U.S. Court of International Trade

Slip Op. 20–87

HABAŞ SINAI VE TIBBI GAZLAR ISTHIHSAL ENDÜSTRISI A.Ş. et al., Plaintiff and Consolidated Plaintiffs, and CHARTER STEEL AND KEYSTONE CONSOLIDATED INDUSTRIES, INC., Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and NUCOR CORPORATION et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before Claire R. Kelly, Judge
Consol. Court No. 18–00144

[Sustaining the Department of Commerce's remand redetermination in the countervailing duty investigation of carbon and alloy steel wire rod from the Republic of Turkey.]

Dated: June 25, 2020

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OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce") remand redetermination filed pursuant to the court's order in *Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. v. United States*, 43 CIT ___, ___, 413 F. Supp. 3d 1347, 1361 (2019) ("*Habaş*"). *See* Final Results of Redetermination Pursuant to Ct. Remand, Feb. 7, 2020, ECF No. 69–1 ("*Remand Results*"). In *Habaş*, the court remanded for further explanation or reconsideration Commerce's final determination in the countervailing duty ("CVD") investigation of carbon and alloy steel wire rod from the Republic of Turkey ("Turkey"). *See Habaş*, 43 CIT at ___, 413 F. Supp. 3d at 1350–51, 1561; see also Carbon and Alloy Steel Wire Rod from [Turkey], 83 Fed. Reg. 13,239 (Dep't Commerce Mar. 28, 2018) (final affirmative [CVD] determination & final affirmative critical circumstances determina-

tion in part) ("*Final Results*"), and accompanying Issues & Decision Memo. for Final Affirmative Determination, Mar. 19, 2018, ECF No. 20–4 ("Final Decision Memo"); *see also Carbon and Alloy Steel Wire Rod From* [*Turkey*], 83 Fed. Reg. 23,420 (Dep't Commerce May 21, 2018) (amended final affirmative [CVD] determination for [Turkey] and [CVD] orders for Italy and [Turkey]) ("CVD Order"). The court instructed Commerce to further explain or reconsider its selection of Eurostat data on natural gas import prices from Russia into Turkey ("Russian Eurostat data") as a tier two benchmark against which to measure the adequacy of remuneration for purchases of natural gas from the Government of Turkey ("GOT"). *See Habaş*, 43 CIT at ___, 413 F. Supp. 3d at 1356–61.

On remand, Commerce reconsiders its reliance on Russian Eurostat data as a tier two benchmark, and instead relies on data from an International Energy Administration ("IEA") report that Commerce adjusts to construct a tier three benchmark. *See Remand Results* at 6–7, 10–11. For the following reasons, the court sustains Commerce's remand redetermination.

BACKGROUND

The court presumes familiarity with the facts of this case, as set out in the previous opinion ordering remand to Commerce, and now recounts the facts relevant to the court's review of the *Remand Results*. *See Habaş*, 43 CIT at ___, 413 F. Supp. 3d at 1349–52. On March 28, 2018, Commerce published its final determination pursuant to its CVD investigation of carbon and alloy steel wire rod from Turkey. *See Final Results*, 83 Fed. Reg. at 13,240. Commerce selected Habaş Sinai ve Tibbi Gazlar Istihasal Endüstrisi A.Ş. ("Habaş") and Icdas Celik Enerji Tersane ve Ulasim, A.S. ("Icdas") as mandatory respondents for individual investigation. See Respondent Selection Memo. at 1, PD 67, bar code 3577988–01 (June 2, 2017);[1] *see also* Decision Memo. for Preliminary Determination in [CVD] Investigation of Carbon and Alloy Steel Wire Rod from [Turkey] at 4, C-489–832, Aug. 25, 2017, *available at* https://enforcement.trade.gov/frn/summary/turkey/2017–18640–1.pdf (last visited June 18, 2020) ("Preliminary Decision

[1] On August 21, 2018, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination, on the docket, at ECF No. 20–5–6. On February 21, 2020, Defendant filed indices to the public and confidential administrative records underlying Commerce's remand redetermination at ECF No. 70–2–3. All references to documents from the initial administrative record are identified by the numbers assigned by Commerce in the August 21st indices, *see* ECF No. 20, and preceded by "PD" or "CD" to denote the public or confidential documents. All references to the administrative record for the remand redetermination are identified by the numbers assigned in the February 21st indices, *see* ECF No. 70, and preceded by "PRR" or "CRR" to denote remand public or confidential documents.

Memo"). Commerce relied on facts otherwise available with an adverse inference ("adverse facts available" or "AFA")[2] to determine subsidy rates for Habaş and Icdas after discovering unreported information about respondents' use of the GOT's "Assistance to Offset Costs Related to AD/CVD Investigations" program. Final Decision Memo at 4–7. When determining whether Habaş benefited from its purchase of natural gas from the GOT for less than adequate remuneration ("LTAR"), Commerce reconsidered its preliminary reliance on IEA data as a tier two benchmark, opting instead to rely on Russian Eurostat data. *See* Final Decision Memo at 13–14. Commerce assigned subsidy rates of 3.86 percent and 3.81 percent to Habaş and Icdas, respectively. *Final Results*, 83 Fed. Reg. at 13,240.

Habaş, Icdas, and Nucor Corporation ("Nucor") commenced separate actions pursuant to Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a, and 28 U.S.C. § 1581(c) (2012),[3] which were later consolidated. *See* Summons, June 19, 2018, ECF No. 1; Compl., July 12, 2018, ECF No. 6; Order, Sept. 20, 2018, ECF No. 23 (consolidating Court No. 18–00144, Court No. 18–00146, and Court No. 18–00148 under Court No. 18–00144). Habaş and Icdas challenged Commerce's application of adverse facts available to determine their subsidy rates. *See Habaş*, 43 CIT at ___, 413 F. Supp. 3d at 1352–56. Nucor separately challenged Commerce's selection of benchmark data to calculate the benefit associated with purchases of natural gas for LTAR from the GOT. *See Habaş*, 43 CIT at ___, 413 F. Supp. 3d at 1356–61. The court sustained Commerce's application of AFA to Habaş and Icdas, but remanded Commerce's selection of the Russian Eurostat data as a tier two benchmark for further explanation or reconsideration. *See Habaş*, 43 CIT at ___, 413 F. Supp. 3d at 1352–61. Specifically, the court instructed Commerce to further explain or reconsider its decision not to use the IEA data as a tier two benchmark, as well as its decision to rely on Russian Eurostat data. *Id.*

On remand, Commerce placed new factual information ("NFI") on the record that tended to demonstrate export prices for natural gas

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[2] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. *See, e.g.*, *Final Results*, 83 Fed. Reg. at 13,240; Final Decision Memo at 4–7. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and, second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b).

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

from Russia were distorted by Russian foreign policy objectives, and invited the parties to comment and supplement the record with their own factual submissions. *See* Jan. 14th NFI Memo., PRRs 4–8, bar code 3930375–01–05 (Jan. 14, 2020). Nucor submitted NFI that tended to corroborate Commerce's NFI. *See e.g.*, Nucor's Jan. 16th NFI Memo., PRR 16, bar code 3932768–01 (Jan. 16, 2020) ("Nucor's Jan. 16th NFI Memo"). Haba1 submitted rebuttal NFI from, inter alia, the United Nations' COMTRADE database ("COMTRADE data"). *See* Habaş's Rebuttal NFI & Cmts., PRRs 10–13, bar codes 3932460–01–04, CRRs 1–5, bar codes 3932448–01, 3932452–01–04 (Jan. 16, 2020)[4] ("Habaş's Rebuttal NFI & Cmts.").

Commerce reconsidered its reliance on Russian Eurostat data as a tier two benchmark. *See Remand Results* at 5–11. In so doing, Commerce determined that prices for sales of natural gas from Russia into the European Union ("EU") were inappropriately based on Russian foreign policy objectives instead of commercial considerations. *Id.* Further, Commerce determined that both the COMTRADE data placed on the record by Habaş, and the Russian Eurostat data, likely contain pricing information for compressed natural gas ("CNG").[5] *Id.* Thus, Commerce rejected both sources for use as a tier two or tier three benchmark. *Id.* Since some of the countries used to source the IEA report are not connected to Turkey by pipeline, Commerce inferred that the data does not reflect prices available to Turkish purchasers, and declined to use the IEA data as a tier two benchmark. *Id.* Commerce instead relied on the IEA data as a tier three benchmark, and adjusted the IEA reported average unit value ("AUV") for natural gas to account for the distortive effect of Russian export prices on the AUV for natural gas. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) (2012), which grant the Court authority to review final determinations in a CVD investigation. "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)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for

[4] Cites to page numbers in Exhibit 1 of Habaş's Rebuttal NFI & Cmts are external, i.e., they do not correspond to the pagination printed on the documents contained in the exhibit, as these documents do not appear to be consistently paginated.

[5] Commerce investigated respondents' purchases of natural gas for power generation—i.e., natural gas in its gaseous form exclusive of CNG and liquified natural gas—from the GOT. *See* Preliminary Decision Memo at 15–16; Final Decision Memo at 13–14.

compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

I. Reliance on IEA Data

Habaş challenges Commerce's reliance on the IEA data as a tier three benchmark against which to measure the adequacy of remuneration for purchases of natural gas from the GOT. *See* [Pl. Habaş's Cmts.] Opp'n [*Remand Results*] at 3–32, Mar. 9, 2020, ECF No. 71 ("Habaş's Br."). Habaş submits that Commerce "erred in rejecting the reliability of" the Russian Eurostat and COMTRADE data and "failed to adequately consider evidence" weighing against use of the IEA data. *See* Habaş's Br. at 17–32. Defendant and Nucor counter that Commerce's determinations are reasonable and accord with agency practice. *See* Def.'s Resp. Cmts. [*Remand Results*] at 11–25, Apr. 7, 2020, ECF No. 76 ("Def.'s Br."); [Nucor's] Opp'n to Pl. Habaş's Cmts. on [*Remand Results*] at 5–20, Apr. 7, 2020, ECF No. 77 ("Nucor's Br."). For the following reasons, Commerce's decision to rely on the IEA data is supported by substantial evidence.

Commerce imposes a CVD when it determines that a foreign government provided a financial contribution resulting in a benefit to the recipient, and the government's provision of goods is for LTAR. *See* 19 U.S.C. § 1677(5)(E). Commerce measures the adequacy of remuneration "in relation to prevailing market conditions for the good . . . being provided" in the country subject to review. 19 U.S.C. § 1677(5)(E)(iv). Its regulations set out a hierarchy of methodologies to identify the appropriate benchmark. 19 C.F.R. § 351.511(a)(2). Under the "tier one" benchmark, Commerce compares the "government price to a market-determined price for the good or service resulting from actual transactions in the country in question." *Id.* at § 351.511(a)(2)(i). If in-country market prices are not available, then under the tier two benchmark, Commerce "compar[es] the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." *Id.* at § 351.511(a)(2)(ii). Should that benchmark also be unavailable, Commerce will measure remuneration with the tier three benchmark, which "assess[es] whether the government price is consistent with market principles." *Id.* at § 351.511(a)(2)(iii).

On remand, Commerce now reconsiders its reliance on Russian Eurostat data as a tier two benchmark, and considers for the first

time the COMTRADE data placed on the record by Habaş. *See generally* Habaş's Rebuttal NFI & Cmts. Commerce finds both the Russian Eurostat and COMTRADE data unreliable for use as a tier two benchmark due to distortions in the export prices of natural gas from Russia into the EU, and also finds both sources unreliable for use as a tier three benchmark due to the likelihood that the pricing data contains information on CNG.[6] *See Remand Results* at 6–7, 26.

Commerce initially predicated its determination that Russian Eurostat data constitutes a reliable tier two benchmark on two findings. First, Commerce found that Turkish purchasers had access to natural gas from Russia through pipelines, thus satisfying the requirement under 19 C.F.R. § 351.511(a)(2)(ii) that the agency reasonably conclude that the prices used as the tier two benchmark "would be available to purchasers in the country in question." *See* Final Decision Memo at 13; *see also* 19 C.F.R. § 351.511(a)(2)(ii). Second, Commerce found that there was no record evidence to demonstrate that Russian governmental influence over domestic prices for natural gas—as exerted via monopoly control of the market through Gazprom, a Russian state-owned entity—extended to Russian export prices for natural gas. *See Remand Results* at 6 (citing Preliminary Decision Memo at 13).

Commerce reconsiders the latter finding, and now determines, based on additional analysis and information placed on the record, that Russian export prices for natural gas are influenced by Russian foreign policy objectives.[7] *Id.* at 6–7. Namely, Commerce cites an EU Parliament Report provided by petitioners, which indicates that Russia "uses its energy wealth" to "protect and promote its interests in its 'near abroad' and to make its geopolitical influence felt further afield, including in Europe." *Remand Results* at 17 (quoting Nucor's Jan. 16th NFI Memo at Attachment 1) (emphasis removed). According to Commerce, the EU Parliament Report provides "multiple instances

[6] Commerce continues to find that there was no usable market-determined "tier one" benchmark because of the GOT's "overwhelming involvement" in Turkey's natural gas market, which distorts private transaction prices. *See Remand Results* at 6; *see also* Preliminary Decision Memo at 15–16; Final Decision Memo at 13.

[7] Prefacing its remand analysis, Commerce invokes recent CVD proceedings involving Turkey that likewise determine Russian export prices for natural gas to be influenced by foreign policy objectives. *See Remand Results* at 6 (citing *Steel Concrete Reinforcing Bar from [Turkey]*, 84 Fed. Reg. 36,051 (Dep't Commerce July 26, 2019) (final results and partial rescission of [CVD] admin. review; 2016) ("*Turkey Rebar II*") and accompanying Issues and Decisions Memo. for [*Turkey Rebar II*] at 16–17, C- 489–819, (July 18, 2019) *available at* https://enforcement.trade.gov/frn/summary/turkey/2019–15824–1.pdf (last visited June 18, 2020) ("Turkey Rebar II IDM") and *Steel Concrete Reinforcing Bar From [Turkey]*, 84 Fed. Reg. 48,583 (Dep't Commerce Sept. 16, 2019) (prelim. results of [CVD] admin. review; 2017) ("*Turkey Rebar III*") and accompanying Prelim. Decision Memo. for [*Turkey Rebar III*] at 11, C-489–830, (Sept. 6, 2019) *available at* https://enforcement.trade.gov/frn/summary/turkey/2019–19921–1.pdf (last visited June 18, 2020).

in which Russia likely used its energy leverage for political purposes," and notes that "many of the affected countries were within the EU." *Id.* (citing Nucor's Jan. 16th NFI Memo Attachment 1 at 13, 15–16). Commerce thus determines that the Eurostat data and COMTRADE data, covering exports of natural gas from Russia into Turkey, are influenced by foreign policy objectives and thus unsuitable for use as a tier two benchmark. *See id.* at 6–7, 16 n.67.

Commerce also revisits its finding that Eurostat data on natural gas is not distorted by prices for CNG. *See Remand Results* at 4–5, 7, 26–27; *Habaş*, 413 F. Supp. 3d at 1359–60. Commerce now finds that prices for natural gas contained in the customs-sourced data—i.e., the Eurostat data and COMTRADE data—are likely distorted by pricing data for CNG. *See Remand Results* at 7, 26–27. Commerce explains that, similar to the benchmark data from the Global Trade Atlas ("GTA") that it rejected in the *Final Results*,[8] the Russian Eurostat and COMTRADE data "relate to HTS subheading 2711.21" which "cover[s] natural gas in its gaseous state." *Remand Results* at 26; *see also id.* at 4 (citing *Habaş*, 43 CIT at ___, 413 F. Supp. 3d at 1359–60).[9] Commerce infers that "at least a portion of imports under this heading are likely [CNG]," because natural gas can only be delivered by pipeline, and the HTS subheading contains "exports from the rest of the world, including countries that are not connected to the EU via pipeline[.]" *Remand Results* at 27. Although Habaş cites evidence that most of the COMTRADE data under HTS 2711.21 covers EU imports of natural gas from countries connected by pipeline, *see* Habaş's Br. at 17–22,[10] Commerce explains that it cannot identify the extent to which the heading covers values and quantities

[8] Habaş provided benchmark data from the Global Trade Atlas ("GTA"), Eurostat, and Energy Experts international. *See* Letter From Habaş re: Benchmarking Data, PD 101, bar code 3599709–01 (July 26, 2017) ("Habaş's NFI").

[9] Habaş argues that, unlike the GTA data, the COMTRADE data does not present any conversion issues. *See* Habaş Br. at 26–28; *see also Habaş*, 43 CIT at ___, 413 F. Supp. 3d at 1360. Habaş adds that, unlike the Russian Eurostat data, the COMTRADE data is not limited to EU data on imports from Russia. *See* Habaş's Br. at 27. Although Commerce mentions that the customs-sourced trade data "requires conversions of varying complexities at the time of data collection [,]" *Remand Results* at 21, Habaş's arguments are rendered inapposite by the fact Commerce predicates its determination not to rely on the COMTRADE customs-sourced data on its inference that an indeterminate portion of pricing data under the HTS 2711.21 subheading relates to CNG. *See Remand Results* at 7 & n.30; *see also id.* 26–27.

[10] Habaş alleges that Commerce ignores record evidence that demonstrates imports under the HTS 2711.21 subheading contain only a negligible amount of CNG, if any at all. Habaş's Br. at 19–20 (citing Data to Commerce Pertaining to Habaş, PRR 14, bar code 3932464–01 (Jan. 16, 2020)). Habaş explicates that 98.03 percent of natural gas imports into the EU come from pipeline suppliers, and that the remaining percentage of imports are either too small to be relevant (i.e., data from the United States and Serbia), are from suppliers that Commerce does not consider in its calculations (i.e., Turkey), or are from suppliers that the

relating to shipments of CNG.[11] *Remand Results* at 26–27. Commerce thus declines to rely on the Russian Eurostat or COMTRADE data to construct a tier two or tier three benchmark. *Id.* at 7, 26–27.

As for the IEA data, Commerce, pursuant to a tier three analysis,[12] reasonably determines that the IEA report is the only transparent and reliable source of benchmark data against which to measure the adequacy of remuneration for the provision of natural gas from the GOT to respondents. *See Remand Results* at 8–11, 26–27. Consistent with its regulatory preference,[13] Commerce initially assesses whether government prices for natural gas in Turkey are determined based on market principles, and determines that they are not for

EU pipeline runs through (i.e., Switzerland). *See id.* at 20 (citing Habaş's Rebuttal NFI & Cmts. Ex. 1 at 12). Habaş adds that because the EU pipeline runs through Switzerland, import data from Switzerland under HTS 2711.21 would relate to imports of natural gas, and submits that even if Swiss import data under the HTS 2711.21 contains data for CNG, "the quantity is negligible[,] and the unit value is in line with the AUVs of other suppliers." *Id.* However, as Nucor notes, Habaş's reasoning rests on an unsupported presumption that there is no trade in CNG between states connected by pipelines. *See* Nucor's Br. at 7. Further, Habaş's argument, even if true, fails to demonstrate that Commerce's selection of the IEA data is unreasonable. *See* Def.'s Br. at 17.

[11] Stating that "there is no evidence on the record that there is any value difference between [natural gas] and CNG" and that the two products "share[ ] the same HTS category," Habaş infers that "there is reason to believe that the differences [in unit value] between [natural gas and CNG] is insubstantial." Habaş's Br. at 21–22. Habaş cites no record evidence to support this inference, and it is reasonably discernable that Commerce infers, conversely, that the difference in unit value between CNG and natural gas is significant. *See Remand Results* at 26–27. Habaş's provision of another possible inference alone fails to demonstrate that Commerce's inference is unreasonable. *See Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers* , 6 F.3d 1511, 1520 (Fed. Cir. 1993). Habaş also submits that Commerce initially inferred that customs data for Russian export of natural gas did not include CNG, suggesting that it is arbitrary and capricious for Commerce to infer the opposite on remand without citing additional evidence. *See* Habaş Br. at 21 (citing Final Decision Memo at 13). However, the court remanded Commerce's determination on this issue for further explanation or reconsideration. *See Habaş*, 413 F. Supp. 3d at 1359–60 ("Commerce appears to have selected the Russian Eurostat data even though it, too, may contain CNG. Commerce does not address this evidence or explain why, unlike the GTA data, the Russian Eurostat data reasonably reflect natural gas, exclusive of [liquid natural gas] and CNG.").

[12] Commerce determines that the IEA data does not constitute an appropriate tier two benchmark because the data does not relate to prices for natural gas available to Turkish purchasers by countries connected to Turkey by pipeline. *See Remand Results* at 7.

[13] In relevant part, the *CVD Preamble* notes, with respect to tier three benchmark prices, that "in situations where the government is clearly the only source available to consumers in the country," Commerce "normally will assess whether the government price was established in accordance with market principles." *See Countervailing Duties*, 63 Fed. Reg. 65,348, 65,378 (Dep't Commerce Nov. 25, 1998) (final rule) ("*CVD Preamble*"). Where Commerce determines that the government price is not set in accordance with market principles, it resorts to "an appropriate proxy to determine a market-based natural gas benchmark." *Remand Results* at 9 (citing *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Russian Federation*, 81 Fed. Reg. 49,935 (Dep't Commerce July 29, 2016) (final affirmative [CVD] determination and final negative critical circumstances determination) ("*Cold-Rolled Steel from Russia*") and accompanying Issues and Decisions Memo. for [*Cold-Rolled Steel from Russia*] at cmt. 7, C-821–823, (July 20, 2016) *available at* https://enforcement.trade.gov/frn/summary/russia/2016–17937-1.pdf (last visited June 18, 2020). ("Cold Rolled Steel from Russia IDM")).

reasons undisputed by the parties.[14] *See id.* at 8–11; *see also* 19 C.F.R. § 351.5111(a)(2)(iii). Having determined that the Russian Eurostat and COMTRADE data are unusable for purposes of a tier two or tier three analysis, Commerce does not consider whether the COMTRADE and Russian Eurostat data conform with market principles. *See Remand Results* at 7–11, 26–27; *see also* 19 C.F.R. § 351.511(a)(2)(iii). Accordingly, Commerce determines that the only reliable benchmark source is the IEA data. *Id.* at 10–11.

First, unlike the COMTRADE and Russian Eurostat data, which are customs-sourced, Commerce observes that the IEA report contains prices of natural gas to end-use consumers, eliminating the possibility of capturing prices for natural gas that are subject to subsequent transactions.[15] *See Remand Results* at 20. Second, acknowledging Habaş's concern that the IEA report is sourced on a country-specific basis, and that data collection methodologies may differ between sources, Commerce notes that the IEA report also provides its methodological descriptions on a country- specific basis.[16] *Id.* Commerce further addresses Habaş's concerns regarding the distortive effect of inconsistent collection methodologies by explaining that the agency is "construct[ing] a broad benchmark covering numerous countries."[17] *Id.* It is reasonably discernible that Commerce

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[14] Commerce observes that all of the board members of Boru Hatlari ile Petrol Taşima A.Ş. ("BOTAS"), the state economic enterprise from which Habaş purchases its natural gas, are appointed by approval of the Turkish President and Turkish Prime Minister. *Remand Results* at 8 (citing Preliminary Decision Memo at 14). Further, Commerce cites record evidence indicating, inter alia, that BOTAS does not operate as a profit seeking independent venture; that Turkey's domestic gas market is distorted both by inconsistent application of BOTAS's pricing mechanism as well as BOTAS's practice of setting tariffs for eligible consumers at below the weighted-average cost of gas; and that BOTAS operates at possible losses due to its pricing policy. *See Remand Results* at 8–9 (citations omitted). These findings were not challenged below.

[15] Habaş argues that Commerce's "level-of-trade" consideration is "bogus," alleging that it has not prevented Commerce from relying on customs data in other proceedings. Habaş's Br. at 29 (citations omitted). Habaş misrepresents Commerce's position. Commerce is not claiming that it cannot rely on customs data; rather, the agency cites the fact that IEA report contains prices to end users as one reason why the data is preferable in this instance. Further, Habaş's bare characterization of Commerce's reasoning as a "post hoc rationalization" is unclear, and otherwise unavailing. *See id.*

[16] Habaş's also claims that the "opacity" of the methodological description accompanying the Polish data is "manifest." Habaş's Br. at 31. Commerce disagrees that the IEA report lacks methodological transparency and reasonably explains why the methodological descriptions are sufficient. *Remand Results* at 19–20. The court declines to reweigh the evidence.

[17] Habaş argues that Commerce cannot test whether differences between the country-specific methodologies that source the IEA report undermine the accuracy of the data. Habaş's Br. at 30. Again, Commerce observes that the IEA report provides descriptions for each source's methodology, and that such concerns are limited here, where the agency is using the data to construct "a broad benchmark covering numerous countries." *Remand Results* at 20.

views the breadth of the IEA data used to construct the benchmark as sufficient to ameliorate any distortions caused by varying collection methodologies.[18] *See Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 41 CIT ___, ___, 222 F. Supp. 3d 1255, 1266–67 (2017) (quoting *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009)); *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373, 1376–77 (Fed. Cir. 2016).

Habaş argues Commerce's determination that Russian export prices are influenced by foreign policy objectives is not supported by substantial evidence. Habaş Br. at 22–26. Habaş claims that Commerce fails to identify any evidence that specifically demonstrates prices for natural gas from Russia into the EU were distorted by foreign policy objectives during the period of investigation.[19] *See id.* However, it is reasonable here for Commerce to predicate its determination that Russian export prices are not market-driven based on a pattern of abusing its "dominant market position in support of foreign policy goals." *See Remand Results* at 16–17 & n.74 (citing Nucor's Jan. 16th NFI Memo, Attachment 1 at 13). Moreover, Habaş claims that it is "sheer speculation on Commerce's part to presume that Russian pricing to the EU is political[,]" *id.* at 23, but appears to ignore the segments of the EU parliament report that Commerce cites to demonstrate that prices for Russian exports of natural gas into the EU "are driven to a great extent by [Russian] geo-political concerns[.]" *See Remand Results* at 16–17. As Commerce explains:

> Habaş downplays the significance of this information. First, Habaş asserts that the [Government of Russia's] geo-political influence in the energy market is limited to "near abroad" countries within the Russian sphere of influence and does not extend to the EU. Record evidence indicates otherwise. For example, the European Parliament Report provided by the petitioners observed that "Russia uses its energy wealth as well to protect

[18] Commerce also argues that agency precedent supports the reliability of the IEA data as a tier three benchmark. *See Remand Results* at 9–10, 19, 22 (citing Turkey Rebar II IDM at 19; *Steel Concrete Reinforcing Bar from the [Turkey]*, 82 Fed. Reg. 23,188 (Dep't Commerce May 22, 2017) (final affirmative [CVD] determination) ("*Turkey Rebar I*") and accompanying Issues and Decisions Memo. for [*Turkey Rebar I*] at cmt. 4, C-489–830, (May 15, 2017) available at https://enforcement.trade.gov/frn/summary/turkey/2017–10505–1.pdf (last visited June 18, 2020).

[19] Habaş also appears to argue that Russia could not exert control over export prices for natural gas because Gazprom is contractually required to sell to the EU under long-term contracts with prices pegged to the world-market price of oil. *See* Habaş's Br. at 9 (citing Habaş's NFI at 4–5). However, Commerce cites evidence that these contracts can be, and are, re-negotiated on a country specific basis, and that the share of contracts with prices pegged to the price of oil is shrinking. *Remand Results* at 17 (citing Nucor's Jan. 16th NFI Memo, Attachment 1 at 13; Nucor's Jan. 17th Clarification on NFI at Attachment 1, PRRs 17–18, bar codes 3933483–01–02 (Jan. 17, 2020)).

> and promote its interests in its 'near abroad' and to make its geopolitical influence felt further afield, including in Europe. The report provides multiple instances in which Russia likely used its energy leverage for political purposes, and many of the affected countries were within the EU.

Remand Results at 17 (citing Nucor's Jan. 16th NFI Memo, Attachment 1 at 13, 15–16); *see also* Nucor's Br. at 10 (citing Nucor's Jan. 16th NFI Memo, Attachment 1 at 4–5). Regardless, Habaş urges that the "secondary information" Commerce relies on should give way to "primary information"—namely, the statistical conformity that purportedly exists between the Russian Eurostat and COMTRADE trade statistics. *See* Habaş's Br. at 24. However, as explained, Commerce finds the trade statistics unreliable as a source of benchmark data in this instance. *See Remand Results* at 18. Further, contrary to Habaş's claim that Commerce "sidesteps any analysis involving the Comtrade/Eurostat data[,]" Habaş's Br. at 17, Commerce observes that it "do[es] not view the COMTRADE data as 'cross-validated' with the Eurostat data[ ] as Habaş urges" because of "an approximately 10 percent difference [in total import value for the EU] between the two datasets" in "the total import value for the EU-28 from Russia[.]" *Remand Results* at 27 n. 97.

Habaş also challenges the reliability of the IEA data. Namely, Habaş argues that the inclusion of household prices for natural gas in the IEA's Austrian-sourced data undermines the report's reliability as a source for benchmark data because Habaş purchases natural gas for electricity generation. *See* Habaş's Br. at 30–31. Habaş also claims that the IEA data is not limited to natural gas provided by pipeline. *See* Habaş's Br. at 31–32; *but see* Nucor's Br. 9–10, 14–15.[20]

Contrary to Habaş's suggestion that all end-use prices for natural gas included in the IEA's Austrian-sourced data contain information from household users, *see* Habaş's Br. at 31, the cited section of the IEA report indicates that industrial prices and household prices are calculated by using different methodologies, which demonstrates the data for those categories of prices are given separate consideration.

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[20] Nucor submits that these arguments were not exhausted before the agency. *See* Nucor's Br. at 9–10, 14–15 (citing Habaş's Br at 31–32; Habaş's Rebuttal NFI & Cmts. at 11–13; Habaş's Draft Comments at 10–12, PRR 25, bar code 3935224–01 (Jan. 23, 2020) ("Habaş's Draft Cmts.")). Absent a strong contrary reason, parties are generally required to present all issues and arguments to Commerce at the time that the agency is addressing the issue. *See Boomerang Tube LLC v. United States*, 856 F.3d 908, 912–913 (Fed. Cir. 2017); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010). Nonetheless, Habaş challenged the reliability of the IEA data before the agency, *see* Habaş's Draft Cmts. at 10–12; and, from Commerce's response to Habaş's comments regarding the IEA report, it is reasonably discernible that Commerce found the IEA data reliable after scrutinizing the entire report, notwithstanding the particular issues Habaş raises here. *See Remand Results* at 19–22.

See Jan. 14th NFI Memo. Ex. 10, Attachment 3 at 57, PRR 8, bar code 3930375–05 (Jan. 14, 2020) ("IEA Report") (describing distinct methodologies for calculating or deriving industrial prices and household prices). Further, the preceding tables containing the data produced by those methodologies distinguish between industry prices and household prices. *See id.* at 53–57. From Commerce's commendations of the IEA report's "substantial methodological information," it is reasonably discernible that Commerce viewed the tables and the accompanying methodological descriptions and determines that the industry prices do not contain household prices. *See Remand Results* at 19–20.

Habaş also cites to various occurrences of data in the IEA report relating to liquid natural gas ("LNG") and CNG to support its position that the IEA report is not restricted to natural gas delivered by pipelines. *See* Habaş's Br. at 32 (citing IEA Report at 119, 137, 143, 161, 191, 220, 285). Habaş misses the point. Commerce's issue with the customs-sourced data on the record is that an indeterminate portion of the pricing data under the HTS subheading 2711.11, covering natural gas in its gaseous state, likely pertains to CNG. *See Remand Results* at 27. Although the IEA report contains information on LNG and CNG, none of the portions of the IEA report that Habaş cites appears to present an instance where data covering natural gas might also pertain to CNG or LNG. Indeed, as Nucor argues, the fact that the IEA report distinguishes between natural gas, LNG, and CNG, suggests the opposite. *See* Nucor's Br. at 16–19. Given Commerce's decision not to rely on customs-sourced data that might relate to CNG, *see Remand Results* at 27, it is reasonably discernible that Commerce did not rely on data for CNG or LNG when constructing the benchmark using the IEA report.

Moreover, Habaş submits that CNG and natural gas are commercially indistinguishable and that any value difference between them is insubstantial, *see* Habaş's Br. at 21, but Nucor points out that Habaş neither raised the argument before Commerce nor placed any evidence on the record demonstrating that the prices are the same. *See* Nucor's Br. at 9–10. Nonetheless, it is also reasonably discernible, from Commerce's reliance on its previous finding that CNG and natural gas are different products that are delivered in different ways, that the agency infers there is a difference in value between the two products as well. *See Remand Results* at 26–27 (citing *Reba* r, 43 CIT at ___, 389 F. Supp. 3d at 1382–84); *see also Rebar*, 43 CIT at ___, 389 F. Supp. 3d at 1382–84 (noting Commerce's finding, based on an explanation from the GOT, that CNG is a "different product that is shipped in canisters rather than through pipelines.") (citations omitted)).

Habaş does not persuade that Commerce's rejection of the Russian Eurostat and COMTRADE data or reliance on the IEA data is unreasonable. It is logical for Commerce to deduce that, because the subheading HTS 2711.11 in the customs-sourced data covers natural gas in its gaseous state, and because some of the pricing data relates to trade between states that are not connected by pipelines, the custom-sourced data includes CNG. Further, it is not unreasonable to conclude that the physical differences between the products, as well as the differences in how the products are delivered, evince commercial differences between natural gas and CNG. *See Remand Results* at 27. Regarding the IEA data, it is discernible that Commerce reasons that prices contained in a published and distributed energy report sourced by various national agencies are reliable. *See Remand Results* at 9, 19. Not only do government sources generally have a stake in producing accurate information, the process of publishing a comprehensive report normally entails an intensive review process. Finally, Commerce's decision to construct a broad benchmark would temper any distortions arising from the purported idiosyncrasies between the various source-methodologies comprising the report by capturing a larger sample of data. *See Remand Results* at 19–20. Habaş fails to point to evidence that impugns the reasonableness of Commerce's determination. In light of the deference this court affords Commerce in identifying, selecting, and applying its CVD methodologies, Commerce's determination to rely on the IEA data as a tier three benchmark is reasonable. *See Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996).

II. Adjustments to IEA Data

Habaş argues that Commerce's adjustments to Russian export prices for natural gas contained in the IEA report to address the distortive effect of Russia's foreign policy considerations are not supported by substantial evidence. *See* Habaş's Br. at 32–33. Defendant and Nucor counter that Habaş's proposed adjustments are based on the COMTRADE data, which Commerce finds unreliable. *See* Def.'s Br. at 24–25; Nucor's Br. at 19–20. Commerce's adjustments are reasonable.

Because Commerce determines that Russian export prices are distorted by Russian foreign policy objectives, Commerce also determines that "each Russian shipment to the EU leads to a corresponding distortion of the average EU price used for benchmarking purposes[.]" *Remand Results* at 10. To correct for the distortion, Commerce, relying on several pieces of record evidence, explains its methodology:

> First, natural gas imports (from all sources) amount to an estimated 67 percent of the EU market for natural gas, and 39.5 percent of those imports come from Russia. Second, we estimated the average price of Russian exports to the EU during the POI. Using this information, to account for the effect, we multiplied the Russian export AUV by Russia's share of the EU natural gas market, i.e. 26.47 percent, considering that: (1) an estimated 67 percent of the EU market for natural gas is comprised of imports; and (2) Russia supplied 39.5 percent of EU natural gas imports during the POI. We then subtracted this amount from the EU AUV and divided the difference by the share of non-Russia supplied natural gas in the EU market (i.e. 73.54 percent, based on our estimate above that 26.47 percent of the EU market is comprised of Russian imports).

Id. at 10–11 (citations omitted). Commerce notes that its adjustment is consistent with recent practice. *Id.* at 11 (citing *Steel Concrete Reinforcing Bar from [Turkey]*, 84 Fed. Reg. 36,051 (Dep't Commerce July 26, 2019) (final results and partial rescission of [CVD] admin. review; 2016) ("*Turkey Rebar II*") and accompanying Issues and Decisions Memo. for [*Turkey Rebar II*] at 20, C-489–819, (July 18, 2019) *available at* https://enforcement.trade.gov/frn/summary/turkey/2019–15824–1.pdf (last visited June 18, 2020); *Steel Concrete Reinforcing Bar From [Turkey]*, 84 Fed. Reg. 48,583 (Dep't Commerce Sept. 16, 2019) (prelim. results of [CVD] admin. review; 2017) ("*Turkey Rebar III*") and accompanying Prelim. Decision Memo. for [*Turkey Rebar III*] at 15, C-489–830, (Sept. 6, 2019) *available at* https://enforcement.trade.gov/frn/summary/turkey/2019–19921–1.pdf (last visited June 18, 2020) (final results not yet issued)).

Habaş argues that Commerce should rely on the COMTRADE data to make its adjustments to Russian export prices. *See* Habaş's at 32–33 (citing Habaş's Rebuttal NFI & Cmts.). However, Commerce explains that it declines to rely on the COMTRADE data to render the adjustment for the same reasons it declines to rely on customs-sourced data as a tier two or tier three benchmark. *See Remand Results* at 23–27. Namely, Commerce determines that the custom-sourced data on the record relate to an HTS subheading that contains pricing data for CNG. It is reasonable for Commerce not to employ COMTRADE data to render its adjustments to the IEA data because relying on data that is likely comprised of an indeterminate amount of CNG, which Commerce finds to be a different commercial product, would distort Commerce's adjustment to the benchmark for natural gas. *See id.*

CONCLUSION

For the foregoing reasons, the *Remand Results* comply with the court's order in *Habaş*, are in accordance with law and supported by substantial evidence, and are therefore sustained. Judgment will enter accordingly.

Dated: June 25, 2020
New York, New York

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

Slip Op. 20–88

CSC SUGAR LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 20–00016

[Denying Plaintiff's motion for judgment on the agency record.]

Dated: June 25, 2020

Jeffrey S. Neeley, *Nithya Nagarajan*, *Michael Klebanov*, and *Joseph S. Diedrich* Husch Blackwell, LLP, of Washington, DC for Plaintiff CSC Sugar LLC.

Douglas G. Edelschick, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs was *Paul K. Keith*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Robert C. Cassidy, Jr., *Charles S. Levy*, *James R. Cannon, Jr.*, and *Jonathan M. Zielinsky*, Cassidy Levy Kent (USA) LLP, of Washington, DC for Defendant-Intervenors the American Sugar Coalition, American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association.

Rosa S. Jeong, *Irwin P. Altschuler*, and *Sonali Dohale*, Greenberg Traurig, LLP, of Washington, DC for Defendant-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera.

OPINION

Gordon, Judge:

Before the court is the USCIT Rule 56.2 motion of Plaintiff CSC Sugar LLC ("Plaintiff" or "CSC Sugar") for judgment on the administrative record challenging the U.S. Department of Commerce's ("Commerce") final determination in *Sugar from Mexico*, 85 Fed. Reg. 3,620 (Jan. 22, 2020) (Amendment to Agreement Suspending the Antidumping Duty Investigation) ("*2020 AD Amendment*").[1] *See* Pl.'s Mot. for J. on the Agency R. under CIT Rule 56.2, ECF No. 31 ("Pl.'s Br."); *see also* Def.'s Resp. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 34 ("Def.'s Resp."); Resp. of Def.-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 35, ("Cámara Resp."); Def.-Intervenor Am. Sugar Coalition's Resp. to Pl.'s 's Mot. for J. on the Agency R., ECF No. 36 ("ASC Resp."); Reply Memorandum in Support of Pl.'s Mot. for J. on the Agency R., ECF No. 38 ("Pl.'s

[1] CSC Sugar also filed a parallel action, Court No. 20–00017, challenging Commerce's amendment to the Countervailing Duty ("CVD") Suspension Agreement ("*2020 CVD Amendment*"), which is addressed in this Court's decision, Slip Op. 20–89, also issued this date.

Reply").[2] The court has jurisdiction over this matter pursuant to Section 516A(a)(2)(B)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iv) (2012),[3] and 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, the court denies Plaintiff's motion, and sustains the *2020 AD Amendment*.

I. Background

In 2014, pursuant to a petition filed by the American Sugar Coalition, and its members (collectively, "ASC"), Commerce and the U.S. International Trade Commission conducted an investigation as to whether imports of sugar from Mexico were being sold at less than fair value, and whether such imports were injurious to the U.S. industry. After Commerce issued a preliminary determination that sugar from Mexico was being sold, or was likely to be sold, in the United States at less than fair value, Commerce, on behalf of the United States Government, and the Government of Mexico ("Mexico") negotiated and signed a suspension agreement. *See Sugar From Mexico*, 79 Fed. Reg. 78,039 (Dep't of Commerce Dec. 29, 2014) (suspension of AD investigation) ("*AD Agreement*").

In 2017, Commerce and Mexico negotiated amendments to the *AD Agreement*. *See Sugar from Mexico*, 82 Fed. Reg. 31,945 (Dep't of Commerce July 11, 2017) (amendment to AD Suspension Agreement) ("*2017 AD Amendment*"). Among other changes, this amendment altered the definition of "refined sugar." *See id.* (amending definition of "refined sugar" to consist of sugar with polarity of 99.2 degrees and above, instead of 99.5 degrees and above). In response, CSC Sugar commenced an action challenging the *2017 AD Amendment* on procedural and substantive grounds. CSC Sugar demonstrated that Commerce failed to maintain a complete record including memoranda of ex parte meetings as required pursuant to 19 U.S.C. § 1677f(a)(3). The court issued two decisions ultimately vacating the *2017 AD Amendment*. *See CSC Sugar v. United States*, 42 CIT ___, 317 F. Supp. 3d 1334 (2018); *CSC Sugar v. United States*, 43 CIT ___, 413 F. Supp. 3d 1318 (2019) ("*CSC Sugar II*"). The court assumes familiarity with these decisions.

Thereafter, Commerce commenced a proceeding to consider and adopt a new AD amendment. *See* AD Statutory Assessment Memo at

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

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

1–2, PD[4] 101 (describing negotiation, notice and comment process, and signing of *2020 AD Amendment*). CSC Sugar now challenges the *2020 AD Amendment* arguing (1) that Commerce did not comply with recordkeeping requirements during the negotiation of the *2020 AD Amendment*; (2) that the record does not support the need to both revise the polarity standards for raw and refined sugar and incorporate a bulk shipment requirement; and (3) that Commerce did not provide a complete analysis of the public interest requirement under 19 U.S.C. § 1673c(a)(2)(B). *See generally* Pl.'s Br.

II. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Fundamentally, though, "substantial evidence" is best understood as a word formula connoting a reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2020). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2020).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping duty statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of

[4] "PD ___" refers to a document contained in the public administrative record, which is found in ECF No. 29–1, unless otherwise noted. "CD ___" refers to a document contained in the confidential administrative record, which is found in ECF No. 29–2, unless otherwise noted.

unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

III. Discussion

CSC Sugar first argues that because the *2020 AD Amendment* makes substantively the same changes to the *AD Agreement* as the *2017 AD Amendment*, Commerce's recordkeeping failure for the *2017 AD Amendment* "is carried over to the 2020 record by reason of Commerce's implicit reliance on this tainted record." Pl.'s Br. at 11. To the contrary, Commerce expressly clarified that it would rely on "only" information placed on the record after October 18, 2019, the date of the court's decision vacating the *2017 AD Amendment*. *See* Period for Rebuttal Comments, PD 51 ("Commerce will only consider comments and factual information submitted to the official records of these proceedings after October 18, 2019.").

Accepting CSC Sugar's position that Commerce implicitly relied on information from the 2017 proceeding would require the court to conclude that Commerce acted in bad faith in conducting the 2020 proceeding. The law is clear that, absent "well-nigh irrefragable proof," government officials are presumed to act in good faith in discharging their duties. *McEachern v. Office of Personnel Management*, 776 F.2d 1539, 1544 (Fed. Cir. 1985). Yet CSC Sugar appears to contend that Commerce's procedural failure in the negotiations over the *2017 AD Amendment* can never be remedied, maintaining that "[e]ven if the details of those ex parte meetings were disclosed *now*, which Commerce admitted it cannot do as part of the prior litigation, that would not vindicate CSC Sugar's right to participate in the process *while the process is ongoing*." Pl.'s Br. at 13. The court does not agree and rejects CSC Sugar's argument that the procedural defects of the 2017 proceeding somehow carried over to the 2020 proceeding.

As for CSC Sugar's argument that Commerce improperly cloned the record of the 2017 proceeding for the 2020 proceeding, *see* Pl.'s Br. at 10–14, there is no dispute that the changes in the 2020 AD Amendment are substantively the same as those in the *2017 AD Amendment*. Nevertheless, Defendant argues that "CSC is incorrect that the records are substantively identical." Def.'s Resp. at 17. CSC Sugar ignores the crucial fact that it had the opportunity to develop the record of the 2020 proceeding through submission of comments, rebuttal comments, and factual information. *See* Comments on Suspension Agreement, PD 44; Rebuttal Comments, PD 58; Clarification of Rebuttal Comments, PD 65; Comments on Draft Amendments to Suspension Agreement, PD 85. This crucial fact undercuts Plaintiff's

attempt to equate the 2020 proceeding with the 2017 proceeding. *Cf. CSC Sugar II*, 43 CIT at ___, 413 F. Supp. 3d at 1325 (explaining prejudice to CSC Sugar in 2017 Amendment negotiations, noting "Commerce's complete failure to follow § 1677f effectively prevented CSC Sugar from commenting on the *ex parte* materials and discussions Commerce engaged in *during* the *AD Amendment* negotiations.").

Although certain information in the record of the 2020 proceeding was also in the record for the 2017 proceeding, this alone does not demonstrate that the procedural irregularity the court found in the 2017 proceeding carries over to the 2020 proceeding. CSC Sugar argues that information originally placed on the record of the 2017 proceeding is tainted and therefore should not be placed in the record of the 2020 proceeding. *See* Pl.'s Br. at 13. CSC Sugar's argument is predicated on the view that this Court passed on the merits of the information contained in the record of the 2017 proceeding. Plaintiff is mistaken. The reason for the court's order vacating the *2017 AD Amendment* was Commerce's failure to memorialize ex parte meetings and no more. *See CSC Sugar II*, 43 CIT at ___, 413 F. Supp. 3d at 1326. Given Commerce's express commitment to consider solely information submitted after October 2019, *see* Period for Rebuttal Comments, as well as the fact that CSC Sugar had ample opportunity to participate and comment on the new record, CSC Sugar has failed to demonstrate that "record supporting the 2020 Amendment is functionally the same as the record supporting the 2017 Amendment." *See* Pl.'s Br. at 10.

Aside from contending that the procedural defects of the 2017 proceeding should be imputed to the 2020 proceeding, Plaintiff maintains that the "2020 Amendment suffers from procedural irregularities related to timing, which also deprived CSC Sugar of important procedural benefits." *Id.* at 14–19. Specifically, CSC Sugar argues that Commerce rushed the 2020 proceeding, completing it in only six weeks, which left "simply no time (or willingness by Commerce) ... to consider and address new information." Pl.'s Br. at 15. Plaintiff's contentions are not supported by the record. CSC Sugar does not argue that Commerce's swift completion of the 2020 proceeding violated any statutory or regulatory provisions. While Plaintiff contends that the proceeding did not provide adequate time for the submission and consideration of certain information, *see* Pl.'s Br. at 18, it did not press Commerce for additional time to cure any perceived procedural shortcomings or to submit additional information for the record, except for one instance. And, Commerce granted CSC Sugar's sole

extension request. *See* Ext. for Comments on Amendments to Draft Suspension Agreements, PD 29. CSC Sugar has thus failed to demonstrate that it was deprived of any procedural safeguards regarding the information on the *2020 AD Amendment* record.

CSC Sugar also argues that "by statute and through practice, Commerce has a duty to publish appropriate notifications and to issue instructions to Customs that puts into effect its published decisions." Pl.'s Br. at 17. CSC Sugar notes that "Commerce held off on issuing the instructions to vacate the 2017 Amendment by almost seven weeks. Yet, it took only three weeks for Commerce to issue instructions to implement the 2020 Amendment." *Id.* Problematically, Plaintiff does not cite any statutes, regulations, or practice that Commerce allegedly violated. Instead, CSC Sugar's contention appears to be that Commerce must have acted in bad faith by delaying its instructions to Customs in vacating the *2017 AD Amendment*.[5] Commerce's instructions for the termination of the *2017 AD Amendment* specifically state that "as of [December 7, 2019], the AD Agreement . . . is in effect and applies to all contracts entered into after [December 7, 2019.]" *See* Termination of Customs Instructions, PD 115.

Therefore, the delay in issuing the instructions did not impact the dates of the contracts to which the original *AD Agreement* applied. Similarly, Commerce's instructions for the *2020 AD Amendment* were informational and state that "[t]he 2020 AD Amendment applies to all contracts for Sugar from Mexico exported from Mexico on or after the signature date of the Amended AD Agreement, *i.e.*, [January 15, 2020]." 2020 AD Amendment Customs Instructions, PD 118. Thus, even pursuant to the Customs instructions, the original *AD Agreement* applied to contracts for sugar from Mexico from the time of the termination of the *2017 AD Amendment* to the signing of the *2020 AD Amendment*. These facts make it difficult to accept CSC Sugar's hoped for inference that Commerce acted in bad faith in delaying its issuance of instructions to Customs.

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[5] Plaintiff does cite to this Court's Order of December 6, 2019, in the related CVD action in which the Court stated:

> This discrepancy in rationales indicates that the purpose of the stay is not to "permit an orderly transition to compliance with the Court's judgments," but instead to delay enforcement of the judgment until Commerce issues a "new" suspension agreement and tries to force Plaintiff to start an appeal anew. Without attempting to discern the "true" motivation for the stay of enforcement, it suffices to say that the difference in rationales asserted by the Defendant and the Defendant-Intervenors gives the court pause.

CSC Sugar II, 43 CIT at ___, 413 F. Supp. 3d at 1310 (Court No. 17–00214). Although the court did express concern about the "discrepancy" in rationales for delay asserted by Commerce and other interested parties, Plaintiff has not met its burden in demonstrating any factual support that Commerce's delay was *actually* the result of bad faith.

Turning to the merits, CSC Sugar maintains that Commerce's adoption of the *2020 AD Amendment* is unsupported by substantial evidence because "Commerce has provided *no* evidence to show why the 2020 Amendment's change in polarity standards are necessary *in addition to* the amendment's bulk-shipment requirement." Pl.'s Br. at 20. Plaintiff also argues that "the polarity standard adopted is contrary to law because Commerce must explain the 'connection between the facts found and the choice made.'" *Id.* at 21 (citing *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm'n*, 747 F.2d 1511, 1513 (D.C. Cir.1984)).

Plaintiff's argument that Commerce failed to provide a "reasoned explanation" for a change in the polarity threshold is misplaced. Commerce explained, throughout the negotiation of the *2020 AD Amendment*, why the changes to the polarity thresholds for Refined Sugar[6] and Other Sugar[7] coupled with the inclusion of the "bulk shipment" provision[8] for Other Sugar work in concert to "eliminate completely" the injurious effects of Mexican sugar imported into the United States. *See* 19 U.S.C. § 1673c(c); *see also* AD Price Suppression Memo, PD 100; AD Statutory Assessment Memo, PD 101; Sugar Comments Memo, PD 102. Specifically, during the negotiation of the *2020 AD Amendment*, Commerce explained that modifying the polarity thresholds and including a bulk-shipping provision would help to address two critical issues: (1) diminished supply of raw sugar for United States cane sugar refiners; and (2) decline in United States price of Refined Sugar caused by exports of Mexican sugar into the United States. *See* AD Statutory Assessment Memo at 4–8 (explaining that "The change in the definition of Other Sugar in terms of polarity, and the requirement that Other Sugar is to be shipped in bulk, freely-flowing, ensure to the fullest extent possible under the amended Agreements that sugar that enters subject to the lower reference price is sold in the market segment of sugar that requires further processing."); Sugar Comments Memo at 5–8 ("The change in polarity definition, and the associated changes to the export limits in

[6] "Refined Sugar" is defined as sugar at a polarity of 99.2 and above, as produced and measured on a dry basis. *See 2020 AD Amendment*.

[7] "Other Sugar" is defined as sugar at a polarity of less than 99.2, as produced and measured on a dry basis. *See 2020 AD Amendment*.

[8] The "bulk shipment" provision specifies that "Other Sugar must be exported to the United States loaded in bulk and freely flowing (*i.e.*, not in a container, tote, bag or otherwise packaged) into the hold(s) of an ocean-going vessel." *See 2020 AD Amendment*. "To be considered as Other Sugar, if Sugar leaves the Mexican mill in a container, tote, bag or other package (*i.e.*, is not freely flowing), it must be emptied from the container, tote, bag or other package into the hold of the ocean-going vessel for exportation." *Id.* "All other exports of Sugar from Mexico that are not transported in bulk and freely flowing in the hold(s) of an ocean-going vessel will be considered to be Refined Sugar for purposes of the Export Limit or Additional U.S. Needs Sugar, regardless of the polarity of that Sugar." *Id.*

the 2020 CVD Amendment, will ensure that an adequate supply of raw sugar reaches cane refiners. Under the 2020 Amendments, lower polarity Mexican sugar will have increased availability compared to the original agreement and the higher input cost for sugar above 99.2 degrees polarity will prevent such Mexican sugar from supplanting sales of U.S. refined sugar. ... The potential harm to CSC is uncertain and limited, while the potential benefits to the domestic industry as a whole are substantial. For these reasons, we do not find CSC's arguments persuasive and we believe that the changes to the polarity definitions, and other provisions of the 2020 Amendments, are justified."). Accordingly, Commerce reasonably explained why the polarity modification was necessary along with the bulk-shipping provision.

With respect to CSC Sugar's substantial evidence challenge, to prevail on a substantial evidence challenge to Commerce's determination to include both the polarity threshold modification as well as the bulk-shipping requirement, CSC Sugar needed to demonstrate that the record supports one, and only one, reasonable outcome: that the bulk-shipping requirement "entirely eliminated" the injurious effect of the imported sugar and that the polarity threshold change was redundant and unnecessary. *See Tianjin Wanhua Co. v. United States*, 41 CIT ___, ___, 253 F. Supp. 3d 1318, 1328 (2017) (emphasizing that claimants challenging Commerce's determinations that choose among various options must demonstrate that their position is the "one and only reasonable" option on the record); *Mitsubishi Heavy Indus. Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) ("'[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" (quoting *Consolidated Edison, Co. v. NLRB*, 305 U.S. 197, 229 (1938))). Plaintiff does not explain how its preferred outcome is the one and only reasonable choice on the record. *See* Pl.'s Reply at 14 n.8. It just offers a conclusory assertion that the bulk shipment requirement rendered the polarity modification superfluous. Although CSC Sugar presented this argument to Commerce, other parties (including Defendant-Intervenors) also responded with their own arguments and information. *See, e.g.*, ASC Rebuttal Comments at 10, PD 59, CD 11 (contending that "[w]ithout both provisions, the likelihood that such sugar bypasses refiners at the lower reference price increases"). Commerce directly addressed why it found both the bulk shipment provision and polarity modification necessary, explaining:

> In our statutory memoranda, we identified distinct problems with the functioning of the original agreements and explained how the changes contained in the 2020 Amendments address

> those problems. We noted that ASC alleged that U.S. cane refiners were receiving a diminished supply of sugar for their processing operations and that imports of Mexican sugar were undercutting U.S. sugar prices. Specifically, ASC alleged that Mexican "estandar" sugar was being sold for direct consumption at low prices, thus supplanting sales of refined sugar. The shipping requirements in the 2020 Amendments directly increase the likelihood that U.S. cane refiners will receive sufficient amounts of sugar for their operations, and all interested parties, including CSC, seem to agree on this point. The change in polarity definition, which effectively establishes a price increase for sugar with a polarity between 99.2 and 99.5, helps prevent price suppression or undercutting. The changes contained in the 2020 CVD Amendment support both objectives through quantitative restrictions that allow relatively more Other Sugar for U.S. refining operations and further restrict the amount of Refined Sugar (including sugar with a polarity between 99.2 and 99.5) in the U.S. market. We also explained that the change in polarity definition facilitates monitoring and verification. The changes contained in the 2020 Amendments work in concert with each other to ensure that, to the fullest extent possible, the 2020 Amendments meet the statutory requirement to "eliminate completely" the injurious effects of exports.

Sugar Comments Memo at 6; *see also id.* at 7 ("the changes to the polarity definition are intended to address market conditions caused by Mexican sugar imports and to eliminate completely the injury to the domestic industry caused by such imports. The changes are not intended to 'undercut the business model' of CSC." (citing AD Price Suppression Memo at 8)). Commerce thus explained its determination based on information in the record. Accordingly, the court sustains the *2020 AD Amendment* (including the polarity modification) as reasonable (and therefore supported by substantial evidence).

Lastly, CSC Sugar contends that "Commerce failed to adequately address the public interest as required by 19 U.S.C. § 1673c(a)(2)." *See* Pl.'s Br. at 23–26. The record does not support CSC Sugar's argument, as Commerce explained why the *2020 AD Amendment* is in the public interest based on its analysis of the criteria in 19 U.S.C. § 1673c(a)(2)(B). *See* AD Statutory Assessment Memo at 8–11; Sugar Comments Memo at 10–11.

19 U.S.C. § 1673c(a)(2)(B) provides that in evaluating whether a quantitative restriction agreement (such as the one included in the

2020 AD Amendment) is in the public interest, Commerce shall consider:

> (i) whether, based upon the relative impact on consumer prices and the availability of supplies of the merchandise, the agreement would have a greater adverse impact on United States consumers than the imposition of antidumping duties;
>
> (ii) the relative impact on the international economic interests of the United States; and
>
> (iii) the relative impact on the competitiveness of the domestic industry producing the like merchandise, including any such impact on employment and investment in that industry.

19 U.S.C. § 1673c(a)(2)(B). CSC Sugar does not argue that the public interest is better served by terminating the suspension agreement and issuing an antidumping duty order. *See* Pl.'s Br. at 23–26; Pl.'s Reply at 17–18. Rather, it contends that the terms of the *2020 AD Amendment* (namely, the quantitative restriction agreement) are structured in a manner that precludes the *2020 AD Amendment* from being in the public interest, unlike the original *AD Agreement*.

As to the first factor, Commerce noted that the *2020 CVD Amendment* limits the supply of Mexican sugar and revises the export limit ratio of "Other Sugar" and "Refined Sugar," which helps (1) to reduce the likelihood that sugar from Mexico will oversupply the United States market, and (2) to support price stability for consumers in the United States. *See* AD Statutory Assessment Memo at 4–5, 9. Commerce explained that "higher minimum reference prices in the amended AD Agreement work in conjunction with these provisions in the amended CVD Agreement to ensure that prices for the first U.S. sale cannot be set so low as to cause injury to the U.S. industry." *Id.* at 4. Commerce found that the impact of either the *2020 AD Amendment* or the imposition of duties helps to ensure that consumer prices for sugar are at market prices for fairly traded sugar. *Id.* at 9. Consequently, Commerce determined that the *2020 AD Amendment* does not have a greater adverse impact on United States customers than the imposition of antidumping duties. *Id.* at 10–11 (explaining benefits of *2020 AD Amendment* as compared to antidumping duty order).

With respect to the second criterion, the *2020 AD Amendment* helps to prevent unfairly traded imports of sugar while also promoting trade with Mexico, one of the United States' closest trading partners.

See AD Statutory Assessment Memo at 10. In simultaneously eliminating injury to the United States industry caused by imports of Mexican sugar and promoting trading relationships, Commerce found that the *2020 AD Amendment* promotes the international economic interests of the United States. *Id.*

CSC Sugar primarily challenges Commerce's analysis with respect to the third factor, which requires Commerce to assess "the relative impact on the competitiveness of the domestic industry producing the like merchandise." 19 U.S.C. § 1673c(a)(2)(B)(iii); *see* Pl.'s Br. at 25–26. Plaintiff argues that "although Commerce spills much ink across multiple memoranda under headings entitled 'public interest,' in substance those discussions are really about the domestic industry's interest—and making the largest companies in the domestic industry more profitable (although Commerce prefers to refer to this as being "more competitive")—to the exclusion of the general public's interest." *Id.* at 25. Plaintiff also maintains that "even with respect to *just* the domestic industry, Commerce still failed to address the full effect on the domestic industry, including CSC Sugar—and the 2020 Amendment's potential consequences to it." *Id.* at 26.

CSC Sugar argues that the statute requires Commerce to examine competition within the U.S. industry, as well as the public interest as a whole. During the proceeding, Commerce explained that "antidumping and countervailing duty laws are primarily concerned with the pricing behavior of foreign producers, the prices of foreign imports, and the impact of such imports on the U.S. domestic industry." *See* Sugar Comments Memo at 10. Accordingly, Commerce interpreted the phrase "competitiveness of the domestic industry" to refer to the competitiveness of the domestic industry as a whole in relation to foreign imports and foreign producers of subject merchandise. *Id.*

Plaintiff contends that "Commerce has no special expertise or knowledge in determining what the term 'public interest' means as a matter of law." Pl.'s Br. at 24. However, Plaintiff does not challenge Commerce's interpretation of § 1673c(a)(2)(B) with any reference to the legal framework that the court uses to resolve challenges to Commerce's statutory interpretations (*i.e.*, *Chevron*). *See generally* Pl.'s Br. To the extent that Plaintiff seeks to challenge Commerce's interpretation of § 1673c(a)(2)(B), the court deems this argument waived as Plaintiff has failed to make this argument with any reference to the proper legal framework. *See Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1347 (Fed. Cir. 2016) (observing that Plaintiff failed to make its statutory interpretation "arguments within the operative *Chevron* framework. That misstep typically war-

rants a finding of waiver." (citing *United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived.")); *see also Zhejiang Sanhua Co. v. United States*, 39 CIT ___, ___, 61 F. Supp. 3d 1350, 1358 (2015) (citing *Great American Insurance* in holding that a party waived its arguments for failing to raise them within the operative *Chevron* framework); *JBF RAK LLC v. United States*, 38 CIT ___, ___, 991 F. Supp. 2d 1343, 1356 (2014) (same). Accordingly, the court will not address Plaintiff's arguments that Commerce failed to properly *interpret* § 1673c(a)(2)(B) in adopting the *2020 AD Amendment*, and instead address Plaintiff's argument that Commerce failed to reasonably *apply* the statute in adopting the *2020 AD Amendment*.

In applying the third factor to the instant record, Commerce found that the *2020 AD Amendment* would have a positive impact on the competitiveness of the domestic industry, including CSC Sugar. *See* Sugar Comments Memo at 10. Specifically, the signatory producers/exporters of the *2020 AD Amendment* have agreed to revise their prices of subject merchandise to "eliminate completely" the injurious effect of Mexican sugar imported into the United States. *Id.* Additionally, Commerce found that the amended definitions of "Refined Sugar" and "Other Sugar" ensure an adequate supply of input material is available to the United States industry for further processing, a crucial benefit that Commerce determined could not be guaranteed with an antidumping duty order. *See* AD Statutory Assessment Memo at 9. As a result, Commerce found that the public interest as a whole was served. Accordingly, the court sustains Commerce's determination that the *2020 AD Amendment* met the public interest criteria of § 1673c(a)(2)(B).

IV. Conclusion

For the foregoing reasons, Plaintiff's motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: June 25, 2020
New York, New York

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

Slip Op. 20–89

CSC SUGAR LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 20–00017

[Denying Plaintiff's motion for judgment on the agency record.]

Dated: June 25, 2020

Jeffrey S. Neeley, *Nithya Nagarajan*, *Michael Klebanov*, and *Joseph S. Diedrich* Husch Blackwell, LLP, of Washington, DC for Plaintiff CSC Sugar LLC.

Douglas G. Edelschick, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs was *Paul K. Keith*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Robert C. Cassidy, Jr., *Charles S. Levy*, *James R. Cannon, Jr.*, and *Jonathan M. Zielinsky*, Cassidy Levy Kent (USA) LLP, of Washington, DC for Defendant-Intervenors the American Sugar Coalition, American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association.

Rosa S. Jeong, *Irwin P. Altschuler*, and *Sonali Dohale*, Greenberg Traurig, LLP, of Washington, DC for Defendant-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera.

Stephan E. Becker and *Sahar J. Hafeez*, Pillsbury Winthrop Shaw Pittman, LLP, of Washington, DC for Defendant-Intervenor Government of Mexico.

OPINION

Gordon, Judge:

Before the court is the USCIT Rule 56.2 motion of Plaintiff CSC Sugar LLC ("Plaintiff" or "CSC Sugar") for judgment on the administrative record challenging the U.S. Department of Commerce's ("Commerce") final determination in *Sugar from Mexico*, 85 Fed. Reg. 3,613 (Jan. 22, 2020) (Amendment to Agreement Suspending the Countervailing Duty Investigation) ("*2020 CVD Amendment*").[1] *See* Pl.'s Mot. for J. on the Agency R. under CIT Rule 56.2, ECF No. 36 ("Pl.'s Br."); *see also* Def.'s Resp. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 39 ("Def.'s Resp."); Def.-Intervenor Gov't of Mexico's Resp. in Opp'n to Pl.'s 's Mot. for J. on the Agency R., ECF No. 40 ("Mexico Resp."); Resp. of Def.-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 41, ("Cámara Resp."); Def.-Intervenor Am. Sugar Coalition's Resp. to Pl.'s 's Mot. for J. on the Agency R., ECF No.

[1] CSC Sugar also filed a parallel action, Court No. 20–00016, challenging Commerce's amendment to the Antidumping Duty ("AD") Suspension Agreement ("*2020 AD Amendment*"), which is addressed in this Court's decision, Slip Op. 20–88, also issued this date.

43 ("ASC Resp."); Reply Memorandum in Support of Pl.'s Mot. for J. on the Agency R., ECF No. 45 ("Pl.'s Reply").[2] The court has jurisdiction over this matter pursuant to Section 516A(a)(2)(B)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iv) (2012),[3] and 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, the court denies Plaintiff's motion, and sustains the *2020 CVD Amendment*.

I. Background

In 2014, pursuant to a petition filed by the American Sugar Coalition, and its members (collectively, "ASC"), Commerce and the U.S. International Trade Commission conducted an investigation as to whether imports of sugar from Mexico were being subsidized, and whether such imports were injurious to the U.S. industry. After Commerce issued a preliminary determination that countervailable subsidies were being supplied, Commerce, on behalf of the United States Government, and the Government of Mexico ("Mexico") negotiated and signed a suspension agreement. *See Sugar From Mexico*, 79 Fed. Reg. 78,044 (Dep't of Commerce Dec. 29, 2014) (suspension of CVD investigation) ("*CVD Agreement*").

In 2017, Commerce and Mexico negotiated amendments to the *CVD Agreement*. *See Sugar from Mexico*, 82 Fed. Reg. 31,942 (Dep't of Commerce July 11, 2017) (amendment to CVD Suspension Agreement) ("*2017 CVD Amendment*"). Among other changes, this amendment altered the definition of "refined sugar." *See id.* (amending definition of "refined sugar" to consist of sugar with polarity of 99.2 degrees and above, instead of 99.5 degrees and above). In response, CSC Sugar commenced an action challenging the *2017 CVD Amendment* on procedural and substantive grounds. CSC Sugar demonstrated that Commerce failed to maintain a complete record including memoranda of ex parte meetings as required pursuant to 19 U.S.C. § 1677f(a)(3). The court issued two decisions ultimately vacating the *2017 CVD Amendment*. *See CSC Sugar v. United States*, 42 CIT ___, 317 F. Supp. 3d 1322 (2018); *CSC Sugar v. United States*, 43 CIT ___, 413 F. Supp. 3d 1310 (2019) ("*CSC Sugar II*"). The court assumes familiarity with these decisions.

Thereafter, Commerce commenced a proceeding to consider and adopt a new CVD amendment. *See* CVD Statutory Assessment Memo

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

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

at 1–2, PD[4] 101 (describing negotiation, notice and comment process, and signing of *2020 CVD Amendment*). CSC Sugar now challenges the *2020 CVD Amendment* arguing (1) that Commerce did not comply with recordkeeping requirements during the negotiation of the *2020 CVD Amendment*; (2) that the record does not support the need to both revise the polarity standards for raw and refined sugar and incorporate a bulk shipment requirement; and (3) that Commerce did not provide a complete analysis of the public interest requirement under 19 U.S.C. § 1673c(a)(2)(B). *See generally* Pl.'s Br.

II. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Fundamentally, though, "substantial evidence" is best understood as a word formula connoting a reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2020). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2020).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the countervailing duty statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of

[4] "PD ___" refers to a document contained in the public administrative record, which is found in ECF No. 34–1, unless otherwise noted. "CD ___" refers to a document contained in the confidential administrative record, which is found in ECF No. 34–2, unless otherwise noted.

unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

III. Discussion

CSC Sugar first argues that because the *2020 CVD Amendment* makes substantively the same changes to the *CVD Agreement* as the *2017 CVD Amendment*, Commerce's recordkeeping failure for the *2017 CVD Amendment* "is carried over to the 2020 record by reason of Commerce's implicit reliance on this tainted record." Pl.'s Br. at 12. To the contrary, Commerce expressly clarified that it would rely on "only" information placed on the record after October 18, 2019, the date of the court's decision vacating the *2017 CVD Amendment*. *See* Period for Rebuttal Comments, PD 49 ("Commerce will only consider comments and factual information submitted to the official records of these proceedings after October 18, 2019.").

Accepting CSC Sugar's position that Commerce implicitly relied on information from the 2017 proceeding would require the court to conclude that Commerce acted in bad faith in conducting the 2020 proceeding. The law is clear that, absent "well-nigh irrefragable proof," government officials are presumed to act in good faith in discharging their duties. *McEachern v. Office of Personnel Management*, 776 F.2d 1539, 1544 (Fed. Cir. 1985). Yet CSC Sugar appears to contend that Commerce's procedural failure in the negotiations over the *2017 CVD Amendment* can never be remedied, maintaining that "[e]ven if the details of those ex parte meetings were disclosed *now*, which Commerce admitted it cannot do as part of the prior litigation, that would not vindicate CSC Sugar's right to participate in the process *while the process is ongoing*." Pl.'s Br. at 13. The court does not agree and rejects CSC Sugar's argument that the procedural defects of the 2017 proceeding somehow carried over to the 2020 proceeding.

As for CSC Sugar's argument that Commerce improperly cloned the record of the 2017 proceeding for the 2020 proceeding, *see* Pl.'s Br. at 10–14, there is no dispute that the changes in the 2020 CVD Amendment are substantively the same as those in the *2017 CVD Amendment*. Nevertheless, Defendant argues that "CSC is incorrect that the records are substantively identical." Def.'s Resp. at 17. CSC Sugar ignores the crucial fact that it had the opportunity to develop the record of the 2020 proceeding through submission of comments, rebuttal comments, and factual information. *See* Comments on Suspension Agreement, PD 42; Rebuttal Comments, PD 58; Clarification of Rebuttal Comments, PD 66; Comments on Draft Amendments to Suspension Agreement, PD 85. This crucial fact undercuts Plaintiff's

attempt to equate the 2020 proceeding with the 2017 proceeding. *Cf. CSC Sugar II*, 43 CIT at ___, 413 F. Supp. 3d at 1317 (explaining prejudice to CSC Sugar in the 2017 Amendment negotiations, noting "Commerce's complete failure to follow § 1677f effectively prevented CSC Sugar from commenting on the *ex parte* materials and discussions Commerce engaged in *during* the *CVD Amendment* negotiations.").

Although certain information in the record of the 2020 proceeding was also in the record for the 2017 proceeding, this fact alone does not demonstrate that the procedural irregularity the court found in the 2017 proceeding carries over to the 2020 proceeding. CSC Sugar argues that information originally placed on the record of the 2017 proceeding is tainted and therefore should not be placed in the record of the 2020 proceeding. *See* Pl.'s Br. at 13. CSC Sugar's argument is predicated on the view that this Court passed on the merits of the information contained in the record of the 2017 proceeding. Plaintiff is mistaken. The reason for the court's order vacating the *2017 CVD Amendment* was Commerce's failure to memorialize ex parte meetings and no more. *See CSC Sugar II*, 43 CIT at ___, 413 F. Supp. 3d at 1318. Given Commerce's express commitment to consider solely information submitted after October 2019, *see* Period for Rebuttal Comments, as well as the fact that CSC Sugar had ample opportunity to participate and comment on the new record, CSC Sugar has failed to demonstrate that "record supporting the 2020 Amendment is functionally the same as the record supporting the 2017 Amendment." *See* Pl.'s Br. at 10.

Aside from contending that the procedural defects of the 2017 proceeding should be imputed to the 2020 proceeding, Plaintiff maintains that the "2020 Amendment suffers from procedural irregularities related to timing, which also deprived CSC Sugar of important procedural benefits." *Id.* at 14–19. Specifically, CSC Sugar argues that Commerce rushed the 2020 proceeding, completing it in only six weeks, which left "simply no time (or willingness by Commerce) ... to consider and address new information." Pl.'s Br. at 15. Plaintiff's contentions are not supported by the record. CSC Sugar does not argue that Commerce's swift completion of the 2020 proceeding violated any statutory or regulatory provisions. While Plaintiff contends that the proceeding did not provide adequate time for the submission and consideration of certain information, *see* Pl.'s Br. at 18, it did not press Commerce for additional time to cure any perceived procedural shortcomings or to submit additional information for the record, except for one instance. And, Commerce granted CSC Sugar's sole

extension request. *See* Ext. for Comments on Amendments to Draft Suspension Agreements, PD 29. CSC Sugar has thus failed to demonstrate that it was deprived of any procedural safeguards regarding the information on the *2020 CVD Amendment* record.

CSC Sugar also argues that "by statute and through practice, Commerce has a duty to publish appropriate notifications and to issue instructions to Customs that puts into effect its published decisions." Pl.'s Br. at 16. CSC Sugar notes that "Commerce held off on issuing the instructions to vacate the 2017 Amendment by almost seven weeks. Yet, it took only three weeks for Commerce to issue instructions to implement the 2020 Amendment." *Id.* Problematically, Plaintiff does not cite any statutes, regulations, or practice that Commerce allegedly violated. Instead, CSC Sugar's contention appears to be that Commerce must have acted in bad faith by delaying its instructions to Customs in vacating the *2017 CVD Amendment*.[5] Commerce's instructions for the termination of the *2017 CVD Amendment* specifically state that "as of [December 7, 2019], the CVD Agreement . . . is in effect and applies to all contracts entered into after [December 7, 2019.]" *See* Termination of Customs Instructions, PD 114.

Therefore, the delay in issuing the instructions did not impact the dates of the contracts to which the original *CVD Agreement* applied. Similarly, Commerce's instructions for the *2020 CVD Amendment* were informational and state that "[t]he 2020 CVD Amendment applies to all contracts for Sugar from Mexico exported from Mexico on or after the signature date of the Amended CVD Agreement, *i.e.*, [January 15, 2020]." 2020 CVD Amendment Customs Instructions, PD 118. Thus, even pursuant to the Customs instructions, the original *CVD Agreement* applied to contracts for sugar from Mexico from the time of the termination of the *2017 CVD Amendment* to the signing of the *2020 CVD Amendment*. These facts make it difficult to accept CSC Sugar's hoped for inference that Commerce acted in bad faith in delaying its issuance of instructions to Customs.

Turning to the merits, CSC Sugar maintains that Commerce's adoption of the *2020 CVD Amendment* is unsupported by substantial

[5] Plaintiff does cite to this Court's Order of December 6, 2019, in which the Court stated:

> This discrepancy in rationales indicates that the purpose of the stay is not to "permit an orderly transition to compliance with the Court's judgments," but instead to delay enforcement of the judgment until Commerce issues a "new" suspension agreement and tries to force Plaintiff to start an appeal anew. Without attempting to discern the "true" motivation for the stay of enforcement, it suffices to say that the difference in rationales asserted by the Defendant and the Defendant-Intervenors gives the court pause.

CSC Sugar II, 43 CIT at ___, 413 F. Supp. 3d at 1310 (Court No. 17–00214). Although the court did express concern about the "discrepancy" in rationales for delay asserted by Commerce and other interested parties, Plaintiff has not met its burden in demonstrating any factual support that Commerce's delay was *actually* the result of bad faith.

evidence because "Commerce has provided *no* evidence to show why the 2020 Amendment's change in polarity standards are necessary *in addition to* the amendment's bulk-shipment requirement." Pl.'s Br. at 20. Plaintiff also argues that "the polarity standard adopted is contrary to law because Commerce must explain the 'connection between the facts found and the choice made.'" *Id.* (citing *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm'n*, 747 F.2d 1511, 1513 (D.C. Cir.1984)).

Plaintiff's argument that Commerce failed to provide a "reasoned explanation" for a change in the polarity threshold is misplaced. Commerce explained, throughout the negotiation of the *2020 CVD Amendment*, why the changes to the polarity thresholds for Refined Sugar[6] and Other Sugar[7] coupled with the inclusion of the "bulk shipment" provision[8] for Other Sugar work in concert to "eliminate completely" the injurious effects of Mexican sugar imported into the United States. *See* 19 U.S.C. § 1673c(c); *see also* CVD Statutory Assessment Memo, PD 101; Sugar Comments Memo, PD 102. Specifically, during the negotiation of the *2020 CVD Amendment*, Commerce explained that modifying the polarity thresholds and including a bulk-shipping provision would help to address two critical issues: (1) diminished supply of raw sugar for United States cane sugar refiners; and (2) decline in United States price of Refined Sugar caused by exports of Mexican sugar into the United States. *See* CVD Statutory Assessment Memo at 5–8 (explaining that "These changes to the definitions of Refined and Other Sugar ensure to the fullest extent possible, under the amended Agreements, the availability of supply of input sugar for U.S. cane refiners."); Sugar Comments Memo at 5–8 ("The change in polarity definition, which effectively establishes a price increase for sugar with a polarity between 99.2 and 99.5, helps prevent price suppression or undercutting. The changes contained in the 2020 CVD Amendment support both objectives through quantitative restrictions that allow relatively more Other Sugar for U.S. refining operations and further restrict the

[6] "Refined Sugar" is defined as sugar at a polarity of 99.2 and above, as produced and measured on a dry basis. *See 2020 CVD Amendment*.

[7] "Other Sugar" is defined as sugar at a polarity of less than 99.2, as produced and measured on a dry basis. *See 2020 CVD Amendment*.

[8] The "bulk shipment" provision specifies that "Other Sugar must be exported to the United States loaded in bulk and freely flowing (*i.e.*, not in a container, tote, bag or otherwise packaged) into the hold(s) of an ocean-going vessel." *See 2020 CVD Amendment*. "To be considered as Other Sugar, if Sugar leaves the Mexican mill in a container, tote, bag or other package (*i.e.*, is not freely flowing), it must be emptied from the container, tote, bag or other package into the hold of the ocean-going vessel for exportation." *Id.* "All other exports of Sugar from Mexico that are not transported in bulk and freely flowing in the hold(s) of an ocean-going vessel will be considered to be Refined Sugar for purposes of the Export Limit or Additional U.S. Needs Sugar, regardless of the polarity of that Sugar." *Id.*

amount of Refined Sugar (including sugar with a polarity between 99.2 and 99.5) in the U.S. market. ... The potential harm to CSC is uncertain and limited, while the potential benefits to the domestic industry as a whole are substantial. For these reasons, we do not find CSC's arguments persuasive and we believe that the changes to the polarity definitions, and other provisions of the 2020 Amendments, are justified."). Accordingly, Commerce reasonably explained why the polarity modification was necessary along with the bulk-shipping provision.

With respect to CSC Sugar's substantial evidence challenge, to prevail on a substantial evidence challenge to Commerce's determination to include both the polarity threshold modification as well as the bulk-shipping requirement, CSC Sugar needed to demonstrate that the record supports one, and only one, reasonable outcome: that the bulk-shipping requirement "entirely eliminated" the injurious effect of the imported sugar and that the polarity threshold change was redundant and unnecessary. *See Tianjin Wanhua Co. v. United States*, 41 CIT ___, ___, 253 F. Supp. 3d 1318, 1328 (2017) (emphasizing that claimants challenging Commerce's determinations that choose among various options must demonstrate that their position is the "one and only reasonable" option on the record); *Mitsubishi Heavy Indus. Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) ("'[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" (quoting *Consolidated Edison, Co. v. NLRB*, 305 U.S. 197, 229 (1938))). Plaintiff does not explain how its preferred outcome is the one and only reasonable choice on the record. *See* Pl.'s Reply at 15 n.8. It just offers a conclusory assertion that the bulk shipment requirement rendered the polarity modification superfluous. Although CSC Sugar presented this argument to Commerce, other parties (including Defendant-Intervenors) also responded with their own arguments and information. *See, e.g.*, ASC Rebuttal Comments at 10, PD 59, CD 13 (contending that "[w]ithout both provisions, the likelihood that such sugar bypasses refiners at the lower reference price increases"). Commerce directly addressed why it found both the bulk shipment provision and polarity modification necessary, explaining:

> In our statutory memoranda, we identified distinct problems with the functioning of the original agreements and explained how the changes contained in the 2020 Amendments address those problems. We noted that ASC alleged that U.S. cane refiners were receiving a diminished supply of sugar for their processing operations and that imports of Mexican sugar were

> undercutting U.S. sugar prices. Specifically, ASC alleged that Mexican "estandar" sugar was being sold for direct consumption at low prices, thus supplanting sales of refined sugar. The shipping requirements in the 2020 Amendments directly increase the likelihood that U.S. cane refiners will receive sufficient amounts of sugar for their operations, and all interested parties, including CSC, seem to agree on this point. The change in polarity definition, which effectively establishes a price increase for sugar with a polarity between 99.2 and 99.5, helps prevent price suppression or undercutting. The changes contained in the 2020 CVD Amendment support both objectives through quantitative restrictions that allow relatively more Other Sugar for U.S. refining operations and further restrict the amount of Refined Sugar (including sugar with a polarity between 99.2 and 99.5) in the U.S. market. We also explained that the change in polarity definition facilitates monitoring and verification. The changes contained in the 2020 Amendments work in concert with each other to ensure that, to the fullest extent possible, the 2020 Amendments meet the statutory requirement to "eliminate completely" the injurious effects of exports.

Sugar Comments Memo at 6; *see also id.* at 7 ("the changes to the polarity definition are intended to address market conditions caused by Mexican sugar imports and to eliminate completely the injury to the domestic industry caused by such imports. The changes are not intended to 'undercut the business model' of CSC."). Commerce thus explained its determination based on information in the record. Accordingly, the court sustains the *2020 CVD Amendment* (including the polarity modification) as reasonable (and therefore supported by substantial evidence).

Lastly, CSC Sugar contends that "Commerce failed to adequately address the public interest as required by 19 U.S.C. § 1673c(a)(2)." *See* Pl.'s Br. at 23–25. The record does not support CSC Sugar's argument, as Commerce explained why the *2020 CVD Amendment* is in the public interest based on its analysis of the criteria in 19 U.S.C. § 1673c(a)(2)(B). *See* CVD Statutory Assessment Memo at 8–11; Sugar Comments Memo at 9–11.

19 U.S.C. § 1673c(a)(2)(B) provides that in evaluating whether a quantitative restriction agreement (such as the one included in the *2020 CVD Amendment*) is in the public interest, Commerce shall consider:

> (i) whether, based upon the relative impact on consumer prices and the availability of supplies of the merchandise, the agreement would have a greater adverse impact on United States consumers than the imposition of antidumping duties;
>
> (ii) the relative impact on the international economic interests of the United States; and
>
> (iii) the relative impact on the competitiveness of the domestic industry producing the like merchandise, including any such impact on employment and investment in that industry.

19 U.S.C. § 1673c(a)(2)(B). CSC Sugar does not argue that the public interest is better served by terminating the suspension agreement and issuing a countervailing duty order. *See* Pl.'s Br. at 23–25; Pl.'s Reply at 17–20. Rather, it contends that the terms of the *2020 CVD Amendment* (namely, the quantitative restriction agreement) are structured in a manner that precludes the *2020 CVD Amendment* from being in the public interest, unlike the original *CVD Agreement*.

As to the first factor, Commerce noted that the *2020 CVD Amendment* limits the supply of Mexican sugar and revises the export limit ratio of "Other Sugar" and "Refined Sugar," which helps (1) to counteract subsidies that incentivize Mexican overproduction, and (2) to support price stability for consumers in the United States. *See* CVD Statutory Assessment Memo at 9. Commerce found that "the impact of either the amended CVD Agreement or the imposition of countervailing duties would be to bring consumer prices for subject merchandise to fairly-traded market prices." *Id.* Consequently, Commerce determined that the *2020 CVD Amendment* does not have a greater adverse impact on United States customers than the imposition of countervailing duties. *Id.*

With respect to the second criterion, the *2020 CVD Amendment* helps to prevent unfairly traded imports of sugar while also promoting trade with Mexico, one of the United States' closest trading partners. *See* CVD Statutory Assessment Memo at 10. In simultaneously eliminating injury to the United States industry caused by imports of Mexican sugar and promoting trading relationships, Commerce found that the *2020 CVD Amendment* promotes the international economic interests of the United States. *Id.*

CSC Sugar primarily challenges Commerce's analysis with respect to the third factor, which requires Commerce to assess "the relative impact on the competitiveness of the domestic industry producing the

like merchandise." 19 U.S.C. § 1673c(a)(2)(B)(iii); *see* Pl.'s Br. at 25–26. Plaintiff argues that "although Commerce spills much ink across multiple memoranda under headings entitled 'public interest,' in substance those discussions are really about the domestic industry's interest—and making the largest companies in the domestic industry more profitable (although Commerce prefers to refer to this as being "more competitive")—to the exclusion of the general public's interest." *Id.* at 24. Plaintiff also maintains that "even with respect to *just* the domestic industry, Commerce still failed to address the full effect on the domestic industry, including CSC Sugar—and the 2020 Amendment's potential consequences to it." *Id.* at 25.

CSC Sugar argues that the statute requires Commerce to examine competition within the U.S. industry, as well as the public interest as a whole. During the proceeding, Commerce explained that "anti-dumping and countervailing duty laws are primarily concerned with the pricing behavior of foreign producers, the prices of foreign imports, and the impact of such imports on the U.S. domestic industry." *See* Sugar Comments Memo at 10. Accordingly, Commerce interpreted the phrase "competitiveness of the domestic industry" to refer to the competitiveness of the domestic industry as a whole in relation to foreign imports and foreign producers of subject merchandise. *Id.*

Plaintiff contends that "Commerce has no special expertise or knowledge in determining what the term 'public interest' means as a matter of law." Pl.'s Br. at 23. However, Plaintiff does not challenge Commerce's interpretation of § 1673c(a)(2)(B) with any reference to the legal framework that the court uses to resolve challenges to Commerce's statutory interpretations (*i.e.*, *Chevron*). *See generally* Pl.'s Br. To the extent that Plaintiff seeks to challenge Commerce's interpretation of § 1673c(a)(2)(B), the court deems this argument waived as Plaintiff has failed to make this argument with any reference to the proper legal framework. *See Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1347 (Fed. Cir. 2016) (observing that Plaintiff failed to make its statutory interpretation "arguments within the operative *Chevron* framework. That misstep typically warrants a finding of waiver." (citing *United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived.")); *see also Zhejiang Sanhua Co. v. United States*, 39 CIT ___, ___, 61 F. Supp. 3d 1350, 1358 (2015) (citing *Great American Insurance* in holding that a party waived its arguments for failing to raise them within the operative *Chevron* framework); *JBF RAK LLC v. United States*, 38 CIT ___, ___, 991 F. Supp. 2d 1343, 1356 (2014) (same). Accordingly, the court will not address Plaintiff's

arguments that Commerce failed to properly *interpret* § 1673c(a)(2)(B) in adopting the *2020 CVD Amendment*, and instead address Plaintiff's argument that Commerce failed to reasonably *apply* the statute in adopting the *2020 CVD Amendment*.

In applying the third factor to the instant record, Commerce found that the *2020 CVD Amendment* would have a positive impact on the competitiveness of the domestic industry, including CSC Sugar. *See* Sugar Comments Memo at 10–11. Specifically, the signatory producers/exporters of the *2020 CVD Amendment* have agreed to revise their prices of subject merchandise to "eliminate completely" the injurious effect of Mexican sugar imported into the United States. *Id.* Additionally, Commerce found that the amended definitions of "Refined Sugar" and "Other Sugar" ensure an adequate supply of input material is available to the United States industry for further processing, a crucial benefit that Commerce determined could not be guaranteed with a countervailing duty order. *See* CVD Statutory Assessment Memo at 9. As a result, Commerce found that the public interest as a whole was served. Accordingly, the court sustains Commerce's determination that the *2020 CVD Amendment* met the public interest criteria of § 1673c(a)(2)(B).

IV. Conclusion

For the foregoing reasons, Plaintiff's motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: June 25, 2020
New York, New York

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

Slip Op. 20–90

BORUSAN MANNESMANN PIPE U.S. INC., Plaintiff, v. UNITED STATES, Defendant.

Before: M. Miller Baker, Judge
Court No. 20–00012

[Defendant's motion for remand to the Department of Commerce is granted.]

Dated: June 25, 2020

Joseph H. Hunt, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Tara K. Hogan*, Assistant Director; and *Stephen C. Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, on the brief for Defendant.

Julie C. Mendoza, *Donald B. Cameron*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas III*, and *Jordan L. Fleischer*, Morris, Manning and Martin, LLP, of Washington, DC, on the brief for Plaintiff.

OPINION AND ORDER

Baker, Judge:

In this case, a domestic importer of steel pipe products unsuccessfully asked the Department of Commerce for exclusions (exemptions) from the national security tariffs the President imposed on such products. The importer then brought this Administrative Procedure Act suit challenging Commerce's denials of its exclusion requests. Demonstrating that sometimes "the better part of valour is discretion," W. Shakespeare, *Henry IV Part One* 113 (M. Mack ed., Signet Classics 1998) (1598), the government now moves to remand this matter back to Commerce so that the agency can remedy deficiencies in the administrative record and otherwise rethink its denials of the importer's exclusion requests. For the reasons explained below, the Court grants the motion.

I. Statutory and Regulatory Background

As its heading indicates, Section 232 of the Trade Expansion Act of 1962 authorizes the President to take certain actions to reduce imports of goods to "[s]afeguard[ ] national security." 19 U.S.C. § 1862. Pursuant to this authority, the President imposed a 25 percent ad valorem tariff on imports of certain steel products. *Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018).

In addition to imposing tariffs, Proclamation 9705 directs the Secretary of Commerce "to provide relief from the additional duties set forth in clause 2 of this proclamation for any steel article determined not to be produced in the United States in a sufficient and reasonably

available amount or of a satisfactory quality" and further authorizes the Secretary "to provide such relief based upon specific national security considerations." *Id.* at 11,627 ¶ 3.[1]

Pursuant to Proclamation 9705, the Department of Commerce issued an interim final rule allowing domestic parties to request exclusions from the Section 232 steel tariffs[2] and allowing other domestic parties to object to exclusion requests. *See* 83 Fed. Reg. at 12,106. The interim final rule states that "an exclusion will only be granted if an article is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security consideration." *Id.* at 12,110 (cleaned up);[3] *see also Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. 46,026, 46,062–63 (Dep't Commerce Sept. 11, 2018).

II. Factual and Procedural Background

According to its complaint, Plaintiff Borusan Mannesmann Pipe U.S., Inc., is a domestic producer of steel pipe and tube products. ECF 5, at 2–3 ¶ 5. Borusan produces a type of welded steel pipe and tube known as "oil country tubular goods." *Id.* Borusan also imports these products in unfinished form to complement its domestic production. *Id.* These imports are subject to Section 232 tariffs under Proclamations 9705, 9772, and 9886. *Id.* at 3 ¶ 6.

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[1] In related proclamations, the President thereafter made certain adjustments to this tariff, including a 50 percent rate applied to imports from Turkey during the period from August 13, 2018, to May 21, 2019. *See Proclamation 9772 of August 10, 2018, Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 40,429 (Aug. 15, 2018); *Proclamation 9886 of May 16, 2019, Adjusting Imports of Steel into the United States*, 84 Fed. Reg. 23,421 (May 21, 2019).

[2] *See Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum*, 83 Fed. Reg. 12,106, 12,106 (Dep't Commerce Mar. 19, 2018) ("The new supplements set forth the process for how parties in the United States may submit requests for exclusions from actions taken by the President . . . to protect national security from threats resulting from imports of specified articles.").

[3] Some readers may not recognize the parenthetical "cleaned up." It is an innovative legal writing device employed to cut through strings of parenthetical folderol that can plague legal citations:

> Using (cleaned up) indicates that in quoting a [source] the author has removed extraneous, non-substantive material like brackets, quotation marks, ellipses, footnote reference numbers, and internal citations; may have changed capitalization without using brackets to indicate that change; and affirmatively represents that the alterations were made solely to enhance readability and that the quotation otherwise faithfully reproduces the quoted text.

J. Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143, 154 (2017) (cleaned up).

Borusan submitted 19 requests to exclude imported oil country tubular goods from the Section 232 tariffs, contending that such products were not produced in the United States in a sufficient and reasonably available amount or in a satisfactory quality. *Id.* at 3 ¶ 7. In response, certain of Borusan's domestic competitors objected on various grounds not relevant for purposes of the present motion. *Id.* at 3–4 ¶¶ 8–9. Commerce denied Borusan's exclusion requests on July 15, 2019. *Id.* at 4 ¶ 10.

Borusan then brought this suit alleging that Commerce's denial of its exclusion requests violated the APA, 5 U.S.C. §§ 701–06. *Id.* at 5 ¶ 12. Instead of filing a responsive pleading, the government now moves to "remand . . . to the agency to reconsider its final determinations not to exclude 19 products from the remedy imposed by the President under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862." ECF 12, at 2.[4] Borusan opposes the motion. ECF 26.

III. Jurisdiction

Borusan's suit seeking relief under the APA falls within the Court's residual jurisdiction, which consists of exclusive jurisdiction of any civil action commenced against the United States for, *inter alia*, "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).

IV. The Parties' Contentions

The government asks the Court to remand this case to Commerce "for further consideration, without confessing error." ECF 12, at 4. The government argues that where, "*as is the case here*, 'if the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* (cleaned up and emphasis added) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

The government further states that "Commerce intends to review and complete the administrative record, as necessary, including memorializing recommendations by the International Trade Administration," and "then issue new determinations to either: (1) exclude some or all of these products from the scope of the Section 232

[4] Citations to the parties' filings refer to the pagination found in the ECF header at the top of each page.

measure on steel; or (2) deny the exclusion requests." *Id.* Taken together, the government's arguments indicate that Commerce has concerns over the adequacy of the record, and therefore has "doubts about the correctness of its decision" on the current record. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).

Although it acknowledges that "the case law generally favors granting Defendant's motion for a voluntary remand," Borusan contends that remand is inappropriate because this is an "exceptional case." ECF 26, at 3. Specifically, Borusan asserts that the apparent gaps in the record raise questions about how Commerce arrived at its decisions denying Borusan's exclusion requests, *id.* at 3–4, and that these questions are magnified by "other information that raises the possibility that Plaintiff's exclusion requests may have been prejudged or subject to improper influence during the underlying proceeding at Commerce," *id.* at 5.

First, Borusan cites a report from Commerce's inspector general stating that in certain unspecified cases, agency

> officials took subsequent action consistent with [off-record] communications, giving the appearance that the Section 232 exclusion review process is not transparent and that decisions are not rendered based on evidence contained in the record. Additionally, the Bureau of Industry and Security . . . changed an internal criterion used to review exclusion requests before posting them online at the request of an objector, creating the perception of undue influence.

ECF 26–1, at 3.

Second, Borusan cites Commerce's statement that it would cost the agency $350,000 to respond to Freedom of Information Act requests concerning Section 232 exclusion applications. Borusan asserts that if Commerce must actually incur such expense to respond to FOIA requests, it "suggests that Commerce believes there may have been extensive correspondence or other *ex parte* communications between Commerce and outside parties" not included in the current record. ECF 26, at 6.

Third, Borusan cites two studies of Commerce's review of Section 232 exclusion requests by the Mercatus Center at George Mason University, ECF 26–1, at 29– 41, one from 2019, covering the first year of exclusion requests, and the other from 2020, covering the second year of such requests.

The 2019 study notes that "just 2.7 percent of aluminum tariff

exclusion requests with an objection have been approved." *Id.* at 30. The 2019 study further notes, however, that 47 percent of steel tariff exclusion requests were approved and 15 percent were denied, with the remainder pending at the time the article was written. *Id.* at 31. While the study states that "less than one percent of the steel exclusion requests with an objection [had] been approved," it also notes that "89 percent of the exclusion requests that have had an objection [were] still pending . . . ." *Id.* at 33 (cleaned up).

The 2020 study shows that 50 percent of steel tariff exclusion requests were approved, 14 percent were denied, and 36 percent remained pending, and notes that "the government has yet to approve a single steel or aluminum exclusion request for which an objection was filed . . . . At the same time, most of these requests haven't been rejected either but remain pending." *Id.* at 38 (cleaned up).

Borusan contends that the "apparent irregularities in the administrative record," when combined with the IG report raising questions about *ex parte* communications and the Mercatus Center studies, mean that "an open-ended voluntary remand to Commerce is likely to be futile given Commerce's apparent prejudgment of exclusion requests that are subject to any objection by the domestic industry." ECF 26, at 7.

V. Discussion

The applicable legal standard dictates that where, as here, the government "request[s] a remand (without confessing error) in order to reconsider its previous position," this Court "has discretion over whether to remand." *SKF*, 254 F.3d at 1029. "A remand may be refused if the agency's request is frivolous or in bad faith. . . . Nevertheless, if the agency's concern is substantial and legitimate, a remand is usually appropriate." *Id.*

The government's request is *prima facie* "substantial and legitimate," as it identifies an inadequate record as the basis for the remand request. Indeed, Borusan's argument that the existing record does not support Commerce's exclusion denials merely confirms that the government's concerns about the "correctness of its decision[s]" on the current record are well-founded. *Id.*

Given that the remand request is hardly frivolous, the Court is required to grant it unless Borusan has demonstrated bad faith. Commerce, however, is entitled to the presumption of regularity, which "supports official acts of public officers. In the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties." *Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1351 (Fed. Cir. 2006) (cleaned up)

(quoting *Bernklau v. Principi*, 291 F.3d 795, 801 (Fed. Cir. 2002)); *cf. Am-Pro Prot. Agency, Inc. v. United States*, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002) (discussing presumption that government officials act in good faith and requiring clear and convincing evidence to show otherwise).

Borusan's evidence falls far short of clearly and convincingly establishing that Commerce previously prejudged its exclusion requests, much less that Commerce will do so on remand after correcting the deficiencies in the record and fully considering the exclusion requests anew.

First, the IG report simply indicates that in some unidentified cases, officials at Commerce engaged in communications that are not reflected in the record. Whether the incidents noted by the IG report involved Borusan's exclusion requests is wholly speculative. Moreover, even if they did, they do not establish that Commerce either prejudged Borusan's requests or will do so on remand.

Second, Commerce's estimated cost of responding to Borusan's FOIA requests merely confirms, as the government's motion admits, that the existing record is inadequate. It does not establish that Commerce prejudged Borusan's exclusion requests or will do so on remand.

Third, the Mercatus studies show at most that when a domestic steel producer objected to a steel tariff exclusion request, Commerce delayed disposition of that request. The studies do not show how many opposed requests were ultimately granted or denied. Nor do they address the average length of delays, much less the reasons for the delays (aside from an objection being filed). The Mercatus studies simply do not support the conclusion that Commerce prejudged Borusan's exclusion requests before or will do so on remand.

In sum, on this thin evidentiary record, the Court must apply the presumption of regularity to which Commerce is entitled.

Finally, a remand at this early stage of the litigation will promote judicial economy. If the Court were to adjudicate the case on the existing deficient record, the result could well be a remand for reconsideration, which Borusan's complaint requests as an alternative form of relief. *See* ECF 5, at 17. Thus, remanding for reconsideration now essentially expedites relief that Borusan seeks and may obviate the necessity for remand (or, perhaps, any proceedings) later. At a minimum, a remand now for correcting the record and fully reconsidering all aspects of the challenged 19 exclusion denials may serve to better frame the issues for the Court to decide.

* * *

For the foregoing reasons, therefore, it is hereby

ORDERED that Defendant's motion for voluntary remand (ECF 12) is **GRANTED**; and it is further

ORDERED that the Department of Commerce's final determinations not to exclude 19 products from the remedy imposed by the President under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, as challenged in this action, are remanded to Commerce to (1) identify and correct all deficiencies in the existing administrative record, including but not limited to locating and adding all of Commerce's communications with domestic industry objectors and the International Trade Administration concerning Borusan's exclusion requests insofar as such communications are not part of the existing record, and (2) fully reconsider all of Borusan's exclusion requests; and it is further

ORDERED that Defendant shall file the remand results no later than 60 days from the date on which this order is entered; and it is further

ORDERED that Defendant shall file the corrected administrative record for the initial proceeding and the administrative record for any remand proceedings no later than 14 days after filing the remand results; and it is further

ORDERED that Defendant's obligation to respond to Plaintiff's complaint is moot in view of this order; and it is further

ORDERED that within 30 days of Defendant's filing of the remand results, the parties shall meet and confer and, if possible, file a proposed stipulated judgment disposing of this action, but if the parties are unable to agree regarding the disposition of this action, Plaintiff shall file an amended complaint within 30 days of Defendant's filing of the remand results.

Dated: June 25, 2020
New York, New York

/s/ M. Miller Baker
JUDGE