U.S. Court of International Trade

Slip Op. 19–124

TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş. AND ERBOSAN ERCIYAS BORU SANAYI VE TICARET A.S., Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE CO., Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 17–00255

[Commerce's *Remand Results* sustained.]

Dated: September 20, 2019

David L. Simon, Law Office of David L. Simon of Washington, DC, for Plaintiff Tosçelik Profil ve Sac Endüstrisi A.Ş.

Irene H. Chen, Chen Law Group, LLC of Rockville, MD, for Consolidated Plaintiff Erbosan Erciyas Boru Sanayi ve Ticaret A.S.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, U.S. Department of Justice of Washington, DC, for Defendant United States. With her on brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Saad Y. Chalchal*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Roger B. Schagrin and *John W. Bohn*, Schagrin Associations of Washington, DC, for Defendant-Intervenor Wheatland Tube Co.

OPINION

Gordon, Judge:

This action involves the final results of the 2015 administrative review conducted by the U.S. Department of Commerce ("Commerce") of the countervailing duty ("CVD") order published as *Welded Carbon Steel Pipes and Tubes from Turkey*, 82 Fed. Reg. 47,479 (Dep't of Commerce Oct. 12, 2017) (final results admin. review) *("Final Results"); see also* accompanying Issues and Decision Memorandum, C-489–502, (Dep't of Commerce Oct. 4, 2017), *available at* https://enforcement.trade.gov/frn/summary/turkey/2017–22069–1.pdf (last visited this date) ("*Decision Memorandum*").

Before the court are Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Remand Results*"), ECF No. 51–1,[1] filed pursuant to the court's remand order in *Tosçelik Profil ve Sac Endüstrisi A.Ş. v. United States*, 42 CIT ___, 358 F. Supp. 3d 1370 (2019)

[1] All citations to the *Remand Results*, the agency record, and the parties' briefs are to their confidential versions unless otherwise noted.

("*Erbosan I*").[2] The court remanded the *Final Results* for Commerce to address whether Consolidated Plaintiff Erbosan Erciyas Boru Sanayi ve Ticaret A.S.'s ("Erbosan") knowledge of U.S. entries of its circular welded carbon steel pipes and tubes ("subject merchandise") is relevant in determining whether Erbosan may qualify for a no shipment certification. *Erbosan I*, 42 CIT at ___, 358 F. Supp. 3d at 1376. The court has jurisdiction pursuant to Section 516A(a)(2)(8)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(8)(iii) (2012),[3] and 28 U.S.C. § 1581(c) (2012).

I. Background

In the administrative review, Erbosan argued that Commerce should rescind the proceeding pursuant to 19 C.F.R. § 351.213(d)(3) as to Erbosan because it did not have any reviewable shipments during the period of review ("POR"). *See Remand Results* at 2; *see also* 19 C.F.R. § 351.213(d)(3) ("[Commerce] may rescind an administrative review, in whole or only with respect to a particular exporter or producer, if [Commerce] concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be."). Commerce denied Erbosan's no shipment certification based on information received from U.S. Customs and Border Protection ("CBP") establishing that Erbosan's subject merchandise did, in fact, enter the United States during the POR. Commerce found that there were reviewable entries of the subject merchandise that precluded Erbosan from being eligible for a no shipment certification. *Remand Results* at 3. As a result, Commerce assigned Erbosan the "nonselected [CVD] rate" of 6.64%. *Id.* at 5. Erbosan subsequently appealed Commerce's determination. *See Erbosan I*, 42 CIT at ___, 358 F. Supp. 3d at 1375.

The court previously held that Commerce reasonably found that there were reviewable entries of subject merchandise into the U.S. originating from Erbosan. However, the court concluded that Commerce failed to address Erbosan's contention that it did not know or have reason to know of any transshipments of subject merchandise to the United States during the POR. *See id.* 42 CIT at ___, 358 F. Supp. 3d at 1376. Accordingly, the court remanded the action to Commerce to determine whether Erbosan's claimed lack of knowledge is relevant in the CVD context, and more specifically whether knowledge is relevant with respect to Commerce's consideration of a no shipment

[2] The court sustained the *Final Results* as to all issues raised by Tosçelik. *See Erbosan I*, 42 CIT at ___, 358 F. Supp, 3d at 1376. Tosçelik did not file any comments on the *Remand Results. See* Tosçelik Notification Regarding Comments on Remand, ECF No. 55.

[3] 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.

certification under 19 C.F.R. § 351.213(d)(3). *Id.* 42 CIT at ___, 358 F. Supp. 3d at 1376.

On remand, Commerce explained that knowledge of U.S. entries on the part of Erbosan "is not a necessary condition" for determining whether Erbosan had reviewable entries during the POR. *See Remand Results* at 10. Confirming that Erbosan had reviewable entries during the POR, Commerce again refused to rescind the administrative review as to Erbosan and continued to assign Erbosan the "non-selected [CVD] rate" of 6.64%. *Id.* at 10–11.

In challenging the *Remand Results*, Erbosan maintains that Commerce must consider Erbosan's apparent lack of knowledge regarding the U.S. entries of subject merchandise in evaluating its eligibility for a no shipment certification. *See generally* Pl.'s Comments on Final Results of Redetermination Pursuant to Remand, ECF No. 57 ("Pl.'s Cmts."); *see also* Def.'s Reply to Comments on the Remand Redetermination, ECF No. 60; Def.-lntervenor Wheatland Tube Co.'s Responsive Comments on the Remand Redetermination, ECF No. 59. For the reasons that follow, the court sustains the *Remand Results*.

II. 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 further 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, "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).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) governs judicial review of Commerce's interpretation of the countervailing duty statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

III. Discussion

Erbosan challenges the denial of its requested no shipment certification on multiple grounds. It contends that Commerce's finding that Erbosan had reviewable entries of subject merchandise during the POR "despite Erbosan's lack of knowledge that sales to a foreign third party were ultimately shipped to the United States," is "contrary to the plain language and intent of the statute." Pl.'s Cmts. at 4–5 (citing 19 U.S.C. § 1671). Erbosan further argues that Commerce is required to conduct a "pass-through" analysis in making its no shipment certification, and that Commerce must "determine that a person received both a financial contribution and a benefit with regard to the U.S. sales being reviewed." *Id.* at 6, 9–10. Erbosan lastly maintains that Commerce's Federal Register notices in prior CVD proceedings demonstrate that Commerce has recognized that the knowledge test should be used in the CVD context. *See id.* at 11 (citing *Aluminum Extrusions from the People's Republic of China*, 80 Fed. Reg. 77,325, 77,326 (Dep't of Commerce Dec. 14, 2015) (final results and partial rescission of admin rev.) ("*Aluminum Extrusions from China*"), and *Multilayered Wood Flooring from the People's Republic of China*, 83 Fed. Reg. 27,750, 27,751 (Dep't of Commerce June 14, 2018) (final results and partial rescission of admin rev.) ("*Wood Flooring from China*")).

Erbosan initially contends that 19 U.S.C. § 1671 requires Commerce to consider a respondent's knowledge in determining whether to impose a countervailing duty, including in evaluating a respondent's request for a no shipment certification. Specifically, Erbosan argues that the phrase "likely to be sold" in § 1671 (a)(1) connotes that Commerce must use a knowledge test in determining whether to rescind an administrative review under 19 C.F.R. § 351.213(d)(3). Pl.'s Cmts. at 5. Erbosan therefore maintains that Commerce should have granted Erbosan a no shipment certification because its subject merchandise was not knowingly imported, sold, or likely to be sold into the U.S. at the time of its sale. *Id.*

Erbosan, however, does not explain how § 1671 (a)(1)'s use of the phrase "likely to be sold" can be read to require that Commerce use a knowledge test in its no shipment certification analysis. Despite Erbosan's contentions, neither 19 U.S.C. § 1671 (a)(1) nor 19 C.F.R. § 351.213(d)(3) unambiguously require knowledge. Moreover, Erbosan does not provide any legal basis for its argument that Commerce must use the knowledge test in considering a respondent's eligibility for a no shipment certification. Contrary to Erbosan's naked contentions, Commerce provides a detailed explanation as to why knowledge is relevant in its application of the antidumping ("AD") duty statute and why knowledge is likewise not relevant in the CVD context. *See Remand Results* at 7–10. Commerce specifically notes that "Erbosan cites to 19 CFR 351.213, but has not identified any specific language in that regulation to support its contention with respect to CVD administrative reviews." *Remand Results* at 14. Given the lack of reference to a producer's knowledge in either the CVD statute, or in the specific regulation at issue (19 C.F.R. § 351.213(d)(3)), Commerce reasonably concludes that the CVD statute and the applicable regulation do not require Commerce to use a knowledge test in evaluating Erbosan's no shipment certification request. *See id.* Commerce further explained that unlike its determinations in the AD duty context, knowledge is not relevant because the focus in the CVD context is "on imports of merchandise that benefit from countervailable subsidies." *Id.* at 15. Commerce therefore reasonably concluded that "[t]he knowledge test is inapplicable in the context of CVD proceedings because Commerce does not examine a producer's selling practices and, thus, has no need to determine the identity of the price discriminator in such proceedings." *Id.*

Erbosan next contends that Commerce is required to conduct a "pass-through analysis" to determine whether the subsidy granted to Erbosan as a producer of subject merchandise "passed through" to a third-party shipper/reseller. *See* Pl.'s Cmts. at 6–10. Erbosan relies on 19 U.S.C. § 1677(5)(8) (defining a countervailable subsidy), and the decisions in *Delverde, SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) and *Allegheny Ludlum Corp. v. United States*, 26 CIT 1, 182 F. Supp. 3d 1357 (2002), for the proposition that, absent a showing of knowledge on the part of the respondent, Commerce is required to presume that the countervailable subsidy is "deemed to be extinguished" after a sale by the subsidized exporter/producer to a third-party. *Id.*

Erbosan's reliance on *Delverde* and *Allegheny Ludlum Corp.* is misplaced. *Allegheny Ludlum Corp.* dealt with whether nonrecurring financial benefits, received by a previously public entity,

survive privatization, and whether the private new owners are subject to countervailing duties on products they export to the United States. *See Allegheny Ludlum Corp.*, 26 CIT at 4, 182 F. Supp. 3d at 1361. *Delverde* focused on the question of whether a former owner's receipt of subsidies could be presumed to "pass through" a transfer of corporate assets and be attributed to a new corporate owner. *See Delverde*, 202 F.3d at 1363–64. Commerce's denial of Erbosan's no shipment certification is distinguishable from the different issues addressed in Delverde and *Allegheny Ludlum Corp.* As Commerce explained, those cases involved "[a]ttribution issues stemming from changes in ownership," and they are "distinct from whether a particular producer had reviewable entries during the POR." *See Remand Results* at 16.

Erbosan also relies on 19 U.S.C. § 1677(5)(B) to argue that if a subsidized producer/exporter lacks knowledge that subject merchandise will enter the United States, Commerce must deem the countervailable subsidy extinguished once the subject merchandise is sold to a third party, absent a pass-through analysis. *See* Pl.'s Cmts. at 6, 13. Section 1677(5)(B) states in relevant part:

> (B) Subsidy described. A subsidy is described in this paragraph in the case in which an authority—
>
> (i) provides a financial contribution,
>
> (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or
>
> (iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments.

19. U.S.C. § 1677(5)(8). This language does not refer to a "pass-through analysis." Erbosan nevertheless maintains that if it did not know that the subject merchandise was ultimately destined for the United States, "Commerce *must presume* that subsidies were extinguished upon the arms-length sale to the independent entity." Pl.'s Cmts. at 9 (emphasis added).

Commerce reasonably addressed this argument:

> Erbosan again misinterprets how Commerce treats merchandise exported to the United States by non-producing entities in CVD proceedings. Contrary to Erbosan's argument, a pass-through analysis would be inapplicable to entries of subject merchandise produced by Erbosan and exported by a trading

> company. Commerce's regulation at 19 CFR 351.525(c) provides that "benefits from subsidies provided to a trading company which exports subject merchandise *shall be cumulated* with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company, regardless of whether the trading company and the producing firm are affiliated" (emphasis added). As clearly stated, subject merchandise exported by the trading company is deemed to benefit from the subsidies provided to both the trading company and the producer of the merchandise.

Remand Results at 16. Erbosan fails to explain how its lack of knowledge of a third-party's intention to sell subject merchandise in the United States somehow extinguishes the competitive benefit Erbosan obtained from the merchandise's subsidization. Accordingly, the court concludes that Erbosan's reliance on § 1677(5)(8), *Delverde*, and *Allegheny Ludlum Corp*. is misplaced. Neither the statute, nor *Delverde*, nor *Allegheny Ludlum Corp.* require Commerce to make such presumptions or to conduct a "pass-through" analysis on transactions between a producer/exporter of subsidized merchandise and a third-party shipper/reseller.

Alternatively, Erbosan appears to argue that even if it *did have knowledge* of any transshipments of its subject merchandise, Commerce was somehow *still* obligated to perform a pass-through analysis to determine whether the subsidy passed through to the third-party. *See* Pl.'s Cmts. at 5 ("Even if Erbosan had knowledge of the U.S. destination of its products, a pass-through analysis is nonetheless required ...."); *id.* at 9 ("If Erbosan did have knowledge that the shipments were ultimately destined for the United States, then Commerce must take the further step of conducting a pass-through analysis ...."). To the extent that Erbosan is now suggesting that it should qualify for a no shipment certification even if it knowingly made sales of subject merchandise to the United States during the POR, Erbosan has waived this argument. *See Dorbest Ltd. v. United States*, 604 F. 3d 1363, 1375–77 (Fed. Cir. 2010) (affirming waiver of arguments not raised until after remand).

Finally, Erbosan contends that Commerce's Federal Register notices in prior CVD proceedings support the application of a knowledge test. Pl.'s Cmts. at 11. Erbosan relies on Commerce's determinations in *Aluminum Extrusions from China* and *Wood Flooring from China*, arguing that these administrative reviews were rescinded based on Commerce's findings that these companies made no shipments to the

United States in their respective PORs. *Id.* at 12. Erbosan contends that "Commerce's own language supports a knowledge test for U.S. sales in CVD proceedings, in that Commerce ties the reviewed company's actions to shipments to the United States." *Id.* Erbosan again argues that Commerce must determine "whether the producer had knowledge of [subsequent third-party sales of its merchandise to the United States]" and maintains that without an agency determination as to whether a producer had that requisite knowledge, "Commerce cannot assume that subsidies were passed through to the exporter of subject merchandise." Pl.'s Cmts. at 13 (citing 19 U.S.C. § 1677(5)(B)). Beyond its naked citation to 19 U.S.C. § 1677(5)(8), Erbosan again fails to provide any persuasive reasoning that Commerce must use a knowledge test or conduct a "pass-through analysis" in applying 19 C.F.R. § 351.213(d)(3).

Erbosan also misapprehends Commerce's prior determinations in *Aluminum Extrusions from China* and *Wood Flooring from China*. As Commerce explained, its approach in conducting "no shipment" inquiries is to confirm with CBP "whether subject merchandise *produced and/or exported* by [the respondent seeking a no shipment certification] was imported into the United States during the POR." *Remand Results* at 19 (explaining that Commerce does *not* seek to confirm what company is "directly responsible for shipping subject merchandise"). As Commerce explained:

> Commerce's approach in the review at issue is the same approach it undertook in *Aluminum Extrusions from China*, in which Commerce explained that it issued its "no-shipments" message. Specifically, in that case, Commerce inquired with CBP as to whether aluminum extrusions from China had been "produced and/or exported" by firms at issue. We also note that Commerce rescinded the administrative review with respect to the no-shipment companies in *Aluminum Extrusions from China* because all requests to review those companies were timely withdrawn. Similarly, in *Wood Flooring from China*, Commerce's "no shipment" message to CBP inquired whether wood flooring from China had been "produced and/or exported" by the firms at issue. Thus, Commerce's approach in *Aluminum Extrusions from China* and *Wood Flooring from China* does not stand for the proposition that in CVD reviews Commerce determines non-shipment based on whether a company was directly responsible for shipping subject merchandise to the United States.

Id. at 19–20. Commerce's explanation reasonably describes why its no shipment certification analysis under § 351.213(d)(3) focuses objectively on confirming that the subsidized merchandise entered the United States during the POR, rather than on whether the exporter or producer under review had subjective knowledge of the reviewable entries of its merchandise.

IV. Conclusion

The court has already held that Commerce reasonably found that there were reviewable entries of subsidized subject merchandise from Erbosan during the POR. *See Erbosan I*, 42 CIT at ___, 358 F. Supp. 3d at 1375–76. In the *Remand Results*, Commerce has reasonably determined that knowledge is not relevant in a no shipment certification analysis under 19 C.F.R. § 351.213(d)(3). Accordingly, the court sustains the *Remand Results*. Judgment will be entered accordingly.

Dated: September 20, 2019
New York, New York

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

Slip Op. 19–125

BOSUN TOOLS CO., LTD. AND CHENGDU HUIFENG NEW MATERIAL TECHNOLOGY CO., LTD., Plaintiff and Consolidated Plaintiff, and DANYANG NYCL TOOLS MANUFACTURING CO., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS' COALITION, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00102

[Remanding the U.S. Department of Commerce's final determination in the seventh administrative review diamond sawblades and parts thereof from the People's Republic of China.]

Dated: September 23, 2019

Gregory Stephen Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, argued for plaintiff, Bosun Tools Co., Ltd. With them on the brief was *James Kevin Horgan*.

Ronald M. Wisla, Fox Rothschild LLP, of Washington, DC, argued for consolidated plaintiff, Chengdu Huifeng New Material Technology Co., Ltd. and plaintiff-intervenors, Danyang NYCL Tools Manufacturing Co., Ltd., Danyang Weiwang Tools Manufacturing Co., Ltd., Hangzhou Deer King Industrial and Trading Co., Ltd., Guilin Tebon Superhard Material Co., Ltd., Jiangsu Youhe Tool Manufacturer Co., Ltd., Quanzhou Zhongzhi Diamond Tool Co., Ltd., Rizhao Hein Saw Co., Ltd., and Zhejiang

Wanli Tools Group Co., Ltd. With him on the brief were *Lizbeth R. Levinson* and *Brittney Renee Powell*.

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

Cynthia Cristina Galvez, Wiley Rein, LLP, of Washington, DC, argued for defendant-intervenor and consolidated defendant-intervenor, Diamond Sawblades Manufacturers' Coalition. With her on the brief were *Stephanie Manaker Bell*, *Daniel Brian Pickard*, and *Maureen Elizabeth Thorson*.

OPINION AND ORDER

Kelly, Judge:

This consolidated action is before the court on motions for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the seventh administrative review of the antidumping duty ("ADD") order covering diamond sawblades and parts thereof from the People's Republic of China ("PRC"). *See* Pl. Bosun Tools Co. Ltd.'s Mot. J. Agency R., Sept. 26, 2018, ECF No. 32; Consol. Pl.'s 56.2 Mot. J. Agency R., Sept. 26, 2018, ECF No. 34; Pl.-Intervenors' 56.2 Mot. J. Agency R., Sept. 26, 2018, ECF No. 35; *see also Diamond Sawblades and Parts Thereof From the [PRC]*, 83 Fed. Reg. 17,527 (Dep't Commerce Apr. 20, 2018) (final results of [ADD] admin. review; 2015–2016) ("*Final Results*") and accompanying Issues & Decision Mem. Admin. Review [ADD] Order on Diamond Sawblades and Parts Thereof from the [PRC], A-570–900, (Apr. 16, 2018), ECF No. 24–5 ("Final Decision Memo"); *Diamond Sawblades and Parts Thereof From the [PRC] and the Republic of Korea*, 74 Fed. Reg. 57,145 (Dep't Commerce Nov. 4, 2009) ([ADD] orders). Plaintiff, Bosun Tools Co., Ltd. ("Bosun") and Consolidated Plaintiff, Chengdu Huifeng New Material Technology Co., Ltd. ("Chengdu") commenced their individual actions pursuant to section 516A(a)(2)(A)(i)(I) and 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and 1516a(a)(2)(B)(iii) (2012);[1] the actions were subsequently consolidated on July 27, 2018. *See* [Bosun's] Summons,

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

May 4, 2018, ECF No. 1; [Bosun's] Compl., May 4, 2018, ECF No. 6;[2] Order at 2, July 27, 2018, ECF No. 28. Bosun and Chengdu are both foreign manufacturers and exporters of the subject merchandise. Bosun's Compl. at 1; Chengdu's Compl. ¶ 4, May 25, 2018, ECF No. 9, Ct. No. 18–00103. On May 24, 2018, the court granted Plaintiff-Intervenors, Danyang NYCL Tools Manufacturing Co., Ltd., Danyang Weiwang Tools Manufacturing Co., Ltd., Hangzhou Deer King Industrial and Trading Co., Ltd., Guilin Tebon Superhard Material Co., Ltd., Jiangsu Youhe Tool Manufacturer Co., Ltd., Quanzhou Zhongzhi Diamond Tool Co., Ltd., Rizhao Hein Saw Co., Ltd., and Zhejiang Wanli Tools Group Co., Ltd.'s (collectively "Plaintiff-Intervenors"), motion to intervene as of right. Order, May 24, 2018, ECF No. 20. Plaintiff-Intervenors are foreign producers and/or exporters of the subject merchandise and individually participated in this review as separate rate respondents. *See* Pl.-Intervenors' Mem. P. & A. Supp. 56.2 Mot. J. Agency R. at 1, Sept. 26, 2018, ECF No. 35–2 ("Pl.-Intervenors' Br."); *Final Results*, 83 Fed. Reg. at 17,528.

Chengdu challenges as an abuse of discretion, arbitrary and capricious, and unsupported by substantial evidence Commerce's decision to reject and remove from the record Chengdu's second supplemental response. *See* Consol. Pl. [Chengdu's] Mem. P. & A. Supp. 56.2 Mot. J. Agency R. at 11–20, Sept. 26, 2018, ECF No. 34–2 ("Chengdu's Br."). Bosun, Chengdu, and Plaintiff-Intervenors all challenge as contrary to law Commerce's use of total adverse facts available[3] to select the rate assigned to Chengdu and all other companies qualifying for a separate rate.[4] *See id.* at 21–24; Pl. [Bosun's] Mem. Supp. Mot. J. Agency R. at 2–12, Sept. 26, 2018, ECF No. 33 ("Bosun's Br."); Pl.Intervenors' Br. at 7–19.

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[2] Chengdu's Amended Summons and Complaint are located at ECF Nos. 8 and 9 on the docket of Ct. No. 18–00103.

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

[4] In antidumping proceedings, Commerce presumes that the export activities of all companies operating in a non-market economy ("NME") country, like the PRC, are subject to government control. Diamond Sawblades and Parts Thereof from the [PRC]: Decision Mem. for Prelim. Results of [ADD] Admin. Review; 2015–2016 at 4, A-570–900, PD 255, bar code 3646590–01 (Nov. 30, 2017). The presumption is rebuttable, and companies seeking to rebut it file a separate rate application through which they must demonstrate that their export

For the reasons that follow, Commerce abused its discretion by rejecting Chengdu's second supplemental response. The court does not reach the parties' challenges to Commerce's application of total AFA to derive Chengdu's rate and correspondingly the use of Chengdu's rate in establishing the separate rate respondents' rate.

BACKGROUND

Commerce's seventh administrative review of the relevant ADD order covered subject merchandise entered during the period of November 1, 2015, through October 31, 2016. *Initiation of Antidumping & Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 4,294, 4,296 (Dep't Commerce Jan. 13, 2017). Commerce selected Chengdu and Jiangsu Fengtai Single Entity ("Fengtai") as the two mandatory respondents in this review.[5] *See* Selection of Respondents for Individual Examination at 8, PD 106, bar code 3566489–01 (Apr. 26, 2017).[6] Pertinent here, throughout the administrative review proceedings, Commerce continued to find that Chengdu qualified for a separate rate.[7] *See* Diamond Sawblades and Parts Thereof From the [PRC]: Decision Mem. for [the] Prelim. Results of [the] [ADD] Admin. Review; 2015–2016 at 6–8, A-570–900, PD 255, bar code 3646590–01 (Nov. 30, 2017) ("Prelim. Decision Memo"); Final Decision Memo at 9. Also, pertinent here, on October 3, 2017, Commerce rejected as untimely the public ("redacted") and business proprietary ("unredacted") versions of Chengdu's second supplemental response and

activities are de facto and de jure free of the NME-country's control. *Id.* If a company successfully rebuts the presumption, it is assigned its own separate rate. *Id.*

Congress does not prescribe a method for calculating a separate rate. Congress does, however, in 19 U.S.C. § 1673d(c)(5) prescribe a method for calculating an all-others rate; a rate assigned to non-mandatory respondent companies from a market economy country. Commerce has, by practice, adopted the methodology in 19 U.S.C. § 1673d(c)(5) to calculate a separate rate. *See Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1351–53 (Fed. Cir. 2016); *see also* 19 U.S.C. § 1673d(c)(5). Section 1673d(c)(5) states that the all-others rate shall be the weighted average of the individually investigated exporter's and producer's dumping margins, excluding any margins that are de minimis, zero, or determined entirely by AFA. As a result, the rate assigned to the successful separate rate respondents depends on the rate(s) calculated for the mandatory respondent(s). Here, Chengdu's individual rate was calculated using total AFA. Final Decision Memo at 11–12. If Chengdu's rate changes, it will change one of the inputs for calculating the separate rate respondents' rate.

[5] No party challenges Commerce's calculation of Fengtai's rate, and Fengtai is not a party in this consolidated action.

[6] On June 13, 2018, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. Defendant subsequently filed a corrected index to the confidential administrative record. The relevant indices are located on the docket at ECF Nos. 24–1 and 29. All references to administrative record documents in this opinion will be to the numbers Commerce assigned to the documents in the relevant indices.

[7] Throughout the proceedings, Commerce likewise continued to find that Bosun and the Plaintiff-Intervenors were eligible for a separate rate. *See* Prelim. Decision Memo at 6–8; Final Decision Memo at 21 & n.89.

removed all versions from the record. *See* Commerce's Rejection of Chengdu's Second Suppl. Resp. at 1–2, PD 235, bar code 3625400–01 (Oct. 3, 2017) ("Commerce's Rejection Mem."). Chengdu filed a request for reconsideration, which Commerce also denied. *See generally* Chengdu's Resp. & Req. for Reconsideration of Commerce's Rejection Mem., PD 236, bar code 3627194–01 (Oct. 6, 2017) ("Chengdu's Reconsideration Req."); Commerce's Denial of Chengdu's Reconsideration Req., PD 246, bar code 3635994–01 (Nov. 1, 2017) ("Commerce's Denial of Chengdu's Reconsideration Req.").

Commerce preliminarily determined that because Chengdu withheld necessary information and missed filing deadlines, its rate should be determined on the basis of total AFA. *See Diamond Sawblades and Parts Thereof From the [PRC]*, 82 Fed. Reg. 57,585, 57,586 (Dep't Commerce Dec. 6, 2017) (prelim. results of [ADD] admin. review; 2015–2016) ("*Prelim. Results*") and accompanying Prelim. Decision Memo at 10–13. Commerce selected the PRC-wide entity rate of 82.05% as Chengdu's total AFA rate. *Prelim. Results*, 82 Fed. Reg. at 57,586; Prelim. Decision Memo at 10–13. Commerce assigned Fengtai the PRC-wide entity rate as well.[8] Prelim. Decision Memo at 13. The separate rate respondents were assigned the same rate as the mandatory respondents. *Prelim. Results*, 82 Fed. Reg. at 57,586; Prelim. Decision Memo at 8. On January 12, 2018, Chengdu filed a case brief with the agency challenging the preliminary determination. [Chengdu's] Case Br., PD 278, bar code 3661219–01 (Jan. 12, 2018) ("Chengdu's Agency Br."). For the final determination, Commerce continues to assign the 82.05% rate to the mandatory and separate rate respondents. *Final Results*, 83 Fed. Reg. at 17,528. Specifically, Commerce explains that Chengdu and Fengtai did not act to the best of their respective abilities to supply Commerce with necessary information in a timely manner and that an adverse inference continues to be necessary in selecting from the facts otherwise available. *See* Final Decision Memo at 7–12, 16–19, 21. Commerce also explains that it continues to calculate the rate assigned to the separate rate respondents using a simple average of the mandatory respondents' rates. *Id.* at 29.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the Court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. This Court

[8] Specifically, Commerce determined that total AFA was warranted because Fengtai missed filing deadlines and impeded the review proceedings. Prelim. Decision Memo at 13.

will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Rejection of Chengdu's Second Supplemental Response

Chengdu argues that Commerce abused its discretion and acted in an arbitrary and capricious manner when it rejected Chengdu's second supplemental response ("submission").[9] *See* Chengdu's Br. at 11–20. Defendant responds that Commerce properly exercised its discretion because Chengdu did not comply with the 19 C.F.R. § 351.303 (2017)[10] filing requirements, had notice that the cover letter and narrative portions of the redacted version of its submission did not upload to the Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System ("ACCESS") before the filing deadline expired,[11] and did not request to extend the deadline at any point. *See* Def.'s Resp. Mots. J. Agency R. at 11–20, Dec. 19, 2018, ECF No. 42 ("Def.'s Resp. Br."). For the following reasons, Commerce's decision to reject and remove from the record Chengdu's submission was an abuse of discretion.

An agency abuses its discretion when it issues a decision that "represents an unreasonable judgment in weighing relevant factors." *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005) (citation omitted). Factors found to be relevant in reviewing Commerce's decision to reject corrective information include Commerce's interest in ensuring finality, the burden of incorporating the information, and consideration of whether the information will increase the accuracy of the calculated dumping margins. *See Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 36 CIT __, __, 815 F.

[9] Chengdu also argues that Commerce's reasons for rejecting and removing the submission from the record are unsupported by substantial evidence. Chengdu's Br. at 16–20; *see also* Oral. Arg. at 00:34:36–00:37:43. Chengdu's substantial evidence challenge alleges that Commerce failed to establish prejudice to either it or any of the interested parties, Oral Arg. at 00:36:30–00:37:43, which is an abuse of discretion claim. The court, therefore, will treat Chengdu's substantial evidence challenge as an iteration of its abuse of discretion claim and addresses it below.

[10] Further citations to Title 19 of the Code of Federal Regulations are to the 2017 edition.

[11] Commerce set a deadline of September 22, 2017, at 5:00 p.m., for receipt of Chengdu's submission. Commerce's Rejection Mem. at 1. A filer proffering a confidential version of a document may, under 19 C.F.R. § 351.303(c)(2)'s one-day lag rule, first file the document with brackets demarking confidential information not finalized. Subsequently, the filer has one-business day to finalize the brackets and file a public version of the same document. 19 C.F.R. § 351.303(c)(2). Here, the deadline set by Commerce fell on a Friday, meaning Chengdu had until Monday, September 25, 2017, to file the finalized unredacted and the redacted versions of its submission.

Supp. 2d 1342, 1365–67 (2012) (holding that Commerce abused its discretion by failing to consider a separate rate certification filed ninety-five days after the established deadline where the information submitted required minimal analysis, did not result in a great burden, and, if considered, likely would have resulted in the filing party receiving a separate rate); *see also NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207–08 (Fed. Cir. 1995) (holding that Commerce abused its discretion where its decision not to use a "straightforward mathematical adjustment" to correct for certain clerical errors led to "the imposition of many millions of dollars in duties not justified under the statute.").

Here, Commerce abused its discretion by rejecting Chengdu's attempt to re-file the redacted version of a document it previously attempted to file on time but which, for reasons unclear on this record, only uploaded in part. Chengdu's counsel timely filed the complete unredacted version of the submission on ACCESS. Chengdu's Br. at 17 & n.3. It also timely served Petitioner with a PDF copy of the same via hand delivery and served all other interested parties with an electronic copy of the same on a CD via first class mail. *Id.* Finally, Chengdu's counsel served Petitioner and all other interested parties, via email, with the complete redacted version of the submission. *Id.* No party disputes Chengdu's assertion of service or receipt of the redacted and/or unredacted versions of the submission. Although Chengdu attempted to file the redacted version of the submission on ACCESS, only the subparts containing the exhibits were uploaded; the subpart containing the cover letter and narrative portion of the submission did not upload. *Id.* at 17–18; *see also* Chengdu's Reconsideration Req. at Attach. 1 (referring to the confirmation of electronic submission receipt for bar code 3622650). The record is silent on whether the failure to upload resulted from some inadvertence on Chengdu's part or some problem with the ACCESS system. It is clear, however, that before the relevant deadline expired Chengdu attempted to upload the redacted version of its submission but was only successful in uploading it in part and that it successfully uploaded the unredacted version in full. *See* Chengdu's Reconsideration Req. at Attach. 1. As a result, by the relevant deadline, Commerce received the complete unredacted version and a portion of the redacted version of Chengdu's submission. *See id.* Two days after the relevant deadline expired and within an hour of receiving two Workflow Rejection Notifications from Commerce staff with the directive to "refile th[e] [redacted] version with a cover letter and the narrative," *see id.* at Attach. 2, Chengdu's counsel complied and refilled the

complete redacted version of its submission. *See id.* at Attach. 3. Subsequently, Commerce rejected and removed from the record all versions of Chengdu's submission and denied Chengdu's request for reconsideration. *See generally* Commerce's Rejection Mem.; Commerce's Denial of Chengdu's Reconsideration Req.

Commerce has not explained why it would be burdensome to incorporate the information. Invocation of a "general prejudice stemming from late submissions" and the potential effect that cumulative late filings across all proceedings may have on Commerce's ability to administer its case load, Final Decision Memo at 8–9, do not constitute a reasonable explanation given the facts of this case. In fact, Commerce's explanation assumes that the submission was late in the typical sense. The facts surrounding this submission are not typical. There is no dispute that the unredacted submission was timely filed. *See* Chengdu's Reconsideration Req. at Attach. 1 (referring to confirmation of electronic submission receipts for bar codes 3622618 and 3622639 demonstrating timely filing of the unredacted version of the submission). There is also no dispute that Chengdu attempted to timely file the redacted version of its submission and that a portion of that submission failed to upload and needed to be re-filed. *See id.* (referring to confirmation of electronic submission receipt for bar code 3622650 and showing that the redacted version uploaded in part). The court, therefore, cannot conclude that Chengdu's actions infringed or delayed in any meaningful way Commerce's review of the information submitted or that it would be burdensome to incorporate the information proffered. Further, the court cannot conclude that interested parties were prejudiced or burdened by the two-day delay in filing the redacted version of the submission on ACCESS. All interested parties received the redacted and unredacted versions of the submission by the relevant deadline and had notice and opportunity to comment on the submission. Commerce received the unredacted version of the submission by the relevant deadline.[12]

Finally, Commerce's rejection of Chengdu's submission will likely undermine the accuracy of the dumping margins calculated in this case. Commerce makes no claim that anything within the submission is lacking or would otherwise lead to AFA. Therefore, it is likely that but for the untimeliness of the submission a more accurate rate would have been calculated for Chengdu and, by extension, the separate rate respondents. In light of the foregoing reasons, Commerce abused

[12] To support its decision to reject and remove Chengdu's submission, Commerce invokes an incident from an unrelated investigation where the law firm representing Chengdu made an untimely filing on behalf of another one of its clients. *See* Commerce's Rejection Mem. at 2, App. 1. No evidence on this record links Chengdu to the unrelated proceeding or the client on whose behalf the law firm was acting.

its discretion by rejecting and removing from the record Chengdu's submission.[13] On remand, Commerce must place Chengdu's submission on the record and consider it for purposes of calculating Chengdu's rate. Commerce must also recalculate any rates affected by a change to Chengdu's rate.

Defendant argues that Chengdu did not satisfy the requirements of 19 C.F.R. § 351.302(c)—filing an extension request and demonstrating that an "extraordinary circumstance" prevented timely filing—that would warrant consideration of its untimely submission. Def.'s Resp. Br. at 14; 19 C.F.R. § 351.302(c). Chengdu did not request an extension either before or after the filing deadline expired. An extension request, however, presumes that the requestor did not or will not proffer a filing by the deadline set. That is not the situation here because Chengdu did timely proffer its submission. Commerce timely received the complete unredacted version of the submission on ACCESS, it also timely received an incomplete redacted version of the submission, and the redacted and unredacted versions of the same were timely served on all interested parties. The information in the submission was provided by the deadline set and the updated version of the submission, filed two-days late, related back to the original, timely filing. No party alleges that the complete redacted version of Chengdu's submission filed two days after the relevant deadline differed in any way from the timely filed unredacted version.

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[13] Chengdu also argues that Commerce's decision to accept a late filing in the Fiber from India Investigation, within the same week that it rejected and removed Chengdu's submission, demonstrates that Commerce's actions here were arbitrary and capricious. *See* Chengdu's Br. at 15–16 (citing Chengdu's Reconsideration Req. at Attach. 4 (reproducing Commerce's memorandum allowing a late filing in a different proceeding)); *see also* Decision Mem. Prelim. Determination Less-Than-Fair Value Investigation Fine Denier Polyester Staple Fiber from India at 10–12, A-533–875, (Dec. 18, 2017), *available at* http://ia.ita.doc.gov/frn/summary/india/201727752–1.pdf (last visited Sept. 18, 2019) ("Fiber from India Investigation") (providing further background on the proceeding Chengdu is relying upon to make its arbitrary and capricious argument here). In the Fiber from India Investigation, Commerce provided a party with the opportunity to re-file an unredacted version of a document that, when originally filed, excluded 19 pages from the narrative section of the document. *See* Chengdu's Reconsideration Req. at Attach. 4. Chengdu relied on the Fiber from India Investigation in its request for reconsideration and brief to the agency to argue that Commerce's decision to reject and remove Chengdu's submission was arbitrary. *Id.* at 4; Chengdu's Agency Br. at 11–12. Commerce never addressed Chengdu's challenge. Further, although Defendant argues that Commerce's actions in the Fiber from India Investigation are distinguishable, Def.'s Resp. Br. at 18–19, any explanation it provides is a post-hoc rationalization and will not be considered by the court. Accordingly, Commerce fails to explain why its actions are not arbitrary given the factual similarities between the Fiber from India Investigation and this case.

II. Commerce's Decision to Apply the Total AFA Rate to Chengdu, Bosun, and Plaintiff-Intervenors

Bosun, Chengdu, and Plaintiff-Intervenors, all challenge as contrary to law Commerce's use of total AFA to select the weighted-average dumping margin assigned to Chengdu and the separate rate respondents. *See* Chengdu's Br. at 21–24; Bosun's Br. at 2–12; Pl.-Intervenors' Br. at 7–19. In light of the court's determination that Commerce abused its discretion by rejecting Chengdu's submission and corresponding order for Commerce to place on the record and consider the submission for the purposes of calculating Chengdu's rate and recalculating, if necessary, the separate rate applicants' rate, the court does not reach Bosun's, Chengdu's, and Plaintiff-Intervenors' AFA challenges.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce shall place the business proprietary and public versions of Chengdu's second supplemental response on the record; and it is further

ORDERED that Commerce shall consider Chengdu's second supplemental response for purposes of calculating Chengdu's individual rate and, if there is a change to Chengdu's rate, adjust the separate rate respondents' rates accordingly; and it is further

ORDERED that all parties to this action shall consult with one another and file with the Court a proposed scheduling order governing how the remand proceedings will be conducted within 14 days of this date.

Dated: September 23, 2019
New York, New York

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