U.S. Court of International Trade

Slip Op. 18–86

BOHLER BLECHE GMBH & CO KG, et al., Plaintiffs, v. UNITED STATES, Defendant, and NUCOR CORP. and SSAB ENTERPRISES LLC, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 17–00163
PUBLIC VERSION

[Sustaining in part and remanding in part the Department of Commerce's final determination.]

Dated: July 9, 2018

David E. Bond and *Ron Kendler*, White and Case, LLP, of Washington, D.C., for plaintiffs.

Vito S. Solitro, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Chad A. Readler*, Acting Assistant Attorney General, *Tara K. Hogan*, Assistant Director, *Jeanne E. Davidson*, Director, and *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C., for defendant.

Roger B. Shagrin and *Paul W. Jameson*, Schagrin Associates, and *Alan H. Price* and *Christopher B. Weld*, Wiley Rein, LLP, of Washington, D.C., for defendant-intervenors.

OPINION AND ORDER

Goldberg, Senior Judge:

This matter concerns the final determination issued by the Department of Commerce ("Commerce" or the "Department") in the antidumping duty investigation of certain cut-to-length steel products. *Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria*, 82 Fed. Reg. 16,366 (Dep't Commerce Apr. 4, 2017) (final determ.) ("*Final Determination*"), and accompanying Issues & Decision Mem. ("I&D Mem."); *Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria*, 81 Fed. Reg. 79,416 (Dep't Commerce Nov. 14, 2016) ("*Preliminary Determination*"), and accompanying Issues & Decision Mem. ("Prelim. Mem."). Plaintiffs Bohler Bleche GmbH & Co. KG, Bohler International GmbH, voestalpine Grobblech GmbH, and voestalpine Steel & Service Center GmbH (collectively, "Plaintiffs"), challenge the methodology used by Commerce to select foreign like products in connection with its calculation of antidumping duties. For the reasons below, the court remands the *Final Determination* for reconsideration in accordance with this opinion.

BACKGROUND

In order to determine whether certain products are being sold at less than fair value (LTFV) in the United States, Commerce compares

the export price (EP), or constructed export price (CEP), with the normal value (NV). 19 U.S.C. § 1677b(a)(1)(A). EP/CEP is the price at which the subject merchandise is being sold in the U.S. market, while NV is the price at which a "foreign like product" is sold in the producer's home market or in a comparable third-country market. Therefore, before calculating a dumping margin, Commerce must identify a suitable "foreign like product" with which to compare the exported subject merchandise. A "foreign like product," in order of preference, is:

> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise (i) produced in the same country and by the same person as the subject merchandise, (ii) like that merchandise in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the subject merchandise.
>
> (C) Merchandise (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation, (ii) like that merchandise in the purposes for which used, and (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16); *NSK Ltd. v. United States*, 26 CIT 650, 657–58, 217 F. Supp. 2d 1291, 1299–1300 (2002) ("Section [1677](16) establishes a descending hierarchy of preferential modes that Commerce must select for matching purposes."). To identify such merchandise, Commerce designs a "model-match" methodology consisting of a hierarchy of certain characteristics used to sort merchandise into groups. Each group is then assigned a control number ("CONNUM"), used to match home market sales with U.S. sales.

In the instant proceeding, the Department compared the weighted-average of export sales within each CONNUM to the weighted-average of home market sales in that same CONNUM, i.e., identical merchandise, where such sales exist. Prelim. Mem. 7. Otherwise, "[w]here there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, [Commerce] compared U.S. sales to sales of the most *similar* foreign like product made in the ordinary course of trade." *Id.* (emphasis added). "When comparing U.S. sales with comparison-market sales of similar, but not identical, merchandise, [the Department] also made

adjustments for physical differences in the merchandise in accordance with section [19 U.S.C. § 1677b(a)(6)(C)(ii)] and 19 CFR 351.411." *Id.* at 14. This adjustment is called a DIFMER.

The investigation at issue covers certain steel cut-to-length (CTL) plate products from Austria. I&D Mem. 5. Commerce also conducted concurrent investigations of steel CTL plate from other countries.[1] Early in the investigation, on May 19, 2016, Commerce proposed a model-match methodology and sought comments from interested parties across the concurrent CTL plate investigations. Ltr. to All Interested Parties 5 (May 19, 2016), P.R. 83. Among other features of Commerce's proposed methodology, the third field in the hierarchy was QUALITY, which sorts merchandise based on various quality-related characteristics. *Id.* at 5. Plaintiffs requested a number of changes to the methodology, including that the QUALITY field be placed first in the hierarchy, and that a QUALITY subcategory be added to distinguish high alloy tool steel products. I&D Mem. 16. Plaintiffs explained that their suggested changes would help solve issues created by the allegedly broad scope of the investigation, namely, that the model-match methodology, as proposed, would likely fail to sufficiently differentiate products with distinct commercial characteristics and values. Pls. Cmts. on Product Characteristics 3 (June 2, 2016), P.R. 96; *see also* Pls. Case Br. 4–5 (February 16, 2017), P.R. 397–403 (arguing that "[t]he breadth of the scope of this investigation is unprecedented" and that "the Department's CONNUM methodology . . . essentially mirrored the methodology used in past investigations that covered only carbon CTL plate.").

On June 10, 2016, Commerce issued its revised model-match methodology, adopting some of Plaintiffs' requests, over the objections of Petitioners, and rejecting other suggestions by Plaintiffs. *See* Product Characteristics 1, 6 (June 10, 2016), P.R. 115. Commerce's revised methodology:

> Matched foreign like products, based on the physical characteristics reported by the respondents, in the following order of importance: quality, minimum specified carbon content, minimum specified chromium content, minimum specified nickel content, minimum specified yield strength, nominal thickness,

[1] Plaintiffs, along with "almost two dozen respondents" argued to the Department that the scope of the investigation is improperly broad. *See* Pls. Resp. to SSAB Cmts. 2. (October 25, 2016), P.R. 328. Plaintiffs contend that the investigation concerns at least two distinct classes of merchandise, traditional carbon steel CTL plate products and high alloy specialty steel plate products. Alloys are materials, including cobalt, tungsten, and nickel, the addition of which results in different "grades" of steel products. Commerce denied the various challenges to the scope of the investigation. Final Scope Memo (November 20, 2016), P.R. 359.

heat treatment status, nominal width, form, painting, the existence of patterns in relief and descaling.

See Prelim. Mem. 7.

In its July 15, 2016 questionnaire responses, Plaintiffs requested additional changes to Commerce's model-match methodology, on the basis that the revised methodology still captured drastically dissimilar products within individual CONNUMs. Pls. Questionnaire Resp. B-13, C10 (July 15, 2016), P.R. 163–174. Specifically, Plaintiffs argued that the methodology failed to account for the alloy content of Plaintiffs' specialized high alloy steel products, thereby failing to account for significant differences in physical characteristics, costs, and price. *Id.* Plaintiffs proposed a revised methodology that would begin by sorting products by GRADE. *Id.* at B-14, C-11. The GRADE field is essentially a function of the amount of alloy in a product and the costs of those alloys. *See* Pls. Supp. Questionnaire Sec. D & E Resp. Ex. SQ D-3 (Oct. 6, 2016), P.R. 268–89. Plaintiffs later suggested a PROCESS field to further account for what Plaintiffs insist are significant variations in cost of production resulting from different manufacturing processes. *See* Pls. Supp. Questionnaire Sec. B & C Resp. SBC-1 (Oct. 13, 2016), P.R. 296–304; *see also* Pls. Case Br. 11. Commerce rejected Plaintiffs' proposed revisions on two bases: Commerce considered the proposals to be untimely and Commerce also disagreed that the newly proposed methodologies would have the effect of creating closer matches between exported merchandise and home market merchandise. I&D Mem. 17–32.

On November 14, 2016, Commerce published its *Preliminary Determination*. 82 Fed. Reg. 16,366. On April 7, 2017, Commerce published its *Final Determination*. 81 Fed. Reg. 79,416. Plaintiffs timely filed the instant action to contest the *Final Determination*, challenging Commerce's model-match methodology and the resulting antidumping duties. For the reasons discussed below, the court remands to Commerce for reconsideration of its model-match methodology.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this matter under 28 U.S.C. § 1581(c). The court will sustain Commerce's determinations regarding its model-match methodology if they are supported by substantial evidence and otherwise in accordance with law. *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008).

DISCUSSION

Plaintiffs challenge the model-match methodology applied by Commerce to determine whether Plaintiffs sold certain steel products at

LTFV. Plaintiffs argue, as they did below, that the Department's methodology yielded erroneous comparisons of merchandise. In its questionnaire responses to the Department, Plaintiffs asserted that the Department's CONNUM system "does not provide an accurate basis for comparing [home market and export] sales . . . because it unreasonably groups together high alloy, Special Steel CTL plate products that differ significantly . . . resulting in CONNUMs . . . with wildly divergent sales prices and costs of production" which could "lead to highly arbitrary dumping margin calculations." Pls. Questionnaire Resp. B-13–14. In support, Plaintiffs have identified individual CONNUMs that group together products that Plaintiffs describe as having commercially significant physical differences, which are reflected in the costs and prices of those products.

Plaintiffs explain that the variances in cost of manufacturing and price are primarily attributable to the alloy content of the products, a physical feature insufficiently unaccounted for under the Department's methodology. Plaintiffs argue that alloy content, or grade, is not only a commercially significant physical characteristic of its various products, but indeed one of their defining commercial features. Therefore, according to Plaintiffs, the Department's insistence that these various, distinct products can nevertheless form the basis of a single CONNUM is not supported by substantial evidence and not otherwise in accordance with the law.

Plaintiffs' proposed two alternative model-match methodologies that they argue would achieve greater differentiation of distinct products, leading to more accurate dumping margins. The first alternative proposed the addition of a GRADE field to sort products by alloy content. The second alternative proposed that, in addition to a GRADE field, a PROCESS field be included to account for variations among the products owing to certain manufacturing processes to which only some products are subjected. The court sustains the determination of the Department insofar as it refused to amend the methodology to account for the manufacturing processes identified by Plaintiffs. However, the court remands to Commerce for redetermination in light of its methodology's deficient treatment of commercially significant physical differences among Plaintiffs' products owing to alloy content.

A. Foreign Like Product

As discussed, "'[f]oreign like product' is defined as either *identical* merchandise, § 1677(16)(A), or *similar* merchandise, § 1677(16)(B) and (C)." *SKF USA, Inc.*, 537 F.3d at 1375 (emphasis added). "Congress has granted Commerce considerable discretion to fashion the methodology used to determine what constitutes 'foreign like product'

under the statute." *Id.* at 1379 (citing *Pesquera Mares Australes Ltda. v. United States,* 266 F.3d 1372, 1384 (Fed. Cir. 2001)). In identifying "merchandise which is identical in physical characteristics" to subject merchandise, 19 U.S.C. § 1677(16)(A), Commerce may select products with "minor differences in physical characteristics, if those [minor] differences are not commercially significant." *Pesquera Mares*, 266 F.3d at 1384. What is considered a "commercially significant" factor is determined on a case-by-case basis, but at the very least it is a feature that is recognized in the broader industry of the subject merchandise. *See id.* at 1385. At the end of the day, the Department's methodology must be faithful to the statutory directive that a "fair comparison shall be made." 19 U.S.C. § 1677b(a).

B. The Department's Methodology Fails to Account for Commercially Significant Physical Differences Based on Alloy Content

Here, Commerce's methodology is not suited for such fair comparisons. The methodology clearly groups, within individual CONNUMs, goods that have differences in material composition. These differences are neither minor nor commercially insignificant. Plaintiffs explain that:

> [T]he percentage differences between the highest grade and the lowest cost grade within each CONNUM are enormous. For example, CONNUM [[ ]] covers four grades . . . ranging from a high VCOM of € [[ ]]/MT to a low VCOM of € [[ ]]/MT, which is a difference of € [[ ]]/MT or [[ ]]% of TCOM. On average across all listed CONNUMs, there is a difference of 96%, as a percentage of TOTCOM, between the highest-cost grade and the lowest-cost grade within each CONNUM . . . .

Pls. Pre-Prelim. Determ. Cmts. 11 (Oct, 19, 2016), P.R. 312–17. Similarly, Plaintiffs explain that CONNUM [[ ]] includes products that cost anywhere from € [[ ]] to € [[ ]] to make and are priced at anywhere from € [[ ]] to € [[ ]]. *See* Pls. Case Br. 16. Moreover, Plaintiffs insist, and the Department does not contest, that these differences in cost and price are driven by alloy content which, in turn, is driven primarily by the intended end use. *See, e.g.*, Pls. Case Br. 3–4, 7–8. As is supported by the record, end use is plainly a commercially significant factor. *See* Pls. Supp. Questionnaire Resp. Sec. D & E 7–10 (discussing the various manufacturing applications that require particular grades of steel products, including "automobiles, home appliances, electronic devices, medical consumables (e.g., syringes), [and] consumer goods."). Accordingly, because a single set of CONNUMs are used to identify and compare home market and

U.S. sales, Commerce's methodology essentially treats certain "foreign like products" as "identical" to certain exported products, even though customers would view those products as commercially distinct in both utility and value.[2]

It appears that the Department, too, would typically view many of these products as dissimilar. As the Department has explained in prior proceedings, the statute, at 19 U.S.C. § 1677b(a)(6)(C)(ii):

> Requires that we account for and adjust for any differences attributable to physical differences between subject merchandise and foreign like product if similar products are compared. For this purpose, [19 C.F.R. § 351.411(b)] directs us to consider differences in variable costs associated with the physical differences in the merchandise, i.e., the difference-in-merchandise adjustment [or DIFMER].

Thai Plastic Bags Indus. Co. v. United States, 34 CIT 1389, 1394, 752 F. Supp. 2d 1316, 1322 (2010). Further, Commerce's own practice would have called into question whether some of the products within individual CONNUMs were even "similar," given the magnitude of the DIFMER adjustments that would be applied. *See, e.g.*, Department of Commerce Import Administration Policy Bulletin, Number 92.2, "Differences in Merchandise; 20% Rule" (Jul. 29, 1992) (available at <https://enforcement.trade.gov/policy/bull92–2.txt>). Specifically, under the Department's "20% Rule," a DIFMER greater than 20% creates a presumption that two products are not "similar." And as Plaintiffs have demonstrated, under Commerce's methodology, there are a number of product pairs within individual CONNUMs with differences in variable costs well above 20%. *See, e.g.*, Pls. Case Br. 16.

Nevertheless, as discussed, where there are export sales and home market sales within the same CONNUM, and the Department has therefore deemed those respective sales to be of "identical," rather than "similar," merchandise, the Department has not applied a DIFMER to account for any differences in material composition. Prelim. Mem. 7; 19 C.F.R. § 351.411(b) ("The Secretary will not consider differences in cost of production when compared merchandise has identical physical characteristics."). As Plaintiffs correctly note, it is

[2] By contrast, in the Federal Circuit's *Pesquera Mares* decision, the Department reasonably and successfully argued that premium-grade salmon and super-premium-grade salmon did not have commercially significant physical differences requiring separate classification because any distinctions between the grades, such as light lacerations on the fish, were "nominal." 266 F.3d at 1377. The record also supported the conclusion that the minor differences "are not recognized by the salmon producers of any other nation that exports to Japan," the market in which respondent claimed the minor differences were commercially significant. *Id.* (citing *Fresh Atlantic Salmon from Chile*, 63 Fed. Reg. 31,411, 31,414–15 (Dep't Commerce June 9, 1998) (final results)).

not reasonable to interpret the statute as permitting a greater gap in variable costs for "identical" merchandise than would be allowed for "similar" merchandise. That anomalous result is explained here by the fact that Commerce's methodology is not in fact designed to reasonably ensure fair comparisons of "identical" merchandise within each CONNUM.[3]

Plaintiffs identified such erroneous comparisons in their Case Brief below. Specifically, Plaintiffs demonstrated that certain products that were "sold at prices above COP" but nevertheless "appear to have been sold below cost because the weighted average COP used for the Department's CONNUM is skewed by extremely high-cost" products. Pls. Case Br 15–17 & Attach. 2. Neither the Department below nor the Defendant in this action has called this analysis, or the record evidence on which it relies, into question.

In sum, the Department's methodology is unreasonable in failing to sufficiently account for alloy content. Commerce's methodology cannot be sustained because it allows subject merchandise to be cast as "identical" to dubiously similar foreign like products, when the statute plainly requires a different approach. Moreover, the record lacks substantial evidence that Commerce's flawed methodology nevertheless yielded "fair comparisons." *See* 19 U.S.C. § 1677b(a). On this basis, the court remands to Commerce for reconsideration of its model-match methodology.

Throughout the investigation, the Department largely ignored Plaintiffs' central argument: that the Department's methodology allows comparisons of products with commercially distinct physical characteristics, without applying a DIFMER, to determine whether Plaintiffs are dumping. Unfortunately, the Department dedicates significant energy to explaining why it believes it did not have to address Plaintiffs' arguments. Specifically, the Department insists that the Plaintiffs' challenges to the model-match methodology were untimely. They were not.

Plaintiffs raised their concerns at every turn. Plaintiffs proposed addition of a GRADE field to account for alloy content was submitted with their questionnaire responses on July 15, 2016, just 35 days after the Department had issued its revised model-match methodology, four months prior to the Department's *Preliminary Determination*, and four months before the Department issued its final ruling on

[3] The government broadly relies on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Gov. Resp. 13, 15 (Mar. 22, 2018), ECF No. 40. To the degree that the Government requests *Chevron* deference to an interpretation of the statutory term "identical" that includes products with commercially significant differences in materials, cost, and price, the Government exhibits remarkable chutzpah. To the degree that the Government merely asserts that the products at issue have only commercially *in* significant physical differences, no *Chevron* deference is due.

the scope of the investigation. Commerce then reviewed Plaintiffs' GRADE-field proposal and sought additional clarifying information on this issue in its September 14, 2016 supplemental questionnaire, which Plaintiff then provided. *See* Pls. Supp. Questionnaire Resp. Sec. D & E 7. The court will not now entertain the Government's argument that the model-match methodology was a closed issue prior to July 15, 2016. But even if the Department did consider the issue closed, this is a case where "the interests in fairness and accuracy outweigh the burden upon Commerce" presented by having to consider Plaintiffs' concerns about the model-match methodology. *See Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT __, __, 815 F. Supp. 2d 1365, 1367 (2012).

The Government also feigns confusion at Plaintiffs' supposed change of position over time. Specifically, Commerce insists that Plaintiffs provide no explanation for suddenly providing an alternative set of CONNUMs based on GRADE, and then PROCESS, when previously they had provided comments only on the QUALITY-based CONNUMs. On the contrary, the record makes clear that Plaintiffs' overarching concern—that the Department's proposed model-match methodology would insufficiently differentiate high alloy specialty steel products—was consistently communicated.[4] This concern permeated Plaintiffs' comments on scope and on the QUALITY-based CONNUMs, as well as their later proposals of alternative CONNUMs. That Plaintiffs' proposed solution for this problem evolved over a relatively short period does not make their conduct contradictory. Frankly, Commerce's alleged confusion as to why Plaintiffs "suddenly" supported a GRADE-based CONNUM system strains credulity.

In response to Plaintiffs' claim that its products have commercially significant differences in physical characteristics that impact costs and price, the Department stated that this argument improperly focuses on "differences in costs or prices that may coincide with some type of variation in physical differences." I&D Mem. 23, 31. The Department cited prior proceedings to support the idea that differences in costs, in and of themselves, are not probative of relevant physical differences among products. I&D Mem. 23 n.86. As one prior proceeding explained, differences in costs are sometimes attributable to factors other than the physical characteristics of the products, such as "differences in production quantities [or] differences in the timing

[4] *See, e.g.*, Pls. Cmts. on Product Characteristics 2–6; Pls. Rebuttal Cmts. on Product Characteristics 2–3 (June 8, 2016), P.R. 109; Pls. Questionnaire Resp. B-13, C-10; Memo to File of Meeting with Pls. Counsel (Aug. 10, 2016), P.R. 183.

of production." *See id.* (citing *Certain Cold-Rolled Steel Flat Products from the United Kingdom*, 81 Fed. Reg. 49,929 (Dep't Commerce July 29, 2016) (final determ.), and accompanying I&D Mem. cmt. 5). It is not immediately clear why Commerce relies on these particular authorities here. Plaintiffs consistently point to material composition—a bona fide physical characteristic—that *results* in significant variances in costs and prices. By no means do Plaintiffs rely on costs "in and of themselves."

The Department's remaining responses essentially call into question the merits of Plaintiffs' proposed alternative methodologies. The Department expresses concern that Plaintiff's proposals would amount to a proliferation of respondent-and product-specific CONNUMS. I&D Mem. 21. As a consequence, Commerce insists, the product distinctions Plaintiffs are requesting would not be relevant to the Department's other concurrent steel CTL plate investigations.

First, the reasonableness of the methodology in those other investigations is not the subject of this action. And while it would certainly be more convenient for the Department, Commerce cites no authority supporting a right to apply a single methodology across multiple investigations, notwithstanding potentially serious issues with that methodology. Indeed, perhaps the Department should anticipate the issues raised here when it applies a single methodology across 15 concurrent investigations of broad scope. Second, it may be that this particular investigation, or Plaintiffs' particular range of product offerings, call for more granular distinctions between products. *See, e.g., Pastificio Lucio Garofalo, S.p.A. v. United States*, 35 CIT __, __, 783 F. Supp. 2d 1230, 1242 (2011) (the Department defended its application of company-specific CONNUMs on the basis that "substantial evidence regarding physical differences" were "reflected in . . . costs and prices."); *SKF USA*, 537 F.3d at 1379 (explaining that a methodology with "increased number of price comparisons . . . yields more accurate results because it matches the most similar product rather than merely pooling several models that matched as to eight characteristics but could vary significantly in price or cost, due to differences in materials for certain components or added features.").

In any event, Commerce's critiques concerning Plaintiffs' preferred methodologies largely lack legal significance. Certainly, Plaintiffs' case would be stronger if it had devised a perfect alternative to Commerce's methodology. However, if there are two reasonable conclusions—or, here, methodologies—supported by the record, the Department has the discretion to choose either. Thus, the only question before this court is whether *the Department's* chosen methodology is reasonable, supported by substantial evidence on the record,

and otherwise in accordance with the law. Insofar as that methodology insufficiently accounts for alloy content in Plaintiffs' products, the court finds that it is none of the above.

Accordingly, on remand, the Department is ordered to amend its model-match methodology in this investigation, in accordance with this opinion, to better account for the commercially significant differences in physical characteristics among Plaintiffs' products owing to alloy content. The Department is strongly encouraged to ensure that products it would not consider "similar," or to which it would apply a meaningful DIFMER, are not matched as "identical" under its revised methodology.

C. The Court Sustains the Department's Determination that a Process is not a Commercially Significant Physical Characteristic

The court comes to a different conclusion concerning the arguments raised by Plaintiffs with respect to a PROCESS field. Substantial evidence supports the Department's determination that its methodology need not further account for process.

Plaintiffs explain the process issue as follows: "different production processes are required depending on the alloy content of the plate. As the alloy content increases, more control is required in the melting, solidification, and production processes. To achieve such control, [Plaintiffs] use different production processes, with significantly different costs." Pls. Case Br. 8. Plaintiffs' own explanation betrays that "process" is not itself a physical characteristic of the products, but is rather a function of a physical characteristic, alloy content. Moreover, while the record supports Plaintiffs' assertion that various processes can result in alterations in physical characteristics and lead to variances in costs and price, those variances should be accounted for when the Department gives sufficient consideration to grade in its redetermination. Ultimately, substantial evidence, as well as Plaintiffs' own arguments, support the Department's determination that a PROCESS field would largely account for "variations in cost," I&D Mem. 22, and that "the PROCESS field would have no impact" if the GRADE field were applied, I&D Mem. 28.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determination in part and remands to Commerce for reconsideration of its model-match methodology. It is hereby:

ORDERED that the final determination of the United States Department of Commerce, published as *Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria*, 82 Fed. Reg. 16,366 (Dep't Com-

merce Apr. 4, 2017) (final determ.) is hereby REMANDED to Commerce for redetermination; it is further

ORDERED that Plaintiffs' Motion for Judgment on the Agency Record Under USCIT Rule 56.2 is GRANTED in part as provided in this Opinion and Order; it is further

ORDERED that Commerce shall issue a redetermination ("Remand Redetermination") in accordance with this Opinion and Order that is in all respects supported by substantial evidence and in accordance with law; it is further

ORDERED that Commerce shall design a model-match methodology in this investigation that accounts for all commercially significant physical differences; it is further

ORDERED that Commerce apply recalculate dumping margins consistent with its redetermination of its model-match methodology; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its Remand Redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiffs and Defendant-Intervenors shall have thirty (30) days from the filing of the Remand Redetermination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiffs' and Defendant-Intervenors' comments to file comments.

Dated: July 9, 2018
New York, New York

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

Slip Op. 18–87

GOVERNMENT OF SRI LANKA, Plaintiff, CAMSO INC., CAMSO LOADSTAR (PRIVATE) LTD., and CAMSO USA INC., Plaintiffs-Intervenors, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Consol. Court No. 17–00059

[Commerce's remand results in a countervailing duty investigation of off-the-road rubber tires from Sri Lanka are sustained.]

Dated: July 11, 2018

Kristen Smith, Arthur Purcell, and *Emi Ortiz*, Sandler, Travis & Rosenberg, P.A., of Washington, DC, for plaintiff Government of Sri Lanka.

Kevin O'Brien, and *Christine Streatfeild*, Baker & McKenzie, LLP, of Washington, DC, for Consolidated plaintiffs-intervenors Camso Inc., Camso USA, Inc., and Camso Loadstar (Private) Ltd.

John Todor, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Of counsel was *Khalil Gharbieh*, Office of

Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Restani, Judge:

Before the court are the United States Department of Commerce ("Commerce")'s *Final Results of Redetermination on Remand*, ECF No. 83–1 (June 14, 2018) ("Remand Results"), concerning Commerce's countervailing duty ("CVD") investigation into off-the-road ("OTR") rubber tires from Sri Lanka. No party has raised a substantive objection to Commerce's *Remand Results. See Consolidated Plaintiffs' Statement of No Objection to Remand Redetermination*, ECF No. 85, at 1 (June 29, 2018); *Plaintiff's Comments in Agreement with Commerce's Final Results of Redetermination Filed on June 14, 2018 Pursuant to Court Remand*, ECF No. 86, at 2 (June 29, 2018) ("Plaintiff's Comments").[1] For the reasons stated below, Commerce's *Remand Results* are sustained.

BACKGROUND

The court assumes all parties are familiar with the facts of the case as discussed in *Gov't of Sri Lanka v. United States*, Slip Op. 18–43, 2018 WL 1831791 (CIT Apr. 17, 2018) ("*Sri Lanka I*"). For the sake of convenience, the facts relevant to this remand are summarized herein. Commerce identified three countervailable subsidy programs over the course of its investigation into OTR rubber tires from Sri Lanka. *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain New Pneumatic Off–The– Road Tires from Sri Lanka*, C–542–801, POI 01/01/2015–12/31/2015, at 7–8 (Dep't Commerce Jan. 3, 2016). One such program, the Guaranteed Price Scheme ("GPS"), accounted for 0.95 percent of an overall countervailing duty rate of 2.18 percent.[2] *Certain New Pneumatic Off-the-Road Tires From India and Sri Lanka: Amended Final Affirmative Countervailing Duty Determination for India and Countervailing Duty Orders*, 82 Fed. Reg. 12,556, 12,557 (Dep't Commerce Mar. 6, 2017); *Corrected Program Rates in the Issues and Decision Memorandum Regarding the Countervailing Duty*

[1] The Government of Sri Lanka "disagreed" with Commerce's filing its Remand Results "under respectful protest," Plaintiff's Comments at 3; *Remand Results* at 1–2, but Commerce complied with the terms of the remand order, as discussed *infra*, and simply noted its protest in order to preserve its appellate rights, *Remand Results* at 5 (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1375–76 (Fed. Cir. 2003)).

[2] As Camso Loadstar was the only individually investigated respondent in Commerce's Sri Lankan investigation, the countervailing duty rate assigned to Camso Loadstar constituted the "all-others" rate as well. *See Certain New Pneumatic Off-the-Road Tires From Sri Lanka: Final Affirmative Countervailing Duty Determination, and Final Determination of Critical Circumstances*, 82 Fed. Reg. 2,949, 2,950 (Dep't Commerce Jan. 10, 2017).

Investigation Concerning Certain New Pneumatic Off-The-Road Tires (Off Road Tires) from Sri Lanka, C–542–801, POI 01/01/2015–12/31/2015, at 1 (Dep't Commerce Jan. 11, 2017).

Under the GPS: "Essentially [the Government of Sri Lanka] would set an above-market 'guaranteed price' for rubber smallholders, calculate a 'market price' to be paid by purchasers, and assume responsibility for paying the difference between the 'guaranteed price' and the 'market price.'" *Sri Lanka I*, 2018 WL 1831791, at *4. Under certain iterations of this program, purchasers, including Camso, were required to pay smallholders the entire 'guaranteed price,' after which the Government of Sri Lanka later reimbursed sums in excess of the 'market price.' *Id.* at *5. Commerce found the entire value of these reimbursement payments to constitute a countervailable subsidy. *Id.* Before the court, Plaintiffs and Plaintiffs-Intervenors argued that the GPS program did not provide a benefit to Camso within the meaning of 19 U.S.C. § 1677(5)(E), but rather imposed a burden. *Id.* The court agreed, emphasizing Commerce had verified that Camso was merely reimbursed amounts paid in excess of the "market price," without interest. *Id.* at *5, *7. The court remanded the matter for Commerce to eliminate "any duties attributable to GPS based on mere reimbursement for excessive rubber payments." *Id.* at *9. The court noted that Commerce was "free to assess whether the GPS program otherwise benefitted Camso or provided an upstream subsidy to Camso within the meaning of 19 U.S.C. § 1677–1." Id.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce's final results in a countervailing duty investigation are upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

DISCUSSION

On remand, Commerce removed the 0.95 percent duty attributed to the GPS program, leaving a *de minimis* overall duty rate of 1.23 percent. *Remand Results* at 6. Acting within its discretion, Commerce declined to conduct a further investigation into whether the GPS program provided Camso an upstream subsidy, or some other statutorily cognizable benefit. *Id.* at 4. On the record as it stands, there is insufficient evidence to find any other countervailable subsidy. The court thus finds that Commerce has complied with the terms of *Sri Lanka I*.

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are **SUSTAINED**. Judgment will enter accordingly.

Dated: July 11, 2018
New York, New York

/s/ *Jane A. Restani*
JANE A. RESTANI, JUDGE

Slip Op. 18–89

HUZHOU MUYUN WOOD CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 16–00245
PUBLIC VERSION

[Commerce's rescission of the new shipper review cannot be sustained and Commerce is ordered to proceed with the new shipper review.]

Dated: July 16, 2018

Alexandra H. Salzman, DeKieffer & Horgan PLLC, of Washington, DC, argued for plaintiff. With her on the brief were *Gregory S. Menegaz, J. Kevin Horgan*, and *Judith L. Holdsworth*.

Tara K. Hogan, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Christopher Hyner*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC. With him on the brief was *Mercedes C. Morno*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

OPINION

Katzmann, Judge:

In this second round of litigation, at issue is whether the single sale of multilayered wood flooring was commercially reasonable and thus *bona fide* for the purposes of a "new shipper review," the process for calculating individual antidumping duty rates for a shipper who had not previously exported a product covered by an antidumping order into the United States. Before the court is the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand Order (Dep't Commerce March 6, 2018) ("*Remand Redetermination*"), ECF No. 39, which the court ordered in *Huzhou Muyun Wood Co., Ltd. v. United States*, 41 CIT ____, 279 F. Supp. 3d 1215 (2017) ("*Muyun Wood I*"). Plaintiff Huzhou Muyun Wood Co., Ltd. ("Muyun Wood") contests Commerce's *Remand Redetermination*, which concluded that the sale upon which the review was based was not *bona fide* and thus rescinded the review. Muyun Wood seeks another remand in which Commerce would proceed with the new shipper review and ultimately calculate its antidumping margin. Muyun Wood's Comments in Opp'n to Remand Results ("Pl.'s

Br."), Apr. 5, 2018, ECF Nos. 42–43. Defendant the United States ("the Government"), on behalf of Commerce, asks the court to sustain the *Remand Redetermination* in its entirety. Def.'s Reply to Pl.'s Comments on Remand Results ("Def.'s Br.), May 7, 2018, ECF No. 44. The court determines that Commerce's conclusion that Muyun Wood's sale is not *bona fide* is not supported by substantial evidence. Consequently, the rescission of the new shipper review cannot be upheld, and the court orders Commerce to proceed with Muyun Wood's new shipper review.

BACKGROUND

The relevant legal and factual background of the proceedings involving Muyun Wood has been set forth in greater detail in *Muyun Wood I*, 279 F. Supp. 3d at 1218–1223. Information pertinent to the instant case is summarized below.

I. *Anti-Dumping Orders and New Shipper Reviews Generally.*

Dumping occurs when a foreign company sells a product in the United States for less than fair value, i.e., for a lower price than it sells that product in its home market. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Congress enacted the Tariff Act of 1930[1] to provide Commerce with a framework for detecting dumping and calculating a duty rate to offset the margin of dumping. *Id.* Either domestic producers or Commerce may initiate an investigation into potential dumping and, if appropriate, Commerce will issue an anti-dumping order containing the duty rates for dumped products. *Id.*; 19 U.S.C. §§ 1671, 1673. If a producer or exporter did not export merchandise during the period of investigation, it may request a "new shipper review." 19 U.S.C. § 1675(a)(2)(B). Commerce will conduct company-specific reviews of new exporters and producers that submit properly documented requests for review in order "to provide new shippers with an expedited review that will establish individual dumping margins for such firms on the basis of their own sales." *Id.*; Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 at 875 (1994), *reprinted in* 1944 U.S.C.C.A.N. 4040, 4203.[2]

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1675, however, are to the unofficial U.S. Code Annotated 2018 edition. The current U.S.C.A. reflects the amendments made to 19 U.S.C. § 1675 (2012) by the Trade Facilitation and Trade Enforcement Act of 2015 ("EAPA"), Pub. L. No. 114–125, § 433, 130 Stat. 122, 171–73 (2016), which are integral to this case.

[2] The Statement of Administrative Action "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

Commerce determines the normal value, export price, and resultant dumping margin for each entry of subject merchandise to determine a company's individual rate. 19 U.S.C. §1675(a)(2)(B)(i)–(ii). However, "any weighted average dumping margin . . . shall be based solely on the *bona fide* sales of an exporter or producer" to the United States. 19 U.S.C. §1675(a)(2)(B)(iv). The factors that Commerce has historically used to determine whether a sale is *bona fide*, discussed *infra*, pp. 8–9, have been codified in § 433 of the EAPA. In a *bona fide* analysis, Commerce does not attempt to ascertain the fair value of the merchandise, but examines each sale for its commercial reasonableness. *See Hebei New Donghua v. United States*, 29 CIT 603, 374 F. Supp. 2d 1333 (2005). Commerce looks to the nature of the sale to make sure it was sold in a manner reasonably representative of the shipper's future commercial practice, and to ensure that the shipper is not attempting to circumvent the duty order. *See* H.R. Rep. No. 114–114(I) § 433, at 89 (2015).

Commerce may rescind a review if it concludes that "there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise" during the period of review ("POR"), and that "an expansion of the normal period of review to include an entry and sale to an unaffiliated customer in the United States of subject merchandise would be likely to prevent the completion of the review within the [required] time limits." 19 C.F.R. § 351.214(f)(2). "Commerce interprets the term 'sale' in § 351.214(f)(2)(i) to mean that a transaction it determines not to be a *bona fide* sale is, for purposes of the regulation, not a sale at all;" so, if no *bona fide* sales occur during the POR, Commerce may rescind the new shipper review. *Shijiazhuang Goodman Trading Co. v. United States*, 40 CIT ___, ___, 172 F. Supp. 3d 1363, 1373 (2016).

II. *Initial New Shipper Review Proceedings.*

Muyun Wood requested a new shipper review to calculate its dumping duty for its exports during the relevant POR, under the antidumping duty order on multilayered wood flooring from the People's Republic of China ("PRC"), on June 22, 2015. NSR Request. After additional filings by Muyun Wood, Commerce placed data from the sales databases of two mandatory respondents[3] — Dalian Dajen

[3] In antidumping duty investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

> If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

Wood Co., Ltd. and Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. ("Senmao") — from the second administrative review ("AR2") of the multilayered wood flooring antidumping order. Dep't Letter: U.S. Sales Data from the AR2, P.R. 64, C.R. 52–54 (Apr. 12, 2016) ("AR2 data"). Commerce indicated that parties had one week to submit any comments on the data. *Id.* Muyun Wood and the other participant in the new shipper review – Dongtai Zhangshi Wood Industry Co., Ltd. ("Zhangshi") — requested that Commerce clarify how it intended to use the AR2 data, that it issue a supplemental questionnaire, and that it extend the comment deadline to allow Muyun Wood and Zhangshi to respond to the supplemental questionnaire. Muyun Wood Clarification Letter, P.R. 65 (Apr. 13, 2016); Zhangshi Clarification Letter, P.R. 66 (Apr. 13, 2016). Citing statutory deadlines, Commerce declined to issue a supplemental questionnaire or extend the deadline, and indicated only that the "data may be used as part of the Department's analysis in this new shipper review." Dep't of Commerce Resp. to Clarification Request, P.R. 70 (Apr. 15, 2016). Muyun Wood timely submitted comments, reiterating its confusion about the potential use of the AR2 data. Muyun Wood Comments on AR2 Data at 1, P.R. 72.

Commerce issued its Preliminary Results on May 31, 2016. *Multilayered Wood Flooring From the People's Republic of China*, 81 Fed. Reg. 34,310 (Dep't Commerce May 31, 2016), and accompanying Preliminary Decision Memorandum (May 20, 2016) ("*PDM*"), C.R. 61. Commerce found that Muyun Wood's sale was not *bona fide* for the purposes of the new shipper review because: (1) the price of Muyun Wood's sale was higher[4] than the highest priced sale of a Senmao CONNUM[5] from the AR2 with six of seven matching product characteristics and what Commerce viewed as significantly higher[6] than the average of the Senmao CONNUM; (2) the sale occurred late in the POR after a short negotiation; and (3) Muyun Wood was unable to

(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

[4] By [[ ]]. "[[ ]]" denotes information designated by a party as business proprietary information, which is not disclosed in the published opinion. Section 777 of the Tariff Act of 1930 prohibits disclosure of information "designated as proprietary by the person submitting the information" absent consent. 19 U.S.C. § 1677f (b)(1)(A). The business proprietary information is provided in the confidential version of the opinion issued to the parties. *See* USCIT Rule 73.2.

[5] Sales of individual products are denominated by product control numbers denoted as "CONNUMs."

[6] By [[ ]].

show that its U.S. customer[7] resold its product for a profit. *PDM* at 1–7.

Muyun Wood submitted its case brief on July 7, 2016, arguing that its sale was *bona fide* because the difference in price between its product and the Senmao CONNUM could be explained by differences in the products' characteristics and changes in the market since the AR2, and that the sale did in fact follow commercial norms. Muyun Wood Case Br., C.R. 63, at 10–12. Muyun Wood also provided additional information to support its contention that its U.S. customer resold Muyun Wood's product for a profit. *See* Muyun Wood Third Suppl. Questionnaire Resp. at Exhibit SQ3–1, C.R. 59 (May 18, 2016).

In its October 17, 2016 Issues and Decision Memorandum for the final results of the new shipper review ("*IDM*"), Commerce concluded that Muyun Wood's sale was not *bona fide* and that the new shipper review should be rescinded. *IDM* at 24, P.R. 102, C.R. 67. Based on the new information, Commerce revised its view that Muyun Wood could not demonstrate that its U.S. customer sold Muyun Wood's product at a profit. *IDM* at 21. Commerce also agreed with Muyun Wood that the short sales negotiation was not atypical, given prior communication between Muyun Wood and its U.S. customer at a trade show. *Id.* However, Commerce continued to find that the sale was not bona fide due to the price difference between Muyun Wood's product and the Senmao CONNUM. *Id.* at 17–18. In addition, Commerce found that Muyun Wood had received payment from its U.S. customer nine days late, which it viewed as undermining the *bona fide* nature of the sale. Confidential Issues and Decision Memorandum ("*Confidential IDM*") at 3–4, C.R. 67 (Oct. 17, 2016). Commerce also stated that the fact that Muyun Wood made only one sale to the United States during the POR weighed against finding that the sale was *bona fide*. *Id.* at 10–11. Commerce published its rescission of the new shipper review in the Federal Register on October 26, 2016, and also stated that Muyun Wood would remain part of the PRC-entity for the purpose of assessing duties. *Multilayered Wood Flooring from the People's Republic of China: Rescission of Antidumping Duty New Shipper Reviews*, 81 Fed. Reg. 74,393, 74,393–94.

III. *Proceedings Before This Court.*

Muyun Wood contested Commerce's rescission of the new shipper review on three bases: (1) that Commerce abused its discretion by adding the AR2 data without clarifying its intended use and allowing parties only one week to submit comments; (2) that substantial evidence did not support Commerce's determination that Muyun Wood's

[7] The U.S. customer in question was [[ ]].

sale was not *bona fide*; and (3) that Commerce's application of the PRC-entity rate was neither supported by substantial evidence nor in accordance with law.

This court found that Commerce had acted unreasonably by placing the AR2 data on the record a week before the factual record's statutorily required closure and inadequately explaining that information's intended use. *Muyun Wood I*, 279 F. Supp. 3d at 1224. Noting that interested parties are permitted only "one opportunity to rebut, clarify, or correct factual information placed on the record of the proceeding by the Department by a date specified by the Secretary," 19 C.F.R. § 351.301(c)(4), the court held that Muyun Wood had not had a meaningful opportunity to present evidence "because Muyun Wood was not clearly apprised of what, specifically, it was meant to rebut," *Muyun Wood I*, 279 F. Supp. 3d at 1224. The court explained that Commerce is obligated to calculate antidumping duty margins as accurately as possible, *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995), and that providing interested parties a meaningful ability to comment on the information in the record and to submit rebuttal information, 19 C.F.R. § 351.301(c)(4), serves that goal. By placing a large amount of data on the record seven days prior to its closure, without specifying "the single element of that data that would ultimately be used in its new shipper analysis," Commerce denied Muyun Wood the opportunity to meaningfully comment or submit rebuttal information. *Muyun Wood I*, 279 F. Supp. 3d at 1225. The court therefore concluded that Commerce acted unreasonably and abused its discretion.

The court also found that substantial evidence did not support Commerce's determination that Muyun Wood's sale was not *bona fide.* When evaluating whether a sale is commercially reasonable, and thus *bona fide*, Commerce employs a totality of the circumstances test. *Tianjin Tiancheng Pharm. Co. Ltd. v. United States*, 29 CIT 256, 260, 366 F. Supp. 2d 1246, 1249 (2005). Under § 433 of the EAPA, when determining if sales are *bona fide*, Commerce "shall consider, depending on the circumstances surrounding such sales—

(I) the price of such sales;

(II) whether such sales were made in commercial quantities

(III) the timing of such sales;

(IV) the expenses arising from such sales;

(V) whether the subject merchandise involved in such sales was resold in the United States at a profit;

(VI) whether such sales were made on an arms-length basis; and

(VII) any other factor the administering authority determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review."

19 U.S.C. § 1675(a)(2)(B)(iv)(I-VII)). In its *Final Results*, as explained in the *IDM*, Commerce noted that single sales were subject to more careful scrutiny, and found that in this context, the higher price compared to Senmao and allegedly late payment to Muyun Wood indicated the sale was not *bona fide* under the totality of the circumstances. Commerce found that all of the other factors — including whether Muyun Wood's product was resold in the United States for a profit — did not suggest that Muyun Wood's sale was not *bona fide*. *IDM* at 18, 23.

The court concluded that Commerce's use of the Senmao data was appropriate, but that Commerce's failure to take into account differences between the Senmao CONNUM and Muyun Wood's product that meaningfully impact the quality and prices of the product and Senmao's dumping margin were unreasonable. *Muyun Wood I*, 279 F. Supp. 3d at 1228 (internal citations omitted). The court also determined that record evidence did not support Commerce's determination that the brief, alleged payment delay existed or was long enough to be atypical for international commerce. *Id.* at 1230–32. Thus, the court held that Commerce's decision that Muyun Wood's sale was not *bona fide* was not supported by substantial evidence. *Id.* at 1232. Accordingly, without expressing an opinion on the outcome, the court remanded the case for redetermination consistent with its opinion. *Id.* The court also stated that Commerce could, in its discretion, choose to reopen the record. *Id.*

IV. *Remand Redetermination.*

During the remand phase, Commerce released a draft of its redetermination and provided an opportunity to comment on the draft. *Remand Redetermination* at 2. Commerce also reopened the record to add certain new factual information — the most significant of which was a new sales data set for sales price comparison — and provided interested parties with an opportunity to "correct, clarify, and rebut" it. *Id.* Muyun subsequently submitted rebuttal information and comments on the draft remand redetermination. *Id.*

On remand, Commerce reexamined Muyun Wood's sale and again concluded that it was not *bona fide*. *Id.* Commerce compared the price and quantity of Muyun Wood's sale to the prices of wood flooring sold by Dalian Penghong Floor Products Co., Ltd. ("Penghong"), a man-

datory respondent during the contemporaneous fourth administrative review ("AR4") period. Penghong's multiple[8] sales had the exact same CONNUM as Muyun Wood's product. *Id.* at 9. Penghong received a 0.00 percent antidumping margin in AR4, and Penghong and Muyun Wood's sales were made on the same delivery terms. *Id.* at 10. Commerce found that the quantity of product Muyun Wood sold was typical when compared to Penghong's sales.[9] *Id.* at 9. However, Commerce determined that Muyun Wood's sales price was significantly higher than Penghong's average price and highest price, and was therefore atypical.[10] *Id.* at 10.

Commerce also reexamined the information on whether Muyun Wood's U.S. customer had resold the goods at a profit. *Id.* at 16. Documents provided by Muyun Wood confirmed that the U.S. customer had resold a majority of the goods for a profit, but a portion remained unsold as of the date of documentation.[11] *Id.* Although Commerce had found that Muyun Wood had established resale profitability in the original *Final Determination, IDM* at 16, Commerce concluded on remand that Muyun Wood had failed to establish resale profitability because "the sales documents do not indicate that [the American customer's] goods, in their entirety, were resold at a profit," *Remands Results* at 16. Commerce concluded that this fact weighed against finding Muyun Wood's sale *bona fide. Id.*

Regarding the late payment factor at issue in *Muyun Wood I*, Commerce determined that information in the record was inconclusive as to whether the alleged late payment was atypical, and thus did not rely on this factor when concluding that Muyun Wood's sale was not *bona fide*. *Id.* at 13–15. Commerce also reexamined whether the transaction had been made on an arm's length basis and the expenses arising for the transaction, and again found that both of these factors suggested Muyun Wood's sale was typical and thus *bona fide*. *Id.* at 15–17.

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[8] [[ ]] sales, exactly.

[9] The quantity of Penghong's sales ranged from [[ ]] square meters to [[ ]] square meters, and Muyun Wood's sales quantity was [[ ]]. *Remand Redetermination* at 9.

[10] Penghong's sales price ranged from $[[ ]] per square meter to $[[ ]], and its average sales price was $[[ ]]. *Id.* at 10. Muyun Wood's sales price was $[[ ]], making it 17.65 percent higher than Penghong's highest price and 21.36 percent higher than Penghong's average price. *Id.*

[11] Specifically, documentation showed that [[ ]] had resold 78.55 percent of the product by [[ ]], over [[ ]] from the original sale, with a gross profit margin of [[ ]] percent. The resale profitability of the remaining 21.45 percent of Muyun Wood's sale was not established. Id.

Finally, Commerce considered whether any other factors were relevant to its *bona fide* analysis, and determined that Muyun Wood's sale was subject to increased scrutiny because no others were made during the new shipping review POR. *Id.* at 17. In light of the singular nature of the sale, the higher sales price, and resell profitability factor, Commerce decided that the totality of the circumstances suggested that Muyun Wood's sale was not *bona fide*. *Id.*

Muyun Wood filed its comments on the *Remand Redetermination* on April 5, 2018. Pl.'s Br. The Government submitted its reply to Muyun Wood's comments on May 7, 2018. Def.'s Br. Oral argument was held before the court on June 18, 2018. ECF No. 53.

JURISDICTION AND STANDARD OF REVIEW

The court reviews Commerce's remand redeterminations in accordance with the standard set forth in 19 U.S.C. § 1516a(b)(1)(B)(i), and thus "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

DISCUSSION

As noted, *supra*, pp. 8–9, Commerce takes into account a number of factors when determining whether, under the totality of the circumstances, a sale is *bona fide*. Commerce's determination will be sustained 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); *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1374 (Fed. Cir. 2012). Substantial evidence is "more than a mere scintilla," but "less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004). "A finding is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). This includes "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

Muyun Wood argues that Commerce's determination that Muyun Wood's sale is not *bona fide* is neither supported by substantial evidence nor in accordance with law because: (1) Commerce's comparison of Penghong's sales data to Muyun Wood's sale price failed to

account for key differences between their products; (2) Commerce exceeded the scope of the remand order by considering factors other than the sales price and payment delay; (3) Commerce changed its interpretation of the same resale profitability data without explanation; and (4) Commerce impermissibly relied on the fact that there was only a single sale during the POR as a factor in its totality of the circumstances analysis. The court considers each of these contentions in turn.

I. *Commerce's Sale Price Comparison Is Supported by Substantial Evidence.*

The Penghong product's CONNUM was identical to Muyun Wood's CONNUM, the data was from an administrative review contemporaneous with Muyun Wood's sale, and Penghong's product was not subject to an anti-dumping duty margin. *Remand Redetermination* at 9–10. Muyun Wood contends, however, that Commerce's CONNUM does not take into account all aspects of wood flooring products that affect price — particularly, surface treatment and veneer type — and that Commerce ignored evidence of this fact that Muyun Wood introduced to the record. Pl.'s Br. at 5. This argument is not persuasive. Commerce did consider the evidence that Muyun Wood submitted, but reasonably found that Muyun Wood's submissions did not establish that surface treatment and veneer type affected price. *Remand Redetermination* at 21–23. None of the product examples Muyun Wood provided to illustrate that surface treatment affected price contained important information about various other characteristics — for example, traits included in the CONNUM — and thus it could not be ascertained whether surface treatment or one of these other, unaccounted for characteristics caused the price differentials. *See* Rebuttal Submission at Ex. 1. In addition, although Muyun Wood emphasizes that its sliced veneer production adds value to its product, neither the contract between Muyun Wood and the U.S. customer nor the contracts between the U.S. customer and resale customers mention the sliced veneer characteristic, which supports the conclusion that this characteristic is not commercially meaningful. *See* Section A Resp. at Ex. A-7; Third Suppl. Resp. at Ex. SQ3–1.

Muyun Wood also suggests that Commerce should only use Penghong's sales prices made in the same month as its own sale; however, Muyun Wood provides no support for why this alternative analysis would be superior to Commerce's or, more importantly, why Commerce's methodology was unreasonable. Further, as Muyun Wood concedes, its sale price would still be higher than the corresponding Penghong price by 19.35 percent. Pl.'s Br. at 3. Thus, Commerce's

determination that Muyun Wood's price was high, and therefore atypical, is supported by substantial evidence.

II. *Commerce Did Not Exceed the Scope of the Remand Order.*

Muyun Wood claims that Commerce exceeded the scope of the remand order by considering factors of the *bona fide* test other than sales price and late payment. Pl.'s Br. at 9–10. Muyun Wood suggests that these were the only issues in controversy, and thus that the court's instruction to Commerce to "determine whether Plaintiff's sale during the POR was *bona fide as discussed above*" limited Commerce to consideration of the sales price and late payment factors. *Id.* at 9–10 (quoting *Muyun Wood I*, 279 F. Supp. 3d at 1232) (emphasis added by Muyun Wood). However, the issue in controversy in *Muyun Wood I* was whether, under a totality of the circumstances, Muyun Wood's sale was *bona fide*. *See Muyun Wood I*, 279 F. Supp. 3d at 1232 ("Commerce's conclusion that Muyun Wood's sale was not *bona fide* — and, thus the rescission of the new shipper review — is not supported by substantial evidence on the deficient record before the court."). Thus, Commerce's examination of all *bona fide* test factors, considered in light of the totality of the circumstances, was not outside the scope of the Remand Order.

III. *Commerce's New Resale Profitability Interpretation Is Contrary to Law.*

In its original *Final Results*, Commerce found that Muyun Wood had established resale profitability; on remand, Commerce instead determined that Muyun Wood failed to establish resale profitability and that this "calls into question whether Muyun's single sale is *bona fide*." *Remand Redetermination* at 16. Commerce asserts that its new interpretation is consistent with its finding in the *Final Results*, because it had "caveats" about the resale profitability factor. *Id.* at 25–26. However, despite these "caveats," Commerce did find in the *Final Results* that Muyun Wood had adequately established resale profitability — 78.55 percent was resold for a significant profit. *Remand Redetermination* at 16. Notably, Commerce has not explained why its conclusion has changed in the *Remand Redetermination* despite the fact that the record evidence regarding resale profitability remains the same on remand. Thus, Commerce has acted arbitrarily and capriciously with respect to this factor. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.") (internal quotation and citation omitted).

IV. *Commerce's Treatment of the Singular Nature of the Sale Is Unreasonable.*

The "singular nature" of the transaction under evaluation in a new shipper review is not one of the statutory factors enumerated in 19 U.S.C. § 1675(a)(2)(B)(iv)(I-VI)) for determining whether a sale is *bona fide*. *See supra*, pp. 8–9. It is established that single sales should be "carefully scrutinized to ensure that new shippers do not unfairly benefit from unrepresentative sales," *Tianjin*, 366 F. Supp. 2d at 1262. That said, it is not clear from the *Remand Redetermination* exactly how Commerce here treated the singular nature of the sale in its calculus. Commerce points to the "catch-all" provision, 19 U.S.C. § 1675(a)(2)(B)(iv)(VII), providing that Commerce shall consider any factors that are relevant to the assessment of whether a sale is likely to be typical of a new shipper's future sales. *Remand Redetermination* at 27. Commerce characterizes its approach to the fact that Muyun Wood made a single sale as "careful scrutiny," *see, e.g., Remand Redetermination* at 27; yet, in several places in the *Remand Redetermination*, Commerce appears to treat the single sale the same as the enumerated statutory factors and indicate that the single sale itself is a reason for finding Muyun Wood's sale commercially atypical. *See, e.g., id.* at 18 (listing "the fact that there was only a single sale between Muyun and its new customer" as one of three reasons, along with higher price and resale profitability, for finding the sale "not reflective of normal business practices"). Commerce states that it "did not conclude that the singular nature of Muyun's sale was by itself atypical," but only that the single sale and higher price together suggest that the sale is not *bona fide*. *Id.* at 28. However, Commerce used similar language when describing the role of statutory factors in its analysis. *See, e.g., id.* at 16 (finding that, when the fact that the entirety of the goods were not resold for a profit is analyzed together with other aspects of the sale, it calls into question whether the sale is *bona fide*). Because Commerce's explanation regarding its use of the singular nature of Muyun Wood's sale is unclear, insofar as it appears to have invoked it, Commerce has failed to "articulate a satisfactory explanation for its action." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) (citing *Amanda Foods (Vietnam) Ltd. v. U.S.*, 33 CIT 1407, 1416–17, 647 F. Supp. 2d 1368, 1379 (2009)).

V. *Commerce's Determination that the Sale Is Not Bona Fide Is Not Supported by Substantial Evidence.*

In sum, by definition, totality of the circumstances analyses are specific to particular cases, and the impact of various factors in

determining whether a transaction is *bona fide* may vary depending on the circumstances of the transaction. What is constant, however, is the basic Congressional rationale for requiring determinations based on *bona fide* sales: to ensure that a producer does not unfairly benefit from an atypical sale to obtain a lower dumping margin than the producer's usual commercial practice would dictate. *See Muyun Wood I*, 279 F. Supp. 3d at 1226–27. In the instant case, as has been discussed, the sales price was determined to be atypical, and this determination was supported by substantial evidence and in accordance with law. Commerce suggests that, "[w]hile the sale satisfies certain aspects of the *bona fide* analysis, the price factor, in particular, has significant weight, and cannot necessarily be offset by reiteration of other factors by which the sale could be considered typical," and cites *Tianjin*, 366 F. Supp. 2d at 1263, for support. *Remand Redetermination* at 18.[12] However, unlike in *Tianjin*, here the totality of the circumstances do not support a finding that the sale was not *bona fide*. In the matter before this court, Commerce determined that the sales quantity was typical, the expenses were normal, and the sale was made at arm's length. *Remand Redetermination* at 9, 15–17. Commerce did not find the payment timing to be atypical,[13] and a substantial majority of the product was resold for a significant profit.[14] In short, because consideration of all of the factors in the totality of the circumstances analysis do not suggest that the sale was commercially unreasonable, Commerce's decision that Muyun Wood's sale is not *bona fide* is not supported by substantial evidence.

CONCLUSION

For the reasons stated above, the court concludes that Commerce's determination that Muyun Wood's sales price was high is supported by substantial evidence and that Commerce did not exceed the scope

[12] The *Tianjin* court indeed suggested that the price factor was the most important; however, two other statutory factors — namely, payment that was nine months late and inconsistencies in import documentation — supported the determination that the sale was not *bona fide*. *Tianjin*, 366 F. Supp. 2d at 1262–63. Although some other factors were normal, the court concluded that these three factors together provided substantial evidence for Commerce's determination that, under the totality of the circumstances, the sale was commercially unreasonable. *Id.*

[13] As discussed *supra*, Commerce determined the payment timing factor — which was at issue in *Muyun Wood I* — was inconclusive. *Remand Redetermination* at 13. Although in its briefing Muyun Wood expressed some concerns about Commerce's analysis of this factor, Pl.'s Br. at 15–16, both parties agree that Commerce did not rely upon it when finding Muyun Wood's sale not *bona fide*, Oral Arg. The payment timing factor is thus not in dispute in this case. *Id.*

[14] 78.55 percent with a gross profit margin of [[ ]] percent. *Remand Redetermination* at 16.

of the remand redetermination by considering the totality of the circumstances of the sale. However, Commerce's ultimate conclusion that the sale was not commercially reasonable overall and not *bona fide* is not supported by substantial evidence. Consequently, the rescission of the new shipper review cannot be upheld. Commerce is ordered to proceed with Muyun Wood's new shipper review. Judgment shall be entered accordingly.

SO ORDERED.

Dated: July 16, 2018
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 18–90

VICENTIN S.A.I.C. et al., Plaintiffs and Consolidated Plaintiff, v. UNITED STATES, Defendant. and NATIONAL BIODIESEL BOARD FAIR TRADE COALITION, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00009

[Denying a motion to consolidate an action challenging various aspects of the U.S. Department of Commerce's countervailing duty determination involving biodiesel from the Republic of Argentina with two court actions challenging various aspects of the U.S. Department of Commerce's antidumping determination involving biodiesel from Argentina.]

Dated: July 17, 2018

Gregory James Spak, Kristina Zissis, and *Jessica Erin Lynd*, White & Case, LLP, of Washington, DC, for consolidated plaintiff LDC Argentina S.A.

Daniel Lewis Porter, James Philip Durling, and *Valerie S. Ellis*, Curtis Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for plaintiffs Vicentin S.A.I.C. and the Government of Argentina.

Joshua Ethan Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *L. Misha Preheim*, Assistant Director, *Jeanne E. Davidson*, Director, and *Chad A. Readler*, Acting Assistant Attorney General. Of Counsel on the brief were *Catherine Dong Soon Miller* and *Zachary Scott Simmons*, Attorneys, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Myles Samuel Getlan, Jack Alan Levy, Thomas Martin Beline, Nina Ritu Tandon, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenor and consolidated defendant-intervenor, National Biodiesel Board Fair Trade Coalition.

MEMORANDUM AND ORDER

Kelly, Judge:

Before the court is a motion to consolidate Vicentin S.A.I.C. v. United States, Court No. 18–00111 (USCIT filed May 15, 2018)

("Court No. 18–00111") and LDC Argentina S.A. v. United States, Court No. 18–00119 (USCIT filed May 21, 2018) ("Court No. 18–00119"), with this action, Vicentin S.A.I.C. & Gov't of Argentina v. United States, Consol. Court No. 18–00009 (USCIT filed Feb. 2, 2018) ("Consol. Court No. 18–00009") filed by Vicentin S.A.I.C., LDC Argentina S.A., and the Government of Argentina (collectively "Consolidated Plaintiffs").[1] *See* Pls.' Mot. Consol. Cases, June 4, 2018, ECF No. 29 ("Consol. Pls.' Br."). The United States, ("Defendant"), and National Biodiesel Board Fair Trade Coalition ("NBB Fair Trade Coalition" or "Defendant-Intervenor") oppose the motion.[2] *See* Def.'s Opp'n Pls.' Mot. Consol., June 25, 2018, ECF No. 30 ("Def.'s Resp. Br."); Def.-Intervenor's Opp'n Pls.' Mot. Consol. Cases, June 25, 2018, ECF No. 31 ("Def.-Intervenor's Resp. Br.").

BACKGROUND

On November 16, 2017, the U.S. Department of Commerce ("Department" or "Commerce") issued its final countervailing duty ("CVD") determination in biodiesel from the Republic of Argentina. *See Biodiesel From the Republic of Argentina*, 82 Fed. Reg. 53,477 (Dep't Commerce Nov. 16, 2017) (final affirmative [CVD] determination) ("*Biodiesel CVD Final Determination*") and accompanying Issues & Decision Memorandum for the Final Determination in the [CVD] Investigation of Biodiesel from the Republic of Argentina, C-357–821, (Nov. 6, 2017), ECF No. 22 ("Biodiesel CVD Final Decision Memo"). On March 1, 2018, Commerce issued the final antidumping duty ("ADD") determination in biodiesel from Argentina. *See Biodiesel From Argentina*, 83 Fed. Reg. 8,837 (Dep't Commerce Mar. 1, 2018) (final determination of sales at less than fair value and final affirmative determination of critical circumstances, in part) ("*Biodiesel ADD Final Determination*") and accompanying Issues & Decision Memorandum for the Final Affirmative Determination in the

[1] The motion to consolidate states that it was also filed on behalf of Oleaginosa Moreno Hermanos S.A. and Molinos Agro S.A., plaintiffs in Court No. 18–00111. Consol. Pls.' Br. at 1. However, Oleaginosa Moreno Hermanos S.A. and Molinos Agro S.A. are not parties in Consol. Court No. 18–00009.

[2] The Defendant and the Defendant-Intervenor specifically state that they have no objection to the consolidation of Court No. 18–00111 and Court No. 18–00119 with each other, as both actions challenge the results of the same final determination issued by the U.S. Department of Commerce in the antidumping investigation of biodiesel from Argentina. *See* Def.'s Resp. Br. at 3; Def.Intervenor's Resp. Br. at 4 n.1; *see also* Compl. at ¶¶ 1–2, 13–28, May 16, 2018, ECF No. 7, Court No. 18–00111; Compl. at ¶¶ 1–2, 12–25, May 21, 2018, ECF No. 3, Court No. 18–00119; *see generally Biodiesel From Argentina*, 83 Fed. Reg. 8,837 (Dep't Commerce Mar. 1, 2018) (final determination of sales at less than fair value and final affirmative determination of critical circumstances, in part). However, a motion to consolidate Court Nos. 18–00111 and 18–00119 is not before the court.

[ADD] Investigation of Biodiesel from Argentina, A-357–820, (Feb. 20, 2018), ECF No. 29–2 ("Biodiesel ADD Final Decision Memo").

On February 2, 2018, Vicentin S.A.I.C. and the Government of Argentina commenced an action challenging Commerce's determination in *Biodiesel CVD Final Determination*, and filed the corresponding complaint on March 2, 2018. *See* Summons, Feb. 2, 2018, ECF No. 1; Compl., Mar. 2, 2018, ECF No. 11; *see also Biodiesel CVD Final Determination*. On April 2, 2018, the court granted NBB Fair Trade Coalition's motion to intervene as defendant-intervenor. *See* Order, Apr. 2, 2018, ECF No. 19. On April 4, 2018, the court consolidated Vicentin S.A.I.C. and the Government of Argentina's action with LDC Argentina S.A. v. United States, Court No. 18–00015 (USCIT filed Feb. 2, 2018) ("Court No. 18–00015"), also challenging various aspects of the *Biodiesel CVD Final Determination. See* Order [Granting Req. to Consol. Court No. 18–00015 under Court No. 18–00009], Apr. 4, 2018, ECF No. 21; *see also* Compl. at ¶¶ 1–2, 11–19, Mar. 4, 2018, ECF No. 7, Court No. 18–00015. On June 4, 2018, Consolidated Plaintiffs sought to further consolidate Consol. Court No. 18–00009 with two later filed court actions, Court Nos. 18–00111 and 18–00119, both challenging various aspects of *Biodiesel ADD Final Determination. See* Consol. Pls.' Br.; *see also* Compl. at ¶¶ 1–2, 13–28, May 16, 2018, ECF No. 7, Court No. 18–00111; Compl. at ¶¶ 1–2, 12–25, May 21, 2018, ECF No. 3, Court No. 18–00119; *see generally Biodiesel ADD Final Determination*.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012).

Pursuant to Rule 42(a) of the Rules of the United States Court of International Trade ("USCIT"), the court may consolidate actions before the court that "involve a common question of law or fact[.]" USCIT R. 42(a). The decision to consolidate is within the court's "broad discretion[.]" *See Zenith Elecs. Corp. v. United States*, 15 CIT 539, 540 (1991) (quoting *Manuli, USA, Inc. v. United States*, 11 CIT 272, 277, 659 F. Supp. 244, 247 (1987)).

DISCUSSION

Consolidated Plaintiffs argue for further consolidation of Consol. Court No. 1800009 with Court Nos. 18–00111 and 18–00119 because "these actions involve at least one common question of law related to the issue of double remedies . . . [and] the same Argentine Government policy." Consol. Pls.' Br. at 2. Thus, Consolidated Plaintiffs argue that further consolidation will promote judicial economy. *See id.* at 6–7. Defendant and the Defendant-Intervenor argue that there are no common questions of law or fact, the actions involve different admin-

istrative records, there is no complete identity of parties amongst all the cases for which consolidation is sought, and consolidating the cases would cause unnecessary burden and delay. *See* Def.'s Resp. Br. at 3–10; Def.-Intervenor's Resp. Br. at 5–11.

USCIT Rule 42(a) permits the court to consolidate actions if those actions involve a common question of law or fact. *See* USCIT R. 42(a). Consolidation may be appropriate when it promotes judicial economy or avoids inconsistent results. *See Manuli*, 11 CIT at 278, 659 F. Supp. at 248 (finding no benefit to consolidation given the distinct scope and standard of review in the cases); *Brother Indus., Ltd. v. United States*, 1 CIT 102, 103–04 (1980) (consolidating cases involving common questions of law and fact and a common administrative record). Where consolidation would not result in judicial economy or where dissimilar issues outweigh the common issues, consolidation is inappropriate. *See Zenith*, 15 CIT at 540–41.

Here, there are no likely benefits to consolidation. The challenges to the *Biodiesel CVD Final Determination* and the *Biodiesel ADD Final Determination* do not share any common questions of law.[3] The claim of double remedies was only raised before Commerce by the respondents in the ADD investigation, *see* Biodiesel ADD Final Determination at 14–28, and was not raised before the agency nor as a claim in this court in Consol. Court No. 18–00009. Unlike *RHI Refractories Liaoning Co. v. United States*, 35 CIT __, 774 F. Supp. 2d 1280 (2011) and *GPX Int'l Tire Corp. v. United States*, 33 CIT 1368, 645 F. Supp. 2d 1231 (2009), upon which Consolidated Plaintiffs rely, *see* Consol. Pls.' Br. at 3–7, here, there are no common questions of law. Accordingly, there is no danger of inconsistent decisions.[4] Further, the court must review each challenge on its own record, *see* 19 U.S.C. § 1516a(b)(1)(B), and therefore it is unclear why the single consider-

[3] The Consolidated Plaintiffs explain that the double remedies problem here is that the final CVD determination addresses the Argentine policy of taxing soybean exports, i.e., finding that the export tax was a countervailable subsidy. *See* Consol. Pls.' Br. at 2–5; *see also* Biodiesel CVD Final Decision Memo at 19–22. At the same time, the final ADD determination addresses the Argentine policy of taxing soybean exports as well, i.e., finding that the export tax created a market condition warranting adjustment under section 773(e) of the Tariff Act of 1930, as amended 19 U.S.C. § 1677b(e)(3) (2015). *See* Biodiesel ADD Final Decision Memo at 26–28. Pursuant to 19 U.S.C. § 1677b(e)(3) "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, [Commerce] may use another calculation methodology under this title or any other calculation methodology." 19 U.S.C. § 1677b(e)(3).

[4] Presumably, the plaintiffs challenging *Biodiesel ADD Final Determination* will continue challenging the double remedy problem in their briefings before the court, as both raise it as a claim in their complaints. *See* Compl. at ¶¶ 22–23, May 16, 2018, ECF No. 7, Court No. 1800111; Compl. at ¶¶ 22–25, May 21, 2018, ECF No. 3, Court No. 18–00119. It is therefore possible that the court hearing Court Nos. 18–00111 and 18–00119 may remand the matter to Commerce based on the double remedy challenge.

ation of some common facts between the CVD and ADD final determinations would promote judicial efficiency. Finally, it is unclear what harm will result from allowing the challenges to the *Biodiesel ADD Final Determination*, i.e., Court Nos. 18–00111 and 18–00119, to proceed independently from the challenges to the *Biodiesel CVD Final Determination*, i.e., Consol. Court No. 18–00009.

Consolidation would impose significant burdens. The challenged CVD and ADD determinations are based on separate administrative records, both containing business proprietary information, and there is not a complete identity of parties amongst all the cases for which consolidation is sought. As a result, not only is there a danger that the parties may inadvertently conflate portions of the record, constant care would have to be taken to protect business proprietary information. Further, consolidation would likely necessitate a piecemeal briefing schedule involving multiple parties, and still be subject to the normal delays of litigation which would be exacerbated given the number of parties involved.[5]

Although concerns regarding the distinct administrative records and lack of complete identity of parties may not be prohibitive in all cases seeking consolidation, they counsel against consolidation, unless there is a significant benefit and economy to be had from consolidation. The court sees little, if any, possible benefit to consolidation here.

CONCLUSION

For the reasons discussed, the Consolidated Plaintiffs' motion to further consolidate Consol. Court No. 18–00009 with Court Nos. 18–00111 and 18–00119 is denied. In accordance with this opinion, it is

ORDERED that the Consolidated Plaintiffs' motion to consolidate is denied; and it is further

ORDERED that the parties shall file a joint status report and proposed briefing scheduling that will achieve the purposes of USCIT R. 56.2 on or before Monday, July 30, 2018.

Dated: July 17, 2018
New York, New York

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

[5] It is not uncommon for each party to a litigation in this Court to ask for multiple extensions of time during the briefing process.