U.S. Court of International Trade

Slip Op. 19–24

HYUNDAI STEEL COMPANY, Plaintiff, v. UNITED STATES, Defendant, and AK STEEL CORPORATION, STEEL DYNAMICS, INC., ARCELORMITTAL USA LLC, NUCOR CORPORATION, UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 16–00228

[Sustaining the U.S. Department of Commerce's Remand Redetermination in the antidumping duty investigation of certain cold-rolled steel flat products from the Republic of Korea.]

Dated: February 26, 2019

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

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

Roger B. Schagrin and *Christopher T. Cloutier*, Schagrin Associates, of Washington, DC, for Defendant-Intervenor Steel Dynamics, Inc.

Paul C. Rosenthal, *R. Alan Luberda*, *Kathleen W. Cannon*, *Grace W. Kim*, and *Joshua R. Morey*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenor ArcelorMittal LLC.

Alan H. Price, *Timothy C. Brightbill*, and *Chris B. Weld*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Nucor Corporation

Thomas M. Beline, *Jack A. Levy*, and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Defendant-Intervenor United States Steel Corporation.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination upon remand in the antidumping duty investigation of certain cold-rolled steel flat products from the Republic of Korea. *See* Confidential Final Results of Redetermination Pursuant to Court Remand ("Remand Redetermination"), ECF No. 88–1; *see also Hyundai Steel Co. v. United States*, 42 CIT __, 319 F. Supp. 3d 1327, 1357 (2018).[1]

[1] *Hyundai Steel*, 319 F. Supp. 3d 1327 contains background information on this case, familiarity with which is presumed.

Plaintiff Hyundai Steel Company ("Plaintiff" or "Hyundai Steel") initiated this action challenging certain aspects of Commerce's final determination. *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 49,953 (Dep't Commerce July 29, 2016) (final determination of sales at less than fair value) ("*Final Determination*"), ECF No. 39–3, and the accompanying Issues and Decision Mem., A-580–881 (July 20, 2016) ("I&D Mem."), ECF No. 39–2;[2] Compl., ECF No. 8. Plaintiff challenged Commerce's decision to use the facts available with an adverse inference (otherwise referred to as "adverse facts available" or "AFA") to adjust Plaintiff's reported expenses for home market inland freight and warehousing, international freight, and U.S. inland freight on the basis that Plaintiff withheld information requested by Commerce and failed to demonstrate the arm's length nature of the freight and warehousing transactions with its affiliated service providers. *See* Confidential Mem. in Supp. of Pl. Hyundai Steel Co.'s Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Rule 56.2 Br.") at 17–32, ECF No. 47; I&D Mem. at 74. Plaintiff further challenged Commerce's decision to use partial AFA with respect to four specifications of products for which it found that Plaintiff and its U.S. subsidiary reported inaccurate, inconsistent, or unverifiable control numbers ("CONNUMs").[3] Pl.'s Rule 56.2 Br. at 32–40; I&D Mem. at 63. Additionally, Plaintiff challenged Commerce's decision to deny Plaintiff a constructed export price ("CEP") offset on the basis that Plaintiff's home market level of trade was not more advanced than its U.S. level of trade. Pl.'s Rule 56.2 Br. at 40–45; I&D Mem. at 87–89.

On June 28, 2018, the court sustained the agency's *Final Determination*, in part, and remanded four aspects. *See Hyundai Steel*, 319 F. Supp. 3d at 1357. First, while the court affirmed Commerce's use of AFA to adjust Plaintiff's reported inland freight expenses, the court remanded Commerce's decision for the agency to explain whether the AFA adjustment encompassed transactions for which Plaintiff did not incur the expense and those for which Plaintiff used unaffiliated

[2] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 39–5, and a Confidential Administrative Record ("CR"), ECF No. 39–4. The administrative record associated with the Remand Redetermination is contained in a Confidential Remand Administrative Record ("CRR"), ECF No. 90–1, and a Public Remand Administrative Record ("PRR"), ECF No. 90–2. Parties submitted joint appendices containing record documents cited in their Remand briefs. *See* Confidential Remand J.A. ("CRJA"), ECF Nos. 99 (tabs 1–13), 99–1 (tabs 14–18); Public Remand J.A. ("PRJA"), ECF No. 100. Citations are to the confidential joint appendices unless stated otherwise.

[3] In antidumping duty proceedings, Commerce uses CONNUMs to identify the individual models of products to match U.S. and home market sales.

freight providers and, if so, why. *See id.* at 1349, 1357. Second, the court remanded Commerce's selection of an AFA margin for one specification of products ("Spec C" sales) and directed the agency to select a margin that is not based on an aberrational sale.[4] *Id.* at 1356, 1357. Third, the court remanded for reconsideration Commerce's determination to deny Plaintiff a CEP offset. *Id.* at 1356–57. Lastly, the court directed the agency to reconsider whether to correct ministerial errors that it previously found to have no effect on Plaintiff's weighted-average dumping margin. *Id.* at 1337 & n.6, 1357.

On October 17, 2018, Commerce filed its Remand Redetermination. Therein, Commerce found that the use of AFA for U.S. sales for which Plaintiff did not incur domestic inland freight was inappropriate; found that the use of AFA for U.S. sales for which Plaintiff incurred domestic inland freight—whether from an affiliated or unaffiliated freight provider—was warranted because it was not possible to distinguish freight providers based on the record before the agency; selected the second highest calculated margin for Hyundai Steel as the AFA margin for Plaintiff's Spec C sales; continued to deny Plaintiff a CEP offset; and determined that the ministerial errors continue to have no effect on Plaintiff's margin calculation. Remand Redetermination at 6–12.

Plaintiff filed comments on the Remand Redetermination opposing Commerce's AFA adjustment for sales involving domestic inland freight services provided by an unaffiliated freight provider and the agency's denial of a CEP offset. Confidential Hyundai Steel Co.'s Comments on Remand ("Pl.'s Opp'n Cmts.") 1, ECF No. 91. Defendant United States and Defendant-Intervenors[5] support the Remand Redetermination. *See* Confidential Def.'s Resp. to Comments on Remand Redetermination, ECF No. 97; Confidential Def.-Ints.' Comments on Remand, ECF No. 95. For the reasons discussed below, the Remand Redetermination is sustained.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[6] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in ac-

[4] "Spec C" sales are U.S. sales that Hyundai Steel reported as commercial quality, but the agency determined were either drawing or deep drawing quality. *Hyundai Steel*, 319 F. Supp. 3d at 1350.

[5] AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, Steel Dynamics, Inc., and United States Steel Corporation.

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

cordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams, Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (internal quotation marks and citation omitted).

DISCUSSION

I. AFA Adjustment to Domestic Inland Freight Expenses

A. Commerce's Remand Redetermination and Plaintiff's Challenges Thereto

On remand, Commerce reconsidered its use of AFA to adjust the freight amounts for Plaintiff's U.S. sales. Remand Redetermination at 6. With respect to those sales for which Plaintiff procured domestic inland freight from unaffiliated freight providers, Commerce determined that there was "no information to establish the percentage of freight charges that were provided by unaffiliated [versus] affiliated suppliers." *Id.* at 7. The freight documentation that Hyundai Steel provided in its initial and supplemental questionnaire responses did not delineate the amount of freight services procured from unaffiliated providers. *Id.* at 7 & nn.33–34 (citing Hyundai Steel's Sec. C Resp. (Nov. 9, 2015) ("Sec. C Resp.") at C-27, CR 113, PR 173, CRJA Tab 9, PRJA Tab 9; Hyundai Steel's Suppl. Sec. B and C Resp. (Dec. 15, 2015) ("Suppl. Sec. B & C Resp.") at 21 & Ex. S-26, CR 191, PR 228, CRJA Tab 11, PRJA Tab 11; Hyundai Steel's Second Suppl. Sec. B and C Resp. (Feb. 2, 2016) ("2nd Suppl. Sec. B and C Resp.") at Ex. 2, CR 288, PR 282, CRJA Tab 12, PRJA Tab 12). Commerce considered Plaintiff's assertion that Plaintiff procured freight services from an affiliated freight provider only for sales originating from its Suncheon plant.[7] *Id.* at 7. Commerce determined, however, that record evidence showed that Plaintiff's affiliated freight provider "was involved in freight logistics planning at both [of] Hyundai [Steel]'s . . . plants." *Id.* at 7 & nn.36–37 (citing Sec. C Resp. at C-27). Moreover, the record did not allow Commerce to determine the percentage of freight charges provided by unaffiliated providers. Consequently, Commerce was unable to reduce the AFA freight adjustment to account for unaffiliated domestic inland freight. *Id.* at 7–8.

Plaintiff contends that Commerce has contravened the remand order by failing to justify its use of AFA in circumstances in which

[7] Plaintiff had two manufacturing plants: the Suncheon plant and Dangjin plant. Remand Redetermination at 7.

Hyundai Steel procured domestic inland freight from unaffiliated providers. Pl.'s Opp'n Cmts. at 1–2, 6–7, 10. Plaintiff also challenges Commerce's conclusions as unsupported by substantial evidence. *Id.* at 7–12. Moreover, Plaintiff contends that record evidence establishes the percentage amount of freight transactions with its affiliate. *Id.* at 12–13.

B. Commerce's Remand Redetermination is Sustained

As a threshold matter, Commerce complied with the court's remand order. In analyzing the reasonableness of Commerce's AFA adjustments to Hyundai Steel's freight and warehousing expenses, the court stated:

> with respect to Hyundai Steel's arguments that Commerce incorrectly applied AFA with respect to sales for which Plaintiff did not incur domestic inland freight from plant to port or used an unaffiliated freight provider, . . . Commerce has not articulated any justification for this application of AFA and the court cannot provide a justification for the agency. Consequently, the court will remand this limited aspect of Commerce's application of AFA to the agency for reconsideration or further explanation.

Hyundai Steel, 319 F. Supp. 3d at 1349. The court ordered Commerce to "reconsider or further explain its application of AFA for domestic inland freight expenses on transactions that incurred no foreign inland freight and on transactions for which domestic inland freight was provided by an unaffiliated freight provider." *Id.* at 1357. On remand, Commerce found its use of AFA in connection with transactions that incurred no foreign inland freight to be inappropriate and explained that, with regard to the use of unaffiliated freight providers, Hyundai Steel had not documented which sales, or what percentage of sales, used an unaffiliated freight provider. Remand Redetermination at 6–8. Thus, in compliance with the remand order, Commerce reconsidered and further explained its use of AFA concerning domestic inland freight.

Substantial evidence supports Commerce's finding that the record did not establish for which sales, or what percentage of freight services, Hyundai Steel used unaffiliated freight providers. In its Section C questionnaire response, Plaintiff reported that during the period of investigation ("POI"), it "transported merchandise by truck using an affiliated general logistics company, [Plaintiff's affiliate]," and that it "calculated the freight expenses amounts based on the contract prices [Plaintiff's affiliate] charged during the POI." Sec. C Resp. at C-27. Plaintiff did not indicate that its affiliate provided freight services only for the Suncheon plant, nor did Plaintiff reference any unaffili-

ated freight providers in this narrative response. This statement led Commerce to find that Plaintiff's affiliated freight provider was involved in U.S. sales for merchandise shipped from both the Suncheon and Dangjin plants to the port of exportation. Remand Redetermination at 7 & nn.36–37 (citing Sec. C Resp. at C-27).

Commerce recognized that Hyundai Steel may have used unaffiliated freight providers, but it could not ascertain the percentage of freight charges incurred from unaffiliated providers at either plant in order to limit the AFA adjustment accordingly. *See id.* at 7 & nn.33–34 (citing Sec. C Resp. at C-27; Suppl. Sec. B & C Resp. at 21 & Ex. S-26; 2nd Suppl. Sec. B and C Resp. at Ex. 2).[8] Plaintiff's arguments that the record establishes that Hyundai Steel procured freight services from its affiliate exclusively at its Suncheon plant, and that Commerce should have used the AFA adjustment limited to the percentage of sales originating from this plant are unavailing. *See* Pl.'s Opp'n Cmts. at 12–13. Plaintiff references a finding in the verification report wherein Commerce noted that "[Hyundai Steel] stated the only non-[Plaintiff's affiliate] freight provision involved the freight from the Dangjin plant to the Dangjin port." *Id.* at 12 (citing Hyundai Steel Sales Verification Report (May 26, 2016) ("Sales Verification Report") at 39, CR 598, PR 347, CRJA Tab 13, PRJA Tab 13). This statement, however, concerned a single sample sale. Sales Verification Report at 39. As Plaintiff acknowledges, Commerce did not verify that Plaintiff used unaffiliated freight providers for all shipments from the Dangjin plant to the port. *See* Pl.'s Opp'n Cmts. at 12.

Similarly, Plaintiff points to sample freight documentation that it provided to Commerce in Exhibit S-26 of its supplemental section B and C questionnaire response. *Id.* at 8–9, 10. That exhibit was submitted in response to Commerce's request for documentation regarding Plaintiff's freight transactions *with Plaintiff's affiliated freight provider* for shipments of subject merchandise from each plant to each port of exportation. *See* Suppl. Sec. B & C Resp. at 21. Exhibit S-26 is only partially translated and does not appear to indicate whether the freight provider was affiliated with Hyundai Steel. *See id.*, Ex. S-26. In any case, the record evidence indicating that Hyundai Steel's affiliated freight provider was involved in some shipments

[8] With respect to Exhibit 2 of Plaintiff's February 2, 2016 supplemental questionnaire response, while Plaintiff argues that the freight summary contained therein pertains to "*freight from the factory to warehouse and not factory to port*," Pl.'s Opp'n Cmts. at 9, the exhibit indicates that Plaintiff made payments to its affiliate for shipments from the Dangjin plant to the Dangjin port, *see* 2nd Suppl. Sec. B and C Resp, at 2–3 & Ex. 2 at ECF p. 184 (showing departures from "Dangjin" and destinations to "Dangjin (A dock)" and "Dangjin Godae dock").

from both plants, combined with a lack of documentation of what percentage of shipments utilized unaffiliated freight providers, is sufficient to support Commerce's determination that it could not adjust its use of AFA to account for the use of unaffiliated freight providers.[9]

II. CEP Offset

A. Legal Framework

Commerce must establish normal value "to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i). The U.S. Court of Appeals for the Federal Circuit has construed the term "same level of trade" to mean "comparable marketing stages in the home and United States markets." *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1305 (Fed. Cir. 2001). When Commerce is unable to find sales in the home market at the same level of trade as the sales in the U.S. market, it will compare sales at different levels of trade and account for that difference by making a level of trade adjustment or granting a CEP offset, depending on the circumstances. *See id.*

Commerce makes a level of trade adjustment when the difference in the level of trade "(i) involves the performance of different selling activities; and (ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between the sales at the different levels of trade." 19 U.S.C. § 1677b(a)(7)(A); *see also* 19 C.F.R. § 351.412(a)-(b); *Micron Tech.,* 243 F.3d at 1305. When the home market level of trade constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but Commerce lacks enough data to determine whether the difference affects price comparability, Commerce will grant a CEP offset. *See* 19 U.S.C. § 1677b(7)(B); 19 C.F.R. § 351.412(f); *Micron Tech., 243* F.3d at 1305. Commerce grants a CEP offset by deducting the indirect selling expenses included in the normal value "up to the amount of indirect selling expenses deducted in determining constructed export price." 19 C.F.R. § 351.412(f); *see also* 19 U.S.C. § 1677b(a)(7)(B).

The party seeking a CEP offset bears the burden of establishing that the differences in selling functions performed in the home and

[9] Moreover, Plaintiff's response to Commerce's request for documentation regarding Plaintiff's freight transactions with its affiliate indicated that Plaintiff's affiliate provided inland freight from both of its plants. Suppl. Sec. B & C Resp. at 21 (stating "Hyundai Steel provides the requested documents at Exhibit S-26 (Dangjin Factory to Dangjin Port) and Exhibit S-27 (Suncheon Factory to Dangjin Port)").

U.S. markets are "substantial." *Sucocitrico Cutrale Ltda. v. United States*, Slip-Op. 12–71, 2012 WL 2317764, at *5 (CIT June 1, 2012);[10] *see also* 19 C.F.R. § 351.401(b) (the burden of establishing entitlement to a particular adjustment rests with the party in possession of the relevant information).

B. The Court's Remand Order and Commerce's Remand Redetermination

In the *Final Determination*, Commerce examined the four selling function categories that it typically considers when analyzing whether to grant a CEP offset: (1) sales and marketing; (2) freight and delivery services; (3) inventory maintenance and warehousing; and (4) warranty and technical support. I&D Mem. at 87. With respect to the U.S. market, Plaintiff made sales through three channels of distribution: EP sales through unaffiliated Korean distributors (Channel 1); CEP sales through its affiliates—Hyundai Steel America, Hyundai Corporation, and HCUSA—to unaffiliated processors (Channel 2); and CEP sales through its affiliate Hyundai Steel America to unaffiliated and affiliated processors (Channel 3). *Id.* Plaintiff performed selling functions in all four categories at the same relative level of intensity for its U.S. sales through Channels 1 and 3. *Id.* at 88. Commerce also determined that Plaintiff's sales to the home market were made at the same level of trade as Plaintiff's U.S. sales through Channels 1 and 3. *Id.* With respect to Plaintiff's Channel 2 U.S. sales, Commerce determined that Plaintiff provided selling functions in only three of the four selling categories—sales and marketing; freight and delivery services; and inventory maintenance and warehousing—and found that they were at a less advanced level of trade than Channel 1 and Channel 3 sales. *Id.* This finding notwithstanding, Commerce concluded that

> Hyundai Steel's home market sales during the POI were made at a same [level of trade] as its CEP sales. Also, Hyundai Steel's home market [level of trade] is not at a more advanced stage of distribution than its CEP [level of trade] through Channels 1, 2, and 3, and thus, no [level of trade] adjustment is possible. Consequently, there is no basis for considering a CEP offset with

[10] Pursuant to Commerce's regulations,

> The [agency] will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing.

19 C.F.R. § 351.412(c)(2).

> respect to Hyundai Steel. Accordingly, we have not granted a CEP offset, pursuant to section [19 U.S.C. 1677b(a)(7)(B)].

Id. at 89. The court remanded Commerce's conclusion as internally inconsistent in its treatment of sales through Channel 2. *Hyundai Steel*, 319 F. Supp. 3d at 1357.

On remand, Commerce re-examined the record and concluded that all three of Plaintiff's U.S. sale channels represent the same level of trade. Remand Redetermination at 10. Commerce explained that although it had concluded in the *Final Determination* that, for Channel 2 sales, Plaintiff did not provide selling functions in the fourth category—warranty and technical support—on remand, it found that Plaintiff "did, in fact, report that it provided technical assistance for its Channel 2 U.S. sales, as well as its Channel 1 and Channel 3 U.S. sales." *Id.* at 11. On that basis, Commerce found that Hyundai Steel's U.S. sales through Channels 1, 2, and 3 were all at the same level of trade and, when compared to Plaintiff's home market level of trade, there was "no meaningful difference." *Id.* at 11–12.

C. Commerce's Remand Redetermination is Sustained

Plaintiff argues that Commerce erred in declining to provide a CEP offset for Channel 2 sales because "the record confirms that U.S. Channel 2 is at a less advanced level of trade than the remaining channels." Pl.'s Opp'n Cmts. at 14. Plaintiff asserts that it performs "minimal selling functions" for its Channel 2 U.S. sales because "HCUSA performs the bulk of these selling functions." *Id.* Moreover, Plaintiff asserts that Commerce "overstates the extent of the [category 4] services in [Channel 2] as there are no warranty services." *Id.* at 14–15.

Here, Commerce determined that Plaintiff performed selling functions across all four categories and determined that any differences in those categories were minimal. Remand Redetermination at 11–12. Substantial evidence supports that finding. *See* Hyundai Steel Suppl. Sec. A Resp. (Nov. 18, 2015) ("Sec. A Resp."), Ex. SA-13, CR 142, PR 195, CJRA Tab 10, PJRA Tab 10 (showing that Plaintiff performed six out of 14 selling functions (spanning across all four categories) for its U.S. Channel 2 sales with the same level of intensity as its home market sales, and although Plaintiff did not provide warranty services in the U.S. market, it provided this service in a low level of intensity in its home market). "The CEP offset provision applies in situations in which there is a substantial difference in the level of

trade." *Sucocitrico Cutrale*, 2012 WL 2317764, at *6 (citing *Micron Tech*, 243 F.3d at 1305). Based on a review of evidence on record, Commerce reasonably concluded that that the differences here were not substantial.

CONCLUSION

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

Dated: February 26, 2019
New York, New York

/s/ *Mark A. Barnett*
JUDGE

Slip Op. 19–25

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

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

[Antidumping duty determination remanded for Commerce to reevaluate application for rate separate from China-wide entity rate]

Dated: February 27, 2019

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

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

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

OPINION AND ORDER

Restani, Judge:

This matter concerns the Department of Commerce's ("Commerce") final results of the fifth administrative review of the antidumping ("AD") duty order on certain steel threaded rod from the People's Republic of China ("PRC"). *Certain Steel Threaded Rod from the People's Republic of China; Final Results of 2013–2014 Antidumping*

Duty Administrative Review, 80 Fed. Reg. 69,938 (Dep't Commerce Nov. 12, 2015) ("Final Results"). Hubbell Power Systems, Inc ("Hubbell"), a U.S. importer of Chinese exporter Gem-Year Industrial Co. Ltd. ("Gem-Year") products, challenges Commerce's rejection of Gem-Year's application for separate rate status and assignment of the 206% PRC-wide rate to Gem-Year. Pl.'s Brief in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2, Doc. No. 33 ("Hubbell Br."). For the reasons stated below, the matter is remanded for Commerce to reconsider Gem-Year's separate rate application and, if it determines that Gem-Year is entitled to a separate rate, to determine that rate.

BACKGROUND

In 2009, Commerce issued an AD duty order on certain steel threaded rod from the PRC. *Certain Steel Threaded Rod from the People's Republic of China: Notice of Antidumping Duty Order*, 74 Fed. Reg. 17,154 (Dep't Commerce Apr. 14, 2009). In response to requests by interested parties, Commerce initiated its fifth administrative review of the order for the period of review ("POR") April 1, 2013 to March 31, 2014. *See Initiation of Antidumping and Countervailing Duty Administrative Review*, 79 Fed. Reg. 30,809 (Dep't Commerce May 29, 2014) ("Initiation Notice"). Commerce selected exporter Gem-Year as one of two mandatory respondents for the review. *See Issues & Decision Mem. for the Final Results of the Fifth Administrative Review of the Antidumping Duty Order on Certain Steel Threaded Rod from the People's Republic of China, 2013–2014*, at 1, A-570–932, POR: 4/1/2013–3/31/2014 (Dep't Commerce Nov. 3, 2015) ("*I&D Memo*"). During the review, however, Commerce found that Gem-Year had "failed to cooperate by not acting to the best of its ability," because it did not provide Commerce with "full and complete answers" to its inquiries. *Id.* at 27. Commerce highlighted Gem-Year's inadequate information regarding various factors of production ("FOPs") and late disclosure that its affiliate, Jinn-Well Auto Parts (Zhejiang) Co. Ltd. ("Jinn-Well"), had likely produced in-scope merchandise.[1] *Id.* at 9–28. Commerce claimed that to properly conduct a separate rate analysis it needed to examine not only Gem-Year's corporate structure, but also the operations of its affiliated manufac-

[1] At the administrative level, Gem-Year disputed whether the merchandise was in fact within the scope of the AD duty order, *see* Case Brief of Gem-Year, C.R. 551, 14–16 (June 22, 2015) ("Gem-Year Case Brief"), [[

]]; *see also I&D Memo* at 21–22 (stating that the products are within scope and noting Gem-Year's objection). Hubbell "takes no position" on this matter, Hubbell Br. at 5 n. 3., so the court will assume for its purposes that the products fell within the scope of the AD duty order.

turers of in-scope merchandise–Jinn-Well and Gem-Duo. *Id.* at 27. Although Commerce apparently knew that both Gem-Duo and Jinn-Well existed, it was not made aware that Jinn-Well likely had produced in-scope merchandise until verification. *Id.* at 21–22, 26–27. Accordingly, Commerce stated that Gem-Year's separate rate information was "unreliable and incomplete" and had "deficiencies in Gem-Year's corporate structure and affiliation information," such that a separate rate was not merited. *Id.* at 27–28. Thus, Commerce applied "total" adverse facts available ("AFA") and "placed [Gem-Year] in the PRC-wide entity." *Id.* at 28.

Hubbell challenges this result and claims that Commerce improperly conflated Gem-Year's separate rate inquiry with the issue of whether Gem-Year supplied the necessary data needed to set such a rate. *See* Hubbell Br. at 13–16. It argues that any purported deficiencies must go "to the heart of . . . corporate ownership and control" for Commerce to deny a separate rate. *Id.* at 14. At base, Hubbell argues that "the record does not support a finding of state ownership or control." *Id.* at 16. Further, Hubbell argues that, although Commerce was not made aware that Jinn-Well produced potentially-subject merchandise, its status as Gem-Year's affiliate was clear from a timely-submitted organizational chart. *Id.* at 17–18.

According to the chart, Jinn-Well is a fully-owned subsidiary of Gem-Year and Chin-Champ Enterprise Co., Ltd., which in turn can both be traced back to the same four Taiwanese-national owners (members of the Tsai Family) and public shareholders. *Id.* at 18–20; Gem-Year Section A. Questionnaire Response, Ex. 10 "Investment Relation Chart of Gem-Year," C.R. 11 (Aug. 22, 2014) ("Gem-Year Org. Chart"). Because Commerce assessed government control of Gem-Year and the Tsai Family, and had received at least some of Jinn-Well's financial records, Hubbell argues that Commerce ignored significant evidence showing a lack of government control that entitled it to a separate rate. Hubbell Br. at 18–20. Hubbell also stresses that the Jinn-Well merchandise constituted a very small fraction of Gem-Year's exports and that there was no indication that this merchandise was exported to the United States. *Id.* at 17. Finally, Hubbell challenges Commerce's imposition of the PRC-wide rate resulting from an adverse inference, arguing that it is untethered to the record and punitive given Gem-Year's active participation in the review. *Id.* at 22–26.

Defendant United States ("the government") and Defendant-Intervenor Vulcan Threaded Products Inc. ("Vulcan") argue that applying the PRC-wide rate to Gem-Year based on an adverse inference is supported by substantial evidence and otherwise in accordance with law. Def.'s Resp. to Pl.'s Mot. for J. Upon the Agency R., Doc. No.

46 ("Def. Br."); Def.-Intervenor's Resp. to Pl.'s USCIT Rule 56.2 Mot. for J. on the Agency R., Doc. No. 45 ("Vulcan Br."). The government states that "this case presents unusual circumstances in which Commerce received some separate rate information and sought to verify that information, but discovered at verification that the separate rate information was incomplete." Def. Br. at 13. Because Gem-Year omitted the information about Jinn-Well's production, Commerce determined that Gem-Year "failed to cooperate to the best of its ability," which in turn led Commerce to disregard all of Gem-Year's proffered information as unreliable. *Id.* at 14. The government disagrees with claims that the information necessary to evaluate government control of Jinn-Well was on the record, pointing out in its briefing before the Court missing information, such as business licenses and plans, and Commerce's inability to verify such information given the late notice.[2] *Id.* at 16–18. Accordingly, the government argues that Commerce was unable to assess "the Chinese government's involvement in Jinn-Well's business decisions, its purchases and price-setting, or the appointment of its management." *Id.* at 17.

The government claims that absent verification, it cannot validate Hubbell's assertions that the Jinn-Well merchandise was only a small fraction of relevant exports and may not have been shipped to the United States. *Id.* at 22–23. The government emphasizes that "Commerce did not assign Gem-Year an adverse facts available *margin*" (emphasis in original), but rather "as adverse facts available, Commerce rejected all of Gem-Year's separate rate information and included Gem-Year in the China-wide entity." *Id.* at 25. Vulcan largely agrees with the government. *See* Vulcan Br. at 11–32. It also stresses the validity of Commerce's rebuttable presumption of state control in non-market economies ("NME") and that those seeking a separate rate must prove lack of de jure and de facto control rather than Commerce proving control. *See id.* at 11–14.

In its reply, Hubbell essentially contends that if Commerce needed additional information to verify a lack of government control of Jinn-Well, then it should have requested it. *See* Pl.'s Reply Br. in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2, Doc. No. 50 ("Hubbell Reply Br."). Hubbell also claims that as all subject merchandise for this review was produced in 2009 and because Commerce previously found a lack of government control during the first administrative review covering 2008–2010, Commerce should have explained why the previous finding of independence fails to alter the outcome here. Hubbell Reply Br. at 8.

[2] No specific categories of missing corporate structure information were mentioned in Commerce's determination.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). The court upholds Commerce's final results of an administrative review of an AD duty order 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).

DISCUSSION

I. Whether Gem-Year is Entitled to a Separate Rate

a. Separate Rate Determination Framework

Although the parties largely agree on the underlying facts, they deviate in their understanding of precisely why Commerce denied Gem-Year's separate rate application. Hubbell understands Commerce to have denied the separate rate application because of an arguably small amount of undisclosed Jinn-Well merchandise, which it claims is not enough to undermine Gem-Year's application. *See* Hubbell Reply Br. at 6. In contrast, the government understands Commerce to have made its decision not based on Jinn-Well's production of in-scope merchandise per se, but because it found that the failure to mention this production until the end of verification undermined the reliability of Gem-Year's entire separate rate application. Def. Br. at 13–15. Although the latter understanding best comports with Commerce's reasoning in its issues and decision memo, *see I&D Memo* at 25–28, as detailed below, even under a more generous reading of Commerce's rationale, the resulting decision is not supported by substantial evidence.

The Court of Appeals for the Federal Circuit ("CAFC") has consistently upheld Commerce's use of a rebuttal presumption of state control such that entities in NMEs are assigned the state-wide AD duty rate unless they demonstrate eligibility for a separate rate.[3] *See e.g.*, *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1310–11 (Fed. Cir. 2017); *Changzhou Hawd Flooring Co., Ltd. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017); *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1390 (Fed. Cir. 2014); *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). If an entity demonstrates a lack of de jure and de facto government control, Commerce will assign it a separate rate. *AMS Assoc., Inc. v. United States*, 719 F.3d 1376, 1379 (Fed. Cir. 2013). With regard to government control, the CAFC has stated that:

[3] The state-wide rate is, in essence, an individual rate for an entire state entity. *See* 19 U.S.C. § 1673d(c)(1)(B)(i)(I-II).

> The absence of de jure government control can be shown by reference to legislation and other governmental measures that suggest sufficient company legal freedom. The absence of de facto government control can be shown by evidence that an exporter sets its prices independently of the government and of other exporters, negotiates its own contracts, keeps the proceeds of its sales (taxation aside), and selects its management autonomously.

Id. (internal citations omitted); *see also*, *Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China*, A-570–804, 56 Fed. Reg. 20,588, 20,589 (Dep't Commerce May 6, 1991) ("*Sparklers*").[4]

Commerce evaluates an entity's separate status by requiring it to prove that it is wholly-foreign owned[5] or otherwise establish that it is independent through a separate rate application.[6] *See I&D Memo* at 26. If an entity shows that it is entitled to a separate rate, then Commerce typically estimates a dumping margin based on how much the normal value, as derived from the producer's FOPs valued in a surrogate market economy, exceeds the export price or constructed export price. *See* 19 U.S.C. § 1677(35); 19 U.S.C. § 1677b(c); *I&D Memo* at 45. As indicated, if an entity fails to establish separate rate status by not rebutting the presumption of state control, Commerce can place the entity within the PRC-wide entity. Additionally, Commerce has broad discretion in choosing an AFA rate, which the rate

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[4] In that review, which Commerce references in this administrative review, Commerce stated:

> Evidence supporting, though not requiring, a finding of de jure absence of central control includes: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies. De facto absence of central government control with respect to exports is based on two prerequisites: (1) Whether each exporter sets its own export prices independently of the government and other exporters; and (2) whether each exporter can keep the proceeds from its sales.

Sparklers at 20,589; *see also I&D Memo* at 25–26 (referencing the Sprinkler's test).

[5] According to Section A of Gem-Year's AD questionnaire response:

> Gem-Year was established on November 17, 1995, as a wholly foreign owned company in the PRC. Gem-Year made its initial public offering in January 2007 and has been listed and traded on the Shanghai Stock Exchange ever since. [[
>
>]].

Gem-Year Section A Questionnaire Response, at 2, C.R. 11 (Aug. 22, 2014). Commerce, however, found that Gem-Year was not a wholly foreign-owned because it is a publicly-traded PRC company. *I&D Memo* at 26.

[6] Entities that have received a separate rate in the administrative review immediately prior to an administrative review at issue need only submit a separate rate certification stating that they continue to satisfy the requirements for such status. *See* Initiation Notice, 79 Fed. Reg. at 30,810.

applied to the China-wide entity is. It need only act reasonably in the light of the record, but this discretion is not boundless. *See F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). For instance, where application of the PRC-wide rate presumes government control, if a respondent proves an absence of control, Commerce "may not apply the PRC-wide rate as the AFA rate where AFA is warranted for sales and FOP data." *Qingdao Taifa Grp. Co. v. United States*, 637 F. Supp. 2d 1231, 1240 (CIT 2009).

The POR at issue in this administrative review is 2013–2014. As indicated, Hubbell asserts that the previous finding of lack of PRC control for 2009, the production year, should dictate the result here. Government control can arise, however, at other points in the exportation process, for instance, in price setting or contract negotiation. Thus, although this information is something that Commerce could have considered in deciding whether to grant Gem-Year's separate rate application, lack of consideration of this information is not dispositive.

b. Late Notice of Jinn-Well's Production of In-Scope Merchandise

Hubbell continually states that it disclosed Jinn-Well's status as an affiliate in a timely-submitted, organizational chart. Hubbell Reply Br. at 5–10; *see also* Gem-Year Org. Chart. Thus, it argues, Commerce is at fault for any failure to investigate Jinn-Well. The court is not persuaded. The chart contains numerous affiliates–some fully-owned by Gem-Year, some not–that, under Hubbell's logic, Commerce would have been required to investigate without any indication from Gem-Year that these affiliates had produced subject merchandise. *See* Gem-Year Org. Chart. Rather than engage in this potentially-lengthy undertaking, Commerce reasonably asked Gem-Year to identify those affiliates that produced subject merchandise and then set out to investigate those affiliates. This is administratively practicable and saves all parties time and effort.

Nonetheless, the imposition of China's total AFA rate in response to Gem-Year's failure to timely reveal Jinn-Well's production of some small amount of subject merchandise appears unduly punitive or arbitrary given the extensive factual information that remained on the record.[7] *See F.lli De Cecco*, 216 F.3d at 1032 (holding that 19

[7] While the exact amount has not been finally established, it seems clear that Jinn-Well was not a major producer. *See* Gem-Year Verification Report, A-570–932, C.R. 430, Exhibit XIII-C at 6 (Mar. 25, 2015).

U.S.C. § 1677e(b) does not sanction imposing "punitive, aberrational, or uncorroborated margins," but rather incentivizes cooperation). Commerce has not asserted that the remaining timely-submitted information was deficient regarding the question of government control, could not be verified, was incomplete, unduly difficult to assess, or that Gem-Year failed to act to the best of its ability in providing Commerce with government control information. Commerce instead stated, in general terms, that it "discovered numerous deficiencies that significantly impact[ed] the Department's dumping analysis and the separate rate inquiry in particular" such that it deemed "the separate rate information submitted by Gem-Year to be unreliable and incomplete, as a whole." *I&D Memo* at 26–27.

Commerce's claim that the Jinn-Well omission taints all of Gem-Year's submissions strains credulity. *See Qingdao Taifa Grp. Co., Ltd. v. United States*, 760 F. Supp. 2d 1379, 1384 (CIT 2010) (noting that when a respondent is less than honest it is proper to "treat internal documents about who is running [the respondent] with skepticism. Skepticism, however, does not mean total disregard"). Although omissions, lies, and non-cooperation have in some cases been enough to merit Commerce's choice to disregard all information, the discrepancy relied on here does not rise to the level present in such cases. *See, e.g.*, *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1355–56 (Fed. Cir. 2015) (determining that substantial evidence supported Commerce's decision to place respondent in the PRC-wide entity given its repeated misrepresentations and concealment of a relationship with an illegal enterprise until Commerce placed on the record irrefutable evidence proving affiliation); *AMS Assoc. Inc.*, 719 F.3d at 1380 (upholding Commerce's denial of separate rate status in a case where respondent removed confidential information, which resulted in a lack of information on the record needed to assess government control).

Further, Commerce did not discover the production discrepancy here on its own and confront Gem-Year, rather, two days after confirming previously-submitted questionnaire responses stating that Gem-Duo was the only affiliate that produced subject merchandise, Gem-Year officials revealed that Jinn-Well also produced some potentially relevant merchandise. *See* Verification of the Sales and Factors of Production Responses of Gem-Year Indus. Co., Ltd. and Gem-Duo Co., Ltd. in the Fifth Admin. Review of Certain Steel Threaded Rod from the PRC, A-570–932, C.R. 353, at 6 (Dep't Commerce Apr. 30, 2015) ("Verification Report"); *compare with Ad Hoc Shrimp*, 802 F.3d

at 1356 (noting that the respondents in that case only admitted to an affiliation when confronted with unequivocal proof). Moreover, there is at least some indication that Gem-Year may not have understood the Jinn-Well products to be within the scope of the AD duty order and that these products were not sold in the United States. *See* Verification Report at 6; Gem-Year Case Brief at 14–16. Nonetheless, after this revelation, Commerce did ask for and seemingly received "a complete product listing identifying everything that Jinn-Well produced and sold to Gem-Year in 2009, and identifying all products that met the definition of the scope." Verification Report at 6.

This is not a case in which it appears that the omissions are so severe or central to the actual question at issue that they normally would prevent Commerce from determining whether Gem-Year is under state control. *See Ad Hoc Shrimp*, 802 F.3d at 1357 (rejection of separate rate status when the omissions went "to the heart of [the respondent's] ownership and control" and "cut across all aspects of the data.") (internal citations omitted). As the court has previously stated, a company's failure to provide information unrelated to establishing entitlement to a separate rate does not necessarily undermine submissions demonstrating an absence of government control. *See Shenzhen Xinboda Indus. Co. v. United States*, 180 F. Supp. 3d 1305, 1316–17 (CIT 2016) (holding that Commerce cannot find a respondent's separate rate information "tainted" on the basis of deficiencies in sales data as such data is unrelated to corporate ownership and control); *Lifestyle Enter. Inc. v. United States*, 768 F. Supp. 2d 1286, 1296 (CIT 2011) (holding that a respondent's failure in unrelated aspects of a review does not undermine its application for separate rate status); *Shangdong Huarong Gen. Grp. Corp. v. United States*, 27 C.I.T. 1568, 1594 (2003) (denying Commerce's assignment of a PRC-wide dumping margin where respondents presented "evidence of their entitlement to separate rates" when there was "no indication that any necessary information was missing or incomplete"). Here, the production data deficiencies do not relate to the threshold determination of government control, but rather impact Commerce's ability to set an accurate dumping rate. Although Commerce is free to disregard unverifiable information, it has notably not asserted that the information regarding government control submitted by Gem-Year is unverifiable. *See AMS Assoc., Inc.*, 719 F.3d at 1380 (noting that 19 U.S.C. § 1677e(a)(2)(D) instructs Commerce to use facts otherwise available if the information submitted by an interested party cannot be verified). Given the ample record here, Commerce's asser-

tion that Gem-Year's submissions are materially deficient regarding corporate structure and affiliation are not supported.[8]

There appears to be sufficient evidence in the record to assess government control for Gem-Year, Gem-Duo, and Jinn-Well,[9] even if some data is missing, although at this point it is unclear what such missing data would be. On remand, Commerce should recognize Gem-Year as a separate rate entity or clearly specify what material gaps in information as to Jinn-Well's status remain and how that undermines Gem-Year's claim to separate rate status. The court stresses the need for Commerce to clearly bifurcate its decision on whether Gem-Year is entitled to a separate rate from any decision regarding its ability to calculate such a rate accurately.

II. Application of Adverse Facts Available in Calculating a Separate Rate for Gem-Year

On remand, should Commerce determine that Gem-Year is entitled to a separate rate, nothing in this opinion should be read to prevent Commerce from applying adverse inferences to facts otherwise available in calculating such a rate. Should Commerce need to utilize facts otherwise available, it should explain which information is missing, that is, what gap results from deficient reporting, and on what basis any adverse inference is being drawn with regard to such deficiency. *See* 19 U.S.C. § 1677e. The court notes that although Gem-Year's failure to disclose Jinn-Well's production of potentially-subject merchandise is insufficient on its own to apply AFA to the threshold inquiry regarding state control, this failure may be relevant to an application of AFA in arriving at a separate rate. *See e.g.*, *Qingdao Taifa Grp. Co.*, 637 F. Supp. 2d at 1239–41 (upholding Commerce's decision to disregard all of a plaintiff's submitted information to facts

[8] The court notes that Commerce found that Gem-Year did not act to the best of its ability in providing information. These findings, however, seem to rest primarily, if not entirely, on failures to provide information necessary to set an accurate separate rate, rather than information necessary to establish a lack of government control. Thus, unless Commerce on remand explains how the information on government control is insufficient under 19 U.S.C. § 1677m(e), the court presumes it is adequate.

[9] In addition to the investment relation chart mentioned above, such evidence includes Gem-Year's financial statements from 2012 and 2013 [[ ]], *see* Gem-Year's Section A Response, C.R. 10, at 36–37 (Aug. 22, 2014) [[ ]] and Jinn-Well's business license, *see* Business License for Enterprise Activity, C.R. 66, at 76 [[ ]], in addition to the information gathered during verification on Gem-Year and Gem-Duo.

relevant to calculating the dumping margin given its active attempts to hide and alter sales data and other relevant documents).[10]

CONCLUSION

For the foregoing reasons, this matter is remanded for Commerce to reevaluate Gem-Year's separate rate application in a manner consistent with this opinion and if it finds that Gem-Year is entitled to a separate rate, to determine one. The remand redetermination should be filed with the court within 60 days of the date of this order and all other parties shall have 30 days thereafter to file comments on the remand redetermination.

Dated: February 27, 2019
New York, New York

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

[10] In that case, the court held that the direct application of the PRC-wide rate as the AFA rate was not appropriate where a respondent had established a lack of government control, but that AFA could be applied "to all of the facts relevant in calculating [the respondent's] dumping margin." *Qingdao Taifa Grp. Co.*, 637 F. Supp. 2d at 1240. The court does not suggest that Gem-Year's conduct was like that of Qingdao Taifa Group Co., merely that the choice of any particular rate based on application of AFA is not determined here.