U.S. Court of International Trade

Slip Op. 19–128

AMERICAN CAST IRON PIPE COMPANY, et al., Plaintiffs, v. UNITED STATES, Defendant, and EVRAZ INC., NA, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court Nos. 19–00082 & 19–00088

[Dismissing actions for lack of subject matter jurisdiction]

Dated: October 16, 2019

Timothy C. Brightbill, *Laura El-Sabaawi*, and *Tessa V. Capeloto*, Wiley Rein LLP, of Washington, D.C., for plaintiffs.

Joseph H. Hunt, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *L. Misha Preheim*, Assistant Director, and *Eric J. Singley*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for defendant. Of counsel was James H. Ahrens II, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

H. Deen Kaplan and *Craig A. Lewis*, Hogan Lovells US LLP, of Washington, D.C., for defendant-intervenor.

OPINION

Stanceu, Chief Judge:

Plaintiffs brought two parallel actions (Court Nos. 19–00082 and 19–00088) to contest a final "less-than-fair-value" ("LTFV") determination made by the International Trade Administration, U.S. Department of Commerce ("Commerce") in an antidumping duty investigation of large diameter steel pipe from Canada. Concluding that it lacks subject matter jurisdiction, the court dismisses both actions.

I. BACKGROUND

A. The Contested Determination

The contested administrative determination (the "Final Determination") is *Large Diameter Welded Pipe From Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 Fed. Reg. 6378 (Int'l Trade Admin. Feb. 27, 2019). Commerce determined that the merchandise subject to investigation, which was imports from Canada of welded carbon and alloy steel pipe more than 16 inches in nominal diameter, "is being, or is likely to be, sold in the United States at less than fair value (LTFV) during the period of investigation (POI) January 1, 2017, through December 31, 2017." *Id.* In the investigation, Commerce determined an estimated individual

weighted-average dumping margin of 12.32% for respondent Evraz Inc., NA ("Evraz"), a Canadian exporter and producer of the subject merchandise, and adopted this margin as the "all others" rate.[1] *Id.*, at 6379 (*citing* 19 U.S.C. § 1673d(c)(5)(A)).

B. The Parties

Plaintiffs, domestic producers of large-diameter welded pipe, are American Cast Iron Pipe Company, Berg Steel Pipe Corp., Berg Spiral Pipe Corp., Dura-Bond Industries, and Stupp Corporation, individually and as members of the American Line Pipe Producers Association; Greens Bayou Pipe Mill, LP; JSW Steel (USA) Inc.; Skyline Steel; Trinity Products LLC; and Welspun Tubular LLC. Defendant is the United States. Evraz is a defendant-intervenor.

C. Administrative Proceedings

After publication of the Final Determination on February 27, 2019, the U.S. International Trade Commission (the "Commission" or "ITC") issued a final affirmative injury determination. *Large Diameter Welded Pipe from Canada, Greece, Korea, and Turkey,* Inv. Nos. 701-TA-595596 and 731-TA-1401, 1403, and 1405–1406, USITC Pub. 4883 (Apr. 2019) (Final), *Large Diameter Welded Pipe From Canada, Greece, Korea, and Turkey*, 84 Fed. Reg. 16,533 (Int'l Trade Comm. Apr. 19, 2019). Commerce issued an antidumping duty order on May 2, 2019. *Large Diameter Welded Pipe From Canada: Antidumping Duty Order*, 84 Fed. Reg. 18,775 (Int'l Trade Admin. May 2, 2019).

D. Proceedings in the Court of International Trade

Plaintiffs filed identical summonses in the two cases. Summons (No. 19–00082) (May 31, 2019), ECF No. 1; Summons (No. 19–00088) (June 4, 2019), ECF No. 1. Plaintiff's complaints are essentially identical, although the complaint in Court No. 19–00088 adds a factual allegation not included in the complaint in Court No. 19–00082.[2]

[1] Plaintiffs' complaints allege on the merits that Commerce improperly concluded that Evraz was not affiliated with another party, Enbridge Inc., despite evidence of a "close supplier relationship." Compl. ¶¶ 8–11, (No. 19–00082) (June 28, 2019), ECF No. 8; Compl. ¶¶ 9–12, (No. 19–00088) (July 3, 2019), ECF No. 8.

[2] The additional factual allegation in the complaint in Court No. 19–00088 discloses that the date of plaintiffs' notice of intent to commence judicial review under the rule set forth in 19 U.S.C. § 1516a(g)(3)(B) (discussed in this Opinion as the "Special Rule"), as provided to the various parties, was May 8, 2019. This date is not in dispute in this litigation. Plaintiffs explained in a footnote in that complaint that they filed two separate actions due to their uncertainty as to the time for filing the action, which uncertainty they attribute to what they submit are inconsistent judicial decisions. Compl. at 3 n.1 (No. 19–00088) (discussing *Bhullar v. United States*, 27 CIT 532, 259 F. Supp. 2d 1332, 1336 (2003) and *N. Dakota Wheat Comm'n v. United States*, 28 CIT 1236, 1238, 342 F. Supp. 2d 1319, 1322 (2004)).

Compare Compl. ¶ 4, (No. 1900088) (July 3, 2019), ECF No. 8, *with* Compl. (No. 19–00082) (June 28, 2019), ECF No. 8.

Defendant-intervenor Evraz moved to dismiss the cases for lack of subject matter jurisdiction. Mot. to Dismiss for Lack of Subject Matter Jurisdiction (No. 19–00082) (July 17, 2019), ECF No. 13; (No. 19–00088) (July 22, 2019), ECF No. 11. Evraz subsequently moved to supplement its motion in the earlier-filed case. Mot. to Supplement Mot. to Dismiss (No. 19–00082) (July 22, 2019), ECF No. 15. Defendant also moved to dismiss for lack of subject matter jurisdiction. Def.'s Mot. to Dismiss (No. 19–00082) (July 29, 2019), ECF No. 18; (No. 19–00088) (July 29, 2019), ECF No. 16.

Plaintiffs moved for an injunction to prevent liquidation of affected entries. Mot. for Prelim. Inj. (No. 19–00082) (July 29, 2019), ECF No. 25; (No. 19–00088) (July 29, 2019), ECF No. 17. Defendant and defendant-intervenor opposed this motion. Def.'s Resp. to Pl.'s Mot. for a Prelim. Inj. (No. 19–00082) (Aug. 19, 2019), ECF No. 27; (No. 19–00088) (Aug. 19, 2019), ECF No. 25; Resp. of Evraz, Inc. NA to Mot. for Prelim. Inj. (No. 19–00082) (Aug. 8, 2019), ECF No. 26; (No. 19–00088) (Aug. 8, 2019), ECF No. 24.

Plaintiffs filed their response to the motions to dismiss on August 28, 2019. Pls.' Resp. to Def. Int. Evraz's Mot. to Dismiss and Supplement to Mot. and Def. United States' Mot. to Dismiss (No. 19–00082) (Aug. 28, 2019), ECF No. 29; Pls.' Resp. to Def.-Int. Evraz Inc.'s Mot. to Dismiss and Def. United States' Mot. to Dismiss (No. 19–00088) (Aug. 28, 2019), ECF No. 27 ("Pls.' Resp.").

Defendant filed a reply in support of its motion to dismiss. Def's Reply in Support of Def.'s Mot. to Dismiss (No. 19–00082) (Sept. 16, 2019), ECF No. 31; Def's Am. Reply in Support of Def.'s Mot. to Dismiss (No. 19–00088) (Sept. 16, 2019), ECF No. 30. Defendant-intervenor also filed a reply in support of its motion to dismiss. Reply of Evraz, Inc. NA in Support of Def. Int. Evraz's Mot. to Dismiss (No. 19–00082) (Sept. 18, 2019), ECF No. 32; (No. 19–00088) (Sept. 18, 2019), ECF No. 31.

On September 18, 2019, the Government of Canada filed a motion for leave to appear as *amicus curiae*. Mot. for Leave of the Government of Canada to Appear as Amicus Curiae (No. 19–00082) (Sept. 18, 2019), ECF No. 33; (No. 19–00088) (Sept. 18, 2019), ECF No. 32.

II. DISCUSSION

Plaintiffs assert jurisdiction according to 28 U.S.C. § 1581(c), under which the Court of International Trade has exclusive jurisdiction of actions brought under Section 516A(a) of the Tariff Act of 1930, 19

U.S.C. § 1516a(a) ("subsection (a)"), including an action seeking judicial review of a final less-than-fair-value determination by Commerce. *See* 19 U.S.C. § 1516a(a)(2)(B)(i).

Defendant-intervenor and defendant base their motions to dismiss on the "Special Rule" of 19 U.S.C. § 1516a(g)(3)(B), which is applicable to review of antidumping and countervailing duty determinations involving goods of a party to the North American Free Trade Agreement ("NAFTA"). Under the Special Rule, a final determination of less-than-fair-value "is reviewable under subsection (a) [of 19 U.S.C. § 1516a] only if the party seeking to commence review has provided timely notice of its intent to commence such review to—(i) the United States Secretary and the relevant FTA [Free Trade Agreement] Secretary;[3] (ii) all interested parties who were parties to the proceeding in connection with which the matter arises; and (iii) the administering authority [Commerce] or the [U.S. International Trade] Commission, as appropriate." 19 U.S.C. § 1516a(g)(3)(B).

The Special Rule defines, with an exception not here applicable, what is meant by the statutory term "has provided timely notice": "[s]uch notice is timely provided if the notice is delivered no later than the date that is 20 days after the date described in subparagraph (A) or (B) of subsection (a)(5) [of this section] that is applicable to such determination . . . ." *Id.* Defendant and defendant-intervenor maintain that plaintiffs' notice of intention to commence judicial review of the LTFV determination, which plaintiffs acknowledge as having been made on May 8, 2019, was untimely.

To resolve the question of timeliness, the court first must determine "the date described in subparagraph (A) or (B) of subsection (a)(5) [of § 1516a] that is applicable to such determination." *Id.* Only a date described in subparagraph (A), and not a date described in subparagraph (B), can be relevant to this case. Subparagraph (B) applies only to a "scope" determination ("a determination described in clause (vi) of paragraph (2)(B)"), whereas subparagraph (A) applies, *inter alia*, to "a determination described in . . . clause (i) . . . of paragraph (2)(B)." Clause (i) of paragraph (2)(B) (19 U.S.C. § 1516a(a)(2)(B)) applies, *inter alia*, to "[f]inal affirmative determinations by the administering authority [Commerce] . . . under section . . . 1673d of this title . . . ." Section 1673d is the statutory provision under which Commerce issues a final affirmative LTFV determination.

Determining the "date that is described in subparagraph (A) . . . of subsection (a)(5) of this section" requires an interpretation of the

[3] The terms "United States Secretary" and "relevant FTA Secretary" refer to officials in the three North American Free Trade Agreement ("NAFTA") countries who assist in administering dispute settlement proceedings under NAFTA Article 19. *See* 19 U.S.C. § 1516a(f)(6), (f)(7).

following statutory phrase in 19 U.S.C. § 1516a(a)(5)(A): "the 31st day after the date on which notice of the determination is published in the Federal Register." The only "date" (as opposed to "day") "that is described in subparagraph (A)" is the date of Federal Register publication. *See* 19 U.S.C. § 1516a(a)(5)(A); 19 C.F.R. § 356.3(a) (interpreting the 20-day period to run from the date of publication of the determination). The LTFV notice contested in this case was published on February 27, 2019. When the Special Rule is applied to that date, the resulting due date by which the "party seeking judicial review" must have "provided timely notice" is March 19, 2019.

Under the Special Rule, the providing of timely notice is a jurisdictional requirement. That much is clear from the language Congress chose: the "determination . . . is *reviewable* . . . *only if* the party seeking to commence review *has provided timely notice*. . . ." 19 U.S.C. § 1516a(g)(3)(B) (emphasis added).[4] It necessarily follows that these actions must be dismissed. Plaintiffs were not timely in providing the notice Congress expressly made a condition of obtaining judicial review of the final LTFV determination plaintiffs seek to contest in this Court.

In response to the motions to dismiss, plaintiffs argue that "the Court should consider Plaintiffs to have timely filed their notice of intent to commence judicial review, given the unique statutory provisions surrounding challenges to less-than-fair-value determinations and the purpose of the notice of intent requirement." Pls.' Resp. at 1, (No. 19–00082); Pls.' Resp. at 1–2, (No. 19–00088) (Aug. 28, 2019). In referring to the "unique statutory provisions," plaintiffs explain that "affirmative less-than-fair-value determinations, regardless of the country involved, are reviewable by this court only *after* the Commission makes its injury determination." *Id.* at 2 (citing 19 U.S.C. §§ 1516a(a)(2)(A)(II) & (3)). According to this argument, because the ITC did not make its injury determination until May 2, 2019 and Commerce issued the antidumping duty order on that same date, plaintiffs' May 8, 2019 notice, having been made within 20 days of the publication of the order, should be deemed timely. Plaintiffs' arguments do not convince the court.

Plaintiffs' interpretation of the statutory scheme does not overcome the plain meaning of the notice requirement in the Special Rule, the 20-day time period for which begins with the date of Federal Register publication of the LTFV determination, not the date of publication of

[4] Even were the court to conclude that the notice requirement is not jurisdictional, it still would be required to dismiss these actions, on which no relief could be granted.

a resulting antidumping duty order. *See* 19 U.S.C. § 1516a(g)(1) (defining the term "determination," as applicable here, as the determination described in 19 U.S.C. § 1516a(a)(2)(B)(i), which is a final affirmative LTFV determination).

Moreover, plaintiffs' arguments misconstrue the purpose of the Special Rule, which is a notice provision of a party's "*intent* to commence judicial review" in the future. 19 U.S.C. § 1516a(g)(3)(B). The 20-day period for fulfilling the notice requirement is related to the time during which a party may request binational panel review under Article 1904 of the NAFTA, which is 30 days following Federal Register publication of the relevant determination. 19 U.S.C. § 1516a(g)(8); 19 C.F.R. § 356.4(a). Other parties to the administrative proceeding thereby receive notice of a party's intention to bring an action in the Court of International Trade before expiration of the time to file a request for binational panel review (which, as a general matter, will preclude subsequent judicial review in this Court, with certain exceptions, *e.g.*, for constitutional claims). Under the statutory scheme, these other parties will have a minimum of ten days following receipt of the notice of intent in which to request binational panel review.

Contrastingly, under plaintiffs' view of the statute, a party may commence a judicial review action in this Court even though it did not provide the required notice of intent within 20 days of publication of the final determination. An example illustrates the difficulty this could pose. If, by the 31st day after Federal Register publication of the determination, *i.e.*, a day after the 30-day period has run, no party has filed a notice of intent to seek judicial review, and no party has requested binational panel review, parties to the administrative proceeding, as a general matter, should be able to presume that finality has attached to the administrative determination. But under plaintiffs' construction of the statute, that result would not necessarily obtain. Also, plaintiffs' construction, interpreted narrowly, could fail to effectuate the priority the statute gives to "exclusive review" by a binational panel. *See* 19 U.S.C. § 1516a(g)(2). In addition to contravening the plain meaning of the statute, plaintiff's proffered construction defeats the statutory purpose.

Further to their argument that their notice of intent was timely, plaintiffs cite a decision of this Court, *Bhullar v. United States*, 27 CIT 532; 259 F. Supp. 2d 1332 (2003), as supporting their position that notice of intent to commence judicial review is timely according to the Special Rule if accomplished within 20 days of publication of an antidumping duty order. Pls.' Resp. at 3–4. This argument is also

unconvincing. In *Bhullar*, this Court concluded that judicial review was not available because the contested determinations were the subject of requests for binational panel review, and no exception applied that would allow the claims to be heard in this Court. The opinion in *Bhullar* noted that other jurisdictional defects applied: the plaintiff had failed to comply with the requirement to provide notice of intent to commence judicial review and also lacked standing. As to the notice of intent, the opinion instructs that "the notification of a party's intent to commence review must be delivered no later than 20 days after the final determinations are published in the Federal Register." *Bhullar*, 27 CIT at 537, 259 F. Supp. 2d at 1336. The opinion then specifies May 22, 2002, the date of Federal Register publication of "the challenged determinations," which included the *amended* final affirmative LTFV determination and the *amended* final affirmative countervailing duty determination. *Id.* These were published together with the respective LTFV and countervailing duty orders. Because in this instance Commerce did not issue an amended final LTFV determination after issuing the final LTFV determination, the only 20-day period that occurred began to run from the February 27, 2019 publication date. Therefore, *Bhullar* is inapposite.

In summary, plaintiffs' notice of intent to commence judicial review was untimely because it was not provided by due date specified in the Special Rule, which in this instance was March 19, 2019.

III. CONCLUSION

For the reasons set forth above, the court concludes it lacks subject matter jurisdiction. Therefore, the court will grant the motions to dismiss and judgments dismissing Court No. 1900082 and Court No. 19–00088 will enter accordingly.

Dated: October 16, 2019
New York, New York

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

Slip Op. 19–130

HABAŞ SINAI VE TIBBI GAZLAR ISTIHSAL ENDÜSTRISI A.Ş., Plaintiff, and ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Consolidated Plaintiff, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Consol. Court No. 17–00204

[Remanding in Part and Sustaining in Part the U.S. Department of Commerce's Final Results of Redetermination.]

Dated: October 17, 2019

David L. Simon, Law Office of David L. Simon, of Washington, DC, for Plaintiff Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş.

Matthew M. Nolan and *Leah N. Scarpelli*, Arent Fox, LLP, of Washington, DC, for Consolidated Plaintiff Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Joseph A. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, *John R. Shane*, and *Maureen E. Thorson*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Rebar Trade Action Coalition.

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 court-ordered remand. See Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 70–1. Plaintiff Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. ("Habaş") and Consolidated Plaintiff Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. ("Icdas") (together, "Plaintiffs") each challenged certain aspects of Commerce's final affirmative determination in the sales at less than fair value investigation of steel concrete reinforcing bar ("rebar") from the Republic of Turkey ("Turkey").[1] *See Steel Concrete Reinforcing Bar From the Republic of Turkey*, 82 Fed. Reg. 23,192 (Dep't Commerce May 22, 2017) (final determination of sales at less than fair value) ("*Final Determination*"), ECF No. 17–5, *as amended by Steel Concrete Reinforcing Bar From the Republic of Turkey and Japan*, 82 Fed. Reg. 32,532 (Dep't Commerce July 14, 2017) (am. final affirmative antidumping duty determination for the Republic of Turkey and antidumping duty orders) ("Am. *Final Determination*"), ECF No. 17–7, and accompanying Issues and Decision Mem., A-489–829 (May 15, 2017) ("I&D Mem."), ECF No. 17–6. The court previously sustained Commerce's refusal to employ a quarterly cost-averaging

[1] The administrative record associated with the remand results is contained in a Public Remand Record, ECF No. 71–2, and a Confidential Remand Record ("CRR"), ECF No. 71–3. Parties submitted public and confidential joint appendices containing record documents cited in their briefs. *See* Public J.A. - Remand Proceeding (Slip Op. 19–10), ECF No. 79; Confidential J.A. - Remand Proceeding (Slip Op. 19–10) ("CRJA"}, ECF No. 78. The court references the confidential version of record documents, unless otherwise specified.

methodology for either Plaintiff; selection of the invoice date as the date of sale for Habaş's U.S. sales; and rejection of Habaş's zero-interest short-term loans to calculate imputed credit expenses. *See Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi, A.Ş. v. United States* ("*Habaş I*"), 43 CIT ___, ___, 361 F. Supp. 3d 1314, 1317–18 (2019).[2] The court remanded Commerce's calculation of Plaintiffs' respective duty drawback adjustments and the use of partial adverse facts available in relation to certain sales for which Icdas could not provide manufacturer codes. *Id.*

On May 17, 2019, Commerce filed its Remand Results. Therein, Commerce revised its method of calculating Plaintiffs' duty drawback adjustments to U.S. price and made a circumstance of sale ("COS") adjustment to normal value to increase it by the same amount as the duty drawback adjustment; and Commerce also provided additional reasoning to support its use of partial adverse facts available with respect to Icdas. Remand Results at 1–2, 7–20, 33–41, 44–45. The changes made by Commerce reduced Habaş's weighted-average dumping margin from 5.39 percent to 4.98 percent and Icdas's from 9.06 percent to 8.66 percent. Remand Results at 21.

Habaş and Icdas filed comments opposing Commerce's use of a COS adjustment. Comments of Pl. Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi, A.Ş. on Redetermination on Remand ("Habaş's Cmts.") at 2–10, ECF No. 74; Pl. Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S.'s Comments on Remand Redetermination ("Icdas's Cmts.") at 3–13, ECF No. 75. Icdas continues to challenge Commerce's use of partial adverse facts available. Icdas's Cmts. at 13–14. Defendant United States ("the Government") and Defendant-Intervenor Rebar Trade Action Coalition ("RTAC") filed comments in support of the Remand Results. Def.'s Resp. to Pls.' Comments on the Remand Redetermination ("Gov't's Reply Cmts."), ECF No. 76; Rebar Trade Action Coalition's Resp. to Comments on Final Results of Redetermination ("RTAC's Reply Cmts."), ECF No. 77.

For the reasons discussed herein, the court sustains Commerce's duty drawback adjustment as applied to export price, remands Commerce's decision to make a COS adjustment in the same amount, and sustains Commerce's use of partial adverse facts available with respect to Icdas.

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[2] *Habaş I* presents additional background on this case, familiarity with which is presumed.

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),[3] and 28 U.S.C. § 1581(c) (2012).

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

DISCUSSION

I. Duty Drawback and Circumstance of Sale Adjustments

A. Commerce's Duty Drawback Calculation Methodologies Prior to *Habaş I*

To determine whether the subject merchandise is being sold at less than fair value, Commerce compares the export price or constructed export price[4] of the subject merchandise to its normal value. *See generally* 19 U.S.C. §§ 1673 *et seq*. Generally, an antidumping duty is the amount by which the normal value of a product—typically, its price in the exporting country—exceeds export price, as adjusted. *See id.* § 1673. One of the adjustments Commerce makes to export price pursuant to 19 U.S.C. § 1677a(c) is known as the "duty drawback adjustment." Specifically, Commerce is to increase export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." *Id.* § 1677a(c)(1)(B). This statutory adjustment is intended to prevent the dumping margin from being increased by import taxes

[3] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are generally to the 2012 edition. However, 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. Section 502 of the TPEA amended 19 U.S.C. § 1677e, and section 504 amended 19 U.S.C. § 1677b. *See* TPEA §§ 502, 504. These TPEA amendments affect all antidumping duty 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). Accordingly, all references to 19 U.S.C. §§ 1677e and 1677b are to the amended version of the statutes.

[4] U.S. price may be based on export price or constructed export price. Because the distinctions between export price and constructed export price are not at issue in this case, the court generally will refer only to export price or U.S. price. Such references, however, may be understood as including constructed export price.

that are imposed on inputs used to produce subject merchandise, if those import taxes are rebated or exempted from payment when the subject merchandise is exported to the United States. *See Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011); *Wheatland Tube Co. v. United States*, 30 CIT 42, 60,414 F. Supp. 2d 1271, 1286 (2006), *rev'd on other grounds*, 495 F.3d 1355 (Fed. Cir. 2007). The adjustment accounts for the fact that imported inputs remain subject to the import duties when consumed in the production of the foreign like product, "which increases home market sales prices and thereby increases [normal value]." *Saha Thai*, 635 F.3d at 1338; *see also* Remand Results at 7.

"Until recently, Commerce calculated the duty drawback adjustment to U.S. price . . . by dividing rebated or exempted duties by total exports and adding the resultant per unit duty burden to the export price." *Habaş I*, 361 F. Supp. 3d at 1320. When producers were exempt[5] from the payment of import duties, Commerce also increased cost of production and constructed value[6] to account for the cost of the exempted duties for which the producer remained liable until the exemption program requirements were satisfied. *Habaş I*, 361 F. Supp. 3d at 1320; *see also Saha Thai*, 635 F.3d at 1341–44 (affirming the upward adjustment to cost of production). In 2016, Commerce modified its duty drawback adjustment "by allocating exempted duties over total production rather than exports." *Habaş I*, 361 F. Supp. 3d at 1320. Commerce adjusted its methodology in response to assertions that margin distortions arose when foreign producers "use[d] fungible inputs both from foreign sources, which incur[red] import duties, and domestic sources, which [did] not." *Id.* Commerce reasoned that "the larger denominator on the cost-side [i.e., total production] resulted in a smaller adjustment to normal value than U.S. price"; consequently, it determined that "equalizing the denominators

[5] A duty exemption program is different from a duty rebate (or reimbursement) program. For a rebate program, "import duties are paid and later refunded by the government of the exporting country." Remand Results at 7–8. Thus, the duties are usually recorded as a "direct material cost" in the producer's books and a separate revenue is recorded to book the amount of any drawback granted in connection with an export transaction. *Id.* at 8. For an exemption program, an "off-the-books" liability is created upon importation of the input, which is later forgiven when the finished product is exported. *Id.* at 17. In that case, the producer typically will "neither record an amount for import duties as a direct material cost, nor recognize a separate revenue for the amount of duty drawback granted for the export transaction." *Id.* at 8.

[6] Commerce calculates normal value using sales in the home market or a third country market that are at or above the cost of production. 19 U.S.C. § 1677b(b)(1). When there are no such sales, Commerce calculates normal value "based on the constructed value of the merchandise." *Id.* The cost of production includes "the cost of materials and of fabrication or other processing" used in manufacturing; "selling, general, and administrative expenses"; and the cost of packaging. *Id.* § 1677b(b)(3). Constructed value includes similar expenses and an amount for profit. *Id.* § 1677b(e).

used in each adjustment" ensured that an equal amount would be added to U.S. price and normal value and the agency would compare the two values on a "duty neutral" basis. *Id.* at 1320–21.

In the administrative proceeding underlying *Habaş I*, Commerce used this modified duty drawback methodology to calculate the adjustment to U.S. price and make a corresponding equal upward adjustment on the cost side pursuant to *Saha Thai*. *See* I&D Mem. at 12–13 & n.50. The court remanded the duty drawback adjustment to U.S. price—specifically, Commerce's allocation of the exempted duties over total production—as "inconsistent with the clear statutory linkage between [the foregone] duties and exported merchandise." *Habaş I*, 361 F. Supp. 3d at 1322 (collecting cases reaching the same conclusion). The court reasoned that "Congress .. . clearly intended the adjustment to capture the amount of duties Plaintiffs would have paid on their export sales but for the exportation of that merchandise"; thus, "[a]llocating Plaintiffs' exempted duties over total production" contravened "section 1677a(c)(1)(B) because it attributes some of the [duty] drawback to domestic sales, which do not earn drawback, and fails to adjust export price by the amount of the import duties exempted by reason of exportation." *Id.* at 1323 (internal quotation marks and citation omitted). The court further rejected Commerce's reliance on *Saha Thai* to support its revised methodology. *Id.* at 1323–24. While the cost-side adjustment approved by the *Saha Thai* court "ensure[s] that normal value and U.S. price are compared on a mutually-duty-inclusive basis," the appellate court "never stated or otherwise inferred that the adjustments to [U.S. price] and normal value must be equal . . . in order to render the comparison between U.S. price and normal value duty neutral." *Id.* at 1323 (internal citations and internal quotation marks omitted). The court remanded the issue "to the agency to revise its calculation of the duty drawback adjustment using exports as the denominator rather than total production." *Id.* at 1324.

B. Commerce's Calculation Methodology on Remand from *Habaş I*

In accordance with *Habaş I*, Commerce recalculated the duty drawback adjustment using exports as the denominator. Remand Results at 13, 17. In addition, however, Commerce made a circumstance of sale adjustment to normal value to add the same per-unit amount of duty "in order to achieve a fair comparison." *Id.* at 15–16.

Habaş and Icdas imported several inputs subject to varying duties and purchased the same inputs from domestic sources. *Id.* at 13. Habaş and Icdas participated in a duty exemption program, and, thus, did not record liability for the import duties in their books and

records. *Id.* at 13, 14. According to Commerce, when subject merchandise can be produced from various inputs, only some of which are dutiable imports, or from inputs that are procured from foreign and domestic sources, "the presumption that [normal value] includes the full duty proportionate to the full duty drawback is uncertain." *Id.* at 8. Commerce asserts that most countries permit substitution of inputs, which means that, "while the actual imported material subject to duty is fungible and can be consumed in any of the finished goods, it is assigned by the company to exported finished goods for purposes of the program." *Id.* Thus, while the statute requires Commerce to increase U.S. price to account for the duties exempted by reason of exportation, there is a lesser amount of (or no) import duties reflected in normal value. *Id.* at 9. Commerce provided "the following example, wherein one unit of input is domestically sourced for $10 and one unit of input is imported for $10, plus a $5 duty":

> Under the standard way of determining costs for general accounting purposes, the company's average cost for the inputs per unit is the domestic input of $10 plus the imported input of $15 ($10 + $5) divided by two units of input which equals $12.50 (i.e., $10 + $15 = $25 and $25/2 = $12.50). Thus, $12.50 is the annual average per-unit input cost, including only $2.50 of the import duty for each unit. However, upon export of one unit of the finished good, the duty drawback scheme allows the entire $5 of import duties to be rebated or forgiven. As a result, following this logic, the adjusted U.S. price reflects $5 per unit of duties, while the [normal value] cost of production includes an average of $2.50 per unit. This creates an imbalance in the amount of duties on each side of the dumping equation, artificially lowering the margin by $2.50 of duties (assuming through the cost test the average home market price would include the $2.50 of duties in the cost of the input).

Id.

As discussed, Commerce initially attempted to remedy this perceived distortion by limiting the duty drawback adjustment to the amount of duties imputed on the cost-side. *Id.* at 10–11. In response to several opinions from this court holding that the reduced duty drawback adjustment was unlawful, Commerce developed a new methodology. *See id.* at 11 & n.42 (collecting cases). Specifically, in those cases, Commerce applied the full duty drawback adjustment to U.S. price, applied the cost-side adjustment pursuant to *Saha Thai*, and also made a COS adjustment to normal value—ultimately

imputing the same amount of per-unit duties to normal value that were added to U.S. price. *Id.* at 11. In other words, using the example above, Commerce added (1) $5 per unit of import duties to U.S. price; (2) $2.50 per unit to cost; and (3) $2.50 per unit to normal value as a COS adjustment. *Id.*

Upon review by another judge of this court, the court determined that the agency improperly double-counted the amount of duties included within normal value. *Id.* at 11–12 & n.44 (citing *Uttam Galva Steels Ltd. v. United States*, 43 CIT ___, ___, 374 F. Supp. 3d 1360, 1364 (2019)). Taking that court opinion into account, while also asserting that the double-counting finding was in error, Commerce further' changed its methodology in this case to provide for two COS adjustments: the first COS adjustment removes all duties from normal value and the second COS adjustment "add[s] to [normal value] the same per-unit amount of duty added to U.S. price." *Id.* at 14–15. Commerce explained that the second COS adjustment is necessary

> because: (1) the import duty program and drawback provision impose a different set of accounting and duty treatments dependent upon which market the finished good was sold and the markets from which the imported input is sourced; and (2) the effect of the different sourcing of inputs and associated duty costs, and how the duty drawback is treated for the U.S. and home market sales.

Id. at 15. The combined effect of a duty exemption scheme and domestic sourcing of inputs for foreign-like product sold in the home market, according to Commerce, is to "permit[] the assignment of imported inputs and the associated import duties to export sales, while attributing the domestic purchases exclusive of duty to domestic sales." *Id.* This treatment differs "from standard cost accounting and the respondent's normal books and records, which calculate an annual weighted-average price of inputs and is allocated to overall production versus market-specific production." *Id.* According to Commerce, this results in a duty-inclusive U.S. price being compared to a normal value that reflects less or no duties. *Id.*

In the Remand Results at issue here, Commerce explained that it did not make the first COS adjustment to remove booked duties because Plaintiffs participated in a duty exemption program and "the [constructed value] and home market prices in this review . . . are completely duty-exclusive from any duties eligible for duty drawback . . . . " *Id.* at 14. Commerce did, however, make the second COS adjustment to add to normal value the same per-unit amount of duties the agency added to U.S. price, "ensuring that both sides of the

dumping equation contain the same amount of per-unit import duties." *Id.* at 15.[7]

In the remand proceeding, Habaş and Icdas challenged Commerce's reliance on the concept of duty neutrality and its authority to adjust normal value pursuant to the circumstance of sale provision. *See id* at 26–33. Commerce explained that the concept of duty neutrality supports its methodology because the methodology prevents the duty drawback adjustment from artificially decreasing the dumping margin. *Id.* at 34. Commerce explained that it made the COS adjustment "to account for differences not otherwise accounted for in the statute." *Id.* at 37.

The normal value provision of the statute gives Commerce the authority to increase or decrease normal value "by the amount of any difference (or lack thereof) between" U.S. price and normal value, "other than a difference for which allowance is otherwise provided under this section," that Commerce determines is "wholly or partly due to . . . other differences in the circumstances of sale." 19 U.S.C. § 1677b(a)(6)(C)(iii). Commerce explained that the COS provision is the only provision that "address[es] differences in the home market price relating to import duties," by which Commerce means "taxes imposed only on particular inputs, at particular rates, from particular markets, input into particular goods, which can be claimed and rebated only when resold to particular markets." Remand Results at 37. In this case, Commerce explained, Habaş and Icdas import substitutable inputs (such as steel billets and scrap) that "incur import duties at different tax rates, (or not at all), while the domestically sourced identical inputs incur no duties." *Id.* The Turkish duty drawback scheme permits Habaş and Icdas "to assume that the exported product consumed the inputs subject to duties," and the duty drawback provision, 19 U.S.C. § 1677a(c)(1)(8), likewise "implies that imported inputs . . . subject to import duties . . . were consumed in making the exported products." *Id.* at 37–38. Commerce described the different "circumstance of sale" as the assignment of duty costs to particular products "based on where they are sold." *Id.* at 39.

[7] Commerce did not impute exempted import duties to the cost of production as would be consistent with *Saha Thai*. *See* Draft Results of Redetermination Pursuant to Remand of the Antidumping Duty Investigation of Steel Concrete Reinforcing Bar from the Republic of Turkey: Am. Final Calculation for Icdas Celik Enerji Tersane ve Ulasim Sanayi AS. ("Icdas Remand Cale. Mem.") at 2, CRR 1, CRJA Tab 11; Draft Results of Redetermination Pursuant to Remand of the Antidumping Duty Investigation of Steel Concrete Reinforcing Bar from the Republic of Turkey: Am. Final Calculation for Habaş Sinai ve Tibbi Gazlar Istihsal Endustrisi A.Ş. ("Habaş Remand Cale. Mem.") at 2, CRR 9, CRJA Tab 12. Instead, Commerce made a COS adjustment to normal value (regardless of whether it was based on home market sales or constructed value). Icdas Remand Cale. Mem. at 3; Habaş Remand Cale. Mem. at 3.

As Commerce explains it, the agency confronted the following: (1) the requirement to increase U.S. price to account for import duties foregone by reason of exportation of the subject merchandise in order "to make a fair comparison" to a normal value that is "presumably set to recover such import duties" on goods sold domestically; (2) a normal value that does not contain any import duties because dutiable inputs are allocated to export sales; and (3) a statute that is silent on what Commerce should do in that situation. *Id.* at 38. Commerce determined that "[t]he 'other differences in the circumstances of sale' provision is the only means" at its disposal "to ensure a fair comparison" between a duty-exclusive normal value and duty-inclusive U.S. price. *Id.*

C. Commerce's COS Adjustment Contravenes the Plain Language of the Applicable Statute and Regulation

Plaintiffs raise several challenges to Commerce's Remand Results, foremost of which is that the statutory COS provision, along with Commerce's implementing regulation, do not justify an offset to the statutory duty drawback adjustment. Habaş's Cmts. at 6–10; Icdas's Cmts. at 10–11. Plaintiffs are correct.

Congress authorized Commerce to adjust normal value for differences between normal value and U.S. price that are not otherwise provided for in the statute and are due to "other differences in the circumstances of sale." 19 U.S.C. § 1677b(a)(6)(C)(iii). In the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, Pub. L. No. 103–465, § 224, 108 Stat. 4809 (1994), Congress explained that:

> Commerce will continue to employ the circumstance-of-sale adjustment to adjust for differences in direct expenses and differences in selling expenses of the purchaser assumed by the foreign seller, between normal value and both export price and constructed export price. . . . [D]irect expenses and assumptions of expenses incurred in the foreign country on sales to the affiliated importer will form a part of the circumstances of sale adjustment.

Uruguay Round Agreements Act, Statement of Administrative Action, H R. Doc. No. 103–316, vol. 1, at 828 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4167.[8] Consistent with the SAA, Commerce's regulations limit COS adjustments consistent with 19 U.S.C. §

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

1677b(a)(6)(C)(iii) to "direct selling expenses and assumed expenses," with one exception for commissions paid in one market that is not relevant here. 19 C.F.R. § 351.41 0(b) (providing for COS adjustments "only for direct selling expenses and assumed expenses"). Direct selling expenses are defined as "expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." *Id.* § 351.410(c). Assumed expenses are defined as "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." *Id.* § 351.410(d).

According to Habaş, Commerce's assertion of broad authority to make a COS adjustment "to account for differences not otherwise accounted for in the statute" contravenes congressional intent and the agency's regulations that constrain Commerce's discretion in this area. Habaş's Cmts. at 6–9. Habaş argues that the Federal Circuit has made "clear that a COS adjustment may not be used to adjust a 'variance caused by the operation of the [Antidumping] Act.'" *Id.* at 9 (quoting *Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1581 (Fed. Cir. 1993)). Icdas likewise argues that "import duties that have not been collected—on inputs destined for export sales—[do not] qualify as a COS, let alone as a selling expense." Icdas's Cmts. at 10. Icdas also relies on Zenith to support its position that Commerce may not effectively nullify the duty drawback adjustment to U.S. price through its authority to make COS adjustments. *Id.* at 11 (citing *Zenith*, 988 F.2d at 1581).

The Government argues that "Turkey's duty drawback scheme and the antidumping law duty drawback provision transform the import duties subject to the duty drawback scheme into a direct selling expense. " Gov't's Reply Cmts. at 6 (citing Remand Results at 15–17, 39); *see also id.* at 6–7 (arguing that "Commerce specifically found that the duty drawback expense constituted a direct sales expense within the statutory and regulatory language"). The Government also finds support in the fact that drawn back duties are "capped by the amount of the duty in the dutied input that is included in the specific sale for export." *Id.* at 6. The Government further argues that Commerce's methodology is not precluded by the *Zenith* line of cases. *Id.* at 13–15.

RTAC argues that the circumstance of sale provision is intended to "facilitate efficient comparison between foreign market value [now termed normal value] and purchase price [now termed export price]." RTAC's Reply Cmts. at 12 (quoting S. Rep. No. 85–1619, at 7 (1958)). According to RTAC, the provision and its purpose remained largely unchanged when Congress amended the trade remedy laws in 1979

and 1994. *Id.* For that reason, RTAC argues, the SAA cannot fairly be read to "limit[] Commerce's authority to make COS adjustments." *Id.* RTAC further asserts that "adjustments to the [normal value] side of the antidumping equation are in this case necessary to create the conditions under which Congress assumed that the [export price]-side drawback adjustment would operate." *Id.* at 13. Thus, RTAC believes that *Saha Thai* supports Commerce's use of a COS adjustment in this case. *Id.* at 13–14 & n.3.

Commerce's COS adjustment to normal value contravenes both the statutory provision and the agency's implementing regulation. Beginning with the statute, the court's review of Commerce's interpretation and implementation of a statutory scheme is guided by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress's intent is clear, "that is the end of the matter, " and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Only "if the statute is silent or ambiguous," must the court determine whether the agency's action "is based on a permissible construction of the statute." *Id.* at 843. The court may find that "Congress has expressed unambiguous intent by examining 'the statute's text, structure, and legislative history, and apply the relevant canons of interpretation. '" *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (quoting *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012)).

Commerce determined that adjustments to normal value pursuant to 19 U.S.C. § 1677b "do not address differences in the home market price relating to import duties other than through the COS provision," Remand Results at 37, and "the 'other differences in the circumstances of sale' provision is the only means to ensure a fair comparison," *id.* at 38. Notwithstanding Commerce's claims, the statutory COS provision "is not an omnibus provision to be used . . . for whatever adjustment [the agency] seek[s] to effect." *Zenith Electronics Corp. v. United States*, 14 CIT 831, 837, 755 F. Supp. 397, 406 (1990).

This more limited understanding of the COS provision is confirmed by the legislative history. The Senate report accompanying the enactment of the COS provision lists as adjustable differences "terms of sale, credit terms, and advertising and selling costs," all of which are attendant to the sale of the merchandise. S. Rep. No. 85–1619, at 7 (1958). When Congress enacted the URAA, including section 1677b in its current form, it intended for "Commerce's current practice with

respect to [the COS] adjustment to remain unchanged" (with the exception of the "constructed export price offset" that is not relevant here). SAA at 828, *reprinted in* 1994 U.S.C.C.A.N. at 4167. Prior to enactment of the URAA, Commerce's COS regulation provided that differences in the circumstances of sale for which it would "make reasonable allowances normally [were] those involving differences in commissions, credit terms, guarantees, warranties, technical assistance, and servicing," in addition to "differences in selling costs (such as advertising) incurred by the producer or reseller" generally to the extent those costs were assumed "on behalf of the purchaser. " 19 C.F.R. § 353.56(a)(2) (1990).

Although the examples listed in the regulation and legislative history are not exhaustive, they are all examples of "expenses made to support and promote sales." *Torrington Co. v. United States*, 156 F.3d 1361, 1366 (Fed. Cir. 1998) (Archer, J., dissenting) (disagreeing that certain freight costs constituted selling expenses). Adjustments for these types of selling expenses are necessary in order to compare normal value and U.S. price "at a similar point in the chain of commerce." *Maverick Tube Corp. v. Toscelik Profil*, 861 F.3d 1269, 1274 (Fed. Cir. 2017) (citation omitted). Commerce's adjustment for an asserted difference in duty costs arising from Plaintiffs' different sourcing of inputs and the statutory duty drawback adjustment pursuant to 19 U.S.C. § 1677a(c)(1)(B) is not a circumstance surrounding the sale of the merchandise. Notwithstanding Commerce's strained attempt to describe its method using terms relevant to a COS adjustment, Commerce, in fact, made the adjustment to remedy what it characterized as a distortion[9] that arose by operation of the statutory

[9] In *Habaş I*, the court noted that Commerce's concern regarding distortion is based on the unsubstantiated assumption that "the cost of the domestically-sourced inputs approximates the import duty-exclusive cost of the foreign-sourced input." 361 F. Supp. 3d at 1323 n.14 (emphasis omitted) (quoting *Eregli Demir ve Celik Fabrikalari T.A.S v. United States*, 42 CIT ___, ___, 357 F. Supp. 3d 1325, 1334 n.15 (2018)). The court observed that a domestic supplier of a dutiable input "would price its product at a level competitive with the duty-inclusive cost of the imported input," and, that "[i]n such a scenario, it is difficult to understand the margin effect of a proper duty drawback adjustment as distortive." *Id.* (emphasis omitted) (quoting same). Commerce's explanation of the distortion that arises by operation of the duty drawback adjustment in the Remand Results indeed assumes that domestically-sourced and foreign-sourced inputs share the same unit price ($10) without regard to any market effect from the 50 percent duty in Commerce's example. Remand Results at 9. Commerce does not explain why this is so, nor does Commerce address the court's observation in the Remand Results and the record does not otherwise support the agency's assumption. *See id.* RTAC points to record evidence demonstrating that Habaş and Icdas do not pay import duties to support its belief that "a reasonable domestic supplier of the inputs would *not* price duty-inclusively, because such pricing would disadvantage the domestic supplier relative to input supply." RTAC's Reply Cmts. at 10. However, to the extent that Habaş and Icdas both have home market sales, domestic suppliers of inputs do, in fact, compete with duty-inclusive imports (priced at $10 + $5 duties in the example);

drawback adjustment on a particular set of facts. *See* Remand Results at 9, 38. In so doing, Commerce directly and completely nullified the duty drawback adjustment to U.S. price by adding to normal value the same per-unit amount of exempted duties added to U.S. price. *Id.* at 16. Commerce may not, however, use the COS provision to "effectively writ[e] [a separate adjustment] section out of the statute." *Zenith*, 988 F .2d at 1581.[10]

Commerce's circumvention of the statutory scheme cannot be saved by its appeal to the need "to ensure a fair comparison." Remand Results at 38. Section 1677b requires that "a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). As the Federal Circuit has recognized, the statute expressly set out how to determine normal value "[i]n order to achieve a fair comparison with the export price or constructed export price." *Timken Co. v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004) (characterizing the enumerated requirements and adjustments to normal value in subsections 1677b(a)(1)–(8) as "exhaustive"). Thus, the "fair comparison" requirement is met when normal value is calculated in accordance with the statute and does not provide Commerce with additional authority to make adjustments "beyond those explicitly established in the statute." *Id.; cf. Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed. Cir. 2001) (when U.S. price is based on constructed export price, a "fair comparison" to normal value is achieved by making statutory adjustments in order to arrive at the appropriate level of trade). Commerce itself made this point when it promulgated the rule in its current form. *See Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,346 (Dep't Commerce Feb. 27, 1996) (proposed rule) (explaining that the statute and the Antidumping Agreement "specify in detail the methods by which [the fairness] requirement is satisfied" and declining to inure to itself the authority to go further).

Throughout the almost 25 years of administration and litigation pursuant to the Uruguay Round Agreements Act version of the Tariff Act of 1930, and in the years that preceded, parties have argued for and against various extra-statutory adjustments as necessary to a "fair comparison" or allowing for "an apples-to-apples" comparison.

therefore, RTAC's argument is not supported, nor does it make logical, economic sense simply to assume that domestic suppliers would continue to price at the duty-exclusive import price ($10 in the example).

[10] Parties debate the applicability of *Zenith* to the court's review of Commerce's determination here. *See* Habaş's Cmts. at 9; Icdas's Cmts. at 11; Gov't's Reply Cmts. at 13–15; RTAC's Reply Cmts. at 7; cf. Remand Results at 34–37. While *Zenith* addressed Commerce's use of a COS adjustment to remedy the effect on the antidumping margin of a separate pre-URAA statutory provision relating to domestic taxes, the court's statements regarding Commerce's authority pursuant to the COS provision remain instructive, if not binding, here. *See Zenith*, 988 F.2d at 1580–82.

Generally speaking, domestic interested parties have asserted that certain adjustments leading to higher dumping margins are needed to be fair, and respondent interested parties have asserted that other adjustments leading to lower dumping margins are needed to be fair. However, where, as here, Congress has provided for an adjustment in one part of the dumping calculation and not another, it is not for Commerce or the court to circumvent the legislative framework even if the purported goal is to render an allegedly fairer comparison. *See, e.g., Ad Hoc Comm. of AZ-NM-TX-FL Prods. of Gray Portland Cement v. United States*, 13 F.3d 398, 401–03 (Fed. Cir. 1994). Accordingly, Commerce's COS adjustment to offset the effect of the statutory duty drawback adjustment must be rejected as inconsistent with the statute.

While regulatory consistency cannot save an adjustment otherwise inconsistent with the statute, the court notes that Commerce's COS adjustment also contravenes the plain language of its regulation.[11] The Federal Circuit has held that Commerce's identification of a particular cost as a "selling expense[] properly the subject of a COS adjustment" represents an instance of the agency "simply interpreting its own regulations" to which the court owes "substantial deference." *Torrington Co.*, 156 F.3d at 1364 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Auerv. Robbins*, 519 U.S. 452, 461–62 (1997) (according deference to an agency's "fair and considered" interpretation of its own ambiguous regulation). More recently, however, the U.S. Supreme Court cautioned that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). " [B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9). Those "tools" consist of "the text, structure, history, and purpose of a regulation." *Id.*

Turning first to the plain language of the regulation, the court must "consider the terms in accordance with their common meaning." *Mass. Mut. Life Ins. Co. v. United States*, 782 F.3d 1354, 1365 (Fed. Cir. 2015) (quoting *Lockheed Corp. v. Windnal1*, 113 F.3d 1225, 1227 (Fed. Cir. 1997)). A "direct selling expense" must be (1) an "expense[]" that (2) "result[s] from, and bear[s] a direct relationship to, the par-

[11] Commerce's regulation provides for a COS adjustment "only for direct selling expenses and assumed expenses." 19 C.F.R. § 351.410(b). While Commerce did not specify which of the two categories it considered the adjustment at issue to fall within, it sought to explain why certain "duty costs" "are directly related to the sales in different markets. " Remand Results at 39. From this the court discerns that Commerce considers the COS adjustment to fall within the category for direct selling expenses. *See* 19 C.F.R. § 351.410(c) (defining "direct selling expenses" as expenses "that result from, and bear a direct relationship to, the particular sale in question").

ticular sale in question." 19 C.F.R. § 351.41 0(c). Commerce's regulation includes "commissions, credit expenses, guarantees, and warranties" as examples of direct selling expenses. *Id.* All of these examples involve an actual or imputed expenditure by the respondent.[12]

Commerce's determination in the remand proceeding is inconsistent with the plain language of the regulation and, thus, merits no deference. Commerce's adjustment for differences in import duties, *see* Remand Results at 15, 38, ignores the fact that Habaş and Icdas "*did not incur and record any actual duty costs* in their normal books and records. Rather, an 'off-the-books' liability was generated when inputs were imported under the IPR program, *and that liability was later reversed* upon exportation of subject merchandise to the United States and other markets." *Id.* at 17 (emphasis added); *see also id.* ("Habaş and Icdas *did not pay* or record as a cost *any duties* associated with the IPR exemption program") (emphasis added). Here, the record is clear that Plaintiffs incurred *no expense* respecting import duties on inputs consumed in the production of subject merchandise. *See id.* at 17, 39.

Commerce focused on the fact that U.S. price is ultimately duty-inclusive as the basis for the COS adjustment; however, such is the case by operation of the duty drawback adjustment. *Id.* at 38–39. Commerce offers no explanation as to how a statutory adjustment to U.S. price constitutes an "expense" as the term is commonly understood or, indeed, a circumstance of sale. The duty drawback adjustment resulted from the operation of law, it was not incurred as part of the sales process. When Commerce promulgated the current rule, it explicitly rejected drafting the regulation "in such a way as to essentially function as a catch-all provision to achieve 'fairness,'" finding the approach inconsistent with the carefully crafted statutory scheme.[13] *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg.

[12] Credit expenses are typically imputed expenses for the seller, representing the time value of money for the period between shipment and payment. *See generally* Import Admin. Policy Bulletin 98.2: Imputed Credit Expenses and Interest Rates (Feb. 23, 1998), available at https://enforcement.trade.gov/policy/bull98–2.htm (last visited Oct. 17, 2019). Such expenses recognize the value to the buyer, and the cost to the seller, of extending payment terms. *Id.*

[13] The court is concerned by the Government's misleading alteration of the regulation in its reply comments, to wit: "The regulations further provide '[i]n general . . . the Secretary will make circumstance of sale adjustments . . . only for direct selling expenses and assumed expenses.'" Gov't's Reply Cmts. at 6 (quoting 19 C.F.R. § 351.410(b)). The Government's alteration suggests that the phrase "in general" forms part of the sentence describing the adjustments made pursuant to the regulation in such manner that it appears to broaden the scope of the regulation. The regulation actually provides:

> (b) In general. With the exception of the allowance described in paragraph (e) of this section concerning commissions paid in only one market, the [agency] will make circumstances of sale adjustments under [19 U.S.C. § 1677b](6)(C)(iii) . . . only for direct selling expenses and assumed expenses.

at 7,346. In attempting to do so now, Commerce has done what the Supreme Court said it could not do: "creat[ing] *de facto* a new regulation" "under the guise of interpreting a regulation." *Kisor*, 39 S. Ct. at 2415 (citation omitted).[14]

RTAC's argument that *Saha Thai* supports Commerce's use of a COS adjustment also fails. *See* RTAC's Reply Cmts. at 13–14 & n.3. There, the Federal Circuit affirmed Commerce's interpretation of cost-related provisions of the normal value statute to include "implied costs" (*i.e.*, unbooked/exempted duty costs) as well as "actual costs" for purposes of calculating a duty-inclusive normal value to compare to a U.S. price subject to the duty drawback adjustment. *Saha Thai*, 635 F.3d at 1342–43. In contrast to the cost-side adjustment affirmed in *Saha Thai*, the COS provision adjusts normal value even when normal value is based on home market sales and that sales price is greater than the cost of production. *See* 19 U.S.C. § 1677b(a)(1)(B), (a)(6)(C)(iii), (b)(1). This approach is distinct from *Saha Thai* because it presumes that a theoretical duty liability has a price effect on home market sales. Such a presumption is contrary to the *Saha Thai* court's observation that "[a]n import duty exemption granted only for exported merchandise has *no* effect on home market sales prices" and, thus, "the duty exemption should have *no* effect on [normal value]." 635 F.3d at 1342 (emphasis added). Thus, while Commerce properly may include exempted duties in its cost calculations, *id.* at 1342–43, *Saha Thai* cannot support a COS adjustment to pricebased normal value. Accordingly, the court finds that Commerce's COS adjustment is also barred by the unambiguous language of the regulation.[15] This issue will be remanded to the agency for reconsideration consistent with the foregoing.

19 C.F.R. § 351.410(b). Thus, the phrase "In general" is the heading to subsection (b), not part of the text. Rather than speaking to the scope of the permissible adjustments, it speaks to the scope of the regulation, which, with the exception of certain commissions, permits adjustments "*only* for direct selling expenses and assumed expenses." *Id.* (emphasis added). It is a well-settled interpretive rule that "the heading of a section . . . cannot undo or limit that which the text makes plain." *Brotherhood of R. R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947) (construing a statute); *see also Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1316 (Fed. Cir. 2017) (principles of statutory interpretation apply likewise to regulations). The Government's alteration, which seeks to negate the explicit limitation the word "only" places on the types of permissible adjustments, is therefore misleading and erroneous.

[14] RTAC's avoidance of the limits of the regulation based on the asserted need "to create the conditions under which Congress assumed that the [export price] drawback adjustment would operate" likewise must fail. *See* RTAC's Reply Cmts. at 13. Once promulgated, an agency must adhere to its own regulations. *See, e.g., Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1355 (Fed. Cir. 2006); *Drumheller v. Dept. of Army*, 49 F.3d 1566, 1574 (Fed. Cir. 1995) (collecting cases).

[15] Because the court finds that Commerce's COS adjustment was contrary to the relevant statutory and regulatory provisions, it need not resolve Plaintiffs' remaining challenges to the adjustments. The court finds, however, that Icdas's argument that Commerce failed to

II. Partial Adverse Facts Available

A. Legal Framework

When an interested party "withholds information" requested by Commerce, "significantly impedes a proceeding," "fails to provide[] information by the deadlines for submission of the information," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce shall use the "facts otherwise available" in making its determination. 19 U.S.C. § 1677e(a)(2). Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(c),[16] (d),[17] and (e).[18]

Additionally, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise

comply with the court's instruction in *Habaş I* regarding the appropriate denominator to use in calculating the duty drawback adjustment lacks merit. *See* Icdas's Cmts. at 4. Icdas fails to cite to record evidence to support its assertion or clearly explain its concern. *See id.* To the extent that Icdas asserts that Commerce impermissibly used total production as the denominator in calculating the duty drawback adjustment to U.S. price, the record shows that Commerce calculated the adjustment using the amount reported-and requested-by Icdas. *See* Icdas Remand Cale. Mem. at 3. To the extent that Icdas asserts that Commerce impermissibly used total production as the denominator to adjust Icdas's cost of production before adjusting normal value, Commerce did not impute exempted duties to Icdas's cost of production and, in any event, *Habaş I* did not address that calculation. *Id.* at 2.

[16] Subsection (c) provides, *inter alia*, that when an interested party informs Commerce promptly after receiving a request for information "that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms," then Commerce "shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." 19 U.S.C. § 1677m(c)(1).

[17] Subsection (d) provides the procedures Commerce must follow when a party files a deficient submission. Pursuant thereto, if Commerce finds that "a response to a request for information" is deficient, "[it] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews." *Id.* § 1677m(d). If any subsequent response is also deficient or untimely, Commerce, subject to subsection (e), may "disregard all or part of the original and subsequent responses." *Id.*

[18] Pursuant to subsection (e), Commerce:

> shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements . . . if —
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties.

Id. § 1677m(e).

available." *Id.* § 1677e(b)(1)(A).[19] "Compliance with the 'best of its ability' standard is determined by assessing 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 Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).[20] Before applying an adverse inference, Commerce must demonstrate "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. "An adverse inference may not be drawn merely from a failure to respond." *Id.* at 1383. Rather, Commerce may apply an adverse inference when "it is reasonable for Commerce to expect that more forthcoming responses should have been made." *Id.*

B. Commerce's Use of Partial AFA Pre- and Post-*Habaş I*

In the underlying proceeding, Icdas informed Commerce that it was unable to provide the identity of the manufacturer of subject merchandise for a small portion of its affiliated resellers' sales.[21] *Habaş I*, 361 F. Supp. 3d at 133435. Icdas provided Commerce with data indicating that the "transactions missing manufacturer codes most likely involved merchandise produced by Icdas" and, accordingly, "Commerce could therefore consider Icdas as the manufacturer for those transactions." *Id.* at 1335. For the Final Determination, Commerce concluded that an adverse inference was warranted when selecting from among the facts otherwise available to fill this evidentiary gap. *Id.*; I&D Mem. at 4–6. Commerce pointed to mill test certificates and waybills maintained by Icdas and concluded that Icdas could have made a greater effort to obtain the missing information from its affiliates records over which it had control. *Habaş I*, 361 F. Supp. 3d at 1335; I&D Mem. at 6, 31. Commerce "assigned the highest non-aberrational net price from Icdas'[s] downstream home market sales" as partial adverse facts available. *Habaş I*, 361 F. Supp. 3d at 1335 (alteration in original) (quoting I&D Mem. at 6, 30).

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[19] Use of the facts available with an adverse inference may be referred to as "adverse facts available" or "AFA."

[20] *Nippon Steel* predates the TPEA. However, the relevant statutory language discussed in that case remains unchanged. *Compare* 19 U.S.C. § 1677e(b)(2012), *with* 19 U.S.C. § 1677e(b)(1)(2015).

[21] A "back-to-back" sale occurs "wheri a foreign producer sells subject merchandise to an affiliated exporter, who then sells it to a U.S. affiliate, who then sells it to an unaffiliated U.S. purchaser." *Habaş I*, 361 F. Supp. 3d at 1335 & n.33. Icdas identified the manufacturer for its affiliated resellers' back-to-back sales; however, its affiliates did not track the manufacturer of merchandise sold in non-back-to-back sales. *Id.* at 1334–35.

The court remanded Commerce's determination based on the agency's failure to comply with all statutory predicates to using adverse facts available and because "the agency's conclusion that Icdas failed to act to the best of its ability lack[ed] substantial evidence." *Id.* at 1336. Specifically, Commerce failed to comply with 19 U.S.C. § 1677m(c)(1) when it did not respond to Icdas's suggestion, accompanied by supporting documentation, that the agency could consider Icdas the manufacturer for the affected sales. *Id.* Additionally, "Commerce's finding that Icdas could have undertaken additional efforts to obtain mill test certificates and waybills purportedly kept by its affiliates to identify the missing manufacturer codes" was undermined by Icdas's statements that its affiliates simply did not have that information. *Id.*

In the Remand Results, Commerce further explained its previous findings that Icdas generates mill test certificates that identify the manufacturer of the subject rebar and "routinely provides documentation" identifying the manufacturer in its home market sales. Remand Results at 18–19 & nn.63–64 (citations omitted). Commerce explained that the missing information is crucial to Commerce's ability to identify sales of the foreign-like product upon which normal value is based for purposes of making an accurate comparison to U.S. price. *Id.* at 19, 45. Commerce therefore found that Icdas's and its "affiliates' failure to maintain control of the documentation concerning the original manufacturer of the foreign like product sold in the home market amounts to inadequate record keeping" that significantly impeded the proceeding and merited the use of partial adverse facts available. *Id.* at 19; *see also id.* at 44–45.

C. Commerce's Determination to Use Partial AFA is Sustained

Icdas contends that it "offered a reasonable alternative" to the use of partial AFA, "which could have been applied as non-AFA" given that the missing information affected a small number of sales and "there was no willful withholding of information that would 'significantly impede' the proceeding." Icdas's Cmts. at 14. Icdas's arguments miss the mark. "[S]ection 1677e(b) does not by its terms set a 'willfulness' or 'reasonable respondent' standard, nor does it require findings of motivation or intent." Nippon Steel, 337 F.3d at 1383. Instead, Commerce must make "a factual assessment of the extent to which a respondent keeps and maintains reasonable records and the degree to which the respondent cooperates in investigating those records and in providing Commerce with the requested information."

Id. Here, Commerce found that Icdas had, at some time, generated records identifying the manufacturer of the subject rebar but failed to maintain control of that information. Remand Results at 19, 44. Icdas does not dispute these findings. *See* Icdas's Cmts. at 13–14. Icdas also does not dispute the importance of this information to Commerce's ability to calculate accurate dumping margins. *See id.*; Remand Results at 45. Accordingly, Commerce's determination to make an adverse inference as a result of Icdas' inadequate record keeping will be sustained.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Remand Results are remanded in part and sustained in part; and it is further

ORDERED that, on remand, Commerce shall, consistent with this Opinion, recalculate normal value without making a circumstance of sale adjustment related to the duty drawback adjustment made to export price (or constructed export price); and it is further

ORDERED that Commerce's Remand Results are sustained with respect to the agency's use of partial adverse facts available to Icdas; and it is further

ORDERED that Commerce shall file its remand redetermination on or before January 15, 2020; and it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 5,000 words.

Dated: October 17, 2019
New York, New York

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

Slip Op. 19–131

CSC SUGAR LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00214

[Granting Plaintiff's Motion for Judgment on the Agency Record]

Dated: October 18, 2019

Jeffrey S. Neeley and *Michael Klebanov*, Husch Blackwell, LLP, of Washington, DC for Plaintiff CSC Sugar LLC.

Alexander O. Canizares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. David-*

son, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Brandon Custard*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Robert C. Cassidy, Jr., *Charles S. Levy*, *James R. Cannon, Jr.*, and *Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC for Defendant-Intervenors the American Sugar Coalition, American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association.

Irwin P. Altschuler, *Rosa S. Jeong*, and *Daniel E. Parga*, Greenberg Traurig, LLP, of Washington, DC for Defendant-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera.

Gregory J. Spak, *Kristina Zissis*, and *Ron Kendler*, White and Case LLP, of Washington, DC for Defendant-Intervenor Imperial Sugar Company.

Stephan E. Becker, *Moushami P. Joshi*, and *Sahar J. Hafeez*, Pillsbury Winthrop Shaw Pittman, LLP, of Washington, DC for Defendant-Intervenor Government of Mexico.

OPINION

Gordon, Judge:

This action involves a challenge to the U.S. Department of Commerce's ("Commerce") determination to amend the suspension agreement regarding the countervailing duty ("CVD") investigation on sugar from Mexico. *See Sugar from Mexico*, 82 Fed. Reg. 31,942, PD 95[1] (Dep't of Commerce July 11, 2017) (amendment to CVD Suspension Agreement) ("*CVD Amendment*").[2]

Before the court is the motion of Plaintiff CSC Sugar LLC ("Plaintiff" or "CSC Sugar") for judgment on the agency record under USCIT Rule 56.2. *See* Pl.'s Mot. for J. on the Agency R., ECF No. 85[3] ("Pl.'s Mot."); *see also* Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 101 ("Def.'s Resp."); Def.-Intervenor Gov't of Mexico Resp. Opp. Pl.'s Mot. for J. on the Agency R., ECF No. 95 ("GOM Resp."); Def.-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera Resp. Opp. Pl.'s Mot. for J. on the Agency R., ECF No. 96 ("Cámara Resp."); Def.-Intervenors American Sugar Coalition, American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association's Resp. Opp.

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[1] "PD ___" refers to a document contained in the public administrative record, which is found in ECF Nos. 33–1 and 67–71 unless otherwise noted. "CD ___" refers to a document contained in the confidential administrative record, which is found in ECF Nos. 33–2, 72, and 74 unless otherwise noted.

[2] CSC Sugar also filed a parallel action, Court No. 17–00215, challenging Commerce's amendment to the Antidumping Duty ("AD") Suspension Agreement, which is addressed in this Court's decision, Slip Op. 19–132, also issued this date.

[3] All citations to parties' briefs and the agency record are to their confidential versions unless otherwise noted.

Pl.'s Mot. for J. on the Agency R., ECF No. 99 ("ASC Resp."); Pl.'s Reply in Supp. Of Mot. for J. on the Agency R., ECF No. 104 ("Pl.'s Reply"). The court has jurisdiction over this matter pursuant to § 516A(a)(2)(B)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iv),[4] and 28 U.S.C. § 1581(1)(c) (2012). For the reasons set forth below, the court grants Plaintiff's motion.

I. Background

In 2014, after the American Sugar Coalition and its members (collectively, "ASC"), filed a petition with Commerce and the U.S. International Trade Commission ("ITC"), the agencies conducted an investigation as to whether imports of sugar from Mexico were being subsidized, and whether such imports were injurious to the U.S. industry. After Commerce issued a preliminary determination that countervailable subsidies were being supplied, Commerce and the Government of Mexico negotiated and signed a suspension agreement. *See Sugar From Mexico: Suspension of Countervailing Duty Investigation*, 79 Fed. Reg. 78,044 (Dep't of Commerce Dec. 29, 2014) ("*CVD Agreement*").

In 2017, Commerce and the Government of Mexico negotiated amendments to the suspension agreement. *See CVD Amendment*. Among other changes, this amendment altered the definition of "refined sugar" in the *CVD Agreement*. *See id.* (amending definition of "refined sugar" to consist of sugar with a polarity 99.2 degrees and above, instead of 99.5 degrees polarity and above). In response, CSC Sugar commenced this action. *See* Compl., ECF No. 11. After Commerce filed the administrative record pursuant to 19 U.S.C. § 1516a(b)(2)(A)(i) and USCIT Rule 73.2(a), CSC Sugar contended that Commerce did not meet its obligation to file a *complete* administrative record. *See* Pl.'s Mot. to Complete Admin. R., ECF Nos. 36 & 37. Specifically, CSC Sugar argued that Commerce failed to memorialize and include in the record *ex parte* communications between Commerce officials and interested parties (including the domestic sugar industry and representatives of Mexico) as required by 19 U.S.C. § 1677f(a)(3). *Id.*

The court agreed and ordered Commerce to supplement the administrative record with any *ex parte* meetings about the *CVD Amendment*. *See CSC Sugar LLC v. United States*, 42 CIT ___, ___, 317 F. Supp. 3d 1322, 1326 (2018) ("*CSC Sugar I*"). Commerce then supplemented the administrative record with two logs. The first, a "Consultations Log," documented the *ex parte* meetings that were held or may

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

have been held in relation to the CVD Agreement Amendment. *See* Consultations Log, ECF No. 67–1. The second was an "Email Log" that included email correspondence, with attached documents, between interested parties and Commerce. *See* Email Log, ECF No. 67–2. CSC Sugar subsequently filed a motion for judgment on the agency record under USCIT Rule 56.2 arguing that Commerce's failure during the suspension amendment negotiations to maintain contemporaneous *ex parte* meeting memoranda (pursuant to § 1677f(a)(3)) could not be adequately remedied by the Government's belated and incomplete supplementation of the record. *See* Pl.'s Mot. CSC Sugar maintains that the only adequate remedy to address Commerce's willful disregard of its statutory obligations is to vacate the CVD Amendment. Id. at 23–29.

II. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. Nippon *Steel Corp v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting a reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2019).

The court does not set aside agency action for procedural errors unless the error is prejudicial to the party seeking to have the action set aside. *See Sea-Land Serv. Inc., v. United States*, 14 CIT 253, 257,

735 F. Supp 1059, 1063 (1990)), *aff'd and adopted*, 923 F.2d 838 (Fed. Cir. 1991). However, in circumstances where the administrative record "looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless." *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (addressing application of the Administrative Procedure Act to executive agency's failure to document prohibited *ex parte* communications).

III. Discussion

In *CSC Sugar I*, the court held that 19 U.S.C. § 1516a(b)(2)(A)(i) unambiguously required that "all information presented to or obtained by" Commerce in the course of reaching its *CVD Amendment* determination be provided to the court in order to review CSC Sugar's challenge to that determination. *See* 42 CIT at ___, 317 F. Supp. 3d at 1332. The court therefore ordered the Government to comply with §§ 1516a(b)(2) and 1677f(a)(3) and to supplement the record with the memoranda summarizing "any ex parte meetings about the CVD Amendment." *Id.* 42 CIT at ___, 317 F. Supp. 3d at 1332–33. Commerce then supplemented the administrative record with the Consultations and Email Logs that attempted to provide detail as to Commerce's *ex parte* communications with interested parties during the *CVD Amendment* negotiations.

The question the court must now address is whether CSC Sugar is entitled to have the *CVD Amendment* vacated given that Commerce did not and cannot provide contemporaneous memoranda of its *ex parte* meetings during the negotiation of the *CVD Amendment* as required under § 1677f(a)(3). Plaintiff contends that "[b]ecause the relevant statutes and regulation are 'intended to provide important procedural benefits,' the court must vacate the [*CVD Amendment*] unless Commerce shows its error was harmless." *See* Pl.'s Mot. at 23–25 (relying on *Guangdong Chemicals Imp. & Exp. Corp. v. United States*, 30 CIT 85, 414 F. Supp. 2d 1300 (2006), and *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993)). CSC Sugar further argues that Commerce's violations of §§ 1516a(b)(2)(A)(i) and 1677f(a)(3), as well as 19 C.F.R. § 351.104, constituted prejudicial error as Commerce's recordkeeping failures "foreclosed any opportunity [for CSC Sugar] to inspect or comment on those memoranda." *Id.* at 27.

The Government admits that the record in this matter remains incomplete because "preparing *ex parte* memoranda documenting meetings a year or two after the fact would have been extremely

difficult, if not impossible." *See* Def.'s Resp. at 8. Nevertheless, the Government maintains that the record as amended presents a "fulsome review of Commerce's negotiation of the CVD Amendment." *See id.* The Government therefore contends that "the amended record allows for effective judicial review of the merits of Commerce's determination and complies with 19 U.S.C. § 1677f(a)(3)." *Id.* at 10. The Government further argues that Plaintiff misstates the proper burden of proof. The Government maintains that even if the record as amended is not complete, CSC Sugar is not entitled to any further relief absent a demonstration of "substantial prejudice" resulting from Commerce's failure to adhere to the recordkeeping requirements of § 1677f(a)(3). *See* Def.'s Resp. at 10–28 (citing *Suntec Indus. Co. v. United States*, 857 F.3d 1363 (Fed. Cir. 2017) ("*Suntec III*") and *PAM, S.p.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006)).

19 U.S.C. § 1677f does not specify a particular remedy for the violation of its provisions. The parties agree that Commerce's failure to document its *ex parte* meetings during the negotiation of the *CVD Amendment* should be viewed as a procedural failure on the part of the agency. *See* Pl.'s Mot. at 23 ("Separately and together, § 1516a(b)(2)(A)(i), § 1677f(a)(3), and 19 C.F.R. § 351.104 are intended to provide important procedural benefits." (internal citation and quotation marks omitted)); Def.'s Resp. at 3–7 (emphasizing that Plaintiff's Rule 56.2 motion hinges on allegations of "procedural error"). However, the parties disagree as to the proper legal framework that should govern the court's analysis of what remedy, if any, Plaintiff may be entitled to obtain for Commerce's recordkeeping failure. It is for the court to determine the consequence, if any, of an agency's procedural errors by applying principles of "harmless error" or the "rule of prejudicial error." *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings."); *see also* 5 U.S.C. § 706 (judicial review of agency action is conducted with "due account ... of the rule of prejudicial error"). Whether an error is prejudicial or harmless depends on the facts of a given case. *See Shinseki v. Sanders*, 556 U.S. 396, 407–08 (2009) (finding that courts are to determine whether an agency error is harmless by "case-specific application of judgment, based upon examination of the record").

Defendant maintains that CSC Sugar has the burden of demonstrating that it suffered "substantial prejudice" from Commerce's recordkeeping errors pursuant to guidance from the U.S. Court of

Appeals for the Federal Circuit in *Suntec III* and *PAM, S.p.A. v. United States*. However, as Plaintiff rightfully points out, those decisions both concerned "the requirement to show substantial prejudice of a *notice defect*." *See Suntec III*, 857 F.3d at 1369 (emphasis added); *see also* Pl.'s Reply at 8–10, 19 (distinguishing the facts of the present action from the decisions on which Defendant relies that involve "technical failures" or defects of "mere 'notice or service requirements'"). This matter involves Commerce's failure to maintain a complete record as required by the statute and its own regulations, and the court agrees with Plaintiff that such issues involved important procedural benefits that go beyond mere technical notice defects. Instead, this matter is similar to circumstances addressed by the U.S. Court of Appeals for the Ninth Circuit in *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993).

In *Audubon*, environmental group plaintiffs challenged an administrative decision of the Endangered Species Committee and argued that the committee had engaged in undocumented *ex parte* meetings and communications with the White House in reaching the contested determination. *See Audubon*, 984 F.2d at 1536–37. There, the Ninth Circuit held that the record must be supplemented and that plaintiffs were entitled to a remand of the contested decision to the committee for a hearing before an ALJ "to determine the nature, content, extent, source, and effect of any ex parte communications that may have transpired." *Id.* at 1549. As the court explained,

> If the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless. Indeed, where the so-called 'record' looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless.

Id. at 1548 (internal citations omitted).

Although Defendant contends that CSC Sugar was not prejudiced because it "actively participated in the administrative proceeding," Defendant fails to address the fact that Commerce's complete failure to follow § 1677f effectively prevented CSC Sugar from commenting on the *ex parte* materials and discussions Commerce engaged in *during* the *CVD Amendment* negotiations. *See* Def.'s Resp. at 10–16. Similarly, Defendant maintains that CSC Sugar did not suffer substantial prejudice because CSC Sugar cannot demonstrate that Commerce's decision would have been different but for Commerce's failure

to maintain and provide contemporaneous *ex parte* memoranda. *See id.* at 26–28. Defendant's argument requires the court to presume, without basis, that any response CSC Sugar may have had to other interested parties' *ex parte* communications with Commerce during the *CVD Amendment* negotiations would have been meritless and futile. By violating § 1677f(a)(3) when it failed to contemporaneously memorialize *ex parte* meetings, and by violating § 1516a(b)(2)(A)(i) and 19 C.F.R. § 351.104 when it failed to maintain and provide a complete administrative record, Commerce foreclosed any opportunity for Plaintiff to inspect or comment on those memoranda.

The court has previously explained why Commerce's failure to timely maintain *ex parte* memoranda during the administrative proceeding violates the statutory protections and purpose of § 1677f(a)(3) and prejudices interested parties:

> Whether or not information is in the record via the petition or otherwise, Commerce is not entitled to choose which covered *ex parte*meetings it will memorialize, based on its own identification of redundancies. Parties are entitled to know when and how information was conveyed; they should not have to rely on subtle judgments by Commerce officials or employees about whether factual information is important, is already in the record in some other form, or is even useful to the agency or to the parties. All Commerce was required to do was to have timely memoranda drafted and filed so that parties could review them at some useful point during the proceeding. Placing a few very summary memoranda on the record after all decision-making is complete is useless and disrespectful of the administrative process, as well as violative of the statute. By requiring that the memoranda be available for 'inspection,' the statute requires that the parties to the proceeding be able to inspect the memoranda so that they may comment on the factual data contained therein or ask for more detailed memoranda, if those placed on the record are not informative. *See Wieland–Werke AG v. United States*, 22 CIT 129, 134–35, 4 F. Supp. 2d 1207, 1212–13 (1998) (parties must be allowed to comment on information obtained by Commerce). *See also* 19 U.S.C. § 1677m(g) (requiring "opportunity to comment on the information obtained by the administrative authority"). Commerce's disregard as to timing does not serve procedural due process or the goal of transparency, as required by the statute.

Nippon Steel Corp. v. United States, 24 CIT 1158, 118 F. Supp. 2d 1366, 1373–74 (2000).[5] For these reasons, the court concludes (1) that Commerce's failure to follow the recordkeeping requirements of § 1677f(a)(3) cannot be described as "harmless" and (2) that the agency's recordkeeping failure substantially prejudiced Plaintiff. Therefore, the *CVD Amendment* must be vacated.

IV. Conclusion

Based on the foregoing, the court grants Plaintiff's USCIT Rule 56.2 motion for judgment on the agency record. Judgment will be entered accordingly.

Dated: October 18, 2019
New York, New York

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

Slip Op. 19–132

CSC SUGAR LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00215

[Granting Plaintiff's Motion for Judgment on the Agency Record]

Dated: October 18, 2019

Jeffrey S. Neeley and *Michael Klebanov*, Husch Blackwell, LLP, of Washington, DC for Plaintiff CSC Sugar LLC.

Alexander O. Canizares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Brandon Custard*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Robert C. Cassidy, Jr., *Charles S. Levy*, *James R. Cannon, Jr.*, and *Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC for Defendant-Intervenors the American Sugar Coalition, American Sugar Cane League, American Sugarbeet

[5] The court in *Nippon Steel Corp.* ultimately concluded that Commerce's failure to memorialize the submission of information *ex parte* was "harmless" in the specific circumstances presented there because the aggrieved respondent had prevailed on the relevant final determination. *See Nippon Steel Corp.*, 24 CIT 1158, 118 F. Supp. 2d at 1374 & n.7 ("The court, however, will not vacate the final determination and subsequent order based on Commerce's error, as requested by NSC. It is likely that in this case the error that is obvious was harmless.... The final critical circumstances decision was in NSC's favor."). Here, the court cannot similarly conclude that Commerce's failure to timely maintain *ex parte* memoranda on the record pursuant to § 1677f(a)(3) was harmless. *Cf. Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1384–85 (Fed. Cir. 2017) (explaining that where an agency's procedural error affects the record and leaves "uncertainty" as to whether any prejudice occurred, court will refuse to find that error to be harmless).

Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association.

Irwin P. Altschuler, *Rosa S. Jeong*, and *Daniel E. Parga*, Greenberg Traurig, LLP, of Washington, DC for Defendant-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera.

Gregory J. Spak, *Kristina Zissis*, and *Ron Kendler*, White and Case LLP, of Washington, DC for Defendant-Intervenor Imperial Sugar Company.

OPINION

Gordon, Judge:

This action involves a challenge to the U.S. Department of Commerce's ("Commerce") determination to amend the suspension agreement regarding the antidumping duty ("AD") investigation on sugar from Mexico. *See Sugar from Mexico*, 82 Fed. Reg. 31,945, PD 114[1] (Dep't of Commerce July 11, 2017) (amendment to AD Suspension Agreement) ("*AD Amendment*").[2]

Before the court is the motion of Plaintiff CSC Sugar LLC ("Plaintiff" or "CSC Sugar") for judgment on the agency record under USCIT Rule 56.2. *See* Pl.'s Mot. for J. on the Agency R., ECF No. 88[3] ("Pl.'s Mot."); *see also* Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 100 ("Def.'s Resp."); Def.-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera Resp. Opp. Pl.'s Mot. for J. on the Agency R., ECF No. 93 ("Cámara Resp."); Def.-Intervenors American Sugar Coalition, American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association's Resp. Opp. Pl.'s Mot. for J. on the Agency R., ECF No. 95 ("ASC Resp."); Pl.'s Reply in Supp. Of Mot. for J. on the Agency R., ECF No. 104 ("Pl.'s Reply"). The court has jurisdiction over this matter pursuant to § 516A(a)(2)(B)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iv),[4] and 28 U.S.C. § 1581(1)(c) (2012). For the reasons set forth below, the court grants Plaintiff's motion.

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[1] "PD ___" refers to a document contained in the public administrative record, which is found in ECF Nos. 29–1, 62–72 unless otherwise noted. "CD ___" refers to a document contained in the confidential administrative record, which is found in ECF Nos. 29–2, 73, 74, 75, and 77 unless otherwise noted.

[2] CSC Sugar also filed a parallel action, Court No. 17–00214, challenging Commerce's amendment to the Countervailing Duty ("CVD") Suspension Agreement, which is addressed in this Court's decision, Slip Op. 19–131, also issued this date.

[3] All citations to parties' briefs and the agency record are to their confidential versions unless otherwise noted.

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

I. Background

In 2014, after the American Sugar Coalition and its members (collectively, "ASC"), filed a petition with Commerce and the U.S. International Trade Commission ("ITC"), the agencies conducted an investigation as to whether imports of sugar from Mexico were being sold at less than fair value, and whether such imports were injurious to the U.S. industry. After Commerce issued a preliminary determination that sugar from Mexico was being sold, or was likely to be sold, into the United States at less than fair value, Commerce and the Government of Mexico negotiated and signed a suspension agreement. *See Sugar From Mexico: Suspension of Antidumping Investigation*, 79 Fed. Reg. 78,039 (Dep't of Commerce Dec. 29, 2014) ("*AD Agreement*").

In 2017, Commerce and the Government of Mexico negotiated amendments to the suspension agreement. *See AD Amendment*. Among other changes, this amendment altered the definition of "refined sugar" in the *AD Agreement*. *See id.* (amending definition of "refined sugar" to consist of sugar with a polarity 99.2 degrees and above, instead of 99.5 degrees polarity and above). In response, CSC Sugar commenced this action. *See* Compl., ECF No. 11. After Commerce filed the administrative record pursuant to 19 U.S.C. § 1516a(b)(2)(A)(i) and USCIT Rule 73.2(a), CSC Sugar contended that Commerce did not meet its obligation to file a *complete* administrative record. *See* Pl.'s Mot. to Complete Admin. R., ECF Nos. 32 & 33. Specifically, CSC Sugar argued that Commerce failed to memorialize and include in the record *ex parte* communications between Commerce officials and interested parties (including the domestic sugar industry and representatives of Mexico) as required by 19 U.S.C. § 1677f(a)(3). *Id.*

The court agreed and ordered Commerce to supplement the administrative record with any *ex parte* meetings about the *AD Amendment*. *See CSC Sugar LLC v. United States*, 42 CIT ___, ___, 317 F. Supp. 3d 1334, 1345 (2018) ("*CSC Sugar I*"). Commerce then supplemented the administrative record with two logs. The first, a "Consultations Log," documented the *ex parte* meetings that were held or may have been held in relation to the AD Agreement Amendment. *See* Consultations Log, ECF No. 62–1. The second was an "Email Log" that included email correspondence, with attached documents, between interested parties and Commerce. *See* Email Log, ECF No. 62–2. CSC Sugar subsequently filed a motion for judgment on the agency record under USCIT Rule 56.2 arguing that Commerce's failure during the suspen-

sion amendment negotiations to maintain contemporaneous *ex parte* meeting memoranda (pursuant to § 1677f(a)(3)) could not be adequately remedied by the Government's belated and incomplete supplementation of the record. *See* Pl.'s Mot. CSC Sugar maintains that the only adequate remedy to address Commerce's willful disregard of its statutory obligations is to vacate the *AD Amendment. Id.* at 23–29.

II. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. Nippon *Steel Corp v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting a reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2019).

The court does not set aside agency action for procedural errors unless the error is prejudicial to the party seeking to have the action set aside. *See Sea-Land Serv. Inc., v. United States*, 14 CIT 253, 257, 735 F. Supp 1059, 1063 (1990)), *aff'd and adopted*, 923 F.2d 838 (Fed. Cir. 1991). However, in circumstances where the administrative record "looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which

the agency must then show to be harmless." *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (addressing application of the Administrative Procedure Act to executive agency's failure to document prohibited *ex parte* communications).

III. Discussion

In *CSC Sugar I*, the court held that 19 U.S.C. § 1516a(b)(2)(A)(i) unambiguously required that "all information presented to or obtained by" Commerce in the course of reaching its *AD Amendment* determination be provided to the court in order to review CSC Sugar's challenge to that determination. *See* 42 CIT at ___, 317 F. Supp. 3d at 1340. The court therefore ordered the Government to comply with §§ 1516a(b)(2) and 1677f(a)(3) and to supplement the record with the memoranda summarizing "any ex parte meetings about the AD Amendment." *Id.* 42 CIT at ___, 317 F. Supp. 3d at 1345. Commerce then supplemented the administrative record with the Consultations and Email Logs that attempted to provide detail as to Commerce's *ex parte* communications with interested parties during the *AD Amendment* negotiations.

The question the court must now address is whether CSC Sugar is entitled to have the *AD Amendment* vacated given that Commerce did not and cannot provide contemporaneous memoranda of its *ex parte* meetings during the negotiation of the *AD Amendment* as required under § 1677f(a)(3). Plaintiff contends that "[b]ecause the relevant statutes and regulation are 'intended to provide important procedural benefits,' the court must vacate the [*AD Amendment*] unless Commerce shows its error was harmless." *See* Pl.'s Mot. at 23–25 (relying on *Guangdong Chemicals Imp. & Exp. Corp. v. United States*, 30 CIT 85, 414 F. Supp. 2d 1300 (2006), and *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993)). CSC Sugar further argues that Commerce's violations of §§ 1516a(b)(2)(A)(i) and 1677f(a)(3), as well as 19 C.F.R. § 351.104, constituted prejudicial error as Commerce's recordkeeping failures "foreclosed any opportunity [for CSC Sugar] to inspect or comment on those memoranda." *Id.* at 27.

The Government admits that the record in this matter remains incomplete because "preparing *ex parte* memoranda documenting meetings a year or two after the fact would have been extremely difficult, if not impossible." *See* Def.'s Resp. at 8. Nevertheless, the Government maintains that the record as amended presents a "ful-

some review of Commerce's negotiation of the AD Amendment." *See id.* The Government therefore contends that "the amended record allows for effective judicial review of the merits of Commerce's determination and complies with 19 U.S.C. § 1677f(a)(3)." *Id.* at 10. The Government further argues that Plaintiff misstates the proper burden of proof. The Government maintains that even if the record as amended is not complete, CSC Sugar is not entitled to any further relief absent a demonstration of "substantial prejudice" resulting from Commerce's failure to adhere to the recordkeeping requirements of § 1677f(a)(3). *See* Def.'s Resp. at 10–28 (citing *Suntec Indus. Co. v. United States*, 857 F.3d 1363 (Fed. Cir. 2017) ("*Suntec III*") and *PAM, S.p.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006)).

19 U.S.C. § 1677f does not specify a particular remedy for the violation of its provisions. The parties agree that Commerce's failure to document its *ex parte* meetings during the negotiation of the *AD Amendment* should be viewed as a procedural failure on the part of the agency. *See* Pl.'s Mot. at 23 ("Separately and together, § 1516a(b)(2)(A)(i), § 1677f(a)(3), and 19 C.F.R. § 351.104 are intended to provide important procedural benefits." (internal citation and quotation marks omitted)); Def.'s Resp. at 3–7 (emphasizing that Plaintiff's Rule 56.2 motion hinges on allegations of "procedural error"). However, the parties disagree as to the proper legal framework that should govern the court's analysis of what remedy, if any, Plaintiff may be entitled to obtain for Commerce's recordkeeping failure. It is for the court to determine the consequence, if any, of an agency's procedural errors by applying principles of "harmless error" or the "rule of prejudicial error." *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings."); *see also* 5 U.S.C. § 706 (judicial review of agency action is conducted with "due account ... of the rule of prejudicial error"). Whether an error is prejudicial or harmless depends on the facts of a given case. *See Shinseki v. Sanders*, 556 U.S. 396, 407–08 (2009) (finding that courts are to determine whether an agency error is harmless by "case-specific application of judgment, based upon examination of the record").

Defendant maintains that CSC Sugar has the burden of demonstrating that it suffered "substantial prejudice" from Commerce's recordkeeping errors pursuant to guidance from the U.S. Court of Appeals for the Federal Circuit in *Suntec III* and *PAM, S.p.A. v. United States*. However, as Plaintiff rightfully points out, those decisions both concerned "the requirement to show substantial prejudice of a *notice defect*." *See Suntec III*, 857 F.3d at 1369 (emphasis added);

see also Pl.'s Reply at 8–10, 19 (distinguishing the facts of the present action from the decisions on which Defendant relies that involve "technical failures" or defects of "mere 'notice or service requirements'"). This matter involves Commerce's failure to maintain a complete record as required by the statute and its own regulations, and the court agrees with Plaintiff that such issues involved important procedural benefits that go beyond mere technical notice defects. Instead, this matter is similar to circumstances addressed by the U.S. Court of Appeals for the Ninth Circuit in *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993).

In *Audubon*, environmental group plaintiffs challenged an administrative decision of the Endangered Species Committee and argued that the committee had engaged in undocumented *ex parte* meetings and communications with the White House in reaching the contested determination. *See Audubon*, 984 F.2d at 1536–37. There, the Ninth Circuit held that the record must be supplemented and that plaintiffs were entitled to a remand of the contested decision to the committee for a hearing before an administrative law judge "to determine the nature, content, extent, source, and effect of any ex parte communications that may have transpired." *Id.* at 1549. As the court explained,

> If the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless. Indeed, where the so-called 'record' looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless.

Id. at 1548 (internal citations omitted).

Although Defendant contends that CSC Sugar was not prejudiced because it "actively participated in the administrative proceeding," Defendant fails to address the fact that Commerce's complete failure to follow § 1677f effectively prevented CSC Sugar from commenting on the *ex parte* materials and discussions Commerce engaged in *during* the *AD Amendment* negotiations. *See* Def.'s Resp. at 10–16. Similarly, Defendant maintains that CSC Sugar did not suffer substantial prejudice because CSC Sugar cannot demonstrate that Commerce's decision would have been different but for Commerce's failure to maintain and provide contemporaneous *ex parte* memoranda. *See id.* at 26–28. Defendant's argument requires the court to presume, without basis, that any response CSC Sugar may have had to other interested parties' *ex parte* communications with Commerce during

the *AD Amendment* negotiations would have been meritless and futile. By violating § 1677f(a)(3) when it failed to contemporaneously memorialize *ex parte* meetings, and by violating § 1516a(b)(2)(A)(i) and 19 C.F.R. § 351.104 when it failed to maintain and provide a complete administrative record, Commerce foreclosed any opportunity for Plaintiff to inspect or comment on those memoranda.

The court has previously explained why Commerce's failure to timely maintain *ex parte* memoranda during the administrative proceeding violates the statutory protections and purpose of § 1677f(a)(3) and prejudices interested parties:

> Whether or not information is in the record via the petition or otherwise, Commerce is not entitled to choose which covered *ex parte*meetings it will memorialize, based on its own identification of redundancies. Parties are entitled to know when and how information was conveyed; they should not have to rely on subtle judgments by Commerce officials or employees about whether factual information is important, is already in the record in some other form, or is even useful to the agency or to the parties. All Commerce was required to do was to have timely memoranda drafted and filed so that parties could review them at some useful point during the proceeding. Placing a few very summary memoranda on the record after all decision-making is complete is useless and disrespectful of the administrative process, as well as violative of the statute. By requiring that the memoranda be available for 'inspection,' the statute requires that the parties to the proceeding be able to inspect the memoranda so that they may comment on the factual data contained therein or ask for more detailed memoranda, if those placed on the record are not informative. *See Wieland–Werke AG v. United States*, 22 CIT 129, 134–35, 4 F. Supp. 2d 1207, 1212–13 (1998) (parties must be allowed to comment on information obtained by Commerce). *See also* 19 U.S.C. § 1677m(g) (requiring "opportunity to comment on the information obtained by the administrative authority"). Commerce's disregard as to timing does not serve procedural due process or the goal of transparency, as required by the statute.

Nippon Steel Corp. v. United States, 24 CIT 1158, 118 F. Supp. 2d 1366, 1373–74 (2000).[5] For these reasons, the court concludes (1) that Commerce's failure to follow the recordkeeping requirements of §

[5] The court in *Nippon Steel Corp.* ultimately concluded that Commerce's failure to memorialize the submission of information *ex parte* was "harmless" in the specific circumstances presented in that matter because the aggrieved respondent had prevailed on the relevant final determination. *See Nippon Steel Corp.*, 24 CIT 1158, 118 F. Supp. 2d at 1374 & n.7 ("The court, however, will not vacate the final determination and subsequent order based on

1677f(a)(3) cannot be described as "harmless" and (2) that the agency's recordkeeping failure substantially prejudiced Plaintiff. Therefore, the *AD Amendment* must be vacated.

IV. Conclusion

Based on the foregoing, the court grants Plaintiff's USCIT Rule 56.2 motion for judgment on the agency record. Judgment will be entered accordingly.

Dated: October 18, 2019
New York, New York

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

Slip Op. 19–133

NATIONAL NAIL CORP., Plaintiff, and SHANDONG ORIENTAL CHERRY HARDWARE GROUP CO., LTD., Consolidated Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 16–00052

JUDGMENT

Before the court is the United States Department of Commerce's ("Commerce") second remand redetermination ("Remand Results"), ECF No. 87–1, issued pursuant to the court's order in *National Nail Corp. v. United States*, 43 CIT __, Slip Op. 19–71 (June 12, 2019) ("*National Nail II*"). Also before the court are the comments of Plaintiff National Nail Corp., ECF No. 89, and Consolidated Plaintiff Shandong Oriental Cherry Hardware Group Co., Ltd. ("Shandong"), ECF No. 91, and the United States' response to those comments, ECF No. 90.

In *National Nail II*, the court directed Commerce to calculate a separate rate for Shandong in accordance with its instructions. The court ordered:

> (a) with respect to Shandong's factors of production, Commerce shall use the information Shandong reported (i) on a CONNUM-specific basis, and (ii) on a production-group basis, to determine normal value; (b) with respect to Shandong's U.S. sales infor-

Commerce's error, as requested by NSC. It is likely that in this case the error that is obvious was harmless.... The final critical circumstances decision was in NSC's favor."). In this matter, the court cannot similarly conclude that Commerce's failure to timely maintain *ex parte* memoranda on the record pursuant to § 1677f(a)(3) was harmless. *Cf. Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1384–85 (Fed. Cir. 2017) (explaining that where an agency's procedural error affects the record and leaves "uncertainty" as to whether any prejudice occurred, court will refuse to find that error to be harmless).

> mation, Commerce shall use the information Shandong provided, including but not limited to sales data for November and December 2014 and the narrative explanation Shandong provided to tie its sales reconciliation and supporting documentation to its financial statements, in making its comparison of normal value and the price at which the subject merchandise was sold in the United States. With respect to Shandong's unexplained revisions to the August and December 2013 sales quantities, Commerce shall conduct its analysis in accordance with this opinion; and (c) with respect to [Shandong's affiliate,] Jining Dragon's shooting nails, Commerce shall use facts available in filling in missing necessary information, and may draw an adverse inference with respect to information regarding the period of review sales of shooting nails; however, Commerce may not use the deficiencies in Jining Dragon's shooting nails information as a basis for using total adverse facts available.

National Nail II at 48. In the Remand Results, Commerce calculated a rate of 61.05 percent for Shandong, in compliance with the court's order. Remand Results at 5. Commerce stated:

> In accordance with the Second Remand Order, and under respectful protest, for these final results of redetermination, Commerce calculated a rate for [Shandong] using the [factors of production] and U.S. sales information it submitted in the underlying review. Commerce also valued [Shandong]'s [factors of production], movement expenses, and financial ratios using surrogate values from the record information in the underlying review. In addition, and consistent with the Second Remand Order, Commerce applied partial [adverse facts available] to the U.S. sales of shooting nails supplied by Jining Dragon. As partial [adverse facts available], Commerce applied the highest transaction-specific assessment rate calculated for [Shandong] to the entries associated with these shooting nails.

Remand Results 4. There being no further dispute in this matter, each of the parties now asks the court to sustain the Remand Results.

Upon consideration of the Remand Results, the parties' submissions, and the papers and proceedings had herein, it is hereby

ORDERED that the Remand Results are sustained.

Dated: October 18, 2019
New York, New York

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