U.S. Customs and Border Protection

Slip Op. 15–21

TAI SHAN CITY KAM KIU ALUMINIUM EXTRUSION CO. LTD., Plaintiff, v. UNITED STATES, Defendant, ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 14–00016

[Remanding Commerce's determination issued in the final results of the countervailing duty administrative review covering aluminum extrusions from China for Commerce to corroborate Plaintiff's rate.]

Dated: March 20, 2015

William Ellis Perry, Dorsey & Whitney, LLP, of Seattle, WA, argued for plaintiff. With him on the brief was *Emily Lawson*.

Tara Kathleen Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *Jessica Marie Link*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Kelly, Judge:

This matter is before the court on Plaintiff's, Tai Shan City Kam Kiu Aluminium Extrusion Co. Ltd., ("Kam Kiu" or "Plaintiff"), USCIT Rule 56.2 motion for judgment on the agency record challenging the United States Department of Commerce's ("Commerce") administrative review of the countervailing duty order covering certain aluminum extrusions from the People's Republic of China ("PRC"). *See Aluminum Extrusions From the People's Republic of China*, 79 Fed. Reg. 106 (Dep't Commerce Jan. 2, 2014) (final results of countervailing duty administrative review; 2010 and 2011) ("*Final Results*"); *see also Aluminum Extrusions From the People's Republic of China*, 76 Fed. Reg. 30653 (Dep't Commerce May 26, 2011) (countervailing duty order). Kam Kiu commenced this action, pursuant to section 516A of the Tariff Act of 1930 ("Tariff Act" or the "Act"), as amended, 19 U.S.C.

§ 1516a (2012),[1] to challenge Commerce's use of adverse facts available ("AFA") in calculating Kam Kiu's rate.[2] Defendant, United States, and Defendant-Intervenor, Aluminum Extrusions Fair Trade Committee, oppose this motion. Kam Kiu argues that Commerce abused its discretion by not considering Kam Kiu's quantity and value ("Q&V") submission, and, as a result, applying a rate based on facts available with an adverse inference. Alternatively, Kam Kiu argues that the rate Commerce calculated for Kam Kiu was not supported by substantial evidence or in accordance with law. For the following reasons, Commerce acted reasonably and within its discretion in disregarding late submitted information, using facts otherwise available and applying an adverse inference to Kam Kiu. However, Commerce's AFA rate as applied to Kam Kiu is unsupported by substantial evidence because Commerce failed to corroborate the rate.

BACKGROUND

Kam Kiu is a Chinese producer and exporter of aluminum extrusions that are subject to the countervailing duty order in question. On May 1, 2012, Commerce published a notice of opportunity to request an administrative review for the first review period, September 7, 2010 through December 31, 2011. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 77 Fed. Reg. 25679, 25680 (Dep't Commerce May 1, 2012) (opportunity to request administrative review). A U.S. importer, MacLean Power Systems, a subsidiary of MacLean-Fogg Company (collectively, "MacLean-Fogg"), timely requested a review of its imports from Kam Kiu on May 30, 2012 and certified that it had served a copy of its review request on Kam Kiu. *See* MacLean-Fogg Letter Requesting Review of Kam Kiu 1–2, PD 37 at bar code 3078655–01 (May 31, 2012); *see also* Issuance of Quantity and Value Questionnaire 2, PD 127 at bar code 3099325–01 (Oct. 1, 2012). Thereafter, Commerce initiated the first administrative review on July 12, 2012, for 67 companies, including

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

[2] While the statute provides separately for the use of facts otherwise available and the subsequent application of an adverse inference regarding those facts, Commerce uses the term "total adverse facts available rate", "AFA rate", or "total AFA rate", to refer a rate resulting from the application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e. *See e.g.*, *Decision Memo* 8 (explaining "the Department's approach in recent CVD investigations and reviews" for calculating "total AFA rate for non-cooperative companies").

Kam Kiu, and published notice in the Federal Register. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 40565, 40566–73 (Dep't Commerce July 10, 2012).

In selecting mandatory respondents, Commerce determined to limit the number of respondents it would review by choosing companies that accounted for the largest volume of subject merchandise. *See* CBP Query Results Memorandum 1–2, PD 92 at bar code 3097282–01 (Sept. 18, 2012). After identifying inconsistencies in the CBP database, which Commerce used to identify potential mandatory respondents, Commerce determined not to rely solely on the CBP query results to select mandatory respondents. *Id.* at 2. Instead, Commerce issued Q&V questionnaires to each company that had been identified in the CBP data query. *See id.*; *see generally* CBP Query Results Data, PD 93 at bar code 3097282–02 (Sept. 18, 2012). Kam Kiu was not listed in the CBP query results but MacLean-Fogg submitted an entry form showing an entry from Kam Kiu and certified that it had served a copy of the letter on Kam Kiu. *See* MacLean-Fogg Letter Pertaining to Entry from Kam Kiu, PD 111 at bar code 3098593–01, CD 18 at bar code 3098573–01 (Sept. 25, 2012).

On October 1, 2012, Commerce sent a Q&V questionnaire to Kam Kiu via UPS, which set a deadline to respond by October 18, 2012. *See* Issuance of Quantity and Value Questionnaire 2, Att. Q&V Questionnaire, PD 127 at bar code 3099325–01 (Oct. 1, 2012). Commerce notified MacLean-Fogg's counsel by telephone that it had issued the questionnaire to Kam Kiu. *See* Memorandum Re Contacting Potential Respondents 2, PD 131 at bar code 3099979–01 (Oct. 4, 2012). Kam Kiu and two other companies which had been sent questionnaires did not file responses within the October 18, 2012 deadline.

On June 3, 2012, seven days before the preliminary results were published, Kam Kiu submitted its Q&V response and explained that MacLean-Fogg never informed it that a review had been requested, nor did Kam Kiu's management realize that it had received a Q&V questionnaire. *See generally* Kam Kiu Q&V Questionnaire Response, PD 356 at bar code 3138491–01 (June 3, 2013); *see also* Issues and Decision Memorandum for Aluminum Extrusions from the People's Republic of China 111, C-570–968, (Dec. 26, 2013), *available at* http://enforcement.trade.gov/frn/summary/prc/2013–31407–1.pdf (last visited Mar. 11, 2015) ("Decision Memo"). Commerce treated Kam Kiu as uncooperative for the Preliminary Results. *Aluminum Extrusions From the People's Republic of China*, 78 Fed. Reg. 34649, 34650 (Dep't Commerce June 10, 2013) (preliminary results of countervailing duty

administrative review; 2010 and 2011) ("*Preliminary Results*"). Despite arguments contained in Kam Kiu's late submission and in its case brief, Commerce continued to find Kam Kiu uncooperative in the Final Results and assigned Kam Kiu a 121.22% rate based on facts otherwise available with an adverse inference. *Final Results* at 107.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012), and 19 U.S.C. § 1516a(a). "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).

DISCUSSION

I. Commerce did not act unreasonably or abuse its discretion by disregarding Kam Kiu's Q&V submission and assigning a rate based on AFA to Kam Kiu.

Commerce initiates administrative reviews of countervailing duty orders, at least once every 12 months, if it receives a request for a review. *See* 19 U.S.C. § 1675(a)(1)(A). In general, in order to determine rates under §1675(a), Commerce is directed to "determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise." 19 U.S.C. § 1677f-1(e)(1). However, where Commerce "determines that it is not practicable to determine individual countervailable subsidy rates . . . because of the large number of exporters or producers involved in the investigation or review," Commerce may "determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to" a statistically valid sample of exporters or producers or to "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that [Commerce] determines can be reasonably examined." 19 U.S.C. § 1677f-1(e)(2)(A)(i)-(ii). Alternatively, Commerce may "determine a single country-wide subsidy rate to be applied to all exporters and producers." 19 U.S.C. § 1677f-1(e)(2)(B). Additionally, if Commerce limits its examination pursuant to 19 U.S.C. § 1677f-1(e)(2)(A), the statute requires Commerce to use the individually calculated rates "to determine the all-others rate under section 1671d(c)(5) . . . ." 19 U.S.C. § 1677f-1(e).

In order to select mandatory respondents from exporters or producers accounting for the largest volume under 19 U.S.C. § 1677f-1(e)(2)(A)(ii), Commerce relies on information from CBP Query Results and, where the results are unreliable, Q&V questionnaire

responses. *See e.g.*, CBP Query Results Memorandum 2, PD 92 at bar code 3097282–01 (Sept. 18, 2012). Because there are strict statutory deadlines for completing administrative reviews on countervailing duty orders, *see* 19 U.S.C. § 1675(a)(3), Commerce sets deadlines for parties to submit their Q&V questionnaire responses. *See* Issuance of Quantity and Value Questionnaire, PD 127 at bar code 3099325–01 (Oct. 1, 2012).

Moreover, Commerce has discretion to use facts otherwise available to make determinations under certain circumstances. *See* 19 U.S.C. § 1677e. More specifically, where "necessary information is not available on the record," or a party "withholds information that has been requested by [Commerce] . . . [or] significantly impedes a proceeding . . . [Commerce] . . . shall, subject to section 1677m(d) . . . use the facts otherwise available in reaching the applicable determination . . . ." 19 U.S.C. § 1677e(a). If Commerce additionally "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce] . . . [Commerce] . . . , in reaching the applicable determination . . . may use an inference that is adverse to the interests of the party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

Under the foregoing statutory framework, Commerce's determination to use facts otherwise available and apply an adverse inference was both reasonable and within its discretion. Consistent with its authority to individually review fewer than all exporters or producers, Commerce issued Q&V questionnaires to companies in order to aid its selection of the mandatory respondents in this countervailing duty review. *See* CBP Query Results Memorandum 2, PD 92 at bar code 3097282–01 (Sept. 18, 2012). The Q&V questionnaires, which require companies to detail their sales, were issued on October 1, 2012, and the deadline for responses was October 18, 2012. *See* Issuance of Quantity and Value Questionnaire Att. Q&V Questionnaire, PD 127 at bar code 3099325–01 (Oct. 1, 2012). While the questionnaires clearly explained "that due to time constraints in this administrative review, the Department does not intend to extend the deadline for responding to the attached Quantity and Value Questionnaire," *id.* at 1, Kam Kiu filed its Q&V questionnaire response with Commerce on June 3, 2013, over seven months late and on the day Commerce signed the preliminary results. *See Decision Memo* 111.

Using the Q&V questionnaire responses, Commerce selected the mandatory respondents in early November 2012, a decision that informed Commerce's entire administrative review. Respondent Selection Memorandum, PD 206 at bar code 3104450–01 (Nov. 5, 2012).

Commerce's administrative process in this countervailing duty review could be compromised if it had to consider the late-filed response to its Q&V questionnaire in selecting mandatory respondents. Further, requiring Commerce to consider the late-filed response without using facts available or adverse inferences would undermine the integrity of the procedures Commerce has put in place and the system itself. A respondent could simply choose not to submit a Q&V questionnaire response if it wished to avoid being selected as a mandatory respondent in the hopes it might obtain a more favorable rate. Allowing the respondents to opt out of compliance with Commerce's request in such a fashion would run counter to the purpose of providing Commerce with the discretion to impose adverse inferences, *see* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–465, vol. 1, at 869070 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 ("SAA"), and would affect Commerce's ability to conduct administrative reviews. To combat such a strategy, Commerce would have to restart its respondent selection process each time a respondent submitted Q&V information late, or, as in this case, after signing the preliminary results. Such a systemic burden outweighs any potential benefit to Kam Kiu. The court finds that Commerce acted reasonably and did not abuse its discretion.

Kam Kiu's arguments to the contrary are unpersuasive. Kam Kiu sets forth the circumstances which it claims led it to miss the deadline for submitting the Q&V questionnaire response. Kam Kiu points to an affidavit from its Chief Marketing Officer explaining that although Kam Kiu technically received the questionnaire, it was not aware of it because the questionnaire was not addressed to anyone in particular. *See* Kam Kiu Q&V Questionnaire Response Att. 2, PD 356 at bar code 3138491–01 (June 3, 2013). According to Kam Kiu, due to the lack of a specific addressee, the questionnaire was placed with "promotion materials" that Kam Kiu receives, so no one realized its significance. *Id.* Kam Kiu claimed that only after Kam Kiu's attorney alerted the company to the questionnaire and the following "intensive search" did Kam Kiu discover the questionnaire and submit its response. *Id.*

The reasons Kam Kiu provides for failing to timely respond demonstrates that it did not act to the best of its ability. All of Kam Kiu's justifications revolve around its lack of awareness of both the administrative review and the undiscovered Q&V questionnaire. *See e.g.*, Kam Kiu's Administrative Case Brief 2–3, PD 414 at bar code 3147136–01 (July 26, 2013); Mem. P. & A. Supp. Pl.'s Mot. Summ. J. Agency R. 3, Sep. 3, 2014, ECF No. 36 ("Pl.'s Mem."). Kam Kiu failed

to cooperate because it did not have procedures in place to ensure that it could comply with Commerce's requests. Kam Kiu's failure to maintain adequate procedures cannot excuse its inaction here. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce regularly uses Q & V questionnaires in order to determine mandatory respondents. *See* Def.'s Resp. 3. Furthermore, Kam Kiu has participated in other administrative proceedings. *See* Def.'s Resp. 10. It was aware that Commerce could send a Q & V questionnaire through the mail, and therefore Kam Kiu should have had procedures in place to timely locate and respond to materials from Commerce.

Moreover, the Q&V questionnaire was not the only notice that Commerce provided. Commerce published notice of the initiation in the Federal Register specifically identifying Kam Kiu. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 40565, 40566–73 (Dep't Commerce July 10, 2012). Moreover, MacLean-Fogg certified that it had served a copy of its request for review on Kam Kiu. *See* MacLean-Fogg Letter Requesting Review of Kam Kiu, PD 37 at bar code 3078655–01 (May 31, 2012). On these facts, the court cannot say that Commerce abused its discretion or acted unreasonably in disregarding the untimely filed Q&V questionnaire response.

Kam Kiu relies heavily on *Grobest & I-Mei Indust. (Vietnam) Co. v. United States*, 36 CIT__, 815 F. Supp. 2d 1342 (2012), to argue that the court should find Commerce abused its discretion here. There, the court found that Commerce abused its discretion by rejecting a respondent's separate rate certification ("SRC") and applying the NME-wide rate. *Id.* at 1365. In that case, a number of facts informed the court's decision, including: the margin assigned to respondent was likely inaccurate; Commerce found in the investigation and prior two reviews that the same respondent was separate; the rejected certification continued to show respondent was separate; the burden on Commerce would likely have been minimal as Commerce did not need further inquiry beyond the certification in the past two reviews; the untimely certification was submitted seven months prior to the preliminary results and a year before the final results; and, the respondent was diligent in seeking to correct the omission. *See id.* at 1364–66.

The facts and circumstances that led the *Grobest* court to find an abuse of discretion are highly distinguishable from those set forth by Kam Kiu. Kam Kiu submitted its Q&V questionnaire response much later in the proceeding than the untimely filed SRC in *Grobest*. Further, as Commerce explains, the failure to timely file a Q&V ques-

tionnaire response places a great burden on the mandatory respondent selection process, which in turn has implications for calculating the all-others rate. *See Decision Memo* 111. The court simply cannot equate this burden with the minimal burden the court found was imposed on Commerce in *Grobest*. *Grobest*, 815 F. Supp. 2d at 1366–67.

Kam Kiu also argues that Commerce acted arbitrarily in applying a rate based on facts otherwise available and adverse inferences to Kam Kiu when it applied the all-others rate to several voluntary respondents who it claims were similarly situated. While Commerce cannot treat similarly situated parties differently without adequate explanation, *see e.g.*, *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed.Cir. 2001), Kam Kiu and the nine respondents that had their late responses accepted and considered are not similarly situated. Kam Kiu was not a voluntary respondent; it was specifically asked for the information contained in the Q&V questionnaire. *See* Issuance of Quantity and Value Questionnaire 2, PD 127 at bar code 3099325–01 (Oct. 1, 2012). Kam Kiu's situation differed from the voluntary respondents. The issue is not when a given respondent submits its Q&V response, but rather, whether a respondent has met its obligation to comply with a request for information. Kam Kiu's obligation was to comply with Commerce's request for information to the best of its ability, while the voluntary respondents had no such obligation. Kam Kiu failed to meet its obligation. Thus, Commerce did not act arbitrarily or abuse its discretion by finding Kam Kiu uncooperative.

Instead, Kam Kiu most resembles the two other respondents that failed to submit their Q&V questionnaire responses by Commerce's deadline. Those parties were also assigned AFA rates. *Decision Memo* 7. Kam Kiu asserts that it is not similarly situated because those companies did not submit any Q&V questionnaire responses at all, while Kam Kiu merely filed a late response. Reply Brief Supp. Pl.'s Rule 56.2 Mot. J. Agency R. 5, Dec. 3, 2014, ECF No. 44 ("Pl.'s Reply"). This argument, again, draws an incorrect comparison. The proper consideration here is whether respondents complied with Commerce's request for information. 19 U.S.C. § 1677e(b). Both Kam Kiu and the two respondents who never submitted responses failed to comply with Commerce's deadline, and thus were uncooperative. The fact that Kam Kiu submitted its response over seven months late, on the signature day for the preliminary results, instead of not responding at all, does not undercut Commerce's findings that Kam Kiu withheld information that was requested, significantly impeded the proceeding, and failed to cooperate by not acting to the best of its ability to

comply with a request for information. *See* 19 U.S.C. § 1677e(a)(2)-(b).

Kam Kiu further argues that Commerce erred when applying facts otherwise available, as the late-filed Q&V questionnaire response was not rejected but placed on the record. Pl.'s Reply 3 n.3. Kam Kiu asserts that because the Q&V response is on the record despite being untimely, Commerce must consider it. Pl.'s Reply 3–4 n.3. However, the statute permits Commerce to disregard information that does not meet its requirements, even if it remains on the record. 19 U.S.C. § 1677e(a). The statute allows Commerce to fill gaps in the record with facts otherwise available and to apply an adverse inference where Commerce makes the requisite findings. *See* 19 U.S.C. § 1677e(a)(2)(A)-(C). Commerce did not have to consider the response when determining whether to use facts otherwise available, even though the response remained on the record.

II. Commerce failed to corroborate Kam Kiu's AFA rate to the extent practicable.

Commerce must, to the extent practicable, corroborate an AFA rate and its failure to do so in this case renders its determination unsupported by substantial evidence. Specifically, "[w]hen [Commerce] relies on secondary information rather than on information obtained in the course of an investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). "Secondary information" includes information derived from "[t]he petition; [a] final determination in a countervailing duty investigation or antidumping investigation; [a]ny previous administrative review, new shipper review, expedited antidumping review, section 753 review or section 762 review." 19 C.F.R. § 351.308(c)(1)(i)-(iii) (2014).[3] "Independent sources" include, but are not limited to, "published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review." 19 C.F.R. § 351.308(d).

To corroborate, means Commerce "will examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d); *see also* SAA at 4199. To determine that the secondary information has probative value, Commerce examines the reliability and relevance of the secondary information. *See Decision Memo* 9.

Accordingly, although Commerce has broad discretion to employ adverse inferences to ensure that an uncooperative party does not obtain a more favorable result by failing to cooperate than if it had

[3] Further citations to Title 19 of the Code of Federal Regulations are to the 2014 edition, for which all cited regulations are substantively identical to the 2012 and 2013 editions.

cooperated fully, *see* SAA at 4198–99, the Court of Appeals has explained that "Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual [net countervailable subsidy rate]." *F. Ili De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).[4] Instead, Commerce must assign rates that are "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *F. lli De Cecco*, 216 F.3d at 1032; *see also Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (explaining that Congress tempered the deterrent purpose of using 19 U.S.C. § 1677e(a)-(b) with the corroboration requirement).

Moreover, the corroboration requirement helps to maintain the somewhat contradictory purposes of the antidumping and countervailing duty statutes as a whole (*i.e.*, remedial not punitive) and the adverse inference section of the statute (*i.e.*, deterrence). If Commerce does not corroborate to the extent practicable, questions arise about whether the rate applied is punitive.

Kam Kiu specifically argues that Commerce unlawfully assigned rates from location specific subsidy programs spanning across the entire PRC and one program Kam Kiu claims was plainly not for the industry within which Kam Kiu operates. Kam Kiu further argues that applying all the rates resulted in a rate that was unsupported by substantial evidence and punitive. Commerce asserts that it has corroborated the AFA rate for Kam Kiu to the extent practicable.

Commerce's AFA methodology has two parts. First, Commerce identifies all subsidies from which Kam Kiu could conceivably have benefited. Second, it assumes that Kam Kiu, in fact, could have benefited from all of these subsidies simultaneously.

Specifically, Commerce explains that it

> computes the total AFA rate for non-cooperative companies generally using program-specific rates calculated for the cooperating respondents in the instant review or in prior segments of the instant proceeding, or calculated in prior CVD cases involving the country under review (in this case, the PRC), unless it is clear that the industry in which the respondents operate cannot use the program for which the rates were calculated.

[4] Many of the cases relied upon by both parties deal with 19 U.S.C. § 1677e in the antidumping duty context. In recent decisions dealing with 19 U.S.C. § 1677e in the countervailing duty context, the Court of Appeals and this Court have continued to cite these cases as precedent and thus the court will rely on them as well. *See e.g.*, *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1373 (Fed. Cir. 2014).

Decision Memo 8; *see also* Def.'s Resp. 18 (explaining that here Commerce identified 92 countervailable subsidy programs that were examined in this review). It then examined the income tax programs and inferred that Kam Kiu paid no income taxes and thus took full advantage of all such programs. *Decision Memo* 8. Next, Commerce considered all programs other than those involving income tax rate reduction or exemption. *Id.* For these programs Commerce explained its hierarchy:

> first . . . where available [it applied] the highest above de minimis subsidy rate calculated for an identical program from any segment of this proceeding[; next, it] . . . applied, where available, the highest above de minimis subsidy rate calculated for a similar program from any segment of this proceeding[, however,] [b]ecause the rates calculated in the underlying investigation were calculated for voluntary respondents, [it did] not us[e] any of those rates as AFA rates in this administrative review[; next it] . . . applied the highest non-de minimis rate calculated for the same or similar program (based on treatment of the benefit) in another PRC CVD proceeding[; next it] . . . applied the highest calculated subsidy rate for any program otherwise listed from any prior PRC CVD case, so long as the non-cooperating companies conceivably could have used the program for which the rate was calculated.

Decision Memo 8–9.

Next, Commerce explains why the rates used are reliable and relevant. It explains they are reliable because the rates used are "subsidy rates calculated in this review or other PRC CVD final determinations" and "the calculated rates were based on information about the same or similar programs." *Decision Memo* 9. Moreover, the programs are relevant because, "[f]or those programs for which the Department has found a program-type match . . . [it used] . . . the same or similar programs . . . [and] [f]or the programs for which there is no program-type match . . . [it used] . . . the highest calculated subsidy rate for any PRC program which the non-cooperative companies could receive a benefit . . . [which are] actual calculated CVD rates for a PRC program . . . ." *Id.* at 10. Commerce further explained that these rates were calculated for periods close to the POR. *Id.*

Finally, Commerce specifically addressed Kam Kiu's argument that it was unreasonable to attribute location-specific subsidies to the company. *Decision Memo* 62. It explained

> [w]ith the exception of the company's mailing address, the record contains no information on the location of facilities owned

> by Taishan City Kam Kiu or facilities of any possible subsidiaries or other cross-owned affiliated companies. Although Taishan City Kam Kiu relies on the CIT's decision in *MacLean Fogg I* and *MacLean Fogg II* for the proposition that it would be unreasonable to assume that all of the companies subject to the all others rate received subsidies in every region in China, importantly, in affirming the Department's determination not to calculate specific rates for each all others company based on the addresses of the companies, the CIT held: "Plaintiffs' reliance on the addresses provided in the Petition is unavailing because Commerce raises the reasonable concern that these addresses do not accurately convey locations of manufacturing facilities nor do[] they account for potential cross-ownership." It is possible that Taishan City Kam Kiu or an affiliated company has facilities in the areas where the Department has found that subsidies are available. As such, because the Department has no knowledge as to Taishan City Kam Kiu's locations and/or cross ownership, the application of AFA for regional, provincial subsidy programs is warranted.

Decision Memo 62 (citation omitted).

Commerce must corroborate assumptions to the extent practicable, and while it has tried to corroborate the first assumption, it has not addressed the second assumption at all. Rather than corroborating programs with independent sources, Commerce addresses corroboration by meticulously detailing why each step in its AFA methodology leads to the selection of programs that are nonetheless probative, *i.e.*, reliable and relevant. Commerce may very well apply its methodology, but the programs selected, and the application of all of those selections to Kam Kiu simultaneously, must still be corroborated to the extent practicable with independent sources reasonably at its disposal. *See* 19 U.S.C. § 1677e(c).

Commerce's explanations do not address the overarching problem identified above, that Kam Kiu could conceivably benefit from all of the programs simultaneously. While it is true that Commerce's methodology does lead to the selection of programs which have some probative value, evidence reasonably at Commerce's disposal suggests that Kam Kiu could not have benefited from all of these programs at the same time. Even if Kam Kiu's mailing address does not definitively establish Kam Kiu's location and cross-ownership, Commerce can use other information available on the record to corroborate whether Kam Kiu would be the type of company to benefit from subsidies in locations throughout the PRC. For example, Commerce

has Kam Kiu's Q&V questionnaire response on the record. While the court found Commerce did not abuse its discretion by disregarding the untimely response for purposes of identifying mandatory respondents, Commerce may wish to consider the Q&V response, in relation to other Q&V data, to corroborate. *See* 19 U.S.C. § 1677e(c). Further, Kam Kiu has participated in other administrative proceedings.[5] Commerce can use information from those proceedings to corroborate, just as it uses information from other respondents in other proceedings in its adverse inference methodology. Commerce has also investigated both voluntary and mandatory respondents in the investigation and this review. *See* 19 C.F.R. § 351.308(d) (explaining that among other things, "information obtained from interested parties during the investigation or review" are independent sources that Commerce uses to corroborate). Commerce may wish to compare the ability of voluntary respondents to use various types of subsidies from various locations in its corroboration analysis even if it declines to use their rates in its adverse inference methodology. If no respondent in the investigation or review benefitted from subsidies in all the locations throughout the PRC, it is not apparent to the court what in the record supports Commerce's finding that Kam Kiu could have. It is not the court's role to say that particular information would corroborate Commerce's findings. Nonetheless, it is the court's role to determine whether Commerce has acted reasonably. Commerce can either attempt to corroborate Kam Kiu's ability to benefit from these programs simultaneously in the first instance, or can adjust its methodology as applied to Kam Kiu and corroborate its findings under its new methodology.

Commerce's methodology reasonably identifies subsidies from which Kam Kiu could have conceivably benefited but does not link the ability to benefit from all of these programs simultaneously to Kam Kiu. Tellingly, Defendant states that the rate chosen "provided a reasonable estimate of the level of subsidization provided by the Chinese government." Def.'s Resp. 20. However, Commerce calculates net countervailable subsidy rates based in part on the benefit con-

[5] For example, Plaintiff points to *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30650 (Dep't Commerce May 26, 2011) (antidumping duty order). Pl.'s Reply 10. According to Kam Kiu, the Antidumping Duty Order contains evidence that Kam Kiu has only one location. *Id.* "Since Commerce linked exporter and producer margins in the initial investigation, if Taishan City Kam Kiu had multiple affiliated producers in different locations in China, it would have had to report those producers in its Separate Rates application to get a valid separate antidumping rate and the other producers would have been reflected in the antidumping order itself." *Id.* Commerce may decide to look to this order on remand to determine whether it contains independent sources to corroborate.

ferred to individual exporters and producers. *See* 19 U.S.C. § 1677f-1(e); 19 U.S.C. § 1671(a); 19 U.S.C. § 1675 (a)(1)(A); 19 U.S.C. § 1677(5)(E), (6). Further, countervailing duty cases are different from antidumping cases where Commerce assumes respondents, who do not rebut the presumption of government control, are a part of the country-wide entity.[6] Here, Commerce has turned corroboration on its head by presuming that Kam Kiu availed itself of all subsidies provided by the Chinese government, and only eliminating programs Kam Kiu demonstrated it could not have conceivably used. *Decision Memo* 9. As applied to Kam Kiu, this method was not consistent with Commerce's obligation to corroborate the rate assigned to Kam Kiu's "actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F. lli De Cecco*, 216 F.3d at 1032.

Commerce contends the rate has probative value and is corroborated to the extent practicable because it has not identified any independent information to disprove its rate. *See Decision Memo* 9, 62. Commerce's discretion to adopt a methodological approach for establishing an adverse inference does not permit it to throw its hands in the air at the corroboration stage. Here, its determination effectively disaggregates each rate applied to Kam Kiu and explains why each rate has probative value rather than explaining why Kam Kiu, or a company like Kam Kiu, could actually have received subsidies from such a broad swath of the PRC. Commerce cannot satisfy its burden in this manner. The burden of corroboration is an affirmative burden placed on Commerce, to temper its discretion in selecting information. 19 U.S.C. § 1677e(c).

While the Court of Appeals affirmed a rate established solely by a methodological approach in *Essar Steel*, that case presented a very different set of facts from this case. There, Commerce found, despite the respondent's attestations to the contrary, that the respondent had an operating production facility in Chhattisgarh, India. *Essar Steel*, 753 F.3d at 1370–71. Commerce thus proceeded to apply an adverse inference that the respondent availed itself of subsidies offered by the state of Chhattisgarh. *Id.* at 1372. The Court of Appeals explained that the only respondent being investigated, the state government of

[6] In the NME AD context, Commerce presumes that all commercial entities are controlled by the state unless they can show lack of control. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997). Entities that do not rebut the presumption of state control receive the dumping rate assigned to the country-wide entity, often based on 19 U.S.C. § 1677e(b). *See e.g.*, *Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1312–13, 587 F. Supp. 2d 1319, 1326–28 (2008). Thus, Commerce is required to corroborate the rate with respect to the country-wide entity rather than an individual company. However, in countervailing duty cases Commerce does not make the same presumption of state control and thus must corroborate the rate applied to an individual respondent.

Chhattisgarh, and the government of India, failed to cooperate and provide information regarding company specific benefits pursuant to the programs in question. *Id.* at 1374. It further explained that there were no other independent sources of company specific benefits on the record. *Id.* Moreover, the Court of Appeals reviewed Commerce's methodology with regard to benefits received from the specific programs, not programs spanning throughout India. Here, Commerce's methodology assumes Kam Kiu's ability to benefit from programs across China simultaneously and Commerce has information from which it could attempt to corroborate Kam Kiu's ability to use these programs simultaneously.

The lack of corroboration in this case leaves the court concerned that the rate it applied to Kam Kiu is punitive. Commerce applied a rate of 121.22 % for the years 2010 and 2011 to Kam Kiu and the other uncooperative respondents. *See Final Results*, at 107–108. This rate is in stark contrast to the rates applied to the mandatory respondents for 2010 of 15.97% and 1.02% and for 2011 of 15.66% and 1.51%, rates which themselves carry adverse inferences. *See e.g.*, *Decision Memo* 10–11. Commerce has not explained how this rate relates to Kam Kiu or why it is necessary to deter noncompliance. Commerce chose the highest possible rate for each subsidy that Kam Kiu could conceivably have used. Thus, the benefit assigned to Kam Kiu for each possible subsidy includes an adverse inference. Additionally, inherent in Commerce's methodology of applying all conceivably used subsidies to Kam Kiu is another adverse inference. This building of adverse inferences on top of each other to create a rate that Commerce does not corroborate in the aggregate leaves the court with the impression that the rate is punitive. Commerce's finding that the rate applied is a reasonably accurate estimate of Kam Kiu's actual countervailing duty rate albeit with some built-in increase to deter noncompliance, is not supported by substantial evidence.

Defendant also defends Commerce's use of the "Export Rebate for Mechanic, Electronic, and High-Tech Products" program in the AFA rate. Defendant explains that although neither of the mandatory respondents used the program, one of the voluntary respondents in the investigation did and thus, in accordance with its methodology, Commerce properly included the program. Def.'s Resp. at 23. Moreover, because neither respondent in the review used the program, it looked at the same program in a different review, but did not use that rate because it was *de minimis*. *Id.* Then in accordance with its hierarchy it used a similar program from a prior review involving China. *Id.* at 24. Like the use of location specific subsidies from across China, Commerce has not corroborated the use of this program by

Kam Kiu. In order for Commerce to apply this subsidy to Kam Kiu, doing so must be based upon a reasonable reading of the record. Commerce's duty to corroborate ensures that the rate is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F. lli De Cecco*, 216 F.3d at 1032. Evidence that mandatory respondents did not use the program detracts from Commerce's finding. Without explaining how Kam Kiu could have availed itself of the benefits of this program, Commerce's finding is not supported by substantial evidence. s finding is not supported by substantial evidence.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that Commerce's determination is remanded for further consideration consistent with this opinion; and it is further,

ORDERED that Commerce shall file its remand determination with the court within 60 days of this date; and it is further,

ORDERED that Plaintiff shall have 30 days thereafter to file objections; and it is further,

ORDERED that Defendant and Defendant-Intervenor shall have 15 days thereafter to file responses.

Dated: March 20, 2015
New York, NY

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

Slip Op. 15–23

FENGCHI IMP. & EXP. CO., LTD. OF HAICHENG CITY, FENGCHI REFRACTORIES CO. OF HAICHENG CITY, AND FEDMET RESOURCES CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and RESCO PRODUCTS, INC., AND ANH REFRACTORIES COMPANY, Defendant-Intervenors.

Before: Nicholas Tsoucalas,
Senior Judge
Court No.: 13–00186

[Plaintiffs' motion for judgment on the agency record is denied.]

Dated: March 25, 2015

Donald B. Cameron, Brady W. Mills, Julie C. Mendoza, Mary S. Hodgins, R. Will Planert, and *Sarah S. Sprinkle*, Morris Manning & Martin LLP, of Washington, DC, for plaintiffs.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and

Patricia M. McCarthy, Assistant Director. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Camelia C. Mazard, Robert W. Doyle, Jr., and *Andre P. Barlow*, Doyle Barlow & Mazard PLLC of Washington, DC, for defendant-intervenor Resco Products, Inc.

Joseph W. Dorn and *Brian E. McGill*, King & Spalding LLP, of Washington, DC, for defendant-intervenor ANH Refractories Company.

OPINION AND ORDER

Tsoucalas, Senior Judge:

Plaintiffs Fengchi Import and Export Co., Ltd. of Haicheng City, Fengchi Refractories Co. of Haicheng City, and Fedmet Resources Corporation (collectively "Plaintiffs"), move for judgment on the agency record contesting defendant United States Department of Commerce's ("Commerce") determination in *Certain Magnesia Carbon Bricks From the People's Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 22,230 (Apr. 15, 2013) ("*Final Results*"). Commerce and defendant-intervenors, Resco Products Inc. and ANH Refractories Company, oppose Plaintiffs' motion. For the following reasons, Plaintiffs' motion is denied.

BACKGROUND

Magnesia carbon bricks ("MCBs") from the People's Republic of China ("PRC") are subject to an antidumping duty order. *See Certain MCBs From Mexico and the PRC: Antidumping Duty Orders*, 75 Fed. Reg. 57,257 (Sept. 20, 2010) ("Orders"). On October 31, 2011, Commerce initiated an administrative review of the *Orders*, covering sales of subject merchandise between March 12, 2010 and August 31, 2011 ("2010–2011 Administrative Review"). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 Fed. Reg. 67,133, 67,135 (Oct. 31, 2011). Commerce named Fengchi Import and Export Co., Ltd. of Haicheng City and Fengchi Refractories Co. of Haicheng City, as mandatory respondents.[1] *Id.* Fedmet, a domestic importer of Fengchi's merchandise, joined the review as an interested party. *See* Letter to Commerce re: Antidumping Duty Order on Certain MCBs from the PRC, Administrative Review (3/12/10–8/31/11): Entry of Appearance and APO Ap-

[1] Fengchi Import and Export Co., Ltd. of Haicheng City is a Chinese exporter of MCBs, and Fengchi Refractories Co. of Haicheng City is its affiliated producer. *See Final Results*, 78 Fed. Reg. at 22,230. Throughout the opinion, the court will refer to them collectively as "Fengchi."

plication (Oct. 31, 2012), Public Rec.[2] 137 at 1. On March 14, 2012, Commerce issued its standard nonmarket economy questionnaire to Fengchi, seeking information on Fengchi's factors of production and U.S. sales of subject merchandise. *See* MCBs from the PRC: Antidumping Duty Questionnaire, (Mar. 14, 2012) PR 62 at 1.

Concurrent with 2010–2011 Administrative Review, Commerce conducted a scope inquiry to determine whether magnesia alumina carbon bricks ("MACBs") from the PRC were subject to the *Orders*. *See Certain MCBs from the PRC: Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review*, (Apr. 9, 2013) PR 148 at 1–2 ("*IDM*"). On July 2, 2012, Commerce issued the final results of its scope inquiry, determining that MACBs were within the scope of the *Orders*. *See Certain MCBs from the PRC and Mexico: Final Scope Ruling — Fedmet Resources Corporation* at 1–2, Case Nos. A-201–837, A-570–954 and C-570–955 (July 2, 2012) ("*MACB Scope Ruling*").

After issuing the *MACB Scope Ruling*, Commerce sent a supplemental questionnaire to Fengchi indicating its intention to consider sales of MACBs as part of the 2010–2011 Administrative Review. *See* First Antidumping Administrative Review of Certain MCBs from the PRC: Sections C and D Supplemental Questionnaire,[3] (Aug. 3, 2012) CR 46 at 3. Moreover, Commerce requested that Fengchi confirm whether it had reported all sales of subject merchandise, including MACBs, in its initial questionnaire responses, and if not, it requested that Fengchi provide such information. *See id.* Additionally, Commerce provided Fengchi with sales data it acquired from U.S. Customs and Border Protection ("CBP") indicating that Fengchi made entries of MACBs during the period of review ("POR"). *See id*., att. 2 at 1.

Fengchi did not provide information on its MACB sales in its response to the supplemental questionnaire, but instead, submitted a series of letters to Commerce in which it insisted that Commerce's

[2] Hereinafter, documents in the public record will be designated "PR" and documents in the confidential record designated "CR" without further specification except where relevant.

[3] Petitioner ANH Refractories Company ("ANH") requested that Commerce include MACB sales in the 2010–2011 Administrative Review after Commerce issued the preliminary results of the scope inquiry. *See* Letter to Commerce re: MCBs from China: Scope of the Administrative Review, (Apr. 18, 2012) CR 22 at 2. Fengchi responded that Commerce's preliminary scope ruling was not a final determination and thus Commerce should not require Fengchi to provide information on its MACB sales. *See* Letter to Commerce re: Antidumping Order on Certain MCBs from the PRC; Antidumping Duty Administrative Review, PR 67 at 1–3 (Apr. 23, 2012). However, Commerce did not request information on Fengchi's MACB sales during the 2010–2011 Administrative Review until after it issued the *MACB Scope Ruling*. *See* CR 46 at 3.

request was improper. *See* Letter to Commerce re: Antidumping Order on Certain MCBs from the PRC; Antidumping Duty Administrative Review (3/12/10–8/31/11), (Aug. 9, 2012) PR 104 at 1–5; Letter to Commerce re: Antidumping Order on Certain MCBs from the PRC; Antidumping Duty Administrative Review (3/12/10–8/31/11), (Aug. 14, 2012) PR 106 at 1–2; Letter to Commerce re: Antidumping Order on Certain MCBs from the PRC; Antidumping Duty Administrative Review (3/12/10–8/31/11), (Aug. 29, 2012) PR 114 at 2–4. Fengchi argued that Commerce's request was "extremely unreasonable" and "well past the 90-day deadline" under 19 C.F.R. § 351.225(l)(4), because Commerce initiated the 2010–2011 Administrative Review eight months before it issued the *MACB Scope Ruling*. *See* PR 104 at 3, 4. Commerce offered to extend the deadline for Fengchi to provide MACB sales information on multiple occasions, but Fengchi continuously declined to comply with Commerce's request for information. *See* Letter to Fengchi re: First Antidumping Administrative Review of Certain MCBs from the PRC, (Sept. 7, 2012) PR 125 at 1–2.

Commerce issued the *Preliminary Results* of the 2010–2011 Administrative Review in October 2012. *See Certain MCBs From the PRC: AD Administrative Review; 2010–2011*, 77 Fed. Reg. 61,394 (Oct. 9, 2012) ("*Preliminary Results*"). *See also Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain MCBs from the PRC*, PR 132 (Oct. 1, 2012) ("*PRM*"). Commerce determined that Fengchi's refusal to provide information on its MACBs sales constituted a failure to cooperate with the review to the best of its ability and applied total adverse facts available ("AFA"). *PRM* at 8–9. It selected an AFA rate of 236%, based on the petition rate from the investigation. *PRM* at 10.

Commerce issued the *Final Results* in April 2013, upholding the *Preliminary Results* in their entirety. *Final Results*, 78 Fed. Reg. at 22,230; *see IDM* at 1.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and section 516A(a)(2)(B)(iii) of the Tariff Act of 1930,[4] as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012). The court will uphold Commerce's final determination in an antidumping duty administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a

[4] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition, and all applicable amendments thereto.

conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

Additionally, when reviewing an agency's interpretation of its regulations, the court must give substantial deference to the agency's interpretation, *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1391 (Fed. Cir. 2014) (citing *Torrington Co. v. United States*, 156 F.3d 1361, 1363–64 (Fed. Cir. 1998)), according it "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994) (citations omitted); *accord Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007). In this context, "[d]eference to an agency's interpretation of its own regulations is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own." *Viraj*, 476 F.3d at 1355 (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006).

DISCUSSION

Plaintiffs contests the following aspects of the *Final Results* : Commerce's request for sales information on MACBs; Commerce's application of AFA; Commerce's selection of 236% as the AFA rate. *See* Pls.' Br. Supp. Mot. J. Agency R. at 8–23 ("Pls.' Br.").

As an initial matter, the Court of Appeals for the Federal Circuit ("CAFC") issued an opinion overturning the *MACB Scope Ruling* on June 20, 2014, after the completion of briefing in this case. *See Fedmet Res. Corp. v. United States*, 755 F.3d 912, 914 (Fed. Cir. 2014). Plaintiffs argue in their brief that a reversal of the *MACB Scope Ruling* will resolve the issues in this case because "there would be no lawful basis for Commerce to impose antidumping duties on [MACBs] under the [*Orders*], and thus, no lawful basis for Commerce to have directed Fengchi to report sales of [MACBs] in the administrative review." *Id.* The court must reject this argument. The *Fedmet* litigation concerned the *MACB Scope Ruling*. *Fedmet*, 755 F.3d at 914. In contrast, this case concerns Commerce's ability to request information on products subject to a scope ruling during an administrative review and its imposition of AFA after Fengchi declined to comply with that request. Thus, the CAFC's decision in *Fedmet* does not resolve the legal issues raised in the instant case.

I. Commerce's Request for Information on Fengchi's MACB Sales

The first issue before the court is whether Commerce properly requested that Fengchi provide information on its sales of MACBs during the review. As noted above, Fengchi declined to provide such

information on the theory that Commerce's request violated 19 C.F.R. § 351.225(l)(4). As a result of Fengchi's refusal to provide information, Commerce imposed AFA. Plaintiffs claim that Commerce's request was inconsistent with 19 C.F.R. § 351.225(l)(4) because Commerce issued the scope ruling on MACBs 245 days after the initiation of the review. Pls.' Br. at 8. Alternatively, Plaintiffs claim that even if Commerce's interpretation of the regulation was proper, it was nevertheless impractical for Commerce to request that information so late in the review. *Id.* at 14–16.

A. Commerce's interpretation of 19 C.F.R. § 351.225(l)(4) was reasonable.

Under 19 C.F.R § 351.225(l)(4), where Commerce issues a scope ruling that a product is within the scope of an order within ninety days of the initiation of an administrative review of that same order, Commerce, "where practicable, will include sales of that product for purposes of the review and will seek information regarding such sales." 19 C.F.R § 351.225(l)(4). However, where Commerce issues the scope ruling more than ninety days after the initiation of the administrative review, Commerce "may consider sales of the product for purposes of the review on the basis of non-adverse facts available." *Id.* "However, notwithstanding the pendency of a scope inquiry, if [Commerce] considers it appropriate, [Commerce] may request information concerning the product that is the subject of the scope inquiry for purposes of a review . . . ." *Id.*

Here, Commerce issued the scope ruling on MACBs 245 days after initiating the administrative review at issue. *See PRM* at 8. As noted above, Commerce requested information on Fengchi's MACB sales shortly after issuing the scope ruling, *see* CR 46 at 3, but Fengchi declined to provide the information, insisting that Commerce's request was improper. *See* PR 104 at 1. Commerce insisted that its request was consistent with section 351.225(l)(4) because the regulation does not prohibit Commerce from soliciting information on products that are subject to a scope ruling issued over ninety days after the review begins. *IDM* at 4–5. Rather, according to Commerce, the regulation permits Commerce to decline to collect information in such situations and instead consider sales of the product on the basis of non-adverse facts available. *Id.*

Plaintiffs insist that Commerce's reading of section 351.225(l)(4) is unreasonable. Instead, Plaintiffs suggest that the regulation creates a "bright-line rule": if the scope ruling is issued within ninety days of the initiation of the administrative review, then Commerce will request information on the product subject to that scope ruling if practicable, but if the scope ruling is issued more than ninety days after

the initiation of the review, then Commerce may not request information on the product and may only consider sales of the product based on non-adverse facts available. *See* Pls.' Br. at 8–11. According to Plaintiffs, Commerce's interpretation renders the ninety-day time limit, and therefore much of the regulation itself, "mere surplusage." *Id.* at 13. Moreover, Plaintiffs insist that Commerce indicated that their reading of the regulation was proper during promulgation of the regulation, and in fact, acted in a manner consistent with this interpretation in a prior administrative review. *See id.* at 11–14.

The court must reject Plaintiffs' interpretation because it alters the plain meaning of the regulation. According to Plaintiffs, where Commerce issues a scope ruling more than ninety days after the initiation of an administrative review, Commerce may consider sales of the product for purposes of the review, "but *only* on the basis of non-adverse facts available." *Id.* at 8 (emphasis added). This "bright-line rule" reads the word "only" into the second sentence of the regulation. However, section 351.225(l)(4) provides that in such situations, Commerce "*may* consider sales of the product for purposes of the review on the basis of non-adverse facts available." 19 C.F.R. § 351.225(l)(4) (emphasis added). The language of the regulation is permissive and does not proscribe Commerce's power to request information in the manner Plaintiffs suggest.

Furthermore, Plaintiffs reliance on the regulatory history of section 351.225(l)(4) is misplaced. According to Plaintiffs, Commerce adopted their interpretation of section 351.225(l)(4) at the preliminary rule making stage. Pls.' Br. at 10–12. In particular, Plaintiffs rely on Commerce's comment that, when a final scope ruling is issued more than ninety days after initiation of a review, it is "not practicable" to collect sales information and therefore Commerce "will rely on non-adverse facts available." *Id*. at 11 (citing *Antidumping Duties; Countervailing Duties: Proposed Rules*, 61 Fed. Reg. 7308, 7322 (Feb. 27, 1996)). However, Commerce clearly departed from this interpretation by the final rule making stage. Commerce stated that section 351.225(l)(4) "provides, among other things, that if [Commerce] determines after [ninety] days of the initiation of a review that a product is included within the scope of an order or suspended investigation, [Commerce] may decline to seek sales information concerning the product for purposes of the review." *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27,296, 27,330 (May 19, 1997) ("*Preamble*"). Thus, at the final rulemaking stage, Commerce did not limit itself to reliance on non-adverse facts available, but instead provided itself with flexibility to determine whether to collect information. *See id.*

Plaintiffs also rely on two separate statements by Commerce at the final rule making stage to support its interpretation. First, Plaintiffs note that Commerce rejected a request to extend the ninety-day period when it extends the deadline for the preliminary results of a review, indicating that Commerce did not intend to collect information where the scope ruling is issued after the ninety-day period. *See* Pls.' Br. at 11. Plaintiffs misinterpret Commerce's decision; Commerce rejected the request because it generally makes the decision to extend a deadline for the preliminary results of a review right before that deadline expires and well after the ninety-day period ends. *Preamble*, 62 Fed. Reg. at 27,330. Second, Plaintiffs note that Commerce rejected a suggestion that it collect information for a subsequent review when the scope ruling is issued after the ninety-day period. *See* Pls.' Br. at 11–12. This decision also does not support Plaintiffs' argument; Commerce rejected the suggestion because it was unwilling to collect information for a future review. *Preamble*, 62 Fed. Reg. at 27,330.

Moreover, the prior administrative decision that Plaintiffs cite does not support their position. Plaintiffs rely on *Final Results of Antidumping Duty Administrative Review for Two Manufacturers/Exporters: Certain Preserved Mushrooms From the PRC*, 65 Fed. Reg. 50,183 (Aug. 17, 2000). *See* Pls.' Br. at 12. However, in that case, Commerce issued the scope ruling within ninety days of initiating the review, and thus Commerce did not address the situation before the court in the instant case. *Issues and Decision Memorandum for the Administrative Review of Certain Preserved Mushrooms from the PRC – May 7, 1998, through January 31, 2000; Final Results* at comment 1 (Aug. 17, 2000).

Ultimately, Commerce's interpretation of section 351.225(l)(4) was consistent with the plain language of the regulation. Section 351.225(l)(4) does not proscribe Commerce's power to collect information on a respondent's sales of a product subject to a scope ruling issued over ninety-days after the initiation of the review, so long as it is practicable to do so. 19 C.F.R. § 351.225. It does, however, permit Commerce to decline to collect such information and instead rely on non-adverse facts available. *Id.* Contrary to Plaintiffs' argument, Commerce's interpretation does not render any language in the regulation meaningless: if the scope ruling is issued within ninety-days of the initiation of the review, Commerce, where practicable, will collect information on the product subject to that scope ruling; if the scope ruling is issued more than ninety-days after the initiation of the review, Commerce may collect information on the product, if practicable, but may decline to consider the respondent's information and

rely instead on non-adverse facts available. *See id.* As discussed above, this interpretation is consistent with Commerce's discussion of section 351.225(l)(4) when promulgating the final rule. *See Preamble*, 62 Fed. Reg. at 27,330. Because Commerce's interpretation of the regulation was not plainly erroneous or inconsistent with the regulation, the court defers to Commerce's reading of 19 C.F.R § 351.225(l)(4). *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994) (citations omitted); *accord Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007).

B. Commerce reasonably determined that it was practicable to request MACBs sales information.

Having determined that Commerce's interpretation of section 351.225(l)(4) was reasonable, the court now considers whether it was practicable for Commerce to request information on Fengchi's MACBs sales. Plaintiffs insist that there was not sufficient time remaining in the review for Commerce to consider Fengchi's sales of MACBs. Pls.' Br. at 14–17. Specifically, Plaintiffs argue that because consideration of its MACB sales data would require Commerce to modify the CONNUM[5] product hierarchy, surrogate country, and surrogate value data, there was not sufficient time remaining in the review. *Id.* at 15–16.

The court must reject Plaintiffs' assertion because it was practicable for Commerce to request information on Fengchi's MACB sales in this proceeding. Here, Commerce requested that Fengchi provide information on its MACB sales on August 3, 2012, CR 46 at 3, well before the October 1, 2012 deadline for its preliminary determination. *PRM* at 3. Commerce repeatedly offered to extend the deadline for Fengchi to provide the requested information, *See, e.g.*, Letter to Fengchi re: First Antidumping Administrative Review of Certain MCBs from the PRC: Extension of Time for Supplemental Questionnaire, PR 111 at 1 (Aug. 24, 2012), but Fengchi declined to comply with Commerce's request. *See* PR 104; PR 106; PR 114. On September 7, 2012, Commerce offered Fengchi one final opportunity to comply, requesting that Fengchi either provide MACB sales information or submit a request for an extension by September 17, 2012. *See* PR 125 at 1–2. Once again, Fengchi declined to provide its MACB sales information. *See* Letter to Commerce re: Antidumping Order on Certain MCBs from the PRC: Antidumping Administrative Review (3/12/10–8/31/11), PR 130 at 1– 2 (Sept. 17, 2012).

Furthermore, the court does not find merit to Plaintiffs' argument that Commerce would have to modify the CONNUM product hierar-

[5] CONNUM stands for "control number," which refers to a specific product.

chy, surrogate country, and surrogate value data in order to consider information on Fengchi's MACB sales. Commerce determined that MACBs were MCBs within the scope of the *Orders*, and therefore it was unnecessary to modify CONNUM product hierarchy, surrogate country, and surrogate value data. *See IDM* at 8. Because it was practicable to consider Fengchi's MACBs sales at the time of the *MACB Scope Ruling*, Commerce reasonably requested that data during the review.[6] *See* 19 C.F.R. § 351.225(l)(4).

II. Commerce's Application of Adverse Facts Available

The next issue is whether Commerce properly relied on AFA when determining Fengchi's dumping margin. As noted above, Commerce found that AFA was appropriate because Fengchi refused to provide information on its MACB sales.

Commerce may apply AFA where "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether the respondent has put forth its maximum effort to provide Commerce with full and complete answers" to a request for information. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Although Fengchi concedes that it did not provide information on its MACB sales, Plaintiffs argue that Commerce erroneously applied AFA because the request itself was improper. *See* Pls.' Br. at 18–21. As noted above, Plaintiffs insist that Commerce's request for Fengchi's MACB sales information violated 19 C.F.R. § 351.225(l)(4). Plaintiffs conclude that Commerce could not impose AFA based on Fengchi's failure to comply with an inappropriate request for information. *See* Pls.' Br. at 18. Plaintiffs rely on *Laclede Steel Co. v. United States*, 18 CIT 965 (1994), where the Court overturned Commerce's decision to impose AFA because Commerce's request for information was improper. *See* Pls.' Br. at 19 (citing *Laclede Steel*, 18 CIT at 973).

Plaintiffs' argument is unconvincing. As this court has already determined, Commerce's request for Fengchi's MACB sales information was proper. Accordingly, Plaintiffs' reliance on *Laclede Steel* is misplaced. Ultimately, Fengchi's refusal to provide information on its MACB sales demonstrated a failure to comply with Commerce's request for information, and thus, Commerce reasonably applied AFA. *See* 19 U.S.C. § 1677e(b); *Nippon Steel*, 337 F.3d at 1382.

[6] Commerce also argues that it had the authority to request MACB sales information at "any time during the proceeding" pursuant to 19 C.F.R § 351.301(c)(2) (2012). Because Commerce properly requested MACB sales information under 19 C.F.R § 351.225(l)(4),the court declines to consider this alternative justification.

III. The Adverse Facts Available Rate

Having determined that Commerce properly relied on AFA to determine Fengchi's dumping margin, the court now considers whether Commerce properly selected the petition rate of 236% as the AFA rate. Consistent with its practice, Commerce selected the petition rate as the AFA rate. *See PRM* at 10. Commerce found that the petition rate was reliable because it calculated the 236% figure as the AFA rate for the PRC-wide entity during the investigation, which it then corroborated using model-specific margins of a cooperating respondent. *See First Administrative Review of MCBs from the PRC: Corroboration Memorandum* (Oct. 1, 2012), CR 68 at 2–3 (unchanged in final). Commerce determined that the rate was relevant to Fengchi by comparing the CBP data for Fengchi's five MACB sales with the data Commerce used to determine the petition rate. *Id.* at 3. Specifically, Commerce found that the U.S. sales price from the petition rate was within the range of the average unit values for Fengchi's entries. *Id.* Additionally, Commerce found that the usage rates for the factors of production in the petition were within the range of values of Fengchi's reported usage rates. *Id.* Because the rate was both reliable and relevant to Fengchi, Commerce found that it adequately corroborated the petition rate of 236%. *Id.*

When selecting an AFA rate, Commerce may rely on information from the petition, investigations, prior administrative reviews, or "any other information placed on the record." 19 U.S.C. § 1677e(b). However, Commerce cannot select any rate as the AFA rate, but rather, must select an AFA rate that is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). "Commerce must select secondary information that has some grounding in commercial reality." *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010). Although a higher AFA rate creates a stronger incentive to cooperate, "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Id*. at 1323 (citing *De Cecco*, 216 F.3d at 1032).

The requirements articulated by the CAFC are an extension of the statute's corroboration requirement. *See De* Cecco, 216 F.3d at 1032. Under 19 U.S.C. § 1677e(c), when Commerce relies on secondary information, it "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). To corroborate secondary information,

Commerce must find that it has "probative value." *See KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010). Secondary information has "probative value" if it is "reliable" and "relevant" to the respondent. *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007); *see KYD*, 607 F.3d at 765–67.

Plaintiffs argue that the AFA rate was unreasonable, overly punitive, and did not reflect commercial reality. Pls.' Br. at 21–23. According to Plaintiffs, "Commerce never calculated the actual dumping margin . . . on Fengchi's reported MCBs sales, electing instead to apply [AFA] to all of Fengchi's sales of subject merchandise. . . ." *Id.* at 22. Plaintiffs conclude that "in selecting among possible AFA rates, Commerce blinded itself to Fengchi's actual dumping margin on the MCB sales it had reported even as it ostensibly considered whether the AFA rate from the petition reflected commercial reality." *Id.* at 22–23.

While the instant case was before the court, the Federal Circuit issued a decision in *Fedmet Resources Corp. v. United States*, 755 F.3d. 912, (Fed. Cir. 2014) (mandate issued on Feb. 4, 2015), holding that certain MACBs from the PRC were outside the scope of the antidumping order. *Fedmet*, 755 F.3d at 922. As a consequence of the Federal Circuit's holding in *Fedmet*, the court has become concerned with Commerce's potentially unreasonable use of out of scope MACB sales to corroborate the AFA rate. Although the court requested that the parties provide it with supplemental briefing to address this issue, Commerce's responses present post hoc rationalizations that do not bear on the reasonableness of the explanations set forth in the IDM. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) ("The courts may not accept . . . counsel's post hoc rationalizations for agency action; . . . an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself."). Commerce does not appear to have considered the possibility that the entries it used to corroborate the AFA rate were of out-of-scope merchandise. Because the Federal Circuit's decision in *Fedmet* may potentially affect the reasonableness of Commerce's corroboration of the AFA rate, the court must remand so that Commerce has the opportunity to address this concern at the administrative level with the benefit of comment from Plaintiffs and Defendant-Intervenors. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001) ("A remand is generally required if the intervening event may affect the validity of the agency action.") (citing *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)).

IV. Conclusion and Order

Upon consideration of Plaintiffs' motion for judgment on the agency record, Defendant's and Defendant-Intervenors' responses, Plaintiffs' reply, and all papers and proceedings herein, and in accordance with the court's opinion issued on this date, it is hereby

ORDERED that this case is remanded to Commerce for further explanations regarding the corroboration of the AFA rate in light of the Federal Circuit's decision in *Fedmet Resources Corp. v. United States*, 755 F.3d. 912 (Fed. Cir. 2014); and it is further

ORDERED that the *Final Results* is sustained for all other issues discussed above; and it is further

ORDERED that remand results are due within sixty (60) days of the date this opinion is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date responses or comments are due.

SO ORDERED.

Dated: March 25, 2015
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 15–25

UNITED STATES, Plaintiff, v. NYCC 1959 INC., Defendant.

Before: Donald C. Pogue,
Senior Judge
Court No. 14–00045

ORDER

Upon consideration of Plaintiff's Motion to Set Aside the Default Judgment, Reopen This Action, and Grant Leave for Plaintiff to File Corrected Motion for Default Judgment, ECF No. 11 ("Pl.'s Mot."), in which the United States reveals that, following the entry of default judgment in this case, *see* Judgment, ECF No. 10, Government counsel discovered inaccuracies contained in evidence submitted by the United States in support of its claim, which was relied on by the court in ordering judgment against the defaulted Defendant and quoted in the court's opinion, *see* Slip Op. 15–13, ECF No. 9, at 5–6; Pl.'s Mot., ECF No. 11, at 5; upon consideration of all other filings and proceedings had in this action; and upon due deliberation, it is hereby

ORDERED that Plaintiff's motion, ECF No. 11, is granted; and it is further

ORDERED that Slip Opinion 15–13, ECF No. 9, 2015 WL 480180 (CIT Feb. 6, 2015), and Judgment, ECF No. 10, are vacated and withdrawn; and it is further

ORDERED that Plaintiff's Corrected Motion for Default Judgment, ECF No. 11–1, shall be docketed as filed on the date of this order.

Dated: March 25, 2015
New York, NY

/*s*/ *Donald C. Pogue*
DONALD C. POGUE, SENIOR JUDGE