U.S. Court of International Trade

Slip Op. 19–143

CHANGZHOU TRINA SOLAR ENERGY CO., LTD., et al., and SOLARWORLD AMERICAS, INC., Plaintiffs, and Consolidated Plaintiffs, v. UNITED STATES, Defendant, SOLARWORLD AMERICAS, INC., CHANGZHOU TRINA SOLAR ENERGY CO., LTD., and CHANGZHOU TRINA SOLARENERGY CO., LTD., Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Jane A. Restani, Judge
Consol. Court No. 17–00246
PUBLIC VERSION

[Commerce's Remand Redetermination in the Administrative Review of Commerce's Countervailing Duty Order pertaining to Crystalline Silicon Photovoltaic Products from the People's Republic of China is remanded for reconsideration consistent with this opinion.]

Dated: November 18, 2019

Robert G. Gosselink, *Jonathan M. Freed*, and *Kenneth Hammer* Trade Pacific, PLLC, of Washington, D.C., for Plaintiffs and Consolidated Plaintiffs Changzhou Trina Solar Energy Co., Ltd., Trina Solar Limited, Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., and Changzhou Trina PV Ribbon Materials Co., Ltd. (collectively "Trina").

Jeanne E. Davidson, *Tara K. Hogan*, and *Justin R. Miller*, International Trade Field Office, U.S. Department of Justice, of New York, NY for defendant United States. Of counsel on the brief was *Paul Keith*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Timothy C. Brightbill, *Laura El-Sabaawi*, and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor SolarWorld Americas, Inc.

OPINION AND ORDER

Restani, Judge:

This action concerns the U.S. Department of Commerce's ("Commerce") remand redetermination filed pursuant to the court's order in *Changzhou Trina Solar Energy Co. v. United States*, Ct. No. 17–146, Slip Op. 18–167, 2018 WL 6271653 (CIT Nov. 30, 2018) ("*Remand Order*"); *see* Final Results of Redetermination Pursuant to Court Remand, ECF No. 103–1 (Apr. 25, 2019) ("*Remand Results*").

In the *Remand Order*, the court determined that remand was necessary for Commerce to further explain some of its decisions in the underlying review, or else alter its review. Specifically, the court remanded for Commerce to explain and/or reconsider its decision that

respondent benefitted from the People Republic of China's ("PRC") Export Buyer's Credit Program ("EBCP") and whether to include potentially overbroad United Nations Comtrade data in Commerce's calculations of aluminum extrusion and solar glass benchmarks were appropriate. On remand, Commerce has attempted to clarify its decisions, but its ultimate decisions remain largely unaltered.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the *Remand Order*, and accordingly recounts relevant facts only as necessary below. This matter involves a challenge made by Changzhou Trina Solar Energy Co., Ltd., Trina Solar Limited, Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., and Changzhou Trina PV Ribbon Materials Co., Ltd. (collectively "Trina") against Commerce's remand redetermination in the First Administrative Review of Commerce's Countervailing Duty Order pertaining to photovoltaic products from the PRC. SolarWorld Americas. Inc. ("SolarWorld") is a defendant-intervenor.[1]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2) (2012). The court will uphold Commerce's remand redetermination 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. Export Buyer's Credit Program

Lately, the Export Buyer's Credit Program ("EBCP') has been a subject of frequent litigation in the court. *See Clearon Corp. v. United States*, 359 F. Supp. 3d 1344, 1358–60 (CIT 2019) (collecting cases). The EBCP promotes PRC exports by providing preferential loan rates to foreign purchasers of PRC goods. *See id.* at 1347. Commerce found that following the 2013 revisions to the program, it appeared that the prior $2 million-dollar contract minimum requirement had been re-

[1] Although SolarWorld filed a response to plaintiff and plaintiff-intervenors' comments objecting to the remand results, its response is simply a statement of agreement with Commerce's decision on the EBCP, except for the rate applied to the program, and to reiterate its positions taken in prior briefing. *See* SolarWorld's Response to Comments on Final Results of Redetermination Pursuant to Court Order, ECF No. 81 (Aug. 9, 2019).

pealed and that EBCP loans might be routed through third-party banks and not simply issued from the EX-IM Bank as previously understood. *See Decision Memorandum for the Preliminary Results of the Administrative Review of the Countervailing Duty Order on Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China; 2014–2015*, C-570–011, POR: 6/10/2014–12/31/2015, at 30 ("*Prelim. I&D Memo*"). The Government of China ("GOC") refused to provide requested information on the 2013 revisions, including internal guidelines. *See Id.* Because of the GOC's non-cooperation, Commerce found that it was unable to verify respondent's certificates of non-use. *See id*. at 29–31; *Decision Memorandum for Final Results and Partial Rescission of Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Products from the People's Republic of China; 2014–2015*, C-570–011, POR:6/10/2014–12/31/2015 at 31–34 ("*I&D Memo*"). Accordingly, Commerce found that respondent, through the application of AFA,[2] had used the program despite their cooperation in the review. *I & D Memo* at 33–34.

The court remanded this issue concluding that Commerce did not demonstrate that respondent's certifications were unverifiable. *Remand Order* Slip Op. 18–167 at 8. The court held that although Commerce may apply AFA in a way that collaterally affects a cooperating party, Commerce had not attempted to avoid that undesirable consequence. *See id.* Additionally, Commerce did not explain "why it was necessary for it to fully understand the EBCP in order to ascertain claims of non-use." *Id.* at 7.

On remand, Commerce continues to find the certifications unverifiable and imputes usage of the EBCP based on the application of AFA. *Remand Results* at 7–19. Commerce admits that it previously verified non-use of the program, but says it can no longer do so now that it is unsure of the minimum contract size and whether loans are routed through third-party banks. *See id.* at 8–15. Commerce cites a discussion with an EX-IM Bank official who apparently indicated that the 2013 revisions eliminated the contract minimum. *See Remand Results* at 13; *see also* Administrative Review of Countervailing Duty Order on Citric and Certain Citrate Salts: Verification of the Questionnaire Resp. Submitted by the GOC, at 2, P.R.[3] 146 (Oct. 7, 2014)

[2] When a party fails to cooperate to the best of its ability, Commerce may "use an inference that is adverse to the interest of that party in selecting from among the facts otherwise available." *See* 19 U.S.C. § 1677e(b). Commerce refers to this process as "AFA" or "adverse facts available."

[3] "P.R." refers to a document contained in the public administrative record. "C.R." refers to a document contained in the confidential administrative record. "Rem." refers to documents submitted following Commerce's Remand Redetermination.

("EX-IM Discussion"). In addition, Commerce cites a questionnaire submitted by the GOC in a different investigation indicating that an EBCP "borrower must be an importer or a bank approved by the China EX-IM Bank." *See* GOC's 7th Supp. Resp., Certain Amorphous Silica Fabric from China CVD Investigations (C-570–039), P. R. 146 (Sep. 6, 2016) ("GOC Silica Questionnaire Resp."). Commerce states that it cannot conduct verification using its normal practices given these uncertainties about the EBCP's potential use of third-party banks to distribute EBCP funds. *Remand Results* at 14–18. Commerce claims it requires the GOC's disclosure of the 2013 internal guidelines and other information, because without this information, effective verification is stymied, if not completely impeded, as Commerce would be unable to effectively sort through and identify potentially-suspect transactions given the size of the respondent companies.[4] *Id.* at 18. Finally, Commerce states that it finds that respondent benefitted from the program after applying an adverse inference to evidence that the EX-IM Bank provided loans to "new and high-tech projects" and because "energy projects are eligible for this financing." *Id.* at 19.

Trina argues that Commerce has not addressed why information about the operation of the EBCP is necessary to verify usage. *See* Comments on Final Results of Redetermination Pursuant to Court Remand of Trina, ECF No. 75, at 5–8 (June 19, 2019) ("Trina Br."). It further contends that Commerce does have ways in which it could verify Trina's non-use certifications, and that Commerce has made no such attempt to do so. *Id.* at 7, 12. Finally, Trina argues that Commerce misapplies AFA and improperly relies on "uncorroborated statements from the petition." *Id.* at 11–14. The government defends Commerce's decision that verification was impossible and its use of AFA in finding that Trina benefitted from the EBCP. *See* Def.'s Reply to Comments on Remand Redetermination, ECF No. 82, at 6–12 (Aug. 9, 2019) ("Gov. Br.").

The court must determine whether substantial evidence exists by reviewing the record as a whole. *See e.g.*, *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003). From the documents submitted by the government, it appears that Commerce became concerned about the verifiability of customer certifications of non-use following a discussion with an EXIM Bank official in a different administrative review. *See Remand Results* at 13–14. During that discussion, the official apparently informed Commerce that in 2013

[4] Commerce infers that given the size of the respondent companies and their "substantial amount of business activity," there would be too much financial data to sort through. *Id.* at 16–17.

the $2 million-dollar contract minimum was eliminated. *See* EX-IM Discussion at 2. This prompted Commerce to review EX-IM Bank documents including "The Implementing Rules for the Export-Buyer's Credit of the Export-Import Bank of China" which Commerce claims appears to indicate the involvement of "intermediary Chinese bank[s]." *See Remand Results* at 14. When asked to clarify, the GOC failed to do so. *Id.* at 14–15. The record indicates, however, that the GOC had in another investigation a month earlier explained that:

> According to the Ex-Im Bank, in order to make a disbursement, the Ex-Im Bank lending contract requires the buyer (importer) and seller (exporter) to open accounts with either the Ex-Im Bank or one of its partner banks. While these accounts are typically opened at the Ex-Im Bank, sometimes a customer prefers another bank (e.g., the Bank of China) which is more accessible than an account with the Ex-Im Bank. The loan agreement also stipulates that the borrower (generally the importer/customer) must grant the Ex-Im Bank authorization to conduct transactions in the account opened specifically for this financing. After all conditions for disbursement are met, the Ex-Im Bank will disburse the funds according to the lending agreement. The funds are first sent from the Ex-Im Bank to the borrower's (importer) account at the Ex-Im Bank (or other approved partner bank). The Ex-Im Bank then sends the funds from the borrower's (importer) account to the seller's (exporter) bank account.

GOC Silica Questionnaire Resp. at 4–5. Thus, it appears that "other approved partner bank[s]" may be involved in some capacity in the disbursement of EBCP funds. The discussion with the EX-IM official indicates that after the importer's application for the EBCP is approved, "[t]he foreign importer will then instruct EXIM bank to pay the Chinese exporter by assigning payment to the Chinese exporter's bank account." *See* EX-IM Discussion at 2. Considering the evidence as a whole, it may be that even if funds are temporarily routed to banks outside the EX-IM Bank, funds are sent back to the EX-IM Bank and that it disburses those funds to the exporter. If this is indeed the situation, then Commerce would apparently need to verify only whether the exporter had received any funds from the EX-IM Bank and then, if so, ask them to provide documentation showing the purpose of those funds. In this situation, verification seems relatively straightforward.

If, however, the funds are not routed back through the EX-IM Bank prior to reaching the exporter, verification would admittedly be more

difficult. But, so long as Commerce were able to access the importer's and exporter's records, it appears that Commerce could cross-reference the records to see if any funds appeared to originate from the EX-IM Bank, even if the funds went through an intermediary bank at some point. This seems especially doable with Trina and its affiliated U.S. importer, given that it has only one U.S. customer. *See* Trina Br. at 14. The court suspects that doing so will either confirm non-use or at least help clarify how the EBCP operates.

The court cannot sustain Commerce's determination that verification would be impossible or unduly onerous. Although Commerce has shown that the GOC failed to answer certain questions regarding the EBCP's operation, it is still not entirely clear to the court that the missing information is required to effectively verify respondent's non-use of the program. In order to avoid unnecessarily impacting cooperating parties because of the GOC's failure to cooperate, Commerce needs to at least attempt to verify the certifications of non-use in this case. *See Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013) (noting that Commerce should "seek to avoid" adversely impacting a cooperating party). There appears to be enough information on the record for Commerce to identify potential suspect financial entries. As respondent indicates, this may require Commerce to deviate from its standard verification procedures. The court suggests ways in which Commerce might attempt verification, but respondent has suggested others that may be preferable. On remand, the parties should discuss potential ways forward and Commerce should request records that may answer the question of EBCP use from respondent, and, if necessary, their importers. Commerce should detail its process in its remand redetermination.

Should verification fail to clarify whether respondent benefited from the EBCP, and Commerce continue to apply adverse facts, the court would consider Commerce's reliance on the verification checklist in this analysis problematic. Although Commerce cites the results of the solar cells investigation and the accompanying issues and decision memorandum as facts available supporting the notion that EX-IM Bank and EBCP loans are made to "new and high-tech projects" such as energy projects, that finding appears to be based on the petitioner's allegations in the petition.[5] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 63,788 (Dep't Commerce Oct.

[5] In the *Remand Results*, Commerce cites the underlying investigation and issues and decision memorandum to support its claim that energy projects use the EBCP. *See Remand Results* at 19. In turn, the issues and decision memorandum cites the Initiation Checklist, which lists documents supporting this claim that have not been placed on the record in this case.

17, 2012), and accompanying Issues and Decision Memorandum at 59 (Oct. 9, 2012). This does not logically lead to Commerce's remand results for two reasons. First, after review of the Initiation Checklist, it appears that this allegation may relate to the EX-IM Bank's *seller's* credit and not the *buyer's* credit program at issue here. *See* Import Administration Office of AD/CVD Operations Countervailing Duty Investigation Initiation Checklist, C-570–980 at 24 (Nov. 8, 2011) ("Initiation Checklist'"). This potential discrepancy relates to the court's other problem with Commerce's remand redetermination on this issue—Commerce relies on the Initiation Checklist, and ostensibly the underlying supporting documentation, but does not submit the latter to the court.

As noted in both the relevant statutory and regulatory provisions, a petition can serve as a source of information for the selection of adverse facts. *See* 19 U.S.C. § 1677e(b)(2)(A); 19 C.F.R. § 351.308(c)(1)(i) (stating that information derived from the petition is "secondary information"). These provisions also state, however, that when relying on secondary information, Commerce shall "to the extent practicable, corroborate that information from independent sources that are reasonably at [Commerce's] disposal." 19 U.S.C. § 1677e(c)(1); 19 C.F.R. § 351.308(d). In this case, it is unclear what, besides the allegations made in the petition, supported Commerce's finding regarding solar industry usage of the EBCP. Although there may be underlying documents that corroborate this finding, those documents have not been submitted to the court. *See Deacero S.A.P.I. de C.V. v. United States*, 393 F. Supp. 3d 1280, 1286 (CIT 2019) (noting that the Initiation Checklist is part of Commerce's pre-initiation analysis and that "[t]he independent sources may be embedded in the pre-initiation analysis; however, the pre-initiation analysis itself is not an independent source") (footnote omitted). If Commerce continues to apply AFA in determining that respondent's buyers benefitted from the EBCP, Commerce should explain what evidence beyond petitioner's allegations in the investigation supports Commerce's finding.

II. Use of Comtrade/IHS data in Computing a Benchmark for Aluminum Extrusions

In computing the benchmark calculation for aluminum extrusions, Commerce averaged datasets from UN Comtrade ("Comtrade") and IHS Technology ("IHS"). The court remanded and ordered to Commerce to consider whether the Comtrade dataset was overinclusive of irrelevant aluminum products such that it was too flawed to be probative of the world market price for aluminum extrusions. *Remand Order*, Slip Op. 18–167 at 13.

On remand, Commerce continues to average both data sets.[6] *See Remand Results* at 19–24. It distinguishes a similar issue involving the benchmark price for solar glass, detailed below, and states that no record evidence distinguish solar frames from other types of aluminum extrusions contained in the Comtrade data. *Id.* at 19–20. Commerce cites a report by IHS Technology/Markit ("IHS") as evidence to supporting that the price of solar frames fluctuates [[ ]] *Id.* at 21–22 (citing IHS PV Materials Report (Nov. 15, 2016) ("IHS Report"). Because the Comtrade data is the only data on record that assesses monthly-price fluctuations, Commerce continues to find its inclusion necessary. *Id.* at 22.

Trina argues that Commerce fails to show that the monthly fluctuations in the Comtrade data are caused by the price of aluminum extrusions for solar frames rather than non-subject merchandise contained in the Comtrade data. Trina Br. at 23–25. Further, it asserts that Commerce ignores evidence showing that solar frames are distinct from aluminum extrusions generally. *Id.* at 25–26. The government responds that Commerce's decision is supported by substantial evidence. Gov. Br. at 12–22.

Commerce has failed to address the court's concerns that the monthly fluctuations evinced by the Comtrade data might be caused by fluctuations in the price of other products encompassed in the Comtrade headings unrelated to solar frames. Although Commerce's inference from the IHS data that monthly variations in price exist for solar frames is not unreasonable, its decision that the Comtrade data is reflective of this fluctuation is unreasonable.

While the IHS Report states that the price of aluminum frames is [[ ]], it does not necessarily follow that the HTS headings used in the Comtrade data are reflective of this correlation. *See* IHS Report. The record indicates that solar frames [[ ]] and while this does not necessarily mean that the aluminum extrusions in HTS codes 7604.21 and 7604.29 are not comparable merchandise, it undercuts Commerce's finding that they are comparable. *See* IHS Report. Rather than address evidence that contradicts Commerce's ultimate conclusion, Commerce simply states that there "is no evidence on the record that such differences are significant enough to warrant abandoning the sole source of a monthly benchmark on the record." *Remand Results* at 44. Although the evidence that solar frames differ from aluminum extrusions more generally is not defini-

[6] Commerce did, however, cease reliance on HTS subheading 7610.10 finding that it was not a subheading under which aluminum solar frames are imported. *See Remand Results*, at 22–23. It now solely relies on HTS subheadings 7604.21 and 7604.29 from the Comtrade data. *Id.* at 23.

tive, it is enough to render unsupported by substantial evidence Commerce's dismissal of this concern without further analyzing the merchandise captured by the HTS headings used by Comtrade. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1340 (Fed. Cir. 2011) (the court looks "to the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence"). Commerce has not adequately accounted for "factors affecting comparability." 19 C.F.R. § 351.511(a)(2)(ii).[7]

A preference for monthly values cannot overcome data that does not reasonably relate to the product at issue. Accordingly, the court again remands Commerce's decision to use the Comtrade data in computing a benchmark. Commerce must use the IHS data alone in computing the benchmark. Unless Commerce can demonstrate, however, that the HTS subheadings used by Comtrade are not grossly overinclusive and determines that the merchandise is sufficiently comparable to solar frames.

III. Use of Comtrade/IHS data in Computing a Benchmark for Solar Glass

After finding the provision of solar glass to be a countervailable subsidy, Commerce decided to construct a benchmark based on an average of Comtrade and IHS data.[8] *See Remand Order*, Slip Op. 18–167 at 14. As with Commerce's aluminum extrusions benchmark, the court found the Comtrade dataset potentially overinclusive of non-subject merchandise and remanded for Commerce to consider whether this inclusion fatally skewed the dataset. *Id.*

On remand, Commerce continues to average the Comtrade and IHS datasets, finding that neither is sufficient on its own in computing a benchmark price. *Remand Results* at 24–28. Commerce did, however, remove HTSUS Code 7007.29 from the Comtrade benchmark, recognizing that it is "an overbroad representation of the price of solar glass on the record of this case." *Id.* at 26. To support its continued use of the Comtrade data, Commerce points to record evidence showing that the price for solar glass fluctuates year-to-year. *Id.* at 34. It extrapolates that as prices fluctuate on a year-to-year basis, fluctua-

[7] The decision in *Solarworld Americas, Inc. v. United States*, 910 F. 3d 1216, 1222–25 (Fed. Cir. 2018) does not control here as it involved surrogate values, which are inherently less reliable and involve differing procedural and factual considerations. *See* 910 F.3d at 1222–1225.

[8] The Comtrade data was not specific to solar glass, which Commerce recognizes is a type of glass with unique properties. *See Remand Results* at 19, 24–25. Instead the Comtrade data included glass under the U.S. Harmonized Tariff Schedule ("HTS") headings 7007.19 and 7007.29, which includes other types of non-solar tempered or laminated glass. *Id.* at 24–25; HTSUS 7007. In contrast, the IHS data is specific to solar glass. *Id.* at 24.

tions likely occur on a month-to-month basis. *Id.* at 26. Usage of the Comtrade data is appropriate, Commerce claims, because it is the only data on record that can "provide any evidence of how such fluctuations might have occurred on a month-to-month basis." *Id.* at 26–27.

Trina continues to challenge the use of the Comtrade data as overinclusive of non-solar glass. Trina Br. at 36–39. It further argues that the Comtrade data alone shows monthly fluctuation. *Id.* at 37–39. The government defends Commerce's decision as supported by substantial evidence. Gov. Br. at 22–26.

Commerce has not adequately addressed the court's concern that the Comtrade data's monthly fluctuations may be caused by non-solar glass merchandise. *See Remand Order* Slip Op. 18–167 at 14. In another case involving the same issue, *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316, 1335 (CIT 2018), the court faulted Commerce for using the Comtrade data based on purported price fluctuations of solar glass, when the only evidence of price fluctuations appeared to be the challenged Comtrade dataset. *Id.* Although Commerce provides evidence that the price of solar glass fluctuates on a year-to-year basis, this does not necessarily mean that the monthly fluctuations in the Comtrade data set are caused by solar glass rather than non-solar glass.

Commerce failed to explain whether the inclusion of non-solar glass in the Comtrade data set made it unusable. The *Remand Results* do not take into account the factors of comparability required of its regulations. *See* 19 C.F.R. § 351.511(a)(2)(ii). Although the glass covered by HTS heading 7007.19 may have similarities to solar glass, this does not adequately address the court's concern that the fluctuations in the Comtrade data may be due to fluctuations in the price of the non-solar glass products in that subheading

The court concludes that the Comtrade data is fatally overinclusive of non-solar glass such that its usage in deriving a benchmark is unsupported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Thus, the court remands this issue and directs Commerce to use the IHS data alone in computing a solar glass benchmark. In the alternative, if Commerce chooses to reopen the record because it has identified a dataset that is both specific to solar glass and computed on a monthly basis, it should use that dataset in computing the benchmark.

CONCLUSION

For the foregoing reasons this matter is remanded for proceedings consistent with this opinion. Commerce may reopen the record and

supplement it as necessary. Remand results should be filed by January 17, 2020. Objections are due February 17, 2020 and Responses to Objections are due March 2, 2020.

Dated: November 18, 2019
New York, New York

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

Slip Op. 19–144

HABAŞSINAI VE TIBBI GAZLAR ISTIHSAL ENDÜSTRISI A.Ş. et al., Plaintiff and Consolidated Plaintiffs, and CHARTER STEEL AND KEYSTONE CONSOLIDATED INDUSTRIES, INC., Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and NUCOR CORPORATION et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00144

[Sustaining in part and remanding in part the Department of Commerce's countervailing duty determination.]

Dated: November 19, 2019

David L. Simon, Law Office of David L. Simon, of Washington, DC, argued for Habaş Sinai Ve Tibbi Gazlar Istihsal Endüstrisi A.Ş.

Russell A. Semmel, Arent Fox LLP, of Washington, DC, argued for Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. With him on the brief were *Matthew M. Nolan* and *Leah N. Scarpelli.*

Maureen E. Thorson, Wiley Rein, LLP, of Washington DC, for Nucor Corporation. With her on the brief were *Stephen Claeys* and *Derick G. Holt*.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *L. Misha Preheim*, Assistant Director, and *Elizabeth Anne Speck*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice. Of counsel was *Nathan P.L. Tubman*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, Department of Commerce.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on motion for judgment on the agency record. *See* Pl.'s R. 56.2 Mot. J. Agency Rec., Dec. 3, 2018, ECF No. 25; Nucor Corporation's R. 56.2 Mot. J. Agency Rec., Dec. 3, 2018, ECF No. 27; Consol. Pl. Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S.'s R. 56.2 Mot. J. Agency Rec., Dec. 3, 2018, ECF No. 32. Plaintiff Habaş Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.Ş. ("Habaş"), Consolidated Plaintiff Icdas Celik Enerji Tersane ve Ulasim, A.S. ("Icdas"), and Consolidated Plaintiff and Defendant-Intervenor Nucor Corporation ("Nucor") challenge various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the countervailing duty ("CVD") investigation of carbon and alloy steel wire rod from the Republic of Turkey ("Turkey"). *See Carbon and Alloy Steel Wire Rod From [Turkey]*, 83 Fed. Reg. 13,239 (Dep't Commerce Mar. 28, 2018) (final affirmative [CVD] determination & final affirmative critical circumstances determination in part)

("*Final Results*"), and accompanying Issues & Decision Memo. for Final Affirmative Determination, Mar. 19, 2018, ECF No. 20–4 ("Final Decision Memo"); *see also Carbon and Alloy Steel Wire Rod From [Turkey]*, 83 Fed. Reg. 23,420 (Dep't Commerce May 21, 2018) (amended final affirmative [CVD] determination for [Turkey] and [CVD] orders for Italy and [Turkey]) ("*CVD Order*").

Habaş, Icdas, and Nucor commenced separate actions pursuant to Section 516A of the Trade Act of 1930, 19 U.S.C. § 1516a, and 28 U.S.C. § 1581(c) (2012),[1] which were later consolidated. *See* Summons, June 19, 2018, ECF No. 1; Compl., July 12, 2018, ECF No. 6; Order, Sept. 20, 2018, ECF No. 23 (consolidating Court No. 18–00144, Court No. 18–00146, and Court No. 18–00148 under Court No. 18–00144). Habaş and Icdas contest Commerce's application of adverse facts available after determining that Habaş and Icdas failed to report the use of the "Assistance to Offset Costs Related to AD/CVD Investigations" program ("Offset Program") as unsupported by substantial evidence and contrary to law. *See* Memo. Supp. Mot. Pl. [Habaş] J. Agency Rec. Pursuant R. 56.2 at 11–24, Dec. 3, 2018, ECF No. 25 ("Habaş Br."); Consol. Pl. [Icdas] Memo. L. Supp. Mot. J. Agency Rec. Pursuant R. 56.2 at 6–10, Dec. 3, 2018, ECF No. 32 ("Icdas Br."). Icdas also argues that Commerce's decision to treat this program as countervailable is unsupported by substantial evidence. *See* Icdas Br. at 10–11.

Nucor separately argues that Commerce's selection of benchmark data to calculate the benefit associated with natural gas for less than adequate remuneration ("LTAR") is inadequately explained, does not represent the best available information, and is unsupported by substantial evidence and contrary to law. Memo. Supp. Nucor's R. 56.2 Mot. J. Agency Record at 10–25, Dec. 3, 2018, ECF No. 28 ("Nucor Br."). Nucor requests the court to deny Habaş's and Icdas's motions for judgment on the agency record and to only remand Commerce's selection of benchmark data. *See id.* at 25; Resp. Br. Def.-Intervenor [Nucor] at 7, Apr. 12, 2019, ECF No. 39 ("Nucor Resp. Br."); [Nucor's] Reply Br. at 10, May 28, 2019, ECF No. 45 ("Nucor Reply Br."). Defendant requests the court to uphold Commerce's *Final Results* in their entirety. *See* Def.'s Resp. Pl.'s & Consol. Pl.'s Mots. J. Agency Rec. at 1, 40, Mar. 29, 2019, ECF No. 37 ("Def.'s Resp. Br."). For the reasons set forth below, the court sustains Commerce's application of an adverse inference for the selection of facts available to Habaş and Icdas and remands Commerce's selection of benchmark data for further consideration and explanation.

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

BACKGROUND

Following petitions by domestic producers of wire rod, including Nucor, Commerce initiated a countervailing duty investigation of carbon and alloy steel wire rod from Turkey on April 17, 2017, pursuant to Section 702 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671a. *See Carbon and Alloy Steel Wire Rod From Italy and Turkey*, 82 Fed. Reg. 19,123 (Dep't Commerce Apr. 26, 2017) (initiation [CVD] investigations).[2] Petitioners alleged that the Turkish Steel Exporters' Association ("TSEA") is an entity controlled by the Government of Turkey ("GOT") that provided financial support to Turkish exporters subject to anti-dumping and countervailing duty ("AD/CVD") investigations,[3] which amounted to a countervailable subsidy. *See* DOC Initiation Checklist at 21–22, PD 42, bar code 3565079–01 (Apr. 17, 2017).[4] Petitioners also contended that Turkish wire rod producers purchased natural gas from the GOT for LTAR and received a countervailable subsidy. *See* Decision Memo. for Preliminary Determination in [CVD] Investigation of Carbon and Alloy Steel Wire Rod from [Turkey] at 14–17, C-489–832, Aug, 25, 2017, *available at* https://enforcement.trade.gov/frn/summary/turkey/201718640–1.pdf (last visited Nov. 14, 2019) ("Preliminary Decision Memo."). On June 2, 2017, Commerce selected Habaş and Icdas as mandatory respondents for individual investigation and issued questionnaires. *See* Respondent Selection Memo. at 1, PD 67, bar code 3577988–01 (June 2, 2017); *see also* Preliminary Decision Memo. at 4.

On September 5, 2017, Commerce issued its preliminary determination. *See Carbon and Alloy Steel Wire Rod From [Turkey]*, 82 Fed. Reg. 41,929 (Dep't Commerce Sept. 5, 2017) (preliminary affirmative determination & preliminary affirmative critical circumstances determination in part), and accompanying Preliminary Decision Memo. Commerce preliminarily determined that Habaş benefitted in its purchase of natural gas from GOT for LTAR, by comparing prices Habaş paid to a benchmark price in accordance with the three-tiered analy-

[2] The period of investigation is from January 1, 2016 to December 31, 2016 ("period of investigation" or "POI"). Preliminary Decision Memo. at 4.

[3] TSEA, however, described itself as "a nonprofit business and trade association[,]" which "share[s] some part of its budget with the exporters subject to investigation." GOT Initial Questionnaire Response at Ex. 29, CD 53, 87, bar code 3600503–35 (Jul7 27, 2017) ("GOT Initial Questionnaire Response"). TSEA also indicated that "no government agencies or authorities [are] responsible for administering this assistance." *Id.*

[4] August 21, 2018, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination, on the docket, at ECF No. 20–5–6. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices.

sis set out in 19 C.F.R. § 351.511(a)(2) (2017). *See* Preliminary Decision Memo. at 14–17. Commerce considered Turkey's domestic prices to be distorted and selected data from the International Energy Administration ("IEA") as the benchmark. *See id.* at 16. Further, Commerce did not find Habaş or Icdas used the GOT's Offset Program, because "[t]he company respondents reported that they did not receive benefits under the under the programs during the POI or [average useful life of the subsidy.]" *Id.* at 29–30.

Between January 18, 2018 and February 1, 2018, Commerce conducted verifications, and on March 28, 2018, Commerce issued its *Final Results*. *See Final Results*, 83 Fed. Reg. at 13,240. Having discovered unreported information regarding the Offset Program at verification, Commerce selected from facts otherwise available with an adverse inference to calculate subsidy rates for Habaş and Icdas, because it found that neither company acted to the best of its ability. *See id.*; *see also* Final Decision Memo. at 4–7. Commerce assigned Habaş and Icdas respective subsidy rates of 3.86 percent and 3.81 percent. *Final Results*, 83 Fed. Reg. at 13,240.[5] Commerce also reconsidered the use of IEA data as a benchmark and, instead, selected Russian Eurostat data. Final Decision Memo. at 13–14.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) (2012), which grant the Court authority to review final determinations in a CVD investigation. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Selection of Facts Otherwise Available with an Adverse Inference

In the final determination, Commerce applied an adverse inference to its selection of facts otherwise available in finding that both Habaş and Icdas used the Offset Program. *See* Final Decision Memo. at 4–7. Habaş and Icdas argue that Commerce's application of an adverse inference is not supported by substantial evidence and is not in accordance with law. *See* Habaş Br. at 11–23; Icdas Br. at 6–10. As explained below, because Icdas and Habaş failed to provide informa-

[5] Following the parties' submission of ministerial error comments, Commerce issued a ministerial error memorandum and then published the amended final determination and CVD order. *See* Ministerial Error Allegation Memo., PD 327, bar code 3706334–01 (May 3, 2018); *see also CVD Order*.

tion on the Offset Program in response to Commerce's questionnaires, Commerce reasonably used facts otherwise available and, given Habaş and Icdas did not act to the best of their respective abilities, applied an adverse inference.

In a CVD investigation, Commerce requires information from respondents and the foreign government to determine whether that foreign government provided a countervailable subsidy and, further, whether a countervailing duty must be imposed.[6] *See* 19 U.S.C. §§ 1671(a), 1677(5)(B); *see also Fine Furniture (Shanghai) Ltd. v. U.S.*, 748 F.3d 1365, 1369–70 (Fed. Cir. 2014). To analyze whether a subsidy is countervailable, Commerce determines whether, inter alia, a recipient receives a benefit as a result of that contribution.[7] 19 U.S.C. § 1677(5)(B). The statute treats a benefit as conferred where goods are provided for LTAR. *Id.* at § 1677(5)(E). For a subsidy that confers a non-recurring benefit—or a subsidy "for which the benefit . . . extend[s] beyond the period that the subsidy was conferred"—Commerce will allocate that benefit to a company over time, corresponding to the average useful life ("AUL") of renewable physical assets. *Magnola Metallurgy, Inc. v. U.S.*, 508 F.3d 1349, 1352 (Fed. Cir. 2007); *see also* 19 CFR § 351.524. Commerce will request information from respondents and the foreign government probative of whether, and when, a countervailable subsidy has been conferred. *See Fine Furniture*, 748 F.3d at 1369–70. That information is subject to verification. *See* 19 U.S.C. § 1677m(i).

If, however, a respondent fails to provide information, Commerce will use facts otherwise available to fill resulting information gaps and reach a determination. *See* 19 U.S.C. § 1677e(a). Once Commerce determines that facts otherwise available are warranted, Commerce may also draw an adverse inference, should it also find that a respondent has failed to cooperate by not acting to the best of its ability.[8] *See id.* at § 1677e(b). To determine whether a respondent cooperated to

[6] Under the statute, if Commerce determines that a foreign government or public entity "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States," Commerce will impose a countervailing duty equal to the amount of the countervailable subsidy. *See* 19 U.S.C. § 1671(a); *see also Delverde, SrL v. United States* , 202 F.3d 1360, 1365 (Fed. Cir. 2000).

[7] Commerce must also determine whether a foreign government provides a financial contribution and whether that financial contribution is specific. *See* 19 U.S.C. 1677(5)(B) (defining subsidy); *see also* 19 U.S.C. §§ 1677(5)(D)–(E), 1677(5A) (defining financial contribution, benefit, and specificity).

[8] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. *See, e.g.*, *Final Results*, 83 Fed. Reg. at 13,240; Final Decision Memo. at 4–7. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and, second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse

the best of its ability, Commerce will assess whether the 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).

Commerce reasonably selected facts otherwise available and applied an adverse inference in its selection of those facts. Commerce found that the record lacked necessary information concerning Habaş's and Icdas's use of non-recurring subsidies based upon the AUL, and not merely the POI. *See* Final Decision Memo. at 5. Commerce, therefore, reasonably found it necessary to fill this informational gap with facts otherwise available. *Id.* at 4–5. Further, Icdas and Habaş each failed to completely answer questions regarding the Offset Program and to do so by specified deadlines. *Id.* at 5–6. In its initial questionnaire, Commerce specifically requested information both from the period of investigation as well as the longer 15-year AUL period. *See, e.g.*, DOC Questionnaire at II-2, III-19, PD 68, bar code 3579371–01 (June 8, 2017) ("DOC Questionnaire").[9] Further, Commerce asked the GOT about the Offset Program, and whether the respondents, Habaş and Icdas, had used the program. *See* [GOT] Initial Questionnaire Response at 94, CD 53, 87, bar codes 3600503–01, 3600503–35 (July 27, 2017) ("GOT Initial Questionnaire Response"). The GOT replied that "[t]here is no such . . . support program" and referred to the TSEA's answers to the questionnaire appendices. *See id.* at 94, Ex. 29. TSEA stated that "[n]one of the respondent companies received any assistance during the POI" and "[h]ence, the remaining questions . . . are not responded." *Id.* at Ex. 29. Habaş and Icdas also each indicated that they did not receive any assistance from TSEA and, therefore, did not respond to the remaining questions.[10] *See* Habaş Initial Questionnaire Response at 39, CD 46, bar code 3600040 01 (July 27, 2017) ("Habaş Questionnaire Re-

inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b).

[9] At Section II (addressed to GOT), Commerce advised that because "the AUL is 15 years" in this case, "you must provide information concerning 'non-recurring' subsidies . . . approved or disbursed during the AUL." *See* DOC Questionnaire at II-8. Further, at Section III (addressed to respondents), Commerce indicated that it was investigating non-recurring subsidies during the AUL period. *Id.* at III-3, III-19, III-21.

[10] Habaş contends that, "even if there were a gap in the record, Commerce must follow 19 U.S.C. § 1677m(d)," which requires Commerce to promptly inform the submitter of a deficient response to a request for information. *See* Habaş Br. at 20–21. This argument is misplaced. Commerce reasonably believed the record to be complete, because the respondents indicated that they did not receive support from TSEA in their questionnaire responses. *See Final Results* at 5; *see also* Habaş Questionnaire Response at 39; Icdas Questionnaire Response at III-46. Moreover, neither respondent indicated that it was not compelled to report the Offset Program in its responses, because Commerce had reviewed that program in a separate proceeding—an argument both now make. *See* Habaş Br. at 15–16; Icdas Br. at 7–8. Given the state of the record, Commerce was not aware of any purported deficiency.

sponse"); Icdas Resp. to Sec. III Questionnaire at III-47, CD 117, bar code 3601330–02 (July 27, 2017) ("Icdas Questionnaire Response"). However, at verification, Habaş, and Icdas each confirmed that such a program existed and that they had received payments from it during the AUL period.[11] *See* DOC Verification Report Re: Habaş at 10, PD 308, bar code 3679012–01 (Mar. 1, 2018) ("Company officials stated that the program is still active but the board of the [TSEA], which approves payment under this program, decided not to disburse finds for 2016."); *see also* Verification Report for Icdas at 11, PD 306, bar code 3678403–01 (Mar. 1, 2017) ("[Company officials] explained that the[] fees represent payments received to offset the costs of conducting AD/CVD investigations during [2014]."). The respondents provided too little information and confirmed the existence of the Offset Program too late.[12] Therefore, Commerce's decision to rely on facts available and to apply an adverse inference was reasonable and supported by substantial evidence.[13]

Before the court, Habaş and Icdas point to other parts of the record,

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[11] Habaş argues that Commerce's interest in the Offset Program did not extend beyond the POI. *See* Habaş Br. at 7. As support, Habaş refers to Commerce's supplemental questionnaire, in which Commerce asked Habaş to "explain if you received any other assistance from any other investigation during the POI to assist offset costs related to AD/CVD investigations" and, if so, to "respond to all allocations in the . . . Grant Allocation Appendix." *Id.*; *see also* Habaş Supplemental Questionnaire at 5, CD 172, bar code 3608588–01 (Aug. 17, 2017). Habaş focuses on Commerce's reference to "POI" yet disregards the question's reference to the appendix. The Grant Allocation Appendix specifically queries information on the prior 14 years for each nonrecurring subsidy received during the POI. *See* DOC Questionnaire at III-21. Thus, the question did not "exclude[] other portions of the AUL[,]" but included the AUL. *See* Habaş Br. at 7.

[12] Commerce had no obligation to request or accept new factual information, after discovering a response could not be corroborated at verification. *See Tianjin Machinery Import & Export Corp. v. United States*, 28 CIT 1635, __, 353 F. Supp. 2d 1294, 1304 ("Verification is intended to test the accuracy of data already submitted, rather than to provide a respondent with an opportunity to submit a new response."); *see also Uniroyal Marine Exports Ltd. v. U.S.*, 33 CIT 803, 808–09, 626 F. Supp. 2d 1312, 1316–17 (2009) (holding that Commerce's decision to reject untimely filed factual information was reasonable and supported by substantial evidence).

[13] Habaş argues that "Commerce's decision to select the highest available AFA rate was inconsistent with the statutory mandate[,]" because, to do so, "Commerce must make a specific factual determination, pursuant to 19 U.S.C. § 1677e(d)(2)" and "evaluate 'the situation that resulted' in the application of AFA." Habaş Br. at 22. Habaş explains that had Commerce evaluated the situation, "it would not have found that Habaş failed to report the AUL benefit in the first place, and it would not have found that Habaş withheld any information or failed to cooperate." *Id.* at 22. Defendant considers that Habaş had an opportunity to challenge the application of the highest adverse facts available rate before Commerce but did not. Def.'s Resp. Br. at 20–23. Defendant argues Habaş is now barred from raising this argument because if failed to exhaust administrative remedies. *Id.* Whether or not Habaş failed to exhaust its administrative remedies, Commerce, did evaluate the situation that resulted in the application of AFA, contrary to Habaş's contentions. Commerce reasonably determined that, because Habaş did not report the Offset Program until verification, it did not cooperate to the best of its abilities, meriting an adverse inference in the selection of facts otherwise available. See Final Decision Memo. at 4–7.

which, in their view, report the Offset Program. *See* Habaş Br. at 13–16; Icdas Br. at 8–10. Specifically, Habaş appended Commerce's final determination in an administrative review on rebar steel ("Rebar II") to its supplemental questionnaire responses. *See* Habaş Supplemental Questionnaire at Ex. 4, CD 172, bar code 3608588–01 (Aug. 17, 2017) ("Habaş Supplemental Questionnaire") (attaching Issues & Decision Memo. for Final Affirmative Determination in [CVD] Investigation Steel & Concrete Reinforcing Steel from [Turkey], C-489–830, (May. 15, 2017), *available at* https:// enforcement.trade. gov/frn/summary/turkey/2017–10505–1.pdf (last visited Nov. 14, 2019)). Moreover, in attaching the final determination of another proceeding, Habaş did not argue that the Offset Program was not countervailable; and, it did not bring Rebar II's reference to the Offset Program to Commerce's attention. *See* Habaş Br. at 13–16; *see also* Habaş Supplemental Questionnaire at 2, Ex. 4. Yet, according to Habaş, because Rebar II referred to the Offset Program, it was "in plain sight[.]" *See* Habaş Br. at 15; *see also* Reply Br. Pl. [Habaş] at 1–3, May, 28, 2019, ECF No. 43 ("Habaş Reply Br."). Icdas, too, refers to another proceeding, namely another administrative review on rebar steel ("Rebar I"). *See* Icdas Br. at 7–8 (citing *Steel Concrete Reinforcing Bar From [Turkey]*, 82 Fed. Reg. 26,907 (Dep't Commerce June 12, 2017) (final results & partial rescission), and accompanying Issues & Decision Memo., C-489–819, (June 6, 2017), *available at* https://enforcement.trade.gov/frn/summary/turkey/2017–12108–1 .pdf (last visited Nov. 14, 2019)). Since Commerce had determined that the benefit under the Offset Program had been "expensed",[14] in that proceeding, Icdas explains to the court, it did not include the program in its reporting in this proceeding. *See* Icdas Br. at 3, 7–10; *see also* Reply Br. Consol. Pl. [ICDAS] to [Def.'s Resp. Br.] at 3–7, May 28, 2019, ECF No. 44 ("Icdas Reply Br."). However, like Habaş, Icdas referred to Rebar I to Commerce in respect to the countervailability of a separate grant program. *See* Icdas Questionnaire Response at III-21, III-42; *see also* Icdas Supplemental Questionnaire Response at S212, PD 217, 218, bar code 3609227–01 (Aug. 17, 2017) ("Icdas Supp. Questionnaire Resp."). Pointing generally to a final determination in a separate proceeding that happens to mention the Offset Program, yet is proffered in direct response to questions regarding an entirely different grant program, neither advises Commerce as to the existence of the Offset Program nor is probative of whether that Offset

[14] Although Icdas may have had a "reasonable belief that the program was not countervailable during the current POI[,]" a respondent's reasonable belief does not excuse the failure to report requested information. *See* Icdas Br. at 10; *see also Nippon Steel*, 337 F.3d at 1383 ("[T]here is no mens rea component to the section 1677e(b) inquiry [to apply an adverse inference].").

Program conferred a countervailable subsidy in the instant proceeding.[15] Rather, by specifically asking about the Offset Program, it was "reasonable for Commerce to expect that more forthcoming responses should have been made[.]" *See Nippon Steel*, 337 F.3d at 1383.

Further, Icdas contends that, based on Commerce's determination in Rebar I that the Offset Program's benefits had been expensed prior to the POI, the Offset Program is not countervailable in this administrative review. *See* Icdas Br. at 10–11; *see also* Icdas Reply Br. at 7–10.[16] However, Commerce considers the record before it and is not bound by its decisions in separate proceedings. *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012). Given neither respondent confirmed the existence and use of the Offset Program during the AUL period in this proceeding, Commerce's application of facts available with an adverse inference was reasonable.

II. Commerce's Selection of Benchmark Data

Nucor challenges Commerce's selection of Russian Eurostat data over two other potential data sources—i.e., IEA data and GTA data[17] —claiming the choice of Russian Eurostat data is inadequately explained and unsupported. Nucor Br. at 1–2, 9; Nucor Reply Br. at 1–2. Defendant disagrees on both counts. *See* Def.'s Resp. Br. at 24–40. For the reasons that follow, Commerce's selection of Russian Eurostat data on this record is not reasonable.

Commerce imposes a countervailing duty when it determines that a foreign government provided a financial contribution resulting in a benefit to the recipient, where the government's provision of goods is for LTAR. 19 U.S.C. § 1677(5)(E). Commerce measures the adequacy of remuneration "in relation to prevailing market conditions for the good . . . being provided" in the country subject to review. 19 U.S.C. §

[15] In its supplemental questionnaire, Commerce informed Icdas that "references to the Department's final results in [Rebar I] are not sufficient to demonstrate that a program is not countervailable, as the Department considers the records of separate proceedings to be distinct." Icdas Supp. Questionnaire Resp. at S2–12. Commerce indicated to Icdas that it required a more complete response. *Id.*

[16] Icdas also contends that "nothing bars Commerce from considering decisions in the context of a proximate proceeding involving the same subsidy, the same respondent, the same production facility, and similar products." Icdas Reply Br. at 3–4. In making that argument, Icdas attempts to draw a parallel between Commerce's practices of relying on corroborated rates from earlier segments of the proceeding and of transferring non-proprietary information from one proceeding to another. *See id.* Even if Commerce has such discretion, Icdas does not provide any authority as to why Commerce must exercise that discretion here.

[17] Habaş provided benchmark data from the Global Trade Atlas ("GTA"), Eurostat, and Energy Experts international. *See* Letter From Habaş re: Benchmarking Data, PD 101, bar code 3599709–01 (July 26, 2017). Nucor submitted benchmark data from the IEA. *See* Nucor Deficiency Comments, PD 193–94, bar codes 3607060–01, 3607062–01 (Aug. 11, 2017).

1677(5)(E)(iv). Its regulations set out a hierarchy of methodologies to identify the appropriate benchmark. 19 C.F.R. § 351.511(a)(2). Under the "tier one" benchmark, Commerce compares the "government price to a market-determined price for the good or service resulting from actual transactions in the country in question." *Id.* at § 351.511(a)(2)(i).[18] If country market prices are not available, then under the "tier two" benchmark, Commerce "compar[es] the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question."[19] *Id.* at § 351.511(a)(2)(ii). Should that benchmark also be unavailable, Commerce will measure remuneration with the "tier three" benchmark, which "assess[es] whether the government price is consistent with market principles." *Id.* at § 351.511(a)(2)(iii).

Here, in Commerce's investigation of respondents' purchases of natural gas for power generation—i.e., natural gas in its gaseous form exclusive of compressed natural gas ("CNG") and liquified natural gas ("LNG")—from the GOT, Commerce benchmarked the GOT's natural gas prices against a "world market price" and ultimately selected Russian Eurostat data to do so. *See* Preliminary Decision Memo. at 15–16; Final Decision Memo. at 13–14. In the preliminary determination, Commerce selected IEA data as the "world market price" with which to compare the GOT's prices, because IEA data reflected prices available to Turkish purchasers[20] and, in a prior proceeding, Commerce determined IEA data to be more accurate than GTA data.[21] *See* Preliminary Decision Memo. at 16–17. However, inthe final determination, Commerce relied upon Russian Eurostat

[18] Commerce concluded there was no usable market-determined tier one benchmark because of the GOT's "overwhelming involvement" in Turkey's natural gas market, which distorts private transaction prices. Preliminary Decision Memo. at 15–16; *see also* Final Decision Memo. at 13.

[19] If there is more than one commercially available world price, Commerce "will average such prices to the extent practicable[.]" 19 C.F.R. § 351.511(a)(2)(ii).

[20] Commerce, in the preliminary determination, considered that IEA data to reflect prices available to Turkish purchasers. However, in the final determination, Commerce made no mention of this preliminary finding. While Commerce is not bound to its preliminary determination, Commerce must explain why the IEA data's merits—inclusive of whether it reflects natural gas availability to Turkish producers—is a reasonable basis to reject that data. *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) ("[P]reliminary determinations are 'preliminary' precisely because they are subject to change."). Commerce, on remand, should clarify whether and which data source or sources reflect natural gas that is available to Turkish purchasers.

[21] Commerce explained that the IEA data included country-specific natural gas prices for Organisation for Economic Co-operation and Development countries, including Turkey. Preliminary Decision Memo. at 16. Further, given that natural gas may only be transported via pipeline, Commerce noted that Turkish natural gas consumers would not be able to purchase gas outside of OECD Europe. *Id.*

data. *See* Final Decision Memo. at 13. Although Commerce explained its reasons for rejecting GTA compared to IEA data,[22] Commerce did not provide any explanation for rejecting the IEA data or compare that data source with the Russian Eurostat data. *Compare* Final Decision Memo. at 12–13 (explaining that the GTA data "likely covers both natural gas and compressed natural gas . . . . that distort the value of the data") *with id.* at 13 (merely noting that "the IEA information is not the best information on the record"). Commerce also made no finding that the IEA data was unusable or otherwise unavailable, unlike the GTA data. *Id.* at 12–13. Rather, having eliminated GTA data as a possible benchmark data source, two possible benchmark data sources—IEA and Russian Eurostat—remained. Commerce did not explain why the IEA data was "not the best information on the record" but only stated that it "decided against using the . . . the IEA data[.]" *Id.* If the IEA data was not usable, then Commerce should explain so; otherwise, a bald assertion that the IEA information is "not the best information on the record" does not articulate a reasonable explanation for rejection. *See Baroque Timber Indus. (Zongshan) Co., Ltd. v. United States*, 38 CIT __, __, 971 F. Supp. 2d 1333, 1339 (2014) (citing *Burlington Truck Lines, Inc. v. United States*, 317 U.S. 156, 168 (1962)).

Nor does Commerce adequately explain why the Russian Eurostat data is the best available data. Consistent with the regulatory preference that Commerce select a benchmark price that would be available to in-country purchasers,[23] Commerce considered the "Russian export prices [to be] the best available data on the record . . . because

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[22] Habaş advocated for the use of GTA data over IEA data, because, in Habaş's view, the IEA data was not reliable or usable. *See* Habaş Case Br. at 13–17, CD 300, bar code 3681094–01 (Mar. 9, 2018). Commerce rejected each concern, explaining, inter alia, that it disagreed with Habaş that the IEA data did not contain information on the methodology used to obtain prices or pricing information by user-specific categories. *See* Final Decision Memo. at 12–13. Further, Commerce explained that it considered GTA data to be "unusable for this investigation," because the GTA data "likely covers both natural gas and compressed natural gas . . . . that distort the value of the data presented by Habaş." *See id.* at 12.

[23] In relevant part, the *CVD Preamble* notes, with respect to tier two benchmark prices, that Commerce "will consider whether the market conditions in the country are such that it is reasonable to conclude that the purchaser could obtain the good or service on the world market." See *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998) (final rule) ("*CVD Preamble*"). To illustrate, Commerce contrasts two situations:

> [A] European price for electricity normally would not be an acceptable comparison price for electricity provided by a Latin American government, because electricity from Europe in all likelihood would not be available to consumers in Latin America. However, as another example, the world market price for commodity products, such as certain metals and ores, or for certain industrial and electronic goods commonly traded across borders, could be an acceptable comparison price for a government-provided good, provided that it is reasonable to conclude from record evidence that the purchaser would have access to such internationally traded goods.

Id., 63 Fed. Reg. at 65,377–78.

the information on the record shows that natural gas from Russia is available to purchasers in via [sic] pipeline and the data only contains natural gas, exclusive of CNG and LNG." Final Decision Memo. at 13 (citing 19 C.F.R. § 351.511(a)(2)(ii)).[24] Commerce referred to a pipeline map that, in its view, confirmed "natural gas, exclusive of CNG and [LNG], is only imported into Turkey via pipeline from Azerbaijan, Iran, and Russia." *Id.* (citing GOT Initial Questionnaire Response at Ex. 7C, pp. 22–23). On that basis, Commerce selected Russian Eurostat data.[25] *See id.* However, between the premise—that natural gas enters Turkey via the mapped pipeline routes—and the conclusion that Russian Eurostat data is the "best available data on record"—Commerce's analysis elides several analytic steps in its Final Decision Memo. and fails to account for detracting evidence on the record.

First, it is unclear whether the Russian Eurostat data reflects natural gas, exclusive of CNG and LNG. Habaş placed Eurostat data on the record to supplement GTA data[26] and provide a "stand-in for Russian export figures[,]" given that Russia does not provide value figures to GTA. Habaş Benchmark Data, PD 108, bar code 3599709–01 (July 26, 2017). Habaş indicated that both data sources reflect "HTS 2711.21, i.e. natural gas in its gaseous state." Habaş Case Br. at 11; *see also* Habaş Benchmark Data at Exs. 3–5.[27] Commerce, however, rejected GTA data because "the harmonized tariff schedule number 2711.21, on which Habaş's GTA data is based, likely covers both natural gas and compressed natural gas." Final Decision

[24] Moreover, as Commerce noted in its preliminary determination, natural gas in its gaseous form may only be transported via pipeline. *See* Preliminary Decision Memo. at 16.

[25] Nucor challenges Commerce's adoption of Russian prices, from the Eurostat data, as the world market price. *See* Nucor Br. at 14–16; Nucor Reply Br. at 9–10. Nucor alleges, that because the Russian government sets prices of natural gas, Russian Eurostat data cannot serve as a "world market price." Nucor Br. at 14–16; Nucor Reply Br. at 9–10. As Nucor clarified during oral argument, in its view, a world market price must be a market-determined price, i.e., a price that, like a tier one price, is free from government distortion. Oral Arg. at 6:30–9:02. The regulations do not define "world market price." Commerce must use a "world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii). Thus, it is possible that other available prices, too, could be set by or otherwise distorted by a government; however, so long as that price is available to other purchasers in the world market—and presumably in competition with other countries' export prices—Commerce may rely upon such an available "world market price."

[26] Habaş included exhibits in its benchmark submission to "captur[e] international trade in natural gas from GTA as well as European imports of natural gas from Russia, from . . . Eurostat[,]" because gas pipelines connect Turkey to the European Union ("EU") and Russia. Habaş Case Br. at 10 (citing Habaş Benchmark Data, PD 108 bar code 3599709–01 (July 26, 2017) ("Habaş Benchmark Data")).

[27] Exhibit 5 contains screenshots from the Eurostat website, which sorts "import" data "by HS6" and for "natural gas in its gaseous state." Habaş Benchmark Data at Ex. 5. Further, at Exhibit 3, Habaş included the definition of HS 2711.21, which, as reflected in the Harmonized Tariff Schedule for the United States, is "natural gas" in the "gaseous state." *Id.* at Ex. 3

Memo. at 12. Commerce appears to have selected the Russian Eurostat data even though it, too, may contain CNG.[28] Commerce does not address this evidence or explain why, unlike the GTA data,[29] the Russian Eurostat data reasonably reflect natural gas, exclusive of LNG and CNG.

Second, Commerce, in the final determination, did not address Nucor's arguments regarding alleged "weight and energy miscalculations" concerning Habaş's submission of the GTA and Eurostat data. *Compare* Preliminary Decision Memo. at 16 *with* Final Decision Memo. at 11, 13–14. Both data sets required conversion for comparison to the GOT's prices for natural gas to determine the adequacy of remuneration. *See* Habaş Benchmark Data at 4–5. Nucor identified several flaws in Habaş's conversion factors in its rebuttal case brief to Commerce.[30] Nucor's Rebuttal Br. at 9–12, CD 302, bar code 3682688–01 (Mar. 13, 2018) ("Nucor Rebuttal Br."); *see also* Letter from Wiley Rein LLP to Sec. Commerce re: Rebuttal Information on Benchmark, PD 195, bar code 360706201 (Aug. 11, 2017). Commerce,

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[28] Defendant refers to Commerce's reasoning that "natural gas from Russia is available to purchasers in [Turkey] via pipeline and the data only contains natural gas, exclusive of [CNG and LNG]" as evidence that it is "reasonably discernable" that the "Eurostat data would not contain [CNG] and [LNG]." Def.'s Resp. Br. at 35 (citing Final Decision Memo. at 13) (internal quotations omitted). However, a step in Commerce's reasoning, as noted above, appears to be missing. Commerce fails to explain why the Russian Eurostat data would not contain CNG and LNG. Defendant, similarly, does not point to record evidence that supports Commerce's finding. Moreover, while Defendant acknowledges that "Nucor's case brief raised the issue that trade data for HTS 2711.21 would include the compressed natural gas[,]" it faults Nucor for "not plac[ing] any information on the record that indicated that Eurostat data is based on HTS 2711.21" and considers Nucor, by raising the issue now, to have failed to exhaust administrative remedies. *Id.* However, it was Habaş, not Nucor, that placed the Russian Eurostat data on the record, and indicated it covered HTS 2711.21, like the GTA data. *See* Habaş Case Br. at 11; *see also* Habaş Benchmark Data at Exs. 3–5. Commerce, as explained above, must consider the record as a whole, including detracting evidence, notwithstanding which respondent places what evidence on the record. *See CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016); *Altx, Inc. v. United States*, 25 CIT 1100, __, 167 F. Supp. 2d 1353, 1374 (2001) (explaining that the agency "must address significant . . . evidence which seriously undermines its reasoning and conclusions"). Therefore, Defendant's exhaustion argument is inapposite.

[29] Defendant contends that a comparison of GTA and Russian Eurostat data is "moot" because, "[a]fter declining to use the [GTA] data for benchmarking purposes, it would have been inconsistent to then use the information to undertake the manner of comparative analysis advocated for by Nucor." Def.'s Resp. Br. at 37. Yet, in direct contradiction to this point, Commerce, immediately after rejecting GTA data, compared the reliability of GTA data with IEA data. *See* Final Determination at 11–13.

[30] According to Nucor, Habaş applied the same density information to calculate natural gas price for all countries, when each country has its own density rate. Nucor Rebuttal Br. at 10–11 (citing Letter from Wiley Rein LLP to Sec. Commerce re: Rebuttal Information on Benchmark at Ex. 2, PD 195, bar code 3607062–01 (Aug. 11, 2017)). In addition, Nucor alleged that Habaş selected a calorific value "plucked from thin air" and incorrectly applied that one value to natural gas from all countries, when Habaş' own submission shows that the calorific value of natural gas varies by source." *Id*. at 11.

however, did not address these points in its final determination. Instead, it accepted Habaş's corrections of conversion deficiencies "with respect to the GTA data." *See* Final Decision Memo. at 12. Commerce did not explain whether it also accepted Habaş's corrections of conversion deficiencies with respect to the Russian Eurostat data. Moreover, even if Commerce's acceptance extended to Russian Eurostat data, Commerce nonetheless failed to address significant arguments regarding the conversion of such data and Nucor's rebuttal evidence. On remand, Commerce should address the suitability of the conversion factors.

Although Commerce may have discretion to choose among imperfect data sets, that choice must be explained. *See CS Wind Vietnam Co.*, 832 F.3d at 1373. Here, "the path of Commerce's decision" is not reasonably discernable. *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1255, 1266–67 (quoting *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009)). Commerce offered no further explanation as to why Russian Eurostat data was the best available data and did not address detracting evidence on the record. Rather, Commerce elevated the "availability" of the data source to the exclusion of other record evidence.

Given that Commerce failed to adequately explain its selection of Russian Eurostat data for the tier two benchmark, its decision is also not in accordance with law. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1378 (Fed. Cir. 2001). On remand, Commerce should elaborate as to why, given the asserted flaws of each benchmark data source, the choice of a tier two benchmark is nonetheless reasonable, and further, reconsider and explain the basis of its selection of benchmark data.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Commerce's final determination with respect to the selection of benchmark data is remanded for further consideration consistent with this opinion; and it is further

ORDERED that Commerce's final determination is sustained in all other respects; and it is further

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

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

ORDERED that the parties shall have 15 days thereafter to file replies to comments on the remand determination.

Dated: November 19, 2019
New York, New York

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

Slip Op. 19–145

HUBBELL POWER SYSTEMS, INC. Plaintiffs, v. UNITED STATES, Defendant, and VULCAN THREADED PRODUCTS, INC. Defendant-Intervenor

Before: Jane A. Restani, Judge
Court No. 15–00312

[Commerce's Final Results of Redetermination Pursuant to Court Order are sustained]

Dated: November 20, 2019

Kevin M. O'Brien, and *Christine M. Streatfeild*, Baker & McKenzie LLP, of Washington, DC, for the plaintiff Hubbell Power Systems, Inc.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant United States. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Natan P. L. Tubman*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Roger B. Schagrin, Christopher T. Cloutier, and *Paul W. Jameson*, Schagrin Associates Washington, DC, for the defendant-intervenor Vulcan Threaded Products Inc.

OPINION AND ORDER

Restani, Judge:

This matter concerns the Department of Commerce's ("Commerce") final results of the fifth administrative review of the antidumping ("AD") duty order on certain steel threaded rod from the People's Republic of China ("PRC"). *See Certain Steel Threaded Rod from the People's Republic of China; Final Results Antidumping Duty Administrative Review; 2013–2014*, 80 Fed. Reg. 69,938 (Dep't Commerce Nov. 12, 2015) ("*Final Results*"). Before the court are Commerce's *Final Results of Remand Redetermination Pursuant to Court Remand*, ECF No. 85 at 9 (Dep't Commerce May 20, 2019) ("*Remand Results*"). The Court sustains Commerce's *Remand Results* assigning Gem-Year Industrial Co. Ltd. ("Gem-Year") a separate rate of 206 percent.

BACKGROUND

The court assumes familiarity with the facts of the case as set out in the court's previous opinion remanding the matter and recounts only the facts relevant for review of the *Remand Results*. Following an appeal from Hubbell Power Systems, Inc. ("Hubbell"), a U.S. importer of Chinese exporter Gem-Year products, the court remanded this matter to Commerce to reconsider Gem-Year's separate rate application. *See Hubbell Power Sys., Inc. v. United States*, Court No.

15–00312, Slip Op. 19–25 (CIT Feb. 27, 2019) ("*Remand Order*"). The Court held that despite Gem-Year's late disclosure of its affiliate, Jinn-Well Auto Parts (Zhejiang) Co. Ltd. ("Jinn-Well"), Commerce appeared to have sufficient record evidence to assess government control and determine whether Gem-Year was entitled to a separate rate. *See Final Results*.

On remand, Commerce assigned Gem-Year a separate rate. *See Remand Results*. Commerce found that record evidence showed both an absence of *de jure* and *de facto* government control over export activities. *Id.* at 7–9. Specifically, submissions by Gem-Year demonstrated that Jinn-Well was a wholly-owned subsidiary of Gem-Year, and as Commerce was able to verify Gem-Year's separate rate information showing an absence of government control, Commerce granted Gem-Year a separate rate. *Id.*

In assessing Gem-Year's dumping margin, Commerce found that Gem-Year had failed to adequately respond to Commerce's initial questionnaire and six supplemental questionnaires, failed to report several factors of production ("FOP") for its affiliate Gem-Duo, failed to report Gem-Year's use of oxalic acid and lubricant as FOPs and was "unprepared to substantiate the responses it had provided."[1] *Remand Results* at 10–11; *see also Decision Memorandum for Preliminary Results of Fifth Antidumping Duty Administrative Review: Certain Steel Threaded Rod from the People's Republic of China*, A-570–032, POR: 04/01/13–03/31/14 at 8–14 (Dep't Commerce Apr. 30, 2015) ("*Prelim I & D Memo*"); *Issues and Decision Memorandum for the Final Results of the Fifth Administrative Review of the Antidumping Duty Order on Certain Steel Threaded Rod from the People's Republic of China*, A-570–032, POR: 04/01/13–03/31/14 at 9–23 (Dep't Commerce Nov. 3, 2015) ("*I & D Memo*"); Verification of the Sales and Factors of Production Responses of Gem-Year, A-570–932, at 2–3, 12–26 (Dep't Commerce April 30, 2015) ("Verification Report"). Com-

[1] As noted in the *Prelim. I & D Memo*, Gem-Year submitted a questionnaire response reporting FOPs as if the merchandise sold during the period of review was produced in that time period, when it was in fact produced in 2008 and 2009, despite explicit instructions from Commerce not to report in this fashion. This discrepancy resulted in Commerce issuing several supplementary requests for additional information from the "period comprising the majority of the production." *Prelim. I & D Memo*, at 8 (citing Gem-Year's Sections C & D Questionnaire Response (Sep. 5, 2014)). Gem-Year also initially failed to report the FOPs for its affiliated-producer Gem-Duo and ultimately reported the "FOPs and U.S. sales information for only a portion of the finished product." *Id.* Additionally, Gem-Year failed to report numerous FOPs and, upon onsite verification, officials witnessed the consumption of several unreported materials used in the production process. *See id.*, at 10–11. Gem-Year also failed to disclose its affiliate, Jinn-Well, which it admitted only at verification produced in-scope merchandise, resulting in Commerce's inability to obtain and verify Jinn-Well's FOPs. *Id.* At verification, Commerce claims that both Gem-Year and Gem-Duo were unprepared, which resulted in Commerce's inability "to verify and substantiate the majority of the FOPs." *Id.*, at 14.

merce was unable to verify many of Gem-Year's reported FOPs and additionally "identified further discrepancies relating to the date of sales reporting, by-product offset reporting, and a purported returned sale that was not disclosed until verification." *Remand Results* at 10–11.

Because of the missing, unverifiable, and unreliable data, Commerce found it necessary to rely on facts otherwise available. *See id.* at 11 (citing 19 U.S.C. § 1677e(a)(1)). Commerce, however, found that the gaps created by Gem-Year's failure to cooperate to the best of its ability were central to Commerce's dumping margin determination such that Commerce could not "apply 'partial' facts available" and so relied "on total facts otherwise available." *Id.* at 13–14. Accordingly, Commerce found the application of an adverse inference to facts available warranted given Gem-Year's failure to cooperate. *Id.* (citing 19 U.S.C. § 1677e(b)). Commerce then selected the highest dumping margin from the proceeding and assigned Gem-Year "the rate of 206 percent, the highest rate from any segment of these proceedings, as corroborated and applied to the China-wide entity in the [less than fair value] investigation." *Id.* at 16 (citing 19 U.S.C. § 1677e(d)).

Hubbell agrees that Gem-Year qualifies for a separate rate, but disputes the assignment of what it describes as the China-wide entity rate. *See* Pl.'s Comments on Remand Redetermination, ECF No. 87 at 3–10 (June 19, 2019) ("Hubbell Br."). Hubbell argues that the China-wide entity rate cannot serve as an "AFA" rate as that rate is predicated on a finding of state control. *Id.* at 4–5. Hubbell does not meaningfully dispute Commerce's finding that Gem Year's submissions were deficient or that Commerce had significant issues with verification, but only states that "Gem-Year's conduct does not rise to the level of that of numerous respondents for which courts have refused to permit the application of the China-wide rate." Hubbell Br. at 2, 8. It further asserts that Commerce was required to corroborate the rate imposed in accordance with 19 U.S.C. § 1677e(c). *Id.* at 5–10. Hubbell states that Commerce should have applied the 55.16 percent deposit rate as sufficiently "adverse in the context of this review without rising to the level of grossly disproportionate or plainly punitive." *Id.* at 6. Finally, Hubbell argues that Commerce failed to "address the impact of the findings in the first administrative review on these results – when the periods of review overlapped," and where Gem-Year received a 55.16 percent rate. *Id.* at 9–10.

The government claims that Hubbell misunderstands the remand redetermination and relies on "cases that required Commerce to consider a respondent's commercial reality when calculating an AFA rate which is a requirement that has been abrogated by statute."

Def.'s Resp. to Comments on the Remand Results, ECF No. at 7 (Aug. 22, 2019) ("Gov. Br."). The government further rejects Hubbell's contention that it was required to corroborate the 206 percent rate, as Commerce's decision falls within the exception to the general rule that the agency should "to the extent practicable" corroborate secondary information. *See id.* at 8–11 (citing 19 U.S.C. § 1677e(c)(2)).

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2) (2012). The court will uphold Commerce's remand redetermination 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. Relying on Facts Available with an Adverse Inference

If Commerce determines that there is a gap in the record, it may use facts otherwise available in rendering a decision. *See* 19 U.S.C. § 1677e(a). If a party fails to cooperate "to the best of its ability," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). A party fails to cooperate to the best of its ability when it does not "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of [its] ability to do so." *Nippon Steel Corp. v. United States*, 337 F. 3d 1373,1382 (Fed. Cir. 2003); *see also* 19 U.S.C. § 1677e(a)(2). Further, "intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate." *Id.* at 1383; *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (citation omitted).

Commerce repeatedly asked for information regarding FOPs, affiliates, and sales information, only to be repeatedly stymied and misled by Gem-Year. Although at the administrative level Gem-Year argued that it made extraordinary efforts to cooperate, disputed some of Commerce's claims about Gem-Year's omissions and non-cooperation, and claimed that many mistakes were immaterial, Hubbell does not meaningfully make those arguments now. *See Steel Threaded Rod from China: Case Brief of Gem-Year*, ECF No. 78–31 (June 22, 2015). Gem-Year undoubtedly submitted a great deal of documentation to Commerce, but quantity is not a definitive indicator of cooperation. Despite its responses, Commerce found that GemYear's submissions contained several errors and omissions, that it failed to disclose affiliated producers of in-scope merchandise, that numerous FOPs

were unreported, and other deficiencies. *See Remand Results*, at 10–11.

Because of these deficiencies, Commerce reasonably found that the whole of Gem-Year's submissions were unreliable, incomplete, and unverifiable. *See id.* at 2, 6–7. Gem-Year's failure to cooperate caused an informational gap in the record that allowed Commerce to resort to facts available in assessing a dumping margin. *See* 19 U.S.C. § 1677e(a). Further, Gem-Year's failure to act to the best of its ability allowed Commerce to apply adverse inferences to facts available, as Gem-Year provided false and inaccurate information that evinced a lack of care or perhaps even deliberate concealment. *See* 19 U.S.C. § 1677e(b)(1); *see also Nippon Steel*, 337 F. 3d at 1383; *Essar Steel*, 678 F.3d at 1276.

II. Selection of the Highest Rate on Record

Hubbell argues that Commerce's selection of a rate equal to the China-wide rate is unsupported by record evidence and not in accordance with the law as that rate is predicated upon a respondent's inclusion in the Chinese entity. Hubbell Br. at 6. If Commerce's reasoning is not arbitrary and capricious, the court will sustain its chosen rate. *See Deosen Biochem. Ltd. v. United States*, 301 F. Supp. 3d 1372, 1380 (CIT 2018) (citing *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F. Supp. 3d 1367, 1377 (Fed Cir. 2012)).

As it is authorized to do, Commerce applied the highest rate from any segment in the proceeding, the China-wide rate, to Gem-Year based on application of facts available with an adverse inference. *Remand Results* at 16; *see also* 19 U.S.C. § 1677e(d)(2) (stating that it is within Commerce's discretion to apply the highest rate). In a recent case, the court explained that although Commerce may resort to the highest rate on record, it must conduct a situation-specific analysis and explain that decision. *See POSCO v. United States*, 296 F. Supp. 3d 1320, 1349–50 (CIT 2018).

Here, Commerce did adequately explain its rationale for choosing the 206 percent rate. In response to Hubbell's comments on the Remand Redetermination, Commerce explained that although Gem-Year had in an earlier review been assigned the 55.16 percent rate, Commerce chose not to assign that rate in this proceeding given Gem-Year's failure to cooperate in the review. *Remand Results* at 19. Commerce found that the higher rate was required to ensure that Hubbell, as an uncooperating party, did not "obtain a more favorable

result by failing to cooperate than if it had fully cooperated." *Id.*[2] Commerce additionally noted that although Hubbell had been assigned the 55.16 percent rate in the first administrative review of the order, after failing to cooperate in subsequent administrative reviews, Hubbell was assigned a rate of 206 percent. *Id.* at 18–19.

Commerce was reasonable in disregarding the other rate on the record given this rationale. Although RMB was assigned a rate of 39.42 percent, that party cooperated and submitted documentation that allowed Commerce to calculate that rate. Assigning Hubbell that rate would disincentivize cooperation by allowing Hubbell to benefit from another party's cooperation despite its non-cooperation. *See*, *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (noting that "Commerce's discretion in applying an AFA margin is particularly great when a respondent is uncooperative"); *see also Viet I-Mei Frozen Foods Co., Ltd. v. United States*, 839 F.3d 1099, 1110 (Fed. Cir. 2016) (upholding the imposition of the Vietnam-wide rate despite respondent's eligibility for a separate rate and holding that assigning a non-cooperating respondent a lower rate than a cooperating respondent "would only incentivize gamesmanship and undermine the purpose of the AFA provisions"); Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA"), H. R. REP. No. 103–316, vol. 1, at 870 (1994) *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 (allowing Commerce apply adverse inferences to facts available "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully"). Accordingly, Commerce reasonably found the 55.16 percent rate insufficient to induce cooperation. *Remand Results* at 19.

III. Corroboration

Hubbell's brief claims that it is legal error for Commerce to not corroborate the rate assigned to Gem-Year. *See* Hubbell Br. at 5–10. This argument fails because the statute clearly authorizes Commerce to assign a rate from a previous segment of the same proceeding without corroborating the margin. *See* 19 U.S.C. § 1677e(c)(2) (Commerce "shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding"). The 206 percent rate assigned to Gem-Year derives from the petition in the less-than-fair-value investigation and was corroborated at that time. *See Certain Threaded Rod from the People's Republic of China: Final Determination of Sales at Less than Fair Value*,

[2] The only other rate computed for this administrative review was for a cooperating party, IFI & Morgan Ltd. and RMB Fasteners Ltd. ("RMB"), which was assigned a rate of 39.42 percent based on its submission of relevant sale and FOP data. *See Final Results* 80 Fed. Reg. at 69,939.

74 Fed. Reg. 8,907, 8,910 (Feb. 27, 2009) (finding the 206 percent rate probative "because it [was] in the range of margins calculated for the [respondent]"). Commerce applied this rate in a separate segment of these proceedings and thus had no obligation to corroborate the rate.[3]

CONCLUSION

For the foregoing reasons Commerce's Remand Redetermination is sustained.

Dated: November 20, 2019
New York, New York

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

[3] Hubbell's argument and citation to pre-Trade Preferences Extension Act ("TPEA") cases indicate that it misunderstands the current statutory scheme concerning the application of facts available with an adverse inference. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27 § 502, 129 Stat. 362, 383–84 *codified as amended* 19 U.S.C. § 1677e (2015). Although cases prior to the TPEA required Commerce to demonstrate a relationship between an AFA rate and a respondent's actual estimated dumping margin, that is no longer the case. Commerce no longer has to "demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party." 19 U.S.C. § 1677e(d)(3)(B). Thus, Hubbell's argument that Commerce needed to explicitly account for the fact that the majority of the subject merchandise it produced during this administrative review was produced in 2009 when it was subject to the 55.16 percent rate is of no moment.