U.S. Court of International Trade

Slip Op. 19–171

GUIZHOU TYRE CO., LTD.; GUIZHOU TYRE IMPORT & EXPORT CO., LTD; & XUZHOU XUGONG TYRES CO., LTD., Plaintiffs, and TIANJIN UNITED TIRE & RUBBER INTERNATIONAL CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Consolidated Court No. 17–00101

[Sustaining the Department of Commerce's remand redetermination.]

Dated: December 26, 2019

Ned H. Marshak & *Andrew T. Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, and *Richard P. Ferrin* & *Douglas J. Heffner*, Drinker Biddle & Reath, LLP, of Washington, D.C., for plaintiffs.

John Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Goldberg, Senior Judge:

This matter returns to the court following a second remand of the final determination of the U.S. Department of Commerce ("Commerce" or "the Department") in its countervailing duty ("CVD") investigation of off-the-road tires from the People's Republic of China ("PRC"). *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 82 Fed. Reg. 18,285 (Dep't Commerce Apr. 18, 2017) (final results), *amended by Certain New Pneumatic Off-the-Road Tires from the People's Republic of China,* 82 Fed. Reg. 40,554 (Dep't Commerce Aug. 25, 2017) (am. final results) ("*Amended Final Results*") and accompanying Issues & Decision Mem. ("I&D Mem."). The two prior opinions of this court thoroughly set forth the facts underlying this remand. *Guizhou Tyre Co. v. United States*, 42 CIT __, 348 F. Supp. 3d 1261 (2018) ("*Guizhou I*"); *Guizhou Tyre Co. et al. v. United States*, 43 CIT __, 399 F. Supp. 3d 1346 (2019) ("*Guizhou II*"). The court presumes familiarity with those opinions. Shortly after this court's second remand opinion, Commerce submitted its Final Results of Redetermination Pursuant to Court Remand, ECF 109–1 (Nov. 19, 2019) ("Second Remand Results"). Plaintiffs Guizhou Tyre Co. and Guizhou Tyre Import and Export Co. (collectively "Guizhou")

as well as Xuzhou Xugong Tyres Co. ("Xugong") have agreed with the conclusion drawn in the Department's remand results. For the reasons discussed below, the court sustains Commerce's Remand Results.

BACKGROUND

In this administrative review, Commerce examined whether Plaintiffs benefited from the Export Buyer's Credit Program ("EBCP" or "the Program"), a loan program instituted by the Government of China ("GOC") that provides loans to foreign companies to promote the export of Chinese goods. *See Guizhou I*, 42 CIT at __, 348 F. Supp. 3d at 1267–69. Previously, in response to each of Commerce's questions regarding the Program's operation, the GOC responded that "none of their relevant customers used the Program." *Id*. In support thereof, Guizhou submitted declarations from its U.S. customers confirming non-use. *Id*. at 1271.

In its Final Determination, Commerce concluded that the GOC both withheld requested information and significantly impeded the proceeding such that the Department has applied a rate under adverse facts available ("AFA") for each respondent based on Plaintiffs' presumed benefit from the EBCP. I&D Mem. at 24. According to Commerce, there is a "'gap' in the record [which] . . . prevents complete and effective verification of the customer's [*sic*] certifications of non-use," *id*., such that the Department cannot verify the respondent's non-use declarations. Consequently, Commerce applied an adverse inference that Plaintiffs used and benefited from the Program. In *Guizhou I*, the court held that Commerce had misapplied AFA under 19 U.S.C. § 1677e when it failed to make "an initial finding . . . that material information was missing from the record." *Guizhou I*, 348 F. Supp. 3d at 1270.

On the first remand, Commerce explained that during a CVD investigation of chlorinated isocyanurates in 2012, the Department "learned for the first time that the rules for administering the EBCP had been revised in 2013." Final Results of Redetermination Pursuant to Court Remand 10, ECF 93–1 (Mar. 5, 2019) ("First Remand Results"). The revisions to the EBCP include a limiting provision of Export Buyer's credits to business contracts exceeding two million dollars and the use of third-party banks to disburse Export Buyer's credits. According to Commerce, these revisions to the EBCP make verification of any non-use affidavits "unreasonably onerous, if not impossible" because verification would now "require knowing the names of the intermediary banks." First Remand Results at 12–13. Therefore, Commerce "no longer attempts to verify usage" at all, *id.* at 13 n.36.

Plaintiffs and the GOC maintained that the rule change was "internal to the bank" and "non-public," First Remand Results at 10, and moreover, that the change had little relevance to Commerce because Guizhou already demonstrated that its U.S. customers do not use the Program.

The court took issue with several aspects of the First Remand Results. First, the Department failed to explain how the rule change affected the way the Department conducts verification of non-use declarations, or why Commerce could not verify the non-use declarations using different tools at its disposal. *Guizhou II*, 399 F. Supp. 3d at 1351. Second, the Department failed to show the requisite gap needed to make an adverse inference—and how that gap would be filled by the information that it is requesting. *Id.* at 1352. And more so, the court faulted the Department for inconsistently interpreting what constitutes a gap for the purposes of applying an adverse inference to the EBCP.

The Department issued its Second Remand Results shortly following the court's last opinion. Commerce has reconsidered its decision to apply AFA in evaluating use of the EBCP and now determines, "under protest," that the EBCP program was not used by the respondents based on the certifications submitted by Plaintiffs. Second Remand Results at 1.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court must sustain Commerce's remand redetermination if it is supported by substantial record evidence, is otherwise in accordance with law, and is consistent with the court's remand order. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014); *see also* 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

In its second remand results, Commerce "complied, under protest, with the Court's ruling and now finds that neither of the respondents used this program during the [period of review]." Second Remand Results at 8. The Department relied on the non-use certifications submitted by Plaintiffs from its customers to reach its conclusion, as well as record statements by Xugong that it confirmed with its customers that none used the program. *Id.* Commerce further removed the EBCP program rate from the list of rates included in the calculation of Plaintiffs' subsidy rates. *Id.* at 9.

The court affirms the Department's determination that the record evidence sufficiently demonstrates that neither Guizhou nor its customers used the Program. However, the court does not affirm all of the

statements Commerce included in its remand redetermination. Commerce is steadfast in continuing "to find a 'gap' in the record" and "that this gap prevents an accurate and effective verification of Guizhou Tyre's customers' certification of non-use and Xuzhou Xugong's statements that its customers did not use the program." Second Remand Results at 8. However, it seems the Department misinterpreted this court's multiple opinions on the EBCP and the issue the court took with the Department's decision to apply an adverse inference.

The adverse use of facts otherwise available can only be used to fill gaps necessary to complete the factual record. *Guizhou II*, 399 F. Supp. 3d at 1349. The Department has provided a myriad of reasons why verification *might* be onerous without additional information pertaining to the EBCP revisions. But until these reasons are grounded in facts supported by the record—that is, until the Department actually *attempts* verification and adequately confronts these (purportedly) insurmountable challenges, there is little for the Department to hang its hat on when it "continues to find a 'gap' in the record," Second Remand Results at 8. The court is sympathetic to the Department's struggles surrounding this Program, but an adverse inference is not one that can be applied just because Commerce is unsatisfied with the respondent's answers about the EBCP's operations—a program that Plaintiffs do not even use, according to the only evidence available on the record. The court remains convinced that the Department has not adequately addressed what the gap in the record is (as required under the AFA statute), or, that the missing information is required to effectively verify respondent's non-use of the Program.

Therefore, for the reasons provided in *Guizhou I*, *Guizhou II*, and discussed here, the court views as correct the Department's decision, albeit made under protest, to find that neither of the respondents used the Program during the period of review.

CONCLUSION

The court rules that Commerce was correct in deciding that the Plaintiffs did not use the EBCP based on the record evidence. For the foregoing reasons, Commerce's Remand Results are **SUSTAINED**. Judgment will enter accordingly.

Dated: December 26, 2019
New York, New York

/*s*/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 19–172

DAK AMERICAS LLC and AURIGA POLYMERS INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 17–00195

[Denying plaintiffs' motion for judgment on the agency record]

Dated: December 27, 2019

Paul C. Rosenthal, Kelley Drye & Warren, LLP, of Washington, D.C., for plaintiffs DAK Americas LLC and Auriga Polymers Inc. With him on the brief were *David C. Smith*, *Cameron R. Argetsinger*, and *Joshua R. Morey*.

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.* , Assistant Director. Of counsel were *Suzanna Hartzell-Ballard* and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION

Stanceu, Chief Judge:

Plaintiffs brought this action to contest written demands by U.S. Customs and Border Protection ("Customs" or "CBP") for the return to the government of certain monetary payments plaintiffs previously received from Customs under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"). 19 U.S.C. § 1675c, Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549 (2000) *(repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006)). Before the court is plaintiffs' motion for judgment on the agency record under USCIT Rule 56.1. The court denies the motion.

I. Background

Background is presented in the court's previous opinion in this case and is supplemented herein. *DAK Americas LLC v. United States,* 42 CIT__, Slip Op. 18–95 (Aug. 6, 2018) *("DAK Americas I").*

Plaintiffs are "affected domestic producers" ("ADPs"), which is the term used in the CDSOA to identify parties eligible to receive monetary distributions that are paid under the CDSOA as compensation for qualifying expenses from duties collected under an antidumping duty ("AD") or countervailing duty order. Plaintiffs DAK Americas LLC ("DAK Americas") and Auriga Polymers Inc. ("Auriga") received annual CDSOA distributions under an AD order on polyester staple fiber ("PSF") from the Republic of Korea; DAK Americas also received distributions in its capacity as a successor-in-interest to Wellman Inc.

("Wellman"), another ADP under that order and an AD order on PSF from Taiwan.[1] Compl. ¶¶ 2–4.

1. The Demand Letters

In 2017, Customs issued letters (the "demand letters") to DAK Americas, Wellman, and Auriga demanding the partial repayment of certain monetary distributions that Customs paid to these parties under the CDSOA. The demand letters identified as the reason for the repayment demands the settlement of litigation (the *"Nan Ya"* litigation) before this Court, to which plaintiffs were not parties. *See* Order of Dismissal, *Nan Ya Plastics Corp., Am. v. United States,* Ct. No. 08–00138 (June 15, 2015), ECF No. 140 (Order of Dismissal following parties' Stipulation of Dismissal) *("Nan Ya* Dismissal Order"). The *Nan Ya* litigation involved the issue of whether Nan Ya Plastics Corp., Americas ("Nan Ya"), also a domestic producer of PSF, qualified as an ADP under the CDSOA. This litigation did not proceed to a judgment and resulted in a settlement agreement. *Nan Ya* Settlement Agreement (Feb. 12, 2015) (Admin.R.Doc. No. 1 at 5–11) ("Settlement Agreement"). Further to the settlement, Nan Ya was added retroactively to the list of ADPs published by the U.S. International Trade Commission ("ITC") for the Korea and Taiwan PSF orders, effective as of Fiscal Year 2007 and for subsequent fiscal years. Letter from ITC to Customs (Feb. 25, 2015) (Admin.R.Doc. No. 5 at 84) ("Letter from ITC"). In the demand letters, Customs characterized the repayments it sought from the plaintiffs in this case as plaintiffs' pro-rata shares of the payments the government made to Nan Ya as a result of the settlement of the *Nan Ya* litigation, which were not otherwise available in CDSOA accounts.

Customs issued the four demand letters nearly two years after the *Nan Ya* settlement, as follows.

The March 10, 2017 letter Customs sent to DAK Americas sought claimed overpayments of $231,148.82 made under the Korea AD Order for Fiscal Years 2007 through 2011. Customs Demand Letter to DAK Americas (Mar. 10, 2017) (Admin.R.Doc. 6 at 86–87) ("Demand Letter to DAK Americas").

The March 10, 2017 letter to Wellman (sent to the address of affiliate DAK Americas) sought $443,300.52 for claimed overpayments under both AD orders for Fiscal Years 2007 and 2008 ($223,637.61 under the Taiwan AD Order and $219,662.91 under the

[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea and Antidumping Duty Orders: Certain Polyester Staple Fiber From the Republic of Korea and Taiwan,* 65 Fed. Reg. 33,807, 33,807–08 (Int'l Trade Admin. May 25, 2000).

Korea AD Order). Customs Demand Letter to Wellman (Mar. 10, 2017) (Admin.R.Doc. 7 at 89–90) ("Demand Letter to Wellman").

The March 10, 2017 letter to Auriga sought repayment of $11,548.84 received under the Korea AD Order for Fiscal Year 2011. Customs Demand Letter to Auriga (Mar. 10, 2017) (Admin.R.Doc. 8 at 92–93) ("First Demand Letter to Auriga").

Customs sent a second demand letter to Auriga, dated May 26, 2017, seeking repayment of an additional $95,079.75 in CDSOA distributions Auriga received "due to a supplemental distribution" under the Korea PSF Order for Fiscal Year 2010, which Customs stated "should have been included" in its earlier demand letter to Auriga (for a total demand of $106,628.79). Customs Updated Demand Letter to Auriga (May 26, 2017) (Admin.R.Doc. 9 at 95–95) ("Second Demand Letter to Auriga").

On May 31, 2017, Auriga repaid the sum of $11,548.84 demanded by Customs in the First Demand Letter to Auriga. Check from Auriga to Customs (May 31, 2017) (Admin.R.Doc. 10 at 109). No plaintiff has paid any other portion of the amounts demanded by Customs. Compl. ¶¶ 33–34.

2. The Denial of Defendant's Motion to Dismiss

In *DAK Americas I,* the court denied a Rule 12(b)(6) motion by the government seeking dismissal of this action for failure to state a claim on which relief can be granted. 42 CIT at __, Slip Op. 18–95 at 15.

3. The Pending Motion and Related Proceedings

Plaintiffs filed the motion before the court, for judgment on the agency record under USCIT Rule 56.1, on December 28, 2018. Pls.' Rule 56.1 Mot. for J. on the Agency R. (Dec. 28, 2018), ECF No. 31 ("Pls.' Mot."); Pls.' Mem. of Points and Authorities (Dec. 31, 2018), ECF No. 32 ("Pls. Mem."). Defendant responded on March 22, 2019. Def.'s Resp. in Opp. to Pls.' 56.1 Mot. for J. on the Agency R. (Mar. 22, 2019), ECF No. 37 ("Def.'s Resp."). Plaintiffs replied on April 19, 2019. Reply in Supp. of Pls.' Rule 56.1 Mot. for J. on the Agency R. (Apr. 19, 2019), ECF No. 38 ("Pls.' Reply"). The court held oral argument on plaintiffs' motion on July 23, 2019. *See* Oral Argument (July 23, 2019), ECF No. 43.

II. DISCUSSION

A. Subject Matter Jurisdiction

The court exercises jurisdiction according to 28 U.S.C. § 1581 (i), the "residual" jurisdiction provided by section 201 of the Customs

Courts Act of 1980, 28 U.S.C. § 1581(i).[2] Paragraph (2) of§ 1581 (i) provides the Court of International Trade jurisdiction of "any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2). Paragraph (4) of subsection (i) provides for jurisdiction of "any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection . . . ." *Id. §* 1581(i)(4).

B. Standard of Review

In an action brought under 28 U.S.C. § 1581(i), the court conducts its review according to the standard of review set forth in the Administrative Procedure Act, 5 U.S.C. § 706, under which a court must hold unlawful agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 28 U.S.C. § 2640(e).

C. Plaintiffs' Claims and Demands for Relief

Plaintiffs claim that each of the CBP's letters demanding recovery, or "clawback," of their previously paid CDSOA distributions are invalid agency actions that must be set aside. They base their claims in large part on their construction of two provisions in the Customs Regulations implementing the CDSOA.

They contend that section 159.64(b)(3) of the regulations, 19 C.F.R. § 159.64(b)(3), which addresses the return to Customs of overpayments of CDSOA distributions, is applicable only where Customs seeks to recoup distributions to account for refunds of antidumping and countervailing duties made to importers arising from import entries. Pls.' Mem. 12–18. They maintain that this provision, therefore, does not support a demand for the return of past CDSOA payments made to affected domestic producers and, specifically, does not apply in the specific situation where, as here, a settlement of litigation against the government resulted in the addition of a new ADP. *Id.*

Plaintiffs argue, further, that CBP's demands are precluded by another provision in the Customs Regulations implementing the CDSOA, 19 C.F.R. § 159.64(f). Pls.' Mem. 18. This provision creates a general rule, subject to certain exceptions, that "any distribution made to an affected domestic producer under this section shall be

[2] Citations to the Customs Courts Act of 1980 are to the relevant portions of Title 28 of the U.S. Code, 2006 edition. Citations to Title 19 of the Code of Federal Regulations are to the 2017 edition.

final and conclusive on the affected domestic producer." 19 C.F.R. § 159.64(f).

Additionally, plaintiffs argue that the CDSOA does not allow Customs to reallocate CDSOA distributions retroactively among ADPs in an attempt to seek clawback of previously-paid distributions. They emphasize, in particular, the lengths of time elapsing since the original payments (dating back to Fiscal Year 2007) and the issuance of the demand letters in 2017. Pls.' Mem. 1.

Plaintiffs seek three forms of relief. They seek, first, to have the demand letters set aside as unlawful agency actions. Pls.' Mot. 1. Second, they would have the court enjoin Customs "from making such demands on Plaintiffs in the future." *Id.* Finally, they seek an order "that Customs shall refund to Auriga Polymers Inc. the $11,548.84 payment that Auriga made to Customs in response to Customs' unlawful demand in its March 10, 2017 letter." *Id.*

D. Plaintiffs Have Not Established their Entitlement to a Remedy in this Action

Under the standard of review, the court is not called on to decide whether defendant ultimately will or will not succeed in recovering amounts from CDSOA distributions Customs previously paid to the plaintiffs. Instead, the court must decide whether the specific agency actions challenged in this case—i.e., the issuances of the demand letters to plaintiffs—are invalid as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law on the grounds plaintiffs assert in support of their motion for judgment on the agency record. The court concludes they are not.

In summary, the court bases its decision on the following five conclusions: (1) Contrary to plaintiffs' argument, Customs did not misinterpret section 159.64(b)(3) of the Customs Regulations is deciding to demand the payments at issue; (2) Section 159.64(b)(3) was not the sole ground upon which Customs sought the repayments from plaintiffs; (3) Section 159.64(f) of the Customs Regulations does not invalidate the demand letters; (4) The CDSOA is silent on the question of whether the United States may seek to recover erroneous overpayments to ADPs; and (5) In the circumstances of this case, it was neither arbitrary and capricious, nor an abuse of discretion, for Customs to seek the repayments from plaintiffs based on the retroactive designation of a new ADP for the relevant AD orders.

1. Customs Did Not Issue the Demand Letters Based upon a Misinterpretation of Section 159.64(b)(3) of the Customs Regulations

In support of their claim, plaintiffs argue that paragraph (3) of section 159.64(b) of the Customs Regulations, 19 C.F.R. §

159.64(b)(3), does not authorize the collection actions taken by the demand letters. Their argument turns on the meaning of the phrase "and/or court actions" as it appears in the first sentence in that paragraph, which reads as follows:

> (3) *Overpayments to affected domestic producers*. Overpayments to affected domestic producers resulting from subsequent reliquidations and/or court actions and determined by Customs to be not otherwise recoverable from the corresponding Special Account as set out in paragraph (b)(2) of this section will be collected from the affected domestic producers.

19 C.F.R. § 159.64(b)(3). In support of this argument, plaintiffs point to the immediately preceding paragraph of subsection (b), i.e., paragraph (2), which provides as follows:

> (2) *Refunds resulting from reliquidation or court action.* If any of the underlying entries composing a prior distribution should reliquidate for a refund, such refund will be recovered from the corresponding Special Account. Similarly, refunds to importers resulting from any court action involving those entries will also be recovered from the corresponding Special Account. Refunds to importers will not be delayed pending the recovery of overpayments from domestic producers as set out in paragraph (b)(3) of this section.

Id. § 159.64(b)(2). In summary, plaintiffs' argument is that the words "and/or court actions" as used in paragraph (3) must be read to refer to the phrase "court action involving those entries" as it appears in paragraph (2), especially in the context of the words "refunds to importers" in paragraph (2), and that the settlement of the *Nan Ya* litigation is not within the intended meaning of the term "court actions" as used in paragraph (3). Pls.' Mem. 15. Plaintiffs cite in support of their argument certain language in the preamble to the final rulemaking, which discusses these provisions solely in the context of refunds of duties on import entries. Pls.' Mem. 16–17 (quoting *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers* (Final Rule), 66 Fed. Reg. 48,546, 48,549–50 (Cust. & Border Prot. Sept. 21, 2001).

The court is not persuaded by plaintiffs' argument. Customs used the phrase "and/or court actions" in paragraph (3) without qualifying language analogous to the language ". . . involving those entries" or "refunds to importers" that it used in paragraph (2). Also, the qualifier in paragraph (3), "as set out in paragraph (2) of this section," is not necessarily read (as plaintiffs do, Pls.' Mem. 15–16) to modify the term "[o]verpayments" and thus limit the operation of paragraph (3) to the circumstances of paragraph (2). Instead, in context it is more

reasonably interpreted to modify only the nearby words "not otherwise recoverable from the corresponding Special Account."

While it might be argued that the relationship of paragraph (3) to paragraph (2) is an indication of some ambiguity as to the meaning of paragraph (3), the preamble to the proposed rule contains language indicating that Customs intended to recover overpayments that did not necessarily result from reliquidations or court actions related to refunds of duties arising from import entries. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers* (Proposed Rule), 66 Fed. Reg. 33,920, 33,923 (Cust. & Border Prot. June 26, 2001) *("Any* overpayment of a distribution made by Customs to an affected domestic producer will be subject to billing and other collection methods, including, *but not limited to,* administrative offsets resulting from a reliquidation." (emphasis added)). The preamble language in the final rule on which plaintiffs rely does not state that only court actions involving duty refunds to importers will result in actions to recover overpayments to ADPs, and there is nothing therein indicating that Customs qualified or limited its earlier expression of intent as reflected in the preamble to the proposed rule.

In summary, the language of 19 C.F.R. § 159.64(b) might be imperfectly drafted and thereby not remove all ambiguity, but there is a sufficient expression of agency intent, particularly in the preamble to the proposed rule, to recover a broader class of overpayments than that posited by plaintiffs. The court concludes that the demand letters are not invalidated by a misinterpretation of this regulation on the part of Customs.[3]

Even were the court to agree with plaintiffs that § 159.64(b)(3) was intended to refer only to overpayments resulting from those court actions that involve refunds upon import entries, it still could not declare the demand letters invalid or provide the other relief plaintiffs seek. That is because the regulations do not preclude Customs from seeking to recoup overpayments of previous CDSOA distributions using authority other than that provided specifically by section 159.64(b)(3). In that regard, as discussed below, Customs did not rely solely, or even principally, on section 159.64(b)(3) in demanding payments from the plaintiffs in this case.

[3] The court reaches this conclusion without affording the type of deference to an agency's interpretation of its own regulations of the type addressed by the Supreme Court in *Auer v. Robbins,* 519 U.S. 452 (1997). *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2416–17 (2019) (limiting *Auer* deference to official agency positions). The court's conclusion that the demand letters are not invalidated by an agency misinterpretation of 19 C.F.R. § 159.64(b)(3) accords with certain *dicta* in *PS Chez Sidney, L.L.C. v. US. Int'l Trade Comm'n,* 684 F.3d 1374, 1383–84 (Fed. Cir. 2012) (directing Customs to fashion an appropriate remedy in the instance of a court decision retroactively recognizing an additional ADP and clarifying that 19 C.F.R. § 159.64(b)(3) applies to overpayments made to the other ADPs).

2. Customs Did Not Rely Exclusively on Section 159.64(b)(3) of the Customs Regulations for Authority to Demand Repayment of Previous CDSOA Distributions

In its previous opinion, the court denied the government's motion to dismiss, ruling that defendant's motion could not be adjudicated absent examination of the administrative record in this case. The court noted its inability to determine, without a record that included the demand letters, the authority or authorities under which Customs grounded its demands for repayment. *DAK Americas I,* 42 CIT at __, Slip Op. 18–95 at 14.

The administrative record shows that only in the second letter to Auriga did Customs rely specifically on section 159.64(b)(3) of the Customs Regulations, 19 C.F.R. § 159.64(b)(3), for the authority to demand return of claimed overpayments to an ADP. Second Demand Letter to Auriga at 95–96. That letter, however, which referred to the First Demand Letter to Auriga, also relied on other authority for its conclusion that "Auriga is jointly and severally liable for the return of any CDSOA overpayments that were previously paid to its predecessor," including the *Notice of Intent to Distribute Offset for Fiscal Year 2011,* 76 Fed. Reg. 31 ,020, 31,021 (Cust. & Border Prot. May 27, 2011). *Id.* at 96. The texts of the three initial demand letters, i.e., the Demand Letters to DAK Americas and to Wellman, and the First Demand Letter to Auriga, indicate that Customs did not rely exclusively, or even principally, on section 159.64(b)(3) of the Customs Regulations for authority to demand repayment. In summary, the court's interpretation of all four demand letters is that Customs did not rely solely on 19 C.F.R. § 159.64(b)(3).

Three of the four demand letters, the Demand Letters to DAK Americas and Wellman, and the First Demand Letter to Auriga, which are identical in respects relevant to the question of the claimed authority for the repayment demand, state in the first paragraph that certain past CDSOA distributions "were made in accordance with 19 U.S.C. § 1675c (a general citation to the CDSOA as a whole] and 19 C.F.R. §§ 159.61 through 159.64 [which together comprise the entire set of CDSOA regulations]." Demand Letter to DAK Americas at 86; Demand Letter to Wellman at 89; First Demand Letter to Auriga at 92.

The letters continue by stating that "[a]s more fully set out below, your company was overpaid and the overpayment must be immediately returned to U.S. Customs and Border Protection (CBP)." Demand Letter to DAK Americas at 86; Demand Letter to Wellman at 89; First Demand Letter to Auriga at 92. The next paragraph provides the stated reason for the obligation to return funds to the

government. It does not mention section 159.64(b)(3) but instead explains the reason for the demand by citing a feature of the CDSOA: the awarding of distributions on a pro-rata basis to the various affected domestic producers who may qualify to receive distributions under an AD or CVD order. That paragraph (quoted from the Demand Letter to DAK Americas and First Demand Letter to Auriga) is as follows:

> When the amount of qualifying expenditures for a particular antidumping or countervailing duty case exceeds the collections available for distribution, the CDSOA requires pro-rata distributions among the eligible affected domestic producers. 19 U.S.C. § 1675c(d)(3); 19 C.F.R. § 159.64(c)(2). For the fiscal year(s) noted above [Fiscal Years 2007 through 2011], there were insufficient CDSOA-subject collections to satisfy each affected domestic producer's qualifying expenditures for A-580–839 [referring to AD duties collected under the AD order on PSF from Korea]. As such, you were paid a pro-rata share for A-580–839 in each of these fiscal years. However, due to certain litigation in the Court of International Trade involving A-580–839, an additional entity has been lawfully determined to be an eligible domestic affected producer for A-580–839 for Fiscal Years 2007 onward. *Nan Ya Plastics Corp., Am. v. United States,* CIT Case. No. 08–00138. Therefore, the pro-rata shares for A-580–839 must be retroactively re-calculated and you must return the amounts noted below, which constitute an erroneous overpayment.

Demand Letter to DAK Americas at 86; First Demand Letter to Auriga at 92; *see also* Demand Letter to Wellman at 89 (similar). The citations to 19 U.S.C. § 1675c(d)(3) and 19 C.F.R. § 159.64(c)(2) in the quoted language are references to the "pro-rata" nature of distributions of CDSOA benefits among ADPs. The three letters refer to section 159.64(b)(3) on the second pages of each, but they do so in the context of the provision therein under which interest accrues on amounts demanded but not satisfied. Demand Letter to DAK Americas at 87; Demand Letter to Wellman at 90; First Demand Letter to Auriga at 93. ("In accordance with 19 C.F.R. 159.64(b)(3), any amount not repaid within 30 days of the date of the bill will begin to accrue interest at the rate indicated in 19 C.F.R. § 24[.3]a(c).").

3. Section 159.64(f) of the Customs Regulations Does Not Invalidate the Demand Letters

Plaintiffs' argument that CBP's demands are precluded by another provision in the Customs Regulations implementing the CDSOA, 19

C.F.R. § 159.64(f), under which "any distribution made to an affected domestic producer under this section shall be final and conclusive on the affected domestic producer," Pls.' Mem. 18, fares no better. As defendant argues, Def.'s Resp. 20, the provision is expressly binding only on the affected domestic producer, and, regardless, specifies that CBP actions to recover overpayments taken under section 159.64(b)(3) are an exception to the administrative finality provided in section 159.64(f). *See* 19 C.F.R. § 159.64(f) ("Except as provided in paragraphs (b)(3) and (c)(3) of this section . . . .").

4. The CDSOA Is Silent on the Question of Whether the United States May Seek to Recover Amounts It Deems to Be Overpayments of CDSOA Distributions to ADPs

In its response brief, defendant argues that CBP's demands were made "in accordance with the CDSOA's statutory mandate" that an eligible ADP is to receive a pro-rata share of the amount collected by Customs in the preceding fiscal year, based on qualifying expenditures certified by all ADPs for the commodity. Def.'s Resp. 13. In their reply brief, plaintiffs dispute this premise, arguing that the CDSOA "does not allow Customs to retroactively reallocate CDSOA distributions among ADPs years after those distributions were made." Pls.' Repl. 3–4. Plaintiffs point to several procedural time limitations the statute applies to the ITC and Customs "regarding how and when to perform the actions necessary to effect distributions to ADPs." *Id.* at 4 (identifying the 60-day time limit for ITC's providing Customs a list of petitioners and supporters of the petition, the 30-day time limit prior to distribution for CBP's publication of an intention to distribute, and the 60-day time limit for distribution following the beginning of a fiscal year). According to plaintiffs, the Taiwan and Korea AD orders were issued prior to the enactment of the CDSOA, requiring the ITC to submit the list of petitioners and petition supporters within 60 days of enactment, and "[t]here is no provision in the CDSOA that permits the ITC to submit a revised list of ADPs to Customs fifteen years after the enactment of the CDSOA." *Id.* They argue, further, that "there is no provision in the CDSOA that would allow Customs to act on such a revised list." *Id.* at 4–5. They conclude that "there is no legal basis for Customs to unwind each of the statutorily mandated steps that it was required to take in distributing CDSOA funds under the Taiwan and Korea PSF Orders between 2007 and 2011 simply because Customs and the ITC decided, years after the fact, and in the context of a litigation settlement, to retroactively add Nan Ya to the petition support list for those orders." *Id.* at 5.

As plaintiffs themselves recognize, "the CDSOA says nothing about clawing back funds from domestic producers." *Id.* at 2. While the statute does not specifically authorize clawback in the event of an erroneous overpayment to an ADP, neither does it preclude it. Just as it is silent on the matter of an ADP's receiving an overpayment due to, for example, a clerical error, the CDSOA is also silent on the particular situation occurring when the ITC determined—in the government's current view, erroneously—that a particular domestic producer (in this instance, Nan Ya) did not qualify as a petitioner, or a supporter of the petition, and therefore did not receive *pro rata* distributions that the government, during litigation, later concluded the producer was entitled to receive. It was on that basis that the demand letters considered the amounts being sought to be erroneously-made overpayments to the plaintiffs. The written decision to add Nan Ya retroactively to the list of petitioners and petition supporters for the Taiwan and Korea AD orders on polyester staple fiber (a decision which plaintiffs, who limit their claim to CBP's issuance of the demand letters, do not challenge), is on the administrative record of this case. Letter from ITC at 84.

Plaintiffs' argument that nothing in the CDSOA allows Customs to act on the revised list of petitioners and petition supporters is also flawed. It presumes, without basis, that the CDSOA's silence on the matter of erroneous overpayments equates to a conclusion that Customs, as the agency principally responsible for administering the CDSOA, is statutorily prohibited from seeking to recover such overpayments. The 30-day and 60-day time limits applicable to certain actions Customs is to take, in the ordinary course of administering the CDSOA, are not an indication of congressional intent to establish such a prohibition in the special situation presented by this case.

Plaintiffs argue, further, that the "spirit and intent" of the CDSOA, in which Congress intended to remediate harm to domestic producers, are frustrated by clawback of distributions years after payment. Pls.' Repl. 6–7. But nothing in the CDSOA provides or suggests that Congress intended for an ADP to be allowed to retain distributions that may be shown to have been erroneously paid.

In summary, while the court need not, and does not, opine on whether the United States ultimately could recover on the demands made in the letters, it nevertheless concludes that CBP's action of issuing those demands was not precluded by the CDSOA. As discussed below, that action, additionally, was neither arbitrary and capricious, nor an abuse of discretion, on the part of Customs.

5. It Was Neither Arbitrary and Capricious, Nor an Abuse of Discretion, for Customs to Seek from Plaintiffs the Repayment of Certain Past CDSOA Distributions

The settlement of the *Nan Ya* litigation in this Court followed this Court's vacating, in part, its judgment in *Nan Ya Plastics Corp., Am. v. United States,* 36 CIT __, 853 F. Supp. 2d 1300 (2012) *("Nan Ya I").* In *Nan Ya I,* a three-judge panel of this Court held that the ITC did not err in denying Nan Ya ADP status under the CDSOA. Nan Ya had expressed support for the AD petitions on PSF in the preliminary phase of the ITC investigation but in the final phase had selected the "take no position" box in the ITC's questionnaire. On July 13, 2012, the day after this Court issued its decision in *Nan Ya I,* the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") issued a decision holding that a domestic producer that, like Nan Ya, had expressed support for a petition in the preliminary phase of the ITC's investigation but took "no position" on that petition in the final phase, satisfied the petition support requirement of the CDSOA. *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n,* 684 F.3d 1374, 1382–1383 (Fed. Cir. 2012) *("Chez Sidney").*

Following the decision of the Court of Appeals, this Court vacated its judgment of dismissal and issued a new judgment dismissing only constitutional claims Nan Ya had raised and allowing Nan Ya's statutory claims to proceed upon a third amended complaint. *Nan Ya Plastics Corp., Am. v. United States,* 37 CIT __, 916 F. Supp. 2d 1376 (2013). On that complaint, Nan Ya and the United States reached a settlement of the litigation. The Settlement Agreement provided that "[o]f the $1,762,558.67 to be paid to Nan Ya, $108,117.60 will be paid from the special accounts established pursuant to 19 U.S.C. § 1675c(e) for the antidumping duty orders on polyester staple fiber from Korea (A580839) and Taiwan (A583833), and the Department of Justice will submit appropriate documentation to the Department of Treasury for the payment of the balance, $1,654,441.07." Settlement Agreement ¶ 9. Language in the Settlement Agreement shows that the government contemplated collecting overpayments from the ADPs that received distributions under the AD orders on polyester staple fiber. *Id.* ¶ 17 ("The parties may cite to this agreement only as is necessary to effect the terms of this agreement and as may be necessary for the Government to collect overpayments made to Nan Ya or other domestic producers (ADPs) for Fiscal Years 2006 through Fiscal Years 2011 for antidumping duty orders on polyester staple fiber from Korea (A580839) and Taiwan (A583833).").

In its decision in *Chez Sidney,* the Court of Appeals also contemplated that the United States would seek the return of overpayments

to other ADPs to satisfy a judgment in favor of the plaintiff in that case, which the Court of Appeals concluded must be recognized retroactively as a fully-qualifying ADP. *Chez Sidney,* 684 F.3d at 1383 ("To be sure, 19 C.F.R. § 159.64(b)(3) will govern how Customs recovers the overpayments it made to other ADPs in this case.").

The government's retroactive designation of Nan Ya as an additional ADP under the PSF AD orders had a legal basis in the precedential decision of the Court of Appeals in *Chez Sidney.* Although, as plaintiffs argue, considerable time has passed since the original distributions for which Customs sought repayment, that fact alone, while possibly relevant in the event of future actions by the government to collect on the demands, does not by itself make CBP's attempts to seek that repayment arbitrary and capricious, or an abuse of discretion, on the administrative record of this case.

III. CONCLUSION

Because plaintiffs, in contesting the demand letters, have not demonstrated their entitlement to a remedy, the court does not declare the demand letters invalid, does not order return to Auriga of the $11,548.84 payment Auriga previously made to Customs,[4] and does not enjoin Customs from making future demands on plaintiffs for return of CDSOA distributions. Upon denying plaintiffs' motion for judgment on the agency record, the court will enter judgment in favor of defendant United States in accordance with USCIT Rule 56.1(b).

Dated: December 27, 2019
New York, New York

Timothy C. Stanceu
TIMOTHY C. STANCEU, CHIEF JUDGE

Slip Op. 19–173

YAMA RIBBONS and BOWS CO., Plaintiff, v. UNITED STATES, Defendant, and BERWICK OFFRAY LLC, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 18–00054

[Ordering remand of a final agency determination in a countervailing duty proceeding on narrow woven ribbons with woven selvedge from the People's Republic of China]

Dated: December 30, 2019

[4] The court decides only that plaintiff Auriga has not established its right to return of the payment on the grounds it asserted in moving for judgment on the agency record. The court does not decide whether Auriga ultimately may obtain relief on some ground not asserted in this litigation.

John J. Kenkel, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiff Yama Ribbons and Bows Co. With him on the brief were *Alexandra H. Salzman, Judith L. Holdsworth*, and *J. Kevin Horgan*.

Kara M. Westercamp, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. 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 *Paul Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Gregory C. Dorris, Pepper Hamilton LLP, of Washington D.C., for defendant-intervenor Berwick Offray LLC.

OPINION AND ORDER

Stanceu, Chief Judge:

In this action, plaintiff Yama Ribbons and Bows Co. ("Yama") contests an administrative determination the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude a periodic review of a countervailing duty ("CVD") order on narrow woven ribbons with woven selvedge from the People's Republic of China ("China" or the "PRC"). Ruling that the determination is contrary to law in certain respects, the court remands the determination to Commerce for appropriate corrective action.

I. Background

A. The Contested Determination

The contested determination (the "Final Results") is *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2015*, 83 Fed. Reg. 11,177 (Int'l Trade Admin. Mar. 14, 2018) ("*Final Results*"). The Final Results incorporated by reference an explanatory document. Decision Memorandum for the Final Results of 2015 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China (Int'l Trade Admin. Mar. 8, 2018) (P.R. Doc. 101, J.App. at 16)[1] ("Final Decision Mem.").

B. The Administrative Review, Preliminary Results, and Final Results

Commerce issued a countervailing duty order (the "Order") on narrow woven ribbons with woven selvedge from China (the "subject

[1] This Opinion and Order discloses only information included in public versions of record documents and information subsequently made public in the Preliminary Decision Memorandum, the Final Decision Memorandum, or the public versions of the parties' filings. Therefore, solely citations to the public versions of record documents are provided. All citations to the "J.App" are to the Joint Appendix Public Version (Dec. 26, 2018), ECF No. 33.

merchandise") in 2010. *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 53,642 (Int'l Trade Admin. Sept. 1, 2010) ("*Order*").[2] Commerce initiated the review at issue, the fifth periodic review of the Order, on November 9, 2016 upon the request of Berwick Offray LLC ("Berwick Offray"), the petitioner in the countervailing duty investigation and the defendant-intervenor in the present action. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 78,778 (Int'l Trade Admin. Nov. 9, 2016). The review pertained to entries of subject merchandise made during the period of review ("POR") of January 1, 2015 through December 31, 2015. *Id.* at 78,788. Commerce identified Yama as the sole exporter or producer of the subject merchandise to be reviewed. *Id.*

Commerce published the preliminary results of the review on September 7, 2017. *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2015*, 82 Fed. Reg. 42,296 (Int'l Trade Admin. Sept. 7, 2017) ("*Preliminary Results*"). Commerce preliminarily assigned Yama a total net countervailable duty subsidy rate of 23.37%. *Id.* at 42,297. Commerce incorporated by reference a decision memorandum for the preliminary results. Decision Memorandum for Preliminary Results of 2015 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China (Int'l Trade Admin. Aug. 30, 2017) (P.R. Doc. 68, J.App. at 48) ("Preliminary Decision Mem.").

In the Final Results, Commerce assigned Yama a total net countervailable duty subsidy rate of 23.37%, unchanged from the Preliminary Results. *Final Results*, 83 Fed. Reg. at 11,177.

C. Proceedings in the Court of International Trade

Yama instituted this action in March 2018. Compl. (Mar. 20, 2018), ECF No. 4. Before the court is Yama's motion for judgment on the agency record, brought under USCIT Rule 56.2. Pl. Yama's Mot. for J. upon the Agency R. (July 30, 2018), ECF No. 23 ("Pl.'s Br."). Yama's motion is opposed by defendant United States, Def.'s Resp. in Opp'n to Pl.'s Mot. for J. upon the Agency R. (Nov. 9, 2018), ECF No. 29 ("Def.'s Br."), and by defendant-intervenor Berwick Offray. Def.-Int. Berwick Offray's Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R.

[2] The countervailing duty order applies generally to woven ribbons 12 centimeters or less in width, and of any length, that are composed in whole or in part of man-made fibers and that have woven selvedge. Some exclusions apply. *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 53,642, 53,642–43 (Int'l Trade Admin. Sept. 1, 2010). The term "selvedge" refers to "the edge on either side of a woven or flat-knitted fabric so fashioned as to prevent raveling." *Selvage or selvedge*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002).

(Nov. 9, 2018), ECF No. 28 ("Def.-Int.'s Br."). The court held oral argument on Yama's motion on May 23, 2019. Oral Argument (May 23, 2019), ECF No. 35.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c),[3] pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an administrative review of a countervailing duty order. *See* 19 U.S.C. § 1516a(a)(2)(B)(iii). In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. Countervailing Duties under the Tariff Act

Section 701(a) of the Tariff Act directs generally that Commerce is to impose a countervailing duty if: (1) Commerce determines that the government of a country, or any public entity within that country, "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States"; and (2) the U.S. International Trade Commission determines that an industry in the United States is materially injured or threatened with material injury by reason of the subsidized imports. 19 U.S.C. § 1671(a). A "countervailable subsidy" exists, generally, where a governmental authority provides a financial contribution to a person and a benefit is thereby conferred, and the subsidy meets the requirement of "specificity" as set forth in the statute. 19 U.S.C. § 1677(5), (5A).

C. The Export Buyer's Credit Program

In the Final Results, Commerce attributed to Yama participation in numerous governmental programs and assigned individual subsidy rates ("program rates") for each one, resulting in the overall subsidy

[3] Citations to the United States Code are to the 2012 edition.

rate of 23.37%. *See* Final Decision Mem., J.App. at 21–22. Of the program rates, the highest one included in Yama's 23.37% subsidy rate was 10.54%, which Commerce attributed to Yama in relation to China's "Export Buyer's Credit Program" (to which it also refers as the "EXIM Buyer's Credits Program" and the "EXIM Bank Credit Program") ("EBCP"), an export-promoting loan program administered by the Export-Import Bank of China ("EX-IM Bank").[4] *Id.* at 21.

When subsidization takes the form of a government loan, a "benefit" is conferred "if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." 19 U.S.C. § 1677(5)(E)(ii).

In its Rule 56.2 motion, Yama argues that the record does not contain evidence that either Yama or its customers used the EBCP and thereby obtained a benefit, that Commerce unlawfully disregarded record evidence that Yama and its customers were *not* users of the program, and that the Department's attributing use of the EBCP to Yama therefore was contrary to law. Pl.'s Br. 10–27. Yama also argues that Commerce applied a rate based on "facts otherwise available" and an "adverse inference" without an adequate basis in the record. *Id.* at 10–11, 27–35. In the alternative, Yama challenges as unreasonable and punitive, and as unsupported by record evidence, the Department's assigning a program rate of 10.54% for the EBCP in determining Yama's overall subsidy rate. *Id.* at 35–39.

D. The Department's Decision to Include the EBCP Program in Determining Yama's Overall Subsidy Rate and the Stated Rationale

The Tariff Act provides for imposition of a countervailing duty only if a benefit is "conferred" upon a person as a result of a financial contribution. 19 U.S.C. § 1677(5)(B). Here, Commerce imposed a countervailing duty on exports of Yama's merchandise without reaching a finding of fact that a benefit from the EBCP actually was conferred upon Yama through participation in the EBCP by Yama or its customers. Instead, as discussed below in this Opinion and Order, Commerce inferred participation in the EBCP, and the conferring of a benefit therefrom, as "facts otherwise available" with an "adverse inference," invoking its authority under 19 U.S.C. § 1677e, subsections (a) and (b), respectively. When invoking both provisions, Com-

[4] The second-highest program rate, 9.52% *ad valorem*, was for the provision of synthetic yarn to Yama for less than adequate remuneration. Decision Memorandum for the Final Results of 2015 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China (Int'l Trade Admin. Mar. 8, 2018) (P.R. Doc. 101, J.App. at 21). The remaining program rates were considerably smaller than those for the Export Buyer's Credit Program ("EBCP") and synthetic yarn. *See id.*

merce refers to its use of subsections (a) and (b) together as "adverse facts available," or "AFA." For the Final Results, Commerce concluded that "consistent with our practice, where the GOC [i.e., the government of China] withheld necessary information and failed to cooperate by not acting to the best of its ability to comply with our requests for information, Commerce applied AFA to the GOC by finding that: . . . the export Buyer's credits program constitutes a financial contribution and is specific." Final Decision Mem., J.App. at 32.

Commerce presented its reasoning for resorting to "facts otherwise available" in the Preliminary and the Final Decision Memoranda. In both, Commerce declined to decide whether the record evidence did or did not support a finding that Yama used or benefitted from the EBCP. Instead, the Department's approach was to decide that the record evidence did *not* allow it to find that Yama did *not* use or benefit from the program: "As explained in the *Preliminary Results*, we continue to find that the information on the record does not support Commerce finding that Yama did not use the export Buyer's credit program during the POR." Final Decision Mem., J.App. at 29. According to Commerce, "[a]s we noted in the *Preliminary Results*, the GOC has not provided the requested information and documentation necessary for Commerce to develop a complete understanding of this [Export Buyer's Credit] program (*i.e.*, the Standard Questions Appendix, information pertaining to the 2013 revision to the program, and the use of third-party banks to disburse/settle export Buyer's credits)." *Id.* at 30. Commerce added that "[s]uch information is critical to understanding how export Buyer's credits flow to and from foreign buyers and the EXIM Bank of China. Absent the requested information, we are unable to rely on the GOC's and Yama's claims of non-use of this program." *Id.*

The "requested information" that Commerce identified as missing is in three categories: (1) responses to the "Standard Questions Appendix"; (2) information concerning a 2013 revision to the EBCP that, according to Commerce, eliminated a requirement that participation in the program requires that the contract amount be more than two million U.S. dollars; and (3) a list of third-party banks involved in the disbursement/settlement of export Buyer's credits. Preliminary Decision Mem., J.App. at 57–58; Final Decision Mem., J.App. at 30.

Commerce stated, further, that "we requested the information a second time in a supplemental questionnaire, to which the GOC in many instances chose not to provide specific information requested about this program." Final Decision Mem., J.App. at 30. Commerce added that "we continue to find that the GOC withheld necessary

information that was requested of it, and thus, Commerce must continue to rely on facts otherwise available in these final results, pursuant to section 776(a)(2)(A) and 2(C) of the Act." *Id.* Section 776(a)(2)(A), 19 U.S.C. § 1677e(a)(2)(A), which directs the use of "facts otherwise available," applies if "an interested party or any other person withholds information that has been requested" by Commerce "under this subtitle." Section 776(a)(2)(C), 19 U.S.C. § 1677e(a)(2)(C), applies "if an interested party or any other person ... significantly impedes a proceeding under this subtitle."[5] Thus, Commerce found that the Chinese government withheld information Commerce requested and significantly impeded the review. Commerce found, further, that China failed to act to the best of its ability in responding to the Department's requests for information and on that basis invoked its "adverse inference" authority under 19 U.S.C. § 1677e(b). Under that provision, if Commerce "finds that an interested party has failed to cooperate," Commerce, "in reaching the applicable determination under this subtitle . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

Commerce acknowledged in its decision that it had found the Chinese government, rather than Yama, to be the party it considered to have failed to cooperate in responding to requests for information. Commerce reasoned that "the foreign government is in the best position to provide information regarding financial contribution and benefit." Final Decision Mem., J.App. at 32. Commerce added that "[o]bviously, this has an effect on the respondent company [i.e., Yama], but this does not mean that Commerce's application of AFA was unlawful." *Id.* Notably, Commerce added that "*[t]he respondent company has the opportunity to demonstrate that it did not use, or benefit from, the program at issue.*" *Id.* (emphasis added).

E. Commerce Failed to Provide Yama a Meaningful Opportunity to Demonstrate That It Did Not Benefit from the EBCP and Wrongly Concluded It Lacked the Information to Make the "Benefit" Determination

Yama's primary claim in this litigation is that Commerce acted unlawfully in including the EBCP program rate in the overall subsidy

[5] The Tariff Act provides generally that Commerce is to use "facts otherwise available" if "necessary information is not available on the record," 19 U.S.C. § 1677e(a)(1), or if "an interested party or any other person-(A) withholds information that has been requested by the administering authority [i.e., Commerce] or the Commission under this subtitle, (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . (C) significantly impedes a proceeding under this subtitle, or (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title [concerning the verification process]." 19 U.S.C. § 1677e(a)(2).

rate it determined for Yama, based on facts otherwise available and an adverse inference stemming from the Department's finding that the government of China was a noncooperating party. As the court explains in this Opinion and Order, the Department's action was not lawful.[6]

Commerce must tread carefully when its use of an adverse inference would injure a party such as Yama, which Commerce did not find to have failed to cooperate in responding to the Department's requests for information. *See Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1325 (2018) ("*Changzhou II*") ("Commerce may apply AFA even if the collateral effect is to 'adversely impact a cooperating party.' . . . Commerce, however, should 'seek to avoid such impact if relevant information exists elsewhere on the record.'" (quoting *Archer Daniels Midland Co. v. United States*, 37 CIT __, __, 917 F. Supp. 2d 1331, 1342 (2013))). Commerce did not seek to avoid the adverse impact despite the existence elsewhere on the record of information relevant to, and indeed highly probative on, the question of whether Yama benefitted from the EBCP.

As explained below, Commerce asserted that it offered Yama an opportunity to demonstrate that it did not use or benefit from the EBCP, but Commerce deprived Yama of any real opportunity to do so. While purporting to offer Yama that opportunity, Commerce resorted to fact otherwise available, and applied an adverse inference, based on findings of fact that lacked substantial evidence on the record of the review.

Had Commerce actually provided Yama the opportunity to demonstrate the lack of a benefit, it necessarily would have considered the evidence of record that Yama *did not* use or benefit from the EBCP in light of any evidence that Yama *did* use or benefit from it. While the record contained evidence of the former, there was no evidence of the latter. Instead of addressing the record evidence specifically, Commerce disregarded it upon a vague claim that, due to the Chinese government's failure to submit the three identified categories of requested information on the EBCP, it lacked "a complete and reliable understanding" of the program. Final Decision Mem., J.App. at 31. In this way, Commerce relied on a finding that its lack of understanding of the EBCP resulting from the Chinese government's alleged failure to provide the three identified categories of information prevented it

[6] Because the court concludes, on Yama's primary claim, that the Department's use of its "AFA" authority was unlawful in this case, it does not reach Yama's claim in the alternative that it was unreasonable and punitive that the Department assigned, as an adverse inference, a program rate of 10.54% for the EBCP in determining Yama's overall subsidy rate.

from making the determination of whether Yama benefitted from the program. That finding is not supported by the record evidence.

While stating that it considered the record information relevant to the question of whether Yama benefitted from the EBCP, Commerce stated at the same time that it could not rely on any of it, brushing that evidence aside with the following statement:

> Commerce has considered all information on the record of this proceeding, including the statements of non-use provided by Yama; however, as explained above and in the *Preliminary Results*, we are unable to rely on information provided by Yama due to Commerce's lack of sufficient information to provide a complete and reliable understanding of the program.

Final Decision Mem., J.App. at 31. This conclusory statement misconstrues the determination the statute required the Department to make. Commerce was empowered to impose a countervailing duty to redress the EBCP only if it found that a financial contribution was provided "to a person," (i.e., Yama) "and a benefit [was] thereby conferred." 19 U.S.C. § 1677(5)(B). Instead of doing that, Commerce placed Yama in the position of proving a negative: "we continue to find that the information on the record does *not* support Commerce finding that Yama did *not* use the export Buyer's credit program during the POR," Final Decision Mem., J.App. at 29 (emphasis added), and declined to consider the record evidence Yama produced in its endeavor to prove its non-use of the EBCP. Commerce appears to have lost sight of the issue, which was not whether Commerce had a "complete and reliable understanding of the program," *id.* at 31, but whether Yama did, or did not, use or benefit from that program.

The three categories of information Commerce identified as missing do not justify the Department's failure to make the "benefit" determination the statute required. In summary, the information requested in the Standard Questions Appendix that pertained to the question of whether Yama benefitted from the program was present on the record. As to the 2013 program revision, the record contained conflicting information on the question of whether the $2 million threshold was in effect. *Compare* Dep't Commerce Mem., "Administrative Review of Countervailing Duty Order on Citric and Certain Citrate Salts; Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China" (Int'l Trade Admin. Oct. 7, 2014) (P.R. Doc. 74, J.App. at 511) ("Salts Verification Mem.") *with* Gov't of China Supplemental New Subsidy Allegations Questionnaire Response (May 12, 2017) (P.R. Docs. 41–48, J.App. at 270) ("China Supplemental NSA Response"). But neither the record nor the Department's explanations in its decision memoranda estab-

lish any specific relevance of that question to the issue before Commerce, which was whether Yama benefitted from the EBCP. The third category of information Commerce identified as missing, about "the use of third-party banks to disburse/settle export Buyer's credits," Final Decision Mem., J.App. at 30, also fails as a basis for the Department's determination. Through the Chinese government's response, the Department was informed that only the EX-IM Bank was involved in "disbursement" of EBCP credits, and Commerce did not find that the record contained information contradicting this statement. In its NSA questionnaires, Commerce did not ask the government of China for a list of banks involved in the "*settlement*" (as opposed to the disbursement) of EBCP credits, although in the Final Decision Memorandum Commerce presumed that it had. *See* Supplemental New Subsidy Allegations Questionnaire to the Government of China (Apr. 28, 2017) (P.R. Doc. 39, J.App. at 246) ("Supplemental NSA Questionnaire to China") ("Provide a list of all partner/correspondent banks involved in *disbursement* of funds under the Export Buyer's Credit Program" (emphasis added)).

1. The Record Contained Considerable Evidence that Yama Did Not Use or Benefit from the EBCP but Contained No Evidence to the Contrary

Included in Yama's record are the responses to the Department's request that Yama provide (1) a list of customers to which Yama exported subject merchandise during the POR; (2) an explanation of the role Yama played in assisting its customers to obtain export buyer credits; and (3) if Yama claimed that none of its customers used buyer credits during the POR, a detailed explanation of the steps Yama took to make this determination. Dep't Commerce Letter to Yama re: New Subsidy Allegations (Mar. 3, 2017) (P.R. Doc. 34, J.App. at 209) ("NSA Questionnaire to Yama").

Yama provided a list of its export customers during the POR. Yama New Subsidy Allegations Questionnaire Response (Mar. 17, 2017) (P.R. Doc. 37, J.App. at 233–34, 242) ("Yama NSA Response") (referring to an "Exhibit NSA-1" submitted to Commerce with its response (but absent from the public joint appendix submitted to the court) containing a list of Yama's export customers, 83 in number, during the POR).

Yama responded as follows to the inquiry about the role Yama played in assisting its customers to obtain buyer credits: "Not applicable. Yama did not provide any assistance to its customers in obtaining buyer credits. Further, none of Yama's export customers had obtained or had tried to obtain buyer credits from EXIM Bank of the

PRC during POR." *Id.* at 233–34. As to the steps Yama took to make the determination of non-use, Yama's response stated that "Yama contacted all its export customers, as listed in Exhibit NSA-1, and confirmed no customers had obtained buyers' credit from China Ex-Im Bank in the POR." *Id.* at 234.

Also included in the record is the statement by the government of China that "[a]fter consultation with EX-IM Bank and Yama, the GOC confirms that none of the U.S. customers of Yama used the Export Buyer's Credits from EX-IM Bank during the POR." China Supplemental NSA Response, J.App. at 270. Responding to the Department's question of the steps taken to determine whether there was use of the program, the GOC stated the following:

> The GOC had obtained list of Yama'[*sic*] US export customers., [*sic*] which then was provide [*sic*] to EX-IM Bank. EX-IM Bank then searched in its own systems each of customers identified on the list. The search results indicate that none of the customers had balances for export buyer's credits during the POR. Thus GOC confirms this program was not used by these customers during the POR.

Id. at 272. On this record, Commerce was not free to ignore record evidence that Yama did not benefit from the EBCP.[7]

2. Commerce Impermissibly Inferred Yama's Participation in the EBCP from the Manner in which the Government of China Responded to Questionnaires

Commerce sent the Chinese government the "Initial Questionnaire" for the administrative review on December 5, 2016. Dep't Commerce Initial Questionnaire (Dec. 5, 2016) (P.R. Doc. 7, J.App. at 81–137) ("Initial Questionnaire"). This questionnaire did not specifically mention the EBCP. Rather, it contained a section titled "programs not used or provided [*sic*] no measurable benefits," which set out seventeen different programs and instructed the GOC to "please answer all questions in the ***Standard Questions Appendix and any other applicable appendices*** of this section" for each program

[7] In recent decisions, this Court has rejected, or otherwise declined to sustain, the Department's application of a methodology similar to that used here. *Guizhou Tyre Co. v. United States*, 42 CIT __, 348 F. Supp. 3d 1261 (2018) ("*Guizhou I*"); *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, 352 F. Supp. 3d 1316 (2018) ("*Changzhou II*"); *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, 352 F. Supp. 3d 1316 (Nov. 30, 2018) ("*Changzhou III*"); *Guizhou Tyre Co. v. United States*, 43 CIT __, 389 F. Supp. 3d 1315 (May 15, 2019) ("*Guizhou II*"); *Guizhou Tyre Co. v. United States*, 43 CIT __, 399 F. Supp. 3d 1346 (Aug. 21, 2019) ("*Guizhou III*"); *Changzhou Trina Solar Energy Co. v. United States*, 43 CIT __, 2019 WL 5856438 (Nov. 8, 2019) ("*Changzhou IV*"); *Changzhou Trina Solar Energy Co. v. United States*, 43 CIT __, 2019 WL 6124908 (Nov. 18, 2019) ("*Changzhou V*"); *Guizhou Tyre Co. v. United States,* 43 CIT __, 2019 WL 6718926 (Dec. 10, 2019) ("*Guizhou IV*").

used by any company during the POR. *Id.* at 104–05 (emphasis in original). The questionnaire instructed, further, that "[i]f no respondent company used a program during the stated time period, please so state; you need not provide a response to the appendices for the program." *Id.* at 105. In accordance with the instructions contained in the questionnaire, *id.* at 87–88, the government of China forwarded Section III of the questionnaire to Yama, which submitted a response and supporting exhibits. Yama Affiliated Company Questionnaire Response (Dec. 20, 2016) (P.R. Doc. 12, J.App. at 139); Yama Section III Questionnaire Response (Jan. 19, 2017) (P.R. Docs. 16–19, J.App. at 151) (containing exhibits). Yama's response did not mention the EBCP. *Id.*

The government of China failed to submit a questionnaire response by the due date of January 11, 2017 and on January 25, 2017 requested an extension until February 20, 2017, which Commerce denied on February 7, 2017. Dep't Commerce Mem. re: Initial Questionnaire (Feb. 7, 2017) (P.R. Doc. 28, J.App. at 170, 172). But as discussed below, the failure of the government of China to submit a timely response did not justify the Department's inferring a benefit to Yama from the EBCP as facts otherwise available with an adverse inference.

On February 7, 2017, defendant-intervenor Berwick Offray submitted a "new subsidy allegation" identifying several subsidy programs from which, it argued, Yama benefitted during the POR, among them the EBCP. Berwick New Subsidy Allegation (Feb. 7, 2017) (P.R. Docs. 20–27, J.App. at 154); *see also id.* at 160 ("[T]he Department has initiated an investigation into this program [i.e., the EBCP] and has found it countervailable in many cases" and "should do so here."). According to this submission, the Export Import Bank of China provided "export-contingent loans at preferential rates" during the POR for certain products, including textiles. *Id.* at 158.

Commerce proceeded to investigate the new subsidy allegation, including Yama's alleged use of the EBCP. Dep't Commerce Mem. re: New Subsidy Allegations (Mar. 2, 2017) (P.R. Doc. 30, J.App. at 175). Commerce sent the Chinese government and Yama additional questionnaires ("new subsidy allegations" ("NSA") questionnaires).

In the Final Decision Memorandum, Commerce found that the Chinese government did not provide certain information Commerce requested in the Standard Questions Appendix and that this information was necessary to evaluating "the GOC's and Yama's claims of non-use of this program." Final Decision Mem., J.App. at 30. This finding was not supported by substantial evidence on the record.

The first NSA questionnaire issued to the Chinese government, dated March 3, 2017, instructed it to "[a]nswer all questions in the

following appendices for this program: *Standard Questions Appendix."* Dep't Commerce Letter to Gov't of China re: New Subsidy Allegations (Mar. 3, 2017) (P.R. Doc. 33, J.App. at 186) ("First NSA Questionnaire"). The Standard Questions Appendix is not specific to the EBCP or any other program. It contains letter-designated questions "A" through "M," many of which contained sub-parts with additional questions. *See id.* at 194–198 (Standard Questions Appendix). Question A sought "a description of the program including the purpose of the program and the date it was established." *Id.* at 194. Question B asked for the names and addresses of the government agencies or authorities responsible for administering the program. *Id.* Information responsive to both questions is on the record of the review, provided in the government of China's response to the second NSA questionnaire, as discussed below. Because there is no evidence on the record that Yama benefitted from the EBCP (and there is evidence that it did not), the record evidence does not establish any relevance of questions C through M of the Standard Questions Appendix.[8]

In its response to the first NSA questionnaire, the government of China stated that the Department's questions regarding the EBCP were "[n]ot applicable," as "Yama confirms none of its customers have used this program. Please refer to Yama's response." Gov't of China New Subsidy Allegations Response (Mar. 17, 2017) (P.R. Docs. 35–36, J.App. at 219) ("China NSA Response"). This questionnaire, after directing the Chinese government to answer the questions in the Standard Questions Appendix, listed seven specific requests for information, qualified by introductory instructions limiting the requests to information "regarding Export Buyer's Credits provided to ***all* U.S. customers** of the respondent (including all responding cross-owned affiliated companies) during the POR." First NSA Questionnaire, J.App. at 186 (emphasis in original). The instructions repeated this limitation, requesting the information "regarding *all buyer credits provided to the respon[d]ent's customers*." *Id.* (emphasis in original). Therefore, the response from the government of China to the first NSA questionnaire was not a failure to cooperate unless, contrary to the Chinese government's response, Commerce permissi-

[8] The instructions for Question C of the Appendix provided as follows:

> If none of these companies [i.e., the companies under review] applied for, received, claimed, accrued or used assistance under this program during the period designated [i.e., the period of review], *you need not reply to all of the remaining questions in this Appendix*.

Dep't Commerce Letter to Gov't of China re: New Subsidy Allegations (Mar. 3, 2017) (P.R. Doc. 33, J.App. at 194) (emphasis added). While the Department's NSA Questionnaire to China contained a general directive to "answer all questions" in the Standard Questions Appendix, the specific exception to this general directive, which appeared in Question C, can be read to apply in this instance.

bly could find that any EBCP credits to Yama's customers actually were provided during the POR. This, however, is not the case, for the record contains no evidence that there were any such credits and considerable evidence that there were not. Nevertheless, in a supplemental NSA questionnaire, dated April 28, 2017, that Commerce sent to the Chinese government, Commerce told the government of China that in the government's March 17, 2017 response to the first NSA questionnaire it found "*deficiencies, omissions*, and areas where further clarification is needed." Supplemental NSA Questionnaire to China, J.App. at 244 (emphasis added). As to "deficiencies and omissions," and any alleged failure of the Chinese government to cooperate stemming from the first NSA questionnaire, the Department's findings were unsupported by the record. The record suggests that Commerce misinterpreted its own questionnaire instructions, overlooking the qualifying introductory words quoted above.

The Chinese government's response to the April 28, 2017 supplemental NSA questionnaire, dated May 12, 2017, provided a detailed discussion of the operation of the EBCP as administered by the EX-IM Bank. China Supplemental NSA Response, J.App. at 270–272. Because of this record evidence, and the aforementioned misinterpretation by Commerce of its own questionnaire, the court cannot sustain the Department's finding that a failure by the government of China to respond to questions in the Standard Questions Appendix (or subsequent questions related to it) prevented Commerce from determining whether Yama or its customers benefitted from the Export Buyer's Credit Program during the POR.

3. The Record Does Not Demonstrate the Specific Relevance of the $2 Million Contract Threshold to the Question of Whether Yama Benefitted from the EBCP

The court also is unable to sustain the Department's finding that information Commerce said to be missing from the record concerning a 2013 revision to the EBCP, which it alleges the government of China failed to provide, prevented it from determining whether Yama used or benefitted from the program. As to the relevance of the 2013 revision, Commerce maintained that this revision eliminated an EBCP requirement that participation in the program requires that the contract amount on which a loan is sought be more than $2 million in U.S. dollars. *See* Preliminary Decision Mem., J.App. at 57. Commerce stated that it had placed on the record "[i]nformation obtained in a prior CVD proceeding" indicating the elimination of the requirement. *Id.*

In its May 12, 2017 response to the Department's supplemental NSA questionnaire, the Chinese government stated that the contract amount must be more than 2 million U.S. dollars, that this require-

ment could not be satisfied by combining invoices of lesser amounts, that the EX-IM Bank had confirmed this requirement, and that it had attached to its response "Article 5 of the Administrative Measures of Export Buyer's Credit of EIBC ('Administrative Measures')," in which the requirement is set forth. China Supplemental NSA Response, J.App. at 270.

Commerce added to the record two submissions from prior proceedings. The first was a Commerce verification report, dated October 7, 2014, of a questionnaire response of the Chinese government in an administrative review of a countervailing duty order on citric acids and citrate salts from China. Salts Verification Mem., J.App. at 511–17. The report describes a meeting between Department officials with EX-IM Bank officials and states as follows: "One of the conditions [of the EBCP] prior to and during the POR was that sales contracts have to be a minimum of US$ 2 million. EXIM officials indicated the *Administrative Measures* was revised in 2013 and eliminated the contract minimum." *Id.* at 512.

The second submission added to the record is the "Government of China 7th Supplemental Response" in an administrative review of a countervailing duty order on certain amorphous silica fabric from China, dated September 6, 2016. Letter from Perkins Coie, "Government of China 7th Supplemental Response" (Sept. 6, 2016) (P.R. Doc. 74, J.App. at 519–29) ("China Silica Fabric Response"). The only reference in this document suggesting that the $2 million contract threshold was eliminated in 2013 is in the Department's first question. That question refers to an earlier questionnaire response in that proceeding, in which the Chinese government mentioned that the $2 million requirement was in effect. Commerce asked for a clarification of the "discrepancy" with other information in the Department's possession, which possibly is a reference to the verification report discussed above. The government of China's response refers Commerce to the "*2000 Rules Governing Export Buyers' Credit* (also referred to as '*Administrative Measures*'), in which the US$2 million threshold requirement appeared for the first time." *Id.* at 525–26. The response also states that *Administrative Measures* "remain in effect" and "were not repealed or replaced in 2013" by guidelines issued in 2013, which the Chinese government described as "internal to the bank, nonpublic, and not available for release." *Id.* at 526.

The only record evidence that the $2 million threshold was discontinued in 2013 is the Department's statement in its verification report on the review on citric acid and citric salts and the apparently related reference to it in the questionnaire mentioned above. All other record evidence, including both of the Chinese government's responses in

the amorphous silica fabric review and in this review, indicates that the requirement remained in effect. But even if it is presumed that the elimination of the requirement actually occurred in 2013 (for which there is less than substantial evidence on this record), such a presumption would not establish that Yama benefitted from the EBCP.

It might be inferred generally that the $2 million loan threshold, if applied to U.S. customers, would make participation of any customer less likely. But in this case, the record evidence does not establish any specific relevance of the $2 million loan threshold, or the possible discontinuance thereof in 2013, to the question of whether Yama or its customers used the EBCP. Commerce failed to demonstrate the significance of that question to its inquiry on the record before it, which contained evidence that Yama did not benefit from the EBCP and lacked evidence to the contrary. Commerce, therefore, erred in treating the issue of whether that threshold was in effect during the POR as a justification for its attributing a benefit from the EBCP to Yama as an adverse inference.[9]

4. Commerce Never Requested Information on Third-Party Banks Involved in the "Settlement" of Export Buyer's Credits, and the Finding of Noncooperation as to this Request is Unsupported

The third category of information Commerce claimed to need, and claimed the Chinese government failed to provide, was information on "the use of third-party banks to disperse/settle export Buyer's credits." Final Decision Mem., J.App. at 30. The record does not support a finding that the Chinese government failed to answer the inquiry regarding disbursement of credits. The government of China clarified that no bank other than the EX-IM Bank disbursed credits under the EBCP and provided a detailed discussion of the process. The record also reveals that Commerce, contrary to its finding of noncooperation, never requested from the government of China information on the settlement of EBCP credits.

[9] Defendant-intervenor unpersuasively argues that "[t]his same AFA determination following the 2013 changes to the EBC Program was upheld by the Court in *RZBC Grp. Shareholding Co. v. United States*, 222 F. Supp. 3d 1196, 1200–03 (Ct. Int'l Trade 2017)." Def.-Int. Berwick Offray's Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R. (Nov. 9, 2018), ECF No. 28, 10. The court disagrees that it is "the same AFA determination." *RBZC Grp.* involved facts not present on this record here, including rejection of a proffered translation of *Administrative Measures* as untimely new information. In support of the same argument, defendant-intervenor relies upon *Changzhou Trina Solar Energy Co. v. United States*, 40 CIT __, __, 195 F. Supp. 3d 1334, 1354–55 (2016) ("*Changzhou I*"). This decision also is inapposite, as it involved a refusal by the government of China to allow access to records during the verification procedure that related to the question of a customer's possible use of the EBCP.

In its first NSA questionnaire, Commerce asked the government of China to "[p]rovide a list of all partner/correspondent banks involved in disbursement of funds under the Export Buyer's Credit Program." First NSA Questionnaire, J.App. at 187. However, as the court discussed above, this request for information was limited by the instructions on the previous page of that questionnaire, which specified that the government must answer this (and six other) questions "regarding Export Buyer's Credits provided to ***all* U.S. customers** of the respondent (including all responding cross-owned affiliated companies) during the POR." *Id.* at 186 (emphasis in original). The instructions repeated this limitation, requesting the information "regarding all buyer credits provided to the respon[d]ent's customers." *Id.* (emphasis in original). The Chinese government responded, "Not applicable. Yama confirms none of its customers have used this program. Please refer to Yama's response." China NSA Response, J.App. at 219. Because the record as a whole does not support a finding that Yama's customers used the program, the response of the Chinese government cannot be shown to be incorrect, and the Department's finding of noncooperation by the Chinese government is also unsupported as to the request for information on third-party banks as presented in the first NSA questionnaire.

In its supplemental NSA questionnaire, Commerce again requested that the Chinese government "[p]rovide a list of all partner/correspondent banks involved in disbursement of funds under the Export Buyer's Credit Program." Supplemental NSA Questionnaire to China, J.App. at 246. The Chinese government's response was that "Export-Import (EXIM) Bank of the PRC is the only bank which is involved in the Export Buyer's Credits Program." China Supplemental NSA Response, J.App. at 272. This response reasonably can be read as responding specifically to the question that Commerce asked, i.e., what banks were involved in disbursement of EBCP funds, and referring to the government entity that administers the program. It was impermissible on this record for Commerce to state a finding that the government of China had failed to provide requested information regarding "the use of third-party banks to . . . *settle* export Buyer's credits." Final Decision Mem., J.App. at 30 (emphasis added). Commerce never asked the government of China for information on the participation of third-party banks in the "settlement" of EBCP credits. Having chosen not to make this inquiry, Commerce could not permissibly base any findings in the Final Results on the false premise that it had.

What is more, the record contained information on the procedures followed by the EX-IM Bank. The response of the Chinese government to the supplemental NSA questionnaire provided such information, and additional information on the process is contained in the

questionnaire response of the government of China in the proceeding on certain amorphous silica fabric, which Commerce itself placed on the record. *See* China Supplemental NSA Response, J.App. at 270–72; China Silica Fabric Response, J.App. at 524–29. The latter discusses the possible role of banks other than the EX-IM Bank in the overall process of settlement of funds, but it is consistent with the response that the EX-IM Bank is the only entity that performs the disbursement.

On the record considered on the whole, Commerce was not free to ignore the evidence the government of China, after obtaining from the EX-IM Bank the search results on Yama's customers, provided. This evidence consisted of the government's statements that at the EX-IM Bank "none of the customers had balances for export Buyer's credits during the POR" and that, therefore, "GOC confirms this program was not used by these customers during the POR." China Supplemental NSA Response, J.App. at 272. Nor was Commerce free to ignore the evidence consisting of Yama's statements that it contacted all its export customers, which it identified in its questionnaire response, "and confirmed no customers had obtained buyers' credit from China Ex-Im Bank in the POR." Yama NSA Response, J.App. at 234. Defendant-intervenor argues that Yama should have obtained certifications of non-use from each of its customers, Def.-Int.'s Br. 13, but the absence of such certifications is not a justification allowing Commerce to ignore the record evidence that existed. There is no basis in the record upon which it reasonably could be presumed or speculated—as Commerce apparently did—that a Yama customer could have obtained or participated in a loan under the Export Buyer's Credit Program about which both (1) the EX-IM Bank had no record and (2) Yama and the customer itself were unaware.

5. Defendant Relies on Inapposite Judicial Decisions in Advocating that the Final Results Must Be Sustained

Defendant relies on *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010) for the proposition that "Commerce may apply an adverse inference, based upon the Chinese government's failure to provide requested information in a countervailing duty proceeding, even when the respondent cooperates." Def.'s Br. 10. This reliance is erroneous in two respects. *KYD* involved an antidumping duty, not a countervailing duty, proceeding. *See KYD*, 607 F.3d at 761–62. Countervailing duty proceedings involve different considerations because the exporting country's government is often in the best position to provide information necessary to the Department's determination.

KYD is also distinguishable in that the cooperating party was a U.S. importer and the noncooperating party was the exporter of the merchandise. As the Court of Appeals recognized, plaintiff KYD, Inc., as an importer unaffiliated with the noncooperating exporter, was not entitled by statute or regulation to its own assessment rate. *KYD*, 607 F.3d at 768. In short, *KYD* has nothing to do with this case.

Defendant also relies on *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014) ("*Fine Furniture*") for the principle that "cooperating respondents may be subject to collateral effects due to the adverse inferences applied when a government fails to respond to Commerce's questions." Def.'s Br. 10 (quoting *Fine Furniture*, 748 F.3d at 1373). *Fine Furniture* is distinguishable from this case in that in *Fine Furniture* "Commerce did not apply adverse inferences to substitute for any information that was actually submitted by the cooperating respondents." *Fine Furniture*, 748 F.3d at 1372. Substituting an adverse inference for information supporting a finding of non-use of the EBCP, as provided by Yama and the government of China, is precisely what Commerce did in the instant review.

III. CONCLUSION AND ORDER

Commerce erred in promising, and then failing, to allow Yama a meaningful opportunity to demonstrate that it did not benefit from the EBCP. It erred, specifically, when it ignored the considerable evidence Yama and the government of China provided indicating that Yama had not in fact benefitted from the program and when it overlooked that there was a complete lack of evidence that Yama had obtained a benefit. Commerce also erred in finding that, due to the failure of the Chinese government to respond to three identified categories of information requests, the record information did not allow Commerce to determine whether Yama benefitted from the program. That finding lacked the support of substantial evidence on the record of the review. Accordingly, the record did not contain evidence sufficient to support the Department's determination to impute to Yama a benefit from the EBCP using facts otherwise available or an adverse interference. On remand, Commerce now must make the "benefit" determination the statute required it to make as to the EBCP, it must do so without resort to facts otherwise available or an adverse inference, and it must redetermine Yama's overall subsidy rate in accordance with that finding.

Because there is only one correction to be made in the Final Results upon remand, the court is allowing a period of only 60 days in which the Department must submit its new determination. Due to the limited nature of the correction to be made, the court does not antici-

pate the need to grant an extension of this time period and will do so only in the most extraordinary circumstances.

For all the reasons stated above, the court remands the Final Results to Commerce for correction according to this Opinion and Order. Therefore, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Motion for Judgment on the Agency Record of Plaintiff Yama Ribbons and Bows Co. (July 30, 2018), ECF No. 23, be, and hereby is, granted; and it is further

ORDERED that Commerce shall correct its errors concerning the Export Buyer's Credit Program and submit a new determination upon remand ("Remand Redetermination") that complies fully with this Opinion and Order; it is further

ORDERED that Commerce will submit its Remand Redetermination within 60 days of the date of this Opinion and Order; it is further

ORDERED that any comments by plaintiff Yama Ribbons and Bows Co. and defendant-intervenor Berwick Offray LLC on the Remand Redetermination must be filed with the court no later than 30 days after the filing of the Remand Redetermination; and it is further

ORDERED that any response of defendant to the aforementioned comments must be filed no later than 15 days from the date on which the last comment is filed.

Dated: December 30, 2019
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, CHIEF JUDGE