U.S. Court of International Trade

Slip Op. 15–111

UNITED STATES, Plaintiff, v. JEANETTE PACHECO, Defendant, and INDIVIDUAL A, Intervenor.

Before: Nicholas Tsoucalas,
Senior Judge
Court No.: 14–00289

[Plaintiff's Motion for Entry of Default Judgment is granted.]

Dated: September 28, 2015

Stephen C. Tosini, Senior Trial Counsel, Department of Justice, Civil Division, Commercial Litigation Branch, of Washington, D.C., for Plaintiff. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Luis F. Arandia, Jr. and *Robert T. Givens*, Givens & Johnston, PLLC, of Houston, TX, for Intervenor.

OPINION

Tsoucalas, Senior Judge:

Before the court is United States' ("Plaintiff") Motion for Default Judgment seeking $2,651,312.18 in civil penalties plus interest, costs, and fees against Defendant Jeanette Pacheco ("Pacheco") for fraud under section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012).1592 (2012).1592 (2012).[1] Pl.'s Mot. for Entry of Default J. at 6, July 7, 2015, ECF No. 9 ("Pl.'s Br."). For the following reasons, Plaintiff's motion is granted.

From October 29, 2009, to approximately December 23, 2009, Pacheco entered thirty six entries of dried peppers into the United States from Mexico. Pl.'s Br. Decl. of Liza Lopez at ¶ 2, June 22, 2015. Individual A was the licensed customs broker for each entry.[2] *Id*. at ¶ 3. Homeland Security Investigations conducted an investigation in which they discovered that Individual A approached Pacheco in a

[1] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, and all applicable amendments thereto, unless otherwise noted.

[2] Individual A filed a Motion to Intervene for the limited purpose of amending the Court's Opinion and removing Individual A's name from the Opinion. Initially, Plaintiff opposed Individual A's Motion; however, thereafter, Plaintiff stated in a teleconference that it no longer opposed the Motion. The Court granted the Motion.

nightclub and told her that Individual A had a way to make "fast cash." Pl.'s Br. Report of Investigation Ex. B, at 2. Subsequently, Individual A gave Pacheco $200, and in exchange, she provided Individual A with a power of attorney to allow Individual A to use her name to conduct customs business on Individual A's own behalf. *Id*.

The entry documents submitted to Customs and Border Protection ("CBP") declared a transaction value of approximately $0.11 per kilogram of dried peppers. Pl.'s Br. Decl. of Liza Lopez at ¶ 5. The median transaction value for identical or similar shipments of dried peppers is $3.75 per kilogram. *Id*. at ¶ 7. Based on the aforementioned transaction values, CBP was concerned that the dried peppers were undervalued, and consequently it requested documents to verify the claimed transaction value through proof of payment and/or the terms of sale agreement for the entries. *Id*. at ¶ 6. Pacheco failed to provide documentation to corroborate the declared transaction value of $0.11 per kilogram. *Id*. at ¶ 8. Consequently, CBP appraised the entries using a transaction value for similar merchandise to determine a dutiable value of $2,285,550.00. *Id*. at ¶ 9.

The Food and Drug Administration (FDA) issued a Notice of FDA Action refusing these entries as adulterated under section 402 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342 (2012)[3] and barred them from entering the commerce of the United States under 21 U.S.C. § 381(a). *Id.* at ¶ 12. The Notice of FDA Action required Pacheco to redeliver the entries for exportation or destruction. *Id.* Pacheco failed to redeliver the goods. *Id.* at ¶ 13.

As a result of Pacheco's failure to redeliver the entries, CBP assessed claims for liquidated damages for the subject entries at the $0.11 per kilogram figure provided by Pacheco for a total of $184,419.00. *Id.* at ¶ 10; Pl.'s Br. Jeanette Pacheco Claims for Liquidated Damages, Ex. D.

CBP issued a Pre-Penalty notice to Pacheco on April 16, 2013, informing her that it sought a monetary penalty in the amount of $2,651,312.18 for fraud under 19 U.S.C. § 1592. Pl.'s Br. Pre-Penalty Notice Ex. F, at 1.

On April 24, 2013, CBP issued a penalty notice to Pacheco seeking $2,651,312.18 for fraud under 19 U.S.C. § 1592. Pl.'s Br. Penalty Notice Ex. G, at 1–2. CBP sent to Pacheco demands for payment of the penalty on May 7, 17, & 30, 2013, and June 14, 2013. Pl.'s Br. Decl. of Liza Lopez at ¶ 18. To date, CBP has not received any payments from Pacheco. *Id.* at ¶ 19.

[3] Further citations to the Federal Food, Drug, and Cosmetic Act are to the relevant portions of Title 21 of the U.S. Code, 2012 edition, and all applicable amendments thereto, unless otherwise noted.

Plaintiff filed the instant action on October 29, 2014. Compl., Oct. 29, 2014, ECF No. 2. Pacheco failed to answer or otherwise respond to the complaint. As a result, the Clerk of Court entered Pacheco's default on May 19, 2015. Entry of Default, May 19, 2015, ECF No. 8. Plaintiff now moves for entry of default judgment. Pl.'s Br. at 1.

JURISDICTION

The court possesses jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1582(1) (2012) over this civil penalty action brought by the United States under 19 U.S.C. § 1592.

DISCUSSION

Pursuant to 19 U.S.C. § 1592(e)(1), the Court determines all issues de novo, including the amount of any penalty. 19 U.S.C. § 1592(e)(1). In evaluating a motion for a default judgment, the Court accepts as true all well-pled facts in the complaint but must reach its own legal conclusions. *United States v. Callanish Ltd.*, 37 CIT ____, ____, Slip Op. 13–43 (Mar. 28, 2013) (citing *Nishimatsu Constr. Co., Ltd. v. Hous. Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)). "Although a defendant's default acts as an admission of liability for all well-pled facts in the complaint, it does not admit damages." *United States v. Freight Forwarder Int'l*, 39 CIT ____, ____, 44 F. Supp. 3d 1359, 1362 (2015) (citing *Greyhound Exhibit Grp. Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992)). "An entry of default alone . . . does not suffice to entitle a plaintiff to the relief that it seeks." *United States v. Country Flavor Corp.*, 36 CIT ____, ____, 825 F.Supp. 2d 1296, 1301 (2012). "Even after an entry of default, 'it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.'" *Id*. (quoting 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2688, p. 63 (3d ed. 1998)). "Because section 592(e) directs that the court determine 'de novo' the amount of penalty to be recovered, the penalty cannot be considered a 'sum certain' to which plaintiff has established its entitlement as a matter of right." *United States v. Inner Beauty Int'l (USA) Ltd.*, 35 CIT____, ____, Slip Op. 11–148 (Dec. 2, 2011).

In the case at bar, the Clerk of Court has entered the Defendant's Default, and Plaintiff supported the Motion for Default Judgment with an affidavit showing the amount due. Entry of Default; Compl. at ¶27, Ex. B; Pl.'s Br. Decl. of Liza Lopez. Thus, the court must address whether the unchallenged facts constitute a legitimate cause of action and what amount, if any, should be awarded Plaintiff.

1. The Unchallenged Facts Constitute a Legitimate Cause of Action Per § 1592

Under 19 U.S.C. § 1592(a)(1) it is unlawful for a person, by fraud to enter, introduce, attempt, or aid or abet any other person in introducing merchandise into the commerce of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or any omission which is material. 19 U.S.C. §1592(a)(1). "A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing agency action including, but not limited to a . . .[d]etermination of the classification, appraisement, or admissibility of merchandise . . . .") 19 C.F.R. Part 171, appendix B § (B) (2015) ("Penalty Guidelines").

In the instant case, the misrepresented entered value was material because it influenced CBP's decision regarding the admissibility of the peppers. Restricted merchandise such as dried peppers are subject to inspection, may be conditionally released, or the shipment may be placed on hold and later refused entry. Customs may request redelivery of the refused shipment. A refusal to comply with the redelivery requirement may result in Customs assessing liquidated damages at three times the value of the merchandise. 19 C.F.R. § 141.113(c)(3) (2015). Customs assessed liquidated damages in the amount of $184,419.00 relying on the low values provided by the importer. Pl.'s Br. Jeanette Pacheco Claims for Liquidated Damages Ex. D, at 1–2. Had the importer given the correct value of $3.75 per kilogram, Customs would have assessed liquidated damages at $6,856,650.00 and required that the importer post a bond in the amount of $6,856,650.00 or refused entry to the merchandise. Pl.'s Br. Decl. of Liza Lopez Ex. A, at ¶ 11. Rather, Pacheco misrepresented the value of the peppers, procured a bond at a significantly lower amount, and sold the merchandise for consumption in the U.S. *Id*.

Furthermore, by providing the power of attorney for $200 so that Individual A could conduct customs business on Individual A's own behalf, Pacheco aided and abetted Individual A's fraud upon Customs. Pl.'s Br. Report of Investigation Ex. B, at 2. Having given Individual A a power of attorney, Pacheco, as principal, can be held liable for her agent Individual A's actions whether or not she authorized the specific unlawful conduct which constituted the violation of section 1592. *See United States v. Pan Pac. Textile Grp. Inc.*, 29 CIT 1013, 1022–23, 395 F. Supp. 2d 1244, 1252 (2005) (holding that when determining a principal's liability, it is irrelevant whether or not the principal authorized their agent's conduct which constituted the violation of section 1592).

Thus, the court finds that Plaintiff has demonstrated that the unchallenged facts constitute a legitimate cause of action under 19 U.S.C. § 1592.

2. Amount of Damages

Fraud is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise. 19 U.S.C. § 1592 (c)(1). A "Plaintiff is not necessarily entitled to be awarded a judgment for the maximum penalty available under section 592 as a 'sum certain,' as that term is used in Rule 55 . . . It is appropriate that the court consider the facts and circumstances as shown in plaintiff's submissions." *Inner Beauty*, 35 CIT at ____. The Court examines whether there are aggravating or mitigating factors present in assessing the penalty. *Id*. Although not binding on the Court, the guidelines published by Customs are informative on the general question of what constitutes aggravating and mitigating circumstances. *Id*. Under those guidelines, for a Non-Duty Loss Violation, "[a] penalty disposition greater than 80 percent of the dutiable value may be imposed in a case involving an egregious violation, or a public health and safety violation, or due to the presence of aggravating factors, but the amount may not exceed the domestic value of the merchandise." Penalty Guidelines §(F)(2)(a)(ii). Undervaluation of duty-free merchandise such as dried peppers from Mexico constitutes a non-duty loss violation. *Id*. at §(D)(2).

Providing misleading information to Customs concerning the section 1592 violation and failing to comply with a lawful demand for records are aggravating factors that permit a penalty of up to the domestic value of the merchandise. *Id*. at §(H) (3),(7). In this case, Pacheco initially lied to investigators about whether the peppers were hers, and she failed to comply with Customs' lawful demand for documentation verifying the declared transaction value of $0.11 per kilogram. Pl.'s Br. Report of Investigation Ex. B, at 1–2; Request for Information Ex. C, at 1–2; Decl. of Liza Lopez Ex. A, at ¶ 8. Thus, the court finds that aggravating factors are present in this case.

Additionally, the following factors may be considered in mitigation of the penalty: contributory customs error (where Customs provides Defendant with misleading or erroneous advice in writing); Defendant's cooperation with the investigation; immediate remedial action taken by Defendant; inexperience in importing (only where the violation is not due to fraud); prior good record (excluding fraud violations); inability to pay the Customs penalty; and Customs' failure to notify Defendant of a violation, in non-fraud cases, where Customs

had actual knowledge of a violation. Penalty Guidelines §(G). The court finds that there are no mitigating factors present on the record before the court.

The court grants Plaintiff's Motion for Default Judgment and awards Plaintiff the domestic value of the merchandise, in the amount of $2,651,312.18 due to the presence of aggravating factors and the absence of mitigating factors, plus post-judgment interest as provided by law. Plaintiff shall bear its own costs and fees.

Dated: February 11, 2016
New York, New York

/s/ *Nicholas Tsoucalas*
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 16–14

HEBEI JIHENG CHEMICALS CO., LTD., Plaintiff v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Senior Judge
Court No. 14–00337

[final countervailing duty determination affirmed]

Dated: February 18, 2016

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP, of Washington, DC, for Plaintiff, Hebei Jiheng Chemicals Co., Ltd.

David F. D'Alessandris, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Lisa W. Wang*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

James R. Cannon, Jr. and *Ulrika K. Swanson*, Cassidy Levy Kent (USA), LLP, of Washington, DC, for Defendant-Intervenors Clearon Corp. and Occidental Chemical Corp.

OPINION

Pogue, Senior Judge:

In this action, Plaintiff Hebei Jiheng Chemicals Co., Ltd. ("Jiheng") challenges the final determination of the U.S. Department of Commerce ("Commerce") in the countervailing duty ("CVD") investigation of chlorinated isocyanurates from the People's Republic of China

("PRC").[1] Plaintiff challenges Commerce's determination, claiming that Commerce misread the record regarding preferential electricity rates provided to the Plaintiff by the Government of China ("GOC"), and thereby "vastly overstated the calculated net benefit" conferred on Plaintiff and impermissibly applied adverse facts available ("AFA") to Plaintiff, a cooperating respondent.[2]

Because Commerce's benefit calculation was based on a reasonable reading of the record evidence, its decision is supported by substantial evidence. Because Commerce's application of AFA to the GOC, and the collateral impact of that decision on Plaintiff, is reasonably within the agency's discretion, its decision is in accordance with law. The court, accordingly, affirms.

BACKGROUND

In the administrative proceeding challenged here, Commerce initiated a CVD investigation, following a petition filed by Defendant-Intervenors,[3] to determine whether producers and exporters of chlorinated isocyanurates in the PRC had received countervailable subsidies within the meaning of 19 U.S.C. §§ 1671, 1677(5).[4]

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[1] Compl., ECF No. 7, at ¶¶ 1–2; *see Chlorinated Isocyanurates from the [PRC]*, 79 Fed. Reg. 56,560 (Dep't Commerce Sept. 22, 2014) (final affirmative countervailing duty determination; 2012) ("*Final Determination*") and accompanying Issues & Decision Mem., C-570–991, Investigation (Sept. 8, 2014) ("*Final I&D Mem.*"). Jiheng is "a Chinese producer and exporter to the United States of subject chlorinated isocyanurates." Mem. of P. & A. in Supp. of Pl.'s Mot. for J. on the Agency R., ECF No. 25–2 ("Pl.'s Br."), at 1. Chlorinated isocyanurates, as defined by the scope of the *Final Determination*, are "derivatives of cyanuric acid, described as chlorinated s-triazine triones," the "three primary chemical compositions of chlorinated isocyanurates" being "(1) Trichloroisocyanuric acid ('TCCA') ($Cl_3(NCO)_3$), (2) sodium dichloroisocyanurate (dihydrate) [('SDIC')] ($NaCl_2(NCO)_3$ X $2H_2O$), and (3) sodium dichloroisocyanurate (anhydrous) ($NaCl_2(NCO)_3$)." *Final Determination*, 79 Fed. Reg. at 56,561.

[2] Pl.'s Br., ECF No. 25–2, at 5–15. The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012) and 28 U.S.C. § 1581(c) (2012). All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition.

[3] Clearon Corp. and Occidental Chemical Corp. are domestic producers of chlorinated isocyanurates. *Chlorinated Isocyanurates from the [PRC]*, 78 Fed. Reg. 59,001, 59,001 (Dep't Commerce Sept. 25, 2013) (initiation of countervailing duty investigation) ("*CVD Initiation*").

[4] *CVD Initiation*, 78 Fed. Reg. at 59,001. Commerce will impose a countervailing duty on an import whenever it determines that "the government of a country . . . is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States." 19 U.S.C. § 1671(a) (1). The International Trade Commission must also find that "an industry in the United States" is "materially injured" or "threatened with material injury," by the importation of those imports. *Id.* at § 1671(a)(2). The International Trade Commission's determination is not at issue in this case. A subsidy is countervailable when it provides a "financial contribution" to a "specific" industry, and "a

Commerce selected Plaintiff as one of two mandatory respondents.[5]

To investigate the Petitioner's allegation that the GOC had subsidized respondents' electricity costs, Commerce sent initial and supplemental questionnaires to the GOC and mandatory respondents.[6] While respondents' filings were responsive,[7] the GOC did not provide, in either questionnaire, requested province-specific information on its electricity pricing practices.[8] "[N]ecessary information regarding the GOC's provision of electricity [was therefore] not on the record."[9] Consequently, Commerce had to "rely on facts otherwise available," pursuant to 19 U.S.C. § 1677e(a) to evaluate the GOC's electricity pricing practices.[10] Further, Commerce found that "the GOC [had] failed to cooperate by not acting to the best of its ability," and determined that "an adverse inference was warranted in its application of the facts available" provision, pursuant to 19 U.S.C. § 1677e(b).[11]

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benefit is thereby conferred" upon the respondent. *Id.* at §§ 1677(5), (5A). A benefit is conferred upon a respondent when "goods or services," such as electricity, "are provided for less than adequate remuneration." *Id.* at § 1677(5)(E)(iv). Ideally, the "adequacy of remuneration" is measured by "comparing the government price," the price paid by the respondent, "to a market-determined price for the good or service resulting from actual transactions in the country in question," the benchmark price. 19 C.F.R. § 351.511(a)(2)(i) (2012).

[5] *Chlorinated Isocyanurates from the [PRC]*, 79 Fed. Reg. 10,097, 10,098 (Dep't Commerce Feb. 24, 2014) (preliminary determination and alignment of final determination with final antidumping determination) and accompanying Issues & Decisions Mem., C—570991, Investigation (Feb. 11, 2014) ("*Prelim. I&D Mem.*") at 3 (selecting Plaintiff and Juancheng Kangtai Chemical Co., Ltd., as mandatory respondents based on their status as the largest, by volume, producers/exporters of chlorinated isocyanurates from the PRC to the United States during the period of investigation); *see* 19 U.S.C. § 1677f-1(e)(2)(A)(ii) ("If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates [for each known exporter or producer of subject merchandise] because of the large number of exporters or producers involved in the investigation or review, the administering authority may . . .determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to . . . exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined."); 19 C.F.R. § 351.204(c) ("[Commerce] may limit the investigation using [the] method described in [19 U.S.C. § 1677f-1(e)(2)(A)(ii)]").

[6] *Prelim. I&D Mem.*, *supra* note 5, at 1–2. To determine whether there is a countervailable subsidy, "Commerce often requires information from the foreign government allegedly providing [that] subsidy." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369–70 (Fed. Cir. 2014); *see Final I&D Mem.*, supra note 1, at 21 ("In a CVD case, [Commerce] requires information from both the government of the country whose merchandise is under investigation and the foreign producers and exporters.").

[7] *Final I&D Mem.*, *supra* note 1, at 21.

[8] *Final Determination*, 79 Fed. Reg. at 56,561; *Final I&D Mem., supra* note 1, at 9.

[9] *Final Determination*, 79 Fed. Reg. at 56,561.

[10] *Id.*

[11] *Id.*

Drawing adverse inferences regarding the facts available, Commerce determined that the GOC's provision of electricity was "a financial contribution within the meaning of [19 U.S.C. § 1677(5)(D)] and [was] specific within the meaning of [19 U.S.C. § 1677(5A)]."[12] These determinations are uncontested here.[13] Commerce also used adverse facts available when it selected the benchmark rates used to calculate the benefit conferred on the respondents.[14] Specifically, for the benchmark Commerce selected the highest electricity rates on the record for the respondents' rate and user categories, the large industry rate schedule for Zhejiang province.[15] "To calculate the benefit," Commerce "subtracted the amount paid by the respondents for electricity"[16] from the "benchmark electricity price."[17] Commerce accordingly determined that "subsidies [had] been provided to producers and exporters of chlorinated isocyanurates . . . in the [PRC],"[18] and

[12] *Id.*

[13] Pl.'s Br., ECF No. 25–2, at 5 ("Jiheng does not dispute Commerce's application of [AFA] with respect to the provision of electricity for [less than adequate remuneration].").

[14] *Final Determination*, 79 Fed. Reg. at 56,561; *Final I&D Mem., supra* note 1, at 21 ("This benchmark reflects an adverse inference, which [Commerce] drew as a result of the GOC's failure to act to the best of its ability in providing requested information about its provision of electricity in this investigation.").

[15] *Final I&D Mem., supra* note 1, at 10, 21, 30; Prelim. Benchmark Mem., *Chlorinated Isocyanurates from the [PRC]*, C-570–991, Investigation (Feb. 11, 2014) (adopted in *Final Determination*, 79 Fed. Reg. at 56,561; *Final I&D Mem., supra* note 1, at 10) ("*Prelim. Benchmark Mem.*") at 1, attach. 1 (electricity benchmark table), *reproduced in* Def.'s App. in Supp. of Mem. in Opp'n to [Pl.'s Br.], ECF No. 30–1 ("Def.'s App.") at Tab 4; *see also* GOC's Initial Questionnaire Resp., *Chlorinated Isocyanurates from the [PRC]*, C-570–991, Investigation (Dec. 20, 2013) at Ex. E2–3 (Electricity Sales Schedule of Zhejiang Grid), *reproduced in* Def.'s App., ECF No. 30–1 at Tab 2 ("*Zhejiang Electricity Schedule*").

[16] Commerce "relied on [respondents] records" to "the extent that [they were] usable and verifiable," to determine what the respondents actually paid for electricity. *Final I&D Mem., supra* note 1, at 21. Commerce found that Hebei Jiheng Group Co., Ltd. ("Jiheng Group"), "a holding company and majority shareholder of Jiheng, which provides raw materials (sulfuric acid and steam) to Jiheng and other affiliated companies," *Prelim. I&D Mem., supra* note 5, at 5, was found to have "failed to report its electricity purchases for one of its branch companies," such that "necessary information regarding [its] electricity purchases [were] not on the record," and Commerce had to "rely on facts otherwise available in this final determination in calculating the Jiheng Group's CVD rate," *Final Determination*, 79 Fed. Reg. at 56,561 (citing 19 U.S.C. § 1677e(a)). Commerce further found that "Jiheng Group failed to cooperate by not acting to the best of its ability and, consequently, an adverse inference is warranted in the application of facts available." *Id.* (citing 19 U.S.C. § 1677e(b)).

[17] *Final I&D Mem., supra* note 1, at 22. From this benefit, Commerce calculated the respondents' respective countervailable subsidy rates. Id.

[18] *Id*. at 1; *Final Determination*, 79 Fed. Reg. at 56,560.

that Jiheng's total estimated countervailable subsidy rate was 20.06 percent.[19]

Plaintiff challenges this determination as unsupported by substantial evidence and not in accordance with law, first alleging that Commerce "misinterpreted the . . . [Zhejiang] electricity schedule" as a three-tier rather than four-tier pricing system,[20] and second claiming Commerce incorrectly selected "large industry" rates rather than rates "specific to chlor-alkali producers."[21] Plaintiff argues that, in so doing, Commerce incorrectly benchmarked respondents' electricity rates, thereby "vastly overstat[ing] the calculated net benefit" to the Plaintiff[22] and "effectively appli[ng] an adverse inference to [Plaintiff], over and above applying the intended adverse inference to the GOC."[23] Defendant and Defendant-Intervenors counter that Commerce's determination was supported by substantial evidence and in accordance with law because Commerce's benchmark selection was based on a reasonable reading of the record evidence and Plaintiff was not impermissibly affected by the application of adverse inferences to the GOC.[24]

STANDARD OF REVIEW

The court will sustain Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[25]

Substantial evidence review requires consideration of "the record as a whole, including any evidence that fairly detracts from the substantiality of the evidence,"[26] and asks, in light of that evidence, whether Commerce's determination was reasonable.[27]

As relevant here, review for "accordance with law," asks, where "Congress directly spoke to the precise question at issue and clearly expressed its purpose and intent in the governing statute," whether the agency's determination is in accordance with that statute; or, if

[19] *Final Determination*, 79 Fed. Reg. at 56,562.

[20] Pl.'s Br., ECF No. 25–2, at 6; *see generally id.* at 5–11.

[21] *Id.* at 12; *see generally id.* at 11–15.

[22] *Id.* at 10, 12.

[23] *Id.* at 10, 14–15.

[24] Def.'s Mem. in Opp'n to [Pl.'s Br.], ECF No. 30; Resp. Br. of Clearon Corp. & Occidental Chem. Corp., ECF No. 31.

[25] 19 U.S.C. § 1516a(b)(1)(B)(i).

[26] *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319,1323 (Fed. Cir. 2010) (internal quotation marks and citationomitted).

[27] *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

Congress has not spoken directly on the issue, "the agency's interpretation" is "a reasonable construction of the statute."[28]

DISCUSSION

To calculate the benefit conferred by a countervailable subsidy, Commerce compares a benchmark price to the price actually paid by the respondent.[29] Here, drawing an adverse inference against the GOC, Commerce selected, from the facts available on the record, the large industry rates from Zhejiang province for the benchmark, because those rates were the "highest electricity rates on [the] record" for the "applicable rate and user categories."[30] Because respondents were cooperative, Commerce relied on the respondent's own records, "to the extent [they were] usable and verifiable," to determine their actual electricity consumption and rates paid.[31]

In comparing the two sets of rates, Commerce determined that the Zhejiang province electricity schedule was a three-tier pricing system, with rates varying by time of usage.[32] Jiheng reported its electricity consumption and rates based on the Southern Hebei electricity schedule, which has a four-tier pricing system.[33] To adjust for this

[28] *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716F.3d 1370, 1377 (Fed. Cir. 2013) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

[29] 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.511(a)(2)(i); *see Fine Furniture*, 748 F.3d at 1370.

[30] *Final I&D Mem.*, supra note 1, at 10; *Prelim. Benchmark Mem.*, ECF No. 30–1 at Tab 4, at 1, attach. 1 (electricity benchmarktable); *Zhejiang Electricity Schedule*, ECF No. 30–1 at Tab 2 at Ex. E2–3.

[31] *See Final I&D Mem.*, *supra* note 1, at 21 (citation omitted).

[32] *Final I&D Mem.*, *supra* note 1, at 30–31; *Prelim. Benchmark Mem.*, ECF No. 30–1 at Tab 4, at attach. 1 (electricity benchmarktable). That is, the *Zhejiang Electricity Schedule* provides (1) "Sharp Price" (also translated as "Critical Peak," charged from 19:00 to 21:00 each day); (2) "Peak Price" (charged from 08:00 to 11:00, 13:00 to 19:00, and 21:00–22:00 each day); and (3) "Off-Peak Price" (also translated as "Valley," charged from 11:00 to 13:00 and 22:00 to 08:00 the following day). *Zhejiang Electricity Schedule*, ECF No. 30–1 at Tab 2 at Ex. E2–3. Commerce, "[b]ased on past practice, and [its] understanding of the PRC's multi-tiered electricity system," has "consistently interpreted these labels, including slightly varied translations thereof, to be a three-tiered 'valley, normal, and peak' rate structure and selected the highest rates from the 'sharp' category for the 'peak' benchmark rate." *Final I&D Mem.*, *supra* note 1, at 31 (footnote and citations omitted).

[33] That is: (1) "High Peak"; (2) "Peak"; (3) "Normal"; and (4) "Valley." GOC's Initial Questionnaire Resp., *Chlorinated Isocyanurates from the [PRC]*, C-570–991, Investigation (Dec. 20, 2013) at Ex. E2–3 (Electricity Sales Schedule of Southern Hebei Power Grid), *reproduced in* [Pl.'s] App., ECF Nos. 26 (conf. ver.) & 27 (pub. ver.) at Tab 4; Section III Resp. of [Jiheng], *Chlorinated Isocyanurates from the [PRC]*, C-570–991, Investigation (Dec. 23, 2013), *reproduced in* [Pl.'s] App., ECF Nos. 26 & 27 at Tab 3 ("*Jiheng Section III Resp.*") at app. 26 (Electricity Template of Hebei Jiheng) ("*Jiheng Electricity Template*") (reporting Jiheng's electricity consumption on the Southern Hebei four-tier schedule with high peak, peak, normal, and valley).

difference, Commerce aligned the lowest rate from Zhejiang ("Off Peak") with the lowest rate from Southern Hebei ("Valley"), the next highest rate in Zhejiang ("Peak") with the next highest rate in Southern Hebei ("Normal"), and the highest rate in Zhejiang ("Sharp") with the next highest rate in Southern Hebei ("Peak").[34] Then, lacking a fourth Zhejiang rate, Commerce used the actual Southern Hebei "High Peak" for the benchmark.[35]

I. The Zhejiang "Four-Tier" Electricity Schedule

Plaintiff first argues that Commerce's determination is incorrect because the agency "misinterpreted the Zhejiang electricity schedule" as a three-tier rather than four-tier pricing system and thereby "vastly overstated the net benefit attributable" to Plaintiff.[36] Plaintiff claims that "Commerce totally ignored" the presence of the "KWH Electricity Tariff" in the Zhejiang electricity schedule.[37] Plaintiff asserts that the KWH Electricity Tariff "corresponds to the 'Normal' price category in the Southern Hebei electricity schedule" because it applies in Zhejiang "when the three time-period rates [are] not [otherwise] applicable."[38] This, according to Plaintiff, proves that "the Zhejiang schedule, just like the Southern Hebei schedule, was, i[n] fact, a four-tiered price system."[39]

Commerce did not, however, "totally ignore" the Zhejiang KWH Electricity Tariff, but rather, considering the record evidence and reasonable inferences therefrom,[40] expressly declined to adopt Plaintiff's interpretation of the Zhejiang rate schedule. Commerce found "no basis to assume that the KWH Electricity Tariff would be representative of a normal rate."[41] Indeed, as Commerce points out, the Zhejiang rate schedule provides no explanation or definition of what

[34] *See Prelim. Benchmark Mem.*, ECF No. 30–1 at Tab 4, at attach. 1; *Final I&D Mem.*, *supra* note 1, at 30–31.

[35] *See Prelim. Benchmark Mem.*, ECF No. 30–1 at Tab 4, at attach. 1 (providing the "S[outhern] Hebei" rate as the benchmark for each of the "High Peak" rates).

[36] Pl.'s Br., ECF No. 25–2, at 6, 10; *see generally id.* at 5–11.

[37] *Id.* at 6.

[38] *Id.*

[39] *Id.*

[40] *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) ("More specifically, [under the substantial evidence standard] the question . . . is whether the evidence and reasonable inferences from the record support [Commerce's finding].").

[41] *Final I&D Mem.*, *supra* note 1, at 31.

the KWH Electricity Tariff is or when it applies.[42] Further, the three-tier schedule, not including the KWH Electricity Tariff, covers all 24 hours of the day.[43]

Plaintiff's attempt at defining the KWH Electricity Tariff brings much heat but no light to the issue. Plaintiff makes various conclusory statements,[44] argumentative pronouncements,[45] and declara-

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[42] *See Zhejiang Electricity Schedule*, ECF No. 30–1 at Tab 2 at Ex. E2–3; *Final I&D Mem., supra* note 1, at 31 (noting that the "record is silent as to what the KWH Electricity Tariff represents" and that it is "unclear as to what time period the KWH Electricity Tariff covers," leaving Commerce "no basis to assume that the KWH Electricity Tariff would be representative of a normal rate").

[43] *See Zhejiang Electricity Schedule*, ECF No. 30–1 at Tab 2 at Ex. E2–3; *Final I&D Mem., supra* note 1, at 31.

[44] Plaintiff claims that the Zhejiang KWH Electricity Tariff is used "when the three time-period rates [on the Zhejiang schedule] [are] not applicable." Pl.'s Br., ECF No. 25–2, at 6. From this, Plaintiff concludes that "the Zhejiang schedule, just like the Southern Hebei schedule, [is], i[n] fact, a four-tiered price system." *Id.* "In fact" is a curious choice of words, given that Plaintiff offers no evidence on the record to support this position. Plaintiff offers only a re-reading of the Zhejiang schedule that is more to its liking. Plaintiff believes that the "Zhejiang schedule clearly provides four tariff rates" because the KWH Electricity Tariff "is placed in a column right next to the prices of Sharp, Peak and Off-Peak tariff rates," *id*. at 8 (citation omitted), its use as the benchmark for "normal" would present a better numerical progression, *id.* at 7–8, and it is the "only tariff rate applicable" to some types of users, *id*. at 9. "Necessarily," Plaintiff says, "the [Zhejiang] KWH Electricity Tariff . . . is applicable in all cases where the other three rates are not applicable." *Id*. at 8. But there is nothing necessary about this conclusion. The Zhejiang electricity rate schedule does not define the "KWH Electricity Tariff," *See Zhejiang Electricity Schedule*, ECF No. 30–1 at Tab 2 at Ex. E2–3, and Plaintiff points to nothing on the record to suggest that it applies as a "normal rate" to users in Zhejiang province. Plaintiff only provides an alternative, unsubstantiated interpretation. This is not enough for this Court to remand to Commerce. "[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." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

[45] Plaintiff argues that Commerce's statement that "'there is no evidence [on the record to demonstrate] that [this] is a higher rate than "peak,"'" Pl.'s Br., ECF No. 25–2, at 8 (misquoting *Final I&D Mem., supra* note 1, at 31), is "preposterous," because "Commerce's own benchmark includes a 'High Peak' category" and "the Southern Hebei electricity schedule . . . contains a 'sharp peak' or 'high peak' rate that is higher than the 'peak' rate," *id.* However, Commerce's statement is only "preposterous" when quoted out of context, as Plaintiff's counsel has done. Commerce was not discussing the Southern Hebei schedule or even its benchmarks in this investigation, but rather its practice of using a three-tier benchmark pricing schedule, with "peak" being the generic label for the highest rate, regardless of the vagaries of translation. *Final I&D Mem., supra* note 1 at 31 ("Based on past practice, and [Commerce's] understanding of the PRC's multi-tiered electricity system, [Commerce has] consistently interpreted [the Zhejiang labels of 'sharp, peak, and off-peak' or 'critical peak, peak, and valley'], including slightly varied translations thereof, to be a three-tiered 'valley, normal, and peak' rate structure and selected the highest rates from the 'sharp' category for the 'peak' benchmark rate. Moreover, we note that apart from the reference to a 'critical peak' period, there is no evidence on the record to demonstrate that this is a higher rate than 'peak.'") (footnote and citations omitted).

tions of irrelevant facts.[46] As such, Plaintiff accomplishes the ironic effect of supporting not its own position but Commerce's determination that "the record is silent as to what the KWH Electricity Tariff represents."[47]

Commerce's determination is not rendered "mistaken"[48] "faulty,"[49] "untenable,"[50] "preposterous,"[51], or "nonsensical,"[52]simply because Plaintiff's counsel says it is. If Plaintiff thought Commerce's three-tier interpretation incorrect, it should have developed the administrative record with information supporting its own four-tier interpretation.[53] More importantly, the question for this Court is whether Commerce's determination is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"[54] not whether Plaintiff can provide some argument for a preferred rate.[55] Because Commerce has articulated a reasonable and rational connec-

[46] Plaintiff asserts that its "reported electricity consumptions under the 'Normal' tariff rate of the Southern Hebei electricity schedule . . . is approximately equal to the monthly electricity consumptions reported under the Peak and Valley tariff rates, and is several time[s] larger than the monthly electricity consumptions under the Sharp tariff rate." Pl.'s Br., ECF No. 25–2, at 9 (citations omitted). "Accordingly," Plaintiff's counsel asserts, "consumption under the [Zhejiang] KWH electricity Tariff should similarly be expected." *Id.* Plaintiff's counsel would have the court infer that, based on Jiheng's own consumption under the Southern Hebei schedule, the "KWH Electricity Tariff under the Zhejiang electricity schedule is a separate rate whose application is not limited by any time period . . . [and] used in instances when [the] Sharp[,] Peak and Off Peak tariffs are present, but not applicable." *Id.* This is a non sequitur. Plaintiff's own consumption under the Southern Hebei schedule has no bearing on what the Zhejiang KWH Electricity Tariff is or when it applies. It is irrelevant.

[47] *Final I&D Mem.*, *supra* note 1, at 31.

[48] Pl.'s Br., ECF No. 25–2, at 6.

[49] *Id.* at 7.

[50] *Id.*

[51] *Id.* at 8.

[52] *Id.* at 8, 9.

[53] *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce.") (second alteration original, quotation marks and citations omitted); *US Magnesium LLC v. United States*, __ CIT __, 70 F. Supp. 3d 1321, 1328 (2015) ("If [Plaintiff] believed [that Commerce made] a poor choice, [Plaintiff] should have developed the administrative record with information substantiating its inference . . . .") (citation omitted).

[54] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[55] *See Consolo*, 383 U.S. at 620; *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("[Under the substantial evidence standard], [t]he question is whether the record adequately supports the decision of the [agency], not whether some other inference could reasonably have been drawn.").

tion between the facts on the record and the choices the agency has made, its reading of the Zhejiang electricity pricing schedule is supported by substantial evidence.[56]

II. The Zhejiang Schedule "Large Industry" v. "Large Industry (Chlor-Alkali)" Rates

Second, Plaintiff argues that Commerce's use of the Zhejiang rates for large industry, rather than the (lower) Zhejiang rates for "the production of chlor-alkali products," resulted in a calculation that "vastly overstated the net benefit" to Plaintiff,[57] and thereby made the application of AFA "excessive" and "contrary to Commerce's stated intention of limiting [the application of adverse facts] to the GOC."[58]

Commerce, however, has broad "discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative."[59] The statute is unambiguous on this point.[60] In applying adverse inferences Commerce is authorized to look to "any . . . information placed on the record," to fill the gaps in its data,[61] so long as Commerce's determination remains in accordance with law and reasonable in light of the record evidence.[62]

Here, Commerce's application of adverse inferences is in accordance with law because it is "consistent with the method provided in the statute."[63] Specifically, an adverse inference in a CVD investigation may have "a collateral impact on a cooperating party," without being

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[56] *Cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (finding an agency determination unsupported by substantial evidence because the agency did not "articulate any rational connection between the facts found and the choice made").

[57] Pl.'s Br., ECF No. 25–2, at 12; Reply Br. of [Jiheng], ECF No. 36 ("Pl.'s Reply"), at 11–16.

[58] Pl.'s Br., ECF No. 25–2, at 15; Pl.'s Reply, ECF No. 36, at 16–17.

[59] *See F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

[60] *See Nan Ya Plastics Corp. v. United States*, No. 2015–1054, 2016 WL 209915, at *8–9 (Fed. Cir. Jan. 19, 2016).

[61] 19 U.S.C. § 1677e(b)(4).

[62] *See Nan Ya*, 2016 WL 209915, at *7 (citing 19 U.S.C. § 1516a(b)(1)(B)(i)). Commerce's application of adverse inferences must be reasonably accurate, *see Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1234 (Fed. Cir. 2014), and tied to "commercial reality," *Gallant Ocean*, 602 F.3d at 1323. But, contrary to Plaintiff's understanding, "a Commerce determination (1) is 'accurate' if it is correct as a mathematical and factual matter, thus supported by substantial evidence; and (2) reflects 'commercial reality' if it is consistent with the method provided in the statute, thus in accordance with law." *Nan Ya*, 2016 WL 209915, at *7 (citations omitted); *see Fine Furniture*, 748 F.3d at 1373 ("[19 U.S.C. § 1677e(b)] authorize[es] Commerce to provide a reasonable estimate based on the best facts available, accompanied by a reasonable adverse inference used in place of missing information . . . .").

[63] *See Nan Ya*, 2016 WL 209915, at *7.

rendered "improper."[64] Where, as here, an adverse inference made against the GOC "collaterally reaches" a cooperating company that is "within the [PRC], benefitting directly from subsidies the [GOC] may be providing," then the adverse inference is permissible, because it "has the potential to encourage the [GOC] to cooperate so as not to hurt its overall industry."[65]

Further, Commerce's determination is supported by substantial evidence because it is based on a reasonable reading of the record evidence.[66] Commerce selected the "highest, non-specific electricity rates for the appropriate user categories" on the record, that is, actual electricity rates, as provided by the GOC, charged to users comparable to respondents during the relevant time period.[67]

Contrary to Plaintiff's arguments,[68] Commerce reasonably declined to use the chlor-akali subset of large industry rates from Zhejiang, despite Plaintiff's status as a chlor-alkali "producer,"[69] because "the GOC's refusal to respond to [Commerce's] questions" regarding the GOC's electricity pricing practices "rendered the provincial electricity rates unreliable."[70] Commerce found that the chlor-akali rates were "a preferential electricity rate specific to [the chlor-alkali] industry," making its selection inconsistent with adverse inferences.[71] Accord-

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[64] *Fine Furniture*, 748 F.3d at 1372 (citing *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010)).

[65] *Fine Furniture*, 748 F.3d at 1373.

[66] *See Nan Ya*, 2016 WL 209915, at *7; *Nippon Steel*, 458 F.3d at 1351.

[67] *See Final I&D Mem., supra* note 1, at 30; *Prelim. Benchmark* Mem., ECF No. 30–1 at Tab 4, at 1, attach. 1 (electricity benchmark table); *Zhejiang Electricity Schedule*, ECF No. 30–1 at Tab 2 at Ex. E2–3.

[68] Plaintiff argues that because it is "in the chlor-alkali business," Pl.'s Br., ECF No. 25–2, at 12, and because "Commerce has made no finding that the chlor-alkali rates in the Zhejiang . . . schedule constitute a countervailable subsidy or that they provide a specific benefit to an industry or a group of industries under 19 U.S.C. § 1677(5A)," Pl.'s Reply, ECF No. 36, at 14, there is "no basis to disqualify the Zhejiang chlor[ ]alkali electricity rates as benchmarks for Jiheng's consumption of electricity," *id*., and Commerce must, therefore, use them as the benchmarks in its benefit calculation, Pl.'s Br., ECF No. 25–2, at 14; Pl.'s Reply, ECF No. 36, at 16. But Commerce is under no such obligation. 19 U.S.C. § 1677e(b)(4) (Commerce may use "any . . . information placed on the record."); *see Nan Ya*, 2016 WL 209915, at *8–11.

[69] *See* Pl.'s Br., ECF No. 25–2, at 12.

[70] *Final I&D Mem., supra* note 1, at 31.

[71] *Id.* at 32. Plaintiff itself concedes that the rate is "preferential." Pl.'s Br., ECF No. 25–2, at 12 (noting that, on the Southern Hebei Electricity Schedule, its rate is translated as "preferential" (citing *Jiheng Electricity Template*, ECF Nos. 26 & 27 at Tab 3, at app. 26), and that the chlor-alkali rates on the Zhejiang Electricity Schedule are "the same or comparable"); *see also* Pl.'s Reply, ECF No. 36, at 14–16. Plaintiff tries to argue that this preference is the result of "well-established market principles," Pl.'s Reply, ECF No. 36, at 15. This argument is unconvincing because Plaintiff can marshal no more support for it than "perhaps the most overused phrase in retail, 'the more you buy, the more you save.'"

ingly, Commerce used the Zhejiang large industry rates as a "reasonably accurate estimate of [Plaintiff's] actual [electricity] rate[s], albeit with some built-in increase intended as a deterrent to [the GOC] for noncompliance."[72] Such an adverse inference is supported by substantial evidence.[73]

CONCLUSION

For these reasons, Commerce's determination in *Chlorinated Isocyanurates from the [PRC]*, 79 Fed. Reg. 56,560 (Dep't Commerce Sept. 22, 2014) (final affirmative countervailing duty determination; 2012) is supported by substantial evidence and in accordance with law, and is therefore AFFIRMED. Judgment will be issued accordingly.

Dated: February 18, 2016
New York, NY

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

Slip Op. 16–15

UNITED STATES, Plaintiff, v. LINCOLN GENERAL INSURANCE COMPANY, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court Nos. 13–00084, 13–00085, 13–00086, 13–00087, 13–00088, 13–00089, 13–00090, 13–00091, and 13–00092

[Ordering stay of litigation in nine actions following liquidation of defendant by order of the Commonwealth Court of Pennsylvania]

Dated: February 18, 2016

Beverly Farrell, Civil Division, U.S. Department of Justice, of New York, NY, argued for plaintiff United States. With her on the brief were *Amy Rubin*, Assistant Director, and *Benjamin Mizer*, Principal Deputy Assistant Attorney General. Of counsel on the brief were *Edward Maurer* and *Michael Heydrich*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

T. Randolph Ferguson, Sandler Travis & Rosenberg, P.A., of San Francisco, CA, and *Frederick L. Ikenson*, Blank Rome LLP, of Washington DC, for defendant Lincoln

Id. Further, Plaintiff provides, by its own submission on the record, that the chlor-alkali process is not a distinct industry, but an electricity-intensive step in the production of chloro isocyanurates (SDIC and TCCA) (i.e., implicating both the subsidized good and industry at issue here). *See Jiheng Section III Resp.*, ECF Nos. 26 & 27 at Tab 3, at app. 3 (providing an outline of the chlor-akali stage in the production of chlorinated isocyanurates).

[72] *See Mueller Comercial*, 753 F.3d at 1234 (quoting *F.lli De Cecco*, 216 F.3d at 1032); *Fine Furniture*, 748 F.3d at 1373.

[73] *See Fine Furniture*, 748 F.3d at 1373.

General Insurance Co. (In Liquidation). With them on the brief was *Kierstan L. Carlson*, Blank Rome LLP, of Washington DC.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff United States initiated the nine above-captioned actions to recover from defendant Lincoln General Insurance Company ("Lincoln") supplemental antidumping duties and accrued interest claimed to be owing on various entries secured by customs bonds. The entries at issue, which were made between May 1, 2002 and October 31, 2002, covered imports into the United States of garlic from the People's Republic of China.

Before the court are plaintiff's motions to stay the above-captioned actions in light of the recent liquidation of Lincoln by order of the Commonwealth Court of Pennsylvania, issued November 5, 2015 ("Liquidation Order"). Pl.'s Mot. to Stay 1 (Nov. 11, 2015), ECF No. 66 ("Pl.'s Mot."); *see also*, *id.* at Attach. 1 (*IN RE: Lincoln General Insurance Company In Liquidation*, No. 1 LIN 2015) ("*Liquidation Order*").[1] Defendant Lincoln General Insurance Company (In Liquidation), successor in interest to Lincoln General Insurance Company (collectively, "LGIC"), opposes the stays.[2] Def.'s Resp. in Opp'n to Pl.'s Mot. to Stay (Nov. 16, 2015), ECF No. 67 ("Def.'s Opp'n"). For the reasons discussed herein, the court will grant plaintiff's motions to stay these cases.

Under the terms of the Liquidation Order, LGIC is to be liquidated pursuant to Article V of the Insurance Department Act of 1921 (the "Act"), 40 Pa. Stat. §§ 221.1–.63 (governing the liquidation of insolvent insurers under Pennsylvania law). *Liquidation Order* 1. Plaintiff points out that the Liquidation Order sets a deadline of July 6, 2016 for filing of proof of claims against LGIC's estate, adding that "[i]t will not be known until after all proofs of claims are received and evaluated whether the estate will be in any position to make good on the Government's claims . . . ." Pl.'s Mot. 2; *see also Liquidation Order* ¶ 13; 40 Pa. Stat. §§ 221.37–.38.

Section 221.44 of the Act establishes the following classes of priority for claims against an insolvent insurer:

> (a) administrative claims; (b) claims under policies of insurance; (c) claims of the federal government; (d) certain debts due em-

[1] Pursuant to the court's April 3, 2014 order granting plaintiff's consent motion for leave to file single, representative submissions for the nine above-captioned actions, all citations to the parties' court filings are to the docket for Court No. 13–00084.

[2] LGIC is under the control of Teresa D. Miller, Insurance Commissioner of the Commonwealth of Pennsylvania, in her official capacity as Liquidator of LGIC. *Liquidation Order* 1.

> ployees; (e) the claims of general creditors, including simple contract creditors; (f) claims for unearned premium or premium refunds; (g) claims of local and state governments; and (h) all other claims.

Id. § 221.44. Section 221.44 further provides that "[e]very claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment." *Id.* In seeking the stays, plaintiff submits that LGIC's estate may be partially or entirely depleted of funds before reaching plaintiff's creditor class. Plaintiff argues, further, that continuing litigation of the nine pending actions at this time could further diminish the estate's limited assets, increasing the likelihood that plaintiff would be unable to collect on successful claims, and that denying the requested stays could encumber both parties with unnecessary litigation costs.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) ("*Landis*"). The decision of when and how to stay a proceeding rests "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In making this decision, the court is to "weigh competing interests," including those of judicial economy and efficiency, "and maintain an even balance." *Landis*, 299 U.S. at 257. Where a stay might damage another party, the moving party "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Id.* at 255.

Judicial economy and efficiency favor a stay of proceedings in the above-captioned actions. According to the parties, the appointed liquidator of LGIC's estate advised LGIC's counsel in writing that she would like to proceed with these actions. Pl.'s Mot. 1; Def's Opp'n 7. The reasons the liquidator wishes to continue litigation are not stated in the letter to LGIC's counsel. *See* Def. Lincoln Gen. Insurance Co.'s Post-Oral Argument Br. on Jurisdiction, Ex. 2, Appx. B (Nov. 9, 2015), ECF No. 62 (liquidator's November 9, 2015 letter).

A stay of the above-captioned actions pending the receipt and evaluation of submissions in the statutory proof of claim process may avoid the needless adjudication of claims in the pending cases. As plaintiff points out, some or all of these claims could be rendered moot by creditor priority provisions and the limited assets of LGIC's estate.

In opposing plaintiff's motions, defendant argues that proceeding to litigate these cases at this time "will not pointlessly deplete the assets of LGIC's estate" because it "will aid the Liquidator in determining the amount of assets available for distribution," Def.'s Opp'n 10, as well as "LGIC's liability to the United States," *id*. at 8. Defendant, however, does not state why the requested stays would be prejudicial to it, and the court has no basis upon which to conclude that any such prejudice would occur. The court concludes that the benefits to judicial economy and efficiency occasioned by the requested stays outweigh any benefits that would result from continuing to litigate these actions in the short term. *See* USCIT R. 1. Accordingly, the court is granting plaintiff's motions.

The court concludes, further, that prompt reporting by the parties concerning the status of the proof of claim process is appropriate so that the court may review the need for any continuation of the stays. For this reason, the court is ordering the parties to file a status report on or before August 31, 2016.

ORDER

Upon consideration of plaintiff's motions to stay, defendant's response in opposition, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's motions to stay be, and hereby are, granted; it is further

ORDERED that the nine above-captioned actions are stayed; and it is further

ORDERED that the parties shall provide the court with a status report concerning the proof of claim process pertaining to Lincoln General Insurance Company (In Liquidation) and any related issues on or before August 31, 2016.

Dated: February 18, 2016
New York, New York

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

Slip Op. 16–16

MAVERICK TUBE CORPORATION, Plaintiff, and UNITED STATES STEEL CORPORATION, BOOMERANG TUBE LLC, ENERGEX TUBE (A DIVISION OF JMC STEEL GROUP), TEJAS TUBULAR PRODUCTS, TMK IPSCO, VALLOUREC STAR, L.P., AND WELDED TUBE USA INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and TOSCELIK PROFIL VE SAC ENDUSTRISI A.S., CAYIROVA BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., AND BORUSAN ISTIKBAL TICARET, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 14–00229

[Sustaining results of remand of countervailing duty investigation into oil country tubular goods from Turkey.]

Dated: February 22, 2016

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein, LLP, of Washington DC, for the plaintiff Maverick Tube Corporation.

Robert E. Lighthizer, *Jeffrey D. Gerrish*, and *Nathaniel B. Bolin*, Skadden Arps Slate Meagher & Flom, LLP, of Washington DC, for the plaintiff-intervenor United States Steel Corporation.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

David L. Simon, Law Office of David L. Simon, of Washington DC, for the defendant-intervenors Toscelik Profil ve Sac Endustrisi A.S. and Cayirova Boru Sanayi ve Ticaret A.S.

Donald B. Cameron, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, and *Sarah S. Sprinkle*, Morris Manning & Martin, LLP , of Washington DC, for the defendant-intervenors Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Istikbal Ticaret.

OPINION

Musgrave, Senior Judge:

This opinion addresses the results of remand ("Remand Results" or "RR") filed by the International Trade Administration, U.S. Department of Commerce ("Commerce"), on the underlying consolidated case, familiarity with which is presumed. As discussed below, the Remand Results are supported by substantial evidence and in accordance with law.

By way of brief background, the products that concerned the final affirmative countervailing duty ("CVD") investigation are oil country

tubular goods ("OCTG") from Turkey, in particular the alleged state provision of hot-rolled steel for less than adequate remuneration ("LTAR") and other state benefits in the production thereof. *See Certain Oil Country Tubular Goods From the Republic of Turkey*, 79 Fed. Reg. 41964 (July 18, 2014), PDoc 369, and accompanying issues and decision memorandum (July 10, 2014) ("*IDM*"), PDoc 363, (collectively "*Final Determination*"); *see also* 19 U.S.C. §1677(5). The period of investigation is January 1, 2012, through December 31, 2012 ("POI").

Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Istikbal Ticaret (together "Borusan") filed the first appeal of the *Final Determination*. *See* Court No. 14–00214. Opposing consolidation with the other lawsuits challenging the investigation filed thereafter, Borusan also filed a "motion to expedite briefing and consideration." *Id.*, ECF No. 7 (Sep. 10, 2014). The filing of a joint proposed scheduling order, to which the defendant had consented, mooted acting on the motion to expedite briefing, *see id*., ECF No. 11 (Sep. 17, 2014), and motions to intervene in that action were filed thereafter and duly acted upon in the order received, *see id*., ECF Nos. 30–33 (Sep. 29, 2014).

Issuance of slip opinion 15–36 in due course remanded to Commerce and obviated acting on the motion for expedited consideration.[1] *See Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT ___, 61 F. Supp. 3d 1306 (2015) ("*Borusan*"). In the court's opinion, substantial evidence of record appeared to support Commerce's determination that HRS suppliers Eregli Demir ve Celik Fabrikalari T.A.S. ("Erdemir") and its subsidiary Iskenderun Demir ve Celik A.S. ("Isdemir") were government "authorities" for purposes of the CVD statute, but further consideration of the finding that the Turkish HRS market was distorted as well as the application of adverse facts available ("AFA") with respect to reported HRS purchases by Borusan was remanded as necessary. *See generally* 39 CIT at ___, 61 F. Supp. 3d at 1324–49; *see also* 19 U.S.C. §§ 1677e(a) and (b). Also remanded were several other issues related to benefit measurements under 19 C.F.R. §351.511(a)(2)(iv), the further consideration of which depended upon the Turkish HRS market's level of distortion. *See* 61 F. Supp. 3d at 1337.

Subsequently, *Maverick Tube Corp. v. United States*, 39 CIT ___, Slip Op. 15–59 (June 15, 2015) ("*Maverick*"), addressed the similar claims of the domestic industry litigants and the respondent Toscelik

[1] In particular, issuance of that opinion also obviated that motion's proposed order's peculiarity, *i.e.*, having the court order itself to consider the case on an expedited basis, whereas the timing of today's opinion reflects the consideration associated with the knottiness of certain issues after remand.

Profil ve Sac Endustrisi A.S. (together with Cayirova Boru Sanayi ve Ticaret A.S., "Toscelik") separately filed here against the HRS-for-LTAR aspect of the investigation into OCTG from Turkey as well as Toscelik's claim against the agency's benchmark for valuing a parcel of land that the Government of Turkey ("GOT") had granted to Toscelik in 2008 for LTAR (the "Osmaniye Parcel"). *See generally* Slip Op. 15–59. *Maverick* adopted *Borusan* in remanding the same or similar issues, and the two cases were consolidated during remand.[2]

In the Remand Results before the court, Commerce reversed its prior position regarding market distortion under protest and used tier-one (*i.e.*, actual) transaction prices in Turkey as a benchmark to calculate the benefit from the provision of HRS for LTAR to Borusan and Toscelik during the POI. RR at 18, 46. As a result, Commerce deemed the remaining benefit-related matters that had been remanded no longer relevant and did not address them further in the Remand Results.[3] *See* RR at 3. Commerce again insisted that applying partial AFA to Borusan was proper. *See id*. at 7–8, 19–28. Lastly, Commerce adjusted the Osmaniye Parcel benchmark. *Id*. at 3. The parties argue for further remand, as follows.

I

The domestic industry representatives, Maverick Tube Corporation ("Maverick") and United States Steel Corporation ("U.S. Steel"), argue that the Remand Results' analysis of market distortion is not adequately explained. Their arguments may be summarized as putting the onus on the Government of Turkey ("GOT") for the state of the record, which "precluded" Commerce from finding the Turkish HRS market distorted, because the GOT did not provide data on Erdemir's and Isdemir's share of HRS production and consumption in Turkey. The domestic industry thus argues Commerce erred in not applying AFA.

Restating parts of the Remand Results, U.S. Steel argues "there is no question that the GOT failed to cooperate to the best of its ability by failing to provide the information requested by Commerce regarding the HRS market in Turkey." U.S. Steel Cmts at 5–6. Maverick also criticizes Commerce for accepting "without scrutiny or explanation" the GOT's statement that "confidentiality requirements" related to Turkey's European Union relationship and businesses precluded submitting documentation underlying the GOT's National Restructuring

[2] *See*, *e.g.*, Court No. 14–00214, ECF No. 85 (June 22, 2015).

[3] As an aside, Commerce confirmed on remand that *Borusan*'s "interpretation is an accurate statement of Commerce's meaningful control standard," which no party challenges. *See* RR at 12.

Plan, and Maverick insinuates that the GOT did not treat that documentation as confidential "when they formed the basis of [the GOT's] position paper"or distinguish information in these documents from the types of information regularly submitted as confidential under the protection of an administrative protective order in Commerce's investigations. Maverick Cmts at 8.

Regarding the averment that Commerce was not "direct[ed] to reassess the GOT's failure to provide HRS production data[ ] and on that basis presume as adverse facts available that the HRS market is distorted", Maverick Cmts at 4, quoting RR at 31, Maverick first notes that this is true only insofar as the remand orders did not direct Commerce to reconsider the record in any particular manner or to reach any particular conclusion, which is correct,[4] and that Commerce was also requested "to explain those circumstances where 'substantial portion of the market' results in minimal distortion and where it results in substantial or significant distortion and explain its reasoning on its categorization of the matter at bar and the record evidence that supports it", *id*., quoting *Borusan*, 61 F. Supp. 3d at 1330. Maverick argues the Remand Results attempt this exercise "but fail for the explicit reason that the GOT did not provide necessary information despite Commerce's repeated requests." *Id*., referencing RR at 14.

The court does not discern where in the Remand Results that exercise is attempted. Be that as it may, Commerce obviously casts doubt on the GOT's responsiveness by calling into question whether the GOT was actually in possession of the kind of production and consumption data requested or could mandate its procurement, and Maverick and U.S. Steel go further, arguing that the GOT actually was in possession. However, the assumption that underlies their arguments is that the GOT in fact maintained, or had access to, the level of such data that would be meaningful to this investigation. Speculation is not substantial evidence. *See*, *e.g.*, *Asociacion Columbiana Exportadores de Flores v. United States*, 23 CIT 148, 153–54, 40 F. Supp. 2d 466, 472 (1999). *Cf. Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990) (Commerce may not "characterize a party's failure to list and give details of sales as a 'refusal' or 'inability' to give an answer where, in fact, there are no sales").

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[4] As stated in *PPG Industries* on a similar contention, "it is equally true that that order did not restrict the agency from doing so. Indeed, the intent of the remand was to permit maximum administrative flexibility." *PPG Indusries v. United States*, 15 CIT 632, 637 (1991).

In the final analysis, Commerce did not find dispositive evidence of market distortion on the record, and the parties do not point to anything of record to indicate that the GOT was not being truthful in stating that it could not provide production and consumption data for HRS. Maverick insists, however, that the record belies the GOT's claim of "confidentiality requirements." Maverick Cmts at 8, referencing PDocs 272–79 at 3–4. The argument is underdeveloped, and examination of that portion of the record does not reveal contradiction. In particular, Maverick does not explain why either the GOT's claim could not have been construed as comporting with 19 C.F.R. §351.304 or may have been improperly considered privileged information pursuant to 19 C.F.R. §351.105(d). Furthermore, whether the parties' aspersions accurately characterize what transpired during the investigation, they do not lead to the conclusion that the application of AFA against the GOT is the proper remedy at this point, given Commerce's treatment thereof at that time and since. *Cf.*, *e.g.*, *Essar Steel Ltd. v. United States*, 34 CIT 1057, 1070, 721 F. Supp. 2d 1285, 1297 (2010) ("[w]here the foreign government fails to act to the best of its ability, Commerce will usually find that the government has provided a financial contribution to a specific industry") (citation omitted).[5] Hence, notwithstanding the Remand Results' narrative regarding the GOT's responsibility for the state of the record, substantial evidence of record supports the Remand Results on the issue of market distortion.

II

Regarding the application of partial AFA to Borusan's questionnaire responses on its HRS purchase information, the relevant regulation, 19 C.F.R. §351.525(b)(5), provided during the POI that "[i]f a subsidy is tied to production or sale of a particular product, the Secretary will attribute the subsidy only to that product", but "[i]f a subsidy is tied to production of an input product" such as HRS, "then the Secretary will attribute the subsidy to both the input and downstream products produced by a corporation." In retrospect, it is apparent that remand of the issue engendered interpretive difficulty.

A

The Remand Results elaborate somewhat on Commerce's attribution practice, beginning with restatement that Commerce's regula-

[5] The court also notes Borusan opposing the implication in the Remand Results that *Borusan* affirmatively supports use of a *per se* market distortion rule in any case in which the government supplier accounts for a majority of the market, Borusan's Cmts at 14–17, but any comment here on that, at this stage, would amount to an advisory opinion.

tory practice is to regard the provision of an input for LTAR as benefitting a company's overall production absent a requirement explicitly made at the time of "bestowal," *i.e.*, when the terms for the provision are set, that the input may only be used for a certain subset of a company's production. Commerce's "tying rules are an attempt at a simple, rational set of guidelines" for addressing the kind of "attribution-related issues" that arise when considering fungible inputs. *See* 19 C.F.R. §351.525(b)(5). *Cf.* RR at 20, quoting *Countervailing Duties*, 63 Fed. Reg. 65348, 65403 (1998) ("*CVD Preamble*").

Thus, pursuant to practice, Commerce seeks purchase information for all procured input being investigated for LTAR regardless of whether the input is for incorporation into subject or non-subject merchandise. RR at 20–22, referencing, *inter alia*, *Certain Kitchen Shelving and Racks from the People's Republic of China* ("*PRC*"), 74 Fed. Reg. 37012 (July 27, 2009) (final affirmative CVD determ.) ("*Kitchen Racks from the PRC*") and accompanying issues and decisions memorandum (such memoranda hereinafter "I&D Memo") at cmt. 10 ("[g]iven the breadth of product line . . . and the wide variance of Wire King's use of wire rod in its products, we do not find that the GOC intended to benefit specific . . . products"). "Absent a determination that a subsidy is tied to a specific product under 19 CFR 351.525(b)(5), Commerce does not limit the attribution of a benefit from a subsidy program to a specific product." RR at 23, quoting *IDM* at 53 (internal quotations and bracketing omitted). More precisely, Commerce will only consider a subsidy tied to a particular product when it is specifically earmarked to that product by the foreign government. *See id*. at 20.

The Remand Results also restate Commerce's position on the administrative record of Borusan's responses to the two administrative requests for information on Borusan's HRS input procurement. By way of brief background, Commerce first requested Borusan's HRS input information pursuant to its general practice. Borusan's first response did not provide all the information Commerce requested; instead, Borusan provided the information that Borusan believed would suffice for purposes of calculating the CVD margin for its subject merchandise. Commerce's supplemental questionnaire repeated its request for all HRS purchase information and also requested that if Borusan is unable to provide this information then Borusan should explain in detail why it cannot do so and explain the efforts made to obtain the information. Borsuan responded by providing a more elaborate explanation of the difficulties it had encountered in obtaining the Gemlik mill information, in particular the fact the information was in disparate systems and had to be extracted

manually, that the Gemlik plant information alone, which was the only plant dedicated to production of subject merchandise, had amounted to over 300 pages of detail, and had taken over two weeks involving numerous personnel. By "provid[ing] in the alternative"[6] the full reporting of HRS purchase information for the Gemlik plant, Borusan asked Commerce to relieve it of the burden of having to produce the HRS purchase information for the other two plants pursuant to 19 U.S.C. §1677m(c). Borusan also stated that if Commerce truly needed the information for the non-subject merchandise producing plants, Borusan stood ready to provide it but that it would take several weeks to provide. *See generally* CDocs 136–37 at 8–11. For the remainder of the administrative review, Commerce was silent on the matter, and for its *Final Determination* it applied partial AFA to Borusan's responses.

B

Given Commerce's silence, and since it was unclear to the court why Commerce still considered that information necessary to its *Final Determination*, *cf. CVD Preamble*, 63 Fed. Reg. at 65403 (explicitly rejecting "fungibility" as "the guiding principle for attributing subsidies"), the matter was remanded with the intention of clarifying whether insistence upon adherence to administrative practice was only an excuse for resorting to facts available pursuant to 19 U.S.C. §1677e in order to impose an adverse inference in the selection thereof at the time the *Final Determination* was made. Unfortunately, given the timeline of the relevant events, the opinion's commentary may have clouded the issue.

For example, defense of the Remand Results veers into argument that 19 U.S.C. § 1677e(a) does not require that information be "necessary," only "reasonable," in order for Commerce to "act[ ] well within its discretion" when seeking information, and that "an interpretation of the statute to require that Commerce establish that all information that it requests is 'necessary' effectively reads subsection (2) out of the statute entirely." *See*, *e.g.*, Def's Resp. to Cmts at 12–13, referencing RR at 30, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014), *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990), *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1254 (Fed. Cir. 2009) and *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1353 (Fed. Cir. 2015) (recognizing a distinction between subsections (a)(1) and (2)). *Borusan*, however, did not impose such an interpretation of the statute; it was the *Final Determination*'s own

[6] CDocs 136–37 at 10.

statement (*i.e.*, that the application of AFA to Borusan rested on the absence of "necessary" information and the purported "withholding" of that information) that prompted the expressed opinion.

The parties also argue over the "tying" exception in 19 C.F.R. §351.525(b)(5) rather than focus on the point of the remand. Borusan, for example, argues that its purchases of HRS for the Gemlik plant were indeed "tied," and it distinguishes its circumstance from cases claimed in the Remand Results as support for Commerce's position, in particular *Steel Wire Strand from the PRC*.[7] However, there is no indication in the record that the HRS was "tied" to either subject or non-subject-merchandise in the sense contemplated by 19 C.F.R. §351.525(b)(5) apart from the fact that shipments of HRS to Gemlik from Erdemir and Isdemir were "destined for" Gemlik. For instance, it does not appear that Erdemir and Isdemir "purposed" the HRS shipped to Gemlik for incorporation only into particular merchandise. For that reason, the court must conclude the Remand Results reasonably explain that provision of the HRS purchase information for the non-subject merchandise producing plants was "necessary" in the sense contemplated by Commerce's general regulatory practice.

Nonetheless, Borsuan argues that the Remand Results do not explain how in the final analysis of the facts of this case Commerce

[7] *See Kitchen Racks from the PRC*, I&D Memo at cmt. 10 (rejecting petitioner's request "to tie the benefit from Wire King's purchases of preferentially priced wire rod only to purchase made with wire rod"); *Drill Pipe from the PRC*, 76 Fed. Reg. 1971 (Jan. 11, 2011) (*inter alia*, final affirmative CVD determ.) ("*Drill Pipe from the PRC*"), and accompanying I&D Memo at cmt. 6 (rejecting petitioners' request to tie benefit to particular products because "their position on a product classification [ ] simply groups together different products that use a common material input" and the input at issue was used in the production of various products); *Circular Welded Austenitic Stainless Pressure Pipe From the PRC*, 73 Fed. Reg. 39657, 39663–64 (July 10, 2008) (*inter alia*, prelim. affirmative CVD determ.) ("*Pressure Pipe from the PRC*") at "Provision of Stainless Steel Coil for LTAR" (rejecting respondents' argument that stainless steel coils should not be subject to LTAR subsidy analysis where the inputs are "not . . . incompatible with the production process"); *Pre-Stressed Concrete Steel Wire Strand from the PRC*, 75 Fed. Reg. 28557 (May 21, 2010) (final affirmative CVD determ.) ("*Steel Wire Strand from the PRC*"), and accompanying I&D Memo at 10 (discovering at verification of unreported data and refusing to accept respondents' justification that other factories "did not use the wire rod they purchased during the POI to produce PC strand," therefore issue of whether respondents did not have the capability to produce the subject merchandise was not reached). Borusan argues that unlike *Steel Wire Strand from the PRC*, where Commerce discovered at verification that the respondents had not reported wire rod purchases for two factories, Borusan had explained to Commerce four and a half months before Commerce's post-preliminary analysis of this case via its original and supplemental responses that the Halkali and Izmit plants do not produce the subject merchandise and were not at the time capable of producing the subject merchandise. PDoc 75 at 11; PDoc 218 at 8–11. Borusan also argues that it explained it did not transfer any HRS from these plants to the Gemlik plant that produces the subject merchandise, *see* PDoc 75 at 11 & PDoc 218 at 10, and that Commerce never contested these facts. Borusan's Cmts at 6–7.

could lawfully determine that the HRS delivered to the Halkali and Izmit mills constitutes a subsidy with respect to the manufacture, production, or export of subject OCTGs in accordance with 19 U.S.C. §1671(a)(1). As previously explained, that position is not unreasonable even though it is at odds with Commerce's interpretation of the statute in its regulation.

On the one hand, most importantly, Commerce had the actual HRS purchase information for the Gemlik plant that pertained to all of "Boruan's" subject merchandise, which was the main point of questioning why the non-subject-merchandise-producing plants' information was "necessary" *for the Final Determination*. Assuming it is reasonable to presume that a company as a whole benefits from the fungibility of a monetary benefit, such as the purchase of an input-for-LTAR, then if Commerce had received the "missing" HRS purchase information for the non-subjectmerchandise producing plants and had calculated a company-wide benefit that it then attributed (back) across subject and non-subject merchandise that was produced at other plants, it was (and still is) unclear to the court whether that result would be any more accurate than attributing to the subject merchandise a calculated "company-wide benefit" consisting of the HRS purchases for the HRS that was *actually* procured at identifiable prices and was *actually* incorporated into subject merchandise that could be attributed to said subject merchandise.[8]

The only difference having the HRS purchase information for the non-subject merchandise producing plants (which are geographically and conceptually distinct from the Gemlik plant) would make is if there are measurable purchase price differences in HRS procurement. In such a circumstance, determining the average price of all "company-wide" input-for-LTAR procurement and "attributing" the "benefit" across all production utilizing the input-for-LTAR potentially produces a "fuzzier" result for the relevant subject merchandise than a record that can account for the price of the HRS that is actually incorporated into (and therefore attributable to) the subject merchandise.[9] In other words, differently priced input-for-LTAR pro-

[8] *See Borusan*, 39 CIT at ___, 61 F. Supp. 3d at 1347 ("[i]n other words, at that point, and assuming the truth of Borusan's claims regarding subject merchandise and non-subject merchandise production survived verification, Commerce's 'attribution' would wind up at exactly at the point that Borusan had been making all along to Commerce: that the HRS purchase information for the non-subject-merchandise-producing Halkali and Izmit mills is not relevant to the *attributable* HRS for LTAR in the countervailing duty investigation of oil country tubular goods from Turkey") (italics in original).

[9] Analogous to the physically distinct HRS shipped from Erdemir to the geographically separate Gemlik and non-subject merchandise producing plants is the fact that U.S. Customs and Border Protection explicitly lists the "specific identification method" as one of its recognized inventory management systems for the handling of fungible goods for iden-

vide different levels of benefit(s) to the company, so insistence upon application of a "company-wide" attribution average would conceptually distort the record of the actual benefit of the actual cost of the input that generally accepted cost accounting principles would attribute to account for the input's actual incorporation into subject merchandise -- either away from that merchandise, or *vice versa* in the case of non-subject merchandise. Either instance would not appear to comport with 19 U.S.C. §1671(a)(1). *Cf.* 19 C.F.R. §351.525(b)(5)(i) ("tied to the production or sale of a particular product"). And that, in a nutshell, is Borusan's argument.

On the other hand, the question before the court is whether Commerce's determination is supported by substantial evidence and in accordance with law. And on that question, the court must defer to Commerce's methodology if it is reasonable. *See*, *e.g.*, *GPX Int'l Tire Corp. v. United States*, 37 CIT ___, ___, 893 F. Supp. 2d 1296, 1329 (2013), *aff'd*, 780 F.3d 1136 (Fed. Cir. 2015). The Remand Results explain that Commerce's tying inquiry is meant to balance the fact that "money" is fungible with the congressional attempt to "attribute" subsidies to the products directly benefitting from the subsidy. RR at 40. The court must conclude the general attribution practice not unreasonable *per se*, because aggregating a company's discrete purchases of a subsidized fungible input into one "company-wide" benefit is not inconsistent with the statute. The statute is ambiguous on that point, and Commerce's interpretation of ambiguity in the statute it is charged with administering is entitled to *Chevron* deference. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). *Cf.* 19 U.S.C. §1671(a)(1) ("a countervailable subsidy *with respect to* the manufacture, production, or export of a class or kind of merchandise") (italics added).

Regardless, as the domestic industry correctly points out, the application of AFA is the ultimate issue here, not Commerce's input-attribution practice in general. On the AFA issue, however, Commerce's attribution practice is not irrelevant, because Commerce also has the discretion to deviate from practice if circumstances warrant. *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003). Taking into consideration the entirety of the above, thus, it was (and, again, still is) unclear what "attribution-related issue" remained after Borusan had submitted its first and supplemental questionnaire responses providing all HRS purchase information for the only plant that produced subject merchandise and explaining its circumstance and the difficulty it had encountered in gathering the

tification of the good's country of origin. *See* 19 C.F.R. §102.12(b) & Pt. 181, Appx. (*NAFTA Rules of Origin*), Sec. 7(16) & Sch. X. §13.

HRS information even for just that plant. *Cf.* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103316, vol. 1, at 869 (1994) ("Section 776(a) makes it possible for Commerce . . . to make [its] determination[ ] within the applicable deadlines if *relevant* information is missing from the record") (italics added), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198. Nonetheless, the Remand Results necessarily imply that Commerce, when making its *Final Determination*, concluded that Borusan's circumstances did not compel deviation from Commerce's company-wide input information demand practice. Whether that was an afterthought, the court is precluded from "displac[ing] the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

C

Borusan also contends that even if the information was "necessary" in accordance with Commerce's practice, there was no basis to apply an adverse inference when selecting among the facts otherwise available. Borusan's Cmts at 4. In accordance with the foregoing, however, there was a basis.

Although, and as previously indicated, the court has substantial doubts on whether Commerce properly informed Borusan of the "nature" of the original questionnaire response's deficiency in the spirit of 19 U.S.C. §1677m(d),[10] once again it is Commerce's interpretation of ambiguous portions of the statute it is tasked with administering that is entitled to *Chevron* deference, *see supra*, not an independent *de novo* opinion on the subject, and the "nature of the deficiency" would certainly encompass informing that a response to a questionnaire did not provide all requested information, even if it did not provide a straightforward answer on Borusan's request to be relieved of providing information that seemed unnecessary to the *Final Determination* on the investigation of HRS-for-LTAR in the subject

[10] *Cf.* PDoc 177 at 4–5 *with American Tubular Products, LLC v. United States*, 36 CIT ___, Slip Op. 14–116 at 20 (2014) (19 U.S.C. §1677m(d) "ensures that Commerce's data collection does not morph into an administrative guessing game, where the agency punishes parties for giving incomplete answers to cryptic questions"), referencing *Bowe-Passat v. United States*, 17 CIT 335, 342 (1993). In that spirit, simply pointing to "practice" and stating the obvious (that Borusan's original questionnaire response did not provide all the HRS information requested) and requesting Borusan to provide the missing information and explain its efforts to provide it, is hardly a "question" that fully addressed Borusan's original response, as it does not indicate clear acknowledgment and rejection of Borusan's request to be allowed to submit only the Gemlik plant HRS purchase information.

merchandise OCTGs. *See* 19 U.S.C. §1677m(d) ("If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency"). To require more, however, would intrude into Commerce's province.

It is true, as Borusan argues, that the observation in the prior opinion that the application of an adverse inference does not appear warranted in this case did not hinge on the "necessity" of the HRS purchase information for the Halkali and Izmit plants, as the opinion was based on the record of Commerce's and Borusan's communications during the investigation. Nonetheless, to the extent Borusan contends that the opinion's observation amounts to a holding or a conclusion of the issue as a matter of law,[11] the argument is inconsistent with the court's standard of review. In the final analysis, the question is solely whether the agency's determination is supported by substantial evidence on the record and is in accordance with law. 19 U.S.C. §1516a(b)(1)(B)(i).

Notwithstanding that Borusan was left in limbo on its request for relief from Commerce's request for non-subject merchandise producing mills' HRS purchase information, Commerce's request for that information was still outstanding by the time Commerce reached its preliminary determination and Commerce implicitly refused to deviate from its general attribution practice. Substantial evidence of record supports Commerce's conclusion in its *Final Determination* that Borusan had not exerted its best efforts to provide the requested

[11] *See Borusan*, 39 CIT at ___, 61 F. Supp. 3d at 1349 ("it does not *appear* that Borusan's was the type of 'willful' non-compliance that would merit imposition of an adverse inference") (italics added). The Remand Results also stress that a showing of "willfulness is not required" to draw an adverse inference. RR at 24–25, citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("*Nippon Steel*"). However, *Borusan* did not hold that Commerce was required to find willfulness in order draw an adverse inference, the opinion merely drew attention to Commerce's own argument in relief against the record in that regard, and Borusan highlights the prior opinion's recognition that willfulness is not required by calling attention to that opinion's albeit subtle reference, *via Mukand, Ltd. v. United States*, 767 F.3d 1300 (Fed. Cir. 2014), to *Nippon Steel* -- the very case relied upon by Commerce. *Cf. Borusan*, 39 CIT at ___, 61 F. Supp. 3d at 1346, citing, Def's Resp. in Ct. No. 14–00214, ECF Doc. No. 52 (Jan. 15, 2015), at 45–46, *with Nippon Steel Corp*. 337 F.3d at 1383 (holding that while there is no requirement to find motivation or intent in order to draw an adverse inference, "[a]n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made"). Precisely so.

information. *See Nippon Steel*, 337 F.3d at 1382–83. In other words, whether Commerce's inaction upon Borusan's request for relief was arguably abusive, substantial evidence supports that Borusan at least shared if not bore responsibility for the state of the record, *see supra*, and the state of the law does not, apparently, require more of Commerce. *Cf. Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1275–76 (Fed. Cir. 2012) (quoting *Nippon Steel*, 337 F.3d at 1382: "[c]ompliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation"), *with Ansalado Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986) ("[i]t is Commerce, not the respondent, that determines what information is to be provided" *et cetera*).

III

Toscelik previously persuaded that in order to value its Osmaniye Parcel, for its *Final Determination* on the investigation of OCTG from Turkey Commerce had "merely adopted" the 2011 administrative review results of the CVD order on circular welded carbon steel pipes and tubes from Turkey ("CWP from Turkey"). *Maverick*, Slip Op. 15–59 at 12. The court concluded that the *post-Toscelik*[12] final results of those reviews implicated the benchmark valuation of the Osimanye Parcel and remanded for correction thereof. *Id*. Commerce complied in the Remand Results. RR at 28.

U.S. Steel contends the revision of the benchmark should be overturned, arguing that establishing the amortization schedule for the Osmaniye Parcel during the 2010 administrative review of *CWP from Turkey* may have had binding consequences on the subsequent 2011 review of that product but is not binding and has "no application" in this separate OCTG from Turkey investigation. U.S. Steel emphasizes that for *OCTG from Turkey*, Commerce revised its valuation by expanding the number of data points for the benchmark in order to "build the most robust data set possible" as "the more commercial transactions within Turkey that [Commerce] uses as part of its benchmark analysis, the greater the likelihood that the benchmark will accurately reflect the experience of commercial land purchasers in Turkey." U.S. Steel Cmts at 18, quoting *IDM* at 58, PDoc 363. U.S. Steel contends this makes the benchmark "more accurate" and "there is no reason not to make the calculation more accurate in a completely

[12] *See Toscelik Profil ve Sac Endustrisi A.S. v. United States*, 38 CIT ___, Slip Op. 14–126 (Oct. 29, 2014) ("*Toscelik*").

separate CVD proceeding. Indeed, failing to recalculate the benefit in this case simply perpetuates the inaccuracy of the calculation in a separate case based on a principle that has no application." *Id*. at 18–19.

In other words, U.S. Steel argues that the 2010 and 2011 land benefit calculations in *CWP from Turkey* are properly characterized as "inaccurate" and it thereby impugns the validity of the 2010 and 2011 (*post-Toscelik*) administrative reviews of *CWP from Turkey*. After re-reading the prior opinion and the relevant potion of the *IDM* for the original determination of this proceeding in accordance with U.S. Steel's arguments, the court continues to conclude that a consistent Osmaniye Parcel benchmark value across proceedings is necessary. *Cf.*, *e.g*., PDoc 140 *with* RR at 57 ("[o]ur calculation of a simple average is *consistent with* the Department's calculation of the land benchmark in *CWP from Turkey* 2011 AR") (italics added; footnote omitted). U.S. Steel does not persuade that error is manifest in Commerce's benchmark valuation of the Osmaniye Parcel and/or the amortization schedule thereof as established in *CWP from Turkey* through appeal thereof, and in the absence of such a showing a disparate valuation of that same parcel of land as a final result of *this* proceeding would be odd indeed.

Conclusion

In accordance with the foregoing, the Remand Results must be sustained, and judgment to that effect will be entered.

Dated: February 22, 2016
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 16–17

GOLDEN DRAGON PRECISE COPPER TUBE GROUP, INC., HONG KONG GD TRADING CO., LTD., GOLDEN DRAGON HOLDING (HONG KONG) INTERNATIONAL, LTD., AND GD COPPER (U.S.A.) INC., Plaintiffs, v. UNITED STATES, Defendant, and CERRO FLOW PRODS., LLC, WIELAND COPPER PRODUCTS, LLC, MUELLER COPPER TUBE PRODUCTS, INC, AND MUELLER COPPER TUBE CO., INC., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 14–00116

[Granting defendant's partial consent motion for voluntary remand of final results of redetermination.]

Dated: February 22, 2016

Kevin M. O'Brien, *Christine M. Streatfeild,* and *Yi Fang*, Baker & McKenzie, LLP, of Washington DC, for the plaintiffs.

Michael D. Snyder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for the defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *David P. Lyons*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Thomas M. Beline, Cassidy Levy Kent (USA) LLP, of Washington DC, for the defendant-intervenors.

OPINION AND ORDER

Musgrave, Senior Judge:

Before this court is a partial consent motion by the defendant's Department of Commerce, International Trade Administration ("Commerce") for voluntary remand of the *Final Results of Redetermination Pursuant to Court Order*, *Golden Dragon Precise Copper Tube Group, Inc., et al. v. United States*, Court No. 14–00116, ECF No. 82 (Nov. 18, 2015) ("Remand Results"). The Remand Results were filed pursuant to *Golden Dragon Precise Copper Tube Group, Inc. v. United States*, 39 CIT ___, Slip Op. 15–89 (Aug. 8, 2015) ("*Golden Dragon II*"), remanding the final results of the second administrative review of *Seamless Refined Copper Pipe and Tube From the People's Republic of China,* 79 Fed. Reg. 23324 (Apr. 28, 2014), subsequently amended, 79 Fed. Reg. 47091 (Aug. 12, 2014) ("Final Results"). Familiarity with the case is presumed.[1] As discussed herein, the court grants Commerce's request for a voluntary remand in accordance with the following.

I. *Background*

Following publication of Commerce's amended Final Results in August 2014, Plaintiffs Golden Dragon Precise Copper Tube Group, Inc., Hong Kong GD Trading Co., Ltd., Golden Dragon Holding (Hong Kong) International, Ltd., and GD Copper (U.S.A.) Inc. (collectively "Golden Dragon") and Defendant-Intervenors Cerro Flow Products, LLC, Wieland Copper Products, LLC, Mueller Copper Tube Products, Inc., and Mueller Copper Tube Company, Inc. (collectively "Mueller") each challenged several aspects of Commerce's determination. Golden Dragon's Public Motion for Judgment on Agency Record, ECF

[1] *See Golden Dragon Precise Copper Tube Group, Inc. v. United States*, Court No. 1400116, Slip Op. 14–85 (July 18, 2014) ("*Golden Dragon I*") (remanding to consider ministerial error allegations) and *Golden Dragon II* (remanding to further explain Commerce's selection of Thailand as surrogate value country).

No. 48; Mueller's Public Motion for Judgment on Agency Record, ECF No. 46. This court remanded the Final Results to Commerce for further explanation regarding the selection of Thailand as the surrogate value country in light of Golden Dragon's submissions promoting the selection of Ukraine as the surrogate value country. *Golden Dragon II* at 13–14, 16, 23.

Responding to the *Golden Dragon II* remand order of August 19, 2015, Commerce filed the Remand Results with the court on November 18, 2015, noting that the department did not receive any comments on the draft results and that there were no changes from the draft redetermination to the final redetermination. Remand Results at 1–2. Subsequently, Commerce filed the present motion for voluntary remand of the Remand Results, stating that Commerce had inadvertently neglected to notify parties of the remand proceedings by email, contraryto its standard remand practice. Defendant's Motion for Voluntary Remand ("Commerce Mot."), ECF No. 84.

Commerce's "typical practice" when commencing a remand proceeding is to create a "service list of interested parties" to receive email notifications when Commerce posts a document during the remand proceeding. Commerce Mot. at 2, 3. Commerce avers that it failed to create such a list here, and the agency posits that its "oversight" resulted in parties not receiving email notification of the draft results or of the deadline for comment submission. *Id*. at 2. Specifically, Commerce is moving for a voluntary remand to (1) permit parties to comment on a draft of the remand redetermination, and (2) permit Commerce to address those comments in the final remand redetermination. *Id.* at 2. In support, Commerce explains that a remand will allow the agency to comply with "its important policy of giving parties the opportunity to meaningfully participate in the administrative proceeding". *Id.* at 3.

Defendant-Intervenor Mueller opposes the motion. Response in Opposition to Commerce's Motion for Voluntary Remand ("Mueller Opp'n"), ECF No. 85.[2] Golden Dragon filed a brief in support of Commerce's motion one day later. Response to Defendant's Motion for Voluntary Remand ("GD Resp."), ECF No. 86.

II. *Jurisdiction and Standard of Review*

Jurisdiction is here pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. §1516a(a)(2)(B)(iii) and 28 U.S.C. §1581(c). The court will uphold an administrative determina-

[2] Mueller's opposition brief does not include page numbers. For purposes of this opinion, the court will use the pagination as determined by the CMECF system for page references herein.

tion 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).

III. *Discussion*

Mueller asserts several arguments opposing Commerce's remand request. The main thrust of Mueller's argument contends that Commerce's remand request is not appropriate under the prevailing remand standards and that therefore the remand request is premature. Mueller Opp'n at 2–3. This argument is unpersuasive. In *SKF USA Inc. v. United States*, the U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit") held that when a court reviews an agency action, "the agency may request a remand (without confessing error) in order to reconsider its previous position." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1027–30 (Fed. Cir. 2001) ("*SKF*"). The requesting agency may wish to "consider further the governing statute, or the procedures that were followed. [The agency] might simply state that it had doubts about the correctness of its decision". *Id*. at 1029. When an agency requests a remand without confessing error, "the reviewing court has discretion over whether to remand." *Id*. (internal citations omitted). A remand may be refused if the agency's request is "frivolous or in bad faith" but a remand is "usually appropriate" if "the agency's concern is substantial and legitimate." *Id*. Further, the court has considered Commerce's concerns to be substantial and legitimate when (1) Commerce provides a compelling justification, (2) the need for finality does not outweigh the justification, and (3) the scope of the remand request is appropriate. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT ___, 882 F. Supp. 2d 1377, 1381 (2013) ("*Ad Hoc Shrimp*"), referencing *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1521–25, 412 F. Supp.2d 1330, 1336–39 (2005) ("*Shakeproof*").

While the court agrees with Mueller that in its motion Commerce does not expressly invoke one particular remand situation, Commerce states that it "has not concluded that it[s] decision is incorrect on the merits" and that its basis for requesting a remand is "most similar" to a request to reconsider its previous position without confessing error. Commerce Mot. at 2–3. The remand request encompasses Commerce permitting parties to comment on the draft results and later addressing those comments in the final remand results. *Id*. at 2. Commerce specifically states that this request does not stem from an admission of error. *Id*. at 3. This justification "falls neatly" into the fourth situation prescribed by the *SKF* Court. *SKF*, 254 F.3d at 1029. Further, Mueller does not persuade the court of any frivolity

or bad faith on Commerce's part. *See, e.g.,* Mueller Resp; *cf.* Commerce Mot. at 3 ("Commerce is requesting the remand in good faith . . . to comply with its important policy of giving parties the opportunity to meaningfully participate in the administrative proceeding."). Therefore, Commerce's request is appropriate under the *SKF* standard.

Further, Commerce's remand request is supported by a "substantial and legitimate" concern. *SKF*, 254 F.3d at 1029; *Ad Hoc Shrimp,* 37 CIT at ___, 882 F. Supp. 2d at 1381. Commerce is concerned that its failure to follow "typical practice" resulted in the lack of party comments on the draft results. Commerce Mot. at 1–2. Commerce's justification for the remand request is compelling as it has been substantiated by Golden Dragon's stated intent to file comments but for Commerce's "oversight". GD Resp. at 2. The need for finality does not outweigh Commerce's justification for the remand request because the agency has not yet had the opportunity to consider party comments on its draft results. Mueller argues that this remand will result in "two rounds of briefing (one before [Commerce] and another before the [c]ourt)." Mueller Opp'n at 3. However, a "brief remand" to consider comments which are allegedly forthcoming during the normal course of Commerce's proceedings is not outweighed by Mueller's "concern": the argument in fact describes what the usual remand process entails. Moreover, "the need for an agency to adequately address a seeming departure from past practice -- irrespective of the cause of such departure -- is itself a significant concern weighing in favor of voluntary remand."[3] *Shakeproof*, 29 CIT at 1523, 412 F. Supp. 2d at 1337. Finally, the scope of the request, permitting parties to comment on the draft redetermination results and to respond to those comments in the final redetermination, is appropriate. *See, e.g., Ad Hoc Shrimp*, 37 CIT at ___, 882 F. Supp. 2d at 1381 (granting a remand request to address "certain information addressed to a discrete material issue" after finding said scope "reasonable and appropriate"); *cf. Corus Staal BV v. United States*, 29 CIT 777, 781–82, 387 F. Supp. 2d 1291, 1296–97 (2005) (Commerce did not give sufficient reason for remand and the court exercised discretion to deny remand

[3] Commerce's "typical practice" of using an email service list to keep interested parties informed of updates to the remand proceeding may have risen to the level of an agency action which has become an established "agency practice" that, without notification of change, would lead a party to reasonably expect adherence to the practice. *See Ranchers-Cattlemen Action Legal Foundation v. United States*, 23 CIT 861, 884–85 (1999). Without further briefing on the specific issue, the court is unprepared to categorically state that Commerce's remand proceeding warrants such a characterization, but the likelihood of that determination supports the court's position here.

request) (internal citations omitted). Accordingly, the court finds that Commerce's request for a voluntary remand is based on a substantial and legitimate concern.

Mueller asserts several other arguments for denying Commerce's motion, but none are persuasive here. Mueller contends that granting the remand request would be an unnecessary waste of the parties' resources. Mueller Opp'n at 3. As discussed above, Mueller's concern for expediency is well-taken, but the court perceives no reason to depart from the normal remand process involving notice and comment. It does not appear that the remand will result in an unreasonable delay, but it will enable Commerce to continue to follow its typical practice of considering party comments in draft result redeterminations.

Mueller further contends that there is no indication that Golden Dragon wished to comment on the draft results prior to publication of the final Remand Results.[4] Mueller Opp'n at 3, 6. However, Mueller's contention is dispelled by Golden Dragon's stated intent to file comments on the draft results. GD Resp. at 2. Golden Dragon's averments affirm Commerce's concern that Golden Dragon intended to file comments and was not notified in the usual manner in order to do so. *Id*.; Commerce Mot. at 2.

Mueller also attempts to reframe Commerce's motion for voluntary remand as a "motion to correct for a procedural due process defect in its proceeding." Mueller Opp'n at 4. Mueller argues that there is no statutory duty to publish a draft remand, and that Commerce is not statutorily required to permit parties to comment on the draft remand results. *Id*. While Mueller appropriately characterizes Commerce's remand commentary process as not statutorily required, Commerce is permitted to establish remand procedures encouraging parties to meaningfully participate in the administrative proceeding. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Council, Inc.*, 435 U.S. 519, 543–544 (1978) ("absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge

[4] Mueller asserts that Golden Dragon "should have been looking" for the draft redetermination results prior to the court-imposed deadline. Mueller Opp'n at 6. The court agrees that given the unchanged deadline for Commerce to file the Remand Results, Golden Dragon presumably knew that draft results would likely be available for comment prior to the Remand Results filing deadline. However, the court also observes that given Commerce's break with its "typical practice" and Golden Dragon's averment that it intended to file comments on the draft results, coupled with the further averment that Golden Dragon was never made aware of the draft results through its later-in-time communications with Commerce (GD Resp. at 3), this case would be best served by permitting Commerce to solicit and address comments to the draft results by interested parties as requested by Commerce.

their multitudinous duties") (internal quotations omitted). Notably, Commerce's motion does not attempt to establish such a duty, nor does it seek a remand based on a defect in its procedural due process. Commerce has not concluded that its remand is based on any error, procedural or otherwise. Commerce Mot. at 3. Instead, Commerce requests a remand squarely within the bounds afforded by *SKF*. Mueller's argument is therefore unpersuasive.

Finally, the court is mindful of the unspoken elements of the exhaustion doctrine underlying this motion. The exhaustion doctrine generally provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003), quoting *McKart v. United States*, 395 U.S. 185, 193 (1969) (internal quotations and citations omitted). It is a well-settled principle of administrative law that a "reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action", *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946), and the court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013), quoting *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (citations omitted). Further, the administrative remedy for challenging remand results generally requires filing comments on draft results at the agency level. *Taian Ziying Food Co., Ltd. v. United States*, 37 CIT __, 918 F. Supp. 2d 1345, 1361 (2013), referencing *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008) (failure to raise issue in comments to draft remand was failure to exhaust administrative remedies).

Here, the court finds Commerce's request for a remand both appropriate and reasonable. Golden Dragon presumably did not exhaust its administrative remedy of filing comments to the draft remand results because it had not received the typical remand proceeding email notifications from Commerce due to Commerce's "oversight". In this instance, in the interest of protecting administrative authority over determinations and promoting judicial economy[5], the court considers Commerce's administrative concern to be worthy of remand.

[5] *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (the exhaustion doctrine serves the two main purposes of promoting judicial efficiency and protecting administrative agency authority by "discouraging disregard of the agency's procedures") (internal quotations and brackets omitted).

IV. *Conclusion*

Granting a remand to solicit and incorporate comments from interested parties in compliance with Commerce's typical remand procedure is appropriate here because it will conserve judicial resources and permit Commerce to comply fully with its administrative remand procedures.

The final results of redetermination shall be due March 23, 2016. After filing thereof with the court, the parties shall confer and report on proceeding further on the case, including a proposed scheduling order for further comments, if necessary.

So ordered.

Dated: February 22, 2016
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 16–18

MEYER CORPORATION, U.S., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00154

Dated: February 23, 2016

Joseph M. Donley, Clark Hill, PLC, of Philadelphia, PA, and *John P. Donohue*, Reed Smith, LLC, of Philadelphia PA, for the plaintiff.

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director.

MEMORANDUM AND ORDER

Musgrave, Senior Judge:

Before the court is the plaintiff's motion to compel production of unredacted copies of certain documents sought in connection with discovery on this and several related actions filed to seek refund of alleged overpayment of customs duties to U.S. Customs and Border Protection ("Customs"). For the following reason, the plaintiff's motion is denied.

Background

The complaint underlying this motion alleges that the overpayments are due to Customs' denial of the arm's length "first sale rule"

of *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992), to entries of cookware the plaintiff imported beginning in 2009, and also due to Customs' denial of duty-free treatment under the Generalized System of Preferences ("GSP"), 19 U.S.C. §2461 *et seq*., to merchandise imported from Thailand, a GSP country.

During discovery, on November 14, 2013, the plaintiff served a request for the production of documents upon the defendant, seeking, among other things, all documents related to the audit and internal advice request at issue in this case. From January to April 2014, the defendant produced nearly 10,000 pages of documents to the plaintiff, in addition to numerous Excel files maintained by Regulatory Audit ("Reg Audit"). Certain documents were redacted to remove content claimed as subject to various privileges and protections, including the deliberative process privilege and the law enforcement privilege. Business proprietary information of others, attorney-client communications, attorney work product, and Customs' computer system codes and information were also redacted. On April 30, 2014, the defendant provided the plaintiff with a detailed privilege log setting forth by document and Bates number the redacted content, specifying the date, document type, description of the document, author and recipient, privilege being invoked and the basis for the assertion.

Following the government's production, the plaintiff deposed, as fact witnesses, six Customs persons from Regulations and Rulings, Reg Audit, and the port of San Francisco. The plaintiff deposed the former Assistant Field Director of Reg Audit in San Francisco, who had retired, and also deposed Customs pursuant to Rule 30(b)(6).

Approximately one and one-half years after the documents were produced and eight depositions were taken, the plaintiff filed the instant motion to compel on October 23, 2015, challenging Customs' assertion of the deliberative process and law enforcement privileges, and seeking the unredacted versions of those documents. The defendant opposes, arguing that the redacted portions of the documents are subject to the asserted privileges.

The plaintiff cites *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571 (Ct. Cl. 2012) ("*Sikorsky*") for the procedural proposition that the privilege can only be invoked by an agency head or his or her designated subordinate (after careful, personal review, and the reviewer must identify the specific information that is subject to the privilege and provide reasons for maintaining the confidentiality of the pertinent record) and for the substantive proposition that the government must demonstrate the allegedly privileged material is both pre-decisional and deliberative. 106 Fed. Cl. at 576 (citations omitted). Responding, the defendant provides a Delegation Order

from Customs' Commissioner as well as the Declaration of Myles Harmon, Acting Executive Director, Regulations and Rulings ("Harmon Declaration"), asserting the agency's deliberative process and law enforcement privileges.

Also in connection with its response, the defendant agreed to provide unredacted copies of certain documents, and asserted privilege over a document that had previously been produced in full. The plaintiff's motion for leave to file a reply having been granted, the supplemental papers (*i.e.*, the plaintiff's reply and the defendant's sur-reply on the plaintiff's motion to compel) continue the parties' dispute over whether Customs' two audit reports and the lengthy ruling of HQ H088815 provide sufficient explanation of why Customs denied first-sale and GSP treatment to Meyer's imported merchandise.

Discussion

As a preliminary matter, in order to show that a document or certain information in it is protected by the deliberative process privilege, (1) the department head having control of the requested information or his or her designated subordinate must make a formal claim (2) by way of affidavit sufficiently describing the information for which the agency is claiming the privilege and based on his or her actual consideration thereof. *See Elkem Metals Co. v. United States*, 24 CIT 1395, 1397–98 (2000); *see also*, *e.g.*, *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000), citing *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984). The same standard would appear to apply to assertion of the law enforcement privilege. *See Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996). On that basis, the plaintiff contends that the Harmon Declaration is too general and that paragraph eight thereof is too conclusory in nature. Pl's Reply at 3–5, referencing *PG&E v. United States*, 70 Fed. Cl. 128 (2006) and *Greenpeace v. National Marine Fisheries Serv.*, 198 F.R.D. 540 (W.D. Wash. 2000). The defendant argues those cases are distinguishable, as they involved blanket assertions of privilege whereas the Harmon Declaration is specific, incorporating by reference the privilege log previously provided to Meyer that "describes every document in detail, by date, the decision to which it relates, document type, title and purpose, author, recipient, privilege asserted and basis for the assertion of the privilege." Def's Sur-Reply at 5 (footnote omitted). *Cf. United States v. Optrex America, Inc.*, 28 CIT 993, 996 (2004), quoting *Burns v. Imagine Films Entertainment, Inc.*, 194 F.R.D. 589, 594 (1996).

Generally speaking, the deliberative process privilege prevents "injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The privilege does not protect documents alone, but also "the decision making processes of government agencies." *Id*. at 150. The underlying purpose is to protect the quality of governmental decision-making by maintaining the confidentiality of advisory opinions, recommendations, and deliberations that comprise part of the process by which the government formulates law or policy. *See Petroleum Information Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). Information that does not reveal the deliberative process, communications unrelated to the formulation of law or policy, and routine reports are not shielded by the privilege. *See*, *e.g.*, *id.* ; *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114, 1116–17 (9th Cir. 1988); *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160 (W.D. Wash. 1986). However, information that would reveal the "give-and-take of agencies' decision making," even facts such as whether to hold a meeting and who should attend a meeting, may fall within the deliberative process privilege. *See*, *e.g.*, *Competitive Enterprise Institute v. EPA*, 12 F. Supp. 3d 100, 117 (D.D.C. 2014), quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir. 1980).

Returning to the main case upon which the plaintiff relies, "[m]aterial is pre-decisional if it address activities antecedent to the adoption of an agency policy." *Sikorsky*, 106 Fed. Cl. at 571 (internal quotes and citation omitted). However, "[a] claim of deliberative process privilege, even when properly established, is not absolute[; t]he deliberative process privilege is qualified, requiring the court to balance the interests of the parties for and against disclosures." *Id*. at 577 (citations omitted). Thus, "[t]he privilege may be defeated by a showing of evidentiary need by a plaintiff that outweighs the harm that disclosure of such information may cause to the defendant." *Id*. (internal quotes and citation omitted). The privilege may also be waived if the government produces documents related to the subject matter of the privileged matter or produces the privileged matter in other litigation. *Id*. (citations omitted). "While documents may be pre-decisional and deliberative when originated, they will not be entitled to any deliberative privilege if they are applied by the decisionmakers --as 'secret law'--or otherwise expressly adopted or incorporated by reference into the final decision." *USX Corp. v. United States*, 11 CIT 419, 420–21, 664 F. Supp. 519, 522 (1987) (citations omitted). "In addition, factual material contained in deliberative documents also falls outside of the privilege, to the extent that it is severable." *Id.*, 11 CIT at 421, 664 F. Supp. at 522.

At the defendant's request, the court has examined, *in camera*, the unredacted versions of the documents sought (which process should not be interpreted as impugning the veracity of the defendant's assertions of privilege), and after such examination, the court concludes that all the redacted information is clearly either business proprietary, agency proprietary, or work product prepared in anticipation of, and therefore antecedent to, one or more "decisions". The defendant summarizes those decisions potentially covered by Meyer's broad request for production as follows:

> • *Audit Report 811–07-OFO-AU-21434, August 31, 2009*: In this "main" audit, CBP concluded that the transaction between Meyer's manufacturer and related middleman on cookware from Thailand did not meet the requirements for first sale because it was not shown to be at arm's length [and that] certain cookware . . . did not qualify for GSP due to the exclusion of non-originating material that did not undergo a double substantial transformation. Meyer disagreed with the findings of Reg Audit and requested that the agency seek Internal Advice from [Regulations and Rulings], which [the agency] did.
>
> • *HQ H088815, September 28, 2011* : In response to the request for internal advice, CBP ruled that Meyer's use of the "first sale" price on its Thai merchandise was improper, that certain pots and pans manufactured in Thailand did not qualify for GSP because certain materials did not undergo a double substantial transformation in Thailand, and that certain cookware sets did not qualify for GSP treatment.
>
> • *Follow-Up Audit Report 811–11-OFO-F1–21434, June 12, 2012*: CBP conducted a follow-up audit, resulting in the issuance of a report, which sought to determine if Meyer was in compliance with HQ H088815 and to compute the loss of revenue based on the ruling's holdings on first sale, GSP and sets.

Def's Resp. at 5.

The court therefore concludes that the Harmon Declaration's invocation of privilege with respect to such redacted information is not improper, that there is no indication that any of the redactions in the remaining[1] documents challenged by the plaintiff are or have been used by the agency in dealings with the public, that none of the exceptions to the clam of privilege otherwise applies, and that the plaintiff does not persuade that it has an evidentiary need that

[1] As part of its consideration of the plaintiff's motion to compel, the defendant explains that it released several redactions to the plaintiff. *See* Def's Resp. at 7–8 & n.7.

outweighs the harm that disclosure of such information may cause to the defendant. To the extent the plaintiff disagrees with Customs' analysis and denial of its protest, the burden is on the plaintiff to establish its entitlement to first-sale and GSP treatment in accordance with the facts and law established during judicial review that is *de novo*.

Conclusion & Order

Therefore, in accordance with the foregoing, upon review of the motion of the plaintiff to compel the defendant to produce full unredacted versions of documents identified on Exhibit A to the plaintiff's brief on its motion, it must be, and hereby is

ORDERED that the plaintiff's motion to compel is denied.

So ordered.

Dated: February 23, 2016
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE