U.S. Court of International Trade

Slip Op. 17–45

BORUSAN MANNESMANN BORU SANAYI VE TICARET A.Ş., Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Court No. 14–00009

[Granting Plaintiff's Motion for Judgment on the Agency Record and remanding action to agency]

Dated: April 20, 2017

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OPINION

RIDGWAY, Judge:

In this action, Plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. ("Borusan") – a Turkish producer and exporter of standard pipe – contests the final results of the U.S. Department of Commerce's 2011–2012 administrative review of the antidumping duty order covering welded carbon steel standard pipe and tube products from Turkey ("standard pipe").[1] The period of review is May 1, 2011

[1] Previously, this was a consolidated action. *See* Order (April 8, 2014) (consolidating *United States Steel Corp. v. United States*, Court No. 14–00036 into this action). However, U.S. Steel did not file a motion for judgment on the agency record in the consolidated action, and – after the deadline for filing such a motion passed – U.S. Steel filed a consent motion to sever its case (*i.e.*, Court No. 14–00036). *See* Consent Motion to Sever (Sept. 2, 2014). That motion was granted. *See* Order (Sept. 4, 2014) (granting U.S. Steel's motion to sever, reinstating Court No. 14–00036, and directing U.S. Steel to file motion for voluntary dismissal of that case). U.S. Steel subsequently filed a consent motion to dismiss *United States Steel Corp.*, Court No. 14–00036, which also was granted. *See* Order (Sept. 5, 2014), *entered in United States Steel Corp.*, Court No. 14–00036 (dismissing U.S. Steel's complaint with prejudice).

through April 30, 2012. *See* Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Final Results of Antidumping Duty Administrative Review; 2011–2012, 78 Fed. Reg. 79,665 (Dec. 31, 2013) ("Final Results"); *see also* Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2011–2012 at 2 (Dec. 23, 2013) (Pub. Doc. No. 265) ("Issues & Decision Memorandum").[2]

Now pending is Borusan's Motion for Judgment on the Agency Record, which raises a single issue: whether, in calculating Borusan's dumping margin, Commerce properly declined to include in Borusan's duty drawback adjustment "yield loss" – *i.e.*, the "scrap" and "second-quality pipe" that are by-products of the company's production of the standard pipe that it exports to the United States. *See generally* Brief of Plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. ("Borusan") in Support of Its Motion for Judgment Upon the Agency Record at 1–2, 3, 6–9, 10, 31–36 ("Pl.'s Brief"); Reply Brief of Plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. ("Borusan") in Response to Defendant's and Defendant-Intervenor's Briefs at 1, 16–22 ("Pl.'s Reply Brief").[3]

Both the Government and Defendant-Intervenor United States Steel Corporation ("U.S. Steel") – a domestic producer of standard pipe – oppose Borusan's motion and maintain that the Final Results are supported by substantial evidence and are otherwise in accordance with law, and therefore must be sustained. *See generally* Defendant's Response to Plaintiff's Motion for Judgment on the Agency Record at 2, 3–4, 6, 40–43 ("Def.'s Response Brief"); Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency Record Filed by Defendant-Intervenor United States Steel Corporation at 1,

[2] The administrative record in this action includes both public and confidential (*i.e.*, business proprietary) information. All documents in the record were filed through IA ACCESS, the Import Administration Antidumping and Countervailing Duty Centralized Electronic Service System. The record index (like the record) is divided into two sections. One section consists of public documents and public (*i.e.*, redacted) versions of confidential documents. The other section consists of unredacted versions of all documents on the record that include confidential information. Only documents from the public section of the administrative record are cited in this opinion. They are cited as "Pub. Doc. No. ___."

[3] Borusan's Complaint sets forth three counts challenging Commerce's Final Results. However, shortly before oral argument, Borusan voluntarily dismissed the first two counts of the Complaint, which contested Commerce's application of the agency's "targeted dumping" analysis. *See* Complaint, Count One (disputing agency determination that Borusan engaged in "differential pricing"); *id*., Count Two (asserting that withdrawal of agency's targeted dumping regulation was unlawful); Consent Motion [of Borusan] to Voluntarily Dismiss Counts One and Two of Plaintiff's Complaint with Prejudice; Order (Oct. 1, 2015) (dismissing with prejudice Counts One and Two). Only Count Three remains at issue in this action.

4–6, 9, 23–27 ("Def.-Int.'s Response Brief").[4] In its brief, the Government argues that Borusan did not demonstrate that it was entitled to a duty drawback adjustment for yield loss (*i.e.*, scrap and second-quality pipe) because Borusan did not substantiate its claim with documentary evidence. Def.'s Response Brief at 2, 6, 40–43. U.S. Steel argues that Commerce's determination to exclude scrap and second-quality pipe from Borusan's duty drawback adjustment is consistent with the plain language of the statute and that Commerce properly determined that Borusan was not entitled to a duty drawback adjustment for yield loss, because the scrap and second-quality pipe are not "subject merchandise," because they were not exported, and because they were sold domestically, on the Turkish market. Def.-Int.'s Response Brief at 1, 4–6, 9, 23–27.

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[5] For the reasons set forth below, Borusan's Motion for Judgment on the Agency Record must be granted, and this matter must be remanded to Commerce for further consideration.

I. *Background*

Understanding the issue presented in this case requires a brief overview of certain aspects of both U.S. antidumping law and Turkish customs law, which are summarized below in the context of the facts of the case.

A. *Overview of the Basic Legal Framework*

Dumping and Antidumping Duty Orders. Dumping is the sale of foreign goods in the United States at "less than fair value." 19 U.S.C. § 1677(34) (defining "dumped" and "dumping"); *see also United States Steel Corp. v. United States*, 621 F.3d 1351, 1360 (Fed. Cir. 2010). If dumping results in material injury (or the threat of material injury) to the relevant domestic industry, Commerce issues an antidumping duty order imposing antidumping duties on imports of the foreign goods into the United States. 19 U.S.C. § 1673; *see also Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013). The purpose of imposing antidumping duties is to offset any negative effects that

[4] At one point, there were two defendant-intervenors in this action. Like U.S. Steel, Wheatland Tube Company – a domestic producer of standard pipe – intervened on the side of the Government. *See* Order (Jan. 29, 2014) (granting Wheatland Tube's consent motion to intervene). Unlike U.S. Steel, however, Wheatland Tube elected not to file a brief in response to Borusan's motion for judgment on the agency record. Shortly before oral argument, Wheatland Tube sought leave to withdraw, which was granted. *See* Order (Oct. 7, 2015) (granting Wheatland Tube's consent motion for leave to withdraw from this action).

[5] All citations to statutes herein are to the 2006 edition of the United States Code. The pertinent statutory text remained the same at all times relevant herein.

dumping may have on the domestic industry. *See generally Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012) (explaining that "dumping presents unfair competition concerns because foreign companies selling goods below fair value can undercut domestic producers selling those same goods at market prices").

Dumping Margin, Normal Value, and Export Price. The amount of the antidumping duties that are imposed is determined by the "dumping margin," which is "the amount by which the *normal value* exceeds the *export price*. . . of the subject merchandise." 19 U.S.C. § 1677(35) (emphases added); *see also Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337 (Fed. Cir. 2016) (same). The "normal value" of merchandise is generally the price that a foreign producer charges in its home market, while the "export price" is most often the price that the producer charges in the United States. 19 U.S.C. §§ 1677a, 1677b; *see also Nan Ya Plastics Corp.*, 810 F.3d at 1337 (stating that dumping margin is the amount by which the price a producer charges in its home market (*i.e.*, normal value) exceeds the price of the product in the U.S. (*i.e.*, export price)) (citing *United States Steel Corp.*, 621 F.3d at 1353).

Adjustments to Normal Value and Export Price. In order to ensure a fair, "apples-to-apples" comparison between normal value and export price, the statute directs Commerce to make certain "adjustments" to both. *See* 19 U.S.C. § 1677a(c) (specifying adjustments to be made to export price, including "duty drawback adjustment"); 19 U.S.C. §1677b(a)(6) (specifying adjustments to be made to normal value); *see also Fla. Citrus Mutual v. United States*, 550 F.3d 1105, 1110 (Fed. Cir. 2008) (explaining that purpose of adjustments is to achieve a fair comparison "between U.S. price [*i.e.*, export price] and foreign market value [*i.e.*, normal value]"). At issue in this action is the "duty drawback adjustment" – *i.e.*, an upward adjustment to export price that Commerce is statutorily required to make as part of its antidumping analysis, in order to account for a foreign producer's receipt of any "duty drawback" under the laws of another country. *See* 19 U.S.C. § 1677a(c)(1)(B).

Duty Drawback. "Duty drawback" is a long-standing tool used by countries around the world to encourage export production. *See generally, e.g.*, Susan G. Markel, "Tax and Duty Incentives," in *Export Practice*, 371, 391–92 (Terence P. Stewart ed., 1994) (providing overview of duty drawback program in the U.S.). In general, under a duty drawback program, a country either exempts from import duties – or refunds (*i.e.*, rebates) import duties that were paid at the time of

entry for – goods (*e.g.*, material inputs or components) that are imported into the country and used to produce merchandise that is then subsequently exported from the country. Depending on the country, the exemption or refund/rebate offered under a duty drawback program may cover all, or just a portion, of the import duties that would otherwise apply.[6] A country's establishment of a duty drawback program promotes and incentivizes production for exportation, because duty drawback allows businesses in the country to compete in foreign markets without the handicap of including in their sales prices import duties that the companies otherwise would have been required to pay on imported material inputs or components. *See generally id*. at 392. (As discussed below, when Borusan imported into Turkey quantities of material inputs essential to the company's production of standard pipe, Borusan availed itself of Turkey's duty drawback laws. *See generally infra* section I.B.)

Duty Drawback Adjustment. In calculating a foreign producer's dumping margin, to ensure an "apples-to-apples" comparison between normal value and export price, Commerce must – through a "duty drawback adjustment" – account for any duty drawback that the foreign producer received pursuant to the duty drawback program in its home country. Specifically, Commerce is directed by statute to increase the export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B); *see also Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011) (summarizing duty drawback adjustment statute).[7] Like any adjustment that increases the export price, a duty drawback adjustment (in effect) lowers the foreign producer's dumping margin.

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[6] In the United States, for example, a domestic manufacturer may obtain drawback of 99% of duties paid on inputs or components that are imported into the U.S. and further processed or assembled and then subsequently exported. *See generally* U.S. Customs and Border Protection, What Every Member of the Trade Community Should Know About: Drawback at 7 (Dec. 2004).

[7] In deciding whether a foreign producer or other respondent is entitled to a duty drawback adjustment, Commerce applies a two-prong test, which requires the respondent to demonstrate that: "(1) the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, that the exemption is linked to the exportation of the subject merchandise; and (2) that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise." *Saha Thai*, 635 F.3d at 1340 (quoting *Saha Thai Steel Pipe (Public) Co. v. United States*, 33 CIT 1541, 1542 (2009)); *see also 2015 Enforcement and Compliance Antidumping Manual*, Chapter 7: Export Price and Constructed Export Price at 10–11 (explaining adjustments to export price required by the statute). As with all adjustments to normal value or export price that favor respondents, the respondent bears the burden of demonstrating that both prongs of Commerce's test are satisfied, thereby establishing the respondent's entitlement to a duty

The purpose of the duty drawback adjustment – *i.e.*, the upward adjustment made to the export price pursuant to 19 U.S.C. § 1677a(c)(1)(B) – is to prevent a dumping margin from being created, or artificially inflated, because the exporting country exempts from import duties (or refunds/rebates import duties paid on) material inputs or components that are imported into the country and used to produce a product that is subsequently exported. *See generally, e.g., Wheatland Tube Co. v. United States*, 30 CIT 42, 60, 414 F. Supp. 2d 1271, 1286 (2006), *rev'd on other grounds*, 495 F.3d 1355 (Fed. Cir. 2007); *Allied Tube & Conduit Corp. v. United States*, 29 CIT 502, 506, 374 F. Supp. 2d 1257, 1261 (2005); *Hornos Electricos de Venezuela, S.A. v. United States*, 27 CIT 1522, 1525, 285 F. Supp. 2d 1353, 1358 (2003) ("*HEVENSA*"); *Far East Mach. Co. v. United States*, 12 CIT 428, 430–31, 688 F. Supp. 610, 611 (1988); *Carlisle Tire & Rubber Co. v. United States*, 10 CIT 301, 307, 634 F. Supp. 419, 424 (1986).[8]

Duty drawback adjustments thus account for the fact that producers do not have to factor import duty into their prices for their merchandise when it is sold *in foreign markets*, but "the producers remain subject to the import duty when they sell the subject merchandise *domestically*, which increases home market sales prices and thereby increases [normal value]." *Saha Thai*, 635 F.3d at 1338 (emphasis added); *see also id*. at 1342 (stating that "the entire purpose of increasing [export price through the duty drawback adjustment] is to account for the fact that the import duty costs are reflected in [normal value] (home market sales prices) but not in [export price] (sales prices in the United States")).[9] In other words, as the Court of Appeals has explained, when duty drawback is granted only for an imported input that is used to produce merchandise that is later exported (and *not* merchandise sold domestically), the cost of the

drawback adjustment. *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1040 (Fed. Cir. 1996).

[8] Duty drawback adjustments have long been a part of U.S. trade law. *See generally* S. Rep. No. 67–16, at 12 (1921) (stating that it is necessary to add to the exporter's sales price "any drawback given by the country of exportation upon the exportation of the merchandise, or any excise tax which is refunded or not collected upon the exportation" in order that the sale does not overstate or wrongly constitute dumping).

[9] Stated differently, Congress provided for the duty drawback adjustment "because purchasers in the home market presumably must pay the passed on cost of import duties [paid on imported inputs used to produce the merchandise] when they buy the merchandise." *Huffy Corp. v.* United States, 10 CIT 214, 215–16, 632 F. Supp. 50, 52 (1986). On the other hand, "[i]f the duties are rebated [or if the inputs are exempt from import duties] when the merchandise is exported [to the United States], presumably no similar cost is passed on to purchasers in the United States. By adding the amount of the rebate [or exemption] to [the export price] . . . this adjustment accommodates the difference in cost to the two different purchasers." *Id*.

import duty is reflected in normal value but not in export price. *Id*., 635 F.3d at 1338. "The statute corrects this imbalance, which could otherwise lead to an inaccurately high dumping margin" – or even a false finding of dumping when dumping is not actually occurring. *Id*.; *see also, e.g., Wheatland Tube Co.*, 30 CIT at 60, 414 F. Supp. 2d at 1286 (explaining that "[t]he duty drawback adjustment is intended to prevent dumping margins from being *created or affected by* the rebate or exemption of import duties on inputs used in the production of exported merchandise") (emphasis added).

In sum, the purpose of the duty drawback adjustment is to correct the "imbalance" between the price charged for subject merchandise in the producer's home market (which presumably reflects duties paid on imported inputs) and the price charged in the United States (where the producer received either a duty rebate on imported inputs or an exemption from duties on the inputs because the subject merchandise was exported). The duty drawback adjustment to export price serves to "offset" import duties that are reflected in normal value, and thus permits a fair comparison to be made between normal value and export price, eliminating a potential source of distortion in Commerce's antidumping analysis. *See Carlisle Tire & Rubber Co.*, 10 CIT at 307, 634 F. Supp. at 424 (describing duty drawback adjustment as "an offsetting adjustment" in the calculation of normal value, designed "[t]o prevent dumping margins from arising because the exporting country rebates import duties . . . for raw materials used in exported merchandise"); *Wheatland Tube Co.*, 30 CIT at 46, 414 F. Supp. 2d at 1275 (noting argument that rationale for duty drawback adjustment is "to offset duties that are paid on inputs used in the production of merchandise sold in the home market").

As the Court of Appeals has repeatedly underscored, "[a]n overriding purpose of Commerce's administration of [the] antidumping laws is to calculate dumping margins *as accurately as possible*." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) (emphasis added) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). Ultimately, the duty drawback adjustment helps ensure that Commerce does exactly that.

B. *The Facts of This Case*

The antidumping duty order covering imports of standard pipe from Turkey dates back roughly three decades, to 1986. *See* Antidumping Duty Order; Welded Carbon Steel Standard Pipe and Tube Products from Turkey, 51 Fed. Reg. 17,784 (May 15, 1986). "Once an antidumping duty order . . . is in place, 'Commerce periodically reviews and reassesses antidumping duties' during administrative reviews."

Dongtai Peak Honey Industry Co. v. United States, 777 F.3d 1343, 1349 (Fed. Cir. 2015) (quoting *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1321 (Fed. Cir. 2010)). This action contests the Final Results of the 2011–2012 administrative review, where Commerce calculated Borusan's weighted-average dumping margin to be 1.79%. Final Results, 78 Fed. Reg. at 79,666. That dumping margin did not include the duty drawback adjustment that Borusan sought for "yield loss." *Id.*; Issues & Decision Memorandum at 18–19 (Comment 4). Commerce's decision to deny Borusan a duty drawback adjustment for yield loss is the subject of Borusan's claim here.

The relevant facts are straightforward and not in dispute. Borusan produces standard pipe in Turkey, using as its primary material input hot-rolled steel coil which the company imports into Turkey in accordance with the terms of that country's duty drawback program. Borusan's Response to Commerce's Initial Questionnaire – Sections B & C at C-35 (Oct. 9, 2012) (Pub. Doc. No. 57) ("Borusan's Initial Questionnaire Responses").[10] To account for the phenomenon known as

[10] The administrative record includes an English translation of the duty drawback regulation in effect in Turkey during the period of review. *See* Borusan's Initial Questionnaire Responses at C-35, Ex. C-7; *see also id.* at C-36 to C-37, Ex. C-10 (official announcement of modification to Turkish duty drawback program, dated May 31, 2010, making the domestic sale of by-products such as the scrap and second-quality pipe at issue here subject to import duties and value-added tax ("VAT") at the rate in effect for imports of the specific by-products in question, as if they had been imported into Turkey).

Under Turkish duty drawback law, to be eligible for an exemption from import duties on imported raw materials that are used to produce finished exported products, an exporter must apply for and obtain an Internal Processing Permit Certificate ("Internal Processing Certificate") from Turkey's Undersecretariat of Foreign Trade. On the application form, the exporter must specify the total volume of imported raw material that is required to produce the volume of finished products that the exporter plans to export. In addition, the exporter also must submit a "Letter of Export Commitment," stating that the imported raw materials will be used to produce goods for export and acknowledging that failure to do so would subject the exporter to penalties. The specific duration of an Internal Processing Certificate depends on the industry and may be extended under certain circumstances.

After the Internal Processing Certificate is issued, the producer/exporter must show it to Turkish customs authorities each time the company imports raw materials on a duty-exempt basis. The Turkish authorities stamp the entry documents to indicate that the entry is being made on a duty-exempt basis. In addition, the producer/exporter must indicate on customs export documentation whether a particular exportation of the finished product is being used to meet the exporter/producer's obligation under the Internal Processing Certificate to export a specified volume of the finished product (relative to the volume of imported raw materials claimed to be imported for use in the production of the finished product).

At the end of the period covered by the Internal Processing Certificate, the producer/exporter must submit certain documents to the Secretary General of the applicable Exporter's Union for inspection and review. The requisite documents include the original customs import and export declaration forms, the import list, the export list, and a raw material balancing table. The Secretary General of the Exporter's Union reviews the documentation to verify that the volume of finished product that was exported was sufficient to have required the volume of raw materials that was imported duty-free. The Secretary General of the Exporter's Union then issues a closing confirmation letter to the producer/exporter. To be granted duty drawback, the producer/exporter submits the relevant Internal Processing Certificate and the associated closing documents to the Turkish authorities for approval.

"yield loss," Turkey's duty drawback law allows Borusan to obtain an exemption from import duties for a volume of hot-rolled steel coil that is greater than the volume of standard pipe that the company subsequently exports. Borusan's Response to Commerce's Supplemental Questionnaire – Sections A-C at C-29 (Feb. 19, 2013) (Pub. Doc. No. 158) ("Borusan's Supp. Questionnaire Responses"); Borusan's Initial Questionnaire Responses at C-37 to C-39; *see also* Pl.'s Brief at 6, 32–33; Pl.'s Reply Brief at 19. As Borusan explains (using a simplified example), the company "may need to import 1.1 metric tons of [hot-rolled steel] coil in order to produce 1 metric ton of finished standard pipe." Pl.'s Brief at 33; *see also* Pl.'s Reply Brief at 19. In that example, the difference between the 1.1 metric tons of hot-rolled steel coil and the 1.0 metric ton of finished standard pipe is the "yield loss." Pl.'s Brief at 6, 33; Pl.'s Reply Brief at 19; *see also* Borusan's Supp. Questionnaire Responses at C-29.[11]

The yield loss that results from Borusan's production of standard pipe consists of "scrap" and "second-quality pipe." Borusan's Initial Questionnaire Responses at C-36 to C-37; Borusan's Supp. Questionnaire Responses at C-28 to C-29. After the production process is complete, Borusan exports the standard pipe to the United States (among other countries) and sells the yield loss – *i.e.*, the scrap and second-quality pipe – domestically, on the Turkish market. Borusan's Initial Questionnaire Responses at C-37; Borusan's Supp. Questionnaire Responses at C-28 to C-29.

Turkish customs authorities historically and consistently have granted Borusan duty drawback for the entire volume of hot-rolled steel coil that Borusan imports into Turkey in order to produce a corresponding volume of standard pipe for exportation. *See* Borusan's Initial Questionnaire Responses at C-37 to C-39; Borusan's Supp. Questionnaire Responses at C-29 to C-30; Pl.'s Brief at 6, 32–33; Pl.'s Reply Brief at 19–20. In addition, until the period covered by the administrative review here, there were no duties or additional taxes imposed on Borusan's domestic (Turkish) sales of the scrap and second-quality pipe that are by-products of Borusan's manufacture of standard pipe for export. Borusan's Initial Questionnaire Responses at C-36 to C-37.

In 2010, the Turkish government modified its duty drawback program, announcing that the domestic sale of by-products and scrap produced under an Internal Processing Certificate would be subject to import duties and value-added tax ("VAT") at the rate in effect for

See generally Borusan's Initial Questionnaire Responses at C-35 to C-37 (summarizing operation of Turkey's duty drawback program).

[11] Yield loss can result from, for example, drying or evaporation, or as a result of manufacturing processes (as it does in the case of Borusan's production of standard pipe).

imports of the specific by-products or scrap in question (*i.e.*, as if the by-products or scrap had been imported into Turkey). *See* Borusan's Initial Questionnaire Responses at C-36 to C-37, Ex. C-10; Borusan's Supp. Questionnaire Responses at C-29. As a result, Borusan is now required by Turkish law to declare the volume of steel scrap and second-quality pipe that results from its manufacture of standard pipe pursuant to Turkey's duty drawback program. *See* Borusan's Initial Questionnaire Responses at C-37; Borusan's Supp. Questionnaire Responses at C-29. Under Turkish customs law, however, the import duty rate applicable to imports of scrap and second-quality pipe was 0% throughout the period at issue here. *See* Borusan's Initial Questionnaire Responses at C-37; Borusan's Supp. Questionnaire Responses at C-29.[12]

As a practical matter, the entire volume of hot-rolled steel coil that Borusan imported into Turkey for its production of standard pipe for export to the United States during the 2011–2012 period was exempted from import duties by Turkish customs authorities, pursuant to Turkey's duty drawback program.[13] The Turkish customs authorities imposed no import duties on the steel coil when it was entered into Turkey; and no import duties were imposed on the steel coil when Borusan exported the subject standard pipe, even though the scrap and second-quality pipe that resulted from the company's production of standard pipe were not exported and, in fact, were sold domestically, on the Turkish market. Borusan's Initial Questionnaire Responses at C-37 to C-39; Borusan's Supp. Questionnaire Responses at C-29 to C-30; *see also* Pl.'s Brief at 6, 32–33; Pl.'s Reply Brief at 16–17, 19, 20.

In administrative reviews of the antidumping duty order on standard pipe from Turkey prior to the 2011–2012 review at issue, Commerce's duty drawback adjustment for Borusan has uniformly reflected the fact that Turkey grants the company duty drawback on the entire volume of hot-rolled steel coil that Borusan imports for its production of standard pipe for export. In other words, in the past, Commerce has not reduced Borusan's duty drawback adjustment to account for the fact that the process of producing standard pipe yields scrap and second-quality pipe that are not physically incorporated

[12] Under Turkish law, throughout the period at issue here, there was no VAT on domestic sales of steel scrap. Although there was a VAT on domestic sales of second-quality pipe, Borusan passed it through to the company's customers. Thus, Borusan explains, "the VAT is a 'wash' transaction" for the company and "the net effect . . . [is that] the new regulation . . . [made] no change in the real costs" that Borusan incurred. Borusan's Initial Questionnaire Responses at C37; *see also* Pl.'s Brief at 7. In any event, the treatment of VAT is not at issue in this action.

[13] At least for 2011–2012, the duty rate applicable to hot-rolled coil under Turkish customs law was 9% *ad valorem*. *See* Borusan's Initial Questionnaire Responses at C-39, Ex. C-7.

into the standard pipe that Borusan exports. Nor has Commerce reduced Borusan's duty drawback adjustment to account for the fact that Borusan did not export the scrap and second-quality pipe, and, in fact, sold them domestically, on the Turkish market. *See generally* Borusan's Initial Questionnaire Responses at C-39 & n.4 (stating that Borusan's duty drawback adjustment calculation including yield loss proffered in the instant administrative review used "the same methodology verified and accepted by [Commerce] in numerous Turkish antidumping cases"); Borusan's Supp. Questionnaire Responses at C-29; *see also* Pl.'s Brief at 32, 34; Pl.'s Reply Brief at 20, 21–22.

In the Final Results of the 2011–2012 administrative review, Commerce – for the first time – declined to include scrap and second-quality pipe in Borusan's duty drawback adjustment. In its entirety, Commerce's explanation for that determination (as set forth in the agency's Issues & Decision Memorandum) states:

> We agree with U.S. Steel that [in the Preliminary Results, Commerce] erroneously incorporated yield loss factors relating to scrap and second-quality pipe in making Borusan's duty drawback adjustment. In the Preliminary Results, [Commerce] used Borusan's reported [duty drawback] field that accounted for the yield loss factors for scrap and second-quality pipes. Although it did not export the scrap and second-quality pipe, Borusan claimed that it did not pay regular import duties on that portion of the coil that represents the yield loss on the finished, prime product because it exports the finished, prime product. This was in error because, under Turkish law, the scrap and second-quality pipe that are not re-exported are, in fact, "subject to import duty . . . at the rate in effect for imports of the specific by-products . . . as if the by-products or scrap had been imported into Turkey." Therefore, [Commerce] will not incorporate yield loss factors related to scrap and second-quality pipe in making Borusan's duty drawback adjustment in these final results.

Issues & Decision Memorandum at 18–19 (footnotes, consisting of citations only, omitted).

This action ensued.

II. *Standard of Review*

In an action reviewing an antidumping determination by Commerce, the agency's determination must be upheld except to the extent that it is 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); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Dongtai Peak Honey Industry Co.*, 777 F.3d at 1349 (same).

Moreover, any determination as to the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp.*, 340 U.S. at 487–88); *see also CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. *Dongtai Peak Honey Industry Co.*, 777 F.3d at 1349 (citing *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)).

In addition, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore Ltd.*, 557 F.3d at 1319–20. Commerce's rationale nevertheless must address the parties' principal arguments; and, more generally, "the path of Commerce's decision must be reasonably discernable" in order to support judicial review. *Id.* (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)); 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination that addresses relevant arguments, made by interested parties"); *see generally CS Wind Vietnam Co.*, 832 F.3d at 1375–81 (highlighting agency's "obligation to set forth a comprehensible and satisfactory justification for its [determination] . . . as a reasonable implementation of statutory directives supported by substantial evidence," and analyzing that obligation in depth).

Further, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50; *see also Changzhou Wujin Fine Chemical Factory Co. v. United States*, 701 F.3d 1367, 1377, 1379 (Fed. Cir. 2012) (citations omitted) (same); *Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1381 (Fed. Cir. 2011) (citing, *inter alia, Abbott Labs. v. United States*, 573 F.3d 1327, 1332–33 & n.1 (Fed. Cir. 2009)) (same). An agency's determination thus cannot be sustained on the basis of a rationale supplied after the fact – whether by the agency's litigation counsel, by another party, or

by the court. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962); *see also Home Prods. Int'l*, 633 F.3d at 1381 (citing *Abbott Labs.*, 573 F.3d at 1332–33 & n.1 (same); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988)); *Changzhou Wujin Fine Chemical Factory Co.*, 701 F.3d at 1379 (citation omitted) (same).

III. *Analysis*

Borusan contests Commerce's decision to exclude yield loss (*i.e.*, scrap and second-quality pipe) from the duty drawback adjustment in calculating the company's dumping margin. In essence, Borusan contends that Commerce's exclusion of scrap and second-quality pipe from the duty drawback adjustment results in an "imbalance" between export price and normal value, which – in turn – artificially inflates the company's dumping margin. *See* Pl.'s Brief at 1–2, 3, 6–9, 10, 31–36; Pl.'s Reply Brief at 1, 16–22; *Saha Thai*, 635 F.3d at 1338 (explaining that purpose of duty drawback adjustment is to correct "imbalance" between export price and normal value that would result if duty drawback received by an importer were not added to export price in agency's calculation of dumping margin).

As detailed below, Commerce's Issues & Decision Memorandum fails to address Borusan's main argument, misstates Turkish customs law, and otherwise fails to adequately explain the agency's decision. Moreover, the arguments that the Government and U.S. Steel make in an effort to prop up Commerce's determination are *post hoc* rationale. *See generally* Def.'s Response Brief at 2, 3–4, 6, 40–43; Def.-Int.'s Response Brief at 1, 4–6, 9, 23–27. As such, the path of Commerce's reasoning in deciding to exclude scrap and second-quality pipe from Borusan's duty drawback adjustment is not "reasonably . . . discernable." *See State Farm*, 463 U.S. at 43. And, absent an adequate explanation of Commerce's reasoning, it is not possible to conduct a "substantial evidence" review or to analyze whether the agency's determination is in accordance with the statute.

Remand is therefore necessary to allow Commerce to reconsider this issue and to clearly explain whatever determination it may reach.

A. *Borusan's Arguments*

There are several significant deficiencies in Commerce's stated bases for denying Borusan a duty drawback adjustment for its yield loss (*i.e.*, the scrap and second-quality pipe that result from Borusan's production of the standard pipe that it exports to the U.S.). In relevant part, the Issues & Decision Memorandum states: "Although it

did not export the scrap and second-quality pipe, Borusan claimed that it did not pay regular import duties on that portion of the coil that represents the yield loss on the finished, prime products because it exports the finished, prime product. This was in error because, under Turkish law, the scrap and second-quality pipe that are not re-exported are, in fact, 'subject to import duty . . . at the rate in effect for imports of the specific by-products . . . as if the by-products or scrap had been imported into Turkey.'" Issues & Decision Memorandum at 19.

As Borusan emphasizes, however, the company's principal argument throughout the administrative review was that the duty rate applicable to scrap and second-quality pipe during the 2011–2012 period of review was 0%. Thus, Borusan states, the amount of duty drawback that Turkey granted to Borusan was unaffected by the 2010 modification to Turkey's duty drawback program, which subjects by-products such as scrap and second-quality pipe to import duty at the rate applicable to those by-products as if they had been imported into Turkey, if the by-products are sold on the domestic (Turkish) market. *See* Pl.'s Brief at 7, 10, 34–36; Pl.'s Reply Brief at 1617, 18–20, 22. Yet, in explaining Commerce's decision to exclude scrap and second-quality pipe from Borusan's duty drawback adjustment, the Issues & Decision Memorandum inexplicably fails to make any mention of the 0% duty rate. *See* Issues & Decision Memorandum at 18–19.

Commerce is obligated by statute to "include in [its] final determination . . . an *explanation* of the basis for its determination *that addresses relevant arguments, made by interested parties*." 19 U.S.C. § 1677f(i)(3)(A) (emphases added); *see Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1351, 1356 (Fed. Cir. 2005) (discussing statutory directive); *NMB Singapore Ltd.*, 557 F.3d at 1320 (same); *Husteel Co. v. United States*, 39 CIT ____, ____, 98 F. Supp. 3d 1315, 1331 (2015), *appeal docketed*, No. 2016–2732 (Sept. 29, 2016) (observing that "Commerce has a general duty to explain the basis for its decisions," which "includes addressing relevant arguments made by interested parties") (citing *NMB Singapore Ltd.*, 557 F.3d at 1319–20); *see generally State Farm*, 463 U.S. at 48–49 ("reaffirm[ing]" the fundamental principle that "an agency must cogently explain why it has exercised its discretion in a given manner") (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 (1965)).

In *Amerijet*, the U.S. Court of Appeals for the D.C. Circuit recently underscored the importance of an agency's obligation to "articulate an explanation for its action": "[A] 'fundamental requirement of admin-

istrative law is that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action.'" *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (referring to the requirement that an agency adequately explain its decision as a "basic principle" that is "indispensable to sound judicial review") (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)). *Amerijet* further noted that "conclusory statements will not do; an 'agency's statement must be one of *reasoning*.'" *Amerijet Int'l, Inc.*, 753 F.3d at 1350 (emphasis added) (quoting *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)); *see generally CS Wind Vietnam Co.*, 832 F.3d at 1376–77, 1379–81 (discussing at length and in great detail Commerce's obligation to supply adequate explanations for its determinations; stating, *inter alia*, that the agency's explanation for a determination "must reasonably tie the determination under review to the governing statutory standard and to the record evidence by indicating what statutory interpretations the agency is adopting and what facts the agency is finding").

Much like the flawed agency rationale at issue in *Amerijet*, Commerce's explanation in the Issues & Decision Memorandum here "does not address the main thrust" of Borusan's argument in support of its claim for a duty drawback adjustment on yield loss – *i.e.*, Borusan's argument that, under Turkish customs law, the duty rate applicable to scrap and second-quality pipe is 0%. *See Amerijet Int'l, Inc.*, 753 F.3d at 1351–52. As a result, much like the situation in *Amerijet*, it is impossible here to "discern if [Commerce] considered the substance of [Borusan's] request and, if so, what reasons it had for denying it." *Id*.

The bottom line is that, in its Issues & Decision Memorandum, "Commerce essentially ignored [Borusan's] argument[]" concerning the 0% duty rate. *See Husteel Co.* 39 CIT at ____, 98 F. Supp. 3d at 1331.[14] Commerce thus contravened its basic duty under the statute

[14] At oral argument, the Government emphasized that the footnotes to Commerce's explanation in the Issues & Decision Memorandum cite Borusan's questionnaire responses. The Government further emphasized that Borsuan's questionnaire responses, in turn, state that – under Turkish customs law – the duty rate applicable to scrap and second-quality pipe is 0%. The Government contends that the footnotes in the Issues & Decision Memorandum (and the footnotes' bare citations to Borusan's submissions) suffice to discharge Commerce's statutory obligation to acknowledge and address Borusan's argument based on the 0% duty rate.

The Government's argument grasps at straws. In effect, the footnotes to Commerce's explanation in the Issues & Decision Memorandum (at best) incorporate by reference, and constitute a restatement of, Borusan's position. The footnotes do nothing to illuminate Commerce's rationale for its decision to deny Borusan a duty drawback adjustment for scrap and second-quality pipe. In effect, the submissions cited in the footnotes set forth Borusan's position. As such, references to those submissions contribute nothing to the substance of Commerce's explanation. Merely restating a party's position does not fulfill an agency's obligation to grapple with the party's main arguments and to adequately explain

to ensure that its explanation for its determination "addresses relevant arguments, made by interested parties." 19 U.S.C. § 1677f(i)(3)(A). Remand would be warranted for this reason alone.[15]

There is, however, at least one additional problem with Commerce's reasoning as set forth in the Issues & Decision Memorandum. Commerce fundamentally misstates the relevant Turkish customs law. Specifically, in the Issues & Decision Memorandum, Commerce asserts that, "under Turkish law, the scrap and second-quality pipe that are not re-exported are, in fact, 'subject to import duty . . . at the rate in effect for imports of the specific by-products . . . as if the by-products or scrap had been imported into Turkey.'" Issues & Decision Memorandum at 19. Significantly, Commerce's summary of Turkish law thus omits the pivotal concept of domestic sale. Contrary to Commerce's assertion, under Turkish law, whether scrap and second-quality pipe are subject to import duty does not turn on whether or not they are exported from Turkey. Instead, the key consideration is whether scrap and second-quality pipe that is not exported is *sold domestically, on the Turkish market*. In other words, even if scrap and second-quality pipe are not exported, Turkish customs law nevertheless does not subject them to import duty, unless they are the subject of domestic sales (and, even then, the applicable duty rate is 0%).

In the course of oral argument, the Government argued that, although Commerce's statement of Turkish law is incomplete, it is not

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the reasoning that underpins the agency's determination. *See generally, e.g., Amerijet Int'l, Inc.*, 753 F.3d at 1351 (rejecting as inadequate an agency's proffered explanation which "simply restated the rules from which [a party] sought exception," and observing that "[r]estating a rule from which an exception is sought explains nothing about *why* the agency denied the exception; it begs the question").

In addition, a basic tenet of civil and appellate procedure is that "arguments raised in footnotes are not preserved." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (citations omitted). A reasonable corollary would preclude an agency from burying in a footnote some essential aspect of the rationale for the agency's determination.

[15] Further, as set forth in section II above, it is hoary black letter law that any analysis of the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A.*, 44 F.3d at 985 (quoting *Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380–81 (Fed. Cir. 2008) (same). Moreover, "an agency 'must address significant arguments and evidence which seriously undermine[] its reasoning and conclusions.'" *Husteel Co.*, 39 CIT at ____, 98 F. Supp. 3d at 1359 (quoting *Altx, Inc. v. United States*, 25 CIT 1100, 1117–18, 167 F. Supp. 2d 1353, 1374 (2001)).

By ignoring Borusan's argument emphasizing the 0% duty rate applicable to scrap and second-quality pipe under Turkish customs law, Commerce failed to take into account arguments and evidence that "fairly detract" from both the agency's determination and the evidence on which that determination is based. In addition, Commerce failed to address a significant argument and evidence that "seriously undermine" the agency's reasoning and conclusions. Accordingly, on the existing record, it cannot be said that Commerce's decision to deny Borusan a duty drawback adjustment for scrap and second-quality pipe is supported by substantial evidence. Remand would be justified on these grounds as well.

inaccurate because, in this case, Borusan did sell the scrap and second-quality pipe on the Turkish market. Under the circumstances presented here, however, a clearer statement of Commerce's position is required.

From the Issues & Decision Memorandum, it is simply impossible to know whether or not Commerce fully understood applicable Turkish law at the time the agency made its determination. Even more to the point, from a reading of the Issues & Decision Memorandum, it is impossible to state definitively whether Commerce's position is that the scrap and second-quality pipe at issue should not be included in Borusan's duty drawback adjustment because they were not exported, or whether Commerce's position is that the scrap and second-quality pipe should not be included in the duty drawback adjustment because Borusan sold them on the Turkish domestic market, or whether Commerce's position is that the scrap and second-quality pipe should not be included in the duty drawback adjustment because they are subject to import duty under Turkish customs law – albeit at a rate of 0%.[16] In sum, just as Commerce's failure to acknowledge and

[16] Borusan observes that it would be more than passing strange if Commerce's position here is that the scrap and second-quality pipe should not be included in the duty drawback adjustment because they were not exported. As Borusan indicates, such a position would effectively constitute a "sea change" on Commerce's part.

Borusan has repeatedly pointed out that, in prior administrative reviews, Commerce has consistently included scrap and second-quality pipe in the company's duty drawback adjustment, even though the company has *never* exported the scrap and second-quality pipe and even though the company has *always* sold the scrap and second-quality pipe domestically, on the Turkish market. *See, e.g.*, Borusan's Supp. Questionnaire Responses at C-29; Pl.'s Brief at 32–35; Pl.'s Reply Brief at 20, 21–22.

Moreover, in an investigation covering a time period more recent than the period of review in this case, Commerce granted Borusan "the duty drawback adjustment as it was reported" by the company – without excluding scrap and second-quality pipe. Issues & Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey at 17 (Comment 1) (July 10, 2014); *see also* Certain Oil Country Tubular Goods From the Republic of Turkey: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances, in Part, 79 Fed. Reg. 41,971 (July 18, 2014).

Indeed, *Saha Thai* – an oft-cited case concerning the duty drawback adjustment – involved a duty drawback adjustment for yield loss, much like the scrap and second-quality pipe at issue here. *See Saha Thai Steel Pipe (Public) Co.*, 33 CIT at 1546–49 (rejecting Commerce's decision to use Saha Thai's actual "yield loss factors" – rather than Thai government's standard "yield loss factors" – in calculating company's duty drawback adjustment), *aff'd*, 635 F.3d 1335 (Fed. Cir. 2011); *see generally* Pl.'s Reply Brief at 21 (summarizing *Saha Thai* and its implications for this case). Nowhere in the decisions in that case is there even a whisper of a hint that yield loss is not to be included in duty drawback adjustments.

The sheer brevity of Commerce's explanation in the Issues & Decision Memorandum further suggests that Commerce is not making a "sea change" by taking the position that yield loss that is not exported cannot be included in a duty drawback adjustment. "When an agency decides to change course, . . . it must adequately explain the reason for a reversal of policy." *Huvis Corp. v.* United States, 570 F.3d 1347, 1354 (Fed. Cir. 2009) (quoting *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1377–78 n.5 (Fed. Cir. 2007)) (internal citations omitted). In circumstances such as those presented here, it would be

address Borusan's argument based on the 0% duty rate applicable to scrap and second-quality pipe alone justifies remand to the agency, Commerce's misstatement of Turkish law does as well.

B. *The Arguments of the Government and U.S. Steel*

In their briefs, both the Government and U.S. Steel strain to salvage Commerce's determination, maintaining that the agency properly declined to include scrap and second-quality pipe in calculating Borusan's duty drawback adjustment. *See generally* Def.'s Response Brief at 2, 6, 40–43; Def.-Int.'s Response Brief at 4–6, 9, 23–27. Their efforts, however, are in vain.

The gravamen of the Government's brief is that Commerce correctly denied Borusan's request for a duty drawback adjustment for scrap and second-quality pipe, due to a "failure of proof." Specifically, in its brief, the Government asserts that "[t]he record does not support Borsuan's contention" that, under Turkish customs law, the duty rate applicable to scrap and second-quality pipe was 0%. Def.'s Response Brief at 42; *see also id*. at 2, 6. While acknowledging that "Borusan *asserted* that the applicable duty rate on scrap and second-quality pipe imported into Turkey was zero," the Government's brief argues that Borusan "did not substantiate its claim with any supporting *evidence*, such as a Turkish tariff schedule that lists the duty rate applicable to imports of scrap and second-quality pipe." *Id*. at 42–43 (emphases in the original); *see also id*. at 2, 6. Wholly discounting the certified statements in Borusan's questionnaire responses that "[t]here is no customs import duty in Turkey on steel scrap or second-quality pipe" and that "the import duty on scrap and second quality pipe is zero," the Government's brief asserts that "[c]onclusory statements such as those made by Borusan, do not equate to preponderant evidence." *Id*. at 43 (citation omitted); *see* Borusan's Initial Questionnaire Responses at C-37; Borusan's Supp. Questionnaire Responses at C-29.[17]

incumbent upon Commerce to "provide a more detailed justification [for a change in policy or practice] than what would suffice for a new policy [or practice] created on a blank slate." *Huvis Corp.*, 570 F.3d at 1354–55 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)); *see also, e.g., State Farm*, 463 U.S. at 42 (ruling that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance").

[17] As required by Commerce's regulations, like all "submission[s] containing factual information" that respondents file with the agency, all of Borusan's questionnaire responses were filed under certification by both Borusan and its counsel. *See* 19 C.F.R. § 351.303(g); Borusan's Initial Questionnaire Responses at 4–5 (Pub. Doc. No. 54) (certifications by Borusan and its counsel); Borusan's Supp. Questionnaire Responses at 4–5 (same); *see also* Pl.'s Reply Brief at 17, 18. In their certifications (the precise language of which is dictated by Commerce's regulations), Borusan and its counsel attested to the accuracy and completeness of all information provided in the questionnaire responses, under penalty of

The short answer to the Government's argument is that it is pure, impermissible *post hoc* rationale. As discussed elsewhere herein, Commerce's explanation of its determination in the Issues & Decision Memorandum *does not even mention* the 0% duty rate applicable to scrap and second-quality pipe. *See* Issues & Decision Memorandum at 18–19. Clearly Commerce did not base its determination on an alleged absence of record evidence substantiating that duty rate. *See* Pl.'s Reply Brief at 18–19.

As set forth in section II above, it is well-settled that an agency's determination cannot be sustained on the basis of a rationale supplied after the fact by litigation counsel. *See Burlington Truck Lines*, 371 U.S. at 168–69. As the Supreme Court has underscored, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. The Government's argument therefore must be rejected.[18]

criminal sanctions for "material false statements" pursuant to 18 U.S.C. § 1001. *See* 19 C.F.R. § 351.303(g); Borusan's Initial Questionnaire Responses at 4–5 (Pub. Doc. No. 54); Borusan's Supp. Questionnaire Responses at 4–5; 18 U.S.C. § 1001; *see also* Pl.'s Reply Brief at 17, 18.

[18] Quite apart from the fact that it constitutes *post hoc* rationale, the argument that the Government makes in its brief is plagued by a number of other serious infirmities. As a threshold matter, although it is true that there is no documentary evidence of the duty rate applicable to scrap and second-quality pipe in the existing administrative record, the record does include Borusan's certified questionnaire responses attesting to the fact that the duty rate during the relevant period was 0%. *See* Borusan's Initial Questionnaire Responses at C-37; Borusan's Supp. Questionnaire Responses at C-29. And, pursuant to Commerce's own regulations, such "statements of fact" constitute "[e]vidence." *See*19 C.F.R. § 351.102(b)(21)(i)-(ii) & (iv)-(v) (2016) (defining "[e]vidence" as "*including statements of fact*, documents, and data . . . .") (emphasis added). *See generally* Pl.'s Reply Brief at 17–18 (noting, *inter alia*, that 19 C.F.R. § 351.104(a)(1) specifies that the administrative record includes "all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding"). It is therefore incorrect to assert that the record here includes no evidence of the 0% duty rate applicable to scrap and second-quality pipe under Turkish customs law.

Moreover, the notion that respondents must prove all facts by documentary evidence is highly impracticable and, in fact, has not been Commerce's practice. As Borusan puts it, "respondents . . . make factual statements in response to hundreds of questions and are not required to submit a separate document substantiating . . . [each and every] factual statement[]." Pl.'s Reply Brief at 17–18.

Further, although the Government (and the domestic producer) here wish to discount a statement in a respondent's certified questionnaire response and accord it no evidentiary weight, the precedent that they propose to set could be dangerous. "The shoe will be on the other foot" in other proceedings, where the agency and the domestic industry will want to rely on such a statement. To the extent that they here contend that such certified statements cannot be relied upon and have no evidentiary value, it would be incongruous (to say the least) for them to seek to rely on such statements in other proceedings or to seek to hold respondents accountable for them.

In any event, at least in this case, any insistence on documentary proof elevates form over substance, because the fact at issue is not in dispute. No one contests Borusan's statement that the applicable duty rate was 0%. *See, e.g.*, Def.-Int.'s Response Brief at 25 (acknowledging "the applicable import duty rate for [scrap and second-quality pipe] established

Although it is perhaps a slightly closer call, U.S. Steel's arguments in support of Commerce's determination also constitute *post hoc* rationale. For example, U.S. Steel characterizes the scrap and second-quality pipe at issue as "nonsubject merchandise" and emphasizes that they were not exported to the U.S., asserting that yield loss that is not exported to the U.S. cannot be included in a duty drawback adjustment. *See* Def.-Int.'s Response Brief at 24 26, 27; *see also id*. at 1, 5, 9. Contrary to U.S. Steel's implication, however, there is no indication in the Issues & Decision Memorandum that Commerce focused on the definition of "subject merchandise" vis-à-vis the scrap and second-quality pipe; and Commerce's explanation in the Issues & Decision Memorandum does not even use the term "nonsubject merchandise." *See* Issues & Decision Memorandum at 18–19. Further, according to the explanation in the Issues & Decision Memorandum, Commerce's decision to exclude scrap and second-quality pipe from Borusan's duty drawback adjustment did not turn on the fact that the scrap and second-quality pipe were not exported. Instead, the explanation in the Issues & Decision Memorandum seemingly identifies as the critical factor the fact that the scrap and second-quality pipe were subject to import duty (though, again, the explanation fails to note that the applicable duty rate was 0%). *See id*. U.S. Steel cannot put words in Commerce's mouth.

U.S. Steel similarly highlights the fact that Borusan sold the scrap and second-quality pipe domestically, on the Turkish market. *See* Def.-Int.'s Response Brief at 24–25, 27; *see also id*. at 1, 5, 9. But Commerce's explanation in the Issues & Decision Memorandum is devoid of any reference to Borusan's domestic sales of scrap and second-quality pipe. *See* Issues & Decision Memorandum at 18–19. Thus, according to the agency's own explanation, those domestic sales played no part in Commerce's determination.

Lastly, U.S. Steel advances an argument tracking the language of the statute, which provides for a duty drawback adjustment to account for "the amount of any import duties imposed by the country of exportation . . . which have not been collected[] by reason of the exportation of the subject merchandise to the United States." *See* Def.-Int.'s Response Brief at 25; 19 U.S.C. § 1677a(c)(1)(B). Drawing on the statutory text, U.S. Steel concludes that the reason that Borusan pays no import duties on scrap and second-quality pipe is not because of "the exportation of the subject merchandise [here, stan-

under Turkish customs laws – *i.e.*, zero percent"); *id*. at 25–26 (arguing that scrap and second-quality pipe are subject to import duties, "albeit at a zero percent rate"). Indeed, the administrative record here could not sustain a finding that the applicable duty rate was anything other than 0%.

dard pipe] to the United States," but, rather, because – under Turkish customs law – the duty rate applicable to scrap and second-quality pipe is 0%. *See* Def.-Int.'s Response Brief at 25. However, any such nuanced parsing of the statute is conspicuously absent from Commerce's explanation of its determination in the Issues & Decision Memorandum. *See* Issues & Decision Memorandum at 18–19. Whatever the merits of U.S. Steel's statutory analysis, it cannot be credited because it is *post hoc* rationale.

C. *Proceedings on Remand*

Much as in *CS Wind Vietnam Co.*, "[i]n this case, Commerce has not provided the needed explanation setting forth the interpretations and evidence-based factual findings that establish the required connection from statute to determination." *See CS Wind Vietnam Co.*, 832 F.3d at 1377. Remand will permit Commerce "to provide that A-to-Z explanation" that is missing from the existing administrative record. *Id*.

Some of the questions and uncertainties surrounding Commerce's determination are identified above and others were explored in oral argument. *See* Audio Recording of Oral Argument (Oct. 8, 2015). However, "[o]n remand, Commerce's task is not to provide isolated responses" to the questions and concerns that have been specifically identified. *See CS Wind Vietnam Co.*, 832 F.3d at 1380. Instead, Commerce must give holistic consideration to the treatment of yield loss in calculating duty drawback adjustments and then "provide a coherent, full explanation" of its practice both in this case in particular and more generally, "laying out and justifying each step so that not only are . . . [the already identified] concerns addressed, but, more broadly, . . . [the court] may *see* how [Commerce's] ultimate result is grounded in a justified statutory interpretation and the evidence of record." *Id*.

IV. *Conclusion*

For all the reasons set forth above, Borusan's Motion for Judgment on the Agency Record must be granted and this matter remanded to the U.S. Department of Commerce for further action not inconsistent with this opinion.

A separate order will enter accordingly.

Dated: April 20, 2017
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY
JUDGE

Slip Op. 17–46

LINYI BONN FLOORING MANUFACTURING CO., LTD., Plaintiff, OLD MASTER PRODUCTS, INC. & LUMBER LIQUIDATOR SERVICES, LLC, Plaintiff-Intervenors, v. UNITED STATES, Defendant, COALITION for AMERICAN HARDWOOD PARITY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 15–00227

[Remanding a determination made in an administrative review of an antidumping duty order]

Dated: April 21, 2017

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Kristen S. Smith and *Mark Rett Ludwikowski*, Sandler, Travis & Rosenberg, PA, of Washington D.C., for plaintiff-intervenor Lumber Liquidator Services, LLC.

Tara K. Hogan, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of Washington D.C., for defendant United States. 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 *Shelby M. Anderson*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

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OPINION AND ORDER

Stanceu, Chief Judge:

Linyi Bonn Flooring Manufacturing Co., Ltd. ("Linyi Bonn" or "Bonn"), a Chinese producer and exporter of multilayered wood flooring, brought this action to contest a final determination in an antidumping duty proceeding. The International Trade Administration of the U.S. Department of Commerce ("Commerce" or the "Department") issued the contested determination to conclude the second periodic administrative review of an antidumping duty ("AD") order on multilayered wood flooring from the People's Republic of China ("China" or "the PRC").[1] Commerce assigned Linyi Bonn the AD duty rate of 58.84% that it calculated for the "PRC-wide entity," which Commerce

[1] "Multilayered wood flooring" is a product "often referred to by other terms, *e.g.*, 'engineered wood flooring' or 'plywood flooring.'" *Multilayered Wood Flooring from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 76 Fed. Reg. 76,690 (Int'l Trade Admin. Dec. 8, 2011). Such flooring generally is "composed of an assembly of two or more layers or plies of wood veneer(s)" in which "[t]he several layers, along with the core, are glued or otherwise bonded together to form a final assembled product." *Id.* "Veneer is referred to as a ply when assembled" in combination with a core. *Id.* at 76,690 n.2.

considered to be comprised of Chinese producers and exporters of multilayered wood flooring that failed to establish independence from the PRC government.

The court rules that assigning Linyi Bonn the 58.84% rate was unlawful. The record does not demonstrate that Commerce provided Linyi Bonn notice of a procedure for which Linyi Bonn may have qualified that would have prevented the assignment of the 58.84% rate in the special circumstance of this case. That circumstance occurs when a foreign exporter and producer seeks an individual dumping margin in a parallel "new shipper" review and also had no reviewable shipments in the periodic review other than those Commerce reviewed in the new shipper review. Linyi Bonn obtained a zero dumping margin in the parallel new shipper review but, unlike two other parties who were similarly situated, was not permitted to retain that rate. The court remands the agency's decision for correction.

I. BACKGROUND

A. The Contested Decision

The contested decision (the "Final Results") is *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012–2013*, 80 Fed. Reg. 41,476 (Int'l Trade Admin. July 15, 2015) ("*Final Results*").

B. The Antidumping Duty Investigation and Issuance of the Order

Commerce initiated an AD investigation of multilayered wood flooring from the PRC (the "subject merchandise") in November 2010. *Multilayered Wood Flooring from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 75 Fed. Reg. 70,714 (Int'l Trade Admin. Nov. 18, 2010). In May 2011, Commerce published a preliminary affirmative determination that there was a reasonable basis to believe or suspect that the subject merchandise was being sold, or likely to be sold, at less than fair value, as provided in section 733(b) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1673b(b).[2] *Multilayered Wood Flooring from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 30,656 (Int'l Trade Admin. May 26, 2011). Later that year, Commerce reached an affirmative final determination of sales or

[2] All citations to the United States Code herein are to the 2012 edition. All citations to the Code of Federal Regulations herein are to the 2015 edition.

likely sales of the subject merchandise at less than fair value ("Final LTFV Determination"), pursuant to section 735(a) of the Tariff Act, 19 U.S.C. § 1673d(a). *Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 64,318 (Int'l Trade Admin. Oct. 18, 2011) (*"Final LTFV Determination"*).

Following allegations that the Final LTFV Determination contained ministerial errors, Commerce issued an amended final LTFV determination and the AD order on multilayered wood flooring from China (the "Order") in late 2011. *Multilayered Wood Flooring From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 76 Fed. Reg. 76,690 (Int'l Trade Admin. Dec. 8, 2011) (*"Amended Final LTFV Determination"*). In the amended final LTFV determination, Commerce assigned a zero margin to an individually investigated respondent and weighted average dumping margins of 3.97% and 2.63%, respectively, to the two other exporters/producers it individually investigated. *Id.*, 76 Fed. Reg. at 76,692. Commerce assigned a simple average of the latter two margins, 3.31%, to 89 other exporters/producers, each of which it had determined to have demonstrated *de facto* and *de jure* independence from the government of the PRC. *Final LTFV Determination*, 76 Fed. Reg. at 64,322; *Amended Final LTFV Determination*, 76 Fed. Reg. at 76,692–93.

In the Final LTFV Determination, Commerce stated as follows with respect to antidumping duty investigations involving merchandise from nonmarket economy ("NME") countries, including the PRC:

> In proceedings involving NME countries, the Department holds a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assessed a single antidumping duty rate. It is the Department's policy to assign all exporters of the subject merchandise in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

Final LTFV Determination, 76 Fed. Reg. at 64,321. Invoking its authority under section 776 of the Tariff Act, 19 U.S.C. § 1677e, to use "facts otherwise available" and "an adverse inference" in making determinations with respect to uncooperative respondents, Commerce assigned a rate of 58.84% to the "PRC-wide entity," which it determined to include those exporters/producers that failed to demonstrate independence from the PRC government. Commerce stated that these were Chinese companies that "did not respond to the Department's request for information[,] including information per-

taining to whether they were separate from the PRC-wide entity." *Id.*, 76 Fed. Reg. at 64,322. Commerce added that "[t]hus, the Department has found that these PRC exporters/producers are part of the PRC-wide entity and the PRC-wide entity has not responded to our requests for information." *Id.* Commerce determined it appropriate to assign the PRC-wide entity, as an adverse inference, "the rate of 58.84%, the highest calculated transaction-specific rate among mandatory respondents." *Id.*

C. The Commencement of the New Shipper Reviews and the Second Periodic Administrative Review of the Order

On June 28, 2013, Commerce initiated "new shipper" reviews ("NSRs") of Linyi Bonn and two other Chinese requestors, Dalian Huade Wood Product Co., Ltd. ("Huade") and Zhejiang Fuerjia Wooden Co., Ltd. ("Fuerjia"), pursuant to section 751(a)(2)(B) of the Tariff Act, 19 U.S.C. § 1675(a)(2)(B).[3] *Multilayered Wood Flooring from the People's Republic of China: Initiation of Antidumping Duty New Shipper Reviews; 2012–2013*, 78 Fed. Reg. 46,318 (Int'l Trade Admin. July 31, 2013) ("*NSR Initiation Notice*"). The period of review ("POR") for the new shipper reviews was the six-month period of December 1, 2012 through May 31, 2013. *Id.*

In December 2013, while the new shipper reviews were underway, Commerce announced the opportunity to request a periodic administrative review of the Order under section 751(a) of the Tariff Act, 19 U.S.C. § 1675(a). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 78 Fed. Reg. 72,636, 72,638 (Int'l Trade Admin. Dec. 3, 2013). Based on requests for reviews of various exporters and producers made by the Coalition for American Hardwood Parity, the petitioner in the original AD investigation and the defendant-intervenor in this litigation, Commerce initiated the second periodic administrative review of the Order ("second review") in February 2014. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 Fed. Reg. 6,147, 6,152–6,153 (Int'l Trade Admin. Feb. 3, 2014) ("*Initiation Notice*"). In its notice initiating the second periodic review (the "Initiation Notice"), Commerce identified Linyi Bonn as one of the parties

[3] As explained herein, a "new shipper review" allows an exporter or producer of merchandise subject to an antidumping duty order that did not export the subject merchandise during the period of investigation, and is not affiliated with a producer or exporter who did, to obtain an individual weighted average dumping margin. *See* 19 U.S.C. § 1675(a)(2)(B).

for which a review had been requested. *Id.*, 79 Fed. Reg. at 6,152. The period of review was December 1, 2012 through November 30, 2013, i.e., a period that began on the same date the POR for the new shipper reviews began but extended for six months beyond that period. *Compare id. with NSR Initiation Notice*, 78 Fed. Reg. at 46,318.

Commerce explained in the Initiation Notice that "[i]n proceedings involving non-market economy ("NME") countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate." *Initiation Notice*, 79 Fed. Reg. at 6,148. The Initiation Notice continued, "[i]t is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate." *Id.*

D. The Results of the New Shipper Reviews

In the new shipper reviews, Commerce preliminary found that sales of subject merchandise by Linyi Bonn, Huade, and Fuerjian during the 6-month new shipper POR were not at less than normal value and, accordingly, determined preliminary zero weighted average dumping margins. *Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Reviews; 2012–2013*, 79 Fed. Reg. 33,723, 33,723–24 (Int'l Trade Admin. June 12, 2014). Commerce also concluded that all three exporter/producers had established their independence of control of the government of the PRC. *Decision Mem. for Preliminary Results of Antidumping Duty New Shipper Review. 2012 2013: Multilayered Wood Flooring from the People's Republic of China*, A-570–970, APR 12–13, at 4–6 (Int'l Trade Admin. June 6, 2014) *available at* http://enforcement.trade.gov/frn/summary/prc/2014–13766–1.pdf (last visited Apr. 11, 2017) ("*Prelim. NSR I&D Mem.*"). As to all three new shipper applicants, Commerce reached the same conclusions in the final results of the new shipper reviews and assigned final individual weighted average dumping margins of zero to all three. *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty New Shipper Reviews; 2012–2013*, 79 Fed. Reg. 66,355, 66,356 (Int'l Trade Admin. Nov. 7, 2014); *Issue and Decision Mem. for the Final Results of Antidumping Duty New Shipper Review. 2012–2013: Multilayered Wood Flooring from the People's Republic of China*, A-570–970, APR 12–13, at 1 (Int'l Trade Admin. Nov. 7, 2014) *available at* http://enforcement.trade.gov/frn/summary/prc/

2014–26561–1.pdf (last visited Apr. 11, 2017) ("*Final NSR I&D Mem.*").

E. The Results of the Second Periodic Administrative Review

On January 9, 2015, Commerce published the preliminary results of the second review ("Preliminary Results"). *Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 1388 (Int'l Trade Admin. Jan. 9, 2015) ("*Prelim. Results*").

Commerce preliminarily designated Linyi Bonn "part of the PRC-wide entity" and assigned it the rate of 58.84%, the PRC-wide rate. *Id.*, 80 Fed. Reg. at 1390, 1390 n.9. In the Preliminary Results, Commerce included Linyi Bonn within a group of companies that "were named in the *Initiation Notice* but did not submit a certification of no shipment, separate rate application or separate rate certification" and were "therefore . . . part of the PRC-wide entity." *Id.*, 80 Fed. Reg. at 1390 n.9. Commerce found that Huade and Fuerjia "did not have any qualifying shipments for the Department to review, due to their certification that their only POR shipments underwent review during their respective new shipper reviews." *Id.*, 80 Fed. Reg. at 1389 n.4. Commerce determined that "[b]oth companies therefore maintain the dumping margin that was assessed as a result of their respective new shipper reviews." *Id.* As mentioned above, those margins were zero.

Following publication of the Preliminary Results, Linyi Bonn submitted a document on January 22, 2015, which it designated as a "Partial No Shipment Certification." Commerce rejected the filing of this document as untimely information and removed it from the administrative record. *Rejection of Submission of Partial No Shipment Certification Filed in the 2012–2013 Administrative Review of the Antidumping Duty Order on Multilayered Wood Flooring from the People's Republic of China*, A-570–970, APR 12–13 (Jan. 30, 2015) ("*Rejection Letter*"). In its brief before the court, Linyi Bonn states that this document informed Commerce that Linyi Bonn had made no sales in the one-year period of review for the second review other than one sale it had reported previously in the new shipper reviews. Mem. of Law in Supp. of Linyi Bonn Flooring Mfg. Co., Ltd.'s Mot. for J. on the Agency R. Under USCIT R. 56.2, 6–7 (Mar. 15, 2016), ECF No. 37 (Confidential), ECF No. 37 (Public) ("Pl.'s Br."). According to Linyi Bonn's brief, it was upon that sale that Commerce determined the zero margin for Linyi Bonn in the new shipper review. *See id.* at 6. In

its rejection letter to Linyi Bonn, Commerce cited the *Initiation Notice*, stating that this issuance had notified parties that "the deadline by which parties were to certify that they had no exports, sales, or entries to review was April 4, 2014." *Id.* This date corresponded to the 60-day deadline stated in the *Initiation Notice* for "no shipment" certifications, which was 60 days from the February 3, 2014 publication of the Initiation Notice. *See Initiation Notice*, 79 Fed. Reg. at 6,147. Commerce cited this deadline in its rejection letter but also stated that its rejection of the submission was "in accordance with" its regulation, 19 C.F.R. § 351.302(d). *Rejection Letter.* Noting that the deadline for submission of factual information under that regulation was 30 days before the scheduled date of the preliminary results of the periodic review, Commerce concluded that the fully extended deadline for publication of the Preliminary Results was December 31, 2014 and that the deadline for submission of factual information in the review was December 1, 2014. *Id.*

In the Final Results, Commerce determined a zero margin for one individually examined respondent and a 13.74% margin for another. *Final Results*, 80 Fed. Reg. at 41,478. Commerce assigned the 13.74% margin to 67 separate rate respondents and assigned the PRC-wide entity the rate of 58.84%.[4] *Id*. Commerce again included Linyi Bonn within a group of companies that "were named in the *Initiation Notice* but did not submit a certification of no shipment, separate rate application or separate rate certification" and were "therefore . . . part of the PRC-wide entity." *Id*., 80 Fed. Reg. at 41,478, 41,478 n.18. Based on the designation of Linyi Bonn as part of the PRC-wide entity, the Final Results subjected Linyi Bonn to the PRC-wide rate of 58.84%. *Id*. As to Huade and Fuerjia, Commerce again found that it "did not have any qualifying shipments for the Department to review, due to their certification that their only POR shipments underwent review during their respective NSRs." *Id.*, 80 Fed. Reg. at 41,477.

F. Proceedings in this Court

Linyi Bonn filed a summons on August 10, 2015, Summons, ECF No. 1, and a complaint on August 19, 2015, Compl., ECF No. 8. On March 15, 2016, Linyi Bonn filed, under USCIT Rule 56.2, a motion for judgment on the agency record, which is now before the court. Pl.'s Br. Defendant United States responded on May 16, 2016. Def.'s Resp.

[4] The final results of the second administrative review also contained the final results of a new shipper review conducted on an exporter/producer (Linyi Anying Wood Co., Ltd.) not included in the new shipper review of Linyi Bonn, Huade and Fuerjia and assigned this party a zero margin. *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012–2013*, 80 Fed. Reg. 41,476, 41,477 (Int'l Trade Admin. July 15, 2015).

in Opp'n to Pl.'s Mot. for J. upon the Admin. R., ECF No. 43 ("Def.'s Opp'n."). On July 1, 2016, Linyi Bonn replied to defendant's opposition. Pl.'s Reply to Def.'s Resp. in Opp'n to Pl.'s Mot. for J. upon the Admin. R. of May 16, 2016, ECF No. 47 (Confidential) ECF No. 48 (Public) ("Pl.'s Reply").[5]

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), under which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting a final determination concluding an administrative review of an antidumping duty order. *See* 19 U.S.C. § 1516a(a)(2)(B)(iii). In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. Commerce Unlawfully Assigned the 58.84% Rate to Linyi Bonn

If an exporter or producer requests a "new shipper" review under an antidumping duty order and qualifies for such a review because it did not export subject merchandise during the period of the antidumping duty investigation and was not affiliated with an exporter or producer who did, Commerce "shall conduct a review under this subsection to establish an individual weighted average dumping margin . . . for such exporter or producer." 19 U.S.C. § 1675(a)(2)(B). Commerce determines the individual weighted average dumping margin on the basis of an entry or entries, and a sale or sales, of subject merchandise by the exporter or producer; Commerce ordinarily will not conduct, or will rescind, a new shipper review in the absence of an entry and sale during the period for the new shipper review. *See* 19 C.F.R. § 351.214(b), (f)(2).

According to the Tariff Act, the determination reached in a new shipper review "shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination [reached in the new shipper review] and for deposits of estimated duties." 19 U.S.C. § 1675(a)(2)(C).

Commerce determined a weighted-average dumping margin of zero for Linyi Bonn, as well as for Huade and Fuerjia, in the 2012–2013

[5] Plaintiff-intervenors and defendant-intervenor have not filed briefs in this proceeding.

new shipper review proceeding. *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty New Shipper Reviews; 2012–2013*, 79 Fed. Reg. at 66,356. In concluding the new shipper reviews of these three parties, Commerce indicated that it would instruct Customs and Border Protection ("CBP") "to liquidate the appropriate entries without regard to antidumping duties." *Id.* Commerce further indicated that a cash deposit rate of zero would apply to merchandise that was produced by and also exported by Linyi Bonn. *Id.*

In the Final Results, in which Commerce included Linyi Bonn within the PRC-wide entity subject to the rate of 58.84%, Commerce stated that "[w]e intend to instruct CBP to liquidate entries of subject merchandise exported by the PRC-wide entity at the PRC-wide rate." *Final Results*, 80 Fed. Reg. at 41,479. It further stated that "[f]or all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the PRC-wide entity established in the less than fair value investigation (*i.e.*, 58.84%)." *Id.*

The court holds that the decision Commerce reached in the Final Results to assign Linyi Bonn the PRC-wide rate of 58.84% was contrary to law and must be set aside. The Department's stated rationale for its decision was that Linyi Bonn was among a group of companies that "were named in the *Initiation Notice* but did not submit a certification of no shipment, separate rate application or separate rate certification" and were "therefore . . . part of the PRC-wide entity." *Final Results*, 80 Fed. Reg. at 41,478, 41,478 n.18. However, the court concludes, based on the instructions Commerce provided in the Initiation Notice, that Linyi Bonn was not eligible to file a "certification of no shipment." The court concludes, further, that Commerce maintained a special procedure by which Linyi Bonn could have sought to retain its previously-obtained zero margin and its zero cash deposit rate in the second review by timely filing a different kind of certification. That certification would have been one signifying that Linyi Bonn had one or more shipments during the POR for the second review but that any such shipments were the subject of review by Commerce as part of the parallel new shipper reviews. The treatment Commerce accorded to Huade and Fuerjin in the second review, as shown in the published Final Results, confirms that this "partial no shipment certification" procedure existed, but the administrative record as submitted to the court by Commerce in this proceeding does not demonstrate that Commerce made a public disclosure of this special procedure. Because of the unfairness created by the lack of notice, the untimeliness of Linyi Bonn's attempted filing of its own

partial no shipment certification does not justify the Department's assigning Linyi Bonn the 58.84% margin. The fact that Linyi Bonn did not file a separate rate application in the second review also fails as a justification for the Department's decision. Had Linyi Bonn been given notice of the special procedure, it would have had a fair opportunity to comply with that procedure and thereby would not have been required to file a separate rate application in order to retain its zero margin. The Department's failure to provide this notice to Linyi Bonn is not "harmless error" because it had the potential to affect the outcome of the proceeding and caused prejudice to Linyi Bonn.

Below, the court discusses further its reasoning for setting aside the Department's decision and remanding this matter for corrective action.

1. The Record Does Not Demonstrate that Commerce Notified Linyi Bonn of the Procedure for Filing a "Partial" No Shipment Certification

As the court outlined previously, Linyi Bonn, Huade and Fuerjia each received a zero weighted average dumping margin in the 2012–2013 new shipper review proceeding, but in the Final Results of the second review Linyi Bonn's treatment differed substantially from that Commerce accorded to Huade and Fuerjia. As to the latter two companies, Commerce determined in the Preliminary Results of the second review that both would maintain in that review the dumping margins they obtained in the new shipper reviews, which were zero. *Preliminary Results*, 80 Fed. Reg. at 1389 n.4. Commerce made no change in this determination in the Final Results. *Final Results*, 80 Fed. Reg. at 41,477.[6] Commerce further provided in the Final Results that, for Huade and Fuerjia, "the cash deposit rate will remain unchanged from the rate recently assigned in the new shipper reviews of those companies." *Id.*, 80 Fed. Reg. at 41,479. Both companies, therefore, received in the Final Results the benefit of the zero assessment and cash deposit rates they obtained in the new shipper reviews; *see* 19 U.S.C. § 1675(a)(2)(C).

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[6] Commerce did not state in the final results of the second review that the review was "rescinded" as to Huade and Fuerjia, although the decision essentially had that effect. Regarding rescission of an administrative review, the Department's regulations governing administrative reviews of antidumping duty orders provide as follows:

> *No shipments.* The Secretary may rescind an administrative review, in whole or only with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be.

19 C.F.R. § 351.213(d)(3). This regulation seems to require that there have been *no* entries, exports, or sales within the period of review; that was not the case as to Huade or Fuerjia (nor as to Linyi Bonn).

Drawing a contrast with Linyi Bonn, Commerce stated in the Final Issues & Decision Memorandum that Huade and Fuerjia "submitted timely certifications that they had no shipments during the instant review *other than those already reviewed in the new shipper review*, and both companies also certified that they served Linyi Bonn's counsel with copies of their no shipment certifications." *Issue and Decision Mem. for the Final Results of the 2012–2013 Antidumping Duty Admin. Review of Multilayered Wood Flooring from the People's Republic of China*, A-570–970, APR 12–13, at 19 (Int'l Trade Admin. July 8, 2015) (emphasis added) *available at* http://enforcement.trade.gov/frn/summary/prc/2015–17368–1.pdf (last visited Apr. 11, 2017) (*"Final I&D Mem."*). The court is unable to conclude that Linyi Bonn received notice that it had the option of filing a certification in the nature of those filed by Huade and Fuerjia. No procedure for a "partial" no shipment certification is set forth in the Department's regulations, and the record as filed by Commerce, *see* ECF No. 32 (Oct. 5, 2015), does not indicate any other means by which Commerce provided public notice of such a procedure. In reaching its decision to assign Linyi Bonn the rate of 58.84%, Commerce relied upon its Initiation Notice and upon the fact that Linyi Bonn was placed on notice that Huade and Fuerjia filed such certifications. *Final I&D Mem*. 19. Neither suffices.

The Initiation Notice does not justify the Department's action because the procedure it set forth was not the one pertinent to Linyi Bonn's situation. This issuance, which refers to the one-year POR for the periodic review, stated as follows:

> If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review ("POR"), it must notify the Department within 60 days of publication of this notice in the **Federal Register**.

Initiation Notice, 79 Fed. Reg. at 6,147 (emphasis in original). By its plain terms, this requirement applied only if a producer or exporter had *no* exports, sales, or entries during the one-year POR. Because that did not describe Linyi Bonn's posture in the second review, Linyi Bonn was not directed to "notify the Department within 60 days of publication." The Final Issues & Decision Memorandum, therefore, impermissibly attached controlling significance to the timely filing of a certification of "no exports, sales, or entries during the POR," *Final I&D Mem.* 19. Moreover, the Initiation Notice discussed the certification only as a certification *requirement*; there is no indication in the text of an optional procedure for a producer or exporter in Linyi Bonn's situation.

That the no shipment certification requirement did not apply to Linyi Bonn is shown by the record in this case. Commerce could not properly have determined an individual dumping margin (in this case, of zero) for Linyi Bonn in the new shipper reviews in the absence of a sale of subject merchandise and an entry. *See* 19 C.F.R. § 351.214(b), (f)(2). Consistent with this fact, Linyi Bonn argues that it had a sale and a shipment during the period of review for the new shipper review, which corresponded to the first six months of the POR for the second administrative review, and that an entry of merchandise it produced occurred during those six months. *See* Linyi Bonn's Br. 6–7 (stating that it had one shipment during the new shipper period of review and no reviewable sales during the remainder of the POR for the second administrative review), 8 (referring to an entry during the first six months that was the basis for Linyi Bonn's zero margin in the new shipper reviews and the only entry occurring during the one-year POR for the second review).

Alluding to the notice question, Commerce reasoned in the Final Issues & Decision Memorandum that Linyi Bonn was "aware of the fact that Dalian Huade and Zhejiang Fuerjia both submitted timely no shipment certifications in the instant review despite having participated in the same new shipper review with Linyi Bonn." *Final I&D Mem.* 19. The certifications filed by Huade and Fuerjia, although served on Linyi Bonn's counsel, fail as notice that Linyi Bonn had the option of filing a certification such as those made by Huade and Fuerjia because they did not constitute a notification by *Commerce*. Notice of what other parties did does not establish the existence of the unannounced procedure at issue in this case and did not signify that what these parties filed were permissible submissions. The actions by Huade and Fuerjia are not a substitute for notice and procedural transparency on the part of the agency itself.

Referring to Linyi Bonn's own attempt to file a "partial no shipment certification" on January 22, 2015, Commerce further reasoned as follows:

> As explained above, Dalian Huade and Zhejiang Fuerjia, the other companies that participated in the new shipper review with Linyi Bonn, both submitted timely no shipment certifications in the instant review, under precisely the same circumstances as Linyi Bonn. All parties must be held to the same deadlines, which were made clear to all parties in this review. Of the three companies that participated in the same new shipper review, only Linyi Bonn elected to wait until after the *Preliminary Results* to attempt to submit untimely information to the Department.

Id. at 20. However, the certifications filed by Huade and Fuerjia could not have conformed to the procedure announced in the Initiation Notice because each of these two parties, like Linyi Bonn, must have had one or more shipments during the POR for the second review in order to qualify for a zero margin in the new shipper reviews. Commerce misdescribed the certifications of Huade and Fuerjia as "timely no shipment certifications," *id*.

Commerce further erred in stating in the Final Issues & Decision Memorandum that "Linyi Bonn attempted to submit a no shipment certification 293 days after the deadline," *id.* Because the requirement to file a "no shipment certification," as set forth in the Initiation Notice, did not apply to Linyi Bonn, the 60-day deadline from which Commerce calculated the 293-day period did not apply either. Commerce, therefore, was mistaken not only in its reasoning that "[a]ll parties must be held to the same deadlines" but also in its conclusion that the deadlines "were made clear to all parties in this review." *Id*.

In summary, the court concludes, first, that Linyi Bonn was neither required nor permitted to file a no shipment certification as described in the Initiation Notice. Second, the court concludes that nothing in the Department's regulations, the Initiation Notice, or in any other document on the administrative record as submitted by Commerce constituted notice by Commerce of the opportunity to obtain the result Commerce afforded to the other two participants in the new shipper reviews, Huade and Fuerjia, i.e., the retention of the zero margin and cash deposit rate obtained in those reviews. That Huade and Fuerjia either knew of the unannounced procedure or guessed, correctly, that a "partial" no shipment certification would be accepted does not change the court's conclusion. As a matter of due process, an agency may not impose an adverse consequence on an affected party after failing to provide notice of a procedure under which the party could have avoided such a consequence. *See, e.g., Gen. Elec. Co. v. United States Envtl. Prot. Agency*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995). Here, Commerce subjected Linyi Bonn to the 58.84% rate in the second review rather than allow Linyi Bonn to retain the zero dumping margin for which it qualified in the new shipper reviews. Linyi Bonn was entitled to notice of a procedure under which it could have retained the zero margin and thereby avoided that adverse result.[7] On the record as submitted, the court must conclude that Commerce failed to provide notice of the "partial" no shipment certification procedure, which was of importance to Linyi Bonn, to the

[7] Because the record as submitted does not demonstrate *any* notice by Commerce of the partial no shipment certification procedure, the court does not reach the issue of what would have been required to constitute adequate notice.

other two new shipper review participants, and to affected parties in general. Due to the Department's prejudicial failure to announce that procedure, the court must set aside the results of the second administrative review.

Defendant raises two arguments in defense of the Department's decision. It argues, first, that Commerce did not abuse its discretion when it rejected from the record of the second review Linyi Bonn's January 22, 2015 submission. Def.'s Br. 8–14. Defendant argues, second, that Commerce appropriately assigned Linyi Bonn the PRC-wide rate in the second review because Linyi Bonn had failed to meet its burden of rebutting the Department's presumption that it was under the control of the PRC government. *Id.* at 15–18. For the reasons discussed below, the court is not convinced by these arguments that it may sustain the Department's decision.

2. The Untimeliness of the January 22, 2015 Submission when Viewed According to 19 C.F.R. § 351.302(c) Does Not Justify the Department's Decision to Impose the 58.84% Rate

Linyi Bonn argues that the Department's decision not to waive the deadline for submitting a no shipment certification and accept Linyi Bonn's partial no shipment certification was an abuse of discretion. Pl.'s Br. 11–14. Had Commerce rejected Linyi Bonn's January 22, 2015 submission and excluded it from the record solely on the ground that it was filed after the close of the 60-day period for filing required no shipment certifications, the rejection would have been impermissible because, as the court has explained, Linyi Bonn was neither subject to nor eligible for the no shipment certification filing procedure. However, Commerce also rejected Linyi Bonn's Partial No Shipment Certification as untimely filed information based on its regulations, 19 C.F.R. §§ 351.301(c)(5) and 351.302(d). *See Rejection Letter*. The Department's regulation, 19 C.F.R. § 351.301(c)(5), requires generally that factual information not falling within certain specific categories (set forth in 19 C.F.R. § 351.102(b)(21)(i)-(iv) and not applicable here) be filed "30 days before the scheduled date of the preliminary results in an administrative review, or 14 days before verification, whichever is earlier." 19 C.F.R. § 351.301(c)(5). Pointing out that the fully extended deadline for publication of the Preliminary Results was December 31, 2014, the rejection letter concluded that the deadline for submission of factual information in the review was December 1, 2014. *See Rejection Letter*.

In 19 C.F.R. § 351.302(b), Commerce has provided generally that the Secretary of Commerce may extend a time limit "for good cause."

The regulations further provide that a party may request an extension of a time limit before the time limit has expired or, in the event the time limit has expired, may file a request after that time, subject to a stringent limitation. "An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists." 19 C.F.R. § 351.302(c). "The request must be in writing, in a separate, stand-alone submission, filed consistent with § 351.303 [setting forth technical filing requirements], and state the reasons for the request." *Id.* The regulations state that "[a]n extraordinary circumstance is an unexpected event that (i) Could not have been prevented if reasonable measures had been taken, and (ii) Precludes a party or its representative from timely filing an extension request through all reasonable means." *Id.* § 351.302(c)(2).

It appears from the record that Linyi Bonn did not make a separate, stand-alone submission to demonstrate an "extraordinary circumstance" as required by 19 C.F.R. § 351.302(c)(2), for the filing of the partial no shipment certification. Nevertheless, the error by Commerce was in failing to provide notice that Linyi Bonn even had the option of filing such a certification. This error was a controlling circumstance that should have guided the Department's discretion, if not in admitting the January 22, 2015 document to the administrative record of the second review, then in otherwise refraining from reaching the result that Commerce did in this case. The defect as to notice created a due process problem apart from the question of whether or not the January 22, 2015 submission should have been admitted to the record. The court concludes that the untimeliness of the January 22, 2015 submission when viewed according to 19 C.F.R. § 351.302(c)(2) cannot justify the decision to impose the 58.84% rate without notice of the procedure for filing a "partial" no shipment certification. To conclude otherwise would be to charge Linyi Bonn with knowledge of an optional procedure that Commerce failed to disclose to the public and to sustain an adverse consequence for Linyi Bonn's not having followed that procedure.

3. Because the Department's Failure to Announce the Partial No Shipment Certification Procedure Was Not Harmless Error, the Fact that Linyi Bonn Did Not File a Separate Rate Application in the Second Review Does Not Justify the Department's Decision

As Commerce explained in the Initiation Notice, "[i]n proceedings involving non-market economy ("NME") countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be as-

signed a single antidumping duty deposit rate" and "[i]t is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate." *Initiation Notice*, 79 Fed. Reg. at 6,148.

Commerce stated in the Initiation Notice that all firms listed in the notice (which included Linyi Bonn) "that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below." *Id*. The Initiation Notice instructed that "[e]ntities that do not have a separate rate from a completed segment of the proceeding should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding." *Id.* at 6,148–49 (footnote omitted). In a footnote, Commerce instructed that "[s]uch entities include entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (*e.g.*, an ongoing administrative review, new shipper review, *etc.*) . . . ." *Id.* at 6,149 n.2.

Linyi Bonn was not eligible to file a separate rate certification because, as of the time of the Initiation Notice, it had not obtained "a separate rate from a completed segment of the proceeding," *id.* As of the February 3, 2014 publication of the Initiation Notice, Linyi Bonn was participating in the ongoing new shipper reviews, which had been initiated on July 31, 2013. The preliminary results of the new shipper reviews (published on June 12, 2014) had not yet been issued as of the date of the Initiation Notice, and the final results of the new shipper reviews were not issued until November 7, 2014.

Linyi Bonn did not submit a separate rate application during the second administrative review. Had it done so, and had the information it submitted been unchanged from the information it submitted in the new shipper reviews (i.e., establishing independence from the PRC government), Linyi Bonn would not have been subjected to the 58.84% rate assigned to the PRC-wide entity. This is apparent from the rationale Commerce stated in the Final Results for assigning Linyi Bonn the 58.84% rate, in which it included Linyi Bonn within the group of companies that "were named in the *Initiation Notice* but did not submit a certification of no shipment, separate rate application or separate rate certification" and were "therefore . . . part of the PRC-wide entity." *Final Results*, 80 Fed. Reg. at 41,478, 41,478 n.18.

Just what result would have obtained had Linyi Bonn filed a separate rate application is not clear from the Final Results. As the court mentioned previously, the separate rate respondents who were reviewed in the second review but not individually examined received a

margin of 13.74% in the second review. Alternatively, had Commerce treated Linyi Bonn as an individually examined respondent based on the one sale reviewed in the new shipper reviews, presumably it would have assigned a new margin of zero to Linyi Bonn in the second review. Another possibility is that Commerce would have treated Linyi Bonn as it did Huade and Fuerjia, i.e., by allowing Linyi Bonn to retain its zero margin from the new shipper reviews, but this prospect is clouded by the Department's statement in the Final Results that it found that Huade and Fuerjia "did not have any *qualifying* shipments for the Department to review, *due to their certification that their only POR shipments underwent review during their respective NSRs." Final Results,* 80 Fed. Reg. at 41,477 (emphasis added). As discussed herein, Commerce rejected Linyi Bonn's analogous submission as untimely.

Defendant argues that "[b]ecause Linyi Bonn failed to rebut the presumption of government control, and it was Linyi Bonn's burden to do so, Commerce correctly found that it remained part of the China-wide entity." Def.'s Br. 17 (citing *Final I&D Mem.* 18; *Transcom Inc. v. United States*, 294 F.3d 1371, 1373) (Fed. Cir. 2002)). Defendant argues, in essence, that Commerce was justified in taking the action it did, and the irrefutable fact that Linyi Bonn failed to file a separate rate application in the second review lends support to this argument. The Initiation Notice placed Linyi Bonn on notice that it would need to file a separate rate application to obtain in the second review a rate separate from that assigned to the PRC-wide entity, and Linyi Bonn did not do so. Linyi Bonn points out that during the time in which Commerce was conducting the second review, Commerce continued to pursue its new shipper inquiry as to Linyi Bonn, Pl.'s Br. 16, which also involved a determination of independence from government control. However, the Department's statements in the Initiation Notice are not reasonably interpreted to mean that Commerce would consider Linyi Bonn's submission of separate rate information during the concurrent new shipper reviews to suffice as a separate rate application for purposes of the second review. Were there nothing more on the record pertinent to this issue, defendant's argument that the absence of a separate rate application should control the result in this case might have merit. However, there is more.

As the court has explained, the record as submitted does not allow the court to conclude that Commerce provided notice of the procedure by which Linyi Bonn could have sought to retain the zero rate it obtained in the new shipper reviews. The record demonstrates, moreover, that had Linyi Bonn succeeded under the procedure, Commerce would not have required Linyi Bonn to file a separate rate application

in order to retain the zero rate. The Final Issues & Decision Memorandum confirms this point by contrasting Linyi Bonn with Huade and Fuerjia. Responding to Linyi Bonn's argument that Linyi Bonn submitted, during the new shipper reviews, the information Commerce needed, Commerce stated that "it was incumbent upon all three respondents in the new shipper review to submit timely information in the administrative review to certify that they continue to meet the criteria for obtaining a separate rate[] *or* that they made no reviewable shipments during the POR." *Final I&D Mem.* 20 (emphasis added). It appears from the record that Huade and Fuerjia benefitted from the filing of their partial no shipment certifications by not being required to submit separate rate applications. Each was allowed by Commerce to retain the result that each obtained in the new shipper reviews, i.e., a zero margin going forward. Had Linyi Bonn filed its partial no shipment certification timely, it could have expected to be treated in the same way.

To summarize, this case presents the question of whether the Department's failure to disclose its "partial no shipment certification" procedure requires the court to set aside the Final Results even though Linyi Bonn did not file a separate rate application in the second review. The court concludes that it does.

In a case in which an agency commits a procedural error that does not affect the outcome of the proceeding or prejudice the complaining party, a court ordinarily will not order a remedy. *See, e.g., Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996) (finding that U.S. Custom and Border Protection, in notifying a party that a liquidation extension was sought but not why, had committed a harmless error because it did not prejudice the party or deprive it of taking any actions to challenge the extension in court). "Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Id*. Because Linyi Bonn unquestionably had an interest in obtaining the benefit of the zero margin it was assigned according to the new shipper provision in the statute, this is not a case of harmless error but instead a case where such prejudice exists. The Department's error was a consequential one in that it not only had the potential to affect the outcome of the review proceeding but also prejudiced Linyi Bonn by denying Linyi Bonn notice of the opportunity to pursue the outcome obtained by Huade and Fuerjia without filing a separate rate application. Linyi Bonn unfairly was placed at a competitive disadvantage relative to Huade and Fuerjia and other exporters/producers. On this record, the court cannot presume that Linyi Bonn's untimeliness in attempting to file a partial no shipment certification would have occurred had

Commerce properly disclosed its partial no shipment certification procedure. Because of the Department's error, the second review proceeding was not conducted according to principles of fundamental fairness and due process as to Linyi Bonn, and the court must order corrective action.

4. Commerce Must Correct the Procedural Error by Affording Linyi Bonn the Opportunity to Retain the Zero Margin and Cash Deposit Rate Obtained in the New Shipper Reviews

In addition to arguing that Commerce abused its discretion in rejecting its partial no shipment certification, Pl.'s Br. 11–14, Linyi Bonn argues that the one sale Commerce reviewed during the new shipper review, on which Commerce determined a zero margin for Linyi Bonn, was the only sale Linyi Bonn made during the one-year POR for the second periodic administrative review, *id.* at 14. Linyi Bonn maintains that the certification it attempted to file was not actually necessary to the establishment of this fact as it "simply would have confirmed the evidence on the record," which was data obtained from U.S. Customs and Border Protection ("CBP"). *Id.* at 15.

Commerce rejected this argument during the second review. *Final I&D Mem.* 20 ("the Department disagrees with Linyi Bonn's argument that the necessary information on its shipments was already on the record from the CBP data results that the Department obtained for purposes of respondent selection."). The Department's analysis was as follows:

> The Department has previously determined, and the CIT has agreed, that the information from the CBP data queries alone is not sufficient to reliably conclude that there were no entries of subject merchandise from a company under review during the POR. Although CBP data queries are an important tool in our analyses, the Department has recognized that these same data are not always complete or conclusive. Thus, the Department does not rely solely on CBP data queries as a dispositive source of data on company-specific exports for purposes of determining whether a company had shipments. Moreover, as stated in the *Initiation Notice*, the Department requires that a company timely certify that it had no exports, sales, or entries during the POR. The Department considers making a finding of no shipments only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the POR. The company's own certification is considered a necessary

> piece of evidence of no shipments, to be considered along with the CBP data. These submissions are subject to verification in accordance with section 782(i) of the Act. After receiving a timely, properly filed no-shipment certification, it is the Department's practice to confirm the respondent's certification by making a no-shipment inquiry with the CBP. It is only with this evidence on the record that the Department finds that it has a sufficient basis upon which to make a determination of no shipments.

Id. at 20–21 (footnotes omitted).

In the quoted language, Commerce stated a policy of making "a finding of no shipments only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the POR," *Id.* at 21, but the Department's stated policy is inapplicable in this case. As the court has emphasized, Linyi Bonn was not in a position to file a no shipment certification, and Commerce failed to disclose to the public the type of certification, i.e., a partial no shipment certification, that could suffice instead. Therefore, the problem created by the absence from the record of that type of certification is a problem of the Department's own making. This problem arose not only from the Department's exclusion of Linyi Bonn's partial no shipment certification from the record but also from the Department's failure to provide public notice of its procedure. On remand, Commerce must correct the problem created by its failure to provide that notice. Because the procedural flaw was prejudicial to Linyi Bonn, the only remedy that will suffice is one that affords Linyi Bonn the opportunity it would have had if the Department's failure to provide notice had not occurred. Commerce now may choose to afford Linyi Bonn that opportunity by admitting Linyi Bonn's partial no shipment certification to the record and giving it fair consideration, or it may choose to provide this opportunity by another method that achieves the same result, i.e., the providing to Linyi Bonn the opportunity to pursue the result that Huade and Fuerjia obtained in the second review.

Because the prejudice resulting to Linyi Bonn is continuing for as long as Linyi Bonn lacks the cash deposit rate it might have obtained absent the Department's violation, the court is ordering relief on an expedited basis. For the same reason, the court is inviting the parties to address in their comment submissions the issue of when Commerce will effectuate that remedy by means of instructions issued to CBP. In its comment submission, plaintiff may address the question of

whether, and on what grounds, the court should issue a remedy in equity, i.e., permanent injunctive relief.

III. CONCLUSION AND ORDER

For the reasons stated in the foregoing, Commerce must reconsider its decision in the Final Results and reach a new determination upon remand ("Remand Redetermination") consistent with this Opinion and Order. Therefore, upon consideration of the contested decision and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that Commerce, within 45 days of the issuance of this Opinion and Order, shall file its Remand Redetermination and inform the court of the date by which it will effectuate that determination by means of instructions issued to CBP; it is further

ORDERED that plaintiff, plaintiff-intervenors, and defendant-intervenor may submit comments on the Remand Redetermination within 15 days of the filing of the Remand Redetermination; it is further

ORDERED that in their comment submissions the parties may address the issue of when the Remand Redetermination should be effectuated in instructions issued to CBP; and it is further

ORDERED that defendant may respond to plaintiffs' comments within 15 days of the filing of the comment submissions by the parties.

Dated: April 21, 2017
New York, New York

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

Slip Op. 17–47

HANGZHOU YINGQING MATERIAL CO. and HANGZHOU QINGQING MECHANICAL CO., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 14–00133

JUDGMENT

Before the court is the U.S. Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand ("*Remand Results*"), ECF No. 51, in this action. In the *Remand Results*, Commerce reconsidered its allocation of labor costs, determined that it would continue not to adjust the financial ratios, and provided further explanation for its departure from its decision to adjust the

financial ratios based on similar labor expenses in *Certain Steel Nails from the People's Republic of China*, 79 Fed. Reg. 19,316 (Dep't Commerce Apr. 8, 2014) (final results 4th admin. rev.). *Remand Results* at 12. Commerce also reconsidered its valuation of brokerage and handling ("B&H") costs, deducted the cost of obtaining a letter of credit from the total amount of B&H expenses, and revised the combination rate weighted-average dumping margin accordingly. *Id*. All parties agree that the *Remand Results* address the court's concerns in *Hangzhou Yingqing Material Co. v. United States*, 40 CIT ____, 195 F. Supp. 3d 1299 (2016) ("*Hangzhou I*") and that the *Remand Results* should be sustained. Def.'s Notice Regarding Comments to Remand Results, ECF No. 53.

Accordingly, it is hereby

ORDERED that the final results of the fourth administrative review (and aligned new shipper review) of the antidumping duty order covering steel wire garment hangers from the People's Republic of China, *Steel Wire Garment Hangers from the People's Republic of China*, 79 Fed. Reg. 31,298 (Dep't Commerce June 2, 2014) (final results 4th admin. rev. and new shipper rev.), except for the matters covered by the *Remand Results*, are sustained; it is further

ORDERED that the *Remand Results* are sustained; and it is further

ORDERED that the subject entries enjoined in this action, *see* ECF No. 14 (order granting consent motion for preliminary injunction), must be liquidated in accordance with the final court decision, as provided for in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2012).

Dated: April 21, 2017
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 17–48

AJINOMOTO NORTH AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 14–00351

[Plaintiff's motion for judgment on the agency record, contesting surrogate-value determinations based thereon, granted in part; remanded to the International Trade Administration.]

Dated: April 25, 2017

Iain R. McPhie, Peter J. Koenig, and *Nicholas Galbraith, Squire Patton Boggs (US) LLP*, Washington, D.C., for the plaintiff.

Alexander O. Canizares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C.; *Aman Kakar*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of counsel; for the defendant.

OPINION & ORDER

AQUILINO, Senior Judge:

This action challenges determinations of the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Monosodium Glutamate From the People's Republic of China: Final Determination of Sales at* Less Than Fair Value and the Final Affirmative Determination of *Critical Circumstances*, 79 Fed.Reg. 58326 (Sept. 29, 2014), Public Record Document ("PDoc") 279 ("*Final Determination*"); *Monosodium Glutamate From the People's Republic of China . . . : Antidumping Duty Orders; and . . . Amended Final Determination of Sales at Less Than Fair Value*, 79 Fed.Reg. 70505 (Nov. 26, 2014), PDoc 270; and *Monosodium Glutamate From the People's Republic of China: Second* Amended Final Determination of Sales at Less Than Fair Value and *Amended Antidumping Duty Order*, 80 Fed.Reg. 487 (Jan. 6, 2015). The plaintiff U.S. manufacturer of monosodium glutamate ("MSG") and petitioner below has interposed a motion for judgment on the agency record in accordance with USCIT Rule 56.2 on its complaint, confirming jurisdiction of this court pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (2)(B)(i) and 28 U.S.C. §1581(c).

ITA is directed by statute, 19 U.S.C. §1677b(c)(1), to seek surrogate values for the factors of production ("FOPs") for subject merchandise produced in or exported from *a* non-market economy *a la* the People's Republic of China ("PRC"). The plaintiff alleges error in such valuations herein of corn, lignite, high-protein scrap from sugar manufacture, and inland freight (including alleged error in ITA's rejection of factual information relating thereto).

I

With regard to the corn FOP, ITA's preliminary determination based it upon the actual weight of corn consumption by "Meihua"[1] , the proceeding's mandatory respondent. *See* Prelim. Analysis Memo (May 7, 2014), CDoc 109, at 7–8, 303. For the *Final Determination*, the agency used Meihua's standard weight of corn consumption rather than the actual weight. *See* Meihua Analysis Memo for the

[1] "Meihua" consists of Langfang Meihua Bio-Technology Co., Ltd., Tongliao Meihua Biological SCI-TECH Co., Ltd., Meihua Group International Trading (Hong Kong) Limited, Meihua Holdings Group Co., Ltd., Meihua Holdings Group Co., Ltd., Bazhou Branch. *See* Prelim. Decision Memo (May 1, 2014), PDoc 194, at 8–9.

Final Determination (Sept. 22, 2014), PDoc 257, at 5. *See also* Allegation of Ministerial Errors Memo (Nov. 20, 2014), PDoc 266, at 2. The plaintiff argues this amounted to deviation from ITA's policy of calculating surrogate values based upon producers' actual production experiences.

Without conceding error, the defendant requests voluntary remand in order to consider this argument in the first instance. As its "concern" appears "substantial and legitimate", *see SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed.Cir. 2001), the request for that purpose can be, and it hereby is, granted.

II

The plaintiff challenges ITA's reliance upon *"coalspot.com"* to value the lignite FOP by Meihua. It argues that those data are flawed because they (1) reflect "estimated prices, not the required real prices"; (2) are derived from "Indonesian coal reference prices"; (3) are export prices "while [agency] precedent is to use domestic or import prices", and (4) are not clearly exclusive of taxes. The plaintiff also argues ITA should have used Indonesian import price data under HTS 2702.10 or similar import data from other countries.

Substantial evidence supports ITA's decision to rely upon *coalspot.com*, however. It found that those data met each of the factors of reliability it generally considers: they reflected a broad market average, were publicly available, were product specific, were exclusive of duties, and were contemporaneous with the period of investigation.[2] Issues and decision memorandum accompanying *Final Determination* ("*IDM*"), p. 25. ITA considered the lack of clarity as to whether the data excluded taxes and determined that they were nevertheless the best available record information, based upon its consideration of all of the factors. *See id*.

The plaintiff argues that the *coalspot.com* data are "estimates", contending they are "based not on real prices". However, ITA found a notation on the *coalspot.com* printout in the record to indicate that the prices therein "constitute coal prices for spot sales", *i.e*., prices based on actual sales in March 2014. *See* Meihua's Surrogate Country and Surrogate Value Cmts (April 7, 2014), PDoc 126, at Ex. 9, p. 5.

[2] ITA's practice is to test proposed FOP values to determine if they reflect (1) a broad market average, (2) publicly available information, (3) product specificity, (4) tax and duty-free neutrality, and (5) contemporaneity with the period of investigation or review. *E.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed.Reg. 70997 (Dec. 8, 2004), and accompanying issues and decision memorandum ("I&D Memo") at cmt 1.

Plaintiff's position focuses primarily on ITA's contrary analysis in *Certain Polyester Staple Fiber from the People's Republic of China*, 78 Fed.Reg. 2366 (Jan. 11, 2013), I&D Memo (Jan. 4, 2013) at cmt. 1 ("*Polyester Staple Fiber*"), a previous antidumping-duty investigation, asserting that using *coalspot.com* is contrary to its valuation of Indonesian steam coal therein. In that matter, the agency calculated a surrogate value for steam coal used to produce synthetic staple fibers. *See* PDoc 145. Noting that it prefers actual transaction prices, ITA declined to use prices sourced from the Indonesia Minister of Energy and Mineral Resources of the Republic of Indonesia (ESDM), which "contains information from international benchmark steam coal indexes and certain brand name prices, rather than actual transactions involving parties in Indonesia . . . and some of the ESDM values appear to be derived from government indexes based on non-Indonesian reference values". *Id*. at 5–6. ITA thereupon concluded that Global Trade Atlas data were the best information available. *Id*.

Here, the defendant responds that the agency did not specifically consider *coalspot.com* in *Polyester Staple Fiber* and that, although those data regarding lignite were sourced from Indonesia's Director General of Mineral and Coal, it is unclear whether they are substantively equivalent to the ESDM data related to steam coal in *Polyester Staple Fiber*. The defendant thus contends there is no clear basis to assume that ITA's concerns about the ESDM data would or should extend to the *coalspot.com* data at bar.

The plaintiff considers this dissembling, arguing that the *coalspot.com* data suffer from precisely the same flaws as did the pricing data ITA rejected in *Polyester Staple Fiber*, to wit, the reported price is calculated "based on January 2013 HBA/HPB Index", the source is identified as "The Directorate General of Mineral, Coal and Geothermal, Ministry of Energy and Mineral Resources" (*i.e*., ESDM), and HBA is defined as an average of "four international coal indices" (*i.e*., non-Indonesian reference values), including ICI 1, Platts 5900, New Castle Export Index, and Global Coal New Castle Index.

Be that as it may, notwithstanding the disadvantages of the ESDM data identified in *Polyester Staple Fiber* as compared with actual transactions, ITA did not declare that it would never use international indexes and company-specific brand prices. Suffice it to state here that there are imperfections in the available data of record, and it was not unreasonable for the agency to prefer *coalspot.com* as sufficiently reliable when compared to other data. The plaintiff suggests that ITA always prefers import prices, however there is admin-

istrative precedent for using export prices as the "best" information available, and the use of export prices here was within its discretion. *See*, *e.g., Certain Cut-to-Length Carbon Steel Plate from Romania*, 70 Fed.Reg. 12651 (March 15, 2005) (final admin. review), and accompanying I&D Memo at cmt. 3.

Similarly, ITA's rationale as to why it did not use the 2012 Indonesian import data for HTS 2702.10 urged by the plaintiff is supported by substantial evidence. It noted that those data were not contemporaneous with the period of investigation (indeed, Indonesia apparently had no imports under HTS 2702.10 in 2013). The defendant notes that, although not dispositive, contemporaneity of data is an important factor when evaluating surrogate values. Def's Resp. at 19, referencing *Certain Polyester Staple Fiber From The People's Republic of China*, 75 Fed.Reg. 1336 (Jan. 11, 2010) and accompanying I&D Memo at cmt. 1.

Perhaps more tellingly, the lignite imported into Indonesia in 2012 under HTS 2702.10 consisted in total volume to the equivalent of a single shipment[3] of 3.28 metric tons (MT), *see IDM* at 26, which low volume is consistent with the fact that Indonesia is a large domestic producer of that coal. *See* Meihua's Resubmission of Rebuttal Surrogate Country and Surrogate Value Comments (April 30, 2014), PDoc 188, Ex. 8 (Indonesia is the second largest producer of lignite). Given record evidence that that nation produces approximately 160 million MT of lignite a year, it was not unreasonable for ITA to rely upon broad and contemporaneous data instead of a single shipment of 3.28 MT of coal made before the period of investigation.

The plaintiff suggests that ITA "could have" used coal import data from other countries such as Thailand, Colombia, South Africa, or Ecuador. It contends that such secondary surrogate country data may be used "where an input cannot be valued in the selected surrogate country." Pl's Br. at 15. The court, however, cannot supplant a reasonable determination on the sufficiency of the *coalspot.com* data that comports with the agency's practice of preferring to value all FOPs from a single primary surrogate country whenever possible in accordance with 19 C.F.R. §351.408(c)(2). *IDM* at 26. *See Jiaxing Bro. Fastener Co. v. United States*, 38 CIT ___, ___, 11 F.Supp.3d 1326, 1332–33 (2014), *aff'd*, 822 F.3d 1289 (Fed.Cir. 2016). Which is another way of stating that the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agen-

[3] The plaintiff argues there is no indication in the import data itself that these import(s) only constituted a "single shipment" and that ITA identifies no basis in the record for concluding that 3.28 MT of imports does not represent commercial quantities, but this argument is over a tangential matter in the determination that does not merit relief.

cy's approach from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

The plaintiff contends that ITA should have used pricing data from other countries on the record as "benchmarks to assess the accuracy of the Indonesian import values from 2012." Pl's Br. at 16. This argument appears to be raised for the first time now, as it does not appear in case briefs before the agency. *See* Pet's Case Br. (July 31, 2014) at 12–14, PDoc 229; Pet's Rebuttal Br. (Aug. 7, 2014) at 1–8, PDoc 232. If so, it must be deemed waived for lack of exhaustion at the administrative level. *See* 28 U.S.C. §2637(d). *See, e.g., Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed.Cir. 2008) (finding that a party failed to exhaust its administrative remedies when it chose not to comment on ITA's draft remand results); *Rhone Poulenc, Inc. v.* United States, 899 F.2d 1185, 1191 (Fed.Cir. 1990) (appellant waived argument even though it was characterized as "simply another angle to an issue" raised). In any event, there appears to be no contrary evidence of record that might have compelled ITA to employ benchmarks to assess the accuracy of data that it had identified as reliable by other means.

III

The plaintiff next challenges ITA's selection of Indonesian HTS 2303.10.9000 as the best available to determine the surrogate value of high-protein scrap. It argues that Indonesian HTS 2303.20.0000 covering "waste of sugar manufacture" was the correct classification to value that scrap, but that, because there were no Indonesian imports in this classification during the period of investigation, ITA should have used the comparable HTS classification for Thailand. It further argues that ITA's analysis of the use of high-protein scrap in Meihua's production process "confuses inputs with outputs." Pl's Br. at 18. According to the plaintiff, starch milk is the input for this production step, while glucose, a form of sugar, is the output, and thus the high-protein scrap by-product constitutes waste of "sugar manufacture." *Id*. at 19.

In essence, plaintiff's position is that a more product-specific HTS category could have been used but was not. Even assuming that other data existed that were more specific to the product, that is insufficient to disturb the administrative selection of the best available information based upon its weighing of all relevant factors so long as that determination is a reasonable choice. *See, e.g., Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed.Cir. 1999) (ITA has "wide discretion in the valuation of factors or production"). The plain-

tiff does not take issue with ITA's conclusion that the Indonesian HTS 2303.10.9000 classification meets the other four factors that the agency typically considers. *See IDM* at 28. In particular, ITA found that that classification was representative of broad market averages, publicly available, tax and duty exclusive, and contemporaneous with the period of investigation. *Id.*

The defendant argues the product specificity factor weighs in favor of the data ITA used and against those advocated by the plaintiff, explaining that, unlike the Thailand HTS category urged by the plaintiff, Indonesian HTS 2303.10.9000 is specific to the primary surrogate country and is consistent with the agency's preference for primary surrogate country data to reduce distortion. Def's Resp. at 22, citing 19 C.F.R. §351.408(c)(2). Moreover, it continues, ITA determined that Indonesian HTS 2303.10.9000 properly applied to the high-protein scrap used by Meihua, based upon its analysis of the record evidence regarding Meihua's manufacturing process. *Id*., referencing *IDM* at 28.

That appears to be the case. The record shows that the high-protein scrap in question is a byproduct that emerges in the production of MSG. *See* Meihua's Section D Questionnaire Response (March 10, 2014), CDoc 61, at 21 and Ex. D-1; Meihua Analysis Memo, CDoc 226, at 5 and Attachment IV. Based on the confidential record, it was not unreasonable for ITA to use an HTS category that includes both "residues of starch manufacture" and "other wastes of sugar" to value the high-protein scrap, and the plaintiff does not persuade from the record that the high-protein scrap can only be classified as a "waste of sugar manufacture" under Indonesian HTS 2303.20.0000 or that the glucose Meihua produced constitutes "sugar" under that tariff item. *See* Pl's Br. at 18–19. ITA's "judgment call" that Indonesian HTS 2303.10.9000 was preferable to other evidence is one that cannot here be overturned. *See Lifestyle Enterprise, Inc. v. United States*, 751 F.3d 1371, 1378 (Fed.Cir. 2014) ("[w]hen all the available information is flawed in some way, [ITA] must make a judgment call as to what constitutes the 'best' information").

IV

On plaintiff's challenge to ITA's valuation of inland freight, it preliminarily valued such freight using a rate from *Doing Business Indonesia 2013* ("DBI"), a World Bank report, based on a distance of 14.42 kilometers (8.96 miles) from Jakarta center to that city's commercial shipping port. For the *Final Determination*, the agency added to the record the distances from several "periurban districts to the port of Jakarta" and, based on the average thereof, it revised the

inland freight calculation to 65.08 kilometers[4] . ITA claimed that the propriety of those additions was consistent with the DBI methodology because that report states that the businesses responding to the survey are located "in the periurban areas of the economy's largest business city." *IDM* at 7.

The "periurban area" of Jakarta is a fuzzy concept. Certainly, it is unclear from the record what that area actually encompasses: the DBI study does not define the geographical ambit of the term as applied to Jakarta, and the papers herein do not clarify. As it is unclear whether the distances ITA placed on the record are actually from "periurban" areas of Jakarta, its statement to that effect in its Freight Distance Memo dated August 14, 2014 is simply conclusory or *ipse dixit*.

The fact that those distances were used in a different proceeding is of no moment here. In the final analysis, ITA's reliance upon the information it placed on the record, without clarification that those areas are, in fact, "periurban" areas of Jakarta, does not amount to substantial evidence[5] . This is particularly true of the Cianjur location, which is apparently in a province that does not even border on the city of Jakarta. *See* Pl's Br. at 9. In short, ITA has not met its burden to reasonably select the "best available information" in setting the distance used to calculate a value for inland freight. *See* 19 U.S.C. §1677(c)(1)(B). *See also Blue Field (Sichuan) Food Industrial Co. v. United States*, 37 CIT ___, ___, 949 F.Supp.2d 1311, 1336 (2013) ("[t]he court will uphold [ITA]'s surrogate value choices [only] if the agency fairly considered record evidence when choosing surrogates, so that a reasonable mind could accept [it]s findings").

Noted in passing here is plaintiff's further argument that regardless of whether the "periurban area" of Jakarta includes both locations within Jakarta and in other jurisdictions, the *TAB Survey* "makes clear" that the DBI report is based on data collected only from

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[4] *IDM* at 7. These ITA obtained from the record of the inland freight considered in *Frozen Fish Fillets From the Socialist* Republic of Vietnam: Final Results of Antidumping Duty *Administrative Review and New Shipper Review; 2011–2012* (April 7, 2014). The inland freight determination thereof was challenged on other grounds and recently sustained *sub nom. An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 40 CIT ___, ___, 179 F.Supp.3d 1256, 1284 (2016).

[5] *See, e.g., U.S. Magnesium LLC v. United States*, 37 CIT ___, ___, 895 F.Supp.2d 1319, 1328 (2013). Furthermore, even assuming ITA could reasonably interpret that the "periurban area" of Jakarta encompasses the locations and distances it placed on the record, it is unclear whether they provide a representative sample of "typical" exporters to the port of Jakarta, and plaintiff's lament in that regard that ITA's average does not include any distance from within the city of Jakarta itself is valid to the extent ITA did not include the preliminary distance from the center of Jakarta to its port in its average calculation. *See* Pl's Br. at 9.

business located "within the city limits", *i.e.*, collected only for companies "located in" or "operating in" the city of Jakarta.[6] However, it does not necessarily follow that "located in" and "operating in" can only be interpreted as "within the city limits", as argued by the plaintiff, as opposed to ITA's "looser" interpretation of such terms as encompassing the "periurban area" *of* the city of Jakarta, which is consistent with what the DBI survey claims to be based upon.

V

The plaintiff challenges ITA's rejection of its August 28, 2015 submission of factual data for purposes of calculating inland freight costs. It argues that its submission consisted of "factual information relating to distances from locations other than those included in [ITA]'s filing" that "fit squarely within the scope" of ITA's invitation for submissions and 19 C.F.R. §351.301(c)(4). Pl's Br. at 19.

Elaborating, the plaintiff argues that nothing in that section 351.301(c)(4) precluded submission of alternative data to calculate freight. It points out that, while 19 C.F.R. §351.301(c)(3)(iv) limits a party from placing "additional, previously absent-from-the-record alternative surrogate value information" on the record to "rebut, clarify, or correct" factual information placed on the record by another interested party, section 351.301(c)(4) contains no such limitation in cases in which data are placed on the record by the agency.

The defendant contends ITA's determination to reject the submission was proper and consistent with regulation, and that the plaintiff does not dispute that its August 28 proffer consisted of an alternative to the information on the record. *See* Pl's Br. at 19 (data related to "distances from locations other than those included in [ITA]'s filing"). The defendant argues this "new factual information" did not respond to the factual information offered by ITA and that plaintiff's objective

[6] *See* Pet's Distance Cmts, PDoc 248, at Ex. 1. The *TAB Survey* template provides the following definitions:

> DESTINATION: Company "ABC" *located in* «Survey_City» seeks to trade with «DB_tab _PrepopulationEconomyName»'s largest overseas trading partner via ocean transportation through its main port (in the case of landlocked countries the port is the most commonly used in a neighboring country).
>
> . . . COMPANY "ABC":
>
> · *operates in* «Survey_City», and employs 60 workers or more;
>
> · is a private, limited liability company, registered and operating under the commercial laws of the country;
>
> · is domestically-owned with no foreign ownership;
>
> · exports over 10% of its sales to international markets; does not operate within an export processing zone or industrial estate with special export/import privileges.

See PDoc 248 at Ex. 1 (plaintiff's emphasis).

was plainly to expand the scope of the record and to persuade the agency to use such new information and revise surrogate value accordingly.[7]

The plaintiff, nonetheless, asserts that 19 C.F.R. §351.301(c)(4) authorized its submission of alternative data. That provision was codified in April 2013 as part of several rule changes governing time limits for submitting factual information in antidumping-duty and countervailing-duty proceedings.[8] Among the purposes of the changes, the plaintiff points out, was to "ensure that [ITA] has sufficient opportunity to review submissions of factual information." *Definition of Factual Information and Time Limits for Submission of Factual Information*, 78 Fed.Reg. 21246, 21246 (April 10, 2013). *See id*. at 21250. They identified five categories of factual information with associated time limits. 19 C.F.R. §351.301(c)(1)-(5). Submissions of factual information to value factors of production are due no later than 30 days before the scheduled date of the preliminary results of review. Section 351.301(c)(3)(i). Under subsection (c)(3)(iv), an interested party has "one opportunity to submit publicly available information to rebut, clarify, or correct" factual information submitted to value factors of production, but such party "may not submit additional, previously absent-from-the-record alternative surrogate value information". Similarly, and of more relevance here, section 351.301(c)(4) provides as follows:

> Factual information placed on the record of the proceeding by [ITA]. [ITA] may place factual information on the record of the proceeding at any time. An interested party is permitted one opportunity to submit factual information to rebut, clarify, or correct factual information placed on the record of the proceeding by [ITA] by a date specified by the Secretary.

On the interpretation of 19 C.F.R. §351.301(c) generally, the parties argue over *Husteel Co. v. United States*, which considered and rejected argument over whether the specific provision of 19 C.F.R. §351.301(c)(1)(v) permitted parties to submit alternative surrogate data. 39 CIT ___, ___, 98 F.Supp.3d 1315, 1341–42 (2015) (holding

[7] The defendant emphasizes that the plaintiff used that information to calculate a new surrogate value. *See* Distance Comments, PDoc 247; Pet's Resp. to Rejection Memo, PDoc 251.

[8] *See* 19 C.F.R. §351.301. "Factual information" for purposes of this section is defined, in relevant part, as "[e]vidence, including statements of fact, documents and data placed on the record by [ITA], or, evidence submitted by any interested party to rebut, clarify or correct such evidence placed on the record by [ITA]." 19 C.F.R. §351.102(b)(21)(iv); *See* subsection 351.301(a).

that a party's submission of a financial statement was a "substitute data source" and not "factual information to rebut, clarify, or correct" for purposes of that provision).

As noted therein, "'[r]ebuttal evidence' is generally understood to be 'evidence offered to disprove or contradict the evidence presented by an opposing party.'" 39 CIT at ___, 98 F.Supp.3d at 1341, quoting *Black's Law Dictionary* (10th ed. 2014). The defendant here contends *Husteel* stands for the proposition that a substitute data source does not constitute "factual information to rebut, clarify, or correct" previously submitted factual information. The plaintiff contends *Husteel*'s rejection of a party's information submitted *per* 19 C.F.R. §351.301(c)(1)(v) was not because the rejected information was alternative surrogate-value information, as ITA claims, but because the rejected information did not relate to, and therefore did not "rebut", the information to which it purportedly responded.

Plaintiff's is the more persuasive characterization of *Husteel*. In that case, the respondent NEXTEEL provided a breakdown of its cost and sale information in a supplemental questionnaire response. The petitioner then responded by submitting a "large amount of new factual information", including a financial statement, "purporting to 'rebut, clarify or correct'" the evidence submitted in the questionnaire response. 39 CIT at ___, 98 F.Supp.3d at 1338. The court found that the financial statement, which ITA used to calculate constructed value ("CV") profit, did not "disprove or contradict" the limited sales and cost information in the questionnaire response and therefore did not constitute "factual information to rebut, clarify or correct" that information as required by the regulation.[9]

In the matter at bar, however, there is no question, and the defendant does not convincingly dispute, that the periurban distance information submitted by the petitioner responded and related directly to the information placed on the record by ITA. It was, in short, intended to "rebut, clarify or correct factual information placed on the record of the proceeding by [ITA]", *see* 19 C.F.R. §351.301(c)(4), notwithstanding that it includes a "new" surrogate-value calculation that can be characterized as such, but it was intended as evidence contradicting ITA's calculation.

The defendant considers *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 35 CIT ___, ___, 925 F.Supp.2d 1332, 1349–50 (2013),

[9] 39 CIT at ___, 98 F.Supp.3d at 1341–43. Specifically, the court noted:

> NEXTEEL was asked to break down its costs and sales by country of sale and product type. *Little if anything in U.S.* Steel's factual submission, and especially the *evidence in Tenaris's 2012 financial statement, disproves or contradicts NEXTEEL's answers to those questions*. Rather, U.S. Steel's submission constituted a substitute data source that [ITA] could use to calculate CV profit.

Emphasis added.

instructive. Considered therein was the meaning of the phrase "factual information to rebut, clarify, or correct" in section 351.301(c)(1) of the regulation governing factual information submitted in response to questionnaires. Rejecting the respondent's argument that any type of information may be provided to rebut, clarify, or correct information under section 351.301(c)(1), *Baroque Timber* sustained ITA's interpretation of the phrase in subsection 351.301(c)(1) as excluding new surrogate-value data. That decision deferred to ITA's interpretation of the former regulation as prohibiting the introduction of new surrogate-value data where it was silent on the question and ITA's interpretation was not "erroneous or inconsistent" with the regulation itself.

Here, the plaintiff points out, and this court concurs, that ITA's interpretation is now "erroneous or inconsistent" with regard to the new regulation because the new one is no longer silent on the question. Instead, the agency has adopted one provision, to wit, 19 C.F.R. §351.301(c)(3)(iv) (information submitted by parties), that expressly prohibits the submission of "additional, previously absent-from-the-record alternative surrogate value information" as well as the use of new information to value FOPs when submitted to rebut, clarify or correct such FOP information, while the provision at issue here, 19 C.F.R. §351.301(c)(4) (information submitted by ITA), has no such prohibition. The defendant fails to explain how ITA can reasonably interpret the prohibition of 19 C.F.R. §351.301(c)(3)(iv) to apply to 19 C.F.R. §351.301(c)(4) when the agency expressly chose to include it only in subsection (c)(3)(iv).

Furthermore, defendant's argument that interpreting the regulation to permit parties to submit new surrogate-value information would defeat the purpose of encouraging the parties to submit information within time limits is baseless. The argument impermissibly begs the question of what the deadline is, because the petitioner did, in fact, submit the information within the deadlines: parties have only "one opportunity" to submit additional information in response to ITA's placing information on the record *viz*. 19 C.F.R. §351.301(c)(3)(iv) ("[a]n interested party is permitted one opportunity to submit publicly available information"), and parties will presumably do so. Additionally, the logic of the argument falls short because parties will not know at the time of the normal deadline whether such an opportunity will be afforded in a given proceeding, and they therefore will have every incentive to submit all relevant information by the original deadline to ensure that it is considered. The defendant argues the petitioner *did* have an opportunity to submit inland-freight distance information at the onset when it submitted its initial

surrogate-value data due April 7, 2014, however the specific issue of distances relevant to the "periurban area of Jakarta" does not appear to have arisen until ITA placed its memorandum on the file directly, with new information specific thereto. ITA's claim of a procedural impediment in rejecting the petitioner's submission, rather than considering it in the context of information intended to rebut, clarify or correct, was therefore in error.

VI

In view of the foregoing, plaintiff's motion for judgment on the agency record must be granted to the extent of remand to ITA for reconsideration of the issues of (1) the appropriate corn FOP weight and (2) the calculation of an inland-freight surrogate value. The results of this remand shall be filed on or before July 31, 2017, with any comments thereon due within 30 days of the filing thereof.

So ordered.

Dated: April 25, 2017
New York, New York

/*s*/ *Thomas J. Aquilino, Jr.*
SENIOR JUDGE

Slip Op. 17–49

ARCELORMITTAL USA LLC, Plaintiff, and AK STREET CORPORATION, NUCOR CORPORATION, and UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and PAO SEVERSTAL and SEVERSTAL EXPORT GMBH, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 16–00168

[Defendant's Motion to Dismiss is granted. Defendant-intervenors' cross-claim is dismissed without prejudice.]

Dated: April 25, 2017

Brooke Ringel, Kelly Drye & Warren, LLP, of Washington, DC, argued for plaintiff.

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

Daniel J. Cannistra and *Benjamin Blase Caryl*, Crowell & Moring LLP, of Washington, DC, argued for defendant-intervenors.

OPINION

Katzmann, Judge:

This case poses the question of whether a foreign exporter and producer, having obtained a *de minimis* subsidy rate in an investigation by the U.S. Department of Commerce ("Commerce"), and not being subject to a countervailing duty ("CVD") order, nonetheless has standing to challenge by cross-claim Commerce's application of Adverse Facts Available ("AFA") to calculate that subsidy rate. Put another way, where a party ultimately prevails at the administrative level in Commerce's investigation, must its challenge to that proceeding fail because there is no case or controversy and thus no jurisdiction lies?

This matter is before the court on defendant United States' ("the Government") Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction defendant-intervenors PAO Severstal and Severstal Export GmbH's (collectively "Severstal") cross-claim. Def.'s Mot. Dismiss for Lack of Jurisdiction, Dec. 2, 2016, ECF No. 35 ("Def.'s Mot."); Def.-Inter.'s Cross-cl., Oct. 14, 2016, ECF No. 20 ("Cross-cl."). Severstal, a foreign exporter and producer of cold-rolled steel flat products from Russia, cross-claimed to challenge certain factual findings and legal conclusions upon which Commerce's final determination in the CVD investigation of certain cold-rolled steel flat products from the Russian Federation ("Russia") is based. *Countervailing Duty investigation of Certain Cold-Rolled Steel Flat Products From the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 Fed. Reg. 49,935 (Dep't Commerce July 29, 2016) ("*Final Determination*") and the accompanying July 20, 2016 Issues and Decision Memorandum, C–821–823 ("*IDM*"). Severstal claims jurisdiction over its cross-claim is proper pursuant to 28 U.S.C. §§ 1581(c) and 1583, and that it has standing to bring the cross-claim as an interested party within the meaning of 19 U.S.C. §§ 1677(9)(A) and 1516a(f)(3) (2012).[1] Cross-cl. ¶¶ 1–3. For the reasons set forth below, the court finds that it lacks subject matter jurisdiction to hear Severstal's cross-claim and grants defendant's motion to dismiss without prejudice.

BACKGROUND

On July 28, 2015, Commerce received CVD petitions concerning imports of certain cold-rolled steel flat products from Brazil, India, the People's Republic of China, the Republic of Korea, and the Rus-

[1] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, and all applicable supplements thereto, unless otherwise noted.

sian Federation, filed on behalf of domestic industry by five United States producers of certain cold-rolled steel flat products — ArcelorMittal USA EEC ("ArcelorMittal"),[2] AK Steel Corporation, Nucor Corporation, United States Steel Corporation, and Steel Dynamics, Inc. — the first four of whom now appear as parties in this proceeding.[3] *Certain Cold-Rolled Steel Flat Products From Brazil, India, the People's Republic of China, the Republic of Korea, and the Russian Federation: Initiation of Countervailing Duty Investigations*, 80 Fed. Reg. 51,206 (Dep't Commerce Aug. 24, 2015) (initiation of CVD investigation). The petition alleged that the Government of Russia "provid[ed] countervailable subsidies . . . to imports of cold rolled steel from . . . Russia . . . and that such imports are materially injuring, or threatening material injury to, an industry in the United States." *Id.* Based on its review of the petition, Commerce found there was sufficient information to initiate a CVD investigation on 10 of the 14 alleged programs in the petition, including the "deduction of the R & D exploration costs from the company's taxable income." *Id*. at 51,209; August 17, 2015 Countervailing Duty Initiation Checklist at 11–12. Accordingly, Commerce published a notice of initiation of a countervailing duty investigation of certain cold-rolled steel flat products from Russia on August 24, 2015. 80 Fed. Reg. at 51,209; *see* 19 U.S.C. § 1671a(b). The period of investigation ("POI") was January 1, 2014, through December 31, 2014. 80 Fed. Reg. 51,206. On September 14, 2015, Commerce selected Severstal as one of two mandatory respondents in the investigation.[4] Memorandum from Kristen Johnson, International Trade Compliance Analyst, Office III, Antidumping and Countervailing Duty Operations to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Countervailing Duty Investigation on Certain Cold-Rolled Steel Flat Products from the Russian Federation: Selection of Mandatory Respondents" at 5 (Sept. 14, 2015).

Commerce issued its Preliminary Determination on December 22, 2015, finding that Severstal received countervailable subsidies from

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[2] Referred to in later stages of the CVD investigation as "ArcelorMittal USA LLC." *See Final Determination* n.7.

[3] ArcelorMittal filed its summons on August 25, 2016. ECF No. 20. AK Steel Corporation, Nucor Corporation, and United States Steel Corporation were granted plaintiff-intervenor status on October 17, 19, and 27, respectively. ECF Nos. 21, 26, 31.

[4] The selected mandatory company respondents in this investigation are Novolipetsk Steel OJSC (NLMK), Novex Trading (Swiss) S.A. (Novex Trading), Altai-Koks OJSC, Dolomite OJSC, Stoilensky OJSC, Studenovskaya (Stagdok) OJSC, Trading House LLC, Vtorchermet NLMK LLC, Vtorchermet OJSC, and Vtorchermet NLMK Center LLC (collectively, the NLMK Companies) and PAO Severstal, Severstal Export GmbH, JSC Karelsky Okatysh, AO OLKON, AO Vorkutaugol, and JSC Vtorchermet (collectively, the Severstal Companies).
IDM at 2.

the Government of Russia in the form of the tax deduction for exploration expenses program under Article 261 of the Tax Code of the Russian Federation ("TCRF"), and calculating a 0.01 percent ad valorem (*de minimis*) overall subsidy rate for Severstal. *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Russian Federation: Preliminary Affirmative Countervailing Duty Determination*, 80 Fed. Reg. 79,564 (preliminary determination); Preliminary Issues and Decision Memorandum, C-821–823 (Dec. 15, 2015). Commerce found in the Preliminary Determination that Severstal "reported deducting exploration expenses defined in Article 261 in the 2013 income tax return, which was filed with the tax authorities during the POI." Preliminary Issues and Decision Memorandum at 20.

On July 29, 2016, Commerce issued its affirmative *Final Determination*, in which it continued to find that countervailable subsidies were being provided to producers and exporters of certain cold-rolled steel flat products from Russia during the POI. Commerce explained that during Severstal's verification, "verifiers discovered previously unreported deductions contained in line item 040 [of its 2013 tax return] that related to exploration activities" under Article 261 of the TCRF.[5] *IDM* at 124. The agency accordingly found that "neither the Government of Russia nor [Severstal] acted to the best of their ability in responding to the Department's requests for certain information," and "drew an adverse inference where appropriate in selecting from among the facts otherwise available," pursuant to 19 U.S.C. § 1677e. *Final Determination* at 49,935. Thus Commerce assigned to Severstal an AFA rate of 0.03 percent ad valorem and calculated a final countervailable subsidy rate of 0.62 percent ad valorem (*de minimis*) for Severstal.[6] *Final Determination* at 49,936; *IDM* at 15, 21, 126.

Commerce noted that "[i]f the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we will issue a CVD order and will reinstate the suspension of liquidation . . . and will require a cash deposit of estimated CVDs for such entries of subject merchandise in the amounts indicated above." *Final Determination* at 49,936. On the other hand, "[i]f the ITC determines that material injury, or threat of material injury, does not exist, this

[5] Commerce stated that "in the Preliminary Determination, we inadvertently treated the extraction tax reductions the Severstal Companies received under Article 342 of the TCRF as having been received under the Tax Deduction for Exploration Expenses program, as provided under the Article 261 of the TCRF." *IDM* at 123.

[6] NLMK received an above-*de minimis* rate of 6.95 percent ad valorem. Pursuant to 19 U.S.C. §§ 1671d(c)(1)(B)(i)(I), (5)(A), this became the all-others rate as well. *Final Determination* at 49,936.

proceeding will be terminated and all estimated duties deposited as a result of the suspension of liquidation will be refunded or canceled." *Id.* Commerce notified the ITC of its determination in accordance with 19 U.S.C. § 1671d(d). *Id.*

ArcelorMittal filed suit on August 25, 2016, challenging Commerce's *Final Determination* as unsupported by substantial evidence and otherwise not in accordance with law as a result of the agency's assignment of a 0.03 percent ad valorem subsidy rate to Severstal, and seeking remand. Pl.'s Sum. ECF No. 1; Pl.'s Compl., ECF No. 8 (Sep. 23, 2016). On September 16, 2016, the ITC determined that "imports of cold-rolled steel flat products from Russia that are sold in the United States at [less than fair value] and subsidized by the government of Russia are negligible" and terminated the investigations. *Cold-Rolled Steel Flat Products From Brazil, India, Korea, Russia, and the United Kingdom*, 81 Fed. Reg. 63,806 (ITC Sep. 16, 2016) (final determination); *Cold-Rolled Steel Flat Products From Brazil, India, Korea, Russia, and the United Kingdom*, USITC Pub. 4637, USITC Inv. Nos. 701-TA-540, 542–544 and 731-TA-1283, 1285, 1287, and 1289–1290 (Sep. 2016); *see* 19 U.S.C. § 1671d(b)(1). As a result, no CVD order was issued as to Russian importers of cold-rolled steel flat products.

Severstal intervened as a defendant-intervenor on October 3, 2016, and cross-claimed on October 14, challenging as unsupported by substantial record evidence and otherwise not in accordance with law Commerce's application of AFA to calculate Severstal's benefit under the tax deduction for exploration expenses program. Def.-Inter.'s Consent Mot. to Intervene, ECF No. 10; Cross-cl. ¶¶ 19–24.[7]

The Government moved under Rule 12(b)(1) of this Court to dismiss Severstal's cross-claim for lack of jurisdiction. Def.'s Mot.; USCIT R. 12(b)(1). Severstal responded on January 9, 2017, and the Government replied on January 30. Def.-Inter.'s Opp'n., ECF No. 44 ("Def.-Inter.'s Opp'n"); Def.'s Reply, ECF No. 48 ("Def.'s Reply").

Defendant argues that Severstal, having obtained a *de minimis* subsidy rate in Commerce's investigation, and not being subject to any CVD order, cannot show injury in fact, and thus lacks standing to

[7] In a separate action before this court, Severstal, as plaintiff, challenges certain factual findings and legal conclusions made by Commerce in the *Final Determination*. *See Severstal Export GmbH v. United States*, 16-cv-00172 (2016). Count 4 of Severstal's complaint in that action is essentially identical to its sole Count in the instant cross-claim, both challenging Commerce's determination to apply AFA in calculating the benefit from the tax deduction for exploration expenses subsidy program. *Id.* ; Cross-cl. ¶¶ 19–24. The Government, as defendant, has moved to dismiss this action in its entirety. In an opinion issued contemporaneously with the instant one, this court allows the Government's motion to dismiss without prejudice, determining that Severstal has failed to establish a justiciable "case or controversy." *See Severstal Export GmbH v. United States*, 41 CIT __, Slip Op. 17–50 (April 25, 2017).

cross-claim against the defendant. Def.'s Mot. at 2–6. Assuming that Severstal has constitutional standing, the Government argues that Severstal's cross-claim should be dismissed because it impermissibly expands the issues in dispute between ArcelorMittal and the Government.

JURISDICTION AND STANDARD OF REVIEW

The party seeking to invoke the Court's jurisdiction carries the burden of establishing that subject matter jurisdiction lies. *Nat'l Presto Indus., Inc. v. Dazey Corp.*, 107 F.3d 1576, 1580 (Fed. Cir. 1997). This burden extends to each cause of action asserted, and to parties asserting cross-claims. *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318–19 (Fed. Cir. 2006); *see Washington Red Raspberry Com. v. United States*, 11 CIT 173, 183–84, 657 F. Supp. 537, 545– 46 (1987). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006), *quoted in Nitek Elec., Inc. v. United States*, 36 CIT ____, ____, 844 F. Supp. 2d 1298, 1302 (2012), *aff'd*, 806 F.3d 1376 (Fed. Cir. 2015).

In deciding a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the Court "accepts as true all uncontroverted factual allegations in the complaint," *Nitek Elec.*, 844 F. Supp. 2d at 1302 (citing *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011)), and draws all reasonable inferences in the complainant's favor. *Carl v. U.S. Sec'y of Agric.*, 36 CIT ____, ____, 839 F. Supp. 2d 1351, 1352 (2012) (citing *Cedars–Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995)).

DISCUSSION

I. SUBJECT MATTER JURISDICTION

Severstal submits that the Court possesses exclusive jurisdiction to entertain its cross-claim pursuant to 28 U.S.C. §§ 1581(c) and 1583. Cross-cl. ¶ 1. Severstal also alleges that it has standing as an interested party within the meaning of 19 U.S.C. §§ 1677(9)(A) and 1516a(f)(3), having participated fully in the underlying countervailing duty investigation at issue. *Id.* In its Response to the Government's motion to dismiss, Severstal invokes additional support for its statutory standing pursuant to 19 U.S.C. § 1516a(d) and 28 U.S.C. § 2636(c).[8] Def.-Inter.'s Opp'n at 7–8. The Government does not take

[8] The Government notes that "Defendant-Intervenors do not invoke these provisions in their cross-claim." Def.'s Reply at 2.

issue with Severstal's status as an interested party who participated fully in the underlying proceeding, but rather contests Severstal's standing under the United States Constitution, specifically regarding the necessary presence of an injury in fact. Def.'s Mot. at 3–6; Def.'s Reply at 2–5.

The jurisdiction of Federal Courts is limited to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "A necessary component of establishing a case or controversy pursuant to Article III is standing." *Royal Thai Gov't v. United States*, 38 CIT ____, ____ 978 F. Supp. 2d 1330, 1333 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.")). To establish standing, the claimant must show an "injury in fact" that is "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Royal Thai*, 978 F. Supp. 2d at 1333 (quoting *Lujan*, 504 U.S. at 560). Additionally, the claimant must demonstrate that the injury is "fairly traceable to the challenged action" and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quoting *Lujan*, 504 U.S. at 560–61).

The U.S. Court of Appeals for the Federal Circuit and this Court have held that when a respondent challenges an administrative proceeding in which it has prevailed, there is no case or controversy, and thus no jurisdiction lies. *Zhanjiang Guolian Aquatic Prod. Co. v. United States*, 38 CIT ____, ____, 991 F. Supp. 2d 1339, 1342 (2014) (citing *Royal Thai*, 978 F. Supp. 2d at 1333); *see Rose Bearings Ltd. v. United States*, 14 CIT 801, 802–03, 751 F.Supp. 1545, 1546–47 (1990); *see also Freeport Minerals Co. v. United States*, 758 F.2d 629, 634 (Fed. Cir. 1985). Because Commerce assigned Severstal a *de minimis* subsidy rate, Severstal prevailed as a respondent in the underlying proceeding. A *de minimis* subsidy rate removes a respondent from payment obligations under a relevant CVD order. "In making a determination under this subsection, [Commerce] shall disregard any countervailable subsidy rate that is *de minimis*. . . ." 19 U.S.C. § 1671d(a)(3); *see* 19 U.S.C. § 1671b(b)(4); 19 C.F.R. § 351.204(e)(1) (2016) ("The Secretary will exclude from an . . . order under [19 U.S.C. § 1671e] . . . any exporter or producer for which the Secretary determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis*."). Further, the ITC determined that imports of subsidized steel from Russia were negligible, resulting in the termination of the CVD investigation

without the issuance of a CVD order. *See Royal Thai*, 978 F. Supp. 2d at 1333 ("The lack of a CVD order means that plaintiff is currently not suffering any actual or imminent injury in fact due to any alleged errors committed by Commerce.") (citing *Lujan*, 504 U.S. at 560); *see also Zhanjiang*, 991 F. Supp. 2d at 1342 ("[T]he fact that no CVD order has been issued means that Plaintiff is not suffering any injury due to the errors it alleges the ITC committed."); 19 U.S.C. § 1671d(c)(2)(B) (mandating that cash deposits be refunded and the relevant investigation be terminated in the event that either Commerce or the ITC makes a negative final injury determination). Severstal's disagreement with Commerce's AFA application in the underlying proceeding does not overcome the reality that it has not been injured by Commerce's *Final Determination*. "[A] prevailing party may not appeal an administrative determination merely because it disagrees with some of the findings or reasoning." *Royal Thai*, 978 F. Supp. 2d at 1333 (quoting *Rose Bearings*, 14 CIT at 803).

Severstal contends that "[t]he specific injury that is imminent . . . is receiving an above-*de minimis* countervailing duty rate on remand and not being able to challenge the factual findings and legal conclusions contained in Commerce's final determination." Def.-Inter.'s Opp'n at 9.[9] The court addresses these alleged injuries in turn.

This court does not discern merit in Severstal's claim regarding injury. The possibility of receiving an above-*de minimis* countervailing duty rate on remand fails to constitute an injury in fact, as several hypothetical events would need to occur before Severstal would be required to post cash deposits or pay countervailing duties. Plaintiff ArcelorMittal would first need to succeed in obtaining remand in this proceeding. Commerce would then need to calculate an above-*de minimis* countervailing duty rate for Severstal on remand. This is the event that Severstal characterizes as an imminent injury. Even at this step, however, Severstal would not be subject to a CVD order, unless the ITC had also reversed its negative injury determination. This chain of hypothetical outcomes cannot be said to be imminent. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes . . . ."

[9] The Government observes, correctly, that it is not necessarily the case that "defendant-intervenors must forever abandon their objections." Def.'s Mot. at 6. It notes that

> ArcelorMittal USA LLC, a domestic producer, is challenging the *de minimis* countervailable subsidy margin determined for defendant-intervenors, and defendant-intervenors have been granted leave to participate in this case. If plaintiff prevails before this Court, "Commerce will be required to publish a redetermination on remand" and defendant-intervenors "will still have a right to challenge that redetermination," for example, by filing a new lawsuit. *Royal Thai*, 978 F. Supp. 2d at 1334.

Def.'s Mot. at 6.

Clapper v. Amnesty Int'l USA, 568 U.S. ____, ____, 133 S. Ct. 1138, 1147 (2013) (citing *Lujan*, 504 U.S. at 565, n.2). Severstal's desired outcome of a remand would not remediate any actual or imminent injury. *See Lujan*, 504 U.S. at 561 ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)) (internal quotation marks omitted). "[W]hen a plaintiff merely alleges 'hypothetical harm,' the court must dismiss the case." *Royal Thai*, 978 F. Supp. 2d at 1333 (citing *Asahi Seiko Co. v. United States,* 35 CIT ____, ____, 755 F. Supp. 2d 1316, 1322 (2011)). Attempts by this court to reconcile Severstal's hypothetical harm would thus constitute an impermissible advisory opinion. *Zhanjiang*, 991 F. Supp. 2d at 1343 ("[T]he United States Constitution does not permit courts to issue advisory opinions.") (citing *Camreta v. Greene*, 563 U.S. 692, 717 (2011)); *Royal Thai*, 978 F. Supp. 2d at 1333 ("[A]ny discussion by the court regarding such potential harm would be an impermissible advisory opinion.") (citing *Georgetown Steel Corp. v. United States,* 16 CIT 1084, 1087–88, 810 F. Supp. 318, 322 (1992)).

Severstal's second alleged injury—the loss of the ability "to appeal the factual findings, legal conclusions, and determinations made in Commerce's original final determination" if it does not bring this claim now—is likewise unavailing. Def.-Inter.'s Opp'n at 9. Severstal is incorrect under the statutory framework. Were Severstal to receive an above-*de minimis* rate, and ultimately be subject to a CVD order following the ITC's reversal of its negligibility determination, then Severstal would be injured in fact. Per 19 U.S.C. § 1516a(a)(2)(i)(II), Severstal could challenge this outcome by filing a summons "within thirty days after . . . the date of publication in the Federal Register of . . . a countervailing duty order based upon any determination in clause (i) of subparagraph (B)" of that provision. Specifically, 19 U.S.C. § 1516a(a)(2)(B)(i) refers to "[f]inal affirmative determinations by [Commerce]." Severstal could therefore bring a claim challenging elements of Commerce's final affirmative determination upon the publication of a CVD order to which it is subject. Such challenges could target Commerce's application of AFA to Severstal, and other relevant portions of Commerce's existing *Final Determination*, so long as they survive Commerce's remand and thus contribute to the basis of the CVD order. *See Royal Thai*, 978 F. Supp. 2d at 1334 (describing this statutory trajectory in regards to a similar procedural background).

II. IMPERMISSIBLE EXPANSION OF ISSUES IN DISPUTE

Assuming arguendo that Severstal has constitutional standing, the Government contends that Severstal's cross-claim should be dismissed because the cross-claim impermissibly expands the issues in dispute. The Government cites several cases in support of this contention. *Torrington Co. v. United States*, 731 F. Supp. 1073, 1075 (1990) ("[A]n intervenor is limited to the field of litigation open to the original parties, and cannot enlarge the issues tendered by or arriving out of plaintiff's bill.") (citing *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U.S. 53, 58 (1935)); *Id.* (holding that an intervenor "'takes the action as it has been framed by the parties therein,' and cannot use the right of intervention to impose claims otherwise inappropriate.") (quoting *Fuji Elec. Co. v. United States*, 595 F. Supp. 1152, 1154 (1984)).

The Government notes that ArcelorMittal challenged the rate that Commerce assigned to Severstal as AFA under the tax deduction for exploration expenses subsidy program, whereas Severstal maintains that Commerce was not permitted to apply AFA in measuring the benefit of this subsidy as to them at all. Although these claims relate to the same overall AFA determination, nevertheless, according to the Government, "the claims are not the same[.]" Def.'s Mot. at 7.

In contrast, Severstal states that the claims are the same, and thus the court should not dismiss its cross-claim: "Plaintiff's complaint challenges Commerce's AFA rate for Severstal's exploration deduction program and Severstal's cross-claim challenges the factual findings and legal conclusions on which Commerce based its determination to apply AFA to Severstal for the same exploration deduction program." Def.-Inter.'s Opp'n at 9–10.

In its Reply, the Government reprises its impermissible expansion of issues argument by citing *Parkdale Int'l v. United States*, 429 F. Supp. 2d 1324, 1337–38 (2006), *aff'd*, 475 F.3d 1375 (Fed. Cir. 2007), which found that a cross-claim that "goes beyond the scope of [plaintiff's complaint]" "cannot be adjudicated in this proceeding." Def.'s Reply at 7.

The Government's argument that the cross-claim impermissibly expands the issues in dispute lacks merit, because the Government fails to explain its position. In any event, the issue in dispute is the same in both ArcelorMittal and Severstal's complaint and cross-claim, respectively: that is whether the AFA rate assigned to Severstal is supported by substantial evidence and in accordance with law. Thus, there is no impermissible expansion of the issues in this case. *Compare* Pl.'s Compl. at 7–8, Sept. 23, 2016, ECF No. 8 *with* Cross-cl.

The cases cited by the Government are inapposite. *Chandler*, 296 U.S. at 59–60 (affirming dismissal of counterclaim where defendant-intervenor filed counterclaim against plaintiff for infringement of a *different patent* that defendant had no interest in); *Fuji*, 595 F. Supp. at 1154 (granting motion to strike portions of plaintiff-intervenor's complaint, because it raised matters not previously set forth in the pleadings filed between the original parties); *Torrington*, 731 F. Supp. at 1076 (granting motion to strike defendant-intervenor's affirmative defenses which raised an issue of standing that was not challenged by either of the primary parties to the litigation). Here, Severstal's cross-claim disputes the same aspect of the *Final Determination* which ArcelorMittal disputed in its Complaint, specifically, the AFA rate given to Severstal by Commerce. *See Final Determination; compare* Compl. *and* Cross-cl. *with Chandler*, 296 U.S. at 59–60. All parties have an interest in the *Final Determination* here. *Compare* Compl. *and* Cross-cl. *with Chandler*, 296 U.S. at 59–60. Severstal's cross-claim raises the same matter previously set forth in the pleadings; thus, the cross-claim does not impermissibly expand the issues in this case. *Compare* Compl. *and* Cross-cl. with *Fuji*, 595 F. Supp. at 1154. Severstal's cross-claim stays within the confines of the field of litigation between the original parties, the Government and ArcelorMittal. *Compare* Compl. *and* Cross-cl. with *Torrington*, 731 F. Supp. at 1075.[10]

CONCLUSION

For the foregoing reasons, Severstal's cross-claim is dismissed without prejudice.

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[10] The court confines its holding to the narrow question of whether the cross-claim impermissibly expands issues in dispute in this case, as framed by the parties in their filings. In its motion to dismiss Severstal's cross-claim, the Government also contended that the case should be dismissed, because Severstal cannot brief its cross-claim, as cross-motions for judgment on the agency record are not permitted under Rule 56.2(b). Def.'s Mot. at 7. During oral argument, the Government clarified that Severstal is permitted to file a brief in response to a motion for judgment on the agency record. Moreover, the Government explained that its argument was not that Rule 56.2 is a rule of substantive jurisdiction, such that the case should be dismissed because the counterclaim cannot be briefed; rather, the Government's argument is that the counterclaim should be dismissed, because the counterclaim raises new claims and expands the issues in dispute.

The court notes that the rules do not prevent a cross-claimant from filing a responsive brief to plaintiff's motion for judgment on the agency record. USCIT R. 56.2(d) ("Responsive briefs must be served within 60 days after the date of service of the brief of the movant."). Even if Severstal cannot file its own motion for judgment on the agency record, it can still file its response under Rule 56.2(d) to ArcelorMittal's motion, and the court can still enter judgment in Severstal's favor: "If the court determines that judgment should be entered in an opposing party's favor, it may enter judgment in that party's favor, *notwithstanding the absence of a cross-motion*." USCIT R. 56.2(b) (emphasis added).

Dated: April 25, 2017
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 17–50

PAO SEVERSTAL and SEVERSTAL EXPORT GMBH, Plaintiffs, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, AK STEEL CORPORATION, NUCOR CORPORATION, and United States Steel Corporation, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 16–00172

[Defendant's Motion to Dismiss is granted. Plaintiffs' Complaint is dismissed without prejudice.]

Dated: April 25, 2017

Daniel J. Cannistra and *Benjamin Blase Caryl*, Crowell & Moring LLP, of Washington, DC, argued for plaintiffs.

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

Brooke Ringel, Kelly Drye & Warren, LLP, of Washington, DC, argued for defendant-intervenor.

OPINION

Katzmann, Judge:

If this case evokes a sense of déjà vu, it is because it presents from the same record the principal question posed and addressed in an opinion issued today by this court in *ArcelorMittal v. United States*, 41 CIT __, Slip Op. 17–49 (April 25, 2017) ("*ArcelorMittal*"): Does a foreign exporter and producer, having obtained a *de minimis* subsidy rate in an investigation by the U.S. Department of Commerce ("Commerce"), and not being subject to a countervailing duty ("CVD") order, nonetheless have standing to challenge Commerce's calculation of that subsidy rate. Put another way, where a party ultimately prevails at the administrative level in Commerce's investigation, must its challenge to that proceeding fail because there is no case or controversy and thus no jurisdiction lies?

This matter is before the court on defendant United States' Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction plaintiffs PAO Severstal and Severstal Export GmbH's (collectively "Severstal") action. Def.'s Mot. Dismiss for Lack of Jurisdiction, Dec. 2, 2016, ECF No. 35 ("Def.'s Mot."); Pl.'s Compl., Sep. 26, 2016, ECF No. 10 ("Pl.'s Compl."). Severstal, a foreign exporter and producer of cold-rolled steel flat products from Russia, challenges certain factual findings and legal conclusions upon which Commerce's final determination in the CVD investigation of certain cold-rolled steel flat products from the Russian Federation is based. *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 Fed. Reg. 49,935 (Dep't Commerce July 29, 2016) ("*Final Determination*") and the accompanying July 20, 2016 Issues and Decision Memorandum, C–821–823. For the reasons set forth below, the court finds that it lacks subject matter jurisdiction to hear Severstal's claim and grants defendant's motion to dismiss without prejudice.

BACKGROUND

The court need not detail the factual and administrative background resulting in the *Final Determination*, as it is the same as that set forth in *ArcelorMittal*.[1]

Severstal filed suit on August 26, 2016 and filed its complaint, containing four counts, one month later. Pl.'s Sum., ECF No. 1; Pl.'s Compl. Count four is essentially identical to the sole count in Severstal's cross-claim in 16-cv-00168; Severstal in both is challenging Commerce's determination to apply adverse facts available ("AFA") in calculating the benefit from the tax deduction for exploration expenses subsidy program. Pl.'s Compl. ¶¶ 44–48. In the other three counts, Severstal alleges and challenges, first, Commerce's use of the price of coal, rather than the price of coal mining rights, as the benchmark for its calculation of benefit under the provision of coal mining rights for less than adequate remuneration ("LTAR") program; second, Commerce's comparison of coal prices to a constructed coal price that does not include several costs Severstal allegedly incurred in obtaining and delivering coal to its steel factory, rather than a comparison of a constructed coal mining right price benchmark to Severstal's coal mining rights prices; and third, Commerce's alleged refusal to include most of Severstal's coal extraction-related

[1] In *ArcelorMittal*, Severstal, as defendant-intervenor, challenges through cross-claim certain factual findings and legal conclusions made by Commerce in the *Final Determination*. Defendant United States has moved in that action to dismiss Severstal's cross-claim, which this court grants in the contemporaneous opinion noted above.

costs in its construction of a Severstal coal price used to calculate the benefit for the provision of coal mining rights for LTAR program. Pl.'s Compl. ¶¶ 32–43.

The Government moved under Rule 12(b)(1) of this Court to dismiss Severstal's action for lack of jurisdiction. Def.'s Mot.; USCIT R. 12(b)(1). Severstal responded on January 9, 2017, and the Government replied on January 30. Pl.'s Opp'n., ECF No. 39 ("Pl.'s Opp'n"); Def.'s Reply, ECF No. 41 ("Def.'s Reply"). Defendant argues that Severstal, having obtained a *de minimis* subsidy rate in Commerce's investigation, and not being subject to any CVD order,[2] cannot show injury in fact,[3] and thus lacks standing to file suit against the defendant. Def.'s Mot. at 2–6.

JURISDICTION AND STANDARD OF REVIEW

The party seeking to invoke the Court's jurisdiction carries the burden of establishing that subject matter jurisdiction lies. *Nat'l Presto Indus., Inc. v. Dazey Corp.*, 107 F.3d 1576, 1580 (Fed. Cir. 1997). This burden extends to each cause of action asserted. *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318–19 (Fed. Cir. 2006); *see Washington Red Raspberry Com. v. United States*, 11 CIT 173, 183–84, 657 F. Supp. 537, 545–46 (1987). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety." *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 502 (2006), *quoted in Nitek Elec., Inc. v. United States*, 36 CIT ____, ____, 844 F. Supp. 2d 1298, 1302 (2012), *aff'd*, 806 F.3d 1376 (Fed. Cir. 2015).

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[2] On September 16, 2016, the International Trade Commission ("ITC") determined that "imports of cold-rolled steel flat products from Russia that are sold in the United States at [less than fair value] and subsidized by the government of Russia are negligible" and terminated the investigations. *Cold-Rolled Steel Flat Products From Brazil, India, Korea, Russia, and the United Kingdom*, 81 Fed. Reg. 63,806 (ITC Sep. 16, 2016) (final determination); *Cold-Rolled Steel Flat Products From Brazil, India, Korea, Russia, and the United Kingdom*, USITC Pub. 4637, USITC Inv. Nos. 701-TA-540, 542–544 and 731-TA-1283, 1285, 1287, and 1289–1290 (Sep. 2016); *see* 19 U.S.C. § 1671d(b)(1). As a result, no CVD order was issued as to Russian importers of cold-rolled steel flat products.

[3] Plaintiffs acknowledge in regard to all four counts: "The claims put forth below in paragraphs 32–48 are *contingent upon a finding by Commerce that reverses the negative Final Determination as to Severstal*." Pl.'s Compl. ¶ 5 (emphasis added).

1583–84 (Fed. Cir. 1993); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995)).

DISCUSSION

Severstal submits that the Court possesses jurisdiction to entertain this action pursuant to 28 U.S.C. § 1581(c). Pl.'s Compl. ¶ 2. Severstal also argues that it is an interested party within the meaning of 19 U.S.C. §§ 1677(9)(A) and 1516a(f)(3), having participated fully in the underlying countervailing duty investigation at issue, and thus has standing pursuant to 19 U.S.C. § 1516a(d) and 28 U.S.C. § 2636(c). Pl.'s Compl. ¶ 3. The Government takes issue not with Severstal's status as an interested party who participated fully in the underlying proceeding, but rather with Severstal's standing under the United States Constitution, specifically regarding the necessary presence of an injury in fact. Def.'s Mot. at 3–5; Def.'s Reply at 3–4.

The jurisdiction of Federal Courts is limited to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "A necessary component of establishing a case or controversy pursuant to Article III is standing." *Royal Thai Gov't v. United States*, 38 CIT ____, ____, 978 F. Supp. 2d 1330, 1333 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.")). To establish standing, the plaintiff must show an "injury in fact" that is "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Royal Thai*, 978 F. Supp. 2d at 1333 (quoting *Lujan*, 504 U.S. at 560). Additionally, the plaintiff must demonstrate that the injury is "fairly traceable to the challenged action" and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quoting *Lujan*, 504 U.S. at 560–61).

The U.S. Court of Appeals for the Federal Circuit and this Court have held that when a respondent challenges an administrative proceeding in which it has prevailed, there is no case or controversy, and thus no jurisdiction lies. *Zhanjiang Guolian Aquatic Prod. Co. v. United States*, 38 CIT ____, ____, 991 F. Supp. 2d 1339, 1342 (2014) (citing *Royal Thai*, 978 F. Supp. 2d. at 1333); *see Rose Bearings Ltd. v. United States*, 14 CIT 801, 802–03, 751 F. Supp. 1545, 1546–47 (1990); *see also Freeport Minerals Co. v. United States*, 758 F.2d 629, 634 (Fed. Cir. 1985). Because Commerce assigned Severstal a *de minimis* subsidy rate, Severstal prevailed as a respondent in the underlying proceeding. A *de minimis* subsidy rate removes a respondent from payment obligations under a relevant CVD order. 19 U.S.C.

§ 1671d(a)(3) ("In making a determination under this subsection, [Commerce] shall disregard any countervailable subsidy rate that is *de minimis*. . . ."); *see* 19 U.S.C. § 1671b(b)(4); 19 C.F.R. § 351.204(e)(1) (2016) ("The Secretary will exclude from an . . . order under [19 U.S.C. § 1671e] . . . any exporter or producer for which the Secretary determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis*."). Further, the ITC determined that imports of subsidized steel from Russia are negligible, resulting in the termination of the CVD investigation without the issuance of a CVD order. *Supra* n.2; *see Royal Thai*, 978 F. Supp. 2d at 1333 ("The lack of a CVD order means that plaintiff is currently not suffering any actual or imminent injury in fact due to any alleged errors committed by Commerce.") (citing *Lujan*, 504 U.S. at 560); *Zhanjiang*, 991 F. Supp. 2d at 1342 ("[T]he fact that no CVD order has been issued means that Plaintiff is not suffering any injury due to the errors it alleges the ITC committed."); 19 U.S.C. § 1671d(c)(2)(B) (mandating that cash deposits be refunded and the relevant investigation be terminated in the event that either Commerce or the ITC makes a negative final injury determination). Severstal's disagreement with Commerce's AFA application in the underlying proceeding does not overcome the reality that it has not been injured by Commerce's *Final Determination*. "[A] prevailing party may not appeal an administrative determination merely because it disagrees with some of the findings or reasoning." *Royal Thai*, 978 F. Supp. 2d at 1333 (quoting *Rose Bearings*, 14 CIT at 803).

Severstal contends that "[t]he specific injury that is imminent . . . is receiving an above-*de minimis* countervailing duty rate on remand and not being able to challenge the factual findings and legal conclusions contained in Commerce's final determination." Pl.'s Opp'n at 12. The court addresses these alleged injuries in turn.

The possibility of receiving an above-*de minimis* countervailing duty rate on remand fails to constitute an injury in fact, as several hypothetical events would need to occur before Severstal would be required to post cash deposits or pay countervailing duties. A plaintiff with standing, such as ArcelorMittal in *ArcelorMittal*, would first need to succeed in obtaining remand of the *Final Determination* to Commerce. The agency would then need to calculate an above-*de minimis* countervailing duty rate for Severstal on remand. *See supra*n.2. This is the event that Severstal characterizes as an imminent injury. Even at this step, however, Severstal would not be subject to a CVD order, unless the ITC had also reversed its negative injury determination. This chain of independent decisions and hypothetical outcomes cannot be said to be imminent. "Although imminence is

concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes . . . ." *Clapper v. Amnesty Int'l USA*, 568 U.S. ____, ____, 133 S. Ct. 1138, 1147 (2013) (quoting *Lujan*, 504 U.S. at 565, n.2). Severstal's desired outcome of a remand would not remediate any actual or imminent injury. *See Lujan*, 504 U.S. at 561 ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)) (internal quotation marks omitted). "[W]hen a plaintiff merely alleges 'hypothetical harm,' the court must dismiss the case." *Royal Thai*, 978 F. Supp. 2d at 1333 (citing *Asahi Seiko Co. v. United States*, 35 CIT ____, ____, 755 F. Supp. 2d 1316, 1322 (2011)). Attempts by this court to reconcile Severstal's hypothetical harm would thus constitute an impermissible advisory opinion. *Zhanjiang*, 991 F. Supp. 2d at 1343 ("[T]he United States Constitution does not permit courts to issue advisory opinions.") (citing *Camreta v. Greene*, 563 U.S. 692, 717 (2011)); *Royal Thai*, 978 F. Supp. 2d at 1333 ("[A]ny discussion by the court regarding such potential harm would be an impermissible advisory opinion.") (citing *Georgetown Steel Corp. v. United States ,*16 CIT 1084, 1087–88, 810 F. Supp. 318, 322 (1992)).

Severstal's second alleged injury—the loss of the ability "to appeal the factual findings, legal conclusions, and determinations made in Commerce's *original final determination*" if it does not bring this claim now—is likewise unavailing. Pl.'s Opp'n at 12 (emphasis in original). Severstal is incorrect under the statutory framework. Were Severstal to receive an above-*de minimis* rate, and ultimately be subject to a CVD order following the ITC's reversal of its negligibility determination then Severstal would be injured in fact. Per 19 U.S.C. § 1516a(a)(2)(i)(II), Severstal could challenge this outcome by filing a summons "within thirty days after . . . the date of publication in the Federal Register of . . . [a] countervailing duty order based upon any determination in clause (i) of subparagraph (B)" of that provision. Specifically, 19 U.S.C. § 1516a(a)(2)(B)(i) refers to "[f]inal affirmative determinations by [Commerce]." Severstal could therefore bring a claim challenging elements of Commerce's final affirmative determination upon the publication of a CVD order to which it is subject. Such a challenge could target Commerce's application of AFA to Severstal, and other relevant portions of Commerce's existing *Final Determination*, so long as they survive Commerce's remand and thus

contribute to the basis of the CVD order. *See Royal Thai*, 978 F. Supp. 2d at 1334 (describing this statutory trajectory in regards to a similar procedural background).[4]

CONCLUSION

For the foregoing reasons, Severstal's complaint is dismissed without prejudice.

Dated: April 25, 2017
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 17–51

ALBEMARLE CORP. Plaintiff, and NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CALGON CARBON (TIANJIN) CO., LTD., CALGON CARBON CORP. and NORIT AMERICAS INC., Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 11–00451

JUDGMENT

Before the court are the Final Results of Redetermination Pursuant to Court Remand (Oct. 14, 2016), ECF No. 135 ("Remand Redetermination"), which the International Trade Administration, U.S. Department of Commerce ("Commerce") issued in response to the court's Opinion and Order in *Albemarle Corp. v. United States*, __ CIT __, Slip Op. 16–84 (Sept. 7, 2016). Plaintiff Albemarle Corporation ("Albemarle") and plaintiff-intervenor Ningxia Huahui Activated Carbon Co., Ltd. ("Huahui") have commented in favor of the Remand Redetermination. Pl. Albemarle Corp. and Int.-Pl. Ningxia Huahui Activated Carbon Co., Ltd.—Comments on Final Results of Redeterm. pursuant to Ct. Remand (Oct. 27, 2016), ECF No. 137. No other party submitted comments to the court on the Remand Redetermination. Defendant United States has filed a response in favor of the comment of Albemarle and Huahui. Def.'s Resp. to Comments regarding the Remand Redeterm. (Nov. 28, 2016), ECF No. 138.

The court's previous Opinion and Order was issued in response to the mandate of the U.S. Court of Appeals for the Federal Circuit

[4] The Government acknowledges that "[a]lthough Severstal may not make its challenges now because it has suffered no injury in fact, Severstal may indeed challenge 'the factual findings, legal conclusions, and determinations made in Commerce's original final determination,' Pls. Opposition at 12–13, if Severstal ever suffers an injury in fact from those findings, conclusions and determinations." Def.'s Reply at 5.

("Court of Appeals") in *Albemarle Corp. v. United States*, 821 F.3d 1345 (Fed. Cir. 2016). Pursuant to that mandate and the subsequent instructions of this court, Commerce, based on the *de minimis* and zero margins of the individually examined respondents, assigned Huahui a redetermined weighted average dumping margin of zero. *Remand Redetermination* 1, 7. The court determines that the Remand Redetermination complies with the mandate issue by the Court of Appeals and this court's instructions.

Therefore, upon consideration of the Remand Redetermination and all other papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Remand Redetermination be, and hereby is, sustained; and it is further

ORDERED that entries of merchandise that are affected by this litigation shall be liquidated in accordance with the final court decision in this action.

Dated: April 27, 2017
New York, NY

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