U.S. Court of International Trade

Slip Op. 18–39

INTERNATIONAL INDUSTRIES, LTD., Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, BULL MOOSE TUBE COMPANY, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 17–00010

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

Dated: April 9, 2018

R. Will Planert, Morris, Manning & Martin LLP, of Washington, DC, argued for Plaintiff. With him on the brief were *Julie C. Mendoza, Donald B. Cameron, Brady W. Mills, Mary S. Hodgins, Eugene Degnan*, and *Sarah S. Sprinkle*.

Nataline Viray-Fung, Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, argued for Defendant. With her on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

John W. Bohn, Schagrin Associates, of Washington, DC, argued for Defendant-Intervenors. With him on the brief was *Roger Schagrin*.

OPINION

Barnett, Judge:

Plaintiff International Industries, LTD ("Plaintiff" or "IIL") moves, pursuant to United States Court of International Trade ("USCIT") Rule 56.2, for judgment on the agency record, challenging the United States International Trade Commission's ("ITC" or "Commission" or "Defendant") determination that circular welded carbon-quality steel pipe ("CWP") imports from Pakistan are eligible for cumulation with CWP imports from Oman and the United Arab Emirates ("UAE").[1] *See* Confidential Mot. of Pl. International Industries, Ltd. for J. Upon the Agency R. ("Pl.'s Mot."), ECF No. 30; *Circular Welded Carbon-Quality Steel Pipe from Oman, Pakistan, the United Arab Emirates, and Vietnam*, 81 Fed. Reg. 91,199 (ITC Dec. 16, 2016) (final determinations) ("*ITC Final Determination*")[2]; *Circular Welded Carbon-Quality Steel Pipe from Oman, Pakistan, the United Arab Emirates, and Vietnam, Confidential Final Consolidated Staff Report and*

[1] Defendant filed the confidential administrative record ("CR") at ECF No. 20 and the public administrative record ("PR") at ECF No. 21. The parties also submitted joint appendices containing record documents cited in their briefs. *See* Confidential Joint App. ("CJA"), ECF No. 47; Public Joint App. ("PJA"), ECF No. 48. The Court references the confidential versions of the relevant documents, unless otherwise specified.

[2] The Commission found imports of CWP from Vietnam to be negligible and, therefore, those imports are not at issue in this case. *ITC Final Determination*, 81 Fed. Reg. at 91,199.

Views, Inv. Nos. 701-TA-549 and 731-TA-1299–1300, 1302–1303 (Final) (Dec. 2016), CR 398, ECF No. 20–1.[3] Plaintiff challenges the Commission's determination as unsupported by substantial evidence and otherwise not in accordance with law. Confidential Br. of Pl. International Industries, Ltd. in Supp. of its Mot. for J. on the Agency R. ("Pl.'s Br.") at 2, ECF No. 30–1. Specifically, Plaintiff argues that the Commission lacked substantial evidence to support its finding that there was a reasonable overlap between CWP from Pakistan and other CWP, that the Commission did not adequately address Plaintiff's arguments, and that any competition between CWP from Pakistan and other CWP was attenuated. *See* Pl.'s Mot. at 1–2; Pl.'s Br. at 2–3; *see also* Confidential Reply of Pl. International Industries, Ltd. ("Pl.'s Reply") at 2, ECF No. 44. Defendant and Defendant-Intervenors support the ITC's cumulation determination. *See* Confidential Resp. of Def-Ints. Wheatland Tube Co. and Bull Moose Tube Co. to Pl.'s Mot. for J. on the Agency R. Under USCIT Rule 56.2 ("Def.-Ints.' Resp."), ECF No. 32; Confidential Def. United States International Trade Commission's Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("Def.'s Resp."), ECF No. 42. For the reasons discussed below, the Court denies Plaintiff's motion for judgment on the agency record.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[4] and 28 U.S.C. § 1581(c) (2012). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Legal Standard for Cumulation

The Commission is required to "cumulatively assess the volume and effect of imports of the subject merchandise from all countries" when, as here, petitions are filed on the same day "if such imports compete with each other and with domestic like products in the [U.S.] market." 19 U.S.C. § 1677(7)(G)(i); *Views* at 20 (stating the date of

[3] The *Confidential Final Consolidated Staff Report and Views*, to which the court cites throughout this opinion, is divided into three sections: (1) Views of the Commission, (2) Dissenting Views of Commissioners Pinkert, Broadbent, and Kieff with Respect to Less Than-Fair-Value Imports from Pakistan; and (3) Staff Report. *See* ECF No. 20–1. For ease of reference, the court will cite to these sections respectively, as *Views, Dissenting Views*, or *Staff Report*.

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

petitions). To determine whether imports compete with each other and with the domestic like product, the Commission analyzes four factors:

> (1) the degree of fungibility between subject imports from different countries and between subject imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
>
> (2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;
>
> (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and
>
> (4) whether the subject imports are simultaneously present in the market.

Views at 20 (citation omitted). This court and the U.S. Court of Appeals for the Federal Circuit ("CAFC") have approved the Commission's use of these criteria for determining whether competition exists between and among subject imports and the domestic like product. *See Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 985, 33 F. Supp. 2d 1082, 1085 (1998), *aff'd*, 216 F.3d 1357, 1361 (Fed. Cir. 2000); *see also Fundicao Tupy S.A. v. United States*, 12 CIT 6, 10–11, 678 F. Supp. 898, 902 (1988) (summarizing the factors as "the fungibility and similar quality of the imports, the similar channels of distribution, the similar time period involved, and the geographic overlap of the markets"), *aff'd,* 859 F.2d 915 (Fed. Cir. 1988).[5] No one factor in the Commission's analysis is determinative. *Noviant OY v. United States*, 30 CIT 1447, 1461, 451 F. Supp. 2d 1367, 1379 (2006). Moreover, the Commission need only find that a "reasonable overlap" of competition exists; a finding of "'complete overlap' of competition" is not required to support a cumulation decision. *Mukand Ltd. v. United States*, 20 CIT 903, 909, 937 F. Supp. 910, 916 (1996) (quoting *Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52

[5] Similarly, Congress has approvingly cited the Commission's criteria for evaluating whether there is competition sufficient to warrant cumulation. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol.1 at 848 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4182 ("SAA") ("The new section [1677(7)(G)(i)] will not affect current Commission practice under which the statutory requirement is satisfied if there is a reasonable overlap of competition, based on consideration of relevant factors.") (citing *Fundicao Tupy*, 678 F. Supp. at 902). The SAA "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).

(1989)); *see also Goss Graphics*, 216 F.3d at 1362 (stating that the ITC's inquiry is "whether 'reasonable overlap' of competition exists.").

II. The Commission's Determination

The Commission's determination to cumulate subject imports from Pakistan with imports from Oman and the UAE was by a divided vote of the six-member Commission.[6] For purposes of its material injury analysis, the Commission cumulated subject imports from Pakistan, Oman, and the UAE because it found a "reasonable overlap in competition" among imports from those countries and between those imports and the domestic like product. *Views* at 26. The Commission found that the record indicates a geographic overlap in the presence of sales of the CWP imports from Oman, Pakistan, the UAE, and the domestic like product; that there is an overlap in channels of distribution for imports from the subject countries and the domestic like product; that the imports from each subject country were simultaneously present in the U.S. market; and that the imports from the subject countries and the domestic like products are fungible. *Views* at 22–26. Plaintiff challenges only the ITC's findings with respect to the fungibility analysis; it does not challenge the Commission's methodology or its findings related to the remaining factors. *See generally* Pl.'s Br.; Pl.'s Reply at 3.

III. Substantial Evidence Supports the Commission's Decision to Cumulate Imports from Pakistan

Plaintiff argues that the Commission's determination is unsupported by substantial evidence because CWP imports from Pakistan constituted a very small percentage share of the total U.S. market and were confined to a small segment — fence tubing — of the overall U.S. market. Pl.'s Br. at 21–24. Plaintiff asserts that the Commission failed to articulate whether it based its cumulation decision on competition in the fence tubing segment or the CWP market as a whole. *Id.* at 20; Pl.'s Reply at 4. Plaintiff further argues that the Commission failed to address Plaintiff's arguments that the lack of hydrostatic testing, certification pursuant to the American Society for Testing and Materials International ("ASTM") standards, and lead-free certification pursuant to the Safe Drinking Water Act confined

[6] Three Commissioners did not cumulate subject imports from Pakistan with imports from Oman and the UAE and separately analyzed those imports. *Views* at 3 n.1,22 n.66; *see also Dissenting Views*. The dissenting Commissioners found no material injury or threat of material injury to a U.S. industry by reason of CWP imports from Pakistan. *Views* at 3 n.1. Pursuant to 19 U.S.C. § 1677(11), "[i]f the Commissioners voting on a determination by the Commission . . . are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination." 19 U.S.C. § 1677(11).

Pakistani CWP to the fence tubing submarket. Pl.'s Br. at 31. Plaintiff further argues that the Commission "ignored" evidence that, even within the fence tubing segment, competition between Pakistani imports and the domestic like product was "significantly attenuated" due to quality and specification differences. *Id*. at 34–40.

Because Plaintiff only challenges the Commission's fungibility determination, the court's analysis is confined to this issue. The Commission "need only find a reasonable overlap of fungibility to support its competition finding." *Noviant OY*, 30 CIT at 1461, 451 F. Supp. 2d at 1379 (quoting *Mukand,* 20 CIT at 909, 937 F. Supp. at 910). Here, the Commission found "at least moderate interchangeability among imports from Oman, Pakistan and the UAE and between the imports from each of those sources and the domestic like product." *Views* at 23. Contrary to Plaintiff's arguments that Pakistani CWP is not fungible with other imported and domestic like products, substantial evidence on the record supports the Commission's determination of a reasonable degree of fungibility between CWP from Pakistan, the other subject sources and the domestic like product.

Questionnaire responses from market participants regarding interchangeability of CWP imports from Pakistan, Oman, the UAE and domestically produced CWP support a finding of fungibility among these products. During its investigation, the Commission asked market participants to explain whether imported CWP from the subject countries and domestically produced CWP is "always, frequently, sometimes, or never" interchangeable. *Staff Report* at II-32. Substantial numbers of responding domestic producers, importers, and purchasers reported that CWP from Oman, Pakistan, and the UAE was "always" or "frequently" interchangeable with other subject merchandise or the domestic like product. *See Staff Report* at Table II-10.[7]

The Commission further observed that,

> of the five purchasers that purchased both subject imports from Pakistan and domestically produced product, [some] indicated that subject imports from Pakistan and the domestic like product were sometimes interchangeable, and [some] indicated they were always or frequently interchangeable. [Some of the] four

[7] Specifically, the comparison data on domestically produced CWP and Pakistani imported CWP showed that out of the [[ ]] responding U.S. producers, [[ ]] reported that these products were always interchangeable and [[ ]] reported that they were frequently interchangeable. *See* Staff Report at Table II-10. Out of the [[ ]] responding U.S. importers, [[ ]] stated that the products were always interchangeable while [[ ]] stated they were frequently interchangeable, and two reported they were sometimes interchangeable. *Id.* Eight of the U.S. purchasers reported that Pakistani CWP was sometimes interchangeable with the domestic like product, six reported that those products were always interchangeable, one reported that they were frequently interchangeable, while only one reported that they were never interchangeable. *Id.*

> purchasers that provided responses concerning subject imports from Pakistan and other subject imports stated that such imports were always or frequently interchangeable.

Views at 25 (citing questionnaire responses).

Moreover, purchaser comparisons across countries provide additional support for the Commission's finding of fungibility. The Commission asked purchasers to compare CWP produced in the United States with CWP produced in the subject countries using 14 non-price characteristics. *Staff Report* at II-27, Table II-9. A majority of the responding purchasers indicated CWP from Pakistan was comparable in half of the non-price characteristics with CWP from the United States,[8] and a majority also indicated CWP from Pakistan was comparable in almost all the non-price characteristics with CWP from Oman and the UAE. *See* Table II-9.[9]

These questionnaire responses containing views of market participants provide substantial evidence to support the Commission's finding of a reasonable overlap in terms of fungibility. *See Noviant OY*, 30 CIT at 1461, 451 F. Supp. 2d at 1379. Plaintiff seeks to cast doubt on the credibility of the questionnaire responses because of alleged "ambiguities and contradictions" in the responses. Pl.'s Br. at 27–30. For example, Plaintiff avers that although the company that purchased a significant quantity of CWP from Pakistan rated that product as comparable with other subject imports and the domestic like product, it had no actual marketing or pricing knowledge of domestically produced CWP, and the company purchased only small quantities from some countries. *Id.* at 28 n.10. Regarding the other purchasers, Plaintiff points to their responses either indicating lack of knowledge of Pakistani products or the low purchase volume of Pakistani products. *See id.* at 29–30.

"As the principal fact-finder, the ITC is afforded considerable discretion in evaluating information obtained from questionnaires."

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[8] Purchasers indicated that domestically produced CWP was comparable to CWP produced in Pakistan with regard to: discounts offered, extension of credit, packaging, quality meeting industry standards, quality exceeding industry standards, reliability of supply, and domestic transportation costs. Table II-9.

[9] In fact, a company that purchased a significant quantity of CWP from Pakistan and indicated it had actual marketing and pricing knowledge of CWP from Pakistan and UAE rated Pakistani CWP as "comparable" with the subject merchandise from the UAE and the domestic like product in *all* of the non-price characteristics, except one. *Compare* [[ ]] ("[[ ]]") U.S. Purchasers' Questionnaire Resp. ("[[ ]] QR") at Question II-1 (indicating purchase quantities), CJA Tab 8, CR 135, PJA Tab 8, ECF No. 47 *with Staff Report* at Tables IV-2 & C-1 (indicating U.S. imports by source); [[ ]] QR at Questions IV-1 (indicating country knowledge), and IV-7 (providing country comparisons based on the 14 non-price characteristics); *see also* Pl.'s Br. at 28 n.10 (noting that "[[ ]] purchased a significant quantity of CWP from Pakistan.").

NSK Corp. v. United States, 32 CIT 966, 978, 577 F. Supp. 2d 1322, 1336–1337 (2008). Consistent with this discretion, "[c]ertain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process." *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996). The court finds no reason to second guess the ITC's evaluation of the credibility of the questionnaire responses. Plaintiff offers no reasoning or evidence to suggest that a customer must actually purchase significant quantities of a competing product before being qualified to offer views on that product. In short, the Commission chose to credit responses from companies that did not purchase comparable amounts of CWP from Pakistan and Plaintiff offers no reason for this court to disturb that decision.[10]

Pricing data also support a finding of competition among the imports and with the domestic like product. The Commission requested U.S. producers and importers to provide quarterly pricing data for four specific CWP products. *Staff Report* at V-5-V-6. Pricing product 4 was defined as "schedule 40 galvanized fence tube, with nominal outside diameter of 1–1/4—3 inches, inclusive," which is fence tubing. *Staff Report* at V- 6; *see also* Views at 25 n.81 (stating that pricing product 4 "is, by definition, fence tubing.").[11] A majority of CWP imports from Pakistan were in the fence tubing category (pricing product 4), *see Staff Report* at Tables V-3-V-6; U.S. producers and importers reported sales in this product from the United States, the UAE, and, in much smaller quantities, Oman. *See* Staff Report at Tables V-6.[12] Plaintiff contends that its sole customer reported pricing data only in pricing product 4, Pl.'s Br. at 6; thus, the record shows that all of Plaintiff's CWP imports compete with imports from Oman, the UAE, and domestic like product in pricing product 4. *See* Table

[10] The court recognizes that some purchasers of CWP from Pakistan and other sources indicated that they did not have marketing and pricing knowledge about CWP from Pakistan, notwithstanding their purchases. *See* [[ ]] QRs at Questions II-1 and IV-1. Again, it is not the court's role to "reweigh the evidence." *Usinor,* 28 CIT at 1111, 342 F. Supp. 2d at 1272.

[11] Pricing product 1 was "ASTM A-53 schedule 40 black plain-end, with nominal outside diameter of 2–4 inches inclusive"; pricing product 2 was "ASTM A-53 schedule 40 galvanized plain-end, with nominal outside diameter of 2–4 inches inclusive"; pricing product 3 was "ASTM A-53 schedule 40 black plain-end, with nominal outside diameter of 6–8 inches inclusive." Staff Report at V-5-V-6

[12] Additionally, with respect to fence tubing, the *Staff Report* states that "[m]ost U.S. producers and importers reported that their sales of pricing product 4 were not produced to ASTM standards." *Staff Report* at V-6 n.11.

V-6;[13] *see also* Oral Arg. at 11:20–13:23. In addition, "there were multiple quarterly pricing observations of the domestic like product and subject imports from Oman, Pakistan, and the UAE with respect to products 1, 2, and 4 sold to distributors." Views at 26; *see also* Staff Report at Tables V-3–4, V-6.[14]

Plaintiff suggests that the Commission did not adequately articulate whether it based its fungibility determination on the interchangeability of CWP from Pakistan and from other sources in the fence tubing market alone or in the CWP market as a whole. *See* Pl.'s Reply at 4. Plaintiff's argument is inapposite. The Commission found that there is a reasonable overlap of fungibility between and among the subject imports (including CWP from Pakistan) and the domestic like product. The Commission articulated that

> [t]he lack of ASTM certification of most subject imports from Pakistan does not preclude it from being used in the same applications as the domestic like product and subject imports from Oman and the UAE. CWP from each of these sources is used for fence tubing, which is the primary application for subject imports from Pakistan asserted by the Pakistan respondent.

Views at 25. Thus, the Commission understood that most Pakistani CWP was used for fence tubing and found sufficient fungibility between it and other CWP. The reasonable overlap standard does not require overlap in every market segment and Plaintiff does not dispute the existence of overlap in the fence tubing segment.

Plaintiff cites the *Dissenting Views* in support of its argument that because its imports "were relegated to a very small portion of the U.S. market for CWP," they are not eligible for cumulation. *See* Pl.'s Br. at

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[13] Citations to the oral argument reflect time stamps from the recording. At oral argument, counsel for the Plaintiff stated that "there's no question there is some competition" within the fence tubing submarket. Oral Arg. at 11:17–11:20.

[14] Connectors, Inc. ("Connectors"), Plaintiff's sole U.S. customer, reported pricing data only for pricing category 4 (fence tubing) from Pakistan. Connectors, Inc.'s U.S. Importers' Questionnaire Resp. at III-2a, CJA Tab 19, CR 274, PJA Tab 19, ECF No. 47. In addition to Connectors, however, another importer, [[ ]], reported that it imported a total of [[ ]] short tons of products 1–3 from Pakistan during the POI. *See Staff Report* at Tables V-3-V-5; [[ ]] U.S. Importers' Questionnaire Resp. at III-2a, CJA Tab 15, CR 189, PJA Tab 15, ECF No. 47. Plaintiff classifies this as a "reporting error" and a "mistake" because IIL's CEO testified that, to the best of his knowledge, IIL is the only producer of CWP that is capable of exporting to the United States, and IIL sells exclusively to Connectors. Pl.'s Br. at 6 n.4. Pursuant to 19 C.F.R. § 207.3(a), a person submitting a response to a Commission questionnaire on behalf of an interested party "must certify that such information is accurate and complete to the best of the submitter's knowledge." 19 C.F.R. § 207.3(a). The Commission, therefore, reasonably chose to rely on this certified response instead of inferring a reporting error. *Cf. JMC Steel Grp. v. United States*, 38 CIT __, __, 24 F. Supp. 3d 1290, 1319 (2014) (holding that the Commission properly relied on limited questionnaire responses, as opposed to "infer[ring] the existence of additional excess capacity," as the plaintiff had suggested).

22 (quoting *Dissenting Views* at 34–35). Plaintiff concedes, however, that the Commission need not find competition across the entire market. Pl.'s Reply at 11. Here, the Commission's determination that CWP from Pakistan is fungible with CWP from other subject countries and domestically produced CWP is supported by substantial evidence. That some Commissioners reached diverging conclusions based on the record evidence "does not prevent [the Commission's] finding from being supported by substantial evidence." *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1372 (Fed. Cir. 2015) (quoting *Consolo*, 383 U.S. at 620); *see also Grupo Indus. Camesa v. United States*, 85 F.3d 1577, 1582 (Fed. Cir. 1996) ("Although [appellant] points to evidence supporting the dissenting commissioners' decision that the domestic industry was not materially injured, this does not mean that the Commission's affirmative determination is unsupported by substantial evidence.").

Plaintiff argues that competition by Pakistani CWP is attenuated by the fact that its CWP is not certified to ASTM standards. The Commission acknowledged that CWP from Pakistan generally lacked ASTM certification, whereas a majority of CWP imported from other subject countries was made to the ASTM A53 standard. *Views* at 24. Nonetheless, the Commission found this difference inconsequential in its fungibility analysis. *Id.* The Commission reasoned that "CWP from Pakistan is marketed as having equivalent qualities and being generally manufactured to ASTM A53-A standards." *Id.* (citing Revised and Corrected Hr'g Tr. (Nov. 17, 2016) ("Hr'g Tr.") at 137, CJA Tab 32, PJA Tab 32, PR 210, ECF No. 47). Substantial evidence supports this finding. The vice president of IIL's U.S. distributor, Connectors, testified at the hearing that IIL's mill certificate states that IIL's pipe "is generally *manufactured to* the ASTM A53-A spec." Hr'g Tr. at 136–37.[15] Although this witness qualified his testimony to state that despite the mill certification, IIL's pipe "is suitable for use only in commercial fence pipe," *id.* at 137, the Commission was entitled to rely and had record support for its reliance on the witness's testimony. *See* IIL's Post-Hr'g Br., Ex. 11, CJA Tab 24, CR 345, PJA Tab 24, PR 180, ECF No. 47. As the Commission observed, a majority of responding purchasers reported that Pakistani CWP was comparable to the other subject imports and domestic like product in the "quality meeting industry standards" category. *Views* at 24–25; Table

[15] IIL was the only Pakistani producer of CWP to respond to the Commission's questionnaire, and amounted for [[ ]] percent of importers' U.S. shipments of CWP from Pakistan during the POI. Pl.'s Br. at 22.

II-9.[16] Record data supported the Commission's conclusion that CWP from Pakistan is manufactured to similar end finishes, surface finishes, lengths, and thicknesses as CWP from other subject sources and the domestic industry. Views at 25–26 & n.84 (*citing* Staff Report Tables IV-7–9). Moreover, while there were differences between Pakistani CWP and other CWP with regard to the lead free certifications, the Commission found that the lack of such a certification was not a factor in most customers' purchasing decisions. Views at 24. The fact that a significant minority of customers reported that such a certification was very or somewhat important, and that the Commission minority chose to credit their responses, Dissenting Views at 35 n.11, does not detract from the substantial evidence supporting the Commission's finding. *See Siemens Energy, Inc.*, 806 F.3d at 1372.

Plaintiff avers that the Commission failed to address its arguments that the lack of ASTM certification, hydrostatic testing, and compliance with lead free standards in the Safe Drinking Water Act all confined its CWP solely to the fencing sector of the market. Pl.'s Br. at 35. Plaintiff avers the Commission "ignored" record evidence demonstrating differences in specification and quality between Pakistani fence tubing and domestically produced fence tubing. *See* Pl.'s Br. at 34–40.[17] The court disagrees.

"[T]he Commission shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise." 19 U.S.C. § 1677f(i)(3)(B). In so doing, the Commission must specifically reference arguments that are material and relevant or "provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument." SAA at 892, *reprinted in* 1994 U.S.C.C.A.N. at 4215–4216; *see also id.* ("Existing law does not require that an

[16] Moreover, evidence from the domestic industry showed that [[ ]]. *Views* at 25 (citing Pet'rs' Post-Hr'g Br. at 23 & Ex. 11, CJA Tab 23, CR 344, PJA Tab 23, PR 181, ECF No. 47).

[17] Plaintiff acknowledges that "[i]n responding to a question from the Commission regarding the possible applicability of the [CAFC's] decision in *Bratsk Aluminium Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006), to this investigation, IIL . . . stated that CWP from *most import* sources is physically interchangeable with domestic CWP"; however, it "then expressly confirmed that CWP from Pakistan was an exception to this general statement" because "CWP from Pakistan 'is not generally substitutable with domestic standard pipe [due to] the lack of ASTM certification.'" Pl.'s Br. at 33 (citing IIL's Post-Hr'g Br. at 54 & n.161). The court finds that when the *Views* are read in their entirety, the Commission was aware that Pakistani CWP generally was not certified to ASTM standards and that such pipe could only be used as fence tubing. The record contains substantial evidence supporting the Commission's findings of a reasonable overlap in competition and that finding is sufficiently discernible from the *Views* such that remand is unnecessary.

agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency's determination be discussed so that the 'path of the agency may reasonably be discerned' by a reviewing court) (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987); *Nat'l Ass'n of Mirror Mfrs. v. United States,* 12 CIT 771, 780, 696 F. Supp. 642, 649 (1988)).

The Commission explicitly considered Plaintiff's arguments that CWP imports from Pakistan are not substitutable with other CWP because they are used only as fence tubing, are not certified to ASTM A53 standards and are not certified lead free under the Safe Drinking Water Act. *Views* at 21 & nn.62–63 (citing Confidential IIL's Pre-Hr'g Br. at 33–35, CJA Tab 21, CR 314, PJA Tab 21, PR 147, ECF Nos. 47, 53–1); *see also id.* at 24–25 (discussing the impact of Pakistani CWP's lack of ASTM and lead-free certifications in its reasoning and conclusions). The Commission also considered Plaintiff's argument that Pakistani fence tubing is not interchangeable with domestic fence tubing because "domestically produced pipe which competes with Pakistan subject imports" is produced to higher standards. *Views* at 22 (citing Confidential IIL's Pre-Hr'g Br. at 36–37). The Commission's reference to the relevant pages of Plaintiff's pre-hearing brief and its substantive analysis of the fungibility issue indicates that the Commission understood and addressed Plaintiff's arguments and evidence. As discussed by the Commission, although subject imports from Pakistan "generally lack ASTM certification and are perceived somewhat differently by purchasers than the domestic like products" the record nonetheless indicates sufficient overlap of customers and uses between the subject imports from Pakistan and the domestic like product, "as well as some perceptions of interchangeability and comparability." *Views* at 26.

CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's motion for judgment on the agency record. Judgment will enter accordingly.

Dated: April 9, 2018
New York, New York

/s/ Mark A. Barnett
JUDGE

Slip Op. 18–40

HAIXING JINGMEI CHEMICAL PRODUCTS SALES CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and ARCH CHEMICALS, INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 17–00084
PUBLIC VERSION

[Remanding to the Department of Commerce to redetermine whether Plaintiff's sale subject to the new shipper review was *bona fide*.]

Dated: April 10, 2018

Gregory S. Menegaz, J. Kevin Horgan, Judith L. Holdsworth, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Chad A. Readler*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Courtney D. Enlow*, Trial Attorney. Of counsel on the brief was *Jessica DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Peggy A. Clarke, Law Offices of Peggy A. Clarke, of Washington, DC, for Defendant-Intervenor.

OPINION AND ORDER

Barnett, Judge:

Plaintiff, Haixing Jingmei Chemical Products Sales Co., Ltd. ("Plaintiff" or "Jingmei") challenges the Department of Commerce's ("Commerce" or "the agency") final decision to rescind the new shipper review of the countervailing duty order on calcium hypochlorite from the People's Republic of China ("PRC"). *See Calcium Hypochlorite from the People's Republic of China*, 82 Fed. Reg. 15,494 (Dep't Commerce Mar. 29, 2017) (final decision to rescind the countervailing duty new shipper review of Haixing Jingmei Chemical Products Sales Co., Ltd.) ("*Final Rescission*"), ECF No. 18–2, and accompanying Issues and Decision Mem., C-570–009 (Mar. 23, 2017) ("I&D Mem."), ECF No. 18–3.[1] Plaintiff argues that the agency's decision to rescind Plaintiff's new shipper review due to insufficient information to conduct a *bona fide* analysis of Plaintiff's sale during the period of review ("POR") is unsupported by substantial evidence and not in accordance with law. *See* Confidential Pl. Haixing Jingmei Chemical Products Sales Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R. ("Pl.'s Br.") at 1, 12–29, ECF No. 23; Pl. Haixing Jingmei Chemical Products Sales Co., Ltd. Reply Br. ("Pl.'s Reply") at 6–12, ECF No. 32. Plaintiff further contends that the agency's decision to rescind the new shipper review for the reasons it stated amounts to an adverse inference

[1] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 18–5, and a Confidential Administrative Record ("CR"), ECF No. 18–4. Parties submitted joint appendices containing all record documents cited in their briefs. *See* Public Joint App. ("PJA"), ECF No. 34; Confidential Joint App. ("CJA"), ECF Nos. 33, 33–1. The court references the confidential versions of the relevant record documents, if applicable, unless otherwise specified.

against Jingmei, a cooperating party. Pl.'s Br. at 35–36. Defendant United States ("Defendant" or the "Government") and Defendant-Intervenor Arch Chemicals, Inc. ("Arch Chemicals") support the agency's decision. *See* Confidential Def-Int. Arch Chemicals, Inc. Br. in Resp. to Pl.'s Mot. for J. on the Agency R. ("Def.-Int.'s Resp."), ECF No. 25; Confidential Def.'s Mem. in Opp'n to Pl.'s Mot. for J. Upon the Agency R. ("Def.'s Resp."), ECF No. 28. For the reasons discussed below, the court finds that Commerce's decision is not supported by substantial evidence, and remands this matter for the agency to redetermine, consistent with this opinion, whether Plaintiff's sale subject to the new shipper review was *bona fide*.

I. BACKGROUND

On January 30, 2015, Commerce published a countervailing duty order on calcium hypochlorite from the PRC establishing a countervailing duty rate of 65.85 percent for exporters and producers not individually investigated. *Calcium Hypochlorite from the People's Republic of China*, 80 Fed. Reg. 5,082, 5,083 (Dep't Commerce Jan. 30, 2015) (countervailing duty order) ("*CVD Order*"). On November 20, 2015, Plaintiff, a Chinese exporter of calcium hypochlorite, and the affiliated producer of its subject merchandise, Haixing Eno Chemical Co., Ltd. ("Eno"), filed a request for new shipper review. *See* Entry of Appearance and Request for New Shipper Review (Nov. 20, 2015) ("NSR Request") at 1–2, CJA 4, CR 1, PJA 4, PR 1, ECF No. 33. In response, Commerce initiated a review of the *CVD order* with respect to Jingmei and Eno. *See Calcium Hypochlorite from the People's Republic of China*, 81 Fed. Reg. 11,516 (Dep't Commerce Mar. 4, 2016) (initiation of countervailing duty new shipper review; 2014–2015) ("*Initiation*").

The POR was May 27, 2014, through December 31, 2015. *Id.* at 11,516. Jingmei and Eno had only one reviewable sale to the United States during the POR. Prelim. Mem. on *Bona Fide* Nature of the Sale in the Countervailing Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China (Dec. 27, 2016) ("Prelim. *Bona Fide* Mem.") at 2, CJA 3, CR 35, PJA 3, PR 51, ECF No. 33.[2] Between March 4, 2016 and October 28, 2016, Commerce

[2] Jingmei and Eno had two sales of subject merchandise to the United States during the POR: one sale and entry of merchandise into the United States occurred in December 2014, and another sale was made on May 19, 2015 and merchandise entered the United States on June 13, 2015. NSR Request at 2; Prelim. *Bona Fide* Mem. at 2; *see also* Business Proprietary Information Mem. for Final Rescission of the Countervailing Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China: Haixing Jingmei Chemical Products Sales Co., Ltd. ("Final BPI Mem.") at Note 1, CJA 23, CR 43, PJA 23, PR 62, ECF No. 33–1. Commerce, however, reviewed only the second sale because "the first sale

sent questionnaires to Jingmei, Eno, Company X,[3] and Company Y seeking information relevant to the list of factors Commerce uses to determine whether a sale subject to new shipper review is *bona fide*. *See infra* Part III; Final I&D Mem. at 13 & n.96.[4] On January 3, 2017, Commerce published its preliminary intent to rescind the new shipper review because it "requested but [was] not provided sufficient information to determine whether, and conclude that, Jingmei's sale of subject merchandise to the United States was *bona fide*." *Calcium Hypochlorite from the People's Republic of China*, 82 Fed. Reg. 83 (Dep't Commerce Jan. 3, 2017) (preliminary intent to rescind the new shipper review of Haixing Jingmei Chemical Products Sales Co., Ltd.). Commerce preliminarily found that it was unable to fully analyze whether Jingmei's sale was *bona fide* pursuant to 19 U.S.C § 751(a)(2)(B)(iv) because "parties to the NSR repeatedly refused to provide sufficient information" that Commerce deemed necessary to conduct that analysis. Prelim. *Bona Fide* Mem. at 1. Following case and rebuttal briefs by Jingmei and Arch Chemicals, Commerce issued its final decision to rescind the review for the asserted reason that it had insufficient information to conduct a *bona fide* analysis of the sale under review. *See Final Rescission*, 82 Fed. Reg. at 15,495 ("Based on our analysis of the comments received, we make no changes to the preliminary intent to rescind."); *see also* I&D Mem.

II. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[5] and 28 U.S.C. § 1581(c) (2012). The court will uphold an agency's

made entry into the United States during the 'gap' period from the countervailing duty investigation, in which [Commerce] instructed U.S. Customs [and] Border Protection ("CBP") not to suspend liquidation for CVD purposes." Prelim. *Bona Fide* Mem. at 2; Final BPI Mem. at Note 1. The "gap" period was between September 24, 2014, the date on which Commerce instructed CBP to discontinue suspension of liquidation pursuant to 19 U.S.C. § 1671b(d), and January 26, 2017, "the date prior to the date of publication of the [International Trade Commission's] final determination in the Federal Register." *See CVD Order*, 80 Fed. Reg. at 5,083; *Calcium Hypochlorite from China*, 80 Fed. Reg. 4,312 (ITC Jan. 27, 2015) (final determination).

[3] The sale under review involved Eno and Jingmei as producer and seller, respectively; [[ ]], a [[ ]] based reseller of swimming pool supplies, denoted here for confidentiality purposes as Company X; and [[ ]], the ultimate U.S. customer, denoted here for confidentiality purposes as Company Y. Final BPI Mem. at Note 1. Jingmei sold the subject merchandise produced by Eno to Company X, which then sold it to Company Y. *Id*.

[4] Commerce issued a countervailing duty questionnaire on March 4, 2016, and the fourth (last) supplemental questionnaire on October 28, 2016. *See* Dep't Commerce Countervailing Duty Questionnaire (Mar. 4, 2016), CJA 7, PJA 7, PR 11–13, ECF No. 33; Dep't Commerce Fourth Suppl. Questionnaire (Oct. 28, 2016), CJA 16, CR 31, PJA 16, PR 40, ECF No. 33–1.

[5] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, and all references to the United States Code and the Code of Federal Regulations are to the 2012 edition, unless otherwise stated.

determination that is supported by substantial evidence on the record and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

III. ANALYSIS

Pursuant to 19 U.S.C. § 1675(a)(2)(B)(i), if Commerce receives a request from a new exporter or producer that did not export merchandise subject to a countervailing duty order to the United States during the period of investigation, and it is not affiliated with any exporter or producer that did export, Commerce must conduct a review to establish an individual countervailing duty rate for that exporter or producer. 19 U.S.C. § 1675(a)(2)(B)(i) (2016).[6] In addition, Commerce's regulation requires that the exporter or producer must have "exported, or sold for export, subject merchandise to the United States." 19 C.F.R. § 351.214(b)(1). "The purpose of a new shipper review is to provide an opportunity to an exporter or producer who may be entitled to an individual [countervailing duty] rate, but was not active during the investigation, to be considered for such a rate." *Marvin Furniture (Shanghai) v. United States*, 36CIT ___, ___,867F. Supp. 2d 1302, 1307 (2012). The statute requires Commerce to determine an individual countervailing duty rate for a new exporter or producer "based solely on the *bona fide* [U.S.] sales" of that exporter or producer during the period of review. 19 U.S.C.1675(a)(2)(B)(iv). In determining whether U.S. sales are *bona fide*, Commerce

> shall consider, depending on the circumstances surrounding such sales—
>
> (I) the prices 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).[7]

The regulations provide the circumstances under which Commerce may rescind a review. *See* 19 U.S.C. § 351.214(f). Commerce may rescind a review if it concludes that two conditions have been met: (1)

[6] Citations to 19 U.S.C. § 1675 are to the 2016 U.S. Code edition.

[7] For a discussion on the history of new shipper reviews and Congress' recent codification of Commerce's "totality of the circumstances" test to determine whether a sale transaction is *bona fide* for the purposes of a new shipper review, *see Haixing Jingmei Chem. Prod. Sales Co. v. United States*, 41 CIT ___, ___, 277 F. Supp. 3d 1375, 1381–82 & nn.7–8 (2017).

"there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise" during the period of review, and (2) 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). Although the regulation addressing rescission of a new shipper review does not mention a *bona fide* requirement, "Commerce interprets the term 'sale' in [19 C.F.R.] § 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." *Shijiazhuang Goodman Trading Co. v. United States*, 40 CIT __, __, 172 F. Supp. 3d 1363, 1373 (2016). Thus, it follows that when Commerce determines that the sale subject to new shipper review is not *bona fide*, it may rescind the review.

It is undisputed that Plaintiff met the statutory and regulatory requirements for initiation of the new shipper review. In its notice of initiation, Commerce stated that "[p]ursuant to [19 U.S.C. § 1675](a)(2)(B) . . .[and] 19 CFR 351.214(b)," the NSR Request "meets the threshold requirements for initiation of the [new shipper review] for shipments of calcium hypochlorite from the PRC produced by Eno Chemical and exported by Jingmei Chemical." *Initiation*, 81 Fed. Reg. at 11,516. In its final determination, Commerce did not make any contrary findings with respect to the statutory requirements, 19 U.S.C. § 1675(a)(2)(B)(i), but did not reach a final determination on whether or not Jingmei's single sale during the period of review was *bona fide*.

Commerce specifically found: "notwithstanding the [agency's] repeated requests, the record contains insufficient information for the [agency] to conduct a *bona fides* analysis, and conclude that the sale is *bona fide*." I&D Mem. at 6. Commerce determined that the information provided does not substantiate payment for the sale and sale expenses, and that the information provided was insufficient to determine resale profit. I&D Mem. at 7–10. Commerce identified the ways in which it sought information necessary to conduct the *bona fide* analysis, but the information was not provided in a manner satisfactory to the agency. With respect to payment for the sale, Commerce sent Jingmei, Eno, Company X, and Company Y three supplemental questionnaires requesting information on the payment process and documentation to substantiate proof of payment. *See* I&D Mem. at 7; Final BPI Mem. at Note 2. Ultimately, Commerce determined that the parties' documentation was unreliable and, therefore, the parties failed to link any payment for the sale to the companies' books and records. I&D Mem. at 7–8; Prelim. *Bona Fide* Mem. at

9–10. With respect to payment of sales expenses — Chinese inland freight, port charges, import duties, ocean freight, and U.S. inland freight — the agency sent four supplemental questionnaires to Jingmei, Company X, and Company Y seeking to determine which company incurred which expense related to the sale under review. *See* I&D Mem. at 8; Prelim. *Bona Fide* Mem. at 8–9. The agency determined that the documentation provided by the companies in response to the supplemental questionnaires "failed to tie payment of expenses for the sale under review to the individual company's books and records," and that the companies "provided incomplete answers in response to the [agency's] ongoing requests" to link those expenses to the companies' accounting records. Prelim. *Bona Fide* Mem. at 9; I&D Mem. at 8.

In its analysis of whether the merchandise was resold at a profit, the agency explained that the relevant inquiry is whether the U.S. customer, Company Y, made a profit. I&D Mem. at 10. Commerce explained that Company Y provided only a limited number of invoices accounting for the resale of the subject merchandise, thereby complicating the agency's ability to determine resale of the merchandise based on all of Company Y's sales. *Id.* at 10; Final BPI Mem. at Note 5. When Commerce sent a supplemental request to Company Y for a complete list of its sales of the subject merchandise during the POI, Company Y responded with a list that included both subject and non-subject merchandise and no means to enable the agency determine which sales were of subject merchandise. I&D Mem. at 10; Final BPI at Note 5.

The first issue, therefore, is whether Commerce properly rescinded the new shipper review based upon its asserted inability to complete the *bona fide* analysis because of the failure of Eno, Jingmei and Jingmei's downstream customers to provide sufficient information as requested by the agency. Jingmei argues that Commerce's decision is unsupported by substantial evidence because the agency had enough information to find that its sale was *bona fide*. *See* Pl.'s Br. at 12–29; Pl.'s Reply at 9–12. Jingmei requests a remand with instruction to Commerce similar to the court's recent remand instruction in *Haixing Jingmei,* 277 F. Supp. 3d 1375, for the agency to "properly analyze the *bona fide* nature of Jingemei's sale" and, as necessary, "to apply facts available to the perceived lack of record information pertaining to the accounting records of" Company X and Company Y. Pl.'s Reply at 4.[8] The Government and Arch Chemicals argue that the information

[8] The court considered a similar issue in the antidumping new shipper review of Jingmei in *Haixing Jingmei,* 277 F. Supp. 3d 1375, which involved the same parties and same sale transaction, except that it also included Jingmei's first sale discussed in *supra* note 2.

Plaintiff provided was insufficient to enable Commerce to conduct its *bona fide* analysis, and Plaintiff failed to meet its burden of proof in demonstrating that its sale was *bona fide. See* Def.'s Resp. at 17–36; Def.-Int.'s Resp. at 2, 5–11.

The court finds that substantial evidence does not support the agency's decision to rescind the new shipper review due to lack of sufficient information to conduct the statutory *bona fide* analysis. As the court recently stated,

> Commerce does not possess subpoena power to require the respondent or any other interested party to respond to information requests. *See Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1338 (Fed. Cir. 2016) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). Rather, Congress gave the agency the authority to use facts available to fill any gaps in the record and, when certain conditions are present, to make an adverse inference in the selection of the available facts (referred to as "adverse facts available" or "AFA"). *See* 19 U.S.C. §§ 1677e(a),(b). In other words, Congress has established a statutory scheme in which it ensured that the agency will have enough information to make its determinations, whether provided by an interested party in response to an information request or otherwise selected by the agency.

Haixing Jingmei, 277 F. Supp. 3d at 1383.

As in *Haixing Jingmei,* 277 F. Supp. 3d at 1383, although Commerce here claims it lacked sufficient information to find that the sale is *bona fide*, it did not use facts available, with or without an adverse inference, to fill any asserted gaps in the record. I&D Mem. at 9 ("[N]o adverse inferences have been drawn against Jingmei in rescinding this review."); *id.* at 14 ("[T]he facts otherwise available and use of adverse inference statutory provisions have not been applied in this case."). Pursuant to 19 U.S.C. § 1677e(a), when "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce, "significantly impedes a proceeding," "fails to provide [] information by the deadlines for submission of the information," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a)(2).[9] Additionally, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that

[9] Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *See* 19 U.S.C. § 1677e(a). Section 1677m(d) provides the procedures Commerce must follow when a party files a deficient submission. *See id.*§ 1677m(d).

party in selecting from among the facts otherwise available." *Id.* § 1677e(b). Thus, in light of the statutory authority to provide gap-filling information on any record when and as justified, the court cannot find that the agency's decision to rescind the new shipper review due to insufficient information is supported by substantial evidence.

Additionally, as the court explained recently:

> By avoiding the use of facts available and, instead, rescinding the review based on an asserted lack of information, the agency potentially evades the[] statutory constraints while creating the effect of applying an adverse inference.[10] By remanding this determination to the agency to determine whether the sales in question were *bona fide*, the court will be in a better position to evaluate whether that redetermination is supported by substantial evidence and otherwise in accordance with law.

Haixing Jingmei, 277 F. Supp. 3d at 1383. Accordingly, for the foregoing reasons, the court will remand this matter to the agency for redetermination. Jingmei's remaining arguments are deferred pending the agency redetermination. To the extent that Jinmei continues to challenge the redetermination, it should be clear in its briefing which issues it continues to challenge.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Rescission* is remanded to Commerce so that it may determine whether Plaintiff's sale during the period of review was *bona fide* as discussed in Section III; it is further

ORDERED that Commerce shall file its remand redetermination on or before July 9, 2018; and it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h) and the court's Standard Chambers Procedures.

Dated: April 10, 2018
New York, New York

/s/ *Mark A. Barnett*
JUDGE

[10] *See, e.g., supra* note 9; 19 U.S.C. 1677e(c) (corroboration of secondary information).

Slip Op. 18–41

SEVERSTAL EXPORT GMBH, and SEVERSTAL EXPORT MIAMI CORPORATION, Plaintiffs, v. UNITED STATES, UNITED STATES CUSTOMS and BORDER PROTECTION, COMMISSIONER KEVIN K. MCALEENAN, UNITED STATES DEPARTMENT of COMMERCE, SECRETARY WILBUR L. ROSS, and PRESIDENT DONALD J. TRUMP, Defendants.

Before: Jane A. Restani, Judge
Court No. 18–00057

[Motions to intervene denied]

Dated: April 13, 2018

Mark Lunn, David Wilson, and *Sarah Hall*, Thompson Hine LLP, of Washington, DC, for Plaintiffs Severstal Export GmbH and Severstal Export Miami Corp.

Tara Hogan, Joshua Kurland, and *Stephen Tosini*, Commerical Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendants.

Roger Schagrin, Schagrin Associates, of Washington, DC, for proposed Defendant-Intervenor Steel Dynamics, Inc.

Alan Price, Christopher Weld, Joshua Turner, and *Maureen Thorson*, Wiley Rein LLP, of Washington, DC, for proposed Defendant-Intervenor Nucor Corporation.

OPINION AND ORDER

Restani, Judge:

Nucor Corporation ("Nucor") and Steel Dynamics, Inc. ("SDI") filed separate motions to intervene. *See* Nucor's Amended Mot. to Intervene, ECF No. 25 ("Nucor Amend. Mot."); SDI's Amended Mot. to Intervene, ECF No. 33 ("SDI Amend. Mot.").[1] The court has jurisdiction over these motions pursuant to 28 U.S.C. § 1581(i), under which this action was initiated. The original versions of both motions did not include a separate pleading setting out the claims or defenses for which intervention was sought. Nucor's Mot. to Intervene, ECF No. 20; SDI's Mot. to Intervene, ECF No. 23. *See* U.S. Ct. Int. Trade Rule 24(c)(1). These were subsequently amended to include answers to plaintiffs' complaint. Answer of Proposed Defendant-Intervenor Nucor Corporation, ECF No. 26 ("Nucor Answer"); Answer of Applicant Defendant-Intervenor Steel Dynamics, Inc., ECF No. 34 ("SDI Answer"). Both Nucor and SDI's motions, including the amended versions, were filed within 30 days of the March 22, 2018, complaint. Complaint of Severstal Export GmbH and Severstal Export Miami Corp., ECF No. 5. Both motions are opposed by both plaintiffs and defendants. Nucor Amend. Mot. at 4; SDI Amend. Mot. at 4.

Nucor is the United States' largest domestic steel producer, with roughly 24,000 employees, Nucor Amend. Mot. at 2, and SDI is like-

[1] The court previously denied these motions in regard to the preliminary injunction proceedings, via an oral order on March 29, 2018. *See* Order, ECF No. 37. This opinion concerns the disposition of these motions with regard to the remainder of this case.

wise a large domestic steel producer, with roughly 7,400 employees, SDI Amend. Mot. at 2. Both seek to intervene of right under U.S. Ct. Int. Trade Rule 24(a)(2).[2] Nucor Amend. Mot. at 2–3; SDI Amend. Mot. at 1. Nucor, in the alternative, also seeks permissive intervention under U.S. Ct. Int. Trade Rule 24(b)(1)(B).[3] *See* Nucor Amend. Mot. at 3. *See also* 28 U.S.C. § 2631(j).

Both movants claim a similar interest in this case: that the tariff promulgated by Presidential Proclamations Nos. 9705 and 9711 be upheld, so that movants can enjoy the anticipated economic benefits. Nucor Amend. Mot. at 2–3; SDI Amend. Mot. at 2–3. *See* Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018); Proclamation No. 9711, 83 Fed. Reg. 13,361 (Mar. 22, 2018) (collectively, the "Steel Tariff"). The only additional information which movants claim to be able to provide in support of this interest concerns the proprietary details of movants' steelmaking operations. SDI Amend. Mot. at 3. Given the narrow range of review in this matter, the court does not find that additional information about movants' steelmaking operations would materially aid in the resolution of questions of fact and law which are relevant to the disposition of this case.

Movants also refer to testimony, which they provided when Commerce was preparing its report under 19 U.S.C. § 1862, and which suggests that the steel industry is threatened and that its health is a matter of national security. *See* Nucor Amend. Mot. at 2; SDI Amend. Mot. at 2–3. This testimony, however, forms part of Commerce's report, which is already before the court. *See* OFFICE OF TECH. EVALUATION, U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED, at App'x F, p. 12–15, 142–43 (Jan. 11, 2018). As described below, furthermore, movants' legal arguments are indistinct from arguments already advanced by the government. The court thus concludes that existing defendants, particularly the U.S. Department of Commerce ("Commerce"), as author of the study and report which concluded that the U.S. steel

[2] (a) *Intervention of Right*. On timely motion, the court must permit anyone to intervene who

. . .

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

U.S. Ct. Int. Trade Rule 24(a)(2).

[3] "(b) *Permissive Intervention*.

(1) In General. On timely motion, the court may permit anyone to intervene who:

. . .

(B) has a claim or defense that shares with the main action a common question of law or fact.

U.S. Ct. Int. Trade Rule 24(b)(1)(B).

industry is threatened and which underpins the challenged Steel Tariff, will adequately represent movants' interest in the economic benefits they expect to enjoy should the Steel Tariff remain in force.[4]

For similar reasons, and particularly taking into account that movants admit that both plaintiffs and defendants oppose these motions, the court concludes permissive intervention under Rule 24(b)(1)(B) is not warranted.[5] Considering the broad interests relied upon by Nucor, virtually any domestic steel producer could seek permissive intervention on similar grounds, which would unduly delay proceedings. *See Vivitar Corp. v. United States*, 585 F. Supp. 1415, 1419, 7 C.I.T. 165, 169 (1984) ("Because of the potential for a vast number of applications for intervention by persons in the position of [movant], permitting intervention does not appear to be in the interest of judicial economy."). Nucor has furthermore not indicated it will make any arguments distinct from those of the government.[6]

Nucor indicates that it intends to argue "that Plaintiffs' claims are unreviewable, that the challenged action — i.e., the President's Proclamation imposing a tariff on Plaintiffs' imports — is lawful, and that Defendants' implementation and enforcement of that tariff against Plaintiffs is also lawful." Nucor Amend. Mot. at 4. The government, however, has already advanced such arguments before the court. *See Severstal Export, GmbH v. United States*, Slip Op. 18–37, 2018 WL 1705298, at *7–*10 (Ct. Int'l Trade Apr. 5, 2018); Defendants' Motion to Dismiss and, in the Alternative, Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 30, at 14–43. Likewise, the admissions and denials contained in Nucor's Answer do not suggest an approach different from that of defendants. *See generally* Nucor Answer. As the court observed in *Neo Solar Power Corp.*, "[a]lthough this defense and that of the government are the same, this defense belongs, in essence, to the government, not [the movant]." *Neo Solar Power Corp. v. United States*, Slip Op. 16–60, 2016 WL 3390237, at *2 (Ct. Int'l Trade June 17, 2016).

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[4] To the extent movants claim an interest in preserving U.S. national security or the country's general economic welfare, *see* Nucor Amend. Mot. at 2–3; SDI Amend. Mot. at 2–3, the court finds it even less likely that defendants, whose duty it is to safeguard the same, would not adequately represent these interests. Movants have provided no reason for the court to conclude otherwise.

[5] To the extent SDI likewise sought permissive intervention, the following reasoning applies equally to any such application by SDI. Like Nucor, neither SDI's Amended Motion nor its Answer advanced arguments materially different from those already brought by defendants. *See* SDI Amend. Mot. at 1–4; SDI Answer at 8 ("This Court lacks jurisdiction over Plaintiffs' claims. Plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs lack standing. Plaintiffs' claims are not ripe. Plaintiffs' action is barred in whole or in part by the failure to exhaust administrative remedies.").

[6] As Nucor never filed a brief in support of its Motion to Intervene, the court looks to its Amended Motion and its Answer.

Accordingly, whereas additional parties necessarily add time, effort, and expense to proceedings, *see Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943), Nucor's participation will merely be duplicative. *See* 28 U.S.C. § 2631(j)(2) (requiring the court to consider whether intervention would "unduly delay or prejudice the adjudication of the rights of the original parties").

For the reasons stated above, therefore, it is hereby

ORDERED that the Mot. to Amend SDI's Mot. to Intervene, ECF No. 33, is **GRANTED**.

ORDERED that SDI's Amended Mot. to Intervene, ECF No. 33, is **DENIED**.

ORDERED that Nucor's Amended Mot. to Intervene, ECF No. 25, is **DENIED**.

Dated: April 13, 2018
New York, New York

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

Slip Op. 18–42

UNITED STATES, Plaintiff, v. GREAT NECK SAW MANUFACTURERS, INC., Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00049

[Defendant's motion to dismiss denied.]

Dated: April 16, 2018

Albert S. Iarossi, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Carl R. Soller, Soller Law Intl, LLC, of So. Elmont, NY for Defendant Great Neck Saw Manufacturers, Inc.

OPINION AND ORDER

Gordon, Judge:

Before the court is the motion of Defendant Great Neck Saw Manufacturers, Inc. ("GNSM") to dismiss the complaint of Plaintiff United States ("the Government"), pursuant to USCIT Rule 12(b)(6) for failure to state a claim. *See* Def.'s Mot. to Dismiss Pursuant to CIT Rule 12(b)(6), ECF No. 18 ("Def.'s Mot."); *see also* Pl.'s Resp. to Def.'s Mot. to Dismiss, ECF No. 22 ("Pl.'s Resp"). For the reasons set forth below, the court denies GNSM's motion.

I. Background

GNSM is an importer and manufacturer of hand tools including screwdrivers, saws, levels, layout tools, knives, and flashlights ("subject merchandise"). Compl. ¶ 4, ECF No. 2. The Government brought this action against GNSM pursuant to 19 U.S.C. § 1592 and 28 U.S.C. § 1582 for civil penalties in the amount of $1,111,351.24 based on GNSM's negligence or gross negligence in the importation of the subject merchandise and unpaid customs duties in the amount of $307,767.49. *See id.* ¶ 1. The Government alleges that U.S. Customs and Border Protection ("Customs") conducted two audits of GNSM for entries during the period June 20, 2005 through December 31, 2009 ("audit period"), and that Customs concluded that GNSM improperly deducted a payment of a five percent buyer's commission from the commercial invoice unit cost. *Id.* ¶¶ 5, 8. The complaint further alleges that GNSM treated the commission as a non-dutiable charge, resulting in an inaccurate entered value for the subject merchandise. *Id*. ¶10. The Government also claims that while the commission was listed at the bottom of a commercial invoice as a deduction, along with non-dutiable costs of ocean freight and insurance, it was paid directly to GNSM's foreign sellers via wire transfer. *Id*. ¶ 11.

The complaint states that Customs determined that the payments were not bona fide buying commissions despite GNSM's argument that it maintained bona fide buying relationships with the intermediaries identified in its buying agreements. *Id*. ¶¶ 13, 15. The Government alleges that GNSM's three buying agreements show that the agents' names and addresses were identical to those of the foreign sellers that appeared on the commercial invoices, thereby calling into question the existence of a bona fide buying agency relationship. *Id*. ¶ 12. Lastly, the complaint alleges that GNSM continued its deduction of these commissions despite being explicitly notified by Customs, as early as June 28, 2007, that the commissions were non-deductible. *Id*. ¶¶ 22, 23 ("June 2007 Notice"). This behavior, the Government claims, constitutes more than mere negligence. *Id*. ¶ 24. The complaint characterizes the improper deduction of these buying commissions as the material false statements resulting from Defendant's negligence or gross negligence in violation of § 1592(a). *Id*. ¶ 36. GNSM timely filed an answer to the complaint followed by a motion to dismiss pursuant to USCIT Rule 12(b)(6). *See* Answer, ECF No. 12; Def.'s Mot.

II. Standard of Review

In deciding a USCIT Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in

the plaintiff's favor. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993).

A plaintiff's factual allegations must be "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

III. Discussion

A. Timeliness/Judgment on the Pleadings under Rule 12

USCIT Rule 12 requires a defendant to either file an answer to a complaint or move to present certain defenses within the time allowed for a response. *See* USCIT R. 12(a), (b). Rule 12 specifically provides that a motion asserting that a complaint fails to state a claim upon which relief may be granted "must be made before pleading if a responsive pleading is allowed." USCIT R. 12(b). Rather than filing a USCIT Rule 12(b)(6) motion to dismiss, GNSM chose to file its answer. The Government argues that having filed an answer, GNSM was time barred from filing a motion to dismiss for failure to state a claim. *See* Pl.'s Resp. at 3.

The Government is technically correct; however, Rule 12 also provides that a party may move for judgment on the pleadings after the pleadings are closed, but early enough not to delay trial. *See* USCIT R. 12(c). When a court is confronted with a situation in which a party has filed a motion to dismiss after filing an answer, rather than denying the motion to dismiss as untimely, the court will treat the motion as one for judgment on the pleadings under Rule 12(c). *See* 2–12 Milton I. Shadur, *Moore's Federal Practice - Civil*, § 12.38 (3d ed. 2018) (". . . a motion to dismiss filed after the pleadings close will be treated as a motion for judgment on the pleadings."); *see also Whitehurst v. Wal-Mart Stores East, L.P.*, 329 F. App'x. 206, 208 (11th Cir. 2008) ("[T]he court may construe the Rule 12(b)(6) motion as one seeking judgment on the pleadings under Rule 12(c)."). Accordingly, the court will construe Defendant's motion to dismiss as a Rule 12(c) motion for judgment on the pleadings.

A motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss for failure to state a claim. *See Forest Labs., Inc. v. United States*, 29 CIT 1401, 1402–03, 403 F. Supp. 2d

1348, 1349 (2005), *aff'd*, 476 F.3d 877 (Fed. Cir. 2007). In deciding a Rule 12(c) motion for judgment on the pleadings, the court must accept all well-pleaded facts as true and view them in the light most favorable to the nonmoving party. *See United States v. Ford Motor Co.*, 497 F.3d 1331, 1336 (Fed. Cir. 2007); 5C Wright & Miller, *Federal Practice and Procedure* § 1368 (3rd ed. 2017).

To survive a motion under Rule 12(c), a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *See Iqbal*, 556 U.S. at 677–78 (citation omitted). This requires that the complaint plead facts which allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.*

Additionally, the court must determine whether Defendant's motion (whether a Rule 12(b)(6) or Rule 12(c) motion) was filed in contravention of the deadlines for further proceedings in this action. *See* Scheduling Order, ECF No. 15. Furthermore, if the court considers Defendant's motion under Rule 12(c), the court must also determine whether Defendant's motion would improperly delay consideration of the merits. *See* USCIT R. 12(c). Here GNSM filed its answer on July 26, 2017. One month later, the court issued a scheduling order governing further proceedings, including the filing of motions regarding the pleadings, discovery, and disposition on the merits by summary judgment or trial. *See* Scheduling Order. The deadline for motions regarding the pleadings was October 27, 2017, which was extended to November 6, 2017 pursuant to an order on an unopposed motion. *See* Consent Mot. for Extension of Time, ECF No. 16; Order, ECF No. 17. That motion and order did not change the May 2018 date for the closure of discovery nor the August 2018 due dates for dispositive motions or a request for trial. Defendant then filed its motion to dismiss on November 5, 2017. Based on these circumstances, the court concludes that Defendant's motion to dismiss was interposed prior to the deadline provided in the Scheduling Order and early enough in the life of this action so as not to delay the final disposition on the merits. Accordingly, the court will not deny GNSM's Rule 12(b)(6) motion as untimely and will instead consider the motion under Rule 12(c).

B. Negligence or Gross Negligence Claim

Defendant challenges the Government's claim for civil penalties (Count II) as inadequately pled in that the complaint fails to allege negligence or gross negligence on the part of GNSM. *See* Def.'s Mot. at 8–11. Under Section 1592, no person, by gross negligence or negligence, may enter merchandise into United States by means of a

document, written or oral statement, or act that is material and false, or any omission that is material. *See* 19 U.S.C. § 1592(a)(1)(A)(i) & (ii).

A claim of negligence "arises out of 'an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences therefrom. . . ." *United States v. Ford Motor Co*., 29 CIT 827, 845, 395 F. Supp. 2d 1190, 1207–08 (2005) (quoting 19 C.F.R., Part 171, App. B(B)(1)), *aff'd in part and remanded*, 463 F.3d 1267 (Fed. Cir. 2006). Therefore, the Government must allege that GNSM "entered or introduced, or attempted to enter or introduce, merchandise into United States commerce by means of either (i) a material and false statement, document or act, or (ii) a material omission." *See United States v. Maverick Mktg., LLC*, 42 CIT ___, ___, 2018 WL 1187449, at *2 (2018). "Nothing more is required." *United States v. Int'l Trading Servs*., 40 CIT ___, ___, 190 F. Supp. 3d 1263, 1273 (2016).

Defendant contends that the complaint fails to set forth facts that indicate that GNSM made any false statement. Def.'s Mot. at 9. Defendant argues that the complaint only states that Customs' auditors concluded that GNSM had improperly deducted a five percent buying commission from the unit cost, and that GNSM's agency relationships lacked support for the existence of a bona fide buying agreement. *Id*.

As for gross negligence, a claim "arises 'if it results from an act or acts (of commission or omission) done with actual knowledge or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute.'" *Ford Motor Co*., 29 CIT at 845 (quoting 19 C.F.R. Part 171, App. B(C)(2)). To find gross negligence, the court must determine that a defendant's violation of the statute "was willful, wanton or reckless or that the evidence before the Court illustrates [an] utter lack of care." *Id*. (citing *Mach. Corp. of Am. v. Gullfiber AB*, 774 F.2d 467, 473 (Fed. Cir. 1985)).

In defense of the claim for gross negligence, GNSM contends that it actively participated in Customs' Port Account Management Program, which included the regular presentation of its buying agency agreements to Customs. *See* Def.'s Mot. at 10. Defendant further argues that Customs never requested additional documentation from GNSM about the non-dutiability of the buying commissions and liquidated the duties on the subject merchandise as entered. *Id*. Consequently, Defendant contends that the complaint fails to allege any facts that demonstrate gross negligence, i.e., an utter lack of care on its part either before or after Customs' June 2007 Notice.

Taking all of the factual allegations in the complaint as true, the court agrees that the Government, as the non-movant, has sufficiently pled a cause of action for a civil penalty under § 1592, based on GNSM's negligence and/or gross negligence in connection with the entry of the subject merchandise.

The complaint alleges that GNSM "had incorrectly deducted a five percent commission payment from the commercial invoice unit cost, and had treated the [buying] commission payment as a non-dutiable charge for some entries. This resulted in an inaccurate entered value for the subject merchandise." Compl. ¶ 10. The complaint further alleges that GNSM's purported "buying agents" were, in fact, the foreign sellers themselves, who were listed on the commercial invoices. *Id*. ¶ 12. The Government also claims that "the commission payments were not bona fide buying commissions" and the deduction of these improper buying commissions resulted in an actual loss of revenue of more than $300,000. *Id*. ¶¶ 13, 33. The Government alleges that those payments are nothing more than additional monies given to the seller of the subject merchandise, and GNSM was not permitted to deduct the payments as non-dutiable commissions on the relevant entry documents. Therefore, the Government claims that labeling the payments made to the seller of the subject merchandise as a commission constitutes the material false statements, acts, or omissions at issue that are the result of GNSM's negligence prior to the June 2007 Notice and gross negligence thereafter. *Id*. ¶ 36.

The complaint also pleads that Defendant's violations were grossly negligent because Customs expressly notified GNSM that its buying commissions would not be allowed as non-dutiable commissions because the purported agency agreements were not valid. Compl. ¶ 23 (citing June 2007 Notice). The complaint also states how Customs provided additional information as to why those agreements were not valid. Despite this explicit warning, the complaint alleges that GNSM ignored Customs and continued to list those improper deductions on its entry forms. *Id*.[1]

At the motion to dismiss stage, all the complaint must do is allege a false statement, act, or omission. This is what Plaintiff has done.

[1] As part of its defense to the Government's gross negligence claim, GNSM attempts to introduce evidence regarding Customs' Port Account Management Program ("Program"). *See* Def.'s Mot. 10–11. The court will not entertain this information as any information about the Program is outside the four corners of the complaint, and therefore is not appropriate for consideration of a motion to dismiss or a motion for judgment on the pleadings. *See* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1366, 1371 (3d ed. 2017); *see also* USCIT R. 12(d) (providing that if the court, in its discretion, considers information outside of the pleadings in a motion to dismiss or motion for judgment on the pleadings, the motion shall be converted to "one for summary judgment under Rule 56.").

Here the complaint states that GNSM improperly deducted, from the entered value of the subject merchandise, certain buying commissions that were based on non-bona fide agency relationships and determined as not allowable by Customs. The complaint characterizes the improper deduction of these buying commissions as the material false statements resulting from Defendant's negligence or gross negligence in violation of § 1592(a). Accordingly, the court denies GNSM's motion to dismiss, and holds that the Count II of the Government's complaint plausibly alleges a claim for a civil penalty for a violation of § 1592(a) and (b) based on GNSM's negligence and/or gross negligence.

B. "Lawful" Duties

"Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co*., 896 F.2d 1542, 1550 (9th Cir.1990). Because there are no genuine issues of material fact in dispute as to whether the unpaid duties in question are lawful, the court will decide the merits of this issue. *See Forest Labs., Inc. v. United States*, 476 F.3d 877 (Fed. Cir. 2007).

GNSM argues that the Government failed to state a claim for unpaid duties because those duties are not "lawful." *See* Def.'s Mot. at 5. Defendant contends that Customs did not demand payment of additional duties at the time of liquidation and liquidated the entries as entered. *Id*. at 5. As a consequence, GNSM maintains that the liquidation is "final and conclusive upon all persons (including the United States and any officer thereof)." *Id*. Relying on *United States v. Ford Motor Co*., 497 F.3d 1331, 1338 (Fed. Cir. 2007) ("*Ford Motor*"), Defendant argues that once its entries are liquidated, the Government is precluded from recovering any additional duties. Def.'s Mot. at 6–7. Similarly, GNSM maintains that where an entry was liquidated by operation of law pursuant to 19 C.F.R. § 159.11, and the time for filing a protest or voluntarily reliquidating the entry has run, Customs cannot recover additional duties under 19 U.S.C. § 1592(d) or interest or penalties under § 1592(c). Id. at 7 (citing *United States v. Nat'l Semiconductor Corp*., 496 F.3d 1354, 1359–61 (Fed. Cir. 2007) ("*Nat'l Semiconductor*")). Lastly, GNSM contends that if the Government was not deprived of lawful duties, there can be no recovery of a civil penalty based on negligence or gross negligence. *Id*. at 5.

GNSM's reliance on *Ford Motor* is misplaced. In *Ford Motor* the Government was not deprived of lawful duties resulting from a violation of § 1592(a). Rather, the duties were lost as a result of Customs'

unjustified extension of the statutory liquidation deadline,[2] which resulted in Ford's entries being liquidated by operation of law under 19 U.S.C. § 1504. *Ford Motor*, 497 F.3d at 1339. The Federal Circuit explained that if the Government is deprived of duties "as a result of a violation of subsection (a)," then recovery of those duties is permissible. *Id*. at 1338–39. The Federal Circuit did not hold, as Defendant argues, that once an entry is liquidated, additional duties on those entries may never be lawful. It also noted that § 1592(d) "limits the recovery of lawful duties to those duties that it was deprived of 'as a result of' a violation of § 1592(a)." *Id*. at 1338. Lastly, the Federal Circuit recognized that § 1592(c) permits the Government to recover civil penalties regardless of whether the Government is deprived of duties. *Id*.

In *Ford Motor*, Customs was aware of the correct duty, but unjustifiably extended the liquidation deadline. Because the Federal Circuit held that those extensions were not justified, the entries were liquidated at the amounts asserted at entry, and the additional duties that Customs sought were unlawful. The court observed that the deprivation of lost duties was attributed to Customs' "own delay in pursuing its fraud investigation" (which caused the entries to be liquidated pursuant to statute), not any violation of § 1592(a). *Id*. at 1339.

Here the Government alleged that it was deprived of duties because GNSM improperly deducted a buyer's commission on the entry forms for the subject merchandise. The complaint further alleges that Customs relied on those improper deductions, with the entries liquidated at the incorrect rate as a result of GNSM's negligence and/or gross negligence. There is no claim in the complaint that Customs, unlike in *Ford Motor*, was aware of the incorrect duties that Defendant supplied, but liquidated those entries nonetheless, or that the entries were liquidated pursuant to § 1504 as a result of Customs' unjustified delay in conducting an investigation.

As for *National Semiconductor*, that case did not involve the recovery of duties pursuant to § 1592(d) that were lost as a result of violations of § 1592(a). The Federal Circuit was not focused on the

[2] In the underlying administrative proceeding, Customs had initiated a civil fraud investigation, in which it issued three one-year extensions of the statutory one-year liquidation deadline for Ford's entries, based on the existence of the fraud investigation. *Ford Motor, 497 F.3d at 1334*. Customs eventually liquidated the entries at the correct, higher rate, and Ford paid the $5.3 million in additional duties. Ford then protested the liquidation, claiming that the extensions Customs issued were unreasonable. Id. In a prior decision involving the administrative proceeding, the Federal Circuit concluded that Customs' liquidation-deadline extensions were unjustified, and thus Ford's entries had been liquidated by operation of law pursuant to 19 U.S.C. § 1504(a) at the duty rate as entered. *Ford Motor Co. v. United States*, 286 F.3d 1335, 1343 (Fed. Cir. 2002). Customs was then required to return the $5.3 million in duties to Ford.

"lawfulness" of duties in excess of those listed on liquidated entry forms. Rather, the court resolved the question of whether it is proper for Customs to recover non-penal compensatory interest in an action to collect an interest penalty pursuant to § 1592(c), i.e., circumstances unrelated to this action.

GNSM's argument also fails because it cannot be reconciled with the applicable statute. Section 1592(d) requires collection of any duty unpaid as a result of a violation of § 1592(a), "notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed." *See* 19 U.S.C. § 1592(d). Despite GNSM's argument to the contrary, the plain language of § 1592(d) requires that the Government recover those duties lost as a result of a violation of § 1592(a). *United States v. Blum*, 858 F.2d 1566, 1569 (Fed. Cir. 1988). Customs must seek to restore all lost duties which would have been collected but for the alleged violator's entry of merchandise. *See* 19 U.S.C. § 1592(a), (d); *see also United States v. Menard, Inc*., 16 CIT 410, 416, 795 F. Supp. 1182, 1187 (1992) ("[T]he purpose of § 1592(d) is to make the government whole for revenue lost as a result of submission of false statements to Customs.").

Lastly, neither liquidation nor the general concept of "finality" bar the recovery of duties or a civil penalty under §1592. *See Blum*, 858 F.2d at 1569; *see also United States v. Inn Foods, Inc*., 560 F.3d 1338, 1348 (Fed. Cir. 2009) ("subsection (d) allows the United States to recover lawful duties lost as a result of a violation of subsection (a). Lawful duties are those that would have been collected by the United States but for the violation of subsection (a)."). The court rejects GNSM's argument that the duties are not eligible for recovery. Accordingly, the duties that are unpaid by Defendant are lawful duties and collectable under § 1592(d) predicated on a finding by the court that GNSM violated § 1592(a).

IV. Conclusion

Based on the foregoing reasons, it is hereby

ORDERED that GNSM's motion to dismiss Plaintiff's complaint is denied; and it is further

ORDERED that the parties shall file a proposed scheduling order governing further proceedings in this action on or before April 30, 2018.

Dated: April 16, 2018
New York, New York

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

Slip Op. 18–43

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

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

[Commerce's final results in countervailing duty investigation of OTR tires from Sri Lanka remanded.]

Dated: April 17, 2018

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

Kevin O'Brien and *Christine Streatfeild*, Baker & McKenzie, LLP, of Washington, DC, for Consolidated Plaintiffs 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, argued for defendant. Of counsel on the brief was *Khalil Gharbieh*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Restani, Judge:

In this action challenging a final determination and countervailing duty order issued by the United States Department of Commerce ("Commerce") regarding off-the-road ("OTR") rubber tires from Sri Lanka, the Government of Sri Lanka ("GSL"), Camso Inc., Camso Loadstar (Private) Ltd., and Camso USA Inc. (collectively "Camso") (all the foregoing, collectively "plaintiffs"), request that the court hold Commerce's countervailing duty determination to be unsupported by substantial record evidence or otherwise not in accordance with the law, and remand this matter accordingly.

BACKGROUND

Following a petition alleging twenty-two countervailable Sri Lankan programs, Commerce initiated a countervailing duty investigation into sixteen programs related to certain new pneumatic OTR tires from Sri Lanka, India, and the People's Republic of China. *Certain New Pneumatic Off-the-Road Tires From India, the People's Republic of China, and Sri Lanka: Initiation of Countervailing Duty Investigations*, 81 Fed. Reg. 7,067 (Dep't Commerce Feb. 10, 2016). Commerce selected Camso, the largest OTR manufacturer in Sri Lanka, as the sole mandatory respondent in the Sri Lankan investigation. *Respondent Selection for 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 (Dep't Commerce Feb. 25, 2016). In its preliminary determination, Commerce identified a

subsidy margin for the following two programs: Tax Concessions for Exporters of Non-Traditional Products ("TCENTP") and the National Building Tax ("NBT"). *Certain New Pneumatic Off-the-Road Tires From Sri Lanka: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Determination With Final Antidumping Determination*, 81 Fed. Reg. 39,990 (Dep't Commerce June 20, 2016) ("Prelim. Det."); *Decision Memorandum for the Affirmative Preliminary 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 10–11 (Dep't Commerce June 13, 2016) ("*Prelim. Det. I&D Memo*").

Shortly before Commerce issued its preliminary determination, petitioners submitted subsidy allegations with respect to three additional Sri Lankan programs. *See generally Certain Off-the-Road Tires from Sri Lanka – Petitioners' New Subsidy Allegations*, C-542–801, POI: 01/01/2015–12/31/2015 (May 4, 2016). In the course of responding to these new allegations, GSL mentioned yet another program of interest to Commerce, the Guaranteed Price Scheme for Rubber ("GPS"). *GOSL's CVD New Subsidy Allegations Supplemental Questionnaire Response: Certain Off-the-Road Tires From Sri Lanka*, C-542–801, POI: 01/01/2015–12/31/2015, Attach. 1 (Aug. 1, 2016) ("GSL NSA Supp. Q. Response"). Commerce assessed these four programs in a post-preliminary determination, finding that, of these, only GPS provided a countervailable subsidy. *Post-Preliminary Analysis of Countervailing Duty Investigation: Certain New Pneumatic Off-The-Road Tires from Sri Lanka*, C-542–801, POI: 01/01/2015—12/31/2015 (Dep't Commerce Aug. 18, 2016) ("*Post-Prelim. Memo*").

In its final determination, Commerce assigned a countervailing duty of 2.18 percent ad valorem to Camso. *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, 2950 (Dep't Commerce Jan. 10, 2017) ("Final Det."). *See also 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 (Dep't Commerce Mar. 6, 2017) ("Antidumping Order"). Of this, TCENTP accounted for 0.82 percent, and GPS for 0.95 percent. *Corrected Program Rates in the Issues and Decision Memorandum Regarding the Countervailing Duty 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) ("*Corrected Program Rates*"). Finally, 0.41 percent was associated with Exemptions and Concessions for Fiscal Levies on Capital and Intermediate Goods, a program which Commerce had preliminarily determined did not benefit Camso. *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 8 (Dep't Commerce Jan. 3, 2017) ("*Final Det. I&D Memo*"). Commerce furthermore found that the NBT provided no benefit and was therefore not countervailable. *Id.* at 9. GSL now challenges Commerce's determinations with regard to the TCENTP program and GPS. Camso challenges Commerce's determinations only with regard to GPS.

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).

DISCUSSION

I. Relevance of the Agreement on Subsidies and Countervailing Measures

GSL argues that its programs are covered by an exception to the prohibition on export subsidies found in the World Trade Organization ("WTO") Agreement on Subsidies and Countervailing Measures. Corrected Rule 56.2 Brief of the Government of Sri Lanka, ECF No. 64–1, at 16 ("Pl. Br.") (citing *Agreement Establishing the World Trade Organization*, Apr. 15, 1994, 1869 U.N.T.S. 14, Annex 1A, Agreement on Subsidies and Countervailing Measures ("SCM Agreement").). This exception applies to certain least-developed countries ("LDCs") indicated by Annex VII to the SCM Agreement. *Id.* at Art. 27. GSL's argument is unpersuasive.

The countervailing duty statute defines LDCs using Annex VII. 19 U.S.C. § 1677(36)(B)(i)–(ii) (expressly referring to SCM Agreement, Annex VII). Instead of permitting export subsidies by LDCs, however, the countervailing duty statute raises LDCs' de minimis threshold, below which Commerce shall not impose duties to countervail any subsidies, to three percent. 19 U.S.C. § 1671b(b)(4)(C)(i). It is well settled that, to the degree United States domestic law is inconsistent with the United States' international treaty obligations in the area of trade, the court shall apply domestic law and the remedy "is strictly a matter for Congress." *See, e.g., Corus Staal BV v. Dep't of Commerce*,

395 F.3d 1343, 1348 (Fed. Cir. 2005); 19 U.S.C. § 2504(a) (2000).[1] The provision raising LDCs' de minimis threshold states it "shall not apply . . . 8 years after the date the WTO Agreement enters into force." 19 U.S.C. § 1671b(b)(4)(D)(i). The WTO Agreement entered into force on January 1, 1995, therefore Sri Lankan companies could not have benefitted from the terms of 19 U.S.C. § 1671b(b)(4)(C)(i) during the period of investigation, which was over eight years later.

II. TCENTP Program

The TCENTP program was established by Sections 51 and 52 of Sri Lanka's Inland Revenue Act No. 10 of 2006. *GOSL's CVD Questionnaire Response: Certain New Pneumatic Of-The-Road Tires from Sri Lanka*, C-542–801, POI 01/01/2015–12/31/2015, Section II, at 6, Attach. 1, at 112 (April 21, 2016) ("GSL CVD Q. Response"). Over the relevant period, the TCENTP program provided income tax rates of twelve percent for companies involved in certain "specified undertakings." *Id.*, Section II, at 8. Over the same period, Sri Lanka's standard corporate income tax rate was twenty-eight percent. *GOSL's CVD Supplemental and Second Supplemental Questionnaire Response: Certain Of-The-Road Tires from Sri Lanka*, C-542–801, POI 01/01/2015–12/31/2015, First Supp. Q. at 3 (May 20, 2016).

Section 1677(5)(B) provides that a subsidy requires that: (1) "a government of a country or any public entity within the territory of the country;" (2) "provides a financial contribution;" (3) "to a person;" and (4) "a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B). *See Delverde, SrL v. United States*, 202 F.3d 1360, 1365 (Fed. Cir. 2000). To be countervailable, a subsidy must also be specific. 19 U.S.C. § 1677(5)(A); 1677(5A). It is undisputed that the actors involved in the TCENTP program satisfy elements one and three of the subsidy definition. Commerce further concluded that the TCENTP program provided a financial contribution, conferred a benefit to Camso, and

[1] Further, even assuming some conflict exists, the SCM Agreement likely would not have entitled Sri Lanka to subsidize its exports at the time of Commerce's investigation. In relevant part, Annex VII applies to:

> (a) Least-developed countries designated as such by the United Nations . . .
>
> (b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum: . . . Sri Lanka . . .

SCM Agreement, Annex VII. Regardless of Sri Lanka's status at the time of the SCM Agreement's adoption in 1994, the absence of any reference to later dates in Annex VII suggests it was intended to adjust to changes in countries' development status over time. Regarding Subsection (a), Sri Lanka was not designated as an LDC by the United Nations in 2015. *See, e.g.*, United Nations, *World Economic Situation and Prospects 2015* 143, Table F (2015), *available at* www.un.org/en/development/desa/policy/wesp/wesp_archive/2015wesp_full_en.pdf. Benefits under Subsection (b) expired at the same time as that provided under 19 U.S.C. § 1671b(b)(4)(C)(i). *See* SCM Agreement, Art. 27.2(b).

was specific. *Final Det. I&D Memo* at 16. GSL challenges Commerce's conclusions on all three points. Pl. Br. at 17–22.

First, GSL objects to Commerce's finding that the TCENTP program provided a financial contribution. Pl. Br. at 19–20. GSL argues that the TCENTP program represented its sovereign exercise of tax policy rather than "revenue foregone". *Id.* at 19. In relevant part, the definition of "financial contribution" covers: "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income." 19 U.S.C. § 1677(5)(D)(ii). As the name "Tax *Concession* for Exporters of Non-Traditional Products" suggests, the TCENTP program reduced the income tax rate applicable to exporters of certain qualifying merchandise. GSL CVD Q. Response, Section II, at 13. As a result of the TCENTP program, Camso received a sixteen percent reduction in its income tax liability, from twenty-eight percent to twelve percent. *Prelim. Det. I&D Memo* at 13. Tax revenue was likewise foregone by GSL in the amount of the sixteen percent difference. Accordingly, Commerce's financial contribution finding was supported by substantial evidence.

GSL next challenges Commerce's conclusion that the TCENTP program was specific for purposes of 19 U.S.C. § 1677(5A). Pl. Br. at 20–22. GSL points out that TCENTP program benefits were available to a multitude of exporting industries, and even some non-exporting industries. *Id.* at 21. The TCENTP program provided tax concessions for the following "specified undertakings":

> (i) the export of non-traditional goods, manufactured, produced or purchased by such undertaking; or
>
> (ii) the performance of any service of ship repair, ship breaking repair and refurbishment of marine cargo containers, provision of computer software, computer programs, computer systems or recording computer data, or such other services as may be specified by the Minister by Notice published in the Gazette, for payment in foreign currency.

GSL CVD Q. Response, Section II, at 13, Attach. 1, at 121. Subsection (i) is clearly contingent upon export performance, as it requires that a company export non-traditional goods. Nontraditional goods are defined in Section 60 of the Inland Revenue Act to mean "goods other than black tea in bulk, crepe rubber, sheet rubber, scrap rubber, latex or fresh coconuts or any other produce referred to in section 16," which referred to agricultural undertakings. GSL CVD Q. Response, Section II, at 7, Attach. 1, at 122. Camso's export of OTR tires thus satisfied the terms of the first subsection. Export subsidies are one class of specific subsidy. 19 U.S.C. § 1677 (5A)(A). "[A]n export

subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions." 19 U.S.C. § 1677(5A)(B). Regardless of the full breadth of industries and businesses to which the TCENTP program applied, the fact that the subsection under which Camso qualified was contingent upon export performance demonstrates that the TCENTP program constituted an export subsidy as applied to Camso, and was thus specific for purposes of Section 1677(5A).[2] The statute does not require that exporters be the only foreseeable beneficiaries of the TCENTP program, or that the number of exporters impacted be limited, in order for it to be classified as an export subsidy vis-à-vis Camso.

GSL also contends that the intent of the program was not to strengthen the tire industry or any other particular industry, but rather to bolster the general economic situation in Sri Lanka. Pl. Br. at 22. The statute is clear, however, that specificity may be found without regard to the intent of the measure. 19 U.S.C. § 1677(5A).

Finally, GSL claims that a separate, one-time Super Gains Tax equaling twenty-five percent of Camso's taxable income nullified any alleged benefit conferred by the TCENTP program. Pl. Br. at 22–23; GSL CVD Q. Response, Section II, at 8; GSL Verification Report at 3. It argues that the "effective tax rate" applied to Camso during the POI was thirty-seven percent, i.e., twelve percent under the TCENTP program and twenty-five percent under the Super Gains Tax. Pl. Br. at 23. In assessing the benefit provided by a direct tax program, Commerce's regulations provide: "In the case of a program that provides for a full or partial exemption or remission of a direct tax (e.g., an income tax) . . . a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program." 19 C.F.R. § 351.509(a).

The Super Gains Tax was imposed on Camso because its *pre-tax* profits for the year beginning April 1, 2013, exceeded two billion Sri Lankan rupees. *See* GSL CVD Q. Response at Section II, p. 8. Pursuant to Commerce's regulations, to claim that the benefit conferred by the TCENTP program was nullified by the application of the Super Gains Tax, GSL would have to prove that the net effect of the TCENTP program somehow yielded a tax rate greater than or equal to the tax rate which Camso would have paid absent the TCENTP program. *See* 19 C.F.R. § 351.509(a). This it did not do. Due to the

[2] Section 1677 defines the various categories of specific subsidies in the alternative, e.g., a subsidy can be specific if it is *either* an export subsidy *or* a qualifying domestic subsidy. 19 U.S.C. § 1677 (5A)(A). Having found that substantial evidence supports Commerce's conclusion that the TCENTP program constituted an export subsidy, the court need not assess GSL's arguments regarding the degree to which the TCENTP program satisfied the definition of a domestic subsidy. *See* Pl. Br. at 20–22.

pre-tax nature of Super Gains Tax eligibility, companies qualified without regard to other corporate income tax liabilities. Without the TCENTP program, it appears that Camso's tax rate would have equaled the twenty-eight percent standard corporate tax rate, plus the twenty-five percent Super Gains Tax on Camso's pre-tax profits. Thus, the court finds Camso's benefit intact. The court concludes that Commerce's determinations with respect to the countervailability of the TCENTP program are supported by substantial evidence and are in accordance with law.

III. GPS Program

GSL and Camso both argue that Commerce's determination that the GPS constituted a countervailable subsidy benefitting Sri Lankan OTR rubber tire manufacturers was contrary to law and unsupported by substantial record evidence. GSL stated that the purpose of the GPS was to encourage small rubber holdings in Sri Lanka, not aid manufacturers. *Verification of the Questionnaire Responses of the Government of Sri Lanka*, C-542–801, POI: 01/01/201512/31/2015, at 6 (Dep't Commerce Sept. 28, 2016) ("GSL Verification Report"); GSL NSA Supp. Q. Response, Attach. 1, at 3. The GPS guaranteed rubber holdings of no more than 50 acres a certain price per kilogram for rubber sold in Sri Lanka.[3] Essentially GSL 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." GSL Verification Report at 6–7. Relevant to this analysis, both the method of disbursing the difference and the method of calculating the "market price" evolved during the program's existence:

- **Method 1** (11/15/2014 – 12/22/2014): The market price was the average Colombo rubber auction price for the previous month. GSL disbursed the difference directly to rubber smallholders. GSL Verification Report at 6.
- **Method 2** (12/23/2014 – 02/09/2015): The market price was the Singapore International Commodity Exchange ("SICOM") average price for the prior month. Rubber buyers, e.g., Camso, paid

[3] Sri Lankan rubber products manufacturers were not required to rely on locally-sourced rubber, and were ostensibly able to import rubber during the GPS; GSL Verification Report at 9, Camso indicated, however, that "Camso cannot import all of its rubber because the GOSL will not give it sufficient import permits, given that the GOSL is encouraging domestic rubber sales. [Camso] officials stated that Camso needs to apply for import permits frequently and these permits take three to four weeks to approve," *Verification of the Questionnaire Responses of Camso Loadstar (Private) Ltd. and Loadstar (Private) Ltd.*, C-542–801, POI: 01/01/2015–12/31/2015, at 12 (Dep't Commerce Sept. 28, 2016) ("Camso Verification Report").

smallholders the entire guaranteed price. Later, GSL reimbursed rubber buyers in the amount of the difference between the market price and the guaranteed price. *Id.* at 7.

- **Method 3** (03/15/2015 – 06/30/2015): The market price was the SICOM average price for the prior month. GSL disbursed the difference directly to rubber smallholders. *Id.*
- **Method 4** (07/01/2015 – 09/30/2015): The market price was the average price of all rubber categories for the previous month in ten Sri Lankan markets from five regions. Rubber buyers, e.g., Camso, paid smallholders the entire guaranteed price. Later, GSL reimbursed rubber buyers in the amount of the difference between the market price and the guaranteed price. *Id.* at 7, 10.

See also Certain Off-the-Road Tires from Sri Lanka: Verification Exhibits, C-542–801, POI: 01/01/2015–12/31/2015, Ex. 3 at 5–10 (Dep't Commerce Sept. 2, 2016). The changes in program administration were motivated by complaints regarding payment delays, first from smallholders, and later from rubber buyers. GSL Verification Report at 11. While program implementation was smooth under Method 4, the government's budget was insufficient to continue it. *Id.* GSL contended that Camso was not a beneficiary under the GPS and, due to the fact that Camso "would have to wait until the administrative process is concluded to obtain its reimbursement, in fact, the program imposes a burden rather than a benefit." GSA NSA Supp. Q. Response at Attach. 4, at 3. Commerce's verification report indicated that the payments ultimately received by Camso under the GPS accurately reflected the amount above the set market price actually paid to smallholders. GSL Verification Report at 9–10.

Commerce found the entirety of the reimbursement payments to Camso under Methods 2 and 4 to be countervailable subsidies. *See Post-Prelim. Memo* at 3 (assigning a 0.88 percent ad valorem rate); *Corrected Program Rates*, at 1 (assigning a 0.95 percent ad valorem rate); *Final Det. I&D Memo* at 8, 20–22 (explaining what was found to be countervailable). Commerce assessed the reimbursements in isolation from the overall GPS program. *See, e.g.*, Defendant's Response to Motions for Judgment on the Agency Record, ECF No. 61, at 17 ("Def. Br."). With minimal analysis, it concluded the reimbursements were "a financial contribution in the form of a direct transfer of funds and a benefit under sections [19 U.S.C. § 1677(5)(D)(i)] and [19 U.S.C. § 1677(5)(E)], respectively." *Post-Prelim. Memo* at 3. *See also Final I&D Memo*, at 21–22.

It is undisputed that GSL's Ministry of Plantation Industries is a governmental entity. The parties disagree as to whether the GPS reimbursements constituted a "financial contribution" or a "benefit."

Initially, the court concludes that Commerce's approach, selectively analyzing the reimbursement payments in isolation from the overall GPS program, is not in accordance with Section 1677(5)(C).

Commerce is not required to consider the effect of a subsidy where the other elements of the countervailable subsidy are satisfied. 19 U.S.C. § 1677(5)(C). *See also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, vol. 1, at 926 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4240 ("SAA")[4] (indicating that this provision was prompted by a prior holding that "Commerce must determine that the practice has an effect on the price or output of the merchandise under investigation"). This does not authorize Commerce, however, to ignore clear, readily available, and already-verified[5] record evidence that a transfer of funds constituted repayment of a debt. Commerce cited no authority to the contrary. *See* Def. Br. at 13–15, 18–19.

Section 1677(5)(D) and (E) indicate that "financial contribution" is a concept distinct from that of a "benefit." "[T]he statute clearly requires that in order to find that a person received a subsidy, Commerce determine that that person received . . . both a financial contribution and benefit, either directly or indirectly, by means of one of the acts enumerated." *Delverde*, 202 F.3d at 1366. Section 1677(5)(D) defines a "financial contribution" to include, *inter alia*, "the direct transfer of funds, such as grants, loans, and equity infusions." 19 U.S.C. § 1677(5)(D)(i). *See also* S. Rep. 103–412, at 91 (1994) (mentioning the further example of loan guarantees). GSL and Camso argue that, because money received by Camso constituted repayment of a debt incurred by GSL, no such contribution was made. Pl. Br. at 12–13; Consolidated Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record, ECF No. 59, at 12–15 ("Consol. Pl. Br."). Commerce argues that GSL's mere transfer of a certain amount of money to Camso satisfies the requirements of Section 1677(5)(D)(i). Def. Br. at 14. Commerce's argument, however, ignores the instructive value of the illustrative examples provided by Section

[4] The SAA is an "authoritative expression" when interpreting and applying the Uruguay Round Agreements Act. 19 U.S.C. § 3512(d) (1994). *See also Micron Tech., Inc. v. U.S.*, 243 F.3d 1301, 1309 (Fed. Cir. 2001).

[5] Commerce's report indicated that, regarding reimbursements under Methods 2 and 4, Commerce verified that Camso's own rubber purchase records, as well as those provided to GSL during the GPS, approximated the relevant reimbursement figures. *See* Camso Verification Report at 11–12 (Regarding Method 2, "[Commerce] tied several of the above reimbursement applications to source documentation provided to the Rubber Development Department (RDD) Head Office in support of the requests and noted no discrepancies." Regarding Method 4, "[c]ompany officials stated that the RCCs prepare their own calculations to track the amounts expected from the RDD; we reviewed the spreadsheet related to applications in July 2015. We selected an item shown on this spreadsheet and tied it to the corresponding payment received from the RDD. We noted no discrepancies.").

1677(5)(D)(i). The interest-free repayment of a debt owed is unlike a grant, loan, or equity infusion. In all four cases the recipient receives funds, but the latter three transfers yield a net increase to the recipient's capital base at the time of the infusion, whereas interest-free repayment of a debt does not. Notwithstanding that Commerce's determinations under Section 1677(5)(D)(i) are "made on a case-by-case basis,"[6] SAA at 927, 1994 U.S.C.C.A.N. at 4240, this fundamental difference suggests that Section 1677(5)(D)(i) did not contemplate debt repayment, at rates less advantageous than commercial markets, as a financial contribution.

Furthermore, even if the debt repayment were a qualifying financial contribution, the benefit question is dispositive in this case. The GPS program did not provide a "benefit" to Camso within the meaning of Section 1677(5)(E) in the total amount of the reimbursement. Under that statute, "[a] benefit shall normally[7] be treated as conferred where there is a benefit to the recipient, including" an equity infusion "inconsistent with the usual investment practice of private investors," a loan provided below commercial market rates, a loan guarantee wherein the recipient would pay more in absence of the authority's guarantee, after adjusting for differences in guarantee fees, the provision of goods or services for "less than adequate remuneration," or the purchase of goods or services for "more than adequate remuneration." 19 U.S.C. § 1677(5)(E). *See also* 19 C.F.R. § 351.504–508. While the foregoing list is not exhaustive, there are critical differences between the examples listed above and the reimbursement payments received by Camso. In serving as a payment vehicle for the GPS, Camso was effectively providing interest-free loans to GSL. This was to Camso's *detriment*, rather than its benefit.

Commerce attempts to dilute the requirement that countervailable subsidies benefit a recipient by reference to Section 1677(5)(C)'s elimination of any requirement to consider the subsidy's effects. Def. Br. at 16–17. Both the structure of Section 1677 and the SAA, however, indicate that the two concepts are distinct: "The use of 'normally' [in Section 1677(5)(E)] should not be construed as suggesting that, in

[6] In its entirety, the SAA indicates: "[Section 1677(5)(D)] lists the four broad generic categories of government practices that constitute a 'financial contribution.' The examples of particular types of practices falling under [Subsection (D)(i)] are not intended to be exhaustive. The Administration believes that these generic categories are sufficiently broad so as to encompass the types of subsidy programs generally countervailed by Commerce in the past, although determinations with respect to particular programs will have to be made on a case-by-case basis." SAA at 927, 1994 U.S.C.C.A.N. at 4240.

[7] "In using the word "normally" in this subparagraph, the Administration intends only to indicate that in the case of certain types of subsidy programs, such as export insurance schemes, the use of the benefit-to-the-recipient standard may not be appropriate." SAA at 927, 1994 U.S.C.C.A.N. at 4240.

addition to identifying the benefit to the recipient, Commerce should or must consider the effect of the subsidy; [Section 1677(5)(C)] already makes this clear." SAA at 927, 1994 U.S.C.C.A.N. at 4240. Commerce's own regulations likewise recognize this. 19 C.F.R. § 351.503(c). *See also* 63 Fed. Reg. at 65,361 ("In analyzing whether a benefit exists, we are concerned with what goes into a company, such as enhanced revenues and reduced-cost inputs in the broad sense that we have used the term, not with what the company does with the subsidy."). Commerce need not consider the overall pricing effect of the GPS reimbursements or their influence on Camso's behavior to recognize that the series of debts and repayments between Camso and GSL yielded no benefit to Camso within the meaning of Section 1677(5)(E).

For the sake of completeness, the court addresses potentially applicable regulations. Broadly, Commerce's regulations provide for certain categories of benefits, *see, e.g.*, 19 C.F.R. § 351.504 (applicable to grants), and a residual provision, which applies to "program[s] for which a specific rule for the measurement of a benefit is [not] contained in this subpart," 19 C.F.R. § 351.503(a). *See also Preamble: Countervailing Duties*, 63 Fed. Reg. 65,348, 65,360 (Dep't Commerce November 25, 1998) (describing the residual nature of this provision). The confusion in Commerce's brief is telling. Without applying Section 351.503, it likens the GPS reimbursements to a grant under Section 351.504, and yet avoids stating that GPS reimbursements constituted a grant.[8] Commerce's investigatory documents provide no further clarification as to the specific type of benefit alleged. *See Post-Prelim. Memo* at 3; *Final I&D Memo* at 22.

Neither the Tariff Act, as amended, nor Commerce's regulations define "grant." *See* 19 U.S.C. § 1677; 19 C.F.R. § 351.504(a). *See also* 63 Fed. Reg. at 65,362. The court thus assumes that the word carries its ordinary meaning, which may be found in a dictionary. *See, e.g., Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1571 n.9 (Fed. Cir. 1994). "Grant" is ordinarily defined as "2: something granted; *esp*: a gift (as of land or a sum of money) usu. for a particular purpose . . . 3a: a transfer of real or personal property by deed or writing – compare

[8] *Compare* Def. Br. at 14 n.3 ("The calculation of Camso's subsidy rate under this program was therefore *similar to* that applicable to grants, for which a benefit exists in the amount of the grant") (emphasis added); *with id.* at 15 ("[GPS] transfers increased Camso's revenues by their full amount."). *See also* 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.504(a)); *id.* at 22 ("Commerce was countervailing Sri Lanka's direct payments to Camso — not subsidized purchases of rubber. Accordingly, the applicable date of the financial contribution is the date of Sri Lanka's payment to Camso . . . *See, e.g.*, 19 C.F.R. § 351.504(b) (providing that, for grants, Commerce will normally find a benefit as conferred on the date of receipt)). Commerce alternatively attempts to analogize the GPS reimbursements to tax abatements. Def. Br. at 16 (citing 19 C.F.R. § 351.509, 510). This approach is unavailing. As Commerce does not even allege that the GPS program involved a tax, it cannot fall under those regulations.

ASSIGNMENT 3a, GIFT 2a." Grant (Noun), *Webster's Third New Int'l Dictionary* (unabridged 1981) (example sentences omitted). *See also Changzhou Trina Solar Energy Co. v. United States*, 264 F. Supp. 3d 1325, 1335 (Ct. Int'l Trade 2017) ("Commerce concluded that a grant with a *positive balance* provides the recipient with a benefit . . . Commerce reasonably concluded here, from the *positive account balances*, that these grants had been received.") (emphasis added). Applying this definition, payments to Camso under the GPS did not constitute a gift-like transfer, but rather the interest-free repayment of a debt, as described above. Thus, the GPS reimbursements do not fall within the regulatory provisions applicable to grants.

Commerce's regulatory catch-all provision provides: "For other government programs, the Secretary normally will consider a benefit to be conferred where a firm pays less for its inputs . . . than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn." 19 C.F.R. § 351.503(b)(1). The touchstone of Section 1677(E), from which this regulation is derived, is that what the company received somehow exceeded what the company paid or should have paid. Often, this is tested by reference to what would otherwise be available under normal market conditions. Commerce makes much of the following examples of "benefits" from the regulatory preamble: First, a government regulation mandates use of environmentally-friendly equipment, and also covers part of the cost of acquiring said equipment. Def. Br. at 16 (citing 63 Fed. Reg. at 65,361). Second, a government requires that automakers install seat belts, and also covers part of the cost of installation. *Id.* The court agrees that these examples are instructive, but finds that they favor GSL and Camso's position.

For example, these examples describe, first, the requirement to install environmentally-friendly equipment and, second, the partial subsidy of their purchase as "separate actions." 63 Fed. Reg. at 65,361. Commerce attempts to co-opt this language by describing the requirement to front money to rubber smallholders and the later repayment of that money using the same terms. Def. Br. at 16. In the examples from the regulatory preamble, the required "improvements" to the product enhance the product in some way and the government covered some of the cost of the enhancement, i.e., the government provided value. The GPS program as analyzed by Commerce thus far, however, did not provide Camso with any value. Translated into the terms of the environmental equipment example, it was rather as if Camso already possessed environmentally-friendly equipment, the government expropriated the equipment, and later

returned it to Camso without compensation. The GPS is not separable as are those acts described in the regulatory preamble.

The relevant portion of the regulatory preamble concludes: "In the two examples, the government action that constitutes the benefit is the subsidy to install the equipment, *because this action represents an input cost reduction*." 63 Fed. Reg. 65,361 (emphasis added). Commerce has not identified what "input" was made cheaper by GSL's reimbursement payment. By countervailing the entirety of the reimbursement payments, Commerce suggests the "input" concerned is simply the cash itself. As explained above, however, this was made *more expensive* by the GPS, which required that Camso supply the funds, i.e., provide a loan, in exchange for an interest-free repayment.

Finally, the regulatory preamble indicates that the prototypical example of a company receiving more revenues than it otherwise would earn is "when a firm sells its goods to the government and 'such goods are purchased for more than adequate remuneration.'" 63 Fed. Reg. at 65,360. The GPS reimbursements bear no resemblance to that sort of situation. Camso received no overpayment. Commerce verified that Camso simply received the same excess amount which it had previously paid to the rubber smallholders. In sum, the GPS satisfies neither the statutory definition, nor the regulatory interpretation of what constitutes a benefit. Commerce's determination that the GPS reimbursements constituted a subsidy is therefore not in accordance with law.

Plaintiffs' briefs suggest that the GPS' countervailability would be properly assessed through an upstream subsidy analysis. Pl. Br. at 13; Consol. Pl. Br. at 19–23. Such an analysis would test whether any GPS benefits which may have accrued to rubber smallholders had "a significant effect on" the cost of Camso's OTR rubber tire production. 19 U.S.C. § 1677–1. *See also* 19 C.F.R. § 351.523. Commerce simply responded that such an analysis was unnecessary because Commerce only countervailed GSL's reimbursement payments to Camso. Def. Br. at 20–22. As both parties have not substantively addressed whether an upstream subsidy existed, it would be premature for the court to make its own determination. Having concluded that GSL's reimbursement payments did not constitute a benefit per se, however, Commerce may wish to conduct a full upstream subsidy analysis on remand, or otherwise examine whether some part of the reimbursement actually benefitted Camso.

CONCLUSION

For the foregoing reasons, plaintiffs' motions for judgment on the agency record are **GRANTED** in part. Commerce's findings regarding the TCENTP program are **SUSTAINED**. This matter is

REMANDED for Commerce to re-calculate the net countervailable subsidies applicable to Camso, eliminating any duties attributable to GPS based on mere reimbursement for excessive rubber payments. Commerce is 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. Commerce shall have until May 14, 2018, to file its remand results, or request an extension should it determine to conduct further investigation. The parties shall have until May 29, 2018, to file objections, and the government shall have until June 13, 2018, to file its response.

Dated: April 17, 2018
New York, New York

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

Slip Op. 18–44

UTTAM GALVA STEELS LIMITED, Plaintiff, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, AK STEEL CORPORATION, STEEL DYNAMICS, INC., CALIFORNIA STEEL INDUSTRIES, INC., UNITED STATES STEEL CORPORATION, and NUCOR CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00162

[Remanding the U.S. Department of Commerce's final determination following an antidumping duty investigation on certain corrosion-resistant steel products from India.]

Dated: April 18, 2018

Diana Dimitriuc-Quaia and *Claudia D. Hartleben*, Arent Fox LLP, of Washington, D.C., argued for Plaintiff Uttam Galva Steels Limited. With them on the brief was *John M. Gurley*. Of counsel were *Matthew M. Nolan* and *Nancy A. Noonan*.

Agatha Koprowski, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, and *Elizabeth A. Speck*, Senior Trial Counsel. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington D.C.

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OPINION AND ORDER

Choe-Groves, Judge:

This case involves corrosion-resistant steel products from India. Plaintiff Uttam Galva Steels Limited ("Plaintiff" or "Uttam Galva") brings this action contesting the final determination in an antidumping duty investigation, in which the U.S. Department of Commerce ("Commerce" or "Department") found that certain corrosion-resistant steel products from India are being, or are likely to be, sold in the United States at less-than-fair value. *See Certain Corrosion-Resistant Steel Products From India*, 81 Fed. Reg. 35,329 (Dep't Commerce June 2, 2016) (final determination of sales at less-than-fair value), *as amended*, 81 Fed. Reg. 48,390 (Dep't Commerce July 25, 2016) (amended final affirmative determination and issuance of antidumping duty orders) (collectively, "*Final Results*"); *see also* Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from India, A-533–863, (May 24, 2016), *available at* https://enforcement.trade.gov/frn/summary/india/2016–12986–1.pdf (last visited Apr. 11, 2018) ("Final IDM"). This matter is before the court on Plaintiff's Rule 56.2 motion for judgment on the agency record challenging the Department's antidumping duty calculations. *See* Mot. J. Agency R., Mar. 16, 2017, ECF No. 47–1. This case presents one issue: whether Commerce erred in its determination of the amount of duty drawback adjustment for Uttam Galva when it calculated the exempted and rebated import duties over total cost of production. For the reasons discussed below, the court concludes that Commerce's methodology is not in accordance with the law.

BACKGROUND

Commerce received petitions requesting the imposition of antidumping duties on imports of corrosion-resistant steel products from multiple countries, including India, filed on June 3, 2015 on behalf of a group of domestic producers: United States Steel Corporation, Nucor Corporation, ArcelorMittal USA, AK Steel Corporation, Steel Dynamics, Inc., and California Steel Industries, Inc. *See Certain Corrosion-Resistant Steel Products From Italy, India, the People's Republic of China, the Republic of Korea, and Taiwan: Initiation of Less-Than-Fair-Value Investigations*, 80 Fed. Reg. 37,228 (Dep't Commerce June 30, 2015) (initiation of less-than-fair value investigation). The Department initiated an investigation for the period of April 1,

2014 through March 31, 2015. *Id.* at 37,229. Commerce found that it would be impractical to examine all exporters and producers, and therefore opted to examine two companies accounting for the largest volume of U.S. imports of the subject merchandise during the investigation period. *See* Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from India: Respondent Selection, PD 63, bar code 3292985–01 (July 22, 2015). Commerce selected two companies, JSW Steel Limited and Uttam Galva, for examination. *See id.*

Commerce published its preliminary results on January 4, 2016. *See Certain Corrosion-Resistant Steel Products From India*, 81 Fed. Reg. 63 (Dep't Commerce Jan. 4, 2016) (affirmative preliminary determination of sales at less-than-fair value and postponement of final determination) ("*Preliminary Results*"); *see also* Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Certain Corrosion-Resistant Steel Products from India at 1, A-533–863, (Dec. 21, 2015), *available at* https://enforcement.trade.gov/frn/summary/india/2015–32758–1.pdf (last visited Apr. 11, 2018) ("Prelim. IDM"). Pursuant to the Department's differential pricing analysis, Commerce used the average-to-average methodology to calculate dumping margins for both mandatory respondents. *See* Prelim. IDM at 9–11. It assigned a preliminary weighted-average dumping margin of 6.64% for JSW and a weighted-average dumping margin of 6.92% for Uttam Galva. *Preliminary Results*, 81 Fed. Reg. at 65.

The Department granted a preliminary duty drawback adjustment to Uttam Galva based on the company's participation in three duty programs: the Duty Drawback Scheme, Advance Authorization Program, and Duty Free Import Authorization Program. *See* Prelim. IDM at 16. The Duty Drawback Scheme is a rebate program in which Uttam Galva "pays duties at the time of purchase based on a company-specific rate," and the duties are later refunded. Verification of the Cost Response of Uttam Galva Steels Limited in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Flat Products from India 17, PD 379, bar code 3452604–01 (Mar. 23, 2016). The Advance Authorization Program and Duty Free Import Authorization Program are exemption schemes in which Uttam Galva obtains a license and "is allowed to import specified quantities of [inputs] duty free as per Standard Input Output Norm ('SION') of the finished good." *Id.* at 16.

Following the preliminary determination, Uttam Galva submitted revised statistics and a case brief in response. *Final Results*, 81 Fed. Reg. at 35,329. Commerce held a hearing on May 4, 2016. *Id.*

Commerce issued its final determination on June 2, 2016. *See id.* Commerce calculated a final weighted-average dumping margin of 4.44% for JSW, 3.05% for Uttam Galva, and 3.86% for all others. *See id.* at 35,330. Following an affirmative final material injury determination from the International Trade Commission, Commerce published the antidumping duty order on July 25, 2016. *See id.* at 35,329.

Uttam Galva commenced this action contesting Commerce's Final Determination on August 23, 2016, ECF No. 1, and filed its complaint on September 22, 2016, ECF No. 9. Plaintiff filed a Rule 56.2 motion for judgment on the agency record and supporting memorandum. *See* Mot. J. Agency R., Mar. 16, 2017, ECF No. 47–1; Pl.'s Mem. Supp. Mot. J. Agency R., Mar. 16. 2017, ECF No. 47 ("Pl.'s Mem."). Defendant and Defendant-Intervenors submitted responses to Plaintiff's motion. *See* Def.'s Resp. Opp'n Pl.'s Mot. J. Agency R., June 29, 2017, ECF No. 51 ("Def.'s Resp."); Def.-Intervenors' Resp. Opp'n Pl.'s Mot. J. Agency R., July 13, 2017, ECF No. 53 ("Def.-Intervenors' Resp."). Plaintiff filed a timely reply. *See* Reply Br. Pl. Uttam Galva Steels Limited, Aug. 11, 2017, ECF No. 56 ("Pl.'s Reply"). This court held oral argument on January 18, 2018. *See* Oral Argument, Jan. 18, 2018, ECF No. 70.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final determination in an antidumping duty investigation.[1] The court "shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence . . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781–82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Legal Framework for Determining a Duty Drawback Adjustment

Under the Tariff Act of 1930, as amended, Commerce conducts antidumping duty investigations and determines whether goods are being sold at less-than-fair value. *See* 19 U.S.C. § 1973. If the Department finds that subject merchandise is being sold at less-than-

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

fair value, and if the U.S. International Trade Commission finds that these less-than-fair value imports materially injure a domestic industry, the Department issues an antidumping duty order imposing antidumping duties equivalent to "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.* Generally, export price is defined as the price at which the subject merchandise is first sold in the United States, whereas the normal value represents the price at which the subject merchandise is sold in the exporting country. *See id.* §§ 1677a(a), 1677b(b)(i). Constructed export price ("CEP") is "the price at which the subject merchandise is first sold . . . in the United States . . . to a purchaser not affiliated with the producer or exporter." *Id.* § 1677a(b). Commerce calculated both an export price and constructed export price in its investigation because Uttam Galva exports to both affiliated and non-affiliated companies.[2] *See* Prelim. IDM at 13. The statute provides further guidance for determining export price as follows:

> (c) Adjustments for export price and constructed export price The price used to establish export price and constructed export price shall be—
>
> (1) increased by—
>
> (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States.

19 U.S.C. § 1677a(c)(1)(B). This calculation is known as a duty drawback adjustment.

The purpose of a duty drawback adjustment is to ensure a fair comparison between normal value ("NV") and export price ("EP"). *See Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011); *Torrington Co. v. United States*, 68 F.3d 1347, 1352–53 (Fed. Cir. 1995). Under a duty drawback program, producers may receive an exemption or rebate for imported inputs used in exported merchandise. *See Saha Thai*, 635 F.3d at 1338. As a result, producers are still required to pay import duties for domestically-sold goods, which leads to an increase in normal value. *See id.* A duty drawback adjustment "corrects this imbalance, which could otherwise lead to an inaccurately high dumping margin, by increasing EP to the level it likely would be absent the duty drawback." *Id.*; *see also* S. Rep. No. 67–16, at 12 (1921).

[2] For readability purposes, all discussion of export price in this opinion will also encompass constructed export price.

Commerce applies a two-pronged test to determine whether a producer qualifies for a duty drawback adjustment. *See Saha Thai*, 635 F.3d at 1340. The producer must prove "(1) that the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, that the exemption is linked to the exportation of the subject merchandise, and (2) that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise." *Id.*

Commerce awarded Uttam Galva a duty drawback adjustment due to the company's participation in three programs: the Duty Drawback Scheme, the Advance Authorization Program, and the Duty Free Import Authorization Program. Both Plaintiff and Defendant agree that the duty drawback adjustment was properly granted here. *See* Pl.'s Mem. 14–15; Def.'s Resp. 13.

Defendant-Intervenors question whether Uttam Galva met the two-prong test for a duty drawback adjustment. *See* Def-Intervenors' Resp. 3. Plaintiff asserts that Defendant-Intervenors' challenge is improper because the "cross-claim seeks to enlarge the scope of the issues in dispute between Uttam Galva and the Government." Pl.'s Reply 21–22. The court agrees with Plaintiff that Defendant-Intervenors' challenge is procedurally deficient. "An intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944). Because the issue of whether Uttam Galva met the Department's two-prong test for a duty drawback adjustment did not appear in the pleadings or in a separate Rule 56.2 motion for judgment on the agency record, it is not properly before the court. Nevertheless, the court recognizes that sufficient evidence exists on the record to support Commerce's application of its two-prong test to Uttam Galva. Plaintiff provided the relevant rules and explanations for each program under which it claimed an adjustment, and also demonstrated that it imported a sufficient amount of raw materials to merit a refund or exemption of duties. *See* Final IDM at 7; *see also* Prelim. IDM at 16–17; Exhibits 3S-6, 3S-7, 3S-8, and 3S-10, Third Supp. Sections B & C Questionnaire Resp. Uttam Galva Steels Limited, PD 272–278, bar code 3422242–01 (Dec. 2, 2015) (licenses for Advanced Authorization Program, Duty Free Import Authorization Program, and Duty Drawback Scheme, and rules for the duty drawback programs administered by the Government of India, respectively).

II. Commerce's Methodology of Calculating the Duty Drawback Adjustment

The primary issue in dispute is whether Commerce reasonably calculated the duty drawback adjustment for Uttam Galva. The Department made its calculation by reducing the duty drawback adjustment to Uttam Galva's U.S. sales and allocating the duty exemptions and rebates claimed over total cost of production. *See* Def.'s Br. 17. Uttam Galva argues that the Department's calculation is inconsistent with the statute and the agency's alleged practice of computing exempted and rebated duties over total exports to the U.S. *See* Pl.'s Mem. 10–11. Because the statute permits a drawback on duties that are rebated or exempted "by reason of" the exportation of the subject merchandise to the United States, Uttam Galva contends that Commerce's calculation of the duty drawback adjustment is contrary to the statute's plain language in that the chosen methodology ignores the statute's textual linkage between the adjustment and the act of exporting. *See id.* at 16. For the following reasons, the court finds that Commerce's calculation of the amount of duty drawback adjustment was not in accordance with the law.

When determining the amount of a duty drawback adjustment, the Department has accepted the figures historically reported by a respondent for rebated or exempted duties in a given year, and divided it by the number of subject exports. *See* Prelim. IDM at 14; *see also* Final IDM at 7. Commerce argues in this case that its prior methodology did not account properly for situations where a respondent utilizes inputs from both foreign and domestic sources. *See* Prelim. IDM at 14; Final IDM at 8–9. As a result, the calculations using the Department's normal methodology would not produce "the desired import duty neutrality" for "an equitable comparison of EP or CEP and NV." Final IDM at 7. The Department attempted to rectify this perceived imbalance by utilizing the following methodology:

> The amount of the duty drawback adjustment should be determined based on the import duty absorbed into, or imbedded in, the overall cost of producing the merchandise under consideration. That is, we assume for dumping purposes, that imported raw material and the domestically sourced raw material are proportionally consumed in producing the merchandise, whether sold domestically or exported. . . . Accordingly, in order to accurately determine an adjustment for 'the amount of import duties imposed . . . which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States," the Department has made an

> upward adjustment to EP and CEP based on the per unit amount of the import duty cost included in the COP for each CONNUM.

Id. at 8–9 (footnote omitted). Commerce calculated Uttam Galva's duty drawback adjustment by taking the duty amount either rebated or not collected (*i.e.*, exempted) and allocating it over the total cost of production of the subject merchandise for the relevant investigatory period, based on the cost of inputs during that time. *See* Prelim. IDM at 15; Final IDM at 9. The Government explains Commerce's chosen methodology using the following equations:

$$\text{Exempted Duty Adjustment Rate} = \frac{\text{Total Duties Exempted Pursuant to AAP} + \text{Total Duties Exempted Pursuant to DFIA}}{\text{Total Cost of Zinc} + \text{Total Cost of Hot-Rolled Coil} + \text{Total Cost of Cold-Rolled Coil}}$$

$$\text{Rebated Duty Adjustment Rate} = \frac{\text{Paid Import Duties on Zinc} + \text{Paid Import Duties on Hot-Rolled Coil} + \text{Paid Import Duties on Cold-Rolled Coil}}{\text{Total Cost of Zinc} + \text{Total Cost of Hot-Rolled Coil} + \text{Total Cost of Cold-Rolled Coil}}$$

Exempted Duty Adjustment Amount =

> Exempted Duty Adjustment Rate x (Manufacturing Cost of Zinc + Manufacturing Cost of Hot-Rolled Coil + Manufacturing Cost of Cold-Rolled Coil)

Rebated Duty Adjustment Amount =

> Exempted Duty Adjustment Rate x (Manufacturing Cost of Zinc + Manufacturing Cost of Hot-Rolled Coil + Manufacturing Cost of Cold-Rolled Coil)

Total Duty Drawback Adjustment Amount =

> Exempted Duty Adjustment Amount + Rebated Duty Adjustment Amount

Def.'s Resp. 18–19. Defendant-Intervenor provides the following sample calculations, which describe Commerce's methodology substantively the same, but in an alternative format:

Units Produced	100,000	a
Purchase of imported raw materials with no duty exemption	$500,000	b
Purchase of imported raw materials with duty exemption	$500,000	c
Purchase of domestic raw materials	$1,000,000	d
Total raw materials	$2,000,000	e = b + c + d

Import duty %	5.0%	f
Duty paid on imported inputs	$25,000	g = f * b
Duty exempted on imported inputs	$25,000	h = f * c
Cost of production	$3,000,000	I
Domestic sales units	50,000	j
Domestic sales	$1,600,000	k
Domestic unit price	$32.00	L
Export sales units	50,000	m
Export sales	$1,550,000	n
Export unit price	$31.00	o = n / m
What Commerce did		
Duties paid	$25,000	g
Duties exempted	$25,000	h
Duties paid per finished unit	$0.25	p = g / a
Duties exempted per finished unit	$0.25	q = h / a
Cost of production per unit	$30.00	r = i / a
Unit cost of production plus exempted duty	$30.25	s = r + q
Export price per unit	$31.00	t = n / m
Duty drawback adjustment	$.50	u = p + q
Adjusted export price	$31.50	v = t + u
Dumping Margin	1.59%	w = (L – v) / v

Def.-Intervenors' Resp. 24. Uttam Galva claims that Commerce's methodology improperly "reduced the duty drawback adjustment to Uttam Galva's U.S. sales by allocating duty exemptions claimed over total production." Pl.'s Mem. 15.

Defendant contends that Commerce's methodology reflects the "matching principle" and "duty-neutral framework" espoused by the Court of Appeals for the Federal Circuit in *Saha Thai. See* Def.'s Resp. 19–21. The court disagrees with Defendant's reading of the case. Unlike here, the duty drawback regime at issue in *Saha Thai* was one based solely on exemptions. Because the duties in *Saha Thai* were exempted, they were not recorded in the respondent company's books as an expense incurred. Commerce therefore increased the company's cost of production ("COP") and constructed value ("CV"), which are both part of the Department's normal value calculation, to account for

the duties presumably paid on inputs for products sold in the domestic market. The Court of Appeals for the Federal Circuit recognized that:

> [T]he entire purpose of increasing EP is to account for the fact that the import duty costs are reflected in NV (home market sales prices) but not in EP (sales prices in the United States). An import duty exemption granted only for exported merchandise has no effect on home market sales prices, so the duty exemption should have no effect on NV. Thus, because COP and CV are used in the NV calculation, COP and CV should be calculated as if there had been no import duty exemption. It would be illogical to increase EP to account for import duties that are purportedly reflected in NV, while simultaneously calculating NV based on a COP and CV that do not reflect those import duties. Under the "matching principle," EP, COP, and CV should be increased together, or not at all.

Saha Thai, 635 F.3d at 1342–43. Because Commerce adjusted EP in the *Saha Thai* case to account for the duty drawback adjustment received by the respondent company, the Court of Appeals for the Federal Circuit concluded that the subsequent adjustment to NV to reflect the duties paid on inputs for products sold in the home market was proper. The "matching principle" relates, therefore, to an adjustment to normal value with respect to the particular facts, exemption program, and recordkeeping practices presented in *Saha Thai*, and should not be expanded to encompass all duty drawback adjustment calculations made by Commerce. Here, the parties do not allege deficiencies in Uttam Galva's recordkeeping or in the normal value calculation to warrant application of the matching principle. When viewed in this context, *Saha Thai*'s matching principle does not support Commerce's methodology in the instant matter before this court.

Commerce's upwards adjustment to EP, as mandated by the statute, itself creates the "duty-neutral framework" under which the agency can compare NV and EP. Section 1677a(c)(1)(B) contemplates an upward adjustment to EP, allowing for an increase in the export price or constructed export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). The purpose of the adjustment is to correct an imbalance and prevent an inaccurately high dumping margin by increasing EP to the level it likely would be absent a duty drawback. Commerce's allocation of duties rebated and exempted over total cost of production in this case is inconsistent with the statute because allocating duty drawback to

"total cost of production" encompasses home market sales, which could not earn a duty drawback since Uttam Galva did not receive any exemptions or rebates on foreign inputs utilized in products sold in the home market. Commerce's flawed methodology includes costs associated with manufacturing goods sold in the domestic market, lessens the upwards adjustment, and conceptually reintroduces an imbalance in the dumping margin calculation. It fails to adequately connect the adjustment to duties forgiven "by reason of" the products' exportation to the United States. Because Commerce's method of calculating Uttam Galva's duty drawback adjustment is inconsistent with the statute, the court rejects Defendant's argument and concludes that Commerce's methodology is unreasonable, is not in accordance with the law, and contravenes the plain language of section 1677a(c)(1)(B).

Furthermore, the facts in the record do not support the Department's implementation of a new methodology in this case. Commerce cited the possible use of both foreign and domestically-sourced inputs as a primary factor in creating its new methodology. *See* Prelim. IDM at 14; Final IDM at 8–9. Commerce's former methodology risked overstating the amount of duty drawback adjustment that a respondent should receive, which could lead to an unusually high export price and the potential elimination of a dumping margin where there should be one. Uttam Galva counters that Commerce's observation alone "is not indicative of unusual facts." Pl.'s Mem. 15. The court agrees that Commerce's reasoning is not enough to support its use of the new methodology in this case because the agency's perceived solution does not address the facts present in this case. Here, Uttam Galva was able to "identif[y] the raw materials imported for which it paid an import duty, . . . as well as worksheets linking the raw materials to production of merchandise under consideration." Prelim. IDM at 16–17. Evidence in the record shows that Uttam Galva was able to track what import duties were paid on domestic inputs, and thus the problem articulated by Commerce does not exist in this case. Moreover, Commerce has not historically required respondents to trace the imported inputs directly from importation into the home country through exportation to the United States. *See id.* at 14. Commerce's solution is not reasonably connected, therefore, to the facts present in the instant matter and to a solution to the perceived overstatement of duty drawback adjustment.

Uttam Galva also contests Commerce's calculation of the duty drawback adjustment on the premise that it contravenes the agency's past practice, and thus should have been subject to notice and comment rulemaking under the Administrative Procedure Act, 5 U.S.C. §

553. The court disagrees. Courts have recognized that agencies may deviate from past practice, as long as they provide a reasonable explanation for the change. *See SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011) (acknowledging that "[w]hen an agency changes its practice, it is obligated to provide an adequate explanation for the change"); *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (stating that, "while [Commerce's] explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court."). The Department's choice of a new methodology did not require notice and comment rulemaking, but did mandate a well-reasoned explanation. Commerce stated that its previous methodology of "[a]djusting EP/CEP for the full amount of duties imposed . . . when some of the same inputs are domestically sourced, results in a larger adjustment to the EP/CEP than reflected in the NV, creating an imbalance." Prelim. IDM at 15. The Department decided to "take these distortions into account" by making "an upward adjustment to EP and CEP . . . by properly allocating the amount rebated or not collected to all production for the relevant period based on the costs of inputs during the POI. This ensures that the amount added to both sides of the dumping calculations is equal, *i.e.*, duty neutral." *Id.* Commerce based its new methodology on the "only reasonable assumption" that "the imported raw materials and domestically sourced raw materials are consumed proportionally between the corresponding domestic sales and export sales, as then both the U.S. price and NV will be import duty inclusive." Final IDM at 9. As stated before, Commerce failed to provide a reasonable explanation because its new methodology overcompensated for any imbalances and erroneously took into account domestic home market sales, which in this case are not subject to duty drawback adjustments. Commerce's explanation does not justify why its new methodology should include domestic home market sales that are not otherwise subject to duty drawback.[3]

CONCLUSION

The court concludes that Commerce's calculation of the amount of Uttam Galva's duty drawback adjustment was unreasonable and not in accordance with the law. The court remands the Final Results for redetermination. On remand, the Department should recalculate

[3] Uttam Galva further reserves its right to challenge Commerce's differential pricing analysis if on remand Commerce recalculates the company's margin using a comparison methodology other than average-to-average. *See* Pl.'s Mem. 3. Because Commerce employed the average-to-average method, Plaintiff's challenge is premature, and the court will decline to address it at this time.

Uttam Galva's duty drawback adjustment using a methodology that is consistent with this opinion. Accordingly, it is

ORDERED that Uttam Galva's Rule 56.2 Motion for Judgment on the Agency Record is granted in part; and it is further

ORDERED that the *Final Results* are remanded to the U.S. Department of Commerce for further proceedings; and it is further

ORDERED that the U.S. Department of Commerce shall file the remand redetermination ninety days from the date of this opinion; and it is further

ORDERED that USCIT Rule 56.2(h) shall govern thereafter.

Dated: April 18, 2018
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 18–45

VULCAN THREADED PRODUCTS INC., Plaintiff, v. UNITED STATES, Defendant, and JIAXING BROTHER FASTENER CO., LTD., IFI & MORGAN LTD., RMB FASTENERS LTD., and ZHEIJANG NEW ORIENTAL FASTENERS CO., LTD., Defendant-Intervenors.

Before: Judge Gary S. Katzmann
Court No. 16–00268

[Plaintiff's Motion for Judgment on the Agency Record in Commerce antidumping administrative review proceeding is denied.]

Dated: April 18, 2018

Elizabeth Drake, Schagrin Associates, of Washington, DC, argued for plaintiff. With her on the brief were *Robert B. Schagrin* and *Christopher T. Cloutier*.

L. Misha Preheim, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, and *Elizabeth Anne Speck*, Senior Trial Counsel. Of counsel on the brief was *Khalil N. Gharbieh*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Gregory S. Menegaz, DeKieffer & Horgan, PLLC, of Washington, DC, argued for defendant-intervenors, Jiaxing Brother Fastener Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd. With him on the brief were *J. Kevin Hogan* and *Alexandra H. Salzman*.

Peter J. Koenig, Squire Patton Boggs LLP, of Washington, DC, for defendant-intervenor, Zhejiang New Oriental Fasteners Co., Ltd.

OPINION

Katzmann, Judge:

What are the limits of agency discretion when evaluating which information to use from an imperfect swirl of economic data? More

specifically, did the Department of Commerce ("Commerce") choose the "best available information" in this case to calculate what it effectively cost to produce steel threaded rod in China in order to determine whether Chinese manufacturers are "dumping" their products in the United States at below market prices?

Plaintiff Vulcan Threaded Products, Inc. ("Vulcan") alleges that Commerce chose wrongly, and challenges Commerce's determination that the Bulgarian data was the "best available information" to use in the final results and amended final results of the 2014–15 administrative review of the antidumping duty order on certain steel threaded rod from China. *See Steel Threaded Rod from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014–15*, 81 Fed. Reg. 83,800 (Dep't Commerce Nov. 22, 2016) ("*Final Results*"), and accompanying Issues and Decision Memorandum ("*IDM*"), P.R. 179, amended by *Steel Threaded Rod from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2014–15*, 82 Fed. Reg. 1698 (Dep't Commerce Jan. 6, 2017). Vulcan argues that a number of legal and factual determinations in the *Final Results*, in which Commerce selected Bulgaria as the surrogate country for the calculation of the normal value, are unsupported by substantial evidence on the record pursuant to Section 516A(b)(1)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(A).[1] Compl., Jan. 17, 2017, ECF No. 8; Pl.'s Mot. For J. on the Agency R. and Br. in Supp., July 19, 2017, ECF No. 36 ("Pl.'s Br."); Pl.'s Reply, Nov. 6, 2017, ECF No. 44. Vulcan thus seeks remand. Compl. at 1. Defendant the United States ("the Government") and defendant-intervenors RMB Fasteners Ltd., IFI & Morgan Ltd., and Jiaxing Brother Standard Part Co., Ltd. ("RMB/IFI Group") oppose Vulcan's motion. Def.'s Opp'n, Sept. 18, 2017, ECF No. 39 ("Def.'s Br."); Def.-Inter.'s Opp'n, Oct. 10, 2017, ECF No. 43 ("Def.-Inter.'s Br.").

The court concludes that Commerce's decision to use the Bulgarian data was reasonable and supported by substantial evidence on the record, and thus sustains the *Final Results*.

BACKGROUND

A. *Legal and Regulatory Framework of Antidumping Reviews Generally.*

Dumping occurs when a foreign company sells a product in the United States for less than fair value — that is, for a lower price than

[1] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition.

in its home market. *Huzhou Muyun Wood Co., Ltd. v. United States*, 42 CIT ___, ___, 279 F. Supp. 3d 1215, 1218 (2017) (citing *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012)). To empower Commerce to offset economic distortions caused by dumping, Congress enacted the Tariff Act of 1930. *Id.* Under the Tariff Act's framework, Commerce may — either at the request of a domestic producer or of its own initiative — begin an investigation into potential dumping and, if appropriate, issue an antidumping order imposing duties on the subject merchandise. *Id.*

When Commerce conducts an antidumping review, it first determines the normal value for the subject merchandise in order to compare it to the actual export price. 19 U.S.C. § 1677b(a) (2012). Commerce traditionally determines normal value by reference to market prices in the exporting country. *Id.* § 1677b(a)(1). However, when the subject merchandise is produced in a non-market economy, Commerce must "determine the normal value of the subject merchandise on the basis of the value of the factors of production [("FOPs")] utilized in producing the merchandise." *Id.* § 1677b(c)(1). Commerce is required to value FOPs, to the extent possible, by identifying one or more market economy countries that are (A) "at a level of economic development comparable to that of the nonmarket country" and (B) "significant producers of comparable merchandise." *Id.* § 1677b(c)(4)(A–B); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372 (Fed. Cir. 2010). Commerce prefers to draw FOP data from a single surrogate country when possible. 19 C.F.R. § 351.508(c)(2). If several potential surrogates are available, Commerce evaluates the reliability and completeness of the data in the similarly-situated surrogate countries and generally selects the one with the best data as the primary surrogate country. *Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d 1289, 1294 (Fed. Cir. 2016).

Although Commerce is required to value FOPs using the "best available information," Commerce has discretion to determine what constitutes the best available information. *Id.* at 1293. In evaluating the reliability and completeness of the data, Commerce's practice is to "use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data." Import Admin., U.S. Dep't Commerce, Non–Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (2004), https://enforcement.trade.gov/policy/bull04–1.html (last visited Feb. 6, 2018). This evaluation is a context-specific, industry-specific, and fact-intensive inquiry; as such, "Commerce is required to base surrogate country selection on the

facts presented in each case, and not on grounds of perceived tradition. Each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." *Jiaxing*, 822 F.3d at 1299 (internal quotation marks omitted).

B. ***Factual and Procedural History of this Case.***

In 2009, Commerce issued an antidumping order covering certain steel threaded rod from China. *Certain Steel Threaded Rod from the People's Republic of China*, 74 Fed. Reg. 17,154 (Dep't Commerce Apr. 14, 2009). Steel threaded rod is made by taking steel rod, bar, or studs that have a solid, circular cross section and applying threaded grooves around the outside. *IDM* at 1. In April of 2014, Vulcan requested that Commerce conduct an administrative review of the antidumping order. Letter from Vorys, Sater, Seymour and Pease LLP to U.S. Department of Commerce (Apr. 30, 2015), P.R. 3. In May 2015, Commerce initiated the administrative review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 30,041, 30,046–47 (Dep't Commerce May 26, 2015). Commerce selected Zhejiang New Oriental Fastener Co., Ltd. ("New Oriental") and RMB/IFI Group as mandatory respondents. *Certain Steel Threaded Rod from the People's Republic of China*, 81 Fed. Reg. 29,843 (Dep't Commerce May 13, 2016) ("*Preliminary Results*"), and accompanying Preliminary Decision Memorandum ("*PDM*"), P.R. 155.

Because this review concerned exports from China, a country that Commerce treats as a non-market economy, Commerce sought a surrogate market economy in which to value the factors of production for steel threaded rod. *PDM* at 6. Commerce determined that Bulgaria, Ecuador, Mexico, Romania, South Africa, and Thailand were countries at China's level of economic development based upon their per capita gross national income, as reported by the World Bank. 81 Fed. Reg. 29,843; *PDM* at 6–7. Vulcan submitted surrogate value information from Thailand, while both RMB/IFI and New Oriental submitted surrogate value data from Bulgaria. *PDM* at 6–7; Letter from Vorys, Sater, Seymour and Pease LLP to U.S. Department of Commerce (Dec. 7, 2015), P.R. 81–85; Letter from deKieffer & Horgan, PLCC to U.S. Department of Commerce (Dec. 7, 2015), P.R. 88–89; Letter from Squire Patton Boggs to U.S. Department of Commerce (Dec. 7, 2015), P.R. 86–87.

After evaluating the data submitted by the parties, Commerce preliminarily determined that Bulgaria provided the best available information for surrogate valuation purposes. *PDM* at 9. Commerce explained that steel inputs were of "overwhelming importance" in the

calculation of the normal value. *Id.* Therefore, because (1) the Bulgarian data for steel wire rod covered the full range of diameters used by the parties, (2) the parties used significantly more wire rod than round bar, and (3) the carbon content was functionally equivalent between the two datasets, the Bulgarian data were the closest match to the parties' FOPs. *PDM* at 8–9.

In June 2016, Vulcan submitted an administrative case brief arguing that Commerce should use Thailand instead of Bulgaria as the surrogate market economy for China in the final results. Case Brief of Petitioner Vulcan Threaded Products, Inc., appended to Letter from Vorys, Sater, Seymour and Pease LLP to U.S. Department of Commerce (June 20, 2016), P.R. 164. Commerce selected Bulgaria as the surrogate market economy in the *Final Results* issued in November 2016, and Vulcan challenged this determination the following month. *IDM* at 8; Summons, Dec. 21, 2016, ECF No. 1; Compl. This court authorized the participation of RMB/IFI as defendant-intervenors. Order, Feb. 22, 2017, ECF No. 22.

On July 19, 2017, Vulcan submitted its Motion for Judgment on the Agency Record and Brief in Support. Pl.'s Br. The Government and defendant-intervenors submitted their briefs in opposition on September 18, 2017 and October 10, 2017, respectively. Def.'s Br.; Def.-Inter.'s Br. Vulcan replied on November 6, 2017. Pl's Reply. Oral arguments were heard by this court on February 8, 2018. ECF No. 51. Vulcan and defendant-intervenors filed supplemental authority on February 13, 2018. ECF No. 52; ECF No. 53.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). When reviewing antidumping and countervailing duty determinations, the court must sustain Commerce's determinations in administrative reviews unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Based on the record as a whole, the court is not persuaded that Vulcan's disagreements with how Commerce evaluated the data in this case render Commerce's decision unsupported by substantial evidence.

A. *Commerce's Finding that Bulgarian Data Was More Specific with Regard to Diameter Was Reasonable and Supported by Substantial Evidence on the Record.*

Vulcan contends that it provided, and Commerce ignored, evidence that no reasonable person would find the Bulgarian information superior on the basis of the steel wire rod diameter data. Pl.'s Br. at 9–10. Commerce selected the Bulgarian data, in part, because they were more specific with regard to diameter for steel wire rod. Specifically, the Bulgarian Harmonized Tariff Schedule ("HTS") had a separate breakout for wire rod between 14 and 32mm, whereas the Thai HTS only covered the lower range of steel wire rod diameters. *IDM* at 8. Vulcan, however, argues that the "paucity" of imports of steel wire rod with diameters of 14mm and greater to Bulgaria invalidates Commerce's rationale for selecting the Bulgarian data.[2] According to the HTS, the Bulgarian data were based on 1,147 tons of wire rod with a diameter of 14mm or greater in 2014 and 160 tons in 2015. Letter from Squire Patton Boggs to U.S. Department of Commerce (Dec. 7, 2015), P.R. 86–87, at Exhibit SV-4b ("Bulgaria GTA Values").

Vulcan's interpretation of the diameter data does not render Commerce's decision on this issue unsupported by substantial evidence. Substantial evidence is "more than a mere scintilla" and amounts to what a "reasonable mind might accept as adequate to support a conclusion." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1374 (Fed. Cir. 2015) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). Review is limited to the record before Commerce in the particular administrative review proceeding at issue and includes all "evidence that supports and detracts" from Commerce's conclusion. *Sango Int'l L.P. v. United States*, 567 F.3d 1356, 1362 (Fed. Cir. 2009). Importantly, an agency finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence. *Downhole*, 776 F.3d at 1374 (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

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[2] Vulcan also contends that carbon content is more important than wire rod diameter, and thus Commerce's decision to use the Bulgarian data on the basis of wire rod diameter specificity was not supported by substantial evidence. *See* Vulcan's Suppl. Authority at 2–3. Vulcan relies, in part, on a recent decision of this court upholding Commerce's determination, following remand, that carbon content was a more important factor than diameter in evaluating the specificity of wire rod data, *Itochu Bldg. Prods. Co. v. United States*, 43 CIT ___, Slip op. 18–3 (January 18, 2018) (Not reported in F. Supp. 3d). However, that case is distinguishable, as it involved a different kind of subject merchandise with different production input experiences and a different record before Commerce, and thus its holding is not determinative of the instant case. *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006). Moreover, Commerce determined that the two data sets in question here were "roughly equal" in terms of carbon content — a determination made with substantial support in the record, as discussed *infra* — and thus the relative importance of wire rod diameter and carbon content have no bearing on the outcome of this case.

In evaluating Commerce's selection of the best available surrogate value under the substantial evidence standard, "[t]he Court's role is not to make that determination anew, but rather to decide 'whether a reasonable mind could conclude that Commerce chose the best available information.'" *China First Pencil Co. v. United States*, 34 CIT 1284, 1290, 721 F. Supp. 2d 1369 (2010) (quoting *QVD Food Co. v. United States*, 34 CIT 1166, 1169, 721 F. Supp. 2d 1311 (2010), *aff'd*, 658 F.3d 1318 (Fed. Cir. 2011)). Further, because the governing statute fails to define "best available information," Commerce has "broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006) (quoting *Timken Co. v. United States*, 25 CIT 939, 944, 166 F. Supp. 2d 608, 616 (2001)).

Here, Commerce's decision to use the Bulgarian data was supported by substantial evidence. Commerce noted that "both respondents consumed significantly more wire rod than round bar," and that it therefore chose to prioritize the quality of wire rod data when choosing whether to use the Thai or Bulgarian information. *IDM* at 6–8. The Bulgarian set contained some data for wire rod with diameters of 14mm or larger, while the Thai set contained no information pertaining to wire rod with this diameter. Vulcan contends that the sample size for the Bulgarian wire rod above 14mm in diameter is too small, but does not contend that this wire rod was not sold at market-based prices or that the inclusion of this data is otherwise distortive. Further, the record does not support a conclusion that this wire rod data undermined the accuracy of Commerce's calculations. For these reasons, Commerce's decision to use the Bulgarian dataset that included better coverage of larger diameter inputs was reasonable and supported by substantial evidence.

Vulcan's contention that "Commerce improperly failed to 'take into account whatever in the record fairly detracts from its weight'" is also unavailing. Pl.'s Br. at 11 (citing *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)). Vulcan is correct that Commerce did not specifically respond to Vulcan's concern regarding volume in the text of the *IDM*. However, "Courts look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion. An explicit explanation is not necessary, however, where the agency's decisional path is reasonably discernible." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (internal citations removed) (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)). Here, Commerce pro-

vided substantial explanations in the *IDM* for weighing the data as it has. The agency's decisional path is reasonably discernable and, as discussed above, supported by substantial evidence on the record.

B. *Commerce's Finding that Bulgarian and Thai Data Were Roughly Equivalent with Respect to Carbon Content Was Reasonable and Supported by Substantial Evidence on the Record.*

Vulcan argues that the data contained in the Bulgarian HTS for steel wire rod between 14 and 32 mm was based on such a small sample so as to be meaningless, and thus the "clear superiority of Thai wire rod data in terms of carbon content" warrants the selection of Thailand rather than Bulgaria as the surrogate. Pl.'s Br. at 12. Vulcan asserts that the Thai data are superior because they are more specific with regard to the covered range. Or. Arg. Vulcan notes that the Bulgarian data include steel wire rod with a carbon content of less than 0.25 percent whereas the Thai data only includes steel wire rod with a carbon content of 0.23 percent or less. Pl.'s Br. at 12; Letter from Vorys, Sater, Seymour and Pease to U.S. Department of Commerce (Dec. 7, 2015), P.R. 81–85, at Exhibit 1 ("Thailand Surrogate Value Summary"); Bulgaria GTA. That is, the Bulgarian data include steel wire rod with a carbon content of 0.24 percent, equating to one one-hundredth of a percent more coverage than the Thai data. Pl.'s Br. at 12; Thailand Surrogate Value Summary; Bulgaria GTA. However, Vulcan points to nothing in the record that would indicate that the inclusion of steel imports with a carbon content of 0.24 percent would affect the accuracy of Commerce's calculations. Therefore, Commerce's decision that the Bulgarian and Thai were "roughly equal" was reasonable and supported by substantial evidence in the record of this case. *IDM* at 7; Def.-Inter.'s Br. at 4.

In its brief, Vulcan additionally notes that "the Bulgarian HTS identifies carbon content of imported wire rod based only on three ranges [...]. By contrast, the Thai HTS identifies twice as many different carbon content levels for imported wire rod." Pl.'s Br. at 12. Vulcan contends that "Commerce cannot reasonably equate the six distinct carbon content ranges in the Thai HTS with the three in the Bulgarian HTS, for reasons recently articulated by this Court." Pl.'s Br. at 15 (citing *Itochu Bldg. Prods. Co. v. United States*, 42 CIT ___, Slip op. 17–66 (June 5, 2017)). Thus, according to Vulcan, the greater specificity of the Thai HTS with respect to carbon content renders the Thai data superior with respect to carbon content. Pl.'s Br. at 15.

At Oral Argument, Vulcan acknowledged that the greater specificity with regard to the HTS breakouts was effectively meaningless. Or. Arg. Indeed, the court also finds this specificity argument unpersua-

sive. Neither mandatory respondent specified the carbon content of inputs below certain percentages, and so further categorization below that threshold in the Thai data could reasonably be viewed as irrelevant to Commerce's calculations. *See IDM* at 7. Further, Commerce averaged the data contained within the more specific breakouts to make a single wire rod surrogate value, essentially neutralizing any potential effect of the more specific categories. *See* Surrogate Values for the Preliminary Results, P.R. 157, (May 5, 2016), at 3; Surrogate Values for the Final Results, P.R. 182, (Nov. 14, 2016), at 1 (indicating that Commerce used the same surrogate value data as the *Preliminary Results* unless otherwise stated). Therefore, Commerce's determination that the Thai and Bulgarian data were equally specific for purposes of its calculations in this case was supported by substantial evidence.

C. *Commerce's Decision to Give Greater Weight to Steel Wire Rod Was Reasonable and Supported by Substantial Evidence on the Record.*

Vulcan contends that although the Bulgarian HTS has more specific entries as to diameter of steel wire rod, the Thai HTS has more specific entries as to the diameter of round bar. Pl.'s Br. at 15. Specifically, "the Thai HTS has four times as many codes, covering round bar to a much greater specificity [than the Bulgarian HTS]." Pl.'s Br. at 15; Thailand Surrogate Value Summary; Bulgaria GTA. While Commerce supported its decision by stating that the respondents consumed more wire rod than round bar, Vulcan argues that "the different FOP consumption amounts between wire rod and round bar should not allow Commerce to select Bulgaria based on a FOP-specific justification that is completely contradicted for the other FOP." Pl.'s Br. at 16.

However, Commerce is allowed to prioritize FOPs that have a greater impact on production costs, and the surveyed manufacturers reported using significantly more wire rod than round bar. *Jiaxing*, 822 F.3d at 1301 (holding that "Commerce's decision to emphasize the steel input was reasonable and supported by substantial evidence" because "steel is the main input and primary driver of cost for steel threaded rod"); *IDM* at 8. Vulcan does not dispute that more wire rod than round bar was consumed. While the Thai data for round bar with diameters of 14mm and greater is more specific than the Bulgarian, the Bulgarian data for wire rod with diameters of 14mm and greater is more specific than the Thai. *IDM* at 7–8. Thus, in light of the greater consumption of wire rod in the production of the subject merchandise, Commerce's decision to use the Bulgarian data was supported by substantial evidence.

D. ***Commerce Is Not Bound by Its Prior Findings that Thai Data Were Superior in Different Circumstances.***

Finally, Vulcan notes that Commerce had selected Thai data in previous administrative reviews. Pl.'s Br. at 6. Vulcan also seems to imply that the fact that Commerce is currently defending the selection of Thailand as the surrogate market economy for China in other cases before this court is evidence of the superiority of the Thai data. Pl.'s Br. at 7. Therefore, Vulcan intimates, the selection of Thai data is supported by substantial evidence while the use of Bulgarian data is not. However, as the Federal Circuit stated, "Commerce is required to base surrogate country selection on the facts presented in each case, and not on grounds of perceived tradition. Each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." *Jiaxing*, 822 F.3d at 1299 (internal quotation marks omitted); *see also Goldlink* , 431 F. Supp. 2d at 1327 (quoting *Timken Co.*, 166 F. Supp. 2d at 616) (declaring that, Commerce has "broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis"). For the reasons previously discussed, Commerce's decision to use the Bulgarian data was supported by substantial evidence on the record and thus Commerce permissibly selected Bulgaria as the surrogate country in this administrative review.

CONCLUSION

For the reasons stated above, Commerce's use of the Bulgarian data in this administrative review was supported by substantial evidence. For the foregoing reasons, it is hereby

ORDERED that Vulcan's Motion for Judgment on the Agency Record is **DENIED**; and it is further

ORDERED that Commerce's *Final Results* are **SUSTAINED**.

Dated: April 18, 2018
New York, New York

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