U.S. Court of International Trade

Slip Op. 16–91

IMPERIAL SUGAR COMPANY, Plaintiff, v. UNITED STATES, Defendant, and CÁMARA NACIONAL DE LAS INDUSTRIAS AZUCARERA Y ALCOHOLERA, GOVERNMENT OF MEXICO, and AMERICAN SUGAR COALITION, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 15–00118
PUBLIC VERSION

[The Court denies Plaintiff's Motion for Judgment on the Agency Record.]

Dated: October 5, 2016

Gregory J. Spak, White & Case, LLP, of Washington, DC, argued for plaintiff. With him on the brief were *Kristina Zissis* and *Ron Kendler.*

Karl S. von Schriltz, Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, argued for defendant. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Philippe M. Bruno, Greenberg Traurig, LLP, of Washington, DC, argued for defendant-intervenor Cámara Nacional de las Industrias Azucarera y Alcoholera. With him on the brief were *Rosa S. Jeong* and *Irwin P. Altschuler*.

James R. Cannon, Jr., Cassidy Levy Kent (USA) LLP, of Washington, DC, appeared for defendant-intervenor American Sugar Coalition. With him on the brief were *Robert C. Cassidy, Jr., Charles S. Levy*, and *Jonathan M. Zielinski*.

Stephan E. Becker, Pillsbury Winthrop Shaw Pittman LLP, of Washington, DC, appeared for defendant-intervenor Government of Mexico. With him on the brief was *Sanjay J. Mullick.*

OPINION

Barnett, Judge:

Plaintiff Imperial Sugar Company ("Imperial" or "Plaintiff") moves, pursuant to United States Court of International Trade ("USCIT") Rule 56.2, for judgment on the agency record, challenging the United States International Trade Commission's ("ITC" or "Commission" or "Defendant") determination that the agreements suspending the antidumping and countervailing duty investigations concerning sugar from Mexico eliminate completely the injurious effect of subject imports. *See Sugar from Mexico*, 80 Fed. Reg. 16,426 (ITC Mar. 27, 2015) (determinations) ("Notice of Review Determinations"), Public Joint

Appendix ("Public J.A.") Tab 1, ECF No. 62–1 (Tabs 1–10); Administrative Record ("A.R.") 1–139,[1] ECF No. 31; and accompanying Views ("Review Views"), A.R. 2–250, ECF No. 30; *see also* Confidential Joint Appendix[2] ("Conf. J.A.") Tab 16, ECF No. 61–2 (Tabs 11–21). For the reasons discussed below, the Court denies Plaintiff's motion for judgment on the agency record.

BACKGROUND

I. The Underlying Investigations

On March 28, 2014, the American Sugar Coalition ("ASC") and its members[3] filed antidumping ("AD") and countervailing duty ("CVD") petitions on sugar from Mexico. *Sugar from Mexico*, 79 Fed. Reg. 18,697 (ITC Apr. 3, 2014) (institution of antidumping and countervailing duty investigations and scheduling of preliminary phase investigations). On May 12, 2014, the ITC preliminarily determined that there was a reasonable indication that the domestic sugar industry was materially injured by reason of imports of sugar from Mexico. *Sugar from Mexico*, 79 Fed. Reg. 28,550 (ITC May 16, 2014) (preliminary); *Sugar from Mexico*, USITC Pub. 4467, Inv. Nos. 701-TA-513 and 731-TA-1249 (May 2014) (preliminary), Public J.A. Tab 3, ECF No. 62–1 (Tabs 1–10); A.R. 1–47, ECF No. 31; *see also Sugar from Mexico*, Inv. Nos. 701-TA-513 and 731-TA-1249 (May 5, 2014) (preliminary), Confidential Final Consolidated Staff Report and Views ("Prelim. Views") at 3, Conf. J.A. Tab 25, ECF No. 61–5 (Tabs 23–25); A.R. 2–10, ECF No. 66. In its preliminary determination, the Commission found that there is a reasonable indication that the domestic industry was materially injured by reason of subject imports of sugar from Mexico due to: (1) a significant volume and increase in volume of subject imports during the period of investigation[4] ("POI"); (2) significant underselling by subject imports which, coupled with the significant increase in subject import volume, led to depressed domestic prices to a significant degree during the POI; and (3) a significant adverse impact of the subject imports during the POI. *See* Prelim. Views at 47–58.

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[1] The Administrative Record is divided into three sections: the public portion of the record is indicated by a "1-" before the document number; the confidential portion is indicated by a "2-" before the document number; and the privileged portion is indicated by a "3-" before the document number. *See* A.R. at 1.

[2] The Court references the confidential versions of the relevant views, staff reports, and briefs, if applicable, throughout this opinion. However, the opinion does not contain confidential information.

[3] The ASC members include "domestic processors, millers, and refiners of sugar cane and growers of sugar cane and sugar beets." AD Initiation, 79 Fed. Reg. at 22,795–60.

[4] The POI "encompasses crop year ("CY") 2010/11, CY2011/12, CY2012/13, and October-December of CY2012/13 and CY2013/14." Prelim. Views at 5. The U.S. crop year for sugar begins October 1st and ends on September 30th of the following year. *Id*. at 5 n.8.

The product scope of the investigations consisted of "sugar derived from sugarcane and sugar beets from Mexico, which is chemically classified as sucrose, a naturally occurring carbohydrate." *Id.* at 8; *see also Sugar from Mexico*, 79 Fed. Reg. 22,795, 22,800 (Dep't Commerce Apr. 24, 2014) (initiation of antidumping duty investigation) ("AD Initiation"); *Sugar from Mexico,* 79 Fed. Reg. 22,790, 22,793 (Dep't Commerce Apr. 24, 2014) (initiation of countervailing duty investigation). The scope of subject imports included

> "raw" sugar (sugar with a sucrose content by weight in a dry state that corresponds to a polarimeter reading of less than 99.5 degrees), and "estandar," or standard sugar, which is sometimes referred to as "high polarity" or "semi refined" sugar (sugar with a sucrose content by weight in a dry state that corresponds to a polarimeter reading of 99.2 to 99.6 degrees) . . . . Also included in the scope of the investigations [were] "refined" sugar with a sucrose content by weight in a dry state that corresponds to a polarimeter reading of at least 99.9 degrees; brown sugar; liquid sugar (sugar dissolved in water); organic raw sugar; and organic refined sugar.[5]

Prelim. Views at 8–9.

During the ITC's preliminary investigation, Imperial submitted responses to the ITC's questionnaires but, otherwise, did not submit written arguments. Def.-Intervenor Cámara Nacional de las Industrias Azucarera y Alcololera's Resp. in Opp'n to Pls.' Mot. for J. on the Agency R. ("Cámara Resp.") at 7, ECF No. 46. Imperial also did not participate in the investigative staff conference or file postconference briefs. Confidential Def. United States Int'l Trade Comm'n's Opp'n to Pls.' Mot. for J. on the Agency R. ("Def.'s Resp.") at 22, ECF No. 42. Imperial entered its appearance in the final phase of the Commission's investigation on December 9, 2014. Cámara Resp. at 7. Imperial did not participate in Commerce's AD and CVD investigations. *Id.* at 8.

In its preliminary determinations, the Commission defined the domestic industry "as the domestic producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product" pursuant to 19 U.S.C. § 1677(4)(A) (2012).[6] Prelim. Views at 20 & n.87 (internal quotation marks omitted). Accordingly, the ITC based its domestic industry data on the question-

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[5] "Estandar can be used either as a raw material input in the production of refined sugar or as an input in the production of certain food and beverage products." *Id.* at 9.

[6] All references to the United States Code are to the 2012 edition, unless otherwise stated.

naire responses of "24 firms that accounted for the vast majority of sugar production during October 2010 through December 2013, including nine sugarcane millers, two firms that both mill and refine sugarcane, four sugarcane refiners, seven sugar beet processors, and two firms that primarily produce liquid sugar." *Id.* at 4.

Plaintiff represents about seven percent of the domestic sugar industry, Oral Argument ("Oral Arg.") at 7:29–7:50, and is referred to as a "destination refiner." "Destination refiners" are "refiners that use imported raw sugar as an input." Def.'s Resp. at 3. Thus, "destination refiners" produce refined sugar and are members of the domestic industry. The input to their production process, notably, is raw sugar or estandar and, when imported from Mexico, their imported input is subject merchandise in the investigations. *See id.* The destination refiners segment of the domestic industry constitutes about one-third of the domestic sugar industry. Oral Arg. at 27:45–28:04.

On August 25, 2014, Commerce issued its affirmative preliminary determination in the CVD investigation. *Sugar from Mexico*, 79 Fed. Reg. 51,956 (Dep't Commerce Sept. 2, 2014) (preliminary affirmative countervailing duty investigation and alignment of final countervailing duty determination with final antidumping duty determination). On October 24, 2014, Commerce issued its affirmative preliminary determination in the AD investigation. *Sugar from Mexico*, 79 Fed. Reg. 65,189 (Dep't Commerce Nov. 3, 2014) (preliminary determination of sales at less than fair value and postponement of final determination).

On October 27, 2014, three days after its AD Preliminary Determination was issued, Commerce announced that it had initialed draft AD and CVD suspension agreements (collectively, "the Agreements") with the Government of Mexico ("GOM") and Mexican exporters.[7] Review Views at 4. Commerce provided interested parties an opportunity to comment on the draft suspension agreements. *Id.* On the day it initialed the Agreements, Commerce "notified and consulted with" the petitioners and its individual members, the ITC, and other interested parties pursuant to the notice and comment requirements in sections 1671c(e) and 1673c(e). *Sugar from Mexico*, 79 Fed. Reg. 78,039 (Dep't Commerce Dec. 29, 2014) (suspension of antidumping investigation) ("AD Suspension Notice"), Staff Report Inv. Nos. 704-TA-1 and 734-TA-1 (Review) ("Review Staff Report") Appendix A, A.R.

[7] "Initialing" the suspension agreements refers to Commerce's preliminary acceptance of a proposed suspension agreement, 19 C.F.R. § 351.208(f)(2) (2014), and its provision of said agreement(s) to petitioners and other interested parties to comment on, prior to the possible acceptance of an agreement and suspension of the investigation. *See* 19 U.S.C. §§ 1671c(e), 1673c(e) and 19 C.F.R. § 351.208(f). *Cf.* Usinas Siderurgicas De Minas Gerais S/A v. United States, 26 C.I.T. 422, 424, 201 F. Supp. 2d 1304, 1307 (2002) (Commerce and the Government of Brazil initialed a proposed suspension agreement before soliciting comments from interested parties and, subsequently, signing the suspension agreement).

2–247, ECF No. 30; *Sugar from Mexico*, 79 Fed. Reg. 78,044, 78,045 (Dep't Commerce Dec. 29, 2014) (suspension of countervailing duty investigation) ("CVD Suspension Notice"), Review Staff Report Appendix A, A.R. 2–247, ECF No. 30. Commerce "invited interested parties to provide written comments on the proposed suspension agreement[s]." AD Suspension Notice, 79 Fed. Reg. at 78,039; CVD Suspension Notice, 79 Fed. Reg. at 78,045. Numerous interested parties, including Imperial, provided comments on the draft suspension agreements. AD Suspension Notice, 79 Fed. Reg. at 78,040; CVD Suspension Notice, 79 Fed. Reg. at 78,045; *see also* Rule 56.2 Mot. for J. on the Agency R. on Behalf of Pl. Imperial Sugar Co., ECF No. 39, and Confidential Mem. of P. & A. in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. ("Pl.'s Mot.") at 4, ECF No. 39–1.

In its comments on the proposed suspension agreements, Imperial stated that the "draft suspension agreements—in their current form—are not in the public interest and will result in fundamental disruptions of the U.S. sugar market." Pl.'s Mot. at 4 (internal citation omitted). On December 19, 2014, after the notice and comment period concluded, the Agreements were finalized. AD Suspension Notice, 79 Fed. Reg. at 78,040; CVD Suspension Notice, 79 Fed. Reg. at 78,045. Based on the comments received, Commerce negotiated several changes from the draft agreements into the finalized Agreements, including "revision[s] [to] the definitions of 'refined sugar' and 'other sugar,'" a decrease in the share of total exports that could consist of refined sugar, "and adjustments to the reference prices, including increasing the absolute prices as well as the price differential between the refined and other sugar." Review Views at 4. The relevant details of the Agreements are described below.

Also on December 19, 2014, Commerce suspended the antidumping and countervailing duty investigations. AD Suspension Notice, 79 Fed. Reg. at 78,039; CVD Suspension Notice, 79 Fed. Reg. at 78,044.

II. The Suspension Agreements

The Agreements were entered into pursuant to express statutory authority that provides for suspension as an alternative means of resolving an AD or CVD investigation. Review Views at 13; *compare* 19 U.S.C. §§ 1671a, 1673a, *with* 19 U.S.C. §§ 1671c, 1673c. These particular suspension agreements, so-called "(c) agreements,"[8] have a distinct legal standard, which is to "eliminate completely the injurious effect" of subject imports, identified in the underlying AD/CVD proceeding. 19 U.S.C. §§ 1671c(c)(1), 1673c(c)(1). Such agreements

[8] So-called because they are entered into pursuant to subsection (c) of 19 U.S.C §§ 1671c and 1673c. Other types of suspension agreements include agreements to eliminate or offset subsidies, agreements to eliminate dumping, and non-market economy agreements. *See* 19 U.S.C §§ 1671c(b), 1673c(b), and 1673c(l), respectively.

have various statutory conditions that must be satisfied before Commerce may enter into the agreement. The authority to negotiate and enter into a suspension agreement lies exclusively with Commerce.

Before entering into an AD or CVD (c) agreement, Commerce must find that extraordinary circumstances are present. 19 U.S.C. §§ 1673c(c)(1); 19 U.S.C. §§ 1671c(c)(1). The statute defines "extraordinary circumstances" as existing when "(i) suspension of an investigation will be more beneficial to the domestic industry than continuation of investigation, and (ii) the investigation is complex." 19 U.S.C. § 1673c(c)(2)(A); 19 U.S.C. § 1671c(c)(4)(A). The statutory definition of "complex" differs between an AD[9] and CVD[10] investigation.

If Commerce finds that extraordinary circumstances are present, then it must also ensure that the proposed agreement serves the public interest and permits practicable, effective monitoring. 19 U.S.C. § 1673c(d)(1)-(2); 19 U.S.C. §§ 1671c(d)(1). In the underlying proceedings, Commerce found that the requisite conditions for the AD Agreement were satisfied. *See* Mem. to Paul Piquado from Lynn Fischer Fox, "Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico: U.S. Import Coverage, Existence of Extraordinary Circumstances, Public Interest, and Effective Monitoring Assistance" at 2 (Dec. 19, 2014), Review Staff Report Appendix D, A.R. 2–247, ECF No. 30. Commerce also found that the requisite conditions for the CVD Agreement were satisfied. *See* Mem. to Paul Piquado from Lynn Fischer Fox, "Agreement Suspending the Countervailing Duty Investigation on Sugar from Mexico: Existence of Extraordinary Circumstances, Public Interest, and Effective Monitoring Assistance" at 1 (Dec. 19, 2014), Review Staff Report Appendix D, A.R. 2–247, ECF No. 30; *see also* Mem. to Paul Piquado from Lynn Fischer Fox, "The Prevention of Price Suppression or Undercutting of Price Levels by the Agreements Suspending the Antidumping Duty Investigation on Sugar from Mexico" at 11–13 (Feb. 6, 2015) ("Commerce Mem. Feb. 6th"), Review Staff Report Appendix D, A.R. 2–247, ECF No. 30 (addressing the additional requirements for CVD agreements pursuant to section 1671c(c)(2),(3)).

The product scope of each agreement is the same as the respective underlying investigation. *See supra* p. 4.

A. CVD Agreement

The basis for suspending the CVD investigation was an agreement between Commerce and the GOM, whereby the GOM agreed "not to

[9] An AD investigation is "complex" when it involves: (i) a large number of transactions to be investigated or adjustments to be considered; (ii) the issues raised are novel; or (iii) the number of firms involved is large. 19 U.S.C. § 1673c(c)(2)(B).

[10] A CVD agreement is "complex" when it involves: (i) a large number of alleged countervailable subsidy practices and the practices are complicated; (ii) the issues raised are novel; or (iii) the number of exporters involved is large. 19 U.S.C. § 1671c(c)(4)(B).

provide any new or additional export or import substitution subsidies on the subject merchandise and [...] agreed to restrict the volume of direct or indirect exports to the United States of sugar from all Mexican producers/exporters," pursuant to 19 U.S.C. § 1671c(c). CVD Suspension Notice, 79 Fed. Reg. at 78,044; *see also* Agreement Suspending the Countervailing Duty Investigation on Sugar from Mexico ("CVD Agreement"), Review Staff Report Appendix D, A.R. 2–247, ECF No. 30.

The CVD Agreement "provides for multiple volume limitations that will control both the total amount of sugar imported from Mexico as well as the specific volume of refined sugar imports from Mexico that will be allowed into the United States." Review Views at 4–5; *see also* CVD Agreement, sect. V. "Export Limits." The CVD Agreement "effectively integrates Mexico into the U.S. Sugar Program by limiting the volume of sugar exports from Mexico in a given crop year to residual U.S. Needs, as calculated by USDA [United States Department of Agriculture (administrator of the U.S. Sugar Program[11])] based upon its monthly WASDE [World Agricultural Supply and Demand Estimates Report]."[12] Review Views at 39 (internal citations omitted). Commerce is tasked with establishing and adjusting "an annual limit on the volume of sugar exports from Mexico equal to projected U.S. demand," taking into account "beginning stocks and projected domestic production, TRQ imports [(tariff rate quota imports pursuant to the U.S. Sugar Program)], other program imports (such as . . . Free Trade Agreements), and other imports (such as high-tier imports), leaving ending stocks equivalent to 13.5 percent of U.S. demand." *Id.* at 39. As the Commission explained, "U.S. Needs is essentially the portion of the U.S. market that USDA determines will not be served by other sources, including domestic production and other imports, assuming a stocks-to-use ratio of 13.5 percent." *Id.* at 10.

The CVD Agreement provides for periodic adjustments to Mexico's sugar export limits to meet U.S. Needs. Annual sugar exports from Mexico are limited to 70 percent of the U.S. Needs as of October 1st,

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[11] Since October 1990, the USDA has administered the U.S. Sugar Program to align domestic sugar supply with domestic sugar demand. Prelim. Views at 40 & n.173. The USDA regulates the quantity of sugar supplied by domestic producers to the U.S. market by assigning marketing allotments to cane millers and beet processors on a firm-specific basis, with the overall allotment set at 85 percent of projected U.S. human consumption of sugar in a given crop year. *Id.* at 38–39.

[12] WASDE is published by the USDA. CVD Agreement, sect. II.T. The residual U.S. Needs are calculated by using USDA data in a specified formula published monthly in WASDE. Review Views at 10–11 n.34. U.S. Needs is defined in the CVD Agreement using the following calculation:

(Total Use*1.135) – Beginning Stocks – Production – TRQ Imports – Other Program Imports – Other Imports

Id. at 39 & n.124; *see also* CVD Agreement, sect. II. "Definitions", ¶ R.

with the ability to adjust it upward to 80 percent as of January 1st, and 100 percent as of April 1st, assuming that U.S. Needs remain essentially the same or increase over the course of a crop year. *Id.* at 40. Commerce's ability to periodically adjust the limit on sugar exports from Mexico under the CVD Agreement "ensures that the volume of exports from Mexico during a crop year cannot significantly exceed actual U.S. Needs during that crop year." *Id.*

The CVD Agreement also incorporates an anti-surge mechanism for imports from Mexico at the beginning of an export limit period, by capping exports from Mexico at 30 percent of U.S. Needs during the October 1st to December 31st period calculated using the July WASDE and 55 percent during the October 1st to March 31st period calculated using the December WASDE. *Id.* at 40–41. In addition, the CVD Agreement sets a sub-limit for exports of refined sugar, limiting such exports to fifty-three percent of total exports from Mexico to the United States during any given export limit period. CVD Agreement, sect. V.C.3.; *see also* Review Views at 41. Conversely, at least forty-seven percent of the export limit from Mexico is reserved for sugar with a polarity of less than 99.5 degrees. Review Views at 41.

B. AD Agreement

The basis for suspending the AD investigation was an agreement between Commerce and "signatory producers/exporters accounting for substantially all imports of Sugar from Mexico," whereby the signatory producers/exporters agree to sell subject imports at not less than the agreed upon reference prices, pursuant to 19 U.S.C. § 1671c(c). AD Suspension Notice, 79 Fed. Reg. at 78,039; *see also*Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico ("AD Agreement"), Review Staff Report Appendix D, A.R. 2–247, ECF No. 30.

The AD Agreement sets minimum reference prices above which sugar from Mexico must be sold in the United States. Review Views at 8, 47; *see also* AD Agreement, sect. VI "Price Undertaking." The AD Agreement sets separate reference prices for refined and raw sugar: the reference price for raw sugar is $0.2225 per pound and refined sugar is $0.26 per pound. Review Views at 47. Additionally, exporters are required to ensure that their U.S. prices are such that they eliminate at least 85 percent of that exporter's margin of dumping. *Id.* at 26 n.80 (citing section 1673c(c)(1)), 47.

C. The Review of the Agreements

On December 19, 2014, Commerce suspended both the antidumping and countervailing duty investigations. AD Suspension Notice, 79 Fed. Reg. at 78,039; CVD Suspension Notice, 79 Fed. Reg. at 78,044.

Subsequent to the announcement of the signed Agreements, on January 8, 2015, Plaintiff and one other destination refiner[13] filed petitions requesting that the ITC review the Agreements pursuant to 19 U.S.C. §§ 1671c(h) and 1673c(h).[14] *Sugar from Mexico*, Inv. Nos. 704-TA-1 and 734-TA-1 (review), USITC Pub. 4523 (Apr. 2015) ("Review Determinations") at 4, A.R. 1–148, ECF No. 31.[15] On January 21, 2015, the ITC instituted the underlying reviews. *Sugar from Mexico*, 80 Fed. Reg. 3,977 (ITC Jan 26, 2014) (institution of reviews of agreements suspending antidumping duty and countervailing duty investigations) ("Reviews Institution").

Several interested parties opposed the petitions for review of the Agreements and actively participated in the reviews, taking the position that the Agreements would eliminate completely the injurious effect of subject imports. These parties included American Sugar Refining ("ASR"),[16] the Sugar Coalition (domestic processors, millers, and refiners of sugar cane and growers of sugar cane and sugar beet), Cámara (Mexican producers/exporters of subject merchandise), CSC Sugar, LLC ("CSC") (a domestic sugar refiner and importer of subject merchandise), Batory Foods (a domestic wholesaler of the domestic like product), and the GOM. Review Views at 7. The USDA also had submitted written comments on the Agreements.[17] *Id.*

After the reviews began, Commerce issued a memorandum addressing the prevention of price suppression and undercutting of price levels by the AD Agreement. *Id.* at 7 & n.14 (citing Commerce Mem. Feb. 6th). Commerce issued an additional memorandum addressing other statutory requirements for entering into the (c) agree-

[13] That other destination refiner was AmCane Sugar LLC ("AmCane"). AmCane was a consolidated plaintiff and plaintiff-intervenor in this case. AmCane subsequently voluntarily dismissed its case and withdrew as a plaintiff-intervenor. *See generally* Order (Apr. 4, 2016), ECF No. 55 (dismissing AmCane pursuant to its Rule 41 Stipulation of Voluntary Dismissal).

[14] This is the first time the Commission has been asked to review a suspension agreement pursuant to subsection (h). Review Views at 5 n.11.

[15] In the underlying proceeding, Defendant-Intervenor Cámara challenged Imperial's eligibility to request a subsection (h) review, asserting that Imperial did not qualify

> as "an interested party . . . to the investigation" under sections 704(h) and 734(h) because "parties to the investigations" are limited to those parties that actively participate in the investigations pursuant to Commerce regulation 19 C.F.R. § 351.102(a)(36), and to those parties that Commerce is obligated to notify about the proposed suspension agreements pursuant to 19 U.S.C. §§ 1671c(e)(1) and 1673c(e)(1).

Id. at 6 n.13. The Commission rejected Cámara's arguments, finding that the "Commission's regulations do not require any particular level of participation during a particular phase of the investigation for a party to be a 'party to the investigation.'" *Id.* (citing 19 C.F.R. § 201.11(a)). Further, the Commissions found Imperial's entry of appearance, despite its filing date, sufficient to qualify as "a party to the investigation." *Id.*

[16] ASR is the largest domestic destination refiner. *See* Oral Arg. 43:36 – 43:41 ("[T]he Commission [did not] ignore the largest destination refiner, American Sugar Refining.")

[17] United States government agencies are provided an opportunity to comment on proposed suspension agreements pursuant to 19 C.F.R. § 351.208(f)(3).

ments. *See id.* at 7. n.15 (citing Mem. to Paul Piquado from John McInerney, "Satisfaction of the Statutory Requirement That the Agreements Suspending the Antidumping and Countervailing Duty Investigations of Imports of Sugar from Mexico Eliminate Completely the Injurious Effects of Those Imports" (Feb. 10, 2015), Public J.A. Tab 23, ECF No. 62–5 (Tabs 23–25); A.R. 1–83, ECF No. 31).

Upon review, the ITC determined that the Agreements suspending the AD and CVD investigations concerning sugar from Mexico eliminate completely the injurious effect of subject imports. Notice of Review Determinations, 80 Fed. Reg. at 16,426; *see also* Review Views at 3. In its review, the ITC found "that the quantitative restrictions and reference prices established [in] the Agreements will result in higher U.S. prices for both raw and refined sugar, thereby working in concert to eliminate adverse price effects for the industry as a whole even if some mixed underselling by subject imports may continue to occur." Review Views at 47–48 n.147.

Before this Court is Plaintiff's challenge to the ITC's affirmative Review Determinations.

STANDARD OF REVIEW

The court will uphold an agency determination that is supported by substantial evidence on the record and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). The two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), guides judicial review of the Commission's interpretation of the antidumping and countervailing duty statutes. *See Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005). First, the court must determine "'whether Congress has directly spoken to the precise question at issue.'" *Heino v. Shinseki*, 683 F.3d 1372, 1377 (Fed. Cir. 2012) (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, then "'that is the end of the matter.'" *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "[i]f the statute is silent or ambiguous," then the court must determine "whether the agency's action is based on a permissible construction of the statute." *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012) (citing *Chevron*, 467 U.S. at 842–43).

To determine whether an agency's statutory construction is permissible, a court considers whether the construction is reasonable, consistent with statutory goals, and reflects agency practice. *Apex Exps. v. United States*, 777 F.3d 1373, 1379 (Fed. Cir. 2015). If the agency's interpretation is permissible, then the court must accord it deference, even if the agency's construction is not the "reading the court would have reached if the question initially had arisen in a judicial proceeding." *Koyo Seiko Co., Ltd. v. United States*, 66 F. 3d 1204, 1210 (Fed. Cir. 1995).

When reviewing a determination under the substantial evidence standard, substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). It "'requires more than a mere scintilla," but "'less than the weight of the evidence.'" *Nucor Corp. v. United States*, 34 CIT 71, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). In determining whether substantial evidence supports the ITC's determination, the Court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

That a plaintiff can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933, 936 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966); *Armstrong Bros. Tool Co. v. United States*, 626 F.2d 168, 170 n.3 (C.C.P.A. 1980)). The court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)); *see also Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted) (The court "may not reweigh the evidence or substitute its own judgment for that of the agency").

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(v).

DISCUSSION

I. LEGAL FRAMEWORK FOR SUSPENSION AGREEMENTS

A. Statute

Four statutory provisions are particularly relevant to this case: the CVD suspension agreement provision found in 19 U.S.C. § 1671c(c), the AD suspension agreement provision found in 19 U.S.C. § 1673c(c), and their respective review provisions, found in 19 U.S.C. §§ 1671c(h) and 1673c(h).

For CVD suspension agreements, section 1671c(c) provides, in relevant part:

(c) Agreements eliminating injurious effect

(1) General rule

If the administering authority determines that extraordinary circumstances are present in a case, it may suspend an investigation upon the acceptance of an agreement from a government described in subsection (b) of this section, or from exporters described in subsection (b) of this section, if the agreement will eliminate completely the injurious effect of exports to the United States of the subject merchandise.

(2) Certain additional requirements

Except in the case of an agreement by a foreign government to restrict the volume of imports of the subject merchandise into the United States, the administering authority may not accept an agreement under this subsection unless--

(A) the suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented, and

(B) at least 85 percent of the net countervailable subsidy will be offset.

(3) Quantitative restrictions agreements

The administering authority may accept an agreement with a foreign government under this subsection to restrict the volume of imports of subject merchandise into the United States, but it may not accept such an agreement with exporters.[18]

For AD suspension agreements, section 1673c(c) provides, in relevant part:

(c) Agreements eliminating injurious effect

(1) General rule

If the administering authority determines that extraordinary circumstances are present in a case, it may suspend an investigation upon the acceptance of an agreement to revise prices from exporters of the subject merchandise who account for substantially all of the imports of that merchandise into the United States, if the agreement will eliminate completely the injurious effect of exports to the United States of that merchandise and if—

(A) the suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented, and

(B) for each entry of each exporter the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent of

[18] The CVD suspension agreement is a quantitative restriction agreement between Commerce and the GOM. Review Views at 14.

the weighted average amount by which the estimated normal value exceeded the export price (or the constructed export price) for all less-than-fair-value entries of the exporter examined during the course of the investigation.

These first two provisions are particularly relevant because they are the statutory authority for the two agreements into which Commerce entered. As previously noted, the Agreements are sometimes referred to as (c) agreements because that is the subsection pursuant to which Commerce entered into the Agreements. In both cases, the statute requires that the agreement eliminate completely the injurious effect of exports of subject merchandise to the United States. Although Commerce is the agency authorized to enter into the agreements, the ITC is tasked with making an injury determination regarding a domestic industry.[19] That bifurcation of responsibilities is reconciled by the review provisions found in the suspension agreement provisions of the statute.

When Commerce enters into an AD or CVD suspension agreement pursuant to subsection (c) (an elimination of injury agreement), subsection (h) of the respective AD and CVD provisions establishes a process by which a domestic interested party may request a review of the agreement by the ITC to determine whether the agreement eliminates completely the injurious effects of subject imports:

(h) Review of suspension

(1) In general

Within 20 days after the suspension of an investigation under subsection (c) of this section, an interested party which is a party to the investigation and which is described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9) of this title may, by petition filed with the Commission and with notice to the administering authority, ask for a review of the suspension.

(2) Commission investigation

Upon receipt of a review petition under paragraph (1), the Commission shall, within 75 days after the date on which the petition is filed with it, determine whether the injurious effect of imports of the subject merchandise is eliminated completely by the agreement. If the Commission's determination under this subsection is negative, the investigation shall be resumed on the date of publication of notice of such determination as if the

[19] Commerce's decision to enter into a suspension agreement is subject to judicial review pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iv). This case, however, is not brought pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iv) and is not a direct challenge to Commerce's authority to enter into the Agreements. Instead, Plaintiff challenges the ITC's review of the Agreements.

> affirmative preliminary determination under section [1671b(b)/ 1673b(b)] of this title had been made on that date.
>
> [...]

19 U.S.C. §§ 1671c(h), 1673(h).

Such a review was requested and conducted with regard to both the AD and CVD Agreements here. The Commission found that the Agreements did eliminate completely the injurious effect of the subject imports. It is this review determination made by the Commission that Plaintiff now challenges pursuant to 19 U.S.C. § 1516a(a)(2)(B)(v).

B. Regulations

The underlying proceeding constitutes the first time the ITC has reviewed a suspension agreement pursuant to 19 U.S.C. §§ 1671c(h) or 1673c(h). The only regulation the Commission has promulgated with respect to such reviews is 19 C.F.R. § 207.41. That regulation mirrors some of the statutory language and indicate the types of parties that may request such a review and the time period for the Commission to complete the review. No party has suggested that the Commission's regulation is relevant to the issues raised in this judicial proceeding.

II. Plaintiff's Challenges to the Review Determination

In challenging the ITC's review determination, Plaintiff raises three main arguments: (1) that the ITC's statutory interpretation of "eliminate completely" was not in accordance with law; (2) that the ITC's analysis of the indicia of injury was unsupported by substantial evidence or otherwise not in accordance with law; and (3) that the ITC's failure to provide parties an opportunity to comment on an economic model was not in accordance with law. The Court will address each of these arguments, in turn.

A. The ITC's Interpretation of "Eliminate Completely."

Plaintiff argues that the Commission did not properly interpret the phrase "eliminate completely" because it made an affirmative review determination (that the Agreements would eliminate completely the injurious effect of the subject imports) notwithstanding Plaintiff's assertion that the Agreements permit injury to destination refiners. Pl.'s Mot. at 13, 21. The Commission responds that Plaintiff does not dispute its interpretation of "eliminate completely" itself, but rather, objects that the Commission interpreted the phrase "eliminate com-

pletely" in the context of the "injurious effect" to the domestic industry as a whole identified in the preliminary injury determination. Def.'s Resp. at 21–22, 26–27.

In its review of the Agreements, the Commission was tasked with determining "whether the injurious effect of imports of the subject merchandise is eliminated completely by the agreement." 19 U.S.C. §§ 1671c(h)(2), 1673c(h)(2). However, the terms "eliminated completely" and "injurious effect" are not defined in the statute, and, therefore, the Commission construed their meaning in the context of the statute as a whole. Review Views at 19–20.

Because the term "eliminate completely" is not present in other provisions of the trade remedies statute, the ITC consulted Webster's Third New International Dictionary, Unabridged (1981) ("Webster's") to define the term's plain meaning. *Id.* at 22 n.64; *see also* Def.'s Resp. at 3, 20. The ITC defined "eliminate" as "to cast out, remove, expel, exclude, drop, oust, to cause the disappearance of, to get rid of." Review Views at 22 n.64 (citing Webster's at 736). It defined "completely" "so as to be complete, full, to a complete degree, entirely." *Id.* (citing Webster's at 465). The ITC noted that "Congress' modification of the verb 'eliminate' with the adverb 'completely' . . . was intended to communicate the strictness of the standard." *Id.*(citing S. Rep. No. 96–249 at 54, 71 (1979)).

Plaintiff disputes that the ITC applied the plain meaning of "eliminate completely" and urges that "a review of the Commission's decision confirms that it construed the statute contrary to its plain meaning." Pl.'s Mot. at 13, 20. Imperial insists that the ITC's analysis of the statutory standard should have been performed "for all segments" and if the ITC had done so, it would have seen that the destination refining segment would still suffer injury; in other words, the injurious effect was not eliminated completely. Pl.'s Reply at 3–4. The ITC asserts that it considered the domestic industry as a whole and, in doing so, considered all sectors of the domestic industry. Review Views at 23–24.[20] Additionally, because suspension agreements are negotiated after the Commission's preliminary determination and before its final determination, the ITC noted that the only injurious effect of subject imports established at the time of the review is the injurious effect identified by the Commission in its preliminary injury determination. *Id.* at 20. The ITC, therefore, interpreted the

[20] The ITC "focus[ed] on the injurious effects of subject imports on the domestic industry defined in the preliminary determinations, which included 'all producers of sugar within the scope of the investigations.'" Review Views at 22.

"injurious effect" that was to be eliminated completely to be the injury identified in the preliminary determinations. *Id*. at 20–21.[21]

The statute is silent as to whom the injurious effect applies. *See*19 U.S.C. §§ 1671c(c), 1673c(c) (providing for suspension agreements "if the agreement will eliminate completely the injurious effect of exports to the United States"). Accordingly, pursuant to *Chevron*, the Court must determine whether the ITC's interpretation of eliminate completely is permissible. *See Dominion Res.*, 681 F.3d at 1317 (citing *Chevron*, 467 U.S. at 842–43) (when the statute is silent or ambiguous as to the question at issue, the court must turn to the second *Chevron* step). Applying the *Chevron*standard, the Court finds that the ITC's interpretation of eliminate completely to apply to the injurious effect on the domestic industry as a whole comports with the trade remedies statutory scheme, which, among other things, defines "industry" as "the producers as a whole of a domestic like product . . ." *See* 19 U.S.C. § 1677(4)(A).

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation and internal quotation marks omitted). Thus, "reading the statute as a whole," Review Views at 22, it is clear that the statutory standard for an affirmative preliminary determination is, in pertinent part, "whether there is a reasonable indication that *a domestic industry* is materially injured," Prelim. Views at 3 (emphasis added). In the preliminary determinations, the domestic industry statistics were derived from data supplied by "24 firms that accounted for the vast majority of the sugar production during October 2010 through December 2013." *Id.* at 4. These firms included "sugarcane farmers, millers and refiners, and sugar beet growers and processors." *Id.* at 3–4. The ITC's application of the suspension standard to the entire domestic industry is harmonious with reading the statute as a whole.

Additionally, the ITC's decision to apply the suspension agreements standard to the industry as a whole is consistent with language found in other provisions of the same statute. For example, sections 1671c(c)(4)(A)(i) and 1673c(c)(2)(A)(i) require Commerce to evaluate the relative benefits of CVD and AD agreements to the "domestic industry," and when analyzing public interest factors, Commerce must assess the relative impact of the agreement on the competitiveness of the "domestic industry producing the like merchandise." AD Agreement, sect. V; CVD Agreement, sect. IV. The ITC's approach to harmonizing all sections of the statute, by applying its injurious effect analysis to the domestic industry as a whole, is reasonable. *See Food & Drug Admin.*, 529 U.S. at 133 (statutes must be interpreted so as

[21] In so doing, the ITC noted that it was concerned with the injurious effects identified in its own preliminary determinations, as opposed to those identified by Commerce. *Id.* at 21.

to "fit, if possible, all parts into an harmonious whole") (citation and internal quotation marks omitted).

The ITC's interpretation of subsections (h), as requiring it to review the Agreements to determine whether the injurious effect of subject imports identified in its preliminary determinations is eliminated completely is also reasonable, because Commerce may not enter into a suspension agreement that eliminates completely the injurious effect of subject imports until after the ITC has issued an affirmative preliminary injury determination. *See* 19 U.S.C. §§ 1671b(b)(1), 1673b(b)(1)(A)). In the instant case, the injury identified in the preliminary determinations is the only injury finding in effect at the time that Commerce was authorized to negotiate the agreements. Thus, the injury established in the preliminary determinations served as a benchmark for Commerce to negotiate the (c) agreements.

Plaintiff's contention that the Agreements themselves have an injurious effect that the Commission should have examined is unavailing. Subsection (h) of both the CVD and AD suspension agreement provisions requires the Commission to determine whether the "injurious effect *of imports of the subject merchandise*" is eliminated. 19 U.S.C. §§ 1671c(h), 1673c(h) (emphasis added). Plaintiff's loss of its commercial advantage of large volumes of low priced subject imports as a result of the Agreements is neither a harm that the statute contemplates nor a harm shared by all of the destination refining segment. *See* Review Views at 26; Def.'s Resp. at 26. In its injury analysis, the ITC rejected as inappropriate Plaintiff's argument that the Agreements "themselves will have an injurious effect . . . on destination refiners." Review Views at 25. The Commission reasonably found that there is no requirement that it examine injurious effects caused by anything other than the subject imports.[22]

The suspension statutes also do not contemplate injury to a particular segment of an industry caused by losing "a competitive advantage with respect to their U.S. competitors." Government of Mexico's Resp. in Opp'n to Pls.' Rule 56.2 Mot. for J. on the Agency R. at 8–9, ECF No. 41. Because it would lose its competitive advantage, Plaintiff had no interest to eliminate dumping of its imported input, raw sugar. Plaintiff's complaint about its individual injury is misplaced; the ITC reasonably determined to review the injurious effect on the entire domestic industry and not merely on Plaintiff's indi-

[22] Notably, Plaintiff did not challenge the ITC's selection of the period of review for which it considered whether the agreements would eliminate completely the injurious effect of the subject imports. The ITC used the same POI as its preliminary investigation, plus a more current period for which it had data, to analyze the "likely conditions when the volume and price of subject imports will be determined by the operation of the agreements." *Id.* at 19. Thus, the ITC used the POI data (CY2010/11 through CY2012/13) as well as "what is likely to occur prospectively through crop year 2014/15, which is the only prospective period for which [the Commission had] data." *Id*. Thus, the time period for the Review Determination is CY2010/11 to CY2012/13 and CY2014/15.

vidual injury. The Commission reasonably found that there is no requirement that it examine injurious effects caused by anything other than the subject imports.

The Court finally considers Plaintiff's legislative history argument. Plaintiff discusses Congressional intent underpinning the (c) agreements, focusing on alleged Congressional concern with the term "eliminated completely." Pl.'s Mot. at 14–18. Plaintiff repeatedly points to legislative history for its definition of "eliminate completely" to mean "no discernible injurious effect." *Id.* at 17 (citing S. Rep. No. 96–249, at 54, 71).

Plaintiff's narrow interest in a low cost input, which is a lost benefit under the Agreements, is not shared by the industry as a whole, or even within the segment to which Plaintiff belongs. For the industry as a whole, there is no discernible injurious effect caused by suspending the AD and CVD investigations pursuant to these Agreements that would limit imports and impose minimum reference prices. Therefore, the Court finds that the ITC's approach to defining the statutory standard of "eliminate completely the injurious effect" is not inconsistent with the legislative history.

Accordingly, the Court holds that the ITC's conclusion that the Agreements satisfy the statutory standard of "eliminate completely the injurious effect" of subject imports is a permissible statutory construction.

B. THE ITC'S CONSIDERATION OF RECORD EVIDENCE

The Court next turns to Plaintiff's arguments that certain aspects of the ITC's determination are not based on substantial evidence on the record. As discussed above, the court will uphold an agency determination that is supported by substantial evidence on the record. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

1. Volume

Plaintiff contends that the CVD Agreement will neither reduce the volume of refined sugar nor sufficiently limit imports of raw sugar. Pl.'s Mot. at 24–31. According to Plaintiff, the injury to destination refiners from subject imports started in CY2011/12,[23] when there was "too much" Mexican sugar in the U.S. market, and in particular, "too much direct consumption sugar at low prices in order to gain market

[23] In contrast, the ITC found that the "refining segment as a whole was profitable" in CY 2011 and started to "experience[] a decline in their operating income" in CY2012/13. *Id.* at 33 n.105. However, the start date of the injury to the destination refiners segment is not relevant because, in the preliminary determinations, the ITC analyzed injury to the domestic industry as a whole. *Id.*

share." *Id*. at 25. Imperial alleges that this "export of direct consumption sugar" from Mexico resulted in "oversupply in the U.S. markets"[24] and defaults on sugar loans. *Id*. Plaintiff notes that "imports into the direct consumption channel from Mexico include not only 'refined' sugar, but also 'estandar.'" *Id*. (citing Prelim. Views at 9 & n.24).

Plaintiff further contends that the AD Agreement will neither eliminate underselling nor prevent the influx of a "significant amount of 'direct consumption' sugar into the United States from Mexico." *Id*. at 26 (citing Second Written Submission of Imperial Sugar Co. at 12–14, Conf. J.A. Tab 9, ECF No. 61–1 (Tabs 1–10); A.R. 2–243, ECF No. 30). Plaintiff explains that "because the Agreements use polarity as the sole metric for defining 'refined' versus 'other sugar,' the reference price for refined sugar does not apply to all direct consumption sugar that is imported from Mexico." *Id.* Plaintiff speculates that estandar could be interchanged with refined sugar, and alleges that, as written, the Agreements permit 100 percent of raw and refined Mexican sugar exports to be "sold to the direct consumption market without a single ton going to the refiners." *Id*. at 26, 29. Plaintiff argues that "record evidence demonstrate[s] that direct consumption sugar can enter the United States below the refined sugar reference price." *Id*. at 26. Consequently, Plaintiff concludes, the Agreements allow the "injurious effect of this volume" to continue. *Id*.

Defendant responds that the Agreements were designed to eliminate the injurious effect of subject imports by restricting their volume and establishing reference prices below which subject imports may not be sold. Def.'s Resp. at 2 (citing Review Views at 4–5).[25] According to Defendant, the volume of subject imports would have been drastically reduced had the Agreements been in place during the Commission's period of review. *Id*. at 30–31. Defendant and Defendant-Intervenors assert that the ITC is not tasked to review Plaintiff's speculative injurious effect caused by the Agreements themselves. *Id*. at 40–41; Cámara Resp. at 4. Further, the ASC argues that "potential future injury to individual members of the domestic industry caused by the Agreements is not relevant to the Commission's determination that the Agreements eliminated completely the injury to the industry as a whole on the record before the Commission at the time of its

[24] Plaintiff argues that "[d]ue to the large volume of subject imports during the fiscal year 2011/12, sugar stocks in the United States increased by 601,269 short tons raw value ("strv"), raising the ending stocks-to-use ratio up to a level of 17.2 percent, which is well above the 13.5 percent that USDA established." Pl.'s Mot. at 25 (citing First Written Submission of Imperial/AmCane, Ex. 8, Conf. J.A. Tab 7, ECF No. 61–1 (Tabs 1–10); A.R. 2–236, ECF No. 30).

[25] Defendant in its brief internally cited to the public version of the Review Views. This opinion uses the confidential version of the Review Views and, therefore, reference to Defendant's internal citations have been adjusted accordingly. *See supra* p. 1 note 2.

review." Def.-Intervenor American Sugar Coalition's Resp. in Opp'n to Imperial Sugar Co.'s Rule 56.2 Mot. for J. on the Agency R. at 3, ECF No. 44.

The Commission had determined that much of the injurious effect from the substantial volume of subject imports during the POI was sustained by millers in competition with subject imports destined for further processing rather than by processors/refiners, such as Plaintiff, in competition with subject imports destined for consumption. Review Views at 44. Record evidence supports the Commission's finding that, had the Agreements been in place between CY2011/12 and CY2012/13, the 94.5 percent volume increase in imports from Mexico would have been prevented.[26] *See id.* at 37, 42.

The subsequent surge the following year was "only possible" because NAFTA exempted Mexican sugar producers and exporters from the U.S. Sugar Program, as of January 1, 2008, allowing Mexican sugar free access to the U.S. market. *Id*. at 38. Substantial evidence on the record, in the form of the Agreements themselves, indicates that the Agreements will effectively limit the annual volume of sugar exports from Mexico in a given crop year to the residual U.S. Needs, and include additional provisions to prevent surges of imports throughout any given crop year. The ITC reasonably found that these import limitations, calculated by USDA based upon its monthly WASDE, will effectively integrate Mexico into the U.S. Sugar Program and prevent similar surges in the future. *See id*. at 39.

With regard to the breakdown of imports between refined sugar and raw sugar, Plaintiff's argument is speculative. Plaintiff contends that estandar could be interchanged with refined sugar and, as a result of the Agreements, would have direct consumption marketability. Pl.'s Mot. at 25, 26, 29. The Commission found that the record did not support Plaintiff's speculative argument. *See* Review Views at 41–42 n.132 (discussing importation of estandar and its general unsuitability for direct consumption). Estandar may be substituted for refined sugar "in certain end use products for which [its] darker color . . . was not an issue." *Id*. (citing *Sugar from Mexico*, USITC Pub. 4467 at 7 & n.24; Prelim. Views at 9 & n.24). However, record evidence indicates that customers or companies generally would not use estandar for direct consumption "because it has a higher quantity of foreign material in it than would normally be accepted in the U.S. market"; thus, "the vast majority of [estandar] gets used, consumed as raw sugar."

[26] The ITC "found that subject import underselling, coupled with the significant increase in subject import volume, depressed domestic prices to a significant degree during the period of investigation." Review Views at 28.

Id. (citation omitted).[27] The Court finds that the ITC's evidence-based response to Plaintiff's speculative arguments was reasonable.

Accordingly, the Court finds that the ITC's determination that the injurious effect of increasing subject import volume is completely eliminated by the Agreements is supported by substantial evidence on the record.

2. Prices

The ITC found that "the AD suspension agreement works in concert with the CVD suspension agreement to eliminate completely the adverse price effects of subject imports identified by the Commission in the preliminary determinations." Review Views at 45.

a. Underselling

Plaintiff contends that underselling will continue but does not provide an explanation or record support for this assertion. *See*Pl.'s Mot. at 31–32. In response to Plaintiff's concerns about underselling, the ITC explained that it found that underselling itself was not causing material injury to the domestic industry in its preliminary determinations. Review Views at 47. Rather, the ITC found that underselling was "a cause of price depression." *Id.* Plaintiff rejects the distinction and asserts that "adverse price effects are 'injurious' regardless of their particular variety, and the [ITC's] admission that underselling could continue demonstrates" that "the Review Determinations are not supported by substantial evidence." Pl.'s Reply at 11–12.

Defendant responds that the CVD and AD Agreements, "working in concert, eliminate completely the adverse price effects of subject imports identified in the preliminary determinations." Def.'s Resp. at 32; *see also* Review Views at 46–47. Specifically, the Commission found that the CVD Agreement "preclude[s] any increase in subject import volume sufficient to adversely affect sugar prices" and establishes "an annual limit on sugar exports from Mexico," combined with provisions that prevent surges of exports in any given quarter. Review Views at 46. The ITC found that the CVD Agreement thereby eliminates the primary incentive for Mexican producers and exporters to undersell the domestic like product "because doing so would reduce their revenues with no compensatory increase in sales volume or market penetration over the levels dictated by the annual export limit and anti-surge mechanism under the agreement." *Id.* (citing Commerce Mem. Feb. 6th at 12).

In addition to having no incentive to undersell due to the CVD Agreement's export limits, the ITC found that the AD Agreement

[27] Cámara further explained at oral argument that "estandar, if it is above 99.5 [percent polarity] it is [going to] be sold at refined prices . . . and if it is below 99.5 [percent polarity] it comes as raw sugar and will most likely go to the raw sugar market to be further refined." Oral Arg. 1:17:23–50.

establishes minimum prices for Mexican exporters which will "substantially reduce instances of underselling" by setting minimum reference prices for Mexican exports of raw sugar at $0.2225 per pound and refined sugar at $0.26 per pound. *Id.* at 47.

The Court finds that record evidence supports the ITC's determination that the Agreements will work in tandem to eliminate price depression and address underselling.[28] In making this determination, the Court also considers the record information that detracts "from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F. 2d 1556, 1562 (Fed. Cir. 1984). Although the ITC found "significant subject import underselling" in the preliminary investigation, the record indicates that underselling was found to be a contributor to price depression, not an injurious effect itself. Review Views at 45. The ITC analyzed whether price depression was eliminated by the Agreements and determined that it was eliminated through the effects of the Agreements in tandem, despite the possibility of underselling under the Agreements. Plaintiff's speculation about the possibility of underselling must be contrasted with the ITC's analysis of the terms of the Agreements, and the Court finds that substantial evidence supports the Commission's determination.

The Court is unaware of any legal basis for asserting that every instance of underselling is necessarily injurious, yet that is effectively the position advocated by Plaintiff. The Commission has explained that the Agreements take a two-pronged approach, with the CVD Agreement eliminating the incentive to undersell and the AD Agreement minimizing the opportunity to undersell, *see id.* at 41, 45–46, 52, and it is not the Court's role to reweigh the evidence relied upon by the Commission. *See Downhole Pipe & Equip.,* 776 F.3d at 1377. Accordingly, the Court finds that the ITC's underselling determination is supported by substantial evidence on the record.

b. Cost of Goods Sold

Plaintiff contends that the high cost of goods sold ("COGS") to net sales ratios for refiners will continue under the Agreements because a higher reference price for raw sugar raises refiners' COGS without providing the refiners the opportunity to achieve a reasonable refining margin. Pl.'s Mot. at 32–33. Plaintiff also speculates that the reference price set for Mexico will extend to "other sources of supply of raw sugar," effectively raising the cost of its input regardless of source. *Id*. at 32.

[28] Underselling occurs when imported goods are sold for less than like domestic products. A significant amount of imported undersold goods can depress--*i.e.*, lower--the price of like domestic products. *See* Review Views at 45; *see also* Commerce Mem. Feb. 6th at 3 (citing section 1677(7)(C)(ii) (instructing the Commission, in the context of injury determinations, to consider instances of underselling by imported merchandise and whether "imports of such merchandise otherwise depress[] [domestic] prices to a significant degree")).

Defendant explains that "processors/refiners experienced an increase in their COGS to net sales ratio over the interim period [(interim CY2013/14)] because their unit sales values declined faster than their unit COGS, and not because of any increase in their unit costs." Def.'s Resp. at 38 (citing Review Views at 29; *Sugar from Mexico*, USITC Pub. 4467 at Table VI-3). The Commission reasonably surmised that, because the Agreements would eliminate price depression, as discussed above, they would also eliminate completely the depressed sales values that caused the elevated COGS to net sales ratio in interim CY2013/14. *Id.* at 38–39 (citing Review Views at 45–46).

Substantial evidence supports the Commission's conclusion. As the Commission found, "the average refining margin during the suspension agreements period was more than double the lowest refining margin during the period examined in the preliminary phase investigations." Review Views at 50. In other words, the ITC identified empirical support for its finding that the Agreements would alleviate, rather than exacerbate, the high COGS to net sales ratio experienced by the Plaintiff towards the end of the POI. Accordingly, the Court finds that substantial evidence supports the ITC's determination with regard to the COGS to net sales ratio.

c. Price Calculations

Plaintiff contends that the Commission relied on flawed price calculations to compare refined domestic and import prices. Pl.'s Mot at 33–34; Pl.'s Reply at 13–15. Plaintiff asserts that the ITC ignored record evidence that transportation costs for Mexican refined sugar were inflated and that costs for domestic refined sugar were understated. Pl.'s Reply at 14. Plaintiff urges that the Commission "erroneously maintains that [another U.S. sugar producer's] comparison included appropriate packaging costs [...]." *Id.* at 15.

Defendant-Intervenor Cámara explains that when analyzing the price comparisons, the ITC "properly exercised its discretion to assign no weight to the data presented by Imperial which did not compare prices on the same basis." Cámara Resp. at 5. The ITC found the other producer's delivered price comparisons to be "credible" because "they include all relevant packaging and delivery costs and exclude delivered prices from domestic refineries to distant markets they could not serve economically." Review Views at 48. In contrast, the ITC found that Imperial's delivered price comparisons "inappropriately compare the delivered price of domestic refined sugar, including packaging costs and delivery to the U.S. end customer, to a price for refined sugar imported from Mexico that excludes packaging costs and the cost of delivery from U.S. distributors to their end custom-

ers." *Id.* at 48 n.149. The ITC also considered record evidence indicating that Imperial's delivered prices included customers "in distant markets that would be uneconomical to serve from its refinery in Savannah, GA." *Id.*

The ITC has discretion to determine how much weight to assign to particular data, and the Court will not reweigh the evidence. *See Downhole Pipe & Equip.,*776 F.3d at 1377. Correspondingly, when two sets of data are presented on the record, the ITC has discretion to decide the relative reliability of each set and to assign weight to the data presented. *See id.* The ITC's decision that the other producer's data regarding delivered price calculations was more credible than Plaintiff's lies squarely within the realm of the ITC's discretion. Accordingly, the Court finds that the ITC's decision to use the other producer's data in the price calculation analysis is supported by substantial evidence on the record.

3. Impact Factors

Plaintiff contends that the ITC failed to consider the impact of subject imports and inadequately considered the effect of the Agreements on the U.S. Sugar Program. Pl.'s Mot. at 37. As support for its contention, Plaintiff refers to impact factors found in 19 U.S.C. § 1677(7)(B)-(C), particularly, the actual and potential decline in output and capacity utilization.[29] *Id.* at 37–38. Plaintiff further alleges that the ITC's determination is contrary to the Congressional mandate to maintain and utilize the capacity of the domestic sugar refining sector. *Id.* at 38–39.

The ITC reasonably determined that it was not required to consider anew the impact factors referenced by Plaintiff because they had been considered in its preliminary investigation. *See* Prelim. Views at 52–56; Def.'s Resp. at 39–40. As discussed above, the ITC reasonably

[29] The pertinent provisions of section 1677(7) provide:

(iii) Impact on affected domestic industry. In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—

(I) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C)(iii).

interpreted subsections 1671c(h)(2) and 1673c(h)(2) as requiring it to review the Agreements to assess whether the injurious effect of subject imports *identified in the preliminary investigation* is eliminated completely. *See supra* Section II.A. Therefore, Plaintiff's argument regarding thesefactors is inapposite.[30] Plaintiff's insistence that "such factors are especially important when analyzing injurious effect of subject imports for the members of the U.S. industry who petitioned the Commission for review of the specific agreements" is not supported by the record. Pl.'s Mot. at 37. To the extent that Plaintiff suggests that the ITC must be concerned with the efficacy of the U.S. Sugar Program, Plaintiff fails to explain why placing a cap (calculated with reference to the demand, production, and import figures used to administer that same Program) on otherwise unlimited Mexican imports is inconsistent with the goals of the Sugar Program, or why that Program must be taken into consideration by the Commission in a review to determine whether the Agreements eliminate completely the injurious effect of subject imports.

C. ITC'S USE OF AN ECONOMIC MODEL

Plaintiff argues that it was not provided notice and an opportunity to comment on the ITC's use of an economic model run by Commission staff. Pl.'s Mot. at 39–43. The economic model, which was a comparative static model, "generally showed that domestic prices and revenues would have been higher in CY2012/13 had the agreements been in place." Def.'s Resp. at 41; *see also* Economic Modeling Mem. ECNN-003 (Mar. 13, 2015) ("Econ Model Mem."), Conf. J.A. Tab 11, ECF No. 61–2 (Tabs 11–21); A.R. 2–249, ECF No. 30. The memorandum describing the economic model and its results was placed on the Commission's record on April 15, 2015, approximately two months after the parties' last submission (February 25, 2015), and approximately one month after the Commission's final vote (March 19, 2015). Pl.'s Mot. at 42 (citation omitted).

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[30] Plaintiff's reliance on a statement made in a brief in a case pending before this court is also unavailing. *See*Pl.'s Mot. at 38 (citing *Fla. Tomato Exch. v. United States*, Court No. 13–00148). In that case, a domestic party is challenging Commerce's decision to enter into a suspension agreement, asserting that Commerce failed to make a legally sufficient determination that the agreement completely eliminated the injurious effect of subject imports. *Fla. Tomato Exch.*, Court No. 13–00148, Compl., ECF No. 7. Although Imperial cites to the government's brief in that case as indicating that plaintiff in that case could have obtained the desired relief (consideration of impact factors found in section 1677(7)(B)-(C)) by petitioning for a review of the agreement by the Commission, *see* Pl.'s Mot. at 38 (citing *Fla. Tomato Exch.*, Court No. 13–00148, Def.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R. at 31–32, ECF No. 42), the scope of any such review would have to be determined by the Commission itself and may properly be limited based on the nature of the injury finding in the Commission's preliminary injury determination. Indeed, the plain language of section 1677(7) directs the Commission to consider relevant impact factors when it makes preliminary and final injury determinations pursuant to subsections 1671b(a), 1671d(b), 1673b(a), and 1673d(b)—*not* when it reviews suspension agreements pursuant to subsections 1671c(h) and 1673c(h). *See*19 U.S.C § 1677(7)(B).

Plaintiff contends that it was deprived of a statutory right to comment on the economic model. *Id.* at 40–41; Pl.'s Reply at 16–20. Plaintiff relies on 19 U.S.C. § 1677m(g), which requires that timely submitted information in a proceeding is subject to comment by other parties. Additionally, the provision specifies that before making a final determination under certain statutory provisions, the Commission "shall provide the parties with a final opportunity to comment on the information." 19 U.S.C § 1677m(g). Similarly, Plaintiff further contends that it has a "basic right to confront evidence." Pl.'s Mot. at 40. Alternatively, Plaintiff contends that it has a right to comment pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C § 554(c), which provides for an opportunity to comment on "the submission and consideration of facts." *Id.* at 40; Pl.'s Reply at 20.

The Commission counters that "no statute or regulation granted Plaintiff[ ] the right to comment on the economic model." Def.'s Resp. at 45. The ITC explained that three of the Commissioners (Chairman Broadbent, Vice Chairman Pinkert, Commissioner Kieff) found "further support" in the economic model, which examined the possible effects of the suspension agreements. Review Views at 50. These Commissioners found that the results of the model provided "further corroboration" for their finding that the injurious effect of subject imports would be eliminated completely by the suspension agreements. *Id.* at 51.

In response to Plaintiff's statutory arguments regarding the economic model issue, the ITC asserts that section 19 U.S.C. § 1677m(g) does not extend to review determinations pursuant to sections 1671c(h) and 1673c(h) and, thus, the comment requirement in section 1677m(g) is inapposite. Def.'s Resp. at 45. Further, Cámara points out that the economic model referenced in the ITC's determination "is not information submitted to the Commission," negating the application of both 19 U.S.C. § 1677m(g) and the APA. Cámara's Resp. at 39.

Plaintiff has no statutory right to comment on the economic model because it is not submitted information or facts. Economic models and their results are not submitted facts, but rather are analytical tools which the Commission applies to the submitted facts and the results of that application. Subsection 1677m(g) is inapposite because it enumerates the particular final determinations to which it applies and that enumeration does not include sections 1671c and 1673c.[31]

[31] 19 U.S.C. § 1677m(g) provides:

> Information that is submitted on a timely basis to the administering authority or the Commission during the course of a proceeding under this subtitle shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority or the Commission shall provide. The administering authority and the Commission, before making a final determination under section 1671d, 1673d, 1675, or 1675b of this title shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority

Like the first sentence of subsection 1677m(g), any right to comment pursuant to the APA applies to submissions of facts; it does not extend to the Commission's economic model, an analytical tool, and its results.[32] For these reasons, Plaintiff's reliance on 19 U.S.C. § 1677m(g) and the APA is misplaced.[33]

Plaintiff also suggests that the Commission was required to establish "some threshold degree of reliability" for its economic model pursuant to *USX Corp. v. United States*, 12 CIT 205, 214, 682 F. Supp. 60, 69 (1988). Pl.'s Mot. at 34–36. The ITC and Cámara counter that the *USX* reliability requirement does not apply because use of the model in this case was merely for "further corroboration," Def. Resp. at 42 & n.8, and not "so central to the conclusion," Cámara Resp. at 43. The ITC further contends that case law does not require it "to explain its use, or lack thereof, of economic models." Def.'s Resp. at 43 n.8 (citing *USEC, Inc. v. United States*, 25 CIT 49, 67, 132 F. Supp. 2d 1, 16 (2001), aff'd 2002 WL 732139 (Fed. Cir. 2002)).

Plaintiff's reliance on *USX* is inapposite. In *USX*, the issue was the reliability of the elasticities that were used in the economic model, not the model itself. Those elasticities were more akin to facts or data that were fed into the economic model. Such facts and data are subject to comment and, in this case, were subject to comment because they had been identified by the Commission in the preliminary investigations—and the Commission made clear its reliance on data from the preliminary phase of the investigations in its reviews of the suspension agreements. *See* Review Views at 1921; *see also* Econ Model Mem. at 1 (noting that Commission staff used data from the preliminary investigation to run the economic model). Consequently, to the extent that Plaintiff wished to question the reliability of the elasticities used in the economic model, it had that opportunity. *See supra* pp. 4–5 (discussing Imperial's limited participation in the Commission's preliminary investigation).

or the Commission (as the case may be) upon which the parties have not previously had an opportunity to comment. Comments containing new factual information shall be disregarded.

[32] The relevant provision of the APA, 5 U.S.C 554(c), provides:

The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

[33] In the alternative, the ITC raises the affirmative defense of harmless error. Def.'s Resp. at 8. As noted above, the use of the economic model was not outcome determinative because only three Commissioners referenced the model and, even then, only for "further corroboration." Review Views at 51. Even if those three Commissioners' votes were disregarded, the other three Commissioners voted affirmative without relying on the model and the determination would have been affirmative. *See* 19 U.S.C. § 1677(11). Thus, had there been any error, it would have been harmless.

For the foregoing reasons, the Court denies Plaintiff's request for a remand in order to comment on the economic model applied by the Commission staff.

CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's motion for judgment on the agency record. Judgment will enter accordingly.
Dated: October 5, 2016
New York, New York

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

Slip Op. 16–98

Former Employee of Drive Sol Global Steering, Inc., Plaintiff, v. United States Secretary of Labor, Defendant.

Before: Claire R. Kelly, Judge
Court No. 15–00172

[Denying Defendant's motion to dismiss for lack of subject matter jurisdiction and transferring the action to the United States District Court for the District of Connecticut.]

Dated: October 13, 2016

Steven David Schwinn, of Chicago, IL, for plaintiff.
Antonia Ramos Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Molly J. Theobald*, Office of the Solicitor, U.S. Department of Labor, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

This matter is before the court on Defendant's motion to dismiss Plaintiff's cause of action pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, pursuant to USCIT Rule 12(b)(6) for failure to state a cause of action. Def.'s Mot. Dismiss, Aug. 24, 2015, ECF No. 9 ("Mot. Dismiss"). Plaintiff brought this action to challenge the failure to disburse all Trade Readjustment Allowance ("TRA") benefits available under §§ 231 through 234 of the Trade Act of 1974, as amended,[1] 19 U.S.C. § 2291–2294, by the State

[1] Further citations to the Trade Act of 1974, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition unless otherwise indicated.

of Connecticut Department of Labor acting as agent of the U.S. Department of Labor ("Labor") administering the Trade Adjustment Assistance ("TAA") program.[2] *See* Summons and Compl. 6, June 6, 2015, ECF No.1–2. ("Compl."); *see also* Letter Issued by Case Manager Steve Taronji to Pl. Concerning Acceptance of Correspondence for Filing as Summons and Compl., June 24, 2015, ECF No. 3. Plaintiff also contends Labor failed to properly oversee federal TRA funds on behalf of all workers and that the State of Connecticut misallocated federal funds.[3] *See* Compl. 6; *see also* Letter Issued by Case Manager Steve Taronji to Pl. Concerning Acceptance of Correspondence for Filing as Summons and Compl., June 24, 2015, ECF No. 3.

On August 24, 2015, Defendant moved to dismiss Plaintiff's cause of action. *See* Mot. Dismiss. Plaintiff responds that the court has jurisdiction over his cause of action under 28 U.S.C. § 1581(d)(1) (2012)[4] or, in the alternative, under 28 U.S.C. § 1581(i)(4).[5] Pl.'s Resp. Def.'s Mot. Dismiss 9–13, Dec. 21, 2015, ECF No. 25 ("Resp. Br."). Plaintiff also argues that he has stated a claim for relief. Resp. Br. 7–8; Pl.'s Sur-Reply to Def.'s Reply Supp. Mot. Dismiss 13–14, Aug 22, 2016, ECF No. 38 ("Pl.'s Sur-Reply"). Defendant filed its reply brief on February 5, 2016. Def.'s Reply Supp. Mot. Dismiss, Feb. 5, 2016, ECF No. 28 ("Def.'s Reply Br."). On July 28, 2016, the court granted Plaintiff's motion for leave to file a sur-reply, *see* Order, July 28, 2016, ECF No. 37, and Plaintiff filed his sur-reply on August 22, 2016. *See*Pl.'s Sur-Reply. On September 12, 2016, the court ordered the parties to file supplemental briefs addressing the appropriateness of transfer under 28 U.S.C. § 1631 if the Court lacks subject matter jurisdiction. Scheduling Order, Sep. 12, 2016, ECF No. 40; *see also*Letter filed by the Court, Sept. 12, 2016, ECF No. 39. Briefing concluded on September 26, 2016, when the parties filed supplemental briefs on the issue of transfer. *See* Def.'s Suppl. Br., Sept. 26, 2016, ECF No. 41 ("Def.'s Suppl. Br."); Pl.'s Suppl. Br. Appropriateness of Transfer Pursuant to 28 U.S.C. § 1631, Sept. 26, 2016, ECF No. 42 ("Pl.'s Suppl. Br."). For the reasons that follow, the Court lacks subject matter jurisdiction over Plaintiff's cause of action, but the court transfers the action to the United States District Court for the District of Connecticut.

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[2] Plaintiff is an individual who is a former employee of Drive Sol Global Steering, Inc.

[3] The TAA program offers certain benefits to a U.S. firm's workers involved in the production of an article who lose their jobs or whose jobs are threatened by either increased imports or where a shift abroad of production or services "contributed importantly" to the layoffs. *See* 19 U.S.C. § 2272(a). The benefits provided to displaced workers who qualify for such benefits include income support in the form of a TRA, employment and case management services, job training, job search, and relocation allowances. *See* 19 U.S.C. §§ 2291–2298.

[4] Further citations are to the relevant provisions of Title 28 of the U.S. Code, 2012 edition.

[5] The court notes that Plaintiff alleges jurisdiction under 28 U.S.C. § 1581(i) and jurisdiction under 28 U.S.C. § 1581(d) only in the alternative. *See* Pl.'s Resp. Def.'s Mot. Dismiss 9–13, Dec. 21, 2015, ECF No. 25; Pl.'s Sur-Reply to Def.'s Reply Supp. Mot. Dismiss 13–14, Aug 22, 2016, ECF No. 38.

BACKGROUND

Plaintiff is a former employee of Drive Sol Global Steering, Inc. ("Drive Sol"), Compl. 9, 15, who is a member of the worker group certified by Labor as eligible to receive Worker Adjustment Assistance and Alternative Trade Adjustment Assistance. *See Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance*, 73 Fed. Reg. 9,834, 9,835 (Dep't Labor Feb. 22, 2008). On February 13, 2009, Drive Sol advised Plaintiff that it planned to shut down its entire plant located in Watertown, Connecticut. Compl. 15. The same notice informed Plaintiff Drive Sol would permanently lay him off as of approximately June 1, 2009. *Id.*

Plaintiff alleges that he applied for TRA benefits. Compl. 1,18. Plaintiff further alleges that, on April 17, 2009, the State of Connecticut Department of Labor ("CT Labor") affirmatively determined he was eligible to apply for TAA benefits, including basic weekly TRA benefits in the amount of $474.00 per week for the period from March 29, 2009 through March 26, 2011.[6]Compl. 9, 16–18. Plaintiff alleges CT Labor subsequently reversed course and denied him benefits because he failed to meet the state of Connecticut's "work search" requirement for unemployment benefit eligibility. Compl. 13–14, 23–24.

Plaintiff alleges he appealed CT Labor's determination to the Connecticut Employment Security Appeals Division Board of Review and then to the Connecticut Superior Court. Compl. 10–11. Plaintiff alleges both bodies affirmed CT Labor's determination. Complaint 10–11. Plaintiff alleges he continued to pursue his claims through various channels, including through CT Labor, the Office of the Attorney General of the State of Connecticut, the Governor of the State of Connecticut, the Office of the United States Attorney for the District of Connecticut, and his representatives in both houses of Congress. Compl. 1, 3, 6, 13–14, 20–26.

On January 2, 2014, Plaintiff contacted Labor's Regional Trade Coordinator for the Employment and Training Administration to further pursue his claims to TRA benefits. Compl. 24–25. On January 5, 2014, after a representative of the United States Attorney for the District of Connecticut referred the matter to Labor's Office of the Solicitor for guidance, Labor's Regional Trade Coordinator advised

[6] Section 2311 of Title 19 of the U.S. Code authorizes Labor to enter into an agreement with any state or state agency to allow that cooperating state agency to act as agent of the United States to process applications and distribute benefits to affected workers covered under TAA programs and to make determinations as to the eligibility for TAA benefits of individual workers, including cash income support benefits under the TRA program. *See* 19 U.S.C. § 2311(a). Defendant concedes CT Labor administers the program in Connecticut as an agent for Labor. Reply Br. 7.

Plaintiff that the Employment and Training Administration has direct oversight over the TRA program and that CT Labor's decisions in administering the program are subject to review by Labor. Comp. 23–24. Labor further advised Plaintiff that it believed CT Labor had erroneously denied his application on grounds that he was required to seek or accept employment to be eligible for TRA benefits under Connecticut state law. Compl. 23–24. Lastly, Labor advised Plaintiff that it contacted CT Labor to provide instructions, and Labor stated that CT Labor would "seek administrative or other avenues to reverse [its] prior decision." Compl. 24.

The Office of the United States Attorney for the District of Connecticut advised Plaintiff that Labor had discussed the errors with CT Labor and that CT Labor worked with the Connecticut Attorney General's office to set aside the Connecticut Superior Court's decision affirming the denial of his individual TRA benefits. Compl. 14. Plaintiff's complaint includes a letter from the Office of the United States Attorney for the District of Connecticut indicating that CT Labor subsequently filed a motion to set aside and vacate the judgment of the Connecticut Superior Court in Plaintiff's state court action and that this motion was granted on January 10, 2014 by the Connecticut Superior Court. Compl. 14. Plaintiff does not contest that CT Labor filed a motion to vacate its judgment or that such a motion was granted by the Connecticut Superior Court in its response or in his sur-reply.

Plaintiff initiated this action challenging CT Labor's actions, as agent of Labor, depriving him of his full TRA benefits in violation of federal law and Labor's mismanagement and misapplication of the TAA program. Compl. 2; Resp. Br. 18. Plaintiff alleges that the errors committed by CT Labor in administering the TAA program, and by Labor in overseeing that administration, caused the following harms: (1) full TRA benefits were not paid "while [he] was in the TRA program"; (2) the delayed payment of full TRA benefits forced Plaintiff to use personal savings to meet travel expenses to attend job retraining programs for which he should have received TAA benefits; (3) Plaintiff incurred penalties in accessing personal savings in an individual retirement account; (4) Plaintiff incurred administrative expenses, travel expenses, and court fees in pursuing his claims for benefits; and (5) Plaintiff suffered increased tax liability because certain TAA benefits that should have been disbursed in 2011 were actually disbursed in 2013. Compl. 2–3.

Plaintiff acknowledges that he did receive at least some benefits. Compl. 5. Nonetheless, Plaintiff seeks two forms of relief: "fix [his] issue and fix the problem for the others that have been harmed."

Compl. 6. Defendant moved to dismiss pursuant to USCIT Rule 12(b)(1) for lack of jurisdiction, or, in the alternative, pursuant to USCIT Rule 12(b)(6) for failure to state a cause of action.[7] Mot. Dismiss.

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). Moreover, "[w]here, as here, claims depend upon a waiver of sovereign immunity, a jurisdictional statute is to be strictly construed." *Celta Agencies, Inc. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1348, 1352 (2012) (citing *United States v. Williams*, 514 U.S. 527, 531 (1995)).

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to USCIT Rule 12(b)(6), the court assumes all factual allegations in the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 n.13 (Fed. Cir. 1993) (citations omitted); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (citations omitted).

DISCUSSION

I. The Court's Jurisdiction

The jurisdictional limits of this Court are explicitly set forth in the statute. *See* 28 U.S.C. § 1581. The Court "'operates within precise and narrow jurisdictional limits' and 'cannot exercise jurisdiction over actions not addressed by a specific jurisdictional grant.'" *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1051 (Fed. Cir. 2012) (quoting *Trayco, Inc. v. United States*, 994 F.2d 832, 836 (Fed. Cir. 1993)). For the reasons that follow, the court lacks jurisdiction over Plaintiff's claims under either 28 U.S.C. §§1581(d)(1) or (i)(4).[8]

[7] When faced with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), a court, absent good reason to do otherwise, should ordinarily decide the 12(b)(1) motion first. *See Bell v. Hood*, 327 U.S. 678, 682 (1945) (holding that whether a complaint states a cause of action should be decided before a court assumes jurisdiction).

[8] Since the Court lacks subject matter jurisdiction, Defendant's motion to dismiss for failure to state a claim is moot. Therefore, the court does not address the merits of Defendant's latter grounds for dismissal.

A. The Court Lacks Jurisdiction under 28 U.S.C. § 1581(d)(1)[9]

Defendant argues that Plaintiff's challenges are to CT Labor's denial of his individual TRA benefits and CT Labor's mismanagement of federal funds earmarked for the TRA funding. Mot. Dismiss 8; Reply Br. 4. Defendant argues that 28 U.S.C. § 1581(d)(1) limits the Court's jurisdiction to reviewing Labor's certification of worker groups, not the payment of benefits to individual workers. Reply Br. 5. Plaintiff counters that the Court has jurisdiction under 28 U.S.C. § 1581(d)(1) because the denial of individual benefits by CT Labor is the functional equivalent of Labor denying certification to the worker group. Resp. Br. 12. The Court lacks jurisdiction over Plaintiff's claims under 28 U.S.C. § 1581(d)(1) because the Court's jurisdictional statute limits review to group certifications by Labor under 19 U.S.C. § 2273. 28 U.S.C. § 1581(d)(1). Eligibility for TRA benefits of an individual member of a group that has been certified is a separate act from certification of a worker group, and that act is not reviewable under § 1581(d)(1).

The Court's jurisdictional statute does not grant jurisdiction to review all determinations made relating to the TAA program. *Former Employees of Quality Fabricating, Inc. v. United States*, 448 F.3d 1351, 1355 (Fed. Cir. 2006); *see also* 28 U.S.C. § 1581(d)(1). Section 1581(d)(1) of Title 28 provides:

> (d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review-
>
> (1) any final determination of the Secretary of Labor under [19 U.S.C. § 2273] with respect to the eligibility of workers for adjustment assistance under such Act.

28 U.S.C. § 1581(d)(1). Section 2273 of Title 19 authorizes Labor to determine to certify a group of workers for TAA benefits if the group

[9] The court reviews whether it has jurisdiction over Plaintiff's claim under 28 U.S.C. § 1581(d) before addressing jurisdiction under § 1581(i) because it has been consistently held that jurisdiction under § 1581(i) may not be invoked if jurisdiction under another subsection is or could have been available, unless the other subsection is shown to be manifestly inadequate. *See, e.g., Chemsol, LLC v. United States*, 755 F.3d 1345, 1349 (Fed. Cir. 2014), *Norman G. Jensen, Inc. v. United States*, 687 F.3d. 1325, 1329 (Fed. Cir. 2012), *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006), *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988). Section 1581(i) will not confer jurisdiction when a litigant has access to the Court on an enumerated basis. *See Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983). In such circumstances, a litigant must proceed on the available avenue for review on an enumerated jurisdictional basis, complying with all the relevant prerequisites, before invoking jurisdiction under § 1581(i). *See id.*

meets the requirements of 19 U.S.C. § 2272.[10] 19 U.S.C. § 2273. The Court has exclusive jurisdiction to review Labor's final group certification determinations. 19 U.S.C. §§ 2395(a), (c); 28 U.S.C. § 1581(d)(1).

In contrast, state courts have exclusive jurisdiction over claims challenging the application of federal guidelines determining the amount of benefits individual employees may be entitled to. *See* 19 U.S.C. § 2311(e). If Labor certifies a group of workers, those workers meeting individual eligibility standards may apply for and receive TRA benefits.[11] 19 U.S.C. §§ 2291–2294. Although Labor has sole authority to certify a group of workers, the statute authorizes Labor to enter into an agreement with the states to allow state agencies to perform the task of making individual eligibility determinations for

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[10] Under the statute, Labor shall certify a group of workers as qualified to apply for adjustment assistance if it determines that:

(1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and

(2)(A)(i) the sales or production, or both of such firm have decreased absolutely;

(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

(B)(i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

(ii)(I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) and the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

(III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

19 U.S.C. § 2272(a) (2006 & Suppl. II).

[11] Generally, payment of TRA benefits is made to an adversely affected worker covered by a Labor certification under 19 U.S.C. § 2273 who files an application for an allowance for any week of unemployment beginning on or after the date of certification of the worker group if the worker: (1) was laid off within the specified date range of the certification and applies for benefits within the time prescribed in the § 2273 certification by Labor; (2) meets certain terms of employment during the period specified in the § 2273 certification; (3) has exhausted rights to unemployment insurance for which he or she was entitled to, subject to certain conditions; (4) would not be disqualified for extended unemployment compensation; and (5) is enrolled in an approved training program, subject to certain conditions. *See* 19 U.S.C. § 2291(a)(1)–(5).

As Plaintiff's complaint does not make clear when CT Labor made its determination resulting in the denial of TRA benefits, *see* Compl. 13–14, it is unclear whether the amendments to 19 U.S.C. § 2291(a)(5) made by the American Recovery and Reinvestment Act of 2009 controlled CT Labor's individual eligibility determination. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 1821, 123 Stat 115 (2009); 19 U.S.C. § 2291(a)(5)(A) (Suppl. III 2006) (effective May 18, 2009). In any event, the amendments are irrelevant to the court's discussion of 19 U.S.C. § 2291(a).

such benefits.[12] 19 U.S.C. § 2311(a). Neither party disputes that Labor has actually entered into such agreements with the State of Connecticut through CT Labor.[13]A determination by a cooperating state agency with regard to individual entitlement to benefits is reviewable "in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent." 19 U.S.C. § 2311(e). Section 2311(e) vests state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees. *See Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 285 (1986) (construing identical language in what was then 19 U.S.C. § 2311(d) as vesting state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees); *see also* 19 U.S.C. § 2311(e).

Plaintiff's complaint does not challenge any aspect of certification, but rather challenges his individual eligibility determination for TRA benefits.[14] Nothing in 28 U.S.C. § 1581(d)(1) grants the Court authority to review the eligibility determinations of individual workers, which are made under 19 U.S.C. § 2291. *See* 28 U.S.C. § 1581(d)(1). Former employees of Drive Sol who became separated from the company on or after November 29, 2006 were certified by Labor for TAA benefits. *See Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance*, 73 Fed. Reg. 9,834, 9,835 (Dep't Labor Feb. 22, 2008). Although initially Plaintiff was deemed eligible by CT Labor for TRA benefits, Plaintiff alleges CT Labor eventually denied his application for failure to meet its work search requirement. *See* Compl. 9, 16–18; Resp. Br. 12.

Plaintiff argues that the Court has jurisdiction over his claim under 28 U.S.C. § 1581(d)(1) because CT Labor's denial of the full amount of TRA benefits to any individual worker is the "functional equivalent of denying certification to the worker group in the first place." Resp. Br.

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[12] The Trade Act of 1974 establishes a suite of benefits programs available to workers, which are collectively known as TAA. *See generally* 19 U.S.C. §§ 2291–2298. These benefits include a program of income support functioning as a supplement to state unemployment insurance benefits called TRA, *see* 19 U.S.C. §§ 2291–2294, as well as employment and case management services, training, job search allowances, and relocation allowances. *See* 19 U.S.C. §§ 2295–2298.

[13] CT Labor acts as an agent of Labor, and it must cooperate with Labor and any other state and federal agencies in providing payments and services under TAA. 19 U.S.C. § 2311(a).

[14] The court recognizes that Plaintiff seeks not just monetary relief for CT Labor's negative individual eligibility determination, but declaratory judgment that CT Labor is operating the TAA program in contravention of federal law and that Labor is failing to properly oversee CT Labor. *See* Compl. 6. However, the determination Plaintiff alleges caused him harm is the erroneous individual eligibility determination, not the Labor's group certification determination. *See* Compl. 1–6.

12.[15] However, CT Labor's denial of TRA benefits to Plaintiff was not tantamount to a decertification of the entire class of former employees of Drive Sol because Plaintiff, and other Drive Sol employees, still qualify for employment and case management services, job training, job search, and relocation allowances under TAA.

Plaintiff contends that Congress cannot have limited this Court's review to group certification determinations because otherwise Plaintiff would lack any avenue for review. *Id.* at 12–13. However, any claim that CT Labor misapplied the guidelines to deny Plaintiff individual TRA benefits is reviewable in state court.[16] *See* 19 U.S.C. § 2311(e). To the extent Plaintiff has a claim that the CT Labor misapplied the eligibility requirements as to all the former employees of Drive Sol in contravention of federal law, then he may pursue that challenge in federal district court.[17] *See e.g., Hampe v. Butler*, 364 F.3d 90, 93–94 (3d Cir. 2004).

B. The Court Lacks Jurisdiction Under 28 U.S.C. § 1581(i)(4)

Defendant argues the Court lacks jurisdiction over Plaintiff's claim under 28 U.S.C. § 1581(i)(4) because Plaintiff challenges CT Labor's actions relating to his individual eligibility for TRA benefits and its mismanagement of TRA funding. Reply Br. 9. Defendant argues the Court's residual jurisdiction does not expand the jurisdiction of the Court beyond claims concerning Labor's administration and enforcement of worker group certifications. *Id.* at 10. Plaintiff responds that Plaintiff's claim falls within the administration and enforcement of § 1581(d)(1) because CT Labor's determination violated federal law and contravened Labor's administration and enforcement of its certification determination. Resp. Br. 9–10; Pl.'s Sur-Reply 2–11.

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[15] Plaintiff suggests that individual eligibility is merely a "rubber stamping" function that requires no fact-specific application of statutory standards. Resp. Br. 11. However, the detailed statutory standards for determining individual worker eligibility, which are entirely distinct from those for group certification, refute this argument. *See* 19 U.S.C. §§ 2273(a), 2291(a).

[16] The court expresses no opinion on the viability of Plaintiff's cause of action in either federal court or in state court to pursue either his own unpaid benefits or for a claim that Labor and/or CT Labor acted contrary to federal law in denying him and other potentially eligible Drive Sol workers TRA benefits. Likewise, the court does not reach the question of whether Plaintiff may have an implied right of action under the Trade Act of 1974 because this Court's jurisdictional statute does not confer jurisdiction over such a cause of action. *See* Resp. Br. 13–15; *see also* 28 U.S.C. § 1581. As this Court's statutory jurisdiction is strictly limited, any implied right of action under 19 U.S.C. § 2291 would not fall within its jurisdiction. *See* 28 U.S.C. §§ 1581(d)(1), (i)(4).

[17] Plaintiff argues his claim is not challenging his individual benefit determination, but rather CT Labor's the violations of federal law by CT Labor by implementing work search requirement where the federal statute has no such requirement and Labor's failure to properly oversee the program. Resp. Br. 16–17. This Court also lacks jurisdiction over such a claim, but the court addresses this argument in its discussion of jurisdiction under 28 U.S.C. § 1581(i)(4).

Title 28 of U.S.C. § 1581(i) provides the Court with residual jurisdiction to the specific grants of jurisdiction outlined in subsections (a)–(h) of § 1581. *See* 28 U.S.C. § 1581. Section 1581(i) provides that

> [i]n addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section . . ., the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . (4) administration and enforcement with respect to matters referred to in . . . subsections (a)-(h) of this section.

28 U.S.C. § 1581(i)(4). However, the Court's residual jurisdiction is

> "not [intended] to create any new causes of action not founded on other provisions of law.
>
> The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade."

Nat'l Corn Growers Ass'n v. Baker, 840 F.2d 1547, 1557 (Fed. Cir. 1988) (quoting H.R. No. 1235, 96th Cong., 2d Sess., at 47, *reprinted in* 1980 Code Cong. & Admin. News 3729, 3759)). The Court's jurisdictional statute must be strictly construed, *Celta Agencies*, 36 CIT at __, 865 F. Supp. 2d at 1352 (citing *United States v. Williams*, 514 U.S. at 531), and § 1581(i)(4) explicitly limits the Court's review to Labor's administration and enforcement of matters referred to in § 1581(d)(1). *See* 28 U.S.C. §§ 1581(d)(1), (i)(4). Since determinations under § 1581(d)(1) are limited to group certification determinations made by Labor under 19 U.S.C. § 2273, the Court's jurisdiction under § 1581(i)(4) is limited to review of determinations made in the administration and enforcement of those group certification decisions.[18]

[18] Plaintiff asserts that reading the Court's jurisdictional statute as limiting its review to claims concerning Labor's administration and enforcement of worker group certifications under 19 U.S.C. § 2273 would render 28 U.S.C. § 1581(i)(4) redundant with 28 U.S.C. § 1581(d)(1). Pl.'s Sur-Reply 7–8. As an initial matter, §1581(i)(4) gives the Court jurisdiction over a civil action against the United States or its agencies arising out of any federal law providing for the administration and enforcement of §§ 1581(a)-(h). The force of the cannon against surplusage is diminished where the interpretation would not render another part of the same statutory scheme superfluous. *See Marx v. General Revenue Corp.*, 133 S.Ct. 1166, 1178 (2013). Even if interpreting § 1581(i)(4) to limit the Court's judicial review to administration and enforcement of certification determinations rendered that provision superfluous for § 1581(d)(1) claims, it would have the same effect for any action challenging a determination arising out of any federal law providing for the administration and enforcement with respect to matters referred to in the other subsections of § 1581. *See* 28 U.S.C. § 1581(a)–(c), (d)(2)-(4), (e)–(h).

See 28 U.S.C. § 1581(d)(1), (i)(4); *Quality Fabricating*, 448 F.3d at 1355.

Here, as already discussed, Plaintiff's challenge is to the administration and enforcement of CT Labor's determination of his individual eligibility for TRA benefits and to Labor's oversight of those determinations, not to the certification of the group of former employees of Drive Sol. Therefore, Plaintiff's challenge is actually to the administration and enforcement of 19 U.S.C. § 2291, which is not a matter within the Court's jurisdiction. *See* 28 U.S.C. §§ 1581(d)(1), (i)(4). For this reason, this Court lacks jurisdiction to review Plaintiff's claim under its residual jurisdiction.

Plaintiff argues that he is not challenging the state's determination with respect to his entitlement to TRA benefits, but rather Labor's failure to administer and enforce of its group certification because CT Labor's work search requirement contravenes federal law, which contains no such requirement. Resp. Br. 15–17. The work search requirement is an individual requirement which Labor concedes violates federal law. Plaintiff does not dispute that Labor took steps to correct CT Labor's erroneous application of the work search requirement.

Plaintiff argues that his claim that the program is being operated in contravention of a federal court. *Id.* (citing *Brock*, 477 U.S. at 285; *Hampe v. Butler*, 364 F.3d 90, 93–94 (3d Cir. 2004)). However, neither case cited by Plaintiff opined on this Court's jurisdiction to hear such a challenge because neither case originated in this Court. *See Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 568 F. Supp. 1047, 1050 n. 4 (D.D.C. 1983) (plaintiff initially asserted subject matter jurisdiction under 28 U.S.C. § 1331 in United States District Court for the District of Columbia challenging Labor's interpretation of the meaning of the statutory employment requirement for TRA benefit eligibility as contrary to federal law) *overruled by Brock*, 477 U.S. at 285; *Hampe*, 364 F.3d at 95 (plaintiff initially asserted subject matter jurisdiction under 28 U.S.C. § 1331 in United States District Court for the Western District of Pennsylvania challenging the Pennsylvania Department of Labor & Industry's determination denying individual dislocated workers' claims for training and travel benefits under 19 U.S.C. § 2297). Any such challenge does not fall within the specific jurisdictional grant in 28 U.S.C. § 1581.

Plaintiff argues that 19 U.S.C. § 2311(e) does not divest the Court of jurisdiction because Plaintiff is not challenging his individual eligibility for TRA benefits, but rather the violations of federal law by Labor and CT Labor. Resp. Br. 16. Plaintiff argues that his claim is

It would be inappropriate for the court to hypothesize about scenarios where a plaintiff could bring a claim under 28 U.S.C. § 1581(i)(4) that would not involve precisely the review of certification determinations under 28 U.S.C. § 1581(d)(1). Here, as already discussed, Plaintiff's claim challenges the administration and enforcement of 19 U.S.C. § 2291, not 19 U.S.C. § 2273.

actually that the program is being operated in contravention of a federal statute, which he argues is not barred from federal court review. *Id.* Even if § 2311(e) does not divest federal courts of jurisdiction to review individual entitlement determinations entirely, Plaintiff's claim would not be reviewable by this Court under the plain terms of 28 U.S.C. § 1581(d)(1), which explicitly limits this Court's review to Labor's group certification determinations under 19 U.S.C. § 2273(a). *See* 28 U.S.C. § 1581(d)(1); 19 U.S.C. § 2273(a). Therefore CT Labor's denial of TRA benefits to Plaintiff and Labor's oversight of that denial as it may violate 19 U.S.C. § 2291 may be reviewable in federal court, *see e.g., Hampe*, 364 F.3d at 93–94, but such a determination is not reviewable in this Court.[19] *See* 28 U.S.C. §§ 1581(d)(1), (i)(4).

II. Transfer Under 28 U.S.C. § 1631

Although this Court lacks jurisdiction to review a claim as challenging Labor and CT Labor's operation of the TRA benefit program in contravention of federal law, Plaintiff argues that his claim is not barred from review in federal district court.[20] *See* Resp. Br. 16 (citing *Hampe*, 364 F.3d at 93–94). Plaintiff argues that, if the court finds it lacks subject matter jurisdiction, transfer under 28 U.S.C. § 1631 is appropriate and required because Plaintiff could have brought his case in another federal court. *See* Pl.'s Suppl. Br. 3–6. In addition, Plaintiff argues that such transfer is in the interests of justice because Plaintiff brought his cause of action in good faith, his claim is not frivolous, and transfer would expedite the resolution of his claim. *Id.* at 6–7. Defendant responds that transfer is not appropriate because Plaintiff's claim is a challenge to the denial of his individual benefits, and such claims may only be brought in state court under 19 U.S.C. § 2311(e). Def.'s Suppl. Br. 4–7. Defendant argues that, because no federal court possesses jurisdiction over Plaintiff's claim, 28 U.S.C. § 1631 does not authorize transfer. *Id.* at 7 (citing *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426, 428 (Fed. Cir 1983)).

When a civil action is filed and the court in which that action is filed lacks jurisdiction,

[19] Plaintiff also argues that he states individual claims against Labor because Labor failed to provide complete resolution to his individual benefit claims even after it intervened with CT Labor. *See* Pl.'s Sur-Reply 3–5. However, any such claims against Labor would also be enforcing individual rights under 19 U.S.C. § 2291, not rights to group certification under 19 U.S.C. § 2273. *See* 19 U.S.C. §§ 2273, 2291. Likewise, Plaintiff's claims that theories of agency make Labor responsible for actions by CT Labor, *see* Pl.'s Sur-Reply 5–6, do not give this Court's jurisdiction because, even if Labor is responsible for actions taken by CT Labor, those actions would be taken in the administration and enforcement of § 2291, not § 2273. *See* 19 U.S.C. §§ 2273, 2291; 28 U.S.C. §§ 1581(d)(1), (i)(4).

[20] Since neither party addressed the issue of whether Plaintiff's claim should be transferred to another federal district court in the event this Court lacks jurisdiction, the court ordered both parties to address the appropriateness of transfer to a federal district court under 28 U.S.C. § 1631. *See* Scheduling Order, Sept. 12, 2016, ECF No. 40.

> the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed or noticed, and the action . . . shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in. . . the court from which it is transferred.

28 U.S.C. § 1631. Courts, for purposes of § 1631 are defined as including "the courts of appeals and district courts of the United States, . . . the United States Court of Federal Claims, and the Court of International Trade." 28 U.S.C. § 610.

Defendant argues that the Supreme Court's holding in *Brock*, 477 U.S. at 285, bars Plaintiff from bringing his suit in federal court because suits challenging a state agency's application of federal guidelines to benefit claims of individual employees is limited to state court. *See* Def.'s Suppl. Br. 4. However, Plaintiff alleges that the TRA program is being operated in contravention of a federal statute, which can be brought in federal court. Compl. 1 (alleging "State . . . still fail[s] to grasp the TRA law"; and "The State of Connecticut as the agent of the U.S. DOL processed and promoted [a] TRA training program in 2008"), 2 (alleging Plaintiff is "seeking a fair resolution of the improper management of the TRA program"), 3 (alleging Plaintiff is "requesting the U.S. Court of International Trade to embrace a broad jurisdictional oversight to address the . . . many participants harmed by the improper TRA management by the State of Connecticut"); Resp. Br. 15–17 (citing *Brock*, 477 U.S. at 285; *Hampe*, 364 F.3d at 93–94 (3d Cir. 2004)). In *Hampe*, plaintiffs, dislocated workers under the TAA program, alleged that the state implemented a requirement that any worker in the program commuting more than 50 miles away sign waivers agreeing to accept only $5 per day for commuting expenses, and plaintiff's alleged Labor endorsed this policy. *See Hampe*, 364 F.3d at 92. The Court of Appeals for the Third Circuit held that, "while the District Court . . . could not hear requests for individual eligibility determinations, it did have jurisdiction to hear a challenge to [Labor's] approval of [the state labor agency's] negotiated waiver policy. Under the teachings of [*Brock*], [p]laintiff's could therefore sue for an order declaring the . . . policy violated the Trade Act [of 1974]." *Id.* at 95. Although this decision is not binding on the court, Defendant points to no authority for the notion that Plaintiff's claim that Labor and CT Labor are operating the TRA program in contravention of federal law is barred from review in federal court. Therefore, the interests of justice favor transfer of Plaintiff's claim because it will facilitate a prompt hearing of Plaintiff's claim in a court that arguably has jurisdiction to hear that claim.

Defendant argues Plaintiff's claim may not be transferred to a state agency, and Defendant implies that Labor's regulation covering its

agreements with state agencies to administer the TAA program requires review in a state agency, not a federal court. Def.'s Supp. Br. 6–7 (citing 20 C.F.R. § 617.59(f) (2009); *Schafer v. Dep't of Interior*, 88 F.3d 981, 987 (Fed. Cir 1996)). Labor's regulation provides that Labor will not make a finding that a state agency has not fulfilled its commitments under its agreement to administer TAA until it has provided notice and opportunity for a hearing to the state or state agency. 20 C.F.R. § 617.59 (2009). Nothing in this regulation requiring review in the event of the breach of these agreements between Labor and the states implies that a state agency's operation of the federal program, as Labor's agent in contravention of federal law, is not reviewable in federal court. *See* 20 C.F.R. § 617.59. Thus, neither Labor's regulation nor any other authority bars Plaintiff from bringing his claim in federal district court. If Defendant has any other defenses to Plaintiff's claim, those defenses can be adjudicated by the district court.

CONCLUSION

In deciding this Court lacks jurisdiction, the court does not opine on the merits of Plaintiff's claims in other fora. The court, as it seems does Labor as well as numerous officials from both the state of Connecticut and the federal government, regrets the administrative hurdles that Plaintiff has been forced to confront and laments the significant burden that those obstacles have caused him. Plaintiff's complaint details what can only be described as a frustrating, if not maddening, morass of mistakes and misunderstandings. He encountered undue cost and aggravation pursuing benefits that were meant to aid him in a time of need. The court has studied the Plaintiff's correspondence and documentation of his efforts to obtain what was due to him and is awed by Plaintiff's perseverance, professionalism and, frankly, patience. Given that the Plaintiff spent years battling several state agencies and courts in his pursuit of his own cause and the admirable cause of sparing others his aggravation and hardship, it is with great reluctance that this Court must turn him away. As a coequal branch of government, the judiciary may not expand Congress's explicit grant of jurisdiction no matter how noble the cause. However, the court transfers Plaintiff's cause of action to the United States District Court for the District of Connecticut. Given the seriousness of the errors that Plaintiff alleges were committed by CT Labor in adjudicating his claims, the interests of justice favor adjudicating Plaintiff's claims on the merits in a court that may possess jurisdiction over Plaintiff's action. Moreover, given the significant delays Plaintiff encountered, the interest of justice would be more served by a prompt hearing of these claim rather than awaiting the filing of a new action.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that Plaintiff's motion is denied; it is further

ORDERED that, pursuant to 28 U.S.C. § 1631, the above-captioned action is transferred to the United States District Court for the District of Connecticut.

Dated: October 13, 2016
New York, New York

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

Slip Op. 16–99

SOLARWORLD AMERICAS, INC., Plaintiff, v. UNITED STATES, Defendant, and JINKO SOLAR IMPORT & EXPORT CO., LTD. ET AL., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 15–00232

[Remanding the U.S. Department of Commerce's final determination in the first administrative review of the countervailing duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: October 14, 2016

Timothy C. Brightbill, Laura El-Sabaawi, and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, DC, for plaintiff.

Justin Reinhart Miller, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Melissa Marion Devine*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Commercial Litigation Branch – Civil Division, of Washington, DC, *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *Lisa W. Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Neil R. Ellis, Richard L.A. Weiner, Rajib Pal, Shawn Michael Higgins, and *Justin Ross Becker,* Sidley Austin, LLP, of Washington, DC, for defendant-intervenors.

OPINION AND ORDER

Kelly, Judge:

This action comes before the court on a USCIT Rule 56.2 motion for judgment on the agency record challenging the U.S. Department of Commerce's ("Department" or "Commerce") determination in the first administrative review of the countervailing duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("China"). *See* SolarWorld's

Mot. J. Agency R., Feb. 12, 2016, ECF No. 24; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 80 Fed. Reg. 41,003 (Dep't Commerce July 14, 2015) (final results of countervailing duty administrative review; 2012) and accompanying Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China, Oct. 13, 2015, ECF No. 21–2 ("Final Decision Memo"); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (countervailing duty order).

Plaintiff, SolarWorld Americas, Inc. ("SolarWorld"), commenced this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (2012).[1] *See* Summons, Aug. 12, 2015, ECF No. 1. The court granted a consent motion to intervene made by Jinko Solar Import & Export Co., Ltd., JinkoSolar International Limited, and Jinko Solar Co. Ltd. (collectively "Jinko Solar"). *See*Order, Sept. 25, 2015, ECF No. 19; *see also* Consent Mot. Intervene Jinko Solar Import and Export Co., Ltd., JinkoSolar International Ltd., and Jinko Solar Co., Ltd., Sept. 24, 2015, ECF No. 14. Defendant filed a response, and Jinko Solar filed a response as defendant-intervenors supporting Defendant's arguments. *See*Def.'s Opp'n Pl.'s Mot. J. Upon Administrative R., May 10, 2016, ECF No. 26 ("Def.'s Resp. Br."); Resp. Def.-Intervenors Jinko Solar Co., Ltd., et al. to SolarWorld Americas, Inc.'s Mot. J. Agency R., May 20, 2016, ECF No. 30. After SolarWorld filed a reply brief, *see* Pl. SolarWorld Americas, Inc.'s Reply Br., June 22, 2016, ECF No. 31, the court filed a letter with additional questions for the parties. *See* Letter filed by the Court, July 20, 2016, ECF No. 33 ("Court's Supplemental Questions"). Briefing in the matter concluded when the parties filed supplemental briefs responding to the court's questions on September 2, 2016. *See* Pl. SolarWorld Americas, Inc.'s Suppl. Br., Sept. 2, 2016, ECF No. 41 ("Pl.'s Suppl. Br."); Def.'s Suppl. Br. Regarding Hierarchy for Selecting Adverse Facts Available Rates, Sept. 2, 2016 ("Def.'s Suppl. Br."), ECF No. 40; Suppl. Br. Def.-Intervenors Jinko Solar Co., Ltd., et al. Resp. Questions Presented by Judge Kelly, Sept. 2, 2016, ECF No. 42.

BACKGROUND

On February 3, 2014, Commerce initiated its administrative review covering subject imports entered during the period of review March 26, 2012 through December 31, 2012. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 Fed. Reg. 6,147, 6,149–57 (Dep't Commerce

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

Feb. 3, 2014). Commerce selected Lightway Green New Energy Co., Ltd. ("Lightway") and Shanghai BYD Co., Ltd. as mandatory respondents, initially assigning them countervailable subsidy rates of 22.73 percent and 8.63 percent, respectively. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 80 Fed. Reg. 1,019, 1,019–20 (Dep't Commerce Jan. 8, 2015) (preliminary results of countervailing duty administrative review; 2012; and partial rescission of countervailing duty administrative review).

During the countervailing duty investigation, SolarWorld alleged in its petition that the Government of China ("GOC"), through its Export-Import Bank ("China Ex-Im Bank"), provided credits to export buyers in the form of medium and long-term loans with preferential, low interest rates to buyers of goods used in certain energy projects, including solar cells ("Export Buyer's Credit Program"). *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 63,788, 63,789 (Dep't Commerce Oct. 17, 2012) (final affirmative countervailing duty determination and final affirmative critical circumstances determination); *see also* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China at 59, C-570–980, (Oct. 9, 2012), *available at* http://ia.ita.doc.gov/frn/summary/prc/2012–25564–1.pdf (last visited October 11, 2016) ("Original Investigation Final Determination"). Commerce determined that the Export Buyer's Credit Program is countervailable, and Commerce applied adverse facts available ("AFA")[2] to select a rate of 10.54 percent to this program. Original Investigation Final Determination at 64.

In its final determination in this administrative review, Commerce applied AFA to the Export Buyer's Credit Program because it could not verify that respondents had not used export buyer's credits, as the GOC claimed in its questionnaire responses. Final Decision Memo at 33 (citing Memorandum re: Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China at 4–7, PD 255, bar code 3269089–01 (Apr. 6, 2015)).[3] Com-

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[2] Although 19 U.S.C. § 1677e(a)–(b) and 19 C.F.R. § 351.308(a)–(c) (2014) each separately provide for the use of facts otherwise available and the subsequent application of adverse inferences to those facts, Commerce uses the shorthand "adverse facts available" or "AFA" to refer to its use of such facts otherwise available with an adverse inference. *See, e.g.*, Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China at 6, 15, 20–32, PD 198, bar code 3250557–01 (Jan. 5, 2015); Final Decision Memo at 3, 4, 13–20, 32–33, 42–44, 57–59.

[3] On October 13, 2015, Defendant submitted indices to the confidential and public administrative records, which can be found at ECF Nos. 21–4 and 21–5, respectively. All further documents from the administrative record may be located in those appendices.

merce applied an AFA rate of 5.46 percent to the same Export Buyer's Credit Program.[4] Final Decision Memo at 44. Commerce selected this rate because it corresponds to the highest rate calculated for Lightway for the Preferential Policy Lending to the Renewable Energy Industry program, which Commerce considered similar and comparable to the China Ex-Im Bank Export Buyer's Credit Program. *Id.*

SolarWorld challenges Commerce's determination to countervail the China Ex-Im Bank's Export Buyer's Credit Program at an AFA rate of 5.46 percent as unsupported by substantial evidence and otherwise contrary to law. Br. Supp. Pl. SolarWorld Americas, Inc.'s Rule 56.2 Mot. J. Agency R. 9–20, Feb. 12, 2016, ECF No. 24 ("SolarWorld Br."). Defendant responds that Commerce followed its practice of selecting an AFA rate to apply in administrative reviews. Def.'s Resp. Br. 8–18. For the reasons that follow, the court remands Commerce's selection of an AFA rate of 5.46 percent for the Export Buyer's Credit Program for further explanation or reconsideration.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of a countervailing duty order. "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).

DISCUSSION

SolarWorld argues that Commerce's application of an AFA rate of 5.46 percent to the China Ex-Im Bank's Export Buyer's Credit Program is unreasonable, inconsistent with prior agency practice, and otherwise contrary to law. SolarWorld Br. 9–20. Specifically, SolarWorld argues that Commerce unreasonably selected an AFA rate of 5.46 percent in this review when it applied an AFA rate of 10.45 percent to the same program in the original investigation. *Id.* at 5–6. Defendant responds that Commerce followed its established practice in administrative reviews of selecting the highest non-de minimis calculated rate for a similar program from the same proceeding where there is no calculated rate for any respondent in the review benefiting from the identical program. Def.'s Resp. Br. 8–18. Although Com-

[4] In its preliminary determination, Commerce preliminarily found that respondents did not benefit from the Export Buyer's Credit Program. Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China at 36–41, C-570–980, (Dec. 31, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2015–00110–1.pdf (last visited October 11, 2016).

merce has considerable discretion in developing a methodology to select an AFA rate, its rate selection methodology in administrative reviews differs materially from that applied in investigations. *See* Final Decision Memo at 44; Original Investigation Final Determination at 64. In this administrative review, that difference in methodologies resulted in Commerce applying a lower AFA rate to the same program in this administrative review than it did in the initial investigation. *See* Final Decision Memo at 44; Original Investigation Final Determination at 64. Commerce may have a reasonable rationale for its differing methodologies, but it failed to explain its logic in this review. On remand, Commerce must do so or reconsider its determination.

If, in the course of a countervailing duty proceeding, an interested party or any other person provides information to Commerce that cannot be verified, Commerce shall use facts otherwise available in making its determination. 19 U.S.C. § 1677e(a)(2)(D).[5] Commerce may apply an adverse inference in selecting from among the facts otherwise available where it "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with [its] request for information." 19 U.S.C. § 1677e(b). When applying an adverse inference, Commerce may rely on information derived from the petition, a final determination in the investigation, any previous review, or any other information placed on the record. 19 U.S.C. § 1677e(b)(1)–(4); 19 C.F.R. § 351.308(c)(1)(i)–(iii) (2014).[6]

Where Commerce countervails a subsidy program at an AFA rate, neither the statute nor the regulation dictate how Commerce is to determine that rate.[7] *See* 19 U.S.C. § 1677e(b)(1)–(4); 19 C.F.R. § 351.308(c)(1). Therefore, Commerce has considerable discretion to develop a methodology for calculating an AFA rate derived from one

[5] On June 29, 2015, President Obama signed the Trade Preferences Extension Act of 2015 ("TPEA"), which made numerous amendments to the countervailing duty law. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). Section 502 of the TPEA amends 19 U.S.C. § 1677e to add subsection (d), which provides generally that an AFA countervailable subsidy rate applied in countervailing duty proceedings should be applied for the same or similar program involving the same country or for a proceeding Commerce considers reasonable to use. *See* 19 U.S.C. § 1677e(d)(1)(A)(i)–(ii) (2015). Although the TPEA does not provide for an effective date, the Court of Appeals for the Federal Circuit has held that Section 502 of the TPEA has prospective effect and "unambiguously applies only to Commerce determinations made after the date of enactment." *Ad Hoc Shrimp Trade Action Committee v. United States*, 802 F.3d 1339, 1352 (Fed. Cir. 2015). No party argues that the new law should apply in this proceeding. *See* SolarWorld Br. 6–8; Def.'s Resp. Br. 8 n.2. The amendments to the statute are not implicated because they merely list the possible sources Commerce may look to for selecting an AFA rate. 19 U.S.C. § 1677e(d)(1)(A)(i)–(ii) (2015). The statute does not address the question of selecting from among possible AFA rates, which is the question at the heart of SolarWorld's challenge here.

[6] Further citations to Title 19 of the Code of Federal Regulations are to the 2014 edition.

[7] The court does not review Commerce's decision to apply AFA in the first instance because no party challenges that decision. *See* SolarWorld Br. 15.

of the sources listed in the statute. An AFA rate selected by Commerce must also reasonably balance the objectives of inducing compliance and determining an accurate rate. *See F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (holding the corroboration requirement tempers the deterrent value of an AFA rate to prevent overreaching reality to maximize deterrence). The statute does not require Commerce to favor any single source from among the list of possible sources on which it could base its adverse inference. *See* 19 U.S.C. § 1677e(b)(1)–(4).

In administrative reviews, Commerce has developed a methodology for selecting an AFA rate to countervail a subsidy program according to a hierarchy of sources. For subsidy programs not involving income tax exemptions and reductions, Commerce first applies the highest calculated rate for the identical program in the same proceeding if another responding company used that program. Final Decision Memo at 44 (citing *Aluminum Extrusions from the People's Republic of China*, 79 Fed. Reg. 78,788 (Dep't Commerce Dec. 31, 2014) (final results of the countervailing duty administrative review; 2012); Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Aluminum Extrusions from the People's Republic of China at 15–16, C-570–968, (Dec. 22, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/201430659–1.pdf (last visited October 11, 2016) ("Aluminum Extrusions from PRC I&D")). Second, if no other company in the review used the identical program, Commerce's practice is to use the highest calculated non-de minimis rate for a similar program in the same proceeding. *Id.* (citing Aluminum Extrusions from PRC I&D 15–16). Third, if there is no identical or similar program match in the CVD proceeding at issue, Commerce uses the highest rate calculated for an identical program in another CVD proceeding involving the same country. *Id.* (citing Aluminum Extrusions from PRC I&D 15–16). Last, in the absence of an identical program in another CVD proceeding involving the country at issue, Commerce uses the highest calculated rate from a similar program in another CVD proceeding involving the country at issue. *Id.* Defendant suggests Commerce's methodology reflects a preference in an administrative review for a similar program in an earlier segment of the same proceeding because it has a stronger relation to the respondent's prior commercial activity. *See* Def.'s Resp. Br. 13 (citing *Sodium Nitrite From the People's Republic of China*, 73 Fed. Reg. 38,981, 38,982 (Dep't Commerce July 8, 2008) (final affirmative countervailing duty determination) ("*Sodium Nitrite from the PRC*")).

Here, noting that it lacked a calculated rate for the Export Buyer's Credit Program from another responding company, Commerce applied the second level of its AFA rate selection hierarchy for administrative reviews. *See* Final Decision Memo at 44. Thus, it selected the rate calculated for the Preferential Policy Lending to the Renewable

Energy Industry program in this same administrative review to the Export Buyer's Credit Program after determining that the two programs were similar.[8] *Id.* Commerce supported its determination that the programs were similar, noting that both programs call for financial institutions to provide loans at preferential rates. *Id.* at 27, 33.

SolarWorld argues that, in the absence of a calculated rate for the identical subsidy program in the same proceeding, Commerce's AFA rate selection hierarchy in administrative reviews arbitrarily favors a rate derived from a similar or comparable program within the same proceeding before looking to identical programs in other proceedings involving the same country, as Commerce does in investigations.[9] SolarWorld Br. 17–18; SolarWorld Reply Br. 6–8. Defendant supports Commerce's AFA rate selection hierarchy as a means to reasonably balance the interests of inducing compliance with assuring the rate has a strong relation with respondent's prior commercial activity. Def.'s Resp. Br. 13 (citing *Sodium Nitrite From the PRC*, 73 Fed. Reg. at 38,982). Although Commerce's hierarchy in reviews, when viewed in isolation, may reasonably balance deterrence against accuracy, Commerce's AFA rate selection hierarchies in investigations and administrative reviews both must balance these same interests. Therefore, Commerce must provide a reasonable explanation for implementing different hierarchies in reviews than in investigations.

Defendant acknowledges that, in the absence of data pertaining to an identical program in the same proceeding, Commerce's AFA rate selection methodology in administrative reviews, unlike in investigations, looks for similar or comparable programs in any segment of the same proceeding before moving on to find identical programs in another proceeding. Def.'s Resp. Br. 12. Defendant explains the distinction by focusing on the more limited availability of calculated rates in

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[8] SolarWorld does not challenge Commerce's determination that the Preferential Policy Lending to the Renewable Energy Industry program is similar to the Export Buyer's Credit Program. SolarWorld Br. 15. Rather, it argues that Commerce failed to explain its reasoning in concluding the programs were similar. *Id.* The court considers Commerce's logic in considering the programs similar reasonably discernible because both loan programs perform similar functions in support of Chinese industry by offering lower interest rates on loans than would otherwise be available to these companies. SolarWorld offers no record evidence indicating that the loans have an effect other than supporting Chinese industry.

[9] SolarWorld argues Commerce's methodology in administrative reviews is fundamentally at odds with its methodology in investigations. SolarWorld Br. 14–18. Commerce's AFA rate selection hierarchy in an original investigation is to first select the highest calculated rate for the identical program in the same proceeding if another responding company used the identical program. SolarWorld Br. 16 (citing Original Investigation Final Determination at 64). If there is no calculated rate for the identical program in the same proceeding, Solar World argues Commerce looks for a non de minimis rate for the identical program in another CVD proceeding involving the same country. *Id.* at 16–17 (citing Original Investigation Final Determination at 64). If there is no identical program match in any CVD proceeding involving the same country, SolarWorld argues Commerce uses the highest calculated rate for a similar program in another CVD proceeding involving the same country. *Id.* (citing Original Investigation Final Determination at 64).

an investigation. *See id.* at 13 (citing *Sodium Nitrite From the PRC*, 73 Fed. Reg. at 38,982). This explanation implies that Commerce prefers rates from the same proceeding but Commerce has fewer such rates in an investigation. However, it does not address why, in an investigation where Commerce does have a calculated rate for a similar subsidy program on the record, Commerce would prioritize an identical program from another proceeding over a similar program from the same proceeding.[10] In fact, Defendant's explanation would suggest that Commerce should prefer a rate calculated for a similar program from the same proceeding over an identical program from a different proceeding in an investigation. Moreover, Commerce's methodology for selecting an AFA rate in an investigation does look for a calculated rate for an identical programs in the same proceeding. Original Investigation Final Determination at 64. Yet, Commerce does not explain why its review AFA rate selection hierarchy prefers a rate calculated for a similar subsidy program in the same review over that of an identical program in a different proceeding involving the same country under investigation, while its hierarchy in investigations does not. Although Commerce's AFA rate selection methodology in investigations is not before the court in this action, it is a well-established rule that "an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

Where Commerce lacks a calculated rate to use as AFA for an identical program in the same proceeding, Commerce may have a reasonable basis to look to a rate selected as AFA from a similar program in the same proceeding in a review while preferring a rate selected as AFA from an identical program in another proceeding involving the same country in an investigation. However, Commerce must explain why its disparate AFA rate selection practices in administrative reviews versus investigations is reasonable. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). It did not do so in its final determination in this administrative review.[11] If Commerce grounds the difference in prac-

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[10] SolarWorld points out that, in Commerce's investigation, Commerce had a calculated rate for the same Preferential Policy Lending to the Renewable Energy Industry program it considered comparable in this administrative review on the record. SolarWorld Br. 17 (citing Original Investigation Final Determination at 12). Yet, SolarWorld points out that Commerce "did *not* select that rate as the AFA rate for the Ex-Im Bank Buyer's Credit program in the original investigation. Rather, the agency relied upon a 10.54 percent rate for a similar subsidy program calculated in another proceeding as the AFA rate." *Id.* (citing Original Investigation Final Determination at 12).

[11] Defendant argues that Commerce did not address why it balances these interests differently in investigations versus reviews because this issue was not raised in the course of the administrative proceeding. Def.'s Suppl. Br. 6. In SolarWorld's case brief before the agency, it cited Commerce's AFA rate selection hierarchy in investigations, and argued that Commerce should apply a rate of 11.83 percent assigned to a respondent in another

tice in methodological distinctions between how it conducts administrative reviews as opposed to investigations, it must connect those distinctions to the differing methodologies. To the extent that Commerce balances the interests of rate accuracy with inducing compliance differently in reviews versus investigations, Commerce must explain on remand why that discrepancy is reasonable or it must reconsider its methodology.

Defendant concedes that this issue was not addressed by Commerce in its final determination, but Defendant provides an explanation for the difference in methodologies. Def.'s Suppl. Br. 6. In response to the court's question to Defendant on this issue, *see*Court's Supplemental Questions at 3–4, Defendant explains that, in reviews, "Commerce's AFA hierarchy prioritizes an inquiry into the subsidization experience of *the industry at issue* by its government, rather than an inquiry into the use of the identical program by any industry." Def.'s Suppl. Br. 4. Defendant further explains that a rate from within the industry (*i.e.*, from within the same proceeding) for a similar program has a stronger relationship to the respondent's likely prior commercial activity than a rate from a different industry obtained from outside the proceeding. *Id.* (citing *Sodium Nitrite From the PRC*, 73 Fed. Reg. at 38,982).

In contrast, Defendant continues, "Commerce's purpose in an investigation is to achieve an overarching understanding of how the industry under investigation uses subsidies." *Id.* at 5. Defendant observes that, given the limited information available to Commerce

proceeding involving China for a debt forgiveness subsidy program because that program is similar to the Export Buyer's Credit Program. SolarWorld Americas, Inc. Case Brief at 15–16, CD 220, bar code 3273849–01 (Apr. 30, 2015) ("SolarWorld Case Brief"). In the alternative, SolarWorld argued that Commerce should "select a rate of 10.54 percent as the AFA rate for this program, consistent with its practice in prior investigations." *Id.* This argument also advocated that Commerce apply its investigation rate hierarchy to use the highest calculated rate from a similar program in another proceeding involving China. *See id.*

From these arguments, the court discerns that SolarWorld did raise the issue of the application of its AFA rate selection hierarchy in investigations. *See id.* Commerce had not found the Export Buyer's Credit Program countervailable in its preliminary determination. *See* Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China at 36–41, PD 198, bar code 3250557–01 (Jan. 5, 2015). Therefore, Commerce had not assigned an AFA rate to the program prior to its final determination, *see id.* at 41, and SolarWorld's arguments implicating Commerce's methodology in investigations at the administrative level are sufficient to raise the issue that Commerce's methodology in investigations and reviews differs. At the time SolarWorld filed its administrative case brief, SolarWorld could not have anticipated how Commerce would apply its rate selection hierarchy or that its application would differ, resulting in a lower rate than that applied in the investigation.

Defendant requests remand for Commerce to further explain its AFA hierarchy practice in the event the court determines Commerce should have addressed the difference in AFA hierarchies between investigations and administrative reviews. Def.'s Suppl. Br. 6–7. Since the court finds the issue was raised before the agency, Commerce must provide an explanation or reconsider its determination. Therefore the court remands for the agency to do so.

in an investigation pertaining to the industry's use of subsidies, Commerce focuses on the program rather than the industry where it lacks an available rate for the same proceeding. *Id.*

Defendant argues that Commerce has previously explained its AFA hierarchies extensively, and it argues that the explanations provided by Defendant are reasonably discernible from Commerce's explanations in other proceedings, which have been affirmed by the Court and the Court of Appeals for the Federal Circuit. Def.'s Suppl. Br. 6. (citing *Essar Steel Ltd. v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1306, 1310 (2013), *aff'd* 753 F.3d 1368 (Fed. Cir. 2014); *Fengchi Imp. & Exp. Co. of Haicheng City v. United States*, 39 CIT __, __, 59 F. Supp. 3d 1386, 1396 (2015); *Tai Shan City Kam Kiu Aluminium Extrusion Co. v. United States*, 39 CIT __, __, 125 F. Supp. 3d 1337, 1342 n.7 (2015)). Although the cases referenced by Defendant independently affirm Commerce's practices for AFA rate selection in reviews and investigations, none explain or affirm Commerce's rationale for having different AFA rate selection practices in investigations versus administrative reviews. *See Essar Steel*, 37 CIT at __, 908 F. Supp. 2d at 1310–11 (affirming Commerce's application of the second step of its AFA rate selection hierarchy in an administrative review because the program identified in the investigation is similar); *Fengchi*, 39 CIT at __, 59 F. Supp. 3d at 1396 (affirming Commerce's application of the second step of its AFA rate selection hierarchy in an administrative review because the program identified in the investigation is similar); *Tai Shan City Kam Kiu*, 39 CIT at __, 125 F. Supp. 3d at1342 n.7 (reciting Commerce's AFA rate selection hierarchy in administrative reviews). Defendant's explanations are post hoc rationalizations. On remand, Commerce must explain why these differences in methodology are reasonable or reconsider its methodology.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that this action is remanded to Commerce to clarify or reconsider, as appropriate, its AFA rate selection hierarchy as applied in this administrative review; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 60 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 15 days to file their replies to comments on the remand redetermination.

Dated: October 14, 2016
New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE