a), which "will be posted for the information of importers in a conspicuous place in the customhouse at the port of entry," *id.* § 159.9(b).[6]

II. Plaintiff's Original Complaint and Proposed First Amended Complaint

In its original complaint, AFI alleged that Customs untimely liquidated the subject entries and, moreover, those entries liquidated by operation of law on November 12, 2017, at the latest. Compl. ¶ 43. According to AFI, Customs received notice of the removal of suspension on or before May 12, 2017, which notice triggered the six-month timeframe within which Customs is to liquidate the entries to avoid a deemed liquidation. *Id.* ¶¶ 25–42. Specifically, AFI alleged that Customs received notice on the following dates: (1) April 11, 2016, when Commerce published the *Final Results* in the Federal Register, *id.* ¶ 29; (2) March 13, 2017, when the court issued its final judgment in the *AFMC* litigation, *id.* ¶¶ 30, 35–36; (3) March 29, 2017, when Customs published notice of the court's opinion in the Customs Bulletin and Decisions Official Reporter, *id.* ¶ 30; or (4) May 12, 2017, when the dismissal of the *AFMC* litigation became final and conclusive, *id.* ¶¶ 31, 41. AFI also alleged that, assuming the liquidation period ended on November 30, 2017, Customs nevertheless untimely liquidated the single subject entry on December 1, 2017. *Id.* ¶ 43.

AFI's proposed amended complaint differs from its original complaint in the following respects. First, AFI has separated its claims regarding the nine subject entries (count one) and the single subject entry (count two). Proposed Am. Compl. ¶¶ 28–33, 34–37. With respect to the nine subject entries, AFI alleges that "nothing in" Message No. 7150306, published by CBP on May 30, 2017, "indicated the source of the information contained therein or the date on which Customs received such notice of lifting of suspension of liquidation."

---

the version in effect when the entries were made. *See Regulatory Implementation of the Ctrs. of Excellence and Expertise*, 81 Fed. Reg. 92,978, 92,999 (CBP Dec. 20, 2016) (interim final rule; eff. Jan. 19, 2017).

[6] Although 19 U.S.C. § 1500(e) was amended in 1993 to provide for electronic notice of liquidation, *see* N. Am. Free Trade Agreement Implementation Act, Pub. L. No. 103182, § 638, 107 Stat. 2057(1993), it was not until 2017 that Customs made corresponding amendments to 19 C.F.R. § 159.9. *See generally Electronic Notice of Liquidation*, 81 Fed. Reg. 89,375 (CBP Dec. 12, 2016) (final rule; eff. Jan. 14, 2017).

Id. ¶ 32. AFI alleges further that, "to the extent Customs received notice [of the lifting of suspension of liquidation] pursuant to 19 U.S.C. § 1504(d) prior to May 24, 2017, CBP's liquidation of the [nine subject entries] was untimely." *Id.* ¶ 31; *see also id.* ¶ 33. With respect to the single subject entry, AFI alleges that Customs' liquidation of the entry on December 1, 2017 was untimely "because it was done more than six (6) months after receiving the purported notice on May 30, 2017." *Id.* ¶ 35. According to AFI, therefore, the subject entries "deemed liquidated 'at the rate of duty, value, quantity, and amount of duty asserted by the importer of record.'" *Id.* ¶¶ 33, 37 (quoting 19 U.S.C. § 1504(d)).

Second, AFI no longer alleges that Customs received notice of the lifting of suspension of liquidation on April 11, 2016, March 13, 2017, March 29, 2017, or on May 12, 2017 solely by virtue of the finality of the judgment issued in the *AFMC* litigation. *Compare* Compl. ¶¶ 25–42, *with* Proposed Am. Compl. ¶¶ 28–37.

III. Parties' Contentions

AFI contends that the interests of justice would be served by granting its motion to amend and that the amendments would not prejudice the Government. Pl.'s Mot. Am. at 3–4. In that regard, AFI explains that the amendments are responsive to a recent Memorandum and Order issued by the court in a related case. *Id.* at 3 (citing *IMSS, LLC v. United States*, Court No. 19-cv-00029 (CIT Apr. 13, 2020), ECF No. 36 ("*IMSS* Mem.")).[7] AFI also states that the amendments further narrow the issues in this case to (1) whether Message No. 7150306 constituted the requisite notice pursuant to 19 U.S.C. § 1504(d), or (2) whether Customs received such notice on an earlier date. *Id.* According to AFI, the amendments will not prejudice the Government or cause undue delay because discovery had been stayed and the "amended claims do not greatly depart from the general allegations in Plaintiff's original complaint." *Id.* at 4. AFI further contends that the court should find that any delay in seeking leave to amend "was due to excusable neglect." *Id.* at 5. AFI avers that it has "actively and diligently pursued this litigation" and "inadvertent[ly]" failed to file this motion "at an earlier stage in the litigation." *Id.*

The Government contends that AFI has not shown excusable neglect for failing to seek leave to amend sooner, Def.'s Opp'n Am. Compl. at 8, and, thus, the court need not consider the requirements

[7] *IMSS* concerns a single entry that was likewise subject to the tenth administrative review of the antidumping duty order on wooden bedroom furniture from China. *IMSS* Mem. at 2. At issue in that case is the timeliness of Customs' reliquidation of an entry that the plaintiff and defendant agree liquidated by operation of law. *Id.* at 7.

of USCIT Rule 15(a)(2), *id.* at 10. With respect to excusable neglect, the Government argues that AFI has failed to address the relevant criteria. *Id.* at 8–10. The Government further contends that AFI's claim that Customs may have received notice of the lifting of suspension before May 24, 2017 is speculative, lacking any connection to Message No. 7150306, and would permit AFI "to embark on a 'fishing expedition' in an effort to discover information that is non-public and unrelated to the public [Message No. 7150306]." *Id.* at 9. The Government suggests it would be prejudiced by the expenditure of resources necessary to address AFI's "purposeless discovery," *id.*, and the need for another responsive pleading and dispositive motion, *id.* at 11.

The Government also contends that AFI's amendment would be futile because the proposed claims would not survive a motion to dismiss for failure to state a claim pursuant to USCIT Rule 12(b)(6). *Id.* at 10–17. The Government advances three arguments in that regard: (1) AFI has failed to allege facts regarding the public and unambiguous notice necessary for a deemed liquidation to occur, *id.* at 12–14; (2) any non-public notice received before May 30, 2017 cannot, as a matter of law, trigger the six-month deemed liquidation period, *id.* at 14–16; and (3) any entries that liquidated by operation of law were timely reliquidated by Customs within 90 days of the date of deemed liquidation, *id.* at 16–17 (citing 19 U.S.C. § 1501 (2018)).

IV. Analysis

The court first addresses whether AFI has made the requisite showings of good cause and excusable neglect pursuant to USCIT Rules 6(b)(1)(B) and 16(b)(4) before turning to the requirements of USCIT Rule 15(a)(2).[8]

Diligence is the "primary consideration" under the general good cause standard applicable to USCIT Rules 6(b) and 16(b)). *Horizon Prods.*, 34 F. Supp. 3d at 1367. When the amendment "'rests on information that the party knew, or should have known' before the

[8] At least one court has recognized the "tension" that exists between the permissive Federal Rule of Civil Procedure 15(a)(2) standard applicable to a motion for leave to amend a complaint and the need to demonstrate good cause and excusable neglect before the court will consider the merits of such a motion. *Adams v. City of Indianapolis*, 742 F.3d 720, 733–34 (7th Cir. 2014); *see also United States v. Univar USA, Inc.*, 40 CIT ___, ___, 195 F. Supp. 3d 1312, 1317 (2016) (noting that the court may refer to cases interpreting the analogous Federal Rule of Civil Procedure for guidance). There, as here, the parties had agreed to a scheduling order that contained a deadline relevant to motions to amend the pleadings. *See id.* at 726; Scheduling Order. Accordingly, the court will consider whether AFI has met the requirements of good cause and excusable neglect before considering the requirements of USCIT Rule 15(a)(2). *Adams*, 742 F.3d at 734; *Rienzi*, 180 F. Supp. 3d at 1351–52.

deadline," good cause may not be found. *Rienzi and Son, Inc. v. United States*, 40 CIT ___, ___. 180 F. Supp. 3d 1349, 1353 (2016) (quoting *Perfect Pearl Co., Inc. v. Majestic Pearl & Stone, Inc.*, 889 F. Supp. 2d 453, 457 (S.D.N.Y. 2003)).

Since the inception of this case, AFI has sought to challenge Customs' allegedly untimely liquidations of the subject entries. *See* Compl. ¶ 43. AFI initially alleged several theories regarding the way in which CBP received public and unambiguous notice of the lifting of suspension of liquidation following the conclusion of the *AFMC* litigation sufficient to trigger the six-month deemed liquidation period. *See id.* ¶¶ 25–42. In *IMSS*, however, the court held that those events could not, as a matter of law, constitute adequate notice pursuant to 19 U.S.C. § 1504(d). *See IMSS* Mem. at 5 n.3, 7. The court's holding in *IMSS*, in conjunction with briefing on the cross-motions for judgment on the pleadings filed in this case, *see, e.g.*, Def.'s Mot. J. at 10–12 (arguing that AFI's claims of deemed liquidation must fail), revealed the deficiencies in AFI's allegations. While, to some extent, AFI's proposed amendments rest on a new factual allegation regarding Customs' potential receipt of notice of the lifting of suspension of liquidation before May 24, 2017, Proposed Am. Compl. ¶ 31, that allegation is the product of AFI's altered legal theory following the court's ruling in *IMSS* regarding the sufficiency of notice for purposes of 19 U.S.C. § 1504(d), *see* Pl.'s Mot. Am. at 3. Thus, this case is distinguishable from others where the court has found that the plaintiff was not diligent in raising factual allegations, the relevance of which the plaintiff had long been aware. *Cf. Rienzi*, 180 F. Supp. 3d at 1353 (denying leave to amend when the plaintiff sought to revise "its description of the imported merchandise at issue, the details of which" had been available to the plaintiff for "more than a decade"); *Perfect Pearl*, 899 F. Supp. 2d at 458–59 (denying leave to amend to add facts the plaintiff had been aware of for one year).

To the extent that "diligence" also requires timely action, AFI filed its motion less than 60 days after the court issued the referenced ruling in *IMSS* and about one week after a telephone conference concerning the pending cross-motions for judgment on the pleadings. *See supra* pp. 5, 11. While AFI likely could have filed its motion sooner, there is no indication that AFI sought to delay the case. Accordingly, good cause exists to permit AFI the opportunity to replead its claims.[9]

[9] In its ruling on the Government's partial motion to dismiss for lack of subject matter jurisdiction, the court discussed "the concept of 'informed compliance,'" which concept was introduced as part of the Customs Modernization Act of 1993 ("the Mod Act"). *AFI*, 392 F. Supp. 3d at 1324 & n.11 (explaining that "[t]he Mod Act was enacted as Title VI to the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057

Examining whether excusable neglect has been demonstrated pursuant to Rule 6(b)(1)(B) requires the court to consider such factors as prejudice to the Government, the length and reason for the delay, and whether AFI acted in good faith. *Horizon Prods.*, 34 F. Supp. 3d at 1367 (citation omitted). For the following reasons, the court finds that AFI has made this showing.

The court first finds that AFI's amendments would not unduly prejudice the Government. The Government argues that Customs' Message No. 7150306 "is the only public notice of the removal of suspension of liquidation" and AFI's claim that Customs may have received earlier notice is speculative and unrelated to that message. Def.'s Opp'n Am. Compl. at 9. In *IMSS*, the court rejected the Government's argument that the date of publication *necessarily* controls the inquiry, explaining in the context of analogous facts:

> While the Federal Circuit has referred to a publication requirement, *see, e.g.*, *Cemex*, 384 F.3d at 1321 & n.5, it has done so in the context of cases evincing Commerce's publication in the *Federal Register* of a "*Timken* notice" or the amended final results of an administrative review, *see Fujitsu Gen. Am.*, 283 F.3d at 1369, 1380; *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1270, 1275–76 (Fed. Cir. 2002) (selecting the date of *Federal Register* publication because it would not afford "the government the ability to postpone indefinitely the removal of suspension of liquidation (and thus the date by which liquidation must be completed) as would be the case if the six-month liquidation period did not begin to run until Commerce sent a message to Customs advising of the removal of suspension of liquidation"). There is no such *Federal Register* notice implicated in the court's

(1993)"). Informed compliance "represents the idea 'that importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that [CBP] will not unilaterally change the rules without providing importers proper notice and an opportunity for comment.'" *Id.* at 1324 (quoting S. Rep. No. 103–189 at 63–64 (1993)). The legislative history of the Mod Act indicates that the concept of informed compliance also relates to the notion of "'shared responsibility' between Customs and the trade community." *Id.* at 1324 n.12 (quoting *Precision Specialty Metals, Inc. v. United States*, 25 CIT 1375, 1388, 182 F. Supp. 2d 1314, 1328 (2001)); *see also Customs Modernization and Informed Compliance Act: Hearing on H.R. 3935 Before the Subcomm. on Trade of the H. Comm. on Ways and Means,* 102d Cong. 91 (1992) (statement of Commissioner Carol Hallett, United States Customs Service). "Shared responsibility means that 'Customs must do a better job of informing the trade community of how Customs does business; and the trade community must do a better job to assure compliance with U.S. trade rules.'" *AFI*, 392 F. Supp. 3d at 1324 n.12 (quoting *Precision Specialty Metals*, 25 CIT at 1388, 182 F. Supp. 2d at 1328). It appears to the court that a more efficient and expeditious resolution of this case may be achieved if both Parties devote greater attention to the principles of informed compliance and shared responsibility; in particular, with respect to the sharing of information about the manner in which Customs receives liquidation instructions from Commerce and the incorporation of that information into an assessment of the viability of certain claims.

> disposition of this case. Thus, at a minimum, *to the extent discovery reveals that Customs received unambiguous notice of the lifting of suspension of liquidation on a date other than May 30, 2017, the court will need to determine when the six-month period for deemed liquidation began to run*. *Cf. Am. Int'l Chem., Inc. v. United States*, 29 CIT 735, 748, 387 F. Supp. 2d 1258, 1269 (2005) (the six-month period began on date Customs received notice even though it was published the following day).

IMSS Mem. at 8–9 (emphasis added) (footnote omitted). So too here, the court is unable to conclude, as a matter of law, that the date on which Customs published Message No. 7150306 triggered the six-month deemed liquidation period.

Moreover, the possibility that Customs received *non-public* notice of the lifting of suspension of liquidation before publishing Message No. 7150306 is precisely why AFI was unable to allege the date of receipt with greater specificity. Discerning those facts through discovery would not necessarily lead to a "fishing expedition," Def.'s Opp'n Am. Compl. at 9, and there are procedural remedies available to the Government in the event any discovery request is overly broad, *see* USCIT Rule 26(b)(2)(C) (permitting the court to limit the extent of proposed discovery if it "is outside the scope permitted by Rule 26(b)(1)"); USCIT Rule 26(b)(1) (providing for the discovery of information "relevant to any party's claim or defense"); Fed. R. Civ. P. 26(b) adv. comm. note to 1983 am. (noting the court's authority to limit discovery "directed to matters that are otherwise proper subjects of inquiry" when it is "redundant or disproportionate"). The court's stay of discovery during the pendency of the cross-motions for judgment on the pleadings further minimizes any prejudice to the Government. *See* Stay Order.

With respect to the reason for and extent of the delay, as discussed above in the context of good cause, AFI's motion was prompted by the court's ruling in *IMSS* and developments in this case. *See supra* pp. 13–14. Moreover, AFI filed its motion reasonably soon thereafter so as not to delay the proceeding. Given the minimal prejudice to the Government, the length of the delay does not merit denial of AFI's motion. *See Rockwell Automation, Inc. v. United States*, 38 CIT ___, ___, 7 F. Supp. 3d 1278, 1292 (2014) (stating that the length of the delay is "typically accord[ed] relatively little weight, because (for a variety of reasons) the length of the delay in most cases is minimal, both in absolute and relative terms"). Thus, based on the foregoing, the court finds that AFI has demonstrated excusable neglect for its untimely motion.

Turning to the requirements of USCIT Rule 15(a)(2), leave to amend should be granted unless the court finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman*, 371 U.S. at 182. For the reasons already discussed, the court does not find that undue delay, bad faith, dilatory motive, or undue prejudice to the Government merit denial of AFI's motion. *See supra* pp. 13–17. Additionally, because this is AFI's first motion for leave to amend its complaint, AFI "should be offered at least one opportunity to replead in order to correct the defects in the original complaint" unless the proposed amendments would be futile. *Wallace v. Conroy*, 945 F. Supp. 628, 639 (S.D.N.Y. 1996) (citing, *inter alia*, *Foman*, 371 U.S. at 182). As discussed below, the Government's arguments regarding futility of amendment are not persuasive.

With respect to the nine subject entries, the Government first argues that AFI has "fail[ed] to allege any date or event to qualify for the removal of suspension of liquidation" and has failed to allege any form of public notice. Def.'s Opp'n Am. Compl. at 13. Thus, according to the Government, AFI has not alleged facts demonstrating that the nine subject entries liquidated by operation of law. *Id.* at 14. The Government's argument lacks merit.

For a deemed liquidation to occur, the statute requires, *inter alia*, Customs to receive notice of the removal of suspension from Commerce, another agency, or a court of competent jurisdiction. 19 U.S.C. § 1504(d). According to the Federal Circuit, that notice must be both unambiguous and public. *Cemex*, 384 F.3d at 1321.

However, as discussed, this case does not involve a public communication from Commerce to Customs, for example, in the form of a Federal Register notice. *See supra* pp. 15–16. The Government does not dispute AFI's allegations that Customs rendered Message No. 7150306 publicly accessible, Proposed Am. Compl. ¶ 20, or that the contents of Message No. 7150306 do not reveal the source of the contents or the date on which Customs received the information that formed the basis for liquidation, *id.* ¶ 32. Instead, the Government points to a declaration it submitted in connection with its motion for judgment on the pleadings that purports to demonstrate that Commerce issued the liquidation instructions constituting Message No. 7150306 to CBP on May 30, 2017. Def.'s Opp'n Am. Compl. at 13 (citing Decl. of Bradley Dauble, ECF No. 55–1).

Typically, "a motion to amend is adjudicated without resort to any

outside evidence," *DiPace v. Goord*, 308 F. Supp. 2d 274, 278 (S.D.N.Y. 2004), because the test of futility is whether "the proposed new claim cannot withstand a 12(b)(6) motion to dismiss for failure to state a claim," *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2nd Cir. 2001). While the court may consider extrinsic evidence when the parties have conducted discovery and the motion to amend is filed in response to a motion for summary judgment, *see id.*, that is not the case here. It would therefore be inappropriate for the court to consider outside evidence. *See Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420–21 (6th Cir. 2000) (district court abused its discretion in denying leave to amend prior to briefing on summary judgment motions even though evidence subsequently indicated the claim would be futile). Thus, the court finds that AFI's claim that the nine subject entries liquidated by operation of law prior to CBP's manual liquidation if Customs received notice before May 24, 2017 states a sufficient claim for relief. Proposed Am. Compl. ¶¶ 31, 33.[10]

The Government next argues that, assuming AFI's allegations are true and CBP received non-public notice of the lifting of suspension of liquidation, "as a matter of law, notice that is never made available to the public cannot trigger the" six-month deemed liquidation period. Def.'s Opp'n Am. Compl. at 14. The Government relies on *Cemex*, 384 F.3d at 1320–21, 1325 n.5, and *FYH Bearing Units USA, Inc. v. United States*, 35 CIT 77, 81–82 & n.6, 753 F. Supp. 2d 1348, 1353 & n.6 (2011), but those cases do not support the Government's arguments here. *See id.* at 14–16.

In *Cemex*, the court held that a non-public email from Commerce to Customs announcing the lifting of suspension of liquidation that CBP posted on a non-public bulletin board failed to trigger the six-month deemed liquidation period. 384 F.3d at 1321.[11] The court did not address whether a non-public communication that is subsequently made public—or forms the basis of a public notification—could commence the deemed liquidation period.

In *FYH Bearing*, the court concluded that a Federal Register notice publishing Commerce's amended final results of an administrative review—and not an earlier non-public email from Commerce to Customs regarding forthcoming liquidation instructions—triggered the six-month deemed liquidation period because there was no indication that the email was ever made public. 35 CIT at 80, 82, 753 F. Supp.

[10] The court's conclusion is without prejudice to further briefing on the operative date of notice if discovery reveals that Customs received non-public notice before the notice was made public.

[11] The *Cemex* court also concluded that the email was not unambiguous because Commerce sent the email before the suspension of liquidation had actually lifted. 384 F.3d at 1321.

2d at 1351–52, 1354. As with *Cemex*, *FYH Bearing* does not foreclose the possibility that a non-public communication that is subsequently made public, in whole or in part, constitutes adequate notice pursuant to 19 U.S.C. § 1504(d). Accordingly, the Government fails to persuade the court that AFI's allegations fall short to the extent they allege CBP's receipt of non-public notice prior to CBP's publication of Message No. 7150306.

The Government's final argument for futility implicates Customs' ability to reliquidate entries that liquidated by operation of law pursuant to 19 U.S.C. § 1501. Def.'s Opp'n Am. Compl. at 16–17. According to the Government, if the subject entries liquidated by operation of law, Customs properly reliquidated the nine subject entries on November 24, 2017 and the single subject entry on December 1, 2017 because those reliquidations occurred within 90 days from the date on which the entries deemed liquidated. *Id.* In so doing, however, the Government relies on the post-TFEA version of Section 1501, which differs from the version in effect when the entries were made. *See id.* at 17; *supra* p. 8 and accompanying note 4. This court previously held that the amendments to Section 1501 are not retroactive, *United States v. Great Am. Ins. Co. of New York*, 41 CIT ___, ___, 229 F. Supp. 3d 1306, 1323–26 (2017); *cf. Perfectus Aluminum, Inc. v. United States*, 43 CIT ___, ___ 391 F. Supp. 3d 1341, 1358 & n.18 (2019) (applying the pre-TFEA version of Section 1501 to conclude that Customs is time-barred from reliquidating entries that were made from 2011 through 2015), and the Government does not address that authority, *see* Def.'s Opp'n Am. Compl. at 17. Thus, the Government has failed to persuade the court that AFI's claim is futile based on Customs' authority to voluntarily reliquidate AFI's entries.[12] Accordingly, AFI's motion for leave to file a first amended complaint will be granted.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby:

ORDERED that Plaintiff's motion for leave to file a first amended complaint (ECF No. 58) is granted; and it is further

ORDERED that Defendant's motion for judgment on the pleadings (ECF No. 35) and Plaintiff's cross-motion for partial judgment on the pleadings or, alternatively, for partial summary judgment (ECF No. 43) are denied as moot.

The court will contact the parties to discuss further proceedings in this case.

[12] The Government is not precluded from raising Customs' authority to reliquidate pursuant to 19 U.S.C. § 1501 as a defense to AFI's claims. However, should the Government choose to do so, it must address this authority.

Dated: August 17, 2020
New York, New York

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

Slip Op. 20–121

FABUWOOD CABINETRY CORP., Plaintiff, and CUBITAC CABINETRY CORP., AND CNC ASSOCIATES N.Y., INC., Consolidated Plaintiffs, and IKEA SUPPLY AG, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and COALITION FOR FAIR TRADE IN HARDWOOD PLYWOOD AND MASTERBRAND CABINETS INC., Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Consol. Court No. 18–00208

[The court remands the Final Scope Ruling to Commerce.]

Dated: August 19, 2020

Matthew R. Nicely, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, DC, argued for plaintiff, *Fabuwood Cabinetry Corp*. With him on the brief were *Julia K. Eppard*; and *Dean A. Pinkert* of Hughes Hubbard & Reed LLP, of Washington, DC.

Richard W. Grohmann, Smith & Associates, of New York, NY, for consolidated plaintiff, *Cubitac Cabinetry Corp.*

Andrew T. Schutz, Grunsfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for consolidated plaintiff, *CNC Associates of N.Y., Inc*. With him on the brief was *Kavita Mohan*.

Kristen Smith, Sadler, Travis & Rosenberg, P.A., of Washington, DC and New York, argued for plaintiff-intervenor, *IKEA Supply AG.* With her on the brief were *Sarah E. Yuskaitis* and *Arthur K. Purcell*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director and *Tara K. Hogan*, Assistant Director. Of counsel was *Rachel Bogdan*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenors, *Coalition for Fair Trade in Hardwood Plywood* and *Masterbrand Cabinets, Inc*. With him on the brief were *Stephanie M. Bell*, *Tessa V. Capleto*, and *Elizabeth S. Lee*.

OPINION

Katzmann, Judge:

Did the decision by the United States Department of Commerce ("Commerce") to accept a scope ruling request to clarify the orders issued after an antidumping ("AD") and countervailing duty ("CVD") investigation comport with appropriate procedures? Can the scope determinations made by Commerce be sustained? These are the central questions in this case, arising from a dispute over a scope ruling regarding AD and CVD orders imposing duties on certain hardwood plywood products from China. Coalition for Fair Trade in Hardwood Plywood ("Coalition"), a petitioner for the orders, and Masterbrand Cabinets Inc. ("Masterbrand"), a domestic cabinets manufacturer, (collectively, "Petitioner-Masterbrand") requested the scope ruling to

confirm a proposed description of certain in-scope products, and Commerce affirmed the scope ruling request. Fabuwood Cabinetry Corp. ("Fabuwood"), CNC Associates N.Y., Inc. ("CNC"), Cubitac Cabinetry Corp ("Cubitac"), and IKEA Supply AG ("IKEA") (collectively, the "Plaintiffs") brought this action against the United States (the "Government") to challenge Commerce's scope ruling for what they allege were procedural defects and wrongful interpretation of the scope of the original AD and CVD orders. As discussed below, the court grants the Plaintiffs' motion for judgment on the agency record, in part, and holds that Commerce's acceptance of Petitioner-Masterbrand's scope ruling request is unsupported by substantial evidence and not in accordance with law. The court remands to Commerce for further explanation or reconsideration consistent with this opinion.

BACKGROUND

I. Legal and Regulatory Framework

To empower Commerce to offset economic distortions caused by countervailable subsidies and dumping, Congress enacted the Tariff Act of 1930. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012); *ATC Tires Private Ltd. v. United States*, 42 CIT __, __, 322 F. Supp. 3d 1365, 1366 (2018). Under the Tariff Act's framework, Commerce may—either upon petition by a domestic producer or of its own initiative—begin an investigation into potential countervailable subsidies and, if appropriate, issue orders imposing duties on the subject merchandise. 19 U.S.C. §§ 1671, 1673; *Sioux Honey*, 672 F.3d at 1046; *ATC Tires*, 322 F. Supp. 3d at 1366–67.

"When participants in a domestic industry believe that competing foreign goods are being sold in the United States at less than their fair value, they may petition Commerce to impose antidumping duties on importers." *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1297–98 (Fed Cir. 2013) (citing 19 U.S.C. § 1673a(b)). If Commerce determines that "the subject merchandise is being, or is likely to be sold in the United States at less than its fair value," and the U.S. International Trade Commission ("ITC") determines that a domestic industry is injured as a result, Commerce issues an AD duty order. *See* 19 U.S.C. § 1673d(a), (b). Similarly, if Commerce determines that the government of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, sold, or likely to be sold for import, into the United States, and the ITC determines that an industry in the United States is materially injured or threatened with material injury thereby, then Commerce shall impose a CVD order upon such merchandise equal to the

amount of the net countervailable subsidy. *See* 19 U.S.C. § 1671(a).

Once Commerce issues an order, interested parties may apply for a scope ruling to clarify the scope of the order as it relates to their particular product. 19 C.F.R. § 351.225(c). Commerce may also choose to self-initiate a scope inquiry. *Id.* § 351.225(b). Pursuant to 19 C.F.R. § 351.225(a), when "[i]ssues arise as to whether a particular product is included within the scope of an antidumping or countervailing duty order," Commerce may issue "scope rulings that clarify the scope of an order or suspected investigation with respect to particular products" (internal quotations omitted). Issues as to the scope of an order can arise "because the descriptions of subject merchandise contained in [Commerce's] determinations must be written in general terms," or "a domestic interested party may allege that changes to an importer product or the place where the imported product is assembled constitutes circumvention . . ." 19 C.F.R. § 351.225(a).

An interested party applying for a scope ruling must submit an application "contain[ing] the following, to the extent reasonably available to the interested party:"

> (i) A detailed description of the product, including its technical characteristics and uses, and its current U.S. Tariff Classification number;
>
> (ii) A statement of the interested party's position as to whether the product is within the scope of an order or a suspended investigation, including:
>
> (A) A summary of the reasons for this conclusion,
>
> (B) Citations to any applicable statutory authority, and
>
> (C) Any factual information supporting this position, including excerpts from portions of the Secretary's or the Commission's investigation, and relevant prior scope rulings.

Id. § 351.225(c).

In determining the scope of an order, Commerce will consider:

> (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.
>
> (2) When the above criteria are not dispositive, the Secretary will further consider:
>
> (i) The physical characteristics of the product;
>
> (ii) The expectations of the ultimate purchasers;

(iii) The ultimate use of the product;

(iv) The channels of trade in which the product is sold; and

(v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k). "[T]he plain language of an antidumping order is 'paramount' in determining whether particular products are included within its scope" and, "[i]n reviewing the plain language of a duty order, Commerce must consider the [§ 351.225(k)(1) factors]." *Meridian Prod. v. United States*, 890 F.3d 1272, 1277 (Fed. Cir. 2018) ("*Meridian II*") (internal quotation omitted). Commerce may issue a scope ruling without first initiating a scope inquiry if it can do so "based solely upon a party's application for a scope ruling and the descriptions of the subject merchandise referred to in § 351.225(k)(1)." *United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 799 (Fed. Cir. 2020). If not, Commerce will initiate a scope inquiry—"a broader inquiry as to whether a product is included within the scope of an antidumping duty order"—to further consider the factors listed in § 351.225(k)(2). *Id.*; *see also Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015); *Sango Int'l, L.P. v. United States*, 484 F.3d 1371, 1376–77 (Fed. Cir. 2007).

In issuing a scope ruling, Commerce "enjoys substantial freedom to interpret and clarify its . . . orders. But while it may interpret those orders, it may not change them." *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995), *as corrected on reh'g* (Sept. 1, 1995); *see also Eckstrom Indus. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) ("Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.") (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998)).

II. Procedural and Factual History

On December 16, 2016, Commerce initiated AD and CVD investigations into hardwood plywood. *Certain Hardwood Plywood From the People's Republic of China: Initiation of Less Than-Fair-Value Investigation*, 81 Fed. Reg. 91,125 (Dep't Commerce Dec. 16, 2016); *Certain Hardwood Plywood From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 81 Fed. Reg. 91,131 (Dep't Commerce Dec. 16, 2016). Coalition filed petitions for both orders. *Id.* On November 16, 2017, Commerce issued its final affirmative determi-

nations, concluding that imports of certain hardwood plywood from China were subsidized and being, or likely to be, sold in the United States at less than fair value. *Countervailing Duty Investigation of Certain Hardwood Plywood Products From the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 Fed. Reg. 53,473 (Dep't Commerce Nov. 16, 2017); *Certain Hardwood Plywood Products From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 Fed. Reg. 53,460 (Dep't Commerce Nov. 16, 2017); *Certain Hardwood Plywood Products From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (correcting ministerial errors). In December 2017, the ITC found that U.S. industry is materially injured by reason of these subject imports. Hardwood Plywood from China, Inv. Nos. 701-TA-565 and 731-TA-1341 (Final), USITC Pub. 4747 (Dec. 2017).

On January 4, 2018, Commerce issued AD and CVD orders on certain hardwood plywood from China. *Certain Hardwood Plywood Products From the People's Republic of China*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) ("*AD Order*"); *Certain Hardwood Plywood Products From the People's Republic of China*, 83 Fed. Reg. 513 (Dep't Commerce Jan. 4, 2018) ("*CVD Order*") (collectively, "*Orders*"). The *Orders* applied AD and CVD duties to "hardwood and decorative plywood, and certain veneered panels."[1] Relevant here, excluded from the scope of the *Orders* were:

---

[1] The *Orders* in the Federal Register include the initial scope in its entirety. In part, the *Orders* define hardwood and decorative plywood, and certain veneered panels, as the following:

> [H]ardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo. The veneers, along with the core may be glued or otherwise bonded together. Hardwood and decorative plywood may include products that meet the American National Standard for Hardwood and Decorative Plywood, ANSI/ HPVA HP–1–2016 (including any revisions to that standard). For purposes of this investigation a "veneer" is a slice of wood regardless of thickness which is cut, sliced or sawed from a log, bolt, or flitch. The face and back veneers are the outermost veneer of wood on either side of the core irrespective of additional surface coatings or covers as described below. The core of hardwood and decorative plywood consists of the layer or layers of one or more material(s) that are situated between the face and back veneers. The core may be composed of a range of materials, including but not limited to hardwood, softwood, particleboard, or medium-density fiberboard (MDF). All hardwood plywood is included within the scope of this investigation regardless of whether or not the face and/or back veneers are surface coated or covered and whether or not such surface coating(s) or covers obscures the grain, textures, or markings of the wood.

AD Order at 512; *CVD Order* at 515.

> . . . kitchen cabinets that, at the time of importation, are fully assembled and are ready for their intended uses. Also excluded from the scope of this investigation are RTA kitchen cabinets. RTA kitchen cabinets are defined as kitchen cabinets packaged for sale for ultimate purchase by an end-user that, at the time of importation, includes (1) all wooden components (in finished form) required to assemble a finished unit of cabinetry, (2) all accessory parts (e.g., screws, washers, dowels, nails, handles, knobs, hooks, adhesive glues) required to assemble a finished unit of cabinetry, and (3) instructions providing guidance on the assembly of a finished unit of cabinetry.

AD Order at 513; *CVD Order* at 516.

On April 6, 2018, Petitioner-Masterbrand filed an application for a scope ruling with Commerce. *See* Letter from Petitioner-Masterbrand to Wilbur Ross Re: Certain Hardwood Plywood Products from the People's Republic of China: Request for Scope Ruling: Request for Scope Ruling, P.R. 1 ("Scope Ruling Request"). Petitioner-Masterbrand asked that Commerce:

> confirm that all hardwood plywood that meets the physical description of the scope is included in the scope unless it meets an express exclusion, regardless of whether such merchandise is packaged or shipped with other items and/or has undergone minor processing and regardless of the U.S. Harmonized Tariff Schedule ("HTSUS") code under which the merchandise is imported.

Scope Ruling Request at 2. Petitioner-Masterbrand alleged in its request that "many companies in China are improperly using the RTA kitchen cabinet exclusion by shipping hardwood plywood kitchen cabinet components in packages that do not include all required parts as detailed in the RTA kitchen cabinet exclusion." *Id.* at 10. Further, Petitioner-Masterbrand alleged that the products were "not packaged at the time of importation 'for sale for ultimate purchase by an end-user' but instead . . . for further assembly by a distributor based in the United States." *Id.* Petitioner-Masterbrand asked Commerce to "confirm that hardwood plywood that meets the physical description of the scope and does not meet all elements necessary to fit within an exclusion is covered by the scope regardless of whether it is packaged and/or shipped with other merchandise." *Id.* at 13–14.

Commerce issued a memorandum on April 12, 2018, setting a deadline of April 19, 2018, for interested parties to comment on the scope request and a deadline of April 23, 2018, for rebuttal comments. Mem.

from Amanda Briggs to The File re: Certain Hardwood Plywood Products from the People's Republic of China: Deadline for Comments on the Petitioner-Masterbrand 2018 Scope Ruling Request (April 12, 2018), P.R. 6. Commerce later extended the deadline for comments to April 23, 2018 and for rebuttal comments to April 27, 2018. Mem. from Amanda Briggs to The File re: Certain Hardwood Plywood Products from the People's Republic of China, Petitioner-Masterbrand 2018 Scope Ruling Request Comments Extension (Apr. 16, 2018), P.R. 11. Commerce again extended the deadline for rebuttal comments to May 1, 2018. Mem. from Kabir Archuletta to The File re: Certain Hardwood Plywood Products from the People's Republic of China: Deadline for Rebuttal Comments on the Petitioner-Masterbrand 2018 Scope Ruling Request (April 26, 2018), P.R. 25.

By April 23, 2018, interested parties filed comments in opposition to Petitioner Masterbrand's Scope Request. *See* Letter from Husch Blackwell LLP to Sec'y of Commerce re: Hardwood Plywood Products from the People's Republic of China: Comments in Opp'n to Request for a Scope Ruling (Apr. 23, 2018), P.R. 16; Letter from deKieffer & Horgan, PLLC to Sec'y of Commerce re: Hardwood Plywood from the People's Republic of China: Comments in Opp'n to Request for Scope Ruling (Apr. 23, 2018), P.R. 18; Letter from DLA Piper LLP (US) to Sec'y of Commerce re: Scope Inquiry: Certain Hardwood Plywood Products from the PRC (A570–051); Scope Comments of JS Int'l Inc. (Apr. 23, 2018), P.R. 20; Letter from deKieffer & Horgan, PLLC to Sec'y of Commerce re: Hardwood Plywood from the People's Republic of China: Comments in Opp'n to Request for Scope Ruling (Apr. 23, 2018), P.R. 23 ("Letter from deKieffer in Opp'n to Request for Scope Ruling").

On May 1, 2018, IKEA filed what it deemed to be rebuttal comments, but Commerce rejected them, finding that certain comments in IKEA's submission responded to the Scope Request, and thus were untimely filed, after the April 23, 2018 deadline. Letter from Catherine Bertrand to IKEA Supply AG re: Certain Hardwood Plywood Products from the People's Republic of China: Petitioner-Masterbrand 2018 Scope Ruling Request—Rejection of Submission (May 21, 2018), P.R. 34. Commerce allowed IKEA to refile its comments by May 23, 2018, after redacting the comments Commerce deemed to be outside the scope of rebuttal or explaining how these comments rebutted comments of other parties. *Id.* On May 23, 2018, IKEA resubmitted the response comments with certain information redacted at the request of Commerce. *See* Letter from Sandler, Travis & Rosenberg, P.A. to Sec'y of Commerce, Re: Certain Hardwood Plywood Products from the People's Republic of China, Resubmission of

Rebuttal Comments Related to Petitioner and Masterbrand's Scope Inquiry Request (May 23, 2018), P.R. 38.[2]

On June 29, 2018, Commerce asked Petitioner-Masterbrand to file additional detailed information on the scope request. Mem. from A. Brings to The File, re: Certain Hardwood Plywood Products from the People's Republic of China: Petitioner-Masterbrand 2018 Scope Ruling Request (July 17, 2018), P.R. 45. On July 13, 2018, Petitioner-Masterbrand filed an amended Scope Ruling Request that clarified the products for which the request for scope ruling was made. *See* Letter from Wiley Rein LLP to Sec'y of Commerce, Re: Certain Hardwood Plywood from the People's Republic of China: Amendment to Request for Scope Ruling (July 13, 2018), P.R. 43 ("Amended Scope Ruling Request"). The Amended Scope Ruling Request invited Commerce to determine that the following products are included in the scope of the *Orders*:

> Hardwood plywood, regardless of size, coating, and/or minor processing, that is not packaged for sale for ultimate purchase by a consumer end user in a package containing (i) all the wood components of the kitchen cabinet, (ii) all the hardware accessories (e.g., screws, washers, dowels, nails, handles, knobs, hooks, and adhesive glues), and (iii) written instructions needed for the consumer to assemble the kitchen cabinet. Specific products include: [h]ardwood plywood that is shipped without all of the following: (i) all wooden components of the kitchen cabinet, (ii) all required hardware, and (iii) written instruction so that the end user can assemble the cabinet; and [s]hipments of all three of the above required contents but not packaged in a manner suitable for purchase by an end-use consumer.
>
> Hardwood plywood that has been cut-to-size, painted, laminated, stained, ultraviolet light finished, grooved, and/or covered in paper, regardless of where such processing took place; and
>
> Hardwood plywood that has been edge banded.

[2] IKEA also asked Commerce to reconsider its rejection of its May 1, 2018 submission. *See* Letter from Sandler, Travis & Rosenberg, P.A. to Sec'y of Commerce, Re: Certain Hardwood Plywood Products from the People's Republic of China, Request to Reconsider Rejection of Rebuttal Comments Related to Petitioner and Masterbrand's Scope Inquiry Request (May 23, 2018), P.R. 39. Commerce declined to reconsider, and IKEA challenged Commerce's decision before the court. *See* Letter from Catherine Bertrand to IKEA Supply AG, Re: Certain Hardwood Plywood Products from the People's Republic of China: Petitioner-Masterbrand 2018 Scope Ruling Request—Response to IKEA's Request to Reconsider (May 25, 2018), P.R. 40; IKEA's Br. at 42. At oral argument, however, IKEA informed the court that it has abandoned this challenge. Oral Arg., Apr. 15, 2020, ECF No. 67.

Id. at 3.

Commerce officials met with Masterbrand, and Masterbrand submitted additional factual information to Commerce. *See* Letter from Wiley Rein LLP to Sec'y of Commerce, Re: Certain Hardwood Plywood Products from the People's Republic of China: Masterbrand's Factual Information (July 23, 2018), P.R. 52. Interested parties, including the Plaintiffs Fabuwood, CNC, and Cubitac, and the Plaintiff-Intervenor IKEA, filed comments in opposition to the Amended Scope Ruling Request. *See* Letter from deKieffer & Horgan, PLLC to Sec'y of Commerce, Re: Hardwood Plywood from the People's Republic of China Comments in Opp'n to Request for Scope Ruling (Aug. 7, 2018), P.R. 65 ("Concerned Importers' Amended Request Comments"); Letter from Sandler, Travis & Rosenberg, P.A. to Sec'y of Commerce, Re: Certain Hardwood Plywood Products from the People's Republic of China: Comments Related to Petitioner and Masterbrand's Amendment to Request for Scope Ruling (Aug. 6, 2018) ("IKEA's Amended Request Comments"), P.R. 62.

Commerce issued the Final Scope Ruling on September 7, 2018, finding that the products as described by Petitioner-Masterbrand in the Amended Scope Ruling Request were within the scope of the *Orders*. Mem. from J. Doyle to J. Maeder, re: Final Scope Ruling For Certain Hardwood Plywood Products From the People's Republic of China: Request by the Coalition for Fair Trade in Hardwood Plywood and Masterbrand Cabinets Inc. (Sept. 7, 2018), P.R. 71 ("Final Scope Ruling"). In making the determination, Commerce found that "the plain language of the scope of the *Orders* is dispositive" and thus did not "analyze the criteria set forth in 19 CFR 351.225(k)(1) or the additional factors provided in 19 CFR 351.225(k)(2)." *Id.* at 17, 22, 24.

On October 10, 2018, Fabuwood initiated the instant litigation challenging Commerce's Final Scope Ruling. Summons, ECF No.1; Compl., Nov. 9, 2018, ECF No. 10. On December 12, 2018, IKEA intervened as Plaintiff-Intervenor, ECF No. 21, and Coalition and Masterbrand intervened as Defendant-Intervenor, ECF No. 22. The Plaintiffs filed the motion for judgment on agency record on June 11, 2019. *See* Pl.'s Mem. in Support of Rule 56.2 Mot. for J. on the Agency R., ECF No. 38 ("Fabuwood's Br."); CNC's Mem. of Law in Support of Consol. Pl.'s Mot. for J. on the Agency R., June 11, 2019, ECF No. 39, ("CNC's Br."); IKEA Supply AG's Mem. of Points and Authorities in Support of its Rule 56.2 Mot. for J. on the Agency R., June 11, 2019, ECF No. 40 ("IKEA's Br."). On September 4, 2019, the Government and Petitioner-Masterbrand responded. Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Agency R., Sept. 4, 2019, ECF No. 47 ("Def.'s Br."); Def.-Inter.'s Resp. to Mot. for J. on the Agency R., Sept.

4, 2019, ECF No. 48 ("Def.-Inter.'s Br."). The Plaintiffs replied on October 22, 2019. Pl.'s Reply in Support of Rule 56.2 Mot. for J. on the Agency R., ECF No. 53 ("Fabuwood's Reply"); Reply Br. in Support of Consol. Pl.'s Mot. for J. on the Agency R., Oct. 22, 2019, ECF No. 55 ("CNC's Reply"); Pl.-Inter. IKEA Supply AG's Reply Br., Oct. 22, 2019, ECF No. 56 ("IKEA's Reply"). On April 13, 2020, the parties filed responses to the court's questions for oral argument. Pl. Fabuwood Cabinetry Corp.'s Resp. to Questions for Oral Argument, ECF No. 66 ("Fabuwood's Resp. to Questions"); Consol. Pl. IKEA Supply AG's Resp. to Questions for Oral Argument, ECF No. 64 ("IKEA's Resp. to Questions"); Def.'s Resp. to the Ct.'s Questions for Oral Argument, ECF No. 65 ("Def.'s Resp. to Questions"); Def.-Inter.'s Resp. to Ct.'s Questions, ECF No. 63 ("Def.-Inter.'s Resp. to Questions"). Oral argument was held on April 15, 2020. ECF No. 68.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review is set forth in 19 U.S.C. § 1516(a)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

DISCUSSION

The Plaintiffs argue that Commerce (1) impermissibly conducted the scope proceeding below because the scope request did not include a particular product, as required by 19 C.F.R. § 351.225(c), but instead alleged circumvention; (2) acted arbitrarily by stopping at the first step of scope analysis, incorrectly concluding that the plain language of the *Orders* was dispositive; and (3) erred in including kitchen cabinets and furniture parts within the scope of the *Orders*.[3]

I. Commerce Failed To Address the Threshold Issue of Whether Petitioner-Masterbrand Met the Regulatory Criteria Under 19 C.F.R. § 351.225(C) for a Request for a Scope Inquiry.

A. Commerce Did Not Address Whether Petitioner-Masterbrand Had Provided What Was "Reasonably Available" to it.

The Plaintiffs contend that Commerce based its scope proceeding on a defective request, as both the initial Scope Request and the Amended Scope Ruling Request lacked the specificity required under

[3] IKEA also argued in its opening brief that Commerce improperly rejected portions of IKEA's rebuttal comments. IKEA abandoned this contention during oral argument, and the court thus need not address it.

§ 351.225(c)(1) as to the product for which a scope ruling was requested. Fabuwood's Br. at 12; CNC's Br. at 17; IKEA's Br. at 17. The Plaintiffs argue that the Amended Scope Ruling Request only "paraphras[ed] the scope language," Fabuwood's Br. at 12, failed to "identify any specific product from any specific exporter or importer," CNC's Br. at 19, and was "hypothetical" in nature, IKEA's Br. at 20. The Government concedes that the original Scope Ruling Request was deficient but argues that the Amended Scope Ruling Request is sufficiently particular as to the products described. Def.'s Br. at 15.[4]

The court need not decide whether the Amended Scope Ruling Request was deficient because Commerce did not adequately address this issue. As the Plaintiffs correctly observe, Commerce failed to address the threshold question of whether the request was specific enough to provide an adequate basis for a scope ruling. *See* Fabuwood's Br. at 12; CNC's Br. at 18. Nor did Commerce address the opposing comments submitted by the Plaintiffs suggesting that the request was not adequately supported. *See, e.g.*, Concerned Importers Amended Request Comments at 20–23; IKEA's Amended Request Comments at 7–12. In the Final Scope Ruling, Commerce acknowledged in a footnote that certain parties commented that "the request [was] deficient because it only generally describe[d] various alleged products, [did] not have complete or detailed information on any specific product as imported into the United States, and [was] insufficiently supported with actual evidence." Final Scope Ruling at 10 n.52. Commerce, however, then concluded, without explanation, that the Amended Scope Ruling Request "provide[d] all requisite information reasonably available to Petitioner-Masterbrand, and provide[d] sufficient detail regarding the products at issue for Commerce to make a final scope ruling." *Id.* The conclusory statement did not meet the "the obligation to address important factors raised by comments from petitioners and respondents." *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011).

The Government argues that, although Commerce's "discussion of the product description is of less than ideal clarity," Commerce's decision should be sustained because the agency's path "may be reasonably discerned." Def.'s Br. at 13, 15 (citing *Nucor Corp. v.*

[4] Petitioner-Masterbrand argues that the Amended Scope Ruling Request included all "information reasonably available" to them. Def.-Inter.'s Resp. to Mot. for J. on the Agency R. at 17, Sept. 4, 2019, ECF No. 48 (citing 19 C.F.R. § 351.225(c)(1)). As domestic parties, Petitioner-Masterbrand contends, they were "not privy to how, when, by whom, and in what form merchandise is imported into the United States." *Id.* at 17. To this, CNC argues that this defense does not change the fact that Petitioner-Masterbrand failed to identify the products with any particularity, which was prejudicial to the Plaintiffs. Reply Br. in Support of Consol. Pl.'s Mot. for J. on the Agency R. at 2, Oct. 22, 2019, ECF No. 55 ("CNC's Reply").

United States, 414 F.3d 1331, 1339 (Fed. Cir. 2005); *Wheatland Tube Co.*, 161 F.3d at 1365). The Government also claims that, in requesting and accepting the Amended Scope Ruling Request, Commerce indicated that Petitioner-Masterbrand cured the particularity missing from the initial Scope Request in the Amended Scope Request. *Id.* at 15; Def.'s Resp. to Questions at 5–6.

The court disagrees. What is "readily discernible" is Commerce's conclusion that the Amended Scope Ruling Request was not deficient, but not Commerce's rationale behind this conclusion. The Final Scope Ruling did not "explain its action with sufficient clarity to permit 'effective judicial review.'" *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005). Therefore, the court holds that Commerce's Scope Ruling, made on the basis of a deficient Amended Scope Ruling Request, was not supported by substantial evidence.

Because Commerce relied on the Amended Scope Ruling Request, rather than on self-initiation, to initiate the inquiry and issue the Final Scope Ruling, the Final Scope Ruling is invalid. As is discussed above, Commerce failed to show that it accepted the Amended Scope Ruling Request based on substantial evidence. The Amended Scope Ruling Request was the source of the authority for the Final Scope Ruling. Final Scope Ruling at 1. The Government concedes that Commerce does not have the authority to initiate a scope ruling based on a defective scope ruling request. Def.'s Resp. to Questions at 2. While Commerce had the authority to self-initiate scope inquiries under § 351.225(b), Def.-Inter.'s Resp. to Questions at 5, Commerce did not exercise that authority in issuing the Final Scope Ruling. "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Suggesting that the Final Scope Ruling should still stand because of Commerce's authority to self-initiate scope inquiries changes the basis of the authority on which Commerce relied and amounts to impermissible post-hoc rationalization.

The Defendant-Intervenor argues that "even if the scope request was defective, Commerce's failure to strictly abide by its own procedural rules would not render its scope determination invalid." Def.-Inter.'s Resp. to Questions at 5–6 (citing *Mitsubishi Polyester Film, Inc. v. United States*, 41 CIT __, __, 228 F. Supp. 3d 1359, 1381 (2017); *Suntec Indus. Co. v. United States*, 37 CIT 1670, __, 951 F. Supp. 2d 1341, 1352 (2013)). The court is unpersuaded by this argument. *Mitsubishi Polyester Film* discusses delay in issuing the scope ruling

beyond the regulatory time limit, and *Suntec Industries* discusses personal service requirement prior to initiating a review. In comparison, the Amended Scope Ruling Request provided the sole legal authority for the Final Scope Ruling and directly controlled the subject of determination in the Final Scope Ruling. In other words, the Amended Scope Ruling Request, as well as its alleged deficiency, directly affected the substance of the Final Scope Ruling. While the issues of timeline and notice are largely procedural concerns, the validity of the Amended Scope Request is not. Def.-Inter.'s Resp. to Questions at 5–6. Commerce's flawed acceptance of the Amended Scope Request cannot be dismissed as a "procedural requirement," as the Defendant-Intervenor claims. *Id.* Therefore, the court remands the scope ruling to Commerce for further explanation on whether the Amended Scope Ruling Request met the regulatory requirements.

B. Concerns of Circumvention Did Not Render Commerce's Final Scope Ruling Unlawful.

The Plaintiffs claim that Petitioner-Masterbrand improperly requested a scope ruling for a concern that should be addressed in an anticircumvention investigation, pursuant to 19 U.S.C. § 1677j. Fabuwood's Br. at 17–18; CNC's Br. at 21; IKEA's Br. at 21–23. In particular, IKEA contends that all the justifications related to the scope ruling requests were based upon claims of circumvention and evasion. IKEA's Br. at 21–22. When the purpose is to prevent circumvention, IKEA argues, Commerce must conduct an anticircumvention inquiry rather than a scope ruling. IKEA's Br. at 22–23 (citing *ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 90 (Fed. Cir. 2012); *Laminated Woven Sacks Comm. v. United States*, 34 CIT 906, 917, 716 F. Supp. 2d 1316, 1328 (2010); *Mitsubishi Elec. Corp. v. United States*, 16 CIT 730, 739, 802 F. Supp. 455, 462–63 (1992)).

The court is unpersuaded by IKEA's contention that Commerce must conduct an anticircumvention inquiry in place of a scope ruling; the caselaw does not support such a conclusion. Indeed, in the cases cited by the Plaintiffs, the Federal Circuit and this court have held that the concern of circumvention does not bear upon the legality of Commerce's scope rulings. In *ArcelorMittal Stainless Belgium N.V.,* the Federal Circuit rejected Commerce's scope ruling because it unlawfully expanded the scope of an AD order, refusing to consider how the scope ruling would prevent circumvention. 694 F.3d at 90 (holding that "if Commerce is concerned about circumvention," it should conduct a circumvention inquiry but not "'interpret' the order in a manner that changes its scope."). *Laminated Woven Sacks Committee* denied that "the likelihood of circumvention" should invalidate Com-

merce's otherwise proper scope ruling, holding that "the issues of concern . . . in a scope ruling do not address the considerations . . . of circumvention." 716 F. Supp. 2d at 1328; *see also Mitsubishi Elec. Corp.*, 802 F. Supp. at 462– 63 (noting that "if Commerce is concerned about the possibility of circumvention, the appropriate method to resolve such concern would appear to be proceedings under the provisions specifically designed to prevent circumvention"). What these cases show is that Commerce's scope ruling, when decided properly, cannot be defeated by the claim of circumvention, and, when decided improperly, cannot be saved by the concern of circumvention. No caselaw cited prevents Commerce from pursuing, and the court from upholding, a scope inquiry just because there are circumvention concerns.[5]

II. Commerce Failed To Conduct the Scope Ruling with Regard to the RTA Kitchen Cabinet Exclusion Pursuant to the Regulatory Requirement and Failed to Consider § 351.225(K)(1) Factors.

As discussed, the court remands the Final Scope Ruling to Commerce for reconsideration of its acceptance of the Amended Scope Ruling Request. The court notes that the Plaintiffs also challenge Commerce's determination with regard to the RTA kitchen cabinet exclusion based on the plain language of the scope of the *Orders* and the lack of consideration of § 351.225(k)(1) factors. In the interests of judicial economy, the court addresses this issue here.

In the Final Scope Ruling, Commerce decided that the merchandise as characterized by Petitioner-Masterbrand did not qualify for the RTA kitchen cabinet exclusion and was subject to the *Orders*:

> [W]e find that shipments of hardwood plywood do not qualify for the RTA kitchen cabinet exclusion if they are comprised of hardwood plywood, regardless of size, coating, and/or minor processing, that is not packaged for sale for ultimate purchase by a consumer end user in a package containing (i) all the wood components of the kitchen cabinet, (ii) all the hardware accessories (e.g., screws, washers, dowels, nails, handles, knobs,

[5] The court recognizes that the Plaintiffs raise other grounds suggesting that the Final Scope Ruling was unlawful. In particular, the Plaintiffs argue a scope ruling could not be lawful and an anticircumvention inquiry was required because the scope request did include products that fall outside the literal scope of the *Orders*. CNC's Reply at 6. The court agrees that the product covered by the scope ruling should not fall outside "an order's literal scope"; if it does, the inquiry could only survive under the anticircumvention inquiry. *See Deacero S.A. de C.V. v. United States*, 37 CIT 1457, 1461–62, 942 F. Supp. 2d 1321, 1326 (2013); *U.K. Carbon & Graphite Co. v. United States*, 37 CIT 1295, 1300, 931 F. Supp. 2d 1322, 1328 (2013). As the court remands the Final Scope Ruling, the court need not reach the issue of whether the Final Scope Ruling covers products outside the literal scope of the *Orders*.

> hooks, and adhesive glues), and (iii) written instructions needed for the consumer to assemble the kitchen cabinet. Specific products include: hardwood plywood that is shipped without all of the following: (i) all wooden components of the kitchen cabinet, (ii) all required hardware, and (iii) written instruction so that the end user can assemble the cabinet; and shipments of all three of the above required contents but not packaged in a manner suitable for purchase by an end-use consumer.

Final Scope Ruling at 17. This description closely tracks the definition of the excluded RTA kitchen cabinets in the scope of the *Orders*:

> [K]itchen cabinets packaged for sale for ultimate purchase by an end-user that, at the time of importation, includes 1) all wooden components (in finished form) required to assemble a finished unit of cabinetry, 2) all accessory parts (e.g., screws, washers, dowels, nails, handles, knobs, hooks, adhesive glues) required to assemble a finished unit of cabinetry, and 3) instructions providing guidance on the assembly of a finished unit of cabinetry.

AD Order at 513; *CVD Order* at 516. Commerce concluded that the unambiguous scope language of the *Orders* was dispositive and therefore Commerce did not need to analyze the criteria and factors in § 351.225(k)(1) and (2). Final Scope Ruling at 17. Commerce acknowledged that the RTA kitchen cabinet exclusion did not expressly address the manner of packaging nor expressly define the term "end-user." *Id.* Commerce reasoned, however, that the plain language in the scope of the *Orders*—"packaged for sale for ultimate purchase by an end-user" and "instructions providing guidance on the assembly of a finished unit of cabinetry"—together made clear that "the end-user is a retail consumer," who would require instructions for assembling a finished unit of cabinetry. *Id.* Commerce further concluded from the requirement of what to contain "at the time of importation" in the scope of the *Orders* indicates that the required parts to assemble the RTA kitchen cabinets "must be packaged in a single, discrete package" such that "an end-use retail consumer would be able to open the package and assemble a specific kitchen cabinet with, and only with, the included components." *Id.* at 17–18.

The Plaintiffs dispute Commerce's interpretation of the plain language of the *Orders* and argue that Commerce should consider the criteria in § 351.225(k)(1) prior to reaching the Final Scope Ruling, as

the plain language in the *Orders* is not dispositive.[6] Fabuwood's Br. at 23–25; CNC's Br. at 29–33; IKEA's Br. at 29–31. The court agrees. By claiming the language of the *Orders* to be unambiguous as to the issues submitted for determination, Commerce evaded the required step of considering the (k)(1) factors.

"Commerce's regulations at 19 C.F.R. § 351.225(k) establish its analytical path for deciding whether certain imports are covered by the scope of an antidumping or countervailing duty order." *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1306 (Fed. Cir. 2020) (citing *Shenyang Yuanda Aluminum Indus. Eng'g Co.*, 776 F.3d at 1354). Commerce cannot evade the regulatory requirement to consider § 351.225(k)(1) factors. *See Meridian II*, 890 F.3d at 1277 ("In reviewing the plain language of a duty order, Commerce must consider [the § 351.225(k)(1) factors]"); *Shenyang Yuanda Aluminum Indus. Eng'g Co.*, 776 F.3d at 1354 ("First, Commerce must consider the scope language contained in the order itself, the descriptions contained in the petition, and how the scope was defined in the investigation and in the determinations issued by Commerce and the ITC."); *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012) ("[W]hile the plain language of the AD order is paramount, Commerce must also take into account [the § 351.225(k)(1) factors]." (internal quotations omitted)); *TMB 440AE, Inc. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1314, 1320 (2019) ("Commerce . . . will take into account the (k)(1) criteria in conducting a scope determination. No case has invalidated this regulatory requirement.") (citations omitted).

While the scope of the order may govern the scope ruling if the scope is unambiguous, *Meridian Prod., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) ("*Meridian I*"), the court finds that the language of the *Orders* is ambiguous as to the issues submitted.

The court reviews de novo the question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists. *Meridian I*, 851 F.3d at 1382. A scope is unambiguous if the terms of the scope "have a single clearly defined or stated meaning." *Id.* at 1381 n.7 (internal quotations omitted). To be dispositive of the issue, the terms of the scope must "be 'controlling' of the scope inquiry

[6] The Plaintiffs also argue that Commerce should initiate a formal scope inquiry under § 351.225(e) and consider the § 351.225(k)(2) factors. Fabuwood's Br. at 26; CNC's Br. at 34. As the consideration of (k)(2) factors is contingent on the (k)(1) factors not being dispositive, *Meridian Prod., LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017), the court need not decide on whether Commerce is required to consider (k)(2) factors before it has considered the (k)(1) factors.

in the sense that they definitively answer the scope question." *See Sango Int'l, L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007). "Only a 'low threshold' must be cleared to justify a finding of ambiguity, necessitating further review." *Atkore Steel Components, Inc. v. United States*, 42 CIT __, __, 313 F. Supp. 3d 1374, 1380 (2018) (quoting *Novosteel SA v. U.S.*, 284 F.3d 1261, 1270–72 (Fed. Cir. 2002)). When nothing in the record suggests that a term has a single meaning, "the plain language of the Order does not resolve the scope request." *Diamond Sawblades Mfrs.' Coal. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1345, 1352 (2019); *see also TMB 440AE, Inc.*, 399 F. Supp. 3d at 1321 (holding that, because a term was undefined, Commerce was obligated to consider the (k)(1) sources before rendering its decision).

Here, the RTA kitchen cabinet exclusion language in the scope of the *Orders* does not have "a single clearly defined or stated meaning" as to the manner of packaging or the definition of "end-users." *Meridian I*, 851 F.3d at 1381 n.7. Commerce acknowledged that the exclusion language did not explicitly address the issues as to packaging and end-users. Final Scope Ruling at 17 ("The RTA kitchen cabinet exclusion does not expressly address the manner in which RTA kitchen cabinets must be packaged to be suitable for purchase nor expressly define the term 'end-user.'"). The Plaintiffs argue in response that the plain language was ambiguous and thus not dispositive since the key issues are not addressed by the plain language. IKEA's Br. at 26. The court finds the Plaintiffs' argument persuasive. In concluding that the scope meant "retail consumers" by "end-users," Commerce relied on a separate clause that required assembly instructions with the products and inferred that only retail consumers would need assembly instructions. Final Scope Ruling at 17. Commerce further inferred, based on the its conclusion that "end-users" referred to "retail consumers," that the excluded products and their components must come in the same package. *Id.* Commerce's conclusions as to the manner of packaging and definition of "end-users" were inferred and deduced from, rather than "defined or stated," in the scope of the *Orders*. *See Meridian I*, 851 F.3d at 1381

The Government argues that Commerce "lawfully provided clarity regarding 'single packaging' and 'end-user'" based on the scope language "interpreted as a cohesive whole, which supports only one interpretation." Def.'s Br. at 21. The court disagrees that the text of the scope precluded other interpretations. The Plaintiffs raised multiple alternative interpretations in the comments submitted to Commerce. For example, as CNC argues and the court agrees, the term

"for ultimate purchase by an end-user" in the scope of the *Orders* could be understood to refer to the "ultimate purchaser," and the "ultimate purchaser" of unassembled kitchen cabinets could be an "importer or other intermediary party" rather than a retail consumer. CNC's Br. at 26; Letter from deKieffer in Opp'n to Request for Scope Ruling at 15–16. The inclusion of the required components "at the time of importation," moreover, could mean that all required components must come in the same shipment as the same sale, though not necessarily in the same package. *Id.* at 16–17. The plain terms of the scope cannot "definitively answer" which of these interpretations, raised by Commerce and interested parties, is correct.

Therefore, the court finds that the plain language of the scope of the *Orders* does not sufficiently address the manner of packaging or the definition of "end-user" to allow Commerce to reach a determination with regard to the RTA kitchen cabinets exclusion. If the same question as to the requirement of single packaging or sale to retail consumers arises on remand, Commerce must address the factors listed in § 351.225(k)(1). If the (k)(1) factors are still not dispositive of this issue, Commerce must then consider the § 351.225(k)(2) factors, as the regulatory scheme requires. *Meridian I*, 851 F.3d at 1382; *Eckstrom Indus.*, 254 F.3d at 1072.

III. Commerce's Scope Ruling Must Be Consistent with the ITC's Injury Investigation.

In addition to the RTA kitchen cabinet exclusion, the Final Scope Ruling also affirmed that the following products were covered under the scope of the *Orders*: "Hardwood plywood that has been cut-to-size, painted, laminated, stained, ultra-violet light finished, grooved, and/or covered in paper, regardless of where such processing took place; and [h]ardwood plywood that has been edge banded." Final Scope Ruling at 8 (citations omitted).

The Plaintiffs contend that, because furniture and furniture parts also meet this description in the Final Scope Ruling, such language impermissibly expanded the scope to cover furniture and furniture parts, which fell beyond the original scope of the *Orders*. Fabuwood's Br. at 29; CNC's Br. at 35–36; IKEA's Br. at 33. Commerce concluded that Petitioner-Masterbrand did not intend to include finished furniture or furniture parts in the scope, but only hardwood plywood that had undergone "the minor alterations and surface coatings enumerated in their request." Final Scope Ruling at 23.

The court need not reach this issue because the Final Scope Ruling is remanded for further explanation of Commerce's reliance on the Amended Scope Ruling Request. The products included in the scope

of an order must be covered by the underlying investigations; the scope cannot extend to a distinct, downstream product that was not a part of the underlying investigation. *See* 19 U.S.C. § 1673 (2018); *A.L. Patterson, Inc. v. United States*, 585 F. App'x 778, 786 (Fed. Cir. 2014); *Trendium Pool Prods. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1335, 1342 (2019); *see also* IKEA's Br. at 31. The ITC investigation defines the domestic industry "to include all U.S. producers of hardwood plywood" and refers to furniture as a source of demand for hardwood plywood. *Hardwood Plywood from China* at 12, 16, Nos. 701-TA-565 and 731-TA 1341 (Int'l Trade Comm'n December 2017). On remand, Commerce is limited in its scope ruling to inclusion only of merchandise considered within the underlying ITC investigation.

CONCLUSION

The court remands the Final Scope Ruling to Commerce for further proceedings consistent with this opinion. On remand, Commerce shall explain its acceptance of the Amended Scope Ruling Request in light of the opposing comments submitted. Should Commerce accept the Amended Scope Ruling Request, Commerce must look to the § 351.225(k)(1) factors in determining the products related to the RTA kitchen exclusion language in the original scope. Any resulting scope ruling may not include products not covered by the ITC injury investigation for the *Orders*. Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the remand results to the court, and the parties shall have 15 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: August 19, 2020
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE