U.S. Court of International Trade

Slip Op. 19–169

PRO-TEAM COIL NAIL ENTERPRISE, INC., et al., Plaintiffs, UNICATCH INDUSTRIAL CO., LTD., et al., Consolidated Plaintiffs, and S.T.O. INDUSTRIES, INC., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Consol. Court No. 18–00027
PUBLIC VERSION

[Remanding in part and sustaining in part the final results of the U.S. Department of Commerce's first administrative review of the antidumping duty order on certain steel nails from Taiwan.]

Dated: December 19, 2019

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for Plaintiffs Pro-Team Coil Enterprise, Inc. and PT Enterprise Inc., Consolidated Plaintiffs Unicatch Industrial Co., Ltd. and TC International, Inc., and Consolidated Plaintiffs Hor Liang Industrial Corp., and Romp Coil Nails Industries Inc. With him on the briefs were *Max F. Shutzman* and *Andrew T. Schutz*.

John R. Magnus, TradeWins LLC, of Washington, DC, argued for Consolidated Plaintiff PrimeSource Building Products, Inc.

Ronald M. Wisla, *Lizbeth R. Levinson*, and *Brittney R. Powell*, Fox Rothschild LLP, of Washington, DC, for Plaintiff-Intervenor S.T.O. Industries, Inc.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Natan P.L. Tubman*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Adam Gordon, The Bristol Group LLC, of Washington, DC, argued for Defendant-Intervenor Mid Continent Steel & Wire, Inc. With him on the brief was *Ping Gong*.

OPINION AND ORDER

Barnett, Judge:

This consolidated action is before the court on five motions for judgment on the agency record pursuant to U.S. Court of International Trade ("CIT") Rule 56.2 challenging the final results of the U.S. Department of Commerce's ("Commerce" or "the agency") first administrative review of the antidumping duty order on certain steel nails from Taiwan. *See Certain Steel Nails From Taiwan*, 83 Fed. Reg. 6,163 (Dep't Commerce Feb. 13, 2018) (final results of antidumping duty admin. review and partial rescission of admin. review;

2015–2016) ("*Final Results*"), ECF No. 20–2, and accompanying Issues and Decision Mem, A-583–854 (Feb. 6, 2018) ("I&D Mem."), ECF No. 20–3.[1]

Plaintiff Pro-Team Coil Nail Enterprise, Inc. ("Pro-Team") is a Taiwanese producer of subject merchandise; Plaintiff PT Enterprise Inc. ("PT") is Pro-Team's affiliated exporter. PT and Pro-Team (together, "PT/Pro-Team") contest Commerce's use of total facts otherwise available with an adverse inference (referred to as "total adverse facts available" or "total AFA") on the basis that PT/Pro-Team failed to timely provide quantity and value ("Q&V") figures concerning Pro-Team's home market sales and never provided the figures in the form and manner requested. Confidential Pls.' Mot. for J. on the Agency R., ECF No. 30, and Confidential Mem. of Law in Supp. of [] Pls.', Pro-Team Coil Nail Enter., Inc. and PT Enter. Inc. Mot. for J. on the Agency R. ("PT/Pro-Team's Mem."), ECF No. 30; Confidential Pl. PT's Reply to Def.'s Opp'n to PT's Mot. for J. on the Agency R. ("PT/Pro-Team's Reply"), ECF No. 44.

Consolidated Plaintiff Unicatch Industrial Co., Ltd. ("Unicatch") is a Taiwanese producer of subject merchandise; Consolidated Plaintiff TC International, Inc. ("TC Int'l") is Unicatch's affiliated U.S. reseller. Unicatch and TC Int'l (together, "TC/Unicatch") contest Commerce's use of total AFA to determine Unicatch's margin after concluding that Unicatch failed to provide a complete cost reconciliation. Confidential Pls.' Mot. for J. on the Agency R., ECF No. 32, and Confidential Mem. of Law in Supp. of Consol. Pls', Unicatch Indus. Co., Ltd. and TC Int'l, Inc. Mot. for J. on the Agency R. ("TC/Unicatch's Mem."), ECF No. 32; Confidential Pl. Unicatch's Reply to Def.'s Opp'n to Unicatch's Mot. for J. on the Agency R. (TC/Unicatch's Reply"), ECF No. 46.

Consolidated Plaintiff PrimeSource Building Products, Inc. ("PrimeSource"), a U.S. importer of subject merchandise, contests Commerce's decision to assign PT/Pro-Team and Unicatch rates based on total adverse facts available. Mot. for J. Upon the Agency R. under Rule 56.2 of Consol. Pl. PrimeSource Building Prods., Inc., ECF No. 29, and Mem. of P&A in Supp. of Rule 56.2 Mot. for J. on the Agency R by Consol. Pl. PrimeSource Building Prods. Inc. ("PrimeSource's Mem."), ECF No. 29–1; Pl. PrimeSource's Resp. to Def.'s Opp'n to Mot. for J. on the Agency R. ("PrimeSource's Reply"), ECF No. 43.

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[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 20–4, and a Confidential Administrative Record ("CR"), ECF No. 20–5. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public J.A. ("PJA"), ECF No. 54; Confidential J.A. ("CJA"), ECF Nos. 55 (Vol. I), 55–1 (Vol. II), 55–2 (Vol. III), 55–3 (Vol. IV). The court references the confidential version of the relevant record documents, unless otherwise specified.

Consolidated Plaintiffs Hor Liang Industrial Corp. ("Hor Liang") and Romp Coil Nails Industries ("Romp") (together, "HL/Romp") are Taiwanese producers and exporters of subject merchandise that were not selected for individual examination and received the "all-others" rate based on PT/Pro-Team's and Unicatch's adverse rates. HL/Romp challenge Commerce's summary denial of their ministerial error allegation and seek to preserve their right to obtain a revised rate in the event that PT/Pro-Team or TC/Unicatch succeed in their challenges. Pls.' Mot. for J. on the Agency R., ECF No. 34, and Mem. of Law in Supp. of Consol. Pls., Hor Liang Indus. Corp. and Romp Coil Nails Indus. Inc. Mot for J. on the Agency R. ("HL/Romp's Mem.") at 2, ECF No. 34; Pls. Hor Liang Indus. Corp. and Romp Coil Nails Indus. Inc.'s Reply to Def.'s Opp'n to Pls.' Mot. for J. on the Agency R., ECF No. 48.

Plaintiff-Intervenor S.T.O. Industries, Inc. ("S.T.O. Industries"), a U.S. importer of subject merchandise, supports the motions filed by PT/Pro-Team and TC/Unicatch. *See* Pl.-Int.'s Mot. for J. on the Agency R. ("S.T.O.'s Mot."), ECF No. 35.

Defendant United States ("the Government") and Defendant-Intervenor Mid Continent Steel & Wire, Inc. ("Mid Continent"), a domestic producer of subject merchandise and the petitioner in the underlying proceeding, defend the *Final Results*. Confidential Def.'s Mem. in Opp'n to Pls.' R. 56.2 Mots. for J. upon the Admin. R. ("Gov't's Resp."), ECF No. 37; Def.-Int.'s Resp. Br. ("Mid Continent's Resp."), ECF No. 42.

For the reasons discussed herein, the court remands Commerce's use of the facts otherwise available with respect to PT/Pro-Team; remands Commerce's use of an adverse inference when selecting from among the facts otherwise available with respect to Unicatch; declines to reach HL/Romp's first claim; and defers resolving HL/Romp's second claim.

BACKGROUND

In July 2015, Commerce issued an order imposing antidumping duties on certain steel nails from Taiwan. *See Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam*, 80 Fed. Reg. 39,994, 39,996 (Dep't Commerce July, 13, 2015) (antidumping duty orders). In September 2016, Commerce initiated the first administrative review of that order. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 81 Fed. Reg. 62,720 (Dep't Commerce Sept. 12, 2016). The period of review ("POR") was May 20, 2015, through June 30, 2016. *Id.* at 62,722.

Commerce initially selected PT and Bonuts Hardware Logistics Co., LLC ("Bonuts") as mandatory respondents. Selection of Respondents for the 2015–2016 Admin. Review of the Antidumping Duty Order on Certain Steel Nails from Taiwan (Nov. 29, 2016) at 1, PR 38, CJA Vol. I, Tab 3. On February 9, 2017, Commerce selected Unicatch as an additional mandatory respondent after Bonuts indicated its intent not to participate in the review. Selection of Additional Mandatory Respondent (Feb. 9, 2017) at 1, 3–4, PR 76, CJA Vol. II, Tab 17.

On August 7, 2017, Commerce published its preliminary results. *Certain Steel Nails From Taiwan*, 82 Fed. Reg. 36,744 (Dep't Commerce Aug. 7, 2017) (prelim. results of antidumping duty admin. review and partial rescission of admin. review; 2015–2016) ("*Preliminary Results*"), PR 154, PJA Tab 29. Commerce used total adverse facts available to assign PT/Pro-Team and Bonuts preliminary weighted-average dumping margins of 78.17 percent—the dumping margin alleged in the petition underlying the original investigation. *Id.* at 36,744–45; Decision Mem. for Prelim. Results of Antidumping Duty Admin. Review (July 31, 2017) ("Prelim. Mem.") at 12–13, PR 155, PJA Tab 30. Commerce preliminarily calculated a company-specific weighted-average dumping margin of 34.20 percent for Unicatch. *Prelim. Results*, 82 Fed. Reg. at 36,745. In accordance with 19 U.S.C. § 1673d, Commerce preliminarily assigned Unicatch's calculated rate to Romp and Hor Liang. *Prelim. Results*, 82 Fed. Reg. at 36,744.[2]

Commerce published the *Final Results* on February 13, 2018. In a change from the *Preliminary Results*, Commerce used total AFA to determine the rate for Unicatch as well as PT/Pro-Team and Bonuts; thus, all individually-examined respondents received final dumping margins of 78.17 percent. *Id.* at 6,164. Consequently, the all-others rate assigned to Romp and Hor Liang increased to 78.17 percent to

[2] To calculate dumping margins for non-examined companies—such as Romp and Hor Liang—Commerce is guided by 19 U.S.C. § 1673d(c)(5). *See Prelim. Results*, 82 Fed. Reg. at 36,744. By its terms, 19 U.S.C. § 1673d applies to market economy investigations, not administrative reviews. As a general rule, however, Commerce looks to section 1673d(c)(5) for guidance when calculating the rate for non-examined companies in administrative reviews. *See* I&D Mem. at 5. Section 1673d(c)(5)(A) provides that the "all-others rate" assigned to non-examined companies is calculated as "the weighted average of the estimated weighted average dumping margins" assigned to individually-examined companies, "excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title [*i.e.*, on the basis of adverse facts available]." 19 U.S.C. § 1673d(c)(5)(A). If, however, the dumping margins assigned to all individually-examined companies are zero, de minimis, or based on adverse facts available, Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." *Id.* § 1673d(c)(5)(B).

reflect "the rate determined for all mandatory respondents." *Id.* at 6,164; *see also supra*, note 2.

On February 20, 2018, Romp and Hor Liang filed ministerial error comments regarding Commerce's calculation of the all-others rate. *See* Romp/HR Liang's Rejected Req. to Correct Clerical Error (Feb. 20, 2018), PR 196, PJA Tab 49. On February 27, 2018, Commerce rejected Romp and Hor Liang's ministerial error allegation. Rejection of Submission (Feb. 27, 2018), PR 209, PJA Tab 54. Commerce explained that it had not made a ministerial error as that term is defined by statute and regulation, and, "[b]ased upon [its] analysis of the comments received, [] will not amend [Romp's and Hor Liang's] margins." *Id.* The following day, Commerce removed the ministerial error allegation from the administrative record. Rejection of Submissions (Feb. 28, 2018), PR 207, PJA Tab 52. On March 15, 2018, Commerce denied HL/Romp's request to reinstate their ministerial error allegation on the administrative record. Rejection of Submission (Mar. 15, 2018), PR 215, PJA Tab 57.

In February 2018, PT/Pro-Team, TC/Unicatch, HL/Romp, and PrimeSource commenced actions challenging the *Final Results*. Summons, ECF No. 1; *Unicatch Indus. Co., Ltd., et al. v. United States*, No. 18-cv-00028 (CIT Feb. 22, 2018); *Hor Liang Indus. Corp., et al. v. United States*, No. 18-cv-00029 (CIT Feb. 22, 2018); *PrimeSource Building Prods., Inc. v. United States*, No. 18-cv-00030 (CIT Feb. 23, 2018). On September 24, 2018, the court denied the Government's motion to dismiss HL/Romp's complaint pursuant to CIT Rule 12(b)(1) for lack of subject matter jurisdiction and granted S.T.O. Industries' motion to intervene. *Hor Liang Indus. Corp. v. United States*, 42 CIT ___, ___, 337 F. Supp. 3d 1310, 1329 (2018). The court also dismissed counts one and three of HL/Romp's amended complaint for failure to exhaust administrative remedies. *Id.* at 1324–28. On September 27, 2018, the court consolidated the actions under lead court no. 18–00027. Order (Sept. 27, 2018), ECF No. 25.

The court heard oral argument on the pending motions on November 21, 2019. Docket Entry, ECF No. 60.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[3] and 28 U.S.C. § 1581(c). The court will uphold an agency

[3] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are generally to the 2012 edition. However, The Trade Preferences Extension Act ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), made several amendments to the antidumping and countervailing duty laws. Section 502 of the TPEA amended 19 U.S.C. § 1677e. *See* TPEA § 502. The TPEA amendments affect all

determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Authority to Determine Margins Based on Total Adverse Facts Available

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce," "fails to provide" requested information by the submission deadlines "or in the form and manner requested," "significantly impedes a proceeding," or provides information that cannot be verified, Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a).

Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *See id.* According to subsection 1677m(d), if Commerce

> determines that a response to a request for information . . . does not comply with the request, [Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews . . . .

Id. If the respondent's subsequent submission is also deficient or untimely, Commerce may "disregard all or part of the original and subsequent responses," subject to subsection 1677m(e). *Id.*

Section 1677m(e) provides that Commerce may not "decline to consider information that is . . . necessary to the determination but does not meet all the applicable requirements" when the information is timely submitted; "the information can be verified"; "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination"; the proponent of the information "has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce]"; and "the information can be used without undue difficulties." *Id.* § 1677m(e).

Additionally, when Commerce determines that a respondent "has failed to cooperate by not acting to the best of its ability to comply

antidumping duty determinations made on or after August 6, 2015. *See* Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793 (Dep't Commerce Aug. 6, 2015). Accordingly, all references to 19 U.S.C. § 1677e are to the amended version of the statute.

with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003);[4] *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1275–76 (Fed. Cir. 2012).

Commerce generally uses total adverse facts available to determine dumping margins when "none of the reported data is reliable or usable." *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citation omitted); *see also Nat'l Nail Corp. v. United States,* 43 CIT ___, ___, 390 F. Supp. 3d 1356, 1374 (2019) (explaining that "Commerce uses 'total adverse facts available'" when it applies "adverse facts available not only to the facts pertaining to specific sales or information . . . not present on the record, but to the facts respecting all of respondents' production and sales information that the [agency] concludes is needed for an investigation or review") (citation omitted).

II. Commerce's Use of Total AFA to Determine PT/Pro-Team's Margin

A. Additional Background

Dumping margins are determined generally from the difference between the normal value and the export price or constructed export price of the subject merchandise. *See* 19 U.S.C. § 1673. To calculate normal value, Commerce typically uses "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." *Id.* § 1677b(a)(1)(B)(i). However, if "the aggregate quantity (or value) of the foreign like product sold in the exporting country . . . is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States," *id.* § 1677b(a)(1)(C), Commerce may look to third country sales or base normal value on constructed

[4] *Nippon Steel* predates the TPEA. However, the relevant statutory language discussed in that case remains unchanged. *Compare* 19 U.S.C. § 1677e(b) (2012), *with* 19 U.S.C. § 1677e(b)(1) (2015).

value ("CV"),[5] *id.* § 1677b(a)(1)(B)(ii), (a)(1)(C), (a)(4); *see also* 19 C.F.R. § 351.404(a)–(b).[6]

Accordingly, in order to ascertain the proper basis for determining normal value, Commerce instructed PT/Pro-Team to report the quantity and value of subject merchandise sold during the period of review in or to the United States. Req. for Information (Nov. 29, 2016) at A-1, PR 39–41, CJA Vol. I, Tab 4. Commerce further instructed:

> If your home market does not meet the five percent threshold . . . , report the sales to each of the three largest (by volume) third-country markets (provided each meets the five percent threshold) in the [Q&V] chart . . . . If the volume of your largest third-country market sales of the foreign like product is also less than five percent of the volume of your sales to the United States of the subject merchandise, do not report this market. If this is the case, you are required to respond to section D of this questionnaire.

Id. at A-2. PT/Pro-Team reported that it had no sales in the home market or any third country markets and, thus, Pro-Team would respond to Commerce's section D questionnaire. PT Enter. Sec. A Resp. (Jan. 4, 2017) ("PT's AQR") at 3, CR 8–16, PR 57–59, CJA Vol. I, Tab 10. PT/Pro-Team provided a Q&V chart reflecting PT's sales to the United States. *Id.* at Ex. A-1.

PT/Pro-Team's section C questionnaire response contained additional information regarding its sales to the United States. PT Enter. Sec. C Resp. (Jan. 19, 2017) ("PT's CQR"), CR 23–25, PR 70, CJA Vol. II, Tab 12. However, the sales reconciliation worksheet appended to that response contained a summary amount reflecting POR sales of subject merchandise in the home market. *Id.* at Ex. C-2, Sales Reconciliation Worksheet, Sec. II, Line Item I.4.[7] Accompanying spreadsheets disaggregated PT's and Pro-Team's respective sales to U.S. and Taiwanese markets. *See id.*

Commerce issued PT/Pro-Team a supplemental questionnaire seeking clarification as to whether Pro-Team or PT sold "the merchandise under review" in the domestic market and, if so, to identify all such

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[5] Constructed value consists of the cost of production, selling, general, and administrative expenses, profit, and other expenses incidental to preparing the subject merchandise for export to the United States. 19 U.S.C. § 1677b(e).

[6] Commerce typically considers sufficiency in terms of the aggregate *quantity* of sales in the home market but will consider the aggregate *value* of sales "if quantity is not appropriate." 19 C.F.R. § 351.404(b)(2).

[7] The worksheet indicates that Pro-Team sold NT$[[ ]]—equal to U.S.$ [[ ]]—worth of subject merchandise in Taiwan for the combined calendar year 2015 and January to June 2016. PT's CQR at Ex. C-2, Sales Reconciliation Worksheet, Sec. II, Line Item I.4. The domestic sales value equals about [[ ]] percent of PT's U.S.$ [[ ]] in sales to the United States. *See id.*

products. PT Enter. Secs. A–D Suppl. Questionnaire Resp. (Apr. 21, 2017) ("PT's 1st Suppl. QR") at 8–9, CR 37–38, PR 109, CJA Vol. II, Tab 23. PT/Pro-Team responded that Pro-Team sold the merchandise at issue to domestic resellers for export, but PT did not have any domestic sales. *Id.* PT/Pro-Team submitted a list of all products sold by Pro-Team in the domestic market. *Id.* at Ex. SA-7.

Soon thereafter, Mid Continent submitted a letter to Commerce in which it identified the inconsistency between PT/Pro-Team's section A questionnaire response regarding the lack of home market sales and PT/Pro-Team's supplemental questionnaire response acknowledging sales in the domestic market. Comments on PT Enter. Inc. and Pro-Team Coil Nail Enter., Inc.'s Suppl. Secs. A, C, and D Questionnaire Resp. (May 1, 2017) at 2, CR 45, CJA Vol. III, Tab 26. Mid Continent requested Commerce to instruct PT/Pro-Team to provide revised Q&V data to the extent the products sold in the home market constituted subject merchandise in order to "confirm that its home market remains non-viable" as the basis for normal value. *Id.*

Commerce issued PT/Pro-Team a second supplemental questionnaire requesting: (1) "a detailed description of each of the products listed" in Exhibit SA-7 (products sold in the home market by Pro-Team); (2) an explanation "why the product is not subject merchandise"; (3) and, to the extent any products listed in Exhibit SA-7 are subject merchandise, revised home market Q&V figures. Suppl. Questionnaire (May 16, 2017) at 4, CR 49, PR 119, CJA Vol. III, Tab 29. PT/Pro-Team responded that all products listed in Exhibit SA-7 consisted of subject merchandise and provided a detailed description of each in Exhibit SS-5. PT Enter. Second Suppl. Questionnaire Resp. (June 6, 2017) ("PT's 2nd Suppl. QR") at 3, CR 56–65, PR 135–136, CJA Vol. III, Tab 36. PT/Pro-Team did not, however, provide revised Q&V figures. *See id.*

Mid Continent alerted Commerce to PT/Pro-Team's failure to provide the revised Q&V figures and urged Commerce to use total AFA on the basis that PT/Pro-Team's omission "fully supports an inference that its home market in fact is viable, because otherwise PT would have reported the data requested." Initial Comments on PT Enter. Inc. and Pro-Team Coil Nail Enter., Inc.'s Second Suppl. Questionnaire Resp. (June 9, 2017) at 3–4, PR 139, PJA Tab 24. PT/Pro-Team sought to rebut Mid Continent's assertion, explaining that its omission of home market Q&V data from the chart appended to its initial section A questionnaire response and its statement that it did not sell the merchandise under review in the home market resulted from its failure to account for Pro-Team's home market sales. PT Enter./Pro-Team Resp. to Pet'r's Initial Comments on PT and Pro-Team's Second

Suppl. Questionnaire Resp. (June 14, 2017) ("PT's Rebuttal Cmts.") at 2 n.1, CR 72–73, CJA Vol. IV, Tab 40. PT/Pro-Team also stated that it had "inadvertently neglected" to include revised Q&V figures in its second supplemental questionnaire response, *id.* at 2 n.2, and attached a schedule reflecting Q&V data for Pro-Team's POR domestic sales of subject merchandise, *id.* at Ex. P-2 ("the Q&V Schedule"). PT/Pro-Team further explained that Q&V data for Pro-Team's home market sales was on the record since it filed its original sections C and D questionnaire responses in January 2017. *Id.* at 3–4 (citing PT's CQR, Ex. C-2; PT Enter. Sec. D Resp. (Jan. 19, 2017) ("PT's DQR") at Ex. D-7.2, CR 26–27, CJA Vol. II, Tab 13). PT/Pro-Team noted that the total quantity of home market sales was "clearly *de minimis*, well below the 5 [percent] threshold, and [] the [agency]'s use of constructed value to determine normal value, as it did during the [original] investigation, is absolutely appropriate." *Id.* at 4.[8] Commerce rejected PT/Pro-Team's arguments and preliminarily used total AFA to determine PT/Pro-Team's margin. *Prelim. Results*, 82 Fed. Reg. at 36,744–45.

PT/Pro-Team filed an administrative case brief in which it argued, *inter alia*, that judicial precedent from the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") required Commerce to weigh the principles of finality and accuracy before disregarding the Q&V Schedule and using total AFA. Admin. Case Br. of PT (Sept. 22, 2017) at 17–20, CR 93, PR 175, CJA Vol. IV, Tab 57 (discussing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1205, 1206–08 (Fed. Cir. 1995), *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1346–48 (Fed. Cir. 2006), and their progeny).[9] Commerce denied PT/Pro-Team's request and continued to use total AFA to determine PT/Pro-Team's final dumping margin. I&D Mem. at 11–15. Commerce reasoned that *NTN Bearing* and *Timken* were inapplicable on the basis that the "issues" in this case "go far beyond mere clerical errors." *Id.* at 14 & nn.48–52 (citations omitted).

Regarding its authority to use the facts otherwise available, Commerce concluded that PT/Pro-Team's failure to submit home market Q&V information within the time provided or in the form and manner

[8] Specifically, Pro-Team sold [[ ]] kilograms of subject merchandise in the home market, which represents [[ ]] percent of PT's U.S. sales quantity. PT's Rebuttal Cmts. at 4.

[9] *NTN Bearing* held that Commerce abused its discretion when it refused to consider corrections to clerical errors based on the untimely submission of the corrective information submitted soon after Commerce issued its preliminary determination. 74 F.3d at 1207–09. *Timken* found that Commerce erred in initially refusing to consider correcting errors identified after the preliminary determination but before the final determination. 434 F.3d at 1351–54 (affirming the CIT's remand to the agency for reconsideration of its initial position). Nevertheless, the *Timken* court sustained Commerce's subsequent decision not to utilize the corrective information. 434 F.3d at 1351–57.

requested meant that "the record lacks the necessary information to determine the viability of PT/Pro-Team's home market or the accuracy of the reported data." *Id.* at 13. Commerce further found that "PT/Pro-Team withheld certain home market sales data that was requested by Commerce" and "significantly impeded the proceeding by requiring multiple questionnaires to address the basic threshold issue" of home market viability. *Id.* Commerce determined to use *total* facts otherwise available "because 'the missing information is core to the antidumping analysis and leaves little room for the substitution of partial facts [available] without undue difficulty.'" *Id.* at 14 & n.45 (quoting *Mukand Ltd. v. United States*, 767 F.3d 1300, 1308 (Fed. Cir. 2014)). Commerce further concluded that PT/Pro-Team's conduct surrounding its belated submission of home market Q&V figures meant that the "requirements of [19 U.S.C. § 1677m(d) and (e)] have been satisfied" and the use of "total AFA is warranted." *Id.* at 14.

B. Commerce Must Reconsider its Decision to Use Total AFA

PT/Pro-Team contends that Commerce abused its discretion when it disregarded the Q&V Schedule; Commerce's conclusions that PT/Pro-Team withheld information, failed to provide information within the time provided or in the form and manner requested, or significantly impeded the proceeding are unsupported by substantial evidence; and the record likewise does not support Commerce's use of an adverse inference. PT/Pro-Team's Mem. at 19–44; PT/Pro-Team's Reply at 8, 11–21. PrimeSource advances substantially similar arguments. *See* PrimeSource's Mem. at 5–17; PrimeSource's Reply at 7–16. S.T.O. Industries adopts by incorporation PT/Pro-Team's arguments. S.T.O.'s Mot. at 1.

The court finds that Commerce's determination that the "record lacks the necessary information to determine the viability of PT/Pro-Team's home market or the accuracy of the reported data," I&D Mem. at 13, is unsupported by substantial evidence. Thus, this matter is remanded for further consideration.

As previously noted, Commerce did not reject the Q&V Schedule (or the rebuttal comments to which it was appended) on the basis that it contained untimely filed factual information pursuant to its regulatory authority to reject such information. *See* I&D Mem. at 13–14; 19 C.F.R. § 351.302(d)(1)(i).[10] Rather, Commerce disregarded the Q&V Schedule because PT/Pro-Team submitted the information seven

[10] For this reason, the Government's assertion that Commerce properly disregarded the Q&V Schedule because it contained untimely new factual information is impermissible *post hoc* reasoning the court may not consider. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962); Gov't's Resp. at 23–24.

days after the deadline for its second supplemental questionnaire response and failed to submit the information in the form and manner requested. *See* I&D Mem. at 13.[11] Section 1677e permits Commerce to use the facts otherwise available when a respondent "fails to provide [necessary] information by the deadlines for submission of the information or in the form and manner requested"; however, that authority is subject to 19 U.S.C. § 1677m(e) and a remand is required for Commerce to conduct the proper analysis required by that statutory provision.

Commerce's assertion that the statutory requirements for section 1677m(e) "have been satisfied," I&D Mem. at 14, is largely conclusory and there is no indication that Commerce considered whether the Q&V Schedule "is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination" or whether it "can be used without undue difficulties," 19 U.S.C. § 1677m(e)(3),(5). Moreover, Commerce's reliance on the untimeliness of PT/Pro-Team's filing to disregard the information contained therein was an abuse of discretion and the agency's finding that PT/Pro-Team failed to act to the best of its ability lacks substantial evidence. I&D Mem. 13–15; *see also* 19 U.S.C. § 1677m(e)(1),(4).

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[11] Commerce's determination that PT/Pro-Team "withheld" home market sales data, I&D Mem. at 13, is unsupported by substantial evidence. PT/Pro-Team provided information related to Pro-Team's domestic sales in its section C questionnaire response, first and second supplemental questionnaire responses, and, finally, in the Q&V Schedule. *See* PT's CQR at Ex. C-2; PT's 1st Suppl. QR at 8–9, Ex. SA-7; PT's 2nd Suppl. QR at 3, Ex. SS-5; Q&V Schedule.

Commerce's determination that PT/Pro-Team "significantly impeded the proceeding," I&D Mem. at 13, 14, is also unsupported by substantial evidence. Commerce supports its finding with several conclusory sentences but fails to specify any particular impediment. *See id.* The issuance of supplemental questionnaires is not uncommon and, as Commerce has elsewhere acknowledged, while its "strive[s] to make viability determinations early in an investigation or review, . . . there may be instances in which the [agency] must delay or reconsider a decision on viability." Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,358 (Dep't Commerce May 19, 1997) (final rule); *see also id.* at 27,335 (noting several circumstances potentially delaying viability determinations, such as when initial section A questionnaire responses "are so incomplete as to hinder a party's ability to make a market viability allegation, or the information necessary to make a market viability allegation is not available as part of the section A response"). Commerce's conclusion that PT/Pro-Team's conduct "resulted in Commerce having to fully extend the deadline for the preliminary results," I&D Mem. at 14, is also unsupported by substantial evidence. Commerce extended the deadline for several reasons, including the "need [for] additional time to fully consider petitioner's comments on the questionnaire responses of the respondents" and because of the complexity of the case with regard to "home market sales reporting, database revisions, and other issues such as the appropriate calculation of constructed value profit." Extension of Time Limit for Prelim. Results of Antidumping Duty Admin. Review (June 27, 2017) at 1–2, PR 151, PJA Tab 27. Moreover, Commerce never specified how extending the deadline for the preliminary determination constituted a significant impediment.

Regarding the issue of untimeliness, it is well-settled that a deadline-setting regulation that "is not required by statute may, in appropriate circumstances, be waived and must be waived where failure to do so would amount to an abuse of discretion." *NTN Bearing*, 74 F.3d at 1207. Commerce erred in disregarding *NTN Bearing* and *Timken* based on the agency's conclusion that PT/Pro-Team had not made a clerical error. I&D Mem. at 14; Gov't's Resp. at 22–23.[12] "Commerce is free to correct *any* type of [respondent] error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the [respondent] seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections." *Timken*, 434 F.3d at 1353 (emphasis added); *see also Fischer S.A. Comercio, Industria and Agricultura v. United States*, 34 CIT 334, 346, 700 F. Supp. 2d 1364, 1375 (2010) ("*Timken* and *NTN Bearing* both stress that, at the preliminary results stage, Commerce abuses its discretion where it refuses to let a respondent establish an accurate dumping margin by correcting mistakes in its response.").

When "reviewing Commerce's decision to reject corrective information" the court may consider "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." *Bosun Tools Co. v. United States*, Slip Op. 19–125, 2019 WL 4599805, at *4 (CIT Sept. 23, 2019). An evaluation of these factors has led the court to remand Commerce's refusal to consider corrective information (including information to correct an omission) submitted early in the proceeding. *See, e.g.*, *id*. at *4–5; *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 123–25, 815 F. Supp. 2d 1342, 1365–67 (2012); *Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1219–21, 865 F. Supp. 2d 1254, 1267–69 (2012); *Fischer S.A.*, 34 CIT at 346–50, 700 F. Supp. 2d at 1375–77.

Applying those principles here leads to the conclusion that Commerce must reconsider its disregard of the Q&V Schedule. Finality concerns are not implicated because PT/Pro-Team submitted the Q&V Schedule before Commerce issued the *Preliminary Results* and almost eight months before Commerce issued the *Final Results*. *Cf. Timken*, 434 F.3d at 1353 ("This court, however, has never discouraged the correction of errors at the preliminary result stage; we have only balanced the desire for accuracy in antidumping duty determi-

[12] The Government's assertion that Commerce conducted the balancing required by *NTN Bearing* and *Timken* when it "grant[ed] PT/Pro-Team multiple time extensions to provide complete and accurate information" is disingenuous. Gov't's Resp. at 23 (citing I&D Mem. at 12–14). Commerce clearly sought to distinguish *NTN Bearing* and *Timken* and thereby avoid conducting that balancing. I&D Mem. at 14.

nations with the need for finality at the final results stage."). Any burden would appear to be minimal given that the Q&V Schedule summarized information already on the record and confirmed PT/Pro-Team's early assertion that normal value would be based on constructed value. *See* PT's AQR at 3; PT's CQR, Ex. C-2 (reflecting a *de minimis* Taiwanese dollar amount of home market sales); Q&V Schedule (reflecting a *de minimis* volume of home market sales). Lastly, Commerce's summary assertion that "the record lacks the necessary information to determine . . . the accuracy of the reported data," I&D Mem. at 13, is unaccompanied by any examination of record evidence relevant to that assessment, *see* PT's Rebuttal Cmts. at 3–4 (explaining how the Q&V figures were derived from existing record evidence). Absent any reason to question the veracity of the Q&V figures, accuracy concerns favor accepting the Q&V Schedule for the purpose of determining PT/Pro-Team's antidumping duty rate. *Cf. F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (noting that adverse rates contain "some built-in increase intended as a deterrent to non-compliance"). Accordingly, Commerce erred in disregarding the Q&V Schedule based on its untimeliness.

Regarding the issue of whether PT/Pro-Team acted to the best of its ability, Commerce's explanation for its decision to use an adverse inference consisted of a single paragraph that mischaracterized record facts and largely restated its reasons for using *neutral* facts available. *See* I&D Mem. at 14. Commerce faulted PT/Pro-Team for submitting conflicting information regarding its domestic sales in response to the agency's supplemental questionnaires intended to afford PT/Pro-Team the "opportunit[y] to remedy and explain the deficiencies in its reporting." *See id.* Commerce never identified the inconsistencies, however, and record evidence demonstrates that PT/Pro-Team consistently reported Pro-Team's home market sales of the merchandise at issue in its first and second supplemental questionnaire responses. PT's 1st Suppl. QR at 8–9; PT's 2nd Suppl. QR at 3. Commerce further found that "PT/Pro-Team did not respond to Commerce's *multiple* requests to revise its quantity and value data within the appropriate deadlines." I&D Mem. at 14 (emphasis added). However, Commerce issued a single request to PT/Pro-Team to revise its Q&V figures in the agency's second supplemental questionnaire. PT's 2nd Suppl. QR at 3.

More importantly, while Commerce concludes that these issues "significantly impeded Commerce's ability the determine if there is a viable comparison market until well into the proceeding," I&D Mem. at 14, it offers no further justification for its finding that PT/Pro-Team

failed to cooperate to the best of its ability in order to support the agency's use of an adverse inference. Commerce must do more than simply restate its findings ostensibly supporting the use of neutral facts available to support the use of adverse facts available. *See, e.g.*, *Nat'l Nail Corp*., 390 F. Supp. 3d at 1380; *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 488, 149 F. Supp. 2d 921, 930 (2001) (remanding an AFA determination when the court could not discern Commerce's reasons for finding that the respondent, "specifically, did not put forth its maximum effort").

"[T]he antidumping laws are remedial not punitive." *NTN Bearing*, 74 F.3d at 1208 (citing *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–1104 (Fed. Cir. 1990)). Consistent with this notion, "[t]he purpose of the adverse facts statute is 'to provide respondents with an incentive to cooperate' with Commerce's investigation, not to impose punitive damages." *Essar Steel*, 678 F.3d at 1276 (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032). While "inattentiveness" or "carelessness" may merit a finding that a respondent has failed to cooperate, the statute "does not require perfection and recognizes that mistakes sometimes occur." *Nippon Steel*, 337 F.3d at 1382. "Commerce must devise a non-arbitrary way of distinguishing among errors" that merit an adverse inference and errors that do not. *Nippon Steel Corp. v. United States*, 25 CIT 377, 382 n.10, 146 F. Supp. 2d 835, 841 n.10 (2001).

To that end, in the Issues and Decision Memorandum, Commerce stated that it has a practice of "consider[ing], in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation." I&D Mem. at 12 & n.32 (citations omitted). There is good reason for this practice, because it seeks to ensure that a "party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Viet I–Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1109 (Fed. Cir. 2016) (citation omitted). There is no indication, however, that Commerce considered this issue in connection with its decision to disregard all of PT/Pro-Team's reported information and use total AFA. Without more, Commerce's conclusion that PT/Pro-Team failed to "participate to the best of its ability," I&D Mem. at 15, is unsupported by substantial evidence, *see Nippon Steel*, 337 F.3d at 1382.

In sum, Commerce's authority to use the facts otherwise available—neutral or adverse—is circumscribed by 19 U.S.C. § 1677m(e). In disregarding the Q&V Schedule, Commerce elevated form over substance without examining whether the information was sufficiently complete and usable without undue difficulties. Commerce also failed to balance finality and accuracy considerations

before dismissing the Q&V Schedule as untimely. Finally, Commerce's determination that PT/Pro-Team failed to cooperate to the best of its ability lacks substantial evidence and reasoned explanation. Accordingly, Commerce's decision to use total AFA to determine PT/Pro-Team's dumping margin must be remanded for reconsideration.

III. Commerce's Use of Total AFA to Determine Unicatch's Margin

A. Additional Background

Commerce requests complete cost reconciliations from mandatory respondents in order to "meaningfully analyze" the respondent's "section D questionnaire cost response and calculate a reliable margin." I&D Mem. at 16. Accordingly, Commerce instructed Unicatch on how to reconcile its per-unit cost of production and constructed value figures reported in the cost database "to the amounts recorded in [the respondent's] cost accounting system and to the cost of manufacturing recorded in [the respondent's] financial accounting system." Req. for Information (Nov. 29, 2016) ("Initial QRE") at D-10, PR 42–44, CJA Vol. I, Tab 5. Taking what it called a "top down" approach, Commerce instructed Unicatch to submit reconciliation worksheets that began with the "fiscal year income statement" and, ultimately, ended with the "total of the per-unit manufacturing costs submitted to the [agency]." *Id.* at D-12 to D-13. Additionally, Commerce instructed Unicatch to "identify and quantify the following reconciling items": (1) the "differences between the reporting methodology and the normal books and records"; (2) the "cost of merchandise *not* under consideration," *i.e.*, non-subject merchandise; (3) the "cost of merchandise under consideration not sold in the United States or comparison market"; (4) the "cost of merchandise under consideration sold in the U.S. or comparison market that you have been excused from reporting"; and (5) "all other reconciling items." *Id.* at D-13.

On January 19, 2017, Unicatch responded to the questionnaire. Unicatch Sec. [D] Resp. (Jan. 19, 2017) ("Unicatch's DQR"), CR 30–32, CJA Vol. II, Tab 15. Unicatch submitted a worksheet that reconciled the cost of sales reported in its financial accounting system to its "POR Warehouse-Entries in Regular Production." *Id.* at 28, Ex. D-16. Unicatch also submitted a worksheet listing the per-unit cost of manufacture for all products it produced, which included subject and non-subject merchandise. *Id.* at Ex. D-17. Unicatch informed Commerce that the costs reported in Exhibit D-17 "can tie" to the data reported in its CV calculation worksheet. *Id.* at 30, Ex. D-20.

Commerce issued Unicatch a supplemental questionnaire in which it requested Unicatch to revise its cost reconciliation. Suppl. Questionnaire (Mar. 27, 2017) ("Unicatch's 1st Suppl. QRE") at 9, CR 36, CJA Vol. II, Tab 20. Commerce explained that the submitted reconciliation "does not reconcile the sales from Unicatch's audited financial statements . . . to the extended TOTCOM [i.e., total cost of manufacturing] in the submitted cost database." *Id.* In response, Unicatch identified a clerical error in the amount reported for its cost of sales and explained that its initial worksheet reconciled its cost of sales to Unicatch's total cost of production for subject and non-subject merchandise. Unicatch Sec. A, C, D Suppl. Resp. (Apr. 25, 2017) ("Unicatch's 1st Suppl. QR") at 17, CR 40–44, CJA Vol. II, Tab 25 (citing Unicatch's DQR, Ex. D-16). Unicatch resubmitted an exhibit (Exhibit D-16 as Exhibit SD-9A) and provided additional exhibits and information seeking to demonstrate that its reported per-unit costs reconcile to its CV costs. *Id.* at 17–18, Exs. SD-9B to SD-9E.

Commerce issued Unicatch a second supplemental questionnaire seeking further clarification regarding Unicatch's cost reconciliation. Specifically, Commerce directed Unicatch to "revise [its] cost reconciliation in Exhibit SD-9A/Exhibit D-16" to, among other things, "ensure that it starts with the cost of sales per your audited financial statements . . . and ends with the total extended TOTCOM as per the submitted cost database," and "[e]xplain and provide documentary support for each reconciling item." Second Suppl. Questionnaire (May 16, 2017) ("Unicatch's 2nd Suppl. QRE") at 6, CR 48, CJA Vol. III, Tab 28.

Unicatch submitted a revised cost reconciliation worksheet that began with the cost of sales from its financial statements and ended with its POR cost of production for subject and non-subject merchandise. Unicatch Sec. A, C, D Second Suppl. Resp. (June 7, 2017) ("Unicatch's 2nd Suppl. QR") at Ex. SSD-3, CR 66–70, CJA Vol. IV, Tab 37. The worksheet contained line items representing the aggregate cost of production for different products that tied to unit costs reported in a separate worksheet (Exhibit SSD-4) which, in turn, tied to Unicatch's revised CV costs (Exhibit SSD-2). *Id.* at 15–16, Exs. SSD-2, SSD-4. Commerce relied on this information to calculate Unicatch's cost of production for purposes of calculating a preliminary dumping margin. Prelim. Mem. at 20; *see also* Analysis for the Prelim. Results of the 2015–2016 Antidumping Duty Admin. Review of Certain Steel Nails from Taiwan: Unicatch Indus. Co. Ltd. (July 31, 2017) at 3, CR 83–85, CJA Vol. IV, Tab 48.

In its administrative case brief, Mid Continent argued that Commerce should apply partial AFA to Unicatch's reported costs because

Unicatch failed to reconcile fully its cost of sales to the total cost of manufacturing reported in the cost database. Case Br. (Sept. 22, 2017) at 36, CR 95, PR 177, CJA Vol. IV, Tab 59 (averring that Unicatch's cost reconciliation "fails to demonstrate the final, crucial step of the reconciliation down to the submitted costs"). Mid Continent also argued that Unicatch failed to fully explain all "reconciling items" reflected in its cost reconciliation worksheet. *Id.* Mid Continent suggested different ways in which Commerce might apply partial AFA to Unicatch's reported costs. *Id.* at 37.

In response, Unicatch explained that the cost of sales from its financial statements and reflected in Exhibit SSD-3 links to its CV costs (detailed in Exhibit SSD-2) through Exhibit SSD-4, which contains Unicatch's POR cost of production for all product types it produces. Admin. Reply Br. of Unicatch (Sept. 27, 2017) at 37, CR 97, PR 180, CJA Vol. IV, Tab 61. Unicatch explained further that the costs reported in Exhibit SSD-2 differed from the costs in the cost database by an amount consisting of the cost of four product types that it sold, but did not produce, during the period of review. *Id.* at 38.

For the *Final Results*, Commerce disregarded Unicatch's submitted data and determined a dumping margin based on total AFA. I&D Mem. at 16–19. Commerce concluded that Unicatch failed to reconcile the difference between the cost of sales reflected in its financial statements and the extended total cost of manufacturing reported in the cost database. *Id.* at 16. At most, according to Commerce, Unicatch indicated how Commerce might complete the reconciliation using a schedule containing non-subject merchandise. *Id.* at 19. Commerce rejected Mid Continent's "gap-filling alternative adjustment" because "it only leads to more questions regarding the completeness of the reconciliation, the reconciling items, and whether all costs were properly included or excluded. *Id.* at 18. Commerce explained that its practice is to reject all of a respondent's submitted information "when flawed and unreliable cost data renders any price-to-price comparison impossible." *Id.* at 18 & n.65 (quoting Issues and Decision Mem. for the Final Determination of the Investigation of Prestressed Concrete Steel Wire Strand from Mexico, A-201–831 (Dec. 8, 2003) ("Wire Strand from Mexico Mem.") at 13, *available at* https://enforcement.trade.gov/frn/summary/mexico/03–30384-1.pdf (last visited Dec. 19, 2019)).

Commerce further found that Unicatch's "fail[ure] to submit a complete cost reconciliation" reflected less than full cooperation and merited use of an adverse inference. *Id.* at 20; *see also id.* ("Unicatch had multiple chances to answer Commerce's questionnaires and simply did not answer the questions asked. It further instructed Commerce

how to get the completed reconciliation without actually providing it."). Commerce assigned Unicatch the dumping margin alleged in the petition underlying the original investigation based on its practice, which "is to select, as an AFA rate, the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated rate of any respondent in the investigation." *Id.* at 21–22 & n.80 (citation omitted).

B. Substantial Evidence Supports Commerce's Use of Total Facts Otherwise Available; However, Commerce's Use of an Adverse Inference Must be Remanded

TC/Unicatch asserts that Commerce's use of the facts otherwise available with an adverse inference lacks substantial evidence; Commerce failed to comply with 19 U.S.C. § 1677m(d) and (e) before turning to the facts available; Commerce erred in disregarding all of Unicatch's submitted data—both sales and costs—to instead rely on total AFA; and the agency failed to comply with the statutory requirement to evaluate whether Unicatch's conduct merited selection of the highest rate. TC/Unicatch's Mem. at 20–44; TC/Unicatch's Reply at 6–23. PrimeSource and S.T.O. Industries adopt by incorporation Unicatch's arguments. PrimeSource's Mem. at 17; S.T.O.'s Mot. at 1.

The court sustains Commerce's decision to use total facts otherwise available to determine Unicatch's margin; however, Commerce's use of an adverse inference lacks substantial evidence. For that reason, the court declines to reach TC/Unicatch's arguments regarding Commerce's selection of an adverse rate.

1. Commerce's Use of the Facts Otherwise Available

On three occasions, Commerce instructed Unicatch to submit a complete cost reconciliation that began with the cost of sales reflected in the company's financial statements and ended with the reported per-unit costs submitted to the agency. Initial QRE at D-12 to D-13; Unicatch's 1st Suppl. QRE at 9; Unicatch's 2nd Suppl. QRE at 6. TC/Unicatch does not dispute Commerce's core finding that Unicatch failed to complete the requested cost reconciliation. *See* I&D Mem. at 16, 19; TC/Unicatch's Mem. at 20 (stating that "all of the information necessary *to* reconcile" the financial statements down to the reported costs was on the record) (emphasis added); *id.* at 25 (recognizing the need to reconcile the difference between the figures specific to subject merchandise and the reported figures for subject and non-subject

merchandise); TC/Unicatch's Reply at 17 (noting the missing "numerical summary of Unicatch's [narrative] explanation of the differences").

TC/Unicatch's argument that Commerce failed to afford Unicatch an opportunity to remedy its deficient cost reconciliation is unpersuasive. TC/Unicatch's Mem. at 28–34; TC/Unicatch's Reply at 9, 15–16. TC/Unicatch advocates for leniency on the basis that Commerce now provides—but did not then provide—a template for completing a cost reconciliation. TC/Unicatch's Mem. at 33.[13] However, Commerce's first supplemental questionnaire explicitly instructed Unicatch to reconcile its cost of sales from the financial statements down "to the extended TOTCOM in the submitted cost database" and identified the (proprietary) ending value. Unicatch's 1st Suppl. QRE at 9. Commerce repeated its request for a complete cost reconciliation in the second supplemental questionnaire. Unicatch's 2nd Suppl. QRE at 6. At no time did TC/Unicatch express a lack of understanding of the request or seek further guidance from Commerce on how to respond to the request.

TC/Unicatch objects further that Commerce failed to identify the reconciling items for which it needed explanations and, thus, it reasonably believed that it did not need to explain certain offsets to product-specific costs for internal consumption of non-subject merchandise. TC/Unicatch's Reply at 8–9. However, Commerce expressly requested explanations for "all [] reconciling items." Initial QRE at D-13; *see also* Unicatch's 2nd Suppl. QRE at 6 (requesting explanations and "documentary support for each reconciling item"). The line items reflecting costs for internal consumption of non-subject merchandise are necessary to reconcile Unicatch's total cost of production to its product-specific costs. *See* Unicatch's 2nd Suppl. QR at Ex. SSD-3. Thus, substantial record evidence supports Commerce's conclusion that it lacked explanations for each reconciling item. I&D Mem. at 17 & n.61; Final Results Analysis of the 2015–2016 Antidumping Duty Admin. Review of Certain Steel Nails from Taiwan: Unicatch Indus. Co. Ltd. (Unicatch) (Feb. 6, 2018) ("Unicatch's Final Analysis Mem.") at 2, CR 98–99, CJA Vol. IV, Tab 67. In sum, Unicatch had three opportunities to submit a complete cost reconciliation; Commerce was not required to provide a fourth opportunity. *See, e.g.*, *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017) (finding that Commerce complied with 19 U.S.C. §

[13] TC/Unicatch appended a copy of the template to its moving brief. *See* TC/Unicatch's Mem., Ex. 1 at D-13. The template is not, however, part of the administrative record before the court and will be afforded no further consideration. 19 U.S.C. § 1516a(b)(1)(B)(i).

1677m(d) when it issued a supplemental questionnaire informing respondent of the defective submission).[14]

TC/Unicatch's argument that Unicatch's cost reconciliation met the requirements for use pursuant to 19 U.S.C. § 1677m(e) also lacks merit. TC/Unicatch's Mem. at 24–25. Following Commerce's issuance of the *Preliminary Results* and in light of Mid Continent's expressed concerns, Commerce attempted to complete the reconciliation but found a discrepancy in the data. Unicatch's Final Analysis Mem. at 1–2. While TC/Unicatch asserts that Commerce simply misunderstood the submitted data and ignored Unicatch's explanation for the discrepancy, TC/Unicatch's Reply at 10, it was Unicatch's responsibility to build a clear record—not Commerce's, *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). Commerce's finding that it lacked complete and reliable cost data that could be used without undue difficulties is supported by substantial evidence and, thus, Commerce was within its discretion to disregard Unicatch's cost information for the *Final Results*. I&D Mem. at 18; *NTN Bearing*, 74 F.3d at 1208 ("[P]reliminary determinations are 'preliminary' precisely because they are subject to change."); *Hyundai Steel Co. v. United States*, 42 CIT ___, ___, 319 F. Supp. 3d 1327, 1343 (2018) ("Commerce has the flexibility to change its position from the preliminary to the final results, provided it explains the basis for the change and its decision is supported by substantial evidence and in accordance with law.") (internal quotation marks and citation omitted). Thus, substantial evidence supports Commerce's threshold finding that Unicatch's failure to submit a complete cost reconciliation triggered the agency's authority to use the facts otherwise available.

[14] TC/Unicatch's reliance on *Hyundai Heavy Industries, Co. v. United States*, 42 CIT ___, ___, 332 F. Supp. 3d 1331, 1347–48 (2018), and *Borusan Mannesmann Boru Sanayi v. Ticaret A.S. v. United States*, 39 CIT ___, ___, 61 F. Supp. 3d 1306, 1348–49 (2015), for the proposition that Commerce's supplemental questionnaires failed to adequately apprise Unicatch of the deficiencies lacks merit. *See* TC/Unicatch's Mem. at 30–33. Not only were the supplemental questionnaires specific as to the requirements for completing the cost reconciliation, but the cited cases are inapposite. *Hyundai Heavy* faulted Commerce for its finding that a respondent withheld information regarding accessories to subject merchandise "that was *specifically* requested" when the agency never defined the term "accessories" in response to the respondent's requests for a clear definition. 332 F. Supp. 3d at 1345–48 (emphasis added). In *Borusan*, the court remanded Commerce's use of AFA when the respondent informed Commerce that certain requested data was unnecessary to the determination and overly burdensome to collect and Commerce failed to address the respondent's concerns in its supplemental questionnaire. 61 F. Supp. 3d at 1344–46. The court reasoned that Commerce's obligation to explain the "nature of the deficiency" included explaining why requested information is "necessary." *Id.* at 1348. Here, however, Unicatch never alerted Commerce to any lack of clarity regarding the appropriate ending value for its reconciliation and never averred that the requested reconciliation was unnecessary. *See* I&D Mem. at 17.

2. Commerce's Use of *Total* Facts Otherwise Available

TC/Unicatch summarily argues that Commerce erred in rejecting all sales and cost data submitted by Unicatch based on imperfections in the cost reconciliation. TC/Unicatch's Mem. at 41. However, judicial and agency precedent support Commerce's decision to use total facts available. I&D Mem. at 18 & nn.64–66 (citing *Mukand, Ltd. v. United States*, Slip Op. 13–41, 2013 WL 1339399, at *8 (CIT Mar. 25, 2013); Issues and Decision Mem. for the Final Affirmative Determination in the Less Than-Fair-Value Investigation of Finished Carbon Steel Flanges from Italy, A-475–835 (June 23, 2017) ("Steel Flanges from Italy Mem.") at 10–16, *available at* https://enforcement.trade.gov/frn/summary/italy/2017–13629–1.pdf (last visited Dec. 19, 2019); Wire Strand from Mexico Mem. at 18–14); *see also Steel Auth. of India*, 25 CIT at 485–87, 149 F. Supp. 2d 921 at 926–928 (sustaining Commerce's use of total AFA when the respondent's submission of unreliable cost of production or constructed value information rendered impossible the price-to-price comparisons necessary to calculate an accurate dumping margin).

When, as here, "the U.S. price cannot be compared to home market prices, the [agency] compares the U.S. price to [constructed value]" to examine whether the subject merchandise is sold in the United States for less than fair value. Wire Strand from Mexico Mem. at 13. However, "because most of the cost elements are the same for [cost of production] and [constructed value]," the submission of unreliable cost information impairs Commerce's ability to calculate constructed value and establish a basis for comparison to U.S. price. *Id*.; *see also* Steel Flanges from Italy Mem. at 13. In that situation, requiring Commerce to use partial, rather than total, facts available would permit respondents "to manipulate the process by submitting only beneficial information" and would place "ultimate control to determine what information would be used for the margin calculation" in the hands of respondents rather than Commerce. *Steel Auth. of India*, 25 CIT at 487, 149 F. Supp. 2d at 928; *see also* Wire Strand from Mexico Mem. at 13. Absent substantive arguments from TC/Unicatch as to why those concerns are not warranted here, substantial evidence supports Commerce's resort to total facts otherwise available.

3. Commerce's Use of an Adverse Inference

Commerce based its decision to use an adverse inference on Unicatch's failure to submit a complete cost reconciliation in response to Commerce's supplemental questionnaires. I&D Mem. at 20. However, "[a]n adverse inference may not be drawn merely from a failure to respond" to a request for information, "but only under circumstances

in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown." *Nippon Steel*, 337 F.3d at 1383. "A respondent can fail to respond because it was not able to obtain the requested information, did not properly understand the question asked, or simply overlooked a particular request," and such failure is not necessarily grounds for an adverse inference. *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 841–42, 77 F. Supp. 2d 1302, 1316 (1999) (remanding AFA determination when Commerce never identified why a respondent's failure to respond to two aspects of the questionnaire "were anything more than inadvertent omissions" and the "respondent sought to correct its deficiencies in responding to a supplemental questionnaire"). Rather, to determine whether "less than full cooperation has been shown," Commerce should "examine [the] respondent's actions and assess the extent of [the] respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information." *Nippon Steel*, 337 F.3d at 1382. Such examination "make[s] it possible for a reviewing court to discern [Commerce's] reasons for finding that [the respondent], specifically, did not put forth its maximum effort before employing adverse inferences." *Nat'l Nail Corp.*, 390 F. Supp. 3d at 1380.

Here, Commerce failed to account for evidence demonstrating Unicatch's attempts to comply with Commerce's supplemental questionnaire or apprise the court of its reasons for nevertheless finding less than full cooperation. *See* I&D Mem. at 20; *Nippon Steel*, 337 F.3d at 1379 (directing the reviewing court to consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence'") (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Rather, as with PT/Pro-Team, Commerce appears to have considered anything less than perfection as a failure to cooperate to the best of one's ability. The statute, however, "does not require perfection and recognizes that mistakes sometimes occur." *Nippon Steel*, 337 F.3d at 1382. Commerce might have bolstered its decision by complying with its stated practice of "consider[ing] . . . the extent to which [Unicatch] may benefit from its own lack of cooperation," but Commerce failed to do so. *See* I&D Mem. at 20 & n.74 (citations omitted). Thus, while the court sustains Commerce's use of total *neutral* facts otherwise available to determine Unicatch's margin, Commerce's decision to use an adverse inference lacks substantial evidence and is remanded for reconsideration or further explanation. Accordingly, the court will

defer resolution of TC/Unicatch's arguments regarding the adverse rate Commerce selected pending Commerce's redetermination on remand.

IV. Commerce's Calculation of the All-Others Rate

In the event the court remands Commerce's use of total AFA as to one or more mandatory respondents, HL/Romp urge the court to order Commerce to recalculate the rate assigned to non-examined respondents based on any company-specific rates calculated in the remand proceeding. HL/Romp's Mem. at 15–19; HL/Romp's Reply at 2–3. The Government did not respond to this aspect of HL/Romp's moving brief; however, at oral argument, the Government stated that Commerce's practice is to recalculate the all-others rate when one or more mandatory respondents' rates change. Oral Arg. at 02:02:07–02:02:29 (reflecting the time stamp from the recording). In the absence of a live dispute as to the correct method of calculating the all-others rate, the court will not further address this issue. *See Camreta v. Greene*, 563 U.S. 692, 717 (2011) (the "judicial [p]ower" is to be used "to render dispositive judgments, not advisory opinions") (citation omitted). Additionally, HL/Romp concede that their second claim regarding Commerce's summary rejection of the ministerial error allegation "is moot" in the event the court remands Commerce's use of total AFA to determine PT/Pro-Team's and Unicatch's margin. HL/Romp's Mem. at 23. Because the court has remanded Commerce's use of total AFA with respect to both mandatory respondents, the court will not consider HL/Romp's claim at this time.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby:

ORDERED that Commerce's *Final Results* are sustained in part and remanded in part to the agency; and it is further

ORDERED that, on remand, Commerce shall, consistent with this opinion, reconsider or further explain its decision to use the facts otherwise available with respect to PT/Pro-Team and its decision to use an adverse inference when selecting from among the facts otherwise available with respect to Unicatch; and it is further

ORDERED that Commerce shall file its remand results on or before March 18, 2020; and it is further

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

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

Dated: December 19, 2019
New York, New York

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

Slip Op. 19–170

VENUS WIRE INDUSTRIES PVT. LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and CARPENTER TECHNOLOGY CORPORATION, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 18–00113

[Remanding the U.S. Department of Commerce's Final Results in the Changed Circumstances Review of the Antidumping Duty Order on Stainless Steel Bar from India.]

Dated: December 20, 2019

Eric C. Emerson, Steptoe & Johnson LLP, of Washington, DC, argued for Plaintiffs. With him on the brief was *St. Lutheran M. Tillman*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara Hogan*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Grace W. Kim, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenors. With her on the brief was *Laurence J. Lasoff*.

OPINION AND ORDER

Barnett, Judge:

Plaintiffs, Venus Wire Industries Pvt. Ltd. and its affiliates Precision Metals, Sieves Manufacturers (India) Pvt. Ltd., and Hindustan Inox Ltd. (collectively, "Venus"), challenge the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the changed circumstances review of the antidumping duty order on stainless steel bar from India. *See* Compl., ECF No. 9; *Stainless Steel Bar From India*, 83 Fed. Reg. 17,529 (Dep't Commerce Apr. 20, 2018) (final results of changed circumstances review and reinstatement of certain companies in the antidumping duty order) ("*Final Results*"), ECF No. 20–5, and accompanying Issues and Decision Mem., A-533–810 (Apr. 16, 2018) ("I&D Mem."), ECF No. 20–6.[1]

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 20–2, and a Confidential Administrative Record ("CR"), ECF Nos. 20–3, 20–4. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public J.A. ("PJA"), ECF No. 50; Confidential J.A. ("CJA"), ECF No. 46. Parties submitted a supplemental confidential joint appendix containing additional record

Venus challenges two aspects of the *Final Results*. Venus first contests Commerce's determination that Venus is not the producer of subject merchandise made using inputs that are covered by the scope of the underlying antidumping duty order and the corresponding determination that the producers are the unaffiliated suppliers of the inputs. Confidential Pls.' Rule 56.2 Mot. For J. Upon the Agency R., ECF No. 33, and Confidential Venus Wire Indus. Pvt. Ltd. and its Affiliates Precision Metals, Sieves Mfrs. (India) Pvt. Ltd., and Hindustan Inox Ltd.'s Mem. of P&A in Supp. of their Mot. For J. on the Agency R. ("Pls.' Mem.") at 8–15, ECF No. 33. Venus also contests Commerce's decision to use total facts otherwise available with an adverse inference (referred to as "total adverse facts available" or "total AFA") to determine Venus's rate. *See id.* at 16–28.

Defendant United States ("the Government") and Defendant-Intervenors[2] defend the *Final Results*. *See generally* Confidential Def.'s Resp. to Pls.' Mots. For J. Upon the Agency R. ("Def.'s Resp."), ECF No. 39; Confidential Def.-Ints.' Resp. in Opp'n to Pls.' Mot. For J. on the Agency R. ("Def.-Ints.' Resp."), ECF No. 42.

For the following reasons, the court remands Commerce's determination that Venus is not the producer of the subject merchandise and defers consideration of arguments regarding the agency's use of total AFA pending Commerce's redetermination on remand.

BACKGROUND

Commerce published the antidumping duty order on stainless steel bar ("SSB" or "SS bar") from India on February 21, 1995. *See Stainless Steel Bar from Brazil, India and Japan*, 60 Fed. Reg. 9,661 (Dep't Commerce Feb. 21, 1995) (antidumping duty orders) ("*SS Bar Order*").[3] On September 13, 2011, Commerce conditionally revoked the *SS Bar Order* with respect to subject merchandise produced or ex-

documents pursuant to the court's request. *See* Confidential Joint Submission of R. Documents ("Suppl. CJA"), ECF No. 53. The court references the confidential version of the relevant record documents, unless otherwise specified.

[2] Defendant-Intervenors consist of Carpenter Technology Corporation; Crucible Industries LLC; Electralloy, a Division of G.O. Carlson, Inc.; North American Stainless; Outokumpu Stainless Bar, LLC; Universal Stainless & Alloy Products, Inc.; and Valbruna Slater Stainless, Inc. (collectively, "Defendant-Intervenors" or, when in reference to the underlying proceeding, "Petitioners").

[3] The SS bar covered by the scope of the *SS Bar Order* consists of

> articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

SS Bar Order, 60 Fed. Reg. at 9,661.

ported by Venus. *See Stainless Steel Bar from India*, 76 Fed. Reg. 56,401, 56,402–03 (Dep't Commerce Sept. 13, 2011) (final results of the antidumping duty admin. review, and revocation of the order, in part) ("*Revocation Finding*").[4]

On September 29, 2016, Petitioners submitted a request for a "changed circumstances" review of Venus and Viraj Profiles Ltd. on the basis that they had resumed selling SS bar in the United States at less than fair value. Pet'rs' Req. for Changed Circumstances Reviews (Sept. 29, 2016) at 1, 5, CR 1, PR 1, CJA Tab 1.[5] On December 16, 2016, Commerce initiated a changed circumstances review for such purpose. *See Stainless Steel Bar From India*, 81 Fed. Reg. 91,118 (Dep't Commerce Dec. 16, 2016) (initiation of antidumping duty changed circumstances review).

Venus responded to several questionnaires during the review. In section A of Commerce's initial questionnaire, the agency requested Venus to describe the materials used in the production of subject merchandise. Questionnaire to Venus (Sec. A) (Dec. 14, 2016) at A-12, PR 48, CJA Tab 5. Venus responded that it uses "Stainless Steel Black Bars (round/hex/square) or Stainless Steel Rods in Coil Form." Submission of Resp. to Sec. A of the Questionnaire in Changed Circumstances Review (Jan. 30, 2017) ("Venus AQR") at A-24, CR 22, PR 65, CJA Tab. 6. In a separate chart, Venus stated that its production begins with "S.S. Wire Rods" or "S.S. Rounds - Hot Rolled." Venus AQR, Annex. A-8, Suppl. CJA at ECF p. 138.

In subsequent questionnaire responses, Venus referred to its inputs of SS black bar as SS rounds, straight rounds, or hot rolled bar. *See* I&D Mem. at 9 & n.26 (citation omitted); Venus Group Annex. SQR-27 (March 30, 2017), CR 105, PR 144, CJA Tab 10; Venus Group Annex. SQR-28 (March 30, 2017), CR 106, PR 145, CJA Tab 11; Venus Group's Resp. to Sec. B & C Suppl. Questionnaire (Apr. 3, 2017), Annex. D-2, CR 132, PR 173, Suppl. CJA at ECF pp. 212–19; Resp. to

[4] Commerce's authority to revoke an order is grounded in 19 U.S.C. § 1675. By its terms, Commerce "may revoke, in whole or in part, . . . an antidumping duty order" upon completion of a periodic or changed circumstances review. 19 U.S.C. § 1675(d)(1). Pursuant to the regulation in effect at the time of revocation, Commerce could revoke an order in part when it finds that (A) an exporter or producer has "sold the merchandise at not less than normal value for a period of at least three consecutive years"; (B) the exporter or producer has agreed in writing to immediate reinstatement of the order if Commerce determines that, subsequent to revocation, the exporter or producer sells subject merchandise at less than fair value; and (C) continued application of the order is unnecessary to offset dumping. 19 C.F.R. § 351.222(b)(2)(i) (2011). Commerce determined that Venus met each of these requirements. *Revocation Finding*, 76 Fed. Reg. at 56,403.

[5] Commerce conducts a changed circumstances review of an antidumping duty order when it "receives information concerning, or a request from an interested party for a review of" the "final affirmative determination" underlying the order that "shows changed circumstances sufficient to warrant a review." 19 U.S.C. § 1675(b)(1)(A); *see also* 19 C.F.R. 351.216 (2019).

Sec. D of the Questionnaire (May 18, 2017) ("Venus 2nd Suppl. DQR") at 7, 13, Annex. DR-1, DR-2, CR 201, PR 260, Suppl. CJA at ECF pp. 254–82.

Supplier invoices appended to Venus's second supplemental questionnaire response alerted Commerce to the possibility that one of Venus's inputs might be subject merchandise; thus, the agency requested further information. I&D Mem. at 10 & n.29 (citing Venus 2nd Suppl. DQR, Annex. SQR-85, CR 207, PR 266, Suppl. CJA at ECF pp. 304–24); Resp. to SQR3-Questionnaire (July 10, 2017) ("Venus 3rd Suppl. DQR") at Question 15, CR 250, PR 308, CJA Tab 15. Venus reported that one of its inputs, "Stainless Steel Hot Rolled Bars (termed as SS rounds)" is "included in the scope of the [*SS Bar Order*]." Venus 3rd Suppl. DQR at Question 15. Venus also described the processing it performs to convert the inputs into "Cold Finished Stainless Steel Bright Bars." *Id.*

Commerce preliminarily determined to reinstate Venus in the *SS Bar Order* based on the agency's finding that Venus sold subject merchandise at less than fair value. Decision Mem. for the Prelim. Results of the Antidumping Duty Changed Circumstances Review of Stainless Steel Bar from India (Oct. 12, 2017) at 1, PR 377, CJA Tab 19. Commerce further determined that Venus is not the producer of the subject merchandise and, in the absence of cost information from Venus's suppliers, assigned Venus a margin based on total AFA. *Id.* at 5, 7.

Thereafter, Commerce issued Venus a fourth supplemental questionnaire in which it requested Venus to "obtain the actual costs of production" from its suppliers of SS rounds used to make SS bar. Req. for Extension to 4th Suppl. Resp. (Nov. 14, 2017) at 1, CR 318–19, PR 398, CJA Tab 24. Venus reported its "significant efforts to obtain the cost of the stainless steel rounds purchased from unaffiliated suppliers during the [period of review]." *Id.* Those efforts included personal visits to several suppliers and emails "cautioning [the suppliers] of cessation of future business" if they refused to provide cost information. *Id.* at 3; *see also id.* at Ex. 1 (documenting Venus's efforts). Despite these efforts, only one of Venus's suppliers submitted its cost information to Commerce. *Id.* at 1–2.

On April 20, 2018, Commerce published the *Final Results*. Commerce continued to find that Venus is not the producer of subject merchandise manufactured from SS rounds. I&D Mem. at 11–14. Commerce did, however, conclude that Venus produced the subject merchandise manufactured from SS wire rod. Final Results Analysis Mem. for Venus Wire Indus. Pvt. Ltd. and its Affiliates Precision

Metals, Sieves Mfrs. (India) Pvt. Ltd., and Hindustan Inox Ltd. (Apr. 16, 2018) ("Final Analysis Mem.") at 4, CR 327, PR 424, CJA Tab 32. Commerce reinstated Venus in the *SS Bar Order* and assigned Venus a weighted-average dumping margin of 30.92 percent based on the use of total AFA. *Final Results*, 83 Fed. Reg. at 17,530; *see also* I&D Mem. at 14–17; Final Analysis Mem. at 1–3.[6]

Venus timely commenced this action on May 18, 2018. *See* Summons, ECF No. 1. Venus's motion is fully briefed, and the court heard oral argument on September 10, 2019. Docket Entry, ECF No. 56.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[7] and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

The two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), guides judicial review of Commerce's interpretation and implementation of the antidumping and countervailing duty statutes. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017); *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379–82 (Fed. Cir. 2001) (affording *Chevron* deference to agency methodology in furtherance of its statutory interpretations). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Apex Frozen Foods*, 862 F.3d at 1344 (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "if the statute is silent or ambiguous," the court must determine whether the agency's action "is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843).

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[6] Commerce also reinstated Viraj Profiles Ltd. ("Viraj") in the *SS Bar Order* and used total AFA to determine its margin. *Final Results*, 83 Fed. Reg. at 17,530. Those determinations as to Viraj are not at issue here.

[7] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are generally to the 2012 edition unless stated otherwise.

DISCUSSION

I. Commerce's Determination that Venus is Not the Producer of Subject Merchandise Venus Exported to the United States

An antidumping duty is the amount by which the normal value of a product—generally, its price in the exporting country—exceeds the export price, as adjusted. 19 U.S.C. § 1673; *see also id.* § 1677b(a)(1)(B)(i) (defining normal value). In certain situations, Commerce calculates normal value using the constructed value of the merchandise. *Id.* § 1677b(a)(4). Constructed value is the sum of (1) "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise"; (2) actual "selling, general, and administrative expenses" and profits; and (3) "the cost of all containers and coverings . . . and all other expenses incidental to" preparing the subject merchandise "for shipment to the Unites States." *Id.* § 1677b(e)(1), (2)(A), (3).

To ascertain constructed value, Commerce typically requires information from both the producer and the exporter of the subject merchandise. *See id.* § 1677(28); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol.1, at 835 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4172 ("SAA")[8] ("[When] different firms perform the production and selling functions, Commerce may include the costs, expenses, and profits of each firm in calculating cost of production and constructed value."). Consequently, Commerce must identify the producer of the subject merchandise in order to obtain the information necessary to calculate the cost of production and constructed value. I&D Mem. at 11. If Commerce properly concluded that Venus was not the producer of the subject merchandise, then Commerce properly required Venus to provide the production costs of its suppliers for the determination of normal value. Otherwise, if Venus should have been regarded as the producer, cost information from Venus's suppliers would not be necessary.

In the underlying proceeding, Commerce applied a test for identifying the producer of the subject merchandise that it first used in its investigation of narrow woven ribbon with woven selvedge from Taiwan. I&D Mem. at 11 & n.35 (citing *Narrow Woven Ribbons with Woven Selvedge from Taiwan*, 75 Fed. Reg. 41,804 (Dep't Commerce

[8] The SAA is the authoritative interpretation of the statute. 19 U.S.C. § 3512(d); *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1345 n.7 (Fed. Cir. 2002).

July 19, 2010) ("*NWR*"), and Issues and Decision Mem. for the Antidumping Duty Investigation of Narrow Woven Ribbon with Woven Selvedge from Taiwan, A-583-844 (undated) ("NWR Decision Mem.") at 48–49, *available at* https://enforcement.trade.gov/frn/summary/taiwan/2010–17538–1.pdf (last visited Dec. 20, 2019)). In *NWR*, Commerce considered the extent to which the exporter "further manufactured" griege ribbon, a type of in-scope merchandise used to produce subject narrow woven ribbon. NWR Decision Mem. at 48. To ascertain the degree of further manufacturing, Commerce considered "whether raw materials were added, and whether further processing was performed that changed the physical nature and characteristics of the product." *Id.* at 48. Commerce concluded that "minimal" additional materials were used in the manufacturing process. *Id.* at 49. Commerce further noted that 10 out of the agency's 16 essential characteristics for narrow woven ribbon were "created" by the producer of the input greige ribbon. *Id.* Thus, "based on the totality of the record evidence and the facts specific to [that] case," Commerce determined that the greige ribbon weavers were the producers. *Id.*

Commerce applied the same type of analysis here to assess whether Venus is the producer of SS bar made from in-scope SS rounds. I&D Mem. at 12–13. Commerce identified the six "essential physical characteristics" of SS bar as grade, remelting, shape, finish, type of final finishing operation, and size. *Id.* at 12. Commerce then explained that because Venus's processing "does not affect three of the six essential physical characteristics" of the subject merchandise—"grade, remelting, and shape"—and does not require the addition of new materials, Commerce did not find Venus to be the producer of the subject merchandise. *Id.* at 12–13.

In reaching this conclusion, Commerce dismissed Venus's argument regarding the relevance of Commerce's treatment of Venus as the producer in eight prior reviews, stating that "each segment of a proceeding has its own record and stands on its own," and the issue does not appear to have been raised in the prior proceedings. *Id.* at 12–13. In response to Venus's argument that its processing substantially transforms the SS rounds, Commerce explained that "substantial transformation is not the proper analysis when both products at issue fall within the same class or kind of merchandise." *Id.* at 13. Under those circumstances, Commerce stated, *NWR* is the "relevant precedent" guiding its analysis. *Id.; see also id.* at 13–14 (dismissing scope rulings cited by Venus in which the agency concluded that cold-finishing substantially transformed SS wire rod into SS bar because the input and output products belonged to different classes or

kinds of products). Commerce also rejected Venus's argument that its manufacturing process changed proportionally more of the essential physical characteristics as compared to *NWR*, explaining that "there is no threshold for the number of characteristics, whether expressed as an absolute or relative number, that may be determinative for our analysis." *Id.* at 13. Looking to "the totality of the circumstances," Commerce reiterated that the absence of new materials coupled with the changes to three out of six characteristics led it to conclude that Venus is not the producer. *Id.*

II. Parties' Contentions

Venus raises three arguments against Commerce's determination. Venus first contends that Commerce unlawfully departed from agency practice without adequate justification. Pls.' Mem. at 8–9. Venus next contends that prior scope determinations finding that a "substantial transformation" occurred when SS wire rod was converted into SS bar through a process similar to the process used by Venus in this case are relevant and were improperly dismissed by the agency. *Id.* at 10–13. Lastly, Venus contends that Commerce's *NWR* analysis ignored crucial facts. *Id.* at 13–15; *see also* Confidential Venus Wire Indus. Pvt. Ltd. and its Affiliates Precision Metals, Sieves Mfrs. (India) Pvt. Ltd., and Hindustan Inox Ltd.'s Reply Br. in Supp. of their Rule 56.2 Mot. For J. on the Agency R. ("Pls.' Reply") at 1–6, ECF No. 44.

The Government and Defendant-Intervenors contend that Venus has not shown the existence of an agency practice respecting its producer determination and Commerce permissibly concluded that Venus was not the producer of subject merchandise based on the record developed in this review. Def.'s Resp. at 13–14; Def.-Ints.' Resp. at 9–10. The Government and Defendant-Intervenors further contend that agency determinations applying Commerce's substantial transformation analysis are inapposite because those determinations involved inputs and outputs that occupied different classes or kinds of merchandise and sought to identify the country of origin of the imported merchandise, which is not at issue here. Def.'s Resp. at 17–19; Def.-Ints.' Resp. at 10–13. The Government and Defendant-Intervenors also contend that Commerce's findings pursuant to its *NWR* test are supported by substantial evidence. Def.'s Resp. at 16–17; Def.-Ints.' Resp. at 14–16.

III. Commerce Must Reconsider or Further Explain its Use of the *NWR* Test to Determine the Producer of the Subject Merchandise

While Venus has not shown that Commerce's determination is inconsistent with an established agency practice, Commerce's summary dismissal of the relevance of the substantial transformation test in favor of the *NWR* test requires reconsideration and further explanation. Thus, the court does not address Venus's direct challenges to the application of the *NWR* test.

A. Venus has not Established the Existence of an Agency Practice

While Venus casts its argument in terms of a departure from agency practice, Pls.' Mem. at 8–9; Pls.' Reply at 6–8, Venus has not shown that Commerce previously applied a practice or methodology to the question whether Venus is the producer of subject merchandise. Instead, Venus asserts that Commerce's treatment of Venus as the producer in prior reviews constitutes the practice. *See, e.g.*, Pls.' Mem. at 8. However, Venus does not dispute Commerce's statement that the issue was never examined in prior administrative reviews and, therefore, it is not possible to determine whether prior facts were identical to this review and whether Commerce altered the analytical framework applied to those facts. *See* I&D Mem. at 13; Pls.' Mem. at 8–9; Pls.' Reply at 6–8. Absent evidence demonstrating the existence of an established procedure or methodology relevant to this inquiry, Venus's argument that Commerce arbitrarily departed from agency practice must fail. *See SeAH Steel VINA Corp. v. United States*, 40 CIT ___, ___,182 F. Supp. 3d 1316, 1327 (2016) (explaining that departure from a consistent "contrary *practice* in similar circumstances" is arbitrary when unaccompanied by a "reasonable explanation for the *change in practice*'") (quoting *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (emphasis added); *Ranchers–Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999) (explaining that identification of an "agency practice" is predicated upon the existence of "a *uniform and established procedure* [] that would lead a party, in the absence of notification of a change, reasonably to expect adherence *to the established practice or procedure*") (emphasis added); *cf. Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 422 (1992) (a methodology used in five previous segments of the proceeding effectively became "the law of [the] proceeding[]" from which Commerce had departed without adequate explanation).

In any event, in this review and in contrast to prior reviews, Commerce queried Venus's status as producer; developed the factual record accordingly; and rendered a decision based on the evidence presented. *See* I&D Mem. at 10; 12–13. Thus, the mere fact that Commerce reached a different conclusion in this review, standing alone, does not require remand to the agency. Venus's remaining arguments on this issue are not persuasive.[9]

B. Commerce Must Reconsider or Further Explain its Use of the *NWR* Test

At issue here is Commerce's method of determining the producer of the subject merchandise when in-scope inputs are used to manufacture subject merchandise for purposes of 19 U.S.C §§ 1677b and 1677(28). The statute does not define "producer" or provide a method for Commerce to apply in making its determinations. Thus, the court must decide whether Commerce's use of the *NWR* test to determine that Venus was not the "producer" is in accordance with law. *See, e.g., Pesquera Mares Australes,* 266 F.3d at 1379–82; *cf. E.I. Du Pont de Nemours & Co. v. United States*, 22 CIT 370, 373–76, 8 F. Supp. 2d 854, 858–59 (1998) (examining the lawfulness of Commerce's substantial transformation test pursuant to *Chevron* prong two). To determine whether the standard adopted by Commerce is a permissible interpretation of the statute, the court considers whether the construction is reasonable, consistent with statutory goals, and reflects agency practice. *Apex Exps. v. United States*, 777 F.3d 1373, 1379 (Fed. Cir. 2015).

Here, Commerce provided little explanation to support its use of the *NWR* test over its substantial transformation test beyond stating that the *NWR* test is the "relevant precedent" when the input and output products are in the same class or kind of merchandise.[10] I&D Mem. at

[9] Venus argues that the facts at issue have not changed across each review. Pls.' Reply at 8. The pertinent point, however, is whether the factual *record* has changed. *See Jiaxing Brother Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2016) ("[E]ach administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different *facts in the record*.") (alteration in original) (emphasis added) (citation omitted). Venus also argues that Commerce "is 'presumed to have considered' all record evidence in reaching its decision" in the prior reviews. Pls.' Mem. at 9 n.4 (quoting *Ta Chen Stainless Steel Pipe Co. v. United States*, 31 CIT 794, 819 (2007)). However, it is unclear to what extent the prior records contained evidence relevant to the producer issue because, as noted, the issue was never raised, and those records are not now before the court. *See* I&D Mem. at 13. Lastly, Venus avers that Commerce has conducted verification of its facilities in past reviews "during which time [Commerce] officials almost certainly observed raw material being used in production." Pls.' Mem. at 8 n.2 (citations omitted). However, such speculation is insufficient to undermine the factual record before the agency in the present review.

[10] Commerce relies heavily on the fact that while SS wire rod and SS bar are considered separate classes or kinds of merchandise, I&D Mem. at 13–14, SS rounds are considered to

13. However, merely pointing to what the agency "has done [once] before . . . is not, by itself, an explanation of why its methodology comports with the statute." *Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 537–38 (Fed. Cir. 2019) (ellipsis in original) (internal quotation marks and citation omitted).

Moreover, Commerce, in fact, has used its substantial transformation test when the input and output products were in the same class or kind of merchandise. *See, e.g.*, Tapered Roller Bearings from the People's Republic of China: Issues and Decision Mem. for the Final Results of the 2007–2008 Admin. Review of the Antidumping Duty Order, A-570–601 (Dec. 28, 2009) ("TRBs from China Mem.") at 7, *available at* https://enforcement.trade.gov/frn/summary/prc/E9–31417–1.pdf (last visited Dec. 20, 2019) (substantial transformation did not occur when unfinished tapered roller bearings were processed into finished tapered roller bearings and the processing did not alter the class or kind of merchandise); Issues and Decision Mem. for the Final Determination in the Antidumping Duty Investigation of [D]iamond [S]awblades and Parts Thereof from the People's Republic of China, A-570–900 (May 22, 2006) ("DSBs from China Mem.") at 17–19, *available at* https://enforcement.trade.gov/frn/summary/prc/E6–7763–1.pdf (last visited Dec. 20, 2019) (substantial transformation occurred when diamond cores were attached to diamond segments to produce finished diamond sawblades notwithstanding that the upstream and downstream products were within the same class or kind of merchandise); *3.5" Microdisks and Coated Media Thereof From Japan*, 54 Fed. Reg. 6,433, 6,434–35 (Dep't Commerce Feb. 10, 1989) (final determination of sales at less than fair value) (processing performed in Canada on microdisks from Japan did not alter the class or kind of merchandise but was sufficiently significant to render

be within the same class or kind of merchandise as SS bar, *id*. at 12–13. There is, however, no inherent, objective basis for these differences. The class or kind of merchandise involved in any proceeding is typically a function of, and coterminous with, the scope of merchandise for which the petitioner seeks relief—and the breadth of that scope may change from case to case. *See, e.g.*, *Hitachi Metals, Ltd. v. United States*, 42 CIT ___, ___, 350 F. Supp. 3d 1325, 1343–49 (2018) (reviewing a U.S. International Trade Commission determination in a cut-to-length plate ("CTL") investigation in which the scope (and Commerce's determination as to class or kind) included certain alloy CTL which had not been included in prior CTL investigations). While production processes are taken into consideration, Commerce also considers non-production criteria such as administrability and circumvention concerns. *See* Issues and Decision Mem. for the Final Determination in the Antidumping Duty Investigation of Multilayered Wood Flooring from the People's Republic of China, A-570–970 (Oct. 18, 2011) at 54, *available at* https://enforcement.trade.gov/frn/summary/PRC/2011–26932–1.pdf (last visited Dec. 20, 2019); Issues and Decision Mem. for the Final Determination of the Less-Than-Fair-Value Investigation of Certain Steel Wheels from the People's Republic of China, A-570–082 (Mar. 21, 2019) at 9–13, *available at* https://enforcement.trade.gov/frn/summary/prc/2019–05957–1.pdf (last visited Dec. 20, 2019). Thus, Commerce must establish the reasonableness of relying on its class or kind distinction if that distinction continues to play a central role in the agency's analysis.

Canada as the country of origin for antidumping purposes); *Erasable Programmable Read Only Memories (EPROMs) From Japan*, 51 Fed. Reg. 39,680, 39,692 (Dep't Commerce Oct. 30, 1986) (final determination of sales at less than fair value) (substantial transformation did not occur when processed wafers and dice from Japan were assembled into finished EPROMs in Singapore and remained in the same class or kind of merchandise).

As the foregoing agency determinations demonstrate, class or kind of merchandise is but one factor Commerce considers in conducting its substantial transformation test—and it "is not [even] a controlling factor." DSBs from China Mem. at 18;[11] *see also, e.g.*, TRBs from China Mem. at 7 ("[W]hile we consider the class or kind of [merchandise] to be an important factor in determining substantial transformation, it is not the only factor we considered. . . ."); *supra* note 10. Thus, Commerce's attempt to portray changes to the class or kind of merchandise as determinative of whether the substantial transformation test applies runs counter to decades of agency precedent.

Further, while Commerce has used the substantial transformation test to determine country of origin, *see, e.g.*, *Bell Supply*, 888 F.3d at 1228–31, Commerce has not limited the substantial transformation test to country of origin determinations, *see* I&D Mem. at 13.[12] That test, which examines whether certain "manufacturing or processing steps" result in a "new product having a new name, character and use," *Bell Supply*, 888 F.3d at 1228 (quoting *Bestfoods v. United States*, 165 F.3d 1371, 1373 (Fed. Cir. 1999)), appears at least facially relevant to Commerce's identification of the producer of the subject merchandise. Regardless of whether the "manufacturing or processing steps" occur in country B or are performed by company B, Commerce's inquiry is directed at the circumstances under which an input becomes an output and whether that output should be attributed to country B or company B. Commerce's disregard of the substantial transformation test without substantive explanation is not entitled to deference.

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[11] While the formulation of the factors Commerce considers in a substantial transformation test varies slightly across proceedings, in general, Commerce considers "(1) the class or kind of merchandise; (2) the nature and sophistication of processing in the country of exportation; (3) the product properties, essential component of the merchandise, and intended end-use; (4) the cost of production/value added; and (5) level of investment." *Bell Supply Co. v. United States*, 888 F.3d 1222, 1228–29 (Fed. Cir. 2018); *cf.* Laminated Woven Sacks from the People's Republic of China: Issues and Decision Mem. for the Final Results of the First Antidumping Duty Admin. Review, A-570–916 (Mar. 14, 2011) at 4–5, *available at* https://enforcement.trade.gov/ frn/summary/prc/2011–6450–1.pdf (last visited Dec. 20, 2019).

[12] Thus, the Government's argument that the substantial transformation test is inapplicable here because country of origin is not at issue is entirely *post hoc* and, thus, not a basis to sustain Commerce's determination. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

As previously noted, Commerce concluded that Venus is the producer of SS bar manufactured from SS wire rod. Final Analysis Mem. at 4. That finding is consistent with several scope determinations upon which Venus relies and in which Commerce concluded that that the conversion of SS wire rod into SS bar constitutes a substantial transformation. *See* Pls.' Mem. at 12–13 & n.16 (citations omitted); Pls.' Reply at 2–5; Scope Rulings, Suppl. CJA at ECF pp. 7–89.[13] However, to the extent that Commerce relied on a substantial transformation analysis because SS wire rod and SS bar are in different classes or kinds of merchandise, that reliance undermines the Government's *post hoc* argument that the substantial transformation test is inapplicable when country of origin is not at issue. Further, because agency precedent demonstrates that the substantial transformation test may apply irrespective of changes in the class or kind of merchandise, *see supra* pp. 17–18, Commerce's use of the substantial transformation test in connection with one input (SS wire rod) but not the other (SS rounds) is, without further explanation, arbitrary.

Additionally, Commerce's dismissal of the relevance of the scope rulings and the substantial transformation test led it to further ignore Venus's central argument that the processing of SS wire rod into SS bar affects the physical characteristics of SS wire rod in the same way that the "nearly identical" processing of SS rounds into SS bar affects the physical characteristics of the SS rounds. I&D Mem. at 4–5 (summarizing Venus's arguments); *see also* Pls.' Mem. at 12–13; Pls.' Reply at 2–3. Because changes in the class or kind of merchandise (or lack thereof) are not necessarily determinative of substantial transformation, it is not clear that conversion of SS rounds into SS bar would *not* constitute a substantial transformation. It is also not clear

[13] The scope determinations submitted in the supplemental confidential joint appendix include, among others, (1) Final Recommendation Mem.—Scope Ruling Req. by Ishar Bright Steel Ltd. on Whether Stainless Steel Bar is Subject to the Scope of the Antidumping and Countervailing Duty Orders on Stainless Steel Wire Rod from Subject Countries (Feb. 7, 2005) ("UAE SSWR Scope Ruling"); (2) Scope Req. from Rodacciai S.p.A.—Final Scope Ruling Concerning the Stainless Steel Wire Rod from Spain Order [and] Initiation and Prelim. Scope Ruling Concerning the Stainless Steel Bar from Spain Order (May 12, 2015) ("Spain Final SSWR Scope Ruling"); and (3) Scope Req. from Rodacciai S.p.A.—Final Scope Ruling Concerning the Stainless Steel Bar from Spain Order (July 10, 2015) ("Spain Final SSB Scope Ruling"). Each of those rulings address the conversion of SS wire rod into SS bar for purposes of determining country of origin and the applicability of orders covering SS wire rod or SS bar. *See* UAE SSWR Scope Ruling at 1; Spain Final SSWR Scope Ruling at 1; Spain Final SSB Scope Ruling at 1. In the first ruling, Commerce—after extensive analysis—determined that SS bar and SS wire rod occupy different classes or kinds of merchandise and the SS bar produced in the United Arab Emirates using SS wire rod imported from countries subject to antidumping or countervailing duty orders on SS wire rod was not covered by those orders. UAE SSWR Scope Ruling at 5–12. Commerce relied on these findings in subsequent determinations. Spain Final SSWR Scope Ruling at 19–25, 29; Spain Final SSB Scope Ruling at 19–24, 26–27, 29.

that application of the *NWR* test to the SS bar manufactured from SS wire rod would not produce the same results as occurred when that test was applied to SS bar manufactured from SS rounds. The record suggests that there is a comparable absence of additional materials and changes in product characteristics regardless of the starting input. *See* Pls.' Reply at 5. Commerce, however, ignored these parallels and, instead, appeared to rely solely on the class or kind demarcations. *See* Final Analysis Mem. at 4.

For these reasons, Commerce's wholesale disregard of its established substantial transformation test requires further consideration and explanation by the agency. The court does not hold that Commerce *must* use its substantial transformation test or *must not* use the *NWR* test. Rather, the court holds that Commerce has not adequately addressed why the substantial transformation test is irrelevant under the circumstances presented by this case. Accordingly, this matter is remanded to the agency for further consideration and explanation. The court will defer reaching Venus's other arguments regarding Commerce's application of the *NWR* test and Commerce's use of total AFA pending Commerce's redetermination on remand.[14]

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby:

ORDERED that Commerce's *Final Results* are remanded to the agency for further consideration and explanation consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand results on or before March 19. 2020; and it is further

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

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

Dated: December 20, 2019
New York, New York

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

[14] Commerce based its decision to use an adverse inference on two subsidiary findings that Venus did not act to the best of its ability: (1) "by failing to clearly identify" its purchases of subject inputs "until directly asked in the third supplemental questionnaire," and (2) "in attempting to obtain its unaffiliated suppliers' cost data." I&D Mem. at 16. While the first finding is arguably relevant notwithstanding the court's remand of Commerce's determination that Venus is not the producer, Commerce's explanation suggests—though is not entirely clear—that both findings are necessary to support the use of AFA. *See id.* at 16–17. Because the second finding would be obviated in the event Commerce reconsiders its decision that Venus is not the producer, the court will await further clarity from Commerce on remand as to its basis for using an adverse inference—if it continues to do so—before addressing this issue.