U.S. Court of International Trade

Slip Op. 18–111

SHANGHAI SUNBEAUTY TRADING CO., LTD., Plaintiff, UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION, et al., Defendant-Intervenors.

Court No. 17–00089
Before: Richard K. Eaton, Judge
PUBLIC VERSION

[United States Department of Commerce's final rescission determination is sustained.]

Dated: September 6, 2018

Fei He, Law Offices of He & Associates, P.C., of Irvine, CA, argued for plaintiff.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *Nanda Srikantaiah*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Michael J. Coursey, Kelley Drye & Warren LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief were *R. Alan Luberda* and *Joshua R. Morey*.

OPINION

Eaton, Judge:

Before the court is the motion for judgment on the agency record of plaintiff Shanghai Sunbeauty Trading Co., Ltd. ("plaintiff" or "Sunbeauty"), an exporter of honey from the People's Republic of China. *See* Pl.'s Br. Supp. Mot. J. Agency R., ECF No. 27 ("Pl.'s Br."); *see also* Pl.'s Reply Br. Supp. Mot. J. Agency R., ECF No. 36 ("Pl.'s Reply Br."). By its motion, Sunbeauty challenges the United States Department of Commerce's (the "Department" or "Commerce") rescission of the new shipper review of its honey sales to the United States during the period of review of December 1, 2014, to November 30, 2015 ("POR"). *See Honey From the People's Rep. of China*, 82 Fed. Reg. 15,697 (Dep't Commerce Mar. 30, 2017) (final rescission of the new shipper rev.), and accompanying Issues and Dec. Mem., P.R. 150, bar code 3554991–01, ECF No. 38 at tab 2 ("Final I&D Memo") (collectively, "Final Rescission Determination").[1] Plaintiff contests the Depart-

[1] Though the Final Rescission Determination is on the public record ("P.R."), Commerce's *bona fides* analysis is contained primarily in two confidential memoranda, the Bona Fides

ment's determination that Sunbeauty's sales to its U.S. importer were not *bona fide*.[2] Sunbeauty therefore asks the court to remand this matter to Commerce with instructions to calculate a dumping margin for its products. *See* Pl.'s Mot. J. Agency R., ECF No. 26.

The defendant United States ("defendant" or the "Government"), on behalf of Commerce, and defendant-intervenors American Honey Producers Association and Sioux Honey Association, urge the court to sustain the Final Rescission Determination as supported by substantial evidence and otherwise in accordance with law. *See* Def.'s Resp. Pl.'s Mot. J. Agency R., ECF No. 32 ("Def.'s Br."); *see also* Def.-Ints.' Opp'n Pl.'s Mot. J. Agency R., ECF No. 34 ("Def.-Ints.' Br.").

The court has jurisdiction under 28 U.S.C. § 1581(c) (2012), and, for the following reasons, sustains Commerce's Final Rescission Determination.

BACKGROUND

Imports of honey from China have been subject to an antidumping duty order since 2001. *See Honey From the People's Rep. of China*, 66 Fed. Reg. 63,670, 63,671 (Dep't Commerce Dec. 10, 2001). On December 17, 2015, Sunbeauty asked Commerce to conduct a new shipper review of its honey sales during the POR. *See* Letter to the Sec'y from Sunbeauty (Dec. 17, 2015), C.R. 1, ECF No. 38 at tab 12. Through this review, Sunbeauty sought an individual dumping margin.

On January 27, 2016, Commerce initiated the new shipper review and thereafter requested sales and other information from Sunbeauty and its U.S. importer[3] by way of questionnaires. *See Honey From the People's Rep. of China*, 81 Fed. Reg. 5710 (Dep't Commerce Feb. 3, 2016); *see also* Bona Fides Analysis of Honey from the People's Rep. of China for Sunbeauty (Nov. 30, 2016), C.R. 67, ECF No. 38 at tab 6 ("*Bona Fides* Memo") at 2.

In its questionnaire responses, Sunbeauty reported that it sold honey to its importer during the POR, and that each sale was for the same amount and the same price.[4] Moreover, each sale consisted of

Analysis Memorandum and the Business Proprietary Information Memorandum. *See* Bona Fides Analysis of Honey from the People's Rep. of China for Sunbeauty (Nov. 30, 2016), C.R. 67, ECF No. 38 at tab 6 ("*Bona Fides* Memo"); Business Proprietary Information Mem. for Sunbeauty (Mar. 24, 2017), C.R. 73, ECF No. 38 at tab 3. Where the court refers to information from the confidential record ("C.R."), it appears in double brackets.

[2] Sunbeauty made [[ ]] sales of [[ ]] honey during the POR. It is with respect to these sales that Commerce made its *bona fides* determination. *See Bona Fides* Memo at 2, 6.

[3] Sunbeauty's unaffiliated U.S. importer was [[ ]]. *See Bona Fides* Memo at 2.

[4] Each sale was for an amount of [[ ]] kilograms at the price of [[ ]]. *See Bona Fides* Memo at 2.

the same number (272) of two-liter bottles of honey. *See Bona Fides* Memo at 4. According to an online conversion tool, a two-liter bottle of honey would contain in excess of six pounds of honey.[5] Sunbeauty's importer entered the honey under a Harmonized Tariff Schedule of the United States ("HTSUS") subheading that covered honey bound for the wholesale market.[6]

In its *Bona Fides* Memo, the Department considered the factors set out in 19 U.S.C. § 1675(a)(2)(B)(iv)[7] to determine whether Sunbeauty's POR sales were *bona fide*. That is, Commerce sought to determine whether the sales were commercially reasonable or typical of normal business practices and would be representative of the company's sales should it receive a separate rate. *See Bona Fides* Memo at 5; Final I&D Memo at 5. In evaluating the statutory factors, Commerce determined, among other things, that the sales price, quantities, and certain expenses arising from the sales, together with Sunbeauty's failure to provide certain requested documentation, and its admission of negligence in preparing certain record documents, weighed in favor of finding that the sales were not *bona fide*.[8] *See* Final I&D Memo at 6–12.

As to sales price, Commerce compared the average unit value for Sunbeauty's entries to (1) the average unit value for imports under the HTSUS subheading that Commerce found most specifically described Sunbeauty's honey,[9] and (2) the weighted-average unit value for all of the entries made under the appropriate broader HTSUS subheading, *i.e.*, 0409, during the POR.[10] *See Bona Fides* Memo at 6. In like manner, with respect to quantity, the Department compared

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[5] *See* Online Food Calculator, https://www.aqua-calc.com/calculate/food-weight-to-volume (last visited Aug. 31, 2018).

[6] Plaintiff's honey was entered under HTSUS subheading [[ ]], which covers [[ ]]. *See Bona Fides* Memo at 2 (emphasis added).

[7] These factors are: "the prices of such sales"; "whether such sales were made in commercial quantities"; "the timing of such sales"; "the expenses arising from such sales"; "whether the subject merchandise involved in such sales was resold in the United States at a profit"; "whether such sales were made on an arms-length basis"; and "any other factor [Commerce] determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review." 19 U.S.C. § 1675(a)(2)(B)(iv)(I)-(VII) (Supp. IV 2016).

[8] Commerce concluded that the other statutory factors under § 1675(a)(2)(B)(iv), *i.e.*, the timing of the sales, profit on resale, and the arms-length nature of the transactions, did not weigh against a finding that the sales subject to the new shipper review were *bona fide*. *See Bona Fides* Memo at 8–9. Commerce's findings with respect to these factors are not in dispute.

[9] Commerce found that HTSUS subheading [[ ]] most specifically described Sunbeauty's honey. *See Bona Fides* Memo at 5.

[10] Each of the [[ ]] entries made under the subheadings of HTSUS 0409 is identified in the record as a "Type 03" or "Type 07" entry, which is a designation that means the "[m]erchandise [was] subject to an antidumping or countervailing duty order . . . ." *Bona*

the quantity of Sunbeauty's entries to the amount of honey (in kilograms) entered during the POR under (1) the HTSUS subheading that Commerce found most specifically described Sunbeauty's honey, and (2) HTSUS subheading 0409. The price and quantity figures Commerce used for purposes of making these comparisons are derived from proprietary U.S. Customs and Border Protection ("Customs") data.[11] Based on these comparisons, the Department found "the *price* of Sunbeauty's sales to be *unusually high* and the *quantity* to be *unusually low*, indicating the sales under review are non-*bona fide*." Final I&D Memo at 9 (emphasis added).

For expenses, Commerce considered a "lump sum fee" that Sunbeauty reported paying to its logistics vendor.[12] *See* Sunbeauty's Resp. Suppl. Sec. A Quest. (June 7, 2016) at 11, C.R. 35, ECF No. 38 at tab 21. When asked to "provide a more complete and detailed description of this expense," Sunbeauty responded that it "mainly refer[red] to the charge for the service provided for export customs declaration," and that the "'Lump Sum Fee' is based on the service provided." Sunbeauty's Resp. Suppl. Sec. A, C Quest. (July 21, 2016) at 3, C.R. 38–42, ECF No. 38 at tab 16. When Commerce then asked that Sunbeauty "[d]etail all of the services" the vendor provided for the lump sum fee, Sunbeauty reported that, according to its vendor, the lump sum "include[d] customs clearance fee and drayage fee." Sunbeauty's Resp. Suppl. Sec. A, C & D Quest. (Sept. 1, 2016) at 3, C.R. 54–57, ECF No. 38 at tab 15. Commerce found that Sunbeauty's responses were inconsistent and failed to identify the service(s) covered by the lump sum. Commerce found, therefore, that "while not dispositive, these unexplained expenses arising from the transaction contribute to our finding that Sunbeauty's sales are non-*bona fide*." *Bona Fides* Memo at 8; Final I&D Memo at 10.

Fides Memo at 3–4; *see also* Memo to File, Customs Data of U.S. Imports of Honey (Nov. 30, 2016), C.R. 68, ECF No. 38 at tab 14 ("Customs Data Memo").

[11] The following table contains proprietary Customs data on honey imports from China during the POR found in Attachment I to the Customs Data Memo:
[[

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[12] "Sunbeauty reported that it contracted with [[

]] to handle the logistics and export procedures of its sales of subject merchandise to the United States." *Bona Fides* Memo at 7.

Additionally, Commerce found not dispositive, but considered, Sunbeauty's failure to provide certain requested documentation, and its admission that it had been "negligent" in preparing certain paperwork that Sunbeauty placed on the record. *See* Final I&D Memo at 12–13 ("Sunbeauty's self-described 'negligence when preparing' the invoices it later submitted to the Department raises concerns about Sunbeauty's submissions as a whole and also the *bona fides* of Sunbeauty's sales, because this significant discrepancy means that the importer and, ultimately, the final U.S. customer made purchasing decisions with respect to the sale of Sunbeauty's honey without complete and accurate information.").

Accordingly, the Department preliminarily determined that "based on the totality of the circumstances the sales subject to this [new shipper review] [were] non-*bona fide* pursuant to [19 U.S.C. § 1675(a)(2)(B)(iv)]." Dec. Mem. for the Prelim. Results of the Antidumping Duty New Shipper Rev. of Honey from the People's Rep. of China: Sunbeauty (Nov. 29, 2016), P.R. 134, bar code 3526385–01, ECF No. 38 at tab 5 ("Preliminary Decision Memo") at 1. Commerce concluded, therefore, that it could not "rely on these sales to calculate a dumping margin," and, further, "there [were] no sales on which [it could] base [its] review." Preliminary Decision Memo at 4. Consequently, the Department preliminarily rescinded the new shipper review.

On March 30, 2017, Commerce published its Final Rescission Determination, in which it continued to find that Sunbeauty's sales were not *bona fide*, and therefore, could not provide a basis on which to calculate a dumping margin for Sunbeauty. *See* 82 Fed. Reg. at 15,697. Accordingly, the Department rescinded the new shipper review. *See* Final I&D Memo at 1. This appeal followed.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2012).

LEGAL FRAMEWORK

Under the antidumping statute, an exporter or producer that did not export to the United States during the original period of investigation (and is not affiliated with an exporter or producer that did), *i.e.*, a "new shipper," may ask Commerce to review its U.S. sales of subject merchandise and calculate an individual weighted-average dumping margin applicable to the new shipper. *See* 19 U.S.C. § 1675(a)(2)(B)(i); *see Jinxiang Yuanxin Import & Export Co. v. United States*, 39 CIT __,

__, 71 F. Supp. 3d 1338, 1344 (2015); *Shandong Chenhe Int'l Trading Co. v. United States*, 34 CIT 1472, 1482, Slip Op. 10–129 at 20 (Nov. 22, 2010) ("The purpose of a new shipper review is to determine an individual antidumping margin for an importer that did not receive a separate rate under an antidumping duty order."). To calculate an accurate margin for a new shipper, "Commerce must examine sales data that is indicative of the respondent's normal business practices so as to judge its future commercial behavior." *Shandong Chenhe*, 34 CIT at 1482, Slip Op. 10–129 at 20 (citation omitted). If the evidence of the POR sales on the record is "not indicative of typical business practices, no accurate individual rate can be set." *Id*.

Commerce determines the new shipper's dumping margin by comparing the "normal value and export price (or constructed export price) of each entry of the subject merchandise" during the POR. 19 U.S.C. § 1675(a)(2)(A)(i); *see Tianjin Tiancheng Pharm. Co. v. United States*, 29 CIT 256, 259, 366 F. Supp. 2d 1246, 1249 (2005). When calculating export price, Commerce excludes U.S. sales that are not *bona fide*.[13] 19 U.S.C. § 1675(a)(2)(B)(iv) (providing that the new shipper's individual margin "shall be based solely on the bona fide United States sales of [the] exporter or producer, as the case may be, made during the period covered by the review."). Commerce determines whether the sales are *bona fide* based on several statutory factors. In particular, the statute directs that 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;

[13] The law's requirement that the U.S. sales must be *bona fide* was a response to concerns about the reported abuse of a previous rule that permitted an importer to post a bond, in lieu of a cash deposit, to secure payment of antidumping duties during the pendency of a new shipper review. This Court has summarized these concerns, as follows:

> For example, one method of abuse by exporters subject to high antidumping duty rates was to "enter into a scheme to structure a few sales to show little or no dumping" and obtain an expedited new shipper review. The atypical sales resulted in a zero or low antidumping duty rate. This allowed the importer to bring large quantities of the subject merchandise into the United States at "highly dumped . . . prices but with little or no cash deposit." By the time Commerce conducted an annual review of those subsequent sales and assigned the final duty rate, the importer could disappear or become nonresponsive, leaving Customs and Border Protection unable to collect the duties.

Haixing Jingmei Chem. Prod. Sales Co. v. United States, 41 CIT __, __, 277 F. Supp. 3d 1375, 1381 n.7 (2017) (quoting and citing H.R. Rep. No. 114–114, pt. 1, at 89 (2015)).

> (VI) whether such sales were made on an arms-length basis; and
>
> (VII) any other factor [Commerce] 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). These statutory factors codify Commerce's "totality of the circumstances" test. *See Haixing Jingmei Chem. Prod. Sales Co. v. United States*, 41 CIT __, __, 277 F. Supp. 3d 1375, 1382 (2017) (citing Trade Facilitation and Trade Enforcement Act of 2015, Pub. L No. 114–125, § 433, 130 Stat. 122 (2016)).

Commerce's regulations provide for rescission of a review where "there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise" during the POR. *See* 19 C.F.R. § 351.214(f)(2)(i) (2016). "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, if Commerce determines that none of a new shipper's U.S. sales during the POR were *bona fide*, it must end the review because "no data will remain on the export price side of Commerce's antidumping duty calculation." *Tianjin*, 29 CIT at 259, 366 F. Supp. 2d at 1249.

DISCUSSION

At the heart of this case is whether substantial evidence supports Commerce's determination that Sunbeauty's sales during the POR were not *bona fide*. For plaintiff, the record does not support: (1) Commerce's use of averages as a means to compare the price and quantity of Sunbeauty's sales to other POR entries of subject merchandise; (2) Commerce's decision to compare Sunbeauty's sales, which plaintiff argues were not bound for the wholesale market,[14] with POR entries under the HTSUS subheading that Commerce found most specifically described Sunbeauty's sales; (3) Commerce's finding that Sunbeauty's questionnaire responses were inconsistent and failed to explain a reported "lump sum fee"; and (4) Commerce's finding that certain deficiencies and discrepancies in Sunbeauty's questionnaire responses, and Sunbeauty's admission that it prepared

[14] Sunbeauty makes this argument even though its honey was entered under HTSUS subheading [[ ]], which covers [[ ]]. *Bona Fides* Memo at 2 (emphasis added). The HTSUS subheading that Commerce found most specifically described Sunbeauty's sales, [[ ]], covers [[ ]]. *Bona Fides* Memo at 4.

certain paperwork on the record negligently, supported its non-*bona fide* determination. As will be seen, however, none of Sunbeauty's arguments persuade the court that remand is required here.

I. Substantial Evidence Supports Commerce's Use of Averages as a Means to Compare the Price and Quantity of Sunbeauty's Sales to Those of Other POR Entries of Subject Merchandise

In the Final Rescission Determination, the Department found "the price of Sunbeauty's sales to be unusually high[15] and the quantity to be unusually low,[16] indicating the sales under review [were] non-*bona fide*." Final I&D Memo at 9. The Department arrived at its conclusion, as to price, by comparing the average unit value for Sunbeauty's entries to (1) the average unit value for imports under the HTSUS subheading that Commerce found most specifically described Sunbeauty's honey, and (2) the weighted-average unit value for imports under the appropriate broader HTSUS subheading, *i.e.*, 0409, during the POR. Similarly, with respect to quantity, the Department compared the average quantity of Sunbeauty's entries to (1) the average quantity of imports under the HTSUS subheading that Commerce found most specifically described Sunbeauty's honey, and (2) the average quantity of imports under HTSUS subheading 0409 during the POR. *See Bona Fides* Memo at 5–7.

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[15] [In particular, with respect to price, Commerce stated:

> [[ ]] of Sunbeauty's [[ ]] honey sales was for [[ ]], and the quantity for each was [[ ]] kilograms, resulting in a unit value of [[ ]] per kilogram. . . . The . . . [average unit value] . . . for entries under HTSUS [[ ]] is [[ ]], making Sunbeauty's [average unit value] [[ ]]. The [weighted-average unit value] for . . . entries of subject merchandise under subheading 0409 is [[ ]]. In comparison, the [average unit value] for Sunbeauty's sale(s) of subject merchandise is [[ ]].

Bona Fides Memo at 6. Based on these comparisons, Commerce found "the [average unit value] for Sunbeauty's sale(s) to be significantly [[ ]] in relation to the unit values of other POR entries from [China] of known subject merchandise." *Bona Fides* Memo at 6. It is worth noting that there was [[ ]].]

[16] [With respect to quantity, Commerce stated:

> Each of Sunbeauty's [[ ]] honey sales was for [[ ]] kilograms, or a total quantity of [[ ]] kilograms. . . . The average quantity for POR entries from [China] of entries under HTSUS [[ ]] is [[ ]] kilograms. In comparison, the average quantity of Sunbeauty's sales, [[ ]] kilograms, was [[ ]]. The average quantity for POR entries from [China] of entries under subheading 0409 subject to antidumping or countervailing duties is [[ ]] kilograms. In comparison, the average quantity of Sunbeauty's sales was [[ ]].

BPI Memo at 6–7. Based on these comparisons, Commerce found "the quantities of Sunbeauty's U.S. sales of [[ ]] honey to be [[ ]] in relation to the quantities of other POR entries under HTSUS [[ ]] and . . . subheading 0409 . . . ." BPI Memo at 7.]

Before Commerce, Sunbeauty argued that instead of comparing average prices and quantities, the Department should compare "the quantity and unit values of Sunbeauty's entries with the *range*[17] of quantity and unit values as found in [Customs] data of entries under HTSUS subheading 0409." Final I&D Memo at 2–3 (emphasis added). Sunbeauty maintained that, under the range method, the record evidence supported the conclusion that its sales were *bona fide* because its POR sales were not the highest in terms of price or lowest in terms of quantity, according to Customs data. *See* Final I&D Memo at 3. Thus, for Sunbeauty, using a range method to examine its sales, they would not be found aberrational in terms of sale price or volume. *See Hyundai Steel Co. v. United States*, 42 CIT __, __, Slip Op. 18–80 at 46 (June 28, 2018) ("A sale is aberrational when it deviates from the usual or normal way or may be regarded as atypical.") (citation omitted).

Commerce disagreed, however, that range was the appropriate method to use based on the record here.[18] For Commerce, while the price and quantity of Sunbeauty's sales may have fallen within the range of other POR entries, the presence of two aberrant entries[19] made by other sellers during the POR resulted in the range method being less useful in this case than comparing averages. *See* Customs Data Table *supra* note 11. Commerce stated that it "has previously looked at the range of entries when there is a *gradual curve* in pricing or where there were entries with similar quantities and prices, not merely where the quantity and price of the sales under review exist within the range of [Customs] data," and that "[n]o such pattern exists here." *See* Final I&D Memo at 8 (footnotes omitted; emphasis added). Accordingly, Commerce declined to use the range method.

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[17] [The range method has been found to be appropriate when a gradual curve in pricing exists. For example, in *Frozen Fish Fillets*, Commerce compared the price and quantity of a new shipper's sale to the averages of Customs data, and observed that a new shipper's price "[did] not appear to be an outlier when compared to other prices evidenced in the [Customs] data." *Certain Frozen Fish Fillets From the Socialist Rep. of Vietnam*, 74 Fed. Reg. 11,349 (Dep't Commerce Mar. 17, 2009), and accompanying Issues and Dec. Mem., Cmt. 8.]

[18] Commerce stated:

> The [Customs] data on the record for this new shipper review does not support a use of range as a means of comparison because it contains [[ ]] entries with values much [[ ]] and quantities much [[ ]] than those of the other entries. These [[ ]] preclude a useful comparison based on range because the range does not present a gradual curve in pricing, but instead these two [[ ]] entries represent a [[ ]] from the [[ ]] data such that they do not provide a meaningful reference point for our analysis.

BPI Memo at 2 (first citing Customs Data Memo and then citing *Certain Frozen Fish Fillets From the Socialist Rep. of Vietnam*, 74 Fed. Reg. at 11,349) (footnote omitted).

[19] The aberrant entries were [[

]].

Before the court, Sunbeauty argues that Commerce's use of the average method, instead of the range method, is unsupported by substantial evidence. To make this argument, Sunbeauty compares the average unit values and quantities calculated for Sunbeauty's POR entries to those for the entries in the Customs dataset, including the aberrant entries. Based on the results of this comparison, plaintiff concludes that "the average methodology cannot correctly determine whether *any* entries are *bona fide*." Pl.'s Br. 12 (emphasis added). Plaintiff contends this is so because the aberrant entries represent a "significant portion" of the Customs data.[20] Pl.'s Br. 14. Sunbeauty makes this argument even though the volume of the entries it claims make up a "significant portion" of the Customs data amount to less than one percent of the total volume of entries Commerce considered.[21]

Additionally, for Sunbeauty, the Customs dataset that yielded the average unit values and quantities was small, and therefore, unrepresentative of Sunbeauty's high price, low quantity entries during the POR. *See* Pl.'s Reply Br. 6 ("The risks or limitations of applying [an average] methodology . . . are [that] certain [high quantity] entries . . . may have more influence in a small [dataset] than other [low quantity] entries . . . . Thus, the average number *no long*[*er*] *represents the entire data group* but only the [high quantity] entries . . . .").

Rather than the average method, Sunbeauty contends that Commerce should have used the range method, insisting that it is the Department's "long standing practice[]" to do so. *See* Pl.'s Br. 16. To make its case, Sunbeauty points to previous administrative proceedings in which Commerce found that using the range method was appropriate—that is, where the record demonstrates a gradual curve in sales prices. *See* Pl.'s Br. 14–16 (citing various administrative decisions and confidential case-specific memoranda regarding Commerce's *bona fides* determinations); Pl.'s Reply Br. 14. Indeed, Sunbeauty contends that, contrary to Commerce's finding, a gradual

[20] Sunbeauty argues:

> By applying the [average] methodology and following Commerce's logic, [[ ]] of the [[ ]] entries . . . are found not *bona fide* while in fact they are. For instance, . . . entry [[ ]] . . . has a unit value [[ ]] than the weight[ed]-average . . . and its quantity is [ ]] than the average quantity. Similarly, . . . entry [[ ]] . . . has a unit value [[ ]] than the weighted-average and its quantity is [[ ]] than average. In other words, the average methodology cannot correctly determine whether any entries are *bona fide*. Thus, it is not a correct or appropriate approach to compare quantity and value in this case.

Pl.'s Br. 12–13; *see* Customs Data *supra* note 11.

[21] The total quantity of aberrant sales was [[ ]] kilograms, less than one percent of [[ ]] kilograms, the total volume of entries of merchandise entered under HTSUS subheading 0409. *See supra* note 11.

curve in pricing exists here. *See* Pl.'s Br. 13. That is, based on its calculations, Sunbeauty maintains that "there is a strong linear relationship between price and quantity because the regression coefficient is . . . very close to 1," and therefore that "[s]uch evidence suggests that . . . a gradual curve exists in pricing for the [Customs] data and guarantees a useful comparison based on range." Pl.'s Br. 13.

In response to plaintiff's arguments, the Government counters that whereas "Sunbeauty cites to no case, practice, or legal standard that would require Commerce not to rely upon an average comparison, or to evaluate the average comparisons of other entries," this Court has upheld the comparison of a new shipper's prices with the weighted-average unit value "where such a comparison is useful." Def.'s Br. 20 (citing *Jinxiang Chengda Imp. & Exp. Co. v. United States*, 37 CIT __, __, Slip Op. 13–40 at 9–10 (Mar. 25, 2013); *Zhengzhou Huachao Indus. Co. v. United States*, 37 CIT __, __, Slip Op. 13–61 at 18–19 (May 14, 2013)).

As for Sunbeauty's argument that "a gradual curve exists in pricing for the Customs data, such that a range comparison would be useful," the Government asserts that "[t]his is incorrect." Def.'s Br. 20. For the Government, Commerce correctly found that "the range does not represent a gradual curve in pricing, but instead . . . two [aberrant] entries represent a [[ ]] from the [[ ]] data such that they do not provide a meaningful reference point for [Commerce's] analysis." Def.'s Br. 21. In other words, Commerce insists that Sunbeauty's prices do not show a gradual curve but rather a sharp break from other prices during the POR.

Commerce's decision to analyze Sunbeauty's sales using average unit values and quantities is supported by substantial evidence on the record. The thrust of Sunbeauty's argument against the use of the average method is that when the Department compares the price and quantity of imports using averages, the high volume, low price entries overwhelm the low volume, high price entries. This observation is both true and demonstrative of the validity of Commerce's choice of method.

Neither party disputes that the decision to compare price and quantity data by means of the average method or the range method depends on the specific facts of each case. *See Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT 603, 611 n.5, 374 F. Supp. 2d 1333, 1340 n.5 (2005) ("[W]hile some *bona fides* issues may share commonalities across various Department cases, each one is company-specific and may vary with the facts surrounding each sale."

(internal quotation marks and citation omitted)). In past cases, the Department has used the range method where the record shows that a gradual curve in pricing exists. For example, in *Frozen Fish Fillets*, Commerce compared the price and quantity of a new shipper's sale to the averages of Customs data, and observed that the new shipper's price "[did] not appear to be an outlier when compared to other prices evidenced in the [Customs] data." *Certain Frozen Fish Fillets From the Socialist Rep. of Vietnam*, 74 Fed. Reg. at 11,349, and accompanying Issues and Decision Mem., Cmt. 8. There, Commerce noted "[s]pecifically, when all the entries are grouped by manufacturer, [the new shipper's] *price is not so different from the prices right below it*. In other words, the [Customs] data shows a gradual curve of prices, not a sharp curve separating [the new shipper's] price from the other prices from [Customs]." *Id*. (noting same with respect to quantity) (emphasis added). Unlike in *Frozen Fish Fillets*, here Commerce found that a gradual curve did not exist among the prices on the record.

Commerce is right. Indeed, even the most casual glance at the data used by Commerce reveals that the subject sales cited by Sunbeauty represent not a gradual curve but a cliff.[22] That is, the volume of the sales is so tiny and their price so high, that they are clearly the kind of outliers not found in *Frozen Fish Fillets*. *See* Business Proprietary Information Mem. for Sunbeauty (Mar. 27, 2017), C.R. 73, ECF No. 38 at tab 3 ("BPI Memo") at 6–7.

Moreover, using the average method as a means of comparison was reasonable based on the record. This Court has sustained Commerce's use of average unit values derived from Customs data as a "useful tool for comparison because it provides a fair representation of prices set by the market." *Jinxiang Chengda*, 37 CIT at __, Slip Op. 13–40 at 9; *see also U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1363 (Fed. Cir. 1996) ("Computing an average . . . permits compression of large quantities of data into a single representative figure capable of easy comprehension and assimilation."). Here, Commerce compared the average unit value for Sunbeauty's entries, [[ ]], to the average unit value for imports under the HTSUS subheading that Commerce found most specifically described Sunbeauty's honey, [[ ]], as well as to the weighted-average unit value for imports under the appropriate broader HTSUS subheading, *i.e.*, 0409, [[ ]], and concluded that the price of Sunbeauty's

[22] Commerce reasonably found that the average unit values on the record show a [[ ]] between the average unit value of the aberrant entries, [[ ]], and the [[ ]] average unit value [[ ]]. *See* BPI Memo at 2.

POR sales was unusually high. The Department performed the same procedure using the quantity of honey imports and found that Sunbeauty's import quantity was unusually low. *See* Final I&D Memo at 9.

By weight-averaging the value and quantity of the entries under the broader HTSUS 0409 subheading, including the aberrant entries, Commerce could see the differences in value and quantity among the entries in the Customs dataset, thereby providing a fair representation of prices and quantities normally present in the market. Sunbeauty complains that weight-averaging causes the high volume, low price sales to overwhelm the low volume, high price sales; and so they do. Where, as here, the low volume, high price sales are so clearly "outliers," *see* Issues and Dec. Mem., Cmt. 8, accompanying *Certain Frozen Fish Fillets From the Socialist Rep. of Vietnam*, 74 Fed. Reg. at 11,349, weight-averaging serves to provide a valid point of comparison for judging if the price of Sunbeauty's entries was "typical of those" it will charge "after the completion of the review," 19 U.S.C. § 1675(a)(2)(B)(iv)(VII), "because [weight-averaging] provides a fair representation of prices set by the market." *Jinxiang Chengda*, 37 CIT at __, Slip Op. 13–40 at 9.

Using the entries of small quantities with high prices as a part of a range would serve to distort the results by giving them more significance than they warrant. Using an average, on the other hand, results in the significance of the entries being reduced. This reduction is what plaintiff objects to, but it places these entries in their proper perspective.

Based on the record here, Commerce's use of averages as a means of comparing the price and quantity of Sunbeauty's imports is sustained.

II. Substantial Evidence Supports Commerce's Comparison of Sunbeauty's Sales to Honey Entered Under the HTSUS Subheading Selected by Commerce

Sunbeauty objects to the HTSUS subheading used by Commerce, in part, to find comparable entries of honey during the POR for purposes of analyzing price and quantity.[23] Sunbeauty argues that Commerce should not have used a subheading for honey that would enter the wholesale market. Plaintiff makes this argument even though it entered its honey under a subheading for honey to be sold at wholesale. As has been noted, in reaching its price and quantity findings, Commerce compared Sunbeauty's entries with Customs data for (1)

[23] Commerce used HTSUS subheading [[ ]] in its price and quantity comparisons. *Bona Fides* Memo at 4.

imports under the HTSUS subheading that Commerce found most specifically described Sunbeauty's honey, and (2) all of the entries using the subheadings found under HTSUS subheading 0409 that were made during the POR.

In the Final Rescission Determination, Commerce compared the average unit values and average quantities of Sunbeauty's sales with Customs data for entries under the HTSUS subheading that it found most specifically described Sunbeauty's honey based on the record. *Bona Fides* Memo at 4; BPI Memo at 1. For Commerce, its preferred subheading accurately described Sunbeauty's honey, both in terms of its color and whether it was bound for the wholesale market.

As to color, Commerce asserted that while Sunbeauty's importer had entered the subject honey as [[ ]] honey, pursuant to HTSUS subheading [[ ]], in questionnaire responses, Sunbeauty, its importer, and the honey producer, Xiping Haina Trade Co., Ltd. ("Xiping") claimed that the color was not [[ ]] but [[ ]]. *See* BPI Memo at 1 (emphasis added; footnotes omitted). Based on Sunbeauty's response, Commerce concluded that with respect to the color of Sunbeauty's honey, "record evidence show[ed] that a comparison against entries made under HTSUS [[ ]] would be more specific to . . . Sunbeauty's sales." BPI Memo at 1 (emphasis added). Commerce's finding with respect to the color of the imported honey is uncontested.

Additionally, Commerce determined that the record showed Sunbeauty's honey was bound for the wholesale market. Commerce stated, by way of explanation:

> [Sunbeauty's importer] entered the sales as [[ ]] on . . . its entry summaries. [Sunbeauty's importer] did not submit images of the packages or any labels affixed to the packages of merchandise subject to this review in response to the Department's questionnaire. Additionally, [Sunbeauty's importer] [[ ]] of the merchandise, but rather the ultimate U.S. customers [[ ]], and [Sunbeauty's importer] is not aware whether the ultimate U.S. customer later sold the honey as retail merchandise. Nor is there other record information supporting the contention that Sunbeauty's sales were packaged [[ ]]. As such, the Department has no evidence that the final customer sold the honey as retail merchandise in its original packaging. Furthermore, Sunbeauty's sales each consisted of 272 2-liter bottles individually

> packed with [[ ]] of honey each. The amount of honey Sunbeauty packed per bottle is at least [[ ]] larger than a three-pound jug of honey, the largest example of retail honey Sunbeauty placed on the record.

BPI Memo at 1–2 (footnotes omitted). As noted earlier, a two-liter bottle of honey would contain in excess of six pounds of honey. In light of the foregoing, Commerce concluded that the record evidence did not show that Sunbeauty's honey was sold at retail in its original packaging.[24] *See Bona Fides* Memo at 4.

Before the court, Sunbeauty insists that the record shows its honey was not bound for the wholesale market and that, therefore, comparing its sales to imports under HTSUS subheading [[ ]] was improper. Instead, for Sunbeauty, "Commerce should compare Sunbeauty's [POR] sales either with Sunbeauty's sales after [the] POR or with U.S. entries from the . . . broader [heading,] HTSUS 0409, Natural Honey, during the POR." Pl.'s Br. 11. As noted, one of Commerce's two comparisons was of Sunbeauty's entries to entries made under the subheadings of HTSUS 0409. In other words, Commerce did, in fact, conduct the comparison urged by Sunbeauty. Thus, the court understands Sunbeauty's claim to be limited to the other comparison, *i.e.*, the comparison of Sunbeauty's sales to imports entered under the HTSUS subheading selected by Commerce, [[ ]].

In support of its claim, Sunbeauty argues that there is record evidence that the final customer did not sell Sunbeauty's honey at wholesale. For Sunbeauty, "[t]he [[ ]] on the purchase order of Sunbeauty's unaffiliated U.S. customer is a clear indicator that the subject merchandise is used [[ ]]." Pl.'s Br. 10.

Next, Sunbeauty takes issue with particular factual findings based on the record evidence, arguing that the record does not support Commerce's finding that Sunbeauty's importer's customers [[ ]]. Specifically, Sunbeauty points to invoices from a freight carrier and certain customs entry forms, the dates on which show, according to plaintiff, that Sunbeau-

[24] Commerce stated:

> [T]he Department continues to find that a comparison of Sunbeauty's sales to entries of honey [[ ]] is the most appropriate because the record lacks any evidence showing the final customer sold the honey as retail merchandise in its original packaging, and the individual size [*i.e.*, in excess of six pounds] of Sunbeauty's honey is more similar to honey [[ ]] in comparison to other retail honey on the record.

BPI Memo at 2.

ty's importer [[ ]] of the honey "for a period of time before [downstream] sales." Pl.'s Br. 10. Plaintiff also points to other record evidence (*i.e.*, "purchase orders or order confirmation[s] from [the importer's] customers"), arguing that the evidence "suggest[s] that those customers are [[ ]] rather than [[ ]]." Pl.'s Br. 10–11.

Finally, Sunbeauty submits that the quantity of its honey exports supports a finding that its honey was sold at retail in its original packaging. In particular, Sunbeauty asserts that Commerce failed to adequately consider "that the smallest example of honey [[ ]] on record, [[ ]], is approximately [[ ]] larger than Sunbeauty's package." Pl.'s Br. 11 (footnote omitted). For Sunbeauty, "[b]y simply comparing [[ ]] and [[ ]], normal and reasonable people would agree that Sunbeauty's package is much more close to the retail package on record, and that Sunbeauty's honey [was] [[ ]]." Pl.'s Br. 11.

As an initial matter, the court notes that there is no dispute that HTSUS subheading [[ ]] accurately describes the color of Sunbeauty's honey sales during the POR. Indeed, before Commerce, Sunbeauty, its importer, and its producer presented evidence to show that the honey was [[ ]] in color. *See* BPI Memo at 1. Nor is there any dispute that Sunbeauty's importer entered the subject honey as bound for the wholesale market on customs entry forms. *See* Sunbeauty's Resp. Importer-Specific Questionnaire (July 22, 2016), C.R. 46–47 Ex. 7, ECF No. 38 at tab 10 (describing Sunbeauty's entries as [[ ]]).

Sunbeauty insists, nonetheless, that its honey was not bound for wholesale. The record evidence Sunbeauty cites in support of its argument, however, does not demonstrate that this is the case. For example, plaintiff cites to no record evidence explaining just how a [[ ]] on a purchase order supports its claim that the goods were packaged for individual sale, instead of for sale to, *e.g.*, a [[ ]]. That is, plaintiff has not buttressed its claim with evidence. Instead, plaintiff has relied on "common sense" as support for its argument. *See* Sunbeauty Case Br., C.R. 71 at 6, ECF 38 at tab 8 ("As common sense, [[ ]] is designed for [[ ]] and widely used in [[ ]]."). Absent actual evidence that the [[ ]] indicates that its products were packaged for retail sale this claim is unconvincing.

Next, plaintiff cites freight invoices on the record that indicate that the destination of the honey was [[ ]] county. While

this is the same county where Sunbeauty's importer's customers were located, the invoices do not mention the customers' names, or contain any indication of whether or not those customers sold the honey at retail. Likewise, though plaintiff asserts that the " purchase orders or order confirmation[s] from [the importer's] customers . . . suggest that those customers are [[ ]] rather than [[ ]]," plaintiff fails to explain this assertion. Pl.'s Br. 10–11. Rather, plaintiff maintains that it is "common sense that [[ ]] would sell merchandise to [[ ]] in its original packaging rather than repack or process for other purposes." Pl.'s Br. 11. However self-evident this proposition may be to Sunbeauty, Commerce may not rest its determinations on a respondent's "common sense" in place of evidence.

The record is clear, however, that Sunbeauty's importer designated the subject honey as headed for the wholesale market in customs entry forms. *See* Sunbeauty's Resp. Importer-Specific Questionnaire (July 22, 2016), C.R. 46–47 Ex. 7, ECF No. 38 at tab 10 (describing Sunbeauty's entries as [[ ]]). This designation comports with other record evidence regarding Sunbeauty's sales—specifically, each of the 272 two-liter bottles weighing in excess of six pounds. This per-bottle amount was much larger than a three-pound jug of honey, *i.e.*, "the largest example of retail honey [that] Sunbeauty placed on the record." BPI Memo at 2.

Sunbeauty attempts to distinguish its honey sales from honey bound for the wholesale market by arguing that "that the smallest example of honey [[ ]] on record, [[ ]], is approximately [[ ]] larger than Sunbeauty's package." Pl.'s Br. 11 (footnote omitted). Applying Sunbeauty's common sense analysis, however, compels the conclusion that merely because a 300-kilogram (661-pound) drum of honey was unlikely to end up on a grocer's shelf, a jar packed with six pounds of honey would necessarily be headed for the local supermarket.

The record here supports the Department's conclusion that HTSUS subheading [[ ]] specifically describes Sunbeauty's honey both in terms of it color and that it was bound for the wholesale market. *See* BPI Memo at 2 (finding that "a comparison of Sunbeauty's sales to entries of honey [[ ]] is the most appropriate because the record lacks any evidence showing the final customer sold the honey as retail merchandise in its original packaging, and the individual size of Sunbeauty's honey is more similar to honey [[ ]] in comparison to other retail honey on the record."). Accordingly, Commerce's decision, with respect to one of its two comparisons, to compare the price and quantity of

Sunbeauty's honey entries with the price and quantity of honey imported under HTSUS subheading [[ ]], is sustained.

III. Substantial Evidence Supports Commerce's Finding that Reported Expenses Weighed in Favor of a Non-*Bona Fides* Determination

Among the statutory factors that Commerce must consider in reaching its *bona fides* determination are "the expenses arising from such sales." 19 U.S.C. § 1675(a)(2)(B)(iv)(IV). The significance of reported expenses to Commerce's determination depends on the facts of a particular case, but the nature or amount of the expenses can be relevant to Commerce's determination. *See, e.g.*, *Windmill Int'l Pte., Ltd. v. United States*, 26 CIT 221, 231, 193 F. Supp. 2d 1303, 1313 (2002) ("Commerce's reasons for determining that Windmill's sale was non-bona fide included . . . the extraordinary high air freight cost and other expenses incurred by the United States purchaser that were significantly greater than the total value of the sale . . . .") (internal quotation marks and citation omitted).

Sunbeauty reported paying a "lump sum fee" to its logistics vendor for customs clearance services. Commerce issued a supplemental questionnaire designed to elicit more information and supporting documentation about the services that Sunbeauty received and paid for. Sunbeauty's response, however, did not clarify what services it had paid for; rather it raised more questions. As discussed in the Final I&D Memo:

> According to Sunbeauty, [its] unaffiliated logistics company invoiced Sunbeauty for a lump sum fee associated with each export, and Sunbeauty initially cited this fee as a service charge related to the "export procedure" and the "service provided (time consumed to process paperwork)." When asked to detail all of the services included in the lump sum fee, Sunbeauty only stated that it includes a "custom clearance fee and drayage fee." Sunbeauty also stated that the unaffiliated logistics company's cost structure and general market condition affect its quote for the lump sum fee, but failed to provide any documentation from the unaffiliated logistics company outlining its cost structure or the general market condition at the time such that it would have affected its quote.

Final I&D Memo at 9 (footnotes omitted). Put another way, Sunbeauty simply could not, or would not, say what it was paying for. With respect to the "lump sum fee," Commerce found that "Sunbeauty failed to explain the services rendered in association with this export

expense," and its "inconsistent responses regarding the lump sum fee continue[d] to contribute to [its] finding that Sunbeauty's sales [were] non-*bona fide*, because it is unclear what the nature of this lump sum fee is." Final I&D Memo at 10.

Plaintiff challenges Commerce's interpretation of Sunbeauty's questionnaire responses as "inconsistent." Specifically, plaintiff maintains that

> Commerce incorrectly concluded that Sunbeauty's statements with regard to [the] lump sum fee are inconsistent in its *Bona Fide* Memo because Commerce failed to recognize that the second response is from the Sunbeauty's unaffiliated logistic[s] vendor. Although Commerce may overlook the phrase of "{a}ccording to [the vendor]" in the beginning of Sunbeauty's response, Commerce, as the designer of questionnaire, should be aware that Sunbeauty would not be able to answer any questions related to the cost structure or pricing model of Sunbeauty's unaffiliated logistic[s] vendor. Commerce should have a general expectation that Sunbeauty's unaffiliated logistic[s] vendor would be the better respondent to answer these questions and probably provide a different statement due to [the] different perspective and understanding of logistics business. Thus, it is completely normal and reasonable for Sunbeauty to characterize the lump sum fee as a service charge while its unaffiliated logistic[s] vendor detailed such service charge into custom clearance fee and drayage fee which are completely normal and regular export expenses. Like the two sides of a coin, different angles (perspectives) result in different appearances (statements), but different appearances (statements) still suggest the same coin (fact).

Pl.'s Br. 16–17. With respect to Sunbeauty's alleged failure to supply supporting information regarding its vendor's cost structure or market conditions that may have affected the amount the vendor charged Sunbeauty for its services, plaintiff argues that (1) Commerce never requested such documentation, and (2) the cost structure is a "business secret." Pl.'s Br. 17. Plaintiff maintains that without an explicit request for this information from Commerce, "it would be impossible or extremely difficult for Sunbeauty to obtain such documents from its unaffiliated logistic[s] vendor." Pl.'s Br. 17.

Plaintiff's characterization of its own statements in its original and supplemental responses as "different," rather than "inconsistent," Pl.'s Br. 16, misses the mark. By its questionnaires, Commerce sought information from Sunbeauty regarding, among other things, ex-

penses that it incurred in connection with its POR sales. These expenses matter because they are one of the statutory factors relevant to Commerce's determination of whether those sales are *bona fide*. *See* 19 U.S.C. § 1675(a)(2)(B)(iv)(IV). Sunbeauty reported that it incurred a "lump sum fee," among its expenses. *See* Sunbeauty's Resp. Suppl. Sec. A Quest. (June 7, 2016) at 11, C.R. 35, ECF No. 38 at tab 21. Subsequently, Commerce asked Sunbeauty to "provide a more complete and detailed description of this [lump sum] expense," and Sunbeauty responded that it "mainly refer[red] to the charge for the service provided for export customs declaration," and that the "'Lump Sum Fee' is based on the service provided." Sunbeauty's Resp. Suppl. Sec. A, C Quest. (July 21, 2016) at 3, C.R. 38–42, ECF No. 38 at tab 16. When Commerce then asked that Sunbeauty "[d]etail all of the services" the vendor provided for the lump sum fee, Sunbeauty's entire response was, "According to [the vendor], its 'Lump Sum Fee' includes custom clearance fee and drayage fee." *See* ECF No. 38 at tab 15 p. 3.

It can hardly be said that Sunbeauty's response detailed all the services provided by the vendor in exchange for the lump sum fee, or clarified which portion of the lump sum constituted payment for those services. Moreover, contrary to plaintiff's argument, Commerce expressly directed Sunbeauty to "[i]nclude documentation to support [its] response," which Sunbeauty failed to do. Thus, it was reasonable for Commerce to conclude that Sunbeauty's "different" statements were inconsistent, and failed to clarify the nature of the services covered by the lump sum fee. Indeed, much of Sunbeauty's questionnaire response amounts to a claim that the company was willing to pay a fee without any clear idea as to what it was for. It is little wonder that the Department found this explanation lacking.

Plaintiff's claim that it could not provide its vendor's cost structure and the general market conditions, that reportedly affected its vendor's quote for freight and the "lump sum fee," because they were "business secrets," does not excuse Sunbeauty's failure to answer Commerce's questions as to what services the company received for its money. *See* Final I&D Memo at 9. Under Commerce's regulations, Sunbeauty could have supplied a public summary of the requested information to Commerce, *see* 19 C.F.R. § 351.304(c)(1), or included the needed explanation in its lengthy claim of confidential business proprietary information in the record it made, that is now before the court.

Finally, it is the burden of interested parties to a proceeding to create an adequate record. *See Nan Ya Plastics Corp. v. United States*,

810 F.3d 1333, 1337–38 (Fed. Cir. 2016) (citing *QVD Food Co. v. United States,* 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Plaintiff may not deflect that burden by asserting that "Commerce should have a general expectation that Sunbeauty's unaffiliated logistic[s] vendor would be the better respondent to answer these questions . . . ." Pl.'s Br. 16. Accordingly, Commerce's finding that reported expenses weighed in favor of a non-*bona fides* determination is sustained.

IV. Substantial Evidence Supports Commerce's Determination that Additional Factors Were Relevant to its *Bona Fides* Analysis

The remainder of plaintiff's arguments ask the court to find unreasonable Commerce's determination that certain deficiencies and discrepancies in Sunbeauty's questionnaire responses, were relevant to its determination that Sunbeauty's sales were not *bona fide*.

At the outset it must be noted that Sunbeauty does not dispute that it failed to provide information that Commerce asked for regarding its importer's purchases from other suppliers. Nor does Sunbeauty argue that the statute prohibits Commerce from considering deficiencies and discrepancies in questionnaire responses as a factor in its *bona fides* analysis. Rather, plaintiff appears to contest the Department's decision to attach relevance to these deficiencies and discrepancies when making its *bona fides* determination. Plaintiff makes several arguments, none of which persuade the court that the Department committed any error here.

First, Sunbeauty failed to provide its importer's purchase orders, invoices, and packing lists from third party suppliers, as Commerce requested. The Department sought this information from Sunbeauty's importer "to determine whether the price and quantity of the sales subject to this . . . review are not atypical and whether the subject sales provide a reasonable basis to calculate an [antidumping] margin," noting that "this information was not within any of the other record evidence cited by Sunbeauty." Final I&D Memo at 11.

Plaintiff contends that this documentation was a "business secret" and unrelated to the POR sales under review, and, in any event, the record contained other information that could "cure" the deficiency in Sunbeauty's response. *See* Pl.'s Br. 18–20. This "no harm no foul" argument is unconvincing. Commerce designs its questionnaires to elicit information that it has determined it requires to perform its *bona fides* analysis, and Sunbeauty had the burden to respond with the requested information to create an adequate record. *See Nan Ya Plastics Corp.*, 810 F.3d at 1337–38. To the extent that information responsive to Commerce's request was business proprietary, Sunbeauty could have supplied a public summary or included it as con-

fidential business proprietary information. *See* 19 C.F.R. § 351.304(c)(1).

Second, plaintiff contends that Commerce unreasonably failed to accept copies of invoices and cleared checks provided by Sunbeauty's importer's customs broker, as a substitute for the importer's accounting ledgers reflecting the payment of customs duties. For Commerce, "[t]he Department's ability to evaluate whether full payment of all expenses surrounding the sale were made, including customs duties, is additionally necessary to examine whether the sale is atypical." Final I&D Memo at 11. Plaintiff maintains that Commerce's request for "accounting records" did not specify precisely which type of record the Department required, and in any event, the information Sunbeauty provided ("source documents") was "better than the secondary source documents such as general [ledgers]." Pl.'s Br. 19. This claim, however, ignores the Importer-Specific Supplemental Questionnaire, where Commerce asked that Sunbeauty "submit copies of [its importer's] accounting records *that demonstrate where the payments of* [[ ]] *to* [*the customs broker*] *and* [[ ]] *to* [*Customs*] *are recorded*." Importer-Specific Suppl. Quest. (July 12, 2016) at 8, C.R. 37, ECF No. 38 at tab 9 (emphasis added). Copies of cleared checks and invoices do not provide the information requested. That is, they do not show where the identified payments were recorded in the importer's books.

Third, plaintiff contends that the information Commerce requested relating to the payment term between Sunbeauty and its importer, *e.g.*, documents regarding retention, testing, and release of subject merchandise by U.S. authorities, was "irrelevant." Pl.'s Br. 20. For plaintiff, Commerce's request for this information resulted from the Department's "fail[ure] to fully understand the payment term agreed between Sunbeauty and [its importer]."[25] Pl.'s Br. 19–20. Commerce stated, however, that "[t]he Department did not misunderstand Sunbeauty's terms of sale when seeking this information, but, rather, sought this information to clarify the record and inform its understanding of the conditions of payment." Final I&D Memo at 12. Plaintiff, nonetheless, maintains that its failure to provide the information was harmless to Commerce's analysis, and the information it

[25] The payment term was [[ ]]. Pl.'s Br. 20. Plaintiff apparently attributes Commerce's alleged "misunderstanding" of this term to the term's favorability to the buyer "because [[ ]] . . . ." Pl.'s Br. 20. Plaintiff goes on to explain that this term is "a cruel example of . . . how an experienced importer took advantage of an oversea[s] inexperience[d] exporter through a well-designed but unfair term[] of trade." Pl.'s Br. 20 (characterizing the payment term as a "business trick" and "unethical").

did provide, *i.e.*, emails between the importer and the broker, sufficed instead. Again, this argument is unconvincing. As noted above, Commerce designs its questionnaires to elicit information that it has determined it requires to perform its *bona fides* analysis, and Sunbeauty had the burden to respond with the requested information to create an adequate record. *See Nan Ya Plastics Corp.*, 810 F.3d at 1337–38.

Next, plaintiff argues that "Commerce's determination that the failure of Sunbeauty's [importer] to provide documentation undermined the *bona fide* nature of Sunbeauty's sales is akin to making an adverse inference against a cooperating party due to a non-cooperating, non-party's failures." Pl.'s Br. 20. Plaintiff contends that, unlike cases in which this Court upheld the use of an adverse inference against a cooperating party, here, "Sunbeauty . . . obtain[ed] certain alternative documents from its [importer]," and "Sunbeauty has fully cooperated and has provided reliable documentation to allow Commerce to achieve its purpose." Pl.'s Br. 21.

This argument is unavailing. As an initial matter, Commerce did not draw an adverse inference against Sunbeauty, pursuant to 19 U.S.C. § 1677e, in the Final Rescission Determination. Rather, Commerce considered the discrepancies and deficiencies in Sunbeauty's responses as a relevant factor that tended to support its finding that Sunbeauty's sales were not *bona fide*, as it is required to do under the *bona fides* statute. *See* 19 U.S.C. § 1675(a)(2)(B)(iv)(VII) (Commerce "shall consider," *inter alia*, "any other factor [Commerce] 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"). While standing alone these discrepancies and deficiencies may not suffice as substantial evidence that Sunbeauty's sales were not *bona fide*, Commerce properly considered them in light of other evidence on the record and found that they weighed in favor of a determination that the sales were not *bona fide*. *See Zhengzhou*, 37 CIT at __, Slip Op. 13–61 at 42 ("The court finds that the inconsistencies in Huachao's U.S. customer's responses to Commerce's questionnaires, and its failure to provide all of the information the Department requested, lends additional support to Commerce's finding of a non-bona fide sale under the 'totality of the circumstances' test.").

Finally, to the extent Commerce considered Sunbeauty's self-described "negligence" in preparing invoices as a factor bearing on the *bona fide* nature of its sales, the court finds no error. When Commerce pointed out a discrepancy between the production date, [[ ]] on an invoice included in Sunbeauty's request for review, and information on the record stating that its producer,

Xiping, had [[ ]] in that month, Sunbeauty stated that the error was due to its own "negligence when preparing the invoice," specifically: "For the convenience of its own work, [Sunbeauty] did not physically check the merchandise or communicate with [Xiping]." Sunbeauty's Resp. Suppl. Sec. D Quest. (Sept. 1, 2016) at 2, C.R. 53, ECF 38 at tab 32. Although Sunbeauty downplays the significance of the discrepancy as a "clerical error" that should not bear on the reliability of the information it supplied generally, Commerce did not commit any error by considering Sunbeauty's admission of negligence, particularly since plaintiff failed to bring the discrepancy in the documents to Commerce's attention. *See* Final I&D Memo at 12 ("Sunbeauty . . . submitted these documents without initially informing the Department that these discrepancies existed because '{f}or {the} convenience of its own work, it did not physically check the merchandise or communicate with {its producer}.'"). Moreover, it was not unreasonable for Commerce to conclude that the discrepancy between the invoice bearing the erroneous production date and Xiping's production records may have had downstream consequences since, as Commerce noted and Sunbeauty itself pointed out, the [[ ]] would bear on "the shelf life of the honey and its ultimate sale," which means that "the importer and, ultimately, the final U.S. customer made purchasing decisions with respect to the sale of Sunbeauty's honey without complete and accurate information." Final I&D Memo at 12–13. Accordingly, Commerce's consideration of the discrepancies and deficiencies in Sunbeauty's questionnaire responses as a factor in its *bona fides* analysis is sustained.

CONCLUSION

Commerce's conclusion that Sunbeauty's sales were not *bona fide*, based on an examination of the totality of the circumstances, is supported by the record. Therefore, Commerce's Final Rescission Determination is sustained. Judgment will be entered accordingly.

Dated: September 6, 2018
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE

Slip Op. 18–114

REBAR TRADE ACTION COALITION, Plaintiff, v. UNITED STATES, Defendant, and GRUPO SIMEC et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 17–00184
PUBLIC VERSION

[Remanding the U.S. Department of Commerce's final determination in the first administrative review of steel concrete reinforcing bar from Mexico.]

Dated: September 7, 2018

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Rosa S. Jeong, Greenberg Traurig, LLP, of Washington, DC, argued for defendant-intervenors, Grupo Simec; Orge S.A. de C.V.; Compania Siderurgica del Pacifico S.A. de C.V.; Grupo Chant S.A.P.I. de C.V.; RRLC S.A.P.I. de C.V.; Siderurgica del Occidente y Pacifico S.A. de C.V.; Simec International 6 S.A. de C.V.; Simec International 7 S.A. de C.V.; and Simec International 9 S.A. de C.V. With her on the brief was *Irwin P. Altschuler*.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on a motion for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the first administrative review of the antidumping duty ("ADD") order covering steel concrete reinforcing bar ("rebar") from Mexico. *See* [Rebar Trade Action Coalition's] Mot. J. Agency R., Dec. 13, 2017, ECF No. 23; *see also Steel Concrete Reinforcing Bar From Mexico*, 82 Fed. Reg. 27,233 (Dep't Commerce Sept. 14, 2017) (final results of [ADD] administrative review; 2014–2015) ("*Final Results*") and accompanying Decision Mem. for the Final Results of [ADD] Administrative Review: Steel Concrete Reinforcing Bar from Mexico; 2014–2015, A-201 844, (June 7, 2017), ECF No. 19–5 ("Final Decision Memo"); *Steel Concrete Reinforcing Bar From Mexico*, 79 Fed. Reg. 65,925 (Dep't Commerce Nov. 6, 2014) ([ADD] order). Plaintiff, Rebar Trade Action Coalition ("RTAC" or "Plaintiff"), a coalition of domestic producers of the subject merchandise, commenced this action pursu-

ant to section 516A(a)(2)(A)(i)(I) and 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and 1516a(a)(2)(B)(iii) (2012).[1] *See* Summons, July 17, 2017, ECF No. 1; Compl., July 24, 2017, ECF No. 9.

Plaintiff challenges three aspects of Commerce's final determination. *See* Mem. Pl. [RTAC] Supp. Rule 56.2 Mot. J. Agency R., Dec. 14, 2017, ECF No. 27 ("Pl.'s Br.").[2] Plaintiff challenges as not in accordance with law and unsupported by substantial evidence Commerce's (i) decision not to collapse six non-rebar producing affiliates of respondent Grupo Simec S.A.B. de C.V. and Orge S.A. de C.V. ("Simec") that owned fixed assets, *see id.* at 9–17; (ii) application of transactions disregarded and major input rules to adjust the reported costs of the non-collapsed fixed asset owning affiliates of Simec, *see id.* at 17–26; *see also* 19 U.S.C. § 1677b(f)(2)–(3); and (iii) decision not to apply total or partial facts available with an adverse inference to Simec.[3] *See id.* at 26–38[4]

For the reasons that follow, the court remands to the agency for further explanation or reconsideration consistent with this opinion Commerce's (i) decision not to collapse six fixed asset owning companies affiliated with Simec, (ii) application of the transactions disregarded and major input rules, (iii) decision not to apply total facts available to Simec, or facts otherwise available to Simec's cost reporting, and (iv) decision not to apply adverse inferences.

BACKGROUND

Commerce initiated this first administrative review covering subject imports entered during the period of review, April 24, 2014

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

[2] The briefs filed in this action contain significant bracketing of information designated as confidential. The court, having reviewed the briefs and mindful of the need to have readable public opinions, requested that the parties confer and identify the information that could be unbracketed and made public. *See* Letter [Requesting Identification Info. to be Unbracketed] at 2–3, June 8, 2018, ECF No. 44. The parties filed a joint status report complying with the court's request and identifying five terms and concepts that could be unbracketed uniformly throughout the parties' filed submissions. *See* Joint Status Report, June 19, 2018, ECF No. 49. As a result, in this opinion, the court will make public information that may appear bracketed in the briefs filed on the docket of this action and in relevant administrative record documents.

[3] Although 19 U.S.C. § 1677e(a)–(b) and 19 C.F.R. § 351.308(a)–(c) each separately provide for the use of facts otherwise available and the subsequent application of adverse inferences to those facts, parties sometimes use the shorthand "adverse facts available" or "AFA" to refer to its use of such facts otherwise available with an adverse inference.

[4] On September 1, 2017, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF No. 19–2–3. All further references in this opinion to administrative record documents are identified by the numbers assigned by Commerce in these indices.

through October 31, 2015. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 736, 737 (Dep't Commerce Jan. 7, 2016). Commerce's review covered respondents Deacero S.A.P.I de C.V., and Grupo Simec S.A.B. de C.V. and Orge S.A. de C.V. *Id.*

In its final determination, as it had done in its preliminary determination, Commerce collapsed Grupo Simec S.A.B. de C.V., Orge S.A. de C.V., Compania Siderurgica del Pacifico S.A. de C.V., Grupo Chant S.A.P.I. de C.V., RRLC S.A.P.I. de C.V., Siderurgica del Occidente y Pacifico S.A. de C.V., Simec International 6 S.A. de C.V., Simec International 7 S.A. de C.V., and Simec International 9 S.A. de C.V. ("Grupo Simec" or the "collapsed group"), and determined that the companies should be treated as a single entity because record evidence showed that there was a significant potential for manipulation of price or production. *See* Final Decision Memo at 31–32; *Final Results*, 82 Fed. Reg. at 27,234 n.10; *Steel Concrete Reinforcing Bar From Mexico*, 81 Fed. Reg. 89,053, 89,053 n.5 (Dep't Commerce Dec. 9, 2016) (preliminary results of [ADD] administrative review; 2014–2015) ("*Prelim. Results*") and accompanying Decision Mem. for the Prelim. Results of [ADD] Administrative Review: Steel Concrete Reinforcing Bar from Mexico; 2014–2015 at 3–4, A-201–844, PD 127, bar code 3527282–01 (Dec. 5, 2016). Commerce, however, rejected RTAC's argument that six other Simec affiliates that owned fixed assets, but were not producers of the subject merchandise, should also have been collapsed. *See* Final Decision Memo at 31–32. For the *Final Results*, Commerce continued to calculate a weighted-average dumping margin of 0.56% for Deacero S.A.P.I de C.V. and 0.00% for Grupo Simec S.A.B. de C.V., as it had done in its preliminary determination. *See Final Results*, 82 Fed. Reg. at 27,234; *Prelim. Results*, 81 Fed. Reg. at 89,053.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Decision Not to Collapse the Non-Producers

Plaintiff challenges Commerce's decision not to collapse six companies that were affiliated with Simec, the parent company, and owned fixed assets used to produce the subject merchandise at issue here, but were themselves non-producers. *See* Pl.'s Br. at 9–17. Defendant argues that Commerce's determination is in accordance with law and is supported by substantial evidence because Commerce does not have a practice of collapsing non-producers that own fixed assets and, even if it did, the six non-collapsed fixed asset owning companies did not have a significant potential to manipulate price or production. *See* Def.'s Resp. Pl.'s Mot. J. Agency R. at 11–14, Mar. 7, 2018, ECF No. 30 ("Def.'s Resp. Br."); *see also* 19 C.F.R. § 351.401(f).[5] For the following reasons, Commerce's decision not to collapse is not in accordance with law and is not supported by substantial evidence, and is remanded to the agency for further explanation or reconsideration consistent with this opinion.

Commerce's regulation permits it to

> treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and [Commerce] concludes that there is a significant potential for the manipulation of price or production.[6]

19 C.F.R. § 351.401(f)(1). In assessing whether there is a "significant potential for the manipulation of price or production," Commerce may consider:

> (i) The level of common ownership;
>
> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
>
> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

[5] Further citations to Title 19 of the Code of Federal Regulations are to the 2016 edition.

[6] If affiliated producers are collapsed, those companies may be considered a single entity. Collapsing entities allows sales of one collapsed entity to be considered sales of the other for purposes of Commerce's dumping margin calculation. *See* 19 C.F.R. § 351.401(f)(1); 19 U.S.C. § 1675(a)(2)(A)(ii); 19 U.S.C. § 1677b(a).

19 C.F.R. § 351.401(f)(2).

Although Commerce's collapsing regulation speaks of treating two or more affiliated producers as a single entity, Commerce has developed a practice of collapsing non-producers with affiliated producers of subject merchandise if the non-producers meet the factors set out in 19 C.F.R. § 351.401(f)(2). *See* [Commerce's] Affiliation & Collapsing Mem. for the Grupo Simec at 6, 6 n.26, PD 131, bar code 3528081–01 (Dec. 5, 2016) ("Prelim. Collapsing Memo") (providing citations to prior final determinations issued by Commerce applying the 19 C.F.R. § 351.401(f)(2) criteria to determine whether non-producers should be collapsed and describing the regulatory criteria as "instructive"); *see, e.g.*, Issues and Decision Mem. for the [ADD] Investigation of Certain Frozen and Canned Warmwater Shrimp from Brazil at 14, A-351–838, (Dec. 23, 2014), *available at* https://enforcement.trade.gov/frn/summary/brazil/04–28110–1.pdf (last visited Sept. 4, 2018). Commerce may deviate from a prior practice as long as it explains why doing so is justified under the circumstances. *See Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004).

In the final determination, Commerce explains that it did not collapse the six fixed asset owning companies because they are not producers of the subject merchandise and that nothing on the record contravenes that conclusion. *See* Final Decision Memo at 32; *see also* [Simec's] Fifth Suppl. Questionnaire Resp. at Ex. S5–1, CD 179, bar code 3524835–01 (Nov. 22, 2016) ("Fifth Suppl. Questionnaire Resp.") (listing nine fixed asset owning companies affiliated with Simec; six of which were not collapsed). Instead, the six companies owned fixed assets, i.e., the facilities and production equipment, and leased those fixed assets to the collapsed companies to produce the subject merchandise.[7] *See* [Commerce's] Final Results Sales & Cost Analysis Memo at 2, CD 237, bar code 3579897–01 (June 7, 2017) ("Final Calc. Memo"); Final Decision Memo at 32. According to Commerce, because the facilities and the production equipment used to produce the subject merchandise were leased, the six fixed asset owners did not have access to the fixed assets and did not meet the requirements for collapsing. *See* Final Decision Memo at 32; Final Calc. Memo at 2.

Commerce failed to explain why it did not use the 19 C.F.R. § 351.401(f)(2) criteria to determine whether the six non-producing fixed asset owning companies should be collapsed. In the preliminary collapsing memorandum, Commerce asserts that it has applied 19 C.F.R. § 351.401(f) to non-producers in the past to determine whether

[7] The leases were provided at [[ ]]. *See* Final Calc. Memo at 2.

collapsing is warranted. *See* Prelim. Collapsing Memo at 6. In the final determination, however, Commerce states that "[its] practice is to collapse producers of subject merchandise and prevent the manipulation of price or production[,]" and cites to the preliminary collapsing memorandum as support. Final Decision Memo at 31 (citing Prelim. Collapsing Memo at 7). Commerce has not offered an explanation for why it deviated from its practice of incorporating the criteria of 19 C.F.R. § 351.401(f) into its analysis of whether non-producers should be collapsed. If Commerce is going to deviate from its practice, it must acknowledge it is doing so and explain why it is reasonable to do so. *See Save Domestic Oil, Inc.*, 357 F.3d at 1283–84. Therefore, Commerce's determination is not in accordance with law.

Commerce's decision is also unsupported by substantial evidence. Commerce's only explanation for its determination is that the fixed asset owners lacked access to the assets, and therefore could not produce the subject merchandise.[8] *See* Final Calc. Memo at 2; Final Decision Memo at 32.[9] However, given the cost of the lease arrangements[10] and the fact that the leases themselves are not on the record, it is not reasonably discernable what record evidence Commerce relied upon to reach its determination.[11] However, there is record evidence indicating that the companies leasing the facilities and production equipment and the companies receiving the benefits of these leases are all virtually wholly owned by Simec, the parent

[8] Defendant-Intervenors argue that Commerce engaged in the collapsing analysis, without explicitly referring to the individual factors of 19 C.F.R. § 351.401(f)(2). *See* Def.-Intervenors' Resp. Br. Opp'n Pl.'s Mot. J. Agency R. at 11–13, Mar. 8, 2018, ECF No. 34 ("Def.-Intervenors' Resp. Br."); Oral Arg. at 00:38:00–00:42:23. However, the final determination and the final calculation memorandum only conclude that the existence of a lease means that the production equipment cannot be used by different entities at the same time and therefore collapsing is unwarranted. *See* Final Decision Memo at 32; Final Calc. Memo at 2. Therefore, it is not reasonably discernable that Commerce engaged in the collapsing analysis using 19 C.F.R. § 351.401(f)(2) criteria for the companies in the non-collapsed group.

[9] Defendant argues that even if, as Plaintiff claims, the [[ ]] leases evidenced a "close relationship" between the six fixed asset owning companies and the companies in the collapsed group and created the potential for manipulation, Commerce accounted for this issue by applying the transactions disregarded and major input rules of 19 U.S.C. § 1677b(f)(2)–(3). Def.'s Resp. Br. at 14 (quoting Pl.'s Br. at 16); *see also* 19 U.S.C. § 1677b(f)(2)–(3). Defendant's explanation is unpersuasive because it is a post-hoc rationalization, not relied upon by Commerce, and the transactions disregarded and major input rules are distinct from Commerce's collapsing analysis pursuant to 19 C.F.R. § 351.401(f)(1)–(2).

[10] The leases were provided at [[ ]]. *See* Final Calc. Memo at 2.

[11] Defendant's argument that 19 C.F.R. § 351.401(f)(2) requires a significant potential for control, and not just the mere possibility of control, *see* Def.'s Resp. Br. at 11–13, does not excuse Commerce's failure to conduct an analysis as provided for under the regulation and adopted by Commerce through practice, of whether the relationship between the collapsed and non-collapsed companies created a significant potential for the manipulation of price or production.

company. *See* [Simec's] Sec. A Resp. at Exs. A-2a–c, PD 17, bar code 3443882–01 (Feb. 22, 2016). There is also evidence on the record indicating that at least [[ ]] shareholders of two, separate Simec affiliated companies, both collapsed. *See* Fifth Suppl. Resp. at Ex. S5–7.[12] There is also record evidence that the non-collapsed and collapsed companies engaged in the same kinds of intercompany transactions that Commerce noted as indicative of intertwining operations when analyzing whether the companies in the collapsed group should be collapsed,[13] *see* Prelim. Collapsing Memo at 8, and the existence of which suggests that the operations of the non-collapsed and the collapsed groups are likewise intertwined. *See, e.g.*, [Simec's] Sec. A, B, & D Suppl. Questionnaire Resp. at Ex. D-26A, CD 133, bar code 3504495–02 (Sept. 7, 2016) ("Second Suppl. Questionnaire Resp."). Further, there is record evidence that the senior board management of the collapsed companies that owned fixed asset owning companies overlapped with companies that were collapsed, but did not own assets. *See* Prelim. Collapsing Memo at 8 (citations omitted). Commerce does not address the senior management structure of the non-collapsed group in the final determination, and no party directs the court to record evidence of the non-collapsed group's individual senior board management. There is also no evidence on the record supporting the contention that the non-collapsed group could not have manufactured the subject merchandise. Commerce must explain why its determination not to collapse the six fixed asset owning companies is reasonable in light of the evidence that detracts from its determination, namely: the legal corporate structure of Simec, the cost of the leases, and record evidence of the pervasive ownership of all the subsidiaries by Simec. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (noting that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Commerce has not explained why its determination is reasonable on this record, and therefore, its determination is unsupported by substantial evidence.

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[12] In response to Commerce's question to provide a list of shareholders of rebar producing companies, *see* Fifth Suppl. Questionnaire Resp. at 4–5, Simec produced exhibit S5–7, which lists [[ ]], [[ ]] as the [[ ]] shareholder of [[ ]], a collapsed company, and [[ ]], [[ ]] as the [[ ]] shareholder of [[ ]], a collapsed company. *See id.* at Ex. S5–7.

[13] In the preliminary collapsing memorandum, Commerce notes that the financial statements of some of the collapsed companies record [[ ]] between the collapsed companies. Prelim. Collapsing Memo at 8 (citing Second Suppl. Questionnaire Resp. at Ex. D-26A).

II. Commerce's Application of the Transactions Disregarded and Major Input Rules

Plaintiff challenges Commerce's decision to adjust the costs incurred by the non-collapsed fixed asset owning companies by relying on the books and records of Grupo Simec and of certain collapsed fixed asset owners, as not in accordance with law and unsupported by substantial evidence.[14] *See* Pl.'s Br. at 20–26. Defendant argues that Commerce properly adjusted the costs of the non-collapsed fixed asset owning companies given that the non-collapsed affiliates' financial statements were not on the record. *See* Def.'s Resp. Br. at 14–17. For the reasons that follow, the court remands Commerce's application of the transactions disregarded and major input rules to the agency for further explanation or reconsideration consistent with this opinion.

In the calculation of normal value, Commerce may revise prices between affiliates using the transactions disregarded and major input rules, if Commerce determines that the reported prices are below market value. *See* 19 U.S.C. § 1677b(f)(2)–(3); 19 C.F.R. § 351.401(b). Pursuant to the transactions disregarded rule, Commerce may disregard transactions between persons found to be affiliated for purposes of calculating costs of production "if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." 19 U.S.C. § 1677b(f)(2). In applying the transactions disregarded rule, Commerce's practice is to adjust the transfer price for the service or input at issue so that it reflects the market price. *See, e.g.*, Issues & Decision Mem. for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Cold-Rolled Steel Flat Products from Brazil at 38, A-351–843, (July 20, 2016), *available at* http://ia.ita.doc.gov/frn/summary/brazil/2016–17951–1.pdf (last visited Sept. 4, 2018) (explaining that Commerce has an "express preference for market value" and will look to "any reasonable source for market value" if respondent's own purchases or an affiliate's sales are not available (citations omitted)); Issues and Decision Mem. for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Cold-Rolled Steel Flat Products from the

[14] For the final determination, Commerce relied on the financial experience of [[ ]] fixed asset owning companies to estimate the general and administrative expense ratio of the six non-collapsed fixed asset owners. Final Calc. Memo at 3; Final Decision Memo at 32–33. The [[ ]] companies were [[ ]] *See* Fifth Suppl. Questionnaire Resp. at Ex. S5–1. However, to calculate the financial expense ratio of the non-collapsed group, Commerce relied on the consolidated financial records of Grupo Simec. Final Calc. Memo at 3.

United Kingdom at 28, A-412–824, (July 20, 2016), *available at* http://ia.ita.doc.gov/frn/summary/uk/201617940–1.pdf (last visited Sept. 4, 2018) (adjusting the price paid for the inputs to include the acquisition cost the affiliate paid to the unaffiliated entity, plus the selling, administrative, and general costs of the affiliate); Issues & Decision Mem. for the Final Determination of the Less-Than-Fair-Value Investigations of Certain Steel Nails from Malaysia at 20–22, A-557–816, (May 13, 2015), *available at* http://ia.ita.doc.gov/frn/summary/malaysia/2015–12250–1.pdf (last visited Sept. 4, 2018) (adjusting the transfer price to reflect the market values on the record); Stainless Steel Round Wire from Canada, 64 Fed. Reg. 17,324, 17,335 (Dep't Commerce Apr. 9, 1999) (notice of final determination of sales at less than fair value) (adjusting transfer price between affiliates to reflect market price). Pursuant to the major input rule, if the affiliated-party transaction involves the production of a major input to the merchandise, Commerce "may determine the value of the major input on the basis of information available regarding [the] costs of production," if the cost for the input is greater than determined using the transactions disregarded rule. *See* 19 U.S.C. § 1677b(f)(3). Further, the agency will normally determine the value of a major input by the higher of the price paid, the market price, or the cost of producing it. *See* 19 C.F.R. § 351.407(b).

In the final determination, Commerce concludes that the six non-collapsed fixed asset owning companies provided services to Grupo Simec at below-market rates. *See* Final Decision Memo at 32. Commerce, therefore, revised the general and administrative expenses ("G&A"), reported fixed overhead costs, and financial expenses of the cost data pursuant to 19 U.S.C. § 1677b(f)(2)–(3). *See id.* at 29–30, 32–33; Final Calc. Memo at 2–3. To revise the G&A expense ratio for the non-collapsed fixed asset owners, Commerce relied on the financial records of certain fixed asset owning companies that were collapsed and make up the entity, Grupo Simec. *See* Final Calc. Memo at 3, Attach. 1. To revise the financial expense ratio for the non-collapsed fixed asset owners, Commerce relied on the consolidated financial expense ratio of Grupo Simec. *Id.* Commerce then revised the fixed overhead costs reported at the five plants that produced rebar, by adding the resulting estimates for G&A and financial expenses. *Id.* at 2–3. Defendant argues that Commerce's decision was reasonable because the collapsed fixed asset owning companies were good comparators for the cost experiences of the companies in the non-collapsed group. *See* Def.'s Resp. Br. at 15–16.

In the final determination, Commerce does not explain why it relied on the cost experiences of certain collapsed fixed asset owning com-

panies to revise the costs of the non-collapsed group, and Defendant's explanation is a post hoc rationalization of Commerce's selection. Further, even if it was reasonably discernable that Commerce relied on the cost experiences of certain collapsed fixed asset owners because they served as good comparators for the cost experiences of the non-collapsed companies, that explanation is not supported by the record. Commerce does not identify record evidence demonstrating that the cost experiences of the companies in the collapsed group that owned fixed assets were similar to those of the companies in the non-collapsed group, and finds similarity based solely on the fact that the two groups owned fixed assets.[15] However, the record reveals that the costs incurred by the non-collapsed asset owners are distinct in important ways from those of the collapsed-fixed asset owners.[16] The record does not provide the financial statements for the six non-collapsed fixed asset owning companies. The final determination does not explain how, in light of record evidence demarcating the differences in the cost experiences of the collapsed and non-collapsed fixed asset owning companies, Commerce reached its determination. Therefore, Commerce's determination is not supported by this record and is remanded to the agency for further explanation or reconsideration consistent with this opinion.

The Defendant-Intervenors argue that Plaintiff's challenge to Commerce's application of the transactions disregarded and major input rules is "factually inaccurate" because Commerce had the necessary information it needed to make the adjustments to the cost data. *See* Def.-Intervenors' Resp. Br. Opp'n Pl.'s Mot. J. Agency R. at 18, Mar. 8, 2018, ECF No. 34. More specifically, the Defendant-Intervenors argue that "the financial results of the Non-Producing Asset Owners" were consolidated, and cite to several record documents as support.[17] *Id.* (citing [Simec's] Fourth Suppl. Questionnaire Resp. at Exs. S4–2–3, CD 162, bar code 3520897–01 (Nov. 7, 2016); Sec. A Resp. at Ex. A-6b

[15] Defendant, likewise, does not identify record evidence supportive of Commerce's determination, reiterates that it was reasonable for Commerce to use as comparators the [[ ]] collapsed companies that owned fixed assets, and argues that no record evidence undermines Commerce's position. *See* Def.'s Resp. Br. at 15–16.

[16] For example, record evidence shows that in the Mexicali and Guadalajara plants the non-collapsed fixed asset owning companies took on the [[ ]] of the depreciation expenses in those plants. *See* Fifth Suppl. Resp. at Ex. S5–1, Ex. S5–2. However, Commerce's cost adjustments to the non-collapsed group rely on data from the collapsed asset owners who took on the [[ ]]. *See* Final Calc. Memo at 2–3, Attach. I.

[17] Both the Defendant and the Defendant-Intervenors challenge Plaintiff's argument that Commerce's calculations did not include the depreciation expenses of the six non-collapsed fixed asset owning companies. *See* Def.'s Resp. Br. at 16–17; Def.-Intervenors' Resp. Br. at 18–19; *see also* Pl.'s Br. at 23–25. In its reply, however, Plaintiff explains that in light of the responsive briefs filed in this action it acknowledges that Commerce's final calculations do reconcile the depreciation expenses [[ ]], and not just the

at 11). In the final determination, Commerce cites Exhibit S4–2 as part of its explanation for why Simec's revised reporting methodology was reasonable and results in a reliable G&A expense ratio. *See* Final Decision Memo at 30–31. Plaintiff, however, challenges the data contained in that exhibit and others cited by the Defendant-Intervenors as omitting costs of some of the non-collapsed fixed asset owners, and as unreliable without the corroboration of individual financial statements of the non-collapsed fixed asset owning companies. *See* Reply Br. Pl. [RTAC] at 12–13, 12 n.5, Apr. 11, 2018, ECF No. 35 ("Pl.'s Reply Br."). However, even if Grupo Simec's consolidated financial statements fully capture the G&A expenses of all six non-producing fixed asset owners, it is not reasonably discernable why Commerce adjusted the G&A calculations for the non-collapsed group based on the cost experiences of certain collapsed fixed asset owning companies, instead of relying on expenses provided in the company wide consolidated statements. *See* Final Calc. Memo at 2; Final Decision Memo at 32.

Commerce also did not explain why it valued a major input at cost. The relevant regulation provides that Commerce will value a major input using the higher of the transfer value, market value, or cost.[18] 19 C.F.R. § 351.407(b). In the final determination, Commerce states that it will apply the transactions disregarded rule, but does not explain why it chose to value the service, i.e., the leases provided by the non-collapsed fixed asset owning companies to the collapsed group to produce the subject merchandise, at cost. *See* Final Decision Memo at 32–33; Final Calc. Memo at 2–3. Accordingly, Commerce's determination is also not in accordance with law and is remanded back to the agency for further explanation or reconsideration consistent with this opinion.

[[ ]] collapsed fixed asset owning companies. *See* Reply Br. Pl. [RTAC] at 9 n.4, Apr. 11, 2018, ECF No. 35. Nevertheless, Plaintiff maintains its challenge to Commerce's cost adjustment of the depreciation expenses because there is no independent documentation on the record corroborating the financial experiences of the non-collapsed fixed asset owning companies affiliated with Simec. *See id.*

[18] Plaintiff argues that Commerce's valuation should have included profit, and accordingly Commerce should have valued the leases using a market value. *See* Pl.'s Br. at 22–23. The Defendant-Intervenors argue that Commerce is not required to create a "fictitious market" to value the leases, *see* Def.-Intervenors' Resp. Br. at 19–21, and Defendant argues that Plaintiff's approach is "unreasonable" because it would have required Commerce to construct a value from an absence of evidence. *See* Def.'s Resp. Br. at 16. Yet, Commerce does not explain why the cost experiences of the [[ ]] collapsed fixed asset owners are good comparators for the transactions disregarded rule but not for the major input rule.

III. Commerce's Decision Not to Apply Total or Partial Facts Available

Plaintiff challenges Commerce's decision not to apply total facts available to calculate Simec's dumping margin, or in the alternative, not to apply facts otherwise available to Simec's cost reporting, given that necessary information was missing from the record. *See* Pl.'s Br. at 26–31. Specifically, Plaintiff argues that Simec's reporting methodology delayed the disclosure of information necessary for Commerce to understand Simec's corporate structure and identify all of its affiliated fixed asset owning companies, *see id.* at 28, and that Simec's reporting methodology obscured Simec's G&A, depreciation, and fixed asset expenses in a way that prevented Commerce from calculating accurate expense ratios.[19] *See id.* at 28–31. Defendant argues that Commerce's decision is in accordance with law and supported by substantial evidence because Simec neither withheld nor failed to

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[19] Plaintiff argues that Commerce should have applied "total adverse inferences to Simec" because Simec's reporting "obscured" the roles of various Simec affiliates involved in the production of rebar, "distorted and understated fixed asset expenses," and [[ ]] *See* Pl.'s Br. at 26– 31 (citation omitted). Further, Plaintiff argues that Simec's overall approach to responding to Commerce's questionnaires led to the omission of the non-collapsed fixed asset owning companies' individual financial statements and the leases from the record. *See id.* at 33.

Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b). Commerce may, for example, rely on facts otherwise available when the information it requests is provided out of time or not in the "form or manner requested." 19 U.S.C. § 1677e(a)(2)(B). However, pursuant to 19 U.S.C. § 1677m(d), prior to resorting to facts otherwise available Commerce must, where practicable, provide the party with an opportunity to remedy or explain the identified deficiency. If the party's response or remedy "is not satisfactory" or is submitted out of time, Commerce may "disregard all or part of the [interested party's] original and subsequent responses." *See* 19 U.S.C. § 1677m(d). The phrase "total adverse inferences" or "total AFA" encompasses a series of steps that Commerce takes to reach the conclusion that all of a party's reported information is unreliable or unusable and that as a result of a party's failure to cooperate to the best of its ability, it must use an adverse inference in selecting among the facts otherwise available. Commerce may apply "total facts available" if it determines that none of the information provided is usable or reliable. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citing *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 485–89, 149 F. Supp. 2d 921, 926–29 (2001)). Commerce may then apply an adverse inference in selecting among the facts otherwise available if it determines that a party failed to cooperate to the best of its ability. *See* 19 U.S.C. § 1677e(a)–(b). Accordingly, for Commerce to apply a "total adverse inference," or "total AFA" it must determine that all of a party's reported information is unreliable or unusable, and then determine that as a result of a party's failure to cooperate to the best of its ability, it must rely on an adverse inference in selecting among the facts otherwise available.

Here, Commerce used facts otherwise available to make an adjustment to the reported fixed overhead expenses to include certain omitted depreciation expenses, but concluded that an adverse inference was not warranted because Simec complied with Commerce's

produce any information that Commerce requested. *See* Def.'s Resp. Br. at 17–23. For the reasons that follow, Commerce's decision not to apply total facts available to Simec, or facts otherwise available to Simec's cost reporting is not supported by substantial evidence, and is remanded to the agency for further explanation or reconsideration consistent with this opinion.

Under certain circumstances, Commerce may use facts otherwise available. *See* 19 U.S.C. § 1677e(a). Commerce shall use facts otherwise available to reach its final determination when "necessary information is not available on the record," a party "withholds information that has been requested by [Commerce]," fails to provide the information timely or in the manner requested, "significantly impedes a proceeding," or provides information Commerce is unable to verify. *See id.* However, prior to resorting to facts otherwise available, Commerce must explain why the information it does have is insufficient and provide, where practicable, the non-complying party an opportunity to comply. *See* 19 U.S.C. § 1677m(d).

In the final determination, Commerce explains that Simec responded "fully and timely" to "all of the Department's questionnaires, including answering all questions related to their corporate structure and identifying all producers of subject merchandise." Final Decision Memo at 25 (citation omitted). Commerce also explained that Simec's reporting methodology reconciled any and all discrepancies caused by reporting on a plant-based level, as opposed to a company-based level. *See id.* Finally, Commerce explained that even though it agreed that Simec's reporting of fixed overhead expenses required use of facts otherwise available to account for certain omitted depreciation expenses related to fixed assets, application of an adverse inference was not warranted. *See id.* at 26–27.

The court cannot sustain Commerce's determination not to apply facts otherwise available because Commerce's decision assumes that its collapsing analysis and its application of the transactions disregarded and major input rules are supported by substantial evidence and in accordance with law. Pursuant to 19 U.S.C. § 1677e(a)(1), Commerce shall apply facts otherwise available if necessary information is missing from the record. The fact that Commerce received everything it requested does not mean that information necessary to support Commerce's final determination was not missing from the

requests to the best of its ability. *See* Final Decision Memo at 26–27; *see also* Final Calc. Memo at 2, Attach. I. Plaintiff's challenge, however, is not just to specific pieces of information, but is a more global challenge to the adequacy of Simec's cooperation and responses throughout the entirety of the review process. Plaintiff alternatively challenges Commerce's determination not to apply facts otherwise available with an adverse inference to Simec's cost reporting. *See* Pl.'s Br. at 31.

record. Commerce's contention that it was able to reconcile Simec's costs and understand Simec's corporate structure for collapsing purposes, *see* Final Decision Memo at 25–26, is based on an unsupported collapsing analysis. *See id.* at 25–27. As explained above, Commerce's decision not to collapse the six fixed asset owning companies is not in accordance with law and is not supported by substantial evidence. In deciding not to collapse the six fixed asset owning companies, Commerce did not evaluate the record in light of the 19 C.F.R. § 351.401(f)(2) criteria. Further, Commerce's application of the transactions disregarded and major input rules cannot be sustained on the record before the court. Commerce has not explained why the data it relied upon constituted a good comparator for the cost experiences of the non-collapsed fixed asset owning companies, nor has it explained why it valued a major input at cost. Consequently, in concluding that it did not need to resort to facts otherwise available, Commerce assumed necessary information was not missing from the record. Commerce's determination cannot be supported on this record, and is therefore remanded to the agency for further explanation or reconsideration consistent with this opinion.

IV. Commerce's Decision Not to Apply Adverse Inferences

Plaintiff argues that Commerce should have applied total adverse inferences to calculate Simec's dumping margin, or in the alternative, adverse inferences to Simec's cost reporting. *See* Pl.'s Br. at 31–38. Defendant argues that record evidence does not indicate that Simec misreported information, was uncooperative, or engaged in tactics that resulted in necessary information being withheld from Commerce. *See* Def.'s Resp. Br. at 17–23. For the reasons that follow, the court cannot sustain Commerce's determination not to apply adverse inferences and the issue is remanded to the agency for further explanation or reconsideration consistent with this opinion.

Commerce will apply an adverse inference after deciding that use of facts otherwise available is warranted. *See* 19 U.S.C. § 1677e(a). Pursuant to 19 U.S.C. § 1677e(b), Commerce may apply an adverse inference if it "finds that an interested party has failed to cooperate by not acting to the best of its ability[.]" 19 U.S.C. § 1677e(b). "The statute does not provide an express definition of 'the best of its ability.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). However, as *Nippon Steel* explained, a respondent acts to "the best of its ability" when it "do[es] the maximum it is able to do." *Id.*

Here, Commerce determined that Simec's reporting methodology was not evasive, the costs reported were reconciled, and that it was able to adjust costs for the non-collapsed fixed asset holding companies pursuant to the transactions disregarded and major input rules. *See* Final Decision Memo at 25–27. Consequently, Commerce did not resort to total facts available to reach its final determination, and specifically determined that facts otherwise available with an adverse inference should not be used to calculate either Simec's dumping margin generally or applied to Simec's cost reporting.[20] *See id.* at 27. However, and as explained above, Commerce's decision not to use total or partial facts available is not supported by record evidence. Therefore, the court cannot sustain Commerce's determination not to apply adverse inferences. On remand, Commerce may make a different determination or further explain its determination relying on evidence available on the record and in a manner supported by the record. Commerce may also reopen the record and request further information. Therefore, the court remands Commerce's decision not to apply adverse inferences for further explanation or reconsideration consistent with this opinion.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's decision not to collapse the six fixed asset owning companies is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce's application of the transactions disregarded and major input rules is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce's decision not to use total facts available to calculate Simec's dumping margin, or facts otherwise available to Simec's cost reporting is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce's decision not to apply adverse inferences is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

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[20] As stated above, Commerce did rely on facts otherwise available with respect to depreciation costs, but concluded that it would not apply an adverse inference. *See* Final Decision Memo at 26–27. However, Plaintiff is not challenging Commerce's decision to not apply AFA solely on the basis of Commerce needing to make an adjustment to account for certain omitted depreciation expenses. *See* Pl.'s Reply Br. at 18. Instead, Plaintiff makes a more global challenge based on its contention that throughout the review process Simec continually provided deficient responses.

ORDERED that the parties shall have 30 days to file their replies to comments on the remand redetermination.

Dated: September 7, 2018
New York, New York

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

Slip Op. 18–119

S.C. JOHNSON & SON, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 14–00184

[Denying both motions for summary judgment with respect to the classification of certain Ziploc plastic bags.]

Dated: September 14, 2018

Michael E. Roll, Pisani & Roll, LLP, of Los Angeles, CA, and *Brett I. Harris*, Pisani & Roll, LLP, of Washington, D.C., argued for Plaintiff S.C. Johnson & Son, Inc.

Monica P. Triana, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, New York, N.Y. *Jamie L. Shookman*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., also appeared.

OPINION

Choe-Groves, Judge:

This case addresses whether Ziploc plastic bags marketed by S.C. Johnson & Son, Inc. ("Plaintiff" or "SCJ") are "other household articles" or "articles for the conveyance or packing of goods" under the Harmonized Tariff Schedule of the United States ("HTSUS") (2013). Pending before the court are cross-motions for summary judgment. *See* Pl.'s Mot. Summ. J., Nov. 1, 2017, ECF No. 66; Pl.'s Mem. Law Supp. Pl.'s Mot. Summ. J., Nov. 1, 2017, ECF No. 66–2 ("Pl. Br."); Def.'s Cross-Mot. Summ. J., Dec. 22, 2017, ECF No. 71; Def.'s Mem. Law Opp'n Pl.'s Mot. Summ. J. & Supp. Cross-Mot. Summ. J., Dec. 22, 2017, ECF No. 71 ("Def. Br.").

SCJ argues that U.S. Customs and Border Protection ("Customs") improperly denied its protests challenging the classification of its imported Ziploc plastic bags. *See* Pl. Br. 1–2. Plaintiff contends that its merchandise is classifiable under HTSUS Subheading 3924.90.56, which covers:

3924	Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics:
3924.90	Other:
3924.90.56	Other

Subheading 3924.90.56, HTSUS. The tariff provision delineates a duty rate of 3.4% *ad valorem*, but Plaintiff seeks duty-free treatment because products classifiable under HTSUS Subheading 3924.90.56 are eligible for duty-free treatment under the Generalized System of Preferences ("GSP"). *See* Pl. Br. 2.

The United States ("Defendant" or "Government") maintains that Customs properly classified the imported Ziploc plastic bags under HTSUS Subheading 3923.21.00. *See* Def. Br. 10–11. The tariff provision reads as follows:

3923	Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics:
3923.21	Sacks and bags (including cones):
3923.21.00	Of polymers of ethylene.

Subheading 3923.21.00, HTSUS. Products classified under this provision are dutiable at 3.0% *ad valorem*.

ISSUES PRESENTED

The court considers two issues:

1. Do the undisputed facts establish that Plaintiff's Ziploc plastic bags are classifiable as "articles for the conveyance or packing of goods" under HTSUS Heading 3923?
2. Do the undisputed facts establish that Plaintiff's Ziploc plastic bags are classifiable as "other household articles" under HTSUS Heading 3924?

For the reasons discussed below, the court concludes that the Parties have failed to proffer sufficient undisputed material facts for the court to determine whether Plaintiff's Ziploc plastic bags are *prima facie* classifiable under HTSUS Heading 3923. The case will proceed to trial. The court defers its analysis of whether Plaintiff's Ziploc plastic bags are *prima facie* classifiable under HTSUS Heading 3924 until trial.

UNDISPUTED FACTS

The following facts are not in dispute.

This test case covers a single entry of Ziploc plastic bags from 2013. *See* Pl.'s Rule 56.3 Statement of Material Facts Not in Dispute ¶ 1, Nov. 1, 2017, ECF No. 66–1 ("Pl. Facts"); Def.'s Resps. to Pl. S.C. Johnson & Son, Inc.'s Rule 56.3 Statement of Material Facts ¶ 1, Dec. 22, 2018, ECF No. 71–1 ("Def. Facts Resp."). Plaintiff's plastic bags were entered and liquidated under HTSUS Subheading 3923.21.00 and assessed at a duty rate of 3.0% *ad valorem*. *See* Pl. Facts ¶¶ 2–3;

Def. Facts Resp. ¶¶ 2–3; *see also* Compl. ¶ 8, Dec. 8, 2014, ECF No. 5; Answer ¶ 8, Aug. 7, 2015, ECF No. 15.

Plaintiff filed a timely protest, arguing that its plastic bags are classifiable under HTSUS Subheading 3924.90.56 and are entitled to duty-free treatment pursuant to GSP. *See* Pl. Facts ¶ 4–5; Def. Facts Resp. ¶ 4–5; *see also* Summons, Aug. 1, 2014, ECF No. 1. The protest was "not allowed or denied in whole or in part" within the statutory timeframe, and SCJ filed this action. *See* Pl. Facts ¶ 7; Def. Facts Resp. ¶ 7; *see also* Summons; Compl. The matter was subsequently designated a test case. *See* Order, Oct. 5, 2015, ECF No. 19. The court held oral argument on May 14, 2018. *See* Oral Argument, May 14, 2018, ECF No. 85.

Plaintiff's merchandise at issue are Ziploc plastic bags. *See* Pl. Facts ¶ 9; Def. Facts Resp. ¶ 9. Plaintiff's plastic bags measure 6–1/2 inches by 5–7/8 inches and are manufactured from polyethylene resin pellets that are used in an extrusion process for both the film and plastic zipper seals featured on Plaintiff's plastic bags. *See* Pl. Facts ¶ 10; Def. Facts Resp. ¶ 10. Each Ziploc plastic bag has an interior space that can accommodate relatively small items. *See* Def.'s Statement of Undisputed Material Facts ¶ 5, Dec. 22, 2017, ECF No. 71–2 ("Def. Facts"); Pl.'s Resp. to Def.'s Statement of Undisputed Material Facts ¶ 5, Jan. 22, 2018, ECF No. 75–1 ("Pl. Facts Resp."). The Ziploc plastic bags are made to contain items. *See* Def. Facts ¶ 6; Pl. Facts Resp. ¶ 6. The Ziploc plastic bags covered by the entry were imported from Thailand to the United States through the Port of Los Angeles in May 2013. *See* Def. Facts ¶ 1; Pl. Facts Resp. ¶ 1.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012) and 19 U.S.C. § 1515. The court will grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing version of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

ANALYSIS

A. Legal Framework

A two-step process guides the court in determining the correct classification of merchandise. First, the court ascertains the proper meaning of the terms in the tariff provision. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (citing *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). Second, the court determines whether the merchandise at issue falls within the parameters of the tariff provision. *See id.* The former is a question of law and the latter is a question of fact. *See id.* "[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis 'collapses entirely into a question of law.'" *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

The court reviews classification cases *de novo*. *See* 28 U.S.C. § 2640(a)(1). Customs is afforded a statutory presumption of correctness in classifying merchandise under the HTSUS, *see id.* § 2639(a)(1), but this presumption does not apply to pure questions of law. *See Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). The court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms," *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)), and therefore must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation ("GRIs") and, if applicable, the Additional U.S. Rules of Interpretation ("ARIs"), which are both applied in numerical order. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011) (citing *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001)). GRI 1 instructs that, "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1. "Absent contrary legislative intent, HTSUS terms are to be 'construed [according] to their common and popular meaning.'" *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (quoting *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 534 (Fed. Cir. 1994)).

In construing the terms of the headings, "[a] court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Baxter Healthcare Corp. of P.R.*, 182 F.3d at 1337–38). The court may also consult the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes"), which "are not legally binding or dispositive," *Kahrs Intern., Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013), but "provide a commentary on the scope of each heading of the Harmonized System" and are "generally indicative of proper interpretation of the various provisions." H.R. Rep. No. 100–576, 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *see also E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004). Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information.

B. Analysis of the Terms Under HTSUS Heading 3923

The first issue concerns whether Plaintiff's merchandise is *prima facie* classifiable under HTSUS Heading 3923. The court must assess whether HTSUS Heading 3923 is an *eo nomine* provision or a use provision at the outset, as that distinction guides the analysis. *See Schlumberger Tech Corp.*, 845 F.3d at 1164. An *eo nomine* provision describes articles by specific names. *See id.* A use provision, by contrast, classifies articles based on their principal or actual use. *See id.*; *see also R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1354 (Fed. Cir. 2014). ARI 1(a), which governs use provisions, provides that:

> 1. In the absence of special language or context which otherwise requires—
>
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

ARI 1(a). In this context, principal use "has been defined as the use 'which exceeds any other single use.'" *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (emphasis omitted) (quoting *Lenox Collections v. United States*, 20 CIT 194, 196 (1996)).

The court first considers the meaning and scope of HTSUS Heading 3923, "articles for the conveyance or packing of goods." Because the

terms of the heading contemplate a specific use (*i.e.*, "conveyance or packing of goods"), this court regards HTSUS Heading 3923 as a principal use provision. "Conveyance" is defined as "a means of carrying or transporting something." *Webster's Third New International Dictionary* 499 (unabr. 1993). "Convey" is defined as "to bear from one place to another." *Id.* "Packing" is defined as "to process and put into containers in order to preserve, transport, or sell." *The American Heritage Dictionary of the English Language* 1261 (4th ed. 2000); *see also Webster's Third New International Dictionary* 1618 (unabr. 1993) ("[T]he act or process of preparing goods for shipment or storage."). The court concludes that HTSUS Heading 3923 is a principal use provision and encompasses goods of plastic used to carry or to transport other goods of any kind.

C. Classification of Plaintiff's Merchandise Under HTSUS Heading 3923

Principal use provisions require the court to determine whether the group of goods are "commercially fungible with the imported goods" in order to identify the use "which exceeds any other single use." *Aromont USA, Inc.*, 671 F.3d at 1312. When analyzing whether the subject merchandise is commercially fungible, the court considers the *Carborundum* factors, which are

> [1] use in the same manner as merchandise which defines the class; [2] the general physical characteristics of the merchandise; [3] the economic practicality of so using the import; [4] the expectation of the ultimate purchasers; [5] the channels of trade in which the merchandise moves; [6] the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed; and [7] the recognition in the trade of this use.

Id. at 1313 (citing *United States v. Carborundum*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976)). ARI 1(a) requires examination of the principal use not only of Plaintiff's plastic bags, but of all similar plastic bags.

The undisputed facts establish the general physical characteristics of Plaintiff's plastic bags, including the measurements and design. *See* Def. Facts ¶¶ 4–8, 15; Pl. Facts Resp. ¶¶ 4–8, 15. The undisputed facts highlight consumers' personal use of Plaintiff's plastic bags, which relate to the expectation of the ultimate purchaser and the actual use. *See* Def. Facts ¶¶ 36–40; Pl. Facts Resp. ¶¶ 36–40. Despite the foregoing information, the Parties have not provided the court with sufficient undisputed material facts for the court to conduct a

full analysis pursuant to the *Carborundum* factors at this juncture. Because there are disputed facts with respect to principal use, the court cannot determine on summary judgment whether Plaintiff's plastic bags are *prima facie* classifiable under HTSUS Heading 3923. The court will hold a trial on this issue.

D. Analysis of the Terms Under HTSUS Heading 3924

Plaintiff argues that its plastic bags are *prima facie* classifiable under HTSUS Heading 3294 for "tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics." The parties disagree as to whether HTSUS Heading 3924 is an *eo nomine* or principal use provision. *Compare* Pl. Br. 19–21 (arguing for principal use) *with* Def. Br. 40 (arguing that no principal use analysis is needed).

Eo nomine tariff headings describe "the subject merchandise by name, not by use." *Kahrs Intern., Inc.*, 713 F.3d at 645–46 (citing *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998)). Here, the court's inquiry focuses on the meaning of "household articles . . . of plastics." The phrase does not suggest a type of use, and therefore the court declines to read one into it. *See id.* at 646 (citing *Carl Zeiss, Inc.*, 195 F.3d at 1379) (stating that the court "should not read a use limitation into an *eo nomine* provision unless the name itself inherently suggests a type of use"). The court concludes that HTSUS Heading 3924 is an *eo nomine* provision, not a principal use provision.

The court examines HTSUS Heading 3924 with respect to the relevant tariff terms "household articles." "Household" is defined as "the maintaining of a house," "household goods and chattels," "a domestic establishment," or "of or relating to a household." *Webster's Third New International Dictionary* 1096 (unabr. 1993); *see also The American Heritage Dictionary of the English Language* 851 (4th ed. 2000) ("Of, relating to, or used in a household."). "Article" is defined as an "individual thing or element of a class; a particular object or item." *The American Heritage Dictionary of the English Language* 101 (4th ed. 2000).

The Explanatory Note for HTSUS Heading 3924 provides further guidance for the court's analysis. The Explanatory Note states, in relevant part: "This heading covers the following articles of plastics: . . . (C) Other household articles such as ash trays, hot water bottles, matchbox holders, dustbins, buckets, watering cans, food storage containers, curtains, drapes, table covers and fitted furniture dustcovers (slipovers)." Explanatory Note to Heading 3924, HTSUS. The court finds the reference in the Explanatory Note to "other household

articles" to be helpful in defining the broad scope of the tariff terms. The listed articles are all goods commonly found in the home. The court concludes that the plain meaning of the tariff terms in HTSUS Heading 3924 covers plastic goods of or relating to the house or household.

Plaintiff urges the court to define HTSUS Heading 3924 as encompassing "various household containers for food" and attempts to support its assertion with a previous decision by the U.S. Court of Appeals for the Federal Circuit, *SGI, Inc. v. United States*, 122 F.3d 1468 (Fed. Cir. 1997). *See* Pl.'s Br. 18–21. The *SGI, Inc.* court held that the portable soft-sided vinyl insulated coolers at issue were properly classified under HTSUS Subheading 3924.10.50 by analyzing the listed exemplars for HTSUS Subheading 3924.10. *SGI, Inc.*, 122 F.3d at 1472–73. HTSUS Subheading 3924.10 included "[t]ableware and kitchenware: Salt, pepper, mustard and ketchup dispensers and similar dispensers," which the court read as encompassing "various household containers for foodstuffs." *Id.* at 1473. *SGI, Inc.* is inapposite to the instant case. The *SGI, Inc.* court's reasoning concentrated on the terms "tableware and kitchenware" at the six-digit level of the tariff heading, whereas here, the court's inquiry at this stage properly concerns the four-digit level of the tariff heading and focuses on the terms "household articles." While the court recognizes that household articles may include food containers, HTSUS Heading 3924 is not so constrained. By arguing that HTSUS Heading 3924 only includes household containers for foodstuffs, SCJ attempts to engraft an additional limitation on the tariff heading in contravention of the heading's text.

The court concludes that, based on the plain language of the provision, HTSUS Heading 3924 is an *eo nomine* provision that encompasses plastic goods of or relating to the house or household. The court defers its analysis of Plaintiff's merchandise under HTSUS Heading 3924 until trial. The case will proceed to trial on this issue.

CONCLUSION

For the foregoing reasons, the court concludes that:

1. There exist genuine issues of material fact regarding whether Plaintiff's plastic bags are *prima facie* classifiable under HTSUS Heading 3923. Because genuine issues of material fact remain unresolved, the court denies the cross-motions for summary judgment and the case shall proceed to trial.

2. The court defers its analysis of whether Plaintiff's plastic bags are *prima facie* classifiable under HTSUS Heading 3924 until trial.

3. The court's determination of whether Plaintiff's merchandise is eligible for duty-free treatment under GSP must be postponed, as Plaintiff's merchandise would only qualify for GSP treatment if the merchandise is found to be properly classified under HTSUS Heading 3924.

Dated: September 14, 2018
New York, New York

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

Slip Op. 18–120

CP KELCO US, INC., Plaintiff, v. UNITED STATES, Defendant, and NEIMENGGU FUFENG BIOTECHNOLOGIES CO., LTD. AND SHANDONG FUFENG FERMENTATION, CO., LTD., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Consol. Court No. 13–00288

[Sustaining the Department of Commerce's remand redetermination.]

Dated: September 17, 2018

Matthew L. Kanna, Nancy A. Noonan, and *Leah N. Scarpelly*, Arent Fox LLP, of Washington, D.C., for plaintiff.

Alexander O. Canizares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Brandon J. Custard*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Ned H. Marshak, *Jordan C. Kahn*, and *Brandon Petelin*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., for defendant-intervenors.

OPINION

Goldberg, Senior Judge:

This matter returns to the court following a fourth remand of the final determination of the U.S. Department of Commerce ("Commerce" or "the Department") in its antidumping investigation of xanthan gum from the People's Republic of China. *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 33,351 (Dep't Commerce June 4, 2013) (final determ.) ("*Final Determination*") and accompanying Issues & Decision Mem. ("I&D Mem."), *amended by Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't Commerce July 19, 2013) (am. final determ.). The four prior opinions of this court thoroughly set forth the facts underlying this appeal. *CP Kelco US, Inc. v. United States*, Slip Op. 15–27, 2015 WL 1544714 (CIT Mar. 31, 2015) ("*CP Kelco I*"); *CP Kelco US, Inc. v. United States*, Slip Op. 16–36, 2016 WL 1403657 (CIT Apr. 8, 2016) ("*CP Kelco II*"); *CP Kelco US, Inc. v. United States*, 41 CIT __, 211 F. Supp. 3d 1338 (2017) ("*CP Kelco III*"); *CP Kelco US, Inc. v. United States*, Slip Op. 18–36, 2018 WL 1703143 (CIT Apr. 5, 2018) ("*CP Kelco IV*"). The court presumes familiarity with those opinions. For the reasons discussed below, the court sustains Commerce's Remand Results.

BACKGROUND

In its *Final Determination*, Commerce concluded that the Thai Ajinomoto financial statements constituted a better source for calcu-

lating surrogate financial ratios than the Thai Fermentation financial statements. I&D Mem. at cmt. 2. Commerce first disregarded the Thai Fermentation statements on the basis that the record did not contain a full English translation, without making a finding that the untranslated portions were crucial to Commerce's calculations. *Id.* Commerce then selected the only remaining statements, those of Thai Ajinomoto, despite the fact that the Thai Ajinomoto statements "show evidence of the receipt of countervailable subsidies." *Id.* Defendant-Intervenors Neimenggu Fufeng Biotechnologies, Co., Ltd. and Shandong Fufeng Fermentation Co., Ltd. (collectively, "Fufeng") challenged this determination, arguing that Commerce failed to properly justify its disregard of the Thai Fermentation statements. Def.-Intervenor Rule 56.2 Mot. for J. on the Agency R. 13–22, ECF No. 28 (Mar. 7, 2014). The court agreed, remanding for Commerce to provide a more robust explanation for its choice of financial statements. *CP Kelco I*, 2015 WL 1544714, at *7.

Commerce then submitted its Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 83 (July 28, 2015) ("First Remand Results"). Commerce again chose the Thai Ajinomoto statements over the Thai Fermentation statements, justifying its selection by explaining the issues presented by the incompleteness of financial statements generally. *Id.* at 10–12. However, the court again remanded the issue, finding that Commerce still gave short shrift to the issues presented by the countervailable subsidies reflected in the Thai Ajinomoto statements. *CP Kelco II*, 2016 WL 1403657, at *5.

Commerce, as it did in its *Final Determination* and in its First Remand Results, again found that the Thai Ajinomoto statements were the better surrogate financial ratio source. Final Results of Redetermination Pursuant to Ct. Order 8, ECF No. 109 (Aug. 22, 2016) ("Second Remand Results"). Commerce based its determination on what it described as a new practice of "rejecting from use financial statements that are incomplete . . . unless there are no other financial statements left on the record." *Id.* at 7. The court again remanded, explaining that "the practice Commerce advance[d] [was] not reasonable and that it result[ed] in an unsupported determination." *CP Kelco III*, 41 CIT at __, 211 F. Supp. 3d at 1340. The court gave Commerce the option of doing a faithful comparison of the two statements or of making a "fact-sensitive finding" that the untranslated information in the Thai Fermentation statements was "vital," such that Commerce could not discern the reliability of those statements. *Id.*, 41 CIT at __, 211 F. Supp. 3d at 1345.

Commerce opted for the second alternative, explaining that "Thai Fermentation's financial statements are missing complete transla-

tions for two paragraphs of the property plant and equipment (*i.e.*, fixed asset) footnote" which are central to calculating depreciation expense. Final Results of Third Redetermination Pursuant to Ct. Order 7, ECF No. 157 (Sept. 18, 2017) ("Third Remand Results"). Commerce further explained that:

> [I]n the instant proceeding, depreciation expense comprises . . . a majority of the overhead costs for Thai Fermentation. [And] by virtue of comprising all or most of a company's overhead costs, depreciation expense is an integral component of the denominator of the selling, general and administrative (SG&A) expense and profit ratios. Thus, depreciation can significantly impact the surrogate financial ratios . . . .

Id. at 8 (footnotes omitted). Commerce further provided that "the narrative portions of a company's footnotes can provide vital information regarding asset impairments, changes in useful lives of fixed assets, revaluations of fixed assets and the capitalization of production costs, among other things that are not shown on the numeric fixed asset schedule." *Id.* at 10.

The court remanded once more, stating that, "[u]nlike the prior proceedings cited by Commerce, here the Department has not identified a particular depreciation methodology, class of fixed assets, or statement by the auditor in the Thai Fermentation statements that is questionable or unreliable." *CP Kelco IV*, 2018 WL 1703143, at *3. The court found that "Commerce's general discussion about depreciation does not comply with the court's instruction to make 'a fact-sensitive finding that the Thai Fermentation statements are missing "vital" information.'" *Id.* (citing *CP Kelco III*, 41 CIT at __, 211 F. Supp. 3d at 1345). Therefore, the court ordered that Commerce may "either translate the two paragraphs or leave them as is" but must, in any event, "use the Thai Fermentation statements to calculate surrogate financial ratios." *Id.* at 4.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court must sustain Commerce's remand redetermination if it is supported by substantial record evidence, is otherwise in accordance with law, and is consistent with the court's remand order. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014); *see also* 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

In its latest remand results, "Commerce has relied upon the Thai Fermentation financial statements to recalculate Fufeng's weighted-average dumping margins for these final remand results." Final Results of Fourth Redetermination Pursuant to Ct. Order 9, ECF No. 169 (July 5, 2018) ("Remand Results"). As Commerce explains, "the weighted-average dumping margin for Fufeng changes from 8.69 percent to 0.00 percent." *Id.* at 12. For reasons discussed at length in the court's four opinions in this action, the court finds that the Remand Results are supported by substantial evidence and, in all respects, are in accordance with the law. The Remand Results also comply with the terms of *CP Kelco IV*.[1]

CONCLUSION

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

Dated: September 17, 2018
New York, New York

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

[1] CP Kelco now urges the court to "remand the case to Commerce with instructions clarifying that Commerce has the discretion to calculate Fufeng's weighted-average dumping margin using the simple average methodology so long as Commerce includes financial ratios derived from the Thai Fermentation financial statements in its calculation." CP Kelco's Comments on Final Results of Fourth Remand Redetermination 2, ECF No. 173 (Aug. 6, 2018). This suggestion arises out of its view "that a simple average of both the Thai Ajinomoto and Thai Fermentation financial statements would yield a more accurate rate." *Id.* at 4–5. However, this court's standard of review demands that it consider only the soundness of the decision before it. Because the court finds that Commerce's determination here is supported by substantial evidence and in accordance with law, it does not reach either whether CP Kelco's preferred methodology is more reasonable or if that argument was waived, as per Fufeng's suggestion, Fufeng's Comments on Commerce's Fourth Remand 5–6, ECF No. 172 (Aug. 6, 2018).

Slip Op. 18–121

ARCELORMITTAL USA LLC, Plaintiff, and AK STEEL CORPORATION, NUCOR CORPORATION, AND UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, NOVOLIPETSK STEEL PUBLIC JOINT STOCK COMPANY, Consolidated Plaintiff, v. UNITED STATES, Defendant, and PAO SEVERSTAL AND SEVERSTAL EXPORT GMBH, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Consol. Court No. 16–00168

[Commerce's *Final Determination* is remanded for further explanation as appropriate.]

Dated: September 19, 2018

John M. Herrmann, II, and *Brooke Ringel*, Kelly Drye & Warren, LLP, of Washington, DC, argued for plaintiff. With them on the joint brief were *Alan J. Price*, *Timothy C. Brightbill*, and *Christopher B. Weld*, Wiley Rein LLP, of Washington, DC, for plaintiff-intervenor, *Nucor Corporation*; *Thomas M. Beline*, Cassidy Levy Kent, LLP, of Washington, DC, for plaintiff-intervenor, *United States Steel Corporation,* and on the brief were *Jeffrey D. Gerrish* and *Luke A. Meisner*, of Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC; and *Daniel L. Schneiderman* and *Stephen A. Jones*, King & Spalding LLP, of Washington, DC, for plaintiff-intervenor, *AK Steel Corporation*.

Matthew P. McCullough, *Marat S. Umerov*, and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for consolidated plaintiff. With them on the brief were *William H. Barringer* and *Valerie S. Ellis*.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Renee A. Burbank*, Trial Attorney. Of counsel on the brief was *Michael T. Gagain*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Daniel J. Cannistra, Crowell & Moring LLP, of Washington, DC, argued for defendant-intervenors.

OPINION

Katzmann, Judge:

The complex litigation that unfolds in the United States Court of International Trade is typically populated by multiple parties and agencies, shifting alignments, and intersecting claims and issues. Its resolution often calls for diagramming on a blackboard with multi-colored chalk. The case now before this Court may be viewed in such context.

Plaintiffs in two separate cases—ArcelorMittal USA LLC ("ArcelorMittal") in one case, and Novolipetsk Steel Public Joint Stock Company ("NLMK") in the other—challenged different elements of the United States Department of Commerce's ("Commerce") final affir-

mative determination of its *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Russian Federation*, 81 Fed. Reg. 49,935 (Dep't Commerce July 29, 2016) ("*Final Determination*") and the accompanying July 20, 2016 Issues and Decision Memorandum, C–821–823 ("*IDM*"). The United States ("the Government"), on behalf of Commerce, was the defendant in both cases. Domestic steel manufacturers AK Steel Corporation, Nucor Corporation, and United States Steel Corporation joined ArcelorMittal's case as plaintiff-intervenors and supported its arguments; all four companies joined NLMK's case as defendant-intervenors and supported the Government's position with respect to the elements of the *Final Determination* that NLMK contested. In addition, PAO Severstal and its wholly-owned affiliate, Severstal Export GMBH (collectively, "Severstal") joined ArcelorMittal's case as defendant-intervenor and supported the Government's position with respect to the elements of the *Final Determination* that ArcelorMittal contested. The Court, upon motion by the parties, consolidated the two cases into the case currently before the Court.

In essence, this case requires the Court to assess the countervailing duty ("CVD") rates selected, as well as the invocation and application of adverse facts available ("AFA"), by Commerce in its *Final Determination*. Commerce applied AFA in determining CVD rates for both company respondents to the CVD investigation, Severstal and NLMK. Plaintiff ArcelorMittal contests the CVD rate Commerce applied to respondent and defendant-intervenor Severstal, while consolidated plaintiff NLMK contests the CVD rate Commerce applied to it.

The primary question posed with respect to Severstal's CVD rate is whether Commerce erred in its selection of a program-specific AFA rate for Severstal's unreported use of the tax deduction program for mining-exploration expenses.

The following questions are posed with respect to NLMK's CVD rate: (1) Was Commerce's determination—that the Government of Russia's ("the GOR") alleged provision of natural gas for less than adequate remuneration ("LTAR") was *de facto* specific to steel manufacturing—supported by substantial evidence and in accordance with law? (2) Were Commerce's benefit and benchmark determinations supported by substantial evidence and in accordance with law?

BACKGROUND

A. *Countervailable Subsidies Generally.*

If Commerce determines that the government of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold, or likely to be sold for import, into the United States, and the International Trade Commission determines that an industry in the United States is materially injured or threatened with material injury thereby, then Commerce shall impose a countervailing duty upon such merchandise equal to the amount of the net countervailable subsidy. *See* Section 701 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671(a) (2012).[1] An investigation of countervailable subsidies shall commence whenever an interested party files a petition with Commerce, on behalf of an industry,[2] which alleges the elements necessary for the imposition of the duty, and which is accompanied by information reasonably available to the petitioner supporting those allegations. 19 U.S.C. § 1671a(b)(1), (c)(2).

Generally, a subsidy is countervailable if it consists of a foreign government's financial contribution to a recipient, which is specific, and also confers a benefit upon the recipient, as defined under 19 U.S.C. § 1677(5). A benefit is conferred when, in the case where goods or services are provided, such goods or services are provided for less than adequate remuneration. 19 U.S.C. § 1677(5)(E)(iv). Furthermore, the statute states that:

> [T]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

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[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are not to the U.S. Code 2012 edition, but to the unofficial U.S. Code Annotated 2018 edition. The current U.S.C.A. reflects the amendments made to 19 U.S.C. § 1677e (2012) by the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015). The TPEA amendments are applicable to all determinations made on or after August 6, 2015, and therefore, are applicable to this proceeding. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Dep't Commerce Aug. 6, 2015).

[2] "The term 'industry' means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A).

Id. The regulation on "adequate remuneration" provides a multi-tiered analysis under which Commerce may determine a suitable benchmark for the purposes of determining the existence and amount of a benefit conferred. Under Tier One, 19 C.F.R. § 351.511(a)(2)(i), Commerce assesses market prices from actual transactions within the country under investigation; under Tier Two, *id.* § 351.511(a)(2)(ii), Commerce assesses world market prices that would be available to purchasers in the country under investigation; and under Tier Three, *id.* § 351.511(a)(2)(iii), Commerce assesses whether the government price is consistent with market principles. *See IDM* at 16.

The subsidy must also be "specific," either in law or fact, as defined under 19 U.S.C. § 1677(5A). As relevant to this case, a subsidy may be *de facto* specific when "[a]n enterprise or industry is a predominant user of the subsidy." 19 U.S.C. § 1677(5A)(D)(iii)(II).

B. *Adverse Facts Available.*

During the course of its CVD proceeding, Commerce requires information from both the producer respondent and the foreign government alleged to have provided the subsidy. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369–70 (Fed. Cir. 2014). Information submitted to Commerce during an investigation is subject to verification. 19 U.S.C. § 1677m(i)(1).

When a respondent: (1) withholds information that has been requested by Commerce, (2) fails to provide such information by Commerce's deadlines for submission of the information or in the form and manner requested, (3) significantly impedes an antidumping proceeding, or (4) provides information that cannot be verified, then Commerce shall "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a)(2). This subsection thus asks whether necessary or requested information is missing from the administrative record, and provides Commerce with a methodology to fill the resultant informational gaps. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003).

Under certain circumstances, in an investigation, Commerce may assign an AFA rate to an investigated respondent as to a given subsidy program, instead of the countervailable subsidy rate that the respondent might receive for that program under normal circumstances. Specifically, Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" if it "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[.]" 19 U.S.C. § 1677e(b)(1)(A). A respondent's

failure to cooperate to "the best of its ability" is "determined by assessing whether [it] has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries." *Nippon Steel*, 337 F.3d at 1382; *see Özdemir Boru San. ve Tic. Ltd. Sti. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1225, 1231, 1241–42 (2017).

When applying an adverse inference, Commerce may rely on information from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record. 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c). Notably, if Commerce uses an adverse inference under § 1677e(b)(1)(A) in selecting among facts otherwise available, Commerce is not required to demonstrate that the dumping margin used "reflects an alleged commercial reality of the interested party." 19 U.S.C. § 1677e(d)(3); *see Hyundai Steel Co. v. United States*, 41 CIT ___, ___, 279 F. Supp. 3d 1349, 1355–56 (2017).

Typically, an AFA rate is higher than the normally calculable subsidy rate for an investigated program, and thus ultimately results in a higher CVD rate. *See* 19 U.S.C. § 1677e. Commerce maintains that its practice ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Özdemir*, 273 F. Supp. 3d at 1233 (quoting Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, H.R. No. 103–316, vol. 1, at 870 (1994), reprinted in 1994 U.S.C.C.A.N. at 4199 ("SAA")).[3] Commerce's practice when selecting an adverse rate from among the possible sources of information is also intended to ensure that the applied rate is sufficiently adverse to the respondent so as to deter future noncompliance.[4] *See id.* at 1245.

Commerce has developed a hierarchy when selecting the subsidy rate to be applied pursuant to AFA. *IDM* at 14–15, 126. Specifically, in the first step of the CVD AFA hierarchy—the step applied, and primarily at issue, in this case—Commerce examines whether, "in the

[3] *See* 19 U.S.C. § 3512(d), which states in relevant part that "[t]he statement of administrative action . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." *See also RHP Bearings Ltd. v. United States*, 288 F.3d. 1334, 1346 n.7 (Fed. Cir. 2002).

[4] The relevant statutory provision covering application of adverse inferences addresses both countervailing duty cases and antidumping cases in tandem. *See generally* 19 U.S.C. § 1677e. Federal Circuit case precedent too demonstrates that the statute's underlying purposes are equally applicable to countervailing duty cases. *See Fine Furniture*, 748 F.3d at 1372–73 (applying statutory purpose of ensuring uncooperative party does not benefit from its non-cooperation in countervailing duty case); *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010) (applying statutory purpose of deterrence in countervailing duty case).

context of the instant investigation, there is a calculated program subsidy rate for the identical program at issue. If so, [Commerce] will use the calculated program rate for that particular program as the basis of the AFA rate." *Id.* at 15. If there is no identical program match within the investigation, or if the rate is zero, then Commerce in the second step of the hierarchy applies the highest non-*de minimis* rate calculated for the same program in another CVD investigation involving the same country. If there is none, then in the third step Commerce uses the highest non-*de minimis* rate calculated for a similar program in another CVD investigation involving the same country. If that step also does not produce an applicable AFA rate, then Commerce in the fourth step uses the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies. *See Özdemir*, 273 F. Supp. 3d at 1232 (discussing Commerce's AFA hierarchy); *Essar Steel. Ltd. v. United States*, 753 F.3d 1368, 1371–74 (Fed. Cir. 2014); *see, e.g.*, *Welded Line Pipe from The Republic of Turkey*, 80 Fed. Reg. 61,371 (Dep't of Commerce Oct. 13, 2015) (final affirm. CVD determ.), and accompanying Issues & Decision Memorandum at 4–7.

C. *Factual and Procedural Background.*

On August 17, 2015, in response to a petition from petitioners,[5] Commerce initiated a CVD investigation concerning various subsidy programs that allegedly benefitted Russian cold-rolled steel producers. *Certain Cold-Rolled Steel Flat Products From Brazil, India, the People's Republic of China, the Republic of Korea, and Russia*, 80 Fed. Reg. 51,206, 51,210 (Dep't Commerce Aug. 24, 2015) (initiation notice), P.R. 49. These programs included the deduction of research and development ("R&D") and exploration costs from taxable income, and the reduction in extraction taxes. *See* Commerce's Initiation Checklist at 11–12, P.R. 44 (Aug. 19, 2015). Commerce also investigated whether the cold-rolled steel producers were provided natural gas for less than adequate remuneration. *Id.* at 12–14.

On September 14, 2015, Commerce selected Severstal Export GMBH and Novex Trading (Swiss) SA (Novex) as mandatory respondents.[6] Respondent Selection Memorandum at 5, P.R. 71 (Sept. 14,

[5] Petitioners include plaintiff ArcelorMittal and plaintiff-intervenors AK Steel Corporation, Nucor Corporation, and United States Steel Corporation.

[6] In countervailing duty investigations, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(e)(2), which provides:

> If [Commerce] determines that it is not practicable to determine individual countervailable subsidy rates [in investigations or administrative reviews] because of the large

2015); 19 U.S.C. § 1677f-1(e)(2)(A)(i); 19 C.F.R. 351.204(c)(2). Commerce then issued initial and supplemental questionnaires to the GOR and both respondents. *See* Commerce's Letter to Ministry of Economic Development of the Russian Federation Re: Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Countervailing Duty Questionnaire, P.R. 72, (Sept. 14, 2015) ("GOR CVD Questionnaire"). NLMK provided responses on behalf of its wholly-owned affiliate, Novex, as well as several other companies that Commerce determined were cross-owned under 19 C.F.R. § 351.525(b)(6).[7] *IDM* at 9–10. Severstal provided responses on behalf of its wholly-owned affiliate, Severstal Export GMBH, and other companies which Commerce treated as cross-owned. *IDM* at 10.

The GOR CVD Questionnaire requested information regarding whether the two mandatory respondents, NLMK and Severstal, received countervailable subsides in the form of the provision of natural gas for LTAR by Public Joint Stock Company Gazprom ("Gazprom"), a Russian government authority, during the period of investigation ("POI"). *See* GOR CVD Questionnaire at Section II at 4–7. The questionnaire also requested that the GOR "[e]xplain in detail how natural gas rates are set in Russia and provide copies of all laws, regulations and pricing guidelines that govern the setting of the rates." *Id.* at 6. The GOR responded that it does not maintain statistics on industries that purchase natural gas or the amount of natural gas purchased by the metallurgical industry, of which both mandatory respondents are a part. GOR's Initial Questionnaire Resp. at 29, P.R. 133–41, C.R. 138–46, (Oct. 27, 2015).

In its supplemental questionnaire to the GOR, Commerce asked the GOR to suggest an alternate source of data that could be used to evaluate natural gas purchases in the domestic market during the POI. Commerce's Letter to Ministry of Economic Development of the Russian Federation Re: Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Countervailing Duty Supplemental Questionnaire at 4–7, P.R. 186, (Nov.

number of exporters or producers involved in the investigation or review, [Commerce] may—

(A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—

(i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection[.]

[7] 19 C.F.R. § 351.525(b)(6)(vi) states, in relevant part, "[c]ross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations."

12, 2015). In its response, the GOR identified Gazprom's annual reports, which had been placed on the record as part of the GOR's initial questionnaire response, as a potential source of the requested information. GOR's Suppl. Questionnaire Resp. at 7, P.R. 239–62, C.R. 220–43, (Nov. 19, 2015).

In Severstal's response to Commerce's Initial Questionnaire, it addressed Commerce's questions regarding the tax deduction of mining-related R&D and exploration costs by providing information concerning the tax deduction of R&D expenses, but responded that "Severstal did not receive any benefits under the tax deduction for exploration costs." Severstal's Initial Questionnaire Resp. at 17–21, 23–26, P.R. 145–52, C.R. 147–75, (Oct. 27, 2015) ("Severstal's IQR"). Commerce subsequently issued a supplemental questionnaire to Severstal requesting additional information and clarification regarding Severstal's response to the Initial Questionnaire. *See* Letter to Crowell & Moring LLP Re: Countervailing Duty Investigation of Cold-Rolled Steel Flat Products from the Russian Federation, P.R. 225, C.R. 214, (Nov. 17, 2015) ("Supplemental Questionnaire"). In its response to the Supplemental Questionnaire, Severstal did not respond to Commerce's questions about the deduction of mining-related exploration expenses. *See* Severstal's Suppl. Questionnaire Resp. at S-11–5-13, P.R. 269–309, C.R. 253–300, (Nov. 25, 2015) ("Severstal's Suppl. QR").

On December 22, 2015, Commerce issued its preliminary determination. *See Certain Cold-Rolled Steel Flat Products From the Russian Federation*, 80 Fed. Reg. 79,564 (Dep't Commerce Dec. 22, 2015) ("*Preliminary Determination*"), P.R. 369, and accompanying Preliminary Decision Memorandum, P.R. 364, (Dec. 16, 2015) ("*PDM*"). Commerce found, with respect to the provision of natural gas for LTAR, that: (1) Gazprom is a government authority providing a financial contribution in the form of the provision of natural gas; (2) the provision of natural gas is specific to cold-rolled steel producers in Russia; (3) the Russian natural gas market is distorted by Gazprom's presence; and (4) "Tier Two" prices from certain European and Asian export markets were appropriate benchmarks for measuring the benefit of the program to the mandatory respondents. *See PDM* at 13–19; *see also* 19 C.F.R. § 351.511(a)(2)(ii). Furthermore, Commerce determined that the GOR tax deduction program for exploration expenses (1) provided a financial contribution to companies by allowing them to forego tax payments that would otherwise be due to the government, pursuant to 19 U.S.C. § 1677(5)(D)(ii), *PDM* at 21; and (2) was *de facto* specific under 19 U.S.C. § 1677(5A)(D)(iii)(I). Commerce preliminarily calculated overall subsidy rates of 6.33 percent for NLMK and a *de minimis* 0.01 for Severstal. *Preliminary Determination*, 70

Fed. Reg. at 79,565. However, in its *Final Determination*, Commerce explained that it had inadvertently relied on the incorrect data for Severstal in performing this calculation and instead clarified its understanding that Severstal had claimed non-use of the program. *See IDM* at 122–23; Ministerial Error Memorandum at 4, P.R. 534, (Aug. 16, 2016).

Following its *Preliminary Determination*, Commerce verified the facts placed on the record by mandatory respondents and the GOR. Commerce provided the GOR with its outline for verification on February 29, 2016. *See* Verification of the Questionnaire Responses Submitted by the GOR for the Provision of Natural Gas for LTAR ("GOR Verification Outline"), P.R. 39 (Feb. 29, 2016). Both in its verification instructions to the GOR and at verification, Commerce officials "asked the Gazprom representatives to provide data to support the composition of domestic sales reported in the company's annual reports for 2012, 2013, and 2014." GOR Verification Report at 7, P.R. 471, C.R. 426 (May 16, 2016); *see* GOR Verification Outline at 5. Specifically, Commerce requested that the GOR be prepared to provide "supporting records (such as, print-outs from Gazprom's database or sales reports) which were used to build-up the annual sales data and to compute the percentages reported" in Gazprom's 2014 annual report. GOR Verification Report at 4. Gazprom did not allow Commerce personnel to review the specific data contained in the company's quarterly sales reports for 2012, 2013, and 2014, claiming that "the forms are confidential and cannot be examined." *See id.* at 7. Instead, Gazprom provided Commerce with, inter alia, a blank copy of an internal form that the sales departments within Gazprom purportedly complete on a quarterly basis. *See id.*

During verification of Severstal, Commerce found that there were "previously unreported deductions" due to Severstal's use of the exploration expense tax deduction program. *IDM* at 124. Commerce learned during the GOR's verification—which preceded Severstal's verification—that "line 040" of a Russian income tax return is where companies report their "indirect expenses," which include "expenses for exploration activities *and* R&D." *IDM* at 123 (citing GOR Verification Report at 8) (emphasis in original). Based on this information, Commerce requested Severstal provide a breakout and sub-breakout of line 040 of its tax return, which revealed that the sub-breakout contained exploration related accounts, the amount of which did not link to any deduction amounts that Severstal had previously reported to Commerce. *Id.* Commerce declined to collect the specific line 040 breakout and sub-breakout amounts "because they would have con-

stituted untimely new factual information." *Id.* at 123–24. Consequently, the specific amounts within line 040 of Severstal's tax returns corresponding to exploration expenses are not on the record.

On July 29, 2016 Commerce issued its *Final Determination.* Commerce continued to find that Gazprom's provision of natural gas to NLMK Companies was *de facto* specific under 19 U.S.C. § 1677(5A)(D)(iii)(II), on the basis that the metallurgy sector is the predominant user of natural gas provided by Gazprom for LTAR. Commerce made this *de facto* specificity determination by applying AFA due to the GOR's refusal to place on the record the specific information—supporting records such as sales reports—requested by agency officials. *See IDM* at 48–50.

In regards to the appropriate benchmark to be used in calculating benefits under the provision of natural gas for LTAR program, Commerce continued to find that it could not use a Tier One benchmark as a result of the domestic Russian natural gas market being distorted. *See id.* at 52–56; *see also* 19 C.F.R. § 351.511 (a)(2)(ii). However, diverging from its *Preliminary Determination*, Commerce determined that it would rely on a Tier Three benchmark consisting of world market prices — specifically, regional European prices — to measure the adequacy of remuneration for the natural gas that Gazprom sold to the NLMK Companies during the POI. *See IDM* at 66–67. Commerce found that Gazprom's prices were not market based, and that as a result Commerce could not "conclude that the government natural gas prices are reflective of market principles." *Id.* at 69. Because the government natural gas prices in Russia are not set in accordance with market principles, pursuant to the agency's regulations and practice, Commerce looked for "an approximate proxy to determine a market-based natural gas benchmark." *Id.* Commerce concluded that regional European natural gas pricing was the appropriate Tier Three benchmark price, as Russia is part of the European gas market, the two markets are interconnected, and "regional European prices are market-determined in the regional market to which Russia belongs." *Id.* at 70. Commerce calculated an overall subsidy rate of 6.95 percent *ad valorem* for NLMK Companies, based on countervailable subsidy program usage rates of 6.92 and 0.03 percent *ad valorem* for the provision of natural gas for LTAR and tax deduction for exploration expenses subsidy programs, respectively.

With respect to Severstal, Commerce applied AFA to determine the benefit the respondent received from the tax deduction for exploration expenses program. *Id.* at 124. The program-specific AFA rate that Commerce selected for Severstal in connection with the tax deduction

for exploration expenses was based on the subsidy rate that Commerce calculated for NLMK in connection with NLMK's use of the same program. *See id.* at 126. To determine this AFA rate, Commerce relied on the first step of its AFA hierarchy for investigations, described *supra*, in which it "examines whether, in the context of the instant investigation, there is a calculated program subsidy rate for the identical program at issue," and, if so, uses "the calculated program rate for that particular program as the basis of the AFA rate." *Id.* at 14, 126. Commerce calculated an overall subsidy rate for the Severstal Companies of 0.62 percent *ad valorem*, based on the sum of the Severstal Companies' usage rates of the Reduction in Extraction Taxes and the Provision of Mining Rights for LTAR programs of 0.02 percent and 0.57 percent *ad valorem*, respectively. *See id.* at 23, 31. Because 0.62 percent is *de minimis*, the Severstal entries would not be subject to a CVD order concerning cold-rolled steel from Russia. *See Final Determination*, 81 Fed. Reg. at 49,936; *see also* 19 U.S.C. § 1671d(a)(3) ("In making a determination under this subsection, [Commerce] shall disregard any countervailable subsidy rate that is *de minimis* [.]"); 19 U.S.C. § 1671b(b)(4).

ArcelorMittal initiated this action challenging Commerce's Final Determination on August 25, 2016. Summ., ECF No. 1. ArcelorMittal filed its complaint on September 23, 2016. ECF No. 8. Severstal filed a Consent Motion to Intervene as Defendant-Intervenor on October 3, 2016. ECF No. 10. The Court granted that motion on October 3, 2016. ECF No. 14.[8]

On October 14, 2016, Severstal filed a cross-claim against the United States. Case No. 16–00219, ECF No. 20. The Government filed a motion to sever and dismiss Severstal's cross-claim on December 2, 2016, primarily arguing that Severstal had no standing to file a cross-claim. Case No. 16–00219, ECF No. 35. The Court granted Defendant's motion to dismiss, and Defendant-Intervenor's cross-claim was dismissed without prejudice on April 25, 2017. *ArcelorMittal USA LLC v. United States*, 41 CIT ___, 222 F. Supp. 3d 1293 (2017).

[8] AK Steel Corporation moved to intervene as plaintiff-intervenor on October 7, 2016. ECF No. 22. The Court granted that motion on October 17, 2016. ECF No. 21. Nucor Corporation moved to intervene as plaintiff-intervenor on October 18, 2016. ECF No. 16. The Court granted that motion on October 19, 2016. ECF No. 26. U.S. Steel Corporation moved to intervene as plaintiff-intervenor on October 24, 2016. ECF No. 27. The Court granted that motion on October 27, 2016. ECF No. 31.

NLMK initiated an action challenging Commerce's Final Determination on October 17, 2016. Case No. 16–00219, ECF No. 1; NLMK filed its complaint on November 17, 2016. Case No. 16–00219, ECF No. 10.[9]

The Court ordered Case Nos. 16–00168 and 16–00219 to be consolidated under the lead caption *ArcelorMittal USA LLC v. United States*, Consol. Case No. 16–00168, on May 10, 2017. ECF No. 62. Plaintiffs ArcelorMittal et al. and NLMK each filed motions for judgment on the agency record pursuant to USCIT Rule 56.2, as well as memoranda of points and authorities supporting these motions, on August 18, 2017. ArcelorMittal Br., ECF Nos. 65–66; NLMK Br., ECF Nos. 67–68. ArcelorMittal filed a response in opposition to NLMK's motion for judgment on the agency record as defendant-intervenor on November 17, 2017. ECF No. 74. Severstal also filed a response in opposition to ArcelorMittal's motion for judgment on the agency record as defendant-intervenor on that same day. ECF Nos. 75–76. The Government filed its response in opposition to both ArcelorMittal's and NLMK's motions for judgment on the agency record on November 17, 2017. Government Br., ECF Nos. 77–78.

The Government filed a motion to strike part of defendant-intervenor Severstal's Rule 56.2 response brief on December 1, 2017, arguing that much of the Severstal's brief advances arguments that are not a response to ArcelorMittal's motion, but in fact an improper attempt to advance the arguments contained in Severstal's dismissed cross-claim. ECF No. 79. Severstal then filed a response in opposition to the Government's motion to strike on December, 20 2017. ECF No. 82. The next day, the Court issued an order denying without prejudice the motion to strike, and further ordered that the parties may move for reconsideration of the motion to strike following further discussion of these matters at oral argument. ECF No. 83. NLMK and ArcelorMittal et. al. filed reply briefs on January 16, 2018 and January 17, 2018 respectively. ECF Nos. 85–86.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(ii). The stan-

[9] AK Steel Corporation moved to intervene a plaintiff-intervenor on December 5, 2016. Case No. 16–00219, ECF No. 12. The court granted that motion the next day. Case No. 16–00219, ECF No. 16. Nucor Corporation moved to intervene as plaintiff-intervenor on December 13, 2016. Case No. 16–00219, ECF No. 17. ArcelorMittal moved to intervene as plaintiff-intervenor the next day Case No. 16–00219, ECF No. 21. The court granted both those motions on December 16, 2016. Case No. 16–00219, ECF Nos. 27–28. U.S. Steel Corporation also moved to intervene as plaintiff-intervenors on December 16, 2016. Case No. 16–00219, ECF No. 29. The Court granted that motion on December 20, 2016. Case No. 16–00219, ECF No. 33.

dard of review in this action is set forth in 19 U.S.C. § 1516a(b)(l)(B)(i): "[t]he 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[.]"

DISCUSSION

I. *Commerce Did Not Sufficiently Explain Its Selection Of A Program-Specific AFA Rate For Severstal's Unreported Use Of The Tax Deduction Program For Mining-Exploration Expenses.*

As detailed above, in its *Final Determination*, Commerce applied NLMK's rate for the program to Severstal as its AFA rate under step one of Commerce's AFA hierarchy. *See IDM* at 126. ArcelorMittal argues that Commerce's decision was not in accordance with law because Commerce did not adequately explain why it relied on step one of its AFA hierarchy and did not use other alternatives in establishing Severstal's AFA rate. ArcelorMittal Br. at 26. Specifically, Commerce did not explain its reason for resorting to the AFA hierarchy, or evaluate the remaining steps in the hierarchy beyond step one. *Id.* at 27. In doing so, ArcelorMittal argues, Commerce deprived the Court of the material needed to "conduct meaningful judicial review" of Commerce's decision as is required under the law. *Id.* at 26; *see Altx, Inc. v. United States*, 25 CIT 1100, 1104, 167 F. Supp. 2d 1353, 1361 (2001) ("[I]n order to ascertain whether [agency] action is arbitrary, or otherwise not in accordance with law, reasons for the choices made among various acceptable alternatives usually need to be explained." (quoting *Bando Chem. Indus., Ltd. v. United States*, 16 CIT 133, 136, 787 F. Supp. 224, 227 (1992), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994))).

ArcelorMittal also contends that Commerce's selected rate was not in accordance with law because the rate was not sufficiently adverse to Severstal to effectuate the statute's dual purposes: (1) ensuring that the respondent does not benefit from its non-cooperation by receiving a more favorable rate than it otherwise would have and (2) deterring future non-cooperation by respondents. ArcelorMittal Br. at 32, 34–35; *see* SAA, 1994 U.S.C.C.A.N. at 4199; *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1347–48 (Fed. Cir. 2016). ArcelorMittal asserts that Commerce may not use its discretion to select an AFA rate which is insufficiently adverse to achieve the statutory objectives. ArcelorMittal Reply Br. at 8; *see IPSCO, Inc. v. United States* 899 F.2d 1192, 1195 (Fed. Cir. 1990). Additionally, the statute provides Commerce with discretion to rely on record information (but not necessarily the hierarchy) to apply the highest rate possible to effec-

tuate the purposes of the statute. ArcelorMittal Br. at 31; *see* 19 U.S.C. § 1677e(b)(2), (d)(2). ArcelorMittal also cites to prior Commerce determinations to demonstrate that it regularly deviates from its AFA hierarchy to ensure that its selected AFA rate is sufficiently adverse to the non-cooperative party,[10] and contends that Commerce had a "legal obligation" to do so here. *See* ArcelorMittal Br. at 30–32.

With respect to the first statutory purpose of ensuring the respondent does not benefit, ArcelorMittal asserts, based on purported relative size of their respective mining operations, that Severstal's mining-exploration expense deductions must have been much higher than NLMK's. *Id.* at 32–34. Consequently, ArcelorMittal argues, applying NLMK's rate is more beneficial to Severstal than the rate that would have been applied if Severstal had cooperated, in contravention of one of the statutory purposes. *Id.* With respect to the second statutory purpose of deterrence, in ArcelorMittal's view, the selected AFA rate was too low to serve as a deterrent against future non-cooperation, in part because it produced a perverse outcome: Severstal (the uncooperative party) received a *de minimis* overall CVD rate for, while NLMK (which was cooperative) received an affirmative CVD rate. *See id.* at 32. Altogether, according to ArcelorMittal, Commerce's decision was contrary to law because it improperly used its discretion to select an AFA rate for Severstal that was insufficiently adverse to satisfy either of the statute's purposes.

The Court first considers whether Commerce adequately explained its decision to rely on step one of its AFA hierarchy, and whether the subsequent steps were "potentially acceptable alternatives." *See Altx*, 167 F. Supp. 2d at 1361; *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT 1174, 1176, 704 F. Supp. 1068, 1071 (1998). "While Commerce must explain the bases for its decision, 'its explanations do not have to be perfect.'" *Taian Ziyang Food Co., Ltd. v. United States*, 37 CIT ___, ___, 918 F. Supp. 2d 1345, 1354 (2013) (quoting *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009)). Still, "'the path of Commerce's decision must be reasonably discernable' to support judicial review." *Id.* at 1354 (quoting *NMB Singapore*, 557 F.3d at 1319). ArcelorMittal cites no authority requiring Commerce to provide an explanation for not relying on the hierarchy's subsequent steps even though the first step was ap-

[10] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Truck and Bus Tires from the People's Republic of China; and Final Affirmative Determination of Critical Circumstances, in Part* at 14 (Dep't Commerce Jan. 19 2017); *Decision Memorandum for Final Results of Countervailing Duty Administrative Review; Certain Oil Country Tubular Goods from the People's Republic of China* at 23–24 (Dep't Commerce Aug. 25, 2014).

plicable. Therefore, Commerce's explanation, limited to the first step of the AFA hierarchy on which it based its selected rate, was sufficient.

The Court next considers whether Commerce's application of NLMK's program-specific rate to Severstal was sufficiently adverse to ensure Severstal did not benefit from its noncooperation, and to deter future non-cooperation. The SAA expressly sets forth that "one factor [Commerce] will consider is the extent to which a party may benefit from its own lack of cooperation." SAA, 1994 U.S.C.C.A.N. at 4199. As the Federal Circuit has recognized, the statute's "expectation" is that Commerce's selected AFA rate will have a deterrent effect.[11] *See Nan Ya Plastics*, 810 F.3d at 1348. Here, ArcelorMittal's assertion that Severstal benefitted from Commerce's application of NLMK's program-specific rate, because it produced a lower rate than would have been applied had Severstal cooperated, is speculative. While facts on the record do establish the disparity between the size of Severstal's and NLMK's respective mining operations, ArcelorMittal fails to show that necessarily means Severstal's mining-exploration deductions under the program during the period of investigation were resultantly larger. Under the statute, Commerce is not required to infer that there was necessarily a connection between the relative size of Severstal's mining operations and the larger size of its deductions under the program. *See* 19 U.S.C. § 1677e(b)(1)(B), (d)(3).

The Court determines, however, that Commerce's justification does not adequately explain why the application of NLMK's program-specific rate was sufficiently adverse to deter future noncooperation. First, the Government argues that the selected AFA rate is higher than the rate that would have been applied pursuant to Severstal's initial claim of non-usage. *See* Government Br. at 23. However, this justification is essentially an assertion that Commerce's selected rate is sufficiently adverse because it is above 0%—the rate that is applied when a respondent truly has not utilized the program at issue. Moreover, Severstal's claim of non-usage was proven to be false at verification, which is the reason Commerce is resorting to AFA. It was unreasonable for Commerce to use Severstal's demonstrably false non-usage claim as a basis for what rate is sufficiently adverse to

[11] This view is also supported by Commerce's own prior determinations. *See Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain Circular Welded Non-Alloy Steel Pipe from Mexico* at cmt 4 (Dep't Commerce June 13, 2011), *ref'd in* 76 Fed. Reg. 36,086 (Dep't Commerce June 21, 2011) (final results) ("The Department has a duty to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance." (citing *Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8,909, 8932 (Dep't Commerce Feb. 23, 1998)) (citation omitted)).

Severstal. Commerce's contention that "a difference between a finding of use and non-use is adverse" does not adequately remedy this deficiency.

Second, the Government notes that Commerce's selected rate is significantly higher than the rate Commerce assigned Severstal for the program in its *Preliminary Determination*. *See* Government Br. at 23. However, Commerce acknowledged in its *Final Determination* that it had inadvertently relied on the incorrect data in performing this calculation for its *Preliminary Determination*. *See IDM* at 122–23. Using the value set in its *Preliminary Determination* as a benchmark for measuring the adversity of the selected rate to Severstal was arbitrary, given that the value was admittedly incorrect based on an administrative error. *Id.* Because both of the benchmarks Commerce used to justify the adversity of its selected AFA rate to Severstal were unreasonable, the Court remands this issue so that Commerce may provide a more satisfactory explanation as to why NLMK's program-specific rate is sufficiently adverse to deter future noncooperation.

Finally, the Court considers ArcelorMittal's contention that Commerce was legally obligated to deviate from its hierarchy in this case in order to fulfill the purpose of the statute. The statute's provision on adverse inferences consistently uses permissive language to describe how Commerce may go about applying AFA. *See* 19 U.S.C. § 1677e(b), (d). Commerce thus has wide latitude in its selection of an appropriate AFA rate. However, Commerce's discretion is not without limit. The Federal Circuit in *IPSCO*, 899 F.2d at 1195, noted that a Court cannot uphold an agency's "exercise of administrative discretion if it contravenes statutory objectives." In other words, Commerce has discretion to select an AFA rate by any means permissible under the statute, so long as the rate it produces does not contravene the purposes of the statute. Furthermore, ArcelorMittal identifies no authority that requires Commerce to consider the aggregate effect on a company's overall subsidy rate in selecting AFA for a particular program-specific rate. Consequently, whether or not Severstal's overall rate is affirmative or *de minimis* does not necessarily affect whether the program-specific rate it selects is sufficiently adverse. Therefore, on remand Commerce is not obligated to deviate from its AFA hierarchy or produce a program-specific rate that necessarily results in an affirmative overall rate, but it must provide adequate explanation as to why the program-specific rate it selected was suf-

ficiently adverse to satisfy the underlying statutory purposes. If it cannot do so, it must select another rate that can be justified under the statute's purposes.[12]

II. *Commerce's Determination That The GOR's Alleged Provision Of Natural Gas For Less Than Adequate Remuneration Is Specific To Steel Manufacturing Is Not Supported By Substantial Evidence And In Accordance With Law.*

a. *The GOR Did Not Verify The Information Necessary For Commerce To Make Its Specificity Determination.*

NLMK acknowledges that the Gazprom annual reports were "necessary information" for Commerce's specificity determination, be-

[12] In order to provide Commerce with further clarity as it performs the remand, the Court addresses ArcelorMittal's argument that Commerce's rejection of line 040 as the basis for Severstal's use of the mining-exploration expenses tax deduction program ("the program") was not supported by substantial evidence. *See* ArcelorMittal Br. at 23. ArcelorMittal criticizes as speculative Commerce's finding that using line 040 would "overstate[] the benefit" to Severstal under the program, asserting that Commerce properly declined to accept information about the sub-breakouts of line 040 at verification and thus lacked any record evidence to its overstatement conclusion. ArcelorMittal Br. at 21–24; *see, e.g.*, *Marsan Gida Sanayi ve Ticaret A.S. v. United States*, 37 CIT ___, ___, 931 F. Supp. 2d 1258, 1280 (2013) (agreeing that the "purpose of verification is not to collect new information"). ArcelorMittal further notes this Court's holding that, in selecting an AFA rate, there must be a "built in increase" over a respondent's actual rate in order to deter uncooperative behavior. ArcelorMittal Reply Br. at 15 (citing *China Steel Corp. v. United States*, 28 CIT 38, 61, 306 F. Supp. 2d 1291, 1311 (2004)). Thus, according to ArcelorMittal, Commerce's decision to reject line 040 as AFA is contrary to the law's requirement to include a "built in increase" as a response to Severstal's uncooperative behavior. *Id.*

The Court determines that Commerce's finding that line 040 would overstate the benefit of the program is supported by substantial evidence. Substantial evidence is "more than a mere scintilla," but "less than the weight of the evidence." *Altx*, 370 F.3d at 1116. "A finding is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). Despite the fact that the values of each category of expense under line 040 are not on the record, a reasonable mind could conclude that using the line 040 value — which aggregates the values of each sub-breakout expense category — would overstate the amount Severstal deducted under the program, given that most of the sub-breakout expense categories would not qualify for deduction under the program. *See* Severstal Verification Report at 6–7 (listing 11 entries under the breakout for line 040). No evidence in the record suggests that the values of the non-deductible expense categories under line 040 equal zero. Commerce's decision to reject line 040 as inappropriate for AFA was also reasonable and in accordance with law. The statute at 19 U.S.C. § 1677e(b)(1) and (d)(3) expressly discusses adjustments and information that Commerce is not required to consider in selecting AFA, but does not mandate that Commerce consider any particular information in its selection. Moreover, prior decisions of this Court and the Federal Circuit demonstrate that Commerce has significant discretion in its selection of appropriate AFA. *See PAM S.p.A v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009); *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 229 F. Supp. 3d 1362, 1366 (2017). Commerce thus reasonably concluded that using line 040 would "overstate the benefit" of the program to Severstal, and would be contrary to Commerce's responsibility to select AFA that does not unreasonably overestimate the actual usage rate.

cause they provided the natural gas consumption percentages by various industries in the Russia. *See* NLMK Br. at 13–14. The only contested issue is whether the reports are verifiable. *Id.* NLMK asserts that the GOR sufficiently verified the annual reports by (1) presenting original copies of the reports (2) making available Gazprom officials who could attest to the authenticity of the original reports and (3) providing a blank authentic quarterly sales report form to demonstrate the statistical categories used to build the annual reports were the same as those presented in the annual reports. *Id.* at 14. According to NLMK, these steps were sufficient because there was no more granular set of statistical data than that presented in the annual reports, so they adequately verify the statistical categories used in the data, which NLMK claims is the focus of Commerce's specificity analysis.[13] *See id.* Consequently, the completed quarterly sales reports could offer no further insights into these statistical categories, and so Commerce need not have looked at them. *See* NLMK Br. at 14. Additionally, NLMK argues that it was inappropriate for Commerce to find the annual reports untrustworthy for its specificity finding, but rely on them for its market distortion and benefit/benchmark finding. *See* NLMK Br. at 16. Therefore, NLMK contends that Commerce's decision to find the necessary information unverifiable, and consequently apply AFA, was not supported by substantial evidence because, for the reasons stated above, the records were verifiable. *Id.*

The Government argues that NLMK misunderstands the issue at hand. According to the Government, the real issue is not whether the statistical categories match between the quarterly sales forms and the annual reports, but whether the GOR provided the underlying data necessary to verify that the consumption percentages between them match. *See* Government Br. at 32–33. The very purpose of verification is to "verify the accuracy and completeness of submitted factual information." 19 C.F.R. § 351.307(d); *see* Government Br. at 33. Commerce has wide latitude in selecting its verification procedures. *See Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997). Therefore, the Government argues, Commerce cannot take for granted that just because the names of the general statistical categories match, the percentages of sales across the cat-

[13] NLMK attempts to support this proposition by citing to a prior determination it claims shows that Commerce's key consideration in such investigations is to confirm that the statistical categories produced for verification are those used in everyday business. NLMK Br. at 15; *Live Swine from Canada: Final Negative Countervailing Duty Determination*, 70 Fed. Reg. 12,186 (Dep't Commerce Mar. 11, 2005) and accompanying Issues and Decision Memorandum at 11–14.

egories in the annual reports were also verified. *Id.* at 32. Essentially, because the GOR did not provide the underlying data necessary — in the form of the completed quarterly sales reports — Commerce could not verify the consumption percentages in the annual reports, and was thus justified in applying AFA to come to its *de facto* specificity finding. *Id.* at 33.

Additionally, the Government asserts that Commerce was justified in finding the Gazprom annual report unreliable for its specificity finding but still using evidence from the report for its benefit/benchmark finding. *See* Government Br. at 37. The Government contends that the fact that Commerce could not verify the consumption percentages in one discrete section of the annual report does not make the entire report unreliable, since there was nothing that else that put the validity of the rest of the report into question. *Id.* As a result, Commerce was not precluded from relying on other parts of the annual report for its benefit/benchmark determination. *Id.*

The Court concludes that because the GOR did not provide information at verification that would allow Commerce to verify the underlying data used to produce the values of the natural gas consumption percentages in the Gazprom annual reports, Commerce was justified in applying AFA for its *de facto* specificity finding. The presentation of authentic original versions of the annual reports, along with Gazprom officials to verify their authenticity, does not prove the consumption percentages were indeed accurate. These materials simply demonstrate that the consumption percentages found in the copies of the annual reports sent to Commerce in the GOR's questionnaire responses had not been altered from the values listed in the original annual report. However, this does nothing to verify the accuracy of the consumption percentage values in the original annual reports. In addition, the GOR's provision of blank quarterly sales forms does nothing to verify the accuracy of the values found in the annual reports, because this blank form, by definition, contains no underlying data. Thus, because the GOR refused to allow Commerce verification officials to view the completed quarterly sales form — the only known documents that could verify the accuracy of the annual report consumption percentages — on the grounds that they were "confidential," the Consumption percentages were not verified. *See* GOR Verification Report at 4.

b. *Commerce's Finding That The GOR Failed To Cooperate By Not Acting To The Best Of Its Ability Was Supported By Substantial Evidence And In Accordance With Law.*

NLMK argues that Commerce's guidance in its verification outline did not clearly identify the types of documents the GOR needed to produce at verification, so the GOR reasonably believed that it was acting to the "best of its ability" by producing the materials that it did. NLMK Br. at 18, 20. NLMK claims that "nowhere in the outline are actual sales data expressly required." *Id.* at 20. NLMK advances two arguments for why the GOR was reasonable in believing that it was in compliance with Commerce's requests to verify the accuracy and completeness of the consumption percentages in the Gazprom annual reports. *Id.* at 20–23. First, the character of the information at issue is "self-authenticating" because the Gazprom annual reports are published by "a publicly traded company subject to securities laws, which were not prepared for the purposes of the CVD proceeding." *Id.* at 21. Therefore, it was reasonable for the GOR to expect that the veracity of this document would not be challenged beyond the four corners of the report, consistent with prior Commerce determinations which effectively presume the accuracy of such documents. *See id.* at 21–22.[14] Second, the GOR could reasonably rely on Commerce's past practice in *de facto* specificity determinations to expect that the materials it produced were adequate since they demonstrated the statistical categories in the annual reports were those "used in the everyday course of business." *Id.* at 23; *see Live Swine from Canada: Final Negative Countervailing Duty Determination*, 70 Fed. Reg. 12,186 (Dep't Commerce Mar. 11, 2005) and accompanying Issues and Decision Memorandum at 11–14; *Live Cattle from Canada: Preliminary Negative Countervailing Duty Determination*, 64 Fed. Reg. 25,277, 25,279 (Dep't Commerce May 11, 1999). Thus, providing the completed quarterly forms would have done nothing more to prove that the statistical categories in the annual reports were the ones used in the course of everyday business. *See supra* at pp. 24–26 (discussing materials provided by GOR that allegedly verified statistical categories used in annual report); NLMK Br. at 25. For the reasons stated above, NLMK contends that Commerce unreasonably found that the verification outline clearly reflected Commerce's intention to examine actual Gazprom sales data outside the context of

[14] *See, e.g.*, *Countervailing Duty Investigation of Certain Amorphous Silica Fabric From the People's Republic of China: Preliminary Determination of the Countervailing Duty Investigation and Alignment of Final Determination With Final Antidumping Duty Investigation*, 81 Fed. Reg. 43,579 (Dep't Commerce July 5, 2016) and accompanying Issues and Decision Memorandum at 21–25.

that presented in the annual reports. Therefore, in NLMK's view, the GOR acted to "the best of its ability" to comply with the requests made in Commerce's verification outline by providing the materials it did in line with its reasonable interpretation of the instructions.

The Court first considers whether the GOR acted to "the best of its ability" in responding to Commerce's verification instructions. As noted above, "[c]ompliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel*, 337 F.3d at 1382. "While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record-keeping." *Id.*

Whether the GOR acted "to the best of its ability" rests on two distinct but related questions. First, the Court must determine whether Commerce's verification outline instructions were clear enough that it was unreasonable for the GOR to believe the materials it produced at verification were adequate. Commerce's verification instructions explicitly state: "Have available the supporting records (such as, print-outs from Gazprom's database or *sales reports*) which were used to build-up the annual sales data and to compute the percentages reported" on the 2012–2014 Gazprom annual reports. *See* GOR Verification Outline at 4 (emphasis added); *IDM* at 49. The Oxford English Dictionary defines "compute" as "to calculate." *Compute*, OXFORD ENGLISH DICTIONARY (3d ed. 2008). This definition implies that there must be numerical values included in any materials used to "compute" the reported percentages. Thus, materials such as the blank quarterly sales forms, by definition, cannot reasonably be said to be used to compute the reported percentages because they do not include any numbers from which to do so. These instructions, in combination with additional instructions in the verification outline were clear enough that the GOR should have known it needed to provide the completed quarterly sales reports, to which the GOR expressly denied Commerce verifiers access. *See id.* at 39; *see also IDM* at 49; GOR Verification Report at 7. Given the word choice and specificity of the instructions, NLMK cannot reasonably assert that the GOR "reasonably interpreted" these instructions as not requiring the provision of the completed quarterly sales reports. Altogether, the GOR did not act to the "best of its ability" in this regard.

Second, the Court considers whether the Gazprom annual reports were self-authenticating. According to NLMK, if the Gazprom annual reports were self-authenticating by their very nature as audited fi-

nancial documents, then the GOR was reasonable in believing that it need not provide any underlying data, in the form of completed quarterly sales reports, in response to Commerce's verification instructions. *See* NLMK Br. at 21. NLMK argues that it is contrary to Commerce's practice to look behind data in audited financial statements because Commerce regards them as "the touchstone for accuracy." *Id.* at 22. NLMK attempts to support this proposition by citing to *Geum Poong v. United States*, 26 CIT 322, 325, 193 F. Supp. 2d 1363, 1367 (2002), which it asserts establishes that Commerce considers audited financial statements to be "self-verifying." In that case, the Court quoted a Commerce request for additional information from the respondent, in which Commerce "indicated that 'any information submitted must be credible and self-verifying, e.g. audited financial statements . . . .'" *Id.* However, in the very next sentence, the Court pointed out that Commerce "could have requested still more information if it considered the submission somehow incomplete." *Id.* Despite NLMK's assertion to the contrary, this language demonstrates that *Geum Poong* stands for the proposition that Commerce is broadly entitled to ask for additional information from respondents if it feels that the materials provided were not sufficient to verify the facts placed on the record, regardless of Commerce's characterization of the facial reliability of such documents. This is precisely what Commerce did in the instant case, and the GOR expressly refused to provide the additional materials requested by Commerce (*i.e.*, the completed quarterly sales forms) on the grounds that they were "confidential." Therefore, Gazprom's annual reports were not "self-authenticating," and as such it was unreasonable for the GOR to believe it did not need to produce the underlying quarterly sales data in response to Commerce's instructions.

NLMK further argues that the GOR's response to the Commerce verification team's request for information was merely deficient, requiring Commerce to give notice and an opportunity for remedy which Commerce did not provide. NLMK Br. at 26–27. The statute, 19 U.S.C. § 1677m(d), requires Commerce to give a cooperating party an opportunity to remedy or explain deficiencies in its submissions before it may use AFA. NLMK Br. at 26; *see* 19 U.S.C. § 1677m(d). According to NLMK, if Commerce wanted the GOR to produce more materials than what the GOR could have reasonably expected from the verification instructions, and was prepared to invoke AFA if the GOR did not comply, the GOR was entitled to some notice and opportunity to remedy the submissions that Commerce found inadequate. NLMK Br. at 27.

"Nothing in the statute compels Commerce to treat intentionally incomplete data as a 'deficiency' and then to give a party that has intentionally submitted incomplete data an opportunity to 'remedy' as well as to 'explain.'" *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016). In the instant case, Commerce specifically requested the quarterly sales forms in its verification outline instructions. It is unreasonable for NLMK to argue that the completed quarterly sales forms were not "sales reports" used to "compute the annual consumption percentages" per Commerce's instructions. *See supra* pp. 28. Furthermore, Commerce again specifically asked for the quarterly sales reports at verification, and the GOR informed Commerce in no uncertain terms that it would not be able to provide those materials because they were "confidential." NLMK's arguments related to notice and opportunity to remedy under 19 U.S.C. § 1677m(d) are unpersuasive, since it cannot be argued that the GOR's response was "merely deficient" if the instructions were unambiguous as to what was expected of it.

c. *Commerce's Affirmative Specificity Finding Was Not Supported By Substantial Evidence.*

NLMK argues that Commerce's *de facto* specificity determination was not based on any facts on the record. *See* NLMK Br. at 28. NLMK points out that Commerce does not cite to anything in the record in its *de facto* specificity finding. *See id.*; *IDM* at 16, 50. NLMK asserts that when Commerce "simply reaches an adverse conclusion without any resort to facts on the record, that conclusion cannot be said to be supported by substantial evidence." NLMK Br. at 28; *See Changzhou Trina Solar Energy Co., Ltd. et al. v. United States*, 40 CIT ___, ___, 195 F. Supp. 3d 1334, 1350 (2016).

The Government argues that Commerce's determination that the GOR's provision of natural gas was *de facto* specific was supported by substantial evidence, even though Commerce did not cite any record facts to support that determination. First, the Government contends that *Changzhou Trina*'s holding is not binding on this Court and outlines several reasons why it disagrees with the decision. *See* Government Br. at 42; *Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989). The Government then argues that regardless of *Changzhou Trina*, Commerce's *de facto* specificity finding was based on "facts" on the record. Government Br. at 43. Per the Government, although Commerce's finding was not accompanied by a specific record citation, the "procedural history, and the inferences flowing therefrom, are themselves 'facts' supporting this determination." *Id.* at 43–44. Moreover, the Government asserts that Commerce's finding

is consistent with "the culmination of Commerce's analysis of the Gazprom 2014 annual report in the preliminary determination," and with Commerce's decision to initiate the investigation. *Id.* at 44. Instead of Commerce's *de facto* specificity finding being based on verified evidence in the final determination, which is not required for an AFA determination, Commerce declined to reward the GOR for its non-cooperation and found that the "facts" supported a finding of *de facto* specificity. *Id.*

The Court determines that Commerce did not fulfil its obligation to support its *de facto* specificity finding with any record evidence. The AFA statute lists four potential sources of information on which Commerce may rely when making adverse inferences: (1) the petition, (2) a final determination in the investigation under this title, (3) any previous review under 19 U.S.C. § 1675 or determination under § 1675b, or (4) any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(2). Although this list provides Commerce wide latitude in selecting facts upon which to base its adverse inference, it is clear it must be based upon record evidence.

Changzhou Trina is an analogous case reinforcing this proposition. In that case, Commerce resorted to AFA after the respondent and the Government of China were both uncooperative in helping Commerce identify countervailable programs used by the respondent. *See Changzhou Trina*, 195 F. Supp. 3d at 1343–45. As a result, Commerce found the government grants it discovered the respondent had used to be *de facto* specific and therefore countervailable. *See id.* at 1347. Commerce's Final Determination in that case did not cite to any facts that it relied upon in finding that the programs at issue were *de facto* specific. *Id.* at 1347–48. Instead, Commerce's finding was "a sweeping legal conclusion lacking any factual foundation." *Id.* at 1349. The Court held that because Commerce "improperly reached legal conclusions without the support of requisite factual findings, the agency's determination . . . must be remanded for reconsideration." *Id.* at 1350.

In the instant case, Commerce provided no citation to any facts whatsoever—on the record or otherwise—in its finding that the GOR's provision of natural gas was *de facto* specific. *See IDM* at 16, 50. Commerce essentially rested its specificity finding on the proposition that because it may use an adverse inference, it therefore may find the GOR's provision of natural gas was *de facto* specific. *Id.* Such a statement is the type of "sweeping legal conclusion" the *Changzhou Trina* Court held to be inadequate under the statute. As noted, the Government attempts to justify Commerce's lack of citation to any record facts by arguing that the "procedural history, and the inferences flowing therefrom, are themselves 'facts' supporting this deter-

mination." Government Br. at 43–44. However, the government provides no authority to support this proposition, or explain why it satisfies the statutory standard. Because both the statute's language and prior decisions of this Court are clear that Commerce must rely on some actual record fact in applying adverse inferences, the Court remands Commerce's determination so that the agency may identify record facts on which it bases its *de facto* specificity finding.[15]

III. *Severstal Can Raise Arguments Related To Commerce's Application Of AFA In Its Defendant-Intervenor Brief.*

As noted above, the Government filed a motion to strike arguments advanced by Severstal in its defendant-intervenor brief that pertain to whether Commerce was correct in resorting to AFA in determining Severstal's CVD rate. The Government asserts Severstal is now improperly raising arguments that support its cross-claim, which the Court previously dismissed for lack of standing. *See id.* at 3–5; *see also ArcelorMittal*, 222 F. Supp. 3d 1293. Severstal argues that it is appropriate to raise such arguments in its defendant-intervenor brief, because they are merely rebutting "the various arguments and factual assertions in Plaintiff's opening brief, which claims that Severstal failed to report certain tax benefits and that the Department therefore properly relied on [AFA]." Resp. to Mot. to Strike at 3, Dec. 20, 2017, ECF No. 82. Furthermore, Severstal contends that it can bring such arguments in its brief without running afoul of the Court's prior rulings because those pertained to whether Severstal had standing for a cross-claim, which this is not. *Id.* at 4–5.

Under the Court's rules, it "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." USCIT R. 12(f). However, motions to strike constitute extraordinary remedies, and "should be granted only in cases where there has been a flagrant disregard of the rules of court." *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986) (citing *Application of Harrington*, 55 CCPA 1459, 1462, 392 F.2d 653, 655 (1968)). The party's brief must demonstrate "a lack of good faith, or that the court would be prejudiced or misled by the inclusion in the brief of the improper material." *Jimlar*, 647 F. Supp. at 934; *see also Fla. Tomato Exch. v. United States*, 38 CIT ___, ___, 973 F. Supp. 2d 1334, 1338 (2014).

[15] The issues raised by the parties pertaining to the benchmark Commerce selected to measure the adequacy of NLMK's remunerations for the GOR's provision of natural gas are predicated on Commerce appropriately finding that the GOR's provision of natural gas for LTAR was *de facto* specific. Therefore, until Commerce can sufficiently justify its *de facto* specificity finding, the Court will not address those issues.

In its order granting the Government's motion to dismiss, the Court expressly ruled that Severstal's argument that Commerce should not have resorted to AFA did not impermissibly expand the issues in dispute because it is encompassed within the primary issue in this case: "whether the AFA rate assigned to Severstal is supported by substantial evidence and in accordance with law." Given this characterization of the issue, Severstal's inclusion of this argument in its brief does not meet the high standard of "flagrant disregard" of the court's rules to justify striking it from the brief.

IV. *Commerce's Application Of AFA To Severstal Was Appropriate.*

Severstal argues that Commerce failed to meet the legal requirements of the statute's AFA and related provisions, and was wrong, as a factual matter, that Severstal failed to report its use of the program. Severstal Br. at 12–22. In essence, Severstal contends that it was inappropriate for Commerce to resort to AFA on the grounds that Severstal did not disclose its use of the program, because Severstal did disclose its use of the program. *See id.* at 12–19. As such, Severstal claims that Commerce's finding that it "failed to act to the best of its ability" was not supported by substantial evidence. *See id.* Accordingly, Severstal asserts that Commerce should have calculated a program rate based on the same methodology that it used in its *Preliminary Determination*. *See id.* at 10, 22, 28–29.

Severstal's claims that it disclosed its use of the program are incorrect. In Severstal's initial questionnaire response, it unequivocally claimed that "it did not receive any benefits under the tax deduction for exploration costs." Severstal's IQR at 23. Furthermore, Severstal's supplemental questionnaire response directed Commerce to line 054 of Severstal's tax return, which did not include any amount for exploration-related deductions, only R&D expenses deductions — a separate program. *See* Severstal's Pre-Preliminary Comments at 10; *IDM* at 123–24. Moreover, Severstal did not respond to Commerce's direct question regarding exploration expense deduction usage, only its extraction tax deduction. *See id.* at S-11, S-13.[16] Commerce only discovered the actual expenses related to Severstal's use of the program at verification, when it observed the relevant values under line 040 of Severstal's tax return that "did not trace to any of the deduction amounts previously reported by the Severstal Companies." *IDM* at 123. Based on the standard described *supra*, these facts demonstrate that Severstal did not comply with Commerce's requests about

[16] Commerce's question was "Did the company deduct any exploration expenses or take a reduction of its extraction taxes on the company's 2013 tax returns?"

the program to "the best of its ability," and thus Commerce was justified in resorting to AFA to determine Severstal's subsidy rate under the program.

CONCLUSION

Commerce's selected AFA rate for Severstal for the program was contrary to law because it did not adequately explain why the rate it selected was sufficient to deter future non-cooperation, as the statute and binding case precedent require. The Court thus remands the *Final Determination* so that Commerce may either provide a satisfactory explanation as to why its selected AFA rate was sufficiently adverse to satisfy the statute's purpose, or select another rate which does comport with the statute's purpose of deterrence in accordance with the guidance laid out in this opinion.

Regarding NLMK, the consumption percentages in the Gazprom annual reports were not verified by the materials produced by the GOR at verification, and thus the GOR did not act to "the best of its ability." Commerce was therefore warranted in applying AFA. However, even though Commerce's decision to apply AFA was appropriate, its *de facto* specificity finding was still improper because it did not provide any specific factual basis for its conclusion. Consequently, the Court remands the *Final Determination* so that Commerce may identify the record facts it relied upon in making its *de facto* specificity determination.

Commerce shall file with the Court and provide to the parties the results of its redetermination on remand within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the redetermination to the Court and the parties shall have 15 days thereafter to file reply briefs with the Court.

SO ORDERED.

Dated: September 19, 2018
New York, New York

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