U.S. Court of International Trade

Slip Op. 19–65

REBAR TRADE ACTION COALITION, Plaintiff, HABAŞ SINAI VE TIBBI GAZLAR ISTIHSAL ENDÜSTRISI A.Ş., Consolidated Plaintiff, v. UNITED STATES, Defendant, REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 17–00202

[*Final Determination* sustained as to Habaş.]

Dated: May 31, 2019

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Margaret J. Jantzen, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant, United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *Reza Karamloo*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

OPINION

Gordon, Judge:

This action involves the affirmative final determination of the U.S. Department of Commerce ("Commerce") in the countervailing duty ("CVD") investigation published as *Steel Concrete Reinforcing Bar From the Republic of Turkey*, 82 Fed. Reg. 23,188 (Dep't of Commerce May 22, 2017) (final determ.), PD 306,[1] and accompanying Issues and Decision Memorandum (Dep't of Commerce May 15, 2017) ("*Decision Memorandum*"), PD 302 (collectively, "*Final Determination*"), *amended by Steel Concrete Reinforcing Bar From the Republic of Turkey*, 82 Fed. Reg. 32,531 (Dep't of Commerce July 14, 2017) (amended final determ.), PD 315 ("*Amended Final Determination*"). Before the court is the motion for judgment on the agency record of Consolidated Plaintiff Habaş Sinai ve Tibbi Gazlar Istihsal

[1] "PD" refers to a document contained in the public administrative record, which is found in ECF No. 19–1, unless otherwise noted. "CD" refers to a document contained in the confidential administrative record, which is found in ECF No. 19–2, unless otherwise noted.

Endüstrisi A.Ş. ("Habaş").[2] *See* Pl. Habaş's R. 56.2 Mot. for J. on the Agency R., ECF No. 26[3] ("Habaş Br."); *see also* Def.'s Resp. in Opp'n to Pls.' Mots. for J. on the Agency R., ECF No. 31 ("Def.'s Resp."); Habaş Reply Br., ECF No. 37 ("Habaş Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[4], and 28 U.S.C. § 1581(c) (2012). For the reasons that follow, the court sustains the *Final Determination* as to Habaş.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2019).

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[2] Plaintiff Rebar Trade Action Coalition ("RTAC") has also filed a motion for judgment on the agency record in this matter that remains pending before the court. *See* Pl. RTAC's R. 56.2 Mot. for J. on the Agency R., ECF No. 27. The court has stayed consideration of the issues raised in RTAC's motion as they are substantially similar to the issues under consideration by the U.S. Court of Appeals for the Federal Circuit in *Rebar Trade Action Coalition v. United States*, 42 CIT ___, 335 F. Supp. 3d 1302 (2018), *appeal docketed*, No. 2019–1228 (Fed. Cir. Nov. 26, 2018).

[3] All citations to parties' briefs and the agency record are to their confidential versions unless otherwise noted.

[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.

II. Discussion

A. Application of Adverse Facts Available ("AFA") to Habaş

If Commerce finds that a respondent's information is unreliable because the respondent has withheld information that Commerce requests, failed to provide requested information in a timely manner or in the form or manner requested, or significantly impeded the progress of the proceeding, Commerce uses the facts otherwise available. 19 U.S.C. § 1677e(a)(2). Commerce may draw an adverse inference against a respondent in selecting from among the facts otherwise available when it finds that a respondent "has failed to cooperate by not acting to the best of its ability." 19 U.S.C. § 1677e(b).

Prior to applying an adverse inference, Commerce examines a respondent's actions and assesses the extent of the "respondent's abilities, efforts, and cooperation in responding to Commerce's information requests." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "Acting to the best of its ability" requires that a respondent do the maximum that it is able to do. *Id.* Although the standard does not require perfection and recognizes that mistakes occur, it does not condone inattentiveness, carelessness, or inadequate record-keeping. *Id.* Rather, it is the responsibility of a respondent to comply with Commerce's information requests.

In its initial questionnaire, Commerce inquired:

> Did the GOT, or entities wholly or partially owned by the GOT or any provisional or local government, provide, directly or indirectly *any other forms of assistance* to your company during the [period of investigation ("POI")] and the proceeding AUL period? If so, please describe such assistance, in detail, including the relevant benefit amounts, dates of receipt, and purposes and terms.

See Decision Memorandum at 28 (quoting the initial questionnaire sent to Habaş). During verification, in explaining a contract provision referring to "export-related incentives," Habaş officials informed Commerce that the company "occasionally" received export-related incentives pursuant to Turkey's Domestic Processing Regime ("RDP") Resolution 2005/839 ("RDP program" or "duty drawback program"). *Id.* When Commerce asked why such benefits were not reported in the company's questionnaire response, Habaş officials asserted that there was "no countervailable aspect" of the duty drawback program. *Id.* In Habaş's view, the RDP program did not provide "assistance," it did not need to be reported in Habaş's questionnaire response as "other forms of assistance." *Id.* Commerce rejected Habaş's arguments, noting that "[Commerce], not the interested parties, determines whether or not a

response is required." *Id.* After reviewing the available information about the RDP program and Habaş's failure to timely provide Commerce with information about Habaş's utilization of that program, Commerce determined that "the use of facts available [was] warranted" pursuant to both 19 U.S.C. §§ 1677e(a)(1) and (a)(2). *Id.* at 29.

Commerce further found that Habaş "did not cooperate to the best of its ability" by failing to timely report its receipt of assistance under the RDP program. *Id.* Commerce also determined that Habaş's failure to report "impeded the investigation and precluded the Department from adequately examining the program (*i.e.*, the Department was unable to issue a supplemental questionnaire response to the [Government of Turkey ("GOT")] concerning the extent to which this program constitutes a financial contribution, is specific under sections 771(5)(D) and 771(5A) of the Act, and provides a benefit under section 771(5)(E) of the Act and 19 CFR 351.519)." *Id.* at 29–30.

Consequently, Commerce found that it was appropriate to apply an adverse inference, and "that the unreported RDP duty drawback program meets the financial contribution and specificity criteria outlined under sections 771(5)(D) and 771(5A) of the Act, respectively." *Id.* at 30. Additionally, Commerce found that the RDP program "confers a benefit under section 771(5)(E) of the Act and 19 CFR 351.519." *Id.*

Given these findings, Commerce proceeded to apply its "established hierarchy" for selecting an AFA rate for the program, explaining that:

> under the hierarchy, the Department will select AFA rates in the following order of preference: the highest calculated rate for the identical subsidy program in the investigation if a responding company used the identical program and the rate is not zero; if there is no identical program match within the investigation, or if the rate is zero, the highest non-de minimis rate calculated for the identical program in a CVD proceeding involving the same country; if no such rate is available, the highest non-de minimis rate for a similar program, based on treatment of the benefit, in another CVD proceeding involving the same country; absent an above-de minimis subsidy rate calculated for a similar program, the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.

Decision Memorandum at 30. Applying this hierarchy to the record, Commerce determined that "it is appropriate to apply, as AFA, a rate of 14.01 percent ad valorem," which was the subsidy rate calculated

for an export tax rebate program in *Final Affirmative Countervailing Duty Determinations; Certain Welded Carbon Steel Pipe and Tube Products from Turkey*, 51 Fed. Reg. 1268 (Dep't of Commerce Jan. 10, 1986) ("*1986 Welded Pipe and Tube from Turkey Determination*"). *Id.*

Habaş argues that Commerce erred in finding that Habaş's failure to include information about the RDP program in its questionnaire response merited the application of AFA. *See* Habaş Br. at 3–20. Habaş further contends that, even if Commerce properly determined that Habaş was subject to AFA, Commerce's selection of a 14.01% subsidy rate for the RDP program based on the *1986 Welded Pipe and Tube from Turkey Determination* was unreasonable. *Id.* at 20–24.

Habaş contends that its failure to include information about the RDP program in its initial questionnaire response did not merit Commerce's application of AFA because "Commerce's Treatment of the Turkish Drawback Regime Has Been Inconsistent." *See id.* at 4–11. Habaş argues that because Commerce has decided that the RDP program was not countervailable in prior proceedings, Commerce should not have reasonably expected Habaş to provide information about the RDP program in the present proceeding. *Id.* Commerce acknowledged that Habaş is correct that "the Department has not consistently examined Turkey's duty drawback program and, in particular, the RDP program at issue in this case;" however, Commerce explained that "[t]he examination and analysis of a particular duty drawback system, including the RDP duty drawback program, hinges on the specific facts on the record of a CVD proceeding, such as how the government implemented and monitored the system during the POI and whether or not product-specific and company-specific yield factors, including waste rates, are accurate." *Decision Memorandum* at 29. By failing to report its use of the duty drawback program during the POI, Commerce concluded that "Habas denied the [agency] and other interested parties the opportunity to collect and analyze the information necessary to determine the [] duty drawback program's countervailability in this proceeding." *See id.*

The court agrees that Commerce's determination as to whether a duty drawback program is countervailable is a fact-intensive examination that the agency is entitled to undertake, and Habaş cannot unilaterally foreclose it by refusing to respond to the agency. *See id.* at 28–29; *see also Essar Steel Ltd. v. United States*, 34 CIT ___, ___, 721 F. Supp. 2d 1285, 1298–99 (2010) ("Regardless of whether [the respondent] deemed the [] information relevant, it nonetheless should have produced it [in] the event that Commerce reached a different conclusion . . . ."), *rev'd in part on other grounds*, 678 F.3d 1268 (Fed.

Cir. 2012); *Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986) (holding that "it is Commerce, not the respondent, that determines what information is to be provided," despite any claim by respondent that the information request "cannot legally serve as the basis" for the agency's view).

Habaş contends that Commerce erred in its application of AFA by failing to "satisfy the statutory criteria for finding that the drawback program is countervailable." *See* Habaş Br. at 11 (citing *Changzhou Trina Solar Energy Co. v. United States*, 40 CIT, ___, ___, 195 F. Supp. 3d 1334, 1350 (2016)). Habaş maintains that Commerce failed to "make a specific factual finding as to whether" the RDP program constitutes a "financial contribution," is "specific," and provides a "benefit" as defined pursuant to 19 U.S.C. § 1677(5). *Id.* at 11–13. Habaş argues that Commerce's failure to make these factual findings demonstrates that Commerce's determination is not supported by substantial evidence and must be remanded as the court concluded in *Changzhou Trina*. *Id.* The court disagrees.

Commerce recognized its statutory obligations in evaluating the countervailability of the RDP program, (pursuant to 19 U.S.C. § 1677(5)), and reasonably applied AFA (pursuant to 19 U.S.C. § 1677e) in finding that the duty drawback program was countervailable as it met all of the statutory criteria. *See Decision Memorandum* at 29–30. Habaş's argument that Commerce did not make the requisite statutory findings that the RDP program constitutes a "financial contribution," is "specific," and provides a "benefit," does not account for the fact that Habaş's failure to provide information about its use of the duty drawback program is precisely what prohibited Commerce from directly making those findings. *Id.* ("Because Habas impeded the investigation and precluded the Department from adequately examining the program (*i.e.*, the Department was unable to issue a supplemental questionnaire response to the GOT concerning the extent to which this program constitutes a financial contribution, is specific under sections 771(5)(D) and 771(5A) of the Act, and provides a benefit under section 771(5)(E) of the Act and 19 CFR 351.519), an adverse inference is warranted in selecting the [sic] from facts otherwise available.").

Moreover, Habaş's reliance on *Changzhou Trina* is unavailing as it is distinguishable given the lack of information in that matter as to the nature of the programs that Commerce determined to be countervailable. *See Changzhou Trina*, 40 CIT at ___, 195 F. Supp. 3d at 1347–50 (noting that, in contrast to other cases in which Commerce permissibly "applied AFA to a program about which the record contained at least some factual allegations and supporting evidence," Commerce's determination under review lacked "any information,

from any source" justifying findings that the "programs and verification grants and tax deduction" at issue satisfied the elements for countervailability."). There, Commerce similarly applied AFA to grants and a tax deduction about which the record was devoid of any relevant information. *See Changzhou Trina*, 40 CIT at ___, 195 F. Supp. 3d at 1349 (distinguishing Commerce's reasonable application of AFA to infer countervailability as to a particular program in a prior proceeding with Commerce's improper use of AFA to make "sweeping legal conclusion[s] lacking any factual foundation" in the determination under review). In this action, Habaş informed Commerce at verification that it received export related incentives under the RDP program during the POI. *See Decision Memorandum* at 28. Commerce was familiar with the RDP program because it had examined this program in prior unrelated proceedings; although, as noted by Habaş, Commerce reached different determinations as to whether the program was countervailable depending on the record of each proceeding. *See* Habaş Br. at 6–9. Accordingly, the court rejects Habaş's argument that Commerce unreasonably failed to "satisfy the statutory criteria for finding that the drawback program is countervailable." *See* Habaş Br. at 11–13.

Habaş next contends that even if the court concludes that "the finding of countervailability is adequately supported, Commerce has still failed to meet the statutory criteria for its finding [that the use of facts available was warranted]." *See id.* at 13–17. Habaş argues that Commerce's decision to apply facts available is predicated on 19 U.S.C. §1677e(a)(2)(A) because the agency's explanation referenced Habaş's failure to provide "requested information." *See id.* at 13. However, Commerce was quite clear in reaching its determination that it was applying facts available pursuant to both § 1677e(a)(2)(A) *and* § 1677e(a)(1). *See Decision Memorandum* at 29 ("For these reasons, *we find that necessary information is not available on the record, pursuant to section 776(a)(1) of the Act*. Furthermore, pursuant to section 776(a)(2) of the Act, the Department finds that Habas withheld information that was requested, failed to provide such information by the appropriate deadlines, and significantly impeded the proceeding .... Consequently, we determine that, *in accordance with section 776(a)(1) and (2) of the Act*, the use of facts available is warranted." (emphasis added)). Regardless of the merits of Habaş's contention that Commerce erred in concluding that Habaş withheld information pursuant to § 1677e(a)(2)(A), Habaş makes no argument (and the court sees no basis on which to conclude) that Commerce's

application of facts available pursuant to § 1677e(a)(1) was unreasonable. Accordingly, the court rejects Habaş's argument that Commerce "failed to meet the statutory criteria" of 19 U.S.C. §1677e(a). *See* Habaş Br. at 13.

In the alternative, Habaş maintains that even if "Habaş may be considered to have failed to meet the requirement of §1677e(a)(2)(A), Commerce erred in deciding that Habaş 'did not act to the best of its ability in responding to the Department's requests for information,' as required by 19 U.S.C. §1677e(b)(1)." *See* Habaş Br. at 17–20. Despite Habaş's claim that it would have needed to be "clairvoyant" to predict that Commerce would want information about Habaş's utilization of the RDP program, *see* Habaş Br. at 19, the court concludes that Habaş's failure to inform Commerce about its use of the RDP program clearly constituted a failure of Habaş to act to "the best of its ability to comply with a request for information from" Commerce. *See* 19 U.S.C. § 1677e(b)(1); *Decision Memorandum* at 29. Habaş's argument that Commerce's evaluation of the RDP program has been inconsistent demonstrates that Habaş was aware that Commerce had previously found the RDP program to provide a countervailable benefit in other proceedings. *See* Habaş Br. at 6–9 (noting instances where Commerce found Turkish duty drawback countervailable). Even if Habaş was at best confused or uncertain as to whether Commerce would consider the RDP program countervailable, it had an obligation to raise its concerns so that Commerce, not Habaş, could determine whether the program was countervailable in this proceeding. *See Essar Steel*, 34 CIT at ___, 721 F. Supp. 2d at 1298–99 ("Regardless of whether [the respondent] deemed the [] information relevant, it nonetheless should have produced it [in] the event that Commerce reached a different conclusion . . . ."). Accordingly, the court finds no merit in Habaş's contentions that Commerce acted unreasonably in finding that Habaş's failure to disclose its use of the RDP program merited the application of AFA pursuant to 19 U.S.C. § 1677e(b)(1).

Habaş also argues that even if the court sustains Commerce's determination to apply AFA for its failure to provide information about the RDP program, remand is nevertheless appropriate because the AFA rate selected by Commerce is unreasonable. *See* Habaş Br. at 20–24. Habaş maintains that Commerce's selection of the 14.01% rate is unreasonable because Commerce could not corroborate the rate from a 32-year-old terminated program as relevant and reliable pursuant to 19 U.S.C. § 1677e(c) (the statutory requirements for relying on secondary information). *Id.*; *see also Decision Memorandum* at 30–31 (explaining how Commerce determined that the selected AFA rate was "corroborated to the extent practicable").

As described above, *see supra* pp. 5–6, Commerce applied its established hierarchy for the selection of an AFA rate to assign for Habaş's use of the RDP program. *See Decision Memorandum* at 30. Notably, Habaş does not challenge Commerce's hierarchy for the selection of an AFA rate, but instead challenges only Commerce's corroboration of the selected rate. *See* Habaş Br. at 20–23. Specifically, Habaş contends that despite the fact that the court has sustained Commerce's use of the 14.01% rate in a prior CVD proceeding as a corroborated AFA rate, that rate (from the *1986 Welded Pipe and Tube from Turkey Determination*) has never been (and cannot be) found to be "reliable" under 19 U.S.C. § 1677e(c). *See* Habaş Br. at 20–23 (discussing the selected AFA rate, statutory corroboration requirements, and distinguishing *Özdemir Boru San. ve Tic. Ltd. Sti. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1225, 1247–48 (2017)). Defendant disagrees with Habaş's reading of *Özdemir*, and maintains that the court evaluated Commerce's selection of an AFA rate based on the *1986 Welded Pipe and Tube from Turkey Determination* and "deemed [that rate selection as] sufficiently reliable, reasonable, and supported by substantial evidence." *See* Def.'s Resp. at 22 (citing *Özdemir* as holding that the "rate was reliable and corroborated *because* it was calculated in a previous Turkish countervailing duty investigation"). Moreover, Defendant maintains that Commerce properly applied its AFA rate selection hierarchy and, within the discretion afforded to the agency by the relevant statutory scheme, reasonably selected (and corroborated to the extent practicable) the 14.01% rate. *Id.* at 19–22.

The court agrees with Defendant. Habaş's arguments about the alleged insufficiency of Commerce's corroboration of the 14.01% rate ignore the fact that Habaş's failure to provide the relevant information about the RDP program is what led Commerce to select an AFA rate from a similar program from a previous proceeding involving Turkey. The text of 19 U.S.C. § 1677e(d) provides broad discretion to Commerce, permitting the agency to "use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country," and to "apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin." Commerce adhered to its unchallenged hierarchy for selecting AFA rates, and reasonably selected a 14.01% rate because it was the highest non-de minimis rate calculated for a similar program in another Turkish countervailing duty proceeding. *See Decision Memorandum* at 30 (referring to the *1986 Welded Pipe and Tube from Turkey Determination*).

While *Özdemir* is not binding on the court, it is persuasive as to how

and why the rate from the *1986 Welded Pipe and Tube from Turkey Determination* may be corroborated by Commerce. *See Özdemir*, 41 CIT at ___, 273 F. Supp. 3d at 1247–48. Habaş is incorrect when it contends that *Özdemir* failed to evaluate the "reliability" of the challenged AFA rate. The court there stated:

> Commerce determined that the CWP & T 1986 rate was reliable because it was "calculated in ... previous Turkey CVD investigations or administrative reviews." Under the limitations articulated by the agency, and under the statutory standard[,] Commerce's statement regarding reliability served the purposes of corroboration "to the extent practicable."

Özdemir, 41 CIT at ___, 273 F. Supp. 3d at 1248 (internal citations omitted). Here, as in *Özdemir*, Commerce was confronted with a limited record and was forced to select, as an AFA rate, a rate from a "similar" Turkish subsidy program from a prior proceeding. *See Decision Memorandum* at 30–31. Commerce corroborated this rate to the extent practicable by confirming its relevance and reliability. *Id.* ("With regard to the reliability aspect of corroboration, we are relying on a subsidy rate calculated in another CVD proceeding. ... because the calculated rate was based on information provided for another tariff rebate program (*i.e.*, export tax rebates), it reflects the actual behavior of the GOT with respect to a program that is similar to the RDP duty drawback program.") While Habaş urges the court to conclude that Commerce's analysis is insufficient, Habaş has "not provided binding authority that would impose on Commerce a corroboration standard stricter than that identified in the statute and the legislative history." *See Özdemir*, 41 CIT at ___, 273 F. Supp. 3d at 1248. Considering the record as a whole, the court concludes that Commerce reasonably corroborated the 14.01% AFA rate as required by § 1677e(c)(1).

Habaş lastly maintains when Commerce did not assign Habaş a rate lower than 14.01%, the agency unreasonably failed to evaluate the "situation that resulted in ... an adverse inference". *See* Habaş Br. at 23–24. Habaş contends that the "'situation' that led to AFA was that everyone concerned was well aware of drawback in the context of Turkish steel trade cases in general, and rebar cases in particular, and nobody – not the petitioners, not Commerce, and not Habaş – thought to 'connect the dots' between this general knowledge and the specifics of answering the CVD questionnaire." Habaş Br. at 24. Contrary to Habaş's position, Commerce explained that:

> [t]he Department has previously found that import duty rebate/drawback programs may provide countervailable assistance to

> companies importing goods. Although, as noted by Habas, the Department has not consistently examined Turkey's duty drawback program and, in particular, the RDP program at issue in this case, determining the countervailability of a duty drawback program requires a fact-intensive examination ... By failing to report its use of the RDP duty drawback program during the POI in response to the Department's initial questionnaire, Habas denied the Department and other interested parties the opportunity to collect and analyze the information necessary to determine the RDP duty drawback program's countervailability in this proceeding.

Decision Memorandum at 29. Commerce went on to acknowledge Habaş's argument that Commerce "should consider the fact that, in prior proceedings, [Commerce has] often calculated *de minimis* rates for [the RDP Program]," but explained that its selection of an AFA rate "is guided by an established hierarchy, which does not allow for the use of *de minimis* rates." *Id.* at 30.

Notably, Habaş does not challenge Commerce's "established hierarchy" for selecting AFA rates, nor does Habaş identify any specific non-*de minimis* rates that Commerce may have selected as an appropriate "lesser rate" after an "evaluation of the situation" pursuant to 19 U.S.C. § 1677e(d)(2). *See* Habaş Br. at 23–24; Habaş Reply at 4–5. Habaş provides no insight as to how Commerce may have reasonably selected an AFA rate other than 14.01%, nor does Habaş explain how Commerce may have reasonably reduced such a rate in light of an "evaluation of the situation" under § 1677e(d)(2). *Id.* Commerce did explain its selection of an AFA rate for the RDP Program in light of the limited facts on the record and the totality of the circumstances. *See Decision Memorandum* at 31 (noting that "unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there are typically no independent sources for data on company-specific benefits resulting from countervailable subsidy programs"). Commerce further explained how it applied its "established hierarchy" in selecting the 14.01% rate. *See id.* at 30. Nevertheless, Habaş insists that "Commerce failed to make the analysis required by §1677e(d)(2), and a remand is therefore required." Habaş Reply at 5.

Habaş relies on *POSCO v. United States*, 42 CIT ___, ___, 296 F. Supp. 3d 1320, 1349 (2018) for the proposition that Commerce must conduct "a separate case-specific factual evaluation" in selecting an AFA rate pursuant to § 1677e(d)(2). *POSCO* is distinguishable as the court there noted that "Commerce did not expressly state which

hierarchical provision(s) it relied on in this proceeding." *See POSCO*, 42 CIT at ___, 296 F. Supp. 3d at 1335. Here, Commerce explained its straightforward application of its established hierarchy, and found that the 14.01% rate from the *1986 Welded Pipe and Tube from Turkey Determination* was "highest rate for a similar program in a proceeding involving Turkey." *Decision Memorandum* at 30. Moreover, in *POSCO* the court explained that § 1677e(d)(2) "contemplates a case-specific evaluation as part of Commerce's selection *from among a range of rates*." *POSCO*, 42 CIT at ___, 296 F. Supp. 3d at 1349 (emphasis added). The court also clarified that "the issue is not whether Commerce's hierarchical methodology as a whole complies with the statute, but whether Commerce's unexplained selection of the highest rates within each prong of its hierarchy complies with § 1677e(d)(2)." *Id.* Unlike *POSCO*, this matter does not involve the comparison of alternative rates available on the record as Habaş has not identified any specific "lesser rates" that Commerce may reasonably have selected. *See* Habaş Br. at 24 (stating that remand is necessary for Commerce to consider "lesser rates"). Accordingly, the court concludes that Plaintiff's reliance on *POSCO* is unavailing.

Although Commerce did not expressly cite § 1677e(d)(2) in its explanation of the selection of an AFA rate for the RDP Program, Commerce's explanation provides a reasonably "discernable path" for how the agency selected of the 14.01% AFA rate. *See NMB Singapore Ltd. v. United States* , 557 F.3d 1316, 1321–22 (Fed. Cir. 2009) (The court must sustain a determination "of less than ideal clarity" where Commerce's decisional path is reasonably discernable. (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1974))). Accordingly, based on the record as a whole, the court concludes that Commerce reasonably selected the 14.01% AFA rate.

B. Selection of Natural-Gas Benchmark

In the course of investigating whether Habaş purchased natural gas for less than adequate remuneration ("LTAR"), pursuant to 19 U.S.C. §1677(5)(D)(3), Commerce compared the prices Habaş actually paid for natural gas to a benchmark drawn from an International Energy Agency ("IEA") report. *See* 19 C.F.R. § 351.511(a)(2) (Commerce's benchmarking regulation for evaluating whether goods or services were provided for LTAR). As Commerce explained, "Section 351.511(a)(2) of the Department's regulations sets forth the hierarchy of potential benchmarks, listed in order of preference: (1) market prices from actual transaction of the good within the country under investigation (*e.g.*, actual sales, actual imports, or competitively run

government auctions) (*i.e.*, 'tier one'), (2) world market prices that would be available to purchasers in the country under investigation (*i.e.*, 'tier two'), or (3) an assessment of whether the government price is consistent with market principles (*i.e.*, 'tier three')." *Decision Memorandum* at 8. Commerce "found that there was no viable tier one benchmark for natural gas in Turkey during the POI and relied on country-specific industrial natural gas prices published by the International Energy Agency (IEA), which is part of the Organisation for Economic Cooperation and Development (OECD), as a tier two benchmark to calculate the benefit received by Habas under this program." *Id.* at 9.

Habaş challenges Commerce's reliance on the IEA report as unreasonable, contending that Commerce instead should have used the data submitted by Habaş obtained from Global Trade Information Services ("GTIS") as the preferable data source for constructing a tier two benchmark pursuant to § 351.511(a)(2). *See* Habaş Br. at 25–28. Commerce rejected the GTIS data proffered by Habaş, stating:

> [T]he specific set of GTIS data on the record of this investigation contains pervasive problems that cannot be corrected without making assumptions that would be unwarranted and unsupported by the record. Specifically, the GTIS data are reported in six substantially different units of measure: M3, TM3, and L, which are units of volume; KG and T, which are units of mass; and TJ, which is a unit of energy. ... The conversion factors suggested by Habas do not address this problem. ...
>
> The petitioner raised its conversion rate and energy content concerns in its case brief, as well as in earlier factual submissions. However, no party suggested a method for standardizing the GTIS data. Rather, Habas focused its comments on rebutting the petitioner's suggestion that we continue to rely on the IEA, as discussed below. Consequently, without additional information clarifying the nature of the variance in conversion rates, we find that the various units of measure in the GTIS data cannot be harmoniously converted to a single unit of measure that would enable a comparison of the GTIS natural gas prices to Habas' natural gas purchases without introducing unnecessary distortion into the calculations.
>
> Moreover, information on the record of this proceeding indicates that the GTIS data includes shipments of CNG, which, as explained by the GOT, is a different product that is shipped in canisters rather than through pipelines. Based on this fact, it is

> evident that certain shipments included in the GTIS data (*e.g.*, shipments of natural gas from the Czech Republic to Cuba) are comprised entirely of CNG. Because other shipments between countries connected by pipelines (*e.g.*, shipments of natural gas from Hungary to Croatia) also likely include CNG, it is impossible to identify and remove comprehensively all shipments of CNG from the GTIS data.
>
> Therefore, we believe a more accurate gauge of natural gas prices in the POI is provided by the IEA data, which is reported in a unit comparable to the unit in which Habas was invoiced (*i.e.*, MWh/KWh) and, as such, does not require any conversion. ...
>
> For the reasons explained in the *Preliminary Determination*, we continue to find that the annual OECD Europe natural gas prices for 2015, as published by the IEA, are usable as a tier two benchmark. The IEA annual data do not suffer from the same inconsistencies as the GTIS data.

Decision Memorandum at 22–25.

In its brief before the court, Habaş continues to assail Commerce's selection of the IEA data as unreasonable; however, Habaş fails to demonstrate why its proffered GTIS data set is the only reasonable selection on the record, nor does Habaş address the problem highlighted by Commerce that "no party [has] suggested a method for standardizing the GTIS data." *See* Habaş Br. at 25–28; *see also Decision Memorandum* at 24. Instead, Habaş attempts to downplay the significance of the problems with the GTIS data highlighted by Commerce. Habaş argues that its proposed benchmark submission provided Commerce with an analysis of the GTIS data that leaves only a "negligible outlier" of problematic data that "will always find its way into a database, but its existence is not grounds for discarding the entire database." Habaş Br. at 28 (citing Habaş benchmark submission (Mar. 2, 2017), PD 221–222). In the *Decision Memorandum*, Commerce acknowledged that Habaş proposed a conversion rate for energy units to address some of Commerce's concerns about using the GTIS data, but found that Habaş's proposed energy unit conversion solution did not resolve the problems presented in using that data. *See Decision Memorandum* at 24 n.155 ("Habas submitted a conversion rate for energy units, KWh, to volume units, M3, based on its own experience. However, for the reasons already explained, if energy content is shipment-specific, Habas's experience does not provide a reliable method for making conversions for other transactions.").

Habaş's arguments, though, fail to address the basis of Commerce's decision. Commerce was presented with the choice of two competing data sets on the record (*i.e.*, the IEA and GTIS data). After consideration of the pros and cons of each data set, Commerce concluded that the IEA data provided a "more accurate gauge of natural gas prices in the POI" that further were "reported in a unit comparable to the unit in which Habas was invoiced." *Id.* at 24–25. Considering the record as a whole, the court concludes Habaş has failed to establish that a reasonable mind would have to credit Habaş's position as the one and only correct position on the administrative record. The record more than adequately supports Commerce's conclusion that "the annual OECD Europe natural gas prices for 2015, as published by the IEA, are usable as a tier two benchmark ..." and that the "IEA annual data do not suffer from the same inconsistencies as the GTIS data." *See id.*; *see also Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Technical, Salaried & Mach. Workers, AFL–CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("The question is whether the record adequately supports the decision of [Commerce], not whether some other inference could reasonably have been drawn."). Accordingly, Commerce's selection of the IEA data as a tier two benchmark for natural-gas prices is reasonable.

III. Conclusion

For the reasons set forth above, the court sustains the *Final Determination* as to Habaş.

Dated: May 31, 2019
New York, New York

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

Slip Op. 19–66

MIDWEST FASTENER CORP., Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 17–00131

[United States Department of Commerce's Final Results of Redetermination pursuant to Court Remand are sustained.]

Dated: June 3, 2019

Robert K. Williams, *Mark R. Ludwikowski*, and *Lara A. Austrins*, Clark Hill PLC, of Chicago, IL, for plaintiff.

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

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

OPINION

Katzmann, Judge:

The court returns to the question of whether plaintiff Midwest Fastener Corp. ("Midwest's") zinc and nylon anchor products are nails. Before the court now is the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand (Dep't Commerce Dec. 21, 2018) ("*Remand Results*"), ECF No. 50, which the court ordered in *Midwest Fastener Corp. v. United States*, 42 CIT __, 335 F. Supp. 3d 1355 (2018). Under protest, Commerce found that Midwest's zinc and nylon anchors were outside the scope of *Certain Steel Nails from the Socialist Republic of Vietnam: Countervailing Duty Order*, 80 Fed. Reg. 41,006 (July 14, 2015) and *Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39,994 (July 13, 2015) (collectively the "*Orders*"). Midwest requests that the court sustain the *Remand Results* and reiterate the bases of its original remand order. Pl.'s Comments on the Dep't of Commerce's Final Results of Redetermination Pursuant to Court Remand ("Pl.'s Br."), Jan. 24, 2019, ECF No. 54. Defendant-Intervenor Mid Continent Steel & Wire, Inc. ("Mid Continent") requests that the court reconsider its previous decision and remand order. Def.-Inter.'s Comments on Remand Redetermination ("Def-Inter.'s Br."), Jan. 22, 2019, ECF No. 51. The court sustains Commerce's *Remand Results*.

BACKGROUND

The relevant legal and factual background of the proceedings involving Midwest has been set forth in greater detail in *Midwest*, 335 F. Supp. 3d at 1359–62. Information pertinent to the instant case is set forth below.

On May 17, 2017, Commerce determined that Midwest's zinc and nylon anchors fell within the scope of antidumping and countervailing duty orders covering steels nails from Vietnam. *Antidumping and Countervailing Duty Orders on Certain Steel Nails from the Socialist Republic of Vietnam: Final Scope Ruling on Midwest Fastener, Corp.'s Zinc and Nylon Anchors* (Dep't Commerce May 17, 2017), P.R. 17 ("*Final Scope Ruling*"). Midwest appealed the *Final Scope Ruling* to this court, arguing that its anchors are not steel nails and, thus, could not fall within the scope of the orders. In *Midwest*, 335 F. Supp. 3d at 1362–64, the court held that the plain language of the *Orders* excluded Midwest's zinc and nylon anchors, and remanded to Commerce for redetermination consistent with its opinion. On November 29, 2018, Commerce issued a Draft Remand Redetermination in which it found, pursuant to the court's remand order, that Midwest's anchors are outside the scope of the *Orders*. *See Remand Results* at 2. Midwest and Mid Continent submitted timely comments in response, *see id.*, and Commerce issued its *Remand Results* on December 21, 2018, *see generally id.* Under respectful protest, Commerce again found that Midwest's zinc anchors fell outside the scope of the *Orders*. *Id.* at 2, 5–7. Midwest and Mid Continent submitted their comments on the *Remand Results* on January 24, 2019, and January 22, 2019, respectively. Pl.'s Br.; Def.-Inter.'s Br. Defendant the United States submitted its response to these comments on February 7, 2019. Def.'s Resp. to the Parties' Comments on the Dep't of Commerce's Final Results of Redetermination ("Def.'s Resp."), ECF No. 58.

DISCUSSION

Commerce's *Remand Results* are consistent with the court's remand order and previous opinion. However, Mid Continent urges the court to reconsider its previous decision, and expresses concerns about the court's use of dictionaries in interpreting the plain language of the scope, whether the court "judicially voided" scope language stating that "steel nails may . . . be constructed of two or more pieces," and whether the court's decision is consistent with the Federal Circuit's opinion in *Meridian Prods., LLC v. United States*, 890 F.3d 1272 (Fed. Cir. 2018). Def.-Inter.'s Br. at 2–6. These asserted concerns are not meritorious. The court based its determination in *Midwest*, 355 F. Supp. 3d at 1362–64, not only on dictionary definitions of nails, *see*

NEC Corp. v. Dep't Commerce, 23 CIT 727, 731, 74 F. Supp. 2d 1302, 1307 (1999), but also upon close consideration of all of the scope language in the *Orders* — including the phrase "of two or more pieces" — and record evidence, including evidence of trade usage, *see ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012).[1] Midwest's zinc and nylon anchors are simply not nails "constructed of two or more pieces" because, as discussed in *Midwest*, 335 F. Supp. 3d at 1363, they do not function like nails and because record evidence demonstrates that anchors like Midwest's are considered a separate type of product from nails by the relevant industry. The court reiterates that *Meridian Prods.*, 890 F.3d 1272, does not undermine this analysis or determination. *See Midwest*, 335 F. Supp. 3d at 1364 n.4.

CONCLUSION

Commerce's *Remand Results* are sustained.

SO ORDERED.

Dated: June 3, 2019
New York, New York

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

Slip Op. 19–67

LINYI CHENGEN IMPORT AND EXPORT CO., LTD., Plaintiff, and Celtic Co., Ltd. et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR FAIR TRADE IN HARDWOOD PLYWOOD, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00002

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the antidumping duty investigation of certain hardwood plywood products from the People's Republic of China.]

Dated: June 3, 2019

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiff Linyi Chengen Import and Export Co., Ltd., Consolidated Plaintiffs Celtic Co., Ltd., Jiaxing Gsun Import & Export Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Anhui Hoda Wood Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Linyi Evergreen Wood Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Timber International Trade Co. Ltd., Linyi Sanfortune Wood Co., Ltd., Linyi Mingzhu Wood Co., Ltd., Xuzhou Andefu Wood Co., Ltd., Suining

[1] Commerce acknowledges that the court's decision was not "based solely on the common dictionary definition of a nail." *See* Def.'s Resp. at 6.

Pengxiang Wood Co., Ltd., Xuzhou Shengping Import and Export Co., Ltd., Xuzhou Pinlin International Trade Co. Ltd., Linyi Glary Plywood Co., Ltd., Linyi Linhai Wood Co., Ltd., Linyi Hengsheng Wood Industry Co., Ltd., Shandong Qishan International Trading Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Linyi Huasheng Yongbin Wood Co., Ltd., Qingdao Good Faith Import and Export Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Far East American, Inc., and Shandong Dongfang Bayley Wood Co., Ltd., and Plaintiff-Intervenors Celtic Co., Ltd., Jiaxing Gsun Import & Export Co., Ltd., Anhui Hoda Wood Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Linyi Evergreen Wood Co., Ltd., Linyi Glary Plywood Co., Ltd., Linyi Hengsheng Wood Industry Co., Ltd., Linyi Huasheng Yongbin Wood Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Linyi Linhai Wood Co., Ltd., Linyi Mingzhu Wood Co., Ltd., Linyi Sanfortune Wood Co., Ltd., Qingdao Good Faith Import and Export Co., Ltd., Shandong Qishan International Trading Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Suining Pengxiang Wood Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Xuzhou Andefu Wood Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Pinlin International Trade Co., Ltd., Xuzhou Shengping Import and Export Co., Ltd., and Xuzhou Timber International Trade Co., Ltd. With them on the brief was *J. Kevin Horgan*. *John J. Kenkel* also appeared.

Jeffrey S. Neeley and *Stephen W. Brophy*, Husch Blackwell LLP, of Washington, D.C., for Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co., Ltd., Highland Industries Inc., Jiashan Dalin Wood Industry Co., Ltd., Happy Wood Industrial Group Co., Ltd., Jiangsu High Hope Arser Co., Ltd., Suqian Yaorun Trade Co., Ltd., Yangzhou Hanov International Co., Ltd., G.D. Enterprise Limited, Deqing China-Africa Foreign Trade Port Co., Ltd., Pizhou Jin Sheng Yuan International Trade Co., Ltd., Xuzhou Shuiwangxing Trading Co., Ltd., Cosco Star International Co., Ltd., Linyi City Dongfang Jinxin Economic & Trade Co., Ltd., Linyi City Shenrui International Trade Co., Ltd., Jiangsu Qianjiuren International Trading Co., Ltd., and Qingdao Top P&Q International Corp.

Jill A. Cramer and *Yuzhe PengLing*, Mowry & Grimson, PLLC, of Washington, D.C., argued for Consolidated Plaintiffs and Plaintiff-Intervenors Taraca Pacific, Inc., Canusa Wood Products Ltd., Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, USPLY LLC, and Concannon Corporation. With them on the briefs was *Jeffrey S. Grimson*. *Bryan P. Cenko*, *James C. Beaty*, *Kristin H. Mowry*, and *Sarah M. Wyss* also appeared.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel were *Jessica R. DiPietro* and *Nikki Kalbing*, Attorneys, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Stephanie M. Bell, Wiley Rein, LLP, of Washington, D.C., argued for Defendant-Intervenor Coalition for Fair Trade of Hardwood Plywood. With her on the brief were *Timothy C. Brightbill, Jeffrey O. Frank*, and *Elizabeth S. Lee*. *Adam M. Teslik, Cynthia C. Galvez, Derick G.Holt, Laura El-Sabaawi, Maureen E. Thorson, Tessa V. Capeloto*, and *Usha Neelakantan* also appeared.

OPINION AND ORDER

Choe-Groves, Judge:

This action arises from the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the antidumping duty investigation of certain hardwood plywood products from the People's Republic of China ("China"), in which Commerce found that

the subject merchandise is being sold for less than fair value. *See Certain Hardwood Plywood Products From the People's Republic of China*, 82 Fed. Reg. 53,460 (Dep't Commerce Nov. 16, 2017) (final determination of sales at less than fair value, and final affirmative determination of critical circumstances, in part), *as amended*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (amended determination of sales at less than fair value and antidumping duty order) (collectively, "*Final Determination*"); *see also* Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Certain Hardwood Plywood Products from People's Republic of China, PD 871, bar code 3639791–01 (Nov. 16, 2017) ("Final IDM"). For the following reasons, the court sustains in part and remands in part the *Final Determination*.

ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce's actions regarding the administrative record were arbitrary and capricious;
2. Whether Commerce's application of the intermediate input methodology was supported by substantial evidence;
3. Whether Commerce's valuation of veneer inputs was supported by substantial evidence;
4. Whether Commerce must recalculate the antidumping margins assigned to Consolidated Plaintiffs and other separate rate respondents;
5. Whether Commerce's determination to apply AFA to Bayley was supported by substantial evidence and in accordance with the law;
6. Whether Commerce's determination not to verify certain submissions is in accordance with the law; and
7. Whether Commerce's actions regarding Bayley's affiliation with Company D is in accordance with the law and not arbitrary and capricious.

PROCEDURAL HISTORY

Commerce initiated an antidumping investigation on hardwood plywood products from China on December 8, 2016, at the request of Petitioner Coalition for Fair Trade in Hardwood Plywood ("Coalition"). *See Certain Hardwood Plywood Products From the People's Republic of China*, 81 Fed. Reg. 91,125 (Dep't Commerce Dec. 16, 2016) (initiation of less-than-fair-value investigation) ("*Initiation Notice*"). The period of investigation was from April 1, 2016 through

September 30, 2016. *See id.* at 91,126. Commerce selected Shandong Dongfang Bayley Wood Co., Ltd. ("Bayley") and Linyi Chengen Import and Export Co., Ltd. ("Linyi Chengen") as mandatory respondents. *See* Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China, PD 734, bar code 3582552–01 (June 16, 2017) ("Prelim. IDM").

Commerce published its preliminary determination on June 23, 2017. *See Certain Hardwood Plywood Products From the People's Republic of China*, 82 Fed. Reg. 28,629 (Dep't Commerce June 23, 2017) (preliminary affirmative determination of sales at less than fair value, preliminary affirmative determination of critical circumstances, in part), *as amended*, 82 Fed. Reg. 32,683 (Dep't Commerce July 17, 2017) (amended preliminary determination of sales at less than fair value) (collectively, "*Preliminary Determination*"). Commerce preliminarily calculated a zero or *de minimis* dumping margin for Linyi Chengen. *See Preliminary Determination*, 82 Fed. Reg. at 28,637. With respect to Bayley, the Department preliminarily determined that application of facts available with an adverse inference ("AFA") was warranted based on Bayley's failure to cooperate. *See* Prelim. IDM at 7. Specifically, Commerce found that Bayley allegedly failed to disclose information regarding four affiliated companies, *see id.* at 21, and assigned an AFA rate of 114.72% to Bayley. *See Preliminary Determination*, 82 Fed. Reg. at 28,637. Because of the preliminary application of AFA to Bayley, the Department decided not to verify Bayley's information. *See id.* at 28,637. Commerce preliminarily calculated a weighted-average dumping margin of 57.36% for all companies eligible for a separate rate. *See id.*

Petitioners urged Commerce to depart from its normal practice and utilize its intermediate input methodology in calculating Linyi Chengen's factors of production in preliminary comments. *See* Prelim. IDM at 16; *see also* Petitioners' Resubmission of Comments on Chengen's Questionnaire Responses at 15, PD 696, bar code 3576089–01 (May 30, 2017). In applying the intermediate input methodology, Commerce would value core and face veneers as opposed to logs. *See* Prelim. IDM at 16. Linyi Chengen argued against using the methodology. *See* Prelim. IDM at 16; *see also* [Linyi] Chengen & Bayley Pre-Preliminary Comments at 1, PD 637, bar code 3573393–01 (May 17, 2017); [Linyi] Chengen Rebuttal Comments at 1–7, PD 405, bar code 3555234–01 (Mar. 27, 2017). Commerce stated that its "general practice for integrated firms is to value all factors used in each stage of production." *See* Prelim. IDM at 16. Commerce found, based on questionnaire responses and supporting documentation filed by Linyi

Chengen, that Linyi Chengen demonstrated that "it is an integrated producer which begins its manufacture of hardwood plywood with the purchase of logs." Prelim. IDM at 16. Commerce did not "find the record meets the limited exceptions for applying the intermediate input methodology" at the time. *Id.* at 17.

Commerce conducted verification for Linyi Chengen in September 2017. *See* [Linyi] Chengen Verification Report, PD 834, bar code 3624132–01 (Sept. 29, 2017).

The Department received administrative case briefs and rebuttal briefs from Bayley, Linyi Chengen, and the Coalition from August through October 2017. *See* Final IDM at 2–3. Commerce rejected Linyi Chengen's initial submission as an "untimely filed written argument" and as containing "untimely filed new factual information" under 19 C.F.R. § 351.302(d). *See* Dep't Rejection Ltr., PD 887, bar code 3644833–01 (Nov. 27, 2017). Linyi Chengen resubmitted its brief with the information redacted, which Commerce accepted as a part of the record. *See* [Linyi] Chengen Refiled Rebuttal Brief, PD 849, bar code 3631855–01 (Oct. 20, 2017).

Commerce issued its *Final Determination* on November 16, 2017. *See Certain Hardwood Plywood Products From the People's Republic of China*, 82 Fed. Reg. 53,460 (Dep't Commerce Nov. 16, 2017) (final determination of sales at less than fair value, and final affirmative determination of critical circumstances, in part). Based on its analysis of the comments received and findings at verification, the Department applied the intermediate input methodology instead of its general practice of valuing all factors consumed by a respondent in each stage of production to generate a unit of the subject merchandise. *See* Final IDM at 7. Before verification, the Department understood that Linyi Chengen's documents, such as its raw material ledgers, inventory movement worksheets, warehouse-out slips, and accounting vouchers, supported the quantity of logs that Linyi Chengen purchased and consumed during the period of investigation. *See id.* at 24. Commerce considered Linyi Chengen's reporting of the log quantity to be "imprecise" based on observations made at verification, such as how the suppliers marked and measured the log diameter, how the production manager verified the log supply through spot checks, and whether Linyi Chengen used the Chinese National Standard conversion table. *See id.* When describing the intermediate input methodology, Commerce stated:

> In some cases, a respondent may report factors used to produce an intermediate input that accounts for an insignificant share of total output. When the potential increase in accuracy to the overall calculation that results from valuing each of the [factors

> of production] is outweighed by the resources, time, and burden such an analysis would place on all parties to the proceeding, the Department has valued the intermediate input directly using a [surrogate value]. Also, there are circumstances in which valuing the [factors of production] used to yield an intermediate product would lead to an inaccurate result because the Department would not be able to account for a significant cost element adequately in the overall factors buildup. In this situation, the Department would also value the intermediate input directly.

Final IDM at 23 (footnotes omitted). As a result of applying its intermediate input methodology, Commerce assigned a dumping margin rate of 183.36% for Linyi Chengen. *See id.* The Department then applied Linyi Chengen's rate to the separate rate respondents. *See id.* The Department continued to apply total adverse facts available to Bayley and calculated a weighted-average dumping margin of 183.36%. *See id.* at 7–8. The Department stated that because its general practice is to use the highest calculated dumping margin of any respondent, *i.e.*, Linyi Chengen's weighted-average dumping margin, the margin rate of 183.36% was appropriate for Bayley. *See id.* The Department also used Linyi Chengen's margin for the separate rate respondents. *See id.* at 7.

Linyi Chengen submitted ministerial error allegations, contesting Commerce's use of its intermediate input methodology. *See* Chengen Ministerial Error Allegation, PD 884, bar code 3643402–01 (Nov. 20, 2017). Linyi Chengen alleged in its submission that Commerce improperly resorted to the intermediate input methodology in the *Final Determination* based on inadvertent errors, including Commerce's characterization of documents reviewed and events that occurred at verification. *See id.* at 2–8 ("[T]he final decision is clearly at odds with the Department's *own* verification report (including the understanding of its *own* verifiers) on the most important facts of this case."). Commerce considered Linyi Chengen's ministerial error allegations and rejected them as not constituting ministerial errors within the meaning of its regulation. *See* Dep't Ministerial Error Memorandum at 5, PD 891, bar code 3649811–01 (Dec. 8, 2017). Commerce identified other ministerial errors and published an amended final determination on January 4, 2018. *See* Certain Hardwood Plywood Products From the People's Republic of China, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (amended final determination of sales at less than fair value, and antidumping duty order).

Plaintiffs and Consolidated Plaintiffs commenced multiple actions in the court to contest Commerce's final determination. The court

consolidated cases on May 30, 2018. *See* Order, May 30, 2018, ECF No. 30. Before the court are five Rule 56.2 motions for judgment on the agency record.

Plaintiff Linyi Chengen submitted a Rule 56.2 motion for judgment on the agency record. *See* Pl.'s Mot. J. Agency R., July 13, 2018, ECF No. 32; *see also* Pl.'s Rule 56.2 Mem. Supp. Mot. J. Agency R., July 13, 2018, ECF No. 32–2 ("Linyi Chengen's Br."). Linyi Chengen raises three issues: (1) whether Commerce acted arbitrarily and capriciously in its handling of the record; (2) whether Commerce's determination that Linyi Chengen's books and records did not adequately capture the volume of its log inputs, which led to Commerce's application of the intermediate input methodology, is supported by substantial evidence; and (3) whether Commerce's valuation of veneer inputs is supported by substantial evidence and constitutes the best available information. *See* Linyi Chengen's Br. 5.

Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co., Ltd., Highland Industries, Inc., Jiashan Dalin Wood Industry Co., Ltd., Happy Wood Industrial Group Co., Ltd., Jiangsu High Hope Arser Co., Ltd., Suqian Yaorun Trade Co., Ltd., Yangzhou Hanov International Co., Ltd., G.D. Enterprise Limited., Deqing China-Africa Foreign Trade Port Co., Ltd., Pizhou Jin Sheng Yuan International Trade Co., Ltd., Xuzhou Shuiwangxing Trading Co., Ltd., Cosco Star International Co., Ltd., Linyi City Dongfang Jinxin Economic and Trade Co., Ltd., Linyi City Shenrui International Trade Co., Ltd., Jiangsu Qianjiuren International Trading Co., Ltd., and Qingdao Top P&Q International Corp. (collectively, "Zhejiang Dehua et al.") filed a single Rule 56.2 motion for judgment on the agency record. *See* Mot. J. Agency R. Consol. Pls. Zhejiang Dehua TB Imp. & Exp. Co., Ltd., et al., July 20, 2018, ECF No. 33; *see also* Mem. Supp. Rule 56.2 Mot. J. Agency R. Consol. Pls. Zhejiang Dehua TB Imp. & Exp. Co. Ltd., et al., July 20, 2018, ECF No. 33 ("Zhejiang Dehua's Br."). The motion adopts Linyi Chengen's arguments and asserts that Commerce should recalculate the final dumping margin assigned to the separate rate companies based on a revision of Linyi Chengen's calculated dumping margin. *See* Zhejiang Dehua's Br. 1.

Consolidated Plaintiffs Celtic Co., Ltd., Anhui Hoda Wood Co., Ltd., Far East American, Inc., Jiaxing Gsun Import and Export Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Linyi Evergreen Wood Co., Ltd., Linyi Glary Plywood Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Linyi Linhai Wood Co., Ltd., Linyi Hengsheng Wood Industry Co., Ltd., Linyi Huasheng Yongbin Wood Co., Ltd., Linyi Mingzhu Wood Co., Ltd., Linyi Sanfortune Wood Co., Ltd., Qingdao Good Faith Import and Export Co., Ltd., Shanghai Futuwood Trading Co., Ltd.,

Shandong Qishan International Trading Co., Ltd., Suining Pengxiang Wood Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Xuzhou Andefu wood Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Pinlin International Trade Co., Ltd., Xuzhou Shengping Import and Export Co., Ltd., and Xuzhou Timber International Trade Co., Ltd. (collectively, "Separate Rate Plaintiffs") filed a single Rule 56.2 motion for judgment on the agency record. *See* Consol. Separate Rate Pls.' Rule 56.2 Mot. J. Agency R., July 20, 2018, ECF No. 34; *see also* Consol. Separate Rate Pls.' Rule 56.2 Mem. Supp. Mot. J. Agency R., July 20, 2018, ECF No. 34–2 ("Separate Rate Pls.' Br."). The Separate Rate Plaintiffs support and incorporate Linyi Chengen's arguments, and ask that any reductions to Linyi Chengen's dumping margin as a result of this litigation be reflected in a new margin for separate rate companies. *See* Separate Rate Pls.' Br. 4.

Bayley filed a Rule 56.2 motion, contesting various findings made by Commerce with respect to the investigation into Bayley. *See* Consol. Pl. Shandong Dongfang Bayley Wood Co., Ltd. Mot. J. Agency R., July 20, 2018, ECF No. 36; *see also* Consol. Pl. Shandong Dongfang Bayley Wood Co., Ltd. Rule 56.2 Mem. Supp. Mot. J. Agency R., July 20, 2018, ECF No. 36–1 ("Bayley's Br.").

Taraca Pacific filed a Rule 56.2 motion on behalf of itself, Canusa Wood Products Ltd., Concannon Corp. DBA Concannon Lumber Company, Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and USPly LLC. *See* Rule 56.2 Mot. J. Agency R. Consol. Pls. Taraca Pacific, Inc., Canusa Wood Products Ltd., Concannon Corp. DBA Concannon Lumber Company, Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc. Richmond International Forest Products, LLC & USPly LLC, July 20, 2018, ECF No. 35; *see also* Mem. P. & A. Supp. Rule 56.2 Mot. J. Agency R. Consol. Pls. Taraca Pacific, Inc., Canusa Wood Products Ltd., Concannon Corp. DBA Concannon Lumber Company, Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc. Richmond International Forest Products, LLC & USPly LLC, July 20, 2018, ECF No. 35–1 ("Taraca Pacific's Br."). Taraca Pacific adopts and incorporates by reference the briefs filed by Linyi Chengen and Bayley. *See* Taraca Pacific's Br. 1. Taraca Pacific argues additionally that Linyi Chengen's weighted-average dumping margin amounts to an AFA rate because Commerce calculated it based on

substituted facts. *See id.* at 3. Because Commerce typically excludes AFA rates from its calculation of a separate rate, Taraca Pacific contends that Commerce's assignment of a separate rate in this investigation based on Linyi Chengen's rate is improper. *See id.*

This court held oral argument on March 27, 2019. *See* Oral Argument, Mar. 27, 2019, ECF No. 79.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[1] and 28 U.S.C. § 1581(c), which grant the court the authority to review actions contesting the final results of an administrative review of an antidumping duty order. The court will uphold Commerce's determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781–82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, U.S. 197, 229 (1938)).

The court will uphold also Commerce's determinations unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(ii). An agency acted in an arbitrary and capricious manner if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Al. Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009).

ANALYSIS

The Parties filed five separate Rule 56.2 motions for judgment on the agency record. The court will address each motion, and the issues contained within, in turn.

I. Linyi Chengen's Rule 56.2 Motion for Judgment on the Agency Record

Linyi Chengen, one of the mandatory respondents in this investigation, contests three aspects of Commerce's findings and actions in

[1] All further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code. All further citations to the U.S. Code are to the 2012 edition, with exceptions. All further citations to 19 U.S.C. § 1677b(e) are to the 2015 version, as amended pursuant to The Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). All citations to the Code of Federal Regulations are to the 2017 edition.

this investigation: (A) Commerce's handling of the record evidence; (B) Commerce's use of the intermediate input methodology to value Linyi Chengen's log inputs; and (C) Commerce's selection of the veneer input surrogate values.

A. Commerce's Handling of Record Evidence

Commerce "made observations" at verification "that called into question the accuracy of [Linyi] Chengen's log purchase and consumption records, and its ability to substantiate such records." Final IDM at 24. These observations include Commerce's finding that Linyi Chengen's "reporting of the log quantity is imprecise" because Linyi Chengen spot-checks to confirm the accuracy of measurements for log deliveries and uses the diameter of the small end of the log and its length to calculate the logs' volume. *Id.* at 24–25. Commerce also took issue with Linyi Chengen's claims that the formula it uses to measure log volume is the Chinese National Standard, which was allegedly provided at verification. *See id.* at 25. Commerce observed further that Linyi Chengen was unable to provide supplier invoices for its purchases of poplar log, which is Linyi Chengen's "most significant input." *Id.* at 24–25.

Linyi Chengen contends that Commerce mishandled the administrative record and acted in an arbitrary and capricious manner. *See* Linyi Chengen's Br. 13. Linyi Chengen argues that Commerce "made several factual misrepresentations" in the *Final Determination*, "which in turn became the basis for applying" Commerce's intermediate input methodology. *Id.* These alleged factual misrepresentations "contradict findings in the verification report and ignore observations and information provided at verification." *Id.* Specifically, Linyi Chengen takes issue with (1) Commerce's rejection of Linyi Chengen's method of spot-checking to confirm the accuracy of measurements for log deliveries, even though that is the exact same method that Commerce's representatives used at verification; (2) Commerce's finding that Linyi Chengen's conversion table and formula are "inherently imprecise" because they rely only on the diameter of the smaller end of the log and its length; (3) Commerce's conclusion that "there is no evidence that the conversion table and formula" that Linyi Chengen relies upon is the Chinese National Standard; and (4) Commerce's finding that Linyi Chengen's reported log consumption is unreliable because it cannot be cross-checked with supplier invoices. *See id.* 13–23. Linyi Chengen argues that it attempted to correct these alleged errors that first appeared in the *Final Determination*, but Commerce acted arbitrarily in refusing to accept the corrections. *See id.* at 24.

Defendant counters that "[a]ny variance between [Linyi] Chengen's interpretation of the verification report and Commerce's *Final Determination* does not constitute arbitrary and capricious handling of record evidence, but rather reflects Commerce's weighing of the evidence." Def.'s Resp. 43. Defendant notes further that "the fact that the verification report did not specifically identify concerns about [Linyi] Chengen's spot[-]checking methodology does not mean that the report confirmed its accuracy." *Id.* Although it is true that a reweighing of the evidence is improper at this stage of the proceedings, *see Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1367, 1376–77 (Fed. Cir. 2015), the law clearly requires Commerce to explain the basis for its decisions. *See, e.g., Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43 (An agency's action is arbitrary and capricious if it offers "an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) ("[W]hile its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court."). Commerce's *Final Determination* critiques multiple aspects of Linyi Chengen's calculations of its log supply, but fails to explain how the record, particularly the verification report and related exhibits, supports Commerce's conclusion that Linyi Chengen's log consumption calculations were unreliable.

For instance, Commerce determined that Linyi Chengen's method to measure its logs and its conversion table and formula were problematic. *See* Final IDM at 24–25. Commerce stated that the company's calculations were "inherently imprecise," and doubted whether the conversion table and formula used was the Chinese National Standard, as Linyi Chengen claimed. *See id.* at 25 ("[T]here is no evidence on the record that supports [Linyi] Chengen's claim that the conversion table and formula used by [Linyi] Chengen elicits the log's actual volume, or that this conversion table and formula is the Chinese National [S]tandard."). The conversion table and formula on the record is partially translated. The eleven Chinese characters at the top of the document allegedly state that it is the Chinese National Standard, but the characters are not translated. *See* Verification Exhibit 26, at 9, CD 628, bar code 3622212–27 (Sept. 22, 2017); *see also* Linyi Chengen's Br. 19. Linyi Chengen claims that the first page of this original document was the title page and had a translated title describing the document as the Chinese National Standard. *See* Linyi Chengen's Br. 19–20. Commerce's verifiers allegedly detached the title page and accepted only the second page with the conversion table

and formula. The court is troubled by the varying accounts of events at verification presented by the Parties.

Commerce found also that it was "unable to cross-check [Linyi] Chengen's reported consumption of poplar against any third-party sources (*e.g.*, supplier invoices)." Final IDM at 25. The *Final Determination* does not address the delivery sheets provided by suppliers ("warehouse-in tickets") or the copies of invoices provided by Linyi Chengen to its suppliers for official value-added tax purposes. *See* [Linyi] Chengen Verification Exhibit 26, at 9, 32–53, CD 628, bar code 3622212–27 (Sept. 22, 2017) (titled "Poplar Log Cost Package Part 1"). There is no explanation on the record as to why Commerce found these documents to be insufficient for the purposes of calculating Linyi Chengen's consumption of poplar logs.

The court concludes that Commerce's *Final Determination* is arbitrary and capricious in light of perceived inconsistencies on the record. The court remands the *Final Determination* for further proceedings consistent with this opinion.

B. Intermediate Input Methodology

Pursuant to the Tariff Act, Commerce may determine that a foreign country "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). In antidumping proceedings involving nonmarket economy countries, such as China, Commerce calculates normal value based on the factors of production used to produce the subject merchandise and other costs and expenses. *Id.* § 1677b(c)(1). Commerce typically must examine the "quantities of raw materials employed" by a company in reviewing factors of production to calculate normal value. *See id.* at § 1677b(c)(3)(B).

In the *Preliminary Determination*, Commerce calculated Linyi Chengen's normal value by applying a surrogate value to the individual factors of production used to produce the subject merchandise, which in this case was logs. Commerce changed its calculation for the *Final Determination* and instead decided to utilize its intermediate input methodology to value Linyi Chengen's factors of production. Under the intermediate input methodology, Commerce calculated Linyi Chengen's normal value by applying a surrogate value to an intermediate input, which in this case was veneers.

Commerce rarely applies its immediate input methodology and has done so only in limited circumstances. *See, e.g., Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 498 (Dep't Commerce Jan. 31, 2003) (notice of final antidumping duty determi-

nation of sales at less than fair value and affirmative critical circumstances), and accompanying Issues and Decision Memorandum, at Comment 3 (applying the intermediate input methodology due to problems with upstream data from respondents, such as misreported or unreported factors of production); *Honey from the People's Republic of China*, 71 Fed. Reg. 34,893 (Dep't Commerce June 16, 2006) (final results and final rescission of antidumping duty administrative review), and accompanying Issues and Decision Memorandum, at Comment 9 (valuing the raw honey consumed as opposed to the factors of production used to produce the raw honey because of respondent's inability to accurately record and substantiate the complete costs associated with production); *Fresh Garlic from the People's Republic of China*, 71 Fed. Reg. 26,329 (Dep't Commerce May 4, 2006) (final results and partial rescission of antidumping duty administrative review and final results of new shipper reviews), and accompanying Issues and Decision Memorandum, at Comment 1 (resorting to the intermediate input methodology because respondents were unable to record accurately and substantiate the costs of growing garlic). Commerce has utilized this methodology when the factors of production for the intermediate input accounts for an insignificant share of the total output, and the burden associated with calculating each factor of production outweighs the potential increase of calculation accuracy. *See* Final IDM at 23. Commerce has applied this methodology also when valuing the factors of production associated with producing the intermediate input would result in inaccurate calculations because Commerce is not able to value a significant cost in the overall factors buildup. *See id.*

Linyi Chengen argues that Commerce's determination that Linyi Chengen's log volume reporting was "imprecise" is not supported by substantial evidence on the record. *See* Linyi Chengen's Br. 26–34. Linyi Chengen contends that because Commerce's finding regarding Linyi Chengen's log volume reporting is unsupported by substantial evidence, Commerce had no reason to resort to the intermediate input methodology. *See id.* As stated above, the court is remanding the *Final Determination* for Commerce to reconsider its finding regarding Linyi Chengen's log volume reporting. Because Commerce's findings are subject to change on remand, the court will not rule on this issue at this juncture.

C. Veneer Input Surrogate Values

Commerce chose Romania as the primary surrogate country for this investigation in the *Preliminary Determination*. *See* Prelim. IDM at 16. Linyi Chengen supported Commerce's use of Romanian wood log

surrogate values. *See* Linyi Chengen's Br. 35. Commerce continued to find that Romania was the appropriate primary surrogate country in the *Final Determination*, but because it decided to apply the intermediate input methodology, Commerce utilized the Romanian surrogate value for beech veneer. Linyi Chengen contests Commerce's selection of Romanian beech veneer and argues that the value of beech veneer is "illogically priced and less specific to the input." Linyi Chengen's Br. 35.

When valuing a respondent's factors of production in proceedings involving nonmarket economy countries, Commerce shall use the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1)(B). To the extent possible, Commerce uses factors of production from market economy countries that are: "(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). Commerce's regulatory preference is to "value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2). Commerce's methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See* Imp. Admin., U.S. Dep't Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (Mar. 1, 2004), *available at* http://ia.ita.doc.gov/policy/bull04–1.html (last visited June 3, 2019).

Although Commerce has discretion to determine which evidence is the "best available information," Commerce's findings must be reasonable and supported by substantial evidence on the record. *See Qingdao Sea-Line Trading Co.*, 766 F.3d at 1386; *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). The court examines the information used by the Department by inquiring "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).

Because Commerce's *Final Determination* is subject to change on remand, including the application of the intermediate input methodology, the court reserves its decision on this issue.

II. Separate Rate Respondents' Rule 56.2 Motions for Judgment on the Agency Record

Commerce assigned a separate weighted average dumping margin to every company that was not individually examined in the investi-

gation. Commerce based the separate rate on Linyi Chengen's weighted-average dumping margin. The Separate Rate Respondents each filed their own Rule 56.2 motions for judgment on the agency record. *See* Mot. J. Agency R. Consol. Pls. Zhejiang Dehua TB Imp. & Exp. Co., Ltd., et al., July 20, 2018, ECF No. 33; Consol. Separate Rate Pls.' Rule 56.2 Mot. J. Agency R., July 20, 2018, ECF No. 34; Rule 56.2 Mot. J. Agency R. Consol. Pls. Taraca Pacific, Inc., Canusa Wood Products Ltd., Concannon Corp. DBA Concannon Lumber Company, Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc. Richmond International Forest Products, LLC & USPly LLC, July 20, 2018, ECF No. 35. The Separate Rate Respondents adopt Linyi Chengen's Rule 56.2 motion in full and contend that any changes to Linyi Chengen's weighted average dumping margin as a result of this litigation requires Commerce to recalculate the rate applied to the Separate Rate Respondents. Because the court remands the *Final Determination* with respect to Commerce's calculation of Linyi Chengen's rate, as stated above, the court grants the Separate Rate Respondents' Rule 56.2 motions for judgment on the agency record. Commerce is instructed on remand to reconsider the rate applied to the Separate Rate Respondents based on any changes to Linyi Chengen's margin on remand.

III. Bayley's Rule 56.2 Motion for Judgment on the Agency Record

A. Commerce's Application of AFA to Bayley

Section 776 of the Tariff Act provides that if "necessary information is not available on the record" or if a respondent "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," then the agency shall "use the facts otherwise available in reaching" its determination. 19 U.S.C. § 1677e(a)(1), (a)(2)(B). If the Department finds further that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" from the agency, then the Department "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1)(A). The U.S. Court of Appeals for the Federal Circuit has interpreted these two subsections to have different purposes. *See Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014). Subsection (a) applies "whether or not any party has failed to cooperate fully with the agency in its inquiry." *Id.* (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011)). On the

other hand, subsection (b) applies only when the Department makes a separate determination that the respondent failed to cooperate "by not acting to the best of its ability." *Id.* (quoting *Zhejiang DunAn Hetian Metal Co.*, 652 F.3d at 1346).

When determining whether a respondent has complied to the "best of its ability," Commerce "assess[es] 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 v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). This finding requires both an objective and subjective showing. *Id.* Commerce must determine objectively "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.* (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002)). Next, Commerce must demonstrate subjectively 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. Adverse inferences are not warranted "merely from a failure to respond," but rather in instances when the Department reasonably expected that "more forthcoming responses should have been made." *Id.* at 1383. "The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent." *Id.*

Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record when making an adverse inference. *See* 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c). Respondents should be forthcoming with information, regardless of their views on relevancy, in the event the agency finds differently. *See POSCO v. United States*, 42 CIT __, __, 296 F. Supp. 3d 1320, 1340–41 (citing *Essar Steel Ltd. v. United States*, 34 CIT 1057, 1073, 721 F. Supp. 2d 1285, 1299 (2010)).

B. Commerce's Affiliation Determination

Commerce found that Bayley "failed to cooperate by not acting to the best of its ability to comply" with the Department's requests for information by not disclosing the full extent of its affiliations as required by the initial questionnaire. Final IDM at 13; *see also* Prelim. IDM at 25– 31; Dep't Initial Antidumping Questionnaire at A-12, PD 149, bar code 3535284–01 (Jan. 9, 2017) (instructing the compa-

nies to provide affiliation information). Bayley contends that the Department's application of AFA because of its alleged affiliation with one of its customers, Shelter Forest International Acquisition Inc. ("Shelter" or "SFIA"), is unsupported by substantial evidence. *See* Bayley's Br. 14–16. Bayley contends that Commerce relied on (1) inconclusive information that Petitioner placed on the record from an antidumping investigation on hardwood plywood that took place in 2012 ("Plywood I")[2], (2) discredited information from a cached webpage, and (3) conjecture on the relationship between two U.S. companies. *Id.* at 3.

Bayley attempted to rebut the evidence Petitioner placed on the record by arguing that SFIA is not the same company as that operating in 2012. *See* Prelim. IDM at 27; *see also* Bayley Rebuttal to Petitioners' March 20, 2017 Comments on Bayley Questionnaire at 7, PD 446, bar code 3559726–01 (Apr. 3, 2017). Bayley stated that the Plywood I documents refer to Shelter Forest International, Inc. ("SFII"), which is a different company than that at issue in this investigation. *See* Prelim. IDM at 27; *see also* Bayley Rebuttal to Petitioners' March 20, 2017 Comments on Bayley Questionnaire at 4, PD 446, bar code 3559726–01 (Apr. 3, 2017). Bayley placed each company's business registration with the Oregon Secretary of State on the record, arguing that the two companies are different because the registrations show two different companies with two different addresses. *See* Prelim. IDM at 28. Commerce made a "full examination of the business registration documents that are publicly available" and found that Bayley failed to provide available attachments showing that the president of both Shelter companies is the same person, supporting a finding of affiliation. *See* Prelim. IDM at 28–29; *see also* Dep't Memorandum re: Shelter International Corporate Documents, PD 736, bar code 3582562–01 (June 16, 2017).

The court finds that it was reasonable for Commerce to suspect that Bayley failed to provide Commerce with information at the outset of the investigation, based on the evidence on the record. After investigating Bayley's rebuttal evidence further, Commerce found substantial evidence that Bayley and Shelter are affiliated. The court concludes that Commerce's decision to apply AFA was reasonable. *See Nippon Steel*, 337 F.3d at 1383 (holding that "intentional conduct, such as deliberate concealment or inaccurate reporting" shows a failure to cooperate); *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (finding that "[p]roviding false information and failing to produce key documents unequivocally" shows that respon-

[2] *See Hardwood Plywood from China*, 78 Fed. Reg. 76,857 (Int'l Trade Comm. Dec. 19, 2013) (determinations).

dent "did not put forth its maximum effort"); *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360 (Fed. Cir. 2017) (concluding that substantial evidence supports Commerce's decision to apply AFA where respondent failed to provide information requested by Commerce and "never claimed that it was unable to provide" the information). The court concludes that Commerce's decision to apply AFA to Bayley for failure to disclose the full extent of its affiliations is supported by substantial evidence.

C. Commerce's Decision to Not Verify Bayley's Questionnaire Responses

Commerce "shall verify all information relied upon in making a final determination in an investigation." 19 U.S.C. § 1677m(i)(1); *see also* 19 C.F.R. § 351.307(b). At verification, Commerce employees "will request access to all files, records, and personnel which the Secretary considers relevant to factual information submitted of: [] producers, exporters, or importers." 19 C.F.R. § 351.307. Commerce need not consider information submitted by an interested party if the information "is so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." 19 U.S.C. § 1677m(e)(3).

Bayley contends that Commerce should have verified its questionnaire responses. *See* Bayley's Br. 30. Bayley contends also that Commerce should have verified the evidence Petitioner put on the record, including the documents from Plywood I, the cached website information, and Bayley's alleged affiliations with other Chinese producers, once Bayley denied any affiliation with Shelter. *See id.* This is incorrect. Because Commerce did not rely upon Bayley's questionnaires, it did not need to verify them. The evidence that Petitioner placed on the record was not their own and therefore there were no "files, records, and personnel" that Commerce could request from Petitioner to verify it. Commerce considered the evidence to find it was reasonable to suspect Bayley's responses were "so incomplete" as to not "serve as a reliable basis for reaching the applicable determination." Bayley had the burden to rebut this presumption and it was not able to do so. The court concludes that Commerce's decision not to verify both Bayley's questionnaire responses and the evidence the Petitioner put on the record is in accordance with the law.

D. Commerce's Failure to Issue an Additional Questionnaire to Bayley

If Commerce "determines that a response to a request for information . . . does not comply with the request," Commerce "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." 19 U.S.C. § 1677m(d). Commerce "satisf[ies] its obligations under section 1677m(d) when it issue[s] a supplemental questionnaire specifically pointing out and requesting clarification of [the party's] deficient responses." *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007). "[N]othing in the [language of the statute] compels Commerce to treat intentionally incomplete data as a 'deficiency' and then to give a party that has intentionally submitted incomplete data an opportunity to 'remedy' as well as to 'explain.'" *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016), *cert. denied*, 138 S. Ct. 555 (2017).

During the investigation, Commerce's initial questionnaire requested that Bayley report all affiliated and cross-owned companies. *See* Dep't Initial Antidumping Questionnaire at A-12, PD 149, bar code 3535284–01 (Jan. 9, 2017). Bayley reported that it was partially-owned by Person A and majority-owned by Person B, a husband and wife. *See* Prelim. IDM at 25. Bayley originally did not list Company D as an affiliate. *See id.* at 30; *see also* Bayley Section A Questionnaire Response at 14, PD 307, bar code 3543235–01 (Feb. 13, 2017). Commerce discovered that Bayley failed to report an additional affiliate, Company D, based on publicly available information in the companion countervailing duty investigation. *See* Prelim. IDM at 30. Company D manufacturers an input used in hardwood plywood production and is wholly-owned by Person C, the father-in-law of Person A and father of Person B. *See id.* Bayley argued that it reported all suppliers in this investigation, but Commerce concluded that it did "not change the fact that Company D represents an affiliate that should have been reported. By not reporting Company D on the record of this investigation, Bayley withheld necessary information that was requested." Final IDM at 15.

Bayley contends that Commerce's (1) refusal to consider Company D's questionnaire response; (2) refusal to issue Bayley a supplemental questionnaire; and (3) refusal to consider the information Bayley offered to clarify its lack of affiliations, are not in accordance with the law. *See* Bayley's Br. 29–43. The record evidence establishes that Bayley intentionally submitted incomplete information to Commerce regarding its affiliations because it did not report Company D as an affiliated company. *See* 19 U.S.C. § 1677(33)(A) (providing that "the following persons shall be considered to be 'affiliated' or 'affiliated persons': [m]embers of a family, including . . . lineal descendants."). The court finds that Commerce's conclusion that Bayley provided incomplete information was reasonable because under United States law, Bayley should have provided information about the affiliated

relationship of Person C and Person B who are lineal descendants. Commerce satisfied its burden under section 1677m(d) both to inform Bayley that Bayley's affiliation response was deficient and to allow Bayley to correct its response after Commerce issued the first supplemental questionnaire. *See NSK Ltd.*, 481 F.3d at 1360 n.1. Bayley contends also that Commerce must provide a party with an opportunity to remedy or explain a deficiency "regardless of whether the Department, the respondent, or any other party first brings such a deficiency to the Department's" attention. Bayley's Br. 33; *see also* 19 U.S.C. § 1677m(d). Bayley relies on *China Kingdom Import & Export Co. Ltd v. United States*, 31 CIT 1329, 507 F. Supp. 2d 1337 (2007), as support for this proposition. Commerce applied AFA for failure to comply after Bayley did not include all affiliation information in response to the initial questionnaire and first supplemental questionnaire and it therefore did not need to consider Bayley's submission regarding Company D.

Bayley contends further that Commerce's disregard of Bayley's proffered information regarding Company D is arbitrary and capricious. *See* Bayley's Br. 41–43. Commerce addressed Bayley's argument that it reported all suppliers in this antidumping investigation as opposed to the parallel countervailing duty investigation and noted that "this does not change the fact that Company D represents an affiliate that should have been reported. By not reporting Company D on the record of this investigation, Bayley has withheld necessary information that was requested." Final IDM at 15. Commerce requested information from Bayley, which Bayley withheld at the outset. It was reasonable for Commerce to rebuff Bayley's later attempts because of Bayley's failure to cooperate and comply with Commerce's requests, and the court finds that Commerce's decision here was not arbitrary and capricious.

CONCLUSION

For the aforementioned reasons, the court concludes that:

1. Commerce's actions regarding the administrative record were arbitrary and capricious;
2. Commerce's application of the intermediate methodology is reserved for remand;
3. Commerce's valuation of veneer inputs is reserved for remand;
4. Commerce's calculation of the antidumping margins assigned to Consolidated Plaintiffs and other separate rate respondents should be reconsidered on remand based on any changes to Linyi Chengen's margin on remand;

5. Commerce's determination to apply AFA to Bayley regarding an alleged affiliation with one of its customers was supported by substantial evidence and in accordance with the law;
6. Commerce's decision not to conduct verification on Bayley is supported by substantial evidence and in accordance with the law; and
7. Commerce's actions regarding Bayley's affiliation with Company D is in accordance with the law and not arbitrary and capricious.

Commerce's *Final Determination* is sustained in part and remanded in part. Accordingly, it is hereby

ORDERED that Commerce's *Final Determination* is remanded for further proceedings consistent with this opinion; and it is further

ORDERED that Commerce shall file the remand redetermination on or before August 2, 2019; and it is further

ORDERED that Commerce shall file the administrative record on the remand redetermination on or before August 16, 2019; and it is further

ORDERED that the Parties shall file comments in opposition to the remand redetermination on or before September 3, 2019; and it is further

ORDERED that the Parties shall file comments in support of the remand redetermination on or before October 3, 2019; and it is further

ORDERED that the joint appendix on the remand redetermination shall be filed on or before October 17, 2019.

Dated: June 3, 2019
New York, New York

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

Slip Op. 19–68

TABACOS USA, INC., Plaintiff, v. UNITED STATES CUSTOMS AND BORDER PROTECTION, Defendant.

Court No. 18–00221

[Defendant's motion for rehearing or reconsideration denied.]

Dated: June 6, 2019

Shanshan Liang and *Neil B. Mooney*, Pennington P.A., of Tallahassee, FL, for the plaintiff.

Joseph H. Hunt, Assistant Attorney General, and *Amy M. Rubin*, Assistant Director, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Hardeep K. Josan* and *Monica P. Triana*, Trial Attorneys of New

York, NY; and *Paula S. Smith* and *Benjamin Wastler*, Office of Chief Counsel, U.S. Customs and Border Protection, of counsel, for the defendant.

Memorandum & Order

AQUILINO, Senior Judge:

Judgment entered in this case pursuant to the court's slip opinion 18–170, 42 CIT ____ (2018), familiarity with which is presumed, vacating defendant's letter dated September 28, 2018, demanding that the plaintiff terminate continuous bond number 18C000D1D in the amount of $300,000 and post a new continuous bond in the amount of $400,000. The defendant has responded with a motion for rehearing or reconsideration, withdrawing and vacating slip opinion 18–170 and reinstating defendant's demand of September 28, 2018.

The motion alleges that the court committed two errors, first that it relied on facts adduced at the hearing on plaintiff's plea for immediate injunctive relief instead of on the record developed before the administrative agency and second that it misapplied the legal standard of review. The court thereupon ordered the defendant to submit by April 22, 2019 "whatever CBP administrative record may shed additional light on plaintiff's continuous entry bond number 18C000D1D, including the standing thereof on that terminal date."

The defendant has complied under certification of April 29, 2019 by its Director of the Revenue Division, Office of Finance, that eight documents "constitute the administrative record for the decision challenged in this case." The court has reviewed them and finds nothing of moment therein that would have had a different impact on the trial herein. Defendant's Director further declares:

> 4. Pursuant to the temporary restraining order issued by this court on October 29, 2018, CBP issued a letter to Tabacos on October 30, 2018 staying the effectiveness of its September 28, 2018 bond insufficiency letter until further notice. Bond No. 18C000D1D became effective on April 23, 2018, and it currently remains active and valid at $300,000. Bond No. 18C000D1D will roll over into the next annual bond period unless terminated by the surety or the principal. CBP has received no information regarding this bond from Tabacos or the surety since the issuance of the October 30, 2018 letter.

Indeed, the court understood at the time of trial, and understands now, that the underlying "annual bond period" has been April 23, 2018 to April 22, 2019. This being the case, the equitable relief granted the plaintiff may have expired, and the parties may therefore

be at liberty to proceed as their current circumstances and the governing law now dictate. For an injunction becomes moot when the passage of time or a change in circumstances undermines its basis. *See, e.g.*, *Forbes v. Ark. Educ. Television Comm'n Network Found.*, 982 F.2d 289 (8th Cir. 1992).

Ergo, defendant's motion for rehearing or reconsideration can be, and it hereby is, denied.

So ordered.

Dated: New York, New York
June 6, 2019

/s Thomas J. Aquilino, Jr.
SENIOR JUDGE