

UNITED STATES COURT OF INTERNATIONAL TRADE

COMMITTEE OVERSEEING ACTION
FOR LUMBER INTERNATIONAL TRADE
INVESTIGATIONS OR NEGOTIATIONS,

Plaintiff,

and

FONTAINE INC., ET AL.,

Consolidated Plaintiffs,

v.

UNITED STATES,

Defendant,

and

FONTAINE INC., ET AL.,

Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 19-00122

PUBLIC VERSION

OPINION AND ORDER

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

Dated: January 21, 2025

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

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

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

Barnett, Chief Judge: This case comes before the court on the final results of redetermination pursuant to court remand in the countervailing duty (“CVD”) expedited review of certain softwood lumber products from Canada. The U.S. Department of Commerce (“Commerce” or “the agency”) filed the redetermination following this court’s decision in *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations v. United States (Coalition VII)*, 48 CIT ___, 701 F. Supp. 3d 1334 (2024).¹ See Final Results of Redetermination Pursuant to Ct. Remand (Sept. 10, 2024) (“Remand Results”), ECF No. 255-1. The Remand Results modify Commerce’s determination in *Certain Softwood Lumber Products From Canada*, 84 Fed. Reg. 32,121 (Dep’t Commerce July 5, 2019) (final results of CVD expedited rev.) (“*Final*

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

Results”), ECF No. 99-5, and accompanying Issues and Decision Mem., C-122-858 (June 28, 2019) (“I&D Mem.”), ECF No. 99-6.²

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

Plaintiff, Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (“Plaintiff” or “the Coalition”), filed comments in opposition to Commerce’s method of calculating D&G/Portbec’s revised subsidy rate. Confid. Pl.’s

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

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

Cmts. on [Remand Results] (“Pl.’s Cmts.”), ECF No. 257.⁴ No party objected to Commerce’s Remand Results with respect to the rates calculated for Rustique or Fontaine. Defendant United States (“the Government”), D&G/Portbec, and Fontaine filed comments in support of the Remand Results. Def.’s Resp. to Cmts. on Remand Redetermination (“Def.’s Cmts.”), ECF No. 263; Cmts. of Def.-Ints. [D&G/Portbec] in Supp. of [Remand Results] (“D&G/Portbec’s Cmts.”), ECF No. 264; Cmts. Supporting the [Remand Results] (“Fontaine’s Cmts.”), ECF No. 265.

Plaintiff moved to strike portions of D&G/Portbec’s brief that Plaintiff claims raise untimely argument in opposition to one aspect of Commerce’s Remand Results, or in the alternative, Plaintiff seeks leave to file a reply to D&G/Portbec’s comments. Mot. to Strike Certain Portions of Def.-Ints. [D&G/Portbec’s] Cmts. in Supp. of [Remand Results] or Alt. Mot. for Leave to File Reply to [D&G/Portbec’s] Cmts. in Supp. of [Remand Results] (“Pl.’s Mot. to Strike or File Reply”), ECF No. 271. D&G/Portbec opposed Plaintiff’s motion. Reply of Def.-Ints. [D&G/Portbec] to Pl.’s [Mot. to Strike or File Reply] (“D&G/Portbec’s Resp. Mot. to Strike”), ECF No. 279.⁵

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

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

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

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

I. Supplier Subsidies

A. Additional Background

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

During the period of review, D&G, Portbec, and Rustique purchased subject merchandise (lumber) from unaffiliated Canadian suppliers and exported that lumber to the United States sometimes with and other times without further processing. *Id.* at 4. During the review, the Coalition urged Commerce to account for subsidies received by those unaffiliated suppliers of subject merchandise by establishing combination rates pursuant to 19 C.F.R. § 351.107(b)⁶ or by cumulating the subsidies the suppliers received with those received by the exporters pursuant to 19 C.F.R. § 351.525(c).⁷ *Id.*⁸

⁶ Section 351.107(b)(1)(i) provides:

(b) Cash deposit rates for nonproducing exporters—

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

⁷ Section 351.525(c) provides:

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

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

Commerce declined both suggestions, citing the Coalition's failure to submit an upstream subsidy allegation, the lack of record evidence regarding the unaffiliated suppliers' receipt of subsidies, and the small amount of resales relative to the respondents' total sales. *See id.* at 4–5.

The court remanded with instructions for Commerce to reconsider its position. *Coalition VII*, 701 F. Supp. 3d at 1349–54. The court first remanded Commerce's "determination to require an upstream subsidy allegation for purchases of lumber that is within the class or kind of covered merchandise." *Id.* at 1350. The court explained that this determination lacked any explanation as to why "inputs that otherwise are subject merchandise may be considered 'upstream' to the subject merchandise exported to the United States" for purposes of 19 U.S.C. § 1677-1(a)(1) (2018)⁹ and differed from prior agency statements on subsidies received by suppliers of subject merchandise. *Id.* at 1351–52.

Regarding Commerce's regulations, the court first noted that, contrary to Commerce's claimed lack of record information, the administrative record contained a company-specific subsidy rate for one of Rustique's suppliers. *Id.* at 1352–53 & n.38. The court also found that Commerce had failed to "account for the unusual circumstances of CVD expedited reviews" in which the period of review overlaps with

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

“the period of investigation for the original determination” such that “Commerce has subsidy rates for every producer in Canada—either an individually determined rate or the all-others rate.” *Id.* at 1353. Lastly, the court explained that Commerce’s reliance on the assertedly small resale amount overlooked that “subsidies to the respondents’ suppliers . . . might otherwise be the difference between zero or *de minimis* subsidy rates and subsidy rates above *de minimis*.” *Id.*

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

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

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

For D&G/Portbec, Commerce calculated a revised overall subsidy rate in the amount of 0.70 percent, which is considered *de minimis*.¹⁰ *Id.* at 23; *see also* Final Results of Redetermination Calculations for [D&G/Portbec], C-122-858, Attach. (Sept.

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

11, 2024) (“Agency Calc. Sheet”), CRR 12, PRR 13, CRJA Tab 12. Commerce calculated this subsidy rate by first determining D&G’s and Portbec’s respective shares of their combined total sales,¹¹ and then multiplying each company’s purchases of lumber from unaffiliated Canadian suppliers by that company’s respective shares of combined sales.¹² See Remand Results at 19; Agency Calc. Sheet. Commerce then determined each company’s unaffiliated lumber purchases as a percentage of the combined total sales,¹³ to which Commerce applied the all-others rate of 14.19 percent.¹⁴ Agency Calc. Sheet. Summing those two values with D&G/Portbec’s own subsidy rate of 0.21 percent resulted in the overall subsidy rate of 0.70 percent. *Id.*

In response to Commerce’s draft redetermination,¹⁵ the Coalition argued to Commerce that the agency had “double-weighted’ the value of Portbec and D&G’s purchases of unaffiliated suppliers’ lumber” and recommended Commerce use a

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

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

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

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

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

different calculation method. Remand Results at 18 (citing Cmts. on Draft [Remand Results] (July 25, 2024) (“Pl.’s Cmts. on Draft Remand”) at 3–9, CR 9, PR 11, CRJA Tab 9). The Coalition argued that a portion of each company’s unaffiliated lumber purchases were “not accounted for in the subsidy calculation” because Commerce reduced the amount of such purchases based on each company’s share of the combined total sales. See Pl.’s Cmts. on Draft Remand at 6. The Coalition proposed that Commerce should instead “divid[e] Portbec’s (and D&G’s) purchase of unaffiliated lumber [by] Portbec and D&G’s total sales.” *Id.*; see also *id.*, Attach. I (providing detailed calculations demonstrating the Coalition’s proposed methodology). The Coalition alleged that its proposed methodology would result in an above-*de minimis* overall subsidy rate for D&G/Portbec. See *id.* at 7, Attach. I. Commerce disagreed with the Coalition’s proposed methodology, explaining that “D&G and Portbec purchased meaningfully different volumes of lumber from unaffiliated producers and had notably different sales levels for 2015” and Commerce’s methodology “best reflects that portion of the unaffiliated lumber producers’ subsidies that D&G and Portbec each received based on their own particular quantity of lumber purchased and sales made during 2015.” Remand Results at 18–19.

2. Upstream Subsidy Provision

Commerce found any reconsideration of the need for an upstream subsidy allegation to be moot in light of the agency’s application of 19 C.F.R. § 351.525(c). *Id.* at 10. However, in response to arguments on the draft redetermination from D&G/Portbec, Commerce further explained that “regardless of the level of processing”

performed on lumber purchased from unaffiliated suppliers, those exports of “subject merchandise [were] produced by unaffiliated Canadian suppliers.” *Id.* at 15; *cf. Coalition VII*, 701 F. Supp. 3d at 1349–50 (calling into question Commerce’s apparent “determination to treat the [respondents] as the producers and exporters of this merchandise”). Commerce characterized the lumber purchased from unaffiliated suppliers as “subject merchandise (rather than an input into subject merchandise).” Remand Results at 16. No party challenges this aspect of Commerce’s Remand Results.

3. Combination Rate Regulation

With respect to 19 C.F.R. § 351.107(b)(1)(i), the agency explained that a combination rate is appropriate with respect to D&G/Portbec because, after accounting for their suppliers’ subsidies, D&G/Portbec’s overall subsidy rate remained *de minimis*. *Id.* at 10.¹⁶ Commerce chose not to assign a combination rate to Rustique because that company’s overall subsidy rate remained above *de minimis*. *Id.* Commerce explained that, for “CVD proceedings,” the agency “assign[s] cash deposit rates to companies on a ‘producer and/or exporter basis,’” such that an importer can use Rustique’s cash deposit rate “regardless of whether Rustique is considered the producer or the exporter.” *Id.* at 10–11. Furthermore, Commerce noted, this issue is moot with respect to Rustique “because its cash deposit rate has been superseded” by the results of

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

subsequent administrative reviews. *Id.* at 11. No party challenges this aspect of the Remand Results.

B. Parties' Contentions

While the Coalition supports Commerce's application of the trading company regulation to D&G/Portbec and Rustique, Plaintiff contends that Commerce erred in calculating the amount of the supplier subsidies attributable to D&G/Portbec. PI.'s Cmts. at 1–2, 4–7. The Coalition provides two alternative methodologies for calculating an accurate overall subsidy rate. *Id.* at 4–5. Those methodologies are:

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

Approach B: Calculate one subsidy rate for D&G and Portbec using the two companies' combined total sales as the denominator and their combined supplier lumber purchases (multiplied by 14.19 percent) as the numerator.

*Id.*¹⁷

The Government contends that the Coalition did not raise Approach A before the agency and thereby failed to exhaust its administrative remedies with respect to that

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

methodology. Def.'s Cmts. at 9–10. Nevertheless, regarding Approach A, the Government argues that the approach “disregards the uncontested finding that D&G and Portbec are cross-owned producers of softwood lumber” and “Commerce’s practice for cross-owned companies,” which “is to combine their total sales (minus inter-company sales) to calculate a single subsidy rate.” *Id.* at 10. The Government argues that Approach B “is flawed because it treats D&G and Portbec the same and assumes that both companies had similar purchase values of lumber from unaffiliated suppliers, and that both companies had similar sales during the [period of review]” *Id.* Commerce’s methodology, the Government contends, “accounts for the fact that, while D&G is a much larger company than Portbec in terms of sales, it purchases a relatively small amount of lumber from unaffiliated suppliers, while Portbec purchased a significant amount of lumber from unaffiliated suppliers and has a relatively small amount of sales.” *Id.* at 11.

D&G/Portbec echo the Government’s arguments. See D&G/Portbec’s Cmts. at 2. They further contend that if the court remands the Remand Results, any “recalculation would need to take into account Commerce’s prior, verified determination that . . . the vast majority of D&G/Portbec’s transactions involve purchasing Canadian lumber on a duty paid basis in the United States and reselling the lumber to buyers in the United States.” *Id.* at 3 (citation and emphasis omitted). D&G/Portbec assert that they “made this point in [their] comments to Commerce on the [draft] Remand Redetermination” and the agency, “perhaps inadvertently, used the figure comprising the total of all Portbec’s purchases of lumber from unaffiliated suppliers.” *Id.* According

to D&G/Portbec, correcting this error would result in a *de minimis* overall subsidy rate even if Commerce used one of the Coalition's proposed methodologies. *Id.*

D&G/Portbec request that, "[t]o the extent that Commerce is unable to distinguish between U.S. and Canadian lumber purchases by D&G/Portbec, it should be instructed to collect the requisite data to complete a fair and accurate calculation." *Id.* at 4.

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

C. Analysis

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

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

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

applying the all-others rate to what appears to be a reduced share of each company's lumber purchases.

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

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

calculated rates for each company before adding them together. Accordingly, this issue will be remanded for reconsideration or further explanation.¹⁹

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

Striking is inappropriate here because D&G/Portbec's argument regarding the claimed inclusion of lumber purchases made in the United States identifies an issue contingent on any further remand, rather than an independent basis for remanding Commerce's current determination. See D&G/Portbec's Cmts. at 3. However, D&G/Portbec's request for the court to instruct Commerce to collect relevant data if "Commerce is unable to distinguish between U.S. and Canadian lumber purchases," D&G/Portbec's Cmts. at 4, goes a step further by effectively asking the court to validate

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

their position.²⁰ As such, while striking is not warranted, the court will grant the Coalition's request for leave to file a reply to respond to D&G/Portbec.²¹ See Pl.'s Reply Cmts. at 2–6.

The court declines D&G/Portbec's request for an instruction. It is for Commerce, on remand, to determine whether it is appropriate to entertain D&G/Portbec's argument at this stage of the proceeding or to reopen the record to collect additional data. See, e.g., *POSCO v. United States*, 46 CIT ___, ___, 557 F. Supp. 3d 1290, 1299 (2022) (reserving to Commerce's discretion whether to reopen the record on remand).

II. Date of Receipt of Tax Benefits

The period of review for the CVD expedited review is January 1, 2015, through December 31, 2015. I&D Mem. at 27. Fontaine's FY 2015 ended on October 31, 2015. *Id.* at 94. For the *Final Results*, however, Commerce used Fontaine's FY 2014 tax returns to calculate certain tax-related benefits based, in large part, on Fontaine's filing of that tax return in calendar year 2015. See *id.* at 93–94.²² The court remanded

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

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

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

Commerce's determination based on record evidence demonstrating that "Fontaine made FY 2014 payments in 2014 and FY 2015 payments in 2015" and, as such, this case appeared to be one in which the date of payment did not align with the date of filing for purposes of applying 19 C.F.R. § 351.509(b)(1). *Coalition VII*, 701 F. Supp. 3d at 1362.

On remand, Commerce reconsidered its determination and found "sufficient evidence . . . that Fontaine was required to pay, and did pay, its final tax liabilities for FY 2015 by the end of the 2015 calendar year." Remand Results at 12. Commerce therefore elected to use Fontaine's FY 2015 tax returns to calculate Fontaine's benefits for the period of review. *Id.* at 13. That change resulted in a change to Fontaine's overall subsidy rate to 0.88 percent, which is considered *de minimis*. *Id.* at 23.²³

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

19 C.F.R. § 351.509(b)(1).

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

Fontaine filed comments in support of Commerce's determination. Fontaine's Cmts. at 4–5. No party opposes Commerce's Remand Results with respect to Fontaine's date of receipt of tax benefits. In the absence of any such challenge, and Commerce's determination being otherwise supported by substantial evidence and in accordance with the law, the court will sustain that determination.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

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

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

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

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

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

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

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

Dated: January 21, 2025
New York, New York