U.S. Court of International Trade

Slip Op. 19–99

DEACERO S.A.P.I. DE C.V. and DEACERO USA, INC., Plaintiffs, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 17–00183

[Remanding the U.S. Department of Commerce's remand redetermination in the administrative review of carbon and certain alloy steel wire rod from Mexico.]

Dated: August 1, 2019

Rosa S. Jeong and *Irwin P. Altschuler*, Greenberg Traurig, LLP, of Washington, DC, for plaintiffs, Deacero S.A.P.I. de C.V. and Deacero USA, Inc.

Elizabeth Anne Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Tara K. Hogan*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Assistant Attorney General. Of Counsel on the brief was *Emma Thomson Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan Hayden Price, *Daniel Brian Pickard*, and *Derick G. Holt*, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor, Nucor Corporation.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") remand redetermination filed pursuant to the court's order in *Deacero S.A.P.I. de C.V. v. United States*, 42 CIT __, __, 353 F. Supp. 3d 1303, 1314–15 (2018) ("*Deacero I*"). *See* Final Results of Redetermination Pursuant to Ct. Remand [in *Deacero I*], Mar. 15, 2019, ECF No. 58–1 ("*Remand Results*").

In *Deacero I*, the court explained that Commerce failed to corroborate the 40.52% petition rate it assigned to respondent as total facts available with an adverse inference in the 2014–2015 administrative review of the antidumping duty ("ADD") order covering carbon and certain alloy steel wire rod from Mexico and remanded the decision to Commerce for further explanation or reconsideration. *See Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1312–14; *see also Carbon and Certain Alloy Steel Wire Rod From Mexico*, 82 Fed. Reg. 23,190 (Dep't Commerce May 22, 2017) (final results of [ADD] admin. review and final determination of no shipments; 2014–2015) ("*Final Results*") and accompanying Decision Mem. for [the] Final Results of 2014/15

[ADD] Admin. Review: Carbon and Certain Alloy Steel Wire Rod from Mexico, A-201–830, (May 15, 2017), ECF No. 21–5 ("Final Decision Memo"); *Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945, 65,947 (Dep't Commerce Oct. 29, 2002) (notice of [ADD] orders) ("*ADD Order*").

Commerce explains that evidence it placed on the record on remand demonstrates the probative value of the assigned rate and satisfies the statutory corroboration requirement. *See Remand Results* at 4–7; *see also* 19 U.S.C. § 1677e(c).[1] For the following reasons, Commerce's *Remand Results* do not comply with the court's remand order in *Deacero I* and its decision to apply the 40.52% AFA-rate to Deacero continues to be unsupported by substantial evidence.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the prior opinion, *see Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1306, and here restates the facts relevant to the court's review of the *Remand Results*. Commerce's administrative review covered subject merchandise entered during the period of October 1, 2014, through September 30, 2015, and respondent Deacero S.A.P.I de C.V. ("Deacero" or "respondent"). *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 80 Fed. Reg. 75,657, 75,658 (Dep't Commerce Dec. 3, 2015). Pertinent here, in the final determination, Commerce used total facts available with an adverse inference ("AFA")[2] to calculate Deacero's final dumping margin, explaining that the revised section D cost dataset Deacero submitted following the preliminary determination was unreliable and impeded the review process. *See* Final Decision Memo at 4–8, 12; *see generally* Deacero's Resp. Suppl. Sections A–E at Exs. Supp. D-6–7, PD 52, bar code

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are to the unofficial U.S. Code Annotated 2018 edition, which reflects the amendments made to 19 U.S.C. § 1677e by the Trade Preferences Extension Act of 2015 ("TPEA"). *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015).

[2] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b). The phrase "total adverse inferences" or "total AFA" encompasses a series of steps that Commerce takes to reach the conclusion that all of a party's reported information is unreliable or unusable and that as a result of a party's failure to cooperate to the best of its ability, it must use an adverse inference in selecting among the facts otherwise available.

3490088—04 (July 21, 2016).[3] Pursuant to 19 U.S.C. § 1677e(b) and in accordance with its practice, Commerce chose the highest margin alleged in the 2001 petition—40.52%—as Deacero's final weighted-average dumping margin. *See* Final Decision Memo at 8–9 & n.33; *Final Results*, 82 Fed. Reg. at 23,190.

In *Deacero I*, the court sustained Commerce's decision to apply total-AFA to calculate Deacero's final weighted-average dumping margin.[4] *See Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1307–12, 1314. The court, however, determined that Commerce failed to corroborate the 40.52% AFA-rate it assigned to Deacero because it did not place any information demonstrating the rate's probative value, as required under 19 U.S.C. § 1677e(c)(1) and 19 C.F.R. § 351.308(d) (2015).[5] *See id.* at __, 353 F. Supp. 3d at 1314–15. As a result, the court remanded the corroboration issue for further explanation or reconsideration. *Id.*

Commerce filed the *Remand Results* on March 15, 2019. On remand, Commerce placed copies of the Federal Register notice announcing the initiation of an ADD investigation into carbon and certain alloy steel wire rod from Mexico and the public version of the Wire Rod from Mexico Initiation Checklist on the record. *See Remand Results* at 6; Placement Wire Rod from Mexico Less Than Fair Value (LTFV) Notice of Initiation & Accompanying Public Version Wire Rod from Mexico Initiation Checklist on R., PRR 1, bar code 3790294–01 (Feb. 6, 2019) ("Initiation Notice"[6] and "Initiation Checklist"). Commerce continues to apply the 40.52% AFA-rate to Deacero and explains that the documents it placed on the record demonstrate that the rate was corroborated using independent sources during the pre-initiation analysis. *See Remand Results* at 6–7, 12–16. Deacero S.A.P.I. de C.V. and Deacero USA, Inc. (collectively "Plaintiffs") argue

[3] On September 5, 2017, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 21–2–3. On April 1, 2019, Defendant filed indices to the public and confidential administrative records underlying Commerce's remand redetermination. These indices are located on the docket at ECF Nos. 61–2–3. Citations to administrative record documents in this opinion are to numbers Commerce assigned to such documents in the indices.

[4] Relatedly, the court did not reach challenges to Commerce's (1) decision to calculate a U.S. affiliate's general and administrative expenses without accounting for further manufacturing costs incurred, (2) failure to address certain clerical errors made in the preliminary determination, and (3) use of zeroing to calculate Deacero's dumping margin, because these issues became moot as a result of the court sustaining Commerce's decision to rely on AFA to calculate Deacero's rate. *See Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1314.

[5] Further citations to Title 19 of the Code of Federal Regulations are to the 2015 edition.

[6] The Federal Register notice announcing the initiation is also available at *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Ukraine, and Venezuela*, 66 Fed. Reg. 50,164 (Dep't Commerce Oct. 2, 2001) (notice of initiation of [ADD] investigations).

that Commerce did not satisfy the statutory corroboration requirement because it did not show that the 40.52% AFA-rate has probative value and is reliable and relevant. *See* [Pls.'] Comments Opp'n [*Remand Results*] at 6–14, May 6, 2019, ECF No. 64 ("Pls.' Comments"). Plaintiffs also contend that it would be "futile" for this court to remand the corroboration issue to Commerce for reconsideration and request this court to instruct Commerce to choose Deacero's weighted-average dumping margin from among the rates calculated for Deacero in the investigation or any of the prior administrative reviews of the *ADD Order*. *Id.* at 14–17. Defendant-Intervenor, Nucor Corporation ("Nucor") filed comments supporting the agency's position. *See* Def.-Intervenor [Nucor]'s Comments [*Remand Results*] at 4–10, May 7, 2019, ECF No. 66 ("Nucor's Comments").

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012). Commerce's antidumping determinations must be in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

Plaintiffs argue that Commerce's corroboration analysis does not rely upon independent sources and fails to demonstrate that the petition rate is probative, relevant, and reliable. Pls.' Comments at 6–14. Plaintiffs also argue that the determination on remand evidences "that [Commerce] is incapable of corroborating its chosen AFA rate" and ask the court to issue a remand order with specific instructions that Commerce assign, as Deacero's rate, a rate calculated in any prior segment of this proceeding. *Id.* at 14–17. Defendant responds that Commerce verified the rate's reliability, relevancy, and probative value during the pre-initiation analysis, that the independent sources Commerce relied upon are reflected in the Initiation Notice and Initiation Checklist, and that respondent should not be allowed to choose its own rate via this court's remand instructions. Def.'s Resp. to Comments [*Remand Results*] at 8–15, June 20, 2019, ECF No. 67 ("Def.'s Comments"). For the following reasons, Com-

merce's *Remand Results* do not comply with the court's remand order, are unsupported by substantial evidence, and are remanded for further explanation or reconsideration consistent with this opinion.

Whenever Commerce relies on information not "obtained in the course of an investigation or review," such as allegations in a petition, it is relying on secondary information and is required, "to the extent practicable, [to] corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c)(1);[7] *see also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–465, vol. 1, at 870 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4199 ("SAA") (providing the same); 19 C.F.R. § 351.308(c)(1)(i) (listing, as a source of "[s]econdary information," information derived from "[t]he petition"). Commerce corroborates secondary information by "examin[ing] whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d); *see also* SAA at 870, 1994 U.S.C.C.A.N. at 4199 (tying corroboration to whether the secondary information has probative value).

Examples of independent sources include "published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review." 19 C.F.R. § 351.308(d); SAA at 870, 1994 U.S.C.C.A.N. at 4199 (listing the same sources). The independent nature of a source depends on who originates the information provided and not by who files the information. *KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010) (concluding that import statistics, price quotations, and affidavits from officials in a third-party company, attached to an antidumping petition, were independent sources).

The court must base its review of Commerce's corroboration upon the record of the proceeding, which consists of

> (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and
>
> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

[7] Since the passage of the TPEA, Commerce is no longer required to link the selected adverse rate to the respondent's commercial reality. 19 U.S.C. § 1677e(d)(3)(B). Commerce, however, is still required to demonstrate, "to the extent practicable," the probative value of the secondary information it is using. 19 C.F.R. § 351.308(d).

19 U.S.C. § 1516a(b)(2)(A)(i)–(ii). Commerce's regulations require it to maintain "the official record of each segment of the proceeding[ ]" that will form the record reviewed by this Court. 19 C.F.R. § 351.104(a)(1). The official record will contain,

> all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding. . . . [and] government memoranda pertaining to the proceeding, memoranda of ex parte meetings, determinations, notices published in the Federal Register, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified.

Id.

Here, and in line with its practice, Commerce selected the highest margin alleged in the petition as Deacero's AFA-rate. *See* Final Decision Memo at 8 (citations omitted). In *Deacero I*, the court determined Commerce did not corroborate Deacero's rate because it failed to place any information demonstrating the rate's probative value, as required under 19 U.S.C. § 1677e(c)(1) and 19 C.F.R. § 351.308(d), on the record. *See Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1313–14. Specifically, the court stated that the statutory requirement for Commerce to corroborate the assigned rate "to the extent practicable," 19 U.S.C. § 1677e(c)(1), "at a bare minimum, requires Commerce to produce the documents it relied upon to analyze why the chosen rate is probative." *Id.* at __, 353 F. Supp. 3d at 1314.

In response, on remand, Commerce supplemented the administrative record with a copy of the Initiation Notice and Initiation Checklist. *See Remand Results* at 6. Commerce, however, did not rely upon the Initiation Notice and Initiation Checklist to corroborate Deacero's rate. The Initiation Notice and Initiation Checklist present the conclusions Commerce reached and describe the evidence available to Commerce at the time of the pre-initiation analysis. The Initiation Checklist, in addition to redacting all confidential information, merely marks off documents supportive of initiating an investigation into the subject merchandise and is evidence of the allegations that the petitioners successfully made. *See* Initiation Checklist at 13–16.

Indeed, Commerce's explanation reveals that it merely drew on the conclusions stated in the Initiation Notice and Initiation Checklist to conclude that the 40.52% AFA-rate is probative and is reliable and relevant. Commerce explains that during the pre-initiation stage it looked at various independent sources, provided either in the petition itself or solicited through supplemental requests, and that these documents show the 40.52% AFA-rate's probative value. *See Remand*

Results at 6–7. Specifically, it explains that the rate is probative because

> [d]uring our pre-initiation analysis, we examined the information used as the basis of export price (EP) (*i.e.*, affidavits of U.S. prices offerings for a Mexican wire rod manufacturer), and normal value (NV), (*i.e.*, constructed value calculated based on U.S. producers' cost of producing carbon and steel wire rod, adjusted for known differences between the Mexican and U.S. markets), in the Petition, and the calculations used to derive the alleged margins.

Id. at 6 (citing Initiation Checklist at 13, 26). Yet, none of the documents Commerce references to support its calculations as to export price and normal value have been placed on the record.[8] Further, Commerce contends that because it examined the adequacy and accuracy of the evidence resulting in the 40.52% rate in its pre-initiation analysis, absent evidence to the contrary, the rate continues to be reliable as an AFA rate. *Id.* at 7. The court cannot assess the reasonableness of the preceding statement because the documents which Commerce relied upon in making it are not on the record.

Relatedly, Commerce's explanation that because it corroborated the 40.52% AFA-rate during the pre-initiation stage, the rate continues to be corroborated now, *Remand Results* at 6–7, 13–14, is conclusory.[9] If the obligation to demonstrate the probative value of a rate is to have any meaning, Commerce must do more than refer to conclusions of

[8] The statutory framework governing initiation requires petitioner(s) to allege all elements necessary for the imposition of ADDs and to support such allegations with information reasonably at its disposal. 19 U.S.C. §§ 1673a(b)(1), 1673. Commerce, however, is not required to confirm the probative nature of the information underlying the petition at the initiation stage. *See* 19 U.S.C. § 1673a(b)(1); 19 U.S.C. § 1673a(c)(1) (explaining that the agency will examine the adequacy and accuracy of the evidence in the petition to determine whether elements necessary to impose a duty were met); *see also* SAA at 870, 1994 U.S.C.C.A.N. at 4199 (recognizing that secondary information derived from the petition is not de facto reliable because "it is based on unverified allegations[.]"). Commerce, therefore, cannot now claim that it corroborated the 40.52% rate, applied as AFA to respondent here, by pointing to the conclusions of the pre-initiation analysis, but not the independent sources upon which the rate's probative value is based.

[9] Further, to the extent that Commerce and Defendant-Intervenor interpret the court's remand order as simply requiring Commerce to produce the documents cited in the final determination's corroboration analysis, *see Remand Results* at 5–6; Nucor's Comments at 4–5; *see also* Final Decision Memo at 8–9, both read the *Deacero I* decision too narrowly. *See generally Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1312–14. *Deacero I* did not rule that Commerce met the statutory corroboration requirement and that, on remand, Commerce simply needed to produce documents cited to in the final determination. *Id.* at __, 353 F. Supp. 3d at 1314. In fact, the court clearly stated that "Commerce did not corroborate the AFA rate and therefore, its decision to rely on the petition rate is remanded for further explanation or reconsideration consistent with this opinion." *Id.*

calculations it carried out previously. Commerce has not complied with the court's instructions that it "produce the documents it relied upon to analyze why the chosen rate is probative[,]"[10] *Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1314, and its corroboration analysis continues to be unsupported by substantial evidence.

Defendant argues that it is not necessary for Commerce to place evidence underlying the Initiation Notice and Initiation Checklist on the administrative record because Commerce's remand redetermination does not directly cite to the supporting evidence. Def.'s Comments at 9 n.3. The question is not what Commerce cited in the *Remand Results*, but what it relied upon to analyze whether the rate was probative, reliable, and relevant. Defendant also claims that Commerce corroborated the 40.52% AFA-rate using independent sources at its disposal. *Id.* at 12–13. The independent sources may be embedded in the pre-initiation analysis; however, the pre-initiation analysis itself is not an independent source.[11] Defendant cannot claim that Commerce used independent sources to corroborate the 40.52% AFA-rate, as applied to Deacero, Def.'s Comments at 10–13, without identifying which independent sources Commerce relied upon, placing all such sources on the record, and explaining how such sources corroborate the AFA rate.

Finally, in its second remand order, the court will not, as Plaintiffs request, provide explicit instructions to Commerce to abandon its chosen 40.52% AFA-rate and instead, select an AFA-rate from among the rates previously calculated for Deacero in a prior segment of this proceeding. Pls.' Comments at 14–17. The facts and circumstances of this case do not warrant such a response. Commerce has not shown that it is unwilling or unable to corroborate the 40.52% AFA-rate or comply with the court's orders.

CONCLUSION

For the foregoing reasons, it is

[10] Although petitioner Nucor placed excerpts of the public version of the petition on the record, along with several underlying exhibits, [Nucor's] Draft Comments on Remand, PRR 4, bar code 3793273–01 (Feb. 13, 2019), nowhere in the *Remand Results* does Commerce identify which exhibits pertain to its corroboration analysis.

[11] To the extent that Plaintiffs challenge the independence of sources Commerce relied upon in its pre-initiation analysis because of who submitted information and when, *see* Pls.' Comments at 10–11, the challenge fails. As explained above, independence is a measure of who generates the information contained in the document, not who files it and during which proceeding. Therefore, a document filed by a domestic party and attached to a petition may constitute an independent source. However, because Commerce did not produce the sources underlying the pre-initiation analysis, the court cannot opine on whether such sources are independent.

ORDERED that Commerce's decision to rely on the 40.52% AFA-rate is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

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

ORDERED that the parties shall have 30 days thereafter to file their replies to comments on the remand redetermination.

Dated: August 1, 2019
New York, New York

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

Slip Op. 19–101

NEXTEEL CO., LTD., Plaintiff, and HYUNDAI STEEL COMPANY, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, TMK IPSCO, VALLOUREC STAR, L.P., and WELDED TUBE USA INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 19–00092

[Granting Plaintiff-Intervenor's motion for a preliminary injunction.]

Dated: August 2, 2019

J. David Park, Henry D. Almond, Daniel R. Wilson, Leslie C. Bailey, and *Kang Woo Lee*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Plaintiff-Intervenor.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director.

OPINION

Choe-Groves, Judge:

Before the court is Plaintiff–Intervenor Hyundai Steel Company's ("Hyundai" or "Plaintiff-Intervenor") motion for preliminary injunction to enjoin the United States ("Defendant") from liquidating Hyundai's entries subject to the final results of an antidumping order administrative review in *Certain Oil Country Tubular Goods from Korea*, 84 Fed. Reg. 24,085 (Dep't Commerce May 24, 2019) ("Final Results"). For the reasons that follow, Plaintiff-Intervenor's motion for a preliminary injunction is granted.

BACKGROUND

The U.S. Department of Commerce ("Commerce") published the Final Results on May 24, 2019. *Certain Oil Country Tubular Goods from Korea*, 84 Fed. Reg. 24,085 (Dep't Commerce May 24, 2019). Plaintiff NEXTEEL Co., Ltd. ("NEXTEEL" or "Plaintiff"), a mandatory respondent, commenced this action to contest the Final Results on June 10, 2019. Summons, Jun. 10, 2019, ECF No. 1; Compl., Jun. 14, 2019, ECF No. 6. The court entered a statutory injunction, pursuant to 19 U.S.C. § 1516a(c)(2), enjoining Defendant from liquidating NEXTEEL's entries subject to the Final Results. Order for Statutory Inj. Upon Consent, Jun. 18, 2019, ECF. No. 9.

Hyundai moved to intervene in the present action on July 1, 2019. Consent Mot. to Intervene, Jul. 1, 2019, ECF No. 15. The court granted Hyundai's motion to intervene on July 2, 2019. Order, Jul. 2, 2019, ECF No. 19.

Hyundai sought consent from Defendant to enter a statutory injunction for Hyundai's entries subject to the Final Results on July 2, 2019. *See* Mot. for Temp. Restraining Order and Prelim. Inj. 2, Jul. 5, 2019, ECF No. 20. Defendant did not consent and indicated its opposition to the motion. *Id.* The U.S. Court of International Trade's ("USCIT") Specific Instructions for Form 24 direct that "[i]f any party opposes the injunction, then regular motion practice should be followed." Form 24, Specific Instructions. Hyundai filed the instant motion for a temporary restraining order ("TRO") and preliminary injunction on July 5, 2019. Mot. for TRO and Prelim. Inj., Jul. 5, 2019, ECF No. 20. The court granted Hyundai's request for a TRO on July 5, 2019 and extended the TRO on July 19, 2019. Order, Jul. 5, 2019, ECF No. 21; Order, Jul. 19, 2019, ECF No. 33.

Defendant filed its response in opposition to Hyundai's motion for preliminary injunction on July 10, 2019. Def.'s Resp. to Hyundai's Mot. for Prelim. Inj., Jul. 10, 2019, ECF No. 22.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) because this appeal is taken pursuant to 19 U.S.C. § 1516a.

DISCUSSION

Defendant argues that an injunction in favor of Plaintiff-Intervenor Hyundai would improperly expand the issues in the case and conflict with the language of Rule 56.2(a) of the Rules of the United States Court of International Trade. Defendant does not oppose Hyundai's motion on the basis of the four-factor test that the court considers when evaluating whether to grant injunctive relief.

A. Defendant's Threshold Arguments

1. Scope of the Issues

In opposing Hyundai's motion, Defendant relies upon the general principle that "an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944). Under this general principle, an intervenor cannot add new substantive legal issues to the litigation. *Tianjin Wanhua Co. v. United States*, 38 CIT ---, ---, 11 F. Supp. 3d 1283, 1285–86 (2014).

Defendant's attempt to paint Hyundai's motion for injunction as an improper introduction of a new substantive legal issue in this case is inconsistent with the statutory scheme applicable to antidumping actions. The statutory scheme provides for intervention of an interested party who was a party to the underlying administrative review. *See, e.g.*, 28 U.S.C. § 2631(j)(1)(B). Statutory law also provides for the entry of an injunction upon a request by an interested party. *See* 19 U.S.C. § 1516a(c)(2). Under 19 U.S.C. § 1516a(c)(2):

> [T]he United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

19 U.S.C. § 1516a(c)(2).

Plaintiff-Intervenor Hyundai seeks to prevent liquidation of its entries that are subject to the same Final Results being challenged in Plaintiff's complaint. In the absence of injunctive relief, Hyundai's entries would be liquidated before the conclusion of this case. Hyundai has not attempted to raise any substantive challenges that were not raised in Plaintiff's complaint. Rather than enlarging the issues or altering the proceeding, Hyundai seeks to obtain the benefit of any affirmative relief that may arise in this action. *See Tianjin Wanhua*, 38 CIT at ---, 11 F. Supp. 3d at 1285–86.

Given the absence of any new substantive issues raised by Hyundai's motion, Hyundai's motion for preliminary injunction cannot reasonably be viewed as an enlargement of the substantive legal issues in the case or an alteration of the nature of the antidumping proceeding. *See e.g., NEXTEEL Co., Ltd. v. United States*, 41 CIT ---, ---, 227 F. Supp. 3d 1323, 1325–26 (2017).

2. USCIT Rule 56.2

Defendant argues that injunctive relief may apply only to entries that are the subject of the complaint itself pursuant to the language "entries that are the subject of the action" in USCIT Rule 56.2(a). Defendant's construction of this language in USCIT Rule 56.2(a) is incorrect because the language does not purport to define the scope of any available injunctive relief, does not refer to the complaint, and does not apply to motions brought by intervenors.

Rule 56.2(a) provides, in relevant part, that "[a]ny motion for a statutory injunction to enjoin the liquidation of entries that are the subject of the action must be filed by a party to the action within 30 days after service of the complaint, or at such later time, for good cause shown." USCIT R. 56.2(a). First, the purpose of the relevant language in Rule 56.2(a) is to establish a deadline for statutory motions for injunctions, not define or limit the scope of injunctive relief available. *Union Steel v. United States*, 33 CIT 614, 625, 617 F. Supp. 2d 1373, 1383 (2009). Second, the language in question does not limit the entries to be enjoined to those referenced in the complaint. Instead, Rule 56.2(a) refers to entries that are "the subject of the action." USCIT R. 56.2(a). Third, the allegedly limiting language is contained within the second sentence of the second paragraph of Rule 56.2, not the fourth sentence applicable to motions brought by intervenors. USCIT R. 56.2(a) ("an intervenor must file a motion for a statutory injunction no earlier than the date of filing of its motion to intervene and no later than 30 days after the date of service of the order granting intervention, or at such later time, but only for good cause shown").

Defendant's arguments do not demonstrate that Hyundai may not seek injunctive relief pursuant to the statutory scheme and USCIT Rule 56.2.

B. Injunctive Relief

USCIT Rule 65 allows for a court to grant injunctive relief in an action. USCIT R. 65; 28 U.S.C. § 2643. The court considers the following four factors when evaluating whether to grant a preliminary injunction: (1) whether the party will incur irreparable harm in the absence of such injunction; (2) whether the party is likely to succeed on the merits of the action; (3) whether the balance of hardships favors the imposition of the injunction; and (4) whether the injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014).

1. Irreparable Harm

Hyundai argues that it will suffer irreparable injury if the court does not enjoin liquidation of Hyundai's entries. *See Winter*, 555 U.S. at 20; *see also Fine Furniture (Shanghai) v.* United States, 40 CIT ---, ---, 195 F. Supp. 3d 1324, 1332–33 (2016) (concluding that liquidation of plaintiff-intervenor's entries would cause irreparable injury). A party whose entries have liquidated no longer may obtain relief in the form of a revised assessment rate on its entries. *Qingdao Taifa Grp. Co., Ltd. v. United States*, 581 F.3d 1375, 1380 (Fed. Cir. 2009); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983). In the absence of injunctive relief, Hyundai would lose the ability to protect its entries from being liquidated at the challenged rate. The court concludes that Hyundai would suffer irreparable harm absent injunctive relief.

2. Likelihood of Success on the Merits

Hyundai bears the burden of showing that it is likely to succeed on the merits of its claims. *See Winter*, 555 U.S. at 20. Hyundai argues that it is likely to succeed on the merits because this Court ruled against Commerce on the merits twice in related litigation. *See NEXTEEL Co. v. United States*, 43 CIT ---, ---, 355 F. Supp. 3d 1336, 1343 (2019); *NEXTEEL Co. v. United States*, 43 CIT ---, No. 18–00083, 2019 WL 2565365, at *1 (June 17, 2019). The court finds that Hyundai has shown a likelihood of success on the merits.

3. Balance of Hardships

When evaluating a request for a preliminary injunction, the court must balance the hardships on each of the Parties. *See Winter*, 555 U.S. at 20. Defendant is unlikely to suffer any hardship because Hyundai's entries are subject to cash deposits. Hyundai may suffer hardship if its entries were to be liquidated before the conclusion of this case. *See Fine Furniture (Shanghai)*, 40 CIT at ---, 195 F. Supp. 3d at 1333. The court concludes that the balance of hardships tips in favor of Plaintiff-Intervenor.

4. Public Interest

Hyundai argues that a grant of a preliminary injunction serves the public interest. *See Winter*, 555 U.S. at 20. Hyundai asserts that a purpose of the administration of antidumping laws is accurate assessment of antidumping duties. The court finds that the public interest factor does not tip in favor of either Party in this case.

CONCLUSION

The court concludes that Plaintiff-Intervenor has sufficiently met its burden of proof for the issuance of a preliminary injunction. The public interest factor is neutral between the Parties, and the other factors weigh in favor of injunctive relief. Hyundai's motion for a preliminary injunction is granted.

An order will issue accordingly.

Dated: August 2, 2019
New York, New York

/s/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 19–102

FORMER EMPLOYEES of HONEYWELL INTERNATIONAL, INC., Plaintiff, v. UNITED STATES SECRETARY of LABOR, Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00279

JUDGMENT

Before the court is the U.S. Department of Labor's Final Results of Redetermination Pursuant to Court Remand ("*Remand Results*"), ECF No. 36, in this action. All parties agree that the *Remand Results* comply with the court's instructions and should be sustained. *See* Joint Status Report, ECF No. 39. There being no challenge to the *Remand Results*, it is hereby

ORDERED that the *Remand Results* are sustained.

Dated: August 2, 2019
New York, New York

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

Slip Op. 19–103

ARCHER DANIELS MIDLAND COMPANY, CARGILL, INCORPORATED, and TATE & LYLE AMERICAS LLC, Plaintiffs, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 18–00160

[Sustaining the U.S. Department of Commerce's final negative determination.]

Dated: August 2, 2019

Patrick J. Togni and *Stephen A. Jones*, King & Spalding LLP, of Washington, DC, for Plaintiffs.

Meen Geu Oh, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Mykhaylo A. Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Barnett, Judge:

Plaintiffs, Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas LLC (collectively, "Archer Daniels") move, pursuant to U.S. Court of International Trade Rule 56.2, for judgment on the agency record, challenging the U.S. Department of Commerce's ("Commerce" or "the agency") final negative determination in the countervailing duty ("CVD") investigation of citric acid and certain citrate salts from Thailand. *See* Mot. for J. on the Agency R., ECF No. 19; *Citric Acid and Certain Citrate Salts From Thailand*, 83 Fed. Reg. 26,004 (Dep't Commerce June 5, 2018) (final negative countervailing duty determination, and final negative critical circumstances determination) ("*Final Determination*"), ECF No. 15–1, and accompanying Issues and Decision Mem., C-549–834 (May 29, 2018) ("I&D Mem."), ECF No. 15–2.[1]

Archer Daniels' dispute stems from the importation of select equipment and machinery ("the machinery") from the People's Republic of China ("China") into Thailand by COFCO Biochemical (Thailand) Co., Ltd. ("COFCO"); Niran (Thailand) Co., Ltd. ("Niran"); and Sunshine Biotech International Co., Ltd. ("Sunshine") (collectively, "Respondents"). Respondents imported the machinery duty-free pursuant to Section 28 of Thailand's Investment Promotion Act ("IPA Section 28"), a subsidy program exempting certain imported machinery from payment of import duties when used in specified projects. *See* I&D Mem. at 8–12. Commerce determined, however, that duty-free importation of the machinery from China pursuant to IPA Section 28 conferred no benefit because, absent IPA Section 28 eligibility, the duty rate on the machinery imports would have been zero pursuant to the "ASEAN-China FTA."[2] I&D Mem. at 11, 18.

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 15–3, and a Confidential Administrative Record ("CR"), ECF No. 15–4. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public J.A. ("PJA"), ECF No. 28; Confidential J.A. ("CJA"), ECF No. 27. The court references the confidential versions of the relevant record documents, unless otherwise specified.

[2] "ASEAN-China FTA" stands for "Association of Southeast Asian Nations (ASEAN)China Free Trade Area (FTA)." I&D Mem. at 2.

Archer Daniels contends that Commerce's determination is unsupported by substantial evidence and is otherwise not in accordance with law because the record shows that Respondents did not import the machinery pursuant to the ASEAN-China FTA and could not have complied with its requirements. *See* Pls.' Rule 56.2 Br. in Supp. of Mot. for J. on the Agency R. ("Pls.' Br.") at 1–2, ECF No. 31. Defendant, United States ("the Government"), contends that Commerce's determination is supported by substantial evidence and is otherwise in accordance with law because the record is "replete" with documents demonstrating that Respondents' machinery "originated from China." *See* Def.'s Corrected Resp. to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. ("Def.'s Resp.") at 5, ECF No. 34. For the reasons discussed herein, Archer Daniels' motion is denied.

BACKGROUND

I. Legal Framework

In order to offset the unfair competitive advantages created by foreign subsidies, "Commerce is required to impose countervailing duties on merchandise that is produced with the benefit of government subsidies" when it causes material injury to a domestic industry. *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014); *see also Zenith Radio Corp. v. United States*, 437 U.S. 443, 455–56 (1978) (discussing the purpose of CVD law); 19 U.S.C. § 1671(a). "Such a subsidy exists 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)). In other words, to constitute a countervailable subsidy, a foreign government must provide "a specific financial contribution to a party and that party [must] benefit[] from the contribution." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1272 (Fed. Cir. 2012) (citing 19 U.S.C. § 1677(5)).

A party benefits from the contribution when "taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program." 19 C.F.R. § 351.510(a)(1). Thus, in order to measure the value of the financial contribution, Commerce must calculate the taxes the firm would have paid absent the countervailable program. *See Royal Thai Gov't v. United States*, 32 CIT 97, 100, 534 F. Supp. 2d 1373, 1377 (2008) ("*Royal Thai V*"), *aff'd sub nom. Royal Thai Gov't v. U.S. Steel Corp.*, 312 F. App'x 342 (Fed. Cir. 2009). In furtherance of this inquiry, "Commerce must establish a benefit calculation benchmark, or more precisely, determine what tariff rate would have applied absent the

alleged subsidy. Once this benchmark is established, Commerce will have a reference point from which it can determine the amount of benefit that has been conferred." *Id.* It is Commerce's selection of a benchmark that is at issue here.

II. Factual and Procedural History

On June 22, 2017, Commerce initiated a countervailing duty investigation into citric acid and certain citric salts from Thailand. *See Citric Acid and Certain Citrate Salts From Thailand*, 82 Fed. Reg. 29,836 (Dep't Commerce June 30, 2017) (initiation of countervailing duty investigation). The period of investigation was January 1, 2016, through December 31, 2016. *Id.* at 29,837.

Commerce selected COFCO, Niran, and Sunshine as mandatory respondents in the investigation and issued them questionnaires. Selection of Respondents for the Countervailing Duty Investigation on Citric Acid and Certain Citrate Salts from Thailand (July 21, 2017) at 1, CR 11, PR 38, CJA Tab 3, PJA Tab 3; I&D Mem. at 2–3. Commerce also issued a questionnaire to the Royal Thai Government ("the RTG"). I&D Mem. at 2. Respondents reported receiving zero benefit for duty-exemptions applied to the machinery because, absent IPA Section 28 eligibility, the machinery would have been eligible for duty-free treatment pursuant to the ASEAN-China FTA. *See* Royal Thai Gov't, CVD Questionnaire Resp. (Sept. 8, 2017) ("RTG QR") at 10, CR 55, PR 90, CJA Tab 7, PJA Tab 7; Sunshine Biotech Int'l Co., Ltd. CVD Questionnaire Resp. (Sept. 8, 2017) ("Sunshine QR") at 9, CR 15, PR 81, CJA Tab 4, PJA Tab 4; Initial Questionnaire Resp. (Sept. 8, 2017) ("COFCO QR") at 9, CR 44, PR 88, CJA Tab 5, PJA Tab 5; Initial Questionnaire Resp. (Sept. 8, 2017) ("Niran QR") at 10, CR 49, PR 89, CJA Tab 6, PJA Tab 6.

The ASEAN-China FTA is a free trade agreement among the ten nations of the Association of Southeast Asian Nations and China that establishes a free trade area between its members. *See* Pet'rs' Rebuttal Factual Information Submission Regarding the 9/8/17 Initial Questionnaire Resps. (Sept. 22, 2017) ("Archer Daniels' Rebuttal Submission") Ex. 1 at 275, CR 102, PR 131, CJA Tab 8, PJA Tab 8 (listing the ASEAN-China FTA member states). This multilateral trade agreement, among other things, exempts equipment and machinery imported into Thailand from China from ordinary Thai import duties. I&D Memo. at 18; *see also* RTG QR at 10. The ASEAN-China FTA contains rules of origin that prescribe varying requirements depending on the type of good. *See* Archer Daniels' Rebuttal Submission, Ex. 1 at 261–272. Thai companies may claim ASEAN-China FTA treat-

ment by producing a certificate of origin issued pursuant to the ASEAN-China FTA, which demonstrates that the goods originated in a member country (i.e., China). *See id.*, Ex. 1 at 265, 267–69. However, the issuance of a certificate of origin does not necessarily confer ASEAN-China FTA preferential tariff treatment on those imports, which remain subject to verification procedures implemented by the importing member. *See id.*, Ex. 1 at 270–272 (ASEAN-China FTA Rules 16, 19 and 21).

On November 3, 2017, Commerce preliminarily determined that certain Thai producers of citric acid were not receiving countervailable subsidies. *See Citric Acid and Certain Citrate Salts From Thailand*, 82 Fed. Reg. 51,216 (Dep't of Commerce Nov. 3, 2017) (prelim. negative countervailing duty determination, prelim. negative critical circumstances determination and alignment of final determination with final antidumping duty determination); Decision Mem. for the Prelim. Negative Countervailing Duty Determination, Prelim. Negative Critical Circumstances Determination and Alignment of Final Determination with Final Antidumping Duty Determination (Oct. 30, 2017) ("Prelim. Mem.") at 1, PR 172, CJA Tab 10, PJA Tab 10. While Commerce found that IPA Section 28's duty exemptions, as applied to Respondents' imported Chinese machinery, "constitute[d] a financial contribution in the form of revenue foregone," Commerce further found that "such duty-free imports [did] not confer a benefit" because the duty rates on the machinery "would have been zero" absent Respondents' participation in the IPA Section 28 program. Prelim. Mem. at 11. Commerce based its finding on evidence indicating that the machinery would have alternatively qualified for duty-free treatment pursuant to the ASEAN-China FTA. *Id.* Although Commerce countervailed other IPA Section 28 duty-exemptions conferred upon Respondents' non-ASEAN-China FTA eligible machinery and equipment, Respondents' preliminary subsidy rates were *de minimis*. *See id.* at 11, 13.

In November and December of 2017, Commerce conducted verification of Respondents' questionnaire responses. *See* Verification of the Questionnaire Resps. of Sunshine Biotech Int'l Co., Ltd. (Jan. 19. 2018) at 1, CR 202, PR 228, CJA Tab 17, PJA Tab 17 ("Sunshine Verification Report"); Verification of the Questionnaire Resps. Of Niran (Thailand) Co., Ltd. (Jan. 18. 2018) at 1, CR 201, PR 227, CJA Tab 16, PJA Tab 16 ("Niran Verification Report"); Verification of the Questionnaire Resps. of COFCO Biochemical (Thailand) Co., Ltd. (Jan. 18. 2018) at 1, CR 200, PR 226, CJA Tab 15, PJA Tab 15 ("COFCO Verification Report"). Commerce found no evidence during verification to undermine its preliminary determination to use the ASEAN-

China FTA tariff rate as the benchmark for determining the benefit conferred by the IPA Section 28's duty-free treatment of Respondents' machinery imported from China. *See* I&D Mem. at 18 & n.89; Sunshine Verification Report at 6; Niran Verification Report at 7–8; COFCO Verification Report at 7–8.

On June 5, 2018, Commerce published its final determination. *Final Determination*, 83 Fed. Reg. at 26,004. Commerce's determination remained unchanged with respect to the agency's use of the ASEAN-China FTA as the benchmark tariff rate. *See* I&D Mem. at 18. Commerce explained:

> [Respondents] have demonstrated, by means of import documentation verified by Commerce, that the imports in question were, in fact, Chinese origin and that, accordingly, the duty payable on the machinery and equipment in question would have been zero absent eligibility under Section 28 IPA program. Thus, based on the record, as verified, we find that had [Respondents] entered the machinery and equipment in question under the ASEAN-China FTA and submitted the requisite forms to demonstrate Chinese origin under that arrangement instead of under the Section 28 IPA program, the duty rates applied would have been zero. Accordingly, the amount of duty paid pursuant to the Section 28 IPA program and the amount of duty [R]espondents would have paid on the Chinese-origin machinery and equipment absent the Section 28 IPA program are the same. Thus, there is no countervailable benefit for this program for the imports of Chinese-origin and machinery.

Id. (footnotes omitted); *see also id.* at 18 n.89 (discussing verification).

Commerce rejected Archer Daniels' argument that Respondents would not have qualified for preferential tariff treatment pursuant to the ASEAN-China FTA "because they failed to submit an application under that program," concluding that the argument lacked legal authority. *Id.* at 18. Commerce reasoned that submitting an application would have required Respondents "to enter the same Chinese-origin goods under both the ASEAN-China FTA and the Section 28 IPA program for Commerce to determine whether a benefit existed under the program," and there was "no support for [that] approach in [Commerce's] regulations or practice." *Id*. Because Respondents continued to receive only nominal benefits for their respective non-ASEAN China FTA eligible imports, Commerce calculated zero or *de*

minimis final countervailable subsidy rates for each respondent. *Final Determination*, 83 Fed. Reg. at 26,006; I&D Mem. at 12.[3] Accordingly, Commerce issued a negative final determination and terminated the investigation. *See Final Determination*, 83 Fed. Reg. at 26,005–06. On July 5, 2018, Archer Daniels timely commenced this action. *See* Summons, ECF No. 1. Plaintiff moved for oral argument and the court, after reviewing the Parties briefs filed pursuant to USCIT Rule 56.2, denied the request for oral argument as unnecessary.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(ii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(ii) (2012),[4] and 28 U.S.C. § 1581(c).[5] 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)).

DISCUSSION

I. Parties' Contentions

Archer Daniels argues that "the record does not support Commerce's claim that the reported entries would have alternatively qualified for the zero-rate tariff under the ASEAN-China FTA at the time of entry." Pls.' Br. at 19 (internal quotation marks omitted). Pointing to the procedural requirements underlying the issuance of the certificate of origin pursuant to the ASEAN-China FTA, Archer

[3] COFCO and Niran received final countervailable subsidy rates of zero percent, and Sunshine received a *de minimis* final countervailable subsidy rate of 0.21 percent. *Final Determination*, 83 Fed. Reg. at 26,006; I&D Mem. at 12.

[4] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

[5] To establish standing under Article III of the U.S. Constitution, a plaintiff must show, *inter alia*, that its injury "is likely to be redressed by a favorable decision." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)). Archer Daniels' complaint minimally addresses redressability. While Archer Daniels' requests a "remand . . . for reconsideration consistent with the [c]ourt's opinion," Compl. ¶ 18, ECF No. 11, in its briefs, Archer Daniels avers that Commerce's use of a benchmark other than the ASEAN-China FTA would result in an above-*de minimis* subsidy rate and the issuance of a CVD order. *See* Pls.' Br. at 10; Confidential Pls.' Reply Br. ("Pls.' Reply"), at 3–4, ECF No. 26. In the future, it would be more appropriate to include such jurisdictional allegations in the complaint.

Daniels argues that there "is no evidence on the record indicating that any of Respondents' imports complied with these requirements." *Id*. at 14. Without this evidence, Archer Daniels contends, Commerce could not reasonably determine that the machinery would have been eligible for preferential ASEAN-China FTA treatment. *Id*. at 14; *see also id*. at 23–24.

The Government contends that substantial record evidence—including submissions by all Respondents that "provided a detailed, itemized listing of all equipment originating from China along with the duty rates they would have received on the items even absent the IPA Section 28 Program" and statements from the RTG and Respondents that the machinery was of Chinese origin—supports Commerce's determination. *See* Def.'s Resp. at 7. The Government also contends that evidence adduced at verification further supports the agency's determination. *Id*. at 11–12 (explaining that Commerce "spot-checked the information at verification, examined the preselected observations and additional observations randomly selected on site, and confirmed its determinations"). According to the Government, Archer Daniels has failed "to identify a single document that suggests that the country of origin might differ from what the weight of record documents show," i.e., China. *Id*. at 8. Additionally, the Government contends, Archer Daniels' "position makes no sense" because it infers that "[R]espondents (for no practical reason) should have taken the added step of meeting every procedural element for origination outlined in the ASEAN-China FTA even though they agree that respondents had no obligation or reason to specifically apply for the program." *Id*. at 10.[6]

II. Commerce's Determination is Sustained

The parties dispute whether it was reasonable for Commerce to select the ASEAN-China FTA duty-free rate as the benchmark against which to measure whether Respondents received a countervailable benefit for imports of machinery through the IPA Section 28 program. Archer Daniels argues that the ASEAN-China FTA is an inappropriate benchmark because the record does not indicate that Respondents complied with—or could have complied with—the trade

[6] The Government cites to Commerce's determination in a separate proceeding to support this assertion. Def.'s Resp. at 10 (citing, *inter alia*, Issues and Decision Mem. for the Final Results in the Countervailing Duty Admin. Review of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2014 ("Pneumatic Tires Mem.") at 20); *see also* Letter from Patrick J. Togni, King & Spalding LLP, to the Court (July 26, 2019), ECF No. 38 (copy of Pneumatic Tires Mem.). That reference is not persuasive because it merely contains conclusions concerning the uncontested applicability of the ASEAN-China FTA. *See* Pneumatic Tires Mem. at 20.

agreement's requirements. *See* Pls.' Br. at 2, 13–17. Archer Daniels' arguments lack merit.

As Commerce explained, there is no support in its regulations or practice for requiring evidence of parallel compliance with ASEAN-China FTA procedural requirements as part of its identification of a suitable benchmark, I&D Mem. at 18, and Archer Daniels does not point to any.[7] The record reflects that Commerce reviewed import documentation in order to assess the applicability of the ASEAN-China FTA. Commerce is afforded latitude in determining whether the requirements of countervailability have been met. *Cf. Royal Thai Gov't v. United States*, 436 F.3d 1330, 1336 (Fed. Cir. 2006) (Commerce reasonably declined to engage in a transaction-by-transaction review of an allegedly countervailable loan program because the agency reasonably determined that the collection of the "necessary information to engage in the extensive calculations contemplated by [the petitioner] was impracticable"). While Archer Daniels is correct that the country of export may not be determinative of the country of origin, Pls.' Br. at 23, Archer Daniels has not identified any record evidence demonstrating that Commerce's assumption, based on its review of record evidence and additional documentation at verification, was unreasonable. Commerce's finding is supported by substantial evidence of the machinery's Chinese origin and Archer Daniels has failed to identify evidence that fairly detracts from that conclusion. *See* I&D Mem. at 18 & n.89 (citations omitted).[8]

The case law upon which Archer Daniels relies is unpersuasive. Archer Daniels argues that several decisions of this court confirm that origin statements on customs documentation does not confer country of origin for purposes of free trade agreements, including the ASEAN-China FTA. *See* Pl's Br. at 17–20. Archer Daniels cites three cases in support of this proposition, each of which is inapposite. *See*

[7] For this reason, Archer Daniels' argument that Commerce failed to consider the degree to which each piece of machinery imported by Respondents individually complied with the ASEAN-China FTA requirements is unpersuasive. *See* Pls.' Br. at 16; Pls.' Reply at 9 (contending that duty-free treatment pursuant to the ASEAN-China FTA is not automatic, and that every article must qualify in its own right).

[8] Archer Daniels avers that Commerce's determination is undermined by Niran's verification outline, which stated that, "[f]or purchases of machinery that Niran reported duty free under non-[Thai Board of Investment ("BOI")] related exemptions (such as the ASEAN-China Agreement) or on imports of machinery that Niran reported it did not receive an exemption, be prepared to demonstrate the accuracy of this information with supporting documentation." Pls.' Reply at 13–14 (quoting Niran Verification Report at 8) (asserting that the record lacks the requested evidence). However, at issue here are Respondents' machinery imports reported duty free pursuant to BOI-related (i.e., IPA Section 28) exemptions, not *non-BOI* related exemptions. While Respondents reported ASEAN-China FTA *eligibility*, *see* Sunshine QR at 9; COFCO QR at 9; Niran QR at 10, Respondents did not report duty-free *treatment* under the ASEAN-China FTA. Thus, Archer Daniels' argument is unpersuasive.

id. (citing *Polly U.S.A., Inc. v. United States*, 33 CIT 1051, 637 F. Supp. 2d 1226 (2009); *United States v. Univar USA Inc.*, 42 CIT ___, 355 F. Supp. 3d 1225 (2018); *Int'l Fid. Ins. Co. v. United States*, 41 CIT ___, ___, 227 F. Supp. 3d 1353, 1354 (2017)).

Two of the three cases concern the domestic enforcement of free trade agreements codified by Congress implicating statutory origin verification obligations. *See Polly*, 33 CIT at 1053–54, 637 F. Supp. 2d at 1229; *Int'l Fid.*, 227 F. Supp. 3d at 1371–72. *Polly* and *International Fidelity* concern the domestic statutory and regulatory requirements necessary to establish the country of origin when foreign merchandise enters the United States and the importer claims preferential duty treatment pursuant to the North American Free Trade Agreement or the African Growth and Opportunity Act. *See Polly*, 33 CIT at 1053–54, 637 F. Supp. 2d at 1229; *Int'l Fid.*, 227 F. Supp. 3d at 1371–72. Here, there are no statutory or regulatory mandates that require Commerce to adopt a specific methodology when evaluating a foreign free trade agreement for purposes of identifying a benchmark tariff rate. *Univar*, a case involving the collection of allegedly unpaid duties and penalties pursuant to 19 U.S.C. § 1592, is further afield. There, the court confined its discussion of certificates of origin to its analysis of corresponding evidentiary disputes in the context of the underlying transshipment allegation. *See Univar*, 355 F. Supp. 3d at 1262–63.

Archer Daniels also relies on *Royal Thai V* to support the proposition that Commerce does not engage in speculation when selecting a benchmark. Pls.' Br. at 20–21 (citing *Royal Thai V*, 32 CIT at 97, 534 F. Supp. 2d at 1373). *Royal Thai V* affirmed Commerce's decision declining to find "countervailability because it lacked information regarding applicable alternative tariff rates." *Royal Thai V*, 32 CIT at 10102, 534 F. Supp. 2d at 1378–79. Here, however, Commerce relied on record evidence—not speculation—to support its selection of the ASEAN-China FTA. *See* I&D Mem. at 18–19 (reviewing unrebutted record evidence concerning Chinese origin and determining that the machinery would have otherwise qualified for duty-free treatment pursuant to the ASEAN-China FTA).

Lastly, Archer Daniels relies on *Government of Sri Lanka v. United States*, 42 CIT ___, 308 F. Supp. 3d 1373 (2018), to support the proposition that Respondents' duty-exemptions are countervailable because Commerce failed to adduce evidence that the ASEAN-China FTA "nullified" any alleged benefit Respondents received from the IPA Section 28 Program. Pls.' Reply at 14–15. Archer Daniels misapplies *Government of Sri Lanka*, which concerns the partial nullification of a countervailable benefit by the imposition of a one-time

"Super Gains Tax," and does not otherwise address Commerce's selection of Sri Lanka's standard corporate income tax rate as the benchmark income tax rate. *See Gov't of Sri Lanka*, 308 F. Supp. 3d at 1377–79.[9]

In sum, Archer Daniels would have Commerce base a countervailing duty order on nothing more than Respondents' failure to comply with paperwork requirements necessary to qualify for a duty-free treatment program that would have permitted them to import the machinery at the same duty-free rate as the program in question. Archer Daniels has failed to identify any legal authority or record evidence suggesting that Commerce's refusal was unreasonable. Commerce's decision to use the ASEAN-China FTA tariff rate as the benchmark tariff rate is supported by substantial evidence and is otherwise in accordance with law.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's *Final Determination*. Archer Daniels' motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: August 2, 2019
New York, New York

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

Slip Op. 19–104

HYUNDAI HEAVY INDUSTRIES, CO. LTD., Plaintiff, v. UNITED STATES, Defendant, and ABB INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 17–00054

[Sustaining the U.S. Department of Commerce's redetermination upon remand in the third administrative review of the antidumping duty order on large power transformers from the Republic of Korea.]

[9] Archer Daniels argues that Commerce's benefit calculation is "inconsistent with the *CVD Preamble*" and the agency's finding that IPA Section 28 duty exemptions are contingent on export performance. Pls.' Br. at 22 (citing *Countervailing Duties*, 63 Fed. Reg. 65,348 (Nov. 25, 1998) (final rule)); *see also* I&D Mem. at 11 (concluding that IPA Section 28 duty exemptions were "specific" when conditioned on export performance). Archer Daniels suggests that Commerce found some portion of Respondents' benefits "related solely to 'non-export-related criteria'" and did not include the program in its benefit calculation for that reason. Pls.' Br. at 22–23. Archer Daniels offers no support for this assertion. The export contingency of the program is relevant to specificity rather than benefit. I&D Mem. at 11. Commerce excluded IPA Section 28-related duty exemptions respecting Respondents' machinery from its benefit calculations because the alternative tariff rate pursuant to the ASEAN-China FTA would have been zero. I&D Mem. at 18–19.

Dated: August 2, 2019

Ron Kendler, White & Case LLP, of Washington, DC, argued for Plaintiff. With him on the brief were *David E. Bond* and *William J. Moran*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Joseph H. Hunt*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

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

OPINION

Barnett, Judge:

This matter comes before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination upon remand in this case. *See* Confidential Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 65–1.[1] Plaintiff, Hyundai Heavy Industries, Co., Ltd. ("HHI")[2] initiated this action contesting certain aspects of Commerce's final results in the third administrative review of the antidumping duty order on large power transformers ("LPT") from the Republic of Korea for the period of review August 1, 2014, through July 31, 2015. *See* Compl., ECF No. 5; *Large Power Transformers From the Republic of Korea*, 82 Fed. Reg. 13,432 (Mar. 13, 2017) (final results of antidumping duty administrative review; 2014–2015), ECF No. 17–2, and accompanying Issues and Decision Mem., A-580–867 (Mar. 6, 2017) ("I&D Mem."), ECF No. 17–3. Specifically, HHI challenged Commerce's decision to assign HHI a final weighted-average dumping margin of 60.81 percent based on the use of total facts available with an adverse inference (referred to as total "adverse facts available" or total "AFA"). *See generally* Confidential Rule 56.2 Mot. for J. Upon the Agency R. on Behalf of Pl. Hyundai Heavy Industries Co. Ltd. and Mem. of P. & A.

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 17–4, a Public Remand Record ("PRR"), ECF No. 68–1, a Confidential Administrative Record ("CR"), ECF No. 17–5, and a Confidential Remand Record ("CRR"), ECF No. 68–2. Parties submitted joint appendices containing record documents cited in their Rule 56.2 briefs. *See* Public J.A., ECF No. 44 (Vols. I-III); Confidential J.A. ("CJA"), ECF Nos. 40–1 (Vol. I), 41–1 (Vol. II), 42–1 (Vol. III), 43–1 (Vol. IV), 45–1 (Vol. V), 46–1 (Vol. VI), 46–2 (Vol. VII). Parties also filed joint appendices containing record documents cited in their remand briefs. *See* Confidential Remand J.A. ("CRJA"), ECF No. 84–1; Public Remand J.A., ECF No. 85–1; *see also* Public Resp. to Court's May 24, 2019 Order (May 28, 2019), ECF No. 89; Confidential Resp. to Court's May 24, 2019 Order (May 28, 2019), ECF No. 88. References are to the confidential versions of the relevant record documents, unless stated otherwise.

[2] Hyundai Electric & Energy Systems Co., Ltd. is the successor-in-interest to HHI. Letter from David E. Bond, Attorney, White & Case LLP, to the Court (Sept. 12, 2018), ECF No. 59.

in Supp., ECF No. 26; I&D Mem. at 4–6. Commerce based that decision on the following findings: (1) HHI failed to report service-related revenues separately from the gross unit price despite repeated requests from Commerce; (2) HHI failed to include the price of a subject "part" in the price for certain home market sales despite repeated opportunities to do so; (3) HHI failed to report separately the prices and costs for LPT accessories; and (4) HHI was systematically selective in providing documents to Commerce and reported data that contained discrepancies. I&D Mem. at 17–28.

The court remanded this matter to the agency for Commerce to reconsider or further explain its decision to use total AFA because substantial evidence did not support all of the bases underlying that decision. *Hyundai Heavy Indus., Co. v. United States ("HHI I")*, 42 CIT __, __, 332 F. Supp. 3d 1331, 1350 (2018).[3] In particular, substantial evidence did not support Commerce's finding that HHI withheld requested information with respect to accessories. *Id.* at 1346–48. Moreover, Commerce failed to explain the basis for its finding that HHI provided selective documentation and data that contained discrepancies; accordingly, this finding lacked substantial evidence.[4] *Id.* at 1348–49.

On remand, Commerce reconsidered its finding that HHI misreported costs and prices for accessories, its finding that HHI selectively reported information, and the legal and factual basis for the use of total AFA. Remand Results at 1–2. Commerce determined that HHI had properly reported accessories, consistent with the scope of the antidumping duty order. *Id.* at 11, 19. Commerce "clarif[ied]" that accessories are "components attached to the active part of the LPT and included within the subject merchandise." *Id.* at 19. As such, the use of AFA for HHI's reporting of accessories was unwarranted. *Id.* at 11. However, Commerce continued to find that HHI selectively reported certain sales information and provided unreliable data. *Id.* at 12. Based on this finding and those sustained by the court in *HHI I*, 332 F. Supp. 3d at 1340–42, 1345, Commerce again determined that total AFA was appropriate. *See id.* at 16, 25.

HHI supports Commerce's redetermination with respect to accessories but opposes the Remand Results in all other respects. *See* Pl.'s Comments in Supp. of the Final Results of Redetermination Pursuant to Court Remand ("HHI's Supp. Cmts"), ECF No. 79; Confidential Pl.'s Comments in Opp'n to the Final Results of Redetermination

[3] *HHI I* contains additional background in this case, familiarity with which is presumed.

[4] Substantial evidence supported Commerce's findings that HHI failed to report separately service-related revenues, failed to report properly its home market sales inclusive of the price of a particular within-scope part, and failed to act to the best of its ability in providing this information. *HHI I*, 332 F. Supp. 3d at 1340–43, 1345.

Pursuant to Court Remand ("HHI's Opp'n Cmts"), ECF No. 72. Defendant, United States ("the Government"), and Defendant-Intervenor, ABB Inc. ("ABB") support the Remand Results in their entirety.[5] *See* Confidential Def.'s Resp. to Comments on the Dep't of Commerce's Remand Results ("Gov.'s Supp. Cmts"), ECF No. 76; ABB's Supp. Cmts. The court heard oral argument on June 11, 2019. Docket Entry, ECF No. 91. For the reasons that follow, the court sustains the Remand Results.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[6] 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). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1314, 1317 (2017) (citation and internal quotation marks omitted).

DISCUSSION

I. Selective Reporting and Total AFA

a. Commerce's Redetermination

On remand, Commerce continued to find that HHI was selective in its reporting and provided data with various discrepancies. Remand Results at 12–13. Commerce identified the following documentation that HHI failed to provide: "(1) accounting entries to record [HHI's] U.S. sales and payments; (2) U.S. commission documents for certain U.S. sales; (3) test reports for all [U.S. sales transactions (referred to as SEQUs)]; (4) Korean trucking expense invoices for several U.S. sales; and (5) [certain] . . . requests for quote[s] (or "RFQs"), bids, and packing lists." *Id.* at 13 (footnotes omitted). Additionally, Commerce identified inconsistencies with reported transportation and brokerage expenses for certain U.S. sales. *Id.*; *see also id.* at 21.

Commerce found that HHI "failed to cooperate to the best of its ability in complying with requests for information" because, "despite

[5] While ABB does not challenge Commerce's findings on accessories, it avers that this issue is moot since it had no bearing on the agency's use of total AFA. Confidential Def.-Int.'s Comments in Supp. of the Final Results of Redetermination Pursuant to Court Remand ("ABB's Supp. Cmts") at 14–15, ECF No. 78. Accordingly, ABB contends, the court need not rule on this issue. *Id.* at 15.

[6] Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the United States Code are to the 2012 edition.

a specific and comprehensive request for sales and expense documentation, [HHI] selectively reported what it considered 'necessary' and 'sufficient.'" *Id.* at 17. Commerce recognized that respondents sometimes make mistakes in their submissions, *id.* at 25, but attributed HHI's reporting discrepancies and omission of documents to carelessness and inferred that HHI either "was unduly delaying the [administrative review] to its benefit by not submitting the requested documentation or [] failed to put forth the maximum effort to obtain these records," *id.* at 21. Commerce further found that HHI's failure to report service-related revenues, failure to report properly the price of a subject part, and selective and unreliable reporting "render[ed] [HHI's] reporting as a whole [] unreliable"; accordingly, Commerce determined that the use of total AFA was warranted. *Id.* at 16.

b. Parties' Arguments

HHI argues that "substantial evidence confirms the accuracy of HHI's gross unit prices" because HHI submitted documents that "overwhelmingly supported its data." HHI's Opp'n Cmts. at 3 (internal quotation marks and capitalization omitted). HHI further argues that Commerce treated HHI inconsistently with Hyosung, the other mandatory respondent in this review, because it requested more extensive information from HHI. *See id.* at 11–13. Additionally, HHI challenges Commerce's decision to use an adverse inference with respect to the missing documents, arguing that Commerce failed to comply with 19 U.S.C. § 1677m(d) and Commerce's finding that HHI failed to cooperate to the best of its ability is unsupported by substantial evidence. *Id.* at 10, 15. HHI argues that the three issues Commerce identified, whether individually or in combination, do not support the use of total AFA. *Id.* at 16.

The Government argues that Commerce reasonably concluded that HHI failed to provide complete sales documentation and had other reporting discrepancies. Gov.'s Supp. Cmts at 5–12. The Government contends that the combined effect of HHI's reporting failures supports Commerce's use of total AFA. *Id.* at 15–18. ABB agrees that substantial evidence supports Commerce's factual findings. *See* ABB's Supp. Cmts at 4–9. According to ABB, Commerce was justified in using total AFA based solely on the two issues that the court upheld in *HHI I* and HHI's failure to provide the requested information adds support for using total AFA. *Id.* at 3.

c. Analysis

i. Missing documents; Commerce's section 1677m(d) obligation

Substantial evidence supports Commerce's finding that HHI failed to provide certain requested documents.[7] *See* Remand Results at 13, 21. Commerce asked HHI to supply, for all U.S. sales, "clear documentation demonstrating that payment was received . . . (including each recording in [HHI's] accounting system regarding the sale and payment of the subject merchandise for both HHI and Hyundai [Corporation] USA . . .)."[8] Suppl. Questionnaire (Oct. 7, 2016) ("Oct. 7, 2016 Suppl. Questionnaire") at 56, CR 346, PR 213, CRJA 3. Commerce found, and HHI does not dispute, that HHI did not provide any internal accounting screen prints to document any sales. Remand Results at 13, 22; HHI's Opp'n Cmts at 5, 14.

With respect to commission documents, Commerce requested "complete . . . expenses documentation," including "documents relating to any commissions or other fees that may be paid" for "***all*** U.S. [sales]." Oct. 7, 2016 Suppl. Questionnaire at 5–6. Commerce determined that HHI failed to provide documents supporting its commission expenses for fourteen sales. *See* Remand Results at 13 & n.61 (citations omitted). While HHI admits that it did not provide commission documents for one sale—claiming that the omission was inadvertent—it argues that it provided commission agreements for all other U.S. sales for which it paid a commission. HHI's Opp'n Cmts at 6. HHI states that, on remand, it provided to Commerce a "detailed chart tracking the commission expenses reported . . . to the documentation submitted in response to the [October 7, 2016 supplemental questionnaire]." *Id.* (citing Comments on the Draft Results of Redetermination Pursuant to Court Remand (Nov. 26, 2018) ("HHI's Draft Cmts"), Ex. 1, CRR 3, PRR 7, CRJA 7). HHI's chart demonstrates, however, that, for seven of the sales, HHI provided the commission agreement but omitted any supporting documentation. *See* HHI's Draft Cmts, Ex. 1 (SEQUs 11, 15–18, 23–24); *see also* Remand Results at 13 n.61 (citations omitted).

With respect to trucking invoices, HHI admits that it did not provide the invoices in question but avers that Commerce's statement is misleading. *See* HHI Supp. Cmts at 7. HHI explains that "it did not receive trucking invoices showing shipment-specific expenses for all"

[7] HHI admits that it failed to provide test reports, accounting screen prints, and payment and commission documentation for one sale. *See* HHI's Opp'n Cmts at 5, 6, 14. As discussed herein, however, its reporting omissions were not limited to this one sale.

[8] Hyundai Corporation USA is HHI's U.S. sales affiliate. *See* Resp. of Hyundai Heavy Indus. Co., Ltd. to Section C of the Questionnaire (Jan. 27, 2016) at C-1, CR 152–156, PR 91–94, CJA Vol. I, Tab 9.

U.S. sales. *Id.* For sales for which it did receive an invoice, HHI provided it. *Id.* For sales for which HHI did not receive an invoice, it provided screen prints of its internal accounting system. *Id.* at 7–8. HHI did not, however, provide any source documents supporting the allocation of trucking expenses shown in the screen prints. Commerce explained that "[w]ithout complete documentation," it cannot "confirm the accuracy of [HHI's] reported data." Remand Results at 13.

Commerce identified inconsistencies in HHI's reporting of transportation and brokerage expenses as providing additional support for its finding. Specifically, Commerce identified nine sales—SEQUs 3, 5, 12–16, 21, and 22—as containing such inconsistencies and referenced ABB's administrative case brief identifying the inconsistencies. Remand Results at 13 & n.65 (citing, *inter alia*, Pet'r's Case Br. Regarding Hyundai Issues (Jan. 5, 2017) ("Pet'r's Case Br."), Attach. 4, CR 463–65, PR 280–81, CRJA 6). HHI does not identify contrary record evidence to call into question Commerce's acceptance of these claims[9] but argues that ABB's statements were wrong. *See* HHI's Opp'n. Br. at 10–11.

HHI argues that the agency failed to give HHI an opportunity to cure the deficiencies in its submissions as required by 19 U.S.C. § 1677m(d). HHI's Opp'n Cmts at 15. However, Commerce's "request for all of the U.S. sales documentation was a direct result of the deficiencies in Hyundai's original questionnaire responses." Gov.'s Supp. Cmts at 14–15; *see also HHI I*, 332 F. Supp. 3d at 1336–38, 1343–44 (noting that the Oct. 7, 2016 Suppl. Questionnaire was Commerce's second supplemental questionnaire aimed at addressing Commerce's concerns that HHI was misreporting its gross unit prices for the U.S. and home markets). In *HHI I*, the court considered whether Commerce met its obligations pursuant to 19 U.S.C. § 1677m(d) to notify HHI of deficiencies in its questionnaire responses and found that it did. *See HHI I*, 332 F. Supp. 3d at 1341–42. Section 1677m(d) does not entitle HHI to endless opportunities to cure deficiencies in its reporting.

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[9] HHI disputes ABB's claims with respect to four of the nine sales, contending that ABB's statements were wrong and HHI's reporting was accurate. *See* HHI's Opp'n Cmts at 10–11. HHI's arguments fail. For example, HHI "reported wharfage and the untranslated item expenses inconsistently in that [it] sometimes reported wharfage and untranslated expenses listed on the invoices in 'other U.S. transportation expense' and sometimes [it] did not." Gov.'s Supp. Cmts. at 11 & n.2 (comparing SEQUs 14 and 22 with SEQUs 23 and 24) (citing Resp. to Questions 13 and 17 of the Third Suppl. Sections A, B, C and D Questionnaire (Nov. 10, 2016) ("Nov. 10, 2016 Suppl. Resp."), Attach. 3S-35 at JA101303–04, JA103113–19, JA103131–33, JA103145–4, CR 440–449, PR 241–250, CJA Vols. II-IV, CRJA 5). HHI also avers that ABB's administrative case brief "is not substantial evidence upon which [Commerce] should have relied." HHI's Opp'n Cmts at 10. While true, what Commerce did was accept ABB's arguments about the record evidence, and identification of inconsistencies therein, including the record citations in support of those arguments. *See* Pet'r's Case Br., Attach. 4.

ii. Commerce's differential treatment of HHI and Hyosung

HHI argues that Commerce treated HHI and Hyosung inconsistently because it requested the same information from both respondents but penalized only HHI when both companies provided incomplete responses. HHI's Opp'n Cmts at 11–13. The Government and ABB argue that Commerce requested more information from HHI because it considered HHI's worksheets to be unverifiable and unreliable. Gov.'s Supp. Cmts at 12; ABB's Cmts at 9–10.

To the extent that Commerce treated HHI and Hyosung differently, it was justified in so doing. In response to this argument in the remand proceeding, Commerce explained:

> The [c]ourt has already affirmed Commerce's decision to not rely on [HHI's] worksheet information because it was unreliable and unverifiable at a late stage in the review. Because [HHI's] worksheet information was problematic, we asked for additional sales documentation to aid us in our analysis[.] We did not request additional documentation from Hyosung because we found its worksheets sufficient.

Remand Results at 21.[10] As the court discussed in *HHI I*, Commerce requested documentation to determine whether HHI was overstating U.S. gross unit prices by misreporting service-related revenues and understating home market prices by misreporting home market sales of an LPT part. 332 F. Supp. 3d at 1338, 1342. Commerce's concerns were legitimate because HHI failed to report separately service-related revenues even though it had such revenues to report and failed to report properly its home market sales of the LPT part. *Id.* at 1340–42, 1345. It is sufficiently clear to the court that HHI was differently situated than Hyosung, justifying Commerce's different supplemental information requests.

iii. Adverse inference and Total AFA

HHI argues that Commerce was not justified in using an adverse inference and, even if it was, that it was not justified in using total AFA. *See* HHI's Opp'n Cmts at 13–17. With respect to the adverse inference, HHI argues that it provided 3,300 pages of documents, reflecting that HHI "met or exceeded the level of participation that could be expected from a 'reasonable and responsible' respondent"

[10] The court discerns that the "worksheets" to which Commerce was referring were those that HHI submitted along with all the other documents in its November 10, 2016 response to the October 7, 2016 supplemental questionnaire. *See HHI I*, 332 F. Supp. 3d at 1338.

under the circumstances. *Id.* at 13–14. According to HHI, Commerce failed to account for the difficult circumstances Commerce created when it requested documentation for all U.S. sales at a late stage in the review (i.e., after the preliminary results). *Id.* at 14–15. Moreover, HHI argues, there is no evidence that HHI was selective in its reporting. *Id.* at 13–14. The court finds that the record adequately supports Commerce's decision to make an adverse inference.

The mere production of a substantial volume of documents does not, *ipso facto*, demonstrate that a respondent acted to the best of its ability. The inquiry is "whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). The court has previously determined that HHI failed to satisfy this standard when it reported service-related revenues and home market sales of an LPT part. *HHI I*, 332 F. Supp. 3d at 1343, 1345. The court now concludes that Commerce reasonably determined that "despite a specific and comprehensive request for sales and expense documentation, [HHI] selectively reported what it considered 'necessary' and 'sufficient.'" Remand Results at 17.

At a minimum, HHI's failure to document its accounting entries provides substantial evidence for Commerce's finding. There was no ambiguity in Commerce's request for "recording[s] in your accounting system regarding the sale[s] and payment[s] of the subject merchandise for both HHI and Hyundai USA (for U.S. sales))." Oct. 7, 2016 Suppl. Questionnaire at 6. Nevertheless, HHI failed to provide those documents and failed to explain why it was not providing the documents. HHI now argues that the documents it did provide were sufficient to substantiate the gross unit prices it reported, HHI's Opp'n Cmts. at 3,[11] suggesting that HHI reported only information that it deemed necessary and sufficient. Moreover, HHI's ability to provide supporting documentation for some commission expenses

[11] HHI avers that the "'critical question . . . is whether' a respondent, through the submission of requested documents, has '**adequately substantiated the data**' that it reports." HHI's Opp'n Cmts at 3 (quoting *ABB Inc. v. United States*, 40 CIT __, __, 190 F. Supp. 3d 1159, 1168–69 (2016)). The quoted language from *ABB Inc.* related to whether substantial evidence supported Commerce's conclusion that actual cost data, submitted during an administrative review, was reliable when it differed from estimated costs submitted during the investigation phase. *See* 190 F. Supp. 3d at 1168–69. *ABB Inc.* does not stand for the proposition that a respondent may selectively report the information that it deems sufficient to substantiate its reported data. It is Commerce, not the respondents, that decides what information must be provided. *See, e.g., POSCO v. United States*, 42 CIT __, __, 296 F. Supp. 3d 1320, 1341 n.31 (2018).

indicates that additional documents existed but HHI failed to provide them. Under these circumstances,[12] "it is reasonable to conclude that" HHI demonstrated "less than full cooperation." *Nippon Steel Corp.,* 337 F.3d at 1382.

Turning to HHI's argument that Commerce was not justified in using total AFA, HHI contends that its failure to report properly service-related revenues does not support the use of total AFA because, in the preceding review, Commerce determined that such a reporting failure only justified the use of partial AFA. HHI's Opp'n Cmts at 16 (citing *ABB Inc. v. United States*, 42 CIT __, __, 355 F. Supp. 3d 1206, 1215–16 (2018)). With respect to the reporting of home market sales of an LPT part, HHI argues that the reporting error "affects a single part for four sales observations," and is not enough to render the entirety of the home market prices unreliable.[13] *Id.* Regarding the missing documents, HHI argues that the omissions were "minor," and "not pervasive." *Id.* at 17 (internal quotation marks omitted). The court concludes that Commerce's decision to use total AFA based on its collective findings is supported by substantial evidence and in accordance with law.

"In general, use of partial facts available is not appropriate when the missing information is core to the antidumping analysis and leaves little room for the substitution of partial facts without undue difficulty." *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1308 (Fed. Cir. 2014). Commerce uses "total AFA" when it concludes "that all of a party's reported information is unreliable or unusable and that as a result of a party's failure to cooperate to the best of its ability, it must use an adverse inference in selecting among the facts otherwise available." *Deacero S.A.P.I. de C.V. v. United States*, 42 CIT __, __, 353 F. Supp. 3d 1303, 1305 n.2 (2018). The U.S. and home market prices are central to the dumping calculation. Commerce explained that the consequence of a failure to report properly service-related revenues and the price of a subject LPT part[14] caused the reported U.S. prices to be overstated and home market prices to be understated. Remand

[12] With respect to the timing of Commerce's request, Commerce requested the documents when it did because of deficiencies in HHI's initial and supplemental questionnaire responses. HHI did not request additional time to respond to the supplemental questionnaire nor does HHI claim that it could not comply with the request in a timely manner.

[13] HHI claimed that this reporting issue concerned less than five percent of sales, and its effect on gross unit price for those sales was 0.89 to 2.69 percent. Oral Arg. 26:52–27:17, 27:46–28:02 (reflecting time stamp from the recording).

[14] Regarding the LPT part, HHI avers that the agency may not "extrapolate from *a single error*, which may well have been an isolated oversight, a conclusion that the entirety of the respondent's submissions concerning other classes of subject merchandise are unreliable." HHI's Opp'n Cmts at 16 (quoting *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 27 CIT 1059, 1061, 276 F. Supp. 2d 1371, 1374 (2003)) (emphasis added). "On the other hand," however, "numerous 'oversights' would likely suggest a 'pattern of unresponsiveness'

Results at 16. Commerce also explained that HHI's selective provision of sales documentation undermined the reliability of its reporting of expenses associated with U.S. sales.[15] *Id.* at 16. Commerce reasonably found that the reporting failures "cut across and affect all of [HHI's] reported data" and, thus, prevented the agency from relying on HHI's reporting "because the basic elements of a dumping calculation (i.e. the reported gross prices of the [U.S.] and home market) are deficient." *Id.* at 26. The deficiencies in HHI's questionnaire responses were not limited to discrete categories of information but included service-related revenues, the LPT part, and sales related documentation. These gaps were sufficiently prevalent that Commerce reasonably determined that the use of partial AFA was not practicable.

II. Accessories

HHI requests that the court affirm the agency's determination concerning accessories. HHI's Supp. Cmts at 1. ABB argues that the court need not rule on this issue because Commerce's discussion of accessories is moot since it had no bearing on the agency's use of total AFA. ABB's Supp. Cmts at 15. The Government does not express a view, simply requesting that the court sustain the Remand Results.[16] *See* Gov.'s Supp. Cmts at 18. No party challenged the Remand Results with respect to accessories by the deadline for submission of comments in opposition to the Remand Results, therefore, any such arguments are waived. Upon review of the Remand Results, Com-

justifying not only the application of facts available [], but of AFA." *Fujian*, 276 F. Supp. 2d at 1374 n.2 (citation omitted). Despite HHI's effort to disaggregate its reporting omissions and errors, Commerce identified several such "oversights," Remand Results at 16, detracting from HHI's argument. Additionally, regarding the home market sales of the LPT part, Commerce explained that its discovery of this misreporting in sales for which it had requested full documentation gave it reason to question the reliability of the other home market sales for which Commerce did not request full documentation. I&D Mem. at 25.

[15] HHI contends that it is unclear how its failure to provide commission expense or transportation documents support the use of total AFA because those expenses were reported in fields separate from the gross unit prices. HHI's Opp'n Cmts at 7, 8. Commerce explained, however, that the missing information was "important . . . to have [an] accurate starting point from which to calculate [constructed export price] and normal value, or, at a minimum, calculate adjustments to those starting prices." Remand Results at 22 (internal quotation marks omitted).

[16] In the underlying proceeding, Commerce responded to ABB's argument as follows:

> Considering the [c]ourt's finding that there is a need for guidance on the term "accessories," we further examined the record. After analyzing the factual information regarding "accessories" and assessing [HHI's] business practices regarding the term, we find it necessary to clarify our treatment of "accessories" in this case. For this reason, we disagree with ABB that we should not include our discussion of "accessories" and have included our discussion.

Id. at 19.

merce properly reevaluated its treatment of accessories; therefore, the Remand Results are sustained with respect to the treatment of accessories.

CONCLUSION

For the foregoing reasons, the court finds that the Remand Results comply with the court's remand order, are supported by substantial evidence and otherwise in accordance with law. Judgment will enter accordingly.

Dated: August 2, 2019
New York, New York

/*s*/ *Mark A. Barnett*
JUDGE

Slip Op. 19–107

REBAR TRADE ACTION COALITION, Plaintiff, v. UNITED STATES, Defendant, and COLAKOGLU DIS TICARET A.S. and COLAKOGLU METALURJI A.S., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior
Judge Court No. 18–00106

[The court sustains the determinations of the U.S. Department of Commerce.]

Dated: August 8, 2019

Maureen E. Thorson, Wiley Rein LLP, of Washington, D.C., argued for Plaintiff Rebar Trade Action Coalition. With her on the brief were *John R. Shane* and *Alan H. Price*, Wiley Rein LLP, of Washington, D.C.

Robert R. Kiepura, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C.; and *Reza Karamloo*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C., argued for Defendant. With them on the brief were *Joseph M. Hunt*, Assistant Attorney General, Civil Division, U.S. Department of Justice; *Jeanne E. Davidson*, Director; and *L. Misha Preheim*, Assistant Director.

Friederike S. Görgens, Arent Fox LLP, of Washington, D.C., argued for Defendant-Intervenors Colakoglu Dis Ticaret A.S. and Colakoglu Metalurji A.S. With her on the brief was *Matthew M. Nolan*, Arent Fox LLP, of Washington, D.C.

OPINION

This action comes to the court upon a motion by Plaintiff Rebar Trade Action Coalition ("RTAC") under Rule 56.2 of the USCIT Rules, Mot. for J. on the Agency R., ECF No. 22 (Oct. 29, 2018); *see also* Mem. of Pl. in Support of its Mot. for J. on the Agency R., ECF No. 25 (Oct. 30, 2018) ("Pl.'s Br."), appealing from the administrative review of the countervailing duty ("CVD") order on steel concrete reinforcing bar

("rebar") from the Republic of Turkey ("Turkey"), *Steel Concrete Reinforcing Bar from the Republic of Turkey*, 83 Fed. Reg. 16,051 (Dep't Commerce Apr. 13, 2018) (final results and partial rescission) ("Final Results") and accompanying Issues & Decision Mem., P.R. 205 (Apr. 9, 2018) ("I&D Mem."). Both the Government and Defendant-Intervenors Colakoglu Dis Ticaret A.S. and Colakoglu Metalurji A.S. (collectively "Colakoglu") filed responses to RTAC's motion, asking the court to sustain the determinations made by the U.S. Department of Commerce ("Commerce" or "the Department"). Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 34 (Mar. 11, 2019) ("Gov't's Br."); Resp. Br. of Def.-Intervenor in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 35 (Mar. 11, 2019). Upon consideration of the record, the parties' briefing, and oral argument, the court finds the Department's determinations to be supported by substantial evidence and in accordance with law. Therefore, the court sustains the Final Results and judgment will enter accordingly.

BACKGROUND

In November of 2014, the Department of Commerce issued a countervailing duty order on rebar from Turkey pursuant to 19 U.S.C. § 1671. *Steel Concrete Reinforcing Bar from the Republic of Turkey*, 79 Fed. Reg. 65,926 (Dep't Commerce Nov. 6, 2014) (CVD order). Roughly two years later, in response to a notice from Commerce, *Opportunity to Request Admin. Review*, 81 Fed. Reg. 76,920 (Dep't Commerce Nov. 4, 2016), RTAC[1] requested review of the Department's CVD order, Request for Admin. Review, P.R. 4 (Nov. 30, 2016), which in turn prompted Commerce to initiate a review of Turkish rebar for the period covering January 1, 2015 to December 31, 2015. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 4,294, 4,297 (Dep't Commerce Jan. 13, 2017). Involved in that review were mandatory respondents Colakoglu and Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. ("Icdas") as well as seventeen other producers and exporters of Turkish rebar. *Id.*

In the Department's initial administrative review of the CVD order, Commerce had determined that Turkish manufacturers of rebar received countervailable subsidies from the involvement of the Government of Turkey ("GOT") in the market for natural gas. *See Steel Concrete and Reinforcing Bar from the Republic of Turkey*, 79 Fed. Reg. 54,963 (Dep't Commerce Sept. 15, 2014) (final affirm. CVD determ.) and accompanying Issues & Decision Mem. at 8–13 ("Turkey

[1] RTAC is made up of the following entities: Nucor Corp.; Gerdau Ameristeel U.S. Inc.; Commercial Metals Co.; Cascade Steel Rolling Mills, Inc.; Byer Steel Group, Inc.; Bayou Steel Group; and Steel Dynamics, Inc. *See* Request for Admin. Review 1 n.1, P.R. 4 (Nov. 30, 2016).

Rebar Final Determ. I"). Subsequent reviews determined that: (a) the product receiving the subsidy to be natural gas in gaseous form, not liquefied natural gas or compressed natural gas; and (b) the gaseous form is only transported via pipeline. *Steel Concrete Reinforcing Bar from the Republic of Turkey*, 82 Fed. Reg. 23,188 (Dep't Commerce May 22, 2017) (final affirm. CVD determ.) and accompanying Issues & Decision Mem. at 10, 24, and 25 ("Turkey Rebar Final Determ. II").

In the immediate review, Commerce issued a questionnaire to the GOT. Countervailing Duty Questionnaire, P.R. 21 (Feb. 7, 2017). The questionnaire dedicated several questions to gathering information about the Turkish government entity that operates the Turkish natural gas pipeline network, Boru Hatlari Ile Petrol Tasima A.S. ("BOTAS"). *Id.* at 21–24. One such question requested "Annual Report(s) pertaining to the POR, and the two preceding years," *id.* at 30, 48, to which the GOT responded by attaching an exhibit containing annual reports for the years 2013–2015, Questionnaire Resp. of the Gov't of Turkey 11, P.R. 54–87 (Apr. 3, 2017) ("GOT Questionnaire Resp."). Those reports provide general information on the operation of the pipeline network. In particular, the report from 2015 ("2015 Annual Report"), *id.* ex. 6d, contains descriptions of specific segments of the pipeline, *id.* ex. 6d at 28–30, as well as a map titled "Natural Gas and Crude Oil Pipeline System, Natural Gas Supply-Export Contracts" ("BOTAS map"), *id.* ex. 6d at 22–23. The GOT's response also includes information on the Turkish natural gas pipeline "exit and entry points," which lists entry points numbered 1–9 and also "Export Exit Point (Greece)." *Id.* at 21–22.

Pursuant to 19 C.F.R. § 351.301(c)(3)(ii),[2] Colakoglu also submitted factual information for use in calculating a benchmark. Colakoglu's Submission Regarding Natural Gas Benchmark Pricing Data, P.R. 172–73 (Oct. 27, 2017) ("Colakoglu Benchmark Submission"). Colakoglu requested, if Commerce were to decline to employ a Tier 1 benchmark, that "the Department select a [Tier 2] benchmark price which enables it to compare BOTAS prices to a world market price that would actually be available to Colakoglu." *Id.* at 3. Based on the BOTAS map, Colakoglu suggested that "Turkey has [a] natural gas pipeline connection with Russia, Azerbaijan, [and] Iran" and, thus, only those countries could serve as a source price of natural gas available in Turkey. *Id.* The submission further provided amounts of imported natural gas organized by source country, concluding that

[2] That regulation gives parties the opportunity to provide "factual information to . . . measure the adequacy of remuneration under [the Tier 2 regulations]" so long as that information is submitted "no later than 30 days before the scheduled date of the preliminary results of review . . . ." 19 C.F.R. § 351.301(c)(3)(ii).

"almost 60% of natural gas [was imported] from Russia and [a] signification portion of the remaining share came from Iran and Azerbaijan." *Id.* at 4. Colakoglu also submitted natural gas prices published by the Romanian Energy Regulatory Authority ("RERA") and Global Trade Information Services ("GTIS"). *Id.* exs. 5–8.

For its part, RTAC submitted natural gas prices provided by the International Energy Agency ("IEA") to be used by the Department in calculating the CVD rate. RTAC Benchmark Information Submission ex. 6, P.R. 174–177 (Oct. 31, 2017). Included in the IEA dataset are natural gas sales prices from a variety of IEA-member states, including several prices from European countries. *Id.*

On December 6, 2017, the Department issued its preliminary results. *See Steel Concrete Reinforcing Bar from the Republic of Turkey*, 82 Fed. Reg. 57,574 (Dep't Commerce Dec. 6, 2017) (prelim. results) and accompanying Prelim. Decision Mem., P.R. 190 (Nov. 30, 2017) ("PDM"). Commerce preliminarily determined that, pursuant to the Department's prior determinations and due to the continued presence of BOTAS in the market, the price of natural gas in Turkey is distorted. PDM at 12–14 (citing, *inter alia*, Turkey Rebar Final Determ. I). In calculating the accompanying CVD rate, Commerce rejected Turkish domestic prices as a benchmark due to BOTAS's prevailing control over the market for natural gas, *id.* at 15, and instead relied on domestic natural gas prices from Azerbaijan, *id.* at 16. The Department determined that the use of Azerbaijani domestic prices as a Tier 2 benchmark was most appropriate "as that price represents natural gas (a) that would be available through the pipeline system to purchasers in Turkey and (b) excludes any prices on sales to Turkey itself, *i.e.*, import prices in Turkey . . . ." *Id.* (citing 19 C.F.R. § 351.511(a)(2)(ii)). In so doing, Commerce rejected both: (a) the RERA prices and the IEA prices because there ia no pipeline connection between Turkey and the source countries from which those prices originated, as well as (b) the Russian and Iranian prices because those figures are either distorted or unavailable in the record. *Id.* at 15–16. In order to arrive at the ultimate countervailable benefit, the Department then "added the per-unit transmission and capacity fees charged by BOTAS to the Azerbaijan annual price." *Id.* at 16.

After Commerce released the Preliminary Results, RTAC submitted a case brief arguing that the Department should rely on data from the IEA instead of the Azerbaijani pricing data. *See* RTAC's Case Br. & Request for Hr'g, P.R. 198 (Jan. 8, 2018) ("RTAC Case Br."). At RTAC's request, Commerce conducted a hearing on the calculation of the CVD rate. *See* Hr'g Tr., P.R. 202 (Feb. 16, 2018).

In its Final Results, Commerce adopted the determinations made in the Preliminary Results over objection from RTAC, *see* RTAC Case Brief. The Final Results determined that Colakoglu and Icdas did not receive countervailable subsidies, but that eleven companies who had not been individually examined had received countervailable subsidies. Final Results at 16,051–52. Specifically, as to the CVD calculation, the Department rejected RTAC's arguments that Azerbaijani prices could not serve a reasonable Tier 2 benchmark. I&D Mem. at 10. Commerce determined that no reasonable alternative to Azerbaijan prices exists because: (a) neither the IEA nor RERA natural gas prices could be included in the benchmark as "Turkey does not have a natural gas inflow pipeline connection with Europe," *id.* at 14; (b) the Department had previously found the Russian market to be distorted, *id.* ; and (c) GTIS prices were inconsistently reported and, thus, "could not be converted to a single unit of measurement to enable a comparison," *id.* at 15. As a result, the Azerbaijani price was left as the only available Tier 2 benchmark upon which the Department could rely. Accordingly, the Department imposed a *de minimus* CVD rate for Colakoglu and Icdas and a 1.25% rate for all others. Final Results at 16,052.

RTAC challenged the Department's selection of Tier 2 benchmarks in this court and ultimately filed a motion for judgment on the agency record. Mot. for J. on Agency Record, ECF No. 22 (Oct. 29, 2018). After several delays related to a lapse in appropriations, the Government filed its response to RTAC's motion, *see* Gov't's Br., and RTAC requested oral argument, Unopposed Mot. for Oral Arg., ECF No. 40 (May 6, 2019). The court granted RTAC's motion for oral argument, Order, ECF No. 41 (May 9, 2019), and issued questions for the parties to address at the hearing, Letter to Parties, ECF No. 43 (July 2, 2019). The court conducted that oral argument on July 18, 2019. ECF No. 44 (July 18, 2019).

JURISDICTION AND STANDARD OF REVIEW

The court possesses jurisdiction to hear this dispute pursuant to 28 U.S.C. § 1581(c). The court evaluates Commerce's factual determinations under the substantial evidence standard and reviews the Department's reasoning to determine whether it is in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "is something less than the weight of the evidence," *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 619 (1966), but "is more than a mere scintilla," *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* The Department must supply

a reasoned decision, *Atar S.R.L. v. United States*, 730 F.3d 1320, 1325 (Fed. Cir. 2013), and must consider all evidence in the record, including that which fairly detracts from its decision, *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). Ultimately, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

DISCUSSION

Upon review of its order finding a countervailable subsidy for the provision of natural gas to Turkish rebar producers, Commerce calculated a CVD rate using only Azerbaijani domestic prices because those prices represent the most reliable world market price on the record with an inflow pipeline connection to Turkey. RTAC challenges that determination as not supported by substantial evidence and not in accordance with law. However, the record supports the Department's findings and the court finds Commerce's treatment of prices on the record to be reasonable. With the benefit of the parties' submissions and counsels' oral presentations before the court, the court sustains the Department's Final Results.

Commerce endeavors to calculate CVD rates under 19 U.S.C. § 1671 through the use of benchmark prices pursuant to 19 C.F.R. § 351.511. That regulation "sets forth three methods . . . in order of preferred approach." *Nucor Corp. v. United States*, 927 F.3d 1243, 1246 (Fed. Cir. 2019). "The first two methods call for inquiry into how the sale prices at issue compare to either of two 'market' prices: either (i) a 'market-determined price' based on actual transactions in the country or (ii) a 'world market price' that would be available to the purchasers in the country." *Id.* (citing 19 C.F.R. § 351.511(a)(2)(i)–(ii)). The first is known as a Tier 1 benchmark; the second is a Tier 2 benchmark, the application of which is at the center of this dispute. When Commerce utilizes a Tier 2 benchmark because "there is no useable market-determined price with which to make the comparison," the Department will "compar[e] the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii). Commerce will only move on to a Tier 3 benchmark "[i]f there is no world market price available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(iii).

Here, due to the GOT's participation in the Turkish market for natural gas, Commerce moved on from a Tier 1 benchmark to a Tier 2 benchmark to calculate a CVD rate for Turkish producers of rebar. The Department has determined that "Turkey has the requisite inflow pipeline connections with only Azerbaijan, Iran, and Russia," I&D Mem. at 12, and "purchasers in Turkey are physically precluded from purchasing certain natural gas on the world market," *id.* at 13–14. As a result, IEA and RERA prices are not appropriate Tier 2 benchmarks because their source countries lack a pipeline connection capable of transporting natural gas into Turkey. Based on the Department's finding that only those countries with inflow pipeline connections to Turkey would be "available" to purchasers in Turkey and due to the shortcomings accompanying the Russian and Iranian prices, Commerce has used only the Azerbaijani prices.

RTAC does not challenge Commerce's declining to apply a Tier 1 benchmark, but instead contests the Department's Tier 2 calculation. RTAC presents a challenge to: (a) Commerce's factual findings surrounding Turkish pipeline connections and (b) the Department's application of its benchmark regulations. Challenging the Turkish pipeline connection findings, RTAC contends that there was not substantial evidence on the record to discard IEA prices as not capable of transport via pipeline into Turkey. Next, RTAC argues that the Department impermissibly applied its Tier 2 regulations by preferring natural gas prices from countries with an inflow pipeline connection to Turkey in calculating a world market price "available to purchasers" in Turkey. RTAC's arguments, however, are misguided. The court upholds the Department's findings regarding the Turkish pipeline as supported by substantial evidence and further holds the selection of Azerbaijani prices to be a lawful exercise of Commerce's discretion under 19 C.F.R. § 351.511(a)(2)(ii). As a result, the court sustains Commerce's determinations in full.

I. Substantial Evidence Supports the Department's Findings Surrounding the Turkish Natural Gas Pipeline Network

With regard to substantial evidence, "the question here is whether the evidence and reasonable inferences from the record support the [Department's] finding[s] . . . ." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). "Commerce may, based on its experience in administering the statute, make justifiable inferences on the record before it," *Asociacion Colombiana de Exportadores de Flores v. United States*, 23 CIT 148, 153, 40 F. Supp. 2d 466, 472 (1999) (citing *Radio Officers' Union of Commercial Telegraphers*

Union, A.F.L. v. N.L.R.B., 347 U.S. 17, 50 (1954); *Matsushita*, 750 F.2d at 933), so long as those inferences are supported in the record and logically related to the facts found.

Commerce's reliance on Azerbaijani prices as a Tier 2 benchmark is predicated upon the Department's determination that only those prices originating in a country with an inflow natural gas pipeline connection to Turkey would be reasonably available to purchasers in Turkey. Among those countries with an inflow pipeline connection to Turkey, only Azerbaijan's prices were available and non-distorted. Commerce discarded other prices, including the IEA prices, for lack of a pipeline connection because that feature rendered the domestic natural gas in those countries not "available to purchasers" in Turkey. In support of these factual determinations, Commerce cited information provided by the GOT as well as information contained in the 2015 Annual Report and the BOTAS map. As those documents adequately support Commerce's findings, the court sustains these factual determinations.

RTAC focuses its energy attacking Commerce's implicit finding that the record did not support a determination that there was an inflow pipeline connection from Greece to Turkey as such a connection would have enabled Commerce to utilize the IEA prices. Not only has Commerce supported its findings surrounding the Turkish pipeline with substantial evidence, but the factual record does not allow for an inference that there is an inflow connection with Greece. The BOTAS map and the 2015 Annual Report constitute substantial evidence supporting the Department's finding that the Greece-Turkey connection only supplies natural gas in one direction. First, the BOTAS map indicates pipeline flow through arrows which the map legend labels "GAS EXISTING IMPORTS," "COMPACTED GAS VOLUME," and "EXPORT VOLUME." GOT Questionnaire Resp. ex. 6d at 22–23. And the northwestern portion of the map utilizes a green arrow to indicate an "EXPORT VOLUME" connection to Greece. *Id.* Next, the 2015 Annual Report describes the Turkey-Greece natural gas pipeline as "developed . . . to transport natural gas . . . to European markets via Turkey and Greece." *Id.* at 31. Last, the only relevant import data available on the record contains no information on imports via pipeline from Greece or any other European country. Colakoglu Benchmark Submission at 4. Taken together, the evidence constitutes substantial evidence indicating that the pipeline flows from Turkey to Greece, and not *vice versa*.

RTAC would have the court believe that the evidence cited above does not definitively eliminate the possibility that the pipeline also flows from Greece to Turkey. However, RTAC's suggestion remains

unmoored from record evidence and calls for a fishing expedition upon remand. The court declines to engage in such unsubstantiated conjecture. Rather, the court sees the Department's inference as a reasonable one. An agency is permitted to draw an inference in consideration of all record evidence that would bolster or rebut that inference. *See Radio Officers' Union*, 347 U.S. at 56. What's more, "[a]lthough Commerce has authority to place documents in the administrative record that it deems relevant, 'the burden of creating an adequate record lies with [interested parties] and not with Commerce.'" *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). RTAC presented no evidence—either at the administrative stage or in front of the court—supporting its desired outcome and so has failed to meet its burden. The time to submit information regarding the Turkey-Greece pipeline flow has passed and the court will not remand a decision that is adequately supported by substantial evidence.[3] Here, the record contains no evidence that would counter the inference made by Commerce. The evidence in the record clearly establishes inflow pipeline connections with only Iran, Russia, and Azerbaijan. The only logical inference to be made, then, is that no other country, including Greece, has such an inflow connection.

Last, RTAC argues that Commerce "did not address, in explaining its conclusion, the Greece-Turkey pipeline evidence that tended to undermine its conclusion regarding inflow from Europe into Turkey . . . ." Reply Br. of Pl. 6, ECF No. 37 (Apr. 22, 2019). Specifically, RTAC claims that the Department did not provide an adequate reason for disregarding the GTIS data and certain information submitted by Colakoglu. *Id.* Likewise, RTAC contends that the Government's treatment of this evidence amounts to a *post hoc* rationalization for the agency's decision. *Id.* at 8. While RTAC is correct that "a reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked," *Burlington Truck Lines*, 371 U.S. at 169, this court's standard of review requires only that Commerce "take into account whatever in the record fairly detracts from [the] weight" of its ultimate conclusion, *CS Wind Viet.*, 832 F.3d at 1373. The Department's considered approach comports with that standard. First, the GTIS data related to other forms of natural gas not the subject of this

[3] Likewise, RTAC's suggestion that verification is needed falls flat. Where substantial evidence adequately supports a factual determination, no verification of those facts is required of the agency. Further, "each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record," *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014), and the court only considers the adequacy of the determination on the record before it. As a result, RTAC's reference to a prior case in which Commerce did conduct verification of pipeline flow, *Certain Cold-Rolled Steel Flat Prods. from the Russian Fed'n*, 81 Fed. Reg. 49,935 (Dep't Commerce July 29, 2016) (final affirm. CVD determ.), is unavailing.

review, I&D Mem. at 14–15 (citing Turkey Rebar Final Determ. II at 8–12, 22 (GTIS data is inconsistently reported and "includes shipments of compressed natural gas.")), such that Commerce reasonably considered and discarded those prices. Second, Colakoglu's submission is not sufficiently probative of pipeline connections and, thus, does not "fairly detract" from Commerce's findings. *See* Gov't's Br. at 12–13. Accordingly, the agency properly took this evidence under consideration and the Government's argument on appeal does not constitute a *post hoc* rationalization.

Ultimately, Commerce's findings surrounding the Turkish natural gas pipeline are supported by substantial evidence. Not only does the record support an inflow connection from Azerbaijan, but also the lack of such a connection with Greece. As a result, those findings are sustained.

II. Commerce's Prioritization of Prices from Source Countries with an Inflow Pipeline Connection to Turkey is Reasonable and in Accordance with Law

As to Commerce's determination that it would only consider prices from countries connected to Turkey via inflow pipeline, that reasoning constitutes a reasonable methodology for distinguishing amongst prices that may or may not be "available to purchasers in the country in question," 19 C.F.R. § 351.511(a)(2)(ii). In light of the considerable discretion afforded to Commerce's chosen methodology and the soundness of the agency's choice, the court sustains as lawful the Department's determination that countries without an inflow pipeline connection to Turkey do not meet the regulatory requirements of a Tier 2 benchmark.

RTAC's challenge of Commerce's methodology amounts to little more than a stated preference that the Department pursue an alternative course on remand. This court "is not to substitute its judgment for that of the agency." *See State Farm*, 463 U.S. at 43. In fact, the court extends to Commerce a measure of discretion in pursuing its methodology in administrative proceedings. *See Pesquera Mares Australes, Ltda. v. United States*, 266 F.3d 1372, 1379 (Fed. Cir. 2001). To that end, if there are multiple reasonable options at the Department's disposal, the court is not to question the agency's choice among them. *See id.* So long as Commerce has pursued a reasonable and lawful course of action, its determinations will be upheld.

Here, the Department's method of calculating a world market price is reasonable. Commerce chose to prioritize prices from countries connected via pipeline and discarded prices from countries that lacked a pipeline connection. That distinction arose out of the Department's determination that purchasers in Turkey would be "physi-

cally precluded" from accessing prices from countries without a pipeline connection as natural gas can only be transported via pipeline. While the Department may have pursued a different methodology for determining the availability of certain prices, the court will only overturn Commerce's determination if it represents an unlawful choice. Certainly, Commerce's decision to use only those world market prices that, in its view, were "reasonable to conclude . . . would be available" in Turkey is a lawful exercise of its discretion.

The best RTAC can do is allege that Commerce has treated world market prices inconsistently by determining their availability in Turkey according to pipeline connections. According to RTAC, "there is no rational distinction to be made between the Azerbaijani domestic prices and the other national domestic prices on the record" because each represents prices for sale only to domestic purchasers. Pl.'s Br. at 14. But, as the Government is quick to point out, the natural gas price used in calculating the CVD rate is not merely an Azerbaijani domestic price but rather that Azerbaijani price with an adjustment for transportation fees. The IEA prices are not similarly susceptible to such a transportation adjustment because (a) this form of natural gas can only be transported via pipeline and (b) there is no inflow pipeline connection with Europe. Ultimately, Commerce's constructed price is reasonable as Azerbaijan is the only country with available, non-distorted prices that has an inflow pipeline connection to Turkey.

While Commerce's regulations state a preference for conducting an average "to the extent practicable," 19 C.F.R. § 351.511(a)(2)(ii), the Department is under no obligation to do so, especially in an instance such as this where the record contains only one suitable world market price. Commerce need not conduct an average where the prices to be included are not consistently reported or otherwise would have a distortive effect. Moreover, when the Department reasonably concludes that there is only one price on the record amenable to inclusion in a Tier 2 calculation, Commerce need not reverse-engineer the availability of certain prices so as to conduct an average. Here, the Department is faced with only one price on the record it views as reliable and available; having found that selection to be supported by substantial evidence, the court likewise sanctions the calculation using only the Azerbaijani prices as a lawful expression of agency discretion under 19 C.F.R. § 351.511(a)(2)(ii).

CONCLUSION

Commerce's decision to calculate a Tier 2 benchmark using only the Azerbaijani prices is supported by substantial evidence and in accordance with law. The Department cited sufficient evidence and made

permissible inferences in finding that only certain countries have an inflow pipeline connection with Turkey. With those findings in tow, Commerce exercised its discretion to pursue a lawful methodology that employed use of only those prices available to purchasers in Turkey via inflow pipeline connection. Accordingly, the court **SUSTAINS** Commerce's determinations in full and judgment will enter accordingly.

Dated: August 8, 2019
New York, New York

/*s*/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 19–108

OMAN FASTENERS, LLC, Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 18–00244

[Defendant's motion to dismiss for lack of subject-matter jurisdiction is denied; Plaintiff's unopposed motion to consolidate is granted.]

Dated: August 8, 2019

Michael P. House, Perkins Coie, LLP of Washington, DC, for Plaintiff.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Joseph H. Hunt*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Kristen McCannon*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon and *Ping Gong*, The Bristol Group PLLC of Washington, DC, for Defendant-Intervenor.

MEMORANDUM OPINION

Eaton, Judge:

Plaintiff Oman Fasteners, LLC ("Plaintiff" or "Oman Fasteners") commenced this action to challenge certain aspects of the final results of the United States Department of Commerce's ("Commerce" or the "Department") second administrative review of the antidumping duty order on certain steel nails from the Sultanate of Oman. *See Certain Steel Nails From the Sultanate of Oman*, 83 Fed. Reg. 58,231 (Dep't Commerce Nov. 19, 2018) ("Final Results"); *see also Certain Steel Nails From the Rep. of Korea, Malay., the Sultanate of Oman, Taiwan,*

and the Socialist Rep. of Viet., 80 Fed. Reg. 39,994 (Dep't Commerce July 13, 2015) ("Order"). Plaintiff was a mandatory respondent in that review and received a zero percent weighted-average dumping margin.

The Final Results are also the subject of a separate lawsuit, commenced by Mid Continent Steel & Wire, Inc., a U.S. manufacturer of the domestic like product, captioned *Mid Continent Steel & Wire, Inc. v. United States*, Court No. 18–00235 ("*Mid Continent*"). Oman Fasteners is a defendant-intervenor in the *Mid Continent* case. *Mid Continent* is stayed pending the final resolution of an appeal currently before the Court of Appeals for the Federal Circuit, *Mid Continent Steel & Wire, Inc. v. United States*, Court No. 2018–1250 (appeal filed Dec. 4, 2017) ("Appeal").[1]

Before the court are two motions: (1) the motion of Defendant the United States ("Defendant") to dismiss Oman Fasteners' complaint for lack of subject-matter jurisdiction, pursuant to Rule 12(b)(1),[2] and (2) Oman Fasteners' motion to consolidate[3] this action with the *Mid Continent* case, pursuant to Rule 42(a). *See* Def.'s Mot. Dismiss, ECF No. 30 ("Def.'s Mot."); Def.'s Reply Br. Supp. Mot. Dismiss, ECF No. 36 ("Def.'s Reply"); *see also* Pl.'s Unopposed Mot. Consolidate and Stay, ECF No. 39 ("Pl.'s Mot.").

By its motion to dismiss, Defendant claims that Oman Fasteners lacks constitutional standing to bring a lawsuit challenging the Final Results, for the sole reason that it received a zero percent margin in the administrative review. *See generally* Def.'s Mot. Because of the zero percent margin, Defendant contends, Oman Fasteners "cannot demonstrate that it has suffered an injury in fact." Def.'s Mot. 2; *see also* U.S. CONST. art. III, § 2, cl. 1.

Plaintiff opposes the motion to dismiss, maintaining that it has alleged sufficient injury for constitutional standing purposes, namely, "a concrete procedural injury—the potential for permanent loss of its right to challenge Commerce determinations that Oman Fasteners believes were unlawful." Pl.'s Opp'n Def.'s Mot. Dismiss, ECF No. 35 at 6 ("Pl.'s Opp'n"). Specifically, notwithstanding its zero percent margin, Oman Fasteners disputes certain of Commerce's determina-

[1] The Appeal is a review of this Court's decision sustaining the Department's final affirmative less-than-fair-value determination concerning steel nails from the Sultanate of Oman. *See Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, 273 F. Supp. 3d 1348 (2017) (sustaining final less-than-fair-value determination after remand).

[2] Rule 12(b)(1) provides in part that a party may assert certain defenses by motion, including lack of subject-matter jurisdiction. *See* U.S. CT. INT'L TRADE R. 12(b)(1).

[3] Defendant does not oppose Plaintiff's motion should the court deny the motion to dismiss. *See* Pl.'s Unopposed Mot. Consolidate and Stay, ECF No. 39 at 2.

tions as unsupported by substantial evidence and otherwise not in accordance with law. Since its claims are beyond the scope of issues in the *Mid Continent* complaint, however, Oman Fasteners cannot raise them as defendant-intervenor in that action. *See* Pl.'s Resp. Ct. Order, ECF No. 41 at 3–4 (quoting, *inter alia*, *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944)). Thus, by commencing this action, Plaintiff seeks to "ensure that it is afforded due process to present its arguments with respect to [those allegedly unlawful] determinations underlying the Final Results . . . ." Pl.'s Opp'n 3. For Plaintiff, unless it is permitted to bring its claims in this action, it may only get the chance in a separate, expensive lawsuit, or not at all. Thus, Plaintiff asks the court to deny Defendant's motion to dismiss.

Plaintiff's consolidation motion asks the court to consolidate this case with *Mid Continent*. Plaintiff asserts that judicial economy favors consolidation because both the *Mid Continent* case and this action dispute aspects of the same Final Results, and some issues in the Appeal (pending the resolution of which *Mid Continent* is stayed) overlap with Plaintiff's claims in this action. *See* Pl.'s Mot. 2–3 (arguing that consolidation and stay are appropriate because this action and *Mid Continent* "concern the same underlying administrative determination," *i.e.*, "each of the two actions is predicated on the identical underlying agency administrative record, the actions challenge various aspects of thesame administrative determination which is based on that record, and the actions involve the same parties."); Pl.'s Mot. 3 ("The Appeal [before the Federal Circuit] will . . . likely dispose of at least one of three issues raised" in the complaint in this action, *i.e.*, "whether . . . Commerce's decision not to calculate, or attempt to calculate, a profit rate cap . . . is supported by substantial evidence and in accordance with law.").

For the reasons below, the court denies Defendant's motion to dismiss, and grants Plaintiff's motion to consolidate.

BACKGROUND

Oman Fasteners is a foreign producer, exporter, and U.S. importer of steel nails that are subject to the Order. *See* Compl., ECF No. 10, ¶ 1. It participated in the second administrative review of the Order as a mandatory respondent. Compl. ¶ 8.

On November 19, 2018, Commerce published the Final Results, in which it determined a zero percent weighted-average dumping margin for Oman Fasteners. Compl. ¶ 19.

On November 28, 2018, Mid Continent Steel & Wire, Inc., a U.S. manufacturer of the domestic like product and Defendant-Intervenor

here, commenced the *Mid Continent* case to challenge the Final Results with respect to (1) Commerce's determination that Oman Fasteners and its largest U.S. supplier were not affiliated, and (2) Commerce's choice of a Japanese company as the source of information to construct the value for profit and indirect selling expenses. *See Mid Continent*, Ct. No. 18–00235, Compl., ECF No. 8, ¶¶ 15–26. Should Mid Continent ultimately prevail, a natural result would be a positive dumping margin for Oman Fasteners.

On December 19, 2018, Oman Fasteners filed the complaint, alleging that this Court has jurisdiction under 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (B)(iii) (2012), and that Plaintiff had standing as an "interested party" as defined in 19 U.S.C. § 1677(9)(A). Compl. ¶¶ 4, 5. In its complaint, Oman Fasteners alleges three claims: (1) "Commerce's failure to calculate, or attempt to calculate, a profit rate cap as expressly required by statute is unsupported by substantial evidence and contrary to law," Compl. ¶ 22 (Count I); (2) "Commerce's failure to base [constructed value] ratios on a home market source in this review is unsupported by substantial evidence and contrary to law," Compl. ¶ 24 (Count II); (3) "Commerce's application of its so-called 'differential pricing' methodology in this review is unsupported by substantial evidence and contrary to law." Compl. ¶ 26 (Count III). Plaintiff asks the court to "enter judgment holding unlawful the decisions of Commerce identified [in the complaint]; [and] remand this matter to Commerce for a redetermination consistent with the [court's] holding." Compl. ¶ 27. So, as Mid Continent does in its case, Oman Fasteners, too, seeks to challenge aspects of the Final Results.

On December 20, 2019, the day after commencing this action, Oman Fasteners moved to intervene as of right, pursuant to Rule 24(a), as defendant-intervenor in *Mid Continent*. The court granted that motion. *See Mid Continent*, Ct. No. 18–00235, Order dated Dec. 20, 2019, ECF No. 19.

On February 6, 2019, Defendant moved to dismiss this action. *See* Def.'s Mot.

On April 1, 2019, Plaintiff moved to consolidate this action with *Mid Continent*. *See* Pl.'s Mot.

On April 23, 2019, the court ordered Oman Fasteners to submit a statement explaining, "with specificity, how [it] will be prevented from raising the exact same issues in [*Mid Continent*,] Court No. 18–00235, that it has sought to raise in this case," and afforded Defendant an opportunity to submit a response. Order dated Apr. 23, 2019, ECF No. 40. The parties timely filed their respective state-

ments. *See* Pl.'s Resp. Ct. Order; Def.'s Resp. Pl.'s Submission Resp. Ct. Order, ECF No. 42.

STANDARD OF REVIEW

Whether this Court may exercise subject-matter jurisdiction over the claims asserted in a complaint is a threshold inquiry. "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (citation omitted). In deciding a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, the court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (citations omitted).

DISCUSSION

"[J]urisdiction is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case." *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (citations and emphasis omitted). This power is circumscribed by Article III of the U.S. Constitution, which limits the jurisdiction of the federal courts to "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [or] the Laws of the United States . . . ; [and] to Controversies to which the United States shall be a Party."). "One essential aspect of [the] requirement [of jurisdiction] is that any person invoking the power of a federal court must demonstrate standing to do so." *Va. House of Delegates v. Bethune-Hill*, 587 U.S. __, __, 139 S. Ct. 1945, 1950 (2019) (citation omitted). "[S]tanding is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction." *Davis*, 442 U.S. at 239 n.18 (citation and emphasis omitted). "The three elements of standing . . . are (1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Va. House of Delegates*, 587 U.S. at __, 139 S. Ct. at 1950 (citation omitted).

Injury in fact is one of the three elements that must be present before a plaintiff can be found to have constitutional standing. Though often stated as requiring a "concrete and particularized" injury, economic harm is not a standing requirement. *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 582 (1992) (Stevens, J., concurring) ("[T]his Court has often held that injuries to . . . interests [such as "esthetic enjoyment,

an interest in professional research, or an economic interest in preservation of the species"], are sufficient to confer standing."). In other words, the absence of economic harm does not foreclose a finding of a cognizable injury for constitutional standing purposes.

Neither does the requirement of a "concrete and particularized" injury mean that injury must be suffered prior to the institution of suit. In certain situations the prospect of potential future injury will suffice. For instance, the Supreme Court has held that a plaintiff could maintain an action to establish, as a matter of record, title to real property that had been acquired through adverse possession, and to enjoin the defendants from asserting title to the same property. The defendants in that action (1) were unaware that they might have a claim to the real property, (2) had never sought to assert a claim to it, and (3) had evidenced no intent to ever assert a claim. *See Sharon v. Tucker*, 144 U.S. 533, 536, 543 (1892).

For guidance on when the claimed injury is too remote to be justiciable, courts often turn to *Lujan v. Defenders of Wildlife*:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.

504 U.S. 555, 561–62 (1992). The essence of *Lujan*, then, was that when the government is sued to force it to take action (or to challenge an action taken), the plaintiff is required to demonstrate some sort of personal harm for standing to be found. The *Lujan* Court found no standing to challenge a regulation relating to endangered species in foreign lands, when the plaintiffs' only connection to those animals was that they had seen similar animals once, and might travel to see them again. Although decided based on standing, *Lujan* is usually read as touching on a mixture of the proper separation of executive and judicial power, the political question doctrine, and other concerns relating to justiciability.[4] Thus, while setting out the standing re-

[4] Justiciability encompasses the doctrines of standing, mootness, ripeness, and political question. *See Fisher v. United States*, 402 F.3d 1167, 1176 (Fed. Cir. 2005). These concerns were touched upon in the recent cases of *Department of Commerce v. New York*, 588 U.S. __, 139 S. Ct. 2551 (2019) and *Trump v. Sierra Club*, 588 U.S. __, 2019 WL 3369425 (2019).

quirements in a general way, *Lujan* is of limited use when determining who has standing in the unfair trade cases typically before this Court.

More useful guidance can be found in cases dealing with commercial disputes, including the long line of cases resulting from the Declaratory Judgment Act of 1934.[5] It is a legal commonplace that, while the Act created a new form of relief (the declaratory judgment), it did not alter any law relating to standing. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 138 (2007) (Thomas, J., dissenting) (citing *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 27273 (1941)) ("The Declaratory Judgment Act did not (and could not) alter the constitutional definition of 'case or controversy' or relax Article III's command that an actual case or controversy exist before federal courts may adjudicate a question."). Thus, the law of standing developed for cases brought under the Act applies equally to the case now before the court.

Chief Justice Hughes wrote the first Supreme Court opinion describing what was required for a lawsuit brought under the Declaratory Judgment Act to satisfy the Article III "case or controversy" requirement:

> A "controversy" in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, *the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages*.

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937) (emphasis added) (citations omitted). The last lines of the quoted language anticipate that cases could be heard settling the rights of the parties with respect to facts that would develop in the future. Justice Hughes does not mention standing but rather speaks in terms of justiciability,

[5] While *Lujan* itself was a declaratory judgment case, there is no indication that it overruled the long line of cases decided under the Declaratory Judgment Act.

which encompasses standing. *See Fisher v. United States*, 402 F.3d 1167, 1176 (Fed. Cir. 2005) (citations omitted) ("Though justiciability has no precise definition or scope, [the] doctrine[] of standing . . . [is] within its ambit.").

Thereafter, matters have regularly been heard in the federal courts where the injury to a party seeking relief might not appear to be either actual or imminent. For instance, many cases have been heard to sort out the rights and liabilities of parties to insurance contracts where only a right to future indemnity was at issue, *i.e.*, where no claim for indemnity had yet been made under the policy (although the insured had been found liable for amounts arguably covered by the policy). *See, e.g.*, *Nestlé Foods Corp. v. Aetna Cas. & Sur. Co.*, 842 F. Supp. 125 (D.N.J. 1993). In a declaratory judgment action involving a patent dispute, the Federal Circuit has found standing, where, although the defendant had not yet charged infringement, it had twice sued the plaintiff for infringing patents on related products, and with respect to the patent at issue had challenged the plaintiff's patent in the U.S. Patent Office and pursued its own competing application. *See Danisco U.S. Inc. v. Novozymes A/S*, 744 F.3d 1325, 1330 (Fed. Cir. 2014) (quoting and citing *MedImmune*, 549 U.S. at 127). Thus, in commercial cases, standing is regularly found where no party has yet suffered a monetary injury.

And so it should be with the dumping and countervailing duty cases brought before this Court. Thus, the court finds that (1) the absence of a positive dumping margin is not a bar to standing in an antidumping case, and (2) Oman Fasteners has standing to bring its case.[6] The Defendant's sole argument is that the zero percent dumping margin bars Plaintiff's case. As the foregoing cases demonstrate, however, there is no constitutional requirement that Plaintiff demonstrate economic injury to have standing. Nor for that matter is present injury a standing requirement. Rather, the threat of injury may suffice for standing purposes, so long as it is not conjectural or hypothetical. *See Defs. of Wildlife, Friends of Animals & Their Env't v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988) (citation omitted) ("A

[6] Although Article III standing is jurisdictional, it is unclear if prudential standing is. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–27 (2014). Nonetheless, it should be noted here. Under the usual description of prudential standing, three kinds of disputes are barred from being heard by federal courts, *i.e.*, (1) those that involve generalized grievances, (2) those involving third-party standing, and (3) those outside of the zone of interest. While important, prudential considerations are not present in this case. Generalized interests are distinguished from the particularized interests required for standing. Third-party considerations are centered on the idea that a party may assert only its own rights. By zone of interest is meant "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

threatened injury may constitute an injury in fact."); *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 918 F.3d 1355, 136465 (Fed. Cir. 2019) (injury in fact test requires "an inquiry into the actual or threatened effect on the plaintiff of the specific challenged agency action"). Therefore, to the extent Defendant argues that injury may be shown only by a greater-than-zero-percent margin in the underlying proceeding, its argument is not supported by the law.[7] *See* Def.'s Reply 2 ("Oman Fasteners Has Not And Cannot Establish Actual Injury").[8]

Moreover, the court finds that Oman Fasteners has standing to bring its case for reasons both legal and practical.

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[7] *Freeport Minerals Co. v. United States*, 758 F.2d 629 (Fed. Cir. 1985) has been cited for the proposition that a positive dumping margin is a prerequisite for a party to have standing to challenge an administrative determination in a dumping case. *See, e.g.*, *Royal Thai Gov't v. United States*, 38 CIT __, __, 978 F. Supp. 2d 1330, 1333 (2014). In *Freeport Minerals*, a domestic producer of sulfur did not immediately challenge in this Court a "notice" issued by Commerce finding no dumping by three foreign producers. Although the notice alerted those concerned that the three companies had not dumped, it left in place the antidumping duty order that contained positive antidumping duty margins for the three companies. When, some time later, the order was revoked, Freeport sued to challenge the revocation. The government argued that Freeport was too late because the findings it sought to challenge had been the subject of the preceding year's notice, and thus its complaint was filed outside the thirty-day period allowed for such challenges.

The Federal Circuit found Freeport Minerals' suit timely and gave several reasons why. First, the Court agreed with Freeport's argument "that it would have made no sense and would have wasted judicial and legal resources" for it to have challenged the earlier notice. *Freeport Minerals*, 758 F.2d at 633. The reason it would have "made no sense" was because the antidumping order remained in place following the notice, apparently as a means to twist the arms of the three foreign producers to encourage the cooperation of a fourth foreign producer. Keeping the order in place was Freeport Minerals' goal. If Freeport sued immediately after issuance of the notice, it risked having the order revoked as a result of its lawsuit. In reaching its finding that Freeport was right not to sue immediately after the notice had been issued, the Court endorsed Freeport's litigation strategy. Second, the Court noted that "[a]s a general rule, the prevailing party in a proceeding may not appeal the proceeding just because he disagrees with some of the findings or reasoning. If this were not so, appellate courts would be swamped with theoretical disputes." *Id.* at 634. Here, the Court seems to be using a public policy argument combined with the desire to avoid issuing advisory opinions. *Freeport Minerals* was, of course, a case that had been heard by the CIT and appealed to the Federal Circuit; it was not, however, the review of an administrative proceeding by this Court. Third, in a footnote, the Court stated, "Perhaps a more apt litigating analogy would be to the final judgment rule, whereby, with certain statutory and judicial exceptions, a party may not appeal a federal district court decision until it is final." *Id.* at 634 n.13 (citation omitted). The Court, thus, suggests that seeking review in the CIT of the notice would be the equivalent of an interlocutory appeal. Finally, the Court observed that the findings in the notice had been mooted by subsequent CIT action, and Commerce's determination on remand. *Id.* at 634.

Thus, the Court found that Freeport did not bring its action out of time. It is worth noting, however, that in none of the Court's common-sense findings did it mention injury or standing or suggest in any way that Article III standing is dependent upon a plaintiff having received a positive dumping margin.

[8] The cases of *Royal Thai Government v. United States*, 38 CIT __, 978 F. Supp. 2d 1330 (2014), *Zhanjiang Guolian Aquatic Products Co. v. United States*, 38 CIT __, 991 F. Supp. 2d 1339 (2014), *Jubail Energy Services Co. v. United States*, 39 CIT __, 125 F. Supp. 3d 1352 (2015), and *PAO Severstal v. United States*, 41 CIT __, 219 F. Supp. 3d 1411 (2017) are sufficiently different on their facts to be of little assistance here.

First, the record and the Final Results challenged by Plaintiff are now before the court in *Mid Continent*.

Second, Plaintiff is in the *Mid Continent* case as a defendant-intervenor, and Oman Fasteners' status as an intervenor (although an intervenor that may not expand the issues in the complaint) argues in favor of its being granted standing here.

Third, as noted above, at least one of the claims raised in Plaintiff's complaint is currently pending before the Federal Circuit in the Appeal. To the extent the Federal Circuit rules on the overlapping issues, Plaintiff's claims may be resolved one way or another by the Appeal and can be included in the judgment in its case.

Fourth, it is likely that unless Plaintiff is permitted to pursue the claims in its complaint through this action, it will never have the opportunity to do so in the context of *Mid Continent*. Plaintiff is correct that it could not bring crossclaims in *Mid Continent* (as a defendant-intervenor) based on its claims in this case because doing so "would have impermissibly expanded the scope of [*Mid Continent*] beyond the issues raised by Mid Continent's complaint." Pl.'s Resp. Ct. Order at 3–4 (quoting, *inter alia*, *Vinson*, 321 U.S. at 498) ("[O]ne of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but it is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding."). Defendant "agree[s] that it would have been improper for Oman Fasteners to have tried to raise the claims it seeks to raise here as cross-claims in *Mid Continent*." Def.'s Resp. Pl.'s Submission Resp. Ct. Order at 2.

The Government's solution to the problem would be that "if Commerce, upon remand [in *Mid Continent*], calculates a positive dumping margin for Oman Fasteners," then "Oman Fasteners could challenge 'other relevant portions of Commerce's existing [Final Results], *so long as they survive Commerce's remand and contribute to the basis of the [ ] order*' *by filing a summons within thirty days after the publication of [the] new dumping margin*." Def.'s Resp. Pl.'s Submission Resp. Ct. Order at 3 (emphasis added) (quoting *PAO Severstal v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1411, 1416 (2017)). In other words, Defendant suggests that if Plaintiff were to receive a positive margin on remand in the *Mid Continent* case, it could possibly bring a new, separate lawsuit challenging that margin. This cumbersome procedure is simply not in line with modern ideas of efficient adjudication of cases. That is, this kind of piecemeal litigation is something courts have striven to avoid. *See, e.g.*, *Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001) (concluding that, "in the

interests of judicial economy and avoidance of piecemeal litigation," plaintiff's claims should be appealed together where "underlying facts of the . . . claims are . . . intimately connected"); *Since Hardware (Guangzhou) Co. v. United States*, 38 CIT __, __, 991 F. Supp. 2d 1319, 1321–22 (2014) (denying motion to sever cases that had been consolidated because doing so would "promot[e] uncertainty, delay, and expense . . . by forcing the parties to appeal and defend identical issues arising out of the same administrative proceeding in separate appeals, each on their own track"); *Papierfabrik August Koehler AG v. United States*, 36 CIT 1632, 1637 (2012) (not reported in Federal Supplement) (denying motion for partial stay to avoid "delay and extend[ed] proceedings through piecemeal litigation and appellate reviews").

Fifth, and most importantly, Plaintiff's claims would be sufficient for it to have standing were its claims being heard under the procedures of the Declaratory Judgment Act. As noted, the Declaratory Judgment Act is a procedural law only. It created no cause of action, nor did it define any new injuries. Thus, any case brought under the Act must obtain Article III standing in the identical fashion of any other case brought before the federal courts.

The law of declaratory judgment, as developed, has four general prerequisites for a case to be heard, *i.e.*, (1) adverse parties, (2) who have an interest in a disputed legal right, (3) whose claims to that right are capable of being adjudicated by the court, and (4) whose rights can be determined in a final judgment. *See Md. Cas. Co*., 312 U.S. at 273 (citing *Aetna Life Ins. Co*., 300 U.S. at 239–42) ("Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."); *see also MedImmune*, 549 U.S. at 127.

Here, there is little doubt that Plaintiff's claims would survive scrutiny under the four tests and that its rights can be established by the court: (1) the parties are adverse both in this case and with respect to Oman Fasteners' particular claims, (2) there is a dispute over the proper application of the antidumping law to the facts on the record of the administrative review, (3) the adjudication of the meaning of the law is within this Court's competence, and (4) this Court can issue a binding judgment with respect to the meaning of that law for purposes of this case.

It is, of course, true that, here, as in many declaratory judgment cases, the injury is something that may take place in the future.

Because this injury may take place in the future, Defendant says it is too speculative to support Article III standing. Certainty of future injury, however, is not required to satisfy Article III. *See Associated Indem. Corp. v. Fairchild Indus., Inc.*, 961 F.2d 32, 35 (2d Cir. 1992) (citation omitted) ("[L]itigation over insurance coverage has become the paradigm for asserting jurisdiction despite future contingencies that will determine whether a controversy ever actually becomes real."). Remands are hardly unknown in the Court of International Trade. Indeed, the order that resulted in the administrative review that is the subject of Oman Fasteners' case was remanded, and the results of that remand are now on appeal. *See Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, 203 F. Supp. 3d 1295 (2017). Nor is it unknown for dumping margins to change for parties and non-parties to an antidumping lawsuit. Commerce's legal interpretation, of which Oman Fasteners complains, could affect the company's margin should there be a remand. Indeed, these interpretations appear to be ones that Commerce has made before (witness the Appeal presently before the Federal Circuit) and is likely to make again. Thus, while the injury that might befall Oman Fasteners is not imminent, it is not more remote than those found to fall within Article III in other contexts.

Taking its allegations and arguments together, and drawing all reasonable inferences in favor of Plaintiff, Oman Fasteners has demonstrated a sufficiently non-speculative threat of injury resulting from Commerce's actions that is enough to establish constitutional standing. In reaching this conclusion the court is addressing the sole justiciability claim raised by Defendant, *i.e.*, that the absence of a positive dumping margin is a bar to standing in an antidumping case. It reaches no conclusion with respect to other matters touching on justiciability.

Because the goal of judicial economy will be advanced by consolidation here, Plaintiff's case will be consolidated with *Mid Continent* and stayed pending the final outcome of the Appeal.

CONCLUSION

Based on the foregoing, Defendant's motion to dismiss for lack of subject-matter jurisdiction is denied, and Plaintiff's motion to consolidate this action with lead case *Mid Continent Steel & Wire, Inc. v. United States*, Court No. 18–00235, and to stay this action pending the final outcome of the Appeal is granted. This action shall be consolidated *sub nom Mid Continent Steel & Wire, Inc. v. United States*, Consolidated Court No. 18–00235, and subjected to the stay

order currently in place in Court No. 18–00235, ECF No. 31. Judgment shall be entered accordingly.

Dated: August 8, 2019
New York, New York

/s/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE