Slip Op. 18–110

FLINT HILLS RESOURCES, LP, formerly known as KOCH PETROLEUM GROUP, LP, et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 06–00065

[Plaintiffs' motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted.]

Dated: September 6, 2018

Michael F. Mitri, Phelan & Mitri, of Fairfield, CT, argued for plaintiffs. With him on the brief were *Jack D. Mlawski*, Galvin & Mlawski LLC, of Rockville Centre, NY, and *Steven H. Becker*, Becker Law Firm PLLC, of New City, NY.

Tara K. Hogan, 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*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of Counsel on the brief was *Richard McManus*, Office of the Chief Counsel, U.S. Customs & Border Protection, of Washington, DC.

OPINION

Eaton, Judge:

In this consolidated action, plaintiff Flint Hills Resources, LP, formerly Koch Petroleum Group, LP, and consolidated plaintiffs Texaco Refining & Marketing Inc., Texaco Aviation Products, LLC, Shell Oil Company, and Citgo Petroleum Corporation (collectively, "plaintiffs") move for summary judgment, challenging the decisions of the U.S. Customs and Border Protection ("Customs") to deny plaintiffs' administrative protests seeking drawback of (1) Harbor Maintenance Taxes ("HMT")[1] imposed under 26 U.S.C. § 4461, (2) Merchandise Processing Fees ("MPF")[2] imposed under 19 U.S.C. § 58c, and/or (3) Environmental Taxes ("ET")[3] imposed under 26 U.S.C. § 4411, that were paid or imposed upon the entry of their petroleum products into the

[1] "The HMT is a tax on port use calculated at a rate of 0.125 percent of the value of the commercial cargo. It was enacted pursuant to the Water Resources Development Act of 1986, Pub.L. No. 99–662, Title XIV, § 1402, 100 Stat. 4266 (1986), and is codified at 26 U.S.C. § 4461." *George E. Warren Corp. v. United States*, 26 CIT 486, 486 n.1, 201 F. Supp. 2d 1366, 1367 n.1.

[2] MPF is a fee assessed on all imports pursuant to 19 U.S.C. § 58c(a)(9).

[3] "The ET[is] an excise tax imposed on crude oil received at a United States refinery and on petroleum products entered into the United States for consumption, use, or warehousing." *Aectra Refining and Marketing Inc. v. United States*, 31 CIT 2086, 2087 n.4, 533 F. Supp. 2d 1318, 1318 n.4 (2007), *aff'd*, 565 F.3d 1364 (Fed. Cir. 2009) ("*Aectra I*") (citing 26 U.S.C. § 4611).

United States (collectively, "taxes and fees"). Mem. Supp. Pls.' Am. Mot. Summ. J., ECF No. 80 ("Pls.' Br.") 1. Plaintiffs ask the court to order the re-liquidation of their entries, payment of their drawback claims, and interest as provided by law. *See* Pls.' Br. 1.

By its cross-motion for summary judgment, defendant, the United States ("defendant" or the "Government"), on behalf of Customs, asks the court to deny plaintiffs' summary judgment motion, and dismiss the case because plaintiffs' protests were properly denied and Federal Circuit precedent has answered the questions presented by plaintiffs' motion. *See* Def.'s Resp. Pls.' Mot. Summ. J. and Cross-Mot. Summ. J., ECF No. 84 ("Def.'s Br.") at 8–9.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2006), and, for the reasons below, denies plaintiffs' motion for summary judgment and grants defendant's cross-motion for summary judgment.

LEGAL FRAMEWORK

At the time a majority[4] of plaintiffs entered their products into the United States, under 19 U.S.C. § 1313(j)[5] and § 1313(p),[6] an importer could receive a refund of up to 99 percent of the amount paid on any

[4] The court notes that because plaintiffs' lawsuit is comprised of the remaining cases previously suspended under both *Aectra I*, 31 CIT at 2086, 533 F. Supp. 2d at 1318 and *Shell Oil Co. v. United States*, 35 CIT __, 781 F. Supp. 2d 1313 (2011) ("*Shell I*"), the dates on which plaintiffs' drawback claims were filed range between the mid 1990s and the early 2000s. As shall be seen, although there were changes in both the statute and the regulations during this time, such changes do not affect the ultimate treatment of plaintiffs' claims in this case. One noteworthy change in the drawback statute occurred in 1999. Prior to 1999, claims filed under the "substitute petroleum derivatives" provision of the drawback statute were limited to 99 percent of "the amount of the duties paid on, or attributable to" the imported petroleum products. *See* 19 U.S.C. § 1313(p), (a) (1994). In 1999, Congress amended 19 U.S.C. § 1313(p)(4), "so as to provide that the drawback amount payable for non-manufacturing claims shall be that attributable to the imported article under 19 U.S.C. § 1313(j) governing unused merchandise drawback." *Aectra I*, 31 CIT at 2088, 533 F. Supp. 2d at 1319 (citing Miscellaneous Trade and Technical Corrections Act of 1999, Pub. L. No. 106–36, § 2420(d), 113 Stat. 127, 178–79 (1999) ("1999 Trade Act")). In other words, the 1999 Trade Act allowed for a more generous provision of the statute, § 1313(j), to govern drawback claims like those at issue here.

[5] Prior to 2004, § 1313(j) (governing "unused merchandise drawback") stated, in pertinent part, that if there is "imported merchandise on which was paid any duty, tax, or fee imposed under Federal law *because of its importation*, any other merchandise" that "is commercially interchangeable with such imported merchandise," and "is, before the close of the 3-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under customs supervision," and "is not used within the United States" before such exportation or destruction, then

> upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback, but in no case may the total drawback on the imported merchandise . . . exceed 99 percent of that duty, tax, or fee.

19 U.S.C. § 1313(j)(2) (2000) (emphasis added).

[6] Subsection 1313(p) governs "substitution of finished petroleum derivatives" and states, in pertinent part, that if an "article . . . of the same kind and quality as a qualified article is

duty, tax, or fee imposed under federal law "because of its importation" into the United States if (1) the goods are either exported unused or (2) if acceptable substitute merchandise is exported within the statutory and regulatory timeframe. *See* 19 U.S.C. § 1313(j), (p) (2000); *see also* 19 C.F.R. § 191.176(2)(i) (2000) (requiring the exportation of the substitute merchandise within 180 days of entry of the imported merchandise). This refund is known as a "drawback." *See* 19 U.S.C. § 1313(j).

Pursuant to the statute, a claimant has three years from the date of exportation or destruction of the entered merchandise (or substitute merchandise) to file a drawback claim, including "all documents necessary to complete a drawback claim," or else it will be "considered abandoned." 19 U.S.C. § 1313(r)(1) (2000). Since the year 1998, Customs' regulations have defined a "complete" drawback claim as

> consist[ing] of the drawback entry on Customs Form 7551, applicable certificate(s) of manufacture and delivery, applicable Notice(s) of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback, applicable import entry number(s), coding sheet unless the data is filed electronically, and evidence of exportation or destruction under subpart G of this part.

19 C.F.R. § 191.51(a)(1) (1998).

Beginning in the mid-1990s, the issue of whether certain taxes or fees were eligible to drawback became the subject of litigation. In *Texport Oil Co. v. United States*, the Federal Circuit considered whether HMT and MPF were eligible for drawback under 19 U.S.C. § 1313(j)(2). As to HMT, the Court found that

> the dispositive question is whether the HMT is assessed "because of . . . importation." 19 U.S.C. § 1313(j)(2). This language, we think, is best read as limiting the scope of the charges eligible for drawback to only those with a substantial nexus to the importation of merchandise. We thus read the "because of . . . importation" clause to require a nexus between the assessed charges and the act of importation, and therefore preclude the grant of drawback to a duty, tax, or fee that is assessed in a nondiscriminatory fashion against all shipments utilizing ports.

Texport Oil Co. v. United States, 185 F.3d 1291, 1296 (Fed. Cir. 1999).

Thus, the Court found that because "[t]he HMT is a generalized Federal charge for the use of certain harbors," and is "intended to be assessed independently of whether the 'port use' is for imports, ex-

exported" and its exporter imported the qualified article "in a quantity equal to or greater than the quantity of the exported article," then the exporter may file a drawback claim. 19 U.S.C. § 1313(p).

ports, or other shipments," the HMT "does not have the necessary nexus to the importation of goods to qualify it for drawback under section 1313(j)(2)." *Id.* at 1297 (first citing 26 U.S.C. § 4461 and then citing 19 C.F.R. § 24.24(b)(1)). The Court did find, however, that the MPF was eligible for drawback. *Id.* at 1296.

The Federal Circuit reaffirmed its decision with respect to HMT, and extended its holding to ET, in *George E. Warren Corp. v. United States*, 341 F.3d 1348 (Fed. Cir. 2003). There, the Court found that

> Warren has shown no question that is precedent-setting or of exceptional importance or any question not correctly resolved by *Texport* and thus no justification for *en banc* hearing of this appeal. Under *Texport*, Warren's claim for HMT is absolutely foreclosed. Nor has Warren shown any error in the trial court's application of the *Texport* rule to the protest claim for drawback of ETs. We hold simply: like the HMT, the ET is not imposed on cargo "because of . . . importation."

Warren, 341 F.3d at 1356. Read together, the *Texport* and *Warren* decisions made it clear that neither HMT nor ET qualified for drawback under 19 U.S.C. § 1313(j)(2).

In December 2004, following the issuance of the Federal Circuit's opinions in *Texport* and *Warren*, Congress amended 19 U.S.C. § 1313(j) to allow importers to receive drawback of duties, taxes, or fees imposed under federal law "*upon entry or importation*" (rather than only allowing drawback of those duties, taxes, or fees imposed "*because of . . . importation*"). *See* Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108–429, Title I, § 1557(a), (b), 118 Stat. 2579 (2004) ("2004 Trade Act") (emphasis added). The amendment applied to "any drawback claim filed on or after [December 3, 2004, the date of the Act's enactment,] and to any drawback entry filed *before that date if the liquidation of the entry is not final on that date*." *See id.* (emphasis added). Thus, assuming an importer's unliquidated drawback claim complied with all other drawback statutes and regulations, HMT and ET were eligible for drawback under the 2004 Trade Act.[7]

After the amendment of the statute, the Federal Circuit addressed the new statutory provision in *Aectra Refining and Marketing, Inc. v. United States*, 565 F.3d 1364 (Fed. Cir. 2009) ("*Aectra II*"). There, plaintiff Aectra[8] had timely filed ten drawback claims between 1997 and 1998, following its export of substitute petroleum derivatives, but

[7] As noted above, in 1999, following the *Texport* decision, it was clear that importers were allowed drawback for MPF.

[8] As noted above, several cases involving similarly situated plaintiffs—including plaintiffs in the present case—were suspended under *Aectra*.

only sought drawback of import duties, and not HMT, MPF, or ET. Customs liquidated Aectra's drawback entries on or about November 28, 2003, and refunded the import duties Aectra had requested in its drawback claim, but not the unrequested HMT, MPF, or ET. Subsequently, on or about February 2, 2004, Aectra filed protests that sought, for the first time, drawback of HMT and MPF.[9] The protests, however, were filed more than three years after the date of exportation of Aectra's substitute petroleum derivatives, and therefore, Customs denied Aectra's protests as time-barred under 19 U.S.C. § 1313(r)(1). Aectra sought review in this Court, which sustained Customs' protest denials, and the Court of Appeals affirmed. *Aectra Refining and Marketing Inc. v. United States*, 31 CIT 2086, 533 F. Supp. 2d 1318 (2007), *aff'd*, 565 F.3d 1364 (Fed. Cir. 2009) ("*Aectra I*").

In reaching its decision in *Aectra II*, the Federal Circuit concluded that (1) the 2004 Trade Act did not suspend the time limit for completing a drawback claim for HMT, MPF, and ET (*i.e.*, that a claimant must file a drawback claim for HMT, MPF, and ET within three years from exportation of the substitute merchandise); (2) a "complete claim" included the 19 C.F.R. § 191.51(b)'s[10] requirement that a claimant "include an accurate calculation of the entire amount that it seeks to be refunded under the drawback statute," including any HMT, MPF, and ET sought; and (3) "futility [of filing drawback claims for HMT and ET[11]] does not excuse the failure to file a proper claim for limitations purposes." *Aectra II*, 565 F.3d at 1372–73 (first citing 19 U.S.C. § 1313(r)(1) and then citing 19 C.F.R. § 191.51(b) (1998)). In short, the Federal Circuit held that a "complete" drawback claim must include a correct calculation of any taxes and fees for which refund is sought and the claim must be made no later than three years following export of the substitute merchandise. *Id.*

Following the Court of Appeals' decision, importers with claims that were suspended under *Aectra I* moved to designate another test case in this Court: *Shell Oil Company v. United States*, Court No. 08–00109. *Shell* was designated the test case for the purpose of determining whether drawback claimants that filed drawback claims prior to April 6, 1998 (the effective date of 19 C.F.R. § 191.51(b)'s "correct calculation" requirement) were also required to claim HMT

[9] According to the Federal Circuit, Aectra did not actually pay any ET:

> In its Complaint, Aectra makes passing reference to an additional category of fees and taxes, the Environmental Tax [("ET")] imposed under 26 U.S.C. § 4611. On appeal the government contends, and Aectra apparently does not dispute, that there is no evidence that Aectra actually paid that tax on the goods in question.

Aectra II, 565 F.3d at 1366 n.1.

[10] This regulation provides, in pertinent part, that "[d]rawback claimants are required to correctly calculate the amount of drawback due." 19 C.F.R. § 191.51(b) (1998).

[11] Under the *Texport* decision, claims for MPF were not in dispute.

and ET[12] within the three-year limitation. *See Shell Oil Co. v. United States*, 35 CIT __, __, 781 F. Supp. 2d 1313, 1323 (2011), *aff'd*, 688 F.3d 1376 (Fed. Cir. 2012) ("*Shell I*"). Shell filed drawback claims in 1995 and 1996, seeking only drawback of the import duties paid, which Customs refunded on liquidation. *See id.*, 35 CIT at __, 781 F. Supp. 2d at 1317–18. Thereafter, Shell filed protests with Customs in 1997, beyond the three-year limitation period for filing drawback claims, which sought, for the first time, HMT and ET payments that Shell had made in connection with its imports. *Id.* 35 CIT at __, 761 F. Supp. 2d at 1318. Customs denied Shell's protests and Shell filed a summons in this Court contesting the denials. *Id.* This Court sustained Customs' denial, and the Federal Circuit affirmed.

The Federal Circuit held that Shell's claim for drawback of HMT and ET were time-barred under *Aectra II*. *See Shell Oil Co. v. United States*, 688 F.3d 1376, 1385 (Fed. Cir. 2012) ("*Shell II*"). Specifically, in response to plaintiff's argument that "re-filing its HMT and ET drawback claims would have been futile because Customs had a policy of denying drawback claims for HMT and ET," the Court found that "'futility does not excuse the failure to file a proper claim for limitations purposes' because a 'claimant is generally required to file a complete and specific claim within the limitations period, even if the government authority to [which] the claim is presented is certain to dispute the validity of the claim.'" *Shell II*, 688 F.3d at 1383 (quoting *Aectra II*, 565 F.3d at 1373). The Court also observed that, although the pre-1998 version of the regulations did not include an explicit requirement to include a "correct calculation" of the amount of drawback sought with its drawback claims, Shell still bore the burden "to place Customs on notice as to the specific amount it [was] seeking for a refund," and thus, "was required to place Customs on notice that it was seeking drawback for HMT and ET." *Shell II*, 688 F.3d at 1384. In other words, even before the 1998 regulation specifically required a "correct calculation" of the amount of drawback due (including taxes and fees), importers were required to put Customs on notice that they were seeking drawback of HMT and ET before the expiration of the three-year limit imposed under 19 U.S.C. § 1313(r)(1).

[12] In its Motion for Summary Judgment, Shell sought drawback of MPF, however, during oral argument, Shell conceded that, because the company failed to raise drawback of MPF in its protests and in its Complaint, it had abandoned any claim to drawback of MPF. *Shell I*, 35 CIT at __, 781 F.Supp.2d at 1322 n.4.

BACKGROUND

Plaintiffs are the remaining importers whose claims were suspended under both *Aectra* and *Shell*.[13] *See* Order dated Dec. 13, 2012, ECF No. 33 ("Consolidation Order"). Between the mid 1990s and the early 2000s, plaintiffs filed drawback claims with Customs on petroleum products the companies imported into the United States, and later exported as non-manufactured "substitute finished petroleum derivatives." *See* Agreed Statement of Material Facts Not in Dispute, ECF No. 78 ("Statement") ¶ 2; *see* 19 U.S.C. § 1313(p)(2)(A)(iii).[14] Plaintiffs' drawback claims requested a refund of the duties paid, but did not request a refund of taxes and fees. Customs liquidated the various entries and approved drawback refunds to the extent of 99 percent of the duties paid. *See* Statement ¶ 3.[15]

Following liquidation, plaintiffs timely filed protests, asking, for the first time, that Customs approve drawback for taxes and fees. Customs denied each of plaintiffs' protests. Statement ¶ 4. Plaintiffs now challenge the denial of those protests. The court has jurisdiction under 28 U.S.C. § 1581(a).

STANDARD OF REVIEW

Under USCIT Rule 56(a), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

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[13] On December 27, 2006, this Court ordered the suspension of plaintiffs' cases under *Aectra I*. *See* Order dated Dec. 27, 2006, ECF No. 6. Following the *Aectra II* decision, on March 8, 2010, this Court issued a suspension disposition order requiring the suspended plaintiffs to remove their cases from the *Aectra II* test case calendar or face dismissal of their respective actions. *See* Order dated Mar. 8, 2010, ECF No. 7. The majority of the previously suspended plaintiffs moved to suspend their cases under *Shell I* and on August 24, 2010, this Court ordered those plaintiffs be suspended under *Shell I*. *See* Order dated Aug. 24, 2010, ECF No. 10. Following the final disposition of *Shell II*, plaintiffs again moved for the remaining cases to be suspended under this case, as another test case, but this Court instead ordered the consolidation of the remaining cases. *See* Order dated Dec. 13, 2012, ECF No. 33. Because of this Court's consolidation order, all of the importers identified in the attached schedule to that order will be bound by this decision. *See Junior Gallery, Ltd. v. United States*, 16 CIT 687, 688, 1992 WL 199196, at *1 (1992) (noting that the final decision in a consolidated action has a binding legal effect on all of the merged actions).

[14] All of the substitution articles covered by the relevant drawback entries were exported within 180 days after the entry of the designated imported merchandise against which drawback was claimed, and the drawback entries were filed with Customs within three years after the dates of exportation of the substituted articles identified therein. Statement ¶¶ 11, 12.

[15] Customs suspended liquidation of all 19 U.S.C. § 1313(p) petroleum product drawback claims between August 1, 1997, and June 26, 2002. *See* Statement ¶ 13. Additionally, although the entries were liquidated by Customs, as shall be seen, the liquidation did not become final because the liquidation determination was timely protested. *See* 19 U.S.C. § 1514.

a judgment as a matter of law." *Marathon Oil Co. v. United States*, 24 CIT 211, 214 93 F.Supp. 2d 1277, 1279 (2000) (internal quotation marks and citation omitted). As there are no remaining questions of material fact in dispute, summary judgment is proper in this case.

DISCUSSION

I. The Court Reviews Protest Denials *De Novo*

As noted above, plaintiffs timely filed protests following the liquidation of the subject merchandise for "drawback refunds to the extent of 99% of the Harmonized Tariff Schedule of the United States ("HTSUS") Column I duties[16] paid on the imported petroleum products designated therein." Statement ¶ 3.

Plaintiffs first argue that this Court's jurisdiction under 28 U.S.C. § 1581(a) is limited to reviewing the specific reason stated by Customs for denying plaintiffs' protests. Pls.' Br. 2. Thus, because some of Customs' protest denials "did not include the assertion that the drawback claimants failed to complete their claims for taxes and fees before the expiration of a three-year period following export of the substitute merchandise," plaintiffs insist, with respect to those protests at least, they must prevail. Pls.' Br. 2. A review of the protests shows that they were denied for one of three reasons: (1) because the "original decision [was] found correct," (2) because the contested exactions were "ineligible" for drawback, or (3) because the claimant failed to make its claim within the three-year limitation period imposed under 19 U.S.C. § 1313(r)(1). According to plaintiffs, any decision by Customs that failed to expressly raise a timeliness objection (1) constitutes a decision, made final by operation of law, that plaintiffs' claims for taxes and fees were timely, and (2) deprives Customs of the right to assert timeliness as a defense to a valid claim for drawback of taxes and fees. Pls.' Br. 2, 4–5 (first citing 19 U.S.C. § 1514,[17] and then citing 19 U.S.C. § 1515[18]). Thus, for plaintiffs, "the issue of the timeliness of the drawback claim for taxes and fees is not justiciable as to those protests . . . that were denied by Customs for

[16] "Column 1 duties" are the duties imposed based on the classification of the merchandise within the HTSUS.

[17] Title 19 U.S.C. § 1514(a)(6) provides that "decisions of the Customs Service," including "the refusal to pay a claim for drawback . . . shall be final and conclusive upon all persons," unless "a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade . . . ."

[18] Title 19 U.S.C. § 1515(a) provides, in pertinent part, that notice of a protest denial "shall include a statement of the reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action contesting the denial of a protest . . . ." For plaintiffs, the court's review of a protest denial is confined to the reason or reasons expressly stated by Customs in this requisite notice.

reasons stated *other* than failing to timely complete the drawback claims." Pls.' Br. 9. In other words, plaintiffs argue that, as to those protests that were denied for reasons other than being time-barred, the court's review is limited to determining whether Customs' stated reason for denying the protest is correct.

Plaintiffs' argument is without merit. "In any civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930, this Court reviews the record *de novo*." *Rheem Metalurgica S/A v. United States*, 20 CIT 1450, 1456, 951 F. Supp. 241, 246 (1996); *see also BP Oil Supply Co. v. United States*, 35 CIT__, __, Slip Op. 11–116 at 3 (Sept. 16, 2011) ("Denial of a protest is reviewed *de novo*."); *Marathon Oil*, 24 CIT at 213–14, 93 F. Supp. 2d at 1279 ("[28 U.S.C. § 1581(a)] claims are reviewed *de novo*, and in this instance the Court owes no deference to Defendant's interpretation."). Thus, when reviewing Customs' denial of drawback, "the court will sustain Customs' decision if it is proper, even if the rationale is not articulated in Customs' decision." *Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 1024, 116 F. Supp. 2d 1350, 1360 (2000). Therefore, the court will look to the merits of plaintiffs' claims—including any issues regarding the timeliness of plaintiffs' drawback claims for taxes and fees—notwithstanding any failure by Customs to specifically reference the timeliness provision of 19 U.S.C. § 1313(r)(1) in its protest decisions.

II. Plaintiffs' Arguments Regarding the Timeliness of its Drawback Claim for Taxes and Fees are Foreclosed Under *Aectra* and *Shell*

A. A Complete Drawback Claim Must Include a Correct Calculation of Any Amount of Drawback Due

In order for Customs to grant a drawback claim, the claim must be "complete." *See* 19 U.S.C. § 1313(r)(1). Since 1998, Customs' regulations have specifically defined a "complete drawback claim" as consisting of specified forms, certificates, and notices. *See* 19 C.F.R. § 191.51(a)(1) (1998). In addition, as case law makes clear, even before promulgation of the 1998 regulation, an importer "at a minimum, was required to place Customs on notice that it was seeking drawback for HMT and ET."[19] *Shell II,* 688 F.3d at 1384. In *Aectra II*, the Federal Circuit previously found that a "complete" drawback claim must also specifically include a correct calculation of any taxes and fees sought

[19] The Federal Circuit specifically referenced HMT and ET because of its previous decision in *Texport*, which found that MPF did, in fact, qualify for drawback. *Texport*, 185 F.3d at 1296.

pursuant to 19 C.F.R. § 191.51(b) (1998). *See Aectra II*, 565 F.3d at 1371–72 ("The payment of drawback . . . is expressly conditioned—by statute—upon compliance with regulations promulgated by the Secretary of the Treasury. One such regulation, 19 C.F.R. § 191.51 (1998), is directly applicable here. . . . Under the correctly calculate requirement of [§ 191.51(b)], a complete claim for purposes of the three-year limit of 19 U.S.C. § 1313(r)(1) must include a correct calculation of the amount of drawback due. . . . [W]e think that on its face the phrase correctly calculate the amount of drawback due requires a claimant to include an accurate calculation of the entire amount that it seeks to be refunded under the drawback statute.") (internal citations omitted). Notwithstanding the Federal Circuit's conclusion, plaintiffs argue that the "correctly calculate" requirement of § 191.51(b) is not a component of a "complete" drawback claim, and therefore, that a claimant need not calculate the amount of taxes and fees sought prior to the three-year limit imposed under 19 U.S.C. § 1313(r)(1). Pls.' Br. 9–11.

Plaintiffs base their argument on a reading of the regulation that governs the "completion of drawback claims"[20] in conjunction with the regulations governing the "rejection, perfection, or amendment" of drawback claims.[21] *See* Pls.' Br. 11 (citing 19 C.F.R. §§ 191.51, 191.52(a) and (b) (1998)). Specifically, plaintiffs argue that when these regulations are read together, "the only reasonable reading" of a "complete" claim is one that contains the forms, certificates, and notices found in § 191.51(a)(1). In other words, for plaintiffs, a complete claim need not contain a "correct calculation" of the amount of drawback due pursuant to subsection (b). Pls.' Br. 11. Plaintiffs argue that this is because the regulations governing the rejection and perfection of drawback claims define a claim as being either "complete" or "incomplete" in terms of containing the specified forms, certificates, and notices, without any reference to subsection (b)'s "correctly calculate" requirement.[22] *See* Pls.' Br. 11. For plaintiffs, this reading

[20] 19 C.F.R. § 191.51.

[21] 19 C.F.R. § 191.52(a), (b).

[22] Specifically, 19 C.F.R. § 191.52(a) provides:

> Upon review of a drawback claim, if the claim is determined to be *incomplete (see § 191.51(a)(1))*, the claim will be rejected and Customs will notify the filer in writing. The filer shall then have the opportunity to complete the claim subject to the requirement for filing a complete claim within 3 years.

19 C.F.R. § 191.51(a) (emphasis added). Similarly, 19 C.F.R. § 191.52(b) provides, in pertinent part:

> If Customs determines that the claim is *complete according to the requirements of § 191.51(a)(1)*, but that additional evidence or information is required, Customs will notify the filer in writing.

19 C.F.R. § 191.52(b) (emphasis added).

renders the Federal Circuit's interpretation of a "complete" claim (*i.e.*, as requiring the correct calculation of any amount of drawback sought) unreasonable.[23] *See* Pls.' Br. 11.

Plaintiffs then argue that Customs' own construction of its regulations requires a finding that the "correctly calculate" requirement is not part of a "complete" drawback claim. Pls.' Br. 11–12. To support their position, plaintiffs quote a portion of Customs Headquarters Ruling HQ 228093, in which Customs' Office of Rulings and Regulations was asked to determine what action a port should take when an importer claims 100 percent drawback of duties paid, when by statute, the importer was only entitled to receive 99 percent.[24] In particular, plaintiffs direct the court to the following language:

> A drawback entry filed with incomprehensible attachments constitutes an *incompletely* filed claim and *is grounds for rejection* of a claim under 19 CFR 191.52(a). An *overstated claim for drawback should not be rejected*, however pursuant to 19 CFR 191.51(b), drawback should not be paid until the calculations have been corrected by the claimant.

Customs Headquarters Ruling HQ 228093 (Aug. 31, 1999) (emphasis added). For plaintiffs, "[i]f claims containing overstatements in the § 191.51(b) calculation of the amount of drawback due are not subject to" rejection as being "incomplete," then such calculations "cannot be a necessary component of a 'complete' claim . . . ." Pls.' Br. 12. In other words, plaintiffs argue that because Customs has found that failing to include the documents required under § 191.51(a)(1) is grounds for a claim's rejection as "incomplete," but a violation of the "correctly calculate" provision is not, a correct calculation of the amount of drawback due should not be subject to the three-year limitation period found in 19 U.S.C. § 1313(r)(1). *See* Pls.' Br. 12.

Plaintiff's arguments are unavailing. First, the *Aectra II* Court decided the issue of whether a "complete" drawback claim made after 1998 must include a correct calculation of whatever amount a claimant seeks to recover, including both taxes and fees. *See Aectra II*, 565 F.3d at 137172; *see also*, *Delphi Petroleum, Inc. v. United States*, 33 CIT 1758, 1763, 662 F. Supp. 2d 1348, 1353 (2009) ("Such a finding would be inconsistent with the Federal Circuit's holding in [*Aectra II*] that a 'complete claim' goes beyond the documentary requirements to complete a claim . . . and *includes the functional requirement to complete a drawback claim . . .* [*by producing*] *a calculation of the fees*

[23] Plaintiffs claim that this argument is not foreclosed by *Aectra II* because that decision did not consider or address § 191.52(a) and (b). Pls.' Br. 11.

[24] Notably, the case did not specifically address the question posed here regarding drawback of taxes and fees because the importer did not seek a drawback of either HMT or MPF.

sought.") (emphasis added); *Toyota Motor Sales, U.S.A., Inc. v. United States*, 35 CIT __, __, Slip Op. 11–113 at 35 (Sept. 8, 2011) ("A 'complete drawback claim' generally must include the 'drawback entry on Customs Form 7551, applicable certificate(s) of manufacture and delivery, applicable Notice(s) of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback, applicable import entry number(s), coding sheet unless the data is filed electronically, and evidence of exportation or destruction under subpart G of this part.' In addition, *a drawback claim must also include a correct calculation of the amount of reimbursement sought*.") (internal citations omitted) (emphasis added).

Federal Circuit precedent makes the correct calculation requirement clear. First, with respect to drawback claims subject to Customs' regulations, the Federal Circuit has held that "a 'complete' claim for purposes of the three-year limit of 19 U.S.C. § 1313(r)(1) must include a correct calculation of the amount of drawback due." *Aectra II*, 565 F.3d at 1372 (citing 19 C.F.R. § 191.51).

The case law dealing with claims made prior to promulgation of the regulation also does not aid plaintiffs. The Federal Circuit held in *Shell II* that, notwithstanding that § 191.51(b) (1998) was not in effect at the time Shell filed its drawback claims, Shell was nevertheless required to place Customs on notice "as to the specific amount it is seeking for a refund," including any taxes and fees. *Shell II,* 688 F.3d at 1384 ("Shell's focus on whether the pre-1998 regulations lacked explicit requirements to list taxes and fees as part of the total amount is misplaced because . . . Customs does not bear the burden to determine the maximum permissible amount for a drawback claim. Rather, it is on the claimant to place Customs on notice as to the specific amount it is seeking for a refund."); *see also id.* at 1385 n.6 ("To the extent Shell avers that the 1998 regulations created a requirement which did not exist previously, we agree with the CIT and conclude that the 1998 regulatory amendments merely clarified the requirements for what was already required for a proper drawback claim [(*i.e.*, a correct calculation of the amount of drawback sought)].". Like Shell, plaintiffs here failed to put Customs on notice that they were seeking drawback of taxes and fees within the statutory timeframe.

Finally, as to plaintiffs' argument regarding Customs Headquarters Ruling HQ 228093, merely because Customs found that waiving strict enforcement of the "correctly calculate" requirement when a claimant asked for return of 100 percent, rather than 99 percent, of the duties paid would aid in the efficient handling of claims where

there was a common error, it does not follow that Customs intended to create a rule that does away with the correct calculation requirement altogether.

Accordingly, because plaintiffs failed to include a correct calculation of the amount of taxes and fees sought within the three-year limit, the court sustains Customs' denial of plaintiffs' protests.

B. A Correct Calculation of the Amount of Drawback Due Includes Any Taxes or Fees Sought by the Importer

Plaintiffs make a related argument with respect to the correct calculation of the amount of drawback due. Once the *Aectra II* Court had determined that a "complete" drawback claim under 19 U.S.C. § 1313(r)(1) included the "correct[] calculat[ion] of the amount of drawback due," it then addressed what a "correct calculation" specifically requires. *Aectra II*, 565 F.3d at 1372. Looking at the language of 19 U.S.C. § 191.51(b) (the "correctly calculate" requirement), the Court found that "on its face the phrase 'correctly calculate the amount of drawback due' requires a claimant to include an accurate calculation of the entire amount that it seeks to be refunded under the drawback statute," including any taxes and fees. *Id.*

Plaintiffs argue that even if the "correctly calculate" requirement of § 191.51(b) is a component of a "complete" claim under 19 U.S.C. § 1313(r)(1), the Federal Circuit's decision as to the meaning of the phrase "correctly calculate the amount of drawback due" is not binding authority. Pls.' Br. 14. That is, plaintiffs claim that certain language in the *Aectra II* decision indicates that the Federal Circuit "was admittedly unaware of Customs' authoritative construction" of what constitutes a "correct calculation" of the amount of drawback due, and therefore, its decision regarding the definition of a "correct calculation" is not binding precedent. Pls.' Br. 14. Specifically, plaintiffs reference the following paragraph as supporting their position:

> *We are aware of no authoritative administrative construction of the "correctly calculate" requirement of 19 C.F.R. § 191.51(b) (1998)*, but *we think* that on its face the phrase "correctly calculate the amount of drawback due" requires a claimant to include an accurate calculation of the entire amount that it seeks to be refunded under the drawback statute.

Aectra II, 565 F.3d at 1372 (emphasis added). For plaintiffs, this language indicates that the Federal Circuit "only observed that it was unaware" of an authoritative administrative construction of the "correctly calculate" requirement, but its ruling did not go so far as to find that such an authoritative construction did not exist. Pls.' Reply Br. 7.

Therefore, according to plaintiffs, the *Aectra II* decision left open the possibility of an alternative construction of what is meant by "correctly calculate the amount of drawback due." Pls.' Reply Br. 7–8 ("Not being 'aware' of alternative regulatory constructions and only 'thinking' they construed the regulation correctly should not be viewed as creating binding precedent. . . . Given the open-ended nature of *Aectra*'s determination, this Court has the latitude to consider and rule in plaintiff's favor."). Thus, because plaintiffs claim such "an authoritative administrative construction" of the "correctly calculate" requirement exists, they argue that the court may find in their favor, notwithstanding the *Aectra II* decision.

It is apparent that the *Aectra II* and *Shell II* decisions are binding on the meaning of the "correctly calculate" requirement of 19 C.F.R. § 191.51(b) and also for claims made before promulgation of the regulation governing the "completion of drawback claims." *See Aectra II*, 565 F.3d at 1375; *see also Shell II*, 688 F.3d at 1380 ("[In *Aectra II*,] [w]e ultimately held that the importer was not entitled to relief *because it failed to claim drawback of taxes and fees within the statutory three-year period* within which all drawback claims must be filed."). Indeed, the *Aectra II* Court based its interpretation on the plain meaning of the regulation, and held, unambiguously, that "a complete claim under 19 C.F.R. § 191.51(b) (1998) requires a claimant to calculate not only the amount of duty but also the amount of taxes and fees sought as drawback." *Aectra II*, 565 F.3d at 1375; *see also id.* at 1372 ("[W]e think that *on its face* the phrase 'correctly calculate the amount of drawback due' requires a claimant to include an accurate calculation of the entire amount that it seeks to be refunded under the drawback statute. The purpose of the 'correctly calculate' requirement *is plain enough from the face of the regulation*; it is to allow Customs to carry out its mandate to process drawback claims under the statute in an efficient and accurate manner.") (emphasis added). Because the meaning of the "correctly calculate" requirement has been settled by the Federal Circuit in *Aectra II*, and because, even prior to the enactment of the "correctly calculate" regulation, importers were nonetheless "required to place Customs on notice that [they were] seeking drawback for [taxes and fees]," plaintiffs' argument fails. *Shell II*, 688 F.3d at 1384.

The court also notes that plaintiffs' arguments rely heavily on Customs having explicitly used the word "duty," at times, when referring to the correct calculation requirement of § 191.51(b). This is not surprising, however, since the regulation itself used the word "duty" when referring to the correct amount of drawback to be calcu-

lated. *See* 19 C.F.R. § 191.51(b) (1998) ("Drawback claimants are required to correctly calculate the amount of drawback due. The amount of drawback requested on the drawback entry is *generally to be 99 percent of the import duties eligible for drawback*.") (emphasis added). The *Aectra II* Court, however, considered this when interpreting the meaning of § 191.51(b), and ultimately concluded that the "correctly calculate" requirement nevertheless applied to any amount of drawback sought, including taxes or fees. *Aectra II*, 565 F.3d at 1373 ("In short, we think the first sentence of 19 C.F.R. § 191.51(b) (1998) in effect at the time Aectra filed its claims required a correct calculation of whatever amount a claimant sought to recover, not merely a calculation of the customs duties to be refunded. The remainder of paragraph (b), *which does refer specifically to duty, does not limit the requirement of the first sentence but simply discusses the calculation requirement as applied to the duty component of a drawback claim*. The second sentence of (b) notes that the drawback due is 'generally' to be 99 percent of the import duties eligible; *it does not state an absolute rule*.") (emphasis added). Moreover, the *Shell II* Court found that, "merely setting forth a claim for drawback of import duties does not sufficiently make or preserve a claim for taxes and fees like HMT and ET." *Shell II*, 688 F.3d at 1384.

Therefore, plaintiffs' arguments regarding the proper construction of the "correctly calculate" requirement are precluded by *Aectra II*.[25]

III. The Right to Drawback of Taxes and Fees was Limited Under the 2004 Trade Act to Claimants who had Previously Sought Drawback of Taxes and Fees Within the Three-Year Limitation Period

Plaintiffs then argue that their drawback claims for taxes and fees are not untimely under the "default rule." Pls.' Br. 19. The default rule is the principle that "Congress generally drafts statutes of limitations to begin when the cause of action accrues." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005). Under plaintiffs' default rule theory, the right to drawback of taxes and fees first arose on December 3, 2004, the date the 2004 Trade Act was enacted, and therefore, the three-year limit for plain-

[25] Plaintiffs concede that there is no factual basis to distinguish this case from *Aectra II*. Recording of Oral Argument at 31:03. Moreover, Aectra presented similar arguments to the Federal Circuit in its petition for a rehearing *en banc*, which the Court of Appeals denied.

tiffs to file a drawback claim for taxes and fees did not begin to run until December 3, 2004.[26] Pls.' Br. 19.

The court disagrees. Under the Federal Circuit's interpretation, the 2004 Trade Act "was designed to clarify prior law that 19 U.S.C. § 1313(j) had been intended to permit recovery of HMT" and that "the contrary *Texport* decision had been in error." *Aectra II*, 565 F.3d at 1369. The *Aectra II* Court observed that the 2004 Trade Act "was not designed to create a new right to drawback for HMT, but rather to clarify that HMT was always subject to drawback under the statute." *Id.* at 1370. Therefore, the usual three-year limitation period under 19 U.S.C. § 1313(r)(1) remained for unliquidated claims following the enactment of the 2004 Trade Act. *See id.* ("Nothing in the text of the [2004 Trade Act] states or suggests that [the 2004 Trade Act was] intended to waive the normal three-year limit imposed by 19 U.S.C. § 1313(r)(1)."); *see also* 19 U.S.C. § 1313(r)(1) ("A drawback entry and all documents necessary to complete a drawback claim . . . shall be filed or applied for, as applicable, within 3 years after the date of exportation or destruction of the articles on which drawback is claimed . . . . Claims not completed within the 3-year period shall be considered abandoned.").

Based on this analysis, the *Aectra II* Court found that the 2004 Trade Act's amendments (clarifying the right to drawback of HMT) applied only "to unliquidated entries that *already included a timely protective request for HMT*." *Aectra II*, 565 F.3d at 1370 (emphasis added); *see also id.* ("[I]t was not unreasonable to assume that Congress would limit the right [to drawback of HMT] to those who had previously attempted to claim [drawback of HMT] within the three-year limitations period . . . ."). In other words, according to the Federal Circuit, the 2004 Trade Act provided a small retroactive window for previously-filed drawback claims that included a "protective claim" for HMT or ET, so long as the entries had not been liquidated or the three-year limitation period had not expired. *See id.*; *see also Shell II*, 688 F.3d at 1385 ("The 2004 amendments applied only prospectively, and to 'not yet finally liquidated [entries]' that 'already included a timely protective request' for taxes and fees." (quoting *Aectra II*, 565 F.3d at 136971)); *Shell I*, 781 F. Supp. 2d at 1337 ("Congress predicated the right to drawback of HMT and ET on the filing of a timely claim for such drawback, either during the regular statutory three-year period or during the six-month grace

[26] Notably, in making their argument, plaintiffs do not establish whether the default rule applies to administrative deadlines, such as the statutory three-year limitation period for the filing of drawback claims at issue here.

period following the 1999 amendments. *The default rule that Shell invokes does not, and cannot, provide otherwise*. Therefore . . . Shell's 'default rule' argument . . . must fail.") (emphasis added). Thus, because plaintiffs did not file their drawback claims for taxes and fees within three years of exportation of the substitute petroleum products, the court finds plaintiffs' claims to be untimely under 19 U.S.C. § 1313(r)(1).

IV. Congress' Enactment of the 2004 Trade Act Did not Violate the Separation of Powers Doctrine

As discussed above, in *Texport*, the Court of Appeals found that HMT was not a federal exaction imposed "because of . . . importation" within the meaning of 19 U.S.C. § 1313(j) (1994). *Texport*, 185 F.3d at 1297. Specifically, the Court observed that the HMT is "assessed in a nondiscriminatory fashion against all shipments utilizing ports," and therefore, was ineligible for drawback. *Id.* at 1296. Following *Texport*, the 2004 Trade Act "eliminat[ed] the requirement that a charge be imposed 'because of' importation," and instead allowed drawback of any charge assessed "*upon* entry" of merchandise. *Aectra II*, 565 F.3d at 1369. According to the legislative history, Congress made this change because it believed the *Texport* decision had been in "error" and that "allowing for drawback of the Harbor Maintenance Tax is consistent with original Congressional intent."[27] S. Rep. No. 108–028, at 173 (2003); *see also Aectra II*, 565 F.3d at 1369. In *Aectra II*, the Federal Circuit, after examining the 2004 Trade Act's legislative history, found that "the amendment was designed to clarify prior law that 19 U.S.C. § 1313(j) had been intended to permit recovery of HMT," and that the "amendment was not designed to create a new right to drawback for HMT, but rather to clarify that HMT was always subject to drawback under the statute." *Aectra II*, 565 F.3d at 1369–70. Plaintiffs claim that *Aectra II*'s "characterization" of the 2004 Trade Act's amendments to § 1313(j) as "merely '*clarifying*' that the HMT was '*always subject to drawback under the statute*,'" and the

[27] Specifically, the legislative history states:

> *Explanation of provision*
>
> The provision amends [19 U.S.C. § 1313(j)] to clarify that the Harbor Maintenance Tax (HMT) is a fee eligible for drawback under the statute.
>
> *Reason for Change*
>
> The Committee believes that the U.S. Court of Appeals for the Federal Circuit erred in overturning the U.S. Court of International Trade's ruling . . . that [19 U.S.C. § 1313(j)] *allows drawback of the Harbor Maintenance Tax.* [Title 19 U.S.C. § 1313(j)] *allows for drawback of any duty, tax, or fee imposed under Federal law because of its importation. The Committee believes allowing for drawback of the Harbor Maintenance Tax is consistent with original Congressional intent.*

S. Rep. No. 108–028, at 173 (2003) (emphasis added).

Court's observation that the 2004 Trade Act "*was not designed to create a new right to drawback for HMT*," expressly contravene the Constitution's separation of powers doctrine "by failing to recognize the finality of the Federal Circuit's prior decision in *Texport*" and, as such, is "not binding on this Court." Pls.' Br. 22 (quoting *Aectra II*, 565 F.3d at 1370); *see also* Pls.' Br. 21 ("'[A] judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.'" (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995)). In other words, drawing a comparison to *Plaut*,[28] plaintiffs argue that the *Aectra II* Court's interpretation of the 2004 Trade Act as merely clarifying the law would require the reopening of the *Texport* and *Warren* cases, thereby violating the separation of powers doctrine, and thus, that the *Aectra II* decision may be ignored.

The court is not convinced by plaintiffs' separation of powers theory. Although "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *United States v. Price*, 361 U.S. 304, 313 (1960), Congress is nonetheless "free to change [a court's] interpretation of its legislation." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *see also Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1201 (Fed. Cir. 2014) ("[T]he Supreme Court clarified that 'Congress can always revise the judgments of Article III courts in one sense: When a new law makes

[28] In *Plaut*, the plaintiffs moved to reinstate § 10(b) claims which had previously been dismissed as time-barred under *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). *See Plaut*, 514 U.S. at 213–14. Pursuant to *Lampf*, claims under § 10(b) of the Securities Exchange Act of 1934 were required to be commenced within one year after the discovery of facts constituting a § 10(b) violation and within three years of such a violation. *See Lampf*, 501 U.S. at 364. The plaintiffs moved to reinstate their action, notwithstanding its dismissal (which had become final after plaintiffs failed to file a notice of appeal), pursuant to the later-enacted § 27A(b) of the Securities Exchange Act of 1934. Section 27A(b) provided that:

> [a]ny private civil action implied under section [10(b) of the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991 [the day before *Lampf* was decided]—(1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction . . . as such laws existed on June 19, 1991 shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991 [the date § 27A(b) was enacted].

19 U.S.C. § 78aa-1 (1988 ed., Supp. V). The Supreme Court found, among other things, that because the retroactive legislation "require[d] its own application in a case already finally adjudicated," it effected a "clear violation of the separation-of-powers principle . . . ." *Plaut*, 514 U.S. at 225; *see also id.* at 240 ("We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so. Section 27A(b) is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment.").

clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.'" (quoting *Plaut*, 514 U.S. at 226)). Indeed, "Congress may amend a statute to establish new law, but it also may enact an amendment to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases." *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) (internal quotation marks and citation omitted); *see also Hawkins v. United States*, 30 F.3d 1077, 1082 (9th Cir. 1994).

The *Plaut* case relied upon by plaintiffs was a situation in which Congress purported to reopen final judgments of the courts, *i.e.*, a case in which Congress' legislation "require[d] its own application in a case already finally adjudicated . . . ." *Plaut*, 514 U.S. at 225; *see also id.* at 219 ("By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle [that a judgment conclusively resolves the case]."). Here, however, the amendments in the 2004 Trade Act do not allow for the reopening of final judgments. Rather, the amendments "overruled" the *Texport* and *Warren* decisions by clarifying that HMT is in fact eligible for drawback. Legislation which affects pending and future cases is certainly permissible under the separation of powers doctrine. *See Plaut*, 514 U.S. at 226. Thus, to the extent that plaintiffs argue such amendments in the 2004 Trade Act violate the separation of powers doctrine, the court disagrees.

V. Plaintiffs' Argument that Defendant is Responsible for its Delayed Claims for HMT is Waived

In *Delphi Petroleum, Inc. v. United States*, 33 CIT 1758, 662 F. Supp. 2d 1348 (2009), this Court found that plaintiff Delphi was entitled to an extension of the statutorily required three-year limitation period because "Delphi's reliance on advice by the Customs supervisory drawback official . . . rendered Customs responsible for the otherwise untimely filing . . . ." *Delphi*, 33 CIT at 1764, 662 F. Supp. 2d at 1354 (citing 19 U.S.C. § 1313(r)(1)). In *Delphi*, an importer, confused by the state of the drawback law at that time, contacted Customs and indicated that although it did not include an application for drawback of HMT and MPF in its original claim, it intended to "file a protest, after [it] receive[d] the duty drawback, with respect to [HMT and MPF] and that that protest [could] be resolved after the court rules on the U.S. Customs appeal [in *Texport*]." *Delphi*, 33 CIT at 1759, 662 F. Supp. 2d at 1350. Delphi then asked Customs to "inform [it]" if its stated approach was "incorrect" and, if so, it would "amend this drawback claim to include [HMT and MPF]." *Id.*, 33 CIT at 1759–60, 662 F. Supp. 2d at 1350. Under the advice of a Customs

Supervisory Drawback Liquidator, Delphi did not amend its drawback claim to include HMT and MPF, and instead, following liquidation of the entries at issue, filed a protest asking for HMT and MPF for the entries at issue. *Id.* Customs later denied Delphi's protest with respect to its drawback requests because they were outside the three-year limitation period. *Id.* 33 CIT at 1761, 662 F. Supp. 2d at 1351.

The *Delphi* Court found that because Delphi was "willing and ready to present the complete claims" (*i.e.*, including requests for HMT and MPF), but instead, "relied upon the advice of the Supervisory Drawback Liquidator," Customs was "deemed responsible for Delphi's delayed HMT and MPF filings because Delphi had no clear administrative path to follow and a responsible official unknowingly misled Delphi as to the proper course." *Id.* 33 CIT at 1766, 662 F. Supp. 2d at 1355. Therefore, the Court held that "Customs abused its discretion in not granting the extension of time to file the drawback claims" under 19 U.S.C. § 1313(r)(1). *Id.*

Plaintiffs argue, for the first time in their reply brief, that the same result is warranted here because "Customs by its regulations made it impossible to file a drawback claim, within three years of export, that expressly requested taxes and fees."[29] Pls.' Reply Def.'s Resp. Pls.' Am. Mot. Summ. J. and Resp. Def.'s Cross-Mot. Summ. J., ECF No. 89 23–24.

As an initial matter, the court finds that because plaintiffs did not articulate their position that Customs was responsible for the delayed taxes and fees filings until their reply brief, they waived their right to press that argument here. *See, e.g.*, *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (holding that plaintiff waived an argument that was not presented this Court "until after [plaintiff] had filed its principal summary judgment brief," reasoning that "parties must give a trial court a fair opportunity to rule on an issue other than by raising that issue for the first time in a reply brief"). However, even if plaintiffs had briefed and preserved this argument, they nevertheless could not prevail.

Specifically, 19 U.S.C. § 1313(r)(1) provides that "[n]o extension [of the three-year limitation period] will be granted unless it is established that the Customs Service was responsible for the untimely filing." 19 U.S.C. § 1313(r)(1). In *Delphi*, the importer indicated that it was prepared to request drawback of HMT and MPF, but relied on the advice of a Customs Drawback Supervisor to wait until after liquidation to file those claims. Moreover, Delphi's allegation was supported with declarations of witnesses who attested to Customs'

[29] Notably, however, plaintiffs offer no evidence indicating that they corresponded with Customs, or relied, to their detriment, on Customs' advice.

advice to wait and file a protest. Here, plaintiffs have offered no admissible evidence supporting its allegation that Customs was responsible for its untimely claim. The *Delphi* court was very clear that its holding was a narrow one, particular to the facts in that case. *See Delphi*, 33 CIT at 1764, 662 F. Supp. 2d at 1354 ("The court has addressed Delphi's claims in some detail to emphasize the narrowness of the ground upon which Delphi succeeds. Under the facts of this case, Delphi's reliance on advice by the Customs supervisory drawback official for the Port of New York rendered Customs responsible for the otherwise untimely filing and qualifies Delphi for a statutory extension under the final provision § 1313(r)(1)."). Here, plaintiffs' bare assertions that they would potentially face civil and criminal sanction for filing drawback claims for HMT or MPF are not sufficient to entitle them to relief under *Delphi*. Therefore, the court finds that plaintiffs' claims for HMT, MPF, and/or ET are untimely, as plaintiffs are not entitled to an extension under § 1313(r)(1).

CONCLUSION

For the reasons stated above, the court finds that because plaintiffs' drawback claims did not include a calculation of the taxes and fees sought within the three-year limitation period imposed under the statute, these claims are now time-barred. Accordingly, the court denies plaintiffs' motion for summary judgment and grants defendant's motion for summary judgment, thereby sustaining Customs' denial of plaintiffs' protests. Judgment shall be entered accordingly.

Dated: September 6, 2018
New York, New York

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

Slip Op. 18–112

EVONIK REXIM (NANNING) PHARMACEUTICAL CO. LTD. and EVONIK CORPORATION, Plaintiffs, v. UNITED STATES Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00132

[Sustaining the U.S. Department of Commerce's remand redetermination in the administrative review of the antidumping duty order of glycine from the People's Republic of China.]

Dated: September 7, 2018

Matthew T. McGrath, Barnes, Richardson & Colburn, LLP, of Washington, D.C., for Plaintiffs Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. and Evonik Corporation.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. Of counsel was *David W. Campbell*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Choe-Groves, Judge:

Plaintiffs Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. and Evonik Corporation (collectively, "Evonik") challenge the final decision issued by the U.S. Department of Commerce ("Commerce" or "Department") in the administrative review of the antidumping duty order of glycine from the People's Republic of China for the 2013–2014 period of review. *See Glycine From the People's Republic of China*, 80 Fed. Reg. 62,027 (Dep't Commerce Oct. 15, 2015) (final results of antidumping duty administrative review and partial rescission of antidumping duty administrative review; 2013–2014) ("*Final Results*"); *see also* Glycine from the People's Republic of China: Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review; 2013–2014, A-570–836, (Oct. 5, 2015), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–26270–1.pdf (last visited Sept. 4, 2018) ("Final IDM"). The administrative review period involves entries of glycine made from March 1, 2013 through February 28, 2014. *Final Results*, 80 Fed. Reg. at 62,027.

Evonik challenged (1) Commerce's determination that its sales were not *bona fide* and (2) the application of the 453.79 percent China-wide entity rate during the 2013–2014 administrative review. *Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. v. United States*, 41 CIT __, __, 253 F. Supp. 3d 1364, 1370–71 (2017) ("*Evonik I*"), *appeal docketed*, No. 18–1854 (Fed. Cir. Apr. 19, 2018). This court severed the second claim and stayed the action pending the final ruling in *Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, Court No. 12–00362. Order, June 1, 2017, ECF No. 1. Prior decisions were issued by the court in *Evonik I* (sustaining in part and remanding in part) and *Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. v. United States*, 42 CIT __, 296 F. Supp. 3d 1364 (2018) (sustaining the remand redetermination).

Before the court are Commerce's final results of redetermination submitted following the court's grant of a voluntary remand issued on March 23, 2018. *See* Final Results of Redetermination Pursuant to Court Remand, June 5, 2018, ECF No. 9 ("*Remand Redetermination*"). For the following reasons, the court sustains the Remand Redetermination.

BACKGROUND

Commerce found in the underlying administrative review that Evonik's sales of subject merchandise were not *bona fide*. *See* Final IDM at 24. Commerce assigned Evonik the China-wide entity rate of 453.79 percent, which was based on the rate assigned to Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding") in the final results of the antidumping administrative review on glycine from China for 2010–2011. *Remand Redetermination* at 1–2.

In a proceeding separate from this litigation, Baoding challenged the 453.79 percent rate and the court issued a remand for Commerce to reconsider the rate and underlying analysis. *Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1321, 1324–25 (2017) ("*Baoding Mantong*"). Commerce reexamined the surrogate values, recalculated Baoding's weighted-average dumping margin at 0.00 percent, and invalidated the 453.79 percent China-wide entity rate in the Second Remand Redetermination. *Id.* The *Baoding Mantong* court found that Commerce's decisions in the Second Remand Redetermination were based on substantial evidence in the record, including determinations that the ammonia production input was anhydrous ammonia and not aqueous ammonia, and that the anhydrous ammonia should be valued according to the Global Trade Atlas data for Thailand, among other conclusions. *Id.* at ___, 279 F. Supp. 3d at 1331–32. The court sustained Commerce's Second Remand Redetermination as supported by the evidence in the record. *Id.*

After the *Baoding Mantong* court sustained Commerce's Second Remand Redetermination reducing Baoding's weighted-average dumping margin to 0.00 percent, this court granted Defendant's Consent Motion for Voluntary Remand. Order, Mar. 23, 2018, ECF No. 6. In its Remand Redetermination, Commerce vacated the China-wide entity rate of 453.79 percent and assigned an adjusted rate of 155.89 percent, which Commerce explained was the previous China-wide entity rate established in the underlying less-than-fair-value investigation. *Remand Redetermination* at 2, 4. Evonik did not challenge Commerce's proposed adjusted China-wide entity rate of 155.89 percent. *Id.* at 3. Evonik did not provide comments regarding the Remand Redetermination to the court.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over Commerce's final determination in an administrative review of an antidumping duty order. *See* 28 U.S.C. § 1581(c) (2012); 19 U.S.C. § 1516a(a)(2)(B)(iii). The court will uphold the Department's determinations, findings, or conclusions unless un-

supported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). When reviewing substantial evidence challenges to Commerce's decisions in an administrative review, the court assesses whether the agency action is unreasonable given the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

ANALYSIS

The *Baoding Mantong* court sustained Commerce's vacating of the previous China-wide entity rate of 453.79 percent based on substantial evidence considered in the Second Remand Redetermination. After the *Baoding Mantong* case invalidated the rate of 453.79 percent, Commerce reconsidered the appropriate rate to apply in the instant case. Commerce decided to apply the China-wide entity rate of 155.89 percent that had been established in the underlying less-than-fair-value investigation prior to the selection of the rate of 453.79 percent. The court concludes that Commerce's selection of the China-wide entity rate of 155.89 percent is reasonable. Plaintiffs Evonik do not challenge the rate of 155.89 percent and have waived any objections by declining to submit comments on the Remand Redetermination to the court. The court sustains Commerce's Remand Redetermination.

Judgment will be issued accordingly.

Dated: September 7, 2018
New York, New York

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

Slip Op. 18–113

PHARM-RX CHEMICAL CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00268

[Sustaining the U.S. Department of Commerce's remand redetermination in the administrative review of the antidumping duty order of glycine from the People's Republic of China.]

Dated: September 7, 2018

Brittney R. Powell and *Ronald M. Wisla*, Fox Rothschild LLP, of Washington, D.C., for Plaintiff Pharm-Rx Chemical Corporation.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. Of counsel were *Christopher P. Hyner* and *David W. Campbell*, Attorneys, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Choe-Groves, Judge:

Plaintiff Pharm-Rx Chemical Corporation ("Pharm-Rx") challenges the final decision issued by the U.S. Department of Commerce ("Commerce" or "Department") in the administrative review of the antidumping duty order of glycine from the People's Republic of China for the 2015–2016 period of review. *See Glycine From the People's Republic of China*, 82 Fed. Reg. 47,474 (Dep't Commerce Oct. 12, 2017) (final results of antidumping duty administrative review and rescission of antidumping duty administrative review, in part; 2015–2016) ("*Final Results*"); *see also* Glycine from the People's Republic of China: Issues and Decision Memorandum for the Final Results of Administrative Review and Rescission of the Administrative Review, In Part; 2015–2016, A-570–836, (Oct. 4, 2017), *available at* https://enforcement.trade.gov/frn/summary/prc/2017–22068–1.pdf (last visited Sept. 4, 2018). The administrative review period involves entries of glycine made from March 1, 2015 through February 29, 2016. *Final Results*, 82 Fed. Reg. at 47,474.

Pharm-Rx challenged Commerce's application of the 453.79 percent China-wide entity rate during the 2015–2016 administrative review. Compl. ¶ 18, Dec. 8, 2017, ECF No. 9 ("Compl."). Before the court are Commerce's final results of redetermination submitted following the court's grant of a voluntary remand issued on March 20, 2018. *See* Final Results of Redetermination Pursuant to Court Remand, June 4, 2018, ECF No. 27–1 ("*Remand Redetermination*"). For the following reasons, the court sustains the Remand Redetermination.

BACKGROUND

Pharm-Rx imported glycine manufactured by Jizhou City Huayang Chemical Co., Ltd. ("Huayang Chemical"). Compl. ¶ 7. Commerce selected Huayang Chemical as a mandatory respondent during the 2015–2016 administrative review. *Remand Redetermination* at 1. Huayang Chemical failed to respond to Commerce's questionnaire, and as a result, Commerce assigned Huayang Chemical the China-wide entity rate of 453.79 percent, which was based on the rate assigned to Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding") in the final results of the antidumping administrative review on glycine from China for 2010–2011. *Id.* at 1–2.

In a proceeding separate from this litigation, Baoding challenged the 453.79 percent rate and the court issued a remand for Commerce to reconsider the rate and underlying analysis. *Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1321, 1324–25 (2017) ("*Baoding Mantong*"). Commerce reexamined the surrogate values, recalculated Baoding's weighted-average dumping margin at 0.00 percent, and invalidated the 453.79 percent China-wide entity rate in the Second Remand Redetermination. *Id.* The *Baoding Mantong* court found that Commerce's decisions in the Second Remand Redetermination were based on substantial evidence in the record, including determinations that the ammonia production input was anhydrous ammonia and not aqueous ammonia, and that the anhydrous ammonia should be valued according to the Global Trade Atlas data for Thailand, among other conclusions. *Id.* at ___, 279 F. Supp. 3d at 1331–32. The court sustained Commerce's Second Remand Redetermination as supported by the evidence in the record. *Id.*

After the *Baoding Mantong* court sustained Commerce's Second Remand Redetermination reducing Baoding's weighted-average dumping margin to 0.00 percent, this court granted Defendant's Consent Motion for Voluntary Remand. Order, Mar. 20, 2018, ECF No. 23. In its Remand Redetermination, Commerce vacated the China-wide entity rate of 453.79 percent and assigned an adjusted rate of 155.89 percent, which Commerce explained was the previous China-wide entity rate established in the underlying less-than-fair-value investigation. *Remand Redetermination* at 4. Pharm-Rx did not challenge Commerce's proposed adjusted China-wide entity rate of 155.89 percent to Huayang Chemical. *Id.* at 3. Pharm-Rx requested that the court sustain the Remand Redetermination. *See* Pl.'s Request Sustain Remand Results 1, Aug. 21, 2018, ECF No. 30.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over Commerce's final determination in an administrative review of an antidumping duty order. *See* 28 U.S.C. § 1581(c) (2012); 19 U.S.C. § 1516a(a)(2)(B)(iii). The court will uphold the Department's determinations, findings, or conclusions unless unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). When reviewing substantial evidence challenges to Commerce's decisions in an administrative review, the court assesses whether the agency action is unreasonable given the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

ANALYSIS

The *Baoding Mantong* court sustained Commerce's vacating of the previous China-wide entity rate of 453.79 percent based on substantial evidence considered in the Second Remand Redetermination. After the *Baoding Mantong* case invalidated the rate of 453.79 percent, Commerce reconsidered the appropriate rate to apply in the instant case. Commerce decided to apply the China-wide entity rate of 155.89 percent that had been established in the underlying less-than-fair-value investigation prior to the selection of the rate of 453.79 percent. The court concludes that Commerce's selection of the China-wide entity rate of 155.89 percent is reasonable. Plaintiff Pharm-Rx does not challenge the rate of 155.89 percent and has waived any objections by declining to submit comments on the Remand Redetermination to the court. The court sustains Commerce's Remand Redetermination.

Judgment will be issued accordingly.

Dated: September 7, 2018
New York, New York

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

Slip Op. 18–115

POSCO, et al., Plaintiffs, and AK STEEL CORPORATION, et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00225

[Sustaining the U.S. Department of Commerce's Final Results of Redetermination.]

Dated: September 10, 2018

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

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Natan P. L. Tubman*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Timothy C. Brightbill, *Alan H. Price*, *Tessa V. Capeloto*, and *Adam M. Teslik*, Wiley Rein LLP, of Washington, DC, for Consolidated Plaintiff and Defendant-Intervenor Nucor Corporation.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or the "agency") redetermination upon remand in this case. *See* Confidential Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 112–1. For the reasons stated below, Commerce's Remand Results are sustained.[1]

BACKGROUND

The court assumes familiarity with the facts of this case as stated in *POSCO v. United States* ("*POSCO I*"), 42 CIT ___, 296 F. Supp. 3d 1320 (2018). The factual and legal background relevant to this remand is summarized herein.

In this consolidated action, Plaintiff POSCO ("POSCO") challenged Commerce's final determination in its countervailing duty ("CVD") investigation of cold-rolled steel products from the Republic of Korea ("Korea"). *See Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 49,943 (Dep't Commerce July 29, 2016) (final aff. determination) ("*Final Determination*"), ECF No. 41–4, and accompanying Issues and Decision Mem., C-580 882 (July 20, 2016) ("I&D Mem."), ECF No. 41–5, as amended by *Certain Cold-Rolled Steel Flat Products from Brazil, India, and the Republic of Korea*, 81 Fed. Reg. 64,436 (Dep't Commerce Sept. 20, 2016) (am. final aff. countervailing duty determination and countervailing duty order) ("*Amended Final Determination*"), ECF No. 41–3. In particular, POSCO (a Korean cold-rolled steel producer) challenged Commerce's use of the facts available with an adverse inference (referred to as "adverse facts available" or "AFA") for several reporting errors and its selection and corroboration of the adverse facts available rates. *See* Confidential Mot. of Pl. POSCO for J. on the Agency R., ECF No. 53, and Confidential Pl. POSCO's Br. in Supp. of its Mot. for J. on the Agency R. at 2–3, ECF No. 59–1.[2] The court previously sustained Commerce's use of the

[1] The administrative record filed in connection with the Remand Results is divided into a Public Administrative Record, ECF No. 114–2, and a Confidential Administrative Record, ECF No. 114–3.

[2] Consolidated Plaintiff Nucor Corporation ("Nucor") and Plaintiff-Intervenors ArcelorMittal USA LLC, AK Steel Corporation, and United States Steel Corporation (domestic cold-rolled steel producers) also challenged certain aspects of Commerce's final determination. Because the court sustained Commerce's determinations thereto, the Remand Results address challenges raised solely by POSCO. *See POSCO I*, 296 F. Supp. 3d at 1354–63.

adverse facts available. *See POSCO I*, 296 F. Supp. 3d at 1336–47. The court remanded Commerce's selection of the highest calculated rates to use as the adverse facts available rate and its corroboration of one of the selected rates. *Id.* at 1347–54.

Selection of Subsidy Rates

Commerce's selection of subsidy rates when making an adverse inference is governed by 19 U.S.C. § 1677e(d) (2015).[3] Subsection (d)(1) permits Commerce to "use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country," or "if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use." 19 U.S.C. § 1677e(d)(1)(A). Subsection (d)(2) directs Commerce to base its selection of the subsidy rate, which may include the highest rate, on an "evaluation . . . of the situation that resulted in the [agency] using an adverse inference." *Id.*, § 1677e(d)(2).

In the Issues and Decision Memorandum accompanying the *Final Determination*, Commerce explained that "[i]t is the [agency's] *practice* in CVD proceedings to compute an AFA rate for non-cooperating companies using the *highest* calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, rates calculated in prior CVD cases involving the same country." I&D Mem. at 12 (emphasis added).[4] The court remanded Commerce's selection of the highest calculated subsidy rates as lacking the case-specific evaluation required by subsection (d)(2). *POSCO I*, 296 F. Supp. 3d at 1349–50. The court reasoned that subsection

[3] The Trade Preferences Extension Act ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), made several amendments to the antidumping and countervailing duty laws, including the addition of subsection (d) to 19 U.S.C. § 1677e. The TPEA amendments affect all CVD determinations made on or after August 6, 2015. *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 (Dep't Commerce Aug 6, 2015). All references to 19 U.S.C. § 1677e are to the amended version of the statute.

[4] Specifically, Commerce selected its rates pursuant to the following hierarchical methodology:

> [Commerce] applies the highest calculated rate for the identical subsidy program in the investigation if a responding company used the identical program, and the rate is not zero. If there is no identical program match within the investigation, or if the rate is zero, [Commerce] uses the highest non-*de minimis* rate calculated for the identical program in a CVD proceeding involving the same country. If no such rate is available, [Commerce] will use the highest non-*de minimis* rate for a similar program (based on treatment of the benefit) in another CVD proceeding involving the same country. Absent an above-*de minimis* subsidy rate calculated for a similar program, [Commerce] applies 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.

I&D Mem. at 12.

(d)(2) contemplates a range of possible rates from among which Commerce may choose based on its "evaluation of the specific situation," and faulted the agency for "fail[ing] to fulfill its statutory duty because it failed to explain why this case justified its selection of the highest rates." *Id.* at 1349; *see also id.* at 1350 ("[Section] 1677e(d)(2) contemplates the selection of the highest rate when the situation merits the highest rate. . . . Commerce failed to evaluate whether the circumstances in this case merited the highest rate.").

On remand, Commerce explained that by selecting the highest rate within each prong of its adverse facts available hierarchy, it "strikes a balance between [] three necessary variables: inducement, industry relevancy, and program relevancy." Remand Results at 10–12. Commerce further explained that it interprets 19 U.S.C. § 1677e(d)(2) to constitute

> an exception to the selection of an adverse facts available rate under [§ 1677e(d)(1)]; that is, after 'an evaluation of the situation that resulted in the application of an adverse inference,' Commerce may decide that given the unique and unusual facts on the record, the use of the highest rate within that step is not appropriate.

Id. at 12. Commerce evaluated the situation that resulted in the use of adverse inferences and concluded that no deviation from the highest rates was merited. *See id.* at 12–16.

Corroboration of Subsidy Rates

"Corroborat[ion] means that the [agency] will examine whether the secondary information to be used has probative value," 19 C.F.R. § 351.308(d), which includes an examination of its reliability and relevance, *Özdemir Boru San. ve Tic. Ltd. Sti. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1225, 1247 (2017) (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1354 (Fed. Cir. 2015)). For the *Amended Final Determination*, pursuant to the aforementioned hierarchy, Commerce applied a 1.64 percent rate associated with an insurance program deemed countervailable in *Bottom Mount Combination Refrigerator–Freezers from the Republic of Korea*, 77 Fed. Reg. 17,410 (final aff. countervailing duty determination) (Dep't Commerce March 26, 2012) ("*Refrigerators from Korea*"), for several of POSCO's countervailable programs. *POSCO I*, 296 F. Supp. 3d at 1335–36; *see also Am. Final Determination*, 81 Fed. Reg. at 64,437. The court remanded Commerce's selection of the 1.64 percent rate because the rate was "derived from estimates Commerce made on the basis of an adverse inference" and, thus, was not an "[a]ctual rate[ ] calculated based on actual usage of a countervailable program

by a Korean company." *POSCO I*, 296 F. Supp. 3d at 1353 (internal quotation marks, emphasis, and citation omitted). Accordingly, the court determined that the reliability of that rate was unsupported by substantial evidence. *See id.* at 1351, 1353.

In the *Amended Final Determination*, Commerce had also applied a 1.05 percent rate associated with a tax deduction program found countervailable in *Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,975 (final aff. countervailing duty determination) (Dep't Commerce December 26, 2012) ("*Washers from Korea*"), to certain other programs found to be countervailable. The court found that Commerce properly corroborated that rate. *POSCO I*, 296 F. Supp. 3d at 1353–54.

On remand, Commerce replaced the 1.64 percent rate from *Refrigerators from Korea* with the 1.05 percent rate from *Washers from Korea* that the court previously concluded was properly corroborated. *See* Remand Results at 19–20.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012), and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Americas, Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (internal quotation marks and citation omitted).

DISCUSSION

POSCO summarily contends that Commerce's rate selection analysis lacks compliance with the court's decision in *POSCO I*. Pl. POSCO's Comments on the U.S. Dep't of Commerce's June 6, 2018 Final Redetermination Pursuant to Court Remand ("POSCO Comments") at 2, ECF No. 116. POSCO further contends that "the 1.05 percent rate is overstated." *Id.* However, in the interest of "a speedy end to this litigation," POSCO refrained from "commenting further" on either issue. *Id.*

Nucor and Defendant United States urge the court to sustain the Remand Results. Resp. to Pl. POSCO's Comments on the U.S. Dep't of Commerce's June 6, 2018 Final Redetermination Pursuant to Court Remand ("Nucor Reply"), ECF No. 117; Def.'s Resp. to Comments on Remand Results, ECF No. 118. Nucor specifically requests the court to "treat the Remand Results as unopposed" because POSCO "failed to exhaust its administrative remedies and otherwise

failed to articulate any basis for the [c]ourt [to] fault the agency's Remand Results." Nucor Reply at 1.

The court first directed Commerce to base its selection of the subsidy rate on an evaluation of the specific situation that merited the adverse inferences, and apprise the court of the basis for its findings thereto. *POSCO I*, 296 F. Supp. 3d at 1349–50. On remand, Commerce explained, with citations to supporting evidence, why this case did not merit a deviation from the highest calculated rate selected pursuant to Commerce's hierarchical methodology. Remand Results at 12–16. To the extent POSCO seeks to challenge Commerce's findings or its interpretation of subsection (d)(2) as functioning as an "exception" to its practice of selecting the highest rates from within each prong of its hierarchy, *see* POSCO Comments at 2, POSCO has failed to exhaust its administrative remedies, *see, e.g.*, *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008) (failure to raise an issue on remand precludes parties from raising that issue before the court); Remand Results at 21 (noting that POSCO did not provide substantive comments on the draft remand results). Likewise, the court considers POSCO's failure to articulate any grounds for its assertion that Commerce failed to fully comply with the court's remand order as an implied waiver of that argument. *See Home Prods. Int'l, Inc. v. United States,* 36 CIT ___, ___, 837 F. Supp. 2d 1294, 1301 (2012) (quoting *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.")).

Next, the court directed Commerce to reconsider its selection and corroboration of the 1.64 percent subsidy rate derived from *Refrigerators from Korea*. *POSCO I*, 296 F. Supp. 3d at 1353. Commerce did so, and replaced it with the 1.05 percent subsidy rate derived from *Washers from Korea*, which the court had found to be properly corroborated. Remand Results at 19–20; *POSCO I*, 296 F. Supp. 3d at 1354. POSCO failed to substantively challenge Commerce's redetermination at the agency level and before the court. *See* Remand Results at 22; POSCO Comments at 2. Accordingly, the court sees no reason to disturb Commerce's redetermination. *See Mittal Steel*, 548 F.3d at 1383; *Home Prods. Int'l,* 837 F. Supp. 2d at 1301.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby **ORDERED** that Commerce's Remand Results are sustained. Judgment will enter accordingly.

Dated: September 10, 2018
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, JUDGE

Slip Op. 18–116

JINXIANG HUAMENG IMP & EXP CO., LTD. and CS FARMING PRODUCTS, INC., Plaintiffs, v. UNITED STATES, Defendant, and HARMONI INTERNATIONAL SPICE, INC., ZHENGZHOU HARMONI SPICE CO., LTD., FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00243

[Remanding for the U.S. Department of Commerce to redetermine whether Plaintiffs' sale subject to the new shipper review of fresh garlic from the People's Republic of China was *bona fide*.]

Dated: September 10, 2018

John J. Kenkel, *Alexandra H. Salzman*, *Gregory S. Menegaz*, and *J. Kevin Horgan*, deKieffer & Horgan, of Washington, D.C., for Plaintiffs Jinxiang Huameng Imp & Exp Co., Ltd. and CS Farming Products, Inc. With them on the brief was *Judith L. Holdsworth*.

Meen Geu Oh, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Michael J. Coursey, *John M. Herrmann, II*, *Joshua R. Morey*, and *Heather N. Doherty*, Kelley Drye & Warren LLP, of Washington, D.C., for Defendant-Intervenors Fresh Garlic Producers Association, Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

Bruce M. Mitchell, *Ned H. Marshak*, and *Andrew T. Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of New York, N.Y., for Defendant-Intervenors Harmoni International Spice, Inc. and Zhengzhou Harmoni Spice Co., Ltd.

OPINION AND ORDER

Choe-Groves, Judge:

This case involves a new shipper review of imported fresh garlic from the People's Republic of China ("China"). Plaintiffs Jinxiang Huameng Imp & Exp Co., Ltd. ("Huameng") and CS Farming Products, Inc. bring this action contesting the rescission of a new shipper

review, in which the U.S. Department of Commerce ("Commerce" or "Department") found that Huameng's single sale of fresh garlic was not *bona fide*. *See Fresh Garlic From the People's Republic of China*, 81 Fed. Reg. 73,378 (Dep't Commerce Oct. 25, 2016) (final rescission of the semiannual antidumping duty new shipper review of Jinxiang Huameng Imp & Exp Co., Ltd.) ("*Huameng Rescission*"); *see also* Issues and Decision Memorandum for the Final Rescission of Antidumping Duty Semiannual New Shipper Review on Fresh Garlic from the People's Republic of China: Jinxiang Huameng Imp & Exp Co., Ltd., A-570–831, (Oct. 14, 2016), *available at* https://enforcement.trade.gov/frn/summary/prc/201625675–1.pdf (last visited Sept. 5, 2018) ("Final IDM").

This matter is before the court on Plaintiffs' Rule 56.2 motion for judgment on the agency record challenging the final results of the Department of Commerce's rescission of a new shipper review. *See* Pls. Jinxiang Huameng Imp & Exp Co., Ltd & CS Farming Products, Inc.'s Rule 56.2 Mot. J. Agency R., Oct. 16, 2017, ECF No. 60; *see also* Pls. Jinxiang Huameng Imp & Exp Co., Ltd. & CS Farming Products, Inc. Mem. Supp. Mot. J. Agency R., Oct. 16, 2017, ECF No. 60–2 ("Pl. Mem."); Pls. Jinxiang Huameng Imp & Exp Co., Ltd. and CS Farming Products, Inc.'s Reply Def.'s Mem. Opp'n Pls.' Rule 56.2 Mot. J. Agency R., Feb. 26, 2018, ECF No. 83. Defendant United States urges the court to uphold Commerce's decision. *See* Def.'s Mem. Opp'n Pls.' Mot. J. Agency R., Jan. 12, 2018, ECF No. 80 ("Def. Resp."). The Fresh Garlic Producers Association, Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively, "Petitioners") oppose Plaintiffs' motion. *See* Def.-Intervenors' Resp. Pls.' Mot., Dec. 22, 2017, ECF No. 75 ("Pet. Resp."). Harmoni International Spice Inc. and Zhenghou Harmoni Spice Co., Ltd. (collectively, "Harmoni") support the rescission. *See* Def.-Intervenor Harmoni's Resp. Pls.' Mot., Dec. 22, 2017, ECF No. 68. The Parties requested oral argument, but were unable to schedule a mutually convenient hearing date. The court did not hold an oral argument and is making its decision based on the briefs submitted by the Parties.

PROCEDURAL HISTORY

Commerce published an antidumping duty order regarding fresh garlic from the People's Republic of China on November 16, 1994. *See Fresh Garlic From the People's Republic of China*, 59 Fed. Reg. 59,209 (Dep't Commerce Nov. 16, 1994) (antidumping duty order). The order resulted in the imposition of antidumping duties on entries of fresh garlic from China. *Id.* at 59,210.

Huameng, an exporter and producer of fresh garlic, was established on November 11, 2014. *Bona Fide* Nature of the Sale in the Antidumping Duty New Shipper Review of the Fresh Garlic from the People's Republic of China (PRC): Jinxiang Huameng Imp & Exp Co., Ltd. at 3, PD 126, bar code 3469888–01 (May 17, 2016) ("*Bona Fide* Memo"). As a company formed after the commencement of the eighteenth administrative review of fresh garlic, Huameng requested a new shipper review based on a single sale of single-clove garlic that it produced and exported, and Commerce initiated a new shipper review for the period from November 1, 2014 to April 30, 2015. *See Fresh Garlic from the People's Republic of China*, 80 Fed. Reg. 43,062, 43,062–63 (Dep't Commerce July 21, 2015) (initiation of antidumping duty new shipper review; 2014–2015). The Department issued initial and supplemental questionnaires, to which Huameng responded in a timely manner. *See* Decision Memorandum for Preliminary Results of Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: Jinxiang Huameng Imp & Exp Co., Ltd. at 2, A-570–831, (May 17, 2016), *available at* https://enforcement.trade.gov/frn/summary/prc/2016–12336–1.pdf (last visited Sept. 5, 2018) ("PDM"); Pl. Mem. 37. Commerce did not ask follow-up questions related to its *bona fide* determination. *See* Pl. Mem. 23. From November 17, 2015 to May 6, 2016, Commerce received comments from interested parties, including Harmoni. *See* PDM at 2. Commerce issued a Decision Memorandum regarding the *bona fide* nature of the sale on May 17, 2016. *See Bona Fide* Memo. Harmoni, a participant in an ongoing administrative review of the industry, filed a rebuttal and allegations of fraud against Huameng. *See* Final IDM at 2. Petitioners filed rebuttal comments. *See id.* Responding to Harmoni's claims of fraud against Huameng, Commerce conducted a verification review and issued a report on September 28, 2016. *See id.*; Verification of the Sales and Factors Response of Jinxiang Huameng Import & Export Co., Ltd. in the New Shipper Review of Garlic from the People's Republic of China, PD 155, bar code 3510186–01 (Sep. 28, 2016). After a comment period, Commerce issued the final results on October 25, 2016. *See Huameng Rescission*, 81 Fed. Reg. at 73,378.

ISSUE PRESENTED

The issue presented to the court is whether Commerce's decision that Plaintiffs' sale subject to the new shipper review was not *bona fide* is supported by substantial evidence. For the reasons discussed below, the court finds that Commerce's decision is not supported by

substantial evidence and remands this matter for Commerce to redetermine, consistent with this opinion, whether Plaintiffs' sale subject to the new shipper review was *bona fide*.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012), and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting final determinations in an antidumping duty investigation. The court will sustain a determination by Commerce that is supported by substantial evidence on the record and is otherwise in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). In determining whether substantial evidence supports Commerce's determination, the court considers "the record as a whole, including evidence that supports" or that "fairly detracts from the substantiality of the evidence." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003).

ANALYSIS

Pursuant to 19 U.S.C. § 1675(a)(2)(B)(i), Commerce must conduct a new shipper review when requested by a new exporter or producer who (1) was not subject to the previous period of investigation for an antidumping duty review, and (2) is not affiliated with any exporter or producer that exported during the previous period. 19 U.S.C. § 1675(a)(2)(B)(i). The exporter or producer requesting the new shipper review must have exported, or sold for export, subject merchandise to the United States. 19 C.F.R. § 351.214(b)(1). "The purpose of a new shipper review is to provide an opportunity to an exporter or producer who may be entitled to an individual antidumping rate, but was not active during the investigation, to be considered for such a rate." *Marvin Furniture (Shanghai) Co. Ltd. v. United States*, 36 CIT __, __, 867 F. Supp. 2d 1302, 1307 (2012).

To determine whether a sale is *bona fide*, Commerce employs a totality of the circumstances test to determine whether the subject sale is commercially reasonable. Commerce considers the following factors in its *bona fide* analysis:

(I) the prices of such sales;

(II) whether such sales were made in commercial quantities;

(III) the timing of such sales;

(IV) the expenses arising from such sales;

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

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

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

19 U.S.C. § 1675(a)(2)(B)(iv).

Commerce may rescind a new shipper review if (1) "there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise" during the period of review, and (2) an "expansion of the normal period of review to include an entry and sale to an unaffiliated customer in the United States of subject merchandise would be likely to prevent the completion of the review within the [required] time limits." 19 C.F.R. § 351.214(f)(2). While 19 C.F.R. § 351.214(f)(2) does not specifically address a *bona fide* requirement, "Commerce interprets the term 'sale' in [19 C.F.R.] § 351.214(f)(2)(i) to mean that a transaction it determines not to be a *bona fide* sale is, for purposes of the regulation, not a sale at all." *Shijiazhuang Goodman Trading Co., Ltd. v. United States*, 40 CIT __, __, 172 F. Supp. 3d 1363, 1373 (2016). When Commerce determines that the sale subject to the new shipper review is not *bona fide*, it may rescind the review.

Plaintiffs assert that Commerce erred in determining that the subject sale was not *bona fide* because its decision was not based on substantial evidence on the record, was arbitrary and capricious, and was not in accordance with the law. Plaintiffs' primary challenge is to Commerce's determination that Commerce did not have sufficient evidence to determine whether Huameng's subject sale was *bona fide*, and contest this finding on several bases. *See* Pl. Mem. 2–5. Defendant and Harmoni claim that Commerce's determination was reasonable. *See* Def. Resp. 18–31; *see also* Pet. Resp. 2–3. Defendant asserts that Commerce requested information repeatedly regarding Huameng's contractual expenses, which Commerce believed was necessary to verify Plaintiffs' claims that the sale was made "on the basis of the terms in the contract and invoice." *See* Def. Resp. 20; *see also* Final IDM at 6; *Bona Fide* Memo at 5. Defendant argues that Huameng failed to cooperate by not providing information requested for the new shipper review and intentionally obfuscating its sales terms, leading to Commerce's conclusion that Huameng's single sale of

single-clove garlic was not *bona fide*. *See* Def. Resp. 29–30. The issue considered by the court is whether Commerce properly rescinded the new shipper review based on Commerce's asserted inability to complete the *bona fide* analysis because of the failure of Huameng and its downstream U.S. customer to provide requested documentation relating to payment of expenses.

Commerce found specifically that because

> Huameng did not provide evidence that identifies the party that actually paid for [the] contractual expenses, the Department cannot definitely determine that the terms of the sales contract and commercial invoice were reported accurately. As a result, the Department continues to find that the lack of proof of payment for these expenses is indicative that the sale was not a *bona fide* transaction.

Final IDM at 6. Commerce requested that Huameng provide documentation showing that its U.S. customer paid for U.S. Customs duties, international freight, and marine insurance, and Huameng failed to provide such documents. *See id.* Commerce requested "a copy of each type of agreement and all sales-related documentation generated in the sales process (including the purchase order, internal and external order confirmation, invoice, shipping and export documentation, and Customs entry documentation) for a sample sale in the U.S. market during the [period of review]." Response to Section A of Department's Questionnaire ("SAQR") Filed on Behalf of Jinxiang Huameng Imp & Exp Co., Ltd. at 15–16, PD 23, bar code 3301651–01 (Sep. 1, 2015). Commerce could not "definitively determine that the terms of the sales contract and commercial invoice were reported accurately," and found therefore that Huameng failed to "comply fully" with Commerce's requests. Final IDM at 6. Commerce concluded that the missing proof of payment documentation was indicative of possible "unreported agreements" between Huameng and its U.S. customer to falsely inflate prices "to achieve a zero dumping margin," and that Huameng's sales were not *bona fide*. *Id.*; *see also Bona Fide* Memo at 5.

The court finds that substantial evidence does not support Commerce's decision to rescind the new shipper review due to lack of sufficient information to conduct the statutory *bona fide* analysis. *See Haixing Jingmei Chemical Products Sales Co., Ltd. v. United States*, 41 CIT __, __, 277 F. Supp. 3d 1375, 1383 (2017) ("*Haixing Jingmei*") (noting that "Commerce does not possess subpoena power to require the respondent or any other interested party to respond to information requests," and therefore must "use facts available to fill any gaps

in the record" as intended by Congress). The court in *Haixing Jingmei* found that Commerce did not have the statutory authority "to rescind the new shipper review due to insufficient information" when the respondent and its downstream customer failed to produce requested information. *Id.* In this case, Commerce cited a similar lack of sufficient information on downstream sales when it rescinded the new shipper review. The court finds that Commerce should have instead used facts available, with or without an adverse inference, to fill any gaps in the record.

Huameng responded to Commerce's questions regarding the matter and produced some documentation of sales expenses. For example, Huameng provided documentation of various transaction expenses, including ocean freight and related charges. *See* Response to Supplemental Section A Questionnaire ("SAQR") Filed on Behalf of Jinxiang Huameng Imp & Exp Co., Ltd. at 3, 7, PD 81, bar code 3453018–01 (Mar. 28, 2016). Commerce did not use the information provided to fill gaps in the record or draw adverse inferences, but rather concluded that the lack of information provided by Huameng and its downstream customer was indicative of a non-*bona fide* transaction. The court concludes that in light of Commerce's statutory authority to utilize gap-filling information, Commerce's decision to rescind the new shipper review due to insufficient information is not supported by substantial evidence.

For the foregoing reasons, the court remands this matter to Commerce for redetermination. The remaining arguments raised in the Parties' briefs are deferred pending the redetermination. The Parties may challenge any relevant remaining issues after Commerce concludes its remand redetermination.

CONCLUSION

For the reasons stated above, it is hereby

ORDERED that the *Huameng Rescission* is remanded to Commerce for a redetermination of whether Huameng's subject sale was *bona fide* as discussed in this opinion; and it is further

ORDERED that the following schedule shall govern the remand proceedings:

1. Commerce shall file its remand redetermination on or before November 9, 2018;

2. Commerce shall file the administrative record on remand on or before November 26, 2018;

3. The Parties shall file any comments on the remand redetermination on or before December 12, 2018;

4. The Parties shall file any replies to the comments on or before January 11, 2019; and

5. The joint appendix shall be filed on or before January 18, 2019.

Dated: September 10, 2018
New York, New York

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

Slip Op. 18–117

POSCO, Plaintiff, and NUCOR CORPORATION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC., AK STEEL CORPORATION, ARCELORMITTAL USA LLC, UNITED STATES STEEL CORPORATION, HYUNDAI STEEL COMPANY, and GOVERNMENT OF KOREA, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 16–00227

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination following a countervailing duty investigation of certain hot-rolled steel flat products from the Republic of Korea.]

Dated: September 11, 2018

Donald B. Cameron and *Brady W. Mills*, Morris, Manning & Martin LLP, of Washington, D.C., argued for Plaintiff POSCO and Defendant-Intervenors Hyundai Steel Company and the Government of Korea. With them on the brief were *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, and *Eugene Degnan*. *Sabahat Chaudhary* also appeared.

Adam M. Teslik and *Christopher B. Weld*, Wiley Rein LLP, of Washington, D.C., argued for Consolidated Plaintiff and Defendant-Intervenor Nucor Corporation. With them on the brief was *Alan H. Price*. *Cynthia C. Galvez*, *Derick G. Holt*, *Laura El-Sabaawi*, *Maureen E. Thorson*, *Stephanie M. Bell*, *Tessa V. Capeloto*, *Timothy C. Brightbill*, and *Usha Neelakantan* also appeared.

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

Melissa M. Brewer, Kelley Drye & Warren, LLP, of Washington, D.C., for Defendant-Intervenor ArcelorMittal USA LLC. *Kathleen W. Cannon*, *Paul C. Rosenthal*, *R. Alan Luberda*, and *Scott M. Wise* also appeared.

Daniel L. Schneiderman, King & Spalding, LLP, of Washington, D.C., for Defendant-Intervenor AK Steel Corporation. With him on the brief was *Stephen A. Jones*.

Roger B. Schagrin and *Christopher T. Cloutier*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Steel Dynamics, Inc. *Elizabeth J. Drake*, *John W. Bohn*, and *Paul W. Jameson* also appeared.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation. Formerly on the brief were *Jeffrey D. Gerrish* and *Luke A. Meisner*, Skadden Arps Slate Meagher & Flom LLP, of Washington, D.C.

OPINION AND ORDER

Choe-Groves, Judge:

This case involves certain hot-rolled steel flat products from the Republic of Korea ("Korea"). Plaintiff POSCO and Consolidated Plaintiff Nucor Corporation ("Nucor") bring this action contesting various aspects of the final determination in a countervailing duty investigation, in which the U.S. Department of Commerce ("Commerce" or "Department") found that countervailable subsidies are being provided to producers and exporters of certain hot-rolled steel flat products from Korea. *See Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep't Commerce Aug. 12, 2016) (final affirmative determination), *as amended*, 81 Fed. Reg. 67,960 (Dep't Commerce Oct. 3, 2016) (amended final affirmative countervailing duty determination and countervailing duty order); *see also* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea, C-580–884, (Aug. 4, 2016), *available at* https://enforcement.trade.gov/frn/summary/korea-south/2016–19377–1.pdf (last visited Sept. 5, 2018) ("Final IDM"). This matter is before the court on Plaintiff POSCO's Rule 56.2 motion for judgment on the agency record and Consolidated Plaintiff Nucor's Rule 56.2 motion for judgment on the agency record challenging various aspects of the Department's final determination. *See* Pl. POSCO's Mot. J. Agency R., June 1, 2017, ECF No. 54; Pl. POSCO's Br. Supp. Mot. J. Agency R., June 1, 2017, ECF No. 54–2 ("POSCO's Mot."); Pl. Nucor Corporation & Pl.-Intervenors ArcelorMittal USA LLC, AK Steel Corporation, & United States Steel Corporation's Rule 56.2 Mot. J. Agency R., June 1, 2017, ECF No. 56 ("Nucor's Mot.").

ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce properly applied facts otherwise available with an adverse inference ("adverse facts available" or "AFA") against POSCO with respect to POSCO's four cross-owned affiliates;

2. Whether Commerce properly rejected factual information submitted at verification regarding POSCO's affiliated trading company, Daewoo International Corporation;
3. Whether Commerce properly applied adverse facts available against POSCO with respect to POSCO's facility located in a free economic zone;
4. Whether Commerce properly selected the highest rates when applying adverse facts available;
5. Whether Commerce properly corroborated the adverse facts available rates used;
6. Whether Commerce properly determined that the Government of Korea's provision of electricity to respondents was not for less than adequate remuneration;
7. Whether Commerce properly determined not to take into account information regarding the Korea Power Exchange ("KPX");
8. Whether Commerce properly determined that the Government of Korea's provision of electricity is consistent with market principles; and
9. Whether Commerce properly declined to apply facts otherwise available with an adverse inference against the Government of Korea.

PROCEDURAL HISTORY

Nucor, AK Steel Corporation, ArcelorMittal USA LLC, Steel Dynamics Inc., and United States Steel Corporation (collectively, "Petitioners") filed a petition with Commerce concerning imports of hot-rolled steel flat products from Korea. *See* Decision Memorandum for the Preliminary Negative Determination: Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea at 1, C-580–884, (Jan. 8, 2016), *available at* https://enforcement.trade.gov/frn/summary/korea-south/2016–00750–1.pdf (last visited Sept. 5, 2018) ("Prelim. IDM"). Commerce initiated a countervailing duty investigation into certain hot-rolled steel flat products from Korea on September 9, 2015. *See id.*; *see also Certain Hot-Rolled Steel Flat Products From Brazil, the Republic of Korea, and Turkey*, 80 Fed. Reg. 54,267 (Dep't Commerce Sept. 9, 2015) (initiation of countervailing duty investigations). The investigation named two entities, POSCO and Hyundai Steel Co., Ltd. ("Hyundai Steel"), as mandatory respondents. *See* Prelim. IDM at 2.

POSCO submitted a questionnaire response related to Daewoo International Corporation ("Daewoo"), a trading company affiliated with POSCO. *See id.* at 9; POSCO and Daewoo International Corporation's Response to the Affiliated Companies Questions of Commerce's Sept. 24, 2015 Initial Questionnaire, PD 74, bar code 3404843–01 (Oct. 13, 2015). Daewoo is majority-owned by POSCO and exported POSCO-produced subject merchandise into the United States during the period of investigation. *See* Prelim. IDM at 9.

Commerce also issued an initial questionnaire to the Government of Korea, seeking information about how electricity prices in Korea are set and how the Korean Electric Power Corporation's ("KEPCO") costs are reflected in its electricity rates. *See* Commerce's Initial Countervailing Duty Questionnaire, PD 46–47, bar code 3308604–01 (Sept. 24, 2015).

Commerce issued its preliminary determination on January 15, 2016. *See Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 2,172 (Dep't Commerce Jan. 15, 2016) (preliminary negative determination and alignment of final determination with final antidumping duty determination) ("*Preliminary Results*"). The Department found that POSCO and Daewoo are cross-owned through common ownership as defined in 19 C.F.R. § 351.525(b)(6)(vi). *See* Prelim. IDM at 9. Commerce determined preliminarily that the Government of Korea's provision of electricity was not for less than adequate remuneration and did not confer a benefit to the respondents. *See id.* at 33. In reaching this result, Commerce analyzed whether the pricing set by KEPCO was consistent with market principles based on the "Tier Three" benchmark analysis set forth in Commerce's regulations. *See id.* at 31–33. Under the Tier Three benchmark analysis, Commerce determined preliminarily that KEPCO applied the same price-setting method (standard pricing mechanism) to calculate the electricity rates for each tariff classification, that there was no information that the Korean producers were treated differently from other industrial users of electricity purchasing comparable amounts, and that this program provided no benefit to the Korean producers. *See id.* at 32–33. Commerce calculated a *de minimis* rate for both POSCO and Hyundai Steel. *Preliminary Results*, 81 Fed. Reg. at 2,172–73. Nucor submitted subsequent pre-verification comments. *See* Nucor's Pre-Verification Comments for the Government of Korea, PD 349, bar code 3461986–01 (Apr. 21, 2016).

Between the publication of the Preliminary Results and verification, POSCO attempted to provide additional factual information to

the Department. *See* POSCO's Response to Commerce's Apr. 26, 2016 Supplemental New Subsidy Allegation Questionnaire (Rejected and Retained by Commerce), CD 364, bar code 3466175–01 (May 3, 2016). The Department rejected the submission as untimely. *See* Commerce's Letter to POSCO Regarding POSCO's May 3, 2016 Questionnaire Response, PD 384, bar code 3466187–01 (May 3, 2016); Commerce's Rejection of Document Memorandum, PD 385, bar code 3466188–01 (May 3, 2016). Commerce conducted verifications of the questionnaire responses submitted by the Government of Korea, POSCO, and Hyundai Steel from May 9 through May 20, 2016. *See* Final IDM at 2.

Commerce issued its final determination on August 12, 2016. *See Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. at 53,439. The Department found that POSCO failed to provide information about its cross-owned companies. *See* Final IDM at 9. It subsequently applied adverse facts available to POSCO and found, as AFA, that those companies provided inputs used in the production of certain hot-rolled steel flat products during the period of investigation. *See id.* Commerce applied AFA to POSCO for its failure to report that one of its facilities is located in a free economic zone and for Daewoo's failure to report certain loans. *See id.* Commerce selected and applied AFA rates from two previous countervailing duty investigations involving Korea: *Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea*, 77 Fed. Reg. 17,410 (Dep't Commerce Mar. 26, 2012) (final affirmative countervailing duty determination), and *Large Residential Washers From the Republic of Korea*, 77 Fed. Reg. 75,975 (Dep't Commerce Dec. 26, 2012) (final affirmative countervailing duty determination). *See* Final IDM at 11–17. The Department continued to find, pursuant to its Tier Three benchmark analysis, that the Government of Korea's provision of electricity did not benefit POSCO or Hyundai Steel, was not for less than adequate remuneration, and was not countervailable. *See id.* at 25, 44–50. Commerce assigned POSCO a final subsidy rate of 57.04 percent. *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. at 53,439.

POSCO then submitted ministerial error comments to Commerce. *See* POSCO and POSCO Daewoo Corporation's Ministerial Error Allegation, PD 446, bar code 3497444–01 (Aug. 12, 2016). POSCO alleged that Commerce had made an error in selecting and applying the AFA rates for POSCO. *Id.* at 3–4. Commerce stated that most of POSCO's arguments were about methodological decisions rather than ministerial errors, but adjusted one of the AFA rates based on an

error Commerce discovered itself. *See* Commerce's Response to Ministerial Error Comments at 2, PD 450, bar code 3500934–01 (Aug. 23, 2016). Commerce assigned an amended final subsidy rate of 58.68 percent to POSCO. *See Certain Hot-Rolled Steel Flat Products From Brazil and the Republic of Korea*, 81 Fed. Reg. at 67,961.

POSCO and Nucor initiated separate proceedings in this court, which the court consolidated. *See* Order, Feb. 8, 2017, ECF No. 46. Pursuant to the motions for judgment on the agency record filed by the Parties, the court held oral argument on April 18, 2018. *See* Oral Argument, Apr. 18, 2018, ECF No. 93; *see also* Transcript of Oral Argument, May 2, 2018, ECF No. 95.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c).[1] The court "shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

I. POSCO's Rule 56.2 Motion for Judgment on the Agency Record

The court begins by addressing POSCO's Rule 56.2 motion for judgment on the agency record. POSCO contests several issues stemming from Commerce's application of adverse facts available to POSCO in the final determination. For the following reasons, the court grants in part and denies in part POSCO's motion.

A. Legal Standard

Pursuant to the Tariff Act, Commerce has the authority to conduct countervailing duty investigations and to determine whether "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States." 19 U.S.C. § 1671(a)(1). Countervailing

[1] All further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code. All further citations to the U.S. Code are to the 2012 edition, with exceptions. All further citations to 19 U.S.C. § 1677e are to the 2015 version, as amended pursuant to the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). All citations to the Code of Federal Regulations are to the 2015 edition.

subsidies "exist when (1) a foreign government provides a financial contribution (2) to a specific industry and (3) a recipient within the industry receives a benefit as a result of that contribution." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (citing 19 U.S.C. § 1677(5)(B)).

Section 776 of the Tariff Act provides that if "necessary information is not available on the record" or if a respondent "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," then the agency shall "use the facts otherwise available in reaching" its determination. 19 U.S.C. §§ 1677e(a)(1), (a)(2)(B). If the Department finds further that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" from the agency, then the Department "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1)(A). The U.S. Court of Appeals for the Federal Circuit has interpreted these two subsections to have different purposes. *See Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014). Subsection (a) applies "whether or not any party has failed to cooperate fully with the agency in its inquiry." *Id.* (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011)). On the other hand, subsection (b) applies only when the Department makes a separate determination that the respondent failed to cooperate "by not acting to the best of its ability." *Id.* (quoting *Zhejiang DunAn Hetian Metal Co.*, 652 F.3d at 1346).

When determining whether a respondent has complied to the "best of its ability," Commerce "assess[es] whether [a] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). This finding requires both an objective and subjective showing. *Id.* Commerce must determine objectively "that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." *Id.* (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002)). Next, Commerce must demonstrate subjectively that the respondent's "failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information

from its records." *Id.* at 1382–83. Adverse inferences are not warranted "merely from a failure to respond," but rather in instances when the Department reasonably expected that "more forthcoming responses should have been made." *Id.* at 1383. "The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent." *Id.*

Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record when making an adverse inference. *See* 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c).

The Department's prior practice for selecting the AFA rate was to apply a hierarchical methodology. *See Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1371 (Fed. Cir. 2014). Commerce first applied the highest rate calculated for an identical program from any segment of the proceeding. *See id.*; Final IDM at 11–12. If such a rate did not exist or was *de minimis*, Commerce then applied the highest rate for a similar program. *See Essar Steel*, 753 F.3d at 1371; Final IDM at 12. The Trade Preferences Extension Act of 2015 codified Commerce's prior practice for selecting an AFA rate. *See* 19 U.S.C. § 1677e(d)(1); *POSCO v. United States*, 42 CIT __, __, 296 F. Supp. 3d 1320, 1349 (2018). When selecting an AFA rate in a countervailing duty proceeding, the revised statute allows Commerce to:

> (i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or
>
> (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use.

19 U.S.C. § 1677e(d)(1)(A). The Department may select the highest rate available based on an evaluation of the situation leading to the application of AFA. *Id.* § 1677e(d)(2). Under the recent amendment, Commerce is no longer required to estimate what the countervailing subsidy rate would have been if the respondent cooperated nor to demonstrate that the selected rate reflects the "commercial reality of the interested party." *Id.* § 1677e(d)(3)(B).

Commerce's duty to corroborate remains the same under the Trade Preferences Extension Act. If the Department relies on secondary information (*e.g.*, information not "obtained in the course of an investigation or review"), the statute requires that Commerce, "to the

extent practicable, corroborate that information from independent sources that are reasonably at their disposal." 19 U.S.C. § 1677e(c)(1). The Department is not required to corroborate a countervailing duty rate "applied in a separate segment of the same proceeding." *Id.* § 1677e(c)(2).

B. Commerce's Application of Adverse Facts Available to POSCO for Not Reporting That Four Cross-Owned Affiliates Provided Inputs That Could Be Used to Produce the Downstream Product

19 C.F.R. § 351.525 sets forth how Commerce calculates *ad valorem* subsidy rates and attributes subsidies to products. If cross-ownership exists "between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product," the Department "will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations," excluding sales between the two companies. 19 C.F.R. § 351.525(b)(6)(iv). The regulation defines cross-ownership as "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." *Id.* § 351.525(b)(6)(vi). This definition is typically met "where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations." *Id.*

Commerce found in the instant investigation that POSCO failed to report that several affiliated companies had provided inputs that could be used to produce hot-rolled steel, and therefore Commerce applied AFA in the Final Determination. *See* Final IDM at 9, 12. The four cross-owned affiliates at issue are POSCO Chemtech, POSCO P&S, POSCO M-Tech, and POS-HiMetal. *See* Commerce's Verification Report for POSCO and Daewoo at 5, PD 413, bar code 3483994–01 (July 5, 2016). The companies supply POSCO with limestone, scrap, ferro molybdenum, and high purity ferromanganese, respectively. *See id.* As AFA, Commerce determined that the inputs produced by these affiliates were primarily dedicated to the production of the downstream product within the meaning of 19 C.F.R. § 351.525(b)(6)(iv). *See* Final IDM at 12, 65.

POSCO argues that Commerce's decision to apply AFA is improper because POSCO did not fail to cooperate and it acted to the best of its abilities within the meaning of the statute. Plaintiff contends that its failure to report the four cross-owned affiliates was based on its "objectively reasonable belief" that it was not required to report. *See* POSCO's Mot. 18. POSCO asserts that even if the court agrees that POSCO should have reported the companies initially, the facts here

support only the application of "neutral facts available," not AFA, because its two attempts to submit information to Commerce constitute evidence that it acted to the best of its ability. *See id.* at 20; *see also* Reply Br. Pl. POSCO Supp. Mot. J Agency R. 9, Oct. 25, 2017, ECF No. 74. The court finds POSCO's arguments unpersuasive.

Commerce has regulations dictating the time limits to which respondents should adhere when submitting factual information. *See* 19 C.F.R. §§ 351.301, 351.302. Commerce found that POSCO's new submission fell under 19 C.F.R. § 351.301(c)(5), which meant that the submission should have been filed 30 days before the preliminary determination was issued. Because POSCO attempted to provide the information after the preliminary determination was issued, Commerce rejected the filing as untimely. *See* Commerce's Letter to POSCO Regarding POSCO's May 3, 2016 Questionnaire Response at 1–2, PD 384, bar code 3466187–01 (May 3, 2016). The court finds that Commerce's action here was reasonable and in accordance with the regulation.

Commerce has discretion in setting and enforcing the time frame for investigations as a part of its mandate to administer the antidumping duty law. *See Yantai Timken Co., Ltd. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370–71 (2007) (citing *Reiner Brach GmbH & Co.KG v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002)). The record indicates clearly that POSCO did not timely disclose the existence of its four cross-owned affiliates to Commerce in its initial questionnaire response. *See* POSCO and Daewoo's Response to Commerce's Sept. 24, 2015 Initial Questionnaire, PD 92, bar code 3413150–01 (Nov. 3, 2015). POSCO admits this point, but argues that it chose not to disclose based on its interpretation of Commerce's regulations. Respondents should be forthcoming with information, regardless of their views on relevancy, in the event the agency finds differently. *See POSCO*, 42 CIT at __, 296 F. Supp. 3d at 1340–41 (citing *Essar Steel Ltd. v. United States*, 34 CIT 1057, 1073, 721 F. Supp. 2d 1285, 1299 (2010)). POSCO failed to provide Commerce with information at the outset of the investigation, and therefore Commerce's decision to apply AFA was reasonable. *See Nippon Steel*, 337 F.3d at 1383 (holding that "intentional conduct, such as deliberate concealment or inaccurate reporting" shows a failure to cooperate); *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1275–76 (Fed. Cir. 2012) (finding that "[p]roviding false information and failing to produce key documents unequivocally" shows that respondent "did not put forth its maximum effort"); *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360 (Fed. Cir. 2017) (concluding that substantial evidence supports Commerce's decision to apply AFA

where respondent failed to provide information requested by Commerce and "never claimed that it was unable to provide").

Plaintiff contends that Commerce's decision to find as AFA that the inputs produced by POSCO's cross-owned affiliates were primarily dedicated to the production of the downstream product is unsupported by substantial evidence, and relies on *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 40 CIT __, __, 195 F. Supp. 3d 1334, 1347 (2016) ("*Trina Solar*"), to bolster its argument. *See* POSCO's Mot. 12–18. In *Trina Solar*, Commerce failed to identify any evidence to support its AFA findings, and the court held that Commerce must justify such determinations with information on the record. *Trina Solar*, 40 CIT at __, 195 F. Supp. 3d at 1347–48. The facts are distinguishable from the instant case. Commerce determined in this investigation that POSCO Chemtech, POSCO P&S, POSCO M-Tech, and POS-HiMetal were affiliated input providers based on information available in the record. The record shows that POSCO owns significant percentages of the four companies, and that the four companies supply raw materials that could have been conceivably used in the subject merchandise. *See* Final IDM at 61–62; POSCO and Daewoo International Corporation's Response to the Affiliated Companies Questions of Commerce's Sept. 24, 2015 Initial Questionnaire at Ex. 1, PD 74, bar code 3404843–01 (Oct. 13, 2015). Substantial evidence supports Commerce's decision to apply AFA to POSCO for its failure to report information about its affiliated input providers. Based on the facts in the record and the applicable law, the court concludes that Commerce applied AFA properly to POSCO on this issue.

POSCO disputes Commerce's rejection of factual information submitted by Daewoo at verification regarding loans that Daewoo received. *See* POSCO's Mot. 38–39. Commerce rejected the information on the basis that it did not constitute a minor correction. *See* Final IDM at 72. Because the court sustains Commerce's application of adverse facts available to POSCO for the company's failure to report the four discovered input suppliers, this issue is moot.

C. Commerce's Decision to Apply Adverse Facts Available for POSCO's Failure to Provide Information About a Free Economic Zone

POSCO reported in its initial questionnaire response that it did not have any facilities located in a free economic zone. POSCO and Daewoo's Response to Commerce's Sept. 24, 2015 Initial Questionnaire at 45, PD 92, bar code 3413150–01 (Nov. 3, 2015). POSCO later submitted a correction to Commerce, stating that it has a global research and development center in Songdo International City, which is lo-

cated in the Incheon Free Economic Zone. *See* POSCO and Daewoo's Minor Corrections, PD 398, bar code 3469938–01 (May 18, 2016). Commerce applied AFA as a result and attributed the receipt of certain additional benefits to POSCO. *See* Final IDM at 69.

POSCO contends that Commerce's decision to apply AFA with respect to this issue is unsupported by substantial evidence. *See* POSCO's Mot. 35–38. The court disagrees. POSCO stated originally that it did not have any facilities located in a free economic zone, but filed contradictory information after Commerce released the verification agenda in this investigation. *Compare* POSCO and Daewoo's Response to Commerce's Sept. 24, 2015 Initial Questionnaire at 45, PD 92, bar code 3413150–01 (Nov. 3, 2015) *with* POSCO and Daewoo's Minor Corrections at 4, PD 398, bar code 3469938–01 (May 18, 2016). In support of this statement, POSCO attached a printout of its website that discusses this center in Songdo International City. *See* POSCO and Daewoo's Minor Corrections at Attach. 3, PD 398, bar code 3469938–01 (May 18, 2016). It is difficult to believe that POSCO did not have this information at the outset, and it was reasonable for Commerce to find that POSCO was not forthcoming with its responses to merit application of AFA.

POSCO argues that because it attempted to alert Commerce about its research and development facility prior to verification, Commerce's statement that it "did not have an opportunity to follow up on" the claim is misleading, and thus not supported by substantial evidence. *See* POSCO's Mot. 37–38. As stated before, POSCO failed to provide information to the Department in a timely manner. The court finds POSCO's argument unavailing and concludes that substantial evidence supports Commerce's application of AFA with respect to the disclosure of information about the free economic zone program.

POSCO disputes Commerce's adverse inference that it benefited from the free economic zone program. POSCO claims that the Government of Korea's statement regarding the lack of benefits conferred during the "investigation period" constitutes record evidence discrediting the Department's finding that POSCO received a benefit from the location of its research and development facility. *See id.* at 37; *see also* Government of Korea's Response to Commerce's Sept. 24, 2015 Initial Questionnaire at 68, PD 114, bar code 3413530–03 (Nov. 4, 2015). This argument amounts to an impermissible reweighing of the evidence. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (citing *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)). The Department addressed this issue in its Final Issues and Decision Memorandum, noting that the Government of Korea's re-

sponse "does not clarify if the 'investigation period' it refers to is the [period of investigation] or the entire 15-year" average useful life period of the subject merchandise, and therefore the Department could not rely on the response to fill the gap in the record. *See* Final IDM at 69. The Department found that POSCO could have benefited from the program because "certain shareholders of POSCO do in fact appear to be foreign," and therefore "POSCO could have been eligible to receive funding due to POSCO's Global [Research and Development] Center's location in" a free economic zone. *See id.* at 69–70 (citing POSCO and Daewoo International Corporation's Response to the Affiliated Companies Questions of Commerce's Sept. 24, 2015 Initial Questionnaire at Ex. 1, PD 74, bar code 3404843–01 (Oct. 12, 2015)). The court concludes that Commerce's adverse inference that POSCO benefited from the free economic zone program is supported by substantial evidence.

D. Commerce's Use of the Highest Calculated Rates in Korea for Programs That Could Have Conceivably Been Used by POSCO

POSCO disputes Commerce's selection of the highest calculated rates when applying AFA. POSCO contends that Commerce failed to evaluate the facts and circumstances that led to the application of adverse inferences pursuant to 19 U.S.C. § 1677e(d)(2), and argues that Commerce violated the statute by "defaulting" to the highest rate. *See* POSCO's Mot. 22–24. POSCO alleges that the record shows its attempts to comply, and therefore Commerce's selection of the highest rates is not supported by substantial evidence. *See id.* at 24–26. Defendant rebuts that Commerce selected an appropriate rate according to its AFA hierarchy as codified in 19 U.S.C. § 1677e(d). *See* Def.'s Resp. 41–43. Defendant argues that Commerce did not "automatically" apply the highest rate because the Department explained how the discovery of previously unreported information led to the application of AFA. *See id.* at 44. Defendant and Petitioners assert that Commerce justified the selection of the highest rate adequately by citing to the discovery of new information at verification. *See id.* ; Resp. Br. Def.-Intervenors ArcelorMittal USA LLC, AK Steel Corporation, Nucor Corporation, Steel Dynamics, Inc., & United States Steel Corporation 25–26, Sept. 27, 2017, ECF No. 66.

19 U.S.C. § 1677e(d)(2) confers Commerce with discretion to apply the highest rate when selecting among facts otherwise available and making an adverse inference. The provision reads, in relevant part:

> [T]he administering authority may apply any of the countervailable subsidy rates or dumping margins specified under [19 U.S.C. § 1677e(d)(1)], including the highest such rate or margin, *based on the evaluation by the administering authority* of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available.

19 U.S.C. § 1677e(d)(2) (emphasis added). The plain language of the statute allows Commerce to select the highest rate, but only after Commerce examines the circumstances that led to the application of AFA. In other words, 19 U.S.C. § 1677e(d)(2) clearly requires Commerce to conduct a fact-specific inquiry and to provide its reasons for selecting the highest rate out of all potential countervailable subsidy rates in a particular case. It is axiomatic that Commerce must explain the basis for its decisions. *See, e.g.*, *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) ("[W]hile its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court."). Commerce did not provide any such explanation in this investigation, and merely restated facts that contributed to its decision to apply AFA. *See* Final IDM at 11–12. Commerce failed to connect the facts to its selection of the highest rate specifically or to proffer additional facts to rationalize its choice. *See id.*; *see also POSCO*, 42 CIT at __, 296 F. Supp. 3d at 1349 ("That the facts merited the use of an adverse inference does not necessarily mean that those same facts merited selection of the highest rate."). For instance, the Final Issues and Decision Memorandum does not indicate how Commerce employed its AFA hierarchy in this case, what range of rates Commerce considered for this investigation, or why this particular investigation merited application of the highest rate. Because Commerce failed to provide its reasoning for selecting the highest AFA rate, as required by 19 U.S.C. § 1677e(d)(2), the court remands the final determination to Commerce.

POSCO argues that Commerce failed to corroborate the two selected rates in calculating POSCO's total adverse facts available margin, rendering Commerce's final determination unsupported by substantial evidence and not in accordance with the law. *See* POSCO's Mot. 27–35. Because the court remands the final determination for an explanation of Commerce's application of the highest AFA rate, the court does not consider the issue at this juncture.

II. Nucor Corporation's Rule 56.2 Motion for Judgment on the Agency Record

The court addresses Nucor's Rule 56.2 motion for judgment on the agency record, which contests various aspects of Commerce's determination regarding the Government of Korea's provision of electricity to subject producers. Electricity is one of the primary inputs used in the production of hot-rolled steel. The Government of Korea acts as a producer and distributor of electricity in POSCO's home market and is responsible for setting the nation's electricity rates through KEPCO, its state-owned and state-controlled electricity provider. *See* Prelim. IDM at 29–30; *see also* Government of Korea's Response to Commerce's Sept. 24, 2015 Initial Questionnaire at 4–6, PD 114, bar code 3413530–03 (Nov. 4, 2015). Nucor requests that the court remand this case to Commerce with instructions to "reconsider the reasonableness of a third-country benchmark" and "address the arguments raised in Nucor's case brief demonstrating that the [Government of Korea's] provision of electricity for [less than adequate remuneration] is specific." Nucor's Mot. 43. For the following reasons, the court concludes that the Department's findings with respect to the Government of Korea's provision of electricity to subject producers are supported by substantial evidence and in accordance with the law.

A. Legal Standard

A countervailable subsidy exists when a foreign government or public entity provides a financial contribution to a specific industry and a recipient within the industry receives a benefit as a result of that contribution. *See* 19 U.S.C. § 1677(5); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d at 1369. A financial contribution includes, among other things, providing goods or services, other than general infrastructure. 19 U.S.C. § 1677(5)(D)(iii). The statute defines "benefit" as "goods or services . . . provided for less than adequate remuneration," which are determined in "relation to prevailing market conditions for the good or service being provided" in the country subject to the investigation or review. *Id.* § 1677(5)(E)(iv). Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale. *Id.* § 1677(5)(E).

Prior to the passage of the Uruguay Round Agreements Act, Pub. L. No. 103–465, § 101, 108 Stat. 4814 (codified as 19 U.S.C. § 3511 (1994)) ("URAA"), Commerce determined the presence of a subsidy using the preferentiality standard, under which goods or services were provided "at preferential rates." *See Maverick Tube Corp. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1293, 1297 (2017),

appeal docketed, No. 18–1351 (Fed. Cir. Dec. 28, 2017) (citing 19 U.S.C. § 1677(5)(A)(ii)(II) (1988)). The URAA adopted the currently-used "adequate remuneration" language. *Id.* Commerce codified its three-tiered, hierarchal approach for determining the adequacy of remuneration of an investigated good or service. *See* 19 C.F.R. § 351.511. The "Tier One" benchmark analysis begins by identifying a proper benchmark price and comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. *Id.* at § 351.511(a)(2)(i). If no in-country market price is available, Commerce compares the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question under the "Tier Two" benchmark analysis. *Id.* at § 351.511(a)(2)(ii). If no world market price is available, Commerce will determine whether the government price is consistent with market principles pursuant to a "Tier Three" benchmark analysis. *Id.* at § 351.511(a)(2)(iii). With respect to this Tier Three benchmark analysis, Commerce explained:

> Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case. In our experience, these types of analyses may be necessary for such goods or services as electricity, land leases, or water, and the circumstances of each case vary widely.

Countervailing Duties, 63 Fed. Reg. 65,348, 65,378 (Dep't Commerce Nov. 25, 1998) (final rule) ("*CVD Preamble*"). The rule then cites *Pure Magnesium and Alloy Magnesium from Canada*, 57 Fed. Reg. 30,946 (Dep't Commerce July 13, 1992) ("*Magnesium from Canada*"), which serves as an example of a useful Tier Three benchmark analysis for measuring the adequacy of remuneration with respect to government-provided goods or services when the government entity is the sole provider of the good or service. *Maverick Tube Corp.*, 40 CIT at __, 273 F. Supp. 3d at 1299. Under *Magnesium from Canada*, which involved the provision of electricity, Commerce stated:

> The first step the Department takes in analyzing the potential preferential provision of electricity—assuming a finding of specificity—is to compare the price charged with the applicable

> rate on the power company's non-specific rate schedule . . . . If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other industries which purchase comparable amounts of electricity, we would probably not find a countervailable subsidy.

Magnesium from Canada, 57 Fed. Reg. at 30,949–50.

In summary, Commerce conducts a countervailing subsidy analysis pursuant to the statute, the regulation, and Commerce's past practice, as demonstrated by *Magnesium from Canada*. The Department first examines how the government-owned utility company sets its rates and then determines whether a respondent receives a price that is better than that afforded other companies or industries purchasing comparable amounts of electricity. *Maverick Tube Corp.*, 41 CIT at __, 273 F. Supp. 3d at 1300.

B. Commerce's Determination That the Government of Korea's Provision of Electricity for Less Than Adequate Remuneration Did Not Confer a Benefit to Subject Producers

Commerce found in the underlying investigation that a Tier One benchmark (market prices from actual transactions within the country under investigation) was not available because KEPCO was the predominant provider of electricity in the Korean market. *See* Prelim. IDM at 30. Commerce found that a Tier Two benchmark (world market prices) was also not available because there was no cross-border transmission or distribution of electricity into Korea. *See id.* at 30–31. Commerce turned to a Tier Three benchmark analysis to assess whether the government price was set in accordance with market principles. *See* Final IDM at 38–50.

Nucor contends first that Commerce's reliance on the standard pricing mechanism is contrary to the statute and Congressional intent because the URAA eliminated the preferentiality standard. *See* Nucor's Mot. 15–16. The Court has recently upheld Commerce's analysis in similar situations. *See POSCO*, 42 CIT at __, 296 F. Supp. 3d. at 1355–56; *Nucor Corp. v. United States*, 42 CIT __, __, 286 F. Supp. 3d 1364, 1373–74 (2018), *appeal docketed*, No. 18–1787 (Fed. Cir. Apr. 6, 2018); *Maverick Tube Corp.*, 41 CIT at __, 273 F. Supp. 3d at 1303–04. The Department's application here is consistent with the statutory requirement that the adequacy of remuneration be determined in relation to prevailing market conditions, as set forth under 19 U.S.C. § 1677(5)(E). Nucor's argument fails to consider the legislative history of the regulation, which incorporates factors such as the

government's price-setting philosophy, *i.e.*, the standard pricing mechanism, into 19 C.F.R. § 351.511 as part of Commerce's Tier Three benchmark analysis. *See CVD Preamble*, 63 Fed. Reg. at 65,378; *see also Nucor Corp.*, 42 CIT at __, 286 F. Supp. 3d at 1374. By including this factor as part of its Tier Three benchmark analysis, Commerce preserved the preferentiality-based test. *See Nucor Corp*, 42 CIT at __, 286 F. Supp. 3d at 1374; *see also Countervailing Duties*, 62 Fed. Reg. 8,818, 8,836 (Dep't Commerce Feb. 26, 1997) (notice of proposed rulemaking and request for public comments) ("There is no indication that Congress intended to change our practice with respect to government-provided goods and services such as electricity . . . ."). Commerce applied KEPCO's standard pricing mechanism to determine that KEPCO's prices are set in accordance with market principles.

Contrary to Nucor's arguments, Commerce did not rely improperly on *Magnesium from Canada*'s standard pricing mechanism to measure preferentiality in contravention of the revised statutory language of "less than adequate remuneration." In *Magnesium from Canada*, Commerce compared two different government prices: the price that the government normally charged and the contract price that the government charged the respondent. *See Magnesium from Canada*, 57 Fed. Reg. at 30,949–50. In this investigation, Commerce utilized *Magnesium from Canada*'s standard pricing mechanism as one factor in its Tier Three benchmark analysis. The fact that *Magnesium from Canada* was guided by the pre-URAA "preferentiality" standard does not mean its standard pricing mechanism analysis cannot be used to determine the adequacy of the remuneration under a Tier Three benchmark analysis. *See Maverick Tube Corp.*, 41 CIT at __, 273 F. Supp. 3d at 1307 (stating the relevancy of *Magnesium from Canada*'s standard pricing mechanism in determining the adequacy of remuneration when market-based prices are unavailable). In fact, Commerce's past experience shows that in certain situations, preferentiality-based tests may be useful when determining the adequacy of remuneration. *See id.* (citing *Steel Wire Rod From Germany*, 62 Fed. Reg. 54,990, 54,994 (Dep't Commerce Oct. 22, 1997) (final affirmative countervailing duty determination)). In a monopolistic situation, such as situations involving the state-controlled provision of electricity, analyzing whether electricity rates are based on a standard pricing mechanism and then examining if a company or industry obtains a preferential rate is a reasonable way to determine whether a state-controlled supplier receives adequate remuneration. *See id.*

Nucor asserts that Commerce's interpretation of "adequate remuneration" is contrary to the plain meaning of the statute. Nucor contends that adequate remuneration must mean, by common definition, that the seller is able to cover its costs of providing a good. *See* Nucor's Mot. 21–22. By focusing exclusively on a price-setting philosophy, Nucor urges that Commerce arbitrarily and capriciously ignored record evidence on cost. *See id.* at 23. Nucor's argument lacks merit. The Preamble to 19 C.F.R. § 351.511 provides that "Commerce may look solely at a government's price-setting philosophy (i.e., its standard pricing mechanism) under a [T]ier [T]hree benchmark analysis." *Maverick Tube Corp.*, 41 CIT at __, 273 F. Supp. 3d at 1309. It was not inappropriate for Commerce to consider heavily the Government of Korea's price-setting philosophy in the underlying investigation. The record shows that Commerce did not ignore evidence on cost in making its final determination. *See* Final IDM at 49. The Department stated:

> [W]ith regard to the "[T]ier [T]hree" benchmark used to determine whether the provision of electricity was for adequate remuneration, KEPCO's standard pricing mechanism used to develop its tariff schedule was based upon its costs. To develop the electricity tariff schedules that were applicable during the [period of investigation], KEPCO first calculated its overall cost, including an amount for investment return. This cost includes the operational cost for generating and supplying electricity to the consumers as well as taxes. The cost for each electricity classification was calculated by (1) distributing the overall cost according to the stages of providing electricity (generation, transmission, distribution, and sales); (2) dividing each cost into fixed cost, variable cost, and the consumer management fee; and (3) then calculating the cost by applying the electricity load level, peak level, and the patterns of consuming electricity. Each cost was then distributed into the fixed charge and the variable charge. KEPCO then divided each cost taking into consideration the electricity load level, the usage pattern of electricity, and the volume of the electricity consumed. Costs were then distributed according to the number of consumers for each classification of electricity. For the [period of investigation], KEPCO more than fully covered its cost for the industry tariff applicable to our respondents.

Id. (footnotes omitted). The court concludes that Commerce did not act arbitrarily and capriciously in finding that the Government of Korea's provision of electricity to subject producers for less than

adequate remuneration did not confer a benefit, and upholds this determination as in accordance with the law.

C. Commerce's Decision to Not Consider the Korea Power Exchange

Nucor contends that Commerce failed to address arguments regarding how the KPX potentially distorts costs, and therefore the Department's determination regarding whether Korean electricity prices are set in accordance with market principles is not supported by record evidence. *See* Nucor's Mot. 23–30. Nucor's argument lacks merit. Commerce found that a single tariff rate table applied to respondents during the entire period of investigation. *See* Final IDM at 45. The Department also stated:

> [W]ith respect to the costs of the generators, including the nuclear generators, the Department did not request these costs because the costs of electricity to KEPCO are determined by the KPX. Electricity generators sell electricity to the KPX, and KEPCO purchases the electricity it distributes to its customers through the KPX. Thus, the costs for electricity are based upon the purchase price of electricity from the KPX, and this is the cost that is relevant for KEPCO's industrial tariff schedule.

Id. at 49 (footnote omitted). Despite Nucor's attempts to advocate for a contrary finding in the underlying proceedings, Commerce determined that Nucor failed to provide evidence and to support its claims adequately. *See id.* The court declines to reweigh the evidence here. *See Downhole Pipe & Equip., L.P.*, 776 F.3d at 1377 (quoting *Trent Tube Div., Crucible Materials Corp.*, 975 F.2d at 815). "Nothing in the statute requires Commerce to consider how the authority acquired the good or service that was later provided to respondents." *Nucor Corp.*, 42 CIT at __, 286 F. Supp. 3d at 1376. The court concludes that Commerce's decision to disregard the KPX in its determination of whether Korean electricity prices are consistent with market principles is supported by substantial evidence.

D. Commerce's Determination That Korean Electricity Prices Are Consistent With Market Principles

Nucor contends that Commerce's finding that Korean electricity prices are consistent with market principles was not supported by substantial evidence. *See* Nucor's Mot. 30–36. The court disagrees. Commerce found, under its Tier Three benchmark analysis, that KEPCO used a standard pricing mechanism that covered its costs

and that the rate applied to respondents constituted adequate remuneration because respondents were treated no differently from other industrial users purchasing comparable amounts of electricity. *See* Final IDM at 45. Commerce analyzed KEPCO's price-setting method and found that prices charged by KEPCO are set in accordance with market principles. *See id.* at 44. Commerce determined that KEPCO's provision of electricity conferred no benefit to POSCO and Hyundai Steel in line with prevailing market conditions and consistent with KEPCO's standard pricing mechanism. *See id.* at 45. The Department conducted a proper Tier Three benchmark analysis pursuant to 19 C.F.R. § 351.511(a)(2)(iii) and supported its findings with record evidence. The court concludes that Commerce's determination that the Korean electricity prices are consistent with market principles is supported by substantial evidence.

E. Commerce's Refusal to Apply Adverse Facts Available to the Government of Korea

Nucor argues that the Government of Korea failed repeatedly "to provide complete, accurate, and verifiable information on KEPCO's price-setting procedures and electricity generation costs in this investigation," and therefore the Department should have applied AFA. Nucor's Mot. 36. Nucor contends that Commerce's failure to apply AFA "is unsupported by substantial evidence, arbitrary, and an abuse of discretion." *Id.*

19 U.S.C. § 1677e grants the Department discretion to decide whether to apply AFA in each case. *See* 19 U.S.C. § 1677e(b). Commerce determined in this investigation that the Government of Korea responded to inquiries in a timely and complete manner. *See* Final IDM at 38–39. The Department found that the Government of Korea "did not withhold information that was requested of it, did not fail to meet deadlines, did not significantly impede the proceeding, and did not provide unverifiable information." *Id.* Because the Government of Korea cooperated to the best of its ability, Commerce determined that the application of AFA with respect to the alleged provision of electricity for less than adequate remuneration was unwarranted. *Id.* The court concludes that substantial evidence supports the Department's decision to not apply AFA to the Government of Korea.

CONCLUSION

For the foregoing reasons, the court concludes that:

1. Commerce's application of AFA against POSCO with respect to POSCO's four cross-owned affiliates was proper;

2. Commerce's rejection of factual information submitted at verification regarding POSCO's affiliated trading company, Daewoo, is moot;

3. Commerce's application of AFA against POSCO with respect to POSCO's facility located in a free economic zone was proper;

4. Commerce's selection of the highest rates when applying AFA, without articulating its reasoning, was improper;

5. Commerce's determination that the Government of Korea's provision of electricity to respondents was not for less than adequate remuneration was proper;

6. Commerce's decision to not take into account information regarding the Korea Power Exchange was proper;

7. Commerce's determination that the Government of Korea's provision of electricity is consistent with market principles was proper; and

8. Commerce's decision to not apply AFA against the Government of Korea was proper.

POSCO's Rule 56.2 motion for judgment on the agency record is granted in part and denied in part. Commerce's final determination is remanded with instructions to select and properly justify the AFA rates applied to POSCO consistent with this opinion. The issue of corroboration will be addressed after remand proceedings. Nucor's Rule 56.2 motion for judgment on the agency record is denied.

Accordingly, it is hereby

ORDERED that Commerce's decision to apply adverse facts available is sustained with respect to the failure to report POSCO's cross-owned affiliates, Daewoo's loans, and POSCO's facility located in a free economic zone; and it is further

ORDERED that Commerce's *Final Determination* is remanded to Commerce with respect to Commerce's selection of the highest calculated rates for POSCO; and it is further

ORDERED that Commerce's findings regarding the Government of Korea's provision of electricity are sustained; and it is further

ORDERED that the following schedule shall govern the remand proceedings:

1. Commerce shall file its remand redetermination on or before November 13, 2018;

2. Commerce shall file the administrative record on remand on or before November 27, 2018;

3. The Parties shall file any comments on the remand redetermination on or before December 13, 2018;

4. The Parties shall file any replies to the comments on or before January 14, 2019; and

5. The joint appendix shall be filed on or before January 22, 2019.

Dated: September 11, 2018
New York, New York

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

Slip Op. 18–118

AN GIANG FISHERIES IMPORT and EXPORT JOINT STOCK COMPANY et al., Plaintiffs, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 16–00072

[Sustaining the U.S. Department of Commerce's remand redetermination in the eleventh antidumping duty administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: September 12, 2018

Matthew Jon McConkey, Mayer Brown LLP, of Washington, DC, for plaintiffs An Giang Fisheries Import and Export Joint Stock Company; Cuu Long Fish Joint Stock Company; C.P. Vietnam Corporation; GODACO Seafood Joint Stock Company; International Development and Investment Corporation; Seafood Joint Stock Company No. 4 -Branch Dong Tam Fisheries Processing Company; Thuan An Production Trading and Services Co., Ltd.; and Viet Phu Foods and Fish Corporation.

Kara Marie Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Kristen McCannon*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

James R. Cannon, Jr. and *Jonathan Mario Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenors Catfish Farmers of America; America's Catch; Alabama Catfish Inc. d/b/a Harvest Select Catfish, Inc.; Heartland Catfish Company; Magnolia Processing, Inc. d/b/a Pride of the Pond; and Simmons Farm Raised Catfish, Inc.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") remand redetermination filed pursuant to the court's order in *An Giang Fisheries Import and Export Joint Stock Company v. United States*, 42 CIT __, 287 F. Supp. 3d 1361 (2018) ("*An Giang I*"). *See* Final Results of Redetermination Pursuant to *An Giang Fisheries Import and Export Joint Stock Company, et al. v. United States*, Court No. 16–00072, Slip Op. 18–10, May 31, 2018, ECF No. 104 ("*Remand Results*"); *see also An Giang I*, 42 CIT at __, 287 F. Supp. 3d at 1380–81.

In *An Giang I*, the court remanded for further explanation or reconsideration Commerce's decision to adjust the denominator and not the numerator when calculating Hung Vuong Group's ("HVG") farming factors of production in the final determination in the eleventh antidumping duty ("ADD") administrative review of certain frozen fish filets from the Socialist Republic of Vietnam ("Vietnam"). *See An Giang I*, 42 CIT at __, 287 F. Supp. 3d at 1371–72, 1380–81; *see also* Certain Frozen Fish Fillets From [Vietnam], 81 Fed. Reg. 17,435 (Dep't Commerce Mar. 29, 2016) (final results and partial rescission of [ADD] administrative review; 2013–2014) ("*Final Results*") and accompanying Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision Memorandum for the Final Results of the Eleventh [ADD] Administrative Review; 2013–2014, A-552–801, (Mar. 18, 2016), ECF No. 20–3 ("Final Decision Memo"); *see generally* Certain Frozen Fish Fillets From [Vietnam], 68 Fed. Reg. 47,909 (Dep't Commerce Aug. 12, 2003) (notice of [ADD] order).

On remand, Commerce explains that although it intended to first divide the farming factors of production ("FOP") by the amount of harvested whole live fish and then apply the shank equivalent conversation factor, for the *Final Results* it reversed the calculations, making it appear that Commerce had incorrectly applied the shank equivalent conversion factor. *See Remand Results* at 6 (citing Final Results Analysis Memo for An Giang Fisheries Import and Export Joint Stock Company and the [HVG] at Attach. 5, CD 386, bar code 3451921–01 (Mar. 18, 2016) ("Final Analysis Memo")). Commerce contends that on remand it applied the calculations as it had originally intended and that the resulting farming FOP amounts remain the same. *See id.* at 4, 6–7. For the following reasons, Commerce has complied with the court's remand order in *An Giang I*, Commerce's determination is in accordance with law and supported by substantial evidence, and the court sustains the *Remand Results*.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the prior opinion, *see An Giang I*, 42 CIT at __, 287 F. Supp. 3d 1361, 1365–66, and here restates the facts relevant to the court's review of the *Remand Results*. In the eleventh administrative review, Commerce reviewed mandatory respondents HVG and Thuan An Production Trading and Services Co., Ltd. ("TAFISHCO"). *See* Selection of Respondents for Indiv. Review at 1, 4–7, PD 33, bar code 3240494–01 (Nov. 7, 2014); Second Selection of Respondent for Individual Review, PD 67, bar code 3244597–01 (Dec. 1, 2014) (explaining that review of the Vinh Hoan Corporation is rescinded and that in its stead Commerce selects TAFISHCO as a mandatory respondent).[1] Pertinent here, in the final determination, Commerce applied facts otherwise available to calculate HVG's farming FOPs, which were reported on a subject merchandise basis. *See* Final Decision Memo at 16–17.

In *An Giang I*, the court sustained in part and remanded in part Commerce's determination in the eleventh administrative review of the subject merchandise.[2] *See An Giang I*, 42 CIT at __, 287 F. Supp. 3d at 1380–81. The court remanded Commerce's calculation of HVG's farming FOPs. *See id.* The court determined that Commerce failed to explain why it did not adjust the numerator of HVG's farming FOPs, that were reported on a whole live fish harvested basis, by "shank equivalent conversion factor," as it did for the denominator. *Id.*, 42 CIT at __, 287 F. Supp. 3d at 1370–71. However, the court sustained Commerce's reliance on facts otherwise available to calculate HVG's farming FOPs. *See id.*, 42 CIT at __, 287 F. Supp. 3d at 1371.

Commerce filed the *Remand Results* on May 31, 2018. Plaintiffs, An Giang Fisheries Import and Export Joint Stock Company, Cuu Long Fish Joint Stock Company, C.P. Vietnam Corporation, GODACO Seafood Joint Stock Company, International Development and Investment Corporation, Seafood Joint Stock Company No. 4 -Branch Dong Tam Fisheries Processing Company, Thuan An Production Trading

[1] On July 5, 2016, Defendant submitted indices to the public and confidential administrative records, which can be located on the docket at ECF Nos. 20–4–5. On June 14, 2018, Defendant submitted indices to the public and confidential administrative records to the remand portion of these proceedings. The indices to the remand redetermination are located on the docket at ECF Nos. 105–2–3. All further references to administrative record documents are identified by the numbers assigned by Commerce in these indices, unless otherwise specified.

[2] Specifically, in *An Giang I* the court sustained Commerce's application of facts otherwise available to HVG and TAFISHCO, *see An Giang I*, 42 CIT at __, 287 F. Supp. 3d 1367–71, and Commerce's application of partial facts otherwise available with an adverse inference to TAFISHCO. *See id.*, 42 CIT at __, 287 F. Supp. 3d at 1372–74. Further, the court also sustained Commerce's surrogate value selections for fish feed, fingerlings, water, fish waste by-product, and packing tape. *See id.*, 42 CIT at __, 287 F. Supp. 3d at 1374–80.

and Services Co., Ltd., and Viet Phu Foods and Fish Corporation, did not file comments on the draft remand results with Commerce and did not file comment on the *Remand Results* with the Court. Defendant-Intervenors, Catfish Farmers of America; America's Catch, Alabama Catfish Inc., Heartland Catfish Company, Magnolia Processing, Inc., and Simmons Farm Raised Catfish, Inc., were the only party to comment on the draft remand results and the final *Remand Results*, and indicate that they agree with Commerce's redetermination. *See* Def.-Intervenors' Comments on Remand Redetermination, July 2, 2018, ECF No. 108; *see also Remand Results* at 7–8. No party challenges the *Remand Results*.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012) and 28 U.S.C. § 1581(c) (2012). Commerce's antidumping determinations must be in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i) (2012). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

In *An Giang I*, the court remanded for further explanation or reconsideration Commerce's calculation of HVG's farming FOPs. *See An Giang I*, 42 CIT at __, 287 F. Supp. 3d at 1371–72. Specifically, the court determined that although Commerce's decision to rely on facts otherwise available was in accordance with law and supported by substantial evidence, Commerce did not explain why in calculating HVG's farming FOPs it only applied the "shank equivalent" conversation factor to the denominator and did not make a parallel adjustment to the numerator. *See id.* For the following reasons, Commerce's *Remand Results* are sustained.

In the final determination, Commerce relied on data prepared by tollers as facts otherwise available to calculate HVG's farming FOPs. *See* Final Decision Memo at 16–17. The data provided by tollers was on a subject merchandise or shank basis, while HVG's data was on a whole live fish harvested basis. *Id.* Accordingly, and because Commerce's standard practice is to allocate FOPs over the total quantity of the subject merchandise, Commerce explained that it needed to convert HVG's data. *Id.*

On remand, Commerce explains that it applied the math sequence in the *Final Results* in the reverse order than it intended. *Remand Results* at 6. Specifically, for the *Final Results*, Commerce explains that it first converted HVG's denominator, which was based on whole live fish harvested, by what Commerce called the "shank equivalent conversion factor." *Id.* (citing Final Analysis Memo at Attach. 5). The resulting amount was then used as the denominator over which Commerce divided the farming FOPs from all farming activities of HVG, Agifish, and Europe JSC. *See id.*; Final Analysis Memo at Attach. 5. In the remand redetermination, Commerce explains that applying the mathematical sequence in this order "makes it appear as if Commerce adjusted only the denominator and not the numerator."[3] *Remand Results* at 6. By contrast, for the *Remand Results*, Commerce explains that it first divided the farming FOP numerators "by the reported production quantity of harvested whole live fish." *Id.* (citing Draft Remand Analysis Memo at Attach. I, Remand CD 1, bar code 3705319–01 (May 10, 2018) (referring to column labeled "Step 1") ("Draft Remand Analysis Memo")). Commerce then multiplied the resulting farming FOPs by the shank equivalent conversion factor so they would be on the same basis as the U.S. price. *Id.* (citing Draft Remand Analysis Memo at Attach. I (referring to the column labeled "Step 2")). As a result, the farming FOPs are now on the same subject merchandise or shank basis as the processing FOPs. Commerce notes, however, that the correction to the order in which the math sequence was applied did not change the resultant farming FOPs, as calculated in the *Final Results*. *See id.* at 7 (citing Final Analysis Memo at Attach. 5; Draft Remand Analysis Memo at Attach. I).

On remand, Commerce complied with the court's order in *An Giang I*, and its explanation is in accordance with law and supported by substantial evidence.

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[3] In actuality, Commerce has two articulations of the same formula. The formula in the *Final Results* can be expressed as A/(B divided by E), with "A" representing the farming FOP numerator, "B" the harvested whole live fish denominator, and "E" the shank equivalent conversion factor. The formula, as articulated in the *Final Results*, first reduced the harvested whole live fish denominator by dividing it by the shank equivalent conversion factor, as to convert the harvested whole live fish to its shank equivalent. *See* Final Analysis Memo at Attach. 5. Commerce then divided the farming FOP numerator by a denominator that was already reduced because it had been divided by the shank equivalent conversion factor. *See id.* In the *Remand Results*, Commerce achieved the same numerical result, but with more steps. First, Commerce established a ratio of farming FOP to harvested whole live fish, expressed as A/B. *See* Draft Remand Analysis Memo at Attach. I (referring to column labeled "Step 1"). In that ratio, the farming FOP numerator is divided by the harvested whole live fish denominator. The resulting amount is then multiplied by the shank equivalent conversion factor (E). *See id.*(referring to column labeled "Step 2"). The two articulations of the formula used in the *Final Results* and the *Remand Results*, side by side, are: A/(B divided by E) and (A/B) x E. Dividing a number by a fraction is the same as multiplying it by the inverse of the fraction. Therefore, both equations yield the same result because A x (E/B) = (A/B) x E.

CONCLUSION

For the foregoing reasons, the *Remand Results* comply with the court's order in *An Giang I*, are in accordance with law and supported by substantial evidence, and are therefore sustained. Judgment will enter accordingly.

Dated: September 12, 2018
New York, New York

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