U.S. Court of International Trade

Slip Op. 18–13

NUCOR CORPORATION, Plaintiff, and AK STEEL CORPORATION, ARCELORMITTAL USA LLC, and UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and EREGLI DEMIR ve CELIK FABRIKALARI T.A.S., Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 16–00233

[Denying plaintiff's motion for judgment on the agency record in an action contesting a final determination of the U.S. International Trade Commission resulting in termination of a countervailing duty investigation of hot-rolled steel from Turkey]

Dated: February 28, 2018

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OPINION

Stanceu, Chief Judge:

Plaintiff Nucor Corporation ("Nucor"), joined by plaintiff-intervenors ArcelorMittal USA LLC, AK Steel Corporation, and United States Steel Corporation, contests a final negative determination of the U.S. International Trade Commission (the "Commission," or the "ITC") that resulted in termination of a countervailing duty investigation of imports of certain hot-rolled steel flat products

("hot-rolled steel") from Turkey. The Commission terminated the investigation upon finding that the volume of subsidized hot-rolled steel imports from Turkey was negligible. The court sustains the Commission's determination.

I. BACKGROUND

A. The Contested Determination

The determination contested in this action was published as *Certain Hot-Rolled Steel Flat Products From Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, 81 Fed. Reg. 66,996 (Int'l Trade Comm'n Sept. 29, 2016) ("*Final Determination*"). The views of the Commission were contained in *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, USITC Pub. 4638, Inv. Nos. 701-TA-545–547 and 731-TA-1291–1297 (Sept. 2016) (Final) (P.R. Doc. 494),[1] *available at* https://www.usitc.gov/publications/701_731/pub4638.pdf (last visited Feb. 23, 2018) ("*Views of the Commission*").

B. The Commission's Countervailing Duty Investigation of Hot-Rolled Steel from Turkey

On August 11, 2015, six domestic steel producers filed, concurrently with the Commission and the International Trade Administration, U.S. Department of Commerce ("Commerce," or the "Department"), a petition seeking the initiation of antidumping duty ("AD") and countervailing duty ("CVD") investigations of hot-rolled steel from various countries. The petitioners, which were Nucor, plaintiff-intervenors AK Steel Corporation, ArcelorMittal USA LLC, and United States Steel Corporation, and two other U.S. steel producers, alleged that the industry producing hot-rolled steel in the United States was materially injured or threatened with material injury by reason of dumped and subsidized imports of hot-rolled steel from Brazil, Korea, and Turkey and from dumped imports of hot-rolled steel from Australia, Japan, the Netherlands, and the United Kingdom.

[1] This Opinion contains no confidential information. Public documents and public versions of confidential documents from the administrative record are cited as "P.R. Doc. ___". Where necessary, confidential documents from the administrative record are cited as "C.R. Doc. ___".

In response to the petition, the Commission initiated ten separate investigations.[2] The period of investigation ("POI") for the ITC's countervailing duty investigation of Turkish imports was January 1, 2013 through March 31, 2016. *Views of the Commission* at 10 n.31.

In its various antidumping duty and countervailing duty investigations, the Commission determined that the U.S. industry producing hot-rolled steel was being materially injured by reason of dumped imports of hot-rolled steel from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom. *Final Determination*, 81 Fed. Reg. at 66,996. The Commission also reached an affirmative injury determination as to imports found to be subsidized by the governments of Brazil and Korea. *Id.* The Commission stated that it "further finds that imports of hot-rolled steel that have been found by Commerce to be subsidized by the government of Turkey are negligible." *Id.* On that basis, the ITC terminated Investigation No. 701–547, its countervailing duty investigation of hot-rolled steel from Turkey. Due to the ITC's negative determination, Commerce did not issue a countervailing duty order on hot-rolled steel from Turkey. *See* 19 U.S.C. § 1671d(c)(2).

C. Proceedings Before the Court of International Trade

Nucor commenced this litigation on November 23, 2016. Compl. (Nov. 23, 2016), ECF No. 8. Before the court is a motion for judgment on the agency record filed under USCIT Rule 56.2 on behalf of plaintiff Nucor and plaintiff-intervenors AK Steel Corporation, ArcelorMittal USA, LLC, and United States Steel Corporation.[3] Pl. Nucor Corporation and Pl.-Intervenors ArcelorMittal USA LLC, AK Steel Corporation, and United States Steel Corporation's Rule 56.2 Mot. for J. on the Agency Record (May 8, 2017), ECF Nos. 49 (confidential), 50 (public) ("Pl.'s Br."). The motion is opposed by defendant U.S. International Trade Commission and by defendant-intervenor Eregli Demir ve Celik Fabrikalari T.A.S., a Turkish producer of hot-rolled steel. The court held oral argument on January 18, 2018.

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[2] The ITC designated the countervailing duty investigations as Investigation Nos. 701–545 (Brazil), 701–546 (Korea), and 701–547 (Turkey). The antidumping duty investigations were Investigation Nos. 731–1291 (Australia), 731–1292 (Brazil), 731–1293 (Japan), 731–1294 (Korea), 731–1295 (the Netherlands), 731–1296 (Turkey), and 731–1297 (United Kingdom). *See* Int'l Trade Comm'n, Antidumping and Countervailing Duty Orders in Place As of February 14, 2018, *available at* https://www.usitc.gov/sites/default/files/trade_remedy/documents/orders.xls (last visited Feb. 21, 2018).

[3] The court addresses in this Opinion the arguments presented by plaintiff Nucor. Plaintiff-intervenors joined in each of these arguments and did not submit separate briefs. Counsel for plaintiff-intervenor ArcelorMittal USA LLC appeared at oral argument but deferred to the arguments made by Nucor. The remaining plaintiff-intervenors did not appear at oral argument

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) (2012), which grants jurisdiction of civil actions brought under section 516A(a)(2)(B)(i) of the Tariff Act of 1930 (the "Tariff Act"), 19 U.S.C. § 1516a(a)(2)(B)(i).[4] Where, as here, an action is brought under 19 U.S.C. § 1516a(a)(2) seeking review of a final determination of the Commission reached under 19 U.S.C. § 1671d, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. Plaintiff's Claims in this Litigation

In its countervailing duty investigation of hot-rolled steel from Turkey, the ITC made two related negligibility determinations, each of which is the basis for a claim Nucor asserts in this litigation.

1. Nucor's Claim under 19 U.S.C. § 1677(24)(A)(i) ("Clause (i)")

The ITC determined that the subsidized imports of hot-rolled steel from Turkey were "negligible" within the meaning of 19 U.S.C. § 1677(24)(A)(i) ("clause (i)"). Imports are negligible under clause (i) if they "account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes . . . the filing of the petition."[5] *Id.* The Commission found, first, that the volume of imports of Turkish hot-rolled steel that were subsidized by the government of Turkey was less than 3% of the volume of all hot-rolled steel imported into the United States during the relevant period (which the ITC determined to be August 1, 2014 to July 31, 2015). *Views of the Commission* at 12–13. The Commission reached that finding following the determination by Commerce of a *de minimis* final subsidy rate for the hot-rolled steel produced and exported to the

[4] Citations to the Tariff Act of 1930 in this Opinion are to the relevant portions of Title 19 of the U.S. Code, 2012 edition.

[5] The general definition of "negligible" is subject to an exception set forth in clause (ii) of 19 U.S.C. § 1677(24)(A), under which "[i]mports that would otherwise be negligible under clause (i) shall not be negligible if the aggregate volume of imports of the merchandise from all countries described in clause (i) with respect to which investigations were initiated on the same day exceeds 7 percent of the volume of all such merchandise imported into the United States during the applicable 12-month period." 19 U.S.C. § 1677(24)(A)(ii) ("clause (ii)"). Nucor does not assert a claim as to clause (ii).

United States by one of the Turkish producer/exporters subject to the Department's countervailing duty investigation, Colakoglu Dis Ticaret A.S. ("Colakoglu"). *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Turkey*, 81 Fed. Reg. 53,433, 53,434 (Int'l Trade Admin. Aug. 12, 2016).

Nucor does not contest the ITC's finding that the volume of Turkish hot-rolled steel imports Commerce found to have been subsidized was less than 3% of the total import volume of hot-rolled steel imported into the United States during the relevant period. Instead, Nucor claims that the ITC misinterpreted the statute in making the negligibility determination under clause (i) according to that finding. In support of this claim, Nucor argues that the statute required the ITC to base the negligibility calculation on the volume of all of the Turkish imports originally subject to the countervailing duty investigation, not merely those Commerce later found to be subsidized. Nucor argues in the alternative that the statute required the Commission to make the negligibility calculation under clause (i) by including not only the volume of imports Commerce found to be subsidized, but also the volume of imports Commerce found to be dumped in the parallel antidumping duty investigation of hot-rolled steel from Turkey. According to Nucor, had the ITC correctly applied the negligibility provision in clause (i) according to either of these methods, it would have had to find the import volume to be 7.4% of the volume of total imports of hot-rolled steel from Turkey during the relevant period, well exceeding the threshold for non-negligibility.

2. Nucor's Claim under 19 U.S.C. § 1677(24)(A)(iv) ("Clause (iv)")

Nucor's second claim is in the alternative as to its first claim. Nucor claims that, even if the ITC were correct in its negligibility determination under clause (i), it erred in failing to apply an exception to negligibility provided for under 19 U.S.C. § 1677(24)(A)(iv) ("clause (iv)"). According to clause (iv), the Commission, for purposes of determining threat of material injury, "shall not treat imports as negligible if it determines that there is a potential that imports from a country described in clause (i) will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States . . . ." *Id.* Nucor claims that the ITC's finding that there was no such potential was unsupported by substantial evidence on the record.

Having determined under clause (i) that subsidized imports of hot-rolled steel from Turkey were negligible and having further determined under clause (iv) that there was not a potential that

subsidized hot-rolled steel imports from Turkey would imminently exceed the 3% threshold for threat, the Commission terminated the countervailing duty investigation. *Views of the Commission* at 12–14.

C. The Commission Did Not Misinterpret the Tariff Act when Making Its Negligibility Determination under Clause (i)

If Commerce reaches final affirmative determinations of subsidization and dumping in parallel investigations on imports of merchandise from the same country, the ITC is required by the Tariff Act to make separate final determinations as to whether an industry (or industries) in the United States is materially injured, or threatened with material injury, by reason of imports that are subsidized and by reason of imports that are sold (or likely to be sold) in the United States at less than fair value, i.e., imports that are dumped.[6] *See* 19 U.S.C. §§ 1671d(b)(1) (final determination by the ITC of injury or threat by reason of imports found by Commerce to be subsidized), 1673d(b)(1) (final determination by the ITC of injury or threat by reason of imports found by Commerce to be dumped). The Tariff Act provides separate procedures for initiating and conducting each type of investigation. *See, e.g., id.* §§ 1671a (procedures for initiating a countervailing duty investigation), 1673a (procedures for initiating an antidumping duty investigation). In either case, it is Commerce, not the ITC, that determines the "class or kind" of imported merchandise that will be subject to investigation. *See id.*§§ 1671(a)(1) (countervailing duties), 1673(a)(1) (antidumping duties). The element of causation being essential to its statutorily-defined inquiry, the Commission ascertains, in the final phase of one of its investigations, whether a domestic industry (or industries, should it find multiple "domestic like products") is materially injured or threatened with material injury "by reason of" the imports that have been found by Commerce to be unfairly traded, i.e., either subsidized or dumped. *See* 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). Therefore, the ITC does not make its general, final injury or threat determination based on the entire class or kind of merchandise that Commerce originally designated as subject to investigation; instead, it looks to the imports or sales (or likely sales) for importation that are subsidized (in a countervailing duty investigation) or sold at less than fair value (in an antidumping duty investigation).

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[6] The Tariff Act also refers to a final ITC determination of whether "the establishment of an industry in the United States is materially retarded." 19 U.S.C. §§ 1671d(b)(1)(B) (countervailing duties), 1673d(b)(1)(B) (antidumping duties). Material retardation of the establishment of a domestic industry was not at issue in this case.

In its countervailing duty investigation of hot-rolled steel from Turkey, the ITC made its clause (i) negligibility calculation using as the numerator the imports of merchandise that Commerce found to have been subsidized in its final countervailing duty determination. *Views of the Commission* at 13. The Commission excluded the U.S. imports of merchandise exported by Colakoglu because Commerce found these imports to have had a *de minimis* subsidy rate. The ITC explained its method of performing the clause (i) negligibility calculation as follows:

> In Commerce's final countervailing duty determination on hot-rolled steel from Turkey, exports produced by Colakoglu received a *de minimis* subsidy margin. Consequently, imports from Turkey that are subject to the antidumping duty investigation are different from those subject to the countervailing duty investigation. Hot-rolled steel imports from Turkey that are subject to the antidumping duty investigation were 7.4 percent of total imports during this period and therefore were above negligible levels. Subsidized imports from Turkey (excluding exports produced by Colakoglu), however, were * * * percent of total imports during the August 2014 to July 2015 period, and thus fell below the three percent negligibility threshold for the present material injury analysis.

Id. (footnotes omitted) (asterisks indicate omission of confidential information).

1. The Statute Does Not Unambiguously Require the ITC to Base its Clause (i) Negligibility Calculation on the Volume of All Imports from the Named Country that Were Initially Subject to the Investigation

According to the primary argument Nucor makes in support of its first claim, the negligibility calculation under clause (i) differs from the general injury and threat determination made under 19 U.S.C. § 1671(b)(1), which is made on the basis of the *subsidized* merchandise, in that it must be made on the basis of *all* the merchandise originally subject to the ITC's countervailing duty investigation—in this instance, all Turkish imports of hot-rolled steel occurring during the 12-month period identified in clause (i). Relying upon "Step One" of an analysis conducted according to *Chevron U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*"Chevron"*), Pl.'s Br. 9, Nucor argues that "the plain language of the statute" unambiguously requires this result. *Id.* at 12, 14. The court disagrees.

As the Supreme Court instructed in *Chevron*, when "Congress has directly spoken to the precise question at issue" and "the intent of

Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43 (footnote omitted). Stated narrowly and precisely, the first question raised by Nucor's principal statutory construction argument is whether negligibility under clause (i) of 19 U.S.C. § 1677(24)(A), when determined in the final phase of an ITC investigation as required by 19 U.S.C. § 1671d(b)(1), is required by the plain statutory language to be calculated on the basis of all imports originally within the scope of the investigation.

The statute, in 19 U.S.C. § 1671d(b)(1), reads in pertinent part as follows:

> The Commission shall make a final determination of whether . . . an industry in the United States . . . is materially injured, or . . . is threatened with material injury . . . by reason of imports . . . of the merchandise *with respect to which the administering authority* [i.e., Commerce] *has made an affirmative determination under subsection (a) of this section*. If the Commission determines that imports *of the subject merchandise* are negligible, the investigation shall be terminated.

19 U.S.C. § 1671d(b)(1) (emphasis added). The first sentence in the provision contains a reference to the imports Commerce found to be subsidized in the completed final phase of the Department's countervailing duty investigation that precedes (and is the basis of) the final ITC determination.[7] *See* 19 U.S.C. § 1671d(a). The second sentence does not use the same language as the first sentence in describing the imports upon which the ITC is to make its negligibility determination under clause (i) of 19 U.S.C. § 1677(24)(A). Were the court to accept Nucor's plain meaning argument, it would have to conclude that the term "imports of the subject merchandise," as used in the second sentence, does not refer to the imports identified in the first sentence and instead is an unambiguous reference to all merchandise originally subject to the countervailing duty investigation. In support of this argument, Nucor cites the statutory definition of the term "[n]egligible imports," which is "imports from a country of merchandise *corresponding to a domestic like product identified by the Commission*" that "account for less than 3 percent of the volume of all such merchandise imported into the United States . . . ." 19 U.S.C. § 1677(24)(A)(i) (emphasis added). Nucor also cites the statutory definition of "subject merchandise," which is "the class or kind of

[7] If Commerce, in the final phase of its countervailing duty investigation, finds that a countervailable subsidy is not being provided with respect to the subject merchandise, it terminates the investigation, and as a result the ITC does not make a final injury or threat determination. 19 U.S.C. § 1671d(c)(2).

merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title [now repealed], or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25).

The court cannot conclude that the second sentence in 19 U.S.C. § 1671d(b)(1) necessarily must be read to apply to a broader category of merchandise than the merchandise described in the first sentence, which is merchandise Commerce has determined to be subsidized.[8] The definition in 19 U.S.C. § 1677(24) of "[n]egligible imports" applies not only to the question of whether "imports of the subject merchandise are negligible" under § 1671d(b)(1); it also applies to the question of whether "imports of the subject merchandise are negligible" under § 1671b(a)(1), which pertains to the ITC's preliminary determination (and which, if negative, results in termination of the investigation). At the time the ITC makes its preliminary determination, Commerce has not yet made any determination (preliminary or final) as to whether the imported merchandise then subject to the investigation is subsidized. Therefore, it is at least plausible that the definition of "negligible imports" in 19 U.S.C. § 1677(24) was written generally so that it could apply both to § 1671b(a)(1) and to § 1671d(b)(1). Nor does the definition of "subject merchandise" in § 1677(25), which is used in the second sentence of § 1671d(b)(1), compel the conclusion that this second sentence refers to all merchandise initially subject to investigation. The § 1677(25) definition is sufficiently broad as to apply to various phases of an investigation or review. *See* 19 U.S.C. § 1677(25) ("the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle . . . or a finding under the Antidumping Act, 1921"). At the time the ITC makes its final injury and threat determination (and, necessarily, its final clause (i) negligibility determination), Commerce already has made its subsidy determination. Moreover, merchandise Commerce has determined *not* to be subsidized is merchandise that, at least arguably, is by that time no longer "within the scope of" the investigation.

In summary, the text of the statute does not unambiguously require the ITC to perform its clause (i) negligibility calculation on the basis of all imports subject to the countervailing duty investigation,

[8] In support of the argument it grounds in 19 U.S.C. §§ 1677(24) and 1677(25), Nucor cites *Kyocera Solar, Inc. v. United States Int'l Trade Comm'n*, 844 F.3d. 1334, 1339–40 (Fed. Cir. 2016). In contrast to this case, *Kyocera* involved the issue of whether the ITC must conduct two separate, country-specific negligibility analyses when the subject merchandise is further processed in, and imported from, a country other than the named country.

whether subsidized or not. The court, therefore, rejects Nucor's *Chevron* Step One argument. Moreover, as the court discusses in the next section of this Opinion, an analysis performed under Step One of *Chevron* compels a conclusion directly contrary to that advocated by Nucor.

2. Congress Intended that the ITC Would Not *Base Its Clause (i) Negligibility Determination on the Volume of All Imports from the Named Country that Initially Were Subject to the Investigation*

As an alternative to the *Chevron* Step One argument the court rejected above, Nucor makes a *Chevron* Step Two argument. Under Step Two of a *Chevron* analysis, a court will defer to an agency's reasonable interpretation of a statute the agency is charged by law to administer, even if the court might prefer a contrary interpretation. *Chevron*, 467 U.S at 843 & n.11.

Nucor argues that "[e]ven if the language of the statute was [*sic*] ambiguous under *Chevron* Step One, the interpretation offered by the Commission must fail" as unreasonable, as not "permissible under the terms adopted by the statute," and as "arbitrary and capricious." Pl.'s Br. 19 (internal citation omitted). This argument is refuted by the congressional intent underlying the negligibility provisions in the statute, as shown by the relevant legislative history. While both the ITC's interpretation and Nucor's interpretation could be plausible constructions of the statutory language, only the ITC's interpretation accords with the congressional intent. Under *Chevron* Step One, a court employs "the traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9. Those tools include an examination of not only the statutory text and structure but also the legislative history. *See, e.g., Aqua Products, Inc. v. Matal*, 872 F.3d 1290, 1296, 1303, 1312–14 (Fed. Cir. 2017) (*en banc); Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) ("We may find Congress has expressed unambiguous intent by examining the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.") (internal quotation marks and citations omitted); *Kyocera Solar, Inc. v. U.S. Int'l Trade Comm'n*, 844 F.3d 1334, 1338 (Fed. Cir. 2016). Because Step One of a proper *Chevron* analysis resolves the question presented, the court does not proceed to *Chevron* Step Two.

The "negligibility" provisions of the countervailing and antidumping duty statute were enacted by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) ("URAA"), to implement the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994" ("Antidumping Agreement").

Id. at § 101(d)(7) (codified at 19 U.S.C. § 2511(d)(7)). The Statement of Administrative Action ("SAA") accompanying the URAA explains that effectuating the negligibility provisions in U.S. law was accomplished by amending the following sections of the Tariff Act: sections 771(24) [19 U.S.C. § 1677(24), the definition of "negligibility"], 703(a) [19 U.S.C. § 1671b(a), negligibility in an ITC preliminary countervailing duty investigation], 705(b)(1), [19 U.S.C. § 1671d(b), negligibility in an ITC final countervailing duty investigation], 733(a) [19 U.S.C. § 1673b(a), negligibility in an ITC preliminary antidumping duty investigation], and 735(b)(1) [19 U.S.C. § 1673d(b), negligibility in an ITC final antidumping duty investigation]. *Uruguay Round Agreements Act: Statement of Administrative Action*, H.R. Doc. No. 103–316, vol. 1 at 855 (1994) (*"SAA"), reprinted in* 1994 U.S.C.C.A.N. 4040, 4187–88.

The SAA states that "[t]he Agreements require termination of investigations if the investigating authority determines that the volume of *dumped* or *subsidized* imports is negligible." *Id.* (emphasis added). In this way, the SAA reveals the purpose of the new provisions, which was to implement a requirement to which the United States agreed in international negotiations. Nucor's primary statutory construction argument—that the ITC is required by the statute to base its clause (i) negligibility calculation on the volume of all imports of merchandise originally subject to the countervailing duty investigation—is contradicted by this statement of congressional purpose. Further, Article 5.8 of the Anti-dumping Agreement reached in the Uruguay Round negotiations provides that "[t]here shall be immediate termination in cases where . . . the volume of *dumped* imports, actual or potential, or the injury, is negligible" and that "[t]he volume of *dumped* imports shall normally be regarded as negligible if the volume of *dumped* imports from a particular country is found to account for less than 3 per cent of the imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member." Anti-dumping Agreement, Art. 5.8 (emphasis added). Although there is no parallel provision in the Uruguay Round agreement on subsidies, the SAA mentions that "the 'three percent' definition of negligible imports appears only in the Antidumping Agreement" but clarifies that as effected in U.S. law, "the definition of negligible imports in new section 771(24) [19 U.S.C. § 1677(24)] will be applicable to both antidumping and countervailing duty investigations." *SAA* at 855,

reprinted in 1994 U.S.C.C.A.N. 4040, 4188. Other legislative history of the URAA is consistent with the SAA in explaining that the clause (i) negligibility analysis is performed on the basis of the volume of dumped or subsidized imports. Report of the House Committee on Ways and Means to Accompany H.R. 5110, Rep. No. 103–826 (1994) at 71 ("House Report").

In summary, Congress did not intend for the ITC to perform its clause (i) negligibility calculation on the basis of all imports from the named country that initially were subject to the countervailing duty investigation.

3. The Statute Does Not Allow the ITC to Base the Clause (i) Negligibility Calculation on the Volume of All Unfairly Traded Imports from the Named Country

Nucor's next argument, which the court addresses as an argument in the alternative,[9] is that even were the statute construed not to require the ITC to base the clause (i) negligibility calculation on all imports from the named country originally subject to the countervailing duty investigation, the ITC still must be held to have acted contrary to law in basing that calculation only on the subsidized imports rather than on all Turkish imports found by Commerce to have been unfairly traded, i.e., either dumped or subsidized, in the parallel CVD and AD investigations. Pl.'s Br. 14 (arguing that "[i]n no uncertain terms, the statute requires the Commission to consider all in-scope, unfairly traded merchandise in its negligibility analysis" and that "[t]here is no basis under the statute for the Commission's separate AD and CVD negligibility analysis, nor for the exclusion of Colakoglu's imports."). Because the volume of Turkish imports Commerce determined to be dumped amounted to 7.4% of the total volume of U.S. imports from all countries, the ITC did not terminate the parallel antidumping duty investigation of hot-rolled steel from Turkey on the basis of negligible imports. The alternate construction of the statute Nucor urges upon the court would preclude the Commission's termination of the countervailing duty investigation as well, based on the volume of imports Commerce found to have been dumped.

[9] In its Rule 56.2 brief, Nucor conflated what are essentially two separate statutory construction arguments. In response to the court's observation at oral argument that Nucor appeared to be making two arguments in the guise of one, Nucor indicated that the court should review its argument that ITC should have combined all unfairly traded, i.e., the dumped and the subsidized, import volumes as an alternative to its argument that the statute required negligibility to be determined on the basis of all merchandise originally subject to investigation, whether or not found to be unfairly traded. Oral Argument (Jan. 18, 2018), ECF No. 70.

In support of its alternate statutory construction argument, Nucor again points to 19 U.S.C. § 1677(24), which provides that "imports from a country of merchandise *corresponding to a domestic like product identified by the Commission* are 'negligible' if such imports account for less than 3 percent of the volume of all such merchandise imported into the United States" in the relevant 12-month period. 19 U.S.C. § 1677(24)(A)(i) (emphasis added). According to Nucor, "[t]his plain language thus requires the Commission to analyze all unfairly traded merchandise in determining whether the imports in question are negligible." Pl.'s Br. 14.

Nucor's alternate argument does not withstand scrutiny upon examination of the statutory language and structure. The congressional directive is that "[i]f the Commission determines that imports of the subject merchandise are negligible, *the* investigation shall be terminated." 19 U.S.C. § 1671d(b)(1) (emphasis added). The directive of § 1671d(b)(1) pertains solely to a countervailing duty investigation that is initiated according to § 1671a ("Procedures for initiating a countervailing duty investigation") and that was continued upon an affirmative determination by the Commission under § 1671b(a). Nucor's construction of § 1671d(b) awkwardly would read the term "subject merchandise" to refer to merchandise beyond the merchandise that is "subject" to the investigation being considered for termination. It would do this even though § 1671d(b)(1) makes no mention of a parallel antidumping duty investigation (which is initiated under 19 U.S.C. § 1673a ("Procedures for initiating an antidumping duty investigation")). Nor is there any such reference elsewhere within § 1671d or in § 1671b. The statute provides separate procedures for CVD investigations (in Part I of Subtitle IV of the Tariff Act) and for AD investigations (in Part II of Subtitle IV) and does not provide for anything that could be termed a "countervailing and antidumping duty investigation."

Nucor's reliance on 19 U.S.C. § 1677(24), the definitional provision for "negligible imports," which applies to both the CVD investigations of Part I and the AD investigations of Part II, is misplaced. As the court discussed previously in this Opinion, the breadth of the definition in § 1677(24)(A) allows the definition to apply flexibly to various provisions in the statute. It applies not only to the ITC's final determinations in countervailing or antidumping duty investigations, but also to the ITC's preliminary determination in a countervailing duty investigation (19 U.S.C. § 1671b(a)(1)) and to its preliminary determination in an antidumping duty investigation (19 U.S.C. § 1673b(a)(1)). In both of the latter instances, Commerce has not yet made a final determination on whether the imports subject to the

investigation are unfairly traded, i.e., subsidized or dumped, respectively. Procedurally, Commerce provided for separate ITC negligibility determinations in each of the four provisions implicating the definition of "negligible imports," calling for distinct CVD and AD negligibility determinations at both the preliminary and final stages of the investigation.

Moreover, Nucor's alternate statutory construction argument is difficult to reconcile with subpart (B) of § 1677(24), in which Commerce provided for a different method of determining negligibility under clause (i) in a countervailing duty investigation than it did for an antidumping duty investigation. In CVD investigations, but not AD investigations, the clause (i) negligibility threshold is "less than 3 percent" in the ordinary instance, § 1677(24)(A)(i), but is modified to less than "4 percent" by operation of subpart (B) when the "subject merchandise" is from "developing countries." § 1677(24)(B). Congress was specific in applying the latter "[i]n the case of an investigation under section 1671 of this title," i.e., a countervailing duty investigation, and made no parallel provision applicable to antidumping duty investigations under section 1673. Subpart B of § 1677(24) uses the term "subject merchandise" in a way that must be read to refer solely to the merchandise that is subject to the particular countervailing duty investigation, not a related antidumping investigation.

The legislative history is also contrary to Nucor's interpretation. The SAA states that "[t]he Agreements require termination of investigations if the investigating authority determines that the volume of dumped *or* subsidized imports is negligible." *SAA* at 855, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4187 (emphasis added); *see also* House Report at 71 ("Article 5.8 requires termination of investigations if the investigating authority determines that the volume of dumped *or* subsidized imports is negligible.") (emphasis added). A reading of "or" to mean "and" would be a strained interpretation, at the least. Article 5.8 of the Anti-dumping Agreement, which the court discussed previously, shows that such an interpretation could not have been intended. Article 5.8 provides unambiguously that "[t]here shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible." Antidumping Agreement, Art. 5.8. Nucor's interpretation of the statute to require the result it seeks in this case, continuation of the countervailing duty investigation despite negligible subsidized imports, necessarily also would require the ITC to refrain from terminating an antidumping duty investigation in a case in which the volume of dumped imports is negligible, so long as the volume of subsidized

imports in a parallel countervailing duty investigation is not negligible. Such a result would contravene the plain meaning and purpose of Article 5.8, the provision in the Anti-dumping Agreement the URAA was implementing.

Nucor raises various additional arguments in an attempt to demonstrate that the ITC's separate negligibility determination in the CVD investigation of hot-rolled Turkish steel was unlawful. The court is not persuaded by these arguments.

Nucor alludes to "the Tariff Act's purpose and policy goals," Pl.'s Br. 16–21, supporting its argument with a discussion of the purposes of the cumulation provisions in the statute and of the legislative history of the negligibility exception to cumulation that existed in the statute prior to the amendment by the URAA. *Id.* at 17–18. Nucor fails to show any relevance of those previous negligibility provisions to the issue Nucor raises as to current law.

Nucor also argues that in the past the Commission has combined subsidized and dumped imports in performing the negligibility calculation under clause (i) and that, accordingly, the court should not accord the ITC's interpretation *Chevron* deference. *Id.* at 21–25. The ITC's applications of the negligibility provisions in past investigations, whether or not inconsistent with its decision in this case, do not change the court's conclusion. As discussed above, Congress intended for the ITC to make the clause (i) negligibility determination individually in a countervailing duty investigation, on the basis of the imports Commerce found to be subsidized. The court, therefore, rejects both of Nucor's statutory construction arguments and sustains according to Step One of a *Chevron* analysis the ITC's interpretation of the statute, under which ITC conducts separate negligibility determinations in the case of parallel CVD and AD investigations, as it did in the parallel investigations of hot-rolled steel from Turkey. The question of whether the Commission's statutory interpretation is to be accorded deference under Step Two of a *Chevron* analysis does not arise.

4. The Court Declines to Remand the Final Determination for Additional Explanation of the Commission's Statutory Construction of the Clause (i) Negligibility Provision

Nucor argues that the Commission's clause (i) negligibility determination must be set aside because the Commission failed to respond to arguments made before it on the correct interpretation of the negligibility provision. Pl.'s Br. 25. Specifically, Nucor directs the court's attention to an argument ArcelorMittal USA LLC and AK Steel Corporation made during the agency proceeding: "The relevant

statute provides that the Commission should consider 'imports from a country of merchandise corresponding to a domestic like product' in calculating negligibility . . . . This language plainly covers all subject imports, whether dumped or subsidized." *Id.* (quoting AK Steel Corporation's Post-Hearing Brief (P.R. Doc. 404) at 14, n.70 and citing ArcelorMittal USA LLC's Post-Hearing Br. (P.R. Doc. 394) at 14 and AK Steel Corporation's Final Comments (P.R. Doc. 446) at 14–15).

In Nucor's view, the ITC violated the statutory requirement "to include in its final determination 'an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation . . . concerning volume, price effects, and impact on the industry of imports of the subject merchandise'—issues to which the negligibility analysis pertains directly." Pl.'s Br. 25 (quoting 19 U.S.C. § 1677f(i)(3)(B)). Because it includes a reference to "volume . . . of imports," 19 U.S.C. § 1677f(i)(3)(B) plausibly can be construed to apply to the argument Nucor quotes. Therefore, in considering Nucor's argument the court presumes, without deciding, that § 1677f(i)(3)(B) applies in the situation presented. The ITC addressed the argument in question in a footnote, which in pertinent part reads as follows:

> Domestic producers recognize that Commerce issued a *de minimis* final subsidy margin for Turkish producer Colakoglu but argue that Turkish imports are above the three percent threshold and thus are not negligible. . . . ArcelorMittal also urges the Commission to "follow its practice in *Certain Oil Country Tubular Goods from India, et al.*, where it made a single negligibility calculation for Turkey using the total volume of imports from the country – and not separate AD and CVD negligibility calculations – though one Turkish producer received a zero margin in the AD case." ArcelorMittal Posthearing Brief at 14 n.13. The Commission's opinion in that case, however, did not purport to address that issue.

Views of the Commission at 13 n.52. Nucor is correct that the ITC did not provide the reasoning underlying its statutory construction of the clause (i) negligibility provision that it has presented before the court. Nevertheless, the court disagrees with Nucor's argument that the negligibility determination under clause (i) must be set aside for lack of an adequate explanation and remanded to the Commission.

ArcelorMittal and AK Steel raised the statutory construction argument during the ITC investigation in only a cursory way, alluding in one sentence to a single phrase within 19 U.S.C. § 1677(24) without providing an analysis of that provision or how it relates to other statutory provisions to compel their conclusion that the ITC misin-

terpreted the statute. It is fair to say that the statutory construction arguments Nucor makes to the court were not fully presented below for purposes of satisfying the requirement to exhaust administrative remedies. *See* 28 U.S.C. § 2637(d) (directing the Court to require the exhaustion of administrative remedies, where appropriate). On the other hand, the Commission's cursory dismissal of the argument made before it arguably did not fulfill the requirement in 19 U.S.C. § 1677f(i)(3)(B) because it failed to raise the defense, i.e., the statutory interpretation, that the Commission advocates before the court.

Even though the Commission's decision failed to develop fully and explain the Commission's position on the statutory interpretation issue involving clause (i), the court sees no purpose that would be served by remanding that decision to the Commission for a redetermination or a further explanation. Although neither the domestic producers nor the defendant ITC fully developed their respective positions on this issue (which is a pure question of law) during the Commission's investigation, both sides have taken the full opportunity to present their arguments in their submissions to the court in this proceeding.

D. The Commission's Determination that Imports of Subsidized Hot-Rolled Steel from Turkey Were Unlikely to Imminently Exceed the 3% Statutory Threshold is Supported by Substantial Evidence on the Record

1. The Exception to Negligibility under 19 U.S.C. § 1677(24)(A)(iv) ("Clause (iv)")

Clause (iv) of 19 U.S.C. § 1677(24)(A) creates an exception to negligibility under clause (i), as follows:

> [T]he Commission shall not treat imports as negligible if it determines that there is a potential that imports from a country described in clause (i) will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States, or that the aggregate volumes of imports from all countries described in clause (ii) will imminently exceed 7 percent of the volume of all such merchandise imported into the United States. The Commission shall consider such imports only for purposes of determining threat of material injury.

19 U.S.C. § 1677(24)(A)(iv). Nucor claims that the Commission's finding under clause (iv), that there was no potential that imports of subsidized hot-rolled steel from Turkey would imminently exceed 3% of total U.S. imports, was unsupported by substantial evidence and

otherwise not in accordance with law. Pl.'s Br. 27 (citing *Views of the Commission* at 13–14).

2. The Commission's Negative Clause (iv) Determination

The Commission summarized its negative clause (iv) determination as follows:

> We find that the sporadic pattern of imports from the Turkish producers subject to the countervailing duty investigation, combined with their consistently relatively small share of total Turkish hot-rolled steel imports, increasing capacity utilization, and strong home-market orientation, demonstrate that any sustained increase in the percentage of subsidized subject imports from Turkey relative to all imports is unlikely. Therefore, the record supports a conclusion that there is not a potential that subsidized subject imports from Turkey will imminently exceed three percent of total imports.

Views of the Commission at 14.

3. Nucor's Arguments Challenging the ITC's Negative Clause (iv) Determination

In contesting the Commission's clause (iv) determination, Nucor argues that "[t]he Commission based its determination on flawed factual considerations, and it insufficiently addressed significant evidence on the record indicating that these Turkish imports were likely to imminently exceed the negligibility threshold." Pl.'s Br. 2–3. Specifically, Nucor summarizes its arguments by asserting, first, that "[t]he Commission's finding that these Turkish imports were 'sporadic' was not supported by the record, which showed significant volumes of such imports in increasing amounts, both absolutely and as a share of total hot-rolled steel imports." Pl.'s Br. 3. Second, Nucor argues that "[t]he Commission's assertion that non-Colakoglu Turkish imports show a 'strong home-market orientation' is similarly unsupported and fails to account for substantial contradictory evidence showing the export-oriented nature of Turkish producers." *Id.* Third, Nucor argues that "the Commission impermissibly ignored increases in inventories of hot-rolled steel in the Turkish industry excluding Colakoglu in reaching its determination." *Id.* The court rejects these arguments, as discussed below.

4. Substantial Record Evidence Supported the ITC's Finding of "Sporadic" Imports

The Commission expressed its finding that the subsidized imports of hot-rolled steel from Turkey were "sporadic" as follows: "On a monthly basis the volume of subject imports from Turkey subject to the countervailing duty investigation as well as their percentage of total imports were sporadic, including in the period prior to the filing of the petition." *Views of the Commission* at 13 (footnotes omitted). In support, the Commission referred specifically to "Table H-1," Consolidated Final Staff Report to the Commission, *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, Inv. Nos. 701-TA-545–547 and 731-TA-1291–1297 (Final) (Sept. 28, 2016) (C.R. Doc. 604) ("Staff Report") at H-3, which presents monthly data on the share that subsidized Turkish imports occupied of total U.S. imports.[10] *See also Views of the Commission* at 13–14 n.54.

Discussing Table H-1, Nucor argues that "[t]he volumes of relevant Turkish imports, both on an absolute basis and as a share of total U.S. hot-rolled steel imports . . . contradict the Commission's conclusion that such imports were 'sporadic.'" Pl.'s Br. 28. Rather than being "sporadic," Nucor claims that "hot-rolled steel imports from Turkey, excluding those from Colakoglu, were significant and substantially increasing during the POI." *Id*. The court disagrees. Table H-1 supports the Commission's characterization of the subsidized imports from Turkey as sporadic. Import volumes are shown for 39 months (all 12 months of 2013, 2014 and 2015, and the first three months of 2016). For 27 or 28 of the 39 months shown in Table H-1, the monthly import volumes of subsidized Turkish imports, as a percentage of the volume of total U.S. imports of hot-rolled steel, can be fairly described as miniscule. While volumes of subject Turkish imports as shown in Table H-1 were relatively higher during some periods, it would not be accurate to assert that they were *consistently* significant. Similarly, while the data in Table H-1 (and in the related Table H-2, Staff Report at H-4) show an increase in subject Turkish imports during the POI, the court is not persuaded by Nucor's characterization of the increase as "substantial."

An analysis of the monthly volume data, shown in Table H-2, demonstrates that for moving 12-month periods over the course of the period of investigation, the average annual volume of the subsidized

[10] Table H-1 presents data designated by the Commission as confidential. Because citing the specific data in this table and other confidential data in the record is not necessary to a public explanation of the court's conclusions, the court limits its discussion to general summaries of, and trends shown by, the data rather than specific items of data.

Turkish imports did not reach, or even come very close to reaching, the clause (iv) threshold of 3% of total U.S. imports of hot-rolled steel. *See* Table H-2, Staff Report at H-4. Moreover, as the ITC points out before the court, "the simple fact is that the statute requires that the share will imminently exceed three percent, not that it will 'nearly reach' this threshold." Def.'s Opp'n to Pl.'s Mot. for J. on the Agency Record, 31 (July 13, 2017), ECF No. 52 ("Def.'s Br."). In summary, the data set forth in Tables H-1 and H-2 demonstrate that the Commission's finding that subsidized Turkish imports were "sporadic" during the POI is supported by substantial evidence based on the record as a whole. The Commission reasonably concluded that these data supported the ultimate finding that "any sustained increase in the percentage of subsidized subject imports from Turkey relative to all imports is unlikely." *Views of the Commission* at 14.

Nucor's argument that the ITC's "sporadic" finding ignored evidence that "[h]ot-rolled steel imports from Turkey, excluding those from Colakoglu, were significant and substantially increasing during the POI," Pl.'s Br. 28, is also unavailing. Citing Table H-3, Staff Report at H-5, which was compiled from the questionnaire data of the Turkish producers, Nucor selectively focuses its attention on certain isolated record data showing a large percentage increase in the subsidized exports to the United States from Turkey from 2013 to 2015. Pl.'s Br. 33. Nucor also selectively points to significant increases in subsidized imports to the U.S. during particular subsets of the relevant 12-month period, drawing data from Tables H-1 and H-2, Staff Report at H-3 and H-4, respectively. *See* Pl.'s Br. 30–32. Nucor claims these increases are "persuasive evidence that these imports would imminently exceed the 3-percent threshold." *Id.* 32–33 (internal citation omitted). The increases Nucor mentions, however, are from very small bases. Increases from such insubstantial bases are minimally probative when viewed in the context of all the data presented in Tables H-1, H-2, and H-3, which amply support the ITC's finding that "the record supports a conclusion that there is not a potential that subsidized subject imports from Turkey will imminently exceed three percent of total imports." *Views of the Commission* at 14.

5. The ITC Permissibly Found that Turkish Producers Other than Colakoglu Had a "Strong Home Market Orientation"

The ITC concluded from record data that the shipments of the Turkish hot-rolled steel producers subject to the CVD investigation (i.e., those other than Colakoglu) "were overwhelmingly to the home market" and had a "strong home-market orientation." *Views of the Commission* at 14 (footnote omitted). While disputing the characterization of a "strong home-market orientation," Nucor does not cite

evidence rebutting the specific finding that subsidized Turkish hot-rolled steel shipments were "overwhelmingly" to the domestic Turkish market, a finding the record data, compiled from questionnaires of the Turkish producers, entirely supports. *See* Table H-3, Staff Report at H-5.

In contesting the finding of a "strong home-market orientation," Nucor argues that the Commission ignored relevant evidence, including evidence that "the percentage of relevant shipments that were sold in the home market actually *decreased* slightly over the relevant period." Pl.'s Br. 33. The slight decrease does not detract in any meaningful way from the finding that the shipments in question went overwhelmingly to the domestic market. Also, according to Nucor there is "comprehensive evidence showing that Turkish exports are focused on the United States as a top destination market." Pl. Nucor Corporation and Pl.-Intervenors ArcelorMittal USA LLC, AK Steel Corporation, and United States Steel Corporation's Reply Brief, 21 (Aug. 11, 2017), ECF Nos. 57 (confidential), 58 (public) ("Pl.'s Reply Br."). Nucor asserts that "the United States is one of the most attractively priced markets for Turkish imports" and that "Turkish producers have been increasingly affected by difficult home market conditions and third-country trade barriers." *Id.* (internal citation omitted). These subjective characterizations of the record do not refute the conclusions the ITC drew from the quantitative record evidence. Also, Nucor alludes to data on hot-rolled steel exports to the United States that include exports by Colakoglu, Pl.'s Br. 34–35, which Commerce found not to be subsidized. In summary, all of these arguments are unavailing: the producers' questionnaire data summarized in Table H-3 amply demonstrate not only that the Turkish exporters subject to the CVD investigation produced predominantly for the home market but also that the relatively small portion of their production they did export went predominantly to export markets other than the United States during the POI. Based on the court's review, the Commission's finding of a "strong home-market orientation" is well supported by substantial evidence both in the Table H-3 data and the record as a whole.

6. Nucor's Argument that the ITC Disregarded Inventory Data

Nucor argues that "[d]espite its statement that it typically examines inventories in its 'imminently exceed' analysis . . . the Commission entirely disregarded the absolute and relative increases in inventories of Turkish hot-rolled steel excluding Colakoglu's products

from 2013 to 2015." Pl.'s Br. 38 (citing *Views of the Commission* at 13 n.53 and Table H-3, Staff Report at H-5.).[11] Nucor submits that the ITC's failure to consider the inventories as a factor, in combination with other shortcomings it alleges, renders the Commission's clause (iv) determination unsupported by substantial evidence. *Id.* at 38–39. This argument is meritless.

Table H-3, Staff Report at H-5, presents end-of-year inventory data of the Turkish producers other than Colakoglu for 2013, 2014, and 2015 and end-of quarter inventories for the first quarters of 2015 and 2016, i.e., January to March, based on data submitted in response to the Commission's questionnaires. The Table H-3 data show that total inventories decreased, then increased, then decreased, from year-end 2013 through March 2016. The quantity of total inventories at the end of that two-year-plus-one-quarter period did not vary significantly from the total inventories at the beginning of the period. And as the Commission pointed out in its response brief to the court, "the combined subject Turkish producers' reported end-of-period inventory levels as a share of production and as a share of total shipments were relatively low, fluctuating within a fairly narrow band . . . during the period of investigation." Def.'s Br. 35 (citing Table H-3, Staff Report at H-5).

The court cannot conclude that the Commission "disregarded" the inventory data in the Staff Report. To the contrary, it is understandable why the Commission did not see a need to mention the inventory data in *Views of the Commission*: even if viewed in isolation, these inventory data would not support a finding that the volume of subsidized imports have the potential imminently to account for more than 3% of the volume of all U.S. hot-rolled steel imports. This is all the more apparent when the inventory data are viewed in the context of the record data showing that the production of the Turkish producers other than Colakoglu went predominantly to the domestic market and the data showing that their export shipments went predominantly to markets other than the United States.

7. Nucor's Remaining Argument Lacks Merit

While not specifically including it in the summary of its arguments, Pl.'s Br. 3, Nucor adds an argument in the body of its brief. The court rejects this argument for the reasons that follow.

Nucor objects to the ITC's finding that subsidized Turkish imports constituted "a relatively small share of total Turkish exports to the U.S. market from 2013 to 2015." *Views of the Commission* at 14

[11] The brief actually cites the Staff Report "at H-5 (Table H-5)." *Id.* Because there is no "Table H-5" on the record, and because Table H-3 appears on page H-5 of the Staff Report, the court construes the citation to be to Table H-3.

(footnote omitted); *see also* Pl.'s Br. 29. Plaintiff claims this conclusion is "erroneous," Pl.'s Br. 29, and argues that, in any case, "the Commission's focus on the size of the share of non-Colakoglu [i.e. subsidized] imports compared to total Turkish imports was arbitrary and misplaced." *Id.* 30. This argument is unpersuasive.

Nucor is correct that 19 U.S.C. § 1677(24)(A)(iv) bases its negligibility analysis on whether "there is a potential that imports from a country described in clause (i) [i.e., 'imports from a country of merchandise corresponding to a domestic like product'] . . . will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States." That does not mean that it was "arbitrary" or "misplaced" for the ITC to address additional evidence regarding subsidized Turkish imports among its various findings. Nor was it "erroneous," on that evidence, for the Commission to find that the share of subsidized Turkish imports as a percentage of total Turkish imports into the U.S. was "relatively small," *Views of the Commission* at 14. *See* Tables VII-25 and H-1, Staff Report at VII-39 and H-3, respectively. Based on the court's review, substantial record evidence supports this finding. The court, therefore, determines that the Commission permissibly considered trends in subsidized Turkish imports as a percentage of total Turkish imports into the United States.

III. CONCLUSION

The court holds that the ITC did not misinterpret the statutory provisions governing the negligibility determination under clause (i) of 19 U.S.C. § 1677(24)(A). The court also holds that substantial evidence supports the factual findings Nucor challenged in contesting the Commission's negative threat determination under clause (iv) of that provision. Because the Commission correctly construed the statute in determining that subsidized Turkish imports of hot-rolled steel were negligible under clause (i) and permissibly found that the exception to negligibility in clause (iv) did not apply, the court sustains the Commission's termination of the countervailing duty investigation of hot-rolled steel from Turkey. The court, therefore, will deny Nucor's motion for judgment on the agency record and, pursuant to USCIT Rule 56.2, will enter judgment for defendant.

Dated: February 28, 2018
New York, New York

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

Slip Op. 18–18

POSCO et al., Plaintiffs, and AK STEEL CORPORATION, et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00225
PUBLIC VERSION

[Granting in part and denying in part Plaintiff POSCO's motion for judgment upon the agency record; denying Plaintiff Nucor Corporation's motion for judgment upon the agency record.]

Dated: March 8, 2018

Donald B. Cameron and *Brady W. Mills*, Morris Manning & Martin LLP, of Washington, DC, argued for Plaintiff POSCO and Defendant-Intervenors the Government of Korea, POSCO, and Hyundai Steel Company. With them on the brief were *Julie C. Mendoza, R. Will Planert, Mary S. Hodgins, Eugene Degnan, Sarah S. Sprinkle*, and *Henry N. Smith*.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, argued for Plaintiff and Defendant-Intervenor Nucor Corporation. With him on the brief were *Alan H. Price, Tessa V. Capeloto*, and *Adam M. Teslik*.

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Stephen A. Jones and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC, for Plaintiff-Intervenor and Defendant-Intervenor AK Steel Corporation.

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Renée A. Burbank, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Amanda T. Lee*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Barnett, Judge:

In this consolidated action, Plaintiff POSCO ("POSCO"), Plaintiff Nucor Corporation ("Nucor"), and Plaintiff-Intervenors ArcelorMittal USA LLC, AK Steel Corporation, and United States Steel Corporation challenge the final determination of the U.S. Department of Commerce ("Commerce" or the "agency") in its countervailing duty ("CVD") investigation of cold-rolled steel products ("cold-rolled steel") from the Republic of Korea ("Korea"). *See Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 49,943 (Dep't Commerce July 29, 2016) (final aff. determination; 2014) ("*Final Determination*"), ECF No. 41–4, as

amended by *Certain Cold-Rolled Steel Flat Products from Brazil, India, and the Republic of Korea*, 81 Fed. Reg. 64,436 (Dep't Commerce Sept. 20, 2016) (am. final aff. countervailing duty determination and countervailing duty order; 2014) ("*Am. Final Determination*"), ECF No. 41–3, and accompanying Issues and Decision Mem., C-580882 (July 20, 2016) ("I&D Mem."), ECF No. 41–5.[1]

POSCO (a Korean cold-rolled steel producer) challenges Commerce's use of the facts available with an adverse inference (referred to as "adverse facts available" or "AFA") for several reporting errors and its selection and corroboration of adverse facts available rates. *See* Confidential Mot. of Pl. POSCO for J. on the Agency R., ECF No. 53, and Confidential Pl. POSCO's Br. in Supp. of its Mot. for J. on the Agency R. ("POSCO Mot.") at 2–3, ECF No. 59–1. Nucor and Plaintiff-Intervenors (domestic cold-rolled steel producers) (collectively, "Nucor") challenge Commerce's finding that the Government of Korea ("GOK") did not provide electricity for less than adequate remuneration and its decision not to use adverse facts available with respect to the electricity program based on the GOK's questionnaire responses. *See* Confidential Pl. Nucor Corp. and Pl.-Ints. ArcelorMittal USA LLC, AK Steel Corp, and United States Steel Corp.'s Rule 56.2 Mot. for J. on the Agency R. ("Nucor Mot.") at 2–3, ECF No. 56. Defendant United States ("Defendant" or the "Government") supports Commerce's determination. *See generally* Confidential Def.'s Resp. to Pls.' Mots. For J. Upon the Agency R. ("Gov. Resp"), ECF No. 65.[2]

For the following reasons, the court remands Commerce's selection of the highest calculated rate as POSCO's AFA rate and Commerce's selection of an AFA rate that is itself based on adverse facts available. Accordingly, the court grants, in part, POSCO's motion with respect to those issues, and denies the motion in all other respects. The court sustains Commerce's determinations regarding the GOK's provision

[1] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 41–1, and a Confidential Administrative Record ("CR"), ECF No. 41–2. Parties submitted joint appendices containing all record documents cited in their briefs. *See* Public Joint App. ("PJA"), ECF No. 80; Confidential Joint App. ("CJA"), ECF Nos. 77–79; Supplemental Public Joint App., ECF No. 88–1; Supplemental Confidential Joint App., ECF No. 87–1. The court references the confidential versions of the relevant record documents, if applicable, unless otherwise specified.

[2] Court Nos. 16–00225 and 16–00226 were consolidated under lead Court No. 1600225. Order (Jan. 18, 2017), ECF No. 44. Defendant-Intervenors in 16–00225 (AK Steel Corporation, ArcelorMittal USA LLC, Nucor, and United States Steel Corporation (collectively, "Petitioner Defendant-Intervenors")) filed a response to POSCO's motion for judgment on the agency record. *See generally* Confidential Resp. Br. of Def.-Ints. AK Steel Corp., Arcelor Mittal USA LLC, Nucor Corp., and United States Steel Corp. ("Pet'r Def.-Int. Resp."), ECF No. 70. Defendant-Intervenors in Court No. 16–00226 (the GOK, POSCO, and Hyundai Steel Company (collectively, "Respondent Defendant-Intervenors")) filed a response to Nucor's motion for judgment on the agency record. *See generally* Confidential Def.-Ints.' Br. in Opp'n to Pl. and Pl.-Ints.' Mot. for J. on the Agency R. ("Resp't Def.-Int. Resp."), ECF No. 69.

of electricity for not less than adequate remuneration and the adequacy of its questionnaire responses. Accordingly, the court denies Nucor's motion in full.

BACKGROUND

I. Legal Framework

A. Basic CVD Principles

Commerce "impose[s] countervailing duties on merchandise that is produced with the benefit of government subsidies" when the various statutory criteria are met. *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014); *see also* 19 U.S.C. § 1671(a) (2012).[3] Among other things, countervailable subsidies arise "when (1) a foreign government provides a financial contribution (2) to a specific industry and (3) a recipient within the industry receives a benefit as a result of that contribution." *Fine Furniture (Shanghai)*, 748 F.3d at 1369 (citing 19 U.S.C. § 1677(5)(B)). Investigating these factors requires Commerce to obtain information from the foreign government alleged to have provided the subsidy and the producer/respondent that purportedly benefitted from the subsidy. *See Essar Steel Ltd. v. United States*, 34 CIT 1057, 1070, 721 F. Supp. 2d 1285, 1296, (2010), *rev'd on other grounds*, 678 F.3d 1268 (Fed. Cir. 2012). The information Commerce receives is subject to verification. *See* 19 U.S.C. § 1677m(i)(1).

B. Sales for Less than Adequate Remuneration

A countervailable benefit includes the provision of goods or services "for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). The statute directs Commerce to determine the adequacy of remuneration "in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the [subject] country . . . . Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." *Id.*

[3] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the United States Code are to the 2012 edition, unless otherwise stated. *See infra*, note 8 (explaining that references to 19 U.S.C. § 1677e are to the 2015 version of the statute enacted pursuant to The Trade Preferences Extension Act ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015)).

Commerce's regulations prescribe a three-tiered approach for determining the adequacy of remuneration. *See* 19 C.F.R. § 351.511.[4] Commerce first seeks to compare the government price to a market-based price for the good or service under investigation in the country in question (a "Tier 1" analysis). *Id.* § 351.511(a)(2)(i). When an in-country market-based price is unavailable, Commerce will compare the government price to a world market price, when the world market price is available to purchasers in the country in question (a "Tier 2" analysis). *Id.* § 351.511(a)(2)(ii). When, as here, both an in-country market-based price and a world market price are unavailable, Commerce considers "whether the government price is consistent with market principles" (a "Tier 3" analysis). *Id*. § 351.511(a)(2)(iii).

In the Preamble to the final rule implementing Commerce's CVD regulations, Commerce explained that a Tier 3 analysis requires an examination of "such factors as the government's price-setting philosophy,[5] costs (including rates of return sufficient to ensure future operations), or possible price discrimination." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,378 (Dep't Commerce Nov. 25, 1998) ("*CVD Preamble*"). Those factors are not "in any hierarchy," and Commerce "may rely on one or more of these factors in any particular case." *Id.* Commerce recognized that a Tier 3 analysis may be particularly "necessary for such goods or services as electricity, land leases, or water." *Id.* (citing, *inter alia, Pure Magnesium and Alloy Magnesium from Canada*, 57 Fed. Reg. 30,946, 30,954 (Dep't Commerce July 13, 1992) ("*Magnesium from Canada*")).

In *Magnesium from Canada*, Commerce explained that examining the preferential provision of electricity first requires a comparison of "the price charged with the applicable rate on the power company's non-specific rate schedule." 57 Fed. Reg. at 30,949. However, "[i]f the amount of electricity purchased by a company is so great that the rate schedule is not applicable, we will examine whether the price charged is consistent with the power company's standard pricing mechanism

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[4] On December 8, 1994, Congress enacted the Uruguay Round Agreements Act. *See* Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, § 101, 108 Stat. 4814 (codified as 19 U.S.C. § 3511 (1994)). Before passage of the URAA, § 1677 defined "subsidy," *inter alia*, as "[t]he provision of goods or services at preferential rates." *See* 19 U.S.C. § 1677(5)(A)(ii)(II) (1988). Pursuant to "the former preferentiality standard, 'preferential' meant 'more favorable treatment to some within the relevant jurisdiction than to others within that jurisdiction,' but not that preferential treatment was necessarily 'inconsistent with commercial considerations.'" *Maverick Tube Corp. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1293, 1297 (2017) (citations omitted). For further discussion on Commerce's development of the regulation implementing the "adequate remuneration" standard, 19 C.F.R. § 351.511, *see id.* at 1297–99.

[5] Commerce also refers to a "price-setting philosophy" as a "standard pricing mechanism." *See* I&D Mem. at 46.

applicable to such companies." *Id.* at 30,949–50.[6] When "the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other industries which purchase comparable amounts of electricity, [Commerce] would probably not find a countervailable subsidy." *Id.* at 30,950.

C. Facts Available and Adverse Facts Available

When an interested party "withholds information" requested by Commerce, "significantly impedes a proceeding," "fails to provide [] information by the deadlines for submission of the information," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce shall use the "facts otherwise available" (or "FA") in making its determination.[7] 19 U.S.C. § 1677e(a)(2)(2015).[8] Additionally, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id*. § 1677e(b)(1)(A).[9]

"Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373,

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[6] In *Magnesium from Canada*, the government-owned power company signed contracts with 14 large industrial consumers of its electricity. 57 Fed. Reg. at 30,949. Some portion of the electricity rate for these customers depended upon the price of their products or their profitability, and, thus, the electricity price varied each year. *Id.* The contracts were negotiated such that the power company expected to earn the same revenue as it would have under its general rates and programs. *Id.* Because the general rates were inapplicable to these 14 companies, Commerce compared the price charged to the power company's standard pricing mechanism. *Id.*

[7] Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *See* 19 U.S.C. § 1677e. Section 1677m(d) provides the procedures Commerce must follow when a party files a deficient submission. *See id.* § 1677m(d).

[8] The 2015 TPEA made several amendments to the antidumping and countervailing duty laws. Specifically, subsections (b) and (c) of § 1677e were amended, and subsection (d) was added. *See* TPEA § 502; *Özdemir Boru San. ve Tic. Ltd. Sti. v. United States*, Slip Op. 17–142, 2017 WL 4651903, at *1 (CIT Oct. 16, 2017) (discussing the TPEA amendments). The TPEA amendments affect all CVD determinations made on or after August 6, 2015. *See* Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793 (Dep't Commerce Aug 6, 2015). All references to 19 U.S.C. § 1677e are to the amended version of the statute.

[9] In making its determination, Commerce "is not required to determine, or make any adjustments to, a countervailable subsidy rate . . . based on any assumptions about information the [respondent] would have provided if [it] had complied with the request for information." 19 U.S.C. § 1677e(b)(1)(B).

1382 (Fed. Cir. 2003);[10] *see also Essar Steel Ltd. v. United States) ("Essar Steel I"*), 678 F.3d 1268, 1275–76 (Fed. Cir. 2012) (reaffirming *Nippon Steel*'s interpretation of what is required for respondents to comply with the "best of its ability" standard). Before using adverse facts available, Commerce "must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." *Nippon Steel*, 337 F.3d at 1382. Next, Commerce

> must [] make a subjective showing that the respondent['s] . . . failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. at 1382–83.

"An adverse inference may not be drawn merely from a failure to respond." *Id.* at 1383. Rather, Commerce may apply an adverse inference "under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made." *Id*. (affirming Commerce's use of an adverse inference when respondent first told Commerce the requested information was unnecessary, then told Commerce the information did not exist, and only later produced the information after Commerce assigned an adverse dumping margin, at which time the respondent told Commerce it had never asked its factories for the information during the investigation).

When applying an adverse inference, Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c)(2015). When Commerce relies on secondary information, that is, information that was not obtained in the course of the instant investigation or review, Commerce "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c)(1). The corroboration requirement does not apply to a "countervailing duty applied in a separate segment of the same proceeding." *Id*. § 1677e(c)(2). Pursuant to Commerce's regulations, corroboration requires the agency to assess "whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d). When corroboration is not "practicable

[10] *Nippon Steel* predates the TPEA. However, the relevant statutory language discussed in that case remains unchanged. *Compare* 19 U.S.C. § 1677e(b)(2012), *with* 19 U.S.C. § 1677e(b)(1)(2015).

in a given circumstance," Commerce may still "apply[] an adverse inference as appropriate and us[e] the secondary information in question." *Id.*

D. Selecting an AFA Rate

Section 1677e(d) governs Commerce's selection of subsidy rates to apply as adverse facts available. In a CVD proceeding, Commerce may "use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or [] if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use." 19 U.S.C. § 1677e(d)(1)(A). Commerce "may apply any of the countervailable subsidy rates . . . specified under [] paragraph [1], including the highest such rate or margin, based on the evaluation by [Commerce] of the situation that resulted in [the agency] using an adverse inference in selecting among the facts otherwise available." *Id.* § 1677e(d)(2). Commerce need not "estimate what the countervailable subsidy rate . . . would have been if the interested party found to have failed to cooperate . . . had cooperated . . . [or] demonstrate that the countervailable subsidy rate . . . used by [Commerce] reflects an alleged commercial reality of the interested party." *Id.* § 1677e(d)(3).

II. Prior Proceedings

In August 2015, Commerce initiated a CVD investigation of cold-rolled steel from several countries. *See Certain Cold-Rolled Steel Flat Products from Brazil, India, the People's Republic of China, the Republic of Korea, and the Russian Federation*, 80 Fed. Reg. 51,206 (Dep't Commerce Aug. 24, 2015) (initiation of countervailing duty investigations) ("*Initiation Notice*"), CJA Tab 3, PJA Tab 3, PR 58, ECF No. 77. Commerce selected POSCO and Hyundai Steel Co., Ltd. as mandatory respondents for the investigation into cold-rolled steel from Korea. Respondent Selection Mem. (Sept. 15, 2015) at 6, CJA Tab 4, CR 40, PJA Tab 4, PR 75, ECF No. 77. The period of investigation ("POI") encompassed January 1 to December 31, 2014. *Initiation Notice*, 80 Fed. Reg. at 51,206. The subject merchandise includes "certain cold-rolled (cold-reduced), flat-rolled steel products, whether or not annealed, painted, varnished, or coated with plastics or other non-metallic substances." *Initiation Notice*, 80 Fed. Reg. at 51,210.[11]

[11] For a full description of the scope of the investigation, *see Initiation Notice*, 80 Fed. Reg. at 51,210.

A. Questionnaire Responses

1. POSCO

During the investigation, Commerce issued to POSCO a series of questions regarding its affiliated companies. *See* POSCO CVD Questionnaire (Sept. 16, 2015) at 2–3, CJA Tab 6, PJA Tab 6, PR 77, ECF No. 77. POSCO submitted a joint response on behalf of itself and its affiliated trading company DWI. *See generally* POSCO Affiliated Companies Resp. (Sept. 30, 2015) ("POSCO AQR"), CJA Tab 7, CR 41, PJA Tab 7, PR 84, ECF No. 77. In particular, Commerce asked POSCO to "[s]pecify whether an affiliated company supplies inputs into your company's production process." *Id.* at 4. POSCO responded that "[t]here were no affiliated companies located in Korea that provided inputs to POSCO's production of subject merchandise." *Id*. In response to Commerce's instruction that POSCO must provide a complete questionnaire response for affiliates that supply inputs for production of the downstream product, POSCO affirmed that "[t]here were no affiliated companies located in Korea that provided inputs to POSCO's production of subject merchandise." *Id.* at 4–5. In a supplemental questionnaire, Commerce requested POSCO to "confirm that you have provided responses for all cross-owned companies[12] that fall within 19 C.F.R. [§] 351.525(b)(6)." POSCO Second Suppl. Questionnaire Resp. (Nov. 12, 2015) ("POSCO 2nd Suppl. QR") at 1, CJA Tab 12, CR 353, PJA Tab 12, PR 289, ECF No. 78. POSCO answered "that it believes it has provided responses for all cross-owned companies that fall within 19 C.F.R. § 351.525(b)(6)." *Id*.

Commerce also asked POSCO about subsidies to companies located in free economic zones ("FEZ"). *See* POSCO Initial Questionnaire Resp. (Oct. 23, 2015) ("POSCO IQR") at 52, CJA Tab 8, CR 58–102, PJA Tab 8, PR 120–138, ECF No. 77. POSCO reported that it "has no facilities located in a [FEZ] and thus was not eligible for and did not receive any tax reductions, exemptions, grants or financial support under any of the [] programs listed in [Commerce's] question." *Id.* at 52.

Commerce inquired about loans to POSCO and DWI from the Korean Resources Corporation ("KORES") and the Korea National Oil Corporation ("KNOC"). *Id.* at 33. DWI initially reported that it received KNOC and KORES loans during the POI. *Id.* at 34.[13] POSCO

[12] Commerce used the terms "affiliated" and "cross-owned" interchangeably.

[13] "There are two types of loans in the [KORES/KNOC] program: 'general loans' and 'success-contingent' loans." POSCO 2nd Suppl. QR, Ex. F-11 at 1. DWI's reported KORES and KNOC loans were [[ ]] loans. *See id.*, Ex. F-11 at 1–2.

subsequently provided more information about those loans. POSCO 2nd Suppl. QR, Ex. F-11 at 1–2.[14]

2. The Government of Korea

Relevant here, Commerce requested that the GOK provide information regarding the Korean electricity industry and market generally, and the Korea Electric Power Corporation ("KEPCO") specifically. *See* GOK CVD Questionnaire (Sept. 16, 2015), Sect. II at 2–7, CJA Tab 5, PJA Tab 5, PR 76, ECF No. 77. KEPCO is a "state-owned entity," Decision Mem. for the Prelim. Neg. Determination (Dec. 15, 2015) ("Prelim. Mem.") at 30, CJA Tab 17, PJA Tab 17, PR 338, ECF No. 78 (citation omitted),[15] and is "the exclusive supplier of electricity in Korea," The Republic of Korea's Resp. to CVD Questionnaire (Oct. 30, 2015) ("GOK QR") at 4, CJA Tab 9, CR 108–217, PJA Tab 9, PR 147–218, ECF Nos. 77–78; *see also* Prelim. Mem. at 30 (noting that "KEPCO is an integrated electric utility company engaged in the transmission and distribution of substantially all of the electricity in Korea.") (citation omitted).

The GOK explained that electricity is generated by "[i]ndependent power generators, community energy systems, and KEPCO's six subsidiaries." GOK QR at 11.[16] By law, electricity must be bought and sold through the Korean Power Exchange (the "KPX"), including by KEPCO. *Id.*[17] The GOK also noted that KEPCO's electricity tariff rates are approved by the Ministry of Trade, Industry and Energy ("MOTIE"). *Id*;[18] *see also id.* at 13 (explaining that MOTIE sets Korean electricity rates through its approval or disapproval of KEPCO's applications to change the tariff rates, and MOSF "considers the

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[14] Specifically, POSCO reported that DWI had [[ ]] KNOC and [[ ]] KORES [[ ]] loans. *See* POSCO 2nd Suppl. QR, Ex. F-12.

[15] By law, the GOK must own "at least 51 percent of KEPCO's capital, which allows the GOK to control the approval of corporate matters relating to KEPCO." Prelim. Mem. at 30 (citation omitted).

[16] KEPCO itself generally does not produce electricity but distributes electricity to customers. GOK QR at 11.

[17] KEPCO and its subsidiaries own 100 percent of the KPX's shares. GOK QR, Ex. E-3 at 31.

[18] MOTIE supervises certain of KEPCO's operations. *See* GOK QR at 7. In particular,

> [t]o change electricity tariff rates, KEPCO files an application for rate changes with the MOTIE. Upon receipt of an application, the MOTIE consults with the MOSF [Ministry of Strategy and Finance] to measure the potential impact of proposed electricity tariff rate changes on the national consumer price index. After consultation with the MOSF, the MOTIE requests the Korean Electricity Regulatory Commission ("KOERC") to review the application and to provide its views on the proposed rate changes. The MOTIE then makes a final decision after considering the KOERC's input.

Id.

impact of changes in electricity rates on the national economy"). Electricity tariff rates must, by law, "be set to cover the aggregate costs," including "a reasonable rate of return on investment." *Id.* at 17.[19]

Commerce issued to the GOK a supplemental questionnaire asking it to clarify MOSF's review process. The Republic of Korea's Resp. to CVD Suppl. Questionnaire (Nov. 20, 2015) ("GOK Suppl. QR") at 9, CJA Tab 13, CR 369–377, PJA Tab 13, PR 300–304, ECF No. 78. The GOK responded that "MOSF normally does not engage in a detailed review of the proposed change to the tariff rate schedule, as long as the proposed changes are not inconsistent with general price trends in Korea." *Id.* Because the (most recent) November 2013 tariff rate changes "were consistent with general price trends in Korea, the MOSF did not engage in a detailed review of those changes when they were proposed." *Id.; see also* GOK QR at 15 (noting that the November 2013 electricity tariff rate increase was in effect throughout the POI).

As to FEZ-related benefits, the GOK stated that "[d]uring the investigation period, none of the respondents received tax reductions or exemptions, lease-fee reductions or exemptions, or grants or financial support due to their location in an FEZ." GOK QR at 108.

On the basis of the questionnaire responses, Commerce issued a preliminary negative determination, calculating a *de minimis* subsidy rate for POSCO of 0.18 percent. *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, 80 Fed. Reg. 79,567, 79,568 (Dep't Commerce Dec. 22, 2015) (prelim. neg. determination and alignment of final determination with final antidumping duty determination), CJA Tab 30, PJA Tab 30, PR 402, ECF No. 79. Commerce also determined that the GOK's provision of electricity was not for less than adequate remuneration. Prelim. Mem. at 30.

B. Verification

1. POSCO and DWI

Commerce conducted verification at POSCO from March 13 to March 17, 2017, in Seoul, Korea, and at DWI on March 18, 2016.

[19] In KEPCO's Form 20-F filed with the U.S. Securities and Exchange Commission, KEPCO characterized the process the GOK may undertake to approve a tariff rate increase as "lengthy" and "deliberate." GOK QR, Ex. E-3 at 5. KEPCO explained that tariff rates "may not be adjusted to a level sufficient to ensure a fair rate of return . . . in a timely manner or at all," and that KEPCO "cannot assure that any future tariff increase by the [GOK] will be sufficient to fully offset the adverse impact on our results of operation from the current or potential rises in fuel costs." *Id.*

Verification of POSCO and its Cross-Owned Affiliates' Questionnaire Resp. (March 7, 2016) ("POSCO Verification Agenda") at 1, CJA Tab 18, CR 394, PJA Tab 18, PR 376, ECF No. 78. Before verification, Commerce instructed POSCO to make available original records substantiating the information reported in its questionnaire responses, and to "[b]e prepared to demonstrate that none of POSCO's other affiliated companies provided inputs for the production of cold-rolled steel or otherwise would fall under our attribution regulations." *Id.* at 5–6. Commerce also cautioned POSCO that "verification is not intended to be an opportunity for the submission of new factual information." *Id.* at 2. In the course of verification, Commerce discovered several inaccuracies in POSCO's questionnaire responses:

Cross-Owned Input Suppliers

At verification, a POSCO official reiterated that no raw material inputs were purchased from Korean affiliated companies. Verification Report: POSCO and Daewoo Int'l Corp. (Apr. 29, 2016) ("POSCO Verification Report") at 16, CJA Tab 29, CR 454, PJA Tab 29, PR 397, ECF No. 79.[20] Commerce requested—and POSCO provided—a list of suppliers of raw material inputs used in the production of cold-rolled steel. *See* POSCO Verification Report at 16; POSCO's Verification Ex. 3 (March 24, 2016) ("POSCO Verification Ex. 3") at ECF pp. 92–94, CJA Tab 22, CR 402–411, PJA Tab 22, ECF No. 79.[21] Upon reviewing this information, Commerce learned that four POSCO affiliates supplied inputs used in the production of cold-rolled steel. I&D Mem. at 9 & n.30 (citing POSCO Verification Ex. 3). They were POSCO Chemtech Company, Ltd. ("POSCO Chemtech");[22] POSCO Processin-

[20] In the underlying administrative proceeding POSCO disputed this statement on the basis that the relevant official would not have understood the question or had access to the necessary information. *See* POSCO's Case Br. (May 16, 2016) ("POSCO Case Br.") at 12 n. 2, CJA Tab 33, CR 459, PJA Tab 33, PR 410, ECF No. 79. However, POSCO has not contested this statement in the instant litigation.

[21] In the Issues and Decision Memorandum and briefs before the court, Commerce and the parties cite to pages 73–75 of POSCO's Verification Exhibit 3 for this information. Because the embedded page numbers have been partially omitted from the copy provided to the court, for ease of reference, the court cites to the electronic page numbers that appear at the top of each page.

[22] POSCO Chemtech produces limestone. *See* POSCO Verification Report at 10; *see also* POSCO Verification Ex. 3 at ECF p. 93. When asked why POSCO had not reported this information, POSCO stated that "trace amounts" of limestone are used. POSCO Verification Report at 10. Commerce did not verify the amount of limestone purchased for POSCO's cold-rolled steel production. *Id.* at 11.

gand Service ("POSCO P&S");[23] POSCO M-Tech Co., Ltd. ("POSCO M-Tech");[24] and POS-HiMetal Co., Ltd. ("POS-HiMetal").[25]

DWI's Loans

At DWI's verification, POSCO presented "two new loans" under the KORES program as "minor corrections." POSCO Verification Report at 3. Commerce "did not explicitly state that [it] would accept the submission as a minor correction at the time of verification." *Id.* Upon subsequent review of the loan chart, Commerce found that POSCO sought to add more than two loans[26] as minor corrections. *Id.* Commerce later rejected the corrections as not minor, and did not verify the new loans. Request to Take Action on Certain Barcodes (Apr. 21, 2016) at 1–2, CJA Tab 27, CR 442, PJA Tab 27, PR 394, ECF No. 79; I&D Mem. at 77 & nn.371–72 (citing POSCO Verification Report at 25–26).

POSCO's Global R&D Center

While verifying that DWI was not located in an FEZ, Commerce learned that a POSCO facility, named POSCO Global R&D Center (the "R&D facility"), "was listed on the official Incheon FEZ government website as being located in the Incheon FEZ." I&D Mem. at 72–73; *see also* POSCO Verification Report at 2, 38–39. When asked about the R&D facility's "location and purpose," a POSCO official "presented a map printed from a Korean website [with] a hand-drawn border surrounding what they claimed to be the FEZ," which purported to show that the R&D facility was located outside the FEZ. I&D Mem. at 73. Commerce compared the hand-drawn map to the map from the Incheon government website and noted several discrepancies. *Id.; see also* POSCO Verification Report at 38 (explaining that the hand-drawn boundary "was very small" and included only a "few

[23] POSCO P&S provides steel scrap. *Id*. at 12; POSCO Verification Ex. 3 at ECF p. 93.

[24] POSCO M-Tech supplies ferro-molybdenum to POSCO. POSCO Verification Report at 13; POSCO Verification Ex. 3 at ECF p. 94. When asked why POSCO had not reported POSCO M-Tech's supply of ferro-molybdenum, POSCO officials stated that it "was minimally used in subject merchandise production." POSCO Verification Report at 13. Commerce did not verify the amount of ferro-molybdenum used to produce POSCO's cold-rolled steel. *Id*.

[25] POS-HiMetal supplies high purity ferro-manganese to POSCO. POSCO Verification Report at 14; POSCO Verification Ex. 3 at ECF p. 94. POSCO had not reported this information in its questionnaire response because the input is "minimally used" in cold-rolled steel. POSCO Verification Report at 14.

POSCO had reported POSCO Chemtech, POSCO P&S, and POS-HiMetal as cross-owned companies on the basis of its 60 percent share of ownership. I&D Mem. at 65; POSCO AQR, Ex. 1 at 1. POSCO reported a 48.85 percent share of ownership in POSCO M-Tech. POSCO AQR, Ex. 1 at 1. At verification, Commerce determined that "POSCO exercises significant control" over POSCO M-Tech, and that, therefore, POSCO M-Tech is cross-owned. I&D Mem. at 66; *see also* POSCO Verification Report at 12–13 (noting that [[
]]) (citation omitted).

[26] POSCO attempted to submit [[ ]] additional loans in this minor correction. *See* POSCO Verification Report at 3.

apartment buildings" in the FEZ, and no office buildings). Commerce "offered repeatedly to visit the facility as depicted on the Korean government website in order to clarify its location and confirm non-use of the FEZ program, but POSCO officials declined." I&D Mem. at 73. POSCO then concluded the verification. POSCO Verification Report at 39.

2. The Government of Korea

Commerce conducted verification of the GOK's questionnaire responses from March 14 to March 25, 2016. I&D Mem. at 2. Commerce did not, however, verify the GOK's provision of electricity for less than adequate remuneration; instead, the agency relied on the verification conducted as part of its investigation into corrosion-resistant steel ("CORE") from Korea. *See id*. at 42 & n.199 (citing Verification Documents to Proceeding (May 5, 2016) ("*CORE* Electricity Verification Report"), CJA Tab 31, CR 456–58, PJA Tab 31, PR 404, ECF No. 79).

C. Final Determination and Amended Final Determination

In the *Final Determination*, Commerce announced a countervailing duty rate of 58.36 percent for POSCO. 81 Fed. Reg. at 49,944. Commerce calculated this rate after deciding to use adverse facts available with respect to certain subsidy programs. Specifically, Commerce concluded, as AFA, that POSCO and its cross-owned input suppliers benefited from certain specific subsidies. I&D Mem. at 10. Commerce found, as AFA, that the inputs produced by the four above-mentioned input suppliers were primarily dedicated to the production of the downstream product within the meaning of its attribution regulation, 19 C.F.R. § 351.525(b)(6)(iv). *Id*. at 69. Commerce also concluded, as AFA, that POSCO benefitted from the FEZ program, *id*. at 73, and that DWI benefitted from the KORES/KNOC lending program, *id.* at 76. For these reasons, Commerce concluded, as AFA, that "POSCO benefitted from the majority of programs in the current investigation." *Id*. at 11; *see also id.* at 13–15 (identifying 45 programs for which Commerce applied an AFA rate to POSCO).

With regard to selecting rates to use for these programs, Commerce explained that "[i]t is the [agency's] practice in CVD proceedings to compute an AFA rate for non-cooperating companies using the highest calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, rates calculated in prior CVD cases involving the same country." *Id*. at 12. Commerce selected its rates pursuant to the following hierarchical methodology:

> Specifically, [Commerce] applies the highest calculated rate for the identical subsidy program in the investigation if a respond-

> ing company used the identical program, and the rate is not zero. If there is no identical program match within the investigation, or if the rate is zero, [Commerce] uses the highest non-*de minimis* rate calculated for the identical program in a CVD proceeding involving the same country. If no such rate is available, [Commerce] will use the highest non-*de minimis* rate for a similar program (based on treatment of the benefit) in another CVD proceeding involving the same country. Absent an above-*de minimis* subsidy rate calculated for a similar program, [Commerce] applies the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.

Id.

Commerce did not expressly state which hierarchical provision(s) it relied on in this proceeding. *See id*. at 12–17. For six programs, Commerce appears to have relied on the first prong of its hierarchy to apply the highest non-zero rate calculated for Hyundai Steel in this investigation. *See id*. at 14–15 & nn.74, 79, 81, 83–84, 86. For the remaining 39 programs, Commerce applied one of two rates selected from other Korean CVD proceedings. *See id*. at 13–15 & nn.45–88.[27] Specifically, Commerce applied a 1.65 percent rate associated with a GOK lending program found countervailable in *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea. See id*. at 13–15 (noting the source of the rate); *id*. at 16–17 (noting the rate); *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 Fed. Reg. 17,410 (final aff. countervailing duty determination; 2010) (Dep't Commerce March 26, 2012) ("*Refrigerators from Korea*"), and accompanying Issues and Decision Mem., C-580–866 (March 16, 2012) ("*Refrigerators from Korea*, I&D Mem.") at 11–12. Commerce also applied a 1.05 percent rate associated with a tax deduction program found countervailable in *Large Residential Washers from the Republic of Korea. See* I&D Mem. at 13–15 (noting the source of the rate); *id*. at 16–17 (noting the rate); *Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,975 (final aff. countervailing duty determination; 2011) (Dep't Commerce December 26, 2012) ("*Washers from Korea*"), and accompanying Issues and Decision Mem., C-580–869 (Dec. 18, 2012) ("*Washers from Korea*, I&D Mem.") at 14–15.

[27] At oral argument, the Government clarified that, depending on the program at issue in this investigation, these rates fulfill one of the three remaining hierarchical prongs. Oral Arg. at 1:02:20–1:04:40.

Commerce also affirmed its preliminary determination that the GOK's provision of electricity was not for less than adequate remuneration, and was not, therefore, countervailable. I&D Mem. at 45.

In response to ministerial error comments submitted by POSCO, Commerce selected a different program rate for certain of POSCO's programs. Resp. to Ministerial Error Cmts. Filed by Hyundai Steel Co. Ltd and POSCO (Aug. 24, 2016) ("Ministerial Error Mem.") at 3–4, CJA Tab 43, PJA Tab 43, PR 451, ECF No. 79. Instead of the 1.65 percent rate derived from *Refrigerators from Korea*, Commerce selected a 1.64 percent rate associated with a K-SURE Short-Term Export Insurance program found countervailable in that proceeding. *Id*. at 4; *Refrigerators from Korea*, I&D Mem. at 14–15. Commerce also discovered that it had made an additional ministerial error by excluding a sub-program within POSCO's overall AFA rate. Ministerial Error Mem. at 6. Accordingly, POSCO's final subsidy rate increased to 59.72 percent. *Am. Final Determination*, 81 Fed. Reg. at 64,437.

JURISDICTION AND STANDARD OF REVIEW

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

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB.*, 305 U.S. 197, 229 (1938)). It "requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). The court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)).

DISCUSSION

I. POSCO's Rule 56.2 Motion for Judgment upon the Agency Record

A. Commerce's AFA Determinations

POSCO challenged three applications of AFA. Each is discussed, in turn.

1. Inputs from Affiliated Suppliers

a. Parties' Contentions

POSCO contends that Commerce erred in finding that it had failed to cooperate to the best of its ability when it declined to report inputs from four affiliates because POSCO held an objectively reasonable belief that those inputs were not primarily dedicated to the production of the downstream product (hereinafter referred to as "primarily dedicated") and, thus, a response was not required. *See* POSCO Mot. at 1922; Confidential Reply Br. of Pl. POSCO in Supp. of its Mot. for J. Upon the Agency R. ("POSCO Reply") at 8–9, ECF No. 73. According to POSCO, any finding that it should have disclosed inputs from these companies supported only the application of facts otherwise available and not an adverse inference. *See* POSCO Mot. at 21–22. POSCO further contends that Commerce's adverse inference that the inputs produced by its affiliates were primarily dedicated was contradicted by substantial evidence that Commerce failed to consider. POSCO Mot. at 18–19 (citing *Changzhou Trina Solar Energy Co., Ltd. v United States*, 40 CIT ___, ___, 195 F. Supp. 3d 1334, 1350 (2016)); POSCO Reply at 5.

The Government contends that Commerce's determination to rely on adverse facts available for POSCO's failure to report inputs it received from four cross-owned companies is adequately supported. *See* Gov. Resp. at 28–32. The Government argues that POSCO's reason for withholding the information is "irrelevant"; "[b]ecause POSCO was able to provide more information than it did, POSCO did not put forth its 'maximum' efforts to comply with Commerce's questionnaires." *Id*. at 30 (citing *Nippon Steel*, 337 F.3d at 1382). The Government further contends that Commerce correctly rejected POSCO's argument that the inputs were not primarily dedicated. *Id*. at 32. It asserts that POSCO has ignored the fact that the information POSCO seeks to rely on was not verified, and POSCO has misunderstood Commerce's regulation governing the attribution of subsidies of an input supplier to a downstream producer. *Id*. at 34–36.

Petitioner Defendant-Intervenors contend that POSCO may not withhold information requested based on legal conclusions it has drawn from that information. Pet'r Def.-Int. Resp. at 3–5. Petitioner Defendant-Intervenors note that POSCO did not inform Commerce that it was responding to its questionnaires based on its own "reasonable belief" that it need not provide the information, but instead stated unequivocally that it had no affiliated Korean companies supplying inputs to the production of the subject merchandise. *Id*. at 5–6(citing POSCO AQR at 4, 5 & Ex. 1 at 1). Petitioner Defendant-

Intervenors further contend that POSCO's arguments regarding "the merits of the 'primarily dedicated' issue should be foreclosed by its failure to disclose [the] requested information," and that they nevertheless "fail because they are based on a mischaracterization of Commerce's attribution rules and practice." *Id*. at 7.

b. Analysis

As an initial matter, substantial evidence supports Commerce's decision to apply facts available. The statute provides that Commerce shall rely on the facts available when a respondent withholds requested information, "significantly impedes a proceeding," or provides information after the deadline for submission. 19 U.S.C. § 1677e(a)(2). Here, Commerce relied on facts available on the basis of POSCO's inaccurate questionnaire responses and the "conflicting information discovered at verification." I&D Mem. at 10.

There is no dispute that POSCO withheld information regarding its cross-owned input suppliers in its questionnaire responses. *See* POSCO AQR at 4–5; POSCO 2nd Suppl. QR at 1. At verification, Commerce discovered that POSCO's affiliates supplied limestone, scrap, ferro-molybdenum, and high purity ferro-manganese for use in producing POSCO's cold-rolled steel. POSCO Verification Report at 5–17; POSCO Verification Ex. 3 at ECF pp. 92–94. POSCO's inaccurate questionnaire responses and untimely submission of new factual information at verification prevented Commerce from fully examining the extent to which POSCO's affiliates benefitted from subsidies attributable to POSCO. *See* I&D Mem. at 64–65. There is, thus, substantial evidence on the record demonstrating that POSCO withheld information, failed to timely provide information, and impeded the proceeding pursuant to 19 U.S.C. § 1677e(a).

Substantial evidence further supports Commerce's decision to apply an adverse inference, which was otherwise in accordance with law. Commerce "may use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available" when the respondent "fail[s] to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1)(A). Here, Commerce concluded that POSCO had failed to act to the best of its ability because it "failed to report the necessary information and only after discovery at verification did it report on the last day that some of the inputs provided by . . . affiliated companies were, in fact, used in the production of the subject merchandise." I&D Mem. at 68–69 & nn.327–31 (citing *Nippon Steel*, 337 F.3d at 1380, 1382; POSCO Verification Report at 5–17); *see also id*. at 10 (an adverse inference was merited because, "[d]espite repeated re-

quests, POSCO failed to identify or provide necessary information as to its respective cross-owned companies"). At issue here is the subjective prong of the *Nippon Steel* test; i.e., whether Commerce has shown that POSCO's failure to supply the requested information "[was] the result of [POSCO's] lack of cooperation in . . . failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Nippon Steel*, 337 F.3d at 1382–83.[28]

Commerce's questionnaire was framed in general terms; it did not expressly limit POSCO's scope of response to only those suppliers that provided inputs POSCO considered primarily dedicated for purposes of Commerce's attribution regulation. *See* POSCO AQR at 4–5. Commerce reasonably expected POSCO to have provided the affiliated supplier information in its questionnaire response or to have informed Commerce of its basis for withholding the information so that Commerce could investigate POSCO's position. *See* I&D Mem. at 64 ("If POSCO had explained that it was not providing information on certain companies because they were not primarily dedicated in the affiliated questionnaire response, [Commerce] would have had the opportunity to follow-up on this claim."). Instead, POSCO unequivocally stated that no Korean affiliates supplied inputs for the production of subject merchandise. POSCO AQR at 5; *see also* POSCO 2nd Suppl. QR at 1 (affirming "that it believes it has provided responses for all cross-owned companies that fall within 19 C.F.R. § 351.525(b)(6)," without informing Commerce about the basis for its belief).[29] POSCO reiterated its position at verification, and it was not until Commerce obtained a list of POSCO's input suppliers that it

[28] POSCO does not contend that Commerce has failed to make the requisite "objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." *Nippon Steel*, 337 F.3d at 1382; *see also* POSCO Mot. at 13–14 (generally contending that POSCO's decision not to report the affiliate-supplied inputs was "not due to a failure to cooperate by not acting to the best of its ability").

[29] At oral argument, the court asked the Government whether the phrasing of Commerce's second supplemental questionnaire to POSCO and its verification agenda undermine the Government's argument that POSCO withheld information. *See* Letter to Counsel (Nov. 21, 2017) ¶ 1(c), ECF No. 86; POSCO 2nd Suppl. QR at 1 (directing POSCO to "confirm [that is has] provided responses for all cross-owned companies that fall within 19 CFR [§] 351.525(b)(6)"); POSCO Verification Agenda at 6 (directing POSCO to "[b]e prepared to demonstrate that none of POSCO's other affiliated companies provided inputs for the production of cold-rolled steel *or otherwise would fall under our attribution regulations*"). The Government responded that it prepared the second supplemental questionnaire and verification agenda in light of POSCO's affiliated questionnaire response. *See* Oral Arg. at 36:33–37:13. The Government also noted that, in contrast, POSCO did inform Commerce about affiliated input suppliers located outside Korea and thereby demonstrated some analysis of the attribution regulation. *See id.* at 36:05–36:32; POSCO AQR at 5. The court agrees. POSCO's qualified response regarding non-Korean input suppliers supports Commerce's understanding that POSCO's response regarding Korean input suppliers was

learned that POSCO had provided inaccurate information. POSCO Verification Report at 16–17; I&D Mem. at 9 & n.30 (citing POSCO Verification Ex. 3).

POSCO acknowledges that it withheld information about its affiliated input suppliers on the basis of its own belief about the relevance of the information. *See, e.g.*, POSCO Mot. at 13–14, 19–22; POSCO Case Br. at 12. POSCO's conduct, therefore, may not precisely constitute a failure to exert "maximum efforts to investigate and obtain the requested information from its records," *Nippon Steel*, 337 F.3d at 1382-83, because POSCO apparently had the information, but chose not to provide it. Nevertheless, the Federal Circuit further stated that "intentional conduct, such as deliberate concealment or *inaccurate reporting*, surely evinces a failure to cooperate." *Nippon Steel*, 337 F.3d at 1383 (emphasis added). For example, "[p]roviding false information and failing to produce key documents unequivocally demonstrate [a respondent's failure to] put forth its maximum effort." *Essar Steel I*, 678 F.3d at 1275–76 (citing *Nippon Steel*, 337 F.3d at 1383) (affirming Commerce's determination to apply adverse facts available on the basis of respondent's assertions regarding the absence of manufacturing plants in a particular location and record evidence contradicting that assertion).[30] Here, "Commerce requested information from [POSCO], which [POSCO] did not provide and never claimed that it was unable to provide." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360–61 (Fed. Cir. 2017) (affirming application of adverse facts available when respondent had withheld information it had access to on the basis that it deemed it unnecessary to Commerce's determination). "Such behavior cannot be considered

unqualified. Accordingly, the phrasing of the second supplemental questionnaire and verification agenda does not fairly detract from the evidence supporting Commerce's determination. *See Nippon Steel*, 337 F.3d at 1379.

[30] For this reason, POSCO's argument that Commerce's narrative explanation potentially supported the application of facts available, but without an adverse inference, is also unavailing. *See* POSCO Mot. at 21–22. POSCO contends that its failure to report information "does not alone demonstrate that POSCO failed to act to the best of its ability," and that Commerce "does not explain how this reporting deficiency constitutes 'circumstances in which it is reasonable to conclude that less than full cooperation has been shown.'" *Id*. at 21–22 (quoting *Nippon Steel*, 337 F.3d at 1383). Commerce may not have used those precise words in articulating its reasons for applying adverse facts available; however, the court will uphold Commerce's determination when the path to that determination is reasonably discernable from the determination itself. *See NMB Singapore Ltd. v. United States,* 557 F.3d 1316, 1319 (Fed. Cir. 2009). Commerce relied on POSCO's repeated refusal to provide the supplier information, its failure to inform Commerce of the reason for its withholding so that Commerce could further investigate, and the belated discovery of contradictory information. *See* I&D Mem. at 9–10, 64, 68–69. In such circumstances Commerce reasonably concluded that POSCO did not demonstrate full cooperation and adverse facts available was warranted.

'maximum effort to provide Commerce with full and complete answers.'" *Id.* (quoting *Nippon Steel*, 337 F.3d at 1382).

POSCO's reliance on its purported objectively reasonable belief about the irrelevance of the inputs is unavailing. *See* POSCO Mot. at 19–22; POSCO Reply at 8–9. Although Commerce's regulations speak to the attribution of subsidies obtained by a cross-owned "input supplier and a downstream producer" when "the input product is primarily dedicated to production of the downstream product," 19 C.F.R. § 351.525(b)(6)(iv), Commerce's questionnaire went further, directing POSCO to "[s]pecify whether an affiliated company supplies inputs into your company's production processes," POSCO AQR at 4; *see also* Pet'r Def.-Int. Resp. at 4–5 (noting the distinction between the regulation and the questionnaire).[31] This is fitting given Commerce's responsibility to determine, based on the information respondents provide, whether subsidies should be attributed to cross-owned affiliates. *See* 19 C.F.R. § 351.525(b)(6)(iv) (when certain circumstances are present, "*the Secretary* [i.e. Commerce] will attribute subsidies received by the input producer to the combined sales of the input and downstream products") (emphasis added); I&D Mem. at 67 (explaining that it is for Commerce to determine whether inputs are primarily dedicated). Thus, "[r]egardless of whether [POSCO] deemed the [] information relevant, it nonetheless should have produced it [in] the

[31] POSCO asserts that Petitioner Defendant-Intervenors "read too much into the language of the questionnaire." POSCO Reply at 10. According to POSCO,

> [u]nder [Petitioner] Defendant-Intervenors' interpretation, even [when] the evidence indisputably shows that the inputs . . . are not primarily dedicated . . ., the respondent should be hit with AFA if it failed to disclose the existence of the cross-owned input supplier in its questionnaire response. That is an absurd result, and one that is squarely at odds with the regulation and Commerce's obligation to calculate margins as accurately as possible. A sin of omission should not trump the actual facts.

Id. POSCO is incorrect. Petitioner Defendant-Intervenors read nothing into the questionnaire; the questionnaire plainly asked POSCO to identify any affiliates supplying inputs for its production processes. *See* POSCO AQR at 4. Moreover, POSCO's argument ignores the fact that "[i]t is Commerce, not the respondent, that determines what information is to be provided." *Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986). A respondent's refusal to provide requested information may indeed expose it to the use of adverse facts available regardless of the respondent's alleged basis for considering the information irrelevant. *See, e.g., Reiner Brach GmbH & Co.KG v. United States*, 26 CIT 549, 555–64, 206 F. Supp. 2d 1323, 1330–38 (2002). Commerce's obligation to calculate accurate margins cannot be separated from a respondent's obligation to submit accurate information. "[T]he purpose of the adverse facts statute," which "is 'to provide respondents with an incentive to cooperate' with Commerce's investigation," *Maverick Tube*, 857 F.3d at 1360 (quoting *Essar Steel I*, 678 F.3d at 1276), therefore assists Commerce to fulfill its statutory mandate to determine margins "as accurately as possible" under the antidumping and countervailing duty statutes, *Lasko Metal Prods, Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994). POSCO's argument essentially amounts to a defense of a respondent's prerogative to withhold factual information whenever it decides the information lacks legal significance, thereby usurping the agency's role.

event that Commerce reached a different conclusion." *Essar Steel*, 34 CIT at 1073, 721 F. Supp. 2d at 1299 (AFA merited when respondent withheld requested information on the basis of its belief that the information was irrelevant to Commerce's CVD determination); *see also Reiner Brach*, 26 CIT at 555–64, 206 F. Supp. 2d at 1330–38 (adverse facts available merited when respondent failed to provide information regarding all home market sales of identical and similar merchandise on the basis of its own interpretation of the statutory definition of "foreign-like product," even though Commerce had requested information about "'all' home market sales [] for 'identical or similar merchandise'").

POSCO's related assertion that Commerce's reliance on adverse facts available is unsubstantiated because POSCO accurately responded to Commerce's questionnaire is also unavailing. *See* POSCO Mot. at 13–19 (arguing that evidence establishes that the unreported inputs were not primarily dedicated). First, it bears repeating that Commerce did not limit its inquiry to only those inputs POSCO deemed primarily dedicated. *See, e.g.*, POSCO AQR at 4. Second, as discussed below, POSCO's evidentiary argument also fails.

To support its argument, POSCO points to two categories of information: (1) the respective proportion of each affiliates' sales of their inputs to POSCO as a percentage of their total sales, and (2) the respective proportion of each affiliates' total sales to POSCO as a portion of their total sales. *See* POSCO Mot. at 16–18; POSCO Case Br. at 13–19; POSCO's Rebuttal Br. (May 25, 2016) at 10–19, CJA Tab 35, CR 462–63, PJA Tab 35, PR 424–25, ECF No. 79. Commerce addressed the first category of information, but not the latter. *See* I&D Mem. at 66–67. The court will discuss both.

In the Issues and Decision Memorandum, Commerce explained its rejection of POSCO's reliance on the amount of each input sold to POSCO on the basis that POSCO had untimely attempted to submit that factual information at verification. *See* I&D Mem. at 66–67 & nn.315–318 (citing POSCO Verification Report at 5–17; POSCO Verification Ex. 3 at ECF pp. 92–94; *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products From India*, 81 Fed. Reg. 35,323 (Dep't Commerce June 2, 2016) (final aff. determination; 2014) ("*CORE from India*"), and accompanying Issues and Decision Mem., C-533–864 (May 24, 2016) ("*CORE from India*, I&D Mem.") at Cmt. 11).[32] For that reason, Commerce did not verify the input amounts

[32] Commerce characterizes POSCO's argument as asserting that the inputs "were not primary dedicated to [the] *subject merchandise* because only a small amount of the inputs were used in the production of the *subject merchandise*." I&D Mem. at 67 (emphasis added). Commerce explains that the issue "is not whether an input is primarily dedicated to the subject merchandise, but to the downstream product," which may be "an intermediate input

POSCO sought to rely upon. *See* I&D Mem. at 67. POSCO argues that Commerce's failure to verify the information "does not undermine [its] accuracy or reliability" because Commerce "has discretion to decide what to verify, and if it chooses not to verify an item, then the item is considered accurate." POSCO Mot. at 16 n.2 (citing *Certain Oil Country Tubular Goods From the Republic of Turkey*, 79 Fed. Reg. 41,964 (Dep't Commerce July 18, 2014) (final aff. countervailing duty determination and final aff. critical circumstances determination; 2012) ("*OCTG from Turkey*"), and accompanying Issues and Decision Mem., C-489–817 (July 10, 2014) ("*OCTG from Turkey*, I&D Mem.") at Cmt. 9). POSCO also argues that *CORE from India* is inapposite because Commerce issued the decision after POSCO's verification, and because the decision does not discuss Commerce's approach to primary dedication as applied in past cases. POSCO Reply at 6–7 (citing *Washers from Korea*, I&D Mem. at 3; *Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 67,388 (Dep't Commerce Nov. 5, 2002) (final results and partial rescission of countervailing duty expedited reviews; 2000–2001) ("*Lumber from Canada*"), and accompanying Issues and Decision Mem., C-122–839 (undated) ("*Lumber from Canada*, I&D Mem.") at 23).

First, Commerce had notified POSCO that "verification is not intended to be an opportunity for the submission of new factual information." POSCO Verification Agenda at 2. Indeed, "[v]erification is intended to test the accuracy of data already submitted, rather than to provide a respondent with an opportunity to submit a new response." *Tianjin Mach. Import & Export Corp. v. United States*, 28 CIT 1635, 1644, 353 F. Supp. 2d 1294, 1304 (2004), *aff'd*, 146 F. App'x 493 (Fed. Cir. 2005). Accordingly, Commerce did not err in declining to rely on this new information in the *Final Determination. See* 19 U.S.C. 1677m(i)(1) (Commerce "shall verify all information relied upon in making . . . a final determination in an investigation").

Second, POSCO misconstrues *OCTG from Turkey*. Therein, Commerce chose not to verify information the Government of Turkey ("GOT") submitted before verification because it had accepted the "accuracy of th[at] information . . . on its face." *OCTG from Turkey*, I&D Mem. at 54. Commerce explained that "unless the GOT planned to provide new factual information at verification or claim that its own submissions were false, then verification would have no effect on the final determination." *Id.* In contrast, here, at verification POSCO presented information that contradicted its previous questionnaire

to the subject merchandise." *Id*. at 67–68. In fact, however, POSCO argued that the inputs were not primarily dedicated to the production of the *downstream product*, not the subject merchandise. *See, e.g.*, POSCO Case Br. at 10–12.

responses, the accuracy of which Commerce never accepted. *See* I&D Mem. at 64–68 (explaining several times that POSCO's belated presentation of factual information prevented Commerce from fully examining it, rendering the information "unsubstantiated" and "unreliable"). *OCTG from Turkey* does not, therefore, stand for the proposition that any information Commerce chooses not to verify, regardless of when it is first presented to the agency, must be deemed accurate.[33]

Third, in *CORE from India*, although Commerce explained that its attribution regulations "do not contemplate the amount of the input provided by a supplier as a gauge for whether that company should submit a response," as here, Commerce applied adverse facts available for the respondent's failure to report an affiliated input supplier. *CORE from India*, I&D Mem. at 33. In so doing, Commerce rejected the respondent's argument "that the amount of the input involved is small" because Commerce did "not consider the data collected to be complete and verified." *Id.* Thus, Commerce had "no basis on which to conclude that the inputs . . . [were] mere insignificant adjustments." *Id.* Accordingly, *CORE from India* is consistent with Commerce's decision to reject POSCO's opinion on primary dedication in the absence of timely submitted data from the respondent. *See* I&D Mem. at 67.

Fourth, POSCO's reliance on *Washers from Korea* and *Lumber from Canada* is unavailing. In *Washers from Korea*, Commerce based its primary dedication determination on the small amount of the affiliates' sales of inputs to the respondent as a proportion of their total sales, *and* that most of the affiliates' products are used to produce a variety of products that are sold to customers other than the respondent. *See Washers from Korea*, I&D Mem. at 3 (citing *CVD Preamble*, 63 Fed. Reg. at 65,401). In *Lumber from Canada*, Commerce declined to attribute subsidies when "less than 30 percent of [the affiliate's] timber sales [were] made to [the lumber producer]" and "all other sales [were] made to unrelated customers." *Lumber from Canada*, I&D Mem. at 23. Accordingly, relative sales of the input to the respondent is not Commerce's only consideration in the analysis of whether an input is primarily dedicated, and POSCO's failure to report its affiliated input suppliers prevented Commerce from investigating and obtaining other pertinent information. Further, the

[33] POSCO disputes Commerce's assertion that a "large amount of analysis" was "required to verify the [new] data." POSCO Mot. at 16 n. 2 (quoting I&D Mem. at 67). Particularly in light of the fact that Commerce did not obtain this new information until the last day of verification, *see* I&D Mem. at 67, Commerce did not abuse its discretion in declining to verify the information, *see, e.g., Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) (holding that Commerce's verification procedures are reviewed for an abuse of discretion).

respondents in *Washers from Korea* and *Lumber from Canada* timely provided the information, thereby affording Commerce the opportunity to examine or verify it and allowing the agency, not the respondent, to make the decision on primary dedication. *See Washers from Korea*, I&D Mem. at 3; *Lumber from Canada*, I&D Mem. at 23. These determinations do not, therefore, support POSCO's decision to withhold that information from its questionnaire response on the basis of its own conclusion regarding primary dedication. *See* POSCO Reply at 7 (contending these rulings afforded POSCO a reasonable basis for withholding the information).[34]

Finally, POSCO's reliance on *Changzhou Trina Solar* is also unavailing. *See* POSCO Mot. at 18–19 (citing *Changzhou Trina Solar*, 195 F. Supp. 3d at 1350). There, the court faulted Commerce for failing to point to *any* record evidence to support the adverse inference that several programs, some of which were discovered at verification, were "specific," provided a "financial contribution," and "conferred a 'benefit,'" as those terms are statutorily defined. *Changzhou Trina Solar*, 195 F. Supp. 3d at 1347 ("Although the bar is low—Commerce may use 'any . . . information placed on the record,' . . . —it is not non-existent." (quoting 19 U.S.C. § 1677e(b)(2)(D)); *id.* at 1348 (noting that "Commerce [] placed no relevant factual information on record" or "indicated that it relied on any information, from any source" in drawing its adverse inference).

Changzhou Trina Solar involved the countervailability of the alleged subsidies. In contrast, here, POSCO does not challenge the countervailability of the subsidies allegedly received by its affiliates, but the adverse inference that its affiliated-supplier inputs were primarily dedicated pursuant to Commerce's attribution regulation, such that those subsidies may be attributed to POSCO. *See* POSCO Mot. at 14–19; POSCO Reply at 3–6. The common issue, however, is whether Commerce's adverse inference bears some evidentiary support. Unlike *Changzhou Trina Solar*, here, Commerce relied on record evidence demonstrating that POSCO Chemtech, POSCO P&S,

[34] At oral argument, POSCO sought to distinguish the respondent's decision to report its affiliate's sales of timber in *Lumber from Canada* on the basis that primary dedication was at issue in that case. *See* Oral Arg. at 50:07–50:57. In contrast, here, POSCO asserted, primary dedication was not at issue because its affiliates supplied only trace elements. *Id.* at 54:00–54:13 (comparing the 30 percent figure in *Lumber from Canada* to the much smaller amount of POS HiMetal's sales of high purity ferro-manganese to POSCO as a percentage of its total sales). POSCO's distinction is speculative; there is nothing in *Lumber from Canada* to suggest that the respondent premised its decision to submit a questionnaire response on the affiliate's proportion of sales, or to otherwise support POSCO's decision to withhold information on that basis. Moreover, the issue here is not whether POSCO's affiliates' inputs *were* primarily dedicated, but whether Commerce's decision to draw that *adverse inference* as a result of POSCO presenting inaccurate and incomplete information about its affiliated suppliers is supported by substantial evidence.

POSCO M-Tech, and POSCO Hi-Metal are cross-owned by POSCO pursuant to 19 C.F.R. § 351.525(b)(6), and that they supplied inputs used to produce cold-rolled steel. *See* I&D Mem. at 9, 65; POSCO Verification Ex. 3 at ECF pp. 92–94; POSCO Verification Report at 10–14; POSCO AQR, Ex. 1 at 1. Commerce's adverse inference, therefore, complied with statutory and regulatory requirements. *See* 19 U.S.C. § 1677e(b)(2)(D) (stating that an adverse inference may be drawn from "any [] information placed on the record"); 19 C.F.R. § 351.308(c)(2)(2015).[35]

The quantity of the respective inputs sold by the affiliates to POSCO (in absolute terms and as a proportion of the affiliates' sales) does not "'fairly detract' from the reasonableness of [Commerce's] conclusion[]." *Changzhou Trina Solar*, 195 F. Supp. 3d at 1350 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (alteration omitted)). As noted above, that information was supplied by POSCO on the last day of verification, leaving Commerce no time to examine or verify it. *See* I&D Mem. at 67. Using untimely and, therefore, unverified information to impugn Commerce's determination would create a significant loophole in Commerce's deadlines for the submission of factual information. *See* 19 C.F.R. § 351.301.[36]

As to POSCO's second category of information, data regarding each affiliate's total material sales to POSCO as a percentage of its total sales was on the record from the time of POSCO's initial questionnaire response. *See* POSCO IQR, Ex. 12 (POSCO's 2013–2014 Audited Non-Consolidated Financial Statements), Note 37(a) (supplying POSCO's total purchases of material from its subsidiaries) and Ex. 20 (POSCO's 2013–2014 Audited Consolidated Financial Statements), Note 1(c) (supplying each affiliate's total sales). Commerce did not

[35] The court in *Changzhou Trina Solar* distinguished the facts of that case from another case involving the use of adverse facts available. 195 F. Supp. 3d at 1348 (citing *RZBC Grp. Shareholding Co. v. United States*, 39 CIT ___, ___, 100 F. Supp. 3d 1288, 1294–97 (2015)). In *RZBC*, the court affirmed Commerce's finding that a particular subsidy was "specific" on the basis of an adverse inference derived from information in the petition. 100 F. Supp. 3d at 1294, 1296–1300; *see also Changzhou Trina Solar*, 195 F. Supp. 3d at 1348; 19 U.S.C. § 1677e(b)(2)(A) (permitting Commerce to rely on information derived from the petition). Commerce drew the adverse inference in light of the Government of China's failure to provide the statistical data required to make the determination. *RZBC*, 100 F. Supp. 3d at 1296–97. Accordingly, this case is more like *RZBC* than *Changzhou Trina Solar*.

[36] POSCO argues that Commerce cannot accept at verification an exhibit detailing the inputs its affiliates sold to POSCO and "rely upon that information as the basis for its AFA determination," while refusing to consider the specific information because it was unverified. POSCO Reply at 4 ("Commerce cannot have it both ways."). There is a difference, however, between relying on the *existence of the evidence* to conclude that adverse facts available is merited, i.e., information demonstrating that POSCO withheld information showing that the affiliates supplied the inputs, and the *specific content thereof*, i.e., the input amounts. Commerce explained that it did not verify the input amounts provided. *See* I&D Mem. at 67.

discuss this evidence. *See* I&D Mem. at 64–69. That omission, however, is not fatal.[37]

The facts available provisions of the statute allow Commerce to fill gaps in the record and, when necessary conditions have been met, to do so with an adverse inference. "When key data are missing from the record . . . Commerce can take proof from the far reaches of the record to close evidentiary gaps that the parties never filled." *RZBC*, 100 F. Supp. 3d at 1298; *see also Hebei Jiheng Chemicals Co., Ltd. v. United States*, 40 CIT ___, ___, 161 F. Supp. 3d 1322, 1331 (2016) ("Commerce . . . has broad 'discretion to choose which sources and facts it will rely on to support an adverse inference . . . .'") (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

POSCO essentially argues that Commerce should have filled the primary dedication gap by way of an inference drawn from its proffered and *potentially* favorable facts. *See, e.g.*, POSCO Mot. at 16–18.[38] But when, as here, a respondent fails to cooperate by not acting to the best of its ability, the statute permits Commerce to "use an inference that is *adverse* to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A) (emphasis added). This ensures that a "party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 870 (1994), *reprinted in* 1994 USCCAN 4040, 4199 ("SAA").[39] Accordingly, POSCO's argument is unavailing. Commerce is not required to look elsewhere in the record for allegedly exculpatory information or to credit such information when the use of an adverse inference is otherwise justified. Commerce's decision to apply adverse facts available for POSCO's failure to report its affiliated input suppliers is supported by substantial evidence and is otherwise in accordance with law.

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[37] Commerce is not required to "make an explicit response to every argument made by a party"; however, it is required to discuss "issues material to [its] determination." *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1354 (Fed. Cir. 2005) (citation omitted).

[38] None of the proceedings upon which POSCO seeks to rely discuss the total sales of an affiliate to the respondent as a percentage of the affiliate's total sales to all customers as a measure of primary dedication. *See Washers from Korea*, I&D Mem. at 3; *Lumber from Canada*, I&D Mem. at 23. Accordingly, any conclusion on primary dedication to be drawn from such information requires an inference that the total sales of all materials bears a relationship to the total sales of a particular input.

[39] The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

2. POSCO's R&D Facility

a. Parties' Contentions

POSCO contends that Commerce wrongly decided to apply adverse facts available for its failure to report a facility located in an FEZ because the Government of Korea reported that POSCO did not receive any benefits from having such a facility during the "investigation period." POSCO Mot. at 36–39 (citing GOK QR at 108); POSCO Reply at 17–19. POSCO asserts that the GOK's reference to "investigation period" reasonably means "the entire [average useful life ("AUL") period of the subject merchandise], including the POI." POSCO Mot. at 38.[40]

The Government contends that Commerce's decision to apply adverse facts available for POSCO's failure to report this R&D facility is supported by substantial evidence, as is Commerce's decision to draw the adverse inference that POSCO benefitted from the FEZ program. Gov. Resp. at 38–39, 41. The Government further contends that Commerce correctly determined that the reference to "investigation period" was ambiguous, and record evidence demonstrates that the phrase may have been limited to the POI, undermining POSCO's argument that the GOK's response demonstrated that POSCO received no benefit from having a facility located in an FEZ. *Id*. at 40.

Petitioner Defendant-Intervenors contend that record evidence demonstrates the FEZ program's countervailability. Pet'r Def.-Int. Resp. at 16 (citing CVD Investigation Initiation Checklist (Aug. 17, 2015) at 28, CJA Tab 2, CR 25–29, PJA Tab 2, PR 46–50, ECF No. 77). Petitioner Defendant-Intervenors further contend that the GOK's response "cannot remedy POSCO's inaccurate reporting of its own facilities and benefits." *Id*. at 17.

b. Analysis

Commerce's determination to apply adverse facts available for POSCO's failure to report the R&D facility is supported by substantial evidence and is otherwise in accordance with law. Here, POSCO reported that it "has no facilities located in a [FEZ] and thus was not eligible for and did not receive any tax reductions, exemptions, grants or financial support under any of the [] programs listed in [Commerce's] question." POSCO IQR at 52. However, at verification, Commerce learned that POSCO's R&D facility is listed on an official GOK website as being located in an FEZ. I&D Mem. at 7374; POSCO Verification Report at 38. When asked to clarify the purpose and location of the R&D facility, POSCO provided a hand-drawn map

[40] The AUL of the subject merchandise is 15 years. Prelim. Mem. at 8; Gov. Resp. at 40.

contradicting the official map, and refused to accompany Commerce to the R&D facility so that it could gather additional information. I&D Mem. at 73; POSCO Verification Report at 39. Accordingly, Commerce reasonably determined that POSCO had failed to put forth its maximum efforts to provide the requested information. *Cf. Essar Steel I*, 678 F.3d at 1275–76 (affirming Commerce's determination to apply adverse facts available on the basis of respondent's assertions regarding the absence of manufacturing plants in a particular location and record evidence contradicting that assertion).

Commerce's adverse inference that POSCO benefitted from the FEZ program is also supported by substantial record evidence. Commerce relied on evidence that POSCO had a facility within an FEZ. POSCO Verification Report at 38–39. Commerce further explained that because the GOK did not clarify whether its reference to the "investigation period" in its response meant the POI or the entire 15-year AUL of the subject merchandise, I&D Mem. at 73–74, POSCO does "not have an affirmative claim of non-use for [the FEZ] program for the remainder of the 15-year AUL period from the GOK." *Id.* at 81 (noting that the GOK uses "investigation period" to refer to the POI "throughout its initial questionnaire response").[41] Commerce also relied on record evidence demonstrating that POSCO could have benefited from the FEZ program, which was designed to attract foreign investment, because "certain shareholders of POSCO [are] foreign." I&D Mem. at 74; *see also* GOK QR, Ex. FEZ-1 (promotional brochure discussing foreign investment incentives associated with Korean FEZ). POSCO essentially asks the court to reweigh the evidence, which it cannot do. *See* POSCO Mot. at 38 ("A passing reference on a Korean website is not substantial evidence that would support the application of AFA in this instance, particularly in light of the GOK's certified statement that POSCO did not receive any FEZ benefits."); *Downhole Pipe & Equip.,* 776 F.3d at 1377. Commerce's decision to apply adverse facts available for POSCO's failure to report the R&D facility located within an FEZ, and the adverse inference upon which Commerce relied, are supported by substantial evidence and are otherwise in accordance with law.

[41] There are two types of benefits associated with countervailable subsidies: recurring and non-recurring. Commerce allocates recurring benefits to the year in which they were received. 19 C.F.R. § 351.524(a). Commerce allocates non-recurring benefits "over the number of years corresponding to the [AUL] of renewable physical assets" used in the production of the subject merchandise. 19 C.F.R. § 351.524(b); Prelim. Decision Mem. at 8; Gov. Resp. at 39–40. Thus, the GOK's reference to "investigation period," if taken to mean the POI, does not foreclose the possibility that POSCO benefitted from a non-recurring subsidy during the prior 15 years which should have been allocated to the POI. *See* Gov. Resp. at 39–40.

3. DWI's Loans

POSCO contends that Commerce erred in rejecting the additional KORES loans as minor corrections and in applying adverse facts available for DWI's failure to report the loans. POSCO Mot. at 40–44; POSCO Reply at 20–22. The Government contends that Commerce properly rejected DWI's corrections because the information significantly altered the amount of reported lending and properly applied adverse facts available because DWI "categorically withheld the information" regarding one type of loan. Gov. Resp. at 43–48; *see also* Pet'r Def.-Int. Resp. at 17–18. Parties agree, however, that this issue is mooted in the event the court affirms Commerce's use of adverse facts available with regard to POSCO's affiliated input suppliers. *See* Gov. Resp. at 42; Oral Arg. at 2:05:53–2:06:05. Because the court affirms Commerce's use of adverse facts available with regard to POSCO's affiliated input suppliers, the court need not and does not further address this issue.

B. Commerce's Use of the Highest Calculated Rates

1. Parties' Contentions

POSCO contends that Commerce applied the highest calculated subsidy rate without evaluating the circumstances that led the agency to apply an adverse inference, which it further contends did not merit the highest calculated rate. POSCO Mot. at 2226; POSCO Reply at 12–14.

The Government contends that 19 U.S.C. § 1677e(d)(2)-(3) "codif[ied] Commerce's practice of using an adverse facts available hierarchy in countervailing duty cases when selecting adverse facts available rates for subsidy programs," and that in "selecting the adverse facts available rates, Commerce was guided by its well-established methodology." Gov. Resp. at 49 (citations omitted). The Government further contends that the Federal Circuit has affirmed its practice, *id*. (citing *Essar Steel, Ltd. v. United States ("Essar Steel II"*), 753 F.3d 1368, 1373–74 (Fed. Cir. 2014)), which "ensure[s] that Commerce applies a sufficiently adverse rate to ensure that a party does not achieve a better result by not cooperating than if it had cooperated fully." *id*. (citing SAA at 870). The Government also asserts that Commerce did not "automatically" apply the highest calculated rate, but rather based its rate selection on its discovery of unreported information at verification. *Id.* at 50 (citing I&D Mem. at 9–12); *see also* Pet'r Def.-Int. Resp. at 19–21 (arguing that the circumstances giving rise to Commerce's use of adverse facts available justifies the selected rates).

In reply, POSCO asserts that the statute "tempers Commerce's ability to use the highest . . . rates" by requiring an evaluation of the underlying circumstances that resulted in the adverse inferences. POSCO Reply at 12 (citing 19 U.S.C. § 1677e(d)(2)). POSCO notes that the Federal Circuit decided *Essar Steel II* before § 1677e was amended to include subsection (d)(3) and did not directly address Commerce's adverse facts available methodology, but rather involved a challenge to Commerce's corroboration of the selected rates. *Id.* at 13 (citing *Essar Steel II*, 753 F.3d at 1371).

2. Analysis

In addressing its selection of adverse facts available rates, Commerce explained that it relied on its "practice" to select the highest calculated rates within its hierarchical methodology. *See* I&D Mem. at 12 & nn. 41–42.[42] The question is whether Commerce's reliance on its practice constitutes a proper exercise of its discretion to select the highest rate pursuant to § 1677e(d)(2). This appears to be an issue of first impression. The court finds that Commerce's selection of the highest calculated rates lacked reasoned explanation required by statute and, therefore, is not supported by substantial evidence, nor in accordance with law.

In considering whether Commerce's determination is in accordance with law, the court's review of the agency's statutory interpretation is guided by the two-step framework provided in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "if the statute is silent or ambiguous," the court must determine whether the agency's action "is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843).

In their written submissions, none of the parties address § 1677e(d)(2) under the *Chevron* framework. The Government asserts that Commerce considered the circumstances that gave rise to the use of adverse facts available—and thereby complied with § 1677e(d)(2)—when it "thoroughly explained the multiple discoveries at verification of previously unreported information." Gov. Resp. at 50

[42] Commerce cites several prior rulings in support of its practice. *See* I&D Mem. at 12 n. 41. These rulings predate the TPEA's addition of subsection (d)(2) to § 1677e.

(citing I&D Mem. at 9–12); *see also* Pet'r Def.-Int. Resp. at 19–21. In other words, according to the Government, the evaluation contemplated by § 1677e(d)(2) is encompassed by Commerce's decision to rely on adverse facts available, and no further analysis is required. At oral argument, the Government stated that, pursuant to a *Chevron* step two analysis, Commerce reasonably exercised its discretion in selecting the highest calculated rates based on its hierarchy. The Government further argued that Commerce's practice of using the highest rates is an exercise of the discretion afforded by § 1677e(d)(2). Oral Arg. at 1:26:30–1:28:17. POSCO argued that the statute is plain; thus, the inquiry ends at *Chevron* step one. *Id.* at 1:29:20–1:29:33

To be clear, the issue is not whether Commerce's hierarchical methodology as a whole complies with the statute, but whether Commerce's unexplained selection of the highest rates within each prong of its hierarchy complies with § 1677e(d)(2); the answer is no.

Section 1677e(d)(1) codifies Commerce's hierarchy for selecting a rate in an adverse facts available situation. Section 1677e(d)(2) both elaborates that the application of the hierarchy provides Commerce with the discretion to apply the highest countervailing duty rate, and limits Commerce's exercise of that discretion. Congress has directed Commerce to base its selection of the subsidy rate—highest or not—on an "evaluation . . . of *the situation* that resulted in the [agency] using an adverse inference." 19 U.S.C. § 1677e(d)(2) (emphasis added). Thus, the statute contemplates a case-specific evaluation as part of Commerce's selection from among a range of rates. Moreover, because the requirement for this evaluation was added to the pre-existing statutory requirements for using adverse facts available, clearly some additional evaluation is required beyond that which justified the adverse inference. Otherwise, Congress could simply have stated that Commerce "may apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin," and omitted the remaining text. *See id.*§ 1677e(d)(2).[43] Again, something more—i.e., an evaluation of the specific situation—is required. And, at a minimum, Commerce must apprise the court of the basis for its findings in this regard. *See NMB Singapore*, 557 F.3d at 1319. Here, Commerce failed to fulfill its statutory duty because it failed to explain why this case justified its selection of the highest rates. *See* I&D Mem. at 12.

[43] It is well settled "that a statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village Inc.*, 503 U.S. 30, 36 (1992); *see also China Diesel Imports, Inc. v. United States*, 18 CIT 1086, 1090, 870 F. Supp. 347, 351 (1994) ("Courts are required to give effect to each word of a statute, whenever possible.").

The Government's attempt to rely on the factual circumstances meriting the application of adverse facts available as evidence of Commerce's evaluation pursuant to § 1677ed)(2) is unavailing. That the facts merited the use of an adverse inference does not necessarily mean that those same facts merited selection of the highest rate. Moreover, the court may not weigh the evidence justifying a particular decision in the first instance; that is Commerce's province. *See Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 285–86 (1974) ("The agency must articulate a rational connection between the facts found and the choice made.") (internal quotation marks and citation omitted).

Likewise, the court is not persuaded by the Government's argument that Commerce's practice properly "ensure[s] that Commerce applies a *sufficiently adverse* rate to ensure that a party does not achieve a better rate by not cooperating than if it had cooperated fully." Gov. Resp. at 49 (citing SAA at 870) (emphasis added). Although the SAA permits Commerce to "employ adverse inferences . . . to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully," SAA at 870, the SAA does not state or suggest that only the highest rates will achieve that goal. Moreover, Commerce never explained why the highest rate was the only rate "sufficiently adverse" for POSCO not to benefit from its lack of cooperation.

In sum, § 1677e(d)(2) contemplates the selection of the highest rate when the situation merits the highest rate. *See* 19 U.S.C. § 1677e(d)(2). Commerce failed to evaluate whether the circumstances in this case merited the highest rate. Accordingly, its determination is remanded for reconsideration and further explanation.

C. Corroboration of the Selected Rates[44]

1. Parties' Contentions

POSCO contends that Commerce's discussion of the corroboration requirement in the Issues and Decision Memorandum reflects a misinterpretation of its statutory obligation. POSCO Mot. at 27–30. POSCO further contends that, to the extent that Commerce's discussion of its corroboration of the 1.64 percent rate from *Refrigerators from Korea* in the Ministerial Error Memorandum supersedes the Issues and Decision Memorandum, "POSCO's statutory argument

[44] The court is mindful that Commerce may, pursuant to the remand ordered in Section I.B, select different rates on the basis of its evaluation of the situation that resulted in the use of an adverse inference. However, in the event that Commerce retains the current rates, for efficiency purposes, the court will address Parties' arguments regarding the corroboration of those rates.

remains as to the 1.05 percent rate" obtained from *Washers from Korea*. *Id*. at 31; POSCO Reply at 15–16. POSCO asserts, however, that Commerce's failure to corroborate the 1.05 percent rate renders the agency's reliance on that rate unsupported by substantial evidence, and "Commerce's attempt to corroborate the 1.64 percent rate is not supported by substantial evidence." POSCO Mot. at 31; *see also id.* at 31–36; POSCO Reply at 16.

The Government contends that Commerce's inability to corroborate the selected rates using independent data on company-specific benefits means that Commerce corroborated the rates "to the extent practicable." Gov. Resp. at 50–51; *see also* Pet'r Def.-Int. Resp. at 21 (concurring with the Government). According to the Government, because Commerce selected the rates pursuant to its established hierarchy, they are "properly corroborated under the statute." Gov. Resp. at 51 (citations omitted); *see also id.* at 52–54 (discussing the reliability and relevance of the selected rates).

POSCO responds that Commerce's reliance on its hierarchy to select rates does not obviate the corroboration requirement. POSCO Reply at 14–15 (citing *Tai Shan City Kam Kiu Aluminium Extrusion Co. Ltd. v. United States*, 39 CIT ___, ___, 58 F. Supp. 3d 1384, 1395 (2015)).

2. Analysis

"Corroborat[ion] means that the [agency] will examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d). "Commerce demonstrates probative value by 'demonstrating [that] the rate is both reliable and relevant.'" Ö*zdemir,* 2017 WL 4651903, at *16 (quoting *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1354 (Fed. Cir. 2015)). Taken together, the Issues and Decision Memorandum and Ministerial Error Memorandum adequately apprise the court of Commerce's method of corroborating the selected rates, which the court finds is entitled to deference. *See* I&D Mem. at 15; Ministerial Error Mem. at 4. However, Commerce's corroboration of the 1.64 percent rate is unsupported by substantial evidence.

a. Corroboration Methodology

POSCO identifies the following language in the Issues and Decision Memorandum as evidence of Commerce's misinterpretation of its statutory obligation to corroborate secondary information:

> However[,] [19 U.S.C. § 1677e](c)(1) does not require corroboration when the information relied upon for adverse inferences is

> derived from the petition, a final determination in the investigation, any previous review under section 751 of the Act or determination under section 753 of the Act, or any other information placed on the record
>
> . . . .
>
> Additionally, as stated above, we are applying subsidy rates, which were calculated in this investigation or previous Korea CVD investigations or administrative reviews. *Therefore, the corroboration exercise of section 776(c)(1) of the Act is inapplicable for purposes of this investigation*.

POSCO Mot. at 28 (quoting I&D Mem. at 15). POSCO has, however, omitted two key sentences from Commerce's explanation.

First, immediately before the first sentence of the first paragraph quoted above, Commerce explains that § 1677e(c)(1) "provides that, when the [agency] relies on secondary information rather than on information obtained in the course of an investigation or review, *it shall, to the extent practicable, corroborate that information* from independent sources that are reasonably at its disposal." I&D Mem. at 15 (emphasis added). Additionally, immediately before the first sentence of the second paragraph quoted above, Commerce explains that, "[w]ith regard to the reliability aspect of corroboration, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs." *Id*. Accordingly, although Commerce could have been clearer, the agency is plainly cognizant of its statutory obligation to corroborate secondary information "to the extent practicable." Moreover, Commerce's reference to the "inapplicab[ility]" of corroboration is reasonably understood to refer to the "typical[]" lack of independent sources of data on company-specific benefits for Commerce to use to measure the reliability of the selected rates. In other words, the lack of benefits-related data means that Commerce is limited in its ability to corroborate the selected rates pursuant to 19 U.S.C. § 1677e(c)(1) "from independent sources that are reasonably at their disposal."

This understanding of Commerce's explanation is supported by the Ministerial Error Memorandum. Therein, Commerce explains that its ability to "use a countervailable subsidy rate applied for a similar program in a [CVD] proceeding involving the same country . . . is significant[] because . . . with regard to the reliability aspect of corroboration, . . . there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy

programs." Ministerial Error Mem. at 4. Under those circumstances, Commerce implements its duty to corroborate "to the extent practicable" by selecting "[a]ctual rates calculated based on actual usage by Korean companies" that were "calculated in the context of an administrative proceeding." *Id*. As to relevance, Commerce "strive[s] to assign AFA rates that are the same in terms of type of benefit . . . because these rates are relevant to the respondent." *Id.* To that end, Commerce first identifies rates associated with the identical subsidy program in the investigation or a CVD proceeding involving the same country; if such rates are unavailable, Commerce identifies rates associated with a similar program in a CVD proceeding involving the same country; or, finally, absent rates from a similar program, Commerce will use a rate associated with a program identified in a CVD proceeding from the same country "that could conceivably be used by the non-cooperating [respondent]." I&D Mem. at 12. Commerce's hierarchy, which it relied on here, *see* I&D Mem. at 12–15; Ministerial Error Mem. at 4, thus prioritizes the selection of rates from identical programs that would confer the same type of benefit, while accounting for situations when such rates are unavailable.[45]

POSCO asserts that Commerce's reliance on its hierarchy to corroborate the selected rates permits the imposition of "punitive rates that 'render the corroboration requirement . . . meaningless.'" POSCO Mot. at 34 (quoting Ministerial Error Mem. at 4; *De Cecco*, 216 F.3d at 1034) (alteration omitted)). The *De Cecco* court, however, did not speak to the instant issue.[46] Moreover, Commerce relies on an examination of the reliability and relevance of the selected rates in the absence of independent sources of data on company-specific benefits. *See* I&D Mem. at 15. Commerce is entitled to deference in its selection of methodologies to implement its statutory mandates. *See, e.g., Apex Frozen Foods*, 862 F.3d at 1351 (citation omitted). POSCO does not persuade the court that Commerce's method of assessing the reliability and relevance of the selected rates is an impermissible interpretation of its statutory duty to corroborate the rates "to the extent practicable." *Cf.* Ö*zdemir*, 2017 WL 4651903, at *16 (affirming Commerce's corroboration of the selected adverse facts available

[45] At oral argument, the Government explained that Commerce corroborated the 1.05 percent rate "to the extent practicable." Oral Arg. at 1:35:35–1:36–35 (reiterating that when independent data is unavailable for purposes of corroboration, Commerce ensures reliability and relevance by selecting rates in accordance with its hierarchy).

[46] Rather, the court opined that the imposition of an adverse dumping margin that was higher than any margin assigned to other producers would have "render[ed] the corroboration requirement of section 1677e(c) meaningless." *De Cecco*, 216 F.3d at 1034.

rates when its assessment of the reliability and relevance of those rates was supported by substantial evidence).[47]

b. Reliability and Relevance

POSCO contends that the 1.64 percent rate is unreliable because it was calculated using an adverse inference that allowed Commerce to build estimates into its rate determination. POSCO Mot. at 33–34; POSCO Reply at 16. The Government contends that "the 1.64 percent rate is not . . . *wholly derived* from [AFA]," but from estimations made using the respondent's reported data. Gov. Resp. at 53 (emphasis added). At oral argument, the Government sought to persuade the court that Commerce's reliance on the respondent's data means that the rate was sufficiently calculated for corroboration purposes. Oral Arg. at 1:39:40–1:41:58. The court disagrees.

In *Refrigerators from Korea*, Commerce explained that because the respondent failed to provide documentation demonstrating that its claim for benefits under the countervailable K-SURE Short-Term

[47] POSCO also appears to contend that Commerce must corroborate the aggregate subsidy rate in addition to corroborating the individual rates. *See* POSCO Mot. at 35 (asserting that the aggregate rate is considerably less than its affiliates' total sales values); *id.* at 36 (asserting that the rates are not reliable or relevant because they result in a CVD rate that is three times greater than even a punitive rate that can be calculated using record information) (citing *Gallant Ocean (Thailand) Co., Ltd. v. United States,* 602 F.3d 1319, 1323 (Fed. Cir. 2010) for the proposition that corroboration ensures that the rate applied is remedial and not punitive); POSCO Reply at 15 (citing *Tai Shan*, 58 F. Supp. 3d at 1395). Although the *Tai Shan* court remanded Commerce's determination for failure to corroborate the respondent's aggregate adverse facts available rate, it relied, at least in part, on Federal Circuit case law requiring Commerce to select a rate that reflects the respondent's commercial reality. *See Tai Shan*, 58 F. Supp. 3d at 1392 (citing, *inter alia, Gallant Ocean*, 602 F.3d at 1323); *Tai Shan City Kam Kiu Aluminium Extrusion Co. Ltd. v. United States*, 39 CIT ___, ___, 125 F. Supp. 3d 1337, 1344, 1346 (2015) (opinion after remand) (squarely placing the relevance aspect of the corroboration requirement within *Gallant Ocean*'s "commercial reality" framework); *Gallant Ocean*, 602 F.3d at 1323–24 (holding that Commerce must calculate a subsidy rate that reflects "commercial reality"). However, that commercial reality requirement has since been superseded by statute. *See* 19 U.S.C. § 1677e(d)(3)(B)(2015) (Commerce is *not* required "to demonstrate that the countervailable subsidy rate . . . reflects an alleged commercial reality of the interested party"). Additionally, the statute does not require Commerce to estimate what the subsidy rate would have been had POSCO fully cooperated. *See id.*§ 1677e(d)(3)(A). During oral argument, POSCO acknowledged that there is no statutory basis for requiring Commerce to corroborate the aggregate rate. Oral Arg. at 1:51:40–1:53:36. Instead, POSCO relied on the general purpose of corroboration as a check on Commerce's ability to impose punitive rates and its obligation to calculate accurate margins. *Id.* at 1:47:29–1:48:42. However, the statute's corroboration requirement is program-specific. *See* 19 U.S.C. § 1677e(c) (Commerce must corroborate secondary information (i.e., the rates selected from programs external to the instant investigation or review)). Additionally, although POSCO characterizes the final subsidy rate as punitive, *see* POSCO Mot. at 36, it has not presented any substantive arguments challenging Commerce's determination regarding the countervailable programs POSCO benefitted from, *see* I&D Mem. at 18–37 (analysis of programs). *Cf. Tai Shan*, 58 F. Supp. 3d at 1392 (explaining that the respondent challenged Commerce's assignment of rates from location-specific subsidy programs spanning the entirety of the People's Republic of China). Accordingly, POSCO's argument is unavailing.

Export Insurance program did not cover subject merchandise, Commerce made the adverse inference "that the claim applied only to subject merchandise." *Refrigerators from Korea*, I&D Mem. at 16. Based on that adverse inference, Commerce then estimated the insurance premiums the respondent would have paid on the subject merchandise. *Id.* Next, to determine the benefit, Commerce compared its estimated premium to the payout the respondent received on its K-SURE claim during the POI. *Id.* Commerce arrived at the 1.64 percent rate by dividing the amount by which the payout exceeded the estimated premiums by the respondent's exports of subject merchandise to the United States. *See id.* Thus, the 1.64 percent rate is derived from estimates Commerce made on the basis of an adverse inference. *See id.* The rate is not as Commerce asserted, an "[a]ctual rate[] calculated based on *actual usage*" of a countervailable program by a Korean company. *See* Ministerial Error Mem. at 4 (emphasis added). Accordingly, Commerce's selection of this rate is unsupported by substantial evidence, and is remanded for reconsideration.

As to the 1.05 percent rate, Commerce's corroboration of that rate is discernible from the Ministerial Error Memorandum. *See NMB Singapore*, 557 F.3d at 1319. Therein, Commerce clarified that its "selection of the 1.64 percent rate is consistent with the methodology used to select the AFA rates [(i.e., including the 1.05 percent rate)] discussed in [the] *Final Determination*." Ministerial Error Mem. at 4 & n. 21 (citing, *inter alia*, I&D Mem. at 15). Thus, the reliability of the 1.05 percent rate turns on whether it is an actual rate calculated based on a Korean company's actual usage of a countervailable program. *See id.* The pertinent ruling demonstrates that it is, and POSCO has not presented any contrary argument. *See Washers from Korea*, I&D Mem. at 14–15 (explaining that Commerce calculated the countervailable subsidy by dividing the respondent's POI sales by the amount of tax credits it received pursuant to the program). The relevance of the 1.05 percent rate is validated based on Commerce's selection of it pursuant to its hierarchy. *See* I&D Mem. at 12–15. Accordingly, Commerce's corroboration and selection of the 1.05 percent rate is supported by substantial evidence.

In sum, the court grants in part POSCO's motion with respect to Commerce's unexplained use of the highest calculated rates to determine POSCO's adverse facts available rate and Commerce's selection of the 1.64 percent rate for certain programs.

II. Nucor's Rule 56.2 Motion for Judgment upon the Agency Record

A. Commerce's Determination that the Provision of Electricity was not for Less than Adequate Remuneration

1. Parties' Contentions

Nucor contends that Commerce's determination that the provision of electricity was not for less than adequate remuneration is unlawful because Commerce (1) impermissibly examined preferentiality through its standard pricing mechanism analysis; (2) unreasonably interpreted "adequate remuneration" in a manner that excluded cost-recovery; and (3) ignored arguments and evidence demonstrating that Korean electricity price-setting does not comport with market principles. Nucor Mot. at 14–31; Nucor Reply at 2–12.[48] Nucor also contends that Commerce's determination lacks substantial evidence. Nucor Mot. at 30–31; Nucor Reply at 12–20.

The Government contends that Commerce's analysis of KEPCO's standard pricing mechanism "is consistent with the statutory requirement that 'the adequacy of remuneration shall be determined in relation to prevailing market conditions.'"[49] Gov. Resp. at 10, 16 (citing 19 U.S.C. § 1677(5)(E)). The Government asserts that although the statutory and corresponding regulatory changes effected by the URAA deemphasize preferentiality, price discrimination may still be relevant in a so-called Tier-3 analysis. *Id.* at 18. The Government further contends that Commerce adequately addressed KEPCO's cost of purchasing electricity from the KPX. *Id*. at 15.

Respondent Defendant-Intervenors dispute Nucor's contention that Commerce conflated a standard pricing mechanism analysis with preferentiality. Resp't Def.-Int. Resp. at 13. Respondent Defendant-Intervenors further contend that the statutory change from "preferential" to "adequate remuneration" was not intended to discard altogether the concept of preferentiality, but to implement changes in the 1994 WTO Agreement on Subsidies and Countervailing Measures that defined a countervailable subsidy on the basis of financial

[48] Nucor asserts that "Commerce unlawfully determined that the provision of electricity for less than adequate remuneration does not confer a benefit." Nucor Mot. at 14. Such a finding would be contrary to the statute, which states that the provision of a good or service for less than adequate remuneration *does* confer a benefit. *See* 19 U.S.C. § 1677(5)(E)(iv). However, Commerce found no benefit on the basis of its finding that there *was no* provision of electricity for less than adequate remuneration. *See* I&D Mem. at 45.

[49] The Government construes Nucor's arguments as advocating for the court to hold unlawful Commerce's regulation promulgating the three-tiered analysis. Gov. Resp. at 17. Nucor disagrees, arguing that "Commerce's application of its [three tier] regulation *in this case* was inconsistent with the statute because it relied on a preferentiality standard drawn from a pre-URAA investigation." Nucor Reply at 7.

contribution, benefit, and specificity. *Id*. at 14 & n.4 (citing, *inter alia*, SAA at 927). Respondent Defendant-Intervenors also contend that Nucor's argument about market distortion is "flawed and is based on a patchwork of factual information that is woven together to try and create an issue where none exists." *Id*. at 21–22; *id.* at 22–26 (addressing Nucor's evidence).

2. Analysis

a. The Standard Pricing Mechanism

Nucor argues that Commerce used a standard pricing mechanism analysis to measure preferentiality and, thus, failed to measure adequate remuneration in the post-URAA legal landscape. Nucor Mot. at 15, 16–20; Nucor Reply at 7. The statute directs Commerce to determine "the adequacy of remuneration . . . in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review." 19 U.S.C. § 1677(5)(E)(iv). Absent domestic market-based prices or a world market price, Commerce measures the adequacy of remuneration by determining "whether the government price is consistent with market principles." I&D Mem. at 45 (quoting 19 C.F.R. § 351.511(a)(2)(iii)). That determination is based on an examination of certain non-hierarchical disjunctive factors: "the government's price-setting philosophy [i.e. standard pricing mechanism], cost, *or* possible price discrimination." *Id*. at 45 & n.212 (citing *CVD Preamble*, 63 Fed. Reg. at 65,378) (emphasis added). Consistent with the analysis set forth in *Magnesium from Canada*, Commerce considered whether the rate charged to the respondents complied with the standard pricing mechanism, and whether the companies were afforded any preferential treatment. *Id.* at 45–46.

The statutory meaning of "adequate remuneration" is ambiguous, and the statute does not state a particular method Commerce must use to determine the adequacy of remuneration. In two recent opinions, however, this court has affirmed Commerce's consideration of KEPCO's standard pricing mechanism to measure the adequacy of remuneration as a permissible interpretation of the statute. *See Maverick Tube*, 273 F. Supp. 3d at 1308;[50] *Nucor Corp. v. United States*,

[50] *Maverick Tube* concerned Commerce's final negative determination in a CVD investigation of Korean welded line pipe. 273 F. Supp. 3d at 1296. Parties filed supplemental briefs on whether this court should follow *Maverick Tube*. *See* Def.-Ints.' Notice of Recent Op., ECF No. 85; Pl. Nucor and Pl.-Ints. AK Steel Corp., ArcelorMittal USA LLC, and United States Steel Corp.'s Resp. to Notice of Suppl. Authority ("Nucor Suppl. Br."), ECF No. 90; Def.'s Reply to Pet'rs' Resp. to Def.-Int.'s Notice of Recent Court Op., ECF No. 91; Def.-Ints' Reply to Pl.'s Resp. to Def.'s Notice of Recent Court Op., ECF No. 92.

Slip Op. 18–7, 2018 WL 895714, at *5 (CIT Feb. 6, 2018).[51] For the following reasons, the court agrees with and adopts the analyses articulated by the *Maverick Tube* and *Nucor* courts.

Commerce's tier-based approach to determining adequate remuneration "accomplishes the post–URAA preference for market-based prices." *Maverick Tube*, 273 F. Supp. 3d at 1309; *see also Nucor*, 2018 WL 895714, at *6 ("The statute sets a standard of adequate remuneration, . . . and the regulation explicates that standard in a variety of contexts.") (citations omitted). Commerce promulgated § 351.511 after "acquir[ing] some experience with the new statutory provision," *CVD Preamble*, 63 Fed. Reg. at 65,377, and, relevant here, grappling with how best to apply the adequate remuneration standard in the context of government monopolies, *see Maverick Tube*, 273 F. Supp. 3d at 1298 (collecting Commerce rulings discussing the issue). The resulting regulation emphasizes domestic and world market prices (Tier 1 and 2 analyses) while permitting consideration of other factors, such as price-setting and price discrimination (in a Tier 3 analysis), when market-based prices are unavailable. *See* 19 C.F.R. § 351.511; *Maverick Tube*, 273 F. Supp. 3d at 1307 (examining preferentiality in conjunction with a standard pricing mechanism may be "relevant to determine the adequacy of remuneration when market-based prices are unavailable");[52] *Nucor*, 2018 WL 895714, at *7 (Commerce's Tier 3 "analysis preserves a place for the preferentiality test" when market-based prices are unavailable). Nucor's assertion that Commerce's reliance on a standard pricing mechanism analysis is unlawful post-URAA lacks merit because it ignores the entirety of Commerce's regulatory changes and Commerce's separate consideration of price-setting and preferentiality. *See* I&D Mem. at 46.

Nucor also argues that Commerce failed to assess whether the standard pricing mechanism supplied a suitable benchmark. Nucor Mot. at 20; Nucor Reply at 8 (asserting Commerce should first have determined whether the government price is "the *most reasonable*

[51] *Nucor* concerned Commerce's final affirmative determination in a CVD investigation of Korean corrosion-resistant steel products. 2018 WL 895714, at *1.

[52] Nucor asserts that the *Maverick Tube* court allowed Commerce to "take[] the market as it finds it, even if it is, for all practical purposes, a monopoly." Nucor Suppl. Br. at 6–7 (quoting *Maverick Tube*, 273 F. Supp. 3d at 1308). Contrary to Nucor's suggestion, the *Maverick Tube* court did not "blindly accept[]" the Korean government's price for electricity as "adequate remuneration"; rather, that court considered Commerce's examination of KEPCO's rate setting and rate development on the basis of "annual cost data as calculated by an independent accounting firm." *Maverick Tube*, 273 F. Supp. 3d at 1308. Although those factors derive from the "commercial and market practices and conditions for the provision of electricity" as they exist in Korea, *id.* (citation omitted), the court did not suggest that Commerce may never rely on a third-country price in a Tier 3 analysis, or otherwise. The court simply affirmed Commerce's decision not to do so on the factual record before it. *See id*.

surrogate for market-determined prices") (citing *CVD Preamble*, 63 Fed. Reg. at 65,378). When, as here, the prevailing market for electricity is a government monopoly, the *CVD Preamble* recognizes that the government price may be "the most reasonable surrogate for [a] market-determined price[]." 63 Fed. Reg. at 65,378; *see also* Prelim. Mem. at 30; GOK QR at 4. Commerce's examination of a standard pricing mechanism "as a proxy for conformity with market principles" supported the conclusion that the government price provided a suitable benchmark. *Nucor*, 2018 WL 895714, at *7. Commerce "assessed whether the prices charged by KEPCO are set in accordance with market principles through an analysis of KEPCO's price-setting method." I&D Mem. at 45. Commerce explained that POSCO and Hyundai Steel purchased electricity through KEPCO in accordance with the tariff rate that applied throughout the POI and were treated no differently from other industrial consumers that purchased similar amounts of electricity. *Id*. at 46.

Nucor insists, however, that Commerce must analyze KEPCO's standard pricing mechanism for distortive government intervention. Nucor Mot. at 21.[53] According to Nucor, "Commerce failed to reasonably explain how KEPCO's so-called standard pricing for large industrial users of electricity resulted in prices that were market-based." *Id*. But the statute does not obligate Commerce to apply such a test;

[53] Pointing to several Tier 3 cases where Commerce used external prices as a benchmark for adequate remuneration, Nucor urges the court to remand the instant matter for Commerce to clarify when government distortion is irrelevant. Nucor Suppl. Br. at 10–13 (discussing *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, 81 Fed. Reg. 49,935 (Dep't Commerce July 29, 2016) (final aff. countervailing duty determination and final neg. critical circumstances determination; 2014), and accompanying Issues and Decision Mem., C-821–823 (July 20, 2016) (*"CRS from Russia*, I&D Mem.") at 52–56, 69–70; *Certain Uncoated Paper from Indonesia*, 81 Fed. Reg. 3104 (Dep't Commerce Jan. 20, 2016) (final aff. countervailing duty determination; 2014), and accompanying Issues and Decision Mem., C-560–829 (Jan. 8, 2016) ("*Paper from Indonesia*, I&D Mem.") at 13–17; *Laminated Woven Sacks from the People's Republic of China*, 73 Fed. Reg. 35,639 (Dep't Commerce June 24, 2008) (final aff. countervailing duty determination and final aff. determination, in part, of critical circumstances), and accompanying Issues and Decision Mem., C-570–917 (June 16, 2008) ("*Woven Sacks from China*, I&D Mem.") at 58). Nucor's request is, in part, prospective because it seeks "methodological clarity" as to how Commerce will conduct its Tier 3 analysis in future cases. *See* Nucor Suppl. Br. at 15–16. However, the court's post-remand review of any such clarification would amount to an impermissible advisory opinion because the court would be opining on matters outside the scope of the instant case and controversy. *See* Gov. Suppl. Br. at 2–3; Def.-Ints. Nucor Suppl. Br. at 4–5; *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Verson, A Division of Allied Prods. Corp. v. United States*, 22 CIT 151, 153, 5 F. Supp. 2d 963, 966 (1998) ("[A] federal court does not have the power to render an advisory opinion on a question simply because [it] may have to face the same question in the future.") (internal quotation marks and citations omitted). Moreover, the agency rulings cited by Nucor are distinguishable because in those cases Commerce determined that the government price was inconsistent with market principles and, thus, an unsuitable benchmark. *See CRS from Russia*, I&D Mem 67–69 (finding that Gazprom, a gas company in which the Russian Federation owns a controlling stake, sold gas at artificially low prices); *Paper from Indonesia*, I&D Mem.at 15–16 (finding that a ban on the export of logs affected the domestic reference price used as the basis for stumpage fees);

nowhere does it use the phrase "market-based." *See* 19 U.S.C. § 1677(5)(E)(iv) (directing Commerce to determine the adequacy of remuneration "in relation to prevailing market conditions"). Although Commerce's regulatory hierarchy emphasizes domestic or world market prices, when those prices are unavailable, Commerce assesses "consisten[cy] with market principles," not the existence of a supply-and-demand type market. 19 C.F.R. § 351.511(a)(2). "[T]he very existence of the [Tier 3] benchmark analysis supports the view that the relevant market principles" are examined in the context of "those operating within the government-controlled market." *Nucor*, 2018 WL 895714, at *6. In sum, Commerce's methodology is based on a permissible interpretation of the statute.

b. Commerce's Interpretation of Adequate Remuneration

Nucor contends that cost recovery is the *sine qua non* of adequate remuneration, and Commerce's failure to consider evidence that KEPCO sold electricity at below cost renders its interpretation of adequate remuneration unreasonable. Nucor Mot. at 22–23. Both the *Maverick Tube* and *Nucor* courts have rejected Nucor's argument, and this court agrees. *See Maverick Tube*, 273 F. Supp. 3d at 1310; *Nucor*, 2018 WL 895714, at *8.

The *CVD Preamble* contemplates the consideration of costs as one possible factor in Commerce's determination whether a government price is consistent with market principles pursuant to a Tier 3 analysis; however, it is not required. 63 Fed. Reg. at 65,378. Even in a free-market economy, cost recovery is not always a defining feature. *See Maverick Tube*, 273 F. Supp. 3d at 1310 ("[I]t is elemental that the functioning of a free market guided by the law of supply and demand sometimes results in sales below cost."). Further, Commerce did consider KEPCO's costs, finding that KEPCO's standard pricing mechanism was based upon its costs and enabled it to cover them. *See* I&D Mem. at 50;[54] *see also* GOK QR at 20–21 (detailing KEPCO's cost calculation). Commerce's definition of adequate remuneration by way of reference to its regulatory hierarchy and concomitant Tier 3 factors

Woven Sacks from China, I&D Mem. at 15–16 (finding that local government corruption and deviation from land use laws and regulations rendered the purchase of land-use rights discordant with market principles). In contrast, here, Commerce determined that the government price did accord with market principles. *See* I&D Mem. at 46. Accordingly, the court's affirmance of Commerce's decision in this case, as in *Maverick Tube* and *Nucor*, does not mean that Commerce may not rely on an external price when it determines that the particular case merits an external benchmark.

[54] Commerce explained that

> [t]o develop the electricity tariff schedules that were applicable during the POI, KEPCO first calculated its overall cost, including an amount for investment return. This cost includes the operational cost for generating and supplying electricity to the

is, therefore, reasonable. *See* 19 C.F.R. § 351.511; *CVD Preamble*, 63 Fed. Reg. at 65,378.

c. Consideration of the KPX

Nucor argues that the KPX's method of calculating its electricity prices distorts KEPCO's prices because it undercompensates electricity generators, such as nuclear generators, which have high fixed costs and low variable costs.[55] Nucor Mot. at 25–26. According to Nucor, this introduces a subsidy because large industrial users can fashion their electricity consumption to take advantage of electricity produced by cheaper nuclear generators. *Id*. at 26 (citing GOK Suppl. QR at 7 n.3).

Commerce explained that the record does not show "that utility companies have separate tariff rates that are differentiated based upon the manner in which the electricity is generated," or that the costs KEPCO used to develop its tariff schedule did not reflect the actual costs of the electricity it transmits and distributes. I&D Mem. at 50. Commerce did not request information regarding the costs of electricity generation

> because the costs of electricity to KEPCO are determined by the KPX. Electricity generators sell electricity to the KPX, and KEPCO purchases the electricity it distributes to its customers through the KPX. Thus, the costs for electricity are based upon the purchase price of electricity from the KPX, and this is the cost that is relevant for KEPCO's industrial tariff schedule.

Id.

Nucor seeks to undermine Commerce's determination by pointing to the GOK's explanation for the cheaper electricity prices applicable

> consumers as well as taxes. The cost for each electricity classification was calculated by (1) distributing the overall cost according to the stages of providing electricity (generation, transmission, distribution, and sales); (2) dividing each cost into fixed cost, variable cost, and the consumer management fee; and (3) then calculating the cost by applying the electricity load level, peak level, and the patterns of consuming electricity. Each cost was then distributed into the fixed charge and the variable charge. KEPCO then divided each cost taking into consideration the electricity load level, the usage pattern of electricity, and the volume of the electricity consumed. Costs were then distributed according to the number of consumers for each classification of electricity.

I&D Mem. at 50; *see also* GOK QR at 20–21 (containing a diagrammatical breakdown of the cost calculation).

[55] KPX prices are based on a "marginal price" plus "capacity price" formulation. Nucor Mot. at 25 (citing GOK QR at 24, 26–27, Ex. E-3 at 33). The "marginal price" is the variable cost of producing electricity, which consists primarily of fuel costs. GOK QR, Ex. E-3 at 31. The "capacity price" represents the fixed costs of producing electricity, such as constructing facilities to generate electricity. *Id.*, Ex. E-3 at 33. "The capacity price is determined annually by the Cost Evaluation Committee based on the construction costs and maintenance costs of a standard generation unit . . . ." *Id.* The capacity price "is applied equally to all generation units, regardless of fuel types used." *Id.*

to industrial users. Nucor Mot. at 27 (citing GOK Suppl. QR at 7 n.3).[56] The GOK explained, however, that the cost of supplying electricity to the *top 100 consumers* is less than the *average cost* of supplying industrial electricity because the top consumers "have relatively steady electricity demands" that enables lower fixed costs or they can consume electricity when demand is low (e.g., at night). GOK Suppl. QR at 6–7 & n.3. Although the price paid by the top 100 consumers may, therefore, be lower than the average paid by all industrial users, the GOK's statement does not suggest that the industrial tariff applicable to all users is distorted. Nucor also relies on Hyundai Steel's assertion that nuclear generators cover their fixed and variable costs because they receive the same compensation as the highest variable cost generators. Nucor Mot. at 26–27 (citing Hyundai Steel's Rebuttal Br. (May 25, 2016) ("Hyundai Steel Rebuttal Br.") at 15,[57] CJA Tab 36, CR 464, PJA Tab 36, PR 426, ECF No. 79). However, Hyundai Steel sought to explain that nuclear generators cover their costs because they generate a higher return on the marginal price, thereby refuting Nucor's argument that nuclear generators fail to cover their costs "because of an artificially low capacity price component." Hyundai Steel Rebuttal Br. at 32. Hyundai Steel did not, as Nucor contends, state that nuclear generators receive the same total amount as other generators to cover fixed and variable costs. *See* Nucor Mot. at 26–27, 28; Hyundai Steel Rebuttal Br. at 32; GOK QR, Ex. E-3 at 31–33 (discussing how the marginal price is calculated). In any event, "[n]othing in the statute requires Commerce to consider how the authority acquired the good or service that

[56] KEPCO had been asked to provide a report to the Korean National Assembly's Trade, Industry & Energy Committee on its "assistance to top 100 industrial electricity consumers through the supply of electricity from 2003 through 2012." GOK Suppl. QR at 6. To accurately respond, KEPCO "would have had to calculate the differences between the amount of the fees charged to those companies and the actual cost for supplying electricity to them for every year from 2003 through 2012." *Id.* Because KEPCO lacked data on its cost of supplying electricity to the top 100 industrial consumers, a National Assembly member asked KEPCO to instead use "the average cost for supplying industrial electricity" in its calculations. *Id.* at 6–7. In its questionnaire response, the GOK sought to explain why KEPCO's adherence to the member's request—that is, calculating the difference between the price paid by the top 100 consumers and the average cost of supplying industrial electricity *in toto*—produced defective data. *Id.* at 7 & n.3. The GOK explained that electricity costs differ depending, in part, on when electricity is consumed and the pattern of consumption. *Id*. Many of the top 100 industrial consumers of electricity "have relatively steady electricity consumption that allows the fixed costs of generation to be kept relatively low," or if they "do not have relatively steady electricity demands," they "attempt to schedule operations to maximize . . . the use of electricity when the overall load is low," such as at night. *Id.* For those reasons, the cost of "supplying electricity to the top 100 industrial consumers is relatively low compared to the average cost [of] supplying industrial electricity." *Id.*

[57] The passage quoted by Nucor appears on page 32 of Hyundai Steel's Rebuttal Brief—not page 15.

was later provided to respondents." *Nucor*, 2018 WL 895714, at *8. KEPCO is "the exclusive supplier of electricity in Korea," GOK QR at 4, and, thus, Commerce's focus on KEPCO's costs and rate-setting method is reasonable. *See, e.g., Apex Frozen Foods*, 862 F.3d at 1351 (citation omitted).[58]

d. Substantial Evidence Supports Commerce's Determination

In making its benefit determination, Commerce relied on evidence that KEPCO used a standard pricing mechanism to develop its tariff schedule, which was based upon, and covered, its costs and an amount for investment return. I&D Mem. at 50 & nn.234–35 (citations omitted). In particular, the record shows that KEPCO more than covered its cost of supplying industrial electricity for the POI.[59] The evidence upon which Nucor seeks to rely does not undermine Commerce's determination because it contains mostly historical observations that predate the POI. *See* Nucor Mot. at 31–33 (citing *Welded Line Pipe from the Republic of Korea,* 80 Fed. Reg. 61,365 (Dep't Commerce Oct. 13, 2015) (final neg. countervailing duty determination; 2013), and accompanying Issues and Decision Mem., C-580–877 (Oct. 5, 2015) ("*Welded Line Pipe from Korea*, I&D Mem.") at 14–15);[60] Petition, Exs. X-2 at ECF p. 39, X-11 at ECF p. 62, X-15 at ECF p. 107).

Nucor also attempts to dismiss evidence of KEPCO's pre-POI tariff rate increases on the basis of speculative forecasts contained in KEPCO's Form 20-F filed with the U.S. Securities and Exchange Commission. *See* Nucor Mot. at 32;[61] Nucor Reply at 19 (arguing that

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[58] At oral argument, POSCO asserted that Nucor's argument that KPX undercompensates nuclear generators must fail because the record shows those generators to be profitable. Oral Arg. at 2:32:31–2:34:10. The court may not accept "*post hoc* rationalizations for agency action" and may only sustain the agency's decision "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168–69 (1962). Thus, reasoning that is offered *post hoc*, in briefing to the court or during oral argument, is not properly part of this court's review of the agency's underlying determination when such reasoning is not discernable from the record itself. Such reasoning is not discernible because Commerce did not consider KPX's costs relevant to the inquiry and, thus, did not consider or discuss this evidence. *See* I&D Mem. at 50.

[59] KEPCO's "cost recovery rate" for its industrial tariff was [[ ]] percent. GOK QR, Ex. E-23.

[60] Nucor points to Commerce's statement that "cross-subsidization" has existed in the Korea electricity market and that "[c]heap power significantly helped the export-led growth of the Korean economy, while nurturing an industry structure which consumes too much power and which cannot survive with a price that would recover costs." Nucor Mot. at 31–32 (quoting *Welded Line Pipe from Korea*, I&D Mem. at 14–15). Notwithstanding its historical observation, therein, Commerce determined that the GOK's provision of electricity was not for less than adequate remuneration. *Welded Line Pipe from Korea*, I&D Mem. at 18; *see also Maverick Tube*, 273 F. Supp. 3d at 1297 (affirming *Welded Line Pipe from Korea*).

[61] Nucor relies on the following statement by KEPCO:

> [B]ecause the [GOK] regulates the rates we charge for the electricity we sell to our

any contention that political intervention ended before the POI is belied by KEPCO's cautionary statements). In fact, KEPCO raised its prices three times in 2012 and 2013. *See* GOK QR, Ex. E-3 at 53; I&D Mem. at 51. Nucor contends that the rate increases were insufficient in light of the fact that rates for industrial customers were almost 20 percent below generating costs before the increases took effect. *See* Nucor Mot. at 33 (citing Petition, Ex. X-17). However, Nucor points to the overall increases, and not the specific increases to industrial rates, which were higher, collectively totaling 16.8 percent. *See* GOK QR, Ex. E-3 at 53. Moreover, as stated above, record evidence relied upon by Commerce demonstrates that KEPCO more than covered its cost of supplying electricity to industrial users. *See id.*, Ex. E-23. Accordingly, substantial evidence supports the agency's conclusion that the GOK's provision of electricity was not for less than adequate remuneration.[62]

B. Commerce's Determination Not to Apply AFA to the GOK

1. Parties' Contentions

Nucor contends that Commerce should have relied on adverse facts available with regard to the GOK for its "repeated failure to provide complete, accurate, and verifiable information on KEPCO's price-setting procedures and electricity generation costs." Nucor Mot. 36. According to Nucor, the GOK failed to fully respond to Commerce's request "for documentation of KEPCO's 'lengthy deliberative process' [that occurs prior to its application for a tariff increase]," which is important because the GOK "has intervened to prevent KEPCO from implementing commercially sufficient tariff rate increases." *Id*. at 40–41.

> customers . . . our ability to pass on fuel and other cost increases to our customers is limited. . . . [KEPCO] cannot assure that any future tariff increase by the Government will be sufficient to fully offset the adverse impact on our results of operations from the current or potential rises in fuel costs.

Nucor Mot. at 32 (quoting GOK QR, Ex. E-3 at 5).

[62] Nucor also asserts that it presented an alternative calculation purportedly showing that, [[ ]] Nucor Mot. at 35 (citing Nucor Case Br. at 30). Nucor relied on [[ ]] *Id.* (citing same). Nucor asserts that Commerce dismissed its calculation as a possible benchmark because it was drawn from pre-POI data. *Id.* (citing I&D Mem. at 24). Nucor asserts, however, that it did not present the calculation for the purpose of providing an alternative benchmark, but to show that KEPCO had failed to cover its costs. *Id.* at 35–36. Page 24 of the Issues and Decision Memorandum does not discuss Nucor's alternative calculation. Commerce did discuss the National Assembly Report on pages 50–51, wherein the agency dismissed the relevance of the report as part of its discussion about cost recovery on the basis of its "flawed . . . methodology," and because the information in the report predates the POI by two years. I&D Mem. at 50–51. Commerce further noted that KEPCO's electricity tariff rates have increased three times since the date of the report. *Id*. at 51 & n.236. Commerce therefore adequately addressed Nucor's argument.

The Government contends that Commerce correctly determined not to rely on adverse facts available with regard to the GOK because it "was able to use verified information" and "fully analyzed" the allegedly subsidized program using the GOK's questionnaire responses. Gov. Resp. at 22 (quoting I&D Mem. at 42) (alteration omitted); *see also* Resp't Def.-Int. Resp. at 26–27. The Government further contends that it is for Commerce to decide "what information is relevant and necessary for its investigations." Gov. Resp. at 22 (citing *Ansaldo Componenti,* 10 CIT at 37, 628 F. Supp. at 205).

Nucor responds that Commerce *did* determine that information regarding the GOK's interference was relevant and necessary, because it asked for it, and a *post hoc* finding that withheld information was not relevant or necessary cannot be sustained. Nucor Reply at 21–22.

2. Analysis

Pursuant to 19 U.S.C. § 1677e, Commerce "*may* use an inference that is adverse to the interests of [an uncooperative] party." 19 U.S.C. § 1677e(b)(1)(A) (emphasis added). The statute's use of the word "may" indicates that Commerce has discretion in this regard. *See Cerro Flow Prods, LLC v. United States*, Slip Op. 14–84, 2014 WL 3539386, at *7 (CIT July 18, 2014) (citing *Timken U.S. Corp. v. United States*, 28 CIT 62, 84–85, 310 F. Supp. 2d. 1327, 1346 (2004) (analyzing the International Trade Commission's discretion to apply adverse inferences pursuant to the same statute)); *Tianjin Magnesium Int'l Co., Ltd. v. United States*, 36 CIT ___, ___, 844 F. Supp. 2d 1342, 1346 (2012) (citing *PAM, S.p.A. v. United States,* 582 F.3d 1336, 1340 (Fed. Cir. 2009)). The issue of whether an interested party has cooperated to the best of its ability "amounts to a line-drawing exercise [that] is precisely the type of discretion [generally] left within the agency's domain." *Ta Chen Stainless Steel Pipe Co., Ltd. v. United States*, 31 CIT 794, 812 (2007) (internal quotation marks, citation, and second alteration omitted). The court's review of relevant case law has uncovered just one instance where the CIT overturned Commerce's decision *not* to rely on adverse facts available. *See Tianjin Magnesium*, 844 F. Supp. 2d at 1347–48 (remanding for Commerce to address respondent's submission of falsified records two months after Commerce determined they were false). The instant case is readily distinguishable.

Here, Commerce determined that the GOK submitted timely and complete responses to its extensive and detailed questionnaires. *See* I&D Mem. at 42; GOK QR; GOK Suppl. QR. The GOK's responses included information on "KEPCO's rate setting methodology, cost

recovery rates, investment return, [] profit information[, and] . . . usage data on all electricity users, including the top 100 industrial users of electricity." I&D Mem. at 42. Commerce explained that it was able to verify the pertinent information, including "the data underlying the calculations used by KEPCO to set the electricity prices in effect during the POI[, and] . . . KEPCO's standard pricing mechanism and its application in the setting of industrial electricity tariffs." *Id*. at 42 & n.199 (citing *CORE* Electricity Verification Report). In sum, Commerce was able to "fully analyze this alleged program based upon the information provided by the GOK." *Id*. at 42 & n.200 (citing Prelim. Mem. at 30–34).

Nucor points to the GOK's purported "refusal to provide any information regarding the 'informal' consultation process" that precedes KEPCO's submission of an application for a tariff rate increase. Nucor Mot. at 39. The GOK, however, responded to Commerce's inquiries regarding these consultations relevant to the tariff rate schedules and proposed tariff increases. *See* I&D Mem. at 42; GOK QR at 28–30, 34. Accordingly, the GOK did not withhold information, such that resort to the use of facts available was necessary, let alone adverse facts available. *See* 19 U.S.C. § 1677e(a)(2)(A), (b)(1)(A); *Shandong Huarong Mach. Co., Ltd. v. United States*, 30 CIT 1269, 1301, 435 F. Supp. 2d 1261, 1289 (2006) ("Absent a valid decision to use facts otherwise available, Commerce may not use an adverse inference") (affirming Commerce's decision not to apply adverse facts available when the respondent had supplied the necessary information). Thus, Commerce's determination not to rely on adverse facts available is supported by substantial evidence and is otherwise in accordance with law.[63] In sum, the court denies Nucor's motion.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Determination* is sustained with respect to Commerce's use of the facts available with an adverse inference for POSCO's failure to report cross-owned input suppliers and an FEZ-located R&D facility, as set forth in Discussion Section I.A.1 and I.A.2; it is further

[63] Nucor contends that Commerce's refusal to use third-country or Korean benchmark data or reach the issue of specificity hinged on unlawful determinations, and, as such, the court should remand the matter with instructions to reconsider using a third-country benchmark and to address Nucor's specificity-related arguments. Nucor Mot. at 41. Because Commerce's determination that the GOK's provision of electricity was not for less than adequate remuneration is lawful and supported by substantial evidence, these issues are moot.

ORDERED that POSCO's challenge to Commerce's *Final Determination* with respect to Commerce's use of adverse facts available in response to DWI's loan reporting is moot, as set forth in Discussion Section 1.A.3; it is further

ORDERED that Commerce's *Final Determination* is remanded with respect to Commerce's use of the highest calculated rates to determine POSCO's adverse facts available rate, as set forth in Discussion Section I.B; it is further

ORDERED that Commerce's *Final Determination* is sustained with respect to the agency's corroboration methodology, as set forth in Discussion Section I.C.2.a; it is further

ORDERED that, to the extent Commerce continues to use the 1.05 percent rate derived from *Washers from Korea* following reconsideration of its use of the highest rates as required by Discussion Section I.B, Commerce's *Final Determination* is sustained with respect to Commerce's corroboration of the 1.05 percent rate, as set forth in Discussion Section I.C.2.b; it is further

ORDERED that, in addition to Commerce's required reconsideration of the 1.64 percent rate derived from *Refrigerators from Korea* rate pursuant to Discussion Section I.B, Commerce's *Final Determination* is remanded with respect to Commerce's corroboration of the 1.64 percent rate, as set forth in Discussion Section I.C.2.b; it is further

ORDERED that Commerce's *Final Determination* is sustained with respect to all issues raised in Nucor's motion, as set forth in Discussion Section II; it is further

ORDERED that Commerce shall file its remand redetermination on or before June 6, 2018; it is further

ORDERED that the deadlines provided in USCIT Rule 56.2(h) shall govern thereafter; and it is further

ORDERED that any opposition or supportive comments must not exceed 6,000 words.

Dated: March 8, 2018
New York, New York

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

Slip Op. 18–23

DYNAENERGETICS U.S. INC., Plaintiff, v. UNITED STATES, Defendant, MAVERICK TUBE CORPORATION, Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 16–00045

[Sustaining the U.S. Department of Commerce's scope determination and its instructions to U.S. Customs and Border Protection associated with the scope determination.]

Dated: March 16, 2018

Diana Dimitriuc Quaia, Arent Fox LLP, of Washington, DC, argued for Plaintiff. With her on the brief were *John M. Gurley* and *Aman Kakar*.

Justin R. Miller, Senior Trial Counsel, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, NY, argued for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Paul Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Robert E. DeFrancesco, III, Wiley Rein LLP, of Washington, DC, argued for Defendant-Intervenor. With him on the brief were *Alan H. Price* and *Adam M. Teslik*.

OPINION

Barnett, Judge:

This action involves a challenge to a U.S. Department of Commerce ("Commerce" or the "agency") scope determination for the antidumping and countervailing duty orders on *Certain Oil Country Tubular Goods from the People's Republic of China,* 75 Fed. Reg. 28,551 (Dep't Commerce May 21, 2010) (am. final determination of sales at less than fair value and antidumping duty order) ("*AD Order"); Certain Oil Country Tubular Goods from the People's Republic of China*, 75 Fed. Reg. 3,203 (Dep't Commerce Jan. 20, 2010) (am. final affirmative countervailing duty determination and countervailing duty order) ("*CVD Order*") (collectively, "*AD & CVD Orders*" or "the *Orders*"). Before the court is the remand redetermination issued pursuant to *DynaEnergetics U.S. Inc. v. United States*, 41 CIT __, 203 F. Supp. 3d 1351 (2017). *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 53–1.[1] DynaEnergetics U.S.

[1] Defendant filed the public version of the administrative record ("PR") at ECF Nos. 19–2 and 19–4; the confidential version of the administrative record ("CR") at ECF Nos. 19–3 and 19–5; Commerce's instructions to Customs at ECF Nos. 27–1, 27–2; and the public remand administrative record ("PRR") at ECF Nos. 55–2, 55–3. The parties also submitted joint appendices containing record documents cited in their briefs. *See* Confidential Joint App. ("CJA"), ECF No. 66; Public Joint App. ("PJA"), ECF No. 67. The court references the public versions of the relevant record documents throughout this opinion, unless otherwise specified.

Inc. ("Plaintiff" or "DynaEnergetics") challenges the Remand Results in which Commerce determined that Plaintiff's customized tubing for perforating gun carriers ("gun carrier tubing") is within the scope of the *Orders*. *See generally* Pl.'s Comments on the U.S. Department of Commerce's Remand Redetermination ("Pl.'s Comments") at 5–26, ECF No. 57; Remand Results. Plaintiff also challenges Commerce's instructions to U.S. Customs and Border Protection ("Customs" or "CBP") associated with this ruling. Pl.'s Comments at 26–28. Defendant, the United States, and Defendant-Intervenor, Maverick Tube Corporation, defend Commerce's Remand Results with respect to both issues. *See generally* Def.'s Resp. to Comments on the Remand Redetermination ("Def.'s Resp."), ECF No. 60; Def.-Int. Maverick Tube Corporation's Reply Comments on Final Results of Redetermination Pursuant to Court Remand ("Def.-Int's Resp."), ECF No. 64.[2] For the reasons discussed below, the court sustains Commerce's Remand Results.

BACKGROUND

On May 5, 2009, Commerce initiated antidumping and countervailing duty investigations of certain oil country tubular goods ("OCTG") from the People's Republic of China ("PRC"). *Certain Oil Country Tubular Goods from the People's Republic of China*, 74 Fed. Reg. 20,671 (Dep't Commerce May 5, 2009) (initiation of antidumping duty investigation) ("*AD Investigation"); Certain Oil Country Tubular Goods from the People's Republic of China*, 74 Fed. Reg. 20,678 (Dep't Commerce May 5, 2009) (initiation of countervailing duty investigation) ("*CVD Investigation*"). Commerce subsequently issued the antidumping and countervailing duty orders on May 21, 2010, and Jan 20, 2010, respectively. *See generally AD & CVD Orders*. The *Orders* defined their scope as follows:

> [C]ertain OCTG, which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (e.g., whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute ("API") or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors

[2] Defendant-Intervenor filed public and confidential versions of its responsive comments. *See* Def.-Int.'s Resp.; Confidential Def.-Int. Maverick Tube Corporation's Reply Comments on Final Results of Redetermination Pursuant to Court Remand, ECF No. 63. The court references the public version.

> are attached. The scope of the order also covers OCTG coupling stock. Excluded from the scope of the order are: casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.

AD Order, 75 Fed. Reg. at 28,553.[3] The *Orders* also included relevant U.S. Harmonized Tariff Schedule ("HTSUS") subheadings, which Commerce provided for "convenience and customs purposes only," noting that the "written description of the scope of the order is dispositive." *Id*.

On September 25, 2015, Plaintiff, a U.S. producer of oil and gas well perforating systems that imports gun carrier tubing for use in those systems, requested a scope ruling to determine whether its gun carrier tubing falls outside the scope of the *Orders*. Request for a Scope Ruling on Certain Tubing for Perforating Gun Carriers (Sep. 25, 2015) ("Scope Ruling Request"), PJA Tab 1, PR 1–6, ECF No. 67. On February 12, 2016, based on its analysis of the factors enumerated in 19 C.F.R. § 351.225(k)(1), Commerce determined that DynaEnergetics' gun carrier tubing is within the scope of the *Orders*. Final Scope Ruling on DynaEnergetics U.S. Inc.'s Perforating Gun Carriers (February 12, 2016) ("Final Scope Ruling") at 10–13, PJA Tab 8, PR 20, ECF No. 67. Plaintiff timely challenged Commerce's scope determination and the accompanying instructions to Customs before this court. *DynaEnergetics U.S. Inc.*, 203 F. Supp. 3d at 1354. Defendant requested a remand to "reconsider [Commerce's] findings in light of DynaEnergetics' contentions" before the court. *Id*. As the court previously noted, "Defendant acknowledged that the agency's analysis was cursory and did not fully address [Plaintiff's] arguments." *Id.* at 1355. The court granted the request and remanded the matter for the agency to reconsider the scope determination at issue and, if appropriate, its instructions to Customs associated with the scope determination. *Id.* at 1356. Pursuant to the court's order, Commerce timely issued its Remand Results on June 7, 2017, continuing to find that Plaintiff's gun carrier tubing is within the scope of the *Orders*. Remand Results at 1. Additionally, with respect to the customs instructions associated with its scope determination, Commerce found that the customs instructions were proper. *Id*. at 1–2. Plaintiff now challenges both determinations. It requests that the court remand Commerce's determination pursuant to 19 C.F.R. § 351.225(k)(1) for the agency to initiate a scope inquiry and consider the factors listed in 19 C.F.R. § 351.225(k)(2). Pl.'s Comments at 24–26. Further, in the event

[3] The scope of both the *Orders* is the same. *Compare AD Order*, 75 Fed. Reg. at 28,553, *with CVD Order*, 75 Fed. Reg. at 3,204. For ease of reference, the court refers only to the scope of the *AD Order*.

theCourt does affirm the Remand Results, Plaintiff requests that the Court order "that suspension of liquidation be imposed only on a prospective basis." Pl.'s Comments at 28.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi)(2012),[4] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071 (Fed. Cir. 2001) (internal quotation marks and citation omitted). Additionally, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id*. (citation omitted).

DISCUSSION

I. Legal Framework

Because descriptions of merchandise contained in the scope of an antidumping or countervailing duty order must be written in general terms, issues may arise as to whether a particular product is included within the scope of such an order. *See* 19 C.F.R. § 351.225(a). When those issues arise, Commerce's regulations direct it to issue "scope rulings" that clarify whether a particular product falls within the purview of an antidumping or countervailing duty order's scope. *Id*. Although there are no specific statutory provisions that govern the interpretation of the scope of an order, the determination of whether a particular product is included within the scope of an order is governed by case law and the regulations published at 19 C.F.R. § 351.225. *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) (citing *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015); *see also Eckstrom Indus.*, 254 F.3d at 1071–72 (noting that 19 C.F.R. § 351.225 governs a determination of whether an antidumping duty order covers a particular product).[5]

[4] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code and all citations to the U.S. code are to the 2012 edition, unless otherwise specified.

[5] The regulations establish a two-step process, and "case law has added another layer to the inquiry." *Meridian Prods.*, 851 F.3d at 1381 (distinguishing between Commerce's examination of the "text of an order's scope" and the sources enumerated in 19 C.F.R. § 351.225(k)(1), discussed herein).

Commerce's inquiry must begin with the relevant scope language. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (explaining that the language in the order is the "predicate for the interpretive process" and the "cornerstone" of a scope analysis"); *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013); *Meridian Prods.*, 851 F.3d at 1381. If the language is ambiguous, Commerce interprets the scope "with the aid of" the sources set forth in 19 C.F.R. § 351.225(k). *Meridian Prods.*, 851 F.3d at 1381; *Duferco Steel*, 296 F.3d at 1096–97; *Mid Continent Nail Corp.*, 725 F.3d at 1302. Specifically, Commerce first considers the "[t]he descriptions of the merchandise contained in the petition, [Commerce's] initial investigation, and the [prior] determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission." *Mid Continent Nail Corp.*, 725 F.3d at 1302 (quoting 19 C.F.R. § 351.225(k)(1) (the "(k)(1) factors")).

If the (k)(1) factors are dispositive, Commerce issues a final scope ruling. *See* 19 C.F.R. § 351.225(d). To be dispositive, the (k)(1) factors "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Sango Int'l L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007). When the (k)(1) factors are not dispositive, Commerce considers the sources in subsection (k)(2) of the regulation. *See* 19 C.F.R. § 351.225(k)(2).[6]

"Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping duty orders." *King's Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012). Nevertheless, "Commerce cannot interpret an antidumping order so as to change the scope of th[e] order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus.*, 254 F.3d at 1072 (internal quotation marks and citation omitted). When a party challenges a scope determination, the court's objective is to determine whether the scope of the order "contain[s] language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel, Inc.*, 296 F.3d at 1289. The agency's factual findings resulting from analyzing the (k)(1) factors are reviewed for substantial evidence. *Meridian Prods.*, 851 F.3d at 1382.

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[6] Specifically, Commerce will consider: "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2) (the "(k)(2) factors"). Those factors are sometimes referred to as the *Diversified Products* factors because they were first articulated in *Diversified Prods. Corp. v. United States,* 6 CIT 155, 572 F. Supp. 883 (1983). *See Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1355 & n.2 (Fed. Cir. 2010).

II. Analysis

a. Commerce's Determination

The relevant language of the scope of the *Orders* is reproduced above. Commerce determined that the scope of the *Orders* covers "certain OCTG"; therefore, "all language thereafter is predicated on the merchandise being OCTG." Remand Results at 18. Commerce reviewed the definitions of OCTG from the International Trade Commission ("ITC") and the American Iron and Steel Institute ("AISI") and ultimately adopted the ITC's definition of OCTG as "tubular steel products used in oil and gas wells and include casing, tubing, and coupling stock of carbon and alloy steel." *Id*. at 19–20. Relying on the language of the *Orders* covering "certain OCTG, which are hollow steel products of circular cross-section," and the ITC's definition of OCTG, Commerce interpreted the scope to cover hollow steel products of circular cross-section used in oil and gas wells, except for products expressly excluded from the scope. *Id*. at 17–21. As a result, Commerce determined that the scope included, but was not limited to, tubing, casing, and coupling stock. *Id*. at 20–21, 31. Moreover, Commerce determined that OCTG encompasses those tubular steel products used in well drilling and extracting oil or gas to the surface, and extends to those products used in "other functions associated with an oil and gas well." *Id*. at 31.

Comparing Plaintiff's description of the gun carrier tubing and the physical characteristics of the product to this understanding of the scope, Commerce determined that the gun carrier tubing satisfied Commerce's definition of OCTG and the scope language. *Id*. at 20. The gun carrier tubing satisfied the scope's requirement that subject merchandise be "'hollow steel products of circular cross-section . . . of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (e.g., whether or not plain end, threaded, or threaded and coupled)." *Id*. Moreover, Plaintiff's description that "the gun carrier tubing is a tubular steel product used in oil and gas wells" satisfied the definition of OCTG that Commerce adopted. Remand Results at 20.

b. Commerce's Interpretation of OCTG is Consistent With The Scope Language and the (k)(1) Factors

In challenging the Remand Results, Plaintiff argues that Commerce gave "no consideration" to certain (k)(1) factors, such as the petition, Commerce's investigation, and Commerce's statements in aseparate scope proceeding, "other than to dismiss this evidence

without justification." Pl.'s Comments at 6. Plaintiff argues that, for the evidence it did consider, Commerce unjustifiably adopted select statements and disregarded others. *Id*. Contrary to Plaintiff's assertions, Commerce reviewed each of the (k)(1) factors and explained the reasoning supporting its determination. The agency's factual findings regarding the (k)(1) factors are supported by substantial evidence.

i. The Petition

Petitioners' proposed scope initially covered "certain OCTG, hollow steel products of circular cross section, including *only* oil well casing and tubing . . . ." Scope Ruling Request, Ex. 10 (Petitions for the Imposition of Antidumping and Countervailing Duties) (Apr. 8, 2009) ("Petition") at 5 (emphasis added). In response to the agency's questions regarding the language of the scope and whether it was intended to cover couplings (whether or not attached to the subject OCTG), coupling stock, and thread protectors (whether or not attached to the subject OCTG), petitioners revised their scope language to include coupling stock. *See* Scope Ruling Request, Ex. 11 (Resp. to the Department's Questionnaire Regarding Vol. I of the Petitions for the Imposition of Antidumping and Countervailing Duties) (Apr. 22, 2009) ("Petitioners' QR Resp.") at 7. The revised proposed scope, in relevant part, read: "The merchandise covered by the investigation consists of certain oil country tubular goods ("OCTG"), hollow steel products of circular cross-section, including *only* oil well casing and tubing, of iron . . . This scope covers coupling stock." Petitioners' QR Resp. at 2–3, 6–7 (emphasis added). Petitioners also added certain tariff classifications to the proposed scope. *Id*.

When Commerce announced the initiation of the investigations, Commerce removed the word "only" from the language of the scope so that the scope covered "certain [OCTG] . . . including oil well casing and tubing . . . ." *See AD Investigation*, 74 Fed. Reg. 20,677; *CVD Investigation*, 74 Fed. Reg. 20,681. Commerce's revised scope language was also included in the *AD & CVD Orders*.

Plaintiff places great emphasis on the inclusion of the word "only" in the proposed scope as indicating that the scope of the *Orders* covers only casing, tubing, and coupling stock. Pl.'s Comments at 15–19. In evaluating this argument in the Remand Results, the agency considered the evolution of the scope language and noted that the limiting language initially included in the petition was excluded from the final *Orders*. Remand Results at 24. Therefore, the agency found that "the proposed scope language from the original petitions is not determinative and, if anything, actually weighs against reading limitations into the final scope language that are no longer there." *Id.*

To the extent that Plaintiff is suggesting that Commerce was required to determine whether its gun carrier tubing would have been covered by the description of the scope provided in the original petition, Plaintiff is wrong. Commerce, as the investigating authority, has the authority to determine the scope of the merchandise being investigated and its determination may differ from that proposed in the petition. *See Duferco Steel*, 296 F.3d at 1096. When that occurs, as it did here, it is the scope of any resulting antidumping or countervailing duty order that is relevant for determining the coverage of the order and the proposed scope contained in the petition is relevant only to the extent that it aids in the understanding of the scope language of the order. *See* 19 C.F.R. § 351.225(k)(1) (listing "the description of merchandise contained in the petition" as a source that the agency "will take into account" in making its scope determinations); *Duferco Steel*, 296 F.3d at 1097 (stating that the petition may provide guidance to the interpretation of an order, but "cannot substitute for language in the order itself."). Any changes in the language may have expanded or restricted the coverage of the proposed scope, but it is the final scope language that is determinative. *See Duferco Steel*, 296 F.3d at 1096–97

Plaintiff faults Commerce for simply noting the change in language between the proposed scope and the final scope without "analyz[ing] the description of the merchandise in the Petition," Pl.'s Comments at 19, "in light of th[e] context and history of OCTG scope definitions, which was specifically referenced in the Petition," *id.* at 17. Plaintiff argues that the petitioners drafted their proposed scope to be "essentially identical to orders on OCTG from Argentina, Italy, Korea, and Mexico imposed in 1995 and subject to five-year reviews in 2007." *Id.* at 16 (internal quotations and citation omitted). Plaintiff states that the antidumping duty order on OCTG from Italy used the identical limiting language contained in the petition. *Id.* at 16.

Plaintiff's references to the scope coverage of these other investigations and the antidumping duty order on OCTG from Italy do not detract from the agency's reasoning in this case when there are substantive differences between the scope language of the referenced cases and of the *Orders*. Here, after the agency deliberately deleted the word "only" from the proposed scope, it was reasonable for Commerce not to interpret the scope in the same manner as other previous orders that included that limiting term. As Commerce explained in the Remand Results, if Commerce had "intended to limit the scope and the definition of OCTG to oil well casing and tubing, it could have done so by adopting the language from the petitions that DynaEnergetics references." Remand Results at 24.

Plaintiff also posits that Commerce removed the word "only" from the proposed scope to accommodate the addition of coupling stock to the definition so that the scope language would be grammatically correct. Pl.'s Comments at 19. Plaintiff points to no evidence suggesting that the deletion of the limiting language was only for grammatical purposes and not to expand the scope. Even if the court assumes that Commerce was primarily concerned with grammatical correctness, it could have reflected such intent by simply inserting "coupling stock" into the first sentence to state that the scope covered "certain OCTG . . . including only oil well casing, tubing, and coupling stock."

Plaintiff also contends that the scope of the *Orders* cannot be interpreted to cover all hollow steel products of circular cross section used in an oil well because if that were true, there would have been no need for Commerce or the ITC to specifically add coupling stock to the final scope description. *Id.* at 21. Likewise, however, if the scope of the *Orders* was limited to casing, tubing, and coupling stock, as Plaintiff suggests, Commerce need not have referred to "certain OCTG" and, instead, could have defined the scope as covering only those enumerated products. Here, Commerce reasonably found that the language in the *Orders* reflects a broadening of the scope from that initially proposed by the petitioners. The narrow reading of the *Orders* that Plaintiff proposes conflicts with the plain language of the *Orders* that specifically deleted a limiting term once proposed by the petitioners. Although the description of merchandise in the petition may aid Commerce in making its scope determination, "that description 'cannot substitute for language in the order itself' because [i]t is the responsibility of [Commerce], not those who [participated in] the proceedings, to determine the scope of the final orders.'" *Meridian Prods.*, 851 F.3d at 1382 (quoting *Duferco Steel*, 296 F.3d at 1097) (alterations in original). That is precisely what Commerce did here when it altered the proposed scope language in initiating the investigations, and adopted the revised language in the *Orders*. As the U.S. Court of Appeals for the Federal Circuit has explained, "[t]he purpose of the petition is to propose an investigation. . . . Commerce's final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." *Duferco Steel*, 296 F.3d at 1096 (internal citations omitted).

ii. The ITC's Investigation and Final Determination

In determining the meaning of the scope language, Commerce reviewed definitions of OCTG referenced in the ITC's final injury determination and by the AISI, both of which Plaintiff included in its

scope ruling request. Remand Results at 19–20, 23–26, 30–31; *see also* Scope Ruling Request, Ex 8 (AISI Manual) at 33; *id.*, Ex. 9 (Certain Country Tubular Goods from China, USITC Pub. 4124, Inv. No. 701-TA-463 (Jan. 2010) ("ITC Final Det.")) at 5. In 1982, the AISI defined OCTG as a "collective term applied to the drill pipe, casing and tubing used in the drilling of a well and conveying the oil or gas products to the surface." AISI Manual at 33. In its final injury determination, the ITC referenced AISI as having defined six end-use categories for steel pipes and tubes, one of those categories being OCTG. ITC Final Det. at I-9. In a footnote appended to that sentence, the ITC defined OCTG as "steel pipes and tubes used in the drilling of oil and gas wells and in the conveying of oil and gas from within the well to ground level." *Id*. n.16. In the main text in its final injury determination, under "Product Description," the ITC defined OCTG as "tubular steel products used in oil and gas wells," including "casing, tubing, and coupling stock of carbon and alloy steel." *Id.* at 5.[7] Commerce adopted the latter definition as the more relevant to the present determination. Remand Results at 20.

Plaintiff argues that in analyzing the ITC's determination, Commerce made arbitrary choices, electing to adopt some of the ITC's statements and disregard others. Pl.'s Comments at 6. First, it argues that Commerce erred in framing the definition of OCTG as "a choice between the ITC's definition of OCTG . . . and the definition of the AISI" because the ITC specifically incorporated the AISI definition. *Id*. at 7. Next, it argues that the agency disregarded the ITC's specific descriptions for casing, tubing, and coupling stock, each of which described the product's function in "drilling and conveyance of oil and gas." *Id*. at 8–9. According to Plaintiff, the agency disregarded these product details as well as the ITC's more specific definition that OCTG are "steel pipes and tubes used in the drilling of oil and gas wells and in the conveying of oil and gas from within the well to ground level," in favor of the "most generic" statement that OCTG is tubing used in oil and gas wells. *Id*. at 8. Plaintiff further argues that nothing in the ITC's final determination "lend[s] credence to Commerce's conclusion that the ITC's definition went beyond casing, tubing and coupling stock to include other products that are 'associated with an oil and gas well.'" *Id*. at 9. Each of these points were addressed by the agency and each of these arguments fail before this court.

Commerce agreed that the AISI's definition is "not separate and distinct from the ITC's definition" and found, as Plaintiff avers, that

[7] Immediately following this definition, the ITC included detailed descriptions for casing, tubing, and coupling stock. ITC Final Det. at 5.

the ITC's definition "incorporates AISI['s] definition into it." Remand Results at 30. But the agency found, and reasonably explained, that the ITC broadened AISI's definition to be "more inclusive," so that it is not limited to casing, tubing, and coupling stock. *Id*. at 30–31. Moreover, in explaining that OCTG is not limited to drilling and extraction, the agency stated that "while the AISI definition may only define OCTG to include tubular steel products used in drilling and extraction, the ITC's definition defines OCTG to include tubular steel products used in drilling, extraction, and other functions associated with an oil and gas well." *Id*. at 30–31. The scope language and the ITC's final determination support these statements.

As Commerce explained, the AISI's definition "does not expressly preclude other 'hollow steel products of circular cross-section'" from being OCTG and "the ITC's definition recognizes this fact by stating that OCTG are: 1) 'tubular steel products used in oil and gas wells and' 2) '*include* casing, tubing, and coupling stock of carbon and alloy steel.'" Remand Results at 19. This inclusive nature of the definition is reflected in the scope. *See AD Order*, 75 Fed. Reg. at 28,553 ("Certain OCTG . . . including oil well casing and tubing"). Moreover, the ITC's final determination discussed "[r]ecent advancements in oil and gas exploration technologies" that "have enabled gas wells to reach locations that were previously deemed cost prohibitive," and "application of new technologies" that has significantly increased gas production. ITC Final Det. at I-10; *see also* Pl.'s Comments on the Draft Remand Results (May 17, 2017) ("Pl.'s Draft Comments"), Ex. 2 (Staff Report to the ITC on OCTG from China) (Dec. 18, 2009) ("Staff Report") at I-11, PJA 14, PRR 4–5, ECF No. 67. These advancements weighed in favor of a more inclusive definition of OCTG than that provided in 1982 by the AISI. Remand Results at 19–20, 20 n.114. Figure 1–3 in the ITC's final determination and Staff Report, which pertains to these "recent advancements," includes a description of "[c]asing and [t]ubing for shale gas drilling technology" and depicts a five-step process of how "[a]dvances in technology are putting vast shale gas reserves within reach of developers." ITC Final Det. At I-13 (Figure 1–3); Staff Report at I-13 (Figure 1–3). The figure explains that step three of the drilling process is when "cement is injected through the casing to fix it in place. A perforating gun shoots holes through the casing and cement." *Id*. Commerce cited this portion of the ITC's determination, and reasoned that "[i]n light of these recent technological advancements," it found the ITC's more inclusive definition to be more relevant to the present determination. Remand Results at 20 (citing ITC Final Det. at I-10 (citing *id.* at Figure 1–3)).

The agency's intention to give effect to the more inclusive definition is further "evidenced by the specific exclusions within the scope language for drill pipe, unattached couplings, and unattached thread protectors." *Id*. at 26; *see also id.* at 31 & n.160 (noting that drill pipe is explicitly excluded from the *Orders* but has been included in other antidumping duty orders on OCTG) (citing *Oil Country Tubular Goods From Mexico*, 60 FR 41056 (Dep't Commerce Aug. 11, 1995) (antidumping duty order)). If Commerce intended the definition of OCTG to be as limited as Plaintiff suggests, such express exclusions would be superfluous. *Id*. at 31. Additionally, that OCTG could include tubular steel products used in other functions associated with an oil and gas well other than drilling and extraction is further supported by the ITC's report. *Id*. The ITC described casing as "a circular pipe that serves as the structural retainer for the walls of the well . . . [and] is used in the well to provide a firm foundation for the drill string by supporting the walls of the hole to prevent caving in both drilling and after the well is completed"; *i.e.*, casing is not used in the drilling or extraction processes. ITC Final Det. at 5. Although Plaintiff cites coupling blanks as an example of a product that could be considered "'associated with an oil and gas well' . . . that the ITC expressly indicated to be outside the scope," Pl.'s Comments at 9, this argument is unpersuasive. The ITC stated that coupling blanks were not within the scope, not that coupling blanks could not be considered OCTG. *See* ITC Final Det. at 5 ("Only coupling stock, not coupling blanks or couplings, is within Commerce's scope.").

Plaintiff also points to the ITC's questionnaires in the preliminary phase of the investigation that requested parties to report only casing and tubing and the ITC's questionnaires in the final phase of the investigation requesting only casing, tubing, and coupling stock as further evidence that undermines Commerce's inclusive interpretation of the scope language. Pl.'s Comments at 20. As Commerce explained, however, even if casing, tubing, and coupling stock were the primary OCTG products examined, the ITC never stated that OCTG was limited to only these enumerated products. Remand Results at 25. Similar to the proposition that "a petition need not expressly and specifically identify all the products covered by the order at issue," *Novosteel SA v. United States*, 284 F.3d 1261, 1269 (Fed. Cir. 2002), the ITC need not collect pricing and other information on every possible product that may be covered by the scope.

Thus, contrary to Plaintiff's assertions, Commerce analyzed the definitional statements as a whole, taking into consideration the ITC's determination, and found that an inclusive interpretation is

consistent with the scope language. *See* Remand Results at 26 ("[V]iewed as a whole, the official definition of OCTG provided by the ITC is not limited to merchandise used specifically in drilling or conveying, but encompasses other tubular steel products used in oil and gas wells."). The agency's interpretation is consistent with the scope language and reasonable in light of the (k)(1) factors discussed herein. "[T]he court will not re-weigh the evidence presented to Commerce and will uphold decisions by Commerce when the agency chooses from among the range of possible reasonable conclusions based on the record." *Ethan Allen Operations, Inc. v. United States*, 39 CIT __, __, 121 F. Supp. 3d 1342, 1348 (2015) (internal quotation marks and citation omitted).

iii. Prior Scope Rulings

Plaintiff argues that Commerce's interpretation of the scope of the *Orders* is inconsistent with the agency's interpretation of the scope in the second remand redetermination in *Bell Supply Co., LLC v. United States*. Pl.'s Comments at 10–11 (citing Pl.'s Draft Comments, Ex. 7 (Final Results of Second Redetermination Pursuant to Remand, *Bell Supply Co., LLC v. United States*, Consol. Court No. 14–00066 (Dep't Commerce Aug. 11, 2016) ("*Bell Supply* Second Remand Results"))). Specifically, Plaintiff argues that the agency's definition here is inconsistent with the agency's statement in *Bell Supply* that OCTG is "intended to be used in the extraction of oil and gas." Pl.'s Comments at 11 (*citing Bell Supply* Second Remand Results at 17). In considering this very argument, Commerce stated:

> the language in *Bell Supply* discusses certain types of OCTG (green tube and limited service) and extraction. However, the definition of OCTG is greater than just these types of OCTG or just extraction. Therefore, we do not find that the current proceeding conflicts [with] or contradicts our decision in *Bell Supply*.

Remand Results at 33.

Commerce's interpretation of the scope in *Bell Supply* addressed the question of "whether unfinished OCTG (including green tubes) produced in the PRC, regardless of where the finishing of such OCTG takes place," is included in the scope of the *Orders*. *Bell Supply* Second Remand Results at 2. Thus, the issue in Bell Supply was not one concerning the definition of OCTG generally. Rather, the issue was one of country of origin of particular OCTG, specifically green tubes manufactured in the PRC and finished in a third country. *See*

id. Nothing in the *Bell Supply* redetermination suggests that the agency was engaged in a comprehensive definition of OCTG that would be definitive here. Therefore, Commerce's determination in this case does not conflict with that in *Bell Supply*.

c. Substantial Evidence Supports Commerce's Finding That Gun Carrier Tubing Meets the Definition of OCTG

Having found that Commerce reasonably interpreted the scope to cover hollow steel products of circular cross-section used in oil and gas wells, except for products expressly excluded from the scope, the court also finds that substantial evidence supports Commerce's determination that Plaintiff's gun carrier tubing falls within the scope of the *Orders*. In its scope ruling request, Plaintiff described its gun carrier tubing as "mechanical tubing" that is seamless, "custom-designed," and "engineered for a specific end-use as a perforating gun carrier." Scope Ruling Request at 2. A "perforating gun" is a "tool[] used in connection with oil and gas drilling and production." *Id*. at 4. Plaintiff explained that "[a] perforating gun assembly is a single-use device used to perforate existing oil and gas wells in preparation for production using explosive oil charges," and that "[p]erforating tools generally consist of a tube called the carrier[,] which holds the charge holder . . . ." *Id*. (internal quotation marks and citations omitted). The perforating gun is "lowered into the well and fired by the detonation of explosive charges [that] are contained inside the tube charge holder." *Id*. Commerce, therefore, reasonably found that the gun carrier tubing is a hollow steel product of circular cross section that is used in oil and gas wells. Remand Results at 20. Moreover, as explained below, the fact that the gun carrier tubing is part of a perforating system does not preclude the product from meeting the definition of OCTG and being covered by the scope of the *Orders*. *See id*.

Notably, Commerce did not interpret the scope of the *Orders* to cover only OCTG products that are necessary for "every oil well and every oil well completion" as Plaintiff suggests. Pl.'s Comments at 13. Commerce explained that Plaintiff's product, gun carrier tubing, is covered by the scope of the *Orders* because "it is essential to extracting oil and gas from the shale formations which are hydraulically fractured." Remand Results at 32. In its scope ruling request, Plaintiff explained that gun carrier tubing is incorporated into a perforating gun used to detonate inside oil wells. Scope Ruling Request at 2. "[P]erforating guns . . . perforate wells in preparation for production," *id.*, and "[i]t is through these perforations that oil and gas flows into the well bore and up to the surface," *id.* at 4. Moreover, Plaintiff highlighted the essential function of the gun carrier tubing by stating

that "[a]ll the efforts that go into well completion lead to the defining moment when the perforating guns punch holes through OCTG casing and rock to connect the oil or gas reservoir to the well." *Id*. at 5. In light of this evidence, Commerce reasonably stated that "without perforation of the casing, which requires gun carrier tubing, there would be no operational oil and/or gas well." Remand Results at 32. The court does not read Commerce's determination as conflating gun carrier tubing with a perforating gun or as indicative of a finding that gun carrier tubing itself is capable of perforating the casing of an oil well, as Plaintiff suggests. Pl.'s Comments at 14. Indeed, in its brief Plaintiff recognizes that the gun carrier tubing is an "integral component of a perforating gun," *id.* at 13, and at oral argument, Plaintiff stated that its gun carrier tubing is not used for any purpose other than to be manufactured into perforating guns, Oral Arg. at 1:10:38–1:11:11.[8]

Next, Plaintiff posits that the gun carrier tubing is never used in an oil well directly but as a "component of a perforating gun." *Id.* at 13. As Commerce explained, however, "nothing in the scope of the *Orders* indicates that OCTG must be a stand-alone product." Remand Results at 34. In response to this argument below, Commerce cited drill pipe as an example of OCTG that would be covered by the scope but for its specific exclusion. *Id.* at 34. Drill pipe "is that tubular member which is used as a tool to rotate the bit and to carry circulating drill fluid down to the bit where it is circulated back on the outside of the pipe and carries the cuttings to the surface where they are removed on a shale shaker prior to the return of the drilling mud to the system." AISI Manual at 33. Thus, drill pipe is an OCTG product that is used in concert with another component and removed from the well after use. *See id*.; Remand Results at 34 ("[D]rill pipe is a type of OCTG and it is removed from a well after its use in the drilling process."). This reasoning supports Commerce's determination that OCTG need not be a stand-alone product.

d. Commerce did not Unlawfully Revise the Scope

Plaintiff states that its gun carrier tubing is mechanical tubing because it is made to an internal specification based on, but exceeding, the American Society for Testing and Materials ("ASTM") A-519

[8] While Plaintiff argues that "it is not essential to use perforating guns to extract the oil or gas as it depends upon the formation and the completion type," Pl.'s Comments at 13, this is immaterial with respect to the specific inquiry here — whether gun carrier tubing meets the definition of OCTG and falls within the scope — because by Plaintiff's own admission, the only use of gun carrier tubing is to be manufactured into perforating guns that are used in the drilling process, *see id.*

standard developed by its engineers. Pl.'s Comments at 22.[9] Plaintiff argues that mechanical tubing was not part of the original investigation and, thus, Commerce unlawfully revised the scope. *Id.* at 22–24; *see also* Confidential DynaEnergetics U.S., Inc.'s Br. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. (Pl.'s Br.") at 29–35, ECF No. 32 (arguing that neither Commerce nor the ITC defined OCTG to include mechanical tubing, and that the ITC treated OCTG and mechanical tubing separately in its material injury investigation). Moreover, Plaintiff states that "Commerce has not explained how it would determine what characteristics differentiate OCTG from mechanical tubing." Pl.'s Comments at 22. Additionally, Plaintiff advocates for a formal inquiry under the (k)(2) factors because none of the (k)(1) factors "discuss[] a product with the characteristics of [gun] [c]arrier [t]ubing or demonstrates any intention to include other tubing products – such as mechanical tubing – in the investigation on OCTG." *Id.* at 25.

A plain reading of the scope shows that it clearly and unambiguously covers OCTG "whether or not conforming to API or non-API specifications." *AD Order*, 75 Fed. Reg. at 28,553. This language indicates that standards and specifications are irrelevant when determining whether a product is within the scope of the *Orders*. Thus, Commerce's statement that "whether gun carrier tubing conforms to an API or ASTM specification associated with OCTG is not determinative of whether gun carrier tubing is covered by the scope" is reasonable. Remand Results at 21. As Commerce made clear, if a product is a tubular steel product used in an oil or gas well and is not otherwise excluded from the scope, Commerce considers it OCTG, even though the parties might define it or advertise it as mechanical tubing. *Id.* at 28. For example, coupling stock is included in the scope of the *Orders* even though the petitioners alerted the agency that coupling stock could be imported under either OCTG or mechanical tubing classifications. Petitioners' QR Resp. at 3 (stating that "[c]oupling stock is imported either under the OCTG classifications or under the seamless mechanical tubing subheading of the HTSUS. . . . The HTSUS subheadings for coupling stock, however, are a basket category and will include other types of mechanical tubing that are not coupling stock.").

Plaintiff contends that the scope language regarding specifications was intended to address only limited service OCTG and OCTG green

[9] The internal specification exceeds the requirements of the ASTM A-519 standard "in terms of its enhanced chemistry, impact resistance properties and different testing requirements." Pl.'s Comments at 22.

tubes which do not meet the API 5 CT standard. Pl.'s Comments at 24. Plaintiff relies on a response by petitioners to Commerce's request to define limited service OCTG products and green tubes. *Id.* The petitioners defined the former as "consist[ing] of casing and tubing products that do not meet . . . [API] standards for OCTG," and the latter as "generally classified as semi-finished pipes used to make casing and tubing products[, and] . . . are typically non-API certified . . . ." Petitioners' QR Resp. at 5–6. As Commerce explained, however, "if this language were meant to address only limited service OCTG and green tubes, the scope language would have made specific reference to that." Remand Results at 35.

Contrary to Plaintiff's argument that "Commerce has not explained how it would determine what characteristics differentiate OCTG from mechanical tubing," Pl.'s Comments at 22, Commerce explained that the gun carrier tubing is OCTG because it is used in oil and gas wells and meets the scope's requirements. Remand Results at 28; *see also AD Order*, 75 Fed. Reg. at 28,553 (reciting the scope language). No other mechanical tubing was before the agency and it was under no obligation to address such hypothetical questions.

With respect to Plaintiff's argument that Commerce and the ITC treated OCTG and mechanical tubing as distinct product types, *see* Pl.'s Br. at 29–30, Commerce took notice that although its antidumping duty questionnaire did not include an "other" category in addition to casing, tubing, and coupling stock, the questionnaire included language informing a company that believed it had "reason to report its U.S. sales on a different basis," to "contact an official in charge before doing so." Remand Results at 26 (quoting Scope Ruling Request, Ex. 13 (Commerce's Sec. C Antidumping Duty Questionnaire)). It reasoned that if a manufacturer of gun carrier tubing responding to the questionnaire believed that its product did not fit the matching criteria, "it need only contact the [agency] for guidance; but lack of a perfect fit with the matching criteria does not allow a party to reach any conclusions about whether its products are covered by the scope of an order." Remand Results at 25.

With respect to Plaintiff's request for a formal scope inquiry because none of the (k)(1) factors specifically discuss gun carrier tubing or mechanical tubing, Pl.'s Comments at 24–26, Commerce properly explained that "[t]he question is not whether the scope language, petition or ITC investigation expressly mentions the particular article in question, but whether the descriptions of the covered product in those sources and especially in the scope language – which must be written in general terms – encompass the particular article in ques-

tion." Remand Results at 32–33; *see also id.* at 35 ("[N]ot all products must be expressly identified by a petitioner in order to be covered by a scope.") (citing *Novosteel SA*, 284 F.3d 1261); *Novosteel SA*, 284 F.3d at 1269 ("[A]bsence of a reference to a particular product in the Petition does not necessarily indicate that the product is not subject to an order.") The regulations recognize that scope determinations may be necessary because scope orders must be written in general terms. *See* 19 C.F.R. § 351.225(a). Indeed, "scope inclusions are written in broad terms and then specific exclusions are carved out from the general terms." *Power Train Components, Inc. v. United States*, 37 CIT __, __, 911 F. Supp. 2d 1338, 1343 (2013), *aff'd* 565 F. App'x. 899 (Fed. Cir. 2014). Here, there are no specific exclusions for mechanical tubing or gun carrier tubing; thus, Commerce's finding that Plaintiff's gun carrier tubing is included in the scope of the *Orders* is supported by substantial evidence.

e. Commerce's CBP Instructions are not impermissively retroactive

Plaintiff's challenge to the scope determination having failed, the court turns to Plaintiff's challenge to Commerce's instructions to CBP. These customs instructions ordered CBP to "[c]ontinue to suspend liquidation of entries of . . . certain tubing for perforated gun carriers imported by DynaEnergetics" subject to the *Orders*. CBP Message Nos. 6057301 (AD) and 6057302 (CVD) (Feb. 26, 2016), PJA Tab 9, PR 21, ECF No. 67.[10] Plaintiff challenges Commerce's customs instructions as "retroactive" and "unreasonable." Pl.'s Comments at 26–28. Relying on *AMS Assocs., Inc. v. United States*, 737 F.3d 1338 (Fed. Cir. 2013), Plaintiff argues that the Remand Results clarified the language of the *Orders* and this clarification should only have prospective effect. *Id*. at 27 ("[W]hen Commerce clarifies the scope of an existing antidumping duty order that has an unclear scope, the suspension of liquidation and imposition of antidumping cash deposits may not be retroactive but can only take effect on or after the date of the initiation of the scope inquiry.") (quoting *AMS,* 737 F. 3d at 1344) (alteration in original) (internal quotation marks omitted). Plaintiff further relies on *United Steel & Fasteners, Inc. v. United States*, 41 CIT __, 203 F. Supp. 3d 1235 (2017) and *Sunpreme Inc. v. United States*, 40 CIT __, 145 F. Supp. 3d 1271 (2016) to support its position. *Id.* at 27–28.

[10] On March 28, 2016, Commerce amended these instructions in light of the preliminary injunction entered by this court on March 14, 2016. *See* CBP Message No. 6088305 (Mar. 18, 2016), PJA Tab 10, PR 22, ECF No. 66; CBP Message No. 6088307 (Mar. 28, 2016), PJA Tab 11, PR 23, ECF No. 67.

As noted, if the agency can determine, based solely upon the application and the (k)(1) factors, whether a product is included within the scope of an order, the agency "will issue a final ruling as to whether the product is included within the order." 19 C.F.R. § 351.225(d). This is what the agency did here. Pursuant to 19 C.F.R. § 351.225(l)(3), "[i]f the [agency] issues a final scope ruling, under [] paragraph (d) . . . of this section, to the effect that the product in question is included within the scope of the order, any suspension of liquidation under paragraph (l)(1) or (l)(2) of this section *will continue*." 19 C.F.R. § 351.225(l)(3) (emphasis added). Thus, the regulations contemplate the possibility that suspension of liquidation had already begun.

In its briefing, Plaintiff does not allege that its product was not subject to suspension of liquidation so that Commerce's instructions to "continue" suspension of liquidation of the merchandise would be appropriate in that limited (grammatical) sense.[11] Because the court finds that Commerce reasonably interpreted the scope of the *Orders* to include the gun carrier tubing and because the gun carrier tubing already was subject to suspension of liquidation, Commerce's instructions to CBP to continue suspension of liquidation were in accordance with law. *See id.; Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 38 CIT __, __, 961 F. Supp. 2d 1291, 1302–1305 (2014), *aff'd,* 776 F.3d 1351 (Fed. Cir. 2015).

Plaintiff's reliance on *AMS,* 737 F. 3d 1338 to challenge Commerce's instructions is unconvincing. In *AMS*, Commerce issued clarification instructions during the course of an administrative review that interpreted the scope of an existing antidumping duty order to cover laminated woven sacks produced in China with non-Chinese fabric. 737 F.3d at 1340–41. CBP had previously considered these sacks to be of non-Chinese origin and was not suspending liquidation of them. *Id.* at 1340. Pursuant to its "clarification," Commerce instructed CBP to suspend liquidation of those products retroactive to the preliminary determination in the original investigation. *Id*. at 1340-1341. In so doing, Commerce exceeded its authority under 19 C.F.R. § 351.225(l)(2) because the antidumping duty order did not clearly cover that plaintiff's merchandise. *Id.* at 1343. The court held that "when Commerce 'clarifies' the scope of an existing antidumping duty order that has an unclear scope, the suspension of liquidation and imposition of antidumping cash deposits may not be *retroactive* but can only take effect 'on or after the date of the initiation of the scope inquiry.'" *Id.* at 1344 (quoting 19 C.F.R. § 351.225(l)(2)).

[11] At oral argument, Plaintiff's counsel stated that Customs had been suspending liquidation of Plaintiff's product. Oral Arg. at 30:55–31:03.

The circumstances of *AMS* do not exist here. Unlike in *AMS*, Commerce did not clarify an ambiguous scope but, instead, applied the language of the scope to the gun carrier tubing using the definition of OCTG derived from the scope's language itself and the ITC's investigation. Commerce was not required to initiate a formal scope inquiry pursuant to 19 C.F.R. § 351.225 "when it wishe[d] to issue a ruling that [did] not clarify the scope of an unambiguous order." *AMS*, 737 F. 3d at 1344. Rather,

> Commerce must only follow the procedures outlined in § 351.225 when it wishes to clarify an order that is unclear. To hold otherwise would permit importers to potentially avoid paying antidumping duties on past imports by asserting unmeritorious claims that their products fall outside the scope of the original order. Importers cannot circumvent antidumping orders by contending that their products are outside the scope of existing orders when such orders are clear as to their scope. Our precedent evinces this understanding. We have not required Commerce to initiate a formal scope inquiry when the meaning and scope of an existing antidumping order is clear.

Id. (citing *Huaiyin Foreign Trade Corp. (30) v. United States,* 322 F.3d 1369, 1378–79 (Fed. Cir. 2003)). The court is not persuaded that the agency's voluntary request for remand to explain its determination in more detail constitutes a basis for finding that the language of the scope was unclear. *See SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) ("[T]he agency may request a remand, without confessing error, in order to reconsider its previous position."); *see also* Remand Results ("DynaEnergetics states that the [agency's] determination is 'based on a new definition of OCTG.' We disagree. The definition we have used was the same definition used by the ITC, and the language of the scope reflects that definition.") (footnote omitted).

The manner in which Commerce conducted the proceeding in this case is analogous to the way in which Commerce conducted the proceeding in *Shenyang*, 961 F. Supp. 2d 1291, which the court finds instructive here. In *Shenyang,* Commerce determined that the language of the antidumping and countervailing duty orders on aluminum extrusions from the PRC and the description of products subject to the scope request — curtain wall units — were dispositive such that it was unnecessary to consider the (k)(2) factors. *Id*. at 1294. Liquidation of the subject merchandise had already been suspended since the publication of the preliminary determinations in the antidumping and countervailing duty investigations. *Id*. at 1303. Accordingly, after Commerce determined, based solely upon the application

and the (k)(1) factors, that the scope of the orders included the subject merchandise, it instructed CBP to "[c]ontinue to suspend liquidation of entries" of the subject merchandise. *Id*. at 1302. As the court in *Shenyang* explained, "[when], as here, a scope ruling confirms that a product is, and has been, the subject of an order, the [agency] has not acted beyond its authority by continuing the suspension of liquidation of the product." *Id*. at 1304. Unlike *AMS* and like *Shenyang*, Commerce here "added no new products to the scope" but "merely confirmed what had previously been the case." *See id.* at 1303.

Plaintiff's reliance on *Fasteners*, 203 F. Supp. 3d at 1252, 1255 and *Sunpreme*, 145 F. Supp. 3d at 1289, does not persuade the court to hold otherwise. Plaintiff cites *Sunpreme* for the proposition that "goods should only be considered to fall within the scope of antidumping and countervailing duty orders once the agency with the capacity to interpret them has done so." Pl.'s Comments at 28 (quoting *Sunpreme*, 45 F. Supp. 3d at 1289). In *Supreme*, the court found that CBP "acts beyond its authority" when it "attempts to determine whether a product falls within the scope based upon factual information that the scope language does not explicitly call on CBP to consider." 145 F.Supp.3d at 1285. Yet, the court also stated that

> if Commerce issues a final scope ruling based solely upon the application, and suspension of liquidation had already occurred because CBP properly determined the plain language of the antidumping or countervailing duty order included the merchandise, any such suspension of liquidation will continue upon a final scope ruling to the effect that the product is included within the scope of an antidumping or countervailing duty order.

Id. at 1287. *Fasteners*, on the other hand, is factually distinguishable because there was an absence of suspension of liquidation of plaintiff's entries by Customs. 203 F. Supp. 3d at 1240–41; *id.* at 1250 (recognizing that "[t]he relevant regulatory provisions are ambiguous regarding the date that the Department must commence suspension of liquidation when (1) Commerce has issued a final affirmative scope ruling without having initiated a formal scope inquiry and (2) liquidation has not been suspended"); *id*. at 1253–54 (distinguishing *Shenyang* because "in *Shenyang,* Commerce instructed Customs to continue to suspend liquidation, as opposed to suspending liquidation for the first time").

CONCLUSION

For the foregoing reasons, the court finds that Commerce reasonably determined that gun carrier tubing is included in the scope of the

Orders. Because that conclusion was reasonable, the court finds that the factors set forth in 19 C.F.R. § 351.225(k)(1) were dispositive such that Commerce properly ended its analysis without considering the (k)(2) factors. *See* 19 C.F.R. § 351.225(k)(1),(2). Moreover, because the court finds that Commerce reasonably interpreted the scope language of the *Orders* to include the gun carrier tubing and that liquidation of the gun carrier tubing had been suspended, Commerce's instructions to CBP to continue suspension of liquidation of the merchandise were not erroneous. Plaintiff's request that the court remand the Remand Results is DENIED. Judgment will enter accordingly.

Dated: March 16, 2018
New York, New York

/s/ *Mark A. Barnett*
JUDGE

Slip Op. 18–24

ITOCHU BUILDING PRODUCTS CO., INC., TIANJIN JINCHI METAL PRODUCTS CO., LTD., TIANJIN JINGHAI COUNTY HONGLI INDUSTRY & BUSINESS CO., CERTIFIED PRODUCTS INTERNATIONAL INC., CHIIEH YUNGS METAL IND. CORP., HUANGHUA JINHAI HARDWARE PRODUCTS CO., LTD., SHANGDONG DINGLONG IMPORT & EXPORT CO., LTD., TIANJIN ZHONGLIAN METALS WARE CO., LTD., HENGSHUI MINGYAO HARDWARE & MESH PRODUCTS CO., LTD., HUANGHUA XIONGHUA HARDWARE PRODUCTS CO., LTD., SHANGHAI JADE SHUTTLE HARDWARE TOOLS CO., LTD., SHANGHAI YUEDA NAILS INDUSTRY CO., LTD., SHANXI TIANLI INDUSTRIES CO., LTD., CHINA STAPLE ENTERPRISE (TIANJIN) CO., LTD., QIDONG LIANG CHYUAN METAL INDUSTRY CO., LTD., ROMP (TIANJIN) HARDWARE CO., LTD., CYM (NANJING) NINGQUAN NAIL MANUFACTURE CO., LTD. a/k/a CYM (NANJING) NAIL MANUFACTURE CO., LTD., SHANXI PIONEER HARDWARE INDUSTRIAL CO., LTD., and MINGGUANG ABUNDANT HARDWARE PRODUCTIONS CO., LTD., Plaintiffs, The STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD., and STANLEY BLACK & DECKER, INC., Consolidated Plaintiffs, v. UNITED STATES, Defendant, MID CONTINENT NAIL CORPORATION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Consol. Court No. 12–00065
PUBLIC VERSION

[Commerce's remand redetermination results in its administrative review of an antidumping duty covering steel nails from China are sustained.]

Dated: March 22, 2018

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Adam H. Gordon, The Bristol Group PLLC, of Washington, DC, for defendant-intervenor. With him on the brief was *Ping Gong*.

OPINION

Restani, Judge:

Before the court is the U.S. Department of Commerce ("Commerce")'s *Final Results of Redetermination Pursuant to Itochu Building Products Co., Inc., et al v. United States*, ECF No. 163 ("*Remand*

Results"), concerning the second administrative review, for the period August 1, 2009, through July 31, 2010 ("POR"), of the antidumping ("AD") order on certain steel nails from the People's Republic of China ("PRC"). *See Certain Steel Nails From the People's Republic of China: Final Results of the Second Antidumping Duty Administrative Review*, 77 Fed. Reg. 12,556 (Dep't Commerce Mar. 1, 2012) ("*Final Results*").[1] For the reasons stated below, Commerce's *Remand Results* are sustained.

BACKGROUND

The court assumes that all parties are familiar with the facts of the case as discussed in *Itochu Building Products Co., Inc., et al., v. United States*, Slip Op. 17–73, 2017 WL 2703810, at *1–*4 (CIT June 22, 2017) ("*Itochu*"). For the sake of convenience, the facts relevant to this remand are summarized herein. In the *Final Results*, Commerce calculated the surrogate value ("SV") of steel plate using GTA India data because it found Joint Plant Committee ("JPC") data from India to be less suitable for valuing the factors of production ("FOPs") for steel plate.[2] *Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Second Antidumping Duty Administrative Review*, A-570–909, POR 08/01/2009–07/31/2010, at 24–25 (Dep't Commerce Feb. 23, 2012) ("*I&D Memo*"). Commerce also decided to use financial statements from Sundram Fasteners Limited ("Sundram"), and Bansidhar Granites ("Bansidhar"), to calculate surrogate financial ratios for steel nails because the other financial statements on record were either not contemporaneous with the POR, or were known to include countervailable subsidy data. *Id*. at 11–15. Commerce requested remand, however, to reevaluate whether Sundram's financial statements included countervailable subsidies. *Itochu* at *9. Lastly, Commerce applied AFA instead of neutral facts available in lieu of data sought from Jinchi's unaffiliated suppliers when Jinchi was unable to obtain the supplier's financial information requested. *I&D Memo* at 26–28.

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[1] This matter was transferred to the current judge on March 20, 2017. Order of Reassignment, ECF No. 140.

[2] Because Commerce considers the PRC a non-market economy ("NME"), Commerce creates a hypothetical market value for steel nails in conducting its review. *See Downhole Pipe & Equip. LP v. United States*, 887 F. Supp. 2d 1311, 1320 (CIT 2012) (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999)). To construct such a value, Commerce relies on data from a market economy or economies to provide surrogate values for the various factors of production used to manufacture the subject merchandise. *See* 19 U.S.C. § 1677b(c)(1)(B). In addition, Commerce uses financial statements from producers of identical or comparable merchandise to yield surrogate financial ratios to calculate general expenses for inclusion in normal value. *See Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 366 F. Supp. 2d 1264, 1277 n.7, 29 CIT 288, 303 n.7 (2005).

On June 22, 2017, the court remanded the case to Commerce. *Itochu* at *17. The court ruled that: (1) Commerce's decision to use Global Trade Atlas ("GTA") India data as the surrogate value ("SV") for steel plate was unsupported by substantial evidence, *id*. at *8; (2) Commerce's request for remand with regard to Sundram's financial statements was justified and appropriate, and thus approved, *id*. at *9; and (3) Commerce erred when it applied adverse facts available ("AFA") to Tianjin Jinchi Metal Products Co., Ltd. ("Jinchi"), *id*. at *16. The court also directed Commerce and the defendant-intervenor, Mid-Continent Nail Corporation ("Mid-Continent"), to address whether Mid Continent affected AD margins by accepting any payments to withdraw its requests for an administrative review of 160 companies, and if so, whether this was proper. *Id*. at *17.

On remand, Commerce reconsidered its evaluation of certain SV data, namely GTA India data for steel plate prices and Sundram's financial statements for financial ratios. Based on the record data, Commerce decided to value steel plate using JPC data from India, *Remand Results* at 3–13, and found that Sundram's financial statements constitute the best record information for financial ratio purposes, *id*. at 14–26. In addition, Commerce revisited its application of AFA to missing FOP data for Jinchi's unaffiliated masonry nails supplier, and determined to apply neutral facts available. *Id*. at 26–34. Further, Commerce addressed the court's questions and Mid Continent's responses regarding Mid Continent's withdrawal of review requests in this administrative review, finding no improper conduct. *Itochu* at *6, *17; *Remand Results* at 34–39; *Certain Steel Nails from the People's Republic of China: Response to Questions Posed in Court Order in Itochu Building Prods., et al. v. United States, Consol. Ct. No. 12–00065, Slip Op. 17–73 (June 22, 2017)*, A-570–909, POR 08/01/2009–07/31/2010, at 11 (July 14, 2017) ("Mid Continent Withdrawal Letter").

Consolidated Plaintiffs ("Plaintiffs")[3] challenge Commerce's continued reliance on Sundram's financial statements as a source for calculating surrogate financial ratios for steel nail production. Plaintiffs' Comments on Final Results of Redetermination, ECF No. 169, at 8–32 ("Pl. Cmts."). Mid Continent challenges Commerce's use of JPC India data as a SV for steel plate and its application of neutral facts available to Jinchi, arguing Commerce misinterpreted of the court's instructions. Comments of Defendant-Intervenor Mid Continent Nail

[3] The Plaintiffs included in this challenge are Itochu, Jinchi, The Stanley Works (Langfang) Fastening Systems Co., Ltd. ("Stanley"), and Tianjin Jinghai County Hongli Industry & Business Co. ("Hongli").

Corporation on Final Results of Redetermination Pursuant to Court Remand, ECF No. 166, at 3–12 ("Def.-Int. Cmts.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court upholds Commerce's final results in an antidumping duty review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Mid Continent's Withdrawal of Review Requests

In *Itochu*, the court expressed concerns that Mid Continent may have improperly affected antidumping margins by accepting payments in exchange for withdrawing its administrative review request vis-à-vis 160 of the original 222 companies. *Itochu* at *5. The court directed Mid Continent to provide a written response to Commerce addressing these concerns, specifically asking why such a broad review was initially ordered and whether payments were exchanged for the later withdrawal of the review request. *Id*. at *6.

In Mid Continent's written response to Commerce, Mid Continent stated as an initial matter that it acted within Commerce's regulations in withdrawing its requests for review of certain Chinese producers and/or exporters of subject merchandise. Mid Continent Withdrawal Letter at 8.[4] Mid Continent indicated that its decision to withdraw the requests was based on the particular facts of the case, as it knew them. *Id*. at 11. Most significantly, Mid Continent asserted that: "No payments were made in exchange for the withdrawal of the requests." *Id*.

Commerce did not have additional evidence to contradict Mid Continent's responses and, therefore, determined that no further investigation was warranted. *Remand Results* at 38–39. This result is not challenged and is sustained.

[4] *See* 19 C.F.R. § 351.213(d)(1): "The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so."

II. Commerce Properly Relied on JPC Data to Value Steel Plate[5]

In *Itochu*, the court found Commerce's selection of GTA India import data was unsupported by substantial evidence. *Itochu* at *7. The court noted that GTA India price data was not close to the levels of other data and concluded that Commerce failed to consider the reliability of GTA India data in the light of other data sources, and further failed to address evidence suggesting that price does not correlate to steel plate thickness in the range at issue. *Id*. at *8. Accordingly, the court instructed Commerce to: (1) consider whether other record data sources rendered GTA India import data unreliable; and (2) explain what record evidence supports Commerce's decision to disregard available surrogate data for varying thicknesses of steel plate. *Id*.

On remand, Commerce apparently interpreted the court's "unsupported by substantial evidence" holding to mean that GTA India data must not be used for either the SV or for benchmarking analysis. *Remand Results* at 11. The court stated, rather, that the reliability of Commerce's selected surrogate value was called into question, and directed Commerce to assess the other record data sources and explain what evidence supports its decision. *Itochu* at *8. Commerce nonetheless considered the other potential data sets and decided to use JPC India data because it has the next-highest contemporaneity at eight months of the POR and comes from the primary surrogate country, India. *Remand Results* at 11–13. *Second Pre-Prelim Surrogate Value Rebuttal Submission for GDLSK Respondents' in the Second Administrative Review of Certain Nails from the People's Republic of China*, A-570–909, POR 08/01/2009–07/31/2010, at Ex.2L (Dep't Commerce June 24, 2011) ("Itochu SV Submission"). Steelworld data for India covered only six months of the POR. Itochu SV Submission at Ex.2N. The other data sets were used only for benchmarking or corroboration purposes. *Remand Results* at 5–6. No party disputes the selection of JPC over Steelworld data.

Without conceding that GTA India data are aberrational, or otherwise not probative, Commerce identified a different data set in India JPC that conforms to the "best available information" criteria. *Remand Results* at 13, *citing*, e.g., Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17,

[5] Although the three mandatory respondents consumed steel wire rod in their production of steel nails, *see I&D Memo* at 15, Commerce selected a surrogate value for cut steel plate, which is the main input of the cut plate masonry nails purchased by Hongli from one of its suppliers, *id*. at 24.

2006) and accompanying Issues and Decision Memorandum at Comment 1. Despite Commerce's seemingly misguided interpretation of the remand directive, its use of JPC data is supported by substantial evidence.

A. Analysis of Surrogate Valuation Factors for Steel Plate[6]

When determining which SV data set to use, Commerce selects the "best available information," guided by the following factors: (1) public availability; (2) contemporaneity with the POR; (3) representativeness of a broad market range; (4) location in an approved surrogate country; (5) tax and duty-exclusivity; and (6) specificity to the output. *Remand Results* at 12–13, *citing*, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 3. . Commerce uses whichever data set satisfies the "breadth of the aforementioned selection criteria." *Id*. at 13. The specificity and representativeness factors are the focus of the remand redetermination.

Commerce initially decided against using JPC data primarily because the data were said to be sourced from "significantly thicker cut steel plate than what Hongli's[7] supplier used." *I&D Memo* at 25. Commerce contended that steel thickness was crucial to specificity. *See id*.

Plaintiffs submitted ten other data sets to demonstrate that: (1) the thickness of steel did not affect the price; and (2) that JPC's data were more appropriate than GTA India's data. JPC's data were within the range of the other sets even though JPC prices covered thicker steel.[8] Itochu SV Submission at Ex.2A–Ex.2N. In the *I&D Memo*, Commerce summarily rejected the probative value of these additional

[6] Confidential information within double brackets has been omitted.

[7] Hongli is one of the mandatory respondents examined in the administrative review at issue. *I&D Memo* at 1, n.2. The steel plate its supplier used was in the [[ ]] range. *Second Administrative Review of Certain Nails from the People's Republic of China: Factors of Production for certain nails exported by Hongli which were produced by [[ ]]*, A-570–909, POR 08/01/2009–07/31/2010, at Ex.5 (Dep't Commerce Sept. 28, 2011).

[8] The data sets which Plaintiffs submitted all showed price points between USD $0.683/kg and USD $0.7840/kg, despite the steel covered by those data sets varying in thickness from 3 to 25mm. Itochu SV Submission at Ex.2A (showing steel plate prices). *See also, e.g., id*. at Exs.2D and 2E (containing German export data, corresponding to price number two in Ex.2A, for steel of thickness between 3 and 4.75mm (Ex.2D), and greater than or equal to 3mm (Ex.2E)), 2L (containing JPC data, corresponding to price number eight in Ex.2A, for steel between 6 and 25mm thick). GTA India's data shows a value of $1.68/kg for steel plate, *id*. at Ex. 2C, while JPC data shows a value of $0.78/kg for 6 to 25mm thick steel plate, *id*. at Ex.2L.

data sets, and refused to consider this evidence against Commerce's apparent conclusion that steel thickness corresponds to price, even within the ranges of thickness at issue. *I&D Memo* at 25.[9] The court, however, concluded that these data sets were in fact probative and should be considered. *Itochu* at *8. In spite of Commerce's reluctance, its use of JPC data on remand is supported by substantial evidence. JPC data satisfy the main factors evaluated in selecting an SV. Commerce's first choice for a steel plate SV was GTA India data, because the data are allegedly more specific to Hongli's product, in addition to being tax-exclusive, publicly available, contemporaneous with the POR, and represented imports into the principal surrogate country, India. *I&D Memo* at 25. GTA India data, however, has an extremely narrow base, as it covers imports only from one highly developed steel-producing country.[10] *See id*.

Commerce's main argument against using JPC data[11] was that it was not sufficiently specific.[12] *Id*. It is not clear that the difference in plate thickness, within the range at issue, is important; it does not seem to affect price. *See, supra*, note 8. Commerce did acknowledge that JPC data satisfied the other five "best available information" factors, determining that the data were publicly available, presented a broad market average, were tax-exclusive, contemporaneous with the POR, and from the primary surrogate country. *I&D Memo* at 24. On remand, Commerce determined JPC data were the appropriate

[9] On remand, Commerce noted that it finds the submitted data sets not probative, stating that it prefers "POR-specific GTA data for the countries on the *surrogate country list*" when "evaluating whether GTA data for a specific country is aberrational" (emphasis added). *Remand Results* at 5, 11. Commerce did not address precedent stating that "export data from countries that were not potential surrogates" may be "sufficient to call into question the reliability of the [selected surrogate] data." *Itochu* at *8 (citing *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 2013 WL 920276, at *3, *6 (CIT Mar. 11, 2013)). Further, the one country on the SV list, the Philippines, had even lower steel plate values. Itochu SV Submission at Ex.2H.

[10] GTA India includes only prices of imports from Germany. *See* Itochu SV Submission, at Ex.2C. The high price may indicate it is for specialty steel, as record data covering German steel plate exports more generally indicates an average price of $0.769/kg. *See id*. at Ex.2D and Ex.2E.

[11] The JPC data is derived from India domestic price data. *Second Antidumping Administrative Review and New Shipper Review of Certain Steel Nails from the People's Republic of China: Surrogate Values ("SVs") for the Preliminary Results*, A-570–909, POR 08/01/2009–07/31/2010, at 4 (Dep't Commerce Aug. 31, 2011) ("Prelim. SVs"). It covers steel plate imports, regardless of origin, cleared through the cities of Kolkata, Delhi, Mumbai and Chennai. Itochu SV Submission, at Ex.2L.

[12] Whether or not rerolling takes place at Hongli, or its supplier, the court has previously accepted Commerce's view that specificity based on metal material size can be less important than other factors when selecting SV for nails. *See Itochu Building Products Co. Inc. v. United States*, 2018 WL 467986, at *6 (CIT Jan. 18, 2018). ("the diameter of the wire rod may change throughout the production process... [so] Commerce's determination that the mutability of the wire rod input and substitutability of stock of different diameters lessens the importance of diameter, is adequately supported.").

SV data set, but did so under protest, and without conceding that JPC data were the most representative data set on record, under the "best available information" criteria. *Remand Results* at 13.

There is no disagreement that GTA India data and JPC data are publicly available, contemporaneous, tax and duty exclusive, and from the surrogate country. The substantially higher price of steel in GTA India data (aberrational or not),[13] combined with the fact that GTA India only covers imports from Germany, however, indicates that GTA India data are not representative of a broad market average, at least in the sense of source. Commerce offered no evidence to support its previous conclusion that plate thickness should be the controlling factor and no party cites to evidence that would demonstrate this. Furthermore, if Commerce was dissatisfied with the record data sets that demonstrated the reliability of JPC figures and the unreliability of GTA figures, it was free to reopen the record. If there were a reason why GTA India's very high value was plausible as a SV for steel plate here, despite the much lower values on record from developed and non-developed countries, that information was not on this record.

While Commerce's belief that the court ordered it to choose a data set other than GTA India was misguided, its final choice of JPC data is supported on this record as it satisfies Commerce's normal criteria and falls within a plausible price range. There is no reason to remand this matter, as requested by Mid Continent, as on this record GTA India is a flawed choice and Commerce's analysis supporting its new selection is sufficient.

III. Commerce Reasonably Selected Sundram's Surrogate Financial Statements

The court granted Commerce's request for a remand to reconsider whether it had reason to suspect or believe that Sundram received countervailable subsidies, so that its financial statements[14] would not provide useful surrogate value data. *Itochu* at 23. On remand, Commerce reexamined its decision to use Sundram as one of the market economy ("ME") surrogate companies despite the fact that Sundram: (1) was located and operated in a Special Economic Zone ("SEZ"); and (2) qualified to receive special tax incentives under Section 35(2AB) of

[13] In *Itochu*, the court directed Commerce to address Plaintiffs' evidence that GTA India's data are aberrational. *Id*. at *8. Commerce, however, simply noted that it "reviews any disparities on a case-by-case basis" and that the SV must be "substantially higher than the benchmark data on the record" in order to be considered aberrational. *Remand Results* at 5. In other words, it did not acknowledge that the record data indicates a narrow range of low steel prices from various sources, except for the much higher GTA India price data.

[14] Financial statements are used to calculate surrogate financial ratios. Prelim. SVs at 16.

India's Income Tax Act. *Remand Results* at 14–15. Commerce determined that it was "appropriate to rely on Sundram's financial statements," because while Sundram was eligible for subsidies, there was no evidence showing that Sundram actually benefitted from them. *Id*. at 18.

In response to the *Remand Results*, Plaintiffs argue that Commerce's analysis of the subsidies was "directly contrary to controlling law and not supported by substantial record evidence." Pl. Cmts. at 8. Plaintiffs contend that Commerce "impermissibly conflated a rigid test" by not correctly applying the "'reason to believe or suspect' standard." *Id*. at 9. Further, Plaintiffs argued that the evidence suggests Sundram did in fact benefit from subsidies based on the SEZ and Income Tax Act, and thus Commerce erred in using Sundram as a surrogate. *Id*. at 15–24. Plaintiffs also argue that Sundram did not produce comparable merchandise. *Id*. at 24–32. Plaintiffs nevertheless failed to demonstrate that Commerce's evaluation was unreasonable, particularly in the light of Commerce's thorough consideration of the other potential surrogate sources for financial ratios. *I&D Memo* at 10–15.[15]

A. Special Economic Zone

To determine whether Sundram received subsidies, Commerce turned to the financial statements provided by Sundram and considered whether the financial statement contained more than "a mere mention that a subsidy was received." *Remand Results* at 16 (citing *Clearon Corp. v. United States*, 800 F. Supp. 2d 1355, 1358–59 (CIT 2011); *Catfish Farmers of Am. v. United States*, 641 F. Supp. 2d 1362, 1379–80, 33 C.I.T. 1258, 1275–76 (2009)). The "mere fact" a company is located in an Indian SEZ "does not suggest receipt of a specific subsidy" on its own, because "benefits from India's SEZ programs are not provided automatically to companies located within the SEZ." *Id*. at 17.

[15] According to the *I&D Memo*, the record originally contained five financial statements: (1) Bansidhar 2009–2010; (2) J&K 2008–2009; (3) Nasco 2008–2009; (4) Sundram 2009–2010; and (5) Lakshmi 2009–2010, all of which Commerce considered thoroughly. *I&D Memo* at 11. In the *Preliminary Results*, Commerce averaged the financial ratios of Bansidhar, Nasco, and J&K, to obtain the surrogate financial ratios. *Id.* Commerce did not use the J&K and Nasco statements for the *Final Results* because the financial statements from J&K and Nasco covered fiscal periods prior to the POR. *Id*. at 12. Also, Commerce reviewed the financial statements for Lakshmi and determined that it received countervailable subsidies during the POR under programs previously investigated by Commerce. As a result, Commerce did not use the financial statement of Lakshmi either. *Id*. at 11–12. The two remaining financial statements were Bansidhar and Sundram. Both statements were for periods that overlap the POR. *Id*. at 12. For the *Final Results*, Commerce averaged the financial statements for Bansidhar and Sundram, finding they represented the best available information on the record for calculating financial ratios. *Id*. at 14.

While Plaintiffs argued there was "substantial record evidence" showing Sundram benefitted from India's SEZ Act, the evidence cited was based on generalities about the SEZ Act, and did not demonstrate that Sundram benefitted from the subsidies. Pl Cmts. at 16–17 (citing *Certain Steel Nails from the People's Republic of China: Submission of Surrogate Values by Mid Continent Nail Corp*., A-570–909, POR 08/01/2009–07/31/2010, at Ex.1, pages 9, 11, 33 (Dep't Commerce Oct. 13, 2011) ("Mid Continent SV Submission"); *Certain Steel Nails from the People's Republic of China, Second Administrative Review; [Stanley's] Comments Regarding Petitioner's Surrogate Value Submission for the Final Results*, A-570–909, POR 08/01/2009–07/31/2010, at Ex.5B (Dep't Commerce Oct. 24, 2011)). Furthermore, companies in the SEZ "must commit to export their production of goods and/or services," Defendant's Response to Parties' Comments Upon the Department of Commerce's Remand Results, ECF No. 173, at 22 ("Commerce Response") (quoting *Issues and Decision Memorandum for the Final Results of the Countervailing Duty New Shipper Review of Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India*, C-533–825, NSR: 01/01/2009–12/31/2009, at 13 (Dep't Commerce May 27, 2011) ("PET Film I&D Memo")), and that "in certain instances, a company must also apply and qualify for the benefits of the subsidy programs to receive them," *Remand Results* at 17 (citing PET Film I&D Memo at 13–19). The record does not indicate that either of these prerequisite actions were taken in this case. Accordingly, Commerce's determination as to the SEZ was substantially supported and the court sees no indication that legal standards were not properly applied as to the SEZ determination.

B. Section 35(2AB) of India's Income Tax Act

On remand, Commerce reexamined whether it had reason to suspect or believe that Sundram actually received countervailable subsidies in the light of an EU decision finding Section 35(2AB) of India's Income Tax Act countervailable. *Remand Results* at 18.[16] Commerce, however, did not find any indication that Sundram "was approved or specifically received benefits from any programs related to Section 35(2AB)." *Id*. While the financial statements mention Sundram's eligibility for the subsidies in question, Commerce found "no corresponding line item demonstrating that Sundram received any subsidies." *Id*. Plaintiffs have supplied no such evidence.

Nevertheless, Plaintiffs contend that *Fuyao Glass Industry Group Co. v. United States*, requires Commerce to "demonstrate . . . it would

[16] Commerce originally mistakenly stated that the EU had not made such a determination. *I&D Memo* at 12 n.25. That conclusion, however, was incorrect. *Itochu* at *9.

have been unnatural for a supplier to not have taken advantage of such subsidies." Pl. Cmts. at 24 (quoting 29 C.I.T. 109, 118 (2005)). Further, Plaintiffs argue that "like any other prudent business person, Sundram would have availed subsidy benefits pursuant to Section 35(2AB)." Pl. Cmts. at 24. Commerce counters that plaintiff's proffered approach is but one way of assessing the evidence of subsidies. Commerce Response at 20 (citing *Gold East Paper (Jiangsu) Co. Ltd. V. United States*, 121 F. Supp. 3d 1304, 1307–08 (CIT 2015)). In the course of its discussion on subsidies, Fuyao does not address the special problems presented by the use of bald financial statements, from which Commerce derives ratios for overhead, selling, general, and administrative expenses. *See* 29 C.I.T. at 111 –119. This is necessarily an inaccurate process. Here, Commerce reviewed the instant record and evaluated the four corners on the financial statements, because that was the only evidence generally available during the POR. *See* Commerce Response at 23. Given the limited choices available to Commerce on remand and the potential for further inaccuracy stemming from the use of just one financial statement, Commerce's decision not to reject Sundram's statement on this basis and its averaging approach were reasonable here. The court finds Commerce's decision adequately supported.

C. Comparable Merchandise

On remand, once Commerce determined that Sundram's financial statements were acceptable surrogates, based on a lack of demonstrable receipt of subsidies, it addressed Itochu and Stanley's concerns regarding whether Sundram produces comparable merchandise. *Remand Results* at 19–23. In doing so, Commerce considered three factors: (1) physical characteristics; (2) production process; and (3) end uses. *Id*. at 19.

As to physical characteristics, Commerce found nails and screws comparable because they are "both made from steel [and] have a shank and head." *Id*. at 20 (citing Mid Continent SV Submission at Ex.10–1, pages 5–6 ("Certain Steel Nails from the UAE") and Ex.10–2, page 8 ("Certain Fasteners from China and Taiwan")). Both the NME producer's nails and Sundram's screws were made from steel wire rod ("SWR"). Mid Continent SV Submission at Ex.6 (regarding Sundram's use of SWR); *I&D Memo* at 14 (regarding respondents' use of SWR). Plaintiffs argue the SWR used for making automotive fasteners is "high tensile" as compared to the "low-carbon and medium-carbon" SWR used for producing nails, and that this physical distinction renders the products incomparable for SV purposes. Pl.

Cmts. at 29. Plaintiffs, however, do not provide any actual evidence of specific "chemical, physical, or mechanical" differences between the two types of steel. *Id*. (quoting *Remand Results* at 22). Instead, Plaintiffs merely argue that the two are "prima facie different." *Id*. Plaintiffs also "ignore record evidence that demonstrates . . . that Sundram produces other fasteners in addition to automotive fasteners," Commerce Response at 26; *see* Mid Continent SV Submission, at Ex.2, pages 3–4, which indicates that at least some of Sundram's fasteners are even more comparable to the NME producer's product.

As to the production processes, Commerce found them comparable for both nails and automotive fasteners because they are both "produced from steel wire and rod," "produced using cold forming machines" and "subject to . . . head treatment and coating." *Remand Results* at 21–23 (citing Certain Steel Nails from the UAE at I-9–I-10, and Certain Fasteners from China and Taiwan at 10). Commerce noted that it is "not required to 'duplicate the exact production experience'" when comparing the NME producer to Sundram. *Id*. at 22 (quoting *Issues and Decision Memorandum for the Final Determination in the Less Than Fair Value Investigation of Certain Oil Country Tubular Goods from the Peoples' Republic of China*, A-570–943, POI: 10/01/08–03/31/09, at Comment 13 (Dep't Commerce Apr. 19, 2010)). Plaintiffs argue that "Sundram *undeniably* utilizes sophisticated manufacturing processes for producing specialized auto components including fasteners," Pl. Cmts. at 26 (emphasis added); however, Plaintiffs fail to provide any evidence for this claim, other than suggesting Sundram uses a "prima facie different" high tensile steel, *id*. at 29. The court agrees with Commerce that although certain stages in the production process may differ, if overall the processes are similar, this does not necessarily weigh against comparability. *See Remand Results* at 22–23.

Finally, Commerce found that the end uses of both products were sufficiently comparable for its purposes. In prior cases, Commerce defined the end use of a nail as, "holding separate pieces together," Certain Steel Nails from the UAE at I-6, and the end use of a screw as, "hold[ing] [and] join[ing]... or maintain[ing] the equilibrium of single or multiple components," Certain Fasteners from China and Taiwan at 9. Thus, Commerce determined that nails and screws have a comparable end use in that they are both used to hold different pieces together. *Remand Results* at 20. Plaintiffs would have Commerce expand the test for comparability to include factors such as "interchangeability of goods, channels of distribution, customer perception, and manufacturing facilities" to test whether automotive

fasteners and nails have comparable end uses. Pl. Cmts. at 28–29. Plaintiffs, however, offer no precedent or strong reasons for requiring consideration of these factors for this particular determination. *Id*.

Moreover, Plaintiffs cited decisions in three steel nails investigations, Oman, Taiwan, and Korea, decided after the POR as proof that automotive fasteners were not comparable to steel nails. Pl. Cmts. at 29–30. Upon closer examination, however, each case is distinguishable. While these decisions refer to Sundram's lower specificity, in only one, the Final Determination in Oman, were Sundram's financial statements rejected principally based on this factor.[17] In the other investigations, the decision not to use Sundram's financial statements was based, in part, on Sundram's lack of production in the subject countries, Taiwan[18] and Korea,[19] respectively. The Court of International Trade opinion cited by Plaintiffs merely referenced *Certain Steel Nails From the Sultanate of Oman*, and made no judgment on Sundram's product comparability. The court simply noted Com-

[17] *Certain Steel Nails From the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value*, 80 Fed. Reg. 28,972 (May 20, 2015); *Certain Steel Nails from the Sultanate of Oman: Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value*, A-523–808, POI 04/01/2013–03/31/2014 (Dep't Commerce May 13, 2015) ("Oman Final I&D; Memo"). The company chosen to supply substitute financial information in this market economy case, Hitech Fastener Manufacture (Thailand) Co., Ltd., produced only steel screws. Oman Final I&D Memo at Comment 1. Commerce did, however, note that Sundram produced some merchandise comparable to that produced by the company examined. *See id*. The preliminary determination in this case likewise noted that Sundram produced some comparable merchandise, but declined to use its financial statements because Sundram neither produced nor sold this merchandise in Oman. *Certain Steel Nails From the Sultanate of Oman: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 Fed. Reg. 78,034 (Dec. 29, 2014); *Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation: Certain Steel Nails From the Sultanate of Oman*, A-523–808, POI 04/01/2013–03/31/2014, at Part XIV.B (Dep't Commerce Dec. 17, 2014)

[18] In the final determination of this investigation, Commerce did not use Sundram's financial statements primarily because it had financial statements on record from companies that produced comparable merchandise in Taiwan. *Certain Steel Nails From Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 Fed. Reg. 28,959 (May 20, 2015); *Issues and Decision Memorandum for the Affirmative Final Determination in the Less than Fair Value Investigation of Certain Nails from Taiwan*, A-583–854, POI 04/01/2013–03/31/2014, at Comment 1 (Dep't Commerce May 13, 2015). Likewise, in the preliminary determination, Commerce did not use any of the record data sets, and chose not to use Sundram because it does not sell or produce in Taiwan. *Certain Steel Nails From Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 Fed. Reg. 78,053 at 9 (Dec. 29, 2014); *Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Steel Nails from Taiwan*, A-583–854, POI 04/01/2013–03/31/2014, at Part VII.E (Dep't Commerce Dec. 17, 2014).

[19] *Certain Steel Nails From the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 Fed. Reg. 78,051 at 13 (Dec. 29, 2014); *Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation: Certain Steel Nails From the Republic of Korea*, A-580–874, POI 04/01/2013–03/31/2014, at Part XIV.B (Dep't Commerce Dec. 17, 2014).

merce's initial decision.[20] All of the investigations cited by Plaintiffs acknowledge that Sundram produced a certain amount of goods comparable to the steel nails in question.

Notably, "Commerce [does] not rely on decisions made regarding comparability of merchandise from outside the period of review." Commerce Response at 26. Commerce may make different decisions at different times and they may all be supported. Further, it would "defeat the whole purpose of having set periods of review for the administration of the antidumping order," *NSK Ltd. v. United States*, 510 F.3d 1375, 1381–82 (Fed. Cir. 2007) (concerning the inclusion of billing adjustments which occurred outside the period of review), if other records must also be considered.

Commerce weighed the three criteria, some of which were more persuasive than others, and found that Sundram's merchandise was sufficiently comparable to that of the NME producer, such that Sundram's financial statements could be averaged with those of Bansidhar. Accordingly, the court concludes that Commerce's decision is supported by substantial evidence and is in accordance with law.

IV. Commerce's Decision to Apply Neutral Facts Available to Jinchi

In *Itochu*, the court held that Commerce improperly applied AFA to Jinchi for its failure to report FOP data from an unaffiliated supplier because Commerce never made a finding that Jinchi failed to cooperate. *Id*. at *16. Instead, record evidence showed that Jinchi continued to work with Commerce to provide the requested data. *Id*. The court also held that Commerce failed to conduct the necessary case-specific analysis to determine whether it was appropriate to apply an inference adverse to Jinchi for its unaffiliated supplier's failure to cooperate. *Id*.

Accordingly, the court remanded the issue of whether application of AFA to the unaffiliated supplier was appropriate. *Id*. at *17. The court specifically directed Commerce to reconsider its application of a partial AFA margin to Jinchi for the missing information pertaining to Jinchi's unaffiliated supplier, [[ ]]. *Id*. Commerce was given two options: (1) explain why application of AFA to Jinchi, a fully cooperating party, is appropriate; or (2) apply a neutral facts available margin to Jinchi. *Id*. at *16.

On remand, Commerce acted within its discretion and reasonably applied neutral facts available to Jinchi. Commerce found that: (1)

[20] *Mid Continent Steel & Wire, Inc. v. United States*, 2017 Ct. Intl. Trade LEXIS 19, 23–25 (Ct. Int'l Trade Jan. 26, 2017) (referencing 80 Fed. Reg. 28,972).

these hard cut nails represent an *insignificant* quantity of Jinchi's total quantity of subject merchandise sales to the U.S. during the POR (not a supermajority of the sales as initially thought); and (2) a majority of the other SVs are significantly lower than the value applied as AFA to Jinchi's hard-cut masonry nails. *Remand Results* at 33–34.

Commerce noted in its *Final Results* that it "could have chosen to excuse Jinchi from reporting the sales and missing FOPs . . . from this unaffiliated supplier as an insignificant quantity, if Jinchi [had] made such a request." *Id*. at 33. Commerce explained that because Jinchi did not ask to be excused, Commerce initially resorted to applying AFA. *Id*. Commerce failed to consider, however, that a reason Jinchi did not request this relief was because they were actively attempting to obtain the requested information from their supplier. *See* Pl. Cmts. at 7. Recognizing Jinchi's lack of success in this regard, Commerce sent its own questionnaire to the supplier. *Remand Results* at 31–32.

To further justify its original decision, Commerce cites *Mueller Commercial de Mex., S. de R.L. de C.V. v. United States. Remand Results* at 51–52. In that case, however, the supplier, Ternium, was also a potential mandatory respondent given its own high volume of exports to the United States. 753 F.3d 1227, 1229 (Fed. Cir. 2014). Due to this high volume, Commerce applied AFA as a negative incentive to induce Mueller's cooperation. *Id*. at 1235. In contrast, [[ ]] operations do not include any shipments to the United States, it is unable to provide financials to Commerce apparently because it does not have regular accounting, and it only employs 30 people, all facts which point to the insignificant size of [[ ]] operations. *Second Administrative Review of Certain Nails from the People's Republic of China: Factors of Production for certain nails exported by Jinchi which were produced by [[ ]]*, A-570–909, POR 08/31/2009–07/31/2010, at 2 and Attach.1 (Dep't of Commerce Sept. 28, 2011) ("FOP Letter"). Furthermore, *Mueller* makes clear that particular facts are necessary to apply AFA to a cooperating party based on a non-affiliated supplier's conduct. *See* 753 F.3d at 1233.

Turning to Commerce's new determination, given the insignificant amount of product involved, there is no likelihood of control by Jinchi or a motivation to evade as in *Mueller*, so factors that might warrant AFA based on a non-affiliate's conduct are missing. *Id*. at 1235. "If the cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party." *Id*. (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011)).

Mid Continent's argument that Jinchi had sufficient control over its supplier simply because it had an ongoing business relationship with the supplier, Def.-Int. Cmts. at 11, is unpersuasive. Under such a standard, it would be impossible to separate respondents who have control from those that do not. Mid Continent's assertion that [[ ]], as a rational business, would supply the records upon inducement by Jinchi ignores [[ ]] lack of proper accounting and small size.

Moreover, the evidence shows that Jinchi did in fact attempt to apply pressure to its producer. The record indicates that Jinchi actually tried to induce its supplier to provide the records, stating "[w]hether your company provides the help will influence our willingness to continue to do business with your company." FOP Letter, at Attach.1. That [[ ]] still refused to cooperate, arguing that "the requirements of the questionnaire [were] far beyond [its] ability," suggests Jinchi exercised insufficient control over the supplier to induce its cooperation. *Id*. For these reasons, the court concludes that Commerce's application of neutral facts on remand is supported by substantial evidence and is in accordance with law.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's *Remand Results*.

Dated: March 22, 2018
New York, New York

/*S*/ *Jane A. Restani*
JANE A. RESTANI
JUDGE

Slip Op. 18–25

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, GANG YAN DIAMOND PRODUCTS, INC., CLIFF INTERNATIONAL LTD., HUSQVARNA CONSTRUCTION PRODUCTS NORTH AMERICA, INC., HEBEI HUSQVARNA-JIKAI DIAMOND TOOLS CO., LTD., WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., BOSUN TOOLS CO., LTD., and BOSUN TOOLS INC., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00241

JUDGMENT

This case having been instituted to challenge certain administrative review determinations of the International Trade Administration, U.S. Department of Commerce ("Commerce") published *sub nom. Diamond Sawblades and Parts Thereof from the People's Republic of China*, 78 Fed. Reg. 36166 (June 17, 2013), as amended by *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 78 Fed. Reg. 42930 (July 18, 2013); and the matter having been remanded *per* slip opinion 14–112, ECF No. 87 (Sep. 23, 2014); and the administrative results of redetermination, dated May 18, 2015, having been sustained and judgment entered *per* slip opinion 15–116, ECF No. 118 (Oct. 21, 2015); and the case having been appealed to the Court of Appeals for the Federal Circuit, ECF Nos. 120 & 121 (Nov. 20, 2015); and the appellate court having affirmed in part, vacated in part, and remanded for further consideration that part of the decision that concerned Commerce's determination on the timeliness of the plaintiff's targeted dumping allegation, 704 Fed. Appx. 924 (Aug. 7, 2017); and after issuance of the mandate thereon, ECF No. 127 (Sep. 28, 2017), the case having been remanded to Commerce, Order of the Court, ECF No. 128 (Oct. 3, 2017); and the results of that remand having been filed, ECF. No. 137 (Jan. 18, 2018); and the parties having filed a joint status report, ECF No. 138 (Jan. 25. 2018), wherein they indicate (1) that "[o]n remand, the agency conducted a targeted dumping analysis, but ultimately did not find targeting sufficient to warrant changes to its margin calculations", *id*. at 2, referencing ECF No. 137, (2) that "no further briefing is necessary", *id*., and (3) that "the final remand results may be sustained" as is, *id*.; Now, therefore, in view of the foregoing, and upon other papers and proceedings, it is

ORDERED ADJUDGED and DECREED, that Commerce's *Final Remand Redetermination, Diamond Sawblades Manufacturers'*

Coalition v. United States, CIT Consol. Ct. No. 13–00241 (Jan. 19, 2018), ECF No. 137, be, and it hereby is, sustained.

Dated: March 22, 2018
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 18–28

THE DIAMOND SAWBLADES MANUFACTURERS' COALITION, et alia, Plaintiffs, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 16–00124

[Remanding 2013–14 administrative review of antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: March 22, 2018

Daniel B. Pickard, Maureen E. Thorson, and *Stephanie M. Bell*, Wiley, Rein & Fielding, LLP, of Washington, DC, for the plaintiff Diamond Sawblades Manufacturers' Coalition.

Gregory S. Menegaz, J. Kevin Horgan, Judith L. Holdsworth, and *Alexandra H. Salzman*, deKeiffer & Horgan, PLLC, of Washington, DC, for the consolidated plaintiffs Bosun Tools, Co., Ltd. and Bosun Tools Inc.

Max F. Schutzman, Andrew B. Schroth, Dharmendra N. Choudhary, and *Elaine F. Wang*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for the consolidated plaintiffs Weihai Xiangguang Mechanical Industrial Co., Ltd., Ehwa Diamond Industrial Co., Ltd., and General Tool, Inc.

Lizbeth R. Levinson, Ronald L. Wisla, and *Brittney R. McClain*, Kutak Rock LLP, of Washington, DC, for the consolidated plaintiffs Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd., Jiangsu Fengtai Tools Co., Ltd., Chengdu Huifeng Diamond Tools Co., Ltd., Danyang Huachang Diamond Tools Manufacturing Co., Ltd., Danyang NYCL Tools Manufacturing Co., Ltd., Danyang Weiwang Tools Manufacturing Co., Ltd., Guilin Tebon Superhard Material Co., Ltd., Hangzhou Deer King Industrial and Trading Co., Ltd., Hong Kong Hao Xin International Group Limited, Jiangsu Inter-China Group Corporation, Jiangsu Youhe Tool Manufacturer Co., Ltd., Orient Gain International Limited, Pantos Logistics (HK) Company Limited, Qingyuan Shangtai Diamond Tools Co., Ltd., Quanzhou Zhongzhi Diamond Tool Co., Ltd., Rizhao Hein Saw Co., Ltd., Wuhan Wanbang Laser Diamond Tools Co., and Zhejiang Wanli Tools Group Co., Ltd.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *Amanda T. Lee*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Musgrave, Senior Judge:

This opinion concerns the November 1, 2013, through October 31, 2014 period of review ("POR") of the antidumping duty order on diamond sawblades ("DSBs") and parts thereof from the People's Republic of China ("PRC"). *DSBs and Parts Thereof From the PRC*, 81 Fed. Reg. 38673 (June 14, 2016) ("*Final Results*"), Public Record Document ("PDoc") 408, and accompanying issues and decision memorandum, PDoc 389 (June 9, 2016) ("*IDM*"); *see also DSBs and Parts Thereof From the PRC*, 80 Fed. Reg. 75854 (Dec. 4, 2014)

("*Preliminary Results*"), PDoc 352, and accompanying decision memorandum thereto ("*PDM*"), PDoc 333. The following instituted separate lawsuits, subsequently consolidated, to contest aspects of those results as determined by the International Trade Administration, U.S. Department of Commerce ("Department" or "Commerce"): (1) plaintiff Diamond Sawblades Manufacturers' Coalition ("DSMC"); (2) consolidated plaintiffs consisting of Weihai Xiangguang Mechanical Industrial Co., Ltd. ("WXMI", an exporter and producer of subject merchandise from the PRC), Ehwa Diamond Industrial Co., Ltd. (WXMI's Korean affiliate), and General Tool, Inc. (collectively "Weihai"); (3) consolidated plaintiffs Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd. and Jiangsu Fengtai Tools Co., Ltd. (collectively[1] "Jiangsu Fengtai" or "JF", exporters and/or producers of subject merchandise); and (4) consolidated plaintiffs Bosun Tools Co., Ltd., an exporter and/or producer of subject merchandise, and Bosun Tools Inc. (collectively "Bosun").

Jurisdiction over the case is pursuant to 28 U.S.C. §1581(c), and the standard of review thereon is to decide whether a final administrative determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. §1516a(b)(1)(B)(i). The parties' separate motions for judgment, pursuant to the court's Rule 56.2, challenge these administrative determinations on the record: (1) deduction of irrecoverable value-added tax ("VAT") from Jiangsu Fengtai and Weihai's export prices, (2) surrogate valuation of nitrogen and oxygen, (3) surrogate valuation of labor, (4) calculation of surrogate truck freight, (5) treatment of graphite plates as direct material rather than factory overhead, (6) selection of financial statements for financial ratios, (7) denial of a request to rescind the review as to Weihai, (8) valuation of self-produced and purchased DSB cores in the calculation of Weihai's normal value, and (9) the margin for the separate rate respondents, as impacted by the foregoing.[2] The case is being remanded voluntarily, by request, and also in accordance with the following.

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[1] *I.e.*, with the support of the remaining-named PRC companies counseled above. During the review, Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd., Jiangsu Fengtai Tools Co., Ltd., and Jiangsu Sawging Co., Ltd. were determined to be affiliated and consequently considered as a single entity. *See* 80 Fed. Reg. at 75854.

[2] Initially, Bosun also challenged Commerce's application of its differential pricing analysis, arguing that that analysis and its application were contrary to the statute, improperly disclosed, and reliant upon an allegedly improper statistical method, the Cohen's *d* test, *see* Bosun Br.at 13–21, but as its reply brief does not address the defendant's response thereto, that count of Bosun's complaint is therefore deemed abandoned. *See, e.g., United States v. Great American Insurance Co. of New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("arguments that are not appropriately developed in a party's briefing may be deemed waived").

Discussion

I. Voluntary Remand

Commerce voluntarily requests remand of the last two issues in light of the intervening remand order issued in *Diamond Sawblades Manufacturers' Coalition v. United States*, 41 CIT ___, 219 F. Supp. 3d 1368 (2017). That case, which concerns the previous administrative review of DSBs from the PRC, remanded the issue of Weihai's cores' valuation methodology. *See id*.; *see also Diamond Sawblades Manufacturers' Coalition v. United States*, 42 CIT ___, ___ WL ___ Slip Op. 18–26 (Mar. 22, 2018). The case of *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("*SKF*") holds that the reviewing court has the discretion to grant a remand, if an agency requests it, without confessing error, in order to reconsider its previous position. DSMC supports Commerce's request for remand and "agrees that Weihai's normal value calculation and, as necessary, the margin for the non-selected separate rate companies, should be reconsidered in light of the issues raised in DSMC's opening brief and reviewed herein." DSMC Reply at 4. Weihai's response brief targets the DSMC's arguments raised in the latter's 56.2 brief, but Weihai's reply brief is silent on the remand request. Because the agency's request appears legitimate and substantial, issues (8) and (9) will therefore be, and hereby are, remanded to harmonize with Court No. 15–00164 (but, *nota bene* section IX *infra*).

II. Deduction of Irrecoverable VAT

Jiangsu Fengtai, Weihai and Bosun challenge Commerce's determination with respect to Commerce's methodology for the deduction of "irrecoverable" VAT from the reported U.S. prices. *See IDM* at 14. They also challenge Commerce's specific deduction in this case.

By way of background, an antidumping duty represents the amount by which the "normal value" ("NV") of subject merchandise exceeds its United States price ("USP"), which is typically either an export price ("EP") or a constructed export price ("CEP"). 19 U.S.C. §1673. In a market economy situation, NV is typically the price at which the foreign like product is sold or offered for sale for consumption in the exporting country. 19 U.S.C. §1677b(a)(1)(B). When Commerce calculates USP, regardless of whether the proceeding concerns a market economy or non-market economy ("NME") situation the statute calls for deduction of "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States". 19 U.S.C. §1677a(c)(2)(B).

In applying these provisions, Commerce has sought tax neutrality when comparing NV with USP. *See, e.g., IDM* at 15. It has also sought to avoid the "multiplier effect" in the determination of the margin. Explaining what "multiplier effect" means by way of example concerning a market economy, the Court of Appeals for the Federal Circuit had this to say:

> Assume product A is sold in Japan for $100. The identical product is exported and sold in the U.S. for $90. The difference is $10, the amount by which the product is being dumped. Further assume a 10% VAT is imposed on the sale in Japan, but not on the export sale to the U.S. With the tax included, FMV[3] is $100 + 10% $110. The similar calculation of USP, using the tax rate, is $90 + 10% $99. The dumping margin, FMV-USP, is $11 ($110 - 99), rather than the $10 which is the actual amount of dumping. This mathematical peculiarity is known as the "multiplier effect."

Federal-Mogul Corp. v. United States, 63 F.3d 1572, 1576 (Fed. Cir. 1995).

The case clarified that while Congress had specifically rejected a proposed tax neutral approach to the problem, the most that can be inferred from the statute as it came into being at that time is that Congress neither mandated nor precluded a tax-neutral approach to the administration of section 1677a. *See id.* at 1579–80. The Federal Circuit also noted that the easiest way to achieve tax neutrality would be to subtract the VAT from the price actually paid in the home market, which had been Commerce's approach to the problem in a number of cases prior to implementation of the URAA. *See id*. at 1576, referencing *Zenith Electronics Corp. v. United States*, 10 CIT 268, 273 and n.8, 633 F. Supp. 1382, 1386 and n.8 (1986).

Two points are noteable. For one, the problem Commerce had considered in *Federal-Mogul*, to repeat, was in the context of a market economy's VAT. But in a non-market economy ("NME") situation, Commerce must normally resort to determining NV on the basis of the factors of production ("FOPs") for subject merchandise. 19 U.S.C. §1677b(c). Stated differently, the NV price in the NME home market is suspect. Weihai also emphasizes here that Commerce's historical position had been that 19 U.S.C. §1677a(c)(2)(B) does not apply in NME cases because no reliable way existed to determine whether or not an export tax had been included in the price of a product from an

[3] "FMV", *i.e.*, "foreign market value," became NV with passage of the Uruguay Round Agreements Act ("URAA"). *See* Pub L. 103–465 §224 (Dec. 8, 1994).

NME. Either consideration leads to the second point: when comparing NV to USP, avoidance of the multiplier effect, assuming that is desirable, is distinct from a tax-neutral comparison. The latter, obviously, is not the same as "tax-free."

Recent cases have sustained Commerce's theoretical interpretation of the statute as permitting the deduction from USP of irrecoverable VAT. *See generally Aristocraft of America, LLC, v. United States*, 41 CIT ___, 269 F. Supp. 3d 1316 (2017) ("*Aristocraft*"). The apparent reason such cases have been instituted is that Commerce reconsidered how it would apply the NME aspect of the antidumping statute in light of how the PRC's so-called "socialist market economy" has been evolving. *See Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, in Certain NME Antidumping Proceedings*, 77 Fed. Reg. 36481 (June 19, 2012) ("*Methodological Change*").

A

The parties' challenges to Commerce's interpretation of 19 U.S.C. §1677a(c)(2)(B) and 19 U.S.C. §1677(18)(A) raise arguments similar to those considered in other cases and do not advance a different reason for invalidating Commerce's interpretation of the statute.

Jiangsu Fengtai begins by arguing that Commerce's interpretation is contrary to the "plain" meaning of the statute and *Magnesium Corporation of America v. United States*, 166 F.3d 1364, 1370–71 (Fed. Cir. 1999) ("*Magnesium Corp.*"), which "prohibits" deduction from U.S. price of not only export taxes duties and charges that may be imposed upon the exportation of merchandise by NME countries but also the unrebated portion of internal VAT taxes. Jiangsu Fengtai claims these are "by definition" not a form of "export tax, duty or other charge imposed" by the PRC upon export of the subject merchandise. Jiangsu Fengtai 56.2 Br. at 7–12. But, in upholding Commerce's interpretation of section 1677a(c)(2)(B) in the context of the Russian Federation, *Magnesium Corp*. only upheld that section 1677a requires export taxes to be deducted from USP if the export tax is included in such price. The decision does not limit or preclude Commerce from determining the extent to which such taxes (or duties or other charges) are included in such price.

Nonetheless, Jiangsu Fengtai quotes *Magnesium Corp.*'s observations with respect to USP to the effect that in a market economy Commerce can "presume" any tax imposed on merchandise to be exported will be included in the USP of that merchandise and also that such a presumption is "not available" when the merchandise is produced in an NME, in that "the price of the merchandise does not

reflect its fair value because the market does not operate on market principles" and "no reliable way exists to determine whether or not an export tax has been included in the price of a product from" an NME. *Magnesium Corp*., 166 F.3d at 1370. To the extent those observations reiterate Commerce's thinking with respect to NV (or rather, at the time, FMV), the decision predates *Methodological Change*, which Commerce announced after notice and comment, and which is entitled to *Chevron* deference.[4] *E.g., Aristocraft*, 41 CIT at ___, 269 F.

[4] The observations also seem to conflate an NME's internal NV price with its USP, because if the latter is an agreed-upon, arm's length price, it is therefore a "market" price by definition, apart from the question of whether it is a "fair" price. *Cf.* 19 U.S.C. §1677a. In order to assist any post-decisional scrutiny of this opinion, the defendant provides further background as follows:

> Pursuant to 19 U.S.C. §1677a(c)(2)(B), when Commerce calculates export price, it deducts from its calculation any "export tax, duty or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." Historically, Commerce did not apply section 1677a(c)(2)(B) to proceedings for non-market economies because "pervasive government intervention . . . precluded proper valuation" of those charges. *Methodological Change* . . .. Thus, previously, for non-market economy countries, Commerce did not deduct export expenses from export price, because "the actual amounts paid are an internal expense within an NME country." *Pure Magnesium and Alloy Magnesium from the Russian Federation*, 60 Fed. Reg. 16,440 (Dep't of Commerce Mar. 30, 1995) (final results admin. review) ("*Russian Magnesium*").
>
> The Federal Circuit sustained Commerce's practice in *Magnesium Corp*. . .. Specifically, the Federal Circuit sustained Commerce's interpretation of 19 U.S.C. § 1677a(c)(2)(B) as not requiring Commerce, in the non-market economy context, to deduct export duties and costs in an non-market economy, given that "[b]y definition, in a non-market economy, the price of merchandise does not reflect its fair value because the market does not operate on market principles," and "no reliable way exists to determine whether or not an export tax has been included in the price of a product from a non-market economy." *Id*. at 1370. It further explained that "the *nature* of the Russian economy *does not permit Commerce to determine* whether the export taxes imposed on the exported magnesium were actually included in the price of the magnesium as required by subsection 1677a(d)(2)(B)[,]" and thus it was reasonable for Commerce to determine that "[e]xport taxes must be treated as an intra-non-market economy expense *under these circumstances*, making it impossible to determine whether the actual cost of the export tax was included in the price at which the magnesium was sold in the United States." *Id*. at 1371 (emphases added).
>
> After *Russian Magnesium*, and given the nature of the [evolving PRC] economy, Commerce initially found that it could not determine whether [PRC] export duties and costs were actually included in the price of the merchandise. In 2012, in recognition that the present-day [PRC] economy is sufficiently dissimilar from Soviet-style economies such that taxes paid by companies in [the PRC] can be identified and measured, Commerce changed its methodology for antidumping duty proceedings involving merchandise from [the PRC], and determined to deduct any such charges that were imposed, "including VAT that is not fully refunded upon exportation." *Id*. at 36,482. Commerce also determined that, "in many instances, the export tax, VAT, duty, or other charge will be a fixed percentage of the price. In such cases, the Department will adjust the export price or constructed export price downward by the same percentage." *Id*. at 36,483.
>
> Commerce explained that "[a]lthough [Commerce does] not know how individual companies in [the PRC and Vietnam] set prices, we do know that the government taxes a portion of companies' sales receipts," and Commerce "can measure a transfer of funds between certain [non-market economies] and companies therein, regardless of the

Supp. 3d at 1322; *Jacobi Carbons AB v. United States*, 41 CIT ___, ___, 222 F.Supp.3d 1159, 1186–94 (2017) ("*Jacobi Carbons*").

Jiangsu Fengtai next argues that "[i]nstead of affirmatively imposing a tax, charge or other duty as required by the statute upon the export of the subject merchandise, the government of [the PRC] in this case is not refunding previously paid internal VAT when the subject merchandise is exported." JF Br. at 14. This argument, however, essentially concedes the fact of unrefunded (*i.e.*, irrecoverable) VAT, which Commerce's methodology purports to address, and the record shows that Jiangsu Fangtai declared receipt of "rebate" upon exportation. At least conceptually, the unrefunded or irrecoverable VAT represents what must, of necessity, have been a cost that must, in turn, be passed along to the ultimate purchaser in the export price. *See, e.g., Aristocraft*, 41 CIT at ___, 269 F. Supp 3d at 1324–25.

Bosun repeats that VAT is not "imposed" by the PRC "on the exportation of subject merchandise to the United States" as required by the statute, and that Commerce itself previously rejected the rationale of the new VAT adjustment methodology to compensate for a domestic tax imposed on the acquisition of inputs in the PRC and also to ensure the cost is captured in the calculation, which *Magnesium Corp.* had sustained. Bosun Br. at 10–12, referencing *Globe Metallurgical, Inc. v. United States*, 35 CIT ___, ___, 781 F. Supp. 2d 1340, 1346–47 (2011). But *Juancheng Kangtai Chemical Co., Ltd. v. United States*, 41 CIT ___, Slip Op. 17–3 at 27–28, (Jan. 19, 2017) ("*Juancheng Kangtai II*"), among others, has rejected this argument, and this court perceives no reason to reach a contrary conclusion here.

Weihai argues the statute's meaning is "plain", as is the meaning of "exportation" in international commerce and U.S. Customs and Border Protection ("Customs") regulations. Weihai Reply at 26. Elaborating, Weihai contends that the statutory phrase "other charge" is circumscribed, *ejusdem generis*, by "export tax" and "export duty", and that Commerce is only authorized to adjust USP only when there is an "amount" that is "imposed on the exportation of the subject merchandise" and is "included in the export price", *id*. at 27, and that "the statute specifically requires Commerce to make a finding that a 'tax, duty or other charge' equivalent to a fixed percentage of the FOB value of the exported merchandise was '*imposed by the exporting country*'", *id*. at 37 (Weihai's emphasis). Likewise, in its criticism of *Juancheng Kangtai Chemical Co., Ltd. v. United States*, 39 CIT ___,

direction the money flows." *Id*. (citation omitted). "Given that, and given that we know how much respondent companies receive for the [United States] sale, we have determined it appropriate to take taxes into account, as directed by the statute." *Id*.

Def's Resp. at 31–33 (bracketing added in part; italics in original). *See also infra* note 5.

Slip Op. 15–93 (Aug. 21, 2015) ("*Juancheng Kangtai I*") , Weihei contends Commerce must make a specific finding consistent with *China Manufacturers Alliance v. United States*, 41 CIT ___, ___, 205 F. Supp. 3d 1325, 1346–49 (2017), that "irrecoverable VAT itself was actually imposed by [the PRC] on the export of subject merchandise as required by the statute." *Id.* at 35 (emphasis omitted).

Weihai's reading of 19 U.S.C. §1677a(c)(2)(B) and the record is too narrow. In the first place, the statute broadly asks whether there has been included in USP "any export tax, duty, or other charge imposed by the exporting country *on* the exportation of the subject merchandise to the United States". Commerce's reading of "on" is not "by reason of" exportation, it is essentially, and straightforwardly, whether there *is* ("exists") "any export tax, duty, or other charge imposed by the exporting country" included in USP at the time of exportation. *Cf. Magnesium Corp., supra.* To "impose" means "[t]o charge; impute"; "[t]o subject (one) *to* a charge, penalty or the like"; "[t]o lay as a charge, burden, tax, duty, obligation, command, penalty, etc." *Webster's New International Dictionary of the English Language, Unabridged*, p. 1251 (2nd ed. 1956) (italics in original). *See also, e.g., Jacobi Carbons*, 41 CIT at ___ , 222 F. Supp. 3d at 1188 (lexicographical definition of "imposed"). The satisfaction of any such imposition is not necessarily concurrent with the act of imposition, which may occur at any time, and the vagueness of the statutory language neither precludes nor requires such interpretation. *See, e.g., Aristocraft*, 41 CIT at ___, 269 F. Supp. 3d at 1324–25; *Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1187–88.

In the second place, it cannot reasonably be argued on this record, notwithstanding *China Manufacturers Alliance*, that VAT was not "imposed" in contravention not only of Weihai's own statements to that effect, *e.g.*, with respect to its purchases of inputs for subject merchandise or the subject merchandise itself, but in particular with respect to PRC law, which provides that at the time of export of subject merchandise the VAT rebate is calculated based upon the full export value of the subject merchandise at the time of export.

Commerce interpreted Weihai's submissions of PRC law to the effect, not only, that exportation itself is what gives rise to the irrecoverable VAT "imposed" by the PRC on the process of manufacture and on the sale of subject merchandise, but also, that the "irrecoverable" amount of VAT is to be calculated by reference to the full FOB export value of subject merchandise. That interpretation is not inherently unreasonable, and Weihai's nuanced interpretation does not render it so, *i.e.*, the implicit argument being that the statute requires some form of explicit "imposition" that must simultaneously coincide

with exportation, which, as discussed, is not the only reasonably possible interpretation of the statute. Accordingly, Commerce's interpretation of 19 U.S.C. § 1677a(c)(2)(B) and §1677(18)(A), in the context of this review, will be, and hereby is, sustained.

B

That does not, however, settle the methodological dispute. In the *Final Results*, Commerce described its methodology as involving two basic steps: "(1) determining the amount of irrecoverable VAT on subject merchandise, and (2) reducing U.S. price by the amount determined in step one." *IDM* at 15. Commerce further explained that the definition of irrecoverable VAT is "explicitly defined in [PRC] tax regulations" and amounts to the following: (1) the free-on-board value of the exported good, applied to the difference between; (2) the standard VAT levy rate; and (3) the VAT rebate rate applied to exported goods. *Id.* at 16. "The first variable, export value, is unique to each respondent[,] while the rates in (2) and (3), as well as the formula for determining irrecoverable VAT, are each explicitly set forth in [PRC] law and regulation." *Id*. Hence, because Jiangsu Fengtai and Weihai reported the standard VAT levy on the subject merchandise as 17% and the VAT rebate rate for the subject merchandise as 9%, the methodology called for removing from USP an amount calculated from the 8% difference between those rates as "applied to the export sales prices (*i.e.*, U.S. price net of international movement expenses), consistent with the definition of irrecoverable VAT under [PRC] tax law and regulation." *Id*. at 15–16.

Bosun argues the method for the deduction is unsupported by substantial evidence on the record. DSMC counters that the deduction was premised "on the information the Jiangsu Fengtai Single Entity and Weihai placed on the record of this review, which provides an independent basis demonstrating that the PRC government imposes taxes that can be identified and measured", echoing the *IDM* and the defendant's response. DSMC Resp. at 33, quoting *IDM* at 17. Weihai responds it is "unclear" what that "independent basis" is, but it is not unclear to the court. *See supra*.

Weihai argues that under PRC regulations the rate of VAT on exported goods is 0%, and that 17% VAT was merely paid on the purchase of "inputs." It contends that a "formulaic rate-based computation resulting in an 8% VAT deduction from [USP]" is unlawful because the statute authorizes deduction for "the amount" of "any export tax, duty or other charge", *etc*., that is included in the export price and

> it is axiomatic that an adjustment based upon the difference between the VAT rates paid (on purchased inputs) and refunded (on export of finished goods) being applied to a common value base (FOB price of finished goods sold) is not the same as the actual amount paid when the applicable input VAT rate and refund rate are applied to two different value bases, *i.e.*, the value of inputs (17%) and the value of finished goods (9%), respectively.

Weihai Reply at 29 (emphasis removed). Weihai argues that in the instant case Commerce simply applied the irrecoverable VAT formula provided by PRC law as follows:

> Irrecoverable VAT (FOB export value) multiplied by (standard VAT levy rate minus VAT rebate applicable to exported goods) (FOB export value) * (17% -9%) FOB * 8%.

Id. at 32.

But as the defendant's response points out, "Commerce reasonably determined, based on unambiguous record evidence, that Jiangsu Fengtai and Weihai paid the standard [PRC] VAT rate on [their] purchas[es] *of subject merchandise*, and then received a rebate of nine percent." Def's Resp. at 39 (italics added). Jiangsu Fengtai's and Weihai's replies do not dispute this point, although Jiangsu Fengtai contends, nonetheless, that the administrative record establishes that no part of the internal VAT, regardless of whether it is the refunded or unrefunded portion, is included in the price paid by the U.S. customer for the subject merchandise. JF Br. at 14, referencing JF's Section A Resp. at Ex. A-14, CDoc 70. *Methodological Change* indeed indicates that "included in the price" of subject merchandise from the PRC necessitates inquiry into whether the price is reported on a "gross (i.e. inclusive) or net (i.e. exclusive) of tax" basis, 77 Fed. Reg. at 36483, but Commerce implicitly concluded Jiangsu Fengtai's prices were reported on a gross basis, *see IDM* at 14–17. The court perceives no reason, among the papers submitted, for interfering with that conclusion, as the burden is on the respondent to create clarity for the record. *See, e.g., QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("*QVD Food*") (holding that "the burden of creating an adequate record lies with [interested parties] and not with Commerce"); *NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1458–59 (Fed. Cir. 1993) (same).

The parties try to make further hay over whether Commerce's methodology was based on an "amount" or a "ratio", *see Federal Mogul, supra*, but the amount of any tax that is expressed by law as a fractional term will necessarily involve application of the relevant

ratio (*i.e.*, by and through calculation) to determine the relevant "amount" of the tax. Indeed, it is difficult to conceive of how one could be expected to arrive at "the amount" of VAT applicable to a particular transaction otherwise than through application of "the formula" that a particular VAT tax would call for. *See, e.g., IDM* at 14 ("we continue to apply our preliminary formula to adjust the VAT to deduct from the reported U.S. prices *an amount* for irrecoverable VAT") (italics added). More to the point: the multiplier effect that would be of concern in a market economy situation, as expressed in *Federal-Mogul*, normally cannot be concluded relevant to an NME comparison of NV with USP, due to uncertainty over cost or pricing structures within the NME[5] (which uncertainty does not, of course, extend to certainty established by law, *e.g.*, the rate or amount of taxation on those transactions).

The above "formulaic" expression of PRC law, and its application by Commerce in the context of this proceeding, is in accordance with Weihai's reporting thereof and the PRC's regulation on the subject. It is also in accordance with the agency's methodology, as the defendant and DSMC contend. *See Methodological Change*. Commerce concluded that the unrefunded amount of VAT that must be, or have been, "imposed" on "the exportation of the subject merchandise to the United States" is the amount or value of VAT that the PRC itself has indicated to be the "irrecoverable" amount of its VAT program. And despite Weihai's argument, this is not a presumption, it is a factual inference from the record, and substantial evidence of record supports it. To conclude from the record that the amount of irrecoverable VAT was "something less" and/or "capped" by reference to what had purportedly been paid on inputs earlier in production would be to ignore the actual evidence of record and the apparent manner in which the PRC itself operates its VAT program. *See, e.g.*, Def's Resp. at 39, *supra*.

Expanding on that point, several observations are worthwhile. First, as indicated, the PRC formula reveals that the VAT rate in that home market is 17% and for exports of subject merchandise the VAT rebate is 9% of the full export value thereof, an obvious difference of 8%, and Commerce found this "net" remainder to be, or to equate to, the amount of "irrecoverable" VAT that is defined in PRC law. "It is

[5] *See Methodological Change*, 77 Fed. Reg. at 36483 ("when the Department evaluates whether a tax is included in the price of an NME export sale, it cannot take into consideration the same assumptions as those taken into account when performing a similar type of evaluation for a market economy sale, which does operate in accordance with market principles of cost or pricing structures[;] . . . it is not an issue of price formation (*i.e.*, whether the seller considers tax when forming price) because that is a market economy concept which is inapplicable by the very definition of an NME").

VAT paid on inputs and raw materials (used in the production of exports) that is non-refundable and, therefore, a cost." *IDM* at 15. Of course, the 8% amount of irrecoverable VAT may seem difficult to square with the "actual" amount of 17% VAT respondents claim as having been paid on "inputs," because the 9% VAT rebate amount is calculated by reference to the full FOB export value of the good, not only (or merely) by reference to the full amount of VAT that purportedly would have been paid on "inputs," but, as mentioned, the defendant has pointed out that in the context of this proceeding "inputs" can mean subject merchandise in any event.

Second, the formula reflects that in the context of export, the internal VAT credit that an exporter or producer paid on inputs, and uses to net[6] the amount owed on a sale of the merchandise, is a *separate* consideration from the VAT rebate amount that the PRC calculates by reference to the full FOB export price of subject merchandise due to the *implicit* amount of VAT attributable to that event. In other words, by tethering the rebate to the full export value of the merchandise, the PRC regulation essentially declares that the PRC is foregoing an 8% amount of VAT calculated by reference to the full export value of merchandise, notwithstanding the claim of 0% VAT "imposed" on subject merchandise upon its exportation. If the irrecoverable VAT of 8% of the full FOB export value of the subject merchandise is not the remainder of a 17% VAT that has been, or is, implicitly imposed on such merchandise, then it still bears little relationship, if any, to the 17% VAT imposed on the purchase of inputs used in production, because regardless of any "rolling" basis used to account for VAT paid and VAT rebated, the amount of both rebate and irrecoverable VAT must still be calculated based upon the full export value of the subject merchandise.[7] That irrecoverable VAT, thus, represents an amount that must necessarily be included in the export price, because, as mentioned, it is that differential, between the full amount that the PRC government would otherwise receive, and the amount of VAT that the exporter actually receives in rebate, that the PRC itself deems, as Commerce found, "irrecoverable," and which amount remains, at the time of export, an "imposition" on the value of the subject merchandise, and which therefore requires adjustment to USP. It is the functional equivalent of a cost.

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[6] This being merely presumptive in an NME situation, since monetary units are fungible.

[7] *Cf., e.g.*, JF Br. at 14 (the PRC government "in this case is not refunding previously paid internal VAT when the subject merchandise is exported").

Commerce's methodological resolution of these types of VAT problems has been held to require at least further clarity of late,[8] but as articulated here by the defendant, Commerce's methodological approach is based directly on the PRC's own law and regulation. In this matter, Commerce's application thereof appears reasonable and permissible, it has apparently been applied consistently,[9] it is not unreasonable *per se*, and it furthers the aim of the antidumping statute. In arguing for this court to conclude otherwise, the respondents are essentially asking for substitution of judgment on a conclusion or finding from the record that is within Commerce's domain, which is outside the standard of judicial review. Commerce requests deference to its reasonable interpretation of the statute and of the record and its methodology, and current law on the subject supports that request. *See, e.g., Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1186. For the foregoing reasons, this court is unpersuaded by the respondents' challenges on this issue.

IV. Reliance Upon Contemporaneous Thai Import Data

Among the FOPs requiring surrogate values ("SVs") during the review were nitrogen and oxygen. For the *Final Results* Commerce calculated those SVs based on the Global Trade Atlas ("GTA") data for headings 2804.30, and 2804.40 of the Thai Harmonized Tariff Schedule ("HTS") upon determining that those data were contemporaneous with the POR, represented broad-market averages free of taxes and duties, came from the primary surrogate country, and were the best available information. *IDM* at 49–50. Jiangsu Fengtai agrees with use of GTA statistics for the Thai HTS headings 2804.30 and 2804.40 for valuing nitrogen and oxygen, respectively, but it argues Commerce should use the Thai import statistics from the fourth administrative review because the instant review data are aberrational in comparison therewith insofar as the total quantity of imports in the Thai GTA data are "commercially and statistically insignificant" in comparison with its own consumption of nitrogen and oxygen. Jiangsu Fengtai Br. at 27–28.

The defendant contends that in order to exclude an SV, interested parties must provide specific evidence showing it to be aberrational.[10]

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[8] *Cf. e.g., Aristocraft, supra, Jacobi Carbons, supra, with, e.g., U.S. Steel Group v. United States*, 225 F.3d 1284 (Fed. Cir. 2000) (judicial disagreement over "total expenses" in 19 U.S.C. §1677a(f)(2)(C) resolved by *Chevron* deference to agency's reasonable interpretation and computation thereof).

[9] *See, e.g., Multilayered Wood Flooring from the PRC*, 79 Fed. Reg. 26712 (May 9, 2014) and accompanying I&D Memo at cmt. 3.

[10] Def's Resp. at 42, referencing: *Carbazole Violet Pigment 23 from the PRC*, 75 Fed. Reg. 36630 (June 28, 2010) (final results) and accompanying issues and decision memorandum

Commerce explained in the *Final Results* that such a determination does not involve comparing the volume of imports in the import data to the volume of the input a respondent purchased or of non-identical inputs but rather comparing the total import volumes of potential surrogate countries to one another. *See IDM* at 50. The defendant also emphasizes that Commerce need not replicate the respondent's actual experience. Def's Resp. at 43, referencing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1378 (Fed. Cir. 1999).

"This court's duty is 'not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.'" *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011), quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006). The appropriate comparison to make would have been to compare the GTA import data with Thai or other surrogate country data in general. *See Trust Chemical Co. Ltd. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1257, 1265 (2011) (argument that total import data were too small held unavailing in absence of evidence that WTA volume data were only a small fraction of India's domestic consumption); *see also Shakeproof Assembly Components Div. of Illinois Tool Works, Inc. v. United States*, 23 CIT 479, 485, 59 F. Supp. 2d 1354, 1360 (1999) (Commerce's "administrative practice with respect to aberrational data is 'to disregard small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product *from other countries*'") (citation omitted; italics added). Jiangsu Fengtai did not provide such specific evidence for the record, and, as mentioned, the burden of creating an adequate record, including surrogate value information, lies with the interested parties. *See, e.g., QVD Food, supra; NTN Bearing Corp., supra*.

Jiangsu Fengtai's reliance on *Xinjiamei Furniture* and *Juancheng Kangtai I* is similarly unavailing. *See Xinjiamei Furniture (Zhangzhou) Co., Ltd. v. United States*, 37 CIT ___, Slip Op. 13–30

(all such memoranda except for *IDM* hereinafter "I&D Memo") cmt. 4; *Certain Hot-Rolled Carbon Steel Flat Products From Romania*, 70 Fed. Reg. 34448 (June 14, 2005) (final results) and accompanying I&D Memo cmt. 2 ("we reviewed the allegations regarding surrogate values as presented by the interested parties and decided whether the parties had provided sufficient evidence to merit further consideration"); *Polyethylene Retail Carrier Bags from the PRC*, 73 Fed. Reg. 14216 (Mar. 17, 2008) (final results) and accompanying I&D Memo cmt. 6 ("[w]e find that the burden is on the respondents to demonstrate that the Indian import statistics are in fact aberrational").

(Mar. 11, 2013); *Juancheng Kangtai I, supra.* In *Xinjiamei Furniture*, the respondent, arguing that the Indian import data were aberrational, placed non-Indian data on the record including Brazilian, Northern European data and world export market "benchmark" prices. The court ordered Commerce to take the Brazilian, Northern European and world export market data into account on remand. 37 CIT at ___, Slip Op. 13–30 at 16. Similarly, in *Juancheng Kangtai I*, the respondent argued that the Philippine import data was aberrational compared with other surrogate country data, 39 CIT at ___, Slip Op. 15–93 at 51–52. Here, however, Jiangsu Fengtai provided no such comparative data.

Jiangsu Fengtai fights an uphill battle in its reply. It condemns the *Final Results* as providing no valid reasons for Commerce's current policy and argues that *Juancheng Kangtai I* found unreasonable the assumption that the small amount of Thai import data in that case could possibly reflect the "commercial reality" of that respondent. Jiangsu Fengtai Reply at 15, quoting Slip Op. 15–93 at 54. *Accord, Baoding Mantong Fine Chemistry Co. v. United States*, 41 CIT ___, Slip Op. 17–44 at 37 (Apr. 19, 2017) (noting 604 metric tons of Indonesian import data for steam coal "was far less than even Baoding Mantong's own consumption of 1,037 metric tons" and remanding for reconsideration). However, the Federal Circuit in *Nan Ya Plastics* reviewed the legal requirements of "commercial reality" and "accurate" and concluded that "[w]hen Congress directs the agency to measure pricing behavior and otherwise execute its duties in a particular manner, Commerce need not examine the economic or commercial reality of the parties generally, or of the industry more generally, in some broader sense." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016), referencing *United States v. Eurodif S.A.*, 555 U.S. 305, 317–18 (2009).

"Our case law and the statute thus teach that a Commerce determination (1) is 'accurate' if it is correct as a mathematical and factual matter, thus supported by substantial evidence; and (2) reflects 'commercial reality' if it is consistent with the method provided in the statute, thus in accordance with law." *Id*. (citations omitted). For its *Final Results*, Commerce could not determine aberrance with respect to the Thai GTA data for headings 2804.30, and 2804.40 in the absence of other surrogate country data of record against which those data could be examined in relief. Its explanation, that it does not compare the volume of imports in the import data to the volume of the input a respondent purchased or non-identical inputs, and that it need not replicate the respondent's actual experience, comports with

Nan Ya's summation, and is thus in accordance with law. Jiangsu Fengtai's arguments do not persuade otherwise.

V. Valuation of Labor Using NSO 2014 Labor Force Survey

Weihai and Bosun also challenge Commerce's surrogate valuation of labor. Commerce's preferred method of valuing the labor FOPs is to use industry-specific data from the primary surrogate country published in Chapter 6A of the International Labor Organization ("ILO") Yearbook of Labor Statistics when available, and otherwise to use industry-specific labor wage rate data from the primary surrogate country. *See, e.g., Ad Hoc Shrimp Trade Action Committee v. United States*, 41 CIT ___, ___, 219 F. Supp. 3d 1286, 1291 (2017); *see also IDM* at 47; *Antidumping Methodologies in Proceedings Involving Non Market Economies*: *Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36092, 36093 (June 21, 2011) ("*Labor Methodologies*"). For this administrative review, ILO Chapter 6A data for Thailand were not on the record. *IDM* at 47.

For valuing labor, Weihai proposed industry-specific labor cost data published in the Industrial Census report (2011) of the National Statistical Office ("NSO") of the Thai government. *See* Weihai Prelim SVs (July 16, 2015), PDoc 202, at Ex. 6. The petitioners proposed reliance upon general manufacturing labor cost data published quarterly in the NSO Labor Force Survey report (2014). *See* Pets' 2nd SVs (Nov. 2, 2015), PDoc 307. Commerce preliminarily valued labor using the latter as it is manufacturing-specific data contemporaneous with the POR. *PDM* at 22–23.

In their administrative case briefs, Weihai and Bosun argued that those NSO data were not specific enough, and that Commerce should instead rely on data from the 2011 Industrial Census of the NSO, as those data were specific to the manufacture of tools/hardware, including circular sawblades, and could be adjusted to reflect inflation. Weihai's Case Br. at 24–38; Bosun's Case Br. at 20–21. Specifically, Weihai argued that the faster-than-inflation rate of increase in Thai wages in general from 2011 to the POR was irrelevant to the DSB industry and accordingly presented no bar to the use of the less-contemporaneous 2011 Industrial Census data, as the agency could simply inflate those data using the Consumer Price Index ("CPI"). Weihai's Case Br. at 30–32, 36–38. Weihai also argued that contrary to the agency's conclusion in a prior review the Industrial Census data comprehensively accounted for indirect labor costs. *Id*. at 32–36.

In the final determination, Commerce continued to rely on the 2014 Labor Force Survey data. *IDM* at 46–48. Commerce found those data

to satisfy its requirements of being industry specific, publicly available, representative of a broad market average, tax- and duty-exclusive, contemporaneous with the POR, and therefore more compelling than the 2011 data. *See id*. at 46. Its choice of the 2014 Labor Force Survey data was also the result of comparing the direct and indirect labor cost[11] elements in both the 2011 Industrial Census and the 2014 Labor Force Survey data sets with the same elements described in the ILO Chapter 6A definitions thereof, which led Commerce to determine that the 2011 Industrial Census data were not more detailed than the 2014 Labor Force Survey data in terms of matching categories of labor costs specified in the ILO Chapter 6A labor data. *Id*. at 47–48.

Commerce explained that the ILO Chapter 6A data were comprised of: (1) compensation of employees, (2) employers' expenditure for vocational training and welfare services (*e.g.*, training), (3) the cost of recruitment and other miscellaneous items (*e.g.*, work clothes, food, housing), and (4) taxes. *IDM* at 47. Commerce found that the 2014 data included cash for average wage, bonus, overtime, and other income, as well as in-kind compensation for food, clothes, housing, and others, and thus included both direct compensation and bonuses as well as indirect compensation (employee pension, benefits, and work training). *Id.* By contrast, Commerce found that while the 2011 data included wages, salaries, overtime bonus, fringe benefits (medical care, others), and employer's contribution to social security (and thus facially included both direct compensation and indirect compensation, *i.e.*, fringe benefits), it also determined there was "uncertainty" over the 2011 data concerning whether work clothes, food, and housing were included in fringe benefits because the 2011 data only categorized fringe benefits as "Medical care" and "Others." *Id.* at 47.[12]

Commerce also concluded that even if the 2011 data were more specific, they were not susceptible to accurate inflation using the standard CPI inflator, because wages in Thailand increased by a far

[11] Indirect labor costs are items such as employee pension, benefits, and worker training, as opposed to direct compensation and bonuses. *See Labor Methodologies*, 76 Fed. Reg. at 36093.

[12] More precisely, Commerce explained that although the Appendix B of the 2011 Industrial Census data stated that fringe benefits included "food, beverages, lodgings, rent, medical care, transportation recreational and entertainment services, etc.," the 2011 Industrial Census data categorized fringe benefits only as "Medical care" and "Others," and that the data did not specify whether work clothes, food, and housing were included in the "Others" category of fringe benefits. *IDM* at 47. Therefore, the defendant elaborates, Commerce could not discern whether these specific types of fringe benefits were in fact included in the "Others" category of fringe benefits, whereas the 2014 Labor Force Survey data better reflected the full spectrum of labor (*i.e.*, fully loaded, direct and indirect) costs expressed within the ILO Chapter 6A data. Def's Resp at 48, referencing *id*. at 47.

greater percentage from 2011 to the POR than did the CPI. *Id*. at 48. Commerce thus reiterated that the standard CPI inflator would not lead to accurate results and that the 2011 data were unreliable even if they were arguably more specific. *See id.* at 46.

A

Here, Bosun and Weihai both contend that Commerce's choice of using the 2014 data is not supported by substantial evidence and that Commerce should have chosen the 2011 data due to its greater specificity. Bosun Br. at 6–9; Weihai Br. at 32–37. Weihai, echoed by Bosun, argues Commerce's "uncertainty" finding concerning the 2011 data was "self-created." *E.g.*, Weihai Br. at 35. Bosun also contends Commerce persists in "misunderstand[ing]" a material difference in the terms of scope of the 2011 data and the 2014 data. *See* Def's Resp. at 46–49.

Both argue the 2014 NSO Labor Survey data are too broad in the sense that they cover the entire manufacturing sector, whereas the 2011 NSO Industrial Census data are specific to the manufacture of saws and saw blades, including circular saw blades and chainsaw blades. *E.g*, Bosun Reply at 2, referencing PDoc 202 at Ex. 6. Relying on cases that have emphasized the importance of product specificity in the determination of best available information, Bosun argues that such importance extends to specificity determinations on the labor FOP,[13] and that Commerce specifically found the same 2011 Industrial Census data superior to the general manufacturing labor rate in *Drawn Stainless Steel Sinks From the PRC*, 80 Fed. Reg. 69644 (Nov. 20, 2015) (final 2012–14 rev. results; *see* accompanying I&D Memo at cmt. 12), and *Drawn Stainless Steel Sinks from the PRC*, 81 Fed. Reg. 29528 (May 12, 2016) (*inter alia* prelim. 2014–15 rev. results).

Regarding Commerce's position that it could not ascertain whether the 2011 Industrial Census category for "fringe benefits" included clothes, food, and housing, *see IDM* at 48, Bosun emphasizes that the source documentation states that "*all payments* in addition to wages and salaries" are included in fringe benefits and elaborates "fringe benefits" as "all payments in addition to wages or salaries paid to employees such as food, beverages, lodgings, rent, medical care, transportation recreational and entertainment services, *etc*." and also that "[p]ayment might be in cash or in kind." *See* Weihai Initial SVs (July 16, 2015) at Ex. 6 (Bosun's italics); PDocs 202–03. *Id*. Bosun points out that the source documentation specifically lists examples

[13] Bosun Reply at 2–3, referencing *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014), *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1320 (Fed. Cir. 2010), and *Taian Ziyang Food Co. v. United States*, 35 CIT ___, ___, 783 F. Supp. 2d 1292, 1330 (2011).

of fringe benefits to include food and lodging but also covers all additional payments; therefore, if workers received clothing, food, and housing benefits, then it is included in the 2011 Industrial Census rate and it is "wholly unreasonable" for Commerce to question whether clothing, food, and housing are missing from the 2011 labor rate. Bosun thus argues that Commerce could not reasonably determine the 2011 Industrial Census data did not fully cover all labor expenses as do the 2014 data.

For its part, Weihai contends that it "debunked" Commerce's implication that the 2011 Industrial Census data contained only direct labor costs, and also that it established that the 2014 data contained both direct and indirect costs by demonstrating, *viz*., that while the 2011 Industrial Census data encompass all of the elements of direct and indirect labor cost, the 2014 Labor Survey report indisputably does not include the critical indirect labor cost element "employer's contribution to social security." Weihai Br. at 34–35. Weihai argues both the defendant and DSMC implicitly concede that the 2014 data is incomplete and not representative of a fully loaded labor cost even of the generalized manufacturing sector, because given the omission "employer's contribution to social security" they failed to argue or show how the 2014 Labor Force Survey data were "comprehensive." Weihai Reply at 16.

Furthermore, Weihai contends, Commerce erred because a certain letter Weihai obtain from NSO for the record clarified that the 2011 Industrial Census[14] and the 2014 Quarterly Labor Force Survey data were materially different in terms of scope and data collection methodology and, citing to its 2011 Labor Survey report data, NSO "affirmed that the 2011 NSO Industrial Census data, notwithstanding [their] lack of contemporaneity, w[ere] more reliable and accurate for valuing labor cost in the Thai manufacturing sector." Weihai Reply at 18. *See* Weihai Br. at 46. Weihai and Bosun thus both argue that Commerce's "sole" rationale for preferring the 2014 Labor Survey data is on the basis of contemporaneity. *See* Bosun Br. at 9; Weihai Br. at 37.

Even if that were the case, the court has previously upheld Commerce's preference for utilizing surrogate values that are contemporaneous with the period of review. *See Shakeproof*, 30 CIT 1173, 1177–78 (2006), *aff'd*, 228 Fed Appx. 1001 (Fed. Cir. 2007) ("Commerce's reliance on valuation information from within that specific time period is clearly an appropriate means of fulfilling [its] statutory

[14] Weihai's letter sought clarification with respect to the 2011 Labor Force surveys and the "2012" Industrial Census data. *See* Weihai Second SV Submission (Nov. 2, 2015) at Ex. 4B, PDoc 298. The latter are here presumed to equate to references herein to "2011 Industrial Census data".

directive."). In any event, Commerce's determination did not rest upon contemporaneity alone, and the defendant agrees as to the "material differences" between the two data sets that Weihai concedes: Commerce "was unable to rely on the NSO clarification letter" because, "although the letter explained the difference between the 2011 Labor Force Survey and the 2011 Industrial Census data, it did not provide an explanation for the difference between the two sets of data that Commerce had on its record — that is, the difference in methodology between the 2011 Industrial Census data and the 2014 Labor Force Survey data." Def's Resp. at 49. The defendant thus contends Weihai's argument is directly contradicted by record evidence.

Weihai's reply, contending that the differences between the two NSO labor cost databases described in the NSO clarification letter are not limited to the 2011 data but are with regard to "all" of the Labor Survey reports including those issued during the POR, does not address the entirety of the defendant's (and Commerce's) point. Be that as it may, the NSO letter is mere opinion, albeit an official one, and it is not dispositive as to which of the two sets of data Commerce could choose as the best information available on the record. Commerce's position is that although the letter explained the difference between the 2011 Labor Force Survey and the 2011 Industrial Census data, it did not provide an explanation for the difference between the two sets of data that Commerce had on its record, *i.e.*, the difference in methodology between the 2011 Industrial Census data and the 2014 Labor Force Survey data. *IDM* at 48. Commerce's explanation is not inherently unreasonable.

B

Nonetheless, Weihai argues Commerce's finding that the 2011 Industrial Census data "cannot reasonably reflect the labor cost, even after the adjustment for inflation" is erroneous because Commerce has impermissibly conflated two very different databases. Weihai Br. at 36. DSMC's response is that "the 2011 data could not be accurately inflated using the CPI, because Thai labor costs rose between 2011 and the POR by a far greater rate than the CPI", "[n]or could the agency reasonably have simply assumed that the 2011 data could be accurately inflated using the CPI, particularly given that, as Weihai itself concedes, Thai labor costs grew hugely between 2011–2014." DSMC Br. at 36–37, referencing Weihai's Br. at 36 (stating that the Thai minimum wage grew by 45% between 2011–2014). Weihai contends that it "debunked" these arguments in its opening brief and that DSMC is misconstruing its position, which is that while there

was a substantial increase in the average labor cost for manufacturing labor between 2011 and 2014, this was attributable to a 45% enhancement in the Thai minimum wages during this period, and "the enhanced Thai wage of 300 Baht/day (*i.e.* 37.5 Baht/hr) does not affect the substantially higher labor cost of 61.39 Baht/Hr for the industry-specific Code 25939 in the NSO Industrial Census report." Weihai Reply at 13–14, referencing Weihai Br. at 36.

In other words, Weihai contends, the effect of enhancement in the minimum Thai wage rate was limited to those manufacturing sectors where the prevailing wage or labor rates were below 300 Baht/day or 37.5 Baht/hr. "Given that the average labor rate in the saw blade industry was already significantly higher — 61.39 Baht/hr — which is 64% higher than the enhanced minimum wage rate of 37.5 baht/hr., it is axiomatic that this particular manufacturing industry would have remained largely unaffected by this increase." *Id*. at 14. Weihai's fuller reply is as follows:

> . . . DSMC counters Weihai by raising two arguments. First, DSMC argues that given that "[t]he average labor cost for general manufacturing in 2011 was above the increased minimum wage rate . . . under Weihai's logic, the wage for the manufacturing sector generally could not have been affected by the minimum wage increase — a position that is entirely inconsistent with its assertion that the increase in the general manufacturing labor cost is due solely to the minimum wage increase." DSMC Br. at 37 n.8. However, DSMC misses the point that the average labor cost for the general manufacturing sector is based on aggregating the data for 464 distinct and disparate manufacturing sectors. Weihai Br. at 34. Some of these industrial sectors (like saw blades) have higher labor cost (and wage) rates while several others could potentially have had wage rates that were lower than the enhanced Thai minimum wage rate of 300 Baht/day. Consequently, the enhanced Thai minimum wage rate would have affected all those industries wherein the prevailing wage rates were lower than 300 Baht/day. As a result, even though the average labor cost for general manufacturing in 2011 was already above the increased minimum wage rate, it went up further on account of buoyancy experienced by all of those impoverished industrial sectors where the prevailing wage rates were less than 300 Baht/day.
>
> DSMC's second argument is unpersuasively presumptive and results oriented. Based on a hypothetical involving five hand tool workers where the daily wage of some of the workers was less than 300 Baht/day, DSMC conveniently argues that "even

> though the average rate had been above the post-increase minimum wage, the rise in the minimum wage rate still affected the average rate." DSMC Br., 37. As such, it should be rejected. DSMC also argues that since "the average wage rate under Code 25939, corresponding to hand tools/hardware manufacturing, was 384 Baht per day . . . [which] is only 84 Baht per day more than the minimum wage increase in 2014, it is highly unlikely that there were no workers under this code that were affected by the minimum wage increase." DSMC Br., 37 n.9. DSMC misconstrues Weihai's arguments. Weihai never argued that Commerce directly apply the industry specific labor cost rate from 2011; instead, Weihai has consistently argued that the labor cost surrogate value be determined after inflating the 2011 industry-specific labor cost by the applicable CPI index.

Weihai Reply at 14–15 (Weihai's bracketing and ellipses).

If the time-period over which Weihai argues for its preferred methodology were shorter, the argument might have more appeal, but the unevenness of wage rates between manufacturing sectors only serves to underscore the speculative nature of Weihai's argument. Whether it might otherwise be reasonable to infer that the rate of wage inflation over the four-year period from 2011 — in an industry sector which already had as its starting point purportedly higher average wages as compared with other sectors — must correspond to "the applicable CPI index" (as opposed to being significantly higher or lower during that period in reality[15]), Weihai's arguments are no less presumptive than DSMC's, as they do not sufficiently explain the 28.75 percent to 35.71 percent disparity in the cost of labor between the 2014 Labor Force Survey and the 2011 Industrial Census data even if the latter are adjusted for inflation. The arguments therefore do not undermine Commerce's conclusion on Weihai's inflation-adjustment methodology. *See IDM* at 48.

DSMC argues *Hangzhou Spring Washer Co.* v. *United States,* 29 CIT 657 387 F. Supp. 2d 1236 (2005), supports "use of more contemporaneous but less specific data, where Commerce explained why contemporaneity better advanced the goal of accuracy". DSMC Resp. at 37–38. Weihai contends that decision does not provide that support, because, while upholding Commerce's decision, the court cautioned that "Commerce has the statutory discretion to give greater weight to one over the other, provided it offers a reasoned explanation

[15] *Cf., e.g.*, Respondents' Administrative Case Br. (Aug. 16, 2016) in case no. A-570–898 (clorinated isocyanurates from the PRC), IA ACCESS doc# 3501482–01, at page 19 (arguing as to uneven labor inflation rates among different industrial sectors in Mexico).

when such a decision deviates from past *practice." Hangzhou Spring*, 29 CIT at 672 (this court's italics). Weihai argues that it reminded the agency of its decision to apply 2006 NSO Industrial Census data to value labor costs in the prior review, covering the 2012–13 period, and that for the current review Commerce was presented the newer non-contemporaneous 2011 NSO Industrial Census data. "As such and given its own recent precedent, Commerce was required to provide a reasoned explanation for its reversal in this review." Weihai did not raise this argument in its motion brief and the court concludes it may not do so at this point. In any event, the argument does not satisfy the standard of an "agency practice" that would necessitate remand of this issue to Commerce. *See, e.g., Shandong Huarong Machinery Co., Ltd. v. United States*, 30 CIT 1269, 1293 n.23, 435 F.Supp.2d 1261, 1282 n.23 (2006); *Ranchers-Cattlemen Action Legal Foundation v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999).

Commerce considered and responded to all respondent arguments with the following: "While the 2011 Industrial Census data are specific to the relevant industry, they are neither contemporaneous with the POR nor as or more detailed than the 2014 Labor Force Survey in terms of matching categories of labor costs specified in the ILO Chapter 6A labor data." *IDM* at 47–48. In other words, even if the above plaintiff arguments are correct, and even if the court were able to "credit NSO's unambiguous opinion that 'Quarterly Labor Force Survey reports are only a rough estimate of the prevailing labor cost data' and that for valuing 'individual sub-sectors within the manufacturing sector', 'the 2012 Industrial Census report[[16]] is a far better source as compared to the Quarterly Labor Force Survey reports'" as argued by Wehai,[17] at best that would merely appear to put the 2011 Industrial Census data on "closer footing" with the 2014 data in a contest of which data set provided the specificity that Commerce required for purposes of this review when contemplating two imperfect sets of data.

In each proceeding, selection of surrogate values is *ad hoc*, and the contemporaneity of the 2014 data apparently tipped the scales for Commerce's selection for the *Final Results*. In the final analysis, Weihai and Bosun are essentially asking the court to supplant Commerce's finding on the agency's interpretation of the record,[18] which is

[16] *See id*.

[17] Weihai Br. at 37 (emphasis omitted).

[18] Weihai also argues that Commerce failed to cite to any record evidence that there would have been a change in NSO's methodology between the issuance of the 2011 Industrial Census data and the 2014 Labor Survey report, but that seems to miss the point that these are not the same types of data sets, and the argument also seems to invert the burden on

beyond the standard of "substantial evidence" review. In other words, even if a different result might be obtained were the court to examine the matter *de novo*, the current state of the law is such that Commerce's interpretations of and determinations on the record are entitled to deference. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("as to matters . . . requiring expertise a court may [not] displace the [agency]'s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*").

VI. Calculation of Surrogate Truck Freight

To calculate the truck freight surrogate value to the port of export, Commerce relied on two factors for determining that distance: the "standardized" company's location from the Thai *Doing Business* report for 2015, and the destination port. The issue here is Commerce's determination of the "Port of Bangkok"[19] as the destination port, based on the *Doing Business* report, which provided the destination port *per* "Port Name: Bangkok". Commerce reasoned as follows:

> Unlike the previous versions of *Doing Business* in the past reviews, *Doing Business* explicitly identifies Bangkok as the name of the port and the name of the city where the standardized company is located.[ ] Therefore, we do not find that *Doing Business* made a general reference to ports that serve the Bangkok metropolitan area when it explicitly stated that the name of port used to compile these data is Bangkok. Therefore, even if cruise companies and other companies call both ports Bangkok ports as Weihai claims, they are irrelevant to the fact that the freight transportation data compiled in *Doing Business* are based on the transportation from Bangkok to the Port of Bangkok. Also, for the same reason, we find that the quantity of freight the Port of Laem Chabang handles compared to the quantity of freight the Port of Bangkok handles is irrelevant in our valuation of truck freight expense.

IDM at 53–54, referencing, *inter alia, Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the PRC*, 81 Fed. Reg. 1396 (Jan. 12, 2016) (final 2013–14 rev. results), and accompanying I&D Memo at cmt 2.

Weihai argues Commerce should have applied a distance factor based on the average of the distances to both the Port of Khlong Toei (*i.e.*, Bangkok) and the Port of Laem Chabang as it had in the pre-

creating an adequate record, including SV information. *See, e.g., QVD Food, supra; NTN Bearing Corp., supra*.

[19] *I.e.*, Khlong Toei port.

liminary results, because the *Doing Business* reference to "Bangkok" as the port is ambiguous and does not specify whether it is the Port of Bangkok or the Port of Laem Chabang, both of which are referred to as Bangkok exit ports in commercial vernacular. *See* Weihai Br. at 24. Commerce obviously concluded otherwise, and Weihai's "averaging" argument would appear to concede "Port of Bangkok" as proper in the calculation thereof.

Nonetheless, Weihai persuades that this determination requires remand at least for further explanation, or reconsideration if Commerce so chooses, which may involve further development of the record. The conclusion that "Port Name: Bangkok" is an explicit reference to "Port of Bangkok," of course, is the basis upon which Commerce held irrelevant the fact that cruise and other companies call both ports Bangkok as well as the respective quantities of freight handled by the Port of Laem Chabang compared to the Port of Bangkok, but it remains unclear to the court why "Port Name: Bangkok" should be regarded as substantial evidence of record to support the conclusion that this is an explicit reference to "Port of Bangkok" rather than a mere scintilla.

For example, in addition to its evidence that Khlong Toei and Laem Chabang are referred to as Bangkok ports in commercial parlance, Weihai argued that the "Trading Across Borders Survey" questionnaire that was used for the *Doing Business* report instructs survey participants to respond considering "[t]he *seaport most commonly used by traders*" and report the "Cost of inland transport (from warehouse in «Survey_City» to *seaport*) and handling (loading and unloading)" and also notes that "[t]he main method of transporting the containerized product specified above between the «Survey_City» and the chosen *seaport* is considered."[20] As such, Weihai argued, the underlying survey "unambiguously" indicates that the expression "Port Name: Bangkok" means a Bangkok *seaport*, record evidence shows that Laem Chabang is the most widely used commercial *seaport* servicing Bangkok, handles 4.4 times the volume of containerized cargo than Khlong Toei port (*i.e*, Port of Bangkok), and shows that the latter is a *riverport*, not a *seaport*.[21] Weihai claims that as this latter fact is undisputed, it suggests that the expression "Port Name: Bangkok" actually references the seaport of Laem Chabang, but at a minimum the expression must at least encompass the

[20] *E.g.*, Weihai Br. at 25–26, quoting Pets' 2nd SV Cmts (Nov. 2, 2015), Ex. 4B ("Trading Across Borders Case Study Assumptions"), PDoc 306 (Weihai's emphasis).

[21] *Id*., referencing Weihai's Redacted Rebuttal Case Brief at 34–42 (Apr. 13, 2006), PDoc 384, and Second SV Submission for Weihai-Ehwa (Nov. 2, 2015) at Ex. 5, PDocs 298–301.

seaport of Laem Chabang — in other words, Weihai continues, on a conservative basis substantial evidence supports Commerce's preliminary decision to average the distance from Bangkok to Khlong Toei riverport and Laem Chabang seaport. Weihai additionally complains of Commerce's "cursory rejection" of the other corroborative published information that Weihai provided (in particular those relevant to the import/export community and trucking companies in its rebuttal brief, PDoc 384 at 37, which demonstrated that Laem Chabang port is also referred to as Bangkok port) as simply "irrelevant" fails to account for relevant evidence fairly detracting from Commerce's conclusion. Furthermore, Weihai argues, Commerce's decision is inconsistent with its then-recent "precedent" in which it has determined different distance factors when using the *Doing Business* (2015) Thailand report for valuing truck freight.

"Inconsistent" is the very word, all right, for Commerce's determinations regarding the Bangkok-to-port truck freight distance are, quite literally, all over the map. Notwithstanding the lack of specificity of the distance between a "model" surrogate commercial company in Bangkok and its "model" commercial port of export in the 2015 *Doing Business* report, one would suppose such a seemingly verifiable fact ought not be a bone of contention, but the parties' arguments reveal wide disparities in Commerce's determinations thereof from review to review. For one review, Commerce used that report to determine the distance from the city of Bangkok to the exit port to be between 93 km and 183 km. *Certain Activated Carbon From the PRC*, 80 Fed. Reg. 61172 (Oct.9, 2015) (final 2013–14 rev. results), accompanying I&D Memo at cmt. 13. For another, using the same report, it determined that distance to be 37.1 km. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the PRC*, 81 Fed. Reg. 1396 (Jan. 12, 2016) (final 2013–14 rev. results), accompanying I&D Memo at cmt. 3. For yet another, it determined the distance to be 133 km, *Chlorinated Isocyanurates From the PRC*, 80 Fed. Reg. 39060 (July 8, 2015) (prelim. 2013–14 rev. results), accompanying Decision Memo at 18–19, *unchanged in Chlorinated Isocyanurates From the PRC*, 81 Fed. Reg. 1167 (Jan. 11, 2016) (final 2013–24 rev. results) and accompanying I&D Memo. Agency precedent also shows that reliance upon a distance factor that is an average distance to the two ports near Bangkok (the Bangkok Port and the Laem Chabang Port) when determining surrogate value for truck freight based on the *Doing Business: Thailand* report is not unusual. *E.g., Multilayered Wood Flooring From the PRC*, 80 Fed. Reg. 41476 (July 15, 2015) (*inter alia*, final 2012–13 rev. results), accompanying I&D Memo at cmt. 9.

DSMC's and the government's attempted rebuttal(s) of Weihai's contention, by pointing out that the *Final Results* are consistent with *Tapered Roller Bearings* above and arguing that Weihai's contention relies on outdated precedent, only underscores the inconsistency among Commerce's various administrative determinations on the freight distance to the Bangkok port of commercial exit. The defendant contends that the *Doing Business* report for 2015 "explicitly" identified the Port of Bangkok as the destination port. However, Weihai's arguments, recitation of the evidence of record, and the administrative precedents discussed by the parties, persuade that the *IDM*'s reasoning does not evince complete consideration or address of Wehiai's arguments on the record by the agency. Those appear to be of cogent materiality, as more fully described in Weihai's briefing, and thus the determination on the meaning of "Port Name: Bangkok" as stated in the *Doing Business* report is unclear. *See United States v. Nova Scotia Food Prods. Corp*., 568 F.2d 240, 252 (2d Cir. 1977) ("[i]t is not in keeping with the rational [agency] process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered"). In the absence of full consideration and explanation, "Port Name: Bangkok" cannot be concluded to amount to more than a mere scintilla, and as that also appears to be the only buttress upholding the determination of truck freight distance, the derivative conclusions of irrelevancy expressed in the *IDM* appear to amount to circular reasoning. The defendant also contends the court should decline Weihai's argument for the agency to take administrative notice and for the court to take judicial notice of the *Doing Business* report for 2016, but that contention is mooted by the foregoing, upon which the issue of the agency's determination of truck freight distance must be, and hereby is, remanded in order to more fully address Weihai's arguments with respect thereto.

VII. Treatment of Graphite Plates as Direct Material

Jiangsu Fengtai also challenges Commerce's accounting of its graphite plates as indirect rather direct materials consumed in production.

Normal accounting practice treats direct materials as raw materials and indirect materials as part of factory overhead. *See, e.g., Polyvinyl Alcohol from the PRC*, 68 Fed. Reg. 47538 (Aug. 11, 2003) (final less than fair value ("LTFV") determination) and I&D Memo at cmt. 7. In administering NV in accordance with 19 U.S.C. §1677b(c)(1), Commerce distinguishes between direct and indirect material cost

treatment on a case-by-case basis. *See, e.g., Magnesium Corp., supra*, 166 F.3d at 1372 (the statute "gives Commerce broad discretion in valuing the factors of production on which factory overhead is based").

The defendant explains that Commerce considers various criteria in determining whether to classify a material as direct or indirect, for example whether the material is physically incorporated into the final product, the material's contribution to the production process, the relative cost of the input material, and how the cost of the input is typically treated in the industry.[22] Where a process material must continually be replenished, Commerce has determined that the input should be treated as direct material rather than indirect material that is part of factory overhead. *See Silicomanganese from the PRC*, 65 Fed. Reg. 31514 (May 18, 2000) (final results admin. review), and accompanying I&D Memo at cmt. 1. Conversely, where process materials are not consumed in the production process but are reused and infrequently replaced, Commerce has determined that the input is an indirect input and classified it as part of factory overhead. *See Laminated Woven Sacks from the PRC*, 73 Fed. Reg. 35646 (June 24, 2008) (final deter.), and accompanying I&D Memo at cmt. 1; *see also Bridgestone Americas, Inc. v. United States*, 34 CIT 573, 576–77, 710 F. Supp. 2d 1359, 1363–64 (2010) (sustaining administrative discretion to consider some or all of these criteria in direct and indirect material analyses).

In the *Final Results*, Commerce determined that the graphite plates were direct materials because they were replaced "regularly" in the course of production of subject merchandise. *IDM* at 43–44. The record shows that Jiangsu Fengtai used graphite molds that were replaced every 258 production cycles. *See id.;* CDoc 297 at 2. Jiangsu Fengtai agrees with this observation. *See* Jiangsu Fengtai Br. at 20. Jiangsu Fengtai also agrees as to the certain amounts of graphite molds used each day and the certain amounts of DSBs produced each day. *Id.* at *22*; CDoc 297 at 2. Jiangsu Fengtai argues, however, that Commerce's treatment of the graphite plates as direct rather than indirect materials is not supported by substantial evidence because Commerce's relied upon an incorrect arithmetic formula to calculate the number of day(s) in Jiangsu Fengtai's production process that a graphite plate with a useful life of 258 production cycles would have

[22] *See, e.g., Persulfates from the PRC*, 70 Fed. Reg. 6836 (Feb. 9, 2005) (final results of admin. review) and I&D Memo at cmt. 4; *Polyvinyl Alcohol from the PRC*, 68 Fed. Reg. 47538 (Aug. 11, 2003) (final LTFV determination) and I&D Memo at cmt. 7; *Certain New Pneumatic Off-The-Road Tires from the PRC*, 73 Fed. Reg. 40485 (July 15, 2008) (final LTFV determination) and I&D Memo at cmt. 27.

to have been employed before being replaced, and that Commerce's analysis was based on the false assumption that each graphite plate would be used consecutively in 258 production cycles. *See* JF Br. at 18–24.

Jiangsu Fengtai argues the record rather shows that graphite plates are, in fact, durable and replaced only infrequently in the production process. Jiangsu Fengtai argues the apparent mathematical analysis employed in the *Final Results* to substantiate that finding is marred, and "[i]f the final results were based upon an incorrect mathematical calculation, differing in results by a factor of three, by definition, such determination cannot be based upon substantial evidence". *See, e.g.*, JF Reply at 10. Jiangsu Fengtai further argues that "[s]ince all manufacturing overhead costs were fully accounted for in Commerce's application of surrogate financial ratios, inclusion of graphite plates as a raw material input resulted in a double-counting of the costs attributable to graphite plates." JF Br. at 18 (referencing its administrative case brief at 12–16).

Jiangsu Fengtai failed to raise this latter argument with precision before Commerce and therefore failed to exhaust its administrative remedies on the point. *See* 28 U.S.C. §2637(d); *see, e.g., Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (requiring, subject to certain exceptions not applicable here, the exhaustion of administrative remedies as a prerequisite to judicial review). *Cf.* JF Admin. Case Br. at 12–16. Even if exhaustion were inapplicable, Jiangsu Fengtai does not explain why indirect materials in the surrogate financial statement would necessarily include "overhead for graphite plates." The argument rather begs the question, *i.e.,* on whether its graphite plates are properly accounted for as direct or indirect materials costs.

Jiangsu Fengtai stresses that Commerce overestimated the number of graphite plates used because the administrative record allegedly shows that graphite plates were only used in the sintering process, which Jiangsu Fengtai alleges takes so much time that a graphite plate could realistically be used only once or twice per day. JF Br. at 22–23. Regardless, the *Final Results* do not employ particular "mathematical" analysis to determine whether the graphite plates are direct or indirect material but rather appeal to simple logic along a sliding scale of durability. As the defendant argues, whether the proper estimate is lower or higher, Commerce's determination is consistent with past instances where Commerce has considered the frequency with which a part of the production process is replaced and with its practice of treating graphite plates as process materials if

they are replaced "regularly" in the course of producing subject merchandise. *See* Def's Resp. at 61, referencing *Diamond Sawblades and Parts Thereof from the PRC*, 71 Fed. Reg. 29303 (May 22, 2006), I&D Memo at cmt. 2 (contrasting respondent's use of steel molds versus graphite molds, both of which are used in the production process, and finding that steel molds have a long usage life and are properly considered overhead, in contrast to graphite molds which are absorbed into the final product and replaced so regularly that they are valued as a direct input). The defendant contends Commerce simply found in this administrative review that the record did not demonstrate that the graphite plates have a sufficiently long usage life to be considered an overhead cost. *See IDM* at 44; CDoc 297 at 2.

At the end of the day, Jiangsu Fengtai's arguments on this issue do not persuade that its original reporting of its graphite plates as direct material[23] was incorrect. Jiangsu Fengtai is essentially asking for a ruling on the meanings of "durability" and "regularly" with regard to replacement in production, but those are matters properly within Commerce's reasonable domain.

VIII. Selection of Surrogate Financial Statement

Commerce derives financial ratios by selecting one or more surrogate financial statements. In both the preliminary and final results, Commerce selected the financial statements of a Thai company, K.M. & A.A. Co., Ltd. ("KM"), after finding that company's production comparable to the subject merchandise and a subject of the primary surrogate country during the POR and fiscal year 2014. *PDM* at 23; *IDM* at 42. Weihai challenges this selection on two grounds.

A

The first of Weihai's challenges on this issue concerns semantics. After issuance of the preliminary results, both Weihai and DSMC submitted comments and evidence concerning the translation of a Thai term in KM's financial statements. *IDM* at 42 n.151, citing PDocs 331, 354, 355. The translation of the particular term[24] was relevant in determining whether KM was a producer of comparable merchandise. *IDM* at 42. Weihai argued that the Thai term meant "grinding *stone*," submitted a translation supporting its argument, and argued that KM was therefore not a producer of comparable

[23] The defendant also stresses that Jiangsu Fengtai reported graphite plates to Commerce as a direct material, calculated factors of production for them, and did not amend or otherwise update its reporting in subsequent supplemental responses. *See, e.g.*, JF Br. at 18. The court puts little stock in that contention, as parties, like Commerce, are not "wedded" to particular positions throughout the course of a proceeding but may evolve their thinking and interpretations as new data are placed on the record.

[24] *I.e.,* " หินเจียร ". *See*, *e.g.*, Weihai Br. at 9.

merchandise. *IDM* at 41; PDoc 354 at Ex. 2. DSMC, in turn, submitted documents indicating that the word at issue translated to "grinding *wheel*" and thus would support the finding that KM was a producer of comparable merchandise. *IDM* at 41.

In response to these submissions, Commerce conducted its own research and placed several documents on the record. *IDM* at 42; PDoc 356. The first document demonstrated that the dictionary definition of the word was "grinding stone." PDoc 356 at 2. The three other documents demonstrated that in the abrasives industry, the same word translated to "grinding wheel." *Id.* at 3–5. Commerce invited comments from interested parties on the seeming polyseme, and the petitioner (only) submitted comments. *See IDM* at 42; PDoc 358. Based on such research and commentary, Commerce found KM a producer of comparable merchandise. *See* 19 U.S.C. §1677b(c)(1).

The issue here is whether, in order to support Commerce's finding that KM was a producer of comparable merchandise, substantial evidence on the record supports Commerce's determination that the translation of the Thai word at issue means "grinding wheel" as opposed to "grinding stone".

Weihai argues that Commerce erred in selecting KM's financial statement. Weihai's argument, that KM is not a producer of comparable merchandise because the record evidence "only" supports finding that the Thai word in dispute means "grinding stone" and not "grinding wheel," is insufficient to overcome Commerce's conclusion from the record that the Thai word at issue as used in the abrasives industry means "grinding wheel." Commerce found that a translation from a third-party translation agency, KM's own website, and websites of other companies in the abrasives industry, taken together, demonstrate that the Thai word at issue means "grinding wheel". *IDM* at 42. *See* PDocs 355, 356. Commerce explained that although the dictionary definition of the Thai word at issue means "grinding stone", in the Thai abrasives industry it is used as a hyponym, *i.e.*, "grinding wheel." *See id.* Commerce also relied on copies of KM's website, which were contemporaneous with the POR, which demonstrated that KM produced grinding wheels. *Id.;* CDoc 263 at Ex. 1C. Notwithstanding Weihai's arguments in this regard (*see* Weihai Reply at 5–7, quoting, *inter alia, Yantai Xinke Steel Structure Co. v. United States*, 38 CIT ___, Slip Op. 14–38 at 30–31 (Apr. 9, 2014)), the inferences from that evidence constitute substantial evidence of record that KM did, in fact, produce grinding wheels during the POR. Websites of other companies in the same industry also, apparently, demonstrated that the word is employed to mean "grinding wheel."

PDoc 356. In short, Weihai's arguments presented here to the contrary do not persuade that Commerce's conclusion thereon was unreasonable.[25]

B

Weihai argues nonetheless that it was unreasonable for Commerce to select KM's financial statements rather than those of Trigger Co. Philippines, Inc. ("Trigger"), a producer of DSBs and subject to a country not on Commerce's list of surrogate countries prepared for the review ("OP List").[26] *See* Weihai Br. at 10–21. On this point, Weihai first contends Commerce's determination in this administrative review differs from its determination in the previous administrative review. But, Commerce's determinations are made on the basis of the administrative record before it,[27] and the fact that Trigger's financial statements were used in the prior administrative reviews does not necessarily inform as to what is the best available information for a subsequent review. *See Downhole Pipe & Equipment LP v. United States*, 36 CIT ___, ____, 887 F. Supp. 2d 1311, 1321 (2012) ("Commerce has broad discretion to determine the best available information in a reasonable manner on a case-by-case basis") (internal quotation marks and citations omitted). In this review, Commerce explained that, unlike the prior administrative review, the record before it contained a usable financial statement from the primary surrogate country. *IDM* at 43. *See also Jacobi Carbons, supra*, 41 CIT at ___, 992 F. Supp. 2d at 1376 ("Commerce's single surrogate country preference is strong and must be given significant weight.").

Weihai next contests Commerce's non-selection of Trigger's financial statements. Weihai Br. at 17–21. Commerce's decision was not only due to the fact that those statements predated the POR and were therefore not contemporaneous, they were not from the primary surrogate country. *IDM* at 43. Weihai does not dispute those observa-

[25] Weihai also raises reliability concerns over the translation provided by DSMC, arguing that the translation company's conclusion that the Thai word that was translated to grinding wheel "resulted from a discussion with the Petitioners", Weihai Br. at 13, but that argument is undermined by the apparent fact that the translation that Weihai provided was from the same translation company used by DSMC. *Compare* PDoc 354 *with* PDoc 355.

[26] Bosun also challenges Commerce's determination with respect this issue. *See* Bosun Br. at 2–6. In response, the defendant points out that Bosun did not raise this issue in its administrative case brief and therefore it failed to exhaust its administrative remedies. Def's Resp. at 62, referencing *Corus Staal* BV, 502 F.3d at 1379. By not addressing that point in its reply but arguing only further on the merits, Bosun has apparently conceded the point.

[27] *See, e.g., Yama Ribbons and Bows Co., Ltd. v. United States,* 36 CIT ___, ___, 865 F. Supp. 2d. 1294, 1299 (2012) ("Commerce must base its decisions on the record before it in each investigation.").

tions, *see* Weihai Br. at 27–28, but it argues that the Trigger financial statements fell short of contemporaneity "by two months only" and that "contemporaneity alone is an insufficient justification for dismissing better surrogates." *Id*. at 17, quoting *Blue Field (Sichuan) Food Industry Co. v. United States,* 37 CIT ___, ___, 949 F. Supp. 2d 1311, 1332 (2013). As stated, however, Commerce did not rely upon contemporaneity alone for the *Final Results*, Commerce selected KM's financial statements because they pertained to a producer of comparable merchandise from the primary surrogate country in addition to being contemporaneous. *See Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("[i]n determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible.").

Weihai argues, nonetheless, that the fact that Trigger's financial statements are from the Philippines should not be an impediment. *See* Weihai Br. at 18–20. It argues that KM's financial statements were not as detailed as Trigger's, for example with respect to inventories open and closed and has no specific line item for outward freight and handling, and that Commerce should conduct a "side by side" comparison of KM's and Trigger's financial statements in accordance with *CP Kelco US, Inc. v. United States*, 40 CIT ___, Slip Op. 16–36 (Apr. 8, 2016).

Responding, DSMC contends "neither Weihai nor any other party argued below that KM's statements were flawed by reason of a lack of detail" and therefore Weihai's argument suffers from a failure to exhaust its administrative remedies.[28] *See* DSMC Br. at 24. Weihai replies that it did exhaust, by alerting Commerce to the fact that "the 2013 Trigger financial is the most detailed statement available on record" and by discussing breakouts of certain specific line items in Trigger's financial statement in its administrative case brief.

That is a weak reed. Arguing in favor of particular financial statements for the purposes of an administrative review does not equate to a reason for impugning the usability of others on the record. The requirement of exhaustion, generally speaking, imposes a more rigorous standard on the precision of argumentation at the administra-

[28] The court has discretion to require exhaustion of administrative remedies "where appropriate", 28 U.S.C. §2637(d), *see, e.g., Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998), but it tends towards a "strict" requirement of exhaustion in the international trade law context. *See, e.g., Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1205 (2004).

tive level,[29] but even if it could be stated that Weihai did exhaust, the arguments it advances do not suffice to overcome Commerce's regulatory preference to value all factors of production using data from a single surrogate country wherever possible. *See* 19 C.F.R. §351.408(c)(2). That approach that has not been held, *per se*, unreasonable. *See, e.g., Jacobi Carbons*, 41 CIT at ___, 992 F. Supp. 2d at 1376; *Camau Frozen Seafood Processing Import Export Corp. v. United States*, 37 CIT ___, ___, 929 F. Supp. 2d 1352, 1355–56 (2013).

The problems Wehai attempts to overcome are not only that the contested financial statements concern companies from different countries, its preferred financial statements (for Trigger) pertain to a producer subject to a country that is not even on the OP List for this review, which remains the case notwithstanding its arguments that the Philippines should be regarded as economically comparable to the PRC. *See, e.g.*, Weihai Reply at 11–12. In the final analysis, even if those problems can be surmounted, Weihai's overall contention, once again, is effectively asking the court to supplant Commerce's decision from its consideration of KM's versus Trigger's financial statements. *See, e.g.*, Weihai Reply at 11 ("the less than ideal albeit reliable Trigger financial statement is preferable to [KM]'s financial statement, which is not only unreliable but is also beset with poor data quality") (court's bracketing). The court's role, however, is not to re-weigh the evidence of record, it is solely to determine whether the evidence of record to support Commerce's determination is "substantial," meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *E.g., PAM, S.p.A. v. United States*, 582 F.3d 1336, 1339 (Fed. Cir. 2009).

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[29] *See, e.g., Boomerang Tube LLC v. United States*, 856 F.3d 908 (Fed. Cir. 2017); *Stanley Works (Langfang) Fastening Systems Co. v. United States*, 41 CIT ___, ___, 279 F. Supp. 3d 1172, 1189 (2017) ("[b]road, generalized challenges to the differential pricing analysis do not incorporate any conceivable challenge to elements of that analysis"); *Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 41 CIT ___, Slip Op. 17–152 at 12–13 (Nov. 17, 2017) (mere notice fails to accomplish the twin purposes of the exhaustion requirement); *Weishan Hongda Aquatic Food Co. v. United States*, 41 CIT ___, 273 F. Supp. 3d 1279, 1286 (2017) ("exhaustion generally requires a party to present *all* arguments in its administrative case and rebuttal briefs before raising those issues before this court") (emphasis in original; citations omitted), *appeal filed sub nom. China Kingdom (Beijing) Import v. United States*, No. 18–1375 (Fed. Cir. Jan. 3, 2018); *Seah Steel Vina Corp. v. United States*, 41 CIT ___, ___, 269 F. Supp. 3d 1335, 1350 (2017) (failure to exhaust argument that selected financial statements did not represent producer of subject merchandise); *Union Steel Manufacturing Co. v. United States*, 36 CIT ___, ___, 837 F. Supp. 2d 1307, 1332 (2012) ("mere fact that relief was unlikely is insufficient as a ground to waive the exhaustion requirement"). *Cf. also, e.g., Great American Insurance, supra*, 738 F.3d at 1328 ("[i]t is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived"); *MTZ Polyfilms, Ltd. v. United States*, 33 CIT 1575, 1578, 659 F. Supp. 2d 1303, 1308 (2009) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived[; i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones") (citation omitted).

Here, neither of the contested financial statements are "perfect" for the purpose of determining surrogate financial ratios for this administrative review, and while one might well conclude that KM's financial statements offer more detail and relate to a producer of DSBs (not merely "comparable" merchandise), the mere fact that the record may support a different choice of financial statement does not mean Commerce's choice is unsupported by substantial evidence. *See Universal Camera Corp., supra*, 340 U.S. at 488. *Cf., e.g., Catfish Farmers of America v. United States*, 33 CIT 1258, 1273 (2009) ("[w]here Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable"). Given all the variables involved in Commerce's decision-making, the court cannot conclude that the KM and Trigger financial statements are not "fairly conflicting." The record contained detailed and contemporaneous financial statements from a producer of comparable merchandise in the primary surrogate country, and Commerce determined those statements to be the best available evidence on the record for purposes of the review. *IDM* at 43. Weihai does not persuade that a different result must be obtained.

IX. Inclusion of Weihai in the Administrative Review

Weihai also challenges Commerce's determination to reject the request from Robert Bosch Tool Corporation ("Bosch") to rescind its request for review of Weihai.

A. Background

Commerce issued its notice of opportunity to request an administrative review on the antidumping order for DSBs from the PRC in November 2014. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 79 Fed. Reg. 65176 (Nov. 3, 2014) (opp. to req. admin. review). DSMC, Weihai, and Bosch timely filed review requests for Weihai.[30] Commerce initiated the administrative review of the POR for DSBs from the PRC the following month. *Antidumping and Countervailing Duty Administrative Reviews*, 79 Fed. Reg. 76956 (Dec. 23, 2014).

19 C.F.R. §351.213(d)(1) provides that if a party requesting administrative review withdraws that request within 90 days of publication of the review's initiation notice, Commerce will rescind the review. The regulation also states that the "Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." Under

[30] *See, e.g.*, PDocs 3 (DSMC request for review), 6 (Bosch request for review). DSMC also requested review of other DSB producers. *See* PDoc 3.

that provision, the parties had until March 23, 2015 to rescind their request for review. DSMC and Weihai submitted timely requests to withdraw their review requests with respect to Weihai. *See* PDoc 108, 109. Bosch's request for review of Weihai, however, remained on the record. PDoc 133.

On April 7, 2015, Commerce selected Jiangsu Fengtai and Weihai as the mandatory respondents. PDoc 133. On the same day, Commerce issued its questionnaires. *Id.* On April 8, 2015, sixteen days after the deadline to rescind a request, Bosch attempted to rescind its request to review Weihai. PDoc 119. Bosch's request noted that Commerce has previously interpreted the regulation to allow rescission where it has not committed substantial resources to the review, the review has not progressed to a point where it would be unreasonable to allow withdrawal of requests for review, and withdrawal does not constitute "abuse" of departmental procedures. *Id*. Bosch argued that the circumstances of the case thus far was in accordance with such conditions. *Id*.

Weihai then filed its own submission in support of Bosch's request to Commerce to accept Bosch's belated request to withdraw its request for review of Wehai. Bosch's request argued that certain "unexpected events" should excuse its late filing in accordance with Commerce's then-current policy. PDoc 120. *See* Weihai 56.2 Br. at 46–47. DSMC also supported Weihai's and Bosch's request to accept the latter's withdrawal request. PDoc 121.

Commerce rejected Bosch's request to withdraw its review request of Weihai on May 12, 2015, stating that it did not find that the facts Bosch advanced to explain the late filing constituted "extraordinary circumstances" in accordance with *Extension of Time Limits; Final Rules*, 78 Fed. Reg. 57790, 57793 (Sep. 20, 2013) ("*Final Rules*"). PDoc 133.

B. Analysis

Weihai argues Commerce's decision was unlawful because the procedural background of this case resembles that of *Glycine & More, Inc. v. United States*, 39 CIT ___, 107 F. Supp. 3d 1356 (2015), *remand results sustained*, 40 CIT ____, 181 F. Supp. 3d 1360 (2016) ("*Glycine & More*"), *affirmed*, 880 F.3d 1335 (Fed. Cir. 2018). The defendant disagrees, arguing that Weihai did not raise the issue of the denial of its request to rescind the review in its administrative case brief and therefore failed to exhaust its administrative remedies. In the alternative, the defendant argues Commerce acted lawfully by including Weihai in the administrative review, due to the outstanding request by Bosch for review of Weihai.

The defendant's alternative argument is undercut by *Glycine & More*'s holding that a certain 2011 published guidance document[31] ("*2011 Notice*), which is also implicated in the matter at bar. was an unlawful interpretation of 19 C.F.R. §351.213(d)(1). In that case, the sole U.S. petitioner submitted a timely request for rescission of the review. "Baoding," a respondent in the proceeding, also desired rescission, but its request therefor was not timely submitted. Baoding thereafter notified Commerce that it would no longer participate in the review. Proceeding nonetheless, Commerce's preliminary results assigned Baoding the PRC entity rate. Thereafter, Glycine & More appeared in the proceeding and filed a case brief objecting to Commerce's rejection of Baoding's request to withdraw the review request and also assignment of the PRC-wide rate. *See generally* 39 CIT at ___, 107 F. Supp. 3d at 1358–59. In the final results thereof, Commerce's refusal to rescind the review was grounded upon the *2011 Notice* that, as subsequently observed by the Court of Appeals for the Federal Circuit, "dramatically changed [the] meaning" of 19 C.F.R. §351.213(d)(1) to require a showing of "extraordinary circumstances" which "prevented" the ability to submit a timely request for rescission. 880 F.3d at 1340, quoting *2011 Notice*, 76 Fed. Reg. at 45773. The appellate court has decided the *2011 Notice* was unambiguous and an "incompatible departure from the clear meaning of the regulation[,] . . . not simply an interpretive statement regarding ambiguity in the regulation or a general statement of policy" *Id*. at 1345. Because the *2011 Notice* lacked "the necessary notice-and-comment rulemaking, it has no legal standing, and thus provides no basis upon which the Secretary could make his decision." *Id*.

Weihai argues in reply to the defendant's points regarding exhaustion that the doctrine should not bar its challenge, that applicable precedent compels rescission, and that it would be inappropriate to preclude judicial recourse because it had vigorously urged Commerce to rescind the review as to it at the very outset of the proceeding, a position with which petitioner itself agreed. At the end of the review, Weihai continues, rearguing for rescission in its case brief, a review during which it had been forced to expend substantial resources participating, would have been "futile." Weihai contends that once Commerce denied its rescission request in May 2016, Commerce rendered an "irreversible" decision to proceed with the review, and as a result Weihai was forced to proceed or suffer the penalty of incurring an adverse facts available result if it did not. Thus, Weihai submits, "the damage was done", and under these circumstances,

[31] *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 76 Fed. Reg. 45773 (Aug. 1, 2011).

Weihai complains, it should not have been obligated to brief agency reconsideration of the rescission that had already been denied unequivocally, because by doing so it would in effect be asking Commerce to ignore its participation in the administrative review — as if a subsequent reversal of the earlier rescission denial could undo the prejudicial impact of the initial denial. "Adherence to such an absurd formality would not be 'appropriate.'" Weihai Reply at 40, quoting 28 U.S.C. §2637(d).

However, the defendant's response correctly points out that the background of the matter at bar differs materially from that of *Glycine & More*, in which that plaintiff presented in its administrative case brief "all arguments that continue to be relevant to the Secretary's . . . final results".[32] 19 C.F.R §351.309(c)(2). Weihai did not do likewise. Rather, it argues the gesture would have been futile. To persuade on that argument, "a party must demonstrate that it would be required to go through obviously useless motions in order to preserve its rights." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quoted decisions omitted). The inability of an agency to provide an adequate or appropriate remedy, for example, would trigger futility. *PPG Indus., Inc. v. United States*, 14 CIT 522, 542, 746 F. Supp. 119, 137 (1990) (futility applies where "the agency has no power to provide the remedy sought, or where the remedy would be manifestly inadequate" (citations omitted)). Futility may also be shown where "an agency has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider." *Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1145, 724 F. Supp. 2d 1327, 1351 (2010) ("*Pakfood*"), quoting *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986). *Pakfood* observed that in the case of the latter, the agency's commitment to its position must be so strong as to render requiring a party to raise the issue with the agency "'inequitable and an insistence of a useless formality.'" 34 CIT at 1145–46, 724 F. Supp. 2d at 1145–46, quoting *Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26 (2002) (internal quotation marks and citation omitted). *Cf. Itochu Building Prods. v. United States*, 733 F.3d 1140, 1147 (Fed. Cir. 2013) ("there was no reasonable prospect that Commerce would have changed its position").

The court is not persuaded that raising the issue in Weihai's administrative case brief would have been futile. "[T]he mere fact that Commerce rejected an argument at an earlier stage of an administrative proceeding does not, without more, suffice to render a party's

[32] Regulatory exhaustion is "explicitly imposed by the agency as a prerequisite to judicial review." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

continued adherence to such argument an exercise in futility." *Pakfood*, 34 CIT at 1146, 724 F. Supp. 2d at 1351 (citation omitted).[33] "Even where it is likely that Commerce would have rejected a party's arguments without changing course, 'it would still [be] preferable, for purposes of administrative regularity and judicial efficiency, for [the party] to make its arguments in its case brief and for Commerce to give its full and final administrative response in the final results.'" *Id*., quoting *Corus Staal*, 502 F.3d at 1380. Had the *Final Results* announced a rate that was more favorable to Weihai, it would hardly be here to complain; indeed, Weihai's claim at this point highlights part of the reason for the agency's adoption of the 90-day deadline for withdrawing requests for review in the first place. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27317 (May 19, 1997) ("we are concerned with the situation in which a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its request[ ] once it ascertains that the results of the review are not likely to be in its favor").

Nonetheless, it is apparent that *Glycine & More* has altered the legal *status* upon which rests the administrative decision not to accept Borsch's belated request to withdraw its request for review. That is a new and authoritative legal decision that appears to impact directly the legal underpinning of the underlying administrative decision, and the doctrine of intervening judicial interpretation applies here. *See Sucocitrico Cutrale Ltda. v. United States*, 36 CIT ___, ___, Slip Op. 12–71 at 5–7 (2012); *Corus Staal BV v. United States*, 30 CIT 1040, 1050 n.11 (2006). *Cf. SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001), referencing, *inter alia, Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n,* 899 F.2d 1244, 1249 (D.C. Cir. 1990) (granting Commission's request for remand following new legal decision). Remand of the administrative decision not to accept Bosch's 16-day late request to withdraw its review request, which decision was based on the "extraordinary circumstances" standard of the invalidated *2011 Notice*, is also consistent with "[t]he general rule . . . that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281 (1969).

Conclusion

For the above reasons, the case is hereby remanded to the International Trade Administration, U.S. Department of Commerce for

[33] *See also, e.g., PPG Industries*, 14 CIT at 543, 746 F. Supp. at 137 ("that a party to an administrative proceeding finds an argument may lack merit, or had failed to prevail in a prior proceeding based on different facts, does not, without more, rise to the level of futility").

further proceedings consistent with this opinion. The results of remand shall be due July 20, 2018, and by the fifth business day after the filing thereof with the court, the parties shall confer and file a joint status report as to a proposed scheduling of comments, if any, on those results.

So ordered.

Dated: March 22, 2018
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE