U.S. Court of International Trade

Slip Op. 19–100

REBAR TRADE ACTION COALITION, Plaintiff, v. UNITED STATES, Defendant, and GRUPO SIMEC et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 17–00184
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's remand redetermination in the first administrative review of steel concrete reinforcing bar from Mexico.]

Dated: August 1, 2019

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OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") remand redetermination filed pursuant to the court's order in *Rebar Trade Action Coalition v. United States*, 42 CIT __, __, 337 F. Supp. 3d 1251, 1265 (2018) ("*Rebar*"). *See* Final Results of Redetermination Pursuant [*Rebar*] Ct. Remand, Apr. 8, 2019, ECF No. 75–1 ("*Remand Results*").

In *Rebar*, the court addressed Plaintiff, Rebar Trade Action Coalition's ("RTAC" or "Plaintiff") challenges to Commerce's final determination in the first administrative review of the antidumping duty ("ADD") order covering steel concrete reinforcing bar ("rebar") from Mexico. *See Rebar*, 42 CIT at __, 337 F. Supp. 3d at 1255–65; *see also* Mem. Pl. [RTAC] Supp. Rule 56.2 Mot. J. Agency R. at 9–38, Dec. 14, 2017, ECF No. 27; *Steel Concrete Reinforcing Bar From Mexico*, 82 Fed. Reg. 27,233 (Dep't Commerce June 14, 2017) (final results of

[ADD] admin. review; 2014–2015) ("*Final Results*") and accompanying Decision Mem. for the Final Results of [ADD] Admin. Review: Steel Concrete Reinforcing Bar from Mexico; 2014–2015, A-201–844, (June 7, 2017), ECF No. 19–5 ("Final Decision Memo"); *Steel Concrete Reinforcing Bar From Mexico*, 79 Fed. Reg. 65,925 (Dep't Commerce Nov. 6, 2014) ([ADD] order). The court remanded for further explanation or reconsideration Commerce's (i) decision not to collapse six affiliates of Grupo Simec S.A.B. de C.V. and Orge S.A. de C.V.'s ("Simec"), the parent company, that owned fixed assets, but did not produce rebar ("non-collapsed group" or "non-collapsed companies"), *Rebar*, 42 CIT at __, 337 F. Supp. 3d at 1255–59, 1265; (ii) reliance on the cost experiences of the collapsed fixed asset owners to value the non-collapsed companies' fixed assets, *id.* at __, 337 F. Supp. 3d at 1259–62, 1265; and (iii) decision not to apply total or partial facts available with an adverse inference to respondent.[1] *See id.* at __, 337 F. Supp. 3d at 1262–65. For the reasons that follow, the court sustains the *Remand Results*.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the prior opinion, *Rebar*, 42 CIT at __, 337 F. Supp. 3d at 1255, and here restates the facts relevant to the court's review of the *Remand Results*. The first administrative review of the subject merchandise covered the period of April 24, 2014, through October 31, 2015, and reviewed respondents Deacero S.A.P.I de C.V. and Simec. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 736, 737 (Dep't Commerce Jan. 7, 2016).

Pertinent here, in its final determination, Commerce collapsed Grupo Simec S.A.B. de C.V., Orge S.A. de C.V., Compania Siderurgica del Pacifico S.A. de C.V., Grupo Chant S.A.P.I. de C.V., RRLC S.A.P.I. de C.V., Siderurgica del Occidente y Pacifico S.A. de C.V., Simec International 6 S.A. de C.V., Simec International 7 S.A. de C.V., and Simec International 9 S.A. de C.V. ("Grupo Simec" or the "collapsed group"), and determined that the companies should be treated as a single entity because record evidence showed that there was a significant potential for manipulation of price or production. *See* Final Decision Memo at 31–32; *Final Results*, 82 Fed. Reg. at 27,234 n.10; *see also Steel Concrete Reinforcing Bar From Mexico*, 81 Fed. Reg. 89,053, 89,053 n.5 (Dep't Commerce Dec. 9, 2016) (prelim. results

[1] Although 19 U.S.C. § 1677e(a)–(b) (2015) and 19 C.F.R. § 351.308(a)–(c) (2016) each separately provide for the use of facts otherwise available and the subsequent application of adverse inferences to those facts, parties sometimes use the shorthand "adverse facts available" or "AFA" to refer to its use of such facts otherwise available with an adverse inference.

[ADD] admin. review; 2014–2015) ("*Prelim. Results*") and accompanying Decision Mem. Prelim. Results of [ADD] Admin. Review: Steel Concrete Reinforcing Bar from Mexico; 2014–2015 at 3–4, A-201–844, PD 127, bar code 3527282–01 (Dec. 5, 2016).[2] Commerce rejected RTAC's argument that the non-collapsed companies should also have been collapsed because all owned fixed assets, i.e., the facilities and production equipment used to produce rebar, and leased those fixed assets to the collapsed companies. *See* Final Decision Memo at 31–32; *see also* [Commerce's] Final Results Sales & Cost Analysis Mem. at 2, CD 237, bar code 3579897–01 (June 7, 2017) ("Final Calc. Memo"). For the *Final Results*, Commerce continued to calculate a weighted-average dumping margin of 0.56% for Deacero S.A.P.I. de C.V. and 0.00% for Grupo Simec S.A.B. de C.V., as it had done in its preliminary determination. *See Final Results*, 82 Fed. Reg. at 27,234; *Prelim. Results*, 81 Fed. Reg. at 89,053.

In *Rebar*, the court remanded for further explanation or reconsideration Commerce's (i) decision not to collapse six fixed asset owning companies affiliated with Simec, (ii) application of the transactions disregarded and major input rules, (iii) decision not to apply total facts available to calculate Simec's dumping margin, or facts otherwise available to Simec's cost reporting, and (iv) decision not to apply adverse inferences to calculate Simec's dumping margin. *Rebar*, 42 CIT at __, 337 F. Supp. 3d at 1265.

Commerce filed the *Remand Results* on April 8, 2019. On remand, Commerce reopened the record and collected further information on the management, business operations, and ownership of the companies in the non-collapsed group and determined that record evidence did not demonstrate a significant potential for manipulation that would warrant collapsing under 19 C.F.R. § 351.401(f)(2) (2016).[3] *Remand Results* at 7–12. Regarding the application of the transactions disregarded rule, Commerce conceded that "it may not be reasonable to assume" that experiences of the non-collapsed fixed asset holders mirrored those of the collapsed fixed asset holders and revised its methodology. *Id.* at 16. Commerce explains it was able to derive company-specific general and administrative expenses ("G&A") for all the non-collapsed companies relying either solely on Grupo Simec's audited consolidated financial statements and under-

[2] On September 1, 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 No. 19–2–3. On April 11, 2019, Defendant filed indices to the public and confidential administrative records underlying the remand portion of these proceedings. The indices to the remand redetermination are located on the docket at ECF No. 77–2–3. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices.

[3] Further citations to Title 19 of the Code of Federal Regulations are to the 2016 edition.

lying consolidated worksheets, or on a combination of the consolidated financial statements and information solicited during the remand proceedings. *See id.* at 16–18. Finally, Commerce reasoned that it did not need to rely on facts available or adverse inferences because it had all the information it needed to conduct the collapsing analysis and was no longer estimating the non-collapsed companies' costs. *Id.* at 18.

In its reply to comments on remand, Defendant, for the first time, challenged RTAC's standing to bring this action. Def.'s Resp. Comments on [*Remand Results*] at 11–12, July 1, 2019, ECF No. 90 ("Def.'s Resp. Comments"); *see also* U.S. Const. art. III, § 2, cl. 1. The court requested supplemental briefing to provide all parties with the opportunity to be heard on the issue. Ct.'s Letter at 2, June 11, 2019, ECF No. 86. All parties complied with the court's request. *See generally* [RTAC's] Suppl. Br., June 18, 2019, ECF No. 87 ("RTAC's Suppl. Br."); Def.'s Resp. [RTAC's] Suppl. Br., July 1, 2019, ECF No. 91 ("Def.'s Suppl. Resp. Br."); Def.-Intervenors' Resp. Pl.'s Suppl. Br., June 24, 2019, ECF No. 88 ("Def.-Intervenors' Suppl. Resp. Br.").

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) (2012)[4] 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

I. Standing

The Court has "exclusive jurisdiction" over claims commenced under 19 U.S.C. § 1516a. 28 U.S.C. § 1581(c) (2012). The party seeking the Court's jurisdiction has the burden of establishing that jurisdiction exists. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d

[4] 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. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015).

1347, 1355 (Fed. Cir. 2006) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The Constitution constrains the federal courts' jurisdiction to cases which involve "actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."); *see* U.S. Const. art. III, § 2, cl. 1. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, plaintiff must demonstrate that its claim represents an "injury in fact." *Id.* An "injury in fact" is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical[,]" "fairly traceable to the challenged action," and "likely" to be "redressed by a favorable decision." *Id.* at 560–61 (citation omitted). Accordingly, regardless of a statutory grant of jurisdiction, a federal court must dismiss as non-justiciable any claim that fails to meet Article III criteria.

RTAC challenges three aspects of Commerce's final determination, all of which are interconnected. In addition to challenging Commerce's collapsing analysis and, if it should lose on that count, Commerce's application of the transactions disregarded rule,[5] RTAC is also claiming that Commerce's decision not to apply total-AFA, in light of the respondent's conduct and existing gaps in information, is not in accordance with law and is unsupported by substantial evidence. Pl. [RTAC's] Comments on [*Remand Results*] at 3–31, May 9, 2019, ECF No. 80 ("Pl.'s Comments"). RTAC contends that if it is successful on its total-AFA claim, Commerce would be prompted to select the investigation rate, 66.70%, as Simec's rate. RTAC's Suppl. Br. at 4–5. Further, it contends that if the presently non-collapsed fixed asset owners were collapsed, Commerce would be forced to confront the fact that these companies' individual financial statements are not on the record. *See id.* at 4, 7. RTAC contends that the statements will be necessary to calculate a rate for the expanded collapsed entity. *Id.* at 4–5. The production of such records, or lack thereof, RTAC argues, would likely change Commerce's calculation of costs for the expanded collapsed entity or trigger Commerce's reliance on 19 U.S.C. § 1677e(a) or (b), or both. *Id.* at 4–7.

RTAC has standing to challenge Commerce's determination. Commerce's decision whether to resort to the remedies available in 19

[5] RTAC challenges Commerce's application of both the transactions disregarded and major input rules. *See* Pl.'s Comments at 19–27. Commerce, however, did not rely on the major input rule here. *See infra* note 22; *see Remand Results* at 14–18.

U.S.C. § 1677e is subject to review by this Court. That RTAC may ultimately be unsuccessful in its claim is of no moment. RTAC's claim is that Commerce's decision not to apply total-AFA results in a rate that fails to compensate for the ill-effects of Simec's unfair trade practices. RTAC's injury, therefore, is Commerce's decision not to apply AFA.

Defendant argues that because RTAC's requested form of relief would, in fact, lower the respondent's cash deposit rate, RTAC fails to allege a material injury. Def.'s Resp. Comments at 12; Def.'s Resp. Suppl. Br. at 2–4; *see also* 19 U.S.C. § 1673d(b). Defendant's standing challenge ignores RTAC's AFA challenge and wrongly presumes that a zero cash deposit for an expanded collapsed entity is a given. The court cannot simply accept as true Defendant's contention that the zero cash deposit rate will remain unchanged even if the presently non-collapsed fixed asset owning companies were collapsed. Def.'s Resp. Comments at 12; Def.'s Suppl. Resp. Br. at 2–3. It is possible that in calculating costs for the expanded entity, Commerce will need to solicit further information and/or rely on facts otherwise available and possibly, if the circumstances call for it, apply an adverse inference to those facts. The court cannot base a standing determination on the probability of a party's success on the merits. If the basis for standing was tied to success on the merits, parties would often be foreclosed from challenging Commerce's decisions.[6]

Defendant-Intervenors confine their jurisdictional challenge to the purported mootness of RTAC's collapsing claim. *See* Def.-Intervenors' Comments Supp. [*Remand Results*] at 18–19, June 10, 2019, ECF No. 85. Defendant-Intervenors argue that because, on remand, Commerce accounted for all rebar-related costs the companies in the non-collapsed group incurred, even if the companies were collapsed, no additional costs would be uncovered as to affect respondent's weighted-average dumping margin and related cash deposit rate. *Id.* at 19. Commerce, according to the Defendant-Intervenors, effectively collapsed the relevant companies. *Id.* The argument is unpersuasive for the same reasons Defendant's standing arguments fail. At the root of RTAC's collapsing claim is that Commerce, in carrying out 19 C.F.R. § 351.401(f)(2), wrongly determined that information neces-

[6] Defendant-Intervenors also addressed Defendant's standing challenge. Defendant-Intervenors argue that RTAC's AFA-based standing is speculative and hypothetical and that it is highly improbable that Commerce, after determining on two prior occasions that respondent was cooperative and its actions not warranting an application of adverse inferences, would change course and resort to partial- or total-AFA if it decided to collapse the non-producers. *See* Def.-Intervenors' Suppl. Resp. Br. at 3–5. The argument is unpersuasive. Past conduct is not indicative of future conduct. Further, it is speculative to argue that information already on the record will be sufficient to calculate costs for the expanded entity and that AFA, in any of its forms, will not be needed.

sary to its analysis was on the record and that respondent's actions did not warrant application of adverse inferences. Success on either count could alter the resulting weighted-average dumping margin. RTAC has, therefore, alleged an economic injury that can be redressed by this Court's order and this Court has jurisdiction over that claim pursuant to 28 U.S.C. § 1581(c) (2012).

II. Not Collapsing the Non-Producing Fixed Asset Holders

Plaintiff argues that Commerce's continued decision not to collapse six non-producing fixed asset owning companies is unsupported by substantial evidence. *See* Pl.'s Comments at 3–12. Plaintiff also argues that Commerce misinterprets and misapplies prior precedent to support its redetermination. *See id.* at 12–18. Defendant argues that Commerce's determination is in accordance with law and is supported by substantial evidence because the record does not show that the potential for manipulation was significant. *See* Def.'s Resp. Comments at 4–11, 13–22; *see also* 19 C.F.R. § 351.401(f). For the following reasons, Commerce's collapsing analysis on remand complies with the court order, is in accordance with law and supported by substantial evidence, and is therefore sustained.

In *Rebar*, the court remanded for further explanation or reconsideration Commerce's decision not to collapse six non-producing fixed asset owning companies. *See Rebar*, 42 CIT at __, 337 F. Supp. 3d at 1265. The court determined that Commerce acted contrary to law by not conducting a collapsing analysis under 19 C.F.R. § 351.401(f)(2) for the six companies and that its determination was unsupported by substantial evidence because it did not address detracting record evidence.[7] *Id.* at __, 337 F. Supp. 3d at 1255–59.

Commerce's regulation permits it to

> treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and [Commerce] concludes that there is a significant potential for the manipulation of price or production.

[7] Specifically, the court identified evidence showing that the non-collapsed and collapsed companies overlap in terms of ownership and managerial structures, the non-collapsed companies leased fixed assets that were used to produce subject merchandise during the period of review to the collapsed companies at [[ ]] and the collapsed and non-collapsed companies engaged in a variety of intercompany transactions suggestive of intertwinement of operations. *Rebar*, 42 CIT at __, 337 F. Supp. 3d at 1257–59; *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (noting that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

19 C.F.R. § 351.401(f)(1).[8] In assessing whether there is a "significant potential for the manipulation of price or production," Commerce may consider:

> (i) The level of common ownership;
>
> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
>
> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

19 C.F.R. § 351.401(f)(2). Although the regulatory language speaks of collapsing producers, Commerce, through practice, has extended collapsing to non-producers under certain circumstances and upon consideration of the factors set out in 19 C.F.R. § 351.401(f)(2). *See* [Commerce's] Affiliation & Collapsing Mem. for the Grupo Simec at 6 & n.26, PD 131, bar code 3528081–01 (Dec. 5, 2016); *see, e.g.*, Issues & Decision Mem. for the [ADD] Investigation of Certain Frozen and Canned Warmwater Shrimp from Brazil at 14, A-351–838, (Dec. 23, 2004), *available at* https://enforcement.trade.gov/frn/summary/brazil/04–28110–1.pdf (last visited Aug. 1, 2019) ("Brazilian Shrimp").

On remand, Commerce applies the 19 C.F.R. § 351.401(f)(2) factors to the non-collapsed companies, further explains its practice to collapsing non-producers, and determines that the six companies should not be collapsed. *Remand Results* at 7–12. Commerce concludes that transferring production to the non-collapsed companies would necessitate an additional work force and substantial retooling/reorganization of the existing fixed assets. *See id.* at 23–25, 30–33; *see also* 19 C.F.R. § 351.401(f)(1). Commerce's reliance on intertwined operations, as determinative of whether the non-collapsed companies' potential for manipulation of price or production is significant, is reasonable and consistent with Commerce's practice of evaluating the collapsibility of non-producers.

Commerce, relying on several prior determinations, explains that its practice of extending 19 C.F.R. § 351.401(f)(2) beyond "the four corners of the regulation to affiliated non-producing exporters and distributors" is triggered when evidence shows that the non-producer

[8] If affiliated producers are collapsed, those companies may be considered a single entity. Collapsing entities allows sales of one collapsed entity to be considered sales of the other for purposes of Commerce's dumping margin calculation. *See* 19 C.F.R. § 351.401(f); 19 U.S.C. § 1677b.

could shift sales or production to evade antidumping duties. *Remand Results* at 6. In these prior determinations, Commerce appears to rely less upon the companies' overlapping ownership and/or managerial structures, i.e., factors in 19 C.F.R. § 351.401(f)(2)(i) and (ii), and more upon whether operations between the companies are sufficiently intertwined to find a present ability to shift sales or production, i.e., the third factor in 19 C.F.R. § 351.401(f)(2)(iii), to evade antidumping duties. *See* Brazilian Shrimp at 13–15 (collapsing a non-producing affiliate where the non-producing company maintained a fully operational production facility on the producer's premises, the producer participated in pricing and production decisions, and the two shared sales information); Issues & Decision Mem. Final Affirmative Determination & Final Negative Critical Circumstances Determination in the Less-Than-Fair Value Investigation of Certain Carbon & Alloy Steel Cut-To-Length Plate from the Republic of Korea at 25–27, A-580–887, (Mar. 29, 2017) *available at* http://ia.ita.doc.gov/frn/summary/korea-south/2017–06631–1.pdf (last visited Aug. 1, 2019) ("Korean Plate") (concluding that a producer could shift production and/or sales to its distributors that purchased significant amounts of the producer's merchandise, but themselves neither produced nor resold the merchandise).[9]

[9] The remand redetermination also invokes Malaysian Nails, where Commerce concluded that collapsing was necessary because the parent company drastically changed its trading patterns by funneling all of its U.S. sales through a subsidiary and publicly announced that the change was intended to avoid a high cash deposit rate. *Remand Results* at 28, 42–43 (citing Issues & Decision Mem. Final Results [ADD] Changed Circumstances Review of Certain Steel Nails from Malaysia at 6–12, A-557–816, (July 14, 2017), *available at* http://ia.ita.doc.gov/frn/summary/malaysia/2017–15518–1.pdf (last visited Aug. 1, 2019) ("Malaysian Nails")). By contrast, Commerce contends there is no evidence on this record that the non-collapsed companies had plans to sell or produce rebar themselves. *Id.* at 28, 42. In Malaysian Nails, Commerce sought to initiate a changed circumstances review based on evidence of purported evasion of an existing ADD order by a parent and one of its subsidiaries. Malaysian Nails at 9–12. However, as the reviewing court explained, Commerce's evidence was in fact a "misstatement of otherwise lawful activity" and "not a pronouncement of an impending fraudulent export scheme," because Commerce issued two separate rates to the two companies at issue, despite requests from those companies that they be collapsed. *See Inmax Sdn. Bhd. v. United States*, 41 CIT __, __, 277 F. Supp. 3d 1367, 1372–73 (2017). Commerce's reliance on Malaysian Nails is misplaced and does not aid this court in evaluating the collapsing analysis done here.

Further, RTAC challenges Commerce's reliance on *Hontex* to establish the parameters for what future "significant" manipulation under 19 C.F.R. § 351.401(f) entails and attempts to distinguish the case. *See* Pl.'s Comments at 15–16; *Remand Results* at 26; *see also Hontex Enters. v. United States*, 27 CIT 272, 298–99, 248 F. Supp. 2d 1323, 1345–46 (2003). Neither parties' characterization of *Hontex* helps the court evaluate the collapsing analysis here. In that case, the reviewing court remanded, three times, Commerce's collapsing analysis for failure to support with substantial evidence its conclusions that the operations of two exporters were intertwined and there was a relationship of control. *Hontex*, 27 CIT at 299–300, 248 F. Supp. 2d at 1345–47; *Hontex Enters. v. United States*, 28 CIT 1000, 342 F. Supp. 2d 1225, 1234–38, 1246– 47 (2004); *Hontex Enters. v. United States*, 29 CIT 1096, 387 F. Supp. 2d 1353 (2005). Further, Commerce ultimately reversed its decision to collapse. *Hontex Enters. v. United States*, 30 CIT 353, 355–57, 425 F. Supp. 2d 1315, 1318–19 (2006).

Commerce's practice to collapse non-producers with producers when it finds sufficiently intertwined operations, leading to an ability to shift sales or production to evade antidumping duties, *Remand Results* at 6; *see, e.g.*, Brazil Shrimp at 13–15; Korean Plate at 25–27, is reasonable. Commerce's regulation limits collapsing to affiliated producers. 19 C.F.R. § 351.401(f). Commerce's concern is that there may be a "significant potential for the manipulation of price or production" where two affiliated producers share ownership, management, and/or have intertwined operations. Specifically, 19 C.F.R. § 351.401(f) confronts the possibility that affiliated producers may shift production or sales in order to evade antidumping duties. By practice, and explained above, Commerce extended the reach of 19 C.F.R. § 351.401(f) to non-producers under limited circumstances. When considering the possibility of shifting production or sales to non-producers, Commerce asks whether the non-producer could nonetheless behave like a producer. Commerce's practice has been to treat a non-producer as capable of acting like a producer when its operations are sufficiently intertwined with those of a producer. It is always possible for a non-producer to become a producer or a seller of the subject merchandise. Commerce's practice reasonably assesses whether because of intertwined operations a non-producer can presently act as a producer and, as a result, significantly manipulate sales or production. Given the regulatory language that asks whether there is "significant potential for the manipulation of price or production," Commerce's practice is reasonable.

In its analysis, Commerce concedes that the collapsed and non-collapsed groups "unquestionably" overlap in management and common ownership but explains that the overlap is "not instructive" because record evidence "does not suggest that a single company or organized collective of those companies with centralized direction has the ability to control the combination of assets necessary to produce subject merchandise." *Remand Results* at 9; *see also* 19 C.F.R. § 351.401(f)(2)(i)–(ii). Instead, Commerce evaluates whether the non-collapsed companies could significantly manipulate price or production and facilitate the shifting of sales or production because their operations are intertwined. *Remand Results* at 10–12, 37–41. RTAC contends that Commerce's 19 C.F.R. § 351.401(f)(2) analysis is intrinsically flawed because it treats the non-collapsed companies as independent of the parent company's control.[10] Pl.'s Comments at 7–12. As a result, RTAC contends, Commerce fails to consider the parent

[10] Specifically, RTAC contends that because the parent exercises centralized direction and unilateral control over all assets—machinery, labor, and sales—necessary to produce and sell the subject merchandise, the fact that the production process is distributed among [[ ]] plants, owned by [[ ]], both collapsed and non-collapsed, is inconsequential;

company's ability to leverage its ownership interests in and managerial oversight of the non-collapsed companies to exercise top-down control to manipulate sales or production of the subject merchandise. *Id.* at 9–12. Commerce acknowledges that it may be hypothetically possible for the non-collapsed fixed asset owners to become producers themselves. *Remand Results* at 11–12. However, it explains that evidence on this record does not show that the non-collapsed companies could, or made plans to, overcome the barriers to entry—hiring a work force,[11] retaining a customer base and establishing sales relationships, and reorganizing or acquiring all the fixed assets necessary to produce.[12] *Id.* at 10–12, 28–29, 31–32. Finally, although Commerce did identify "significant" transactions between the collapsed and non-collapsed companies,[13] Commerce discounted them because none pertained to the business of producing or selling rebar.[14] *Id.* at 11. On this record, Commerce's determination that

the parent owns and manages all the relevant companies. *See* Pl.'s Comments at 9–10, 15. As a result, RTAC argues, Commerce wrongly assumes the non-collapsed companies would need to expend additional monies to acquire all the machinery and workforce necessary to produce rebar, as opposed to simply having the parent siphon all the necessary resources to the non-collapsed companies. *Id.*

[11] RTAC argues that the non-collapsed companies would not need to hire new workers because they could, as the collapsed producers do, [[ ]]. *See* Pl.'s Comments at 9 (citing [Simec's] Section A Resp. at Exs. A-6d, A6-f, A6-h, A6-j, A6-k, A6-l, CD 4–5, bar code 3443871–01–02 (Feb. 22, 2016) (contending the cited exhibits show that at least [[ ]] of the collapsed producers engaged in [[ ]] practices)). Again, RTAC asks the court to reweigh the evidence and basis its challenge on the presumption that the parent company will shift production from the collapsed to the non-collapsed companies. Commerce's determination that, on this record, any shifts in employment are speculative is not unreasonable.

[12] RTAC argues that it was unreasonable for Commerce to conclude that the non-collapsed companies were affirmatively barred from using or accessing the fixed assets solely on the assurances of the mandatory respondent. Pl.'s Comments at 10. Commerce's determination was reasonable. First, record evidence does not show that during the period of review the non-collapsed companies produced or sold rebar. *Remand Results* at 10, 31. Second, RTAC's challenge presumes the parent's malintent based on its ownership interests in and managerial oversight of the non-collapsed companies. Record evidence does not support such speculation.

[13] During the period of review, the collapsed and non-collapsed companies had the following transactions between them—[[ ]]. *Remand Results* at 11.

[14] RTAC contends that during the period of review the collapsed and non-collapsed companies transacted for [[ ]], which were [[ ]]. *See* Pl.'s Comments at 10–11 & n.8 (citing [Simec's] Section A, B, & D Suppl. Questionnaire Resp. at Exs. D-26A, D-26B, D-26E,CD 133–35, bar code 3504495–01–03 (Sept. 7, 2016) (identifying specific transactions between the collapsed and non-collapsed companies for purchase or sale of the items identified)). RTAC argues these transactions were related to the production of rebar and constitute intertwined operations supportive of collapse. *Id.* Evidence on the record does not identify the [[ ]] as rebar or [[ ]]. *Remand Results* at 25, 37–39. Further, evidence on this record shows that the non-collapsed companies did not report costs of sales during the period of review and no evidence indicates that they produced or sold rebar. *Id.* at 25–26, 28, 37–39. Commerce's decision that the transactional evidence RTAC identifies did not support collapsing the relevant companies is reasonable.

operations between the collapsed and non-collapsed companies were not sufficiently intertwined to indicate a significant potential for manipulation of price or production is reasonable.

III. Commerce's Application of the Transactions Disregarded Rule

In *Rebar*, the court remanded for further explanation or reconsideration Commerce's (i) decision to use the cost experiences of certain collapsed fixed asset owners that produced rebar to revise the costs of non-collapsed fixed asset owners that did not produce and (ii) Commerce's decision to value the leases at cost. *See Rebar*, 42 CIT at __, 337 F. Supp. 3d at 1259–62, 1265.

On remand, Commerce (i) revises its methodology by recalculating the non-collapsed fixed asset owning companies' G&A costs using actual costs and (ii) further explains why it valued the leases at cost. *Remand Results* at 16–17. Commerce explains it was able to extract actual G&A costs from the consolidated worksheets underlying Grupo Simec's audited consolidated financial statements, already on the record, for [[ ]] of the six non-collapsed companies. *Id.* For the remaining non-collapsed companies,[15] Commerce reopened the record and solicited further relevant information. *Id.* at 17. To account for various costs and expenses revealed during the remand proceedings, Commerce made three revisions. It recalculated the remaining non-collapsed companies' G&A costs using information provided on remand in conjunction with the consolidated worksheets. *Id.* It amended its transactions disregarded calculation to include certain expenses and incomes the remaining non-collapsed companies incurred.[16] *Id.* at 17, 46–48. Finally, it revised Grupo Simec's overall G&A expense ratio using neutral facts available to account for services an affiliate freight supplier[17] provided to Grupo Simec and which record evidence suggests involved shipments of intermediate goods or raw materials.[18] *Id.* at

[15] The remaining non-collapsed fixed-asset owning companies are [[ ]].

[16] Specifically, Commerce accounted for [[ ]]. Remand Results at 47–48.

[17] The affiliate supplier referenced is [[ ]]. Remand Results at 49.

[18] RTAC challenges Commerce's valuation of the freight services. Pl.'s Comments at 24–25. Specifically, it argues that Commerce failed to apply the transactions disregarded rule and that Commerce should have applied an adverse inference, instead of valuing the service using [[ ]] unrecovered cost of shipping services for 2015, i.e., its net operating loss, as neutral facts available. *Id.*; *see also Remand Results* at 49–50. Given that Commerce resorted to neutral facts available, it is reasonably discernable that information necessary to value [[ ]] freight services was missing from the record. To apply an adverse inference, Commerce must identify how a respondent failed to cooperate to the best of its

49–50.[19] Commerce's use of actual costs complies with the court's remand order and is reasonable. Therefore, its application of the transactions disregarded rule is sustained.

To derive the actual cost of the fixed asset leases on remand, Commerce applies the non-collapsed companies' individual G&A expense ratios to their respective depreciation expenses.[20] *Remand Results* at 17–18. Commerce complies with the court's remand order and explains that actual cost is a "reasonable approximation of market value for purposes of [its] transactions disregarded analysis[,]"[21] *id.* at 17,[22] and that it does not add a fictitious value for profit to the

ability in providing the missing information. *See* 19 U.S.C. § 1677e(b); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Here, Simec disclosed [[ ]] as a freight service provider delivering subject merchandise in the home market in its initial questionnaire responses and Commerce did not, until the remand questionnaire, seek clarification about this service. *Remand Results* at 49–50. Simec complied with the request for more information. *Id.* Commerce's decision not to apply an adverse inference, in light of Simec's actions, is reasonable. Further, given that the decision to apply the transactions disregarded rule is within Commerce's discretion, 19 U.S.C. § 1677b(f)(2), and there was no evidence on this record on the market value or actual transfer price for the freight service, Commerce's decision to use [[ ]] net operating losses was not unreasonable.

[19] RTAC argues that Commerce's revised G&A ratio for Grupo Simec wrongly omits certain net unrecovered costs [[ ]] and [[ ]] incurred. Pl.'s Comments at 25–26. Defendant contends that Plaintiff failed to exhaust this challenge before the agency. Def.'s Comments at 32–33. The [[ ]] companies listed, along with non-collapsed fixed asset owners [[ ]], are subsidiaries of [[ ]], itself a Simec affiliate. [Simec's] Suppl. Questionnaire Resp. on Remand at 6, CRR 2, bar code 3775333–01 (Nov. 14, 2018). In its comments to the draft remand results, RTAC only makes arguments as to [[ ]] and does not delineate why the net unrecovered costs of the [[ ]] other subsidiaries should be part of Grupo Simec's overall G&A expense ratio calculations. *See* RTAC's Comments on Draft Results of Remand Redetermination at 31–33, CRR 18, bar code 3803020–01 (Mar. 8, 2019). RTAC had access to both the draft redetermination analysis memorandum and the draft remand results. If RTAC believed that the costs of those [[ ]] subsidiary companies, which are not part of either the collapsed or non-collapsed groups, were important to include, RTAC should have raised the issue with Commerce. RTAC failed to exhaust this argument and cannot raise it now.

[20] The leases were provided at [[ ]]. See Final Calc. Memo at 2.

[21] In calculating normal value, Commerce may revise prices between affiliates using the transactions disregarded rule if Commerce determines that the reported prices are below market value. 19 U.S.C. § 1677b(f)(2). Here, Commerce determined that the [[ ]] leases between the collapsed and non-collapsed fixed asset owning companies were below market value and applied the transactions disregarded rule. *Remand Results* at 17.

[22] Commerce did not, as RTAC avers, value the [[ ]] leases using both the transactions disregarded and major input rules. *See, e.g.*, Pl.'s Comments at 20. Commerce only relied on the transactions disregarded rule here. *See Remand Results* at 17. The decision to apply either rule is within Commerce's discretion, 19 U.S.C. § 1677b(f)(2),(3), which means that Commerce decides whether a given input is a "major" input. No evidence on this record demonstrates that Commerce's decision to rely solely on the transactions disregarded rule to value leases was unreasonable. Further, to the extent that RTAC challenges Commerce's determination that actual cost can be a "reasonable approximation of market value," *Remand Results* at 17, Pl.'s Comments at 23–24, because it contradicts Commerce's implicit recognition, in its regulation, that cost of production and market price cannot be the same value, 19 C.F.R. 351.407(b) (stating that a major input will be the "higher of the price paid, the market price, or the cost of producing it), the challenge is unpersuasive. RTAC wrongly assumes that Commerce applied, and was required to apply, the major input rule.

actual cost. *Id.* at 48–49; *see also* 19 U.S.C. § 1677b(f)(2). In applying the transactions disregarded rule, Commerce's practice is to adjust the transfer price for the service or input at issue so that it reflects the market price. *See, e.g.*, Issues & Decision Mem. for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Cold-Rolled Steel Flat Products from Brazil at 38, A-351–843, (July 20, 2016), *available at* http://ia.ita.doc.gov/frn/summary/brazil/2016–17951–1.pdf (last visited Aug. 1, 2019) (explaining that Commerce has an "express preference for market value" and will look to "any reasonable source for market value" if respondent's own purchases or an affiliate's sales are not available (citations omitted)). Commerce has expressed a preference for how to establish market value. *Remand Results* at 14–15, 48 & n.168. First, it looks at whether respondent purchased the input from an unaffiliated supplier; if unavailable, it looks to sales of the input between an affiliate supplier and an unaffiliated party, and as a final resort, to a reasonable source for market value available on the record. *Id.* Grupo Simec did not lease fixed assets from unaffiliated suppliers and the non-collapsed fixed asset owners did not lease their fixed assets to an unaffiliated party. *Id.* at 15. Commerce, accordingly, looked for and selected as a reasonable source the actual cost it calculated for the leases. *Id.* It is not Commerce's practice to add profit when constructing market value and it has only done so on one prior occasion. *See Huvis Corp. v. United States*, 32 CIT 845, 849 (2008) (explaining that Commerce was able to calculate profit for each of two major inputs at issue relying on financial statements of the affiliated supplier). Commerce also explains that because the leases were provided at [[ ]], the only available source from which to derive profit would be the experiences of the collapsed fixed asset owners.[23] The collapsed fixed asset owners are producers and it was reasonable for Commerce to decline to rely on their experiences. Therefore, Commerce's decision to value the fixed asset leases at cost and not construct a fictious value for profit is reasonable.

RTAC's challenges to the accuracy and completeness of Grupo's Simec's financial documents, Pl.'s Comment at 20–27, are speculative

[23] RTAC argues that Commerce's inability to construct a value for profit indicates that respondent failed to act to the best of its ability in providing necessary information and constitutes a reason for application of an adverse inference. Pl.'s Comment at 23–24. Simec disclosed the [[ ]] lease arrangement, Final Calc. Memo at 2, and, on remand, responded to Commerce's additional questions about the terms of the leases. Remand QR Resp. at 5–6. Commerce does not have a practice for constructing a value for profit and the record does not indicate that Commerce asked for such information. To impose an adverse inference, Commerce must first identify what information is missing from the record. There is no information missing on the record which would serve as basis for Commerce resorting to facts otherwise available. *Remand Results* at 48–49. It therefore would have been unreasonable to apply an adverse inference here.

and unpersuasive. RTAC speculates that because some Grupo Simec affiliates originally booked depreciation expenses as part of their G&A expenses and not their cost of goods sold ("COGS"),[24] there is reason to doubt the completeness and accuracy of the costs the non-collapsed companies disclosed. *Id.* at 20. There is no evidence on this record indicating that the non-collapsed companies booked depreciation expenses as part of their G&A expenses, as opposed to their COGS, or that the costs reported were false. Further, Grupo Simec's auditors isolated depreciation expenses booked as G&A expenses and reclassified them as COGS for purposes of Grupo Simec's consolidated financial statements. *Remand Results* at 47. RTAC also speculates that because Commerce had to revise [[ ]] G&A costs to account for income and expenses revealed on remand, the G&A costs of the other [[ ]] non-collapsed companies must be similarly incomplete. Pl.'s Comments at 22. The consolidated worksheets break out each subsidiary's COGS, depreciation expenses, and G&A expenses, and those values reconcile with the "respective line items reported on Grupo Simec's fiscal year 2015 audited consolidated financial statements." *Remand Results* at 17, 46–47. The worksheets provided such costs for the six non-collapsed companies. Commerce, however, revised [[ ]] G&A costs because its costs were reported as part of a much larger Simec affiliate, [[ ]] and therefore did not reflect the [[ ]] companies; individual cost experiences. *Remand Results* at 17, 47. By contrast, the consolidated worksheets did capture the individual depreciation expenses, cost of goods sold, and G&A expenses of the [[ ]] other non-collapsed companies. *Id.* at 16–17. No record evidence suggests that where the consolidated worksheets provide company-specific cost experiences, those experiences are incomplete.[25] Finally, RTAC speculates that [[ ]] had COGS during the period of review that were unreported. Pl.'s Comments at 22–23. Evidence on this record, however, indicates that Grupo Simec's reported COGS for its affiliates—[[ ]]—reconciles with the COGS amount reported in

[24] Commerce derives company-specific G&A ratios by dividing a company's G&A costs by its cost of goods sold. Depreciation expenses are accounted for in a company's COGS.

[25] RTAC also argues that Commerce did not explain the presence of certain "substantial line items" in the consolidated worksheets it used to extract the [[ ]] non-collapsed companies' actual costs. Pl.'s Comments at 20–23 (citations omitted) (referring to entries for "[[ ]]"). RTAC claims these line items are unrelated to the [[ ]] non-collapsed companies' individual expenses. *Id.* at 22. Defendant contends that Plaintiff failed to exhaust this challenge before the agency. Def.'s Comments at 30–31. In the draft remand results, Commerce revealed that it would extract actual G&A costs of [[ ]] non-collapsed fixed asset owning companies using consolidated worksheets. *See* Draft Results of Redetermination Pursuant [*Rebar*] Ct. Order at 15–16, CRR 8, bar code 3798800–01 (Mar. 1, 2019). RTAC, therefore, had the opportunity to raise the existence of these line items to Commerce, but did not, and is prevented from doing so before the court.

the audited consolidated financial statement—[[ ]]. [Simec's] Suppl. Questionnaire Resp. on Remand at Ex. 7, CRR 6, bar code 3775333–04 (Nov. 14, 2018).

IV. Commerce's Decisions that Simec Cooperated and Provided All Information Necessary for the Determination

RTAC enumerates various reasons for why Commerce, in its collapsing and transactions disregarded and major input rules analyses,[26] should have resorted to adverse facts available. Pl.'s Comments at 27–31. RTAC's challenge, therefore, presumes and depends on this court remanding the results of either or both of those analyses. The court, for the reasons provided above, sustains Commerce's *Remand Results* and associated decisions not to resort to facts otherwise available or apply partial-or total-AFA.

CONCLUSION

For the foregoing reasons, the *Remand Results* are sustained. Judgment will enter accordingly.

Dated: August 1, 2019
New York, New York

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

Slip Op. 19–105

HYUNDAI HEAVY INDUSTRIES CO., LTD., Plaintiff, and HYOSUNG CORPORATION, ILJIN ELECTRIC CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and ABB INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Consol. Court No. 18–00066
PUBLIC VERSION

[Remanding the U.S. Department of Commerce's final results of the fourth administrative review of the antidumping duty order on large power transformers from the Republic of Korea.]

Dated: August 5, 2019

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

Henry D. Almond, Arnold & Porter Kaye Scholer LLP, of Washington, DC, argued for Consolidated Plaintiff Hyosung Corporation. With him on the brief were *J. David Park*, *Daniel R. Wilson*, and *Leslie C. Bailey*.

[26] Although RTAC frames its argument as a challenge to Commerce's application of both the transactions disregarded and major input rules, as explained above, Commerce did not rely on the major input rule here. Instead, to value the [[ ]] leases, Commerce applied the transactions disregarded rule. *See Remand Results* at 14–18.

Amrietha Nellan and *Jeffrey Winton*, Law Office of Jeffrey M. Winton PLLC, of Washington, DC, argued for Consolidated Plaintiff ILJIN Electric Co., Ltd.

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*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *L. Misha Preheim*, Assistant Director, and *Kelly A. Krystyniak*, Trial Attorney. Of counsel on the brief was *David W. Richardson*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Melissa M. Brewer, *R. Alan Luberda*, and *David C. Smith*, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenor, ABB Inc.

OPINION AND ORDER

Barnett, Judge:

In this action, Plaintiffs Hyundai Heavy Industries Co., Ltd. ("HHI" or "Hyundai"),[1] Hyosung Corporation ("Hyosung"),[2] and Iljin Electric Co., Ltd. ("Iljin") contest the U.S. Department of Commerce's ("Commerce" or "the agency") final results of the fourth administrative review ("AR4") of the antidumping duty order on large power transformers ("LPTs") from the Republic of Korea ("Korea"). *See Large Power Transformers From the Republic of Korea*, 83 Fed. Reg. 11,679 (Dep't Commerce Mar. 16, 2018) (final results of antidumping duty admin. review; 2015–2016) ("*Final Results*"), ECF No. 19–5, and accompanying Issues and Decision Mem., A-580–867 (Mar. 9, 2018) ("I&D Mem."), ECF No. 19–6.[3] In lieu of filing a response brief, Defendant, United States ("the Government"), on behalf of Commerce, filed a motion requesting remand of "this matter in its entirety." Def.'s Mot. for Voluntary Remand at 1, ECF No. 39. Defendant-Intervenor, ABB Inc. ("ABB"), urges the court to sustain the *Final Results* in their entirety. *See* Confidential Def.-Int.'s Resp. in Opp'n to Pl.'s and Consol. Pls.' Mots. for J. on the Agency R. ("ABB's Resp."), ECF Nos. 49, 49–1; Order (Jan. 28, 2019), ECF No. 53 (granting ABB's motion for errata).

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[1] 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. 32.

[2] Effective June 1, 2018, Hyosung changed its name to Hyosung Heavy Industries Corporation. Confidential Mem. in Supp. of Hyosung's Mot. for J. Upon the Agency R. ("Hyosung's Br.") at 1 n.1, ECF No. 26–1.

[3] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 19–4, and a Confidential Administrative Record ("CR"), ECF Nos. 19–2, 19–3. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public J.A., ECF Nos. 61–1 (Vol. I), 61–2 (Vol. II), 61–3 (Vol. III), 61–4 (Vol. IV); Confidential J.A. ("CJA"), ECF Nos. 60–1 (Vol. I), 60–2 (Vol. II), 60–3 (Vol. III), 60–4 (Vol. IV). Parties also submitted supplemental record documents pursuant to the court's request. *See* Confidential Resp. to Court's June 5, 2019 Order (June 6, 2019) ("Suppl. CJA"), ECF No. 69, & Attachs. 1–8, ECF Nos. 69–1—69–6, 70–1—70–3; Confidential Resp. to Question 6 of the Court's June 5, 2019 Order (June 7, 2019), ECF No. 72, and Attach. 1 ("Sales Representative Agreement"), ECF No. 72–1. The court references the confidential versions of the relevant record documents, unless otherwise specified.

PROCEDURAL BACKGROUND

On August 5, 2016, Commerce issued a Federal Register notice regarding the opportunity to request an administrative review of the antidumping duty order on LPTs from Korea for the period of review covering August 1, 2015, through July 31, 2016. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Req. Admin. Review*, 81 Fed. Reg. 51,850, 51,851 (Dep't Commerce Aug. 5, 2016), PR 1, CJA Vol. III, Tab 3. On October 14, 2016, Commerce initiated AR4, identifying HHI, Hyosung, and Iljin as companies subject to the review. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 81 Fed. Reg. 71,061, 71,063 (Dep't Commerce Oct. 14, 2016), PR 6, CJA Vol. III, Tab 6. Commerce selected Hyosung and HHI as mandatory respondents for individual review. Respondent Selection Mem. (Jan. 3, 2017) at 5–6, PR 22, CJA Vol. III, Tab 8.

For the preliminary results, Commerce assigned Hyosung and HHI weighted-average dumping margins of 60.81 percent based on the use of total adverse facts available (otherwise referred to as total "AFA"). *Large Power Transformers From the Republic of Korea*, 82 Fed. Reg. 42,289, 42,290 (Dep't Commerce, Sept. 7, 2017) (prelim. results of antidumping duty admin. review; 2015–2016) ("*Prelim. Results*"), PR 263, CJA Vol. III, Tab 9.[4] Because both individually-examined companies were assigned a 60.81 percent margin, Commerce selected this same rate for companies not selected for individual examination (including Iljin). *Id.* at 42,290 & n.4 (citing *Albemarle Corp. v. United States*, 821 F.3d 1345 (Fed. Cir. 2016)).

Commerce made no changes to its determination in the *Final Results*. *Final Results*, 83 Fed. Reg. at 11,679; I&D Mem. at 3. Commerce based its decision to use total AFA with respect to Hyosung on three collective findings. Commerce found that Hyosung failed to: (1) separately report service-related revenues; (2) explain an invoice that covered multiple sales over multiple review periods; and (3) report all price adjustments and discounts. I&D Mem. at 25–32. Pursuant to 19 U.S.C. § 1677e(a)(2)(A) and (C), Commerce found that Hyosung

[4] Commerce selected the 60.81 percent rate because it was the AFA rate assigned to HHI in the third administrative review ("AR3"). Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review (Aug. 31, 2017) ("Prelim. Mem.") at 6 & n.22, PR 260, CJA Vol. III, Tab 10 (citing *Large Power Transformers from the Republic of Korea*, 82 Fed. Reg. 13,432 (Dept. Commerce Mar. 13, 2017) (final results of antidumping duty admin. review)). In AR3, Commerce selected the 60.81 percent margin from the petition. *See* Issues and Decision Mem. for the Final Results of the Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea, A-580–867 (Mar. 6, 2017) at 6, *available at* https://enforcement.trade.gov/frn/summary/korea-south/2017–04824–1.pdf (last visited July 31, 2019).

"withheld information requested by Commerce and otherwise impeded the review," such that the use of "facts otherwise available" was authorized. *Id.*; *see also* 19 U.S.C. § 1677e(a). Additionally, Commerce found that Hyosung "failed to cooperate to the best of its ability" when responding to Commerce's information requests concerning these three issues and applied an adverse inference pursuant to 19 U.S.C. § 1677e(b) when selecting the facts otherwise available. I&D Mem. at 4, 29, 31, 32.

Commerce based its decision to use total AFA with respect to HHI on three other findings. Commerce found that HHI failed to correctly report prices and costs for "accessories," understated the gross unit price for certain home market sales, and failed to disclose an affiliated sales agent. *Id.* at 9–19. Commerce found that HHI "withheld requested information and otherwise impeded this review," I&D Mem. at 4, such that the use of use of "facts otherwise available" was warranted, *id.*; *see also* 19 U.S.C. § 1677e(a). Commerce determined that HHI also failed to cooperate to the best of its ability when responding to Commerce's information requests on the three identified issues and applied an adverse inference to its selection of the facts otherwise available. I&D Mem. at 4, 14, 18, 19. Commerce did not change the rate assigned to companies not selected for individual examination in the *Final Results*. *Id.* at 35.

HHI, Hyosung, and Iljin commenced this action to dispute various aspects of Commerce's *Final Results*[5] and ABB intervened as Defendant Intervenor. Order (Apr. 24, 2018), ECF No. 15. Specifically, HHI challenges Commerce's decision to use total AFA to determine HHI's dumping margin, including each of the three bases underlying that decision. *See* Confidential Rule 56.2 Mot. for J. on the Agency R. on Behalf of Pl. Hyundai Heavy Industries Co., Ltd., ECF No. 29, and Confidential Mem. of P. & A. in Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("HHI's Br."), ECF No. 29–1; Confidential Reply in Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("HHI's Reply"), ECF No. 58. Hyosung likewise challenges Commerce's decision to use total AFA to determine Hyosung's dumping margin and each of the three bases upon which Commerce relied to reach that decision. *See* Hyosung's Br.; Confidential Hyosung's Reply Br. in Supp. of its Rule 56.2 Mot. for J. Upon the Agency R. ("Hyosung's Reply"), ECF No. 55. Iljin challenges Commerce's method of selecting

[5] HHI, Hyosung, and Iljin filed separate actions challenging the *Final Results*. *See* Summons, ECF No. 1; *Hyosung Corp. v. United States*, No. 18-cv-00067 (Ct. Int'l Trade filed Apr. 2, 2018); *ILJIN Electric Co., Ltd. v. United States*, No. 18-cv-00075 (Ct. Int'l Trade filed Apr. 10, 2018). On May 10, 2018, the court consolidated the three actions into lead case number 18–00066. Docket Entry (May 10, 2018), ECF No. 17.

the rate assigned to Iljin. *See* Mot. of Pl. Iljin Electric Co., Ltd. for J. on the Agency R., ECF No. 24, and Rev. Br. of Iljin Electric Co., Ltd. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. ("Iljin's Br."), ECF No. 25; Reply Br. of Iljin Electric Co., Ltd. ("Iljin's Reply") at 2, ECF No. 54.[6]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930,[7] as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012), 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).

DISCUSSION

I. The Government's Motion for Remand

A. Legal Framework

When an agency determination is challenged in the courts, the agency may "request a remand (without confessing error) in order to reconsider its previous position" and "the reviewing court has discretion over whether to remand." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (citations omitted). Remand is appropriate "if the agency's concern is substantial and legitimate," but "may be refused if the agency's request is frivolous or in bad faith." *Id.* "A concern is substantial and legitimate when (1) Commerce has a compelling justification, (2) the need for finality does not outweigh that justification, and (3) the scope of the request is appropriate." *Changzhou Hawd Flooring Co., Ltd. v. United States*, 38 CIT __, __, 6 F. Supp. 3d 1358, 1361 (2014) (citations omitted).

B. Parties' Contentions

The Government requests a remand of "this matter in its entirety" to Commerce, Def.'s Mot. for Voluntary Remand at 1, so that the agency may "reconsider or further explain" its decisions to use total AFA with respect to HHI and Hyosung and its decision to assign Iljin

[6] The court provides further factual background relevant to each pending motion in the Discussion section below when helpful to the analysis.

[7] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are generally to the 2012 edition. However, The Trade Preferences Extension Act ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), made several amendments to the antidumping and countervailing duty laws. Section 502 of the TPEA amended 19 U.S.C. § 1677e. *See* TPEA §§ 502. The TPEA amendments affect all antidumping duty determinations made on or after August 6, 2015. *See* Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793 (Dep't Commerce Aug 6, 2015). Accordingly, all references to 19 U.S.C. § 1677e are to the amended version of the statute.

"the average rate of the two mandatory respondents," *id.* 4. The Government provides two justifications for the remand request. It states that Commerce's findings with respect to HHI's reporting of accessories overlap with the court's recent remand order in *Hyundai Heavy Industries, Co. Ltd. v. United States*, 42 CIT __, 332 F. Supp. 3d 1331 (2018).[8] *Id.* at 4. Additionally, it contends, Commerce's findings with respect to Hyosung's alleged failure separately to report service-related revenues overlaps with the court's recent remand order regarding HHI's reporting of service-related revenue in *ABB Inc. v. United States ("ABB II")*, 42 CIT __, 355 F. Supp. 3d 1206 (2018), *reconsideration denied*, 43 CIT __, 375 F. Supp. 3d 1348 (2019).[9] *Id.*

HHI and Hyosung oppose the Government's remand request, arguing that it does not encompass all the issues raised in their respective complaints. *See* Resp. of Pl. Hyundai Heavy Industries Co., Ltd. to Def.'s Mot. for Voluntary Remand ("HHI's Resp. to Mot. for Voluntary Remand") at 2, ECF No. 40; Resp. of Consol. Pl. Hyosung Corp. to Def.'s Mot. for Voluntary Remand ("Hyosung's Resp. to Mot for Voluntary Remand") at 4, ECF No. 43. They contend that a court decision addressing all issues on the merits would better serve judicial efficiency. HHI's Resp. to Mot. for Voluntary Remand at 3; Hyosung's Resp. to Mot for Voluntary Remand at 5; *see also* Hyosung's Reply at 7 (arguing that "in the interest of finality and fairness," the court should "rule at this juncture on the merits [of] the issues that Hyosung has raised"). ABB argues that the Government has failed to demonstrate that the agency's concern is "substantial and legitimate" because the Government did not address why the court's recent opinions would cause Commerce to reconsider its findings regarding accessories and service-related revenues, which findings were based on a distinct administrative record. Def.-Int. ABB Inc.'s Resp. in Opp'n to Def.'s Mot. for Voluntary Remand at 2, ECF No. 41. Moreover, ABB argues that substantial evidence supports the *Final Results*, which are otherwise in accordance with law, and the court should sustain them in their entirety. *Id.* at 1.

C. The Government's Motion for Remand is Denied

Remand is appropriate when Commerce has "a compelling justification," "the need for finality does not outweigh that justification," and "the scope of the request is appropriate." *Changzhou,* 6 F. Supp. 3d at 1361. In its motion, the Government does not provide a com-

[8] *Hyundai Heavy Industries* concerned Commerce's final results in AR3, which covered the August 1, 2014, through July 31, 2015, period of review. 332 F. Supp. 3d at 1334.

[9] *ABB II* concerned Commerce's remand results in the second administrative review ("AR2") of the antidumping duty order on LPTs from Korea, which covered the August 1, 2013, through July 31, 2014, period of review. 355 F. Supp. 3d at 1210.

pelling justification or clearly define the scope of the request that would lead the court to conclude that Commerce's concern is substantial and legitimate. The Government provides no explanation, let alone a compelling justification, why a remand of this matter is appropriate based on the two issues it identified. *See* Def.'s Mot. for Voluntary Remand at 4. Additionally, aside from stating that the accessories and service-related revenues issues "overlap" with the court's recent opinions in AR3 and AR2, respectively, *id.*, the motion is devoid of any substantive discussion of the similarities in the records of the three proceedings. Merely requesting remand so the agency can "reconsider its decision," without appropriate explanation, "is insufficient to support a voluntary remand." *Corus Staal BV v. U.S. Dep't of Commerce*, 27 CIT 388, 391, 259 F. Supp. 2d 1253, 1257 (2003) (internal quotation marks omitted).

In response to questioning from the court, the Government provided additional context for its remand request during oral argument. The Government stated that it requested the remand for Commerce to reconsider its decisions regarding accessories and service-related revenues and consider whether the remaining issues justified the use of total AFA. Oral Arg. at 1:09:01–1:09:40 (reflecting the time stamp from the recording). The Government stated that it was unaware of any material differences between the records of this review and AR3 concerning accessories or between the records of this review and AR 2 concerning service-related revenues. Oral Arg. at 11:57–12:31. Moreover, it asserted that it requested the remand on the accessories issue due to Commerce's remand redetermination in AR3, in which the agency accepted HHI's method of reporting LPT accessories. Oral. Arg. at 15:18–28.

The Government's belated explanations notwithstanding, remand based solely on the Government's request at this juncture is inappropriate because Plaintiffs and ABB have fully briefed all issues, the court has heard oral argument, and the matter is ripe for decision. In light of the totality of the circumstances and the timing and scope of the requested remand, the Government has failed to provide a compelling justification for its request for remand. *See Changzhou,* 6 F. Supp. 3d at 1361. While the court is nevertheless ordering remand, it is doing so based upon its evaluation of the arguments of the parties, the record evidence, and the law. Commerce's redetermination must be conducted in light of the rulings provided herein.[10]

[10] The Government filed the request for remand in lieu of filing a response brief and opted not to respond to Plaintiffs' remaining arguments. ABB argues that, by requesting the remand "in its entirety," the Government has preserved its ability to defend the remaining bases upon which Commerce relied to use total AFA. ABB's Resp. at 37. It further contends

II. HHI's and Hyosung's Motions for Judgment on the Agency Record

A. Legal Framework for Facts Available and AFA

In antidumping duty proceedings, Commerce relies primarily on factual information that interested parties submit during the course of the proceeding. *See* 19 C.F.R. § 351.301(a). When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce," "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a).

Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(c), (d), and (e). Subsection (c) provides, *inter alia*, that when an interested party informs Commerce promptly after receiving a request for information "that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms," then Commerce "shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." *Id.* § 1677m(c)(1). Subsection (d) provides the procedures Commerce must follow when a party files a deficient submission. Pursuant thereto, if Commerce finds that "a response to a request for information" is deficient, "[it] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews." *Id.* § 1677m(d). If any subsequent response is also deficient or untimely, Commerce, subject to subsection (e), may "disregard all or part of the original and subsequent responses." *Id.* Pursuant to subsection (e), Commerce

> shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements ... if—

that a finding that the Government has waived its right to defend Commerce's remaining findings would unfairly prejudice ABB, the prevailing party in the administrative proceeding. *Id.* at 38. The court previously determined that it will treat the Government's motion as its response brief. Order (Jan. 14, 2019) at 3, ECF No. 46. While the Government failed to provide any substantive arguments in response to the Plaintiffs' briefs, the court's review is based on the administrative record; therefore, the court has considered the arguments made by Plaintiffs and Defendant-Intervenor when analyzing whether Commerce's decisions are supported by substantial evidence on the record and the legal bases reflected in the decisions are otherwise in accordance with law.

> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
> (5) the information can be used without undue difficulties. *Id.* § 1677m(e).

If, notwithstanding those restrictions, Commerce still lacks necessary information and determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Before using adverse facts available, Commerce "must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." *Id.* at 1382. Next, Commerce

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

Id. at 1382–83. "An adverse inference may not be drawn merely from a failure to respond." *Id.* at 1383. Rather, Commerce may apply an adverse inference "under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made." *Id.*

Commerce uses

> "total adverse facts available" administratively to refer to Commerce's application of adverse facts available not only to the facts pertaining to specific sales or information . . . not present on the record, but to the facts respecting all of respondents'

> production and sales information that the [agency] concludes is needed for an investigation or review.

Nat'l Nail Corp. v. United States, Slip Op. 19–71, 2019 WL 2537931, at *13 (CIT June 12, 2019) (citation omitted); *see also Deacero S.A.P.I. de C.V. v. United States*, 42 CIT __, __, 353 F. Supp. 3d 1303, 1307 n.2 (2018) (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.").

B. Hyosung's Motion

i. Relevant Facts

In Section C of its initial questionnaire, Commerce requested Hyosung to "[r]eport each U.S. sale of merchandise entered for consumption during the POR," Req. for Information Hyosung Corp. (Jan. 5, 2017) ("Hyosung Initial Questionnaire") at C-2, PR 25, CJA Vol. II, Tab 2, and gave instructions on reporting the price per unit for each sales transaction and reporting the service-related revenues, *id.* at C-17, C-18. For instance, Commerce instructed Hyosung to report service-related revenues (e.g., ocean freight revenue, inland freight revenue, etc.) in separate fields, "and identify the related expense(s) for each revenue." *Id.* at C-1. Furthermore, it instructed: "If the invoice to your customer includes separate charges for other services directly related to the sale, such as a charge for shipping, create a separate field for reporting each additional charge." *Id.* at C-18. Hyosung responded to Commerce's initial questionnaire in February 2017. *See* Section A Questionnaire Resp. (Feb. 2, 2017) ("Hyosung Sec. A Resp."), CR 6–18, PR 34–41, CJA Vol. IV, Tab 7; Resp. of Hyosung Corp. to the Dep't's Jan. 5, 2017 Section C Questionnaire (Feb. 27, 2017) ("Hyosung Sec. C Resp."), CR 67, PR 94, CJA Vol. II, Tab 3. Commerce subsequently issued supplemental questionnaires to Hyosung, to which Hyosung responded.[11]

For the final results, Commerce found that "despite multiple requests from Commerce," Hyosung failed to provide complete and accurate information with respect to service-related revenues. I&D Mem. at 26 & nn.146–47 (citing Prelim. Mem. at 6–9). Commerce explained that although the initial questionnaire instructed Hyosung

[11] *See, e.g.*, First Sales Suppl. Questionnaire (Apr. 12, 2017), CR 191, PR 120, CJA Vol. II, Tab 5; Suppl. Questionnaire Resp. (May 8, 2017), CR 274, PR 166, CJA Vol. II, Tab 6; Third Suppl. Questionnaire (May 26, 2017), CR 328, PR 177, CJA Vol. IV, Tab 9; Third Suppl. Questionnaire Resp. (June 21, 2017), CR 449–53, PR 216–18, CJA Vol. II, Tab 8, CJA Vol. IV, Tab 10.

to create separate fields for reporting separate charges "if the invoice to [the] customer" included such charges, the instruction did not limit separate reporting to only charges that appear separately on the invoice. See *id.* at 26–27. Based on its review of certain Order Acknowledgment Forms ("OAFs" or "OAF," in singular) that Hyosung had provided in response to a supplemental questionnaire, Commerce found that Hyosung dedicated a portion of the sales price that it charged the U.S. customer to cover service-related expenses. *Id.* at 28. To Commerce, the OAFs established that Hyosung's service-related revenues exceeded the related expenses, and Hyosung should have separately identified the service-related revenues based on the allocation in the OAFs so that the revenues could be compared to, and capped by, the expenses. *Id.* at 28–29 & n.167 (citing Analysis of Data/Questionnaire Resps. Submitted by Hyosung Corp. in the Prelim. Results of the 2015–2016 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (Aug. 31, 2017) ("Hyosung Prelim. Analysis Mem.") at 5, CR 555, PR 265, CJA Vol. IV, Tab 11).

Additionally, Commerce faulted Hyosung for failing to provide OAFs for all U.S. sales made during the period of review and, for the sales for which it did provide them, failing to include complete and legible OAFs. I&D Mem. at 28–29 & nn.162, 170 (citations omitted); Prelim. Mem. at 7–9.[12] Commerce also stated that, "due to Hyosung's continued failure to report reliable information despite multiple requests to do so, Hyosung failed to cooperate to the best of its ability." I&D Mem. at 29; *see also id.* at 26.

With respect to the invoice that covered multiple sales over multiple review periods, Commerce had preliminarily determined that Hyosung provided one invoice for multiple sales, including one made during the previous period of review. Prelim. Mem. at 10; Hyosung Prelim. Analysis Mem. at 5–6.[13] For the final results, Commerce concluded that it was "unclear how multiple sales could be contained on one invoice" given Hyosung's questionnaire response stating that, for U.S. sales, its affiliate[14] "issues the invoice to the unaffiliated customer when the merchandise is delivered and/or site test is completed." I&D Mem. at 30 & n.181 (quoting Hyosung Sec. A Resp. at

[12] The OAFs were incomplete because they were missing a page and they contained fields that were dark, making the values within them illegible. Prelim. Mem. at 7 & n.33.

[13] Specifically, Hyosung reported invoice number [[ ]] as the invoice covering SEQUs [[ ]]. Hyosung Prelim. Analysis Mem. at 6 & n.40 (citing Suppl. Section A Resp. (May 8, 2017) at Ex. S-1, Suppl. CJA, Attach. 6). According to ABB, the same invoice covered "SEQU [[ ]] from the previous [period of review]." *Id.*

[14] HICO America Sales Technology, Inc. ("HICO America") is Hyosung's wholly-owned U.S. affiliate. Hyosung Sec. C Resp. at C-2.

A-36).[15] Commerce determined that Hyosung had "not explained this discrepancy, despite multiple opportunities to clarify the record," and, therefore, "an adverse inference is appropriate." *Id.* at 30–31.

Regarding the price adjustments and discounts, Commerce found that Hyosung failed to report certain price adjustments and interest revenue despite clear instructions from Commerce to do so. *Id.* at 31–32. Commerce stated that failure to report adjustments impeded its ability "to examine the veracity of each claimed adjustment, [] the validity of the reported price," and "the level of trade between the respondent and its customers." *Id.* at 32. Additionally, failure to report interest revenue impeded Commerce's ability to analyze the reported prices and the sales process. *Id.* Commerce determined that it was justified in applying an adverse inference because it gave Hyosung "multiple opportunities to remedy these deficiencies, yet [Hyosung] failed to do so. Commerce determined that, therefore, Hyosung failed to put forth its maximum efforts to comply with requests for information, thereby failing to cooperate to the best of its ability." *Id.*

ii. Parties' Contentions

Hyosung contends that substantial evidence does not support a finding that Hyosung failed to provide or withheld information pursuant to 19 U.S.C. § 1677e(a). Specifically, Hyosung contends that it reported service-related revenues consistent with Commerce's initial instruction to report revenues "*if* the invoices" included the charges, Hyosung's Br. at 3–4, 21–22 (emphasis added), and did not rely on the OAFs because "these documents reflect internal allocations of estimated prices," and Commerce did not instruct Hyosung to "consider internal allocations between affiliates" as revenue, *id.* at 26.[16] In any event, Hyosung argues, Commerce lacked statutory authority to deduct service-related revenues from the gross unit price based on estimates reported in internal documents exchanged between affiliates. *Id.* at 35.

Regarding the repeated invoice number, Hyosung contends that it properly reported the invoice in both administrative reviews because the invoice included sales that entered the United States in both

[15] Elsewhere in its initial questionnaire response, Hyosung explained that "[s]ome invoices are divided and issued separately to its unaffiliated customer. In this case, Hyosung reported the last invoice number in the INVOICEU field" in the U.S. sales database. Hyosung Sec. C Resp. at C-16.

[16] Hyosung asserts that the OAF is an internal budgeting document that it exchanges with its affiliate and the OAF reflects pre-production estimates for various expenses associated with a particular order, which expenses often change between the preliminary issuance of the OAF and the issuance of the invoice to the customer. Hyosung's Br. at 4, 11, 35–36.

review periods.[17] *Id.* at 25. Regarding the sales adjustments and discounts, Hyosung states that it reported all price adjustments consistent with the agency's instructions, considering the definition for "price adjustments" that the agency provided. *Id.* at 6–7. It states that the gross unit prices it reported "reflected the purchaser's net outlay" because they included the "'discounts' or other price adjustments negotiated with the customer," *id.* at 7; *see also id.* at 11, and there were no other adjustments "after the price was set," *id.* at 23. Regarding the interest charges, Hyosung states that it reported "the actual amount that the customer was required to pay." *Id.* at 38. Hyosung additionally argues that Commerce acted contrary to law by failing to comply with the notice requirement of 19 U.S.C. 1677m(d); substantial evidence does not support a finding that Hyosung failed to act to the best of its ability; and Commerce's decision to use total AFA is contrary to law. *See id.* at 19–44.

As discussed, the Government has requested remand to reconsider the sales-related revenues issue and otherwise did not substantively respond to Hyosung's arguments. *See supra* Discussion Section I.C.

ABB argues that substantial evidence supports Commerce's individual findings, ABB's Resp. at 23–29, 33–37; Commerce complied with its statutory obligation pursuant to 19 U.S.C. § 1677m(d), *id.* at 23–29; and Commerce lawfully applied an adverse inference, *id.* at 31–32. Specifically, ABB contends that Commerce clearly communicated to Hyosung that it was to report all service-related revenues that were reflected on any sales documentation, not just the invoices. *Id.* at 26, 33. With respect to the invoice reported in two review periods, ABB contends that, given Hyosung's description of the sales process, "it should not be possible for a single invoice to cover" multiple review periods.[18] *Id.* at 27, 36–37. ABB further contends that Hyosung was required to report gross (not net) prices and all price adjustments, including discounts and rebates, but failed to do so. *Id.* at 35–36.

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[17] According to Hyosung, failure to report the invoice in both periods of review under these circumstances would have created a gap in the record in which the invoice was omitted. *Id.* at 21. Hyosung avers that Commerce did not articulate how Hyosung failed to comply with a request for information with respect to this issue. *Id.* at 25.

[18] ABB also relies on "[o]ther record facts" and justifications as support for Commerce's finding on this issue, ABB's Resp. at 27–28, which the agency did not discuss, *see* I&D Mem. at 30–31.

iii. Analysis

1. Substantial evidence does not support Commerce's findings that Hyosung failed separately to report service-related revenues and failed to act to the best of its ability

When Commerce finds that a service is separately negotiable, its practice has been to cap the service-related revenue by the associated expense in its margin calculations. *See ABB, Inc. v. United States ("ABB I")*, 41 CIT __, __, 273 F. Supp. 3d 1200, 1208–09 (2017). When substantial evidence supports a finding that the cost of the service was separately negotiable from the price of the subject merchandise, the agency may reduce the export price or constructed export price by the amount of the expense in question. *See id.* On the other hand, "[w]hen substantial evidence does not support a finding that the cost of the services was separately negotiable from the price of the subject merchandise, the agency is without legal authority to reduce export price or [constructed export price] except by the amount of the expense in question." *ABB II*, 355 F. Supp. 3d at 1206, 1220. In AR3, the court held that Commerce may not "rely on [] internal [company] communications, absent any evidence of communication with the unaffiliated customer, to find that there were additional service-related revenues and expenses that [a company] failed to report." *Id.* at 1219; *see also id.* at 1220 (explaining that "in the absence of [substantial] evidence" to support a finding that a company's "provision of the services in question was separately negotiable with the unaffiliated customer," Commerce lacks a legal basis to reduce the gross unit price).

Substantial evidence does not support Commerce's finding that Hyosung failed separately to report service-related revenues. Commerce based this finding on the information that appeared in the OAFs. *See* I&D Mem. at 27–28 (discussing the OAFs); *id.* at 29 ("[I]t is reasonable to conclude based on this record evidence that Hyosung collected service-related revenues in excess of the expenses and that such revenue[s] should be reported and capped."). While Commerce acknowledged that the OAF is "an internal budgeting document" between Hyosung and HICO America, *id.* at 28, that is not "exchanged between Hyosung and its customer(s)," the agency nevertheless found that the OAF is "part of the sales process and [] clearly based on sales documentation between Hyosung and its customer," *id.* at 27. The evidence upon which Commerce relied does not support a finding that the services that appeared in the OAF, an internal budgeting document, were separately negotiable with the customer.

See id. at 28 & nn.158–161 (citing Hyosung Sec. A Resp. at A-25—A-27).

In its description of the U.S. sales process, Hyosung stated that when HICO America receives a request for a quote from the customer, HICO America coordinates with Hyosung to prepare a price quote. Hyosung Sec. A Resp. at A-24—25. Hyosung "rela[ys] to HICO America information regarding the costs associated with producing the unit" and "[o]nce the design is finalized, HICO America evaluates the total costs . . . taking into account . . . oil, transportation, offloading . . . and [] installation," among other things. *Id.* at A-25—A-26. HICO America then determines the "appropriate sales price for the unit that covers costs and ensures a reasonable profit on the sale," after which "Hyosung's engineering and HICO America's logistics and sales teams determine a price for the LPT unit and submit a proposal to the customer." *Id.* at A-26. The only negotiation with which the U.S. customer is involved concerns modifications to the LPT's design or specifications, corresponding sales price, and delivery terms. *Id.* at A26—27. After HICO America and the U.S. customer finalize the "design, specifications, price and delivery terms, the customer [] either execute[s] a sales contract with HICO America or submit[s] a purchase order to the company." *Id.* at A-26. When HICO America receives a purchase order or a sales contract from a customer, it electronically issues an OAF to Hyosung, *see id.* at A-26—A-27, and Hyosung then authorizes commencement of the production of the LPTs, *id.* at A-18.

Hyosung's description of the sales process provides no indication that the customer separately negotiates service charges that appear on the OAF or that the OAF is ever exchanged with the customer. Absent substantial evidence to support a finding that Hyosung's provision of the services identified in the OAF was separately negotiable with the unaffiliated customer, Commerce lacked a legal basis to reduce the gross unit price and fault Hyosung for failing to report this information.[19]

In the absence of substantial evidence to support Commerce's reliance on the facts available with respect to service-related revenues, Commerce's finding that this issue supports the use of an adverse inference cannot be sustained. Based on the foregoing, on remand, Commerce may not rely on the OAFs to apply its capping methodol-

[19] ABB insists that "[r]ecord evidence shows that the OAF is a direct reflection of the negotiation and assignment of costs and revenues between HICO [America] and the U.S. customer." ABB's Resp. at 35 (citing I&D Mem. at 28 n.166). The "evidence" to which ABB cites is Commerce's Issues and Decision Memorandum, which, in itself and without record support (as is the case here), does not constitute substantial evidence.

ogy to service-related revenues and must reconsider its determination to use total facts available with an adverse inference with respect to Hyosung.

2. Commerce failed to provide a reasoned explanation for its finding that Hyosung withheld requested information and otherwise impeded the review by providing an overlapping invoice

In reviewing whether substantial evidence supports Commerce's determination, the court asks whether there was "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)). This standard requires Commerce to "examine the record and articulate a satisfactory explanation for its action." *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013). While the court will uphold a determination of less than ideal clarity, "the path of Commerce's decision must be reasonably discernable to [the] court." *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009); *see also CS Wind Vietnam Co., Ltd. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (the agency's experience and expertise are not a substitute for the required explanation).

Commerce preliminarily determined that Hyosung provided one invoice for multiple sales, including one made during the previous period of review. Prelim. Mem. at 10; Hyosung Prelim. Analysis Mem. at 5–6. In its case brief to the agency, Hyosung explained:

> The [agency's] standard questionnaire instructed Hyosung to "[r]eport each U.S. sale of merchandise entered for consumption during the [period of review]" and Hyosung confirmed that it "reported U.S. entries of subject merchandise for the review period." Thus, while a single invoice may relate to multiple entries, the relevant question for identifying the reportable transactions for each administrative review is the timing of the entry into the United States. In this case, *the LPT units on the invoice entered the United States in different [periods of review].*
>
> . . .
>
> [T]he different units on the invoice shipped at different times and entered the United States at different times. Due to this difference in shipment timing among the units on the invoice, one unit entered in the last month of the third administrative

> review period (and therefore was correctly reported in that administrative review), while the other two entered in the first month of the current fourth administrative review period (and therefore were correctly reported in this administrative review). Indeed, Hyosung notes that it is not uncommon for shipment dates to differ for units covered by the same invoice. Many other units subject to this [period of review] were invoiced together but shipped on different days. The mere fact that the shipment of the units listed on the invoice for [the SEQUs in question] also contained a unit shipped during the prior [period of review] is of no significance, and certainly not grounds for the Department to default to total AFA. There is no great mystery here. . . .

Case Br. of Hyosung Corp. and Req. for Closed Hr'g (Oct. 13, 2017) ("Hyosung Admin. Case Br.") at 23–24, CR 561, PR 288, CJA Vol. II, Tab 15 (footnotes omitted) (second alteration in original).[20]

For the final results, Commerce concluded that it was "unclear how multiple sales could be contained on one invoice" given Hyosung's statement in a questionnaire response that, for U.S. sales, HICO America "issues the invoice to the unaffiliated customer when the merchandise is delivered and/or site test is completed." I&D Mem. at 30 & n.181 (quoting Hyosung Sec. A Resp. at A-36). The path to Commerce's decision that Hyosung withheld requested information on this point and otherwise impeded the review is not, however, discernable from the explanation the agency provided. Commerce's entire analysis of this issue consists of recounting Hyosung's and ABB's arguments and concluding that "it is unclear how multiple sales could be contained in one invoice." *Id.* at 30. The absence of reasoning is particularly troubling when it is not clear to the court that there is any inconsistency between Hyosung's use of the entry date as the linkage to a review period and "delivery and/or site test" completion as the basis for invoicing. Without any references or citations to record evidence, Commerce summarily stated that Hyosung had "multiple opportunities to clarify the record" on this issue but

[20] Similarly, before the court Hyosung argues that,

> to the extent that multiple shipments from a single invoice enter the United States at the beginning or end of the [period of review], some units from that invoice may enter in one [period of review] while other units enter during another [period of review]. This situation is not unusual; indeed, [ABB's] own submission of factual information made during this administrative review of materials submitted in the prior review identified sales entering on either side of the [period of review] in the normal course of business.

Hyosung's Br. at 2–3 (citing Placement of Admin. Docs. from the 2013/2014 and 2014/2015 Admin. Reviews onto the 2015/2016 R. (Feb. 10, 2017), Attach. 10 at Ex. S5–21, CR 39–65, PR 75–76, CJA Vol. II, Tab 4).

chose not to do so.[21] *Id.* at 31. Commerce's conclusory statements do not provide substantial record support for its finding pursuant to section 1677e(a). ABB's reliance on "[o]ther record facts" and justifications upon which Commerce did not rely, ABB's Resp. at 27–28, amount to "post hoc rationalizations for agency action," upon which the court cannot rely to sustain the agency's decision, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (the court may only sustain the agency's decision "on the same basis articulated in the order by the agency itself").

Because Commerce's finding that the use of the facts available based on this invoice is unsupported by substantial evidence, Commerce's resort to an adverse inference when selecting the facts available cannot stand. The court, therefore, remands this issue for Commerce to reexamine the record and provide a decision that is supported by a reasonable explanation that is based on record evidence.

3. Commerce's finding that Hyosung failed to report certain price adjustments and discounts must be remanded for further consideration

Applying the legal framework set forth above, the first inquiry is whether substantial evidence supports Commerce's finding that Hyosung failed to provide requested information on relevant discounts and price adjustments. *See* 19 U.S.C. § 1677e(a). The answer to that inquiry is yes. In Section C of the initial questionnaire, Commerce instructed Hyosung as follows:

> Report the information requested concerning the quantity sold and the price per unit paid in each sale transaction. All price adjustments granted, including discounts and rebates, should be reported in these fields. The gross unit price less price adjustments should equal the net amount of revenue received from the sale.

Hyosung Initial Questionnaire at C-18 (emphasis omitted).[22] Regarding payment terms, the agency instructed Hyosung to explain if the payment terms it offers "are tied . . . to interest penalties for late payment." *Id.* at C-17.

[21] As discussed, Commerce is without legal authority to resort to facts otherwise available when it fails to comply with section 1677m(d). *See supra* Discussion Section II.A (explaining the relevant legal framework). The court cannot conclude, based on Commerce's bare analysis of this issue, that it complied with this statutory directive.

[22] The Glossary defined "price adjustment" as "any change in the price charged for subject merchandise or the foreign like product that is reflected in the purchaser's net outlay." Hyosung Initial Questionnaire at I-13. Discounts and rebates are such examples. *Id.* "Although the discount need not be stated on the invoice, the buyer remits to the seller only the face amount of the invoice, less discounts." *Id.*

Commerce explained that despite these instructions, Hyosung failed to report properly certain discounts to price and interest revenue, even though Hyosung acknowledged in its case brief that there were discounts reflected on invoices to the customer and Hyosung received interest revenue from certain customers. I&D Mem. at 31–32 & nn.187–188, 191 (citing Hyosung Admin. Case Br. at 25–26).

As it did before the agency, *see* Hyosung Admin. Case Br. at 25–26, Hyosung argues before the court that the gross unit prices it reported "reflected the purchaser's net outlay" because they included the "'discounts' or other adjustments negotiated with the customer," Hyosung's Br. at 7; *see also id.* at 11, and there were no other price adjustments "after the price was set," *id.* at 23; *see also id.* at 23 ("[R]egardless of whether the invoice had a separate line item for a discount . . . Hyosung reported the total amount charged to the customer as the gross unit price."). Regarding the interest charges, Hyosung states that it reported "the actual amount that the customer was required to pay." *Id.* at 38. Regardless of what Hyosung's understanding was, it is quite clear that Commerce instructed Hyosung to report gross unit prices (not net prices) and to report separately any discounts and interest adjustments. Hyosung Initial Questionnaire at C-18. "The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination." *Nippon Steel*, 337 F.3d at 1381. Therefore, Commerce's finding that Hyosung's reporting of gross unit prices as well as discounts and interest charges was deficient was supported by substantial evidence.

Nevertheless, Commerce's authority to disregard Hyosung's data and rely on other sources of information, including its authority to use an adverse inference, is subject to 19 U.S.C. § 1677m(d). *See* 19 U.S.C. § 1677e(a),(b). Pursuant thereto, if Commerce finds that "a response to a request for information" is deficient, "[it] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews." *Id.* § 1677m(d). ABB contends that Commerce identified a deficiency and provided Hyosung an opportunity to respond, but cites only the Issues and Decision Memorandum as support. ABB's Resp. at 29 (citing I&D Mem. at 31–32). That Memorandum summarily states that "Hyosung was provided multiple opportunities to remedy these deficiencies, yet failed to do so," I&D Mem. at 32, without identifying any such opportunities relevant to this issue.

Commerce's finding that Hyosung failed to act to the best of its ability is similarly unsupported by substantial evidence and its decision to apply an adverse inference is otherwise contrary to law. Commerce relied on its summary reference to multiple opportunities and went on to state:

> Therefore, Hyosung failed to put forth its maximum efforts to comply with requests for information, thereby failing to cooperate to the best of its ability. The application of total AFA is, therefore, warranted.

Id. "A finding that simply restates the statutory standard and is unsupported by any discussion linking the applicable standard to the particular facts is inadequate." *ABB II,* 355 F. Supp. 3d at 1223. Therefore, Commerce's resort to facts available, including with an adverse inference, is unsupported by substantial evidence and otherwise inconsistent with law. On remand, Commerce must reconsider this issue and collect or identify additional information to make a determination supported by substantial evidence and otherwise in accordance with law.

4. Commerce is directed to reconsider its use of total AFA

Because the court remands each of the bases on which Commerce relied to use total AFA, on remand, Commerce must also reconsider or further explain its decision to use total facts available with an adverse inference.

C. HHI's Motion

i. Relevant Facts

For the final results, Commerce explained that it had "considered whether there are components of an LPT that may amount to physical differences in the product such that [the agency] would make an adjustment based on the variance in costs of those components." I&D Mem. at 9. It stated that, "[b]ecause the term 'accessories,' by nature, indicates that these parts may not be essential to LPTs that are subject to the scope of this proceeding," Commerce was concerned that HHI may treat the same parts "as accessories or not as accessories between sales both within each market and across markets," and thereby understate or overstate the gross unit prices, which would manipulate the dumping margin. *Id.* at 10. To address those concerns, Commerce requested information regarding the price and cost for accessories to determine whether accessories should be included or excluded from the gross unit price. *Id.*

Commerce found that, despite its "repeated requests," *id.* at 10 & n.45 (citing Prelim. Mem. at 12–17), HHI failed to provide the information in the form and manner requested and instead relied on the scope language and Commerce's historical treatment of accessories for its reporting methodology, *see id*. at 11. Specifically, Commerce stated that HHI "failed to address which components in its reporting constitute the accessories [HHI] considers in its normal course of business." *Id.*; *see also id.* at 13 ("[HHI] could have provided the ranges/types of components which it believes constitutes accessories based on its technical knowledge and experience in the industry."). Commerce further stated that HHI provided conflicting responses, because while HHI claimed it did not know the definition of accessories, HHI also claimed that it reported accessories as subject merchandise. *Id.* at 11.

Regarding HHI's reporting of certain home market gross unit prices, Commerce found that HHI's reporting was deficient because HHI used values from its original purchase contract to report gross unit prices even though later-revised contracts identified different contract values. *Id.* at 15. Commerce determined that the record was "ambiguous" whether the product that accounted for the difference in the contract price was subject merchandise (that would have affected the home market gross unit prices) or non-subject merchandise (that would not have affected the home market gross unit prices). *Id.* at 16. Additionally, Commerce expressed "concern that [HHI] might be understating its home market gross unit price[] because it treated the same/similar part differently." *Id.* Specifically, Commerce explained, HHI classified a particular part for one home market sale as non-subject merchandise and classified "the same/similar part" as foreign like product for another home market sale on the record. I&D Mem. at 16 & n.81 (citation omitted). Commerce ultimately concluded that the record was "unclear" regarding these two issues. *Id.* at 17. "In the absence of clear information and explanation," Commerce found "that: (1) [HHI's] reporting of non-foreign like products is inaccurate; (2) there is inconsistent treatment of a certain item in [HHI's] home market sales; and (3) [exclusion of] this item . . . could lead to the understatement of the home market gross unit price for certain sales." *Id.* at 16.

Regarding the sales agent, Commerce concluded that HHI withheld information and impeded the review because it failed to "disclose the relationship between Hyundai and its sales agent after requests to do so." *Id.* at 4; *see also id.* at 18–19. Commerce found that "record evidence indicates that Hyundai . . . was affiliated with a certain sales

agent in the United States based on the fact that this sales agent uses an email address and a title and a division that belongs to Hyundai."[23] *Id.* at 19 & n.99 (citing HHI Prelim. Analysis Mem. at 5). Additionally, Commerce determined that HHI "failed to provide complete and accurate information regarding its precise relationship with its sales agent" because it did not provide "conclusive evidence to undermine/challenge Commerce's preliminary finding" of affiliation. *Id.* at 19.

ii. Parties' Contentions

HHI contends that Commerce's findings on each of the three issues lack substantial evidence because HHI fully responded to each of the agency's requests for information on accessories and affiliations, and the agency's finding on the issue of home market gross unit prices was inconclusive. HHI's Br. at 2–3, 24–26, 30–31, 33–34. Additionally, HHI challenges Commerce's decision to apply an adverse inference as contrary to law for failure to comply with 19 U.S.C. § 1677m(d). *Id.* at 26–29, 31, 34–35. HHI further contends that Commerce failed to fulfill its obligations to: (1) define the term "accessories," which was ambiguous; and (2) assist HHI, which was experiencing difficulties in responding to the questionnaires regarding accessories, pursuant to 19 U.S.C. § 1677m(c). *Id.* at 27–29. HHI argues that the agency improperly rejected new factual information that HHI submitted after the preliminary results to address Commerce's preliminary finding on affiliation between HHI and the sales agent. *Id.* at 35–37. Lastly, HHI contends Commerce had no basis for using total AFA. *Id.* at 40–41.

As discussed *supra*, the Government has requested remand to reconsider the accessories issue and otherwise has failed to substantively respond to HHI's arguments. ABB contends that Commerce's findings are supported by substantial evidence and the decision to use total AFA is in accordance with law. *See* ABB's Resp. at 7–21. According to ABB, Commerce's finding with respect to HHI's reporting of home market gross unit prices, alone, supports the use of total AFA. *Id.* at 13–17.

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[23] Specifically, [[ ]], designated here for confidentiality purposes as "Individual X," of [[ ]], designated here for confidentiality purposes as "Company Y." Analysis of Data/Questionnaire Resps. Submitted by Hyundai Heavy Industries Co., Ltd. in the Prelim. Results of the 2015–2016 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (Aug. 31, 2017) ("HHI Prelim. Analysis Mem.") at 5, PR 260, CJA Vol. IV, Tab 4.

iii. Analysis

1. Commerce's findings that HHI withheld information on accessories and failed to cooperate to the best of its ability are not supported by substantial evidence

Commerce's finding that HHI failed to provide information on accessories despite "repeated requests" by Commerce, I&D Mem. at 10, is not supported by substantial evidence. In its initial antidumping duty questionnaire, Commerce instructed HHI to "separately report the price and cost for . . . 'accessories' to ensure that product matches are based on accurate physical charateristics [sic] of the LPTs." Req. for Information, Hyundai Heavy Industries Co., Ltd. (Jan. 5, 2017) ("HHI Initial Questionnaire") at D-1, PR 24, CJA Vol. I, Tab 1, Suppl. CJA, Attach. 4. This was the same question that the agency posed to HHI in AR3. *See Hyundai Heavy Indus.*, 332 F. Supp. 3d at 1343. HHI responded to this request by noting that Commerce had not defined "accessories" and that HHI reported its accessories consistent with the scope of the antidumping duty order, which includes accessories in the subject merchandise.[24] Sections B-D Resp. (Feb. 27, 2017) at D-3, CR 95–150, PR 89–92, CJA Vol. I, Tab 3.

Thereafter, Commerce issued a supplemental sales questionnaire, requesting HHI to (1) explain whether its sales documentation separately lists or itemizes the price for accessories, and (2) report separately the revenues and associated expenses for those accessories. First Sales Suppl. Questionnaire (Apr. 12, 2017) at 14–15, PR 121, Suppl. CJA, Attach. 1. HHI submitted its response on May 3, 2017 and provided the requested information in worksheet SA-46 "indicating whether any of its sales documentation separately lists or itemizes values for accessories and the corresponding expenses for the separately-listed revenues." Prelim. Mem. at 13 & nn.70–71 (citing Suppl. A Questionnaire Resp. (May 3, 2017) ("HHI Suppl. A. Resp.") at 41 & Attach. SA-46, CR 200–265, PR 135–160, CJA Vol. I, Tab 7, Suppl. CJA, Attach. 2). Commerce found the worksheet "provide[d] separate line items for various parts and expenses but [did] not identify which parts of the LPT [HHI] defines and treats as accessories." *Id.* at 13. However, the agency did not instruct HHI in this

[24] Subsequently, HHI requested the agency to clarify the definition of the term "accessories" as used in the HHI Initial Questionnaire, Req. for Clarification (March 29, 2017) at 5, CR 189–90, PR 117–18, CJA Vol. I, Tab 4, and requested a meeting with Commerce officials to discuss the accessories issue, July 14, 2017 Meeting with Dep't and Resp. to ABB July 12, 2017 Comments on Hyundai's Suppl. Section B-D Questionnaire Resps. (July 25, 2017) ("HHI's July 25, 2017 Cmts.") at 4, CR 520, PR 241, CJA Vol. I, Tab 17.

questionnaire to identify *which parts HHI treats as accessories*.[25] Commerce had not responded to HHI's clarification request, and HHI reiterated that request in its response. HHI Suppl. A Resp. at 41.

On May 19, 2017, Commerce issued a second sales supplemental questionnaire in which it requested additional information on accessories "in light of" HHI's request for clarification. *See* Second Sales Suppl. Questionnaire (May 19, 2017) ("HHI Second Sales Suppl. Questionnaire") at 9, CR 319, PR 168, CJA Vol. I, Tab 8. Specifically, Commerce requested HHI to explain how it uses the term "accessories" when it negotiates with its customers and explain the basis for such usage, describe what HHI "treat[s] as main bodies, spare parts, and accessories," and, for certain sales, "provide a chart identifying each component, including main bodies, spare parts, and accessories for the LPTs sold." *Id.* at 9–10. Additionally, Commerce asked HHI to add fields to its sales databases to report the gross unit price of accessories, both excluding and including the service-related revenues associated with accessories. *Id.* at 12.

HHI responded to the agency's second supplemental questionnaire on June 16 and 19, 2017. HHI explained that it does not have a definition of accessories, that it "normally mirrors the terminology used by a customer in its request for quotation," and that its customers and the departments within HHI use the term inconsistently. 2nd Suppl. Sales Response (Q29 and Q30) and Suppl. D Questionnaire Resp. (Q14) (June 16, 2017) ("June 16th Second Sales Suppl. Resp.") at 2nd SS-3, CR 390, PR 204, CJA Vol. I, Tab 10. HHI further explained that, since the original investigation, it has reported accessories "in accordance with the scope of the antidumping duty order."[26] *Id.* at SS-8. Consistent with Commerce's instructions, HHI provided a chart in Attachment 2nd SS-21, which identified each component for the LPTs sold. Second Sales Suppl. Response (June 19, 2017) ("June 19th Second Sales Suppl. Resp.") at 22 & Attach. 2nd SS-21, CR 392–445, PR 207–214, CJA Vol. I, Tab 11, CJA Vol. IV, Tab 2. Additionally, HHI provided, for each transaction, revenues separately

[25] In the intervening time between the issuance of the supplemental questionnaire and HHI's response, HHI and ABB were submitting comments to the agency regarding the proper definition of accessories. *See* Pet'r's Resp. to Hyundai's Req. for Clarification of the Definitions of "Separate Revenue for Sales-Related Services" and "Accessories" (Apr. 3, 2017), PR 119, CJA Vol. I, Tab 5; Comments on ABB's April 3, 2017 Resp. to Hyundai's Req. for Clarification of the Definitions of "Separate Revenue for Sales-Related Services" and "Accessories" (May 1, 2017), PR 131, CJA Vol. I, Tab 6. Commerce did not respond to HHI's clarification request and the term remained undefined.

[26] HHI explained that, since the original investigation, it "has reported gross unit prices that are inclusive of all transformer components that are attached to, imported with, or invoiced with the active parts of the transformers, including in instances where the sales documents list individual prices for particular components, in accordance with the scope of the antidumping duty order." June 16th Second Sales Suppl. Resp. at SS-8.

identified in sales documents for the main transformer, parts and components (including accessories), and services. June 19th Second Sales Suppl. Resp., Attach. 2nd SS-24; *see also* Second Cost Suppl. Resp. (July 24, 2017) at 10, CR 527, PR 244, CJA Vol. I, Tab 16 (explaining that Attachment 2nd SS-24 included an updated list of items for which separate revenue was listed in the underlying sales documents).

Commerce took issue with the chart provided in Attachment 2nd SS-21 because HHI did not identify accessories in the chart. Prelim. Mem. at 15 & n.85 (citation omitted). While the chart listed certain components that included the term "accessory" in the component name, it only categorized components as main bodies or spare parts in the "component category" section. *See, e.g.*, June 19th Second Sales Suppl. Resp., Attach. 2nd SS-21 at 2. This was consistent with HHI's explanations to the agency that it does not have a definition of accessories, that it normally mirrors the terminology used by a customer in sales documentation, and that it has consistently reported accessories based on the scope language. *See* June 16th Second Sales Suppl. Resp. at 2nd SS-2, SS-8.

Commerce issued another supplemental questionnaire to HHI on July 11, 2017 and requested that HHI report accessories in a separate field in the cost database "[t]o the extent that you have reported accessories in your revised sales files." 2nd Section D Suppl. Questionnaire (July 11, 2017) at 4, CR 484, PR 229, CJA Vol. I, Tab 15. HHI responded to this request by referring back to attachment 2nd SS-24 and stating:

> Because the [agency] still is considering the definition of an "accessory," it is unclear whether some of these items will ultimately be considered to be parts. In the even [sic] that they are and in order to ensure that the [agency] has both revenue and cost information for these items, we provide in Attachment 2SD-9 a complementary chart in which we have reported for each item listed in Attachment 2nd SS-24 . . . the revenue listed in that exhibit as well as the cost of the item.

Second Cost Suppl. Resp. (July 24, 2017) at 10, CR 527, PR 244, CJA Vol. I, Tab 16. HHI provided the worksheet electronically so "the reported costs can be linked to the COP/CV file by the project code." *Id.* Ten days prior to this response, HHI had met with Commerce officials and had "offered to supply further information to assist [Commerce's] understanding of the 'accessories' issues, including, for example, the bills of materials for the LPTs involved in the reported sales transactions." HHI's July 25, 2017 Cmts. at 5.

As the above discussion demonstrates, Commerce asked HHI to explain how it used the term in the ordinary course of business and HHI provided details of the inconsistent uses within the company and between the company and its customers. *See* June 16th Second Sales Suppl. Resp. at 2nd SS-2. Commerce determined that HHI "failed to address which components in its reporting constitute the accessories [HHI] considers in its normal course of business," I&D Mem. at 11, and that it "could have provided the ranges/types of components which it believes constitutes accessories based on its technical knowledge and experience in the industry," *id.* at 13. Commerce did not provide clear guidance to HHI on how it should report accessories; rather, it requested a series of explanations, which HHI provided. HHI repeatedly informed Commerce that its reporting methodology was consistent with the scope of the antidumping duty order and repeatedly requested guidance from Commerce on the definition of accessories. *See* Req. for Clarification; HHI Suppl. A Resp. at 41.

In *Hyundai Heavy Industries*, the court stated that "HHI's interpretation of the term [accessories] as excluding transformer parts that physically attach to an LPT was reasonable and otherwise appears to comport with the scope of the order and with Commerce's instructions." 332 F. Supp. 3d at 1347 (citation omitted). So too was HHI's understanding of the term here. That HHI's reporting was reasonable is further demonstrated by the agency's own decision in the remand redetermination in AR3, which it issued after the *Final Results*. Therein, Commerce stated that it now "agree[s] with [HHI's] reporting that 'accessories' are components attached to the active part of the LPT and included within the subject merchandise." Final Results of Redetermination Pursuant to Court Remand at 9, *Hyundai Heavy Indus. Co., Ltd. v. United States*, No. 17–00054 (CIT Dec. 13, 2018), ECF No. 66. According to Commerce, therefore, "defining 'accessories' or characterizing parts or components as 'accessories' is no longer relevant for purposes of Commerce's determination," *id.* at 10; "Hyundai did not fail to act to the best of its ability regarding 'accessories'" and "applying AFA to Hyundai with respect to 'accessories' [is] no longer warranted,"[27] *id.* at 19.

In light of the foregoing, Commerce's findings that HHI failed to provide requested information on accessories and failed to act to the

[27] Although *Hyundai Heavy Industries* concerned a separate administrative record, the records are not materially distinguishable with respect to accessories. *See* Oral. Arg. at 11:57–12:31.

best of its ability is unsupported by substantial evidence.[28] Accordingly, Commerce's decision to apply an adverse inference was not in accordance with law.

2. Substantial evidence supports Commerce's finding that the record was unclear whether HHI properly reported home market prices; however, Commerce must reconsider its decision to apply an adverse inference

In its initial questionnaire, Commerce requested HHI to "[p]rovide . . . all sales-related documentation generated in the sales process . . . for a sample sale in the foreign market and U.S. market during the [period of review]." HHI Initial Questionnaire at A-10. HHI provided the requested information on February 2, 2017. *Id.* at 16 & n.85 (citing Sec. A Resp. (Feb. 2, 2017) ("HHI Sec. A Resp."), Attachs. A-13—A-15, CR 1938, PR 42–50, CJA Vol. I, Tab 2, CJA Vol. IV, Tab 1, Suppl. CJA, Attach. 5). In a supplemental questionnaire, Commerce asked HHI to provide "complete sales and expenses documentation" for five home market sales and five U.S. sales. HHI Second Sales Suppl. Questionnaire at 13. Commerce also requested "a complete break-down between foreign like product and non-foreign like product" and "a detailed narrative explanation and supporting documentation demonstrating why you categorized such products shown in the identified document as foreign like product and non-foreign like product, respectively." *Id.* at 10–11.[29] HHI timely responded to these requests. I&D Mem. at 17 & n.88 (citation omitted).

For the preliminary results, Commerce found that HHI "improperly reported its home market gross unit prices for certain home market sales" because HHI used values from its original purchase contract to

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[28] In *Hyundai Heavy Industries*, the court stated that "[i]f Commerce is to take an action adverse to a party for an alleged failure to comply with an information request, it must fulfill its own responsibility to communicate its intent in that request." 332 F. Supp. 3d at 1348 (quoting *Prosperity Tieh Enter. Co. v. United States*, 42 CIT__, __, 284 F. Supp. 3d 1364, 1381 (2018)). In this case, it is difficult to see how HHI can be said to have failed to put forth its maximum effort when it responded to each of Commerce's questions, made multiple requests for clarification, requested a meeting with Commerce officials to discuss the issue, and provided sales and cost information for the parts and components that the agency presumably could have used once it determined the definition of accessories.

[29] HHI averred that Commerce "did not identify which 'certain item' it believed was subject merchandise in one sale, but non-subject merchandise in the other sale." HHI's Br. at 16. While Commerce did not identify the part, it cited the specific pages of ABB's rebuttal brief, which make clear that Commerce was referring to the [[ ]]. Specifically, ABB claimed that

> [[ ]]" as non-subject merchandise. Under no classification system would a [[ ]] be deemed non-subject merchandise. Hyundai confirmed this usage by reporting that the [[ ]].

Pet'r's Rebuttal Br. to Hyundai's Case Br. at 19–20 & n.69 (citing HHI's June 19th Second Sales Suppl. Resp., Attach. SS-21 at ECF p. 86).

report gross unit prices "even though later-revised contracts identify different contract values." Prelim. Mem. at 18 & n.104 (citing 2nd Suppl. Sales Resp. to Questions 42, 47–50, 52, 54, 55, and 77 (June 26, 2017) ("June 26th Second Sales Suppl. Resp."), Attach. SS-94, CR 460–82, PR 222–24, CJA Vol. I, Tabs 13, 14, CJA Vol. IV, Tab 3). Commerce further found that HHI had not demonstrated that the gross unit prices it reported remained unchanged. HHI Prelim. Analysis Mem. at 3. Following the preliminary results, HHI submitted comments asserting that the agency made an erroneous finding. *See* Resubmission of Post-Prelim. Comments (Oct. 5, 2017), Attach. at 4–5, CR 560, PR 281, CJA Vol. I, Tab 22. HHI identified record evidence that it claimed demonstrated that revisions to the purchase contract related to a part that was non-subject merchandise and did not affect the gross unit prices of foreign like product. *Id.*

Commerce concluded that the record was "ambiguous" whether the part accounting for the difference in price was subject merchandise. I&D Mem. at 15–16. Commerce, however, appears to have related the ambiguity associated with this particular part, whether foreign like product or non-foreign like product, with its inability to determine whether certain parts or components are "accessories." *Id*. The ambiguity was also due to the fact that the initial contract listed the particular part under the "Main Transformer" description. *Id.* at 15 & n.79 (citing Pet'r's Rebuttal Br. to Hyundai's Case Br. (Oct. 19, 2017) at 19, CR 566, PR 294, CJA Vol. I, Tab 25; June 19th Second Sales Suppl. Resp., Attach. 2nd SS-22). Because Commerce's decision with respect to this issue appears to be linked to its treatment of accessories, which treatment Commerce must revisit, the court defers ruling on this issue pending Commerce's redetermination on remand. In that redetermination, if Commerce continues to find fault with HHI's reporting of the gross unit prices for these particular home market sales, or its treatment and reporting of a particular part as between the U.S. and home markets, Commerce must clearly explain the basis for each finding and any extent to which the finding supports the use of any facts available, with or without an adverse inference.

3. Substantial evidence does not support Commerce's finding that HHI failed to disclose its affiliation with a sales agent

As stated, the substantial evidence standard of review requires that Commerce "examine the record and articulate a satisfactory explanation for its action." *Bestpak*, 716 F.3d at 1378 (Fed. Cir. 2013). Commerce has failed to do so with respect to its treatment of an allegedly affiliated sales agent.

Commerce concluded that HHI withheld information and impeded the review because it failed to disclose HHI's affiliation with a "sales agent." *See* I&D Mem. at 4, 19 & n.99 (citation omitted); HHI Prelim. Analysis Mem. at 5. It is unclear, however, whether "sales agent" constitutes a reference to Individual X or Company Y. In fact, Commerce appears to refer to Individual X and Company Y interchangeably through the use of the "sales agent" moniker. In one instance, Commerce agreed with ABB's allegation that HHI was affiliated with Company Y. *See* Prelim. Analysis Mem. at 4 ("[ABB] alleged the possibility of affiliation between Hyundai and one sales agent (i.e., [Company Y])"); *id.* at 5 ("[R]record evidence indicates that Hyundai is affiliated with the sales agent in the United States, as the petitioner alleged.") (footnote omitted). In another instance, Commerce found that "th[e] sales agent [Individual X of Company Y] is affiliated with HHI." *Id.* at 5.

HHI disclosed Company Y as a sales agent in its initial questionnaire response and claimed to be unaffiliated with the company. Sections B-D Resp. at C-45, CJA Vol I Tab 3. In a supplemental questionnaire, Commerce requested the following: "Petitioner noted that publicly available information shows, for example, that commission agent [Company Y] shares the same address and phone number with [[ ]]. Please explain [HHI's] relationship with this company and state whether there is any affiliation between [Company Y] and any [HHI] entity." HHI Second Sales Suppl. Questionnaire at 30. In response, HHI reiterated that it had no affiliation with any of its sales agents; that it compensates them whenever they "are able to arrange a sale;" and, regarding Company Y, that it has "no ownership interest in the company, which is privately held." June 19th Second Sales Suppl. Resp. at 81. HHI also provided documentary evidence regarding Company Y's correct address. June 19th Second Sales Suppl. Resp. at 81 (citing June 19th Second Sales Suppl. Resp., Attach. 2nd SS-89). HHI, therefore, addressed Commerce's question to describe in detail its relationship with its sales agents, including Company Y.[30]

Commerce determined that HHI and the "sales agent" were affiliated pursuant to 19 U.S.C. §§ 1677(33)(D) and (E), but did not specify whether it meant Individual X or Company Y. *See* I&D Mem. at 4. Those statutory provisions, respectively, provide that an "[e]mployer

[30] ABB argues that HHI failed to fully and accurately respond to Commerce's supplemental questionnaire because HHI did not mention Individual X or the fact that this individual "uses an HHI title and email address." ABB's Resp. at 19. According to ABB, "[t]he agent's title alone should have caused [HHI] to comment on or further explain the nature of the agent's role with [Company Y] and HHI." *Id.* This argument is unpersuasive because ABB fails to identify any specific requests for information in the questionnaire that required HHI to address employees of its sales agents, their titles, or email addresses.

and employee" and "[a]ny person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization" "shall be considered to be affiliated." 19 U.S.C. §§ 1677(33)(D),(E). The only explanation that Commerce gave to support its finding of affiliation is "the fact that [Individual X] uses an email address and a title and a division that belongs to [HHI]." I&D Mem. at 19 & n.99 (citing HHI Prelim. Analysis Mem. at 5).[31] Commerce did not, however, explain how that "fact" fulfilled the statutory definition of affiliation pursuant to section 1677(33)(D). *See* I&D Mem. at 19. Commerce also failed to identify any evidence supporting its finding of affiliation pursuant to section 1677(33)(E). *See id*.

"Commerce must explain the basis for its decisions," such that "the path of Commerce's decision [is] reasonably discernable to a reviewing court." *NMB Singapore*, 557 F.3d at 1319. Because Commerce did not do so, the court will remand this matter to the agency to reconsider and further explain the basis for its decision that HHI was affiliated with a sales agent pursuant to sections 1677(33)(D) and (E).[32]

In the absence of substantial evidence to support Commerce's use of facts available, Commerce's reliance on an adverse inference also cannot be sustained.

4. Commerce is directed to reconsider its decision to use total AFA

In this case, Commerce disregarded HHI's data based on the three collective findings discussed above. Because substantial evidence does not support those findings, Commerce's decision to use total AFA as a result of these three findings is likewise unsupported by substantial evidence. On remand, Commerce must reconsider or further explain its decision to use total facts available with an adverse inference.

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[31] Although HHI presented several arguments with respect to Commerce's preliminary affiliation finding, *see* Hyundai's Case Br. (Oct. 12, 2017) at 44–47, CR 564, PR 289, CJA Vol. I, Tab 23, Commerce did not analyze those arguments but determined that HHI did not "conclusive[ly]" challenge Commerce's preliminary finding, I&D Mem. at 19. Commerce must address those arguments upon reconsideration on remand.

[32] HHI claims that Commerce's statement in the preliminary results that the sales agent's email address "belongs" to HHI constituted new factual information – i.e., a statement of fact. HHI's Br. at 35–36. Commerce made the statement as a finding based on its review of Attachment SA-15. I&D Mem. at 19 & n.99 (citing HHI Prelim. Analysis Mem. at 5). HHI may disagree whether that finding is supported by substantial evidence; however, this finding does not constitute new factual information to which HHI was entitled to respond.

III. Iljin's Motion for Judgment on the Agency Record

A. Legal Framework

There is no statutory provision that directly addresses how Commerce is to determine the dumping margin for non-examined companies in an administrative review. However, 19 U.S.C. § 1673d(c)(5) addresses such determinations in investigations and Commerce uses this provision as a guide for determining dumping margins for non-examined companies in a review. *See, e.g.*, *Albemarle Corp. v. United States*, 821 F.3d 1345, 1352 & n.6 (Fed. Cir. 2016); *Prelim. Results,* 82 Fed. Reg. at 42,290. It provides that the "all-others rate" assigned to non-examined companies is determined as "the weighted average of the estimated weighted average dumping margins" assigned to individually-examined companies, "excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title [i.e., on the basis of the facts available, including adverse facts available ("AFA")]." 19 U.S.C. § 1673d(c)(5)(A). If, however, the dumping margins assigned to all individually-examined companies are zero, de minimis, or based on adverse facts available, Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." *Id.* § 1673d(c)(5)(B).

The Statement of Administrative Action accompanying the Uruguay Round Agreements Act[33] provides that when the dumping margins for all individually-examined respondents "are determined entirely on the basis of the facts available or are zero or de minimis[,] . . . Commerce may use any reasonable method to calculate the all others rate." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 ("SAA"). While

> the expected method in such cases will be to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, provided that volume data is available[,] . . . if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-[examined] exporters or producers, Commerce may use other reasonable methods.

Id.

[33] The SAA is the authoritative interpretation of the statute. 19 U.S.C. § 3512(d).

B. Relevant Facts

For the preliminary results, Commerce applied to Iljin the rate preliminarily assigned to Hyosung and HHI. *Prelim. Results,* 82 Fed. Reg. at 42,290 & n.4 (citing *Albemarle*, 821 F.3d 1345). Commerce explained that the rate represented "the only rate determined in this review for individual respondents and, thus, should be applied to the [non-examined respondents]." *Id.* at 42,290. In its administrative case brief, Iljin argued that the 60.81 percent rate was not "reasonably reflective of [its] potential dumping margin[]," *see* Case Br. of Iljin (Oct. 12, 2017) at 6, PR 287, CJA Vol. III, Tab 12, and Commerce should instead assign it the 2.99 percent weighted-average dumping margin Iljin received in AR3, *id.* at 8. After determining to retain the 60.81 percent rate for HHI and Hyosung, Commerce continued to assign that same rate to Iljin for the final results. I&D Mem. at 35. Impliedly referencing the rate as the simple average of the rates assigned to the examined respondents, Commerce explained that its methodology is supported by the statute and the SAA and was "upheld in *Albemarle*." *Id.*

C. Parties' Contentions

Iljin contends that Commerce assigned it a margin that is "[i]nconsistent with the [l]aw" and unsupported by record evidence. Iljin's Br. at 6. Specifically, Iljin contends that Commerce is required to assign it a margin that is "reasonably reflective of potential dumping margins," and *Albemarle* does not support Commerce's conclusion that the AFA rates assigned to the examined respondents reasonably reflect Iljin's potential dumping margin. Iljin's Br. at 6–8; Iljin's Reply at 2. Iljin seeks to distinguish *Albemarle*, arguing that the Federal Circuit's decision turned on the fact that the examined respondents received calculated rates "reflect[ing] pricing activity during the [relevant] review period" and, thus, "the examined respondents' rates" reasonably reflected "the non-examined respondents' potential margins." Iljin's Reply at 2–3 & n.4 (citing *Albemarle*, 821 F.3d at 1351). Iljin further argues that *Bestpak* requires Commerce to assign non-examined respondents a rate that reflects those companies' "economic reality." Iljin's Reply at 3 & n.5 (citing *Bestpak*, 716 F.3d at 1378).

ABB contends that the logic and holding of "*Albemarle* applies equally to both de minimis and AFA margins." ABB's Resp. at 41 ("As with de minimis margins, Commerce has no mandate under [section] 1673d(c)(5)(B) 'to routinely exclude' the AFA margins. . . ."). ABB further contends that the record supports Commerce's finding that the 60.81 percent margin is reasonably reflective of Iljin's potential dumping margin for this period of review. *Id.* at 42–46.

D. Analysis

Commerce determined Iljin's rate by taking the simple average of the AFA rates assigned to the examined respondents. *See* I&D Mem. at 35. Because the court remands Commerce's decision to rely on AFA to determine the mandatory respondents' dumping margins, on remand, Commerce may determine not to use AFA to determine the rates applicable to both Hyosung and HHI, making this issue moot. Therefore, the court defers consideration of Commerce's method of selecting the rate assigned to Iljin pending the agency's redetermination on remand.

IV. ABB's Requests

ABB avers that "any remand in this case would require Commerce to consider all of the issues that were briefed by ABB before the agency but were deemed to be moot once Commerce applied adverse facts available to Hyundai and Hyosung on other grounds." ABB's Resp. at 39 (citing I&D Mem. at 19–20, 32). ABB requests that the court "direct Commerce to consider the additional issues raised by ABB in support of the application of total adverse facts available to each respondent because those issues would no longer be moot." *Id.* While it is within Commerce's discretion to reconsider these issues on remand, the court declines to order Commerce to do so. *See Torrington Co. v. United States,* 14 CIT 56, 57, 731 F. Supp. 1073, 1075–77 (1990) ("[A]n intervenor is limited to the field of litigation open to the original parties, and cannot enlarge the issues tendered by or arising out of plaintiff's bill.") (citing *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U.S. 53, 58 (1935)).

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Results* are remanded to Commerce; and it is further

ORDERED that, on remand, Commerce shall:

(1) Redetermine the rate to be applied to Hyosung:

a. Without relying on the OAFs as the basis for applying its capping methodology to service-related revenues;

b. Based upon a reconsideration of Hyosung's overlapping invoice consistent with this Opinion; and

c. Based upon a reconsideration of Hyosung's price adjustments, discounts and interest charges consistent with this Opinion;

(2) Redetermine the rate to be applied to HHI:

a. Based upon a reconsideration of HHI's reporting of accessories consistent with this Opinion;

b. Based upon a reconsideration of its HHI's reported home market gross unit prices consistent with this Opinion; and

c. Based upon a reconsideration of HHI's reported sales agent, consistent with this Opinion; and

(3) Redetermine, as appropriate, the rate applied to Iljin;

ORDERED that Commerce shall file its remand results on or before November 4, 2019; and it is further

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

ORDERED that any comments or responsive comments must not exceed 5,000 words.

Dated: August 5, 2019
New York, New York

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

Slip Op. 19–106

CHINA STEEL CORP., Plaintiff, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, NUCOR CORP., and SSAB ENTERPRISES LLC, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 17–00152
PUBLIC VERSION

[U.S. Department of Commerce's final determination is sustained, in part, and remanded.]

Dated: August 6, 2019

Jeffrey M. Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, DC, argued for Plaintiff.

Vito S. Solitro, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel on the brief was *Paul Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Paul C. Rosenthal, Kelley Drye & Warren, LLP, of Washington, DC, argued for Defendant-Intervenor ArcelorMittal USA LLC. With him on the brief were *R. Alan Luberda*, *David C. Smith, Jr.*, *Melissa M. Brewer*, *Joshua R. Morey*, and *Heather N. Doherty*.

Alan H. Price, *Tessa V. Capeloto*, *Adam M. Teslik*, *Christopher B. Weld*, *Laura El-Sabaawi*, *Maureen E. Thorson*, *Stephanie M. Bell*, and *Timothy C. Brightbill*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor, Nucor Corporation.

Roger B. Schagrin, *Christopher T. Cloutier*, *Elizabeth J. Drake*, *John W. Bohn*, and *Paul W. Jameson*, Schagrin Associates, of Washington, DC, for Defendant-Intervenor SSAB Enterprises LLC.

OPINION and ORDER

Eaton, Judge:

Plaintiff China Steel Corporation ("Plaintiff" or "China Steel") moves for judgment on the agency record, challenging the United States Department of Commerce's ("Commerce" or the "Department") amended final determination in the antidumping investigation of certain carbon and alloy steel cut-to-length plate from Taiwan. *See Certain Carbon and Alloy Steel Cut-To-Length Plate From Taiwan*, 82 Fed. Reg. 16,372 (Dep't Commerce Apr. 4, 2017) ("Final Determination"), *amended by Certain Carbon and Alloy Steel Cut-To-Length Plate From Austria, Belg., Fr., the Fed. Rep. of Ger., It., Japan, the Rep. of Korea, and Taiwan*, 82 Fed. Reg. 24,096 (Dep't Commerce May 25, 2017) ("Amended Final Determination") and accompanying Issues and Dec. Mem. (Mar. 29, 2017), P.R. 427 ("Final IDM"). The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) (2012) and 28 U.S.C. § 1581(c) (2012).

On April 8, 2016, domestic producers ArcelorMittal USA LLC ("ArcelorMittal" or "Petitioner"), Nucor Corporation, and SSAB Enterprises, LLC each filed an antidumping duty petition covering steel from various countries, including Taiwan. Thereafter, on May 5, 2016, Commerce published the notice of initiation of its less-than-fair-value investigation. *See Certain Carbon and Alloy Steel Cut-To-Length Plate From Austria, Belg., Braz., Fr., the Fed. Rep. of Ger., It., Japan, the Rep. of Korea, the People's Rep. of China, S. Afr., Taiwan, and the Rep. of Turk.*, 81 Fed. Reg. 27,089 (Dep't Commerce May 5, 2016) ("Initiation of Investigation"). The scope of the investigation covered products including "certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate)." Final Determination, 82 Fed. Reg. at 16,374, App. I.

On June 7, 2016, the Department limited the respondents selected for individual investigation to two mandatory respondents: Plaintiff China Steel, and Shang Chen Steel Co., Ltd. ("Shang Chen"). *See Certain Carbon and Alloy Steel Cut-to-Length Plate From Taiwan*, 81 Fed. Reg. 79,420 (Dep't Commerce Nov. 14, 2016) ("Preliminary Determination"); Respondent Selection Mem. (June 7, 2016), P.R. 88 at 5.

China Steel is a Taiwanese producer and exporter of the subject steel plate, and first objects both to Commerce's application of adverse facts available ("AFA"),[1] and to Commerce's rejection of a supplemental questionnaire response containing unrequested data. Next, Plaintiff contends that Commerce erred when it applied AFA to some of the company's cost of production data and when it used that AFA-adjusted data in its difference-in-merchandise ("DIFMER") adjustment to normal value. Plaintiff also claims entitlement to a post-sale home-market price adjustment. Finally, it argues that Commerce's decision was unfairly prejudged by a conflict of interest on the part of the Secretary of the Department, Wilbur Ross, who was formerly associated with Petitioner and Defendant-Intervenor ArcelorMittal. *See* Pl.'s Rev. Br. Supp. Mot. J. Agency R., ECF No. 65 ("Pl.'s Br."); *see also* Pl.'s Reply, ECF No. 61.

Because Commerce erred when it based part of its DIFMER analysis, and thus its subsequent adjustment, on AFA-adjusted data, the Amended Final Determination is remanded. Since Plaintiff's other arguments lack merit, Commerce's determination, as to the remaining issues, is sustained.

BACKGROUND

Where goods are being sold at less than fair value, Commerce imposes an antidumping duty "equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise."[2] 19 U.S.C. § 1673.

During this investigation, the Department compared

> all products produced and sold by China Steel in Taiwan during the [period of investigation] that fit the description in the "Scope of Investigation" section of the accompanying *Federal Register* notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared

[1] The statute provides that Commerce shall use facts available "[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]" or "significantly impedes a proceeding." 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). Facts available may also be used if the information provided "cannot be verified" and is therefore unreliable. *Id.* § 1677e(a)(2)(D). Commerce may only use adverse inferences when "selecting from among the facts otherwise available" if it finds that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* § 1677e(b)(1)(A).

[2] Commerce uses several methods to compare normal value and export price in less-than-fair-value investigations. *See* 19 C.F.R. § 351.414(b) (2017) (listing methods). In this case, the Department used the "average-to-transaction" method. *See* 19 C.F.R. § 351.414(b)(3) ("The 'average-to-transaction' method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise."); Final IDM at 18 ("[F]or the [F]inal [D]etermination, the Department is applying the average-to-transaction method to all of China Steel's U.S. sales to calculate the weighted-average dumping margin for China Steel.").

> U.S. sales to sales made in the home market, where appropriate. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade.

Final IDM at 19. When appropriate, Commerce makes various adjustments to normal value, including the difference-in-merchandise ("DIFMER") adjustment for physical variations between products. *See* 19 U.S.C. § 1677b(a)(6)(C)(ii); 19 C.F.R. § 351.411 (2017).

Normal value, in the context of a market economy country[3] such as Taiwan, is generally based on the prices of sales in the home market. *See* 19 U.S.C. § 1677b(a)(1)(B)(i). Commerce disregards home-market sales that were made at less than the cost of production, and bases normal value on the remaining sales, or, if none remain, the merchandise's constructed value. *Id.* § 1677b(b)(1).

In this investigation, after reviewing the company's cost of production information, Commerce eventually concluded that China Steel's home-market sales were a suitable basis for normal value. *See* Final IDM at 20 ("[W]e used home market sales as the basis for [normal value] for China Steel."). Commerce, however, calculated normal value employing AFA for some of China Steel's cost of production data. Further, Commerce rejected China Steel's preferred version of its cost of production database. Thereafter, Commerce determined that it had made a ministerial error by not using AFA-adjusted data as the basis of its DIFMER adjustment to normal value. Its correction of that claimed error resulted in an increased weighted-average dumping margin for China Steel.

I. Commerce's Preliminary Determination

Commerce issued its initial questionnaire on June 9, 2016. *See* China Steel Quest. (June 9, 2016), P.R. 96. In its Section D (cost of production) questionnaire response, Plaintiff provided its cost reporting method and cost data file, denominated as COP1. *See* China Steel Sec. D Narrative Resp. (July 28, 2016), P.R. 195 at 19–21; China Steel Sec. D Exs. (July 28, 2016), P.R. 198, Apps. D-19, D-20.

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[3] In contrast, a "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). When the merchandise in question is exported from a nonmarket economy country, Commerce calculates the normal value of the subject merchandise based on the values of the factors of production, adding "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c)(1)(B).

The Department identified several errors in China Steel's COP1 database. *See* Prelim. Dec. Mem. (Nov. 4, 2016), P.R. 358 at 16 ("Prelim. Dec. Mem."). Accordingly, on September 16, 2016, it issued a supplemental questionnaire to Plaintiff asking for additional information concerning Plaintiff's Section D response.[4] Sec. D Suppl. Quest. (Sept. 16, 2016), P.R. 298 ("Suppl. Quest. I").

China Steel filed its Section D supplemental response on October 11, 2016. *See* China Steel Suppl. Quest. Sec. D Resp. (Oct. 11, 2016), P.R. 324 ("First COP2 Resp."). In addition to providing the information specifically requested by the Department, however, it made additional, unrequested, revisions to its cost data file (denominated as COP2).[5] Prelim. Dec. Mem. at 16 (noting that Plaintiff's additional revisions "were not made in response to a supplemental questionnaire or otherwise solicited by the Department").

In its Preliminary Determination, Commerce found all of China Steel's reported cost data, "unreliable for use." Prelim. Dec. Mem. at 16. The statute provides that Commerce shall use facts available "[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]" or "significantly impedes a proceeding . . . ." 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). Here, Commerce found that China Steel's changes, between COP1 and COP2, to certain product-matching control numbers ("CONNUMs") affected the calculation of the cost of production and rendered all of China Steel's reported cost information unusable. *See* Prelim. Dec. Mem. at 16 (emphasis added) ("[T]he Department preliminarily finds that China Steel failed to provide requested information in the form and manner

[4] Following several requests for extensions of time, Commerce ultimately amended the deadline for Plaintiff's Section D response from September 30, 2016 to October 10, 2016. *See, e.g.*, Letter from Erin Kearney to Jeffrey M. Winton, Extension of Time to Submit Supplemental Questionnaire Responses (Sept. 28, 2016), P.R. 312. Since October 10, 2016 was a non-business day, pursuant to Commerce's regulations, it was permissible for Plaintiff to submit its filing on the following day. *See* 19 C.F.R. § 351.303(b).

[5] These revisions were primarily comprised of China Steel's claimed discovery of, and attempt to correct, errors in "the coding of product-matching control numbers . . . in [its] July 28 [COP1] submission, particularly in the reporting of the 'Quality' characteristic." First COP2 Resp. at 1.

"Quality code" refers to one of the product characteristics, assigned by Commerce, that respondents use for reporting cost of production data in the course of an investigation. *See* Letter from Robert James to Jeffrey M. Winton, Product Characteristics for the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Taiwan (June 14, 2016), P.R. 111. These codes are used to define product-matching control numbers, called CONNUMs. "A 'CONNUM' is a control number assigned to materially-identical products to distinguish them from non-identical, i.e., similar, products." *Eregli Demir ve Celik Fabrikalari T.A.S v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1297, 1321 n.34 (2018) (citation omitted).

requested and by the deadlines established by the Department. By revising its costs so extensively and significantly, and by doing so *in such close proximity to the statutory date*[6] for the [P]reliminary [D]etermination, China Steel has also significantly impeded the proceeding.").

Where Commerce determines that the use of facts available is warranted, it must make the requisite additional finding that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information" before it may use an adverse inference when "selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A). In the Preliminary Determination, the Department found that because China Steel "fail[ed] to explain the extensive, significant, and unsolicited changes to its cost database," an adverse inference when selecting from among the facts available was warranted. *See* Prelim. Dec. Mem. at 17. Applying "total AFA,"[7] the Department preliminarily assigned China Steel a margin of 28 percent, which constituted "the highest calculated dumping margin [assigned] in the investigation." Prelim. Dec. Mem. at 8, 18–19; *see* Preliminary Determination, 81 Fed. Reg. at 79,420 ("Because mandatory respondent China Steel failed to cooperate to the best of its ability in responding to the Department's questionnaires, we preliminarily determine to use adverse facts available (AFA) with respect to

[6] China Steel's supplemental questionnaire response was submitted on October 11, 2016. The Preliminary Determination was issued on November 14, 2016.

[7] Since the 1994 amendments to section 1677e, Commerce has adopted the practice, under certain circumstances, of using what it calls "total adverse facts available" when determining dumping margins. "Total adverse facts available" is not defined by statute or agency regulation. Commerce has used "total adverse facts available" administratively "to refer to Commerce's application of adverse facts available not only to the facts pertaining to specific sales for which information was not provided, but to the facts respecting all of respondents' sales encompassed by the relevant antidumping duty order." *Mukand, Ltd. v. United States*, 37 CIT __, __, 2013 WL 1339399, at *7 (Mar. 25, 2013) (not reported in Federal Supplement), *aff'd*, 767 F.3d 1300 (Fed. Cir. 2014) (citation omitted).

This Court has sustained Commerce's use of total adverse facts available in certain tightly defined circumstances, *e.g.*, (1) the record contained no usable information for core components of Commerce's dumping analysis, or (2) substantial evidence showed that the respondent was egregious in its failure or refusal to comply with Commerce's requests for information. *See, e.g.*, *Mukand*, 37 CIT at __, 2013 WL 1339399, at *7 (citations omitted); *Papierfabrik August Koehler Se v. United States*, 38 CIT __, __, 7 F. Supp. 3d 1304, 1314 (2014). Where, on the other hand, some of the information could be used, or the deficiency was only "with respect to a discrete category of information," the use of "partial adverse facts available" is directed by the statute. *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 35 CIT 1398, 1416, 2011 WL 4829947, at *14 (Oct. 12, 2011); *see also Nat'l Nail Corp. v. United States*, 43 CIT __, __, 2019 WL 2537931, at *14 (June 12, 2019) (not reported in Federal Supplement) ("[I]n order to apply 'total adverse facts available,' Commerce must first find, based on the record, that the use of facts available is warranted with respect to all requested information.").

this respondent.").[8] In other words, in the Preliminary Determination, Commerce found that total AFA should be applied, thus using AFA not only for China Steel's costs of production, but also for its reported sales information. As a result, China Steel's preliminary antidumping duty rate was 28 percent. Preliminary Determination, 81 Fed. Reg. at 79,421.

II. Post-Preliminary Determination and Second Supplemental Questionnaire

Although it applied total AFA to China Steel's products in the Preliminary Determination, Commerce stated that it "intend[ed] to issue a supplemental questionnaire after the [P]reliminary [D]etermination to provide China Steel with an opportunity to explain the changes made to its cost database." Prelim. Dec. Mem. at 17. In a supplemental questionnaire dated November 9, 2016, the Department did just that, and asked Plaintiff to explain its revised cost data file, COP2. Sec. D Suppl. Quest. (Nov. 14, 2016), P.R. 361 ("Suppl. Quest. II"). On November 30, 2016, Plaintiff provided the explanations concerning COP2, but also submitted additional changes to its data file. *See* China Steel Sec. D Suppl. Quest. Resp. (Nov. 30, 2016), P.R. 378 ("Rejected COP3 Resp."). These revisions—which, among other things, incorporated corrections to a computing error that overstated standard costs of production and resulted in an overstated "calculated total aggregate standard cost for all products"—were denominated as data file COP3. Pl.'s Br. 19; *see* Rejected COP3 Resp. at 2–7; Letter from Erin Kearney to Jeffrey M. Winton, Rejection of Unsolicited Database (Dec. 29, 2016), P.R. 395 ("Rejection of Unsolicited Database").

Commerce rejected COP3 as untimely new factual information, and instructed China Steel to resubmit its supplemental response with only an explanation as to the differences between COP1 and COP2. *See* Rejection of Unsolicited Database. Accordingly, the additional revisions contained in COP3 are not part of the record. China Steel complied and submitted its final, revised response without the additional changes to the data file. *See* China Steel Sec. D Suppl. Quest. Resp. (Jan. 4, 2017), P.R. 398 ("Final COP2 Resp.").

[8] As noted, the resulting preliminary antidumping duty rate for China Steel was 28 percent. Preliminary Determination, 81 Fed. Reg. at 79,421. This number represented mandatory respondent Shang Chen's transaction-specific margin. Prelim. Dec. Mem. at 19. In the Preliminary Determination, however, Commerce calculated a weighted-average dumping margin of 3.51 percent for Shang Chen, and assigned this rate to all other, non-mandatory respondents. *See* Preliminary Determination, 81 Fed. Reg. at 79,421. In the Amended Final Determination, the "all others" rate was the average of the two mandatory respondents' recalculated rates (now 75.42 percent for China Steel and 3.62 percent for Shang Chen), resulting in a weighted-average dumping margin of 39.52 percent. Amended Final Determination, 82 Fed. Reg. at 24,098.

Commerce then conducted its verification of China Steel's costs of production. *See* Cost Verification Rep. (Feb. 9, 2017), P.R. 408. In the cost verification report, Commerce identified new computer programming errors in COP2—the database it was attempting to verify—that caused the costs of three CONNUMs[9] to be misstated, as well as an incorrect calculation of weighted-average per-unit costs for a number of other CONNUMs.[10] Final IDM at 6–7.

III. Facts Available and Adverse Inferences in the Final Determination

Commerce issued its Final Determination on April 4, 2017, calculating a dumping margin for China Steel of 6.95 percent, which Plaintiff found "not insanely punitive." Pl.'s Br. 26; *see* Final Determination, 82 Fed. Reg. at 16,373. Commerce based its normal value calculation on China Steel's home-market sales, after removing those products for which more than twenty percent of home-market sales were made at less than the cost of production. Final IDM at 20, 23–24.

Commerce's cost of production analysis, underlying its normal value calculation, was based on China Steel's finalized COP2 database. *See* Final IDM at 6–7. Commerce used AFA for China Steel's cost of production, its overall cost of manufacturing,[11] and certain of its U.S. sales.[12] Final IDM at 6–7. Further, Commerce determined

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[9] In total, sixty-one of a total 143 CONNUMs were affected by errors. These sixty-one included the three that Commerce singles out in its analysis. *See* Final COP2 Resp., P.R. 398, C.R. 598 at 13–14; China Steel Cost Calculation Mem. (Mar. 29, 2017), P.R. 435, C.R. 662 at 1–2 ("Cost Calculation Mem.").

[10] Specifically, there was an incorrect calculation of weighted-average per-unit costs for sixty-one CONNUMs. *See* Cost Calculation Mem. at 1–2.

[11] Commerce applied an adverse inference when it increased China Steel's total reported cost of manufacturing in COP2. Cost Calculation Mem. at 2; *see* Final IDM at 7. Commerce disregarded China Steel's own so-called "favorable variance adjustment," which the company had applied to account for the difference between its standard costs and actual costs of manufacturing and increased the total cost of manufacturing by [[ ]]. *See* Cost Calculation Mem. at 2; Final IDM at 7.

[12] China Steel does not dispute Commerce's use of AFA for certain of the company's U.S. sales. At sales verification, which took place from December 11 to 15, 2016, Commerce asked for, and received, information from China Steel about how changes to its quality code data affected sales. *See* Sales Verification Rep. (Feb. 15, 2017), P.R. 410 at 1–2. China Steel indicated that the errors only affected its home-market sales data, not its U.S. sales data, and submitted an exhibit explaining the quality code changes. *See* Sales Verification Rep. at 2.

In the Final Determination, Commerce found that "China Steel's incorrect reporting of quality codes shifted home market sales from one unique product group (*i.e.*, matching control number (CONNUM)) to another." Final IDM at 7. This incorrect assignment of quality codes caused the transaction margins for certain *U.S.* sales of products associated with those CONNUMs to be misstated. Final IDM at 7. Having found that China Steel failed to act "to the best of its ability" when complying with Commerce's request for information about the company's quality codes, the Department drew an adverse inference when selecting from among the facts available with respect "to all U.S. sales which match to CONNUMs containing the commercial products at issue." Final IDM at 7. Commerce

that China Steel was not permitted post-sale price adjustments it sought to make for certain home-market sales, because the terms and conditions were not known by its customers at the time of sale. *See* Final IDM at 44–47.

Regarding cost of production, Commerce applied facts available to the affected CONNUMs based on the errors remaining in China Steel's COP2 database following verification. *See* Final IDM at 6–7. Further, Commerce determined that China Steel's reporting of inaccurate data amounted to a failure to cooperate to the best of its ability, and then drew an adverse inference for the purpose of calculating cost of production. *See* Final IDM at 6–7 ("Regarding the three CONNUMs . . . for which costs were understated, we have increased the costs for these CONNUMs by substituting the highest reported cost of any CONNUM for the reported cost of these three CONNUMs. Regarding the CONNUMs . . . for which China Steel incorrectly calculated its weighted-average per-unit costs, we have increased the costs for these CONNUMs by substituting the highest reported cost of any CONNUM for the reported cost of the effected [sic] CONNUMs."). Commerce determined that China Steel had not cooperated to the best of its ability "by not providing the Department with timely and accurate cost data for certain CONNUMs" and by misrepresenting "its reported costs in its last two supplemental questionnaire responses by reporting to the Department that it reported actual CONNUM-specific costs for all CONNUMs when there were errors in its reported costs." Final IDM at 29.

IV. Allegation of Ministerial Error Regarding DIFMER Adjustment

After the Final Determination was issued, Petitioner and Defendant-Intervenor ArcelorMittal submitted a ministerial error allegation. *See* Letter from David C. Smith to Sec'y Wilbur Ross, Petitioner's Ministerial Error Allegations Concerning China Steel Corporation (Apr. 17, 2017), P.R. 444 ("Pet.'s Letter"). For Petitioner, Commerce's calculated margin for Plaintiff was flawed because Commerce based part of its difference-in-merchandise (DIFMER) analysis on China Steel's original COP1 cost of production database rather than on the AFA-adjusted COP2 database on record. *See* Pet.'s Letter at 3; *See* Mem. Re: Allegation of Ministerial Error for China Steel Corporation (May 19, 2017), P.R. 449 ("Ministerial Error Mem.").

The DIFMER adjustment to normal value is made where identical products are not sold in the United States and the comparison market (or otherwise cannot be compared). *See* 19 C.F.R. § 351.411(a)-(b);

replaced any transaction margin for a U.S. sale that it found to be distorted with "the highest transaction margin of any U.S. sale of subject merchandise." Final IDM at 7.

Policy Bulletin 92.2: Differences in Merchandise; 20% Rule, ENF'T & COMPLIANCE (July 29, 1992), https://enforcement.trade.gov/policy/bull92–2.txt ("Policy Bulletin 92.2"). In order to make an apples-to-apples comparison between products, Commerce looked at the subject merchandise sold in the United States and compared it to the foreign like product sold in the comparison (or in this case, home) market that had the most similar *actual* physical characteristics. *See* Policy Bulletin 92.2; *see also* Pl.'s Br. 39. When selecting the home-market products to be compared to the subject merchandise, Commerce relied on reported characteristics (*e.g.*, strength and thickness) to identify the best potential matches. *See, e.g.*, China Steel Final Programming Mem., Attach. 2, Margin Calculation Log and Output: U.S. Sales Margin Program (July 11, 2019), C.R. 667 at 37, 46 ("U.S. Sales Margin Program").[13]

The Department agreed with ArcelorMittal that it had erred in using COP1 data as part of the basis for the DIFMER adjustment. Commerce recalculated China Steel's products' cost of manufacturing and the subsequent DIFMER adjustment using only the AFA-adjusted COP2 cost database. *See* Ministerial Error Mem. at 4–5. Based on ArcelorMittal's allegations and further findings of its own, on May 25, 2017, the Department published its Amended Final Determination, calculating a dumping margin of 75.42 percent for China Steel. *See* Amended Final Determination, 82 Fed. Reg. at 24,098.

Plaintiff filed its rule 56.2 motion for judgment on the agency record on January 12, 2018. Pl.'s Not. Mot. J. Agency R., ECF No. 47. On April 9, 2018, Defendant and Defendant-Intervenors filed briefs opposing Plaintiff's motion. *See* Def.'s Resp. Mot. J. Agency R., ECF No. 53 ("Def.'s Br."); *see also* Def.-Ints.' Resp. Opp'n Mot. J. Agency R., ECF No. 55.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence . . . or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

[13] A portion of this attachment includes confidential information. *See* "U.S. Sales Margin Program" at 37, 46 (including sections titled "Concordance Check - Top 5 Possible Matches for Sample U.S. Models" and "Full Concordance - The Best Model Match Selections," which provide numerical values for a number of product characteristics). Having identified the most similar matches, Commerce then calculated the cost differences associated with the physical variations between the similar products. *See* U.S. Sales Margin Program at 49 (showing the field "COSTDIFF" for cost differences between similar products); *see id.* at 66 (showing the field "DIFMER" next to "COSTDIFF").

LEGAL FRAMEWORK

Normally, when calculating a dumping margin for products made in a market economy country, Commerce compares sales of the subject merchandise made in the home market (normal value based on price) to sales made in the United States (export price). 19 U.S.C. § 1673.

Where Commerce "has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product," it determines whether home-market sales "were made at less than the cost of production." 19 U.S.C. § 1677b(b)(1). After the enactment of the Trade Preferences Extension Act of 2015, Commerce no longer requires an outside cost of production allegation before it conducts this analysis. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 505(a), 129 Stat. 362, 386 (2015) ("In an investigation . . . [Commerce] shall request information necessary to calculate the constructed value and cost of production . . . to determine whether there are reasonable grounds to believe or suspect that sales [were made at less than the cost of production]."); *see also* Initiation of Investigation, 81 Fed. Reg. at 27,093 n.40 ("The Department will no longer require a [cost of production] allegation to conduct this analysis.").

Upon finding that sales were made at less than the cost of production, Commerce disregards those sales in the determination of normal value if such sales "have been made within an extended period of time in substantial quantities,[14] and . . . were not at prices which permit recovery of all costs within a reasonable period of time." *Id.* § 1677b(b)(1)(A)-(B). When "such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade," but "[i]f no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value[15] of the merchandise." *Id.* § 1677b(b)(1).

Constructed value is the total of

> the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period

[14] Here, and generally, "substantial quantities" exist where "the volume of such sales represents 20 percent or more of the volume of sales under consideration for the determination of normal value." 19 U.S.C. § 1677b(b)(2)(C)(i).

[15] The purpose of using constructed value in this case is not the same as when a product is produced in a nonmarket economy country. *See, e.g.*, *Sigma Corp. v. United States*, 117 F.3d 1401, 1404 (Fed. Cir. 1997); *see also Downhole Pipe & Equip. LP v. United States*, 36 CIT 1509, 1516, 887 F. Supp. 2d 1311, 1320 (2012) (quoting *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT 53, 57, 815 F. Supp. 2d 1311, 1316 (2012)) ("Commerce ordinarily determines the normal value of subject merchandise of an exporter or producer from a nonmarket economy . . . country 'on the basis of the value of the factors of production utilized in producing the merchandise.'").

> which would ordinarily permit the production of the merchandise in the ordinary course of trade . . . [plus] the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country[;] . . . [and] the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States.

Id. § 1677b(e)(1)-(2)(A), (3). Because Taiwan is a market economy, Commerce requested cost of production information from the respondent itself rather than constructing cost of production from surrogate values.[16]

"If . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]" or "significantly impedes a proceeding," Commerce uses facts available to calculate normal value. 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). Where Commerce determines that the use of facts available is warranted, it may apply adverse inferences (AFA) if it makes the requisite additional finding that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1). "To the best of one's ability" is interpreted by the Federal Circuit to mean "one's maximum effort." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). The question of whether a respondent has cooperated to the "best of its ability" is case-specific, and an AFA rate is not based on the conduct of a "hypothetical, well-resourced respondent." *Nat'l Nail Corp. v. United States*, 43 CIT __, __, 2019 WL 2537931, at *12 (June 12, 2019) (not reported in Federal Supplement). The Federal Circuit has held that "Commerce should consider the overall facts and circumstances of each case, including the level of culpability" and "'the seriousness of the type of misconduct' committed by the uncooperative party" before applying AFA. *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1301 (Fed. Cir. 2019).

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[16] In nonmarket economy proceedings, Commerce's practice in selecting the best available information for valuing factors of production is to "choose surrogate values that represent broad market-average prices, prices specific to the input, prices that are net of taxes and import duties, prices that are contemporaneous with the POR, and publicly available non-aberrational data from a single surrogate market-economy." *Clearon Corp. v. United States*, 37 CIT __, __, 2013 WL 646390, at *3 (Feb. 20, 2013) (not reported in Federal Supplement) (citation omitted).

DISCUSSION

I. Commerce's Amended Final Determination

A. Commerce Acted in Accordance with Law in Rejecting Plaintiff's Unrequested Supplemental Information, and in Drawing Adverse Inferences when Selecting from Among the Facts Otherwise Available

Commerce shall use facts available "[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]" or "significantly impedes a proceeding." 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). Facts available may also be used if the information provided "cannot be verified" and is therefore unreliable. *Id.* § 1677e(a)(2)(D). Here, in its Preliminary Determination, Commerce found that the data was unreliable because the changes made by China Steel were extensive and unexplained. Prelim. Dec. Mem. at 16 ("Because these unsolicited and unexplained changes [in COP2] are significant and extensive, because they cannot be differentiated from solicited changes [in COP1], and because [cost of production] is integral to the margin calculations, we find that China Steel's reported cost data is unreliable for use in this [P]reliminary [D]etermination.").

Further, when Commerce determines that facts available should be used, and it makes an additional finding that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information," it may use an adverse inference when "selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A). Commerce looks not only to the objective reasonableness of a party's behavior, but must also

> make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Nippon Steel, 337 F.3d at 1382–83; *see Nat'l Nail*, 43 CIT at __, 2019 WL 2537931, at *12 ("[A] reviewing court must be able to conclude that Commerce looked at the respondent's ability to comply as well as its performance in complying.").

Here, Commerce determined that China Steel had not cooperated to the best of its ability by failing to explain adequately the changes it made between COP1 and COP2, and by submitting those changes, unsolicited, nearly three months after the initial submission. Prelim. Dec. Mem. at 17 (emphasis added) ("China Steel merely stated [that there were newly discovered errors in COP1] and provided no further explanation. . . . [T]his is an insufficient explanation. Furthermore, China Steel *had the opportunity to provide its [COP2] cost database on July 28, 2016, but failed to provide these significant changes until October 11, 2016*, as part of an unrelated set of corrections. By submitting an unexplained and new cost database when it did, China Steel has prevented the Department from determining, in time for the [P]reliminary [D]etermination, which set of cost data is reliable.").

Therefore, Commerce found, at the Preliminary Determination stage, that "China Steel failed to cooperate to the best of its ability by failing to explain the extensive, significant, and unsolicited changes to its cost database." Prelim. Dec. Mem. at 17. The Department indicated, however, that it "intend[ed] to issue a supplemental questionnaire after the [P]reliminary [D]etermination to provide China Steel with an opportunity to explain the changes made to its cost database." Prelim. Dec. Mem. at 17.

Commerce then sent questions to Plaintiff to obtain information about COP2. *See* Suppl. Quest. II at 3 ("Based on these coding errors, please answer the following questions pertaining to the changes made and resulting differences between the cost databases submitted for the Companies in the September 28, 2016 cost data bases ('COP1') and the revised, October 11, 2016 data bases ('COP2').."). On November 30, 2016, China Steel submitted an explanation of the differences between COP1 and COP2, as requested, but also submitted a new cost database (COP3). *See* Rejected COP3 Resp.; Rejection of Unsolicited Database.

Following a request from Petitioner, Commerce rejected the new COP3 information as untimely, but gave China Steel an opportunity to comply with its prior instructions as to the differences between COP1 and COP2. *See* Rejection of Unsolicited Database ("China Steel may refile its November 30, 2016 submission after removing the new 'COP3' cost database and all references to the information contained in that database . . . ."); *see also* Letter from David C. Smith to Sec'y Penny Pritzker, Petitioner's Comments on the Nov. 30, 2016 Second Supplemental Section D Questionnaire Response of China Steel Corporation and Dragon Steel Corporation (Dec. 9, 2016), P.R. 383 at 2 (urging Commerce to reject COP3). In its data filings, China Steel

complied by filing a new response. *See* Final COP2 Resp. As it had in its first COP3 filing dated November 30, 2016, China Steel explained the differences between COP1 and COP2:

> [T]here were three changes between the COP1 and COP2 data files. First, the Quality codes were modified for a number of CONNUMs, which resulted in changes in production quantities for some CONNUMs and the elimination of other CONNUMs (whose production quantity was reduced to zero), as well as the addition of new CONNUMs. Second, there was a programming error that resulted in a failure to include slab[17] costs in the standard costs for some production line-items. And, third, there was a change in the materials cost variance due to the increase in standard costs as a result of the inclusion of the additional slab costs.

Final COP2 Resp. at 15–16. In other words, China Steel pointed out how certain "quality codes" had been mismatched with certain CONNUMs, and how programming errors had led to an incorrect calculation of standard costs.

Although Commerce, in its Preliminary Determination, stated that it had applied "total AFA" to China Steel's data, in the Final and Amended Final Determinations, the Department, as directed by the statute, drew an adverse inference when selecting from among the facts available with respect to some of the cost of production information and the transaction margins of certain U.S. sales. *See* Prelim. Dec. Mem. at 8; Final IDM at 6–7. In other words, Commerce did not apply total AFA in either final determination. As to cost of production information, Commerce applied AFA to certain CONNUMs affected by computer programming errors or for which weighted-average per-unit costs had been misstated. *See* Final IDM at 6–7. With respect to U.S. sales, Commerce applied AFA to a number of sales where China Steel had erroneously reported quality codes, affecting the transaction margins of those sales. *See* Final IDM at 7.

With respect to the misstated CONNUM costs, Commerce substituted "the highest reported cost of any CONNUM for the reported cost of the effected [sic] CONNUMs" to increase the cost. Final IDM at 7.[18]

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[17] According to China Steel, during the course of correcting the "mis-assignment of quality codes" to certain CONNUMs—an error that had been present in the COP1 data file—China Steel discovered that it had failed to include the cost of steel slabs in its product costs. The correction affected cost of production. *See* Final COP2 Resp. at 3.

[18] *See* Cost Calculation Mem. at 1–2 ("We are adjusting the costs of 61 CONNUMS in [the COP2 database] due to what [China Steel] described as an obscure programming error that affected the reported costs of these CONNUMs. . . . We are assigning the CONNUMs

Concerning China Steel's sales, Commerce applied facts available, with an adverse inference, to some transaction margins of certain U.S. sales for which China Steel had reported incorrect and unverifiable "corrected" codes. Final IDM at 7. Specifically, Commerce applied "the highest transaction margin of any U.S. sale of subject merchandise to all U.S. sales which match to CONNUMs containing the commercial products at issue. . . ."[19] Final IDM at 7. Therefore, with respect to the U.S. sales data, AFA was used for only some of China Steel's transaction margins.

1. Commerce Reasonably Rejected China Steel's Unsolicited COP3 Database

The court finds that Commerce's decision not to allow China Steel's submission of the COP3 database was reasonable because of the timing of the submission in relation to the stage of investigation. China Steel's submission of COP3 (November 30, 2016), coming as it did more than two weeks after the Preliminary Determination was issued (November 14, 2016), would have required Commerce to again determine whether the new data was usable, a clearly necessary process since China Steel had twice provided information that turned out to be flawed. China Steel's failure to flag all inaccuracies was again apparent at cost verification, when Commerce found previously unidentified errors in COP2. *See* Final IDM at 28–29.

Commerce gave China Steel enough chances to satisfy the statute[20] and any sense of fairness. The Department had been willing to con-

affected with the highest reported cost during the POI (*i.e.*, the cost of manufacturing for CONNUM 782111331314022 to these 61 CONNUMs as partial adverse facts available . . . . We are adjusting the cost for three additional CONNUMs that we found at verification to be reported with positive quantities and materials costs, but with negative variable overhead costs [due to an obscure programming error]. . . . For these three CONNUMS (*i.e.*, CONNUMs 782111221514022, 765111221414022, and 760111225314022), we also are assigning the highest reported costs during the POI (*i.e.*, CONNUM 782111331314022) as partial adverse facts available. We note that these three CONNUMs are already included in the list of 61.").

[19] *See* China Steel Final Analysis Mem. (Mar. 29, 2017), P.R. 443 at 8–10 ("Final Analysis Mem.") ("[I]nformation collected at verification indicated that QUALITYH [quality codes] and CONNUMH [matching CONNUMs] were inaccurately reported for certain [home market] product codes . . . . Accordingly, . . . as AFA, we are applying the highest transaction margin of any U.S. sale of subject merchandise to all U.S. sales which match to CONNUMs containing the commercial products at issue, according to either China Steel's erroneously reported QUALITYH or to China Steel's 'corrected' QUALITYH. We accomplished this in a three-step process. First we ran the margin program with . . . language inserted . . . to identify the U.S. CONNUMs affected . . . . Second, we ran the margin program with . . . language inserted . . . to identify and remove the U.S. CONNUMs affected and calculate the weighted-average margin based on the other U.S. CONNUMs . . . . Third, we calculated a weighted-average of the margins calculated based on the affected CONNUMs having the highest transaction margin and on the weighted-average margin of the remaining CONNUMs.").

[20] Upon receiving a noncompliant submission in response to its request, the Department "shall promptly inform the person submitting the response of the nature of the deficiency

sider the first unsolicited corrections provided by China Steel (COP2), and to accept China Steel's efforts to harmonize the cost information in COP1 and COP2. Thereafter, China Steel had been provided an opportunity to resubmit the asked-for explanation of how COP1 and COP2 differed without the unsolicited information contained in COP3. Commerce's refusal to accept a third cost of production database was reasonable since it was not seeking new information at the post-Preliminary Determination stage, and, prior to cost verification, had no way of knowing that COP2 contained more errors than those already identified. Indeed, the investigation was already well underway by November 30, 2016; more than five months had passed since the initial questionnaire had been issued and only approximately four months remained prior to the April 4, 2017 Final Determination. Further, sales verification began on December 11, 2016, less than two weeks after the November 30 submission of COP3. *See* Sales Verification Rep. (Feb. 15, 2017), P.R. 410.

Commerce rejected the unsolicited COP3 database on December 29, 2016, and notified China Steel that it could resubmit the requested explanations of the COP2 data, excluding the COP3 database, by January 4, 2017. *See* Rejection of Unsolicited Database. China Steel complied, resubmitting its response on January 4, 2017. *See* Letter from Jeffrey M. Winton to Sec'y Penny Pritzker, Response to November 9 Supplemental Questionnaire (Jan. 4, 2017), P.R. 397 at 1 ("[W]e have enclosed a revised version of our November 30 submission from which all references to the [COP3] data file have been redacted."). Cost verification took place from January 9 to 13, 2017. *See* Cost Verification Rep. At verification, Commerce determined that the existence of errors, previously unidentified by China Steel, made certain CONNUMs and quality codes in the COP2 submission unverifiable. *See* Final IDM at 28–29; Cost Verification Rep. Accordingly, Commerce applied facts available to the erroneously calculated cost of production information and to the U.S. sales affected by the misstated cost of production information, specifically, the quality codes and matching CONNUMs. Final IDM at 6–7, 29. Commerce uses facts available when the information provided "cannot be verified" and is therefore unreliable, or when that party "significantly impedes a proceeding." 19 U.S.C. § 1677e(a)(2)(C), (D). Therefore, in this instance, Commerce relied on facts available for certain incorrect CONNUMS and inaccurately reported quality codes, where China Steel's failure to timely correct errors and clarify its cost data resulted in the Department's alleged inability to verify the data. Final IDM at 27–29 ("China Steel did not provide enough information to the De-

and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the [established] time limits." 19 U.S.C. § 1677m(d).

partment to indicate that its reporting methodology for these CONNUMs might be deficient until verification. It was not until [cost] verification that the Department was aware of these errors. By this time, it was too late to notify China Steel of any deficiencies, obtain the new data, and examine the methodologies and data for deficiencies.").

Considering the progress of the investigation and the history of China Steel's failing efforts to get it right, Commerce acted reasonably and in accordance with law when rejecting the new information contained in COP3.

2. Commerce's Application of Adverse Inferences to Cost Data Was Reasonable

If Commerce intends to draw an adverse inference from among the facts available, it may only do so if it determines that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1)(A). "It is worth noting that the subjective component of the 'best of its ability' standard judges what constitutes the maximum effort that a particular respondent is capable of doing, not some hypothetical, well-resourced respondent." *Nat'l Nail*, 43 CIT at __, 2019 WL 2537931, at *12. The Federal Circuit has recently emphasized that Commerce must look not only to respondent culpability but also to the seriousness of the uncooperative behavior. *See BMW*, 926 F.3d at 1302 ("Commerce must consider the totality of the circumstances in selecting an AFA rate, including, if relevant, the seriousness of the conduct of the uncooperative party.").

The Federal Circuit has also held that Commerce should assess whether a party has complied to the "best of its ability" by considering "whether [the party] has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel*, 337 F.3d at 1382. While such efforts need not be perfect, the standard "does not condone inattentiveness, carelessness, or inadequate record keeping." *Id.* Specifically, a party should

> (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers' ability to do so.

Id.

Here, when determining that an adverse inference was appropriate, Commerce cited China Steel's repeated failures to timely notify Commerce of errors in its cost data, with respect to the affected CONNUMs and the quality codes. *See* Final IDM at 29 ("China Steel misrepresented the nature of its reported costs in its last two supplemental questionnaire responses by reporting to the Department that it reported actual CONNUM- specific costs for all CONNUMs when there were errors in its reported costs. . . . China Steel's misrepresentation prevented the Department from issuing supplemental questions that might otherwise have resulted in changes to the methodology . . . . We find that China Steel did not act to the best of its ability in reporting costs for certain CONNUMs."); *see also* Final IDM at 7 ("China Steel's incorrect reporting of quality codes shifted home market sales from one unique product group (*i.e.*, matching control number (CONNUM)) to another. . . . [W]e find that China Steel failed to cooperate by not acting to the best of its ability to comply with a request for information with respect to the full reporting of its quality codes.").

China Steel argues that cooperation to the extent Commerce demands was not possible under the circumstances. The company points to three typhoons that struck Taiwan as having affected China Steel's ability to fully reassess its own data. Pl.'s Br. 16. This explanation, however, does not account for the initial errors in COP1, which was submitted prior to the typhoons. The errors in COP1 were so extensive that China Steel itself wished to replace it, first with COP2, then with COP3. *See* First COP2 Resp.; Rejected COP3 Resp. Moreover, China Steel sought and obtained time extensions to its originally prescribed deadlines for further explanation. *See* Letter from Erin Kearney to Jeffrey M. Winton, Extension of Time to Submit Supplemental Questionnaire Responses (Sept. 28, 2016), P.R. 312.

Given the full context of these circumstances, China Steel's arguments are unpersuasive. Commerce's finding that Plaintiff failed to cooperate to the best of its ability, and its resulting decision to draw an adverse inference when selecting from among the facts available, was based on Plaintiff's failure to accurately report data from records that were in its possession. China Steel's failure to identify errors completely and consistently in information exclusively in its possession supports a finding that it did not exert its maximum effort (or even much effort at all) when completing the questionnaire relating to cost data. In its brief, Defendant points out that "[h]ad China Steel undertaken a more careful review of its [cost] data prior to its initial submission, or even prior to submission of the corrected database, China Steel could have identified these additional errors for correc-

tion in a timely manner." Def.'s Br. 12. Plaintiff could have "take[n] reasonable steps" to ensure that its reports were accurate and complete, but Plaintiff did not do so. *See Nippon Steel*, 337 F.3d at 1382. Further, Plaintiff had more than one opportunity to comply with Commerce's requests for clarification, but submitted unrequested information in the form of its new cost databases (COP2 and COP3), even at the verification stage, when Commerce reasonably limits its acceptance of new information to minor corrections and clarifications. *See, e.g.*, *Maui Pineapple Co. v. United States*, 27 CIT 580, 595–96, 264 F. Supp. 2d 1244, 1257–58 (2003). Here, Plaintiff did not offer new information to assist in verification of information already on the record, but rather offered the COP3 information as a substitute for existing record information.

Commerce accepted Plaintiff's substitution of a second, modified cost of production database (COP2) for the original submission (COP1), and Plaintiff explained and harmonized the differences between the two databases. After it had issued the Preliminary Determination, however, Commerce refused to accept and verify a "new" or "corrected," unsolicited cost of production database (COP3). Commerce must accept new information between the preliminary and final determination stages if it is reasonable to do so. Commerce's refusal to retrace its steps in the review process was reasonable here, since China Steel had repeatedly submitted unrequested cost of production information that Commerce determined was unverifiable, after the deadlines for submitting such information had passed. The facts of this case demonstrate that China Steel did not act to the best of its ability when providing information that was exclusively in its custody and control. Not only did the company fail to provide accurate information in response to the initial questionnaire (COP1), but it continued to amend its answers in COP2 and COP3, at times without explanation. These efforts to get things right continued until after sales verification, the Preliminary Determination, and long after the issuance of the initial questionnaire. The primary explanation China Steel provided for its failures was the weather.

It is apparent, then, that Commerce's finding that "China Steel failed to cooperate by not acting to the best of its ability to comply with the Department's request for information" satisfies both the factual and legal requirements to support the use of AFA. Final IDM at 29; *see Nat'l Nail*, 43 CIT at __, 2019 WL 2537931, at *12. Therefore, Commerce's decision to use facts available, and to apply an adverse inference when selecting from among those facts, was supported by substantial evidence and in accordance with law.

B. Commerce Erred in Using an AFA-Adjusted Cost Database in its Calculation of China Steel's DIFMER Adjustment

Difference-in-merchandise (DIFMER) adjustments apply where identical products are not sold in the United States and in the home market (or otherwise cannot be compared).[21] *See* 19 U.S.C. § 1677b(a)(6)(C)(ii); 19 C.F.R. § 351.411; Policy Bulletin 92.2. Here, the products sold in each market were not physically identical, so Commerce compared the subject merchandise sold in the United States to the Taiwan-market products that had the most similar physical characteristics. Commerce then made an adjustment to normal value for the variable manufacturing costs of physical differences. *See* 19 C.F.R. § 351.411; 1 JOSEPH E. PATTISON, ANTIDUMPING & COUNTERVAILING DUTY LAWS 985 (2017) ("If the variable manufacturing costs are less for the U.S. product, a deduction is made from [normal value]. If the variable manufacturing costs are less for the [comparison market] product, an addition is made to [normal value]."). The adjustment is based on actual costs related to physical differences, not on unrelated cost of production differences. *See* 19 C.F.R. § 351.411; Policy Bulletin 92.2. That is, the costs Commerce was to take into account were those related to what made the products different—not those costs related to portions of the product that were the same. The DIFMER adjustment is calculated on the basis of direct manufacturing costs by assessing three components: (1) materials, (2) labor, and (3) variable factory overhead. Pattison at 983; *see also* Policy Bulletin 92.2.

The Department's policy guidelines set out its method:

> [I]t is important in any consideration of a [DIFMER adjustment] to isolate the costs attributable to the difference, not just assume that all cost of production differences are caused by the physical differences. When it is impossible to isolate the cost differences, we should at least determine that conditions unrelated to the physical difference are not the source of the cost differences, such as when different facilities are used, or the cost differences are high but the actual physical differences appear small. If the costs of the physical difference cannot be isolated or it is not

[21] The normal value statute, 19 U.S.C. § 1677b, permits an increase or decrease "by the amount of any difference (or lack thereof) between the export price or constructed export price and [normal value] . . . that is established to the satisfaction of [Commerce] to be wholly or partly due to . . . the fact [foreign like products are] . . . used in determining normal value." 19 U.S.C. § 1677b(a)(6)(C)(ii); *see* 19 U.S.C. § 1677(16) (foreign like product). Commerce's DIFMER regulation states that "[i]n deciding what is a reasonable allowance for differences in physical characteristics, the [Department] will consider only differences in variable costs associated with the physical differences." 19 C.F.R. § 351.411(b).

> reasonably clear that the differences in production cost are related to the physical difference, no adjustment should be made.

Policy Bulletin 92.2. "[U]nder Commerce's difmer practice, a finding that the difmer adjustment to normal value exceeds twenty percent is a presumptive finding that the products may not be reasonably be compared." *Mitsubishi Heavy Indus., Ltd. v. United States*, 24 CIT 727, 731, 112 F. Supp. 2d 1170, 1174 (2000) (citing Policy Bulletin 92.2); *see also Mitsubishi Heavy Indus., Ltd. v. United States*, 24 CIT 275, 279, 97 F. Supp. 2d 1203, 1207 (2000), *aff'd*, 275 F.3d 1056 (Fed. Cir. 2001) (approving Commerce's twenty percent DIFMER rule). When such a finding is made, it is Commerce's policy to calculate the constructed value of those physically different products to account for the fact that there are no comparable products. *See* Policy Bulletin 92.2.

In the Final Determination, Commerce used the cost database COP1 to calculate the U.S. products' cost of manufacturing, which would be compared to the cost of production of home-market products to determine whether a DIFMER adjustment was needed. *See* Pet.'s Letter at 2–4; Ministerial Error Mem. at 3. China Steel submitted COP1 in response to the Department's initial request for information to be used in its cost of production analysis, but because both the company and the Department identified extensive errors within COP1, it was not used at any other point in Commerce's analysis and determinations. *See* Prelim. Dec. Mem. at 16. Thereafter, Commerce relied on the COP2 adjusted database to calculate its home-market cost of production. *See* Ministerial Error Mem. at 3. As addressed above, in its normal value calculation, Commerce made various adjustments to the COP2 cost database submitted by China Steel, some of which involved the application of an adverse inference (with respect to certain affected CONNUMs and overall reported cost of manufacturing). *See* Final IDM at 6–7.

In reaching its DIFMER conclusions, Commerce first identified which of China Steel's products were similar, but not identical, to each other. *See* U.S. Sales Margin Program at 37, 46. The Department then calculated the cost of manufacturing for those products to find what, if any, costs were quantifiably associated with physical differences between these products, and to determine if the differences could be accounted for with a DIFMER adjustment (*i.e.*, the difference in costs associated with physical differences was not more than twenty percent). *See* U.S. Sales Margin Program at 49 (showing sample numerical cost differences); Ministerial Error Mem. at 4; *see also* Policy Bulletin 92.2 ("We do not make an adjustment because the cost of production is different; we are measuring the difference in cost

attributable to the difference in physical characteristics."). For some of the compared products, Commerce determined that a potential adjustment would exceed twenty percent, and thus, the products were too physically different to be compared. *See* Ministerial Error Mem. at 4. This determination was based, in part, on Commerce's use of the COP1 data, although it had not used the COP1 information for any other purpose.

After Commerce issued its Final Determination, Petitioner and Defendant-Intervenor ArcelorMittal submitted a letter claiming that Commerce had made a ministerial error in its calculation of the costs of China Steel's U.S. products, for the purpose of the DIFMER adjustment and "product concordance." Pet.'s Letter at 2–4. ArcelorMittal claimed that Commerce made an error in programming that caused the U.S. costs of manufacturing to be derived from COP1, while home-market costs of manufacturing were derived from COP2. Pet.'s Letter at 4; *see* Ministerial Error Mem. at 3. The use of COP1 for one half of the comparison, Petitioner argued, erroneously reduced Commerce's normal value determination, resulting in an inaccurate final margin for China Steel. Petitioner asked Commerce to "correct the ministerial error that produced an unwarranted reduction to the normal value because of the inadvertent omission of corresponding adjustments to the CONNUM-specific costs for [China Steel's] U.S. sales." Pet.'s Letter at 5.

Commerce agreed with Petitioner that it had made a ministerial error in using the COP1 database, since Commerce had previously found COP1 to be unreliable. *See* Ministerial Error Mem. at 4–6. In its recalculation, Commerce did not use the COP2 data as submitted, however, it used the AFA-adjusted COP2 database for both U.S. products' costs of manufacturing and the home-market products' costs of manufacturing. *See* Ministerial Error Mem. at 5. The use of the AFA-adjusted database apparently caused the difference between a greater number of products to exceed twenty percent, excluding those products from the normal value calculation and yielding an amended weighted-average dumping margin of 75.42 percent for China Steel. *See* Amended Final Determination, 82 Fed. Reg. at 24,097–98; Ministerial Error Mem. at 4–5.

After ArcelorMittal sent its ministerial adjustment letter, but before Commerce readjusted the DIFMER calculation, China Steel objected to Petitioner's position. The company argued that Commerce had properly assessed the DIFMER adjustment in its initial determination, basing the adjustment on physical differences, which were ascertainable precisely because AFA had not yet distorted the cost data. China Steel Resp. to Cmt. Alleged Ministerial Error (Apr. 21,

2017), P.R. 445; *see also* Pl.'s Br. 40 ("In its initial [F]inal [D]etermination, however, Commerce calculated the difference-in-merchandise adjustment based on the costs *before* application of the AFA adjustment. . . . Consequently, Commerce was able to compare the sales of nearly identical homemarket and U.S. products without distortion."). For China Steel, "[t]he AFA adjustment that Commerce made to the *costs* for certain products was not intended to account for specific *characteristics* of those products." Pl.'s Br. 41 (emphasis added). Further, China Steel claimed that Commerce's adjustment "represented a punishment for [China Steel's] alleged failure to cooperate," which resulted in a difference between costs based on Commerce's use of AFA, rather than physical differences between home-market and U.S. products. Pl.'s Br. 41.

A ministerial error is one "in addition, subtraction, or other arithmetic function, [a] clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 C.F.R. § 351.224(f). Commerce is permitted to identify and correct ministerial errors, where that error is the sort of clerical, number-input-related miscalculation that falls under the statutory and regulatory definitions. *See* 19 U.S.C. § 1675(h). Commerce is not empowered, however, to correct an error in a manner unsupported by substantial evidence or not in accordance with law. *See generally* 19 U.S.C. § 1516a(b)(1)(B)(i).

Here, both Commerce and China Steel are wrong. First, the DIFMER regulation, 19 C.F.R. § 351.411, says nothing about using information to which an adverse inference has been applied to determine if a product is identical or similar. And with good reason. Information to which an adverse inference has been applied would distort the results. This is because the application of an adverse inference to facts available says nothing about how one product differs from another; it only speaks to a respondent's *behavior*. 19 U.S.C. § 1677e(b)(1)(A) ("If [Commerce] finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . [Commerce], in reaching the applicable determination under this subtitle . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."). Thus, it does not follow that the use of an adverse inference is lawful when making a determination as to the actual physical comparability of products. Therefore, Commerce erred in its use of an AFA-adjusted database to make the DIFMER comparison.

China Steel's position, however, is also incorrect. The COP1 database is of no use here. China Steel conceded that its COP1 database was not usable, and submitted a new database for Commerce's reliance (COP2). As it was used for all other purposes, the COP2 database must be used for the DIFMER adjustment.

Accordingly, the court remands this matter to Commerce and directs the Department to compute the DIFMER adjustment using information from the COP2 database without the application of an adverse inference.

II. Commerce Did Not Err When It Denied Plaintiff's Post-Sale Home-Market Price Adjustment

When calculating normal value based on price, the Department generally uses a "a price that is net of price adjustments." 19 C.F.R. § 351.401(c). These adjustments, however, exclude post-sale price adjustments "unless the interested party demonstrates . . . its entitlement to such an adjustment." *Id.*

China Steel asked Commerce to recognize a type of billing adjustment it made for its home-market customers. The company made post-sale adjustments if the price it charged its customers for a product subsequently went down during the quarter in which that sale was made. In that event, the customers were given the benefit of the price reduction for products already purchased. *See* China Steel Resp. Suppl. Quest. (Oct. 7, 2016), P.R. 321 at 31 ("Sec. A-C Suppl. Resp."); China Steel Secs. B & C Narrative Resp. (July 28, 2016), P.R. 194, C.R. 240–43, App. B-6 ("B & C Narratives") (referencing the retroactive price adjustments under the field code "BILLADJ7H," one of seven possible billing adjustments). As a respondent, China Steel reported the amount of each retroactive price adjustment in its sales listing by showing a decrease in price after the initial sale. *See* B & C Narratives at 33 ("[B]illing adjustments that decrease the price have been reported as negative amounts."). For China Steel, the BILLADJ7H retroactive adjustment, or rebate, represented a long-established business practice and course of dealing reaching back for at least thirty years. *See, e.g.*, China Steel Rebuttal Br. (Mar. 6, 2017), P.R. 420 at 15.

Commerce determined that China Steel was not entitled to the adjustment in this investigation. The Department did not dispute that China Steel had a business practice of granting rebates, nor that the practice was a long-established one of which its customers were aware. Commerce was not persuaded, however, that the adjustment was the kind that it intended to incorporate in normal value calculations. Final IDM at 46.

When determining a party's entitlement to its claimed adjustment, the Department considers a non-exhaustive list of factors, which have been reduced to regulation, *see* 19 C.F.R. § 351.401(c), as follows:

> *(1) Whether the terms and conditions of the adjustment were established and/or known to the customer at the time of sale, and whether this can be demonstrated through documentation*; (2) how common such post-sale price adjustments are for the company and/or industry; (3) the timing of the adjustment; (4) the number of such adjustments in the proceeding; and (5) any other factors tending to reflect on the legitimacy of the claimed adjustment.

Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings, 81 Fed. Reg. 15,641, 15,644–45 (Dep't Commerce Mar. 24, 2016) ("Modification of Regulations") (emphasis added). Commerce weighs these factors singly or in combination. *See id.* at 15,644–45.

While Commerce's regulation does consider a party's established business practice when determining whether to allow a post-sale adjustment, it does not consider this factor to be independently sufficient for entitlement. Commerce "believe[s] that allowing a company to simply show that certain adjustments are part of its standard business practice might permit certain adjustments . . . that have the potential to manipulate the dumping margins." *Id.* at 15,645. As this Court has noted, by "the potential to manipulate . . . dumping margins," Commerce refers to the possibility that companies would grant rebates after it became known that certain sales would be subject to review, thus decreasing an already established sales price, and thus decreasing dumping margins. *See, e.g.*, *Papierfabrik August Koehler AG v. United States*, 38 CIT __, __, 971 F. Supp. 2d 1246, 1255 (2014) (superseded by regulation on other grounds). Commerce itself has also stated that its "purpose" in requiring proof that buyers were "aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of the sale is to protect against manipulation of the dumping margins by a respondent once it learns that certain sales will be subject to review." *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Can.*, 61 Fed. Reg. 13,815, 13,823 (Dep't Commerce Mar. 28, 1996).

Disposing of first things first, to the extent that Plaintiff's brief before the court raises new arguments in support of its claimed entitlement to the BILLADJ7H post-sale adjustment, the court will not address them. These arguments include China Steel's contention

that the adjustments it made for its customers were not truly retroactive, and that "circumstances of sales" differing in the United States and Taiwan necessitated the adjustments. *See* Def.'s Br. 19–20; *compare* Pl.'s Br. 42–44, *with* China Steel Rebuttal Br. 14–16, *and* China Steel Case Br. (Feb. 28, 2017), P.R. 414; *see also* Sec. A-C Suppl. Resp. at 31. Because China Steel first made these arguments here, and not to the agency below, they will not be considered by the court. *See* 28 U.S.C. § 2637(d).

In the Final IDM, Commerce primarily based its rationale for rejecting China Steel's post-sale price adjustments on customer knowledge. Commerce concluded that the timeline of the adjustments was inconsistent with a finding that the customers, at the time of sale, knew a sufficient amount about the adjustments to justify their use in Commerce's deliberations: "[T]he terms and conditions of the rebates were not established and/or known to the customer at the time of sale," because "neither the actual rebates, nor the prices on which the actual rebates are based, are set or known by the customer until after the end of the quarter in which the sales occur." Final IDM at 46.

China Steel contests this characterization of its practice as a matter of fact, pointing to documentary evidence showing that "course of dealing" and the "longstanding" nature of its practice made its customers aware that, should they be eligible for a post-invoice price adjustment, they would receive such an adjustment. Pl.'s Br. 44.

For Commerce, the evidence on the record supports no more than a finding that China Steel's customers were generally aware that such a practice existed, and that customers, if eligible, would receive reductions if prices should be reduced later in the same quarter. Final IDM at 46; *see, e.g.*, B & C Narratives, App. B-7–7 (showing a 1987 record of the practice). Commerce found, however, that this evidence was insufficient to show that customers knew "[either] the actual rebates, [or] the prices on which the actual rebates are based" at the time of sale. Final IDM at 46, 47 ("[W]e find that the terms and conditions of the adjustments were not established and/or known to the customer at the time of sale."). The facts Commerce relied on to reach this conclusion were those showing that price adjustments would not be finalized until after the end of the quarter in which the sales occurred.[22] *See* Final IDM at 46.

Here, China Steel's record evidence, included in its responses to Commerce's questionnaires, indicated that its customers were aware only that China Steel had a policy of giving its customers the benefit of a downward price shift, and that those changes would be retroac-

[22] "[[ ]]." *See* B & C Narratives, App. B-7–8.

tively effective for customers when prices for their purchases decreased. Sec. A-C Suppl. Resp. at 31. Company records indicated that the downward shift in price was dependent on the market. *See* B & C Narratives at 33 n.11 ("In accordance with market conditions, [China Steel] may adjust its home-market prices for sales during a quarter sometime after the quarter has already begun."). China Steel does not contend, nor does its evidence support a finding, that (1) its customers were assured of a rebate, or (2) that the amount of a potential rebate was known, or could be ascertained by its customers, at the time of sale.

Commerce does not contest, in the Final IDM, that China Steel's rebates were part of its normal course of business. Rather, Commerce concludes that that fact alone does not equal customer knowledge, because customers could not have known that they would in fact be entitled to such an adjustment or its amount. *See* Final IDM at 46–47 ("[W]e find that the existence of this rebate program as a feature of China Steel's normal practice does not constitute a customer's awareness of any potential rebate at the time prior to sale because the customer does not know whether it will actually receive a rebate on any particular product at the time of such sale. . . . Record evidence also indicates that neither the actual rebates, nor the prices on which the actual rebates are based, are set or known by the customer until after the end of the quarter in which the sales occur."). In other words, Commerce asserts that it would have been necessary for China Steel's customers to know that they would receive a rebate on a particular product, but since any rebate was dependent on unknown price changes in the future, whether there would be a rebate, and its amount, would be unknown at the time of sale.

Commerce's decision to disallow China Steel's post-sale adjustment was reasonable because of the uncertainty surrounding the company's proposed adjustments. The Department's concern is that price manipulation can occur after an administrative proceeding is commenced, where, as here, it is unknown whether there will be a rebate or what the amount of that rebate would be, at the time of sale. Here, based on the uncertainty of whether the rebates would occur, and the undetermined amount of the rebates, Commerce found "that the terms and conditions of the rebates were not established and/or known to the customer at the time of sale." Final IDM at 46. Thus, while China Steel's customers may have been aware that they would receive a rebate of some amount should prices go down, the amount of the rebate was unknown at the time of sale, and there is no record evidence that the customers could have calculated it. These unknowns invite the kind of price manipulation Commerce hopes to

guard against. Therefore, it was not unreasonable for Commerce to believe that China Steel's desired adjustment could be used to manipulate its dumping margin.

III. Commerce's Decision Was Not Biased or Otherwise Impeded by Secretary Ross

Plaintiff is statutorily entitled to a fair proceeding unimpeded by a decision-maker's prejudgment under 19 U.S.C. § 1677c (hearings) and 19 U.S.C. § 1677m (submissions). *See NEC Corp. v. U.S. Dep't Commerce*, 21 CIT 933, 946, 978 F. Supp. 314, 326–27 (1997), *aff'd sub nom. NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998) (quoting *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 321 (1933)) ("[The] statute . . . 'command[s] by implication' that the procedures and hearing be fair."); *see also id.*, 21 CIT at 946, 978 F. Supp. at 327 (holding that prejudgment would render an antidumping investigation unfair and invalid if "the decisionmaker has a closed mind at initiation.").

China Steel contends that Commerce's Final Determination was prejudged, and thus fundamentally flawed, because the appointment and subsequent involvement of Secretary of Commerce Wilbur Ross created a conflict of interest that invalidated Commerce's decision. *See* Pl.'s Br. 44–47. China Steel points out that Secretary Ross was a director of ArcelorMittal at the time that Defendant-Intervenor ArcelorMittal USA LLC, the U.S. subsidiary, filed a petition in this case.[23] Pl.'s Br. 44. Thereafter, according to Plaintiff, Secretary Ross improperly intervened when he "publicly announc[ed] the results of [the] investigation that was initiated by ArcelorMittal's . . . subsidiary." Pl.'s Br. 45. This alleged intervention, along with Secretary Ross's previously expressed views on Taiwanese steel dumping, form the basis of China Steel's argument that Secretary Ross's role as decision-maker fatally flawed Commerce's eventual determination. *See* Pl.'s Br. 46.

The Federal Circuit has held that the bifurcated nature of an antidumping proceeding makes it difficult for a plaintiff to successfully allege prejudgment and bias. *NEC Corp.*, 151 F.3d at 1373. A plaintiff "can prevail on its claim of prejudgment only if it can establish that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.* (citations omitted). Moreover, the Federal Circuit has weighed the earlier stages of the proceeding more heavily when considering the possibility of prejudgment: "The fact that the final decision maker in this case

[23] Plaintiff notes that Secretary Ross, *after* his confirmation, resigned his position as a director and divested from ArcelorMittal. *See* Pl.'s Br. 8.

. . . was to a large extent insulated from the earlier machinations within the Department weighs importantly against the fixed mindset thesis." *Id.* at 1374.

Plaintiff's argument rests on Secretary Ross's alleged role as a decision-maker while at Commerce, not in any position he might have held prior to his appointment. As Commerce addresses in its brief, however, the initiation of the investigation itself and Commerce's Preliminary Determination both occurred prior to Secretary Ross's nomination, confirmation, and swearing-in. *See* Initiation of Investigation, 81 Fed. Reg. at 27,089 (dated May 5, 2016); Preliminary Determination, 81 Fed. Reg. at 79,420 (dated November 14, 2016); Def.'s Br. 24 (noting that Secretary Ross's confirmation was on February 27, 2017, and his swearing-in was on February 28, 2017). As to Secretary Ross's role, Commerce contends that he never acted as a decision-maker in this case because the Final Determination was issued under Ronald K. Lorentzen, the then-Acting Assistant Secretary for Enforcement and Compliance. *See* Final Determination, 82 Fed. Reg. at 16,374.

In *NEC Corp.*, the final decision-maker did not oversee the preliminary stages of the relevant investigation, which led this Court to find that it was necessary to determine whether the prior decision-maker had prejudged the outcome of the proceeding in such a way as to constrain the judgment of the final decision-maker. *See NEC Corp.*, 21 CIT at 949, 978 F. Supp. at 330 ("Acting Assistant Secretary Robert LaRussa[, the new decision-maker,] has had only a cursory involvement with the matters in dispute here.").

Here, only one alleged decision-maker's act is under scrutiny. For China Steel, Secretary Ross's appointment, coming as it did during the investigation, after the Preliminary Determination, and before the Final Determination was issued, made Secretary Ross a decision-maker who engaged in prejudgment of China Steel's case by announcing the result (via press release) and by influencing Department officials after his appointment. *See* Pl.'s Br. 30–31 ("Mr. Ross personally announced Commerce's decision in the investigation that is the subject of this appeal on March 30 . . . . Furthermore, during the period in which Commerce was considering the [F]inal [D]etermination and the subsequent request to amend that determination, none of the 'political' positions that ordinarily might have created a buffer between Mr. Ross and the career officials in Commerce's 'Enforcement and Compliance' agency . . . had been filled.").

Secretary Ross's role, as described by China Steel, does not actually involve decision-making, since the press release was issued after the Final Determination was signed by Acting Assistant Secretary

Lorentzen. *See* Final Determination, 82 Fed. Reg. at 16,374; Final IDM at 78 (signed on March 29, 2017); Press Release, Dep't of Commerce, Int'l Trade Adm., Department of Commerce Finds Dumping and Subsidization in the Investigations of Imports of Certain Carbon and Alloy Cut-To-Length Plate from Austria, Belg., Fr., Ger., It., Japan, Rep. of Korea, and Taiwan (Mar. 30, 2017), ECF No. 66–1, Doc. 30. While the optics of the press release might not be good (it could easily be seen as a victory lap), there is nothing here to suggest that Secretary Ross actually affected the outcome of the investigation.[24]

China Steel's remaining arguments, insofar as they attempt to establish Secretary Ross's anti-Taiwan bias and inappropriate influence over other officials of Commerce, are not supported by substantial evidence. The Federal Circuit has made clear that the risk of bias and prejudgment in antidumping investigations is difficult for a plaintiff to prove. *NEC Corp.*, 151 F.3d at 1374 (quoting *Withrow v. Larkin*, 421 U.S. 35, 57 (1975)) ("We are particularly reluctant to hold Commerce to [a] stringent prejudgment standard . . . . [I]t is not uncommon for Commerce to modify its position between the preliminary determination and the final determination. Therefore, in an antidumping investigation, '[t]he risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently grave possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.'"). Moreover, with regard to Secretary Ross's statements criticizing the Taiwanese steel industry, "[i]t is well established that '[a]dministrators . . . may hold policy views on questions of law prior to participating in a proceeding.'" *In re Nat'l Security Agency Telecomm. Records Litig.*, 671 F.3d 881, 900 (9th Cir. 2011) (citations omitted); *see also id.* (citing *Withrow*, 421 U.S. at 47) ("[E]xpressing an opinion, even a strong one, on legislation, does not disqualify an official from later responding to a congressional mandate incorporating that opinion.").

Secretary Ross's appointment does not compel the conclusion that he was involved in reaching the Final or Amended Final Determination in this case. Nor does his appointment invalidate the process by which Commerce reached its conclusions as to China Steel's submissions and eventual margin. In the absence of any evidence showing

[24] China Steel also contends that Secretary Ross violated Federal Ethics Regulation 5 C.F.R. § 2635.502 (2017), which directs employees who "know[] that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of . . . [a]ny person for whom the employee has, within the last year, served as . . . director" to refrain from "participat[ing] in the matter unless" the relevant agency (here, Commerce) authorizes them to do so. 5 C.F.R. § 2635.502(a), (b)(iv). This matter is outside the scope of the court's review.

improper control by Secretary Ross over this investigation, the court does not find that Commerce's determination in this case was flawed by prejudgment or bias.

CONCLUSION and ORDER

Commerce's use of the COP2 cost database, with the application of AFA, as the basis for its difference-in-merchandise (DIFMER) adjustment to normal value is not in accordance with law. That is, the law does not support the use of adverse inferences when calculating costs specifically related to the physical differences of some of China Steel's products. Therefore, it is hereby

ORDERED that the Amended Final Determination is sustained in part and remanded; it is further

ORDERED that, on remand, Commerce issues a revised Amended Final Determination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that, on remand, Commerce shall compute the DIFMER adjustment to normal value using information from China Steel's final COP2 cost database, without the application of an adverse inference, and may use facts available in filling in missing or replacing unverifiable necessary information; and it is further

ORDERED that the revised Amended Final Determination shall be due ninety (90) days following the date of this Opinion and Order; any comments to the revised Amended Final Determination shall be due thirty (30) days following the filing of the revised Amended Final Determination; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: August 6, 2019
New York, New York

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

Slip Op. 19–109

TMB 440AE, INC. (formerly known as ADVANCE ENGINEERING CORPORATION), Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 18–00095
PUBLIC VERSION

[Commerce's final scope ruling is remanded to consider (k)(1) sources in assessing whether certain pipe is within the scope of antidumping duty and countervailing duty orders.]

Dated: August 13, 2019

Ned H. Marshak, *David M. Murphy*, and *Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY and Washington D.C., and *Dale E. Stackhouse* and *Meghann C. T. Supino*, Ice Miller LLP, of Indianapolis, IN for Plaintiff TMB 440AE, Inc.

Elizabeth A. Speck, Senior Trial Counsel, and *Patricia M. McCarthy*, Civil Division, U.S. Department of Justice, of Washington D.C., for the defendant. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and F*ranklin E. White*, Assistant Director. Of counsel on the brief was *Jessica R. Di Pietro*, Attorney, U.S. Department of Commerce, of Washington, D.C.

OPINION

Restani, Judge:

This action challenges a final scope ruling issued by the United States Department of Commerce, International Trade Administration ("Commerce") regarding seamless pipe imported by TMB 440AE, Inc. (formerly known as Advance Engineering Corporation), ("AEC").[1] AEC moves for judgment on the administrative record and asks the court to hold that Commerce's final scope ruling, finding that AEC's seamless pipe ("AEC pipe") is within the scope of the antidumping and countervailing duty orders on certain seamless carbon and alloy steel pipe from the People's Republic of China ("PRC"), is unsupported by substantial evidence or otherwise not in accordance with law. *See* Mem. L. Supp. Pl. Mot. J. Agency Record, ECF No. 21 at 19–22 (Oct. 22, 2018) ("AEC Br.").

AEC contests Commerce's finding that the language of the relevant antidumping and countervailing duty orders was unambiguous and claims Commerce erred in failing to consider certain criteria required by its regulations governing scope rulings. If the court sustains the Final Scope Ruling, AEC alternatively claims that Commerce acted unlawfully in instructing the U.S. Customs and Border Protection ("Customs") to assess antidumping and countervailing duties on AEC pipe entries made prior to the publishing of the final scope ruling. Defendant United States opposes Plaintiff's motion.

For the following reasons, the court remands Commerce's final scope determination for reconsideration. Pending the resolution of the remand, the court defers consideration of AEC's alternative claims regarding Commerce's liquidation instructions.

BACKGROUND

In 2010, Commerce published antidumping duty and countervailing duty orders on certain seamless pipe from the PRC. *See Amended Antidumping Duty Order: Certain Seamless Carbon and Alloy Steel*

[1] Because the parties refer to plaintiff under its former name, the court follows suit.

Standard, Line, and Pressure Pipe from the People's Republic of China, 75 Fed. Reg. 69,052–01 (Dep't Commerce Nov. 10, 2010) ("ADD Order"); *Amended Countervailing Duty Order: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China*, 75 Fed. Reg. 69,050–01 (Dep't Commerce Nov. 10, 2010) ("CVD Order") (collectively, the "Orders"). The Orders cover merchandise under several headings of the Harmonized Tariff Schedule of the United States ("HTSUS"), including subheadings 7304.39.0020 and 7304.39.0024,[2] under which the AEC pipe at issue fall. *See* ADD Order, 75 Fed. Reg. at 69,053; CVD Order, 75 Fed. Reg. at 69,051; AEC Br. at 9. The Orders, however, exclude the following:

> (1) All pipes meeting aerospace, hydraulic, and bearing tubing specifications; (2) all pipes meeting the chemical requirements of ASTM A-335, whether finished or unfinished; and (3) unattached couplings. Also excluded from the scope of the order are all mechanical, boiler, condenser and heat exchange tubing, except when such products conform to the dimensional requirements, i.e., outside diameter and wall thickness of ASTM A-53, ASTM A-106 or API 5L specifications.

ADD Order, 75 Fed. Reg. at 69,052–53; CVD Order, 75 Fed. Reg. at 69,051.

AEC requested that Commerce issue a scope ruling finding that its pipe was excluded from the scope of the Orders as pipes meeting aerospace specifications. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Advance Engineering Scope Request: Specialized Seamless Pipe*, ECF No. 29 (Oct. 20, 2017) ("Scope Ruling Request"). Commerce subsequently issued a determination finding that AEC pipe was within the scope of the Orders and that it did not fall within any

[2] Although the HTSUS subheadings are "provided for convenience and customs purposes, [the] written description of the merchandise subject to this scope is dispositive." ADD Order, 75 Fed. Reg. at 69,053; CVD Order, 75 Fed. Reg. at 69,051. The description in the Orders are:

> The merchandise covered by this order is certain seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in outside diameter, regardless of wall-thickness, manufacturing process (e.g., hot-finished or cold-drawn), end finish (e.g., plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish (e.g., bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or "hollow profiles" suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials ("ASTM") or American Petroleum Institutes ("API") specifications referenced below, or seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A-53, ASTM A-106, ASTM A-334, ASTM A-589, ASTM A-795, ASTM A-1024, and the API 5L specifications, or comparable specifications, and meeting the physical parameters described above, regardless of application[.]

exclusion. *Antidumping and Countervailing Duty Orders on Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Scope Ruling for Advance Engineering; Specialized Seamless Pipe*, ECF No. 18–1 at 7–8 (Mar. 29, 2018) ("Final Scope Ruling"). Commerce found "the plain language [of the Orders] to be dispositive" and accordingly did not conduct an analysis under 19 C.F.R. § 351.225(k). *Id.* at 7. AEC appeals that determination to the court.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). The court has authority to review Commerce's decision that merchandise falls within an antidumping or countervailing duty order. 19 U.S.C. § 1516a(a)(2)(B)(vi). Commerce's final scope determination will be upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Legal Framework

After an antidumping or countervailing duty order is published, importers can request that Commerce clarify the scope of the order. *See* 19 C.F.R. § 351.225(a), (c) (2016). There is no statutory provision setting forth procedures for interpreting the scope of an order. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1353 (Fed. Cir. 2015). Accordingly, Commerce has published regulations that outline the necessary steps for assessing whether a product is included within the scope of an order. *See* 19 C.F.R. § 351.225.

Commerce must consider "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). If these "(k)(1) sources" are dispositive, Commerce can end its inquiry and issue a final ruling. *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005). If not, Commerce must conduct a formal scope inquiry and consider "(k)(2) factors," which are "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 352.225(k)(2); 19 C.F.R. § 352.225(e). Although Commerce is owed "significant deference" with

regard to its interpretation of its orders, Commerce cannot issue an interpretation that changes the scope of the order nor "interpret an order in a manner contrary to its terms." *See Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1094–95 (Fed. Cir. 2002).

II. The AEC Pipe at Issue in the Scope Ruling Request

In the Scope Ruling Request, AEC describes its pipe as servicing a "niche market" that requires more exacting specifications than "[p]ipes meeting the general industry standard, ASTM A-53." Scope Ruling Request at 3. For instance, the Scope Ruling Request describes AEC pipe as having [[

]] to satisfy the more exacting requirements for residential gas utility use. *Id.* at 4–7. The "tight specifications that AEC has designed for the imported AEC pipe ensure that the pipe can be easily threaded" so as to conform with the SAE Aerospace Standard which AEC states is "critical" to its business as AEC would otherwise "not be able to meet its customers' unique needs." *Id.* at 6.[3] AEC states that this specialization renders its pipes more akin to [[

]], which is explicitly excluded from the Orders, than standard "commodity" pipe. *Id.* at 7–8. AEC claims that no domestic source exists that satisfies its specialized requirements. *Id.* at 8–10.

Further, in the Scope Ruling Request, AEC notes that despite having imported the pipe at issue since 2006, neither it nor its Chinese vendor were named in the petition as importers or producers of seamless pipe. *Id.* at 10–11. AEC argues that "[d]ue to the highly specialized base product" AEC pipe does not [[

]] *Id.* at 13. Finally, as noted below, AEC cites evidence from the investigation, petition, and ITC Final Report that it claims support a finding that AEC pipe should be excluded from the Orders. *Id.* at 21–29.

III. Commerce Did Not Act in Accordance with its Regulation in Assessing Whether AEC Pipe is Subject Merchandise Under the Orders.

Commerce found that the language of the Orders was unambiguous and decided not to consider the criteria of 19 C.F.R. § 351.225(k)(1).

[3] Although AEC concedes that "commodity pipe" could be threaded so as to meet the SAE Aerospace Standard, it claims that this "would not be accomplished without creating significant waste" and inspection costs. Scope Ruling Request at 6; *see also* Scope Ruling Request at 17. (noting that without the "tight dimensional requirements for AEC pipe it would be extremely difficult, wasteful, and expensive . . . for AEC pipe to meet the Aerospace Threading Standard"). In addition, AEC asserts that pipes failing to meet its specifications would not be tolerated by its customers given the propensity of less-specialized pipe to crack, leak, or break. Id. at 8–10.

Final Scope Ruling at 7–8. It found that the AEC pipe at importation "meets the written description of the merchandise subject to the Orders," and additionally falls within the HTSUS subheadings specified. *Id.* at 7.

Commerce then considered whether AEC pipe fell within the specific exclusion *for* "[a]ll pipes meeting aerospace, hydraulic, and bearing tubing specifications." ADD Order, 75 Fed. Reg. at 69,052–53; CVD Order, 75 Fed Reg. at 69,051. Commerce found that, in its condition as imported, AEC pipe was not covered by this exclusion. Final Scope Ruling at 7–8.

AEC contends that its pipe falls within the aerospace exclusion and should not be subject to the Orders. *See* AEC Br. at 19–22. Specifically, AEC argues that its pipe meets various specifications that allow it to be easily threaded to meet the SAE Aerospace Standard AS71051B ("SAE Aerospace Standard") once in the United States. *Id.* at 20. Because the Orders do not define what "aerospace specifications" means, AEC argues that Commerce must read the exclusion expansively to cover AEC pipe even though the pipes do not meet the SAE Aerospace Standard until the pipes are threaded following importation. *Id.* at 31.

AEC further argues that the scope language is ambiguous and Commerce was obligated to conduct an analysis under 19 C.F.R. § 351.225(k)(1); *id.* at 22–27, and that the (k)(1) criteria supports a finding that AEC pipe is not subject merchandise. *Id.* at 27–33. AEC highlights that the petition lists neither AEC nor its supplier as involved in the export, import, or production of subject merchandise and that "none of the injury data provided by the Petitioners would be affected by the import of AEC pipe" as there is no comparable product available on the domestic market. *Id.* at 28. Regarding Commerce's investigation, AEC argues that Commerce indicated that the Orders were meant to cover "commodity pipe" and not specialized pipe meeting more exacting standards and thus the aerospace exclusion should be read to "capture all manner of custom pipes that contain any specifications suitable for aerospace." *Id.* at 28–31. AEC asserts that considerations expressed during the U.S. International Trade Commission ("ITC") investigation about specialized A-335 pipe indicate that the Orders were not intended to cover highly-specialized pipes such as AEC pipe. *Id.* at 31–33.

In the alternative, AEC argues that Commerce should have initiated a formal scope inquiry and considered the (k)(2) factors, which support the exclusion of AEC pipe from the Orders. *Id.* at 33–36. Finally, AEC contends that even if its pipe is within the scope of the

Orders, Commerce cannot assess antidumping and countervailing duties on "shipments entered prior to the initiation of a formal scope ruling." *Id.* at 36–42.

The government responds that AEC pipe was clearly within the scope of the Orders such that consideration of (k)(1) criteria was not required. Def.'s Resp. to Pl.'s 56.2 Mot. for Summ. J. upon the Agency Record at 7, 10, 13–15, ECF No. 27 (Mar. 19, 2019) ("Def. Br."). The government argues that the Orders are unambiguous, and that Commerce need only consider the (k)(1) criteria if an order is ambiguous. *Id.* at 10–15. The government further claims that as AEC pipe does not meet any aerospace specification at importation, any potential ambiguity regarding the aerospace exclusion is irrelevant. *Id.* at 13–15. Finally, the government objects to AEC's claims that Commerce's liquidation instructions to Customs were impermissibly retroactive. *Id.* at 15–27.

Commerce is incorrect in finding that it need not consider the (k)(1) criteria in this case. The government relies heavily on the Court of Appeals for the Federal Circuit's ("CAFC") decision in *Meridian* to support its argument that Commerce did not need to consider the (k)(1) criteria. *See* Def. Br. at 9–12; *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017). As the court has stated previously, *Meridian* is considerably narrower than the government asserts. *See Atkore Steel Components, Inc. v. United States*, 313 F. Supp. 3d. 1374, 1380–1382 (CIT 2018) (stating that *Meridian* must be read in the light of what "the court actually did based on particular facts").[4]

Although *Meridian* broadly states that Commerce must first "determine whether [an order's scope] contains an ambiguity and, thus, is susceptible to interpretation," even in that case the court considered (k)(1) sources, namely prior scope rulings, in concluding that the order at issue was unambiguous. *See Meridian*, 851 F.3d at 1381, 1384; *see also Quiedan Co. v. United States* ¸ 927 F.3d 1328, 1333 (Fed. Cir. 2019) (finding the language of the order clear "considering the factors specified in § 351.225(k)(1)"); *ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 88–90 (Fed. Cir. 2012) (considering a prior scope ruling in determining whether an order was ambiguous). The language in *Meridian* should not be read out of context. As

[4] *Meridian* dealt with a scope provision with an exception to a "clear" exclusion. *Meridian*, 851 F.3d at 1384–85. The court sincerely hopes Commerce will not write another scope provision that has general inclusion language, what the CAFC calls a "clear" exclusion to such inclusion, and then an exception to the exclusion. *See id.* This has resulted in considerable litigation, not to mention confusion. *See*, *e.g.*, *infra* note 5.

noted in *Meridian*, when a respondent cites (k)(1) sources as supporting a product's exclusion from the scope of an order, the court cannot consider the language of a scope order in isolation, but must consider those sources. *See Meridian*, 851 F.3d at 1383 (noting that the court "must first assess whether the plain language of the Orders' scope, in light of the disputed 19 C.F.R. § 351.225(k)(1) sources, is unambiguous"). Here, AEC sufficiently challenged the inclusion of its pipe in the Orders based on (k)(1) sources and so Commerce was not free to ignore these sources. Whether the order is ambiguous or not, Commerce's regulations are unambiguous– it "*will* take into account" the (k)(1) criteria in conducting a scope determination. 19 C.F.R. 351.225(k) (emphasis added). No case has invalidated this regulatory requirement.

The government defends Commerce's analysis by arguing that "AEC's pipe meets the written description of the scope" and that ambiguity in the exclusion language is irrelevant because AEC pipe does not meet all purported aerospace specifications until it is threaded after importation. Def. Br. at 13–14. But this reasoning is circular and confuses the analysis required by the regulations. Commerce should have first determined the meaning of the term "aerospace specifications" before concluding that the scope included AEC's pipe. Here, however, Commerce functionally decided that AEC's unfinished pipe did not meet aerospace specifications without first considering what "aerospace specification" means. As AEC notes, "aerospace specifications" could pertain to a number of different standards and the Orders do not specify any in particular. AEC Br. at 20–22. Because "aerospace specifications" is undefined, Commerce was obligated to consider the (k)(1) sources before rendering its decision. *See Meridian*, 851 F.3d at 1381 n.7, 1381–1382.[5]

Whether these sources are dispositive on the issue is unclear on the record before the court. Because Commerce did not consider the (k)(1) sources, the record only contains documents AEC submitted in conjunction with its Scope Ruling Request. AEC cites to some investigation documents and parts of the ITC report, which appear to indicate

[5] The government's reliance on *Whirlpool Corp.* is unavailing. *See* Def. Br. at 9–13 citing *Whirlpool Corp. v. United States*, 890 F.3d 1302 (Fed. Cir. 2018). Unlike here, the exclusion at issue in that case was said to be unambiguous. *Id.* at 1309. If scope language clearly excludes a product, it cannot be within the scope as there would be a complete lack of notice to importers. Exclusion does not raise the issue of the coverage of the ITC investigation. *Whirlpool*, however, involved the same problematic scope provision addressed in *Meridian* so that the "clear" exclusion was limited by an exception, that may or may not be clear. *See Id.* at 1305–06; *Meridian*, 851 F.3d at 1379. Many of the broad statements in *Meridian* are repeated in *Whirlpool* including noting that by regulation Commerce must consider the (k)(1) sources. *Whirlpool*, 890 F.3d at 1308. The sources are not discussed further. Presumably, if someone had argued that there was not an ITC determination covering the product the court would have addressed that.

that the investigation was concerned with standard, non-specialized pipe and that petitioners may not have been injured by specialized pipe. In particular, AEC highlights materials submitted by Salem Steel North America LLC ("Salem Steel") to Commerce in response to its invitation to provide comments on the scope language. According to AEC, these letters—which AEC claims ultimately resulted in the aerospace exclusion—support the exclusion of AEC pipe from the scope of the Orders. *See*, *e.g.*, Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China; Response to Commerce Department's June 23 Proposal to Change Scope Language to Exclude Mechanical Tubing, A-570–956, ECF No. 29, Exhibit H at 2–7 (June 30, 2010) ("Salem Steel Letter") (describing how aviation tubing is a type of mechanical tubing that must conform to certain aerospace specifications); Case Brief of Salem Steel North America LLC, A-570–956, ECF No. 29, Exhibit I at 9–16 (July 14, 2010) ("Salem Steel Case Brief") (describing how mechanical tubing does not compete with standard pipe as it is neither cost-effective nor practical); Salem Steel Letter, Appendix A-2 at 5–6 (May 24, 2010) (noting the differences between mechanical tubing and standard pipe and citing conversations with petitioners who indicated that mechanical tubing was not intended to be included in the investigation).

In addition, AEC notes that the reasons given in the ITC Report for excluding A-335 pipe from the scope of the order support the exclusion of AEC pipe, which is, as AEC contends, similarly specialized. *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China*, Inv. Nos. 701-TA-469 & 731-TA-1168 (Final), USITC Pub. 4190 at I-20–I-22 (Nov. 2010) ("ITC Report") (noting that A-335 pipe, which was excluded by the Orders, was in part excluded because it had specifications that made interchangeability with standard pipe unusual and costly). If these cited materials actually support plaintiff's assertions and reflect the (k)(1) sources generally, subjecting AEC pipe to the Orders may run afoul of the requirement that there be a material injury or threat of material injury to domestic industry prior to the imposition of such duties. 19 U.S.C. § 1671(a)(2); 19 U.S.C. § 1673(2). It appears from these documents that in general specialized pipe was not meant to be included within the scope of the Orders. If that is the case, and AEC pipe is also rightly described as such specialized pipe, then this merchandise may not properly within the scope of the Orders. By not considering the (k)(1) sources, as required by regulation, Commerce created a situation in which duties might be assessed against products without an injury determination.

Indeed, preventing such a result is likely why the applicable regulations state that Commerce "will take into account" the (k)(1) criteria, including the ITC determination. 19 C.F.R. § 351.225(k); *see also*, *Atkore*, 313 F. Supp. at 1381–82 (discussing the importance of considering the (k)(1) sources).[6]

Commerce's failure to consider the "descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary . . . and the Commission," as required by 19 C.F.R. § 351.225(k)(1), in its Final Scope Ruling was not in accordance with law. Accordingly, the court will remand the matter for Commerce to consider the (k)(1) sources and, if those criteria are not dispositive of the issue, then Commerce must consider the additional (k)(2) factors in determining whether AEC pipe is properly included within the scope of the Orders. Because the court is ordering Commerce to reconsider its Final Scope Ruling, it does not address AEC's claim regarding Commerce's liquidation instructions.

CONCLUSION

For the foregoing reasons, the matter is remanded for Commerce to conduct an analysis that considers the sources listed in 19 C.F.R. § 351.225(k)(1) in assessing whether AEC pipe falls within the scope of the Orders. If this analysis is not dispositive, Commerce should proceed with a formal scope inquiry and consider the factors specified in 19 C.F.R. § 351.225(k)(2).

Thus, upon consideration of the plaintiff's motion for judgment on the agency record and all papers and proceedings had in relation to this matter, and upon due deliberation, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record is **GRANTED** in part;

ORDERED that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a Remand Redetermination in compliance with this Opinion and Order;

ORDERED that defendant shall supplement the administrative record with all documents considered by Commerce in reaching its decision in the Remand Redetermination;

ORDERED that plaintiff shall have 30 days from the filing of the Remand Redetermination to submit comments to the court; and

ORDERED that defendant shall have 15 days from the date of the plaintiff's filing of comments to submit a response.

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[6] Looking at (k)(1) sources does not make an order clear or unclear. The (k)(1) sources are what provide the answer as to whether an order is clear enough that no resort to (k)(2) factors is necessary. *See* 19 C.F.R. § 351.225(k). Further, "no formal inquiry is required where a (k)(1) analysis is dispositive." *Quiedan*, 927 F.3d at 1333.

Dated: August 13, 2019
New York, New York

/*s*/*Jane A. Restani*
JANE A. RESTANI, JUDGE

Slip Op. 19–110

GOODLUCK INDIA LIMITED, Plaintiff, v. UNITED STATES, Defendant, and ARCELORMITTAL TUBULAR PRODUCTS, MICHIGAN SEAMLESS TUBE, LLC, PLYMOUTH TUBE CO. USA, PTC ALLIANCE CORP., WEBCO INDUSTRIES, INC. and ZEKELMAN INDUSTRIES, INC, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 18–00162

[Plaintiff's motion for judgment on the agency record is granted. The court remands to Commerce for further proceedings consistent with this opinion.]

Dated: August 13, 2019

Ned H. Marshak and *Michael S. Holton*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY and Washington, DC, argued for plaintiff. With them on the brief were *Andrew T. Schutz*, *Kavita Mohan*, and *Jordan C. Kahn*.

Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Caroline D. Bisk*, Office of the Chief Counsel for Trade Enforcement & Compliance, Office of the General Counsel, U.S. Department of Commerce, of Washington, DC.

Melissa M. Brewer and *Kathleen M. Cusack*, Kelley Drye & Warren, LLP, of Washington, DC, argued for defendant-intervenors. With them on the brief were *R. Alan Luberda* and *David C. Smith*.

OPINION

Katzmann, Judge:

This case turns on distinguishing correctible importer mistakes from submissions of untimely new factual information. Before the court is whether the Department of Commerce ("Commerce") abused its discretion by rejecting as untimely plaintiff Goodluck India Limited's ("Goodluck") corrections to information submitted as part of a less than fair value investigation on carbon and alloy steel from India and by subsequently relying on other sources of information to complete the factual record.

As part of the investigation, Goodluck submitted sales data on cold-drawn mechanical tubing sold in both its home market of India and in the United States and applied particular product characteristic codes to the underlying data. After Goodluck had begun preparing its data, Commerce revised its product characteristic coding guidance

and extended Goodluck's submission deadline. When Goodluck submitted its responses to Commerce, it had failed to revise the coding for 682 home market sales, resulting in cascading errors in Goodluck's home sales and cost databases. Goodluck alerted Commerce to its errors — which it characterized as correctible minor errors — on the first day of verification, but Commerce rejected Goodluck's updated submissions as untimely new factual information. Consequently, Commerce rejected all of Goodluck's submitted data and issued Goodluck a final dumping margin of 33.80 percent based on total adverse facts available. Commerce also used another respondent's export subsidy rate to calculate Goodluck's export subsidy cash deposit offset, rather than the rate specifically calculated for Goodluck in the companion countervailing duty investigation. Goodluck appeals Commerce's determination on each issue to this court.

The court concludes that Commerce's decision to reject Goodluck's corrections was an abuse of discretion and remands to Commerce to consider Goodluck's corrected submission as well as to explain why it has departed from its general practice for calculating cash deposit offset rates in this case.

BACKGROUND

I. Legal Background

Dumping occurs when a foreign company sells a product in the United States for less than fair value. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Similarly, a foreign country may artificially lower a product's price through subsidies. *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1355 n.1 (Fed. Cir. 1996). To ameliorate distortions caused by these economic practices, Congress enacted the Tariff Act of 1930 ("Act"), which empowers Commerce to investigate potential dumping or subsidies, and if appropriate, issue orders imposing duties on the subject merchandise. *Sioux Honey Ass'n*, 672 F.3d at 1046–47. These antidumping and countervailing duty actions are intended to be remedial, not punitive in nature, *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990), and it is Commerce's duty to determine margins as accurately as possible, *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

A. Minor Corrections

"Although 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." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337 (Fed. Cir.

2016) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Commerce's regulations address submissions of new factual information[1] by parties to an investigation, with the type of factual information determining the time limit for submission to Commerce under 19 C.F.R. § 351.301(c). Pertinent here, 19 C.F.R. § 351.301(c)(5) requires that miscellaneous new factual information must be submitted either 30 days before the scheduled date of the preliminary results, or 14 days before verification, whichever is earlier.[2]

Apart from new factual information, "Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections." *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (2006). 19 C.F.R. § 351.224(f) provides a definition of

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[1] 19 C.F.R. § 351.102(b)(21) provides that:

"Factual information" means:

(i) Evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party;

(ii) Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party;

(iii) Publicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2), or, to rebut, clarify, or correct such publicly available information submitted by any other interested party;

(iv) Evidence, including statements of fact, documents and data placed on the record by the Department, or, evidence submitted by any interested party to rebut, clarify or correct such evidence placed on the record by the Department; and

(v) Evidence, including statements of fact, documents, and data, other than factual information described in paragraphs (b)(21)(i)-(iv) of this section, in addition to evidence submitted by any other interested party to rebut, clarify, or correct such evidence.

[2] 19 C.F.R. § 351.301(c)(5) provides that:

Factual information not directly responsive to or relating to paragraphs (c)(1)-(4) of this section: Paragraph (c)(5) applies to factual information other than that described in § 351.102(b)(21)(i)-(iv). The Secretary will reject information filed under paragraph (c)(5) that satisfies the definition of information described in § 351.102(b)(21)(i)-(iv) and that was not filed within the deadlines specified above. All submissions of factual information under this subsection are required to clearly explain why the information contained therein does not meet the definition of factual information described in § 351.102(b)(21)(i)-(iv), and must provide a detailed narrative of exactly what information is contained in the submission and why it should be considered. The deadline for filing such information will be 30 days before the scheduled date of the preliminary determination in an investigation, or 14 days before verification, whichever is earlier, and 30 days before the scheduled date of the preliminary results in an administrative review, or 14 days before verification, whichever is earlier.

"ministerial error."[3] Additionally, this court has held that Commerce abuses its discretion by rejecting "corrective information," which includes submissions "to correct information already provided [to Commerce]," *Fischer S.A. Comercio v. United States*, 34 CIT 334, 348, 700 F. Supp. 2d 1364, 1376 (2010), or to "clarif[y] information already in the record," *id.* at 1373, but not to "fill [ ] gap[s] caused by [a respondent's] failure to provide a questionnaire response or evidence requested during verification," *id.* at 1377. Notably, no regulation addresses the circumstances under which corrections will be accepted or a time frame within which corrections should be submitted. *Deacero S.A.P.I de C.V. v. United States*, 42 CIT __, __, 353 F. Supp. 3d 1303, 1307 (2018); *see also Timken*, 434 F.3d at 1353 (noting that it "appears that Commerce has not issued any regulation addressing whether an importer can correct errors in the information it has submitted, [nor] restricted the types of importer errors that are eligible for such correction.").

While Commerce is afforded discretion in deciding whether to accept a respondent's corrective information, *Deacero*, 353 F. Supp. 3d at 1309, if "Commerce acted differently in this case than it has consistently acted in similar circumstances without reasonable explanation, then Commerce's actions will have been arbitrary," *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (citing *RHP Bearings v. United States*, 288 F.3d 1334, 1347 (Fed. Cir. 2002)). Moreover, "Commerce abuse[s] its discretion [when it] refus[es] to accept updated data when there [i]s plenty of time for Commerce to verify or consider it." *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016) (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208–09 (Fed. Cir. 1995) (requiring correction of typing errors) and *Timken*, 434 F.3d at 1353 (expanding the holding in *NTN* to "any type of importer error—clerical, methodology, substantive, or one in judgment—... provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections")). While "a tension may arise between finality and correct result" at later stages of an investigation, "[p]reliminary determinations are 'preliminary' precisely because they are subject to change . . . the tension between finality and correctness [does] not exist at th[at] time." *NTN*, 74 F.3d at 1208.

[3] 19 C.F.R. § 351.224(f) provides that "under this section, ministerial error means an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial."

B. Reliance on facts otherwise available and adverse facts available

If a party fails to satisfactorily respond to Commerce's requests for "necessary information" to calculate a dumping margin by withholding requested information, failing to provide information by the submission deadlines or in the form or manner requested, significantly impeding a proceeding, or providing information that cannot be verified, Commerce shall use facts otherwise available to calculate the margin. 19 U.S.C. § 1677e(a)(2). "The use of facts otherwise available . . . is only appropriate to fill gaps when Commerce must rely on other sources of information to complete the factual record." *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011) (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)).

Under 19 U.S.C. § 1677e(b)(1)(A), Commerce may apply adverse inferences as facts available ("AFA") when Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[.]" A respondent does not cooperate to the "best of its ability" when it fails to "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries." *Dillinger France S.A. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1349, 1360 (2018) (quoting *Nippon Steel*, 337 F.3d at 1382). "[W]here there is useable information of record but the record is incomplete," Commerce applies partial AFA. *Wash. Int'l Ins. Co. v. United States*, 33 CIT 1023, 1035 n.18 (2009) (citing *Yantai Timken Co., Ltd. v. United States*, 31 CIT 1741, 1746–48, 521 F. Supp. 2d 1356, 1364–65 (2007), *aff'd* 300 Fed. Appx. 934 (Fed. Cir. 2008)). In contrast, when "none of the reported data is reliable or usable," *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1305, 1307–08 (Fed. Cir. 2014), that is, when it "exhibit[s] pervasive and persistent deficiencies that cut across all aspects of the data," *Zhejiang*, 652 F.3d at 1348, Commerce applies total AFA.

C. Export subsidy cash deposit offset determinations

"If Commerce issues a final determination that subject merchandise is being, or is likely to be sold in the United States at less than fair value, Commerce orders the posting of a cash deposit for each entry of the subject merchandise based on the estimated weighted average dumping margin." *Jinko Solar Co. v. United States*, 41 CIT __, 229 F. Supp. 3d 1333, 1359 (2017) (citing 19 U.S.C. §§ 1673d(a)(1), 1673d(c)(1)(B)(i)–(ii)). "The price used to establish export price and constructed export price shall be increased by the amount of any countervailing duty imposed on the subject merchandise . . . to offset

an export subsidy." 19 U.S.C. § 1677a(c)(1)(C). "Neither the statute nor Commerce's regulations otherwise define how the cash deposit is to be calculated in an investigation," and so "Commerce has discretion to establish a reasonable practice to calculate a cash deposit rate in investigations where there is no clear statutory directive." *Jinko*, 229 F. Supp. 3d at 1358 (citing *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009)).

II. Factual Background and Procedural History

On May 16, 2017, Commerce initiated less than fair value investigations on carbon and alloy steel from India, *see Initiation of Less-Than-Fair-Value Investigations*, 82 Fed. Reg. 22,491 (May 16, 2017), Public Record ("P.R.") 32, following a petition submitted on April 19, 2017 by ArcelorMittal Tubular Products, Michigan Seamless Tube, LLC, PTC Alliance Corp., Webco Industries, Inc., and Zekelman Industries, Inc. *Id.*

On June 19, 2017, Commerce designated Goodluck as a mandatory respondent.[4] *See* U.S. Department of Commerce Questionnaire to Goodluck (June 19, 2017) ("ADD Questionnaire"), P.R. 81. Commerce solicited data from Goodluck via questionnaire on every sale of subject merchandise Goodluck made in its home market of India ("Section B"), to the United States ("Section C"), and product specific costs ("Section D") during the period of investigation from April 1, 2016 to March 31, 2017. *Id*. Field 2.0 of the questionnaire instructed Goodluck to create and report a control number, or "CONNUM," for "'each unique product' reported in the sales and cost data files," using product characteristic-specific codes provided by Commerce.[5] *Id.* at 109, 136.

When Commerce first provided the questionnaire to Goodluck on June 19, 2017, Commerce had not yet determined how certain physical characteristics should be coded for the purposes of constructing

[4] In antidumping duty investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

> If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

[5] Commerce instructed that "identical products should be assigned the same control number in each record in every file in which the product is referenced (e.g., products with identical physical characteristics reported in the foreign market sales file and the U.S. market sales file should have the same control number." ADD Questionnaire at 109, 136.

the 24-digit CONNUMs. *See* U.S. Department of Commerce CONNUM Letter (July 6, 2017), P.R. 95 ("First CONNUM Letter"). On July 6, 2017, Commerce issued to Goodluck the product characteristic codes via letter. *Id.* At that time, Goodluck's Section B, C, and D responses were due to Commerce on August 7, 2017. *Id.*

Field 2.5 required Goodluck to provide nominal wall thickness in millimeters for each tube Goodluck sold in both its home market of India in its Section B questionnaire response and in the United States in Section C. *Id.* at Attach. 1. Field 3.5 required Goodluck to apply a two-digit code to the numeric wall thickness reported in Field 2.5 according to thickness ranges provided by Commerce in its July 6, 2017 letter. *Id.* The two-digit codes reported in Field 3.5 were then combined with codes for additional physical characteristics contained in other fields to create the 24-digit CONNUMs reported in Field 2.0. *See* ADD Questionnaire at 109, 136. Goodluck reported weighted average CONNUM-specific costs and used CONNUM-specific expenses to create the Section D database. *Id.* at 162.

On July 12, 2017, Petitioners submitted comments to Commerce contesting the correspondence of certain product characteristics to the Commerce-devised codes. *See* Petitioners' CONNUM Comments (July 12, 2017), P.R. 97. Specifically, Petitioners asserted that Commerce's wall thickness ranges "were too broad to accurately capture cost and price differences between products" and would undermine cost of production and product matching. *Id.* at 4–5. Following Petitioners' comments, Commerce sent Goodluck a Revised Product Characteristics Letter on August 7, 2017. *See* U.S. Department of Commerce Revised Product Characteristics Letter (Aug. 7, 2017), P.R. 153 ("Revised CONNUM Letter"). This letter modified and increased the number of coding ranges for Goodluck to apply to the nominal wall thickness in Field 2.5 to create the two-digit code reported in Field 3.5. *See id.* at Attach. 1; *see also* First CONNUM Letter at Attach. 1. On August 25, 2017, Goodluck timely submitted its questionnaire responses for Sections B, C, and D to Commerce, *see* Goodluck Sections BC&D Questionnaire Response (Aug. 25, 2017), P.R. 165–68, C.R. 62–131, reporting costs for 385 CONNUMs of subject merchandise, *see, e.g.*, *id.* at 788–95.

On September 20, 2017 and October 2, 2017, Commerce asked Goodluck for additional supplemental information on Section D and Sections B and C, respectively. *See* U.S. Department of Commerce Section D Supplemental Questionnaire to Goodluck (Sept. 20, 2017), P.R. 190, C.R. 168; *see also* U.S. Department of Commerce Section B-C Supplemental Questionnaire to Goodluck (Oct. 2, 2017), P.R. 196, C.R. 170. Goodluck submitted its responses to the Section B and C

supplemental questionnaires on October 20 and 23, 2017. *See* Goodluck Supplemental Section B-C Questionnaire Responses (Oct. 20, 2017), P.R. 220, C.R. 207–11; *see also* Goodluck Supplemental Section B-C Questionnaire Responses (Additional Question) (Oct. 23, 2017), P.R. 222, C.R. 220–21. In these exchanges, neither Commerce nor Goodluck raised the manner in which Goodluck had reported nominal wall thickness in Field 2.5 or coded the wall thickness in Field 3.5.

On November 22, 2017, Commerce issued its preliminary determination finding that Goodluck's dumping margin was de minimis. *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, in Part, Postponement of Final Determination, and Extension of Provisional Measures*, 82 Fed. Reg. 55,567 (Nov. 22, 2017), P.R. 240. On November 20, 2017, Petitioners filed a ministerial error allegation requesting Commerce to correct a clerical error in the coding of two steel products sold in the home market. *See* Petitioners Ministerial Error Allegation (Nov. 20, 2017), P.R. 238, C.R. 238. On November 27, 2017, Goodluck filed a ministerial error letter asking Commerce to correct this mistake. *See* Goodluck Ministerial Error Letter (Nov. 27, 2017), P.R. 249, C.R. 242. Commerce agreed to do so on January 3, 2018, and revised Goodluck's preliminary dumping margin to 4.2 percent. *See* U.S. Department of Commerce Amended Preliminary Margin Calculation Memo (Jan. 3, 2018), P.R. 276, C.R. 380–84.

On November 22 and 27, 2017, Commerce sent its Sales Verification Agenda-Outline and Cost Verification Agenda-Outline, respectively, to Goodluck, instructing:

> [V]erification is not intended to be an opportunity for submission of new factual information. New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information on the record.

See U.S. Department of Commerce Sales Verification Agenda-Outline for Goodluck (Nov. 22, 2017), P.R. 244, C.R. 240; *see also* U.S. Department of Commerce Cost Verification Agenda-Outline for Goodluck (Nov. 27, 2017), P.R. 246, C.R. 241.

While preparing for verification, Goodluck discovered that it had reported incorrect codes in Field 3.5 for 682 observations in its home market sales database provided in its Section B questionnaire. *See* Goodluck Sales Verification Exhibits (Dec. 12, 2017), P.R. 269, C.R. 290–93. The incorrect codes in Field 3.5 reflected Commerce's coding

instructions provided in the original July 6, 2017 letter, rather than the updated coding guidance contained in Commerce's August 7, 2017 letter. *Id.* at Exhibit 16.

On the first morning of Sales Verification on December 4, 2017, Goodluck informed Commerce of its error and provided Commerce with a worksheet identifying the erroneous data entries for Field 3.5, which presented the incorrectly reported two-digit product characteristic codes side-by-side with the corrected codes. *See* Pl.'s Br. at Attach. One; *see also Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Final Affirmative Determination of Sales at Less than Fair Value* ("*Final Determination*"), 83 Fed. Reg. 16,296 (Apr. 16, 2018), P.R. 317, accompanying Issues and Decision Memorandum at 6–8 (Apr. 9, 2018) ("*IDM*"), P.R. 311. On the first morning of Cost Verification on December 11, 2017, Goodluck again directed Commerce to the errors. *IDM* at 6–8. Commerce's Cost Verification Report noted "[c]orrection of these errors would result in changes to the physical characteristics of 24 CONNUMs and the addition of 13 new CONNUMs" that were not included in Goodluck's original Section D cost database submission. *See* U.S. Department of Commerce Cost Verification Report (Jan. 18, 2018), P.R. 278, C.R. 385.

On February 15, 2018, both Goodluck and Petitioners filed Case Briefs with Commerce. *See* Goodluck Case Brief (Feb. 15, 2018), P.R. 288, C.R. 389; *see also* Petitioners' Case Brief (Feb. 15, 2018), P.R. 291, C.R. 392. Commerce rejected Goodluck's case brief on February 20, 2018 for including untimely new factual information on Goodluck's identified questionnaire errors. *See* U.S. Department of Commerce Letter re: Rejection of New Factual Information (Feb. 20, 2018), P.R. 295. Goodluck refiled a redacted case brief on February 21, 2018. *See* Goodluck Redacted Case Brief (Feb. 21, 2018), P.R. 296, C.R. 406. Commerce rejected Goodluck's redacted case brief on March 7, 2018, *see* U.S. Department of Commerce Letter re: Rejection of New Factual Information (Mar. 7, 2018), P.R. 302, and Goodluck's corrected database on March 19, 2018 for containing untimely new factual information, *see* Letter from U.S. Department of Commerce re: Rejection of New Factual Information (Mar. 19, 2018), P.R. 306.

On April 16, 2018, Commerce issued its final determination announcing a dumping margin for Goodluck of 33.80 percent and a cash deposit rate of 33.70 percent. *See Final Determination*, 83 Fed. Reg. 16,296. In reaching the *Final Determination*, Commerce rejected all of the data submitted by Goodluck in its questionnaires and instead relied on total AFA to calculate Goodluck's dumping margin. *IDM* at 10–14.

In determining Goodluck's cash deposit rate of 33.70 percent, Commerce employed the .10 percent export subsidy rate calculated for Tube Products of India, Ltd. ("TPI"), a separate respondent in the investigation. *See* Goodluck Final Determination Ministerial Error Comments (Apr. 17, 2018), P.R. 316. On April 17, 2018, Goodluck timely filed ministerial error comments to challenge Commerce's use of TPI's export subsidy rate instead of 4.85 percent, the rate calculated specifically for Goodluck in the accompanying countervailing duty investigation. *Id*. Commerce rejected Goodluck's claim via memorandum on May 16, 2018. *See* U.S. Department of Commerce Ministerial Error Allegation Memorandum (May 16, 2018), P.R. 318.

On July 10, 2018, Goodluck filed its complaint with this court appealing from Commerce's *Final Determination*. Compl., ECF No. 4. Goodluck filed its brief on December 14, 2018. Mot. for J. on the Agency R. ("Pl.'s Br."), ECF Nos. 21–22. Defendant the United States ("the Government) and Defendant-Intervenors filed their responses on April 24, 2019. Resp. to Mot. for J. on the Agency R. ("Def.'s Br."), ECF No. 27; Resp. in Opp'n to Mot. for J. on the Agency R. ("Def.-Inters.' Br."), ECF No. 28. Goodluck filed its reply on May 28, 2019. Reply Br. ("Pl.'s Reply"), ECF Nos. 30–31. The court heard oral argument on July 11, 2019. ECF No. 43.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a. The court may review final affirmative determinations in countervailing duty or antidumping duty proceedings under 19 U.S.C. § 1561a(a)(2)(B)(i) and will hold unlawful those agency determinations which are unsupported by substantial evidence on the record or otherwise not in accordance with law under 19 U.S.C. § 1515a(b)(1)(B)(i).

DISCUSSION

Goodluck contends that Commerce's determination was unsupported by substantial evidence and contrary to law because (1) Commerce abused its discretion by rejecting Goodluck's correction submission at verification; (2) Commerce's reliance on adverse facts available was not warranted where there were no gaps in the record and where Goodluck did not significantly impede the investigation; and (3) Commerce deviated from its typical practice when calculating Goodluck's export subsidy cash deposit without adequate explanation. The court concludes that Commerce's decision to reject Goodluck's corrections was an abuse of discretion and remands to Commerce to consider Goodluck's corrected submission as well as to explain why it has departed from its general practice for calculating

export subsidy cash deposit offset rates in this case. The court declines to reach Commerce's reliance on facts otherwise available and adverse inferences at this time.

I. Commerce's rejection of Goodluck's updated data was not supported by substantial evidence or in accordance with law.

The Government contends that Commerce properly rejected Goodluck's corrections submitted at verification because the errors Goodluck identified amounted to untimely new factual information under 19 C.F.R. § 351.301(c)(5) and the verification instructions.[6] Specifically, according to the Government, the errors identified were so fundamental and systematic that they compromised the integrity of the dataset as a whole.

The court finds this argument unpersuasive in light of existing case law and Commerce's own past practice. For example, in *NTN Bearing Corp. v. United States*, the Federal Circuit held that Commerce abused its discretion when it refused to consider NTN's corrections of errors in its submissions because of the "untimely" submission of the corrective information. *NTN*, 74 F.3d at 1208. When converting its sales data to the manner requested by Commerce, NTN entered some improper code numbers. *Id.* "The effect of these mistakes was compounded because [Commerce] used a sampling method to determine the extent of dumping, and the sample data contained the clerical errors." *Id.* at 1205. In concluding that Commerce abused its discretion by rejecting NTN's corrections, the Federal Circuit noted that "NTN responded in a timely manner to the preliminary determination" when alerting Commerce to its errors, and that "[a] straightforward mathematical adjustment was all that was required. Failure to make it resulted in the imposition of many millions of dollars in duties not justified under the statute" in light of the antidumping laws' remedial, and not punitive, purposes. *Id.* at 1208.

Applying *NTN*, this court in *Fischer S.A. v. United States* distinguished correctible importer error entailing "a mistaken previous submission" to the record from new factual information filling "[a] gap caused by failure to provide a questionnaire response or evidence

[6] Commerce's November 22, 2017 Sales and Costs Verification Agenda-Outline instructions:

> [V]erification is not intended to be an opportunity for submission of new factual information. New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports or clarifies information on the record.

See U.S. Department of Commerce Sales Verification Agenda-Outline for Goodluck (Nov. 22, 2017), P.R. 244, C.R. 240; *see also* U.S. Department of Commerce Cost Verification Agenda-Outline for Goodluck (Nov. 27, 2017), P.R. 246, C.R. 241.

during verification." 700 F. Supp. 2d at 1377. In that case, Fischer reported the wrong factor -- called a "Brix level" — for Commerce to use in its formula for converting its United States and home market sales to the same measurement system so Commerce could make an accurate comparison. *Id.* at 1370–72. The *Fischer* court held that

> On the authority of *Timken* and *NTN Bearing*, the Court holds that Commerce abused its discretion in rejecting Fischer's additional agreement pages as untimely. Doing so was an abuse of discretion because (1) no finality concerns demanded exclusion of the additional data at the preliminary results stage; (2) failure to consider the additional pages to correct information already provided was a violation of Commerce's duty to determine Fischer's dumping margin as accurately as possible; (3) consideration of the additional data is necessary to ensure that the remedial, non-punitive nature of the antidumping laws is not violated by imposition of inaccurately high antidumping duties on Fischer despite the evidence that was rejected; and (4) the recalculation of Fischer's dumping margin could be accomplished by simply replacing the actual Brix levels reported by Fischer in its database with the standard Brix level of 11.8 degrees, should Commerce determine upon remand that the sales agreement pages in fact substantiate that Brix levels above 11.8 degrees did not increase the United States unit price of Fischer's NFC.

Id. at 1376–77.

Here, like the respondents in *NTN* and *Fischer*, Goodluck sought to rectify reporting mistakes contained in its previous submission to the record and not to fill gaps caused by an omission or withholding of requested information from Commerce. Goodluck did not seek to provide additional underlying production data — which was correctly reported in its Section B and C questionnaire — but merely to remedy Goodluck's misapplication of Commerce-devised codes to the underlying data. As in *NTN*, Goodluck's miscoding of nominal wall thickness in Field 3.5, which impacted two digits of a 24-digit CONNUM, could have been addressed through a "straightforward mathematical adjustment" even though the "effect of these mistakes was compounded" by how Commerce used the incorrect CONNUMs. *See NTN*, 74 F.3d at 1205; *Certain Hot-Rolled Steel Flat Products from the United Kingdom*, 81 Fed. Reg. 53,436 (Aug. 12, 2016), accompanying Issues and Decision Memorandum at Comment 1 (noting that whether a reporting error "affected many transactions and cascaded into other fields in [a] database" is not dispositive on the error's categorization).

The Government argues that accepting Goodluck's submission would have "involve[d] numerous corrections," including "revising the weighted average CONNUM costs," *see IDM* at 8, which rendered it new factual information and a systematic error. However, whether the "effect of these mistakes was compounded" by how Commerce used the incorrect CONNUMs does not transform a minor correction into substantial new factual information. *See NTN*, 74 F.3d at 1205; *Certain Hot-Rolled Steel Flat Products from the United Kingdom*, 81 Fed. Reg. 53,436 (Aug. 12, 2016), accompanying Issues and Decision Memorandum at Comment 1 (noting that whether a reporting error "affected many transactions and cascaded into other fields in [a] database" is not dispositive on the error's categorization). As Commerce has previously stated — and this court has affirmed — "the value of the errors as a percentage of total sales, or the number of instances of errors" is not decisive. *See The Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers v. United States*, 23 CIT 88, 93, 44 F. Supp. 2d 229, 236 (1999). Commerce articulated a standard for delineating what constitutes a "substantial revision of [a] response" in *Certain Coated Paper Suitable for High Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*, 75 Fed. Reg. 59,217 (Sept. 27, 2010), accompanying Issues and Decision Memorandum at Comment 10. In *Certain Coated Paper*, despite declaring that the impact of the respondent APP-China's miscoding of a particular product characteristic[7] "may not be minor," Commerce nevertheless accepted the correction at verification as a minor correction because it "d[id] not involve production data, or call into question [Factors of Production[8]] and cost reconciliations." *Id.* Like with APP-China, parties here are not contesting the accuracy of Goodluck's underlying production, input,[9]

[7] The correction at issue in *Certain Coated Paper* involved revising the "reporting of a particular 'finish' characteristic for several of APP-China's products from characteristic '2' – indicating a finish between 65 and 74.99, to characteristic '1' – indicating a finish of 75 or greater." 75 Fed. Reg. 59,217 (September 27, 2010), accompanying Issues and Decision Memorandum at Comment 10.

[8] "Factors of production are the inputs consumed to produce the subject merchandise." *Nat'l Nail Corp. v. United States*, Slip Op. 19–71, 2019 WL 2537931, at *3 n.11 (CIT June 12, 2019).

[9] The court notes that Commerce's *IDM* stated: "[P]arties commented on Goodluck's reporting of nominal field lengths, steel grade, credit, insurance, indirect selling expenses, and inventory carrying costs, U.S. destinations, date of sale, quality rejections, cost specificity, intra-company transfers, and rebates." However, Commerce did not reach these points in light of its decision to rely on total AFA. *IDM* at 13. It is possible that these additional contentions could undermine the accuracy of Goodluck's reported production data, factors of production, and/or cost reconciliations, and thereby render Goodluck's submission a "substantial revision" under the standard articulated in *Certain Coated Paper*. However, because Commerce did not fully explain the implications of this statement, the court will not speculate.

or cost data. On costs specifically, in the section entitled "Cost Reconciliations" of Commerce's Cost Verification Report, Commerce stated: "We reconciled the total [period of investigation ("POI")] costs from the financial statements to the total POI cost of units that produced [merchandise under consideration]." *See* U.S. Department of Commerce Cost Verification Report at 8 (Jan. 18, 2018), P.R. 278, C.R. 385. While it is true that some of the "weighted average CONNUM-specific costs" provided by Goodluck were inaccurate, *IDM* at 12, this does not implicate the accuracy of Goodluck's underlying data, but rather was a cascading result of Goodluck's coding error in field 3.5 of its home market sales database. As with APP-China, the impact of Goodluck's coding error "may not [have] be[en] minor;" nevertheless, under the standard articulated in *Certain Coated Paper*, correction of Goodluck's errors should not require a "substantial revision of [its] response" given the accuracy of Goodluck's underlying data.

The Government further contended that accurately coded product characteristics are indispensable to less than fair value investigations, and within product characteristics, accurately coded wall thickness are paramount to cold-drawn mechanical tubing because misreporting wall thickness dramatically skews costs. *See* Oral Argument, July 11, 2019, ECF No. 43. In the Government's estimation, errors in such crucial elements of the investigation cannot be considered minor. As an initial matter, the court notes that Commerce did not specifically emphasize the importance of wall thickness in its *IDM*. Rather, Commerce more generally asserted that "[w]ithout accurate reporting of physical characteristics [generally] and matching CONNUMs in Goodluck's databases, Commerce does not have the primary components to perform an accurate, reliable margin calculation for Goodluck" and stated that such "errors in a factor as fundamental as the control number invalidate[] the allocations, matches, and calculations that follow." *IDM* at 8–9.

Notwithstanding these contentions, Commerce has previously deemed errors in product characteristic coding, wall thickness coding, and CONNUM creation to be minor errors at verification, despite the impact of the errors on "allocations, matches, and calculations that follow." In a case similar to the one at bar, *National Steel Corp. v. United States*, Commerce found errors committed by the respondent Hoogovens to be neither "systematic in nature" nor "amount[ing] to a failure to provide information" — despite the fact that, like Goodluck, Hoogovens informed Commerce on the first day of verification that it had discovered inaccuracies affecting "product characteristics submitted to Commerce," the majority of which "involved the miscalcu-

lating of thickness [which] placed a number of sales in the wrong thickness group." 18 CIT 1126, 1127, 870 F. Supp. 1130, 1132 (1994). As with Goodluck, Commerce found that Hoogovens' error affected home market sales CONNUMs, and correspondingly, "a significant percentage of margin calculations" and "the model matching hierarchy." *Id.* at 1133. Yet, unlike with Goodluck, Commerce concluded that Hoogovens' "errors themselves were minor" and Hoogoven "did not omit data, but only provided inaccurate information."[10] *Id.* at 1134. While each case turns on its own facts and circumstances, treating Goodluck's strikingly similar error differently is arbitrary.[11]

Finally, the Government contests Commerce's assertion that "the rejected information was available in the record" because "the code

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[10] Given the case law that governed in 1994, Commerce decided not to accept Hoogovens' corrections due to time constraints, despite finding that Hoogovens' errors were minor. *National Steel*, 870 F. Supp. at 1133. Such a determination by Commerce — finding a respondent's computer conversion errors to be minor, and yet declining to correct them — would soon be precluded by the Federal Circuit case *NTN Bearing Corp. v. United States* in 1995, which held that Commerce had abused its discretion in refusing to correct a respondent's typographical errors identified prior to the issuance of final results. 74 F.3d at 1207–08. All of that aside, the salient point in this case comparison is that Commerce's reasoning is inexplicably inconsistent: Commerce declared Hoogovens' CONNUM reporting errors to be neither "systematic" nor "amount[ing] to a failure to provide information," *National Steel*, 870 F. Supp. at 1134, and yet found Goodluck's strikingly similar error to be "systematic," amounting to a provision of new factual information.

[11] When questioned about this difference, the Government responded in Oral Argument that because Hoogovens' mistakes resulted from a computer conversion error, it therefore qualified as a clerical error (stemming from "inaccurate copying, duplication, or the like" under 19 C.F.R. § 351.224(f)); while Goodluck's error "entailed more than copying or duplicating," but properly analyzing and following directions. Def.'s Br. at 21; Oral Argument, July 11, 2019, ECF No. 43; IDM at 8. The court is unpersuaded. To produce the erroneously coded 682 home market sales observations, Goodluck still copied and/or duplicated codes provided by Commerce, but simply the wrong ones — as evidenced by the fact that Goodluck's errors reflected Commerce's original July 6, 2017 coding guidance instead of the revised guidance. See First CONNUM Letter at Attach. 1; *see also* Revised CONNUM Letter.

Moreover, the Government acknowledged that had Goodluck simply mistyped Commerce's updated coding guidance in the process of revising the 682 home market sales observations — with the same cascading effects on CONNUMs and weighted average CONNUM-specific costs — such mistyping would be a correctible clerical error at the preliminary investigation phase, but maintained that verification was too late to make such corrections. However, this delineation in timing is inconsistent with *NTN*, which held that Commerce abused its discretion in declining to correct typographical coding errors identified before Commerce had issued its final results. 74 F.3d at 1209.

Additionally, the court is unconvinced by Commerce's explanation for why this error constitutes a failure to adhere to instructions. In its *IDM* at 8, Commerce states that "Goodluck did not adhere to Commerce's coding instructions, despite having the correct information on hand." The court notes that for any correctible error, the respondent necessarily has the correct information on hand, but inadvertently reports the wrong information instead and thus seeks to correct that mistake. In addition, as discussed, this is not a situation where a company was unresponsive, provided fraudulent information, or clearly ignored Commerce's instructions; rather, Goodluck believed it had reported the correct information in accordance with Commerce's instructions — and largely did so — but made a mistake. It is thus unclear from Commerce's explanation what renders Goodluck's error here a failure to follow instructions rather than a correctible error.

was 'derived' from the data reported in a separate field, field 2.5," pointing out that "nowhere in its case brief does Goodluck — or can it — point to a place on the record in which this new information [the corrected CONNUM codes] can be found." Def.'s Br. at 25. The Government argues that the 13 unreported CONNUMs stemming from Goodluck's coding error necessarily dictate a finding of new factual information. The court is not convinced by this argument. As discussed above, in *NTN*, some code numbers were incorrect,[12] and yet the Federal Circuit found that Commerce abused its discretion by rejecting NTN's corrections. Moreover, as discussed above, cascading effects of errors — such as the effect of CONNUMs here — do not transform a correctible error into new factual information.

The cases provided by Defendant-Intervenor and the Government involving untimely new factual information — as opposed to correctible importer error — are easily distinguishable from the instant case, and in fact further illuminate how Goodluck's submission differs from impermissible new factual information. For example, in *Mukand Ltd. v. United States*, the Federal Circuit found that Commerce had permissibly refused the respondent's untimely new information because Commerce had asked Mukand "for size-specific cost information on five separate occasions" and Mukand was only "suddenly willing and able to provide" the data after Commerce had preliminarily resorted to adverse facts available. 767 F.3d at 1305. By contrast, Goodluck demonstrated no such withholding of requested information from Commerce. Instead, Goodluck complied with Commerce's requests for the underlying data, but improperly applied product characteristic codes, with respect to one of nine physical characteristics. Pl.'s Br. at 40. While Mukand's submission was clearly an attempt to fill "[a] gap caused by [Mukand's] failure to provide a questionnaire response," and therefore constituted un-

[12] The Government emphasizes the Federal Circuit's use of the word 'transposed' to suggest that Goodluck's error was distinguishable from those at issue in *NTN*. However, as discussed in footnote 11, the Government's attempt to draw a divide between pure typographical errors and Goodluck's error is a distinction without a difference. Moreover, Federal Circuit progeny cases establish that the holding of *NTN* is not limited to pure typographical, or even clerical, errors. *Papierfabrik August Koehler SE v. United States* — the most recent Federal Circuit treatment of *NTN Bearing* — stated:

> We have held that Commerce abused its discretion in refusing to accept updated data when there was plenty of time for Commerce to verify or consider it. *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207–8 (Fed. Cir. 1995) (requiring correction of typing errors); *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006) (expanding the holding in *NTN* to "any type of importer error—clerical, methodology, substantive, or one in judgment—...provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections").

843 F.3d at 1384.

timely new factual information, *see Fischer*, 700 F. Supp. 2d at 1377, Goodluck's submission was merely corrective information to rectify reporting errors in its earlier submission.[13]

For these reasons, the court concludes that Goodluck's submission was correctible importer[14] error and not untimely new factual information. Goodluck sought to rectify reporting mistakes contained in its previous submission to the record, and not to supply additional underlying data to fill gaps caused by an omission or withholding of requested information from Commerce. While the Government nevertheless contended that Goodluck's mistakes should be held to "reach[] the threshold for new factual information pursuant to 19 C.F.R. § 351.301(c)(5)," Commerce's proffered reasons for doing so are either unsupported by case law or would entail Commerce arbitrarily treating similar situations differently, *Consolidated Bearings*, 348 F.3d at 1007 (citing *RHP Bearings*, 288 F.3d at 1347), amounting to an abuse of discretion. Finally, while the Government contended that verification was simply too late in the investigation process to correct Goodluck's errors, as discussed above, the Federal Circuit has found correcting analogous errors disclosed in a similar timeframe to be feasible and appropriate. *See NTN*, 74 F.3d at 1208 ("Preliminary determinations are 'preliminary' precisely because they are subject to change. Thus, the tension between finality and correctness simply did not exist at the time NTN requested correction."). In sum,

> [D]raconian penalties are [not] appropriate for the making of clerical errors in order to insure submission of proper data. Clerical errors are by their nature not errors in judgment but merely inadvertencies. While the parties must exercise care in their submissions, it is unreasonable to require perfection. [Commerce's] refusal to consider [plaintiff's] request for correction of clerical errors in this case constituted an abuse of discretion.

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[13] For its part, the Government cited to *Stupp Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1293, 1301 (2019) for the proposition that manipulating existing record evidence to derive corrected data necessarily constitutes new factual information. The court disagrees with this interpretation as applied to the facts of this case. In *Stupp*, the respondent, SeAH, manipulated existing record evidence to create two new databases, not for the purpose of correcting its own coding error, but rather to rebut evidence placed on the record by Commerce. Such rebuttal evidence falls expressly within the definition of "factual information" under 19 C.F.R. § 351.102(b)(21)(iv) ("evidence submitted by any interested party to rebut . . . evidence placed on the record by the Department"), with corresponding regulatory deadlines. By contrast "Commerce's regulations . . . do not provide a time frame within which [importer error] corrections should be submitted." *Deacero*, 353 F. Supp. at 1307.

[14] In light of the court's finding that Goodluck's errors are minor, it need not address the issue as to whether Commerce is only obligated to correct clerical errors versus methodological ones beyond the discussion found in footnote 12.

Id. at 1208–09. The court thus remands to Commerce to consider Goodluck's corrected data submission.[15]

II. Commerce's did not adequately explain its export subsidy cash deposit offset determination.

Commerce used the export subsidy rate of another respondent, TPI, to calculate Goodluck's export subsidy cash deposit offset, rather than the rate specifically calculated for Goodluck in the companion CVD investigation. Goodluck argued that doing so was contrary to Commerce's general practice of adjusting antidumping margins — even those calculated through AFA — by the company-specific export subsidy rate calculated in the companion CVD case, and was otherwise unreasonable. Pl.'s Br. at 43. The Government counters that because 19 U.S.C. § 1677a(c)(1)(C)[16] does not otherwise define how Commerce should calculate a cash deposit rate in an investigation, "Commerce has discretion to establish a reasonable practice." Def.'s Br. at 26.

Commerce indeed has discretion to establish a reasonable practice, but it must also explain the reasons for deviating from that practice. *See, e.g.*, *Consolidated Bearings*, 348 F.3d at 1007 (holding that if "Commerce acted differently in this case than it has consistently acted in similar circumstances without reasonable explanation, then Commerce's actions will have been arbitrary""). Here, Goodluck cited several determinations in which "Commerce adjusted respondents' [AFA] ADD margins . . . by the export subsidies the company received in the companion CVD case." Pl.'s Reply at 16–18. *See, e.g.*, *Carbazole Violet Pigment 23 from India: Final Results of Antidumping Duty Administrative Review; 2015–2016*, 83 Fed. Reg. 15,788, 15,789 (Apr.

[15] As discussed above, Goodluck also challenged Commerce's application of facts available and adverse inferences. Although Commerce has discretion when applying facts available and adverse inferences, "this discretion is not without limits. The appropriate rate 'will depend upon the facts of a particular case,' cannot be 'punitive, aberrational, or uncorroborated,' includes '*some* built-in increase' to deter non-compliance, and . . . reflects the seriousness of the non-cooperating party's misconduct." *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1301 (Fed. Cir. 2019) (citing *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1347 (Fed. Cir. 2016) and *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). However, because the court finds that Goodluck's submission involved minor correctible importer error, at this time, it need not address Commerce's use of facts available, as the gap alleged by Commerce may be resolved by Commerce's consideration of Goodluck's submission. Additionally, because a proper facts available determination is a prerequisite for use of adverse facts available, the court correspondingly does not reach Commerce's reliance on adverse inferences and particularly total AFA.

[16] 19 U.S.C. § 1677a(c)(1)(C) provides:

> (c) Adjustments for export price and constructed export price
>
> The price used to establish export price and constructed export price shall be—
>
> (1) increased by—
>
> (C) the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy

12, 2018); *Fine Denier Polyester Staple Fiber From India: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 Fed. Reg. 24,737 (May 30, 2018). At Oral Argument, the Government acknowledged that *Fine Denier* indeed represents Commerce's most common export subsidy cash deposit offset practice, *see* Oral Argument, July 11, 2019, ECF No. 43, but asserted that because Goodluck was uncooperative in the companion countervailing duty investigation, the lowest possible export subsidy cash deposit offset adjustment was appropriate.[17] Def.'s Br. at 27. On the other hand, Defendant-Intervenors offer a different rationale for Commerce's decision: that, "[c]ontrary to Goodluck's claim that Commerce 'inexplicably' offset Goodluck's antidumping rate using the lowest export subsidy rate, the Department's normal practice is to offset an antidumping duty rate *based on AFA* with the lowest export subsidy rate in the companion countervailing proceeding." Def.-Inters.' Br. at 34–35 (emphasis original).

Nowhere in the record does Commerce, itself, offer either explanation. In the Final Determination, Commerce merely states that:

> Commerce normally adjusts cash deposits for estimated antidumping duties by the amount of export subsidies countervailed in a companion countervailing duty (CVD) proceeding, when CVD provisional measures are in effect. Accordingly, where Commerce made an affirmative determination for countervailable export subsidies, Commerce has offset the estimated weighted-average dumping margin by the appropriate CVD rate.

Final Determination, 83 Fed. Reg. at 16,297. In response to Goodluck's ministerial error allegations, Commerce reiterated this language and detailed that "Commerce deducted the lowest calculated export subsidy rate determined for any party in the companion CVD investigation from Goodluck's antidumping margin, which was based on total adverse facts available, (AFA), for antidumping cash deposit purposes, as intended." *U.S. Department of Commerce Ministerial Error Allegation Memorandum*, (May 16, 2018), P.R. 318. This statement describes *what* Commerce did, but does not explain *why* Commerce used TPI's rate from the companion CVD investigation rather

[17] Goodluck contends that it fully cooperated in the companion countervailing duty investigation. Pl.'s Reply at 16. The court notes that although AFA was applied in the companion countervailing duty investigation, it was on the basis of the Government of India's and another respondent's failure to cooperate. *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 58,172 (Dec. 11, 2017), and accompanying Issues and Decision Memorandum at 27 (noting that, regarding the application of an AFA rate to Goodluck, "[t]he CAFC has upheld the Department's application of AFA to a non-cooperating government even if it subjects a cooperating respondent to the 'collateral effects' of the adverse inference").

than the typical practice of using Goodluck's. Thus, because Commerce has not provided a sufficient explanation on the record for departing from its usual practice of using the companion CVD rate in Goodluck's case, the court remands to Commerce to reconsider or to provide a more comprehensive explanation.

CONCLUSION

In sum, the court finds that Goodluck's revised data submission should be categorized as a correctible importer mistake as opposed to untimely new factual information and remands to Commerce for consideration of Goodluck's corrected submission. Correspondingly, the court does not reach whether Commerce's reliance on facts otherwise available and adverse inferences is supported by substantial evidence and in accordance with law at this time. The court further remands to Commerce to better explain or reconsider its approach to calculating the export subsidy cash deposit offset. Commerce shall file with this court and provide to the parties its remand results within 120 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination to the court and the parties shall have 15 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: August 13, 2019
New York, New York

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

Slip Op. 19–111

JIANGSU ZHONGJI LAMINATION MATERIALS CO., (HK) LTD., JIANGSU ZHONGJI LAMINATION MATERIALS CO., LTD., JIANGSU ZHONGJI LAMINATION MATERIALS STOCK CO., LTD. and JIANGSU HUAFENG ALUMINIUM INDUSTRY CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and ALUMINIUM ASSOCIATION TRADE ENFORCEMENT WORKING GROUP and its INDIVIDUAL MEMBERS, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 18–00091
PUBLIC VERSION

[The court grants Commerce's request for a remand to reassess its VAT calculation and sustains Commerce's determinations on all other issues.]

Dated: August 15, 2019

James C. Beaty and *Sarah M. Wyss*, Mowry & Grimson, PLLC, of Washington, DC, argued for plaintiff. With them on the brief were *Jeffrey S. Grimson* and *Jill A. Cramer*.

Aimee Lee, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Khalil N. Gharbieh*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

John H. Herrmann and *Joshua R. Morey*, Kelley Drye & Warren, LLP, of Washington, DC, argued for defendant-intervenors. With them on the brief were *Paul C. Rosenthal*, *Kathleen W. Cannon*, and *Grace W. Kim*.

OPINION

Katzmann, Judge:

This case involves a challenge to the Department of Commerce's ("Commerce") selection of surrogate values for exports from a nonmarket economy in an antidumping duty investigation. Plaintiff Jiangsu Zhongji Lamination Materials Company ("Zhongji"), a mandatory respondent in Commerce's investigation on aluminum foil from the People's Republic of China ("PRC"), appeals Commerce's dumping margin determination to this court. Specifically, Zhongji argues that Commerce erred in: (1) selecting South Africa rather than Bulgaria as the primary surrogate country to value respondents' inputs; (2) relying on inferior data when valuing international freight; (3) valuing Zhongji's aluminum scrap using the incorrect Harmonized Tariff Schedule ("HTS") classification; (4) calculating Zhongji's value-added tax ("VAT") adjustment based on the wrong transaction; and (5) deferring its preliminary determination beyond the statutory deadline. The court grants Commerce's request for a remand to reassess its VAT calculation and sustains Commerce's determinations on all other issues.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). The standard of review in antidumping duty proceedings is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he Court shall hold unlawful any determination, finding, or conclusion" of Commerce that is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."

BACKGROUND

I. Legal and Regulatory Framework for Surrogate Value Selections.

Dumping occurs when a foreign company sells a product in the United States for less than "fair value" – that is, for a lower price than

in its home market. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). To prevent dumping, Congress enacted the Tariff Act of 1930 ("Act"), which empowered Commerce to investigate the extent to which an imported product is being dumped and impose offsetting duty rates. *Id.* at 1047. The Act allows various interested parties, including domestic trade or business associations in the affected industry, to petition Commerce to initiate an antidumping duty investigation. 19 U.S.C. §§ 1673a(b)(1), 1677(9)(E)–(F).

Once Commerce has initiated an investigation, it determines whether dumping is occurring by comparing the export price of the merchandise in question with the "normal value" of the merchandise when it is sold for consumption in the exporting country. 19 U.S.C. § 1677b(a)(1)(B)(i). If the subject merchandise is exported from a nonmarket economy country and Commerce finds that available information is therefore insufficient for a standard normal value calculation, Commerce values the merchandise using surrogate values for "the factors of production utilized in producing the merchandise" and "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1)(B). Factors of production include labor, raw materials, energy and other utilities, and representative capital costs including depreciation. 19 U.S.C. § 1677b(c)(3)(A)–(D).

To select a market economy country from which it will draw surrogate values, Commerce first requests that its Enforcement and Compliance Office of Policy assemble a list of countries that are, "to the extent possible," (A) "at a level of economic development comparable to that of the nonmarket economy country," and (B) "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(A)–(B). Commerce has the discretion to "mix and match" surrogate country values with more accurate market-based values to the extent the latter are available in the exporting country, *Lasko Metal Prods. v. United States*, 16 CIT 1079, 810 F. Supp. 314, 316 (1992), *aff'd* 43 F.3d 1442 (Fed. Cir. 1994), but Commerce normally prefers to value all factors in a single surrogate country. 19 C.F.R. § 351.408(c)(2); *see also Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d 1289, 1302 (Fed. Cir. 2016) (finding no error in Commerce basing its decision on a preference for a single surrogate when multiple surrogates' data is otherwise equally usable); *Clearon Corp. v. United States*, 2013 Ct. Intl. Trade LEXIS 27 at *20–21 (Feb. 20, 2013) (finding that Commerce's preference for a single surrogate country is reasonable because it "limits the amount of distortion introduced into its calculations").

When several countries meet these threshold criteria, Commerce decides which among them offers the "best factors data" with preference for the following: "investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data." *Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process* (Mar. 1, 2004) (available at: http://enforcement.trade.gov/policy/bull04–1.html) (hereinafter "*Policy Bulletin 04.1*").

Statute requires Commerce to value a respondent's factors of production using the "best available information." 19 U.S.C. 1677b(c)(1)(B). "Commerce has broad discretion to determine what constitutes the best available information, as this term is not defined by statute." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). The data selected need not be perfect. *Home Meridian Int'l, Inc. v. United States*, 772 F.3d 1289, 1296 (Fed. Cir. 2014).

In reviewing Commerce's choice of information, "[the] court's duty is 'not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.'" *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)). The reviewing court must consider "the record as a whole, including that which 'fairly detracts from its weight,'" *Nippon Steel Corp .v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quoting *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951)), and must affirm Commerce's conclusion "if it is reasonable and supported by the record as a whole, even if some evidence detracts from the [agency]'s conclusion." *Id.* at 1352 (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004)).

II. Factual and Procedural History of the Antidumping Order

A. Petition and Selection of Respondents

Commerce received an antidumping duty petition concerning imports of certain aluminum foil from the PRC, filed on behalf of the Aluminum Association Trade Enforcement Working Group and its individual members ("Defendant-Intervenors"). *See* Letter on Behalf of Petitioners to the Dep't re: Petitions for the Imposition of Antidumping and Countervailing Duties (Mar. 9, 2017), P.R. 1–11. In response, Commerce initiated an antidumping duty investigation on

aluminum foil from the PRC. *See Certain Aluminum Foil from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 82 Fed. Reg. 15,691 (Dep't Commerce Mar. 30, 2017), P.R. 35. After receiving responses to a quantity and value questionnaire from 26 companies, Commerce selected Zhongji as one of three mandatory respondents[1] for individual examination. *See* Mem. re: Respondent Selection (May 22, 2017), P.R. 177. The other mandatory respondents were Dingsheng Aluminum Industries (Hong Kong) Trading Co. Ltd. and Hangzhou Dingsheng Import & Export Co. Ltd. (collectively, "Dingsheng"). *Id.*

B. Comments on Surrogate Value Selection

Commerce entered into the record a list of six market economy countries satisfying the threshold criteria of 19 U.S.C. § 1677b(c)(4): Brazil, Mexico, Romania, Bulgaria, South Africa, and Thailand (collectively, "list countries"). *See* Mem. to Michael J. Heaney from Carole Showers re: Request for List of Surrogate Countries (May 23, 2017), P.R. 182. Commerce invited interested parties to submit comments concerning the selection of the primary surrogate country, whether other countries should be considered, and the selection of information to value the respondents' factors of production. *See* Letter re: Request for Economic Development, Surrogate Country, and Surrogate Value Comments and Information (May 24, 2017), P.R. 181.

Parties submitted comments on Commerce's selection of the primary surrogate country. Zhongji suggested that other countries besides those on the list might satisfy the statutory requirements but did not identify any specific alternatives. *See* Letter Pertaining to Jiangsu Zhongji Surrogate Country Comments at 2–4 (June 23, 2017), P.R. 203. Dingsheng commented that all six list countries were economically comparable to the PRC and that five of the six list countries — all except Mexico — were significant producers of comparable merchandise. *See* Letter on Behalf of Dingsheng re: Surrogate Comments at 2–3 (June 23, 2017), P.R. 205. Defendant-

[1] In antidumping duty investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

> If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting or the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Intervenors also commented that all six list countries were economically comparable and noted that only South Africa and Bulgaria were net exporters of aluminum foil during the POI. *See* Letter on Behalf of Petitioners re: Surrogate Country Comments at 3–4 (June 23, 2017), P.R. 204. Defendant-Intervenors stated that they were unable to identify the best surrogate country from the list at this time because (1) respondents Zhongji and Dingsheng had not yet responded to Section D of Commerce's antidumping questionnaire and (2) issues relating to the level of vertical integration of the respondents were not clearly established on the administrative record. *Id.* at 4–6.

Defendant-Intervenors argued in rebuttal comments that, in determining whether list countries were significant producers of comparable merchandise, Commerce should not use HTS heading 7606 as proposed by Dingsheng because the aluminum plate and sheet in that subheading are thicker than the aluminum foil produced by the respondents. Instead, Defendant-Intervenors argued that the aluminum foil is better classified under heading 7607. *See* Letter on Behalf of Petitioners re: Surrogate Country Rebuttal Comments at 2 (June 28, 2017), P.R. 210.

Defendant-Intervenors, Dingsheng, and Zhongji began submitting preliminary surrogate value comments and information on July 17, 2017. Defendant-Intervenors submitted publicly available information from South Africa to value respondents' factors of production and a 2016 financial statement of South African aluminum foil producer Hulamin to value respondents' financial ratios. *See* Letter on Behalf of Petitioners re: Petitioners' Submission of South African Surrogate Value Info at 1–5 (July 17, 2017), Ex. ZA-1–ZA-5, ZA-7, P.R. 243–49. Pursuant to *Policy Bulletin 10.2: Inclusion of International Freight Costs When Import Prices Constitute Normal Value* (Nov. 1, 2010) (available at: https://enforcement.trade.gov/policy/PB-10.2.pdf), Defendant-Intervenors submitted values for freight and marine insurance so that Commerce could adjust the South African import values, which were reported on a free on board ("FOB") basis, to a cost insurance and freight ("CIF") basis.[2]

[2] Commerce prefers surrogate values reported on a CIF basis rather than a FOB basis because CIF values "include the costs associated with purchasing these inputs from foreign exporters, including brokerage and handling, marine insurance, and international freight because this is the price that is most representative of a domestic price for the input in the surrogate country." *See Steel Racks and Parts Thereof from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 84 Fed. Reg. 7,326 (Dep't Commerce Mar. 4, 2019), and accompanying Issues and Dec. Mem. at 13. "[W]hen the import statistics of the surrogate country do not include such [CIF] costs, [Commerce] has added surrogate values for international freight and foreign brokerage and handling

See Letter on Behalf of Petitioners re: Petitioners' Submission of South African Surrogate Value Info at 2–3.

Dingsheng submitted publicly-available information from Bulgaria, including a 2016 financial statement from Bulgarian aluminum foil producer Alcomet, to value its factors of production and financial ratios. *See* Letter on Behalf of Dingsheng re: Dingsheng's First Surrogate Value Submission at Exs. 1–6 (July 17, 2017), P.R. 231–32. Dingsheng also submitted ocean freight rates from a database published by Descartes. *Id.* at Exs. 7–11. Zhongji submitted publicly-available Bulgarian data to value its factors of production and financial ratios, *see* Letter on Behalf of Zhongji re: Surrogate Value Selection Comments at 2–5, Exs. SV-1–SV-7, SV-9–SV-10 (July 17, 2017), P.R. 237–42, and submitted proprietary international freight values from Xeneta. *Id.* at 5, Ex. SV-8.

Zhongji, Dingsheng, and Defendant-Intervenors all submitted surrogate value rebuttal comments on July 31, 2017. Zhongji argued that the South African data submitted by Defendant-Intervenors were not appropriate because: (1) certain South African surrogate values were distorted by subsidies; (2) the values from Bulgaria were more specific to Zhongji's inputs than the South African values; and (3) the South African labor value was less contemporaneous with the POI. *See* Letter on Behalf of Zhongji re: Rebuttal Surrogate Value Comments at 3–13 (July 31, 2017), P.R. 271. Zhongji also argued that Commerce should rely on the Xeneta data submitted by Zhongji to value international freight because Xeneta based its rates on a larger and more representative sample. *Id.* at 13.

Dingsheng argued in its rebuttal comments that: (1) export controls distorted the South African metal market; (2) Hulamin's production experience did not represent that of the respondents; and (3) Defendant-Intervenors' labor values were incorrectly based on a 40-hour work week. *See* Letter on Behalf of Dingsheng re: Rebuttal Surrogate Value Comments (July 31, 2017), P.R. 270.

Defendant-Intervenors argued in their rebuttal comments that: (1) Zhongji's value submissions for labor, energy, and various material and packing inputs relied on information that was incorrect and unsupported by the record; and (2) use of proprietary Xeneta values for international freight was inappropriate and inconsistent with Commerce's practice of relying on publicly available values. *See* Letter on Behalf of Petitioners re: Surrogate Value Rebuttal Information and Comments at 2–22 (July 31, 2017), P.R. 275–76.

charges to the calculation of normal value." *Policy Bulletin 10.2: Inclusion of International Freight Costs When Import Prices Constitute Normal Value* (Nov. 1, 2010) (available at: https://enforcement.trade.gov/policy/PB-10.2.pdf).

C. Preliminary Determination and Case Briefs to Commerce

Commerce deferred its preliminary determination beyond the statutory deadline in order to allow full review of the PRC's status as a nonmarket economy. *See* Letter re: Deferral of Preliminary Determination (Oct. 13, 2017), P.R. 331. In its affirmative preliminary determination of sales at less-than-fair value, Commerce concluded that the PRC was still a nonmarket economy and selected South Africa as the primary surrogate market economy country to value the respondents' inputs. *See Antidumping Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination*, 82 Fed. Reg. 50,858 (Dep't Commerce Nov. 2, 2017) ("*Preliminary Determination*"), P.R. 342, and accompanying decision memorandum (Dep't Commerce Oct. 26, 2017), P.R. 336 ("PDM").

The parties had only submitted surrogate value data for Bulgaria and South Africa, so Commerce assessed which of those two countries provided the best available data by considering whether the data were publicly available, contemporaneous with the POI, representative of a broad market average, tax and duty-exclusive, and specific to the inputs being valued. PDM at 10. Commerce concluded that the South African data were the best available because

> the record contains complete, publicly available, contemporaneous, and specific South African data which represent a broad market average, and which are tax and duty exclusive, for the majority of inputs used by the respondents to produce subject merchandise during the POI. In addition, the South African surrogate financial statements on the record include publicly available statements for a company which produces identical merchandise.

PDM at 11 (internal footnotes omitted).

Using South Africa as the primary surrogate country, Commerce preliminarily calculated antidumping margins of 96.81 percent for Zhongji and 162.24 percent for Dingsheng. PDM at 21. Commerce verified Zhongji's sales and factors of production responses from December 4, 2017 to December 11, 2017 and issued a report on its verification. *See* Mem. re: Verification of the Questionnaire Responses of Zhongji (Jan. 24, 2018), P.R. 425.

Zhongji filed an affirmative case brief arguing that Commerce's selection of South Africa over Bulgaria as the primary surrogate country was not supported by substantial evidence because: (1) Hulamin received countervailable aluminum industry subsidies; (2) Bul-

garian producer Alcomet's financial statement was superior to Hulamin's; (3) South Africa's labor value data was less contemporaneous with the POI than Bulgaria's; (4) Bulgaria's import statistics were reported on a CIF basis, whereas South Africa's were reported on an FOB basis and required conversion to CIF; and (5) Bulgaria's surrogate values were more specific than South Africa's for certain factors of production. *See* Letter on Behalf of Zhongji re: Case Brief at 7–29 (Jan. 31, 2018), P.R. 431. Zhongji also argued that Commerce had erred in: (1) relying on Maersk data instead of Xeneta data to value international freight; (2) valuing Zhongji's aluminum scrap using HTS subheading 7602.00 (aluminum waste and scrap) instead of HTS subheading 7601.20 (unwrought aluminum: aluminum alloys); (3) calculating Zhongji's VAT adjustment based on the wrong transaction; and (4) deferring its preliminary determination beyond the statutory deadline. *See id.* at 37–44, 51–53.

Defendant-Intervenors argued in their case brief that Commerce's selection of South Africa was supported by substantial evidence because: (1) the alleged South African aluminum subsidies were not actionable under U.S. countervailing duty laws; (2) the Hulamin financial statement was sufficient to calculate surrogate financial ratios; (3) the absence of values for nitrogen and argon gas in the Bulgarian data rendered the South African data superior notwithstanding the lack of contemporaneous labor data from South Africa; (4) Commerce reasonably adjusted the South African FOB import statistics to CIF values; and (5) any additional specificity of the Bulgarian data was nullified by the respondents' mixing and modification of that data in their calculation of surrogate values. *See* Letter on Behalf of Petitioners re: Rebuttal Brief at 3–6, 11–28 (Feb. 6, 2018), P.R. 445–46. Defendant-Intervenors also argued that Commerce: (1) correctly valued Zhongji's aluminum scrap using HTS subheading 7602.00 (aluminum waste and scrap); (2) correctly calculated Zhongji's VAT adjustment; (3) should rely on data from Maersk or the Descartes data submitted by Dingsheng to value ocean freight, as the Xeneta data submitted by Zhongji require a paid subscription and are not therefore publicly available; and (4) did not nullify its preliminary determination by deferring past the statutory deadline. *See id.* at 30–31, 43–47, 56–58, 60–62.

D. Final Determination

In its final determination, Commerce continued to select South Africa as the primary surrogate country. *See Certain Aluminum Foil from the People's Republic of China: Final Determination of Sales at*

Less Than Fair Value, 83 Fed. Reg. 9,282 (Dep't Commerce Mar. 5, 2018), P.R. 454, and accompanying issues and decision memorandum at 7–8 (Dep't Commerce Feb. 26, 2018), P.R. 451 ("*IDM*"). Commerce concluded that the record contained South African data for all factors of production, but that the record lacked usable Bulgarian data for nitrogen and argon gases. *IDM* at 8. Commerce found no actionable subsidies in either the aluminum industry or electricity in South Africa, and no evidence that Hulamin specifically benefitted from any actionable subsidy. *Id.* at 9. Commerce decided that the methodology used to calculate financial ratios from Hulamin's financial statement was consistent with methodology used by Commerce in the past, eliminating any concern that the resulting surrogate values were flawed. *Id.* at 10.

Commerce also rejected Zhongji's other arguments, deciding to: (1) value ocean freight using data from Descartes instead of the proprietary Xeneta data; (2) value Zhongji's aluminum scrap using HTS subheading 7602.00 for aluminum waste and scrap instead of subheading 7601.20 for unwrought aluminum; (3) apply the same methodology as in the PDM to adjust Zhongji's VAT; and (4) reject Zhongji's claim that deferral beyond the statutory deadline voided its preliminary determination. *Id.* at 7–16, 18–23, 35.

Following the International Trade Commission's affirmative injury determination, Commerce published the antidumping duty order. *Certain Aluminum Foil from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 83 Fed. Reg. 17,362 (Dep't Commerce Apr. 19, 2018), P.R. 468 ("*Order*").

E. Procedural History

On May 7, 2018, Zhongji filed a complaint with this court seeking review of Commerce's *Order*. Zhongji filed its brief on October 16, 2018. Mem. of Points and Auth. in Supp. of R. 56.2 Mot. for J. on the Agency R., Oct. 16, 2018, ECF Nos. 24–1, 25 ("Pls.' Br."). The Government and Defendant-Intervenors filed their response briefs on February 25, 2019. Def.'s Resp. to Mot. for J. Upon the Agency R., Feb. 25, 2019, ECF Nos. 33–34 ("Def.'s Br."); Def.-Inters.' Resp. in Opp'n to Pls.' Mot. for J. on the Agency R., Feb. 25, 2019, ECF Nos. 35–36 ("Def.-Inters.' Br."). Zhongji filed its reply brief on April 22, 2019. Reply Br. in Supp. of R. 56.2 Mot. for J. on the Agency R., Apr. 22, 2019, ECF Nos. 48–49 ("Pls.' Reply"). Oral argument was held on July 16, 2019. ECF No. 61.

DISCUSSION

Zhongji's arguments before this court mirror the arguments in its affirmative brief to Commerce following Commerce's preliminary determination. Zhongji argues that Commerce erred in: (1) selecting South Africa as the primary surrogate country; (2) relying on Descartes data instead of Xeneta data to value international freight; (3) valuing Zhongji's aluminum scrap using the incorrect HTS classification; (4) calculating Zhongji's VAT adjustment based on the wrong transaction; and (5) deferring its preliminary determination beyond the statutory deadline. For the reasons stated below, the court affirms Commerce's selection of South Africa as the primary surrogate country for valuing Zhongji's factors of production, and affirms Commerce's selection of data to value Zhongji's aluminum scrap and international freight. Additionally, the court grants Commerce's request for a remand to recalculate its VAT adjustment using the correct sale price. Finally, the court finds that Commerce's violation of the statutory deadline in issuing its affirmative preliminary determination did not negate that determination or the ensuing collection of duty deposits.

I. Commerce's Selection of South Africa as the Primary Surrogate Country Was Supported by Substantial Evidence.

Zhongji contends that Commerce's selection of South Africa as the primary surrogate country was unsupported by substantial evidence because the South African aluminum foil industry was distorted by subsidies while the Bulgarian aluminum foil industry was not. Pls.' Br. at 11. Commerce reasonably determined that the evidence presented by Zhongji failed to satisfy the "reason to believe or suspect" standard for evaluating the presence of subsidies, and the precedent cited by Zhongji is distinguishable. Zhongji also claims that the financial statement of South African aluminum foil producer Hulamin was inferior to the statement of Bulgarian producer Alcomet because the Hulamin statement was distorted by subsidies and its labor values required some estimation using a "headcount" method. Pls.' Br. at 17. Again, Commerce reasonably concluded that the alleged subsidies failed to satisfy the "reason to believe or suspect" standard, and Zhongji failed to show that the headcount estimation would distort values. Finally, Zhongji argues that the Bulgarian data were more specific regarding Zhongji's inputs and included more contemporaneous labor data. Pls.' Br. at 21. Specificity and contemporaneity are not the only factors Commerce weighs in selecting surrogate countries, and Zhongji supplies no evidence that the less-specific South African data would distort surrogate values. Commerce rea-

sonably determined that the alleged flaws in the South African data were unsubstantiated or relatively insignificant, and the court therefore affirms Commerce's selection of South Africa as the primary surrogate country.

A. Commerce Reasonably Concluded that South Africa's Aluminum Market Was Not Distorted by Subsidies.

Zhongji claims that the South African aluminum foil industry was distorted by subsidies, and that Commerce therefore erred in selecting South Africa over Bulgaria as the primary surrogate country. Pls.' Br. at 11. When more than one country is at a comparable level of economic development to the nonmarket economy country in question and produces a significant amount of comparable merchandise, Commerce selects the primary surrogate country from the qualified candidates by deciding which country offers the best available information and the best factors data in accordance with *Policy Bulletin 04.1*. When selecting surrogate values, Commerce declines to use prices that the agency has "reason to believe or suspect may be dumped or subsidized." *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1365 n.9 (Fed. Cir. 2019) (quoting H.R. Conf. Rep. No. 100–576 at 590–91 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1623–24.). In investigating whether a price is subsidized, the statute's drafters did not "intend for Commerce to conduct a formal investigation . . . but rather intend[ed] that Commerce base its decision on information generally available to it at the time." *Id.*

Zhongji contends that Commerce's selection of South Africa was unsupported by substantial evidence because there was reason to believe or suspect that South African aluminum foil prices were distorted by subsidies. Pls.' Br. at 11. Specifically, Zhongji cites a Gauteng High Court[3] decision and Organization for Economic Cooperation and Development ("OECD") report showing that South Africa engaged in domestic price supports and export restraints on scrap metals to make South African aluminum producers more competitive. *Id.* at 9. According to Zhongji, this evidence satisfies the three-pronged test for the "believe or suspect" standard implemented by this court in *Fuyao Glass Indus. Grp. Co. v. United States*, 29 CIT 109 (2005):

[3] In South Africa, High Courts have general jurisdiction over matters arising within the defined geographic area in which they are situated. *Courts in South Africa*, DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, http://www.justice.gov.za/about/sa-courts.html (last visited July 26, 2019). They usually hear serious criminal cases, civil cases with large amounts in controversy, and appeals from lower Magistrate courts within their geographic jurisdiction. *Id.* High Court decisions may be appealed to the Supreme Court of Appeal or, in the case of constitutional matters, to the Constitutional Court. *Id.*

> to justify a finding with respect to subsidization, Commerce must demonstrate by specific and objective evidence that (1) subsidies of the industry in question existed in the supplier countries during the period of investigation; (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier to not have taken advantage of such subsidies.

Id. at 114. Zhongji claims that even if the South African aluminum foil industry did not directly benefit from a government subsidy, it indirectly benefitted from the suppression of metal scrap prices as the market adjusted to the influx of price-controlled scrap. Pls.' Br. at 13. These arguments are unpersuasive.

The subsidies alleged by Zhongji do not meet the "reason to believe or suspect" standard. When there is evidence of a potential subsidy but Commerce has not previously found the specific program to be countervailable, Commerce does not per se reject the data in question and requires evidence of distortion before it will reject it. *See Yantai Xinke Steel Structure Co. v. United States*, 2014 Ct. Intl. Trade LEXIS 39 at *61 (Apr. 9, 2014). Commerce had not found the alleged subsidies to be countervailable, and evidence of distortion was therefore required to compel Commerce to reject the South African data. Def.'s Br. at 15. Additionally, Commerce is not required to follow the *Fuyao* framework advocated for by Zhongji. *See Gold East Paper (Jiangsu) Co. Ltd. v. United States*, 39 CIT __, __, 121 F. Supp. 3d 1304, 1307–08 (2015) (finding that *Fuyao* is not the only reasonable method for evaluating whether evidence meets the believe or suspect standard). Even if it were, the *Fuyao* court stated that Commerce should demonstrate each prong with "specific and objective evidence," which Zhongji has not provided. 29 CIT at 114. The OECD report and Gauteng High Court decision suggest that subsidy programs may have existed in South Africa, but do not specify that Hulamin, the South African aluminum foil producer in question, participated in such programs. Hulamin's financial statement acknowledges the existence of government assistance programs, but the mere mention of a subsidy is insufficient to disqualify surrogate data without further evidence that the company actually received the subsidy. *See Clearon Corp. v. United States*, 35 CIT 1685, 800 F. Supp. 2d 1355, 1358 (2011); *infra* p. 19. The alleged subsidies thus did not meet the "reason to believe or suspect" standard.

Zhongji also claims that Commerce should have followed past cases in which it found similar subsidies to be countervailable. Pls.' Br. at

14. Zhongji cites a countervailing duty investigation in which Commerce found export restraints on Chinese primary aluminum to be countervailable. *See Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 Fed. Reg. 9,274 (Dep't Commerce Mar. 5, 2018). The facts of that investigation are distinguishable from the present case. Most importantly, the Chinese policy was the subject of a countervailing duty investigation by Commerce, and the South African policy is not. Additionally, the two cases address different countries (South Africa and the PRC) and different products (aluminum scrap and primary aluminum), and the government programs in question are different: the PRC was imposing a 30 percent export tariff on the subject merchandise, whereas South Africa was requiring the subject merchandise to be offered to domestic users at a 20 percent discount before being exported. Pls.' Br. at 9, 14. Given the difference in circumstances, Commerce was not bound by any prior findings of countervailability in investigating the South African policies.

Zhongji further contends that South African aluminum foil producers received subsidies in the form of preferential electricity rates. *Id.* at 19. Commerce had not previously found South African electricity rates to be countervailable; nonetheless, Zhongji alleges that Commerce's decision here was unreasonable because, in a past investigation involving Canadian paper, Commerce found preferential electricity rates to be countervailable. *Id.* (citing *Supercalendared Paper From Canada: Final Affirmative Countervailing Duty Determination*, 80 Fed. Reg. 63,535 (Dep't Commerce Oct. 20, 2015)). Again, the determination cited is distinguishable: there, the policy in question was already subject to a countervailable subsidy investigation, unlike the electricity rates in the present case, and here there is no evidence of distortion to satisfy the standard put forth in *Yantai Xinke*. Commerce was therefore justified in declining to infer that electricity subsidies had distorted the South African aluminum foil market. Thus, given the lack of evidence of distortion by subsidies in the South African aluminum foil market, Commerce reasonably selected South Africa as the primary surrogate country.

B. Commerce Reasonably Relied on Hulamin's Financial Statement.

Zhongji claims that subsidies for aluminum scrap and electricity distorted the financial statement of South African aluminum foil producer Hulamin, and that Commerce therefore erred in relying on

that statement for surrogate values. Pls.' Br. at 17. As discussed above, when there is evidence of a potential subsidy but Commerce has not previously found the specific program to be countervailable, Commerce does not per se reject the data and requires evidence of distortion before it will reject it. *See Yantai Xinke*, 2014 Ct. Intl. Trade LEXIS at *61. In reviewing financial statements for evidence of countervailable distortions, "a mere mention that a subsidy was received, and for which there is no additional information as to the specific nature of the subsidy" is insufficient for Commerce to exclude the statement. *See Clearon Corp.*, 800 F. Supp. 2d at 1358. The Hulamin statement denoted that "[s]crap export legislation will continue to promote local processing of scrap for the benefit of local industry," but Zhongji provides no evidence that Hulamin received a specific subsidy or that South Africa's export controls on metal scrap affected Hulamin's production and sale of aluminum foil. *See* Letter on Behalf of Petitioners re: Submission of South African Surrogate Value Info at Ex. ZA–7 (July 17, 2017), P.R. 243–49. As discussed in the preceding section, Commerce was justified in finding that the South African aluminum foil industry, including Hulamin, was not distorted by subsidies on aluminum scrap or electricity.

Zhongji also alleges that Commerce unreasonably selected Hulamin's financial statement over that of Bulgarian aluminum foil producer Alcomet because the Hulamin statement required Commerce to estimate how labor costs were split between production and other activities using a headcount method. Pls.' Br. at 20 (citing *IDM* at 10). Commerce determined in its analysis that the Alcomet statement contained notes indicating that Alcomet's costs would require a potentially distortive reallocation of financial ratios. *IDM* at 11. The headcount method used by Commerce to analyze the Hulamin statement was consistent with Commerce's past practice, *Id.* at 10, and Zhongji fails to show that use of the headcount method was more likely to distort surrogate values than the adjustments that would have been required to analyze the Alcomet statement. Commerce therefore had good reason to select the Hulamin statement over the Alcomet statement, and Commerce reasonably relied on the Hulamin statement in its surrogate value calculations.

C. The Relative Specificity of the Bulgarian Data Is Not Dispositive.

Zhongji argues that Commerce erred in selecting South Africa as the primary surrogate country because Bulgaria's data was superior in various respects. Pls.' Br. at 21. Some of Zhongji's arguments in

support of this proposition are addressed elsewhere in this opinion.[4] According to Zhongji, Commerce's selection of South Africa was also flawed because Bulgaria's data was reported at the more specific eight-digit level of HTS product classification codes, while the South African data was only available at the six-digit level. *Id.* Zhongji claims that the eight-digit codes more accurately classify several of its major inputs including foil stock, rolling oil, rolling oil additive, and packing materials. *Id.* at 22–26. Several factors undermine this contention: (1) several of respondent Dingsheng's inputs were more accurately classified by the six-digit South Africa codes; (2) Dingsheng had proposed averaging several eight-digit codes to value its inputs, nullifying any increased specificity offered by those codes; and (3) Zhongji failed to show that the six-digit classifications would notably distort Commerce's valuations of its products. There is therefore insufficient evidence that the increased specificity of the Bulgarian data is meaningful to Commerce's calculations, and even if the Bulgarian data were more specific for some inputs, Zhongji puts forth no convincing evidence that the specificity consideration should outweigh the lack of usable data for nitrogen or argon gases in the Bulgarian data.

Zhongji also contends that the Bulgarian data is superior because its labor data is contemporaneous with the POI and therefore superior to the South African labor data. *Id.* at 33. Contemporaneity is only one of several factors Commerce weighs in selecting among qualified surrogate country candidates under *Policy Bulletin 04.1*, and the South African labor data satisfied the other factors: investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, and publicly available data. Commerce may also prioritize valuing all surrogate values in a single country, a factor which here favored South Africa. 19 C.F.R. § 351.408(c)(2). Commerce was therefore justified in using the South African labor data despite its lack of contemporaneity because the other factors favored the South African data as a whole over the Bulgarian data. Bulgaria's data also suffered from a lack of contemporaneity, as its nitrogen and argon gas values

[4] Zhongji contends that the South African data required an FOB-to-CIF adjustment while the Bulgarian data did not. Pls.' Br. at 31. As discussed in section III below with regards to the international freight issue, Zhongji failed to show that the CIF adjustment would necessarily result in distortion. Zhongji also claims that the electricity rates used by Commerce fail to capture the preferential rates that may be available to aluminum foil producers. *Id.* at 35. As discussed in section I.A above with regards to the subsidies issue, Commerce was reasonable in declining to infer based on no clear evidence that the South African aluminum foil market was distorted by preferential electricity rates. In the absence of clear evidence that these differences between the countries' data would actually undermine the accuracy of its calculations, Commerce was reasonable in selecting South Africa.

were so outdated they could not be reliably inflated and were therefore unusable. For these reasons, the greater specificity of the Bulgarian data is offset by other considerations and otherwise not determinative of the superior primary surrogate country, and Commerce was therefore justified in selecting South Africa.

D. The Record as a Whole Supported Selecting South Africa.

Whether it be specificity, contemporaneity, or subsidies, no one flaw in the South African data is sufficient to overrule Commerce's discretion in selecting South Africa as the primary surrogate country. Nonetheless, Zhongji argues that it is no single flaw but the totality of relative inadequacies in the South African data that should have compelled Commerce to select Bulgaria instead. Pls.' Br. at 36. Ultimately, Zhongji claims that Commerce weighed the flaws in the South African data too lightly and those in the Bulgarian data too heavily. In reviewing Commerce's selection of the best available information, it is not this court's duty "to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Zhejiang*, 652 F.3d at 1341 (quoting *Goldlink*, 431 F. Supp. 2d at 1327). For the reasons discussed above, Commerce reasonably analyzed the data sets and weighed their relative merits and flaws in accordance with the relevant statutes and regulations. The court therefore affirms Commerce's selection of South Africa as the primary surrogate country.

II. Commerce's Selection of Data to Value Zhongji's Aluminum Scrap Was Supported by Substantial Evidence.

Commerce chose to value Zhongji's aluminum scrap using HTS subheading 7602.00, described as "Aluminum Waste and Scrap." *See* Mem. re: Surrogate Value for the Preliminary Determination at 5 (Oct. 26, 2017), P.R. 344. Zhongji contends that given the high aluminum content of its scrap, HTS subheading 7601.20 ("Unwrought aluminum: Aluminum alloys") was more appropriate, and that Commerce had unreasonably ignored record evidence in deciding otherwise. Pls.' Br. at 36. Commerce based its decision on the fact that Zhongji "accounted for and sold [the material in question] as scrap," and failed to demonstrate that its aluminum scrap was different from other aluminum scrap commonly available in the South African market. *IDM* at 35. For the reasons discussed below, the court finds that Commerce acted within its discretion to decide what constitutes the "best available information" when it chose to value Zhongji's aluminum scrap using the HTS subheading that best matched the classi-

fication under which Zhongji was selling the scrap, rather than a subheading that may have better accounted for the scrap's chemical composition. *Qingdao*, 766 F.3d at 1386 (affirming that Commerce has broad discretion to determine what constitutes the best available information). Commerce's selection of surrogate values for the scrap was therefore supported by substantial evidence, and is affirmed.

Zhongji claims that Commerce failed to consider "prices specific to the input in question" as required by *Policy Bulletin 04.1* because Zhongji's scrap was more specifically classified as pure aluminum than aluminum scrap, but the record does not support that contention. Pls.' Br. at 37. Zhongji claims that its scrap was pure enough to be reintroduced into the production process, *id.*, but the aluminum scrap's chemical composition was of little consequence given the manner in which Zhongji actually disposed of its aluminum scrap.[5] *See* Letter on Behalf of Zhongji re: Section C & D Questionnaire Response of Zhongji at Ex. D-8 (July 6, 2017), C.R. 197–98. Commerce therefore had reason to value the scrap using subheading 7602.00.

Zhongji argues that Commerce arbitrarily valued Zhongji's aluminum scrap and Dingsheng's recycled aluminum byproduct using different HTS subheadings. Pls.' Br. at 37. This argument is unpersuasive because the two respondents were not similarly situated regarding this issue. Commerce valued Zhongji's aluminum scrap and Dingsheng's aluminum scrap using the same subheading, 7602.00. *See* Memo re: Surrogate Values for the Final Determination at Attach. 1 (Feb. 26, 2018), P.R. 456. Zhongji claims that Commerce should have valued Zhongji's aluminum scrap using the same subheading 7601.20 used to value Dingsheng's recycled aluminum byproduct, as Zhongji's scrap was more chemically similar to Dingsheng's recycled aluminum byproduct than to Dingsheng's aluminum scrap. Pls.' Br. at 37. This argument fails to account for the fact that Zhongji and Dingsheng disposed of their aluminum scrap and aluminum byproduct in very different ways. *See supra* n.5; Letter on Behalf of Zhongji re: Section C & D Questionnaire Response of Zhongji at Ex. D-17 (July 6, 2017), C.R. 197–98; Letter on Behalf of Dingsheng re: Questionnaire Section D Response at 22–23, Ex. D-6 (July 10, 2017), C.R. 221–22. Commerce was consistent in basing its selection of the best available information on the manner in which the respondents actually used the aluminum in question rather than on the aluminum's chemical composition, and its valuation of Zhongji's aluminum

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scrap was thus neither arbitrary nor capricious and was consistent with the record. Commerce's selection of data to value Zhongji's aluminum scrap was supported by substantial evidence and in accordance with law, and is affirmed.

III. Commerce's Selection of Data to Value Zhongji's International Freight Was Supported by Substantial Evidence.

The cost of international freight is included in the factors of production for which Commerce must obtain surrogate values. *See, e.g.*, *China Mfrs. All., LLC v. United States*, 43 CIT __, 357 F. Supp. 3d 1364, 1368 (2019). Commerce must therefore, when applicable, select the best available information to value international freight based on its weighing of the factors listed in *Policy Bulletin 04.1*. Commerce regulations state a preference for publicly available data to value inputs. 19 C.F.R. § 351.408(c)(1).

Commerce acted within its discretion in selecting data from Descartes over data from Xeneta to value Zhongji's international freight costs. Both datasets have advantages and disadvantages. The Descartes data are not contemporaneous with the POI, rely on fewer data points, and require an FOB-to-CIF adjustment, but are publicly available and free of taxes and import duties. Def.'s Br. at 37–39. Although the Xeneta data are contemporaneous and rely on more data points, they are proprietary and therefore not publicly available. *Id.* Commerce's decision to weigh these factors in favor of the Descartes data, in light of the regulatory preference for publicly available data, is reasonable and therefore affirmed. *See Nippon Steel*, 458 F.3d at 1352.

Zhongji argues that the Xeneta data are available to Commerce despite their proprietary nature and cites two past proceedings in which Commerce deemed international freight information to be publicly available based on its availability to the government: *Certain Stilbenic Optical Brightening Agents From the People's Republic of China: Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 76 Fed. Reg. 68,153 (Dep't Commerce Nov. 3, 2011) (unchanged in final determination); *Certain Steel Wheels From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 76 Fed. Reg. 67,702 (Dep't Commerce Nov. 2, 2011) (unchanged in final determination). Both are distinguishable from the present case because in those proceedings, unlike here, (1) respondents demonstrated that the database in question was available to Commerce without charge and (2) no party

requested proprietary treatment of the data at issue. Commerce's determination that the Xeneta data were not publicly available was thus within its discretion and consistent with its past practice.

Zhongji's argument that the FOB-to-CIF adjustment required for the Descartes data would be distortive is also unpersuasive. Pls.' Br. at 39–40. Zhongji argues that Commerce's use of Maersk data to adjust the Descartes freight data from an FOB basis to a CIF basis was erroneous, because Commerce had rejected Maersk's data for valuing the international freight itself and because the Maersk data was derived from only two ports. *Id.* Commerce's choice to use Maersk data to value the FOB-to-CIF adjustment but not the base freight rates was reasonable because the record contained supporting documentation for the former but not the latter. *See* Ministerial Error Mem. at 3–4 (Apr. 12, 2018), P.R. 465; Letter on Behalf of Petitioners re: Surrogate Value Info at Ex. ZA-1 (July 17, 2017), P.R. 243–49. Though the Maersk data was based on imports from only two ports, those ports were of specific relevance to South African import data. *See* Ministerial Error Mem. at 4. Zhongji failed to show that adjusting the Descartes data to a CIF basis using Maersk data was likely to distort surrogate values, and the need for the adjustment should therefore not weigh against the selection of Descartes over Xeneta. Thus, Commerce's selection of data to value Zhongji's international freight costs was supported by substantial evidence and in accordance with law, and is affirmed.

IV. Commerce's VAT Adjustment Calculation Is Remanded.

Commerce is required to reduce the constructed export price of subject merchandise by "the amount . . . of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(2)(B). Pursuant to this requirement, Commerce reduces the export price in nonmarket economy dumping margin calculations by "the amount of export taxes and similar charges, including [VATs] not rebated upon export." *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36,481 (Dep't Commerce June 19, 2012).

Commerce based its VAT calculation in this case on the U.S. price of Zhongji's merchandise on resale by Zhongji HK, instead of on the price at which Zhongji sold the merchandise to Zhongji HK. Pls.' Br. at 40–41. Zhongji pays no VAT on the markup between itself and Zhongji HK, and adds no inputs at that phase. *Id.* The Chinese government made its final assessment of VAT on the sale price to

Zhongji HK. Letter on Behalf of Zhongji to Commerce re: Case Brief at 51 (Jan. 31, 2018), P.R. 431 ("Admin. Case Br.").

On remand in *Fine Furniture (Shanghai), Ltd. v. United States ("Fine Furniture")*, 40 CIT __, 182 F. Supp. 3d 1350 (2016), Commerce addressed a very similar fact pattern. In that case, a Chinese producer argued that Commerce had erred in basing its VAT calculation on the U.S. price of its merchandise when sold by an affiliated reseller. *Id.* at 1357. Commerce initially considered the producer and affiliated reseller to be a single entity whose internal transactions did not constitute export sales. *Id.* at 1358–59. On reconsideration after remand from CIT, Commerce decided that the tax neutrality of the dumping margin calculation required that Commerce base the VAT calculation on the sale by the producer to the affiliated reseller. *See Fine Furniture (Shanghai) Ltd. v. United States*, 42 CIT __, __, 321 F. Supp. 3d 1282, 1288 (2018).

Commerce acknowledges the similarity of this case to *Fine Furniture* and has accordingly requested a remand to reconsider the price on which it based its VAT adjustment. Def.'s Br. at 39–40. The Federal Circuit has held that Commerce may "request a remand (without confessing error) in order to reconsider its previous position . . . [if] it ha[s] doubts about the correctness of its decision or that decision's relationship to [Commerce's] other policies." *SFK USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). The court may refuse a request to remand that is "frivolous or in bad faith," but if Commerce's concern is "substantial and legitimate, a remand is usually appropriate." *Id.* Given that Commerce's VAT deduction methodology in this case appears to be directly counter to its ultimate methodology in *Fine Furniture*, Commerce has a substantial and legitimate reason to request a remand here. All parties agree that a remand to base the adjustment calculation on the correct price would be appropriate.[6] Therefore, the court grants Commerce's request for a remand to recalculate its VAT adjustment using the correct sale price.[7]

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[6] Defendant-Intervenors argued in their brief that Commerce's initial VAT calculation was lawful, but made it clear at oral argument that they had changed their position and supported a remand to Commerce.

[7] Recent opinions of this court have addressed the broader issue of the legitimacy of the irrevocable VAT adjustment, and come to different conclusions. *See Aristocraft of Am., LLC v. United States*, 42 CIT __, 331 F. Supp. 3d 1372, 1378 (2018) (questioning the link between the amount of input VAT paid and the adjustment made to the export price, and remanding the issue to Commerce for further explanation); *Jacobi Carbons AB v. United States*, 43 CIT __, 365 F. Supp. 3d 1344, 1356 (2019) (noting that Commerce's explanation if its VAT calculation methodology in that case differed significantly from the explanation given by Commerce in *Aristocraft*, and allowing the adjustment). Zhongji did not raise this issue before Commerce or in its complaint, but now claims the court should excuse its failure to exhaust available remedies because *Aristocraft* and *Jacobi* constitute intervening "judicial interpretations of existing law . . . which if applied might have materially altered the

V. Commerce's Issuance of Its Preliminary Determination After the Statutory Deadline Did Not Preclude Issuance of an Affirmative Final Determination.

Statute requires Commerce to issue its preliminary determination in antidumping investigations "within 140 days after the date on which [Commerce] initiates an investigation" or within 190 days after the initiation of an investigation in "extraordinarily complicated" cases. 19 U.S.C. §§ 1673b(b)(1)(A), 1673b(c)(1)(B). All parties agree that Commerce violated even the later deadline, which fell on October 4, 2017, by publishing its preliminary determination in the Federal Register on November 2, 2017. *Preliminary Determination*, 82 Fed. Reg. 50,858. However, Commerce's late filing of a preliminary determination does not preclude it from issuing an affirmative preliminary determination, as precedent dictates that statutory deadlines are not mandatory in the absence of an express statement of consequences from Congress. In light of this precedent, the court affirms Commerce's affirmative preliminary determination and collection of duty deposits notwithstanding the missed deadline.

In *Husqvarna Construction Products v. United States*, 36 CIT 1618 (2012), this court examined the legality of an administrative review of an antidumping duty order issued after the deadline imposed by 19 U.S.C. § 1675(a)(1)(B). The court found that when "no consequence is specified for noncompliance with the timing set forth in the statute, Commerce is under no clear duty to issue the final results [of an antidumping duty investigation] within the statutory timeframe." *Id.* at 1625; *see also Mitsubishi Polyester Film, Inc. v. United States*, 41 CIT __, __, 228 F. Supp. 3d 1359, 1382 (2017) (finding that a time period provision was "directory, not mandatory, as it [did] not specify a consequence for failure to comply"). Federal Circuit and Supreme

result." Pl.'s Reply at 24 (quoting *Hormel v. Helvering*, 312 U.S. 552, 558–59 (1941)). The court is not convinced that the relevant findings of *Aristocraft* or *Jacobi* constitute new interpretations of law capable of materially altering the outcome of the present case, and therefore finds that Zhongji failed to exhaust its available remedies with respect to the validity of the VAT deduction. In any event, the court is poorly situated to address arguments that Commerce did not consider and that the parties discussed in only cursory fashion in their briefs and at oral argument. *See Unemployment Compensation Comm'n v. Argon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps [the agency's] function when it sets aside an agency determination upon a ground not theretofore presented and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its action."); *Boomerang Tube LLC v. United States*, 856 F.3d 908, 910 (Fed. Cir. 2017) ("[A]bsent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies."); *Corus Staal BV v. United States*, 856 F.3d 1370, 1379 (Fed. Cir. 2017) (noting that the Federal Circuit takes "a strict view of the requirement that parties exhaust their administrative remedies before . . . Commerce in trade cases") (internal quotations omitted); *AIMCOR v. United States*, 141 F.3d 1098, 1111–12 (Fed. Cir. 1998). Because the issue was not properly raised, the court does not address it here.

Court case law also support this principle. *See, e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 161 (2003) ("[A] statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire."); *Hitachi Home Elecs. (Am.), Inc. v. United States*, 661 F.3d 1343, 1347 (Fed. Cir. 2011) ("[W]hen Congress intends there to be consequences for noncompliance with statutory deadlines for government action, it says so expressly."); *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1376–77 (Fed. Cir. 2002) ("Our own precedent has faithfully applied this rule of law as formulated by the Supreme Court . . . that, 'even in the face of a statutory timing directive, when a statute does not specify the consequences of non-compliance, courts should not assume that Congress intended that the agency lose its power to act.'") (quoting *Kemira Fibres Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995)). Section 1673b prescribes no consequence for failure to comply with the deadlines it imposes and must therefore be read as merely directory and not required for Commerce to issue an affirmative preliminary determination.

Zhongji contends that *Husqvarna* is distinguishable because it does not specifically address the provisions of 19 U.S.C. § 1673b and because the Commerce action in question was a review and not an investigation as in the present case. Pls.' Br. at 44. These arguments are unpersuasive, as nothing in the aforementioned case law suggests that the directory nature of statutory deadlines is limited to deadlines in certain statutes or to certain stages of an agency's investigative process. Zhongji also argues that a consequence for noncompliance with the statutory deadline is implicit because Commerce's ability to impose duties is contingent on its issuance of an affirmative preliminary determination consistent with § 1673b, so failure to meet the statutory deadline precludes Commerce from imposing duties. This argument contradicts the aforementioned case law requiring an express statement from Congress to impose consequences for noncompliance with statutory deadlines. *See Hitachi Home*, 661 F.3d at 1347. This claim also presupposes Zhongji's own conclusion that Commerce can only impose duties if it complies with the statutory deadline, and therefore lacks merit.

Zhongji further contends that there is:

> no discernible reason to perform the review of China's market economy status in the context of the antidumping duty investigation of aluminum foil, nor any indication that the resources dedicated to that effort had any relation to the aluminum foil investigation, nor did Commerce's report on China's market economy status discuss the Chinese aluminum foil industry.

Pls.' Reply at 26. These arguments are unpersuasive. An antidumping duty investigation on aluminum foil exported from the PRC must necessarily concern itself with whether the PRC is a nonmarket economy to comply with 19 U.S.C. § 1677b, because whether the subject merchandise is exported from a market or nonmarket economy determines the method by which Commerce must calculate normal value.

Additionally, the fact that Commerce did not conduct the review of the PRC's nonmarket economy status with the same resources used for this antidumping duty investigation does not negate the benefits to the investigation of awaiting the outcome of the review in order to achieve the most accurate valuation possible. Legislative history indicates that the accuracy of Commerce's determinations is equally if not more important than compliance with statutory deadlines.[8] Section 1677b prescribes different methods of dumping margin classification for market and nonmarket economies, and the outcome of the review of the PRC's status was thus integral to the accuracy of Commerce's calculation. Hence, Commerce had reason to delay its preliminary determination until the review was completed. The court therefore affirms Commerce's affirmative preliminary determination and collection of duty deposits notwithstanding its deferral past the statutory deadline.[9]

CONCLUSION

The court affirms Commerce's selection of primary surrogate country and data to value Zhongji's aluminum foil inputs, as Commerce was within its discretion under 19 U.S.C. § 1677b and *Policy Bulletin 04.1* in making those selections based on the evidence in the record. Additionally, the court grants Commerce's request for a remand to recalculate its VAT adjustment using the correct sale price. Finally, the court affirms Commerce's preliminary determination and collection of duty deposits notwithstanding its violation of the statutory

[8] The Uruguay Round Agreements Act amended the trade remedy statutes, including their statutory deadlines. Uruguay Round Agreements Act, H.R. 5110, 103rd Cong. (1994). The Statement of Administrative Action, "regarded as an authoritative expression by the United States concerning the interpretation and application" of the Act, *id.* at § 102(d), states:

> The Administration is aware of prior complaints regarding delays in the completion of administrative reviews and the liquidation of entries, and intends to do its utmost to ensure that Commerce and Customs are able to comply with the deadlines established by the bill. At the same time, however, *it is not the Administration's intent to sacrifice accuracy of results and fairness to the parties involved for the sake of speed.*

Uruguay Round Agreements Act, Statement of Administrative Action, 1994 U.S.C.C.A.N. 4040, 4202 (Dec. 8, 1994) (emphasis added).

[9] The court does not reach the Government's argument that Zhongji suffered no harm from the delay or Defendant-Intervenors' argument that the remedy sought by Zhongji is supported by neither statutory authority nor precedent.

deadline. Within 90 days of the date of this order, Commerce shall file with the court and provide to the parties a revised determination of the VAT issue consistent with this opinion; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination to the court and the parties shall have 15 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: August 15, 2019
New York, New York

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