U.S. Court of International Trade

Slip Op. 15–78

SCHLUMBERGER TECHNOLOGY CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 11–00266
PUBLIC VERSION

[Determining the tariff classification of certain imported bauxite proppants]

Dated: July 22, 2015

Alexander H. Schaefer, Crowell & Moring LLP, of Washington, DC, argued for plaintiff Schlumberger Technology Corp. With him on the brief were *John B. Brew*, *Joseph L. Meadows*, and *David C. Wolff*.

Aimee Lee, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant United States. With her on the brief were *Amy M. Rubin*, Acting Assistant Director, and *Stuart Delery*, Assistant Attorney General. Of counsel on the brief were *Edward Maurer* and *Michael Heydrich*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Stanceu, Chief Judge:

In this action, plaintiff Schlumberger Technology Corp. ("STC" or "Schlumberger") contests the tariff classification determined by U.S. Customs and Border Protection ("Customs" or "CBP") for two types of imported bauxite proppants suitable for use in hydraulic fracturing.

Before the court are plaintiff's and defendant's motions for summary judgment. Schlumberger Tech. Corp.'s Mot. for Summ. J. (Nov. 22 & 25, 2013), ECF Nos. 64 (conf.), 69 (public) ("Pl.'s Mot."); Def.'s Mot. for Summ. J. (Nov. 22, 2013), ECF Nos. 66 (conf.), 67 (public) ("Def.'s Mot."). The court denies defendant's motion, determining that the government's proffered classifications are incorrect. The court grants summary judgment in favor of plaintiff.

I. BACKGROUND

Schlumberger was the importer of record for two 2010 entries of bauxite proppants from the People's Republic of China ("China") that are the subject of this case ("subject merchandise" or "subject prop-

pants").[1] Joint Stipulations of Fact No. 8 (Aug. 8, 2013), ECF Nos. 53 (conf.), 54 (public) ("First Set of Stipulations"). Customs liquidated these entries, on December 27, 2010 and February 11, 2011, respectively, in both instances determining classification in subheading 6909.19.50, Harmonized Tariff Schedule of the United States ("HTSUS") ("ceramic wares for laboratory, chemical or other technical uses . . . : Other, other"), at 4% *ad valorem*.[2] Stipulation Nos. 2(c) (Dallas entry), 3(c) (Los Angeles/Long Beach entry). Customs determined the same classification in denying Schlumberger's protests of the liquidations. Protest Records for the Los Angeles/Long Beach Entry 1 (June 27, 2011) ("Los Angeles/Long Beach Entry Protest Record"), Ex. 2 to Mem. of Law & Authorities in Supp. of Schlumberger Tech. Corp.'s Mot. for Summ. J. (Nov. 22 & 25, 2013), ECF Nos. 64 (conf.), 69 (public) ("Pl.'s Br."); Protest Records for the Dallas Entry 1 (July 11, 2011) ("Dallas Entry Protest Record"), Ex. 3 to Pl.'s Br.

Schlumberger initiated this action by filing a summons on July 29, 2011 and a complaint on August 2, 2011. Summons, ECF No. 1; Compl., ECF No. 5. Defendant filed an answer on January 6, 2012. Answer, ECF No. 12.

Schlumberger and defendant United States each moved for summary judgment. Pl.'s Mot.; Pl.'s Br.; Def.'s Mot.; Mem. in Supp. of Def.'s Mot. for Summary J. (Nov. 22, 2013), ECF Nos. 66 (conf.), 67 (public) ("Def.'s Br.). Defendant and plaintiff each opposed the other's motion for summary judgment. Mem. of Law & Authorities in Supp. of Schlumberger Tech. Corp.'s Opp'n to Def.'s Mot. for Summ. J. (Dec. 30, 2013), ECF Nos. 71 (conf.), 72 (public) ("Pl.'s Opp'n"); Def.'s Opp'n to Pl.'s Mot. for Summ. J. (Dec. 30, 2013), ECF Nos. 73 (conf.), 74 (public) ("Def.'s Opp'n"). Plaintiff and defendant each filed reply briefs. Mem. of Law & Authorities in Supp. of Schlumberger Tech. Corp.'s Reply to Def.'s Opp'n to Schlumberger's Mot. for Summ. J. (Jan. 21, 2014), ECF Nos. 78 (conf.), 79 (public) ("Pl.'s Reply"); Def.'s Reply Mem. (Jan. 21, 2014), ECF Nos. 80 (conf.), 81 (public) ("Def.'s Reply").

The court held oral argument on May 8, 2014. ECF No. 83. Prior to and following the oral argument, the parties stipulated to a number of facts. First Set of Stipulations (Stipulation Nos. 1–51); Addendum One to Joint Stipulations of Fact (Oct. 18, 2013), ECF Nos. 59 (conf.), 60 (public) ("Second Set of Stipulations") (Stipulation Nos. 52–53);

[1] Entry No. 231–0425653–6 was made on February 10, 2010 at the Port of Dallas, Stipulation No. 2, and Entry No. 231–0434806–9 was made on March 29, 2010 at the Port of Los Angeles/Long Beach, Stipulation No. 3.

[2] Because both entries of the merchandise in question occurred in 2010, all citations herein to the Harmonized Tariff Schedule of the United States ("HTSUS") are to the 2010 version of the HTSUS.

Joint Status Report & Joint Statement of Stipulated Facts (June 9, 2014), ECF Nos. 87 (public), 86 (conf.) ("Third Set of Stipulated Facts") (Stipulation Nos. 54–60).

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006), according to which the court has jurisdiction over an action brought under section 515 of the Tariff Act of 1930 ("Tariff Act"), *as amended*, 19 U.S.C. § 1515 (2006), to contest a tariff classification by Customs. The court proceeds *de novo* in actions brought to contest CBP's denial of a protest. *See* Customs Courts Act of 1980 § 301, 28 U.S.C. § 2640(a)(1) (2006) (directing the Court of International Trade to "make its determinations upon the basis of the record made before the court").

In cases involving a disputed tariff classification, the court, as an initial step, considers whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) ("*Jarvis Clark*"). Plaintiff has the burden of showing that the government's determined classification is incorrect.[3] *Id*. at 876. If plaintiff meets that burden, the court has an independent duty to arrive at "the *correct* result, by whatever procedure is best suited to the case at hand." *Id.* at 878 (emphasis in original).

The court's determining the correct classification involves two steps. *Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1371 (Fed. Cir. 2009) ("*Faus Grp.*"). "The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law." *Id.* "The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which, when disputed, is a question of fact." *Id*. at 1371–72.

Tariff classification is determined according to the General Rules of Interpretation ("GRIs"), and, if applicable, the Additional U.S. Rules of Interpretation ("ARIs").[4] GRI 1 directs that tariff classification, in the first instance, "be determined according to the terms of the head-

[3] Although a decision of U.S. Customs and Border Protection ("Customs" or "CBP") is presumed to be correct, *see* 28 U.S.C. § 2639(a)(1)(2006), the statutory presumption of correctness carries no force as to questions of law and, therefore, has no relevance absent a factual dispute, *Goodman Mfg. L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995).

[4] "Along with the headings and subheadings, which are enumerated in chapters 1 through 99 of the HTSUS (each of which has its own section and chapter notes), the HTSUS statute also contains the 'General Notes,' the 'General Rules of Interpretation' ('GRI'), the 'Additional United States Rules of Interpretation' ('ARIs'), and various appendices for particular categories of goods." *Dependable Packaging Solutions, Inc. v. United States*, 757 F.3d 1374,

ings and any relative section or chapter notes." GRI 1, HTSUS; *Faus Grp.*, 581 F.3d at 1372. Once merchandise is determined to be correctly classified under a particular heading of the HTSUS, a court then looks to the HTSUS subheadings to determine the correct classification of the merchandise in question. GRI 6, HTSUS; *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998) (citations omitted).

Unless there is evidence of "contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings." *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013). Although not binding law, the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System ("Harmonized System" or "HS"), maintained by the World Customs Organization, "may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision."[5] *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007).

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Where tariff classification is at issue, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) ("*Bausch & Lomb*"). In ruling on a motion for summary judgment, the court must credit the non-moving party's evidence and draw all inferences in that party's favor. *Hunt v. Cromartie,* 526 U.S. 541, 552 (1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("*Anderson*")). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248.

B. General Description of the Merchandise

The facts as stated in this Opinion are not in dispute between the parties except where specifically indicated.

The subject proppants are produced from bauxite and are used in hydraulic fracturing, a technique for production from hydrocarbon reservoirs in which a fluid under high pressure is injected into the rock formation to create a fracture. *See* Int'l Trade Comm'n, *Calcined Bauxite Proppants from Australia: Determination of the Comm'n in Investigation No. 731-TA-411 (Final) Under the Tariff Act of 1930, Together With the Info. Obtained in the Investigation* at A-2, USITC

1377 (Fed. Cir. 2014) (citation omitted); *see also Baxter Healthcare Corp. of P.R. v. United States,* 182 F.3d 1333, 1337 (Fed. Cir. 1999) (citing 19 U.S.C. § 3004(a) (1994)).

[5] All citations to the World Customs Organization Explanatory Notes ("ENs") contained herein are to the 2007 version.

Inv. No. 731-TA-411 (Final), March 1989 ("*ITC Investigation on Calcined Bauxite Proppants*"); Stipulation No. 52. Plaintiff Schlumberger, an oil well-site services provider, incorporates proppants, such as those at issue in this litigation, into packages of oil well services it offers to customers. Stipulation Nos. 1, 8, 36. After importation, the proppants are combined with other materials and liquids to create the fracturing fluid, and, once injected, the proppants prevent the fractures from closing. Stipulation Nos. 36, 52.

The proppants at issue here are intermediate strength proppants that are less than a millimeter in diameter. Stipulation Nos. 2(a), 2(a)(i), 3(a), 3(a)(i), 20(b), 22(a), 23(a). The Los Angeles/Long Beach entry was comprised of "S580–2040 Ceramic Proppants" ("20/40 proppants"), and the Dallas entry was comprised of "S580–4070 Ceramic Proppants" ("40/70 proppants"). Stipulation Nos. 2(a), 3(a). The subject proppants were imported in 3,200 pound sacks and in bulk shipments. Stipulation No. 2(b), 3(b), 39, 41. The numbers "20/40" and "40/70" refer to the sieve distribution of the proppants. Stipulation Nos. 20(a), 20(b). The proppants were produced by two different Chinese producers unaffiliated with Schlumberger: one supplier produced the 40/70 proppants and another produced the 20/40 proppants. Stipulation Nos. 25, 26.

Proppant manufacturing typically involves several basic steps: "milling and mixing of raw materials; granulation; drying and screening; firing; cooling down and screening of the proppant, testing, and packing." Stipulation No. 13. In the first step, the raw materials are milled into a fine powder with particles smaller than 300 micron (0.3 millimeters). Stipulation Nos. 27, 45. During this step, limited quantities of other naturally-occurring minerals, described as dopants, were added to the bauxite and are present in the final product. Stipulation No. 53. One dopant was added to both types of proppants to assist in phase formation and to lower firing temperature during production. *Id.* Another dopant was added only to the 20/40 proppants to help increase the crush resistance of the final product. *Id.*

Second, during the "granulation" or "agglomeration" phase, the powder and some added water are placed in a pan granulator. Stipulation No. 28(b). Several organic "binders," including potentially dextrin, starch, polyvinyl alcohol or methylcellulose, are added to assist in the formation of granules, although these binders later are burnt off during the "firing" process (described below) and are absent from the final product. Stipulation Nos. 14, 28(a), 55. The circular motion in the pan granulator results in granules having a significant degree of roundness and sphericity. Stipulation Nos. 22(a), 23(a), 28(c). Third, following granulation, the granules are sorted to comply with

the size specification and dried to remove excess water. Stipulation No. 29(a), (c), (d). Granules that are too large are returned for additional milling and granules that are too small are returned for additional granulation. Stipulation No. 29(b).

Fourth, the pellets that fall within the size specifications are then fired in a kiln. Stipulation No. 30(a), 30(g). Fifth, after firing, the proppants are sieved to ensure that 90% of the proppants fall within the required size range. Stipulation Nos. 31(b), 31(c). The 20/40 proppants were sieved so that 90% of the granules were between 0.850 millimeters and 0.425 millimeters in diameter. Stipulation No. 31(b). The 40/70 proppants were sieved so that 90% of the granules are between 0.425 millimeters and 0.2125 millimeters in diameter. Stipulation No. 31(c).

C. The Tariff Provisions Identified by the Parties

Concluding that the imported merchandise is described by the tariff term "[c]eramic wares for . . . technical uses" as used in the article description for heading 6909, HTSUS, Customs classified both types of the proppants at issue under the HTSUS as follows:

6909.19.50	Ceramic wares for laboratory, chemical or other technical uses; ceramic troughs, tubs and similar receptacles of a kind used in agriculture; ceramic pots, jars and similar articles of a kind used for the conveyance or packing of goods; Other, other. .....4% *ad val.*

Plaintiff moves for summary judgment classifying the merchandise in the following HTSUS provision:

2606.00.00	Aluminum ores and concentrates: Bauxite, calcined, Other. .....Free

In the alternative, plaintiff advocates classification according to either of the following HTSUS provisions:

2818.10.20	Artificial corundum, whether or not chemically defined; aluminum oxide, aluminum hydroxide: Artificial corundum: Other. .....Free
3824.90.39	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Mixtures of two or more inorganic compounds: Other. .....Free

In its motion, defendant seeks summary judgment classifying the proppants in subheading 6909.19.50, the tariff classification Customs determined upon liquidation, but argues in the alternative, with respect to subheading 3824.90, that the proppants are not "[m]ixtures of two or more inorganic compounds" and therefore are classifiable as follows:

3824.90.92	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other. .....5% *ad val.*

Defendant also claims that if the court should find that the proppants are not "wares" within the meaning of heading 6909, HTSUS, that the proppants may be classifiable as follows:

6914.90.80	Other ceramic articles: Other: Other .....5.6% *ad val.*

D. The Classification under Heading 6909, HTSUS Determined by Customs and Advanced by Defendant in Moving for Summary Judgment, Is Incorrect, as is Defendant's Alternative Classification under Heading 6914

Under the two-step process set forth in *Jarvis Clark*, the court first considers whether Schlumberger has met its burden of showing that the government's classification is incorrect. The court concludes that Schlumberger has met this burden. The classification Customs determined upon liquidation, which was subheading 6909.19.50, HTSUS ("Ceramic wares for laboratory, chemical or other technical uses; . . . Other: Other: Other."), is also the primary classification for which the government seeks summary judgment.[6] Def.'s Br. 12. This classifica-

[6] In denying Schlumberger's protests and determining classification under subheading 6909.19.50, HTSUS, Customs relied primarily on a May 21, 2007 ruling in which Customs had evaluated a classification request by Schlumberger concerning merchandise Schlumberger identified as "artificial proppants" ("NY Ruling Letter N005440"). *The Tariff Classification of Artificial Proppants from China, Russia & Venezuela* (May 21, 2007), *available at* rulings.cbp.gov/ny/2007/n005440.doc (last visited July 13, 2015) ("*NY Ruling Letter N005440*"); Dallas Entry Protest Record ("Correct classification is 6909.19.5095 per ruling N005440."); Attach. to Los Angeles/Long Beach Entry Denial of Protest ("There was no clear proof provided that the merchandise in question, S580–2040 was not the subject of ruling N005440."). In NY Ruling Letter N005440, Customs analyzed samples of certain "artificial proppants" and concluded that those proppants were classifiable in subheading 6909.19.50, HTSUS. *NY Ruling Letter N005440* at 2. In support of this position, Customs stated that:

> The submitted samples consist of very fine spherical grains. Laboratory analysis has shown that both samples are composed of aluminum oxide and aluminum silicate with small amounts of other elements. The samples have the characteristics of ceramics and the hardness of each sample is less than 9 on the Mohs scale.

Id. at 1–2. A classification ruling by Customs may be accorded a "respect proportional to its 'power to persuade,'" based on the "thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *United States v. Mead*, 533 U.S. 218, 235 (2001) ("*Mead*"). In *Mead*, the Supreme Court held that CBP's ruling letters are not entitled to deference by the courts under the principle of *Chevron U.S.C., Inc. v. Natural Res. Defense Council*, 467 U.S. 837 (1984). *Id.* The court held that such a ruling letter is entitled to "respect according to its persuasiveness" according to the principles of *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) ("*Skidmore*"). *Id.* NY Ruling Letter N005440, which contains scant

tion is incorrect because the merchandise, as described in the parties' stipulations, does not fall within the scope of heading 6909, HTSUS.

GRI 1 provides that classification, in the first instance, shall "be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. The terms of heading 6909, HTSUS are as follows:

> Ceramic wares for laboratory, chemical or other technical uses; ceramic troughs, tubs and similar receptacles of a kind used in agriculture; ceramic pots, jars and similar articles of a kind used for the conveyance or packing of goods.

Heading 6909, HTSUS. According to defendant's argument, the heading term "[c]eramic wares for . . . technical uses" describes the merchandise in question. Def.'s Br. 20.

The proppants may be described as "ceramic" and, at least arguably, are produced for a use that may be described by the term "technical."[7] The court concludes, however, that the heading term "[c]eramic *wares*," when interpreted according to the intent of the drafters of the HS, does not describe this merchandise. Because the term "wares" is not defined in the HTSUS or the Explanatory Notes, the court looks for guidance to common dictionary definitions. *See E.M. Chems. v. United States*, 920 F.2d 910, 913 (Fed. Cir. 1990). Read collectively, the dictionary definitions indicate that the term "ware" generally is understood to refer to an "article" or "item" resulting from a manufacturing process or craft.[8] Defendant argues that the term is

discussion of theagency's reasoning, lacks the "'power to persuade.'" *Id*. (citing *Skidmore*, 323 U.S. at 140). As plaintiff argues, the "[t]he ruling provides no references to, nor legal or factual analysis of, the applicability of chapter 69 note 1 shaping requirements, or the definition and applicability of the terms 'wares,' 'ceramic wares' or 'ceramic wares for other technical uses' as required by GRI 1." Mem. of Law & Authorities in Supp. of Schlumberger Tech. Corp.'s Mot. for Summ. J. 9 (Nov. 22 & 25, 2013), ECF Nos. 64 (conf.), 69 (public) ("Pl.'s Br.").

[7] *See* EN, Gen. Note (A), (B), chapter 69 (applying the term "ceramic products" to products obtained from inorganic, non-metallic materials that are shaped and then fired, or "[f]rom rock, (e.g., steatite), fired after shaping."). Because bauxite contains oxides of aluminum, it might be described as "metallic," and it also may be described as "rock." *See*"Bauxite," *Encyclopedia Britannica Online*, *available at* http://www.britannica.com/science/bauxite (last visited July 13, 2015) ("[B]auxite, rock largely composed of a mixture of hydrous aluminum oxides.").

[8] The Oxford English Dictionary defines "ware" as: "A collective term for: Articles of merchandise or manufacture; the things which a merchant tradesman or peddler has to sell; goods, commodities." "Ware" (n.3), *Oxford English Dictionary Online* (June 2015), *available at* http://www.oed.com/view/Entry/225693?rskey=CPYR17&result=3 (last visited July 13, 2015). Webster's Dictionary defines "ware," *inter alia*, as: "1 a: manufactured articles, products of art or craft, or farm produce offered for sale: b: an item offered for sale: an article of merchandise . . . 2: goods, commodities, manufacturers, or produce of a specific class or kind <coopers' [ware]> <household [ware]> <mahogany [ware]>—usu. used in

broad enough to encompass the proppants, Def.'s Br. 21, and defendant is correct that some definitions of the term "ware" use terms such as "goods," "commodities," or "produce of a specific class or kind" that are broader than the term "articles."[9] However, the contexts in which the various definitions are presented connote that the term "ware" is too narrow to encompass crude or semi-processed substances, such as the proppants at issue.

The stipulated facts that the proppants are less than a millimeter in size and are produced in bulk, not as individual items or articles, support the conclusion that the proppants are not ceramic "wares" within the meaning of that term as used in heading 6909, HTSUS. *See* Stipulation Nos. 2(b), 3(b), 39, 41. This conclusion is also supported by samples of the merchandise. Plaintiff provided two plastic bags containing samples of proppants, which plaintiff describes as having been produced by the same two companies that produced the subject merchandise (one sample described as being of 20/40 proppants and the other of 40/70 proppants).[10] Physical Samples (Nov. 22, 2013), ECF No. 63 ("Proppant Samples"). For purposes of summary judgment, the court rules that these samples would be admissible. Visual inspection of the samples reveals that bauxite proppants in the two size categories at issue appear as a dark gray granular substance with extremely small granules.

The Explanatory Note to heading 6909 further supports the court's conclusion that the term "[c]eramic wares" does not describe a semi-processed substance such as an ore that has been milled, granulated, and fired but not advanced to a state that is correctly described as an "item," "article," or "ware." The EN states that "[t]his heading covers a range of varied *articles* usually made from vitrified ceramics (stoneware, porcelain or china, steatite ceramics, etc.), glazed or

combination <hard*ware*> <silver*ware*> <tin*ware*> <glass*ware*>." "Ware" (n.), *Webster's Third New Int'l Dictionary*, Unabridged 2576 (3d ed. 2002) (emphasis added). Interestingly, a definition of "ware" included in the latter source is: "pottery, dishes, or other items of fired clay." *Id*. at 2(d).

[9] The Oxford English Dictionary defines an "article" as: "A particular material thing, *esp.* one belonging to a specified class; a commodity; an item of goods or property." "Article" (n.14), *Oxford English Dictionary Online* (June 2015), *available at* http://www.oed.com/view/Entry/11179?rskey=Y11Jo6&result=1#eid (last visited July 13, 2015).

[10] Defendant asserts that the samples are not representative of the proppants at issue because the samples were not taken from the actual entries that are the subject of this action. Mem. in Supp. of Def.'s Mot. for Summary J. 2–3 (Nov. 22, 2013), ECF Nos. 66 (conf.), 67 (public) ("Def.'s Br."). Neither Customs nor Schlumberger retained samples from the 20/40 entry or the 40/70 entry. Stipulation No. 58. Nevertheless, the samples provided by plaintiff would be admissible at trial, and there is no dispute as to the bulk, granular nature of the merchandise or the size of the granules, as is evident from the parties' stipulations.

unglazed."[11] EN 69.09 (emphasis added). The EN gives numerous examples of the "articles" that would fall within the scope of the heading, none of which is similar to a bulk granular substance such as the proppants in question.[12] The court interprets the phrase "ceramic wares" in light of the enumerated examples in the Explanatory Note to heading 6909 according to the principle of *ejusdem generis*, under which the term in question must possess the same essential characteristics or purposes that unite the listed exemplars. *See Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1332 (Fed. Cir. 2005). The examples given are of articles that can be expected to be made to a specific shape and size, not a product manufactured as a bulk granular substance. EN 69.09; *see also* note 1 to chapter 69, HTSUS ("This chapter applies only to ceramic products which have been fired after shaping.").[13] The proppants are formed by a process described as "granulation" or "agglomeration," in which milled bauxite is mixed with water and some binders and other materials and then formed into granules through rotation in a pan granulator.

---

[11] A "vitrified" ceramic is one that is "converted into glass or a glassy substance by exposure to heat." "Vitrified" (adj.), *Oxford English Dictionary Online* (June 2015), *available at* http://www.oed.com/view/Entry/224103 (last visited July 13, 2015); *see also* "Vitrify" (v.), *Webster's Third New Int'l Dictionary*, Unabridged 2559 (3d ed. 2002) ("to change into glass or a glassy substance by heat and fusion: make vitreous; *esp.* : to produce in (a ceramic ware) enough glassy phase or close crystallization by high firing to make nonporous . . . ."). The proppants have been fired at a temperature sufficient to cause calcination of the granules, but, as an examination of the samples reveals, have not been converted to glass or a glassy substance.

[12] EN 69.09 provides that "[t]he heading covers in particular:"

> (1) Laboratory wares (e.g., for research or industrial use) such as crucibles and crucible lids, evaporating dishes, combustion boats, cupels; mortars and pestles; spoons for acids, spatulas; supports for filters and catalysts; filter plates, tubes, candles, cones, funnels, etc.; water-baths; beakers, graduated vessels (**other than** graduated kitchen measures); laboratory dishes, mercury troughs; small tubes (e.g., combustion tubes, including analysis tubes for estimation of carbon, sulphur, etc.).
>
> (2) Ceramic wares for other technical uses, such as pumps, valves; retorts, vats, chemical baths and other static containers with single or double walls (e.g., for electroplating, acid storage); taps for acids; coils, fractionating or distillation coils and columns, Raschig rings for petroleum fractionating apparatus; grinding apparatus and balls, etc., for grinding mills; thread guides for textile machinery and dies for extruding man-made textiles; plates, sticks, tips and the like, for tools.
>
> (3) Containers of the kinds used for the commercial transport or packing of goods, e.g., large containers, carboys, etc., for the transport of acids and other chemical products; flagons, jars and pots, for foodstuffs (jam, condiments, meat pastes, liqueurs, etc.), for pharmaceutical products or cosmetics (pomades, ointments, creams, etc.), for inks, etc.
>
> (4) Troughs, tubs and similar containers of the type used in agriculture.

EN 69.09 (emphasis in original).

[13] To "shape" is "to give a particular or proper form to by or as if by molding or modeling from an undifferentiated mass" or "to give definite or finished shape to especially by altering a prior shape." "Shape" (v.1, 2), *Webster's Third New Int'l Dictionary*, Unabridged 2087 (3d ed. 2002).

Stipulation Nos. 28(a), 28(b), 28(c). When the granules emerge from this granulation process, they range so substantially in size that sieving is necessary to eliminate granules that do not fall within the desired size range. Stipulation Nos. 31(a), 31(b), 31(c). Even after the proppants are sieved so that 90% of the proppants fall within the desired size range, each of the two ranges characterizing the subject merchandise still permits 100% variation in size. Stipulation Nos. 20(b), 22(a), 23(a).

The Explanatory Note to Chapter 69 is another indication that the drafters of the Harmonized System did not consider HS heading 69.09 to be the correct heading for products such as bauxite proppants. The chapter Explanatory Note describes the organization of chapter 69 into two subchapters (Subchapters I and II), as follows:

> According to the composition and the firing process adopted the following products are obtained:
>
> I. Goods of siliceous fossil meals or of similar siliceous earths and refractory goods of sub-Chapter I (headings 69.01 to 69.03).
>
> II. Other ceramic products, consisting essentially of common pottery, stoneware, earthenware, porcelain or china, etc. constituting sub-Chapter II (headings 69.04 to 69.14).

EN, Gen. Note (A), chapter 69. Subchapter I clearly does not describe the proppants. The description of Subchapter II in the chapter Explanatory Notes, even though containing the words "essentially" and "etc." and thereby admitting of possible exceptions, nevertheless casts serious doubt on the government's preferred classification. *Id.* Proppants produced from bauxite ore are of a different commercial category of goods than are "pottery, stoneware, earthenware, porcelain or china." The Explanatory Note to Subchapter II further clarifies that "other ceramic products" include pottery made from clay, glazed white or coloured ceramics, stoneware that is normally glazed, semi- or imitation porcelains that are "decorated and glazed to give the commercial appearance of porcelain," certain goods made from "powdered steatite, etc. generally mixed with clay," and "articles made of refractory materials (e.g., sintered alumina) . . ." not designed as refractory goods.[14] EN, Gen. Note (II), chapter 69, sub-chapter II. In contrast, the proppants at issue are produced by milling, agglomer-

[14] Steatite is "[a] massive variety of talc, commonly of a grey or greyish green colour, with an unctuous or soapy feel; soap-stone." "Steatite" (n.), *Oxford English Dictionary Online* (June 2015), *available at* http://www.oed.com/view/Entry/189507?Redirectedfrom=Steatite (last visited July 13, 2015). Steatite is also described as "[a] mixture of talc, clay, and alkaline-earth oxides" that is chiefly used "as a ceramic insulator in electronic devices."

ating, and firing bauxite ore, which consists of a crude and variable mixture of various aluminum oxides and various impurities. Stipulation Nos. 12, 13, 54.

Defendant argues that agglomeration shapes the bauxite ore into ceramic wares, within the meaning of note 1 to chapter 69, because the proppants "were intentionally formed into specification-conforming balls." Def.'s Reply 7. Defendant adds that "[t]he process of granulation and agglomeration into particle spheres is commonly and commercially recognized in the industry as forming and shaping the particles to create the desired physical and mechanical performance requirements of the proppants." Def.'s Br. 8 (citing Decl. of Michael Vincent ¶¶ 18–19, 22, 24 ("Vincent Decl."), Ex. 7 to Def.'s Br.; Decl. of William M. Carty ¶¶ 37–43 ("Carty Decl."), Ex. 6 to Def.'s Br.). This argument is unconvincing. Although the individual granules have a degree of sphericity, the agglomeration process produces granules of widely varying sizes, not individual articles of a precise size and shape.

Defendant notes that the Explanatory Note to heading 6909 provides "grinding apparatus and balls, etc., for grinding mills" as examples of "[c]eramic wares for other technical uses." Def.'s Br. 26 (citing EN 69.09). Defendant asserts that ceramic grinding media may be shaped via granulation, directing the court's attention to a patent for certain ceramic grinding media, *id.* at 27 (citing Carty Decl. ¶ 94; U.S. Patent No. 3,486,706 (Dec. 30, 1969) ("U.S. Patent No. 3,486,706"), Ex. 27 to Def.'s Opp'n), specifically, "small ceramic spheroids" that are formed by a process of placing raw materials in "a rotating pelletizing disc or drum" with water, drying, and firing, U.S. Patent No. 3,486,706 at Column 1, 2. Defendant's reference to U.S. Patent No. 3,486,706 does not convince the court that the proppants are classified under heading 6909. Grinding media are not the same product as the proppants, and as to the process of forming the grinding media, the patent itself states that "[i]t is generally desirable to screen and reprocess the green spheroids where a pelletizing disc is used, since oversized and undersized spheroids are generally formed along with the desired range." U.S. Patent No. 3,486,706 at Column 2. The patent further notes that "[w]ith the other, direct forming methods, the screening step can sometimes be eliminated." *Id.* The implication is that the rotating disc or drum method is a less precise method of forming than are the alternative methods of extrusion or molding. *See id.* Defendant has demonstrated only that a type of ceramic grinding media can be produced by granulation. Even were

"Steatite," *Hawley's Condensed Chem. Dictionary* 1043 (14th ed. 2001) (Richard J. Lewis Sr. Ed.).

the court to accept the notion that forms of ceramic grinding media produced in this way necessarily are described by the term "grinding apparatus and balls, etc., for grinding mills" as used in the Explanatory Note to heading 6909, which defendant has not established, the court would not necessarily conclude that *any* ceramic product intended to perform a grinding function would fall within the scope of heading 6909, regardless of the limitation imposed by note 1 to chapter 69, HTSUS and the description of the scope of heading 6909 discussed in the Explanatory Note to the heading.

Defendant also asserts that the subject proppants are "shaped" within the meaning of the note 1 to chapter 69 because the proppants "are chosen for use in hydraulic fracturing specifically for their physical characteristics, such as spherical shape, roundness and strength." Def.'s Br. 4. Defendant asserts further that the function of the subject proppants "derives significant benefit from nearly perfect proppant spheres in order to maximize conductivity of hydrocarbon flow . . . ." *Id*. at 25 (citing Vincent Decl. ¶ 18). Defendant also notes that the Schlumberger's own patent applications indicate "the importance of roundness and sphericity." *Id.* (citing Patent Appl. (WO 2008/105678 A1)); *see also* Def.'s Opp'n 15–16; Carty Decl. ¶ 47 ("Schlumberger patents refer to granulation as a forming or shaping step."). Defendant's arguments highlight that a significant degree of roundness and sphericity are important for ceramic proppants, Def.'s Br. 25, but these arguments do not make the case that the proppants at issue are ceramic articles or "wares" that fall within the intended scope of heading 6909.

Defendant argues that Raschig rings, a type of ceramic ware for technical use provided as an example in the Explanatory Note to heading 6909, are analogous to the subject proppants. Def.'s Br. 27–28. The court disagrees. Raschig rings are hollow tubular goods made to a specific, cylindrical shape. *See* Ex. 11 to Def.'s Reply; "Raschig" (n.), *Oxford English Dictionary Online* (June 2015), *available at* http://www.oed.com/view/Entry/158295?redirectedFrom=Raschig+ring#eid26685723 (last visited July 13, 2015) ("[A] small cylindrical ring usually made of glass, metal, or ceramic material, and used in large numbers as packing in towers and columns for fractionation, solvent extraction, etc."). In this respect, they do not resemble the bulk, granular goods that are before the court.

In summary, because the proppants at issue are not described by the terms of heading 6909, defendant's proffered classification of subheading 6909.19.50, HTSUS is incorrect, and the court, pursuant to GRI 1, HTSUS, next must consider other headings of the HTSUS.

Defendant suggests that, should the court conclude that the term "wares" as used in heading 6909 is insufficiently broad to include the proppants, then "an alternative classification would be for 'other ceramic articles: other: other' under subheading 6914.90.80, HTSUS," which carries a duty of 5.6% *ad valorem*. Def.'s Br. 21 n. 16; subheading 6914.90.80, HTSUS. The court must reject this suggestion. Heading 6914 pertains only to "articles," a limitation that is clear from the article description ("Other ceramic articles") and from the examples given in the Explanatory Note to heading 6914. *See* subheading 6914.90.80, HTSUS; EN 69.14. The notes include as examples "[s]toves and other heating apparatus," "non-decorative flower pots," "fittings for doors, windows, etc.," letters, numbers, and other ceramics for shop signs, ceramic spring level stoppers, jars and containers for laboratory purposes, and other articles such as knife handles. EN 69.14. The Explanatory Note to the heading provides that "[t]his heading covers all ceramic articles not covered by other headings this Chapter or other Chapters of the Nomenclature." *Id.* Unlike the provided examples, the proppants are bulk substances that are not individual "articles" in the normal sense of the word.

E. The Proppants Are Described by the Terms of Heading 2606, HTSUS

In seeking summary judgment, plaintiff submits that the subject bauxite proppants are described by the terms of heading 2606, "[a]luminum ores and concentrates." Plaintiff is correct.[15]

The proppants at issue are produced from non-metallurgical grade bauxite mined in China.[16] Stipulation Nos. 12, 54. Bauxite is defined as "[a] hydrous oxide of alumina and iron, used in the manufacture of aluminium."[17] "Bauxite" (n.), *Oxford English Dictionary Online*

[15] In concluding that the calcined bauxite proppants at issue here are classified under heading 2606, HTSUS, the court reaches a result consistent with an analysis published by the U.S. International Trade Commission. That analysis, although not binding on the court, is the product of an authoritative source with responsibilities pertaining to tariff matters (including the HTSUS and international responsibilities pertaining to the International Harmonized Commodity Description and Coding System). *See* Omnibus Trade and Competitiveness Act of 1988 § 1205, 19 U.S.C. § 3005 (2006). The Commission's analysis of calcined bauxite proppants from Australia determined classification under heading 2606, HTSUS. Int'l Trade Comm'n, *Calcined Bauxite Proppants From Australia Determination of the Comm'n in Investigation No. 731-TA411 (Final) Under the Tariff Act of 1930, Together With the Info. Obtained in the Investigation* at A-13, USITC Inv. No. 731-TA-411 (Final), March 1989 ("*ITC Investigation on Calcined Bauxite Proppants*").

[16] Arguing that the samples were not collected from the samples at issue, defendant asserts that plaintiff has not proved the composition of the proppants. Def.'s Br. 2. Nevertheless, defendant joins in stipulations that the subject proppants were produced from bauxite. Stipulation Nos. 12, 54.

[17] The term "alumina" (Al_2O_3) refers to "[a] white highly heat-resistant solid, aluminium

(June 2015), *available at* http://www.oed.com/view/Entry/16334?redirectedFrom=Bauxite (last visited July 13, 2015). *See also* "Bauxite" (n.), *Webster's Third New Int'l Dictionary*, Unabridged 188 (3d ed. 2002) ("[A]n impure mixture of earthy hydrous aluminum oxides and hydroxides that commonly contains similar compounds of iron and occasionally of manganese . . . and is the principal source of aluminum used in commerce and industry.").

The processes to which the bauxite was subjected in the production of the proppants, as described in the parties' stipulations, did not include concentration of the ore. Therefore, the question presented is whether the proppants are described by the heading term "aluminum ores" within the intended meaning of heading 2606.

Note 2 to chapter 26 states that "[f]or the purposes of headings 2601 to 2617, the term 'ores' means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of section XIV or XV, even if they are intended for non-metallurgical purposes." Note 2 to chapter 26, HTSUS. The Explanatory Note to heading 2606 provides specifically that "[t]his heading covers bauxite (hydrated aluminum oxide containing variable proportions of iron oxide, silica, etc.) . . . ." EN 26.06.

Because there is no dispute that the proppants were produced from bauxite, the next question is whether the bauxite has been subjected to processes that exclude the resulting proppants from the scope of heading 2606. Note 2 to chapter 26, HTSUS, provides that "[h]eadings 2601 to 2617 do not, however, include minerals which have been submitted to processes not normal to the metallurgical industry." Defendant argues that the subject proppants have been submitted to such processes. Def.'s Opp'n 34–35.

The Explanatory Note to chapter 26 provides that "[p]rocesses to which products of headings 26.01 to 26.17 may have been submitted include physical, physico-chemical or chemical operations, provided they are normal to the preparation of the ores for the extraction of metal." EN, Gen. Note, chapter 26. The notes add that "[w]ith the exception of changes resulting from calcination, roasting or firing (with or without agglomeration), such operations must not alter the chemical composition of the basic compound which furnishes the desired metal." *Id*. The Explanatory Note further provides that:

> [P]hysical or physico-chemical operations include crushing,

oxide, which is a major constituent of many rocks, esp. clays, and occurs crystallized as corundum, sapphire, etc. "Alumina" (n.), *Oxford English Dictionary Online* (June 2015),*available at* http://www.oed.com/view/Entry/5877?redirectedFrom=Alumina (last visited July 13, 2015).

> *grinding*, magnetic separation, gravimetric separation, flotation, *screening*, *grading, agglomeration of powders* (e.g., by sintering or pelleting) *into grains*, *balls or briquettes* (whether or not with the addition of small quantities of binders), *drying*, *calcination*, roasting to oxidize, reduce or magnetise the ore, etc. (but not roasting for purposes of sulphating, chloridating, etc.).

Id. (emphasis added).

The subject proppants were produced by "milling and mixing of raw materials; granulation; drying and screening; firing; cooling down and screening of the proppant, testing, and packing." Stipulation No. 13. Grinding and agglomeration "into grains, balls or briquettes" are processes specifically identified in the Explanatory Note to chapter 26. Additionally, the proppants underwent calcination, another process specifically identified in the EN to Chapter 29. To calcine a product is "to heat (as inorganic materials) to a high temperature but without fusing in order to effect useful physical and chemical changes . . . ." "Calcine" (v.), *Webster's Third New Int'l Dictionary*, Unabridged 315 (3d ed. 2002); "Calcination," *Hawley's Condensed Chem. Dictionary* 190 (14th ed. 2001) (Richard J. Lewis Sr. ed.) ("Heating of a solid to a temperature below its melting point . . . . Calcination is often used in the benefaction of ores."); *see also ITC Investigation on Calcined Bauxite Proppants* at A-13 (providing that calcination is "heating at approximately 800 F to drive out chemically held water" and that sintering is "firing at approximately 2,800 F to bring the product to 80 percent of its fusion (melting) point, maximizing the density of the crystal structure (a sintered proppant is twice as strong as a fused/melted proppant."). The subject proppants were heated, but not to the fusing temperature of aluminum oxide, 2,030 C, and not to the point of sintering. Conf. Stipulation Nos. 30(g), 57. "Aluminum Oxide," *Hawley's Condensed Chem. Dictionary* 43 (14th ed. 2001) (Richard J. Lewis Sr. ed.). In addition, the Explanatory Note to heading 2606 states that "[t]he heading also covers bauxite, heat-treated (1,200 C to 1,400 C)." EN 26.06. The granulation, agglomeration, and calcination performed in the production of the subject proppants, then, must be considered normal to the metallurgical industry and not the sort of processing that would cause exclusion from chapter 26 by operation of note 2 to chapter 26, HTSUS.

The court next considers the question of whether the addition of one or both of the dopants removes the proppants from the scope of heading 2606 by operation of chapter note 2. The parties stipulate that during the milling of the raw bauxite, limited quantities of one or two naturally-occurring minerals, described as dopants, were added

and that these minerals are present in the final product.[18] Stipulation No. 53. One dopant was added to both types of proppants to assist in phase formation and to lower firing temperature during production. *Id.* Another dopant was added only to the 20/40 proppants to help increase the crush resistance of the final product. *Id.*

The question presented is whether the court should hold that the addition of small amounts of one or both of these minerals to the milled ore prior to granulation and agglomeration is a process "not normal to the metallurgical industry" within the meaning of chapter note 2. Neither party has identified a technical dictionary or similar technical source that addresses the question as a matter of definition, and the court is unable to find such a source. Nevertheless, the court's own construction of the intended meaning of chapter note 2 causes it to conclude, for a number of reasons, that the additions of the dopants is not the type of process the drafters of the Harmonized System intended would result in the exclusion of calcined bauxite proppants from classification within chapter 26, HTSUS.

First, in discerning the meaning of the phrase "submitted to processes not normal to the metallurgical industry," the court finds persuasive the argument plaintiff advances, and supports with a citation to a technical source, as to the definitions of the two dopants. This technical source demonstrates that each of the two compounds that the parties identify as dopants are also found as impurities in bauxite ore.[19] *See* Pl.'s Br. 34 (citing U.S. Geological Survey, *Bauxite & Alumina Statistics & Info*, Ex. 24 to Pl.'s Br., *available at* http://minerals.usgs.gov/minerals/pubs/commodity/bauxite/ (last visited July 13, 2015)). According to the stipulated facts, the addition of one or both dopants occurred very early in the process: the addition of these dopants was performed on bauxite that had been milled (i.e., ground) but not yet granulated or calcined (heat-treated). Stipulation No. 53. As a result, the addition of a small amount of the dopant or dopants merely altered, in a slight way, the composition of the particular batch of the source ore. Because the minerals used as dopants are also naturally-occurring impurities in bauxite, the addition could not have resulted in a composition that differed from that of a natural bauxite ore. In other words, the processes performed to make the ground bauxite ore into proppants following the initial grinding, i.e.,

[18] The identity of the dopants is on the record of this proceeding by means of confidential stipulations but is not revealed in this Opinion due to requests for proprietary treatment by the parties.

[19] Additionally, a "dopant" is defined as "an impurity added usually in minute amounts to a pure substance to alter its properties." "Dopant" (n.), *Webster's Third New Int'l Dictionary Online*, Unabridged, *available at* http://unabridged.merriam-webster.com/unabridged/dopant (last visited July 13, 2015).

granulation and firing, were performed on ground bauxite ore that was still in a natural state. The ground bauxite ore remained in a natural state following the addition of minute quantities of one or both of the dopants to the starting material. Because the additions of dopants made no change to the natural state of the bauxite ore, the step of adding these dopants, although it could be characterized as a process, does not rise to the type of "process" to which note 2 to chapter 26, HTSUS, was directed.

Second, the intended scope of HS Chapter 26 (and, as to bauxite, the specific scope of heading 2606) includes not only "ores" but also "concentrates," which are "ores which have had part or all of the foreign matter removed by special treatments, either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport." EN to Chapter 26. The court considers it illogical to regard a "special treatment" that removes impurities as permissible under Chapter 26 but also to regard as impermissible the reverse—a step that is simpler than concentration and that essentially puts back into the source material a bauxite impurity.

Third, in addition to concentration of ore, other processes that actually advance milled ore beyond its natural condition are also permitted, including calcination. As the EN to Chapter 26 explains, "[w]ith the exception of changes resulting from calcination, roasting, or firing (with or without agglomeration), such operations must not alter the chemical composition of the basic compound which furnishes the desired metal." The addition of the dopants to the milled ore could not have altered the chemical composition of the aluminum oxides present in the ore. Also, the addition of dopants is relatively insignificant when viewed in comparison to the processes that *are* permitted and that *do* advance the ore from its natural condition, including concentration, calcination, and "agglomeration of powders . . . into grains, balls, or briquettes (whether or not with the addition of small quantities of binders) . . . ." *id.*

Finally, concluding that the addition of one or both of the dopants is sufficient to change the tariff classification to one outside of chapter 26 produces an impracticable result. As demonstrated in this case, Customs has the capability of analyzing the composition of samples of calcined bauxite proppants. But such analysis could not be expected to distinguish between a calcined bauxite proppant to which one or both dopants have been added in small quantities from a calcined bauxite proppant in which the impurities in question already were present in the source ore. In this respect, adding a dopant is not, in a physical sense, distinguishable from combining separate batches of

raw ore that have differing levels of various impurities. As plaintiff argues, "there is no difference between the underlying chemistry of the subject proppants and that of a bauxite or other aluminum ore that happened to naturally contain slightly higher percentages . . . " of the compounds added as dopants. Pl.'s Br. 34–35. The court notes, further, that according to common definitions cited in this Opinion, bauxite varies considerably in composition but is defined by the presence of any of various oxides or hydroxides of aluminum, which invariably are present along with a number of other minerals as impurities. In short, classification of bauxite as an "ore" under heading 2606 requires one or more aluminum compounds to be present among the other minerals but does not depend on any specific composition in the mixture of the various other inorganic compounds.

In summary, the court applies to this case a workable, commonsense interpretation of note 2 to chapter 26, HTSUS that does not preclude classification of the proppants under heading 2606, HTSUS. The note was intended to remove from the chapter those ores that have been subjected to certain (i.e., other than those specifically permitted) industrial processes that effect a change in the physical or chemical condition of bauxite ore, not those processes that merely make a slight change in the starting material and do not advance the condition of bauxite ore from a natural state.

Although arguing that the addition of the dopants does not preclude classification of the proppants under heading 2606, plaintiff joined in a stipulation that in the commercial extraction of aluminum metal from bauxite it is not a normal process to add the dopants at issue here. Stipulation No. 60. The stipulation in question does not alter the court's conclusion. As mentioned previously, the EN to Chapter 26 provides that "[p]rocesses to which products of headings 26.01 to 26.17 may have been submitted include physical, physico-chemical or chemical operations, provided they are normal to the preparation of the ores for the extraction of metal." EN, Gen. Note, chapter 26. This sentence from the EN, in referring to "physical, physico-chemical or chemical operations," should not be construed so broadly, or in an overly-literal sense, so as to preclude the addition of the dopants in question here. For the several reasons the court has discussed, the addition of these dopants in minor quantities does not effect a physical, physico-chemical, or chemical change to the composition of natural bauxite ore.

In opposing classification under heading 2606, defendant also argues that "[t]he proppants, in their condition as imported, are finished products; they are not used to make another product, but are used in their 'as imported' state for hydraulic fracturing." Def.'s Opp'n

2. The court disagrees with the legal conclusion defendant draws as to the scope of heading 2606, HTSUS. Nothing in the terms of the heading, the section or chapter notes, or the relevant Explanatory Notes supports a conclusion that a product ready for the intended use in the condition as imported is outside the scope of the heading. To the contrary, note 2 to chapter 26 and the Explanatory Note to heading 2606 expressly contemplate the inclusion of products intended for non-metallurgical uses, imposing no condition that confines the scope of the heading to products intended for uses as intermediate products. Moreover, the proppants are combined with other materials and liquids to create fracturing fluid. Stipulation No. 36.

Defendant argues, further, that the subject proppants are produced from non-metallurgical grade bauxite and therefore, do not meet the definition of the term "ore" provided in note 2 to chapter 26.[20] Def.'s Opp'n 33–34. Defendant's argument misconstrues note 2, which provides that "[f]or the purposes of headings 2601 to 2617, the term 'ores' means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of section XIV or XV*, even if they are intended for nonmetallurgical purposes*." Note 2 to chapter 26, HTSUS (emphasis added). Even if the bauxite used to produce the proppants is not commercially suitable for the extraction of aluminum, it is indisputably bauxite (as the parties have stipulated) and contains aluminum oxides, which are the "mineralogical species" used to obtain aluminum. The EN to HS Heading 26.06 supports the court's interpretation of chapter note 2, providing that "[t]he heading also covers bauxite . . . suitable for use in metallurgy for the manufacture of aluminum (carbo-thermo-reduction in electric furnace, Gross, etc., progresses) *or for other uses* (in particular, for the manufacture of abrasives)."). EN 26.06 (emphasis added).

Defendant also argues that "there are material issues of fact with respect to the tariff provisions upon which Schlumberger has the

[20] The parties stipulate as follows:

> Bauxite from China is composed chiefly of monohydrate-type bauxite, mainly diaspora [*sic*], with significant amounts of boehmite. Virtually all the Chinese deposits contain or are closely associated with kaolinitic flint clay, which means that they have high reactive silica (aluminosilicate) levels. In fact, commercial definitions of what is actually termed bauxite differ between China and the rest of the world, with Chinese diasporic high-alumina clay being classified as "equivalent" to bauxite. China is noted for its nonmetallurgical-grade bauxite production . . . .

Stipulation No. 12. Diaspore and boehmite are oxides of aluminum. "Diaspore" (n.1), *Webster's Third New Int'l Dictionary*, Unabridged 625 (3d ed. 2002); "Boehmite" (n.), *Webster's Third New Int'l Dictionary*, Unabridged 246 (3d ed. 2002). *See also* Oral Arg. Tr. 39–40, 68 (May 21, 2014), ECF No. 85 (conf.).

burden of proof, *i.e.* headings 2606 and 2828," Def.'s Br. 11, but that there are no material issues of fact with respect to defendant's proposed classification under either headings 6909 or 3824, *id.* Defendant asserts that "Schlumberger has not provided information to establish the actual composition of the proppants at issue," *id*. at 2, and that "[t]his lack of information is fatal to plaintiff's case," *id*. at 13. Specifically, defendant notes that Schlumberger did not produce the subject proppants and argues that Schlumberger is unaware of the precise chemical composition of the proppants. *Id*. at 2. Defendant further claims that certain specification sheets (material data safety sheets, etc.) provided by Schlumberger contain inconsistent information. *id*. at 2. Defendant argues, *inter alia*, that "documents produced by Schlumberger in discovery indicate clay is either added or present in the materials to make proppants." *Id*. at 16; *see also* Oral Arg. Tr. 101–106 (May 21, 2014), ECF No. 85 (conf.) ("Oral Arg. Tr."). According to defendant, the aforementioned samples plaintiff submitted are not representative of the proppants at issue because the samples were not taken from the actual entries that are the subject of this action. Def.'s Br. 2–3.

Although plaintiff insists that clay was not added to the raw materials used to produce the subject proppants, the court does not require the resolution of this factual question in order to conclude that the subject proppants are properly classified under heading 2606. Even where there are ongoing factual disputes between parties, summary judgment may be appropriate where the resolution of those disputes is not necessary to determine the appropriate classification under potential headings. *See, e.g.*, *Dependable Packaging Solutions, Inc. v. United States*, 757 F.3d 1374, 1377 (Fed. Cir. 2014) (affirming a grant of summary judgment by the Court of International Trade despite parties' ongoing disagreement as to the principle use of the considered merchandise).

Because there is no dispute that bauxite was used as the starting material and no dispute as to the processes performed on it to produce the proppants, the court concludes that there is no genuine issue of material fact pertinent to the classification issue presented in this case. As to defendant's argument concerning clay, the parties stipulate that clay may have been present in the bauxite starting material. *See* Stipulation No. 12. Although defendant asserts that clay may have been added as a raw material, there is no indication in record evidence that clay was added to the starting bauxite used to make the proppants in question, and evidence, including affidavits from the two manufacturers producing the proppants, indicates that clay was not

added. *See* Aff. of Mfr. One, Ex. 39 to Conf. Pl.'s Opp'n; Aff. of Mfr. Two, Ex. 40 to Conf. Pl.'s Opp'n. The documents that defendant cites in support of its contention that clay was added correspond to proppants from the supplier that provided the proppants in question, but there is no indication that the proppants described therein are from the same two manufacturers that produced the merchandise at issue in this case. *See* Oral Arg. Tr. 103–05. Additionally, some of the documents do not indicate that clay was *added* to the starting materials—only that the proppants contain clay.

Nevertheless, even were clay added as a starting material, this would not preclude classification under heading 2606. Like the addition of dopants discussed above, any addition of clay to the starting material would not advance the starting material beyond the natural condition of bauxite ore. At least one dictionary definition of "bauxite" states that various clays are commonly present as impurities in bauxite. *Encyclopedia Britannica Online*, *available at* http://www.britannica.com/science/bauxite (last visited July 13, 2015) ("Clay minerals . . . are common impurities."). In short, defendant's argument that clay may have been added in the production of the proppants in question does not establish a genuine issue of material fact so as to preclude summary judgment in favor of plaintiff.

For the foregoing reasons, the court concludes that the proppants at issue in this case are described by the terms of heading 2606, HTSUS. As the court discusses below, the terms of no other heading of the HTSUS describe the merchandise at issue in this case.

F. The Proppants Are Not Described by the Terms of Any Other Heading of the HTSUS

Plaintiff argues in the alternative for classification of the proppants under heading 2828, "[a]rtificial corundum, whether or not chemically defined; aluminum oxide; aluminum hydroxide." Heading 2828, HTSUS. Plaintiff argues that during the firing phase of production, the firing temperature was high enough such that "the naturally-occurring aluminum hydroxide phases converted to corundum." Pl.'s Br. 41 (citing Donald D. Carr, *Industrial Minerals and Rocks* 140 (6th ed. 1994), Ex. 28 to Pl.'s Br.); Rebuttal Report of William M. Carty, PhD at 16 (Aug. 9, 2013), Ex. 13 to Pl.'s Br. The proppants do not fall within a common or commercial definition of the term "artificial corundum." The Explanatory Note to heading 2818 states that "artificial corundum is formed by fusing aluminum oxide in an electrical furnace." EN 28.18. The subject proppants were not formed by fusing aluminum oxide in an electrical furnace but rather through milling, pan granulation, drying, and firing. Stipulation No. 13. As the court

noted above, the stipulated facts show that the subject proppants were not heated to the fusion temperature of aluminum oxide, 2,030 C. *See* Conf. Stipulation Nos. 30(g), 57. Nor do the proppants satisfy a definition of the term "aluminum oxide," which, as the Explanatory Note provides, is a chemical compound and a white powder. EN B 28.18 (explaining that aluminum oxide "is a light white powder, insoluble in water . . . .").

Each party advocates, in the alternative, a classification under heading 3824, HTSUS, a residual heading that includes "chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included." Heading 3824, HTSUS. In opposition to defendant's motion for summary judgment, plaintiff also suggested another alternative classification, this one under heading 6815, "[a]rticles of stone or of other mineral substances, not elsewhere specified or included." Heading 6815, HTSUS. Because the proppants are included under heading 2606, headings 6815 and 3824, each of which is limited to goods "not elsewhere specified or included," must be rejected according to GRI 1.[21] Moreover, the scope of heading 6815 was intended by the HS drafters to encompass, as a general matter, goods made from unfired mineral substances. *See* EN, Gen. Note, chapter 69 ("Firing, after shaping, is the essential distinction between the goods of [Chapter 69] and the mineral or stone products classified in Chapter 68 which are generally not fired, and the glass articles of Chapter 70 in which the vitrifiable compound has undergone complete fusion.").

G. Disposition of the Pending Summary Judgment Motions

Within heading 2606, there is only one eight-digit subheading, and therefore this tariff provision, subheading 2606.00.00, HTSUS, for

[21] In its motion for summary judgment, defendant argues in the alternative for classification under subheading 3824.90.92, HTSUS, subject to duty at 5% *ad valorem*, on the premise that the proppants are not "mixtures of inorganic compounds" as is required for classification in subheading 3824.90.39, HTSUS, free of duty, plaintiff's proposed alternative classification. Def.'s Br. 29–30. Defendant claims that "[t]he proppants do not satisfy the definition of 'mixture' because the chemical components do not retain their identities and are not able to be separated after firing." *Id*. at 29. The term "mixtures of inorganic compounds" is used in subheading 3824.90.39 in a chemical context in that it uses both the term "mixtures" and the term "inorganic chemical compounds." However, the novel definition of "mixtures" advocated by defendant is contrary to definitions of the term commonly understood in chemistry. *See, e.g.*, "Mixture," *Hawley's Condensed Chem. Dictionary* 754 (14th ed. 2001) (Richard J. Lewis Sr. Ed.) (defining a mixture as "[a] heterogeneous association of substances that cannot be represented by a chemical formula," explaining that "[i]ts components may or may not be uniformly dispersed and can usually be separated by mechanical means," and providing as examples of artificial mixtures glass, paint, cement, plastics, and cermets).

"[a]luminum ores and concentrates: Bauxite, calcined: other," is, *eo nomine*, the correct classification for the imported proppants.[22] The duty rate is free. The court, therefore, will enter summary judgment for plaintiff on this classification.

Defendant's motion for summary judgment must be denied. The primary classification defendant advocates, subheading 6909.19.50, HTSUS, is precluded by GRI 1, HTSUS, because the proppants are not "ceramic wares" within the intended meaning of that term as used in heading 6909, HTSUS. Defendant's alternate classification claim, subheading 3824.90.92, HTSUS, is incorrect because heading 3824, HTSUS is limited to goods "not elsewhere specified or included." Heading 3824, HTSUS. Defendant's other alternate classification claim for subheading 6914.90.80, HTSUS, is incorrect because heading 6914, HTSUS is confined to "ceramic articles" rather than substances such as the proppants at issue.

H. Denial of Remaining Motions

Also before the court are various motions related to discovery and confidentiality.[23] With the consent of the parties, the court has held in abeyance any rulings on these motions. June 3, 2013 Tel. Conference, ECF No. 45; Aug. 8, 2013 Status Conference, ECF No. 52; Oral Arg. Tr. 108–09.

Because the court reaches classification decisions upon a conclusion that there is no genuine issue of material fact precluding the granting of the summary judgment motion plaintiff has filed with respect to classification under heading 2606, HTSUS, the court will deny all discovery motions as moot. The confidentiality motions are also moot. Regarding confidentiality, plaintiff states that "Schlumberger's motion [to enforce the protective order] can be dismissed provided Defendant agrees not to publicly disclose documents marked as confidential. Defendant's two motions can be dismissed as moot." Pl.'s Br. 15 n.1. By the terms of the protective order entered in this case, Stipulated Protective Order ¶ 2(a) (April 24, 2012), ECF No. 21, confidential information remains protected and those portions of a document provided by a producing party that "are not confidential shall not be restricted by this Protective Order."

[22] A ten-digit statistical breakout (subheading 2606.00.0060, HTSUS), is provided for calcined, non-refractory grade bauxite, a description to which the subject goods conform, as stated above. Subheading 2606.00.0060, HTSUS.

[23] Schlumberger Tech. Corp.'s Mot. to Maintain Conf. Designations on Docs. it Produced (Mar. 20, 2013), ECF No. 29; Def.'s Mot. to Compel (Apr. 12, 2013), ECF Nos. 32 (conf.), 33 (public); Def.'s Mot. for a Stay of Completion of Disc. Pending Resolution of the Mot. to Compel (Apr. 12, 2013), ECF No. 34; Schlumberger Tech. Corp.'s Mot. for Leave to File its Reply to Def.'s Opp'n to Pl.'s Mot. to Maintain Conf. Designations on Docs. it Produced (Apr. 17, 2013), ECF No. 35; Def.'s Consent Mot. for Oral Arg. (May 13, 2013), ECF No. 41.

I. CONCLUSION

For the reasons stated above, the court will grant plaintiff summary judgment under which the imported proppants are classified under subheading 2606.00.00, HTSUS, free of duty. The court will deny defendant's motion. All other motions will be denied as moot.

Dated: July 22, 2015
New York, NY

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

Slip Op. 15–83

RZBC GROUP SHAREHOLDING CO., LTD., RZBC CO., LTD., RZBC IMP. & EXP. CO., LTD., AND RZBC (JUXIAN) CO., LTD., Plaintiffs, and GOVERNMENT OF CHINA (MOFCOM) Plaintiff-Intervenor, v. UNITED STATES, Defendant, and ARCHER DANIELS MIDLAND COMPANY, CARGILL, INCORPORATED, and TATE & LYLE INGREDIENTS AMERICAS, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 14–00041
PUBLIC VERSION

[Remanding in part the Final Results of a review of a countervailing duty order on citric acid from the People's Republic of China.]

Dated: August 5, 2015

Michael S. Holton, Husch Blackwell LLP, of Washington, DC, argued for plaintiffs. With him on the brief was *Jeffrey S. Neeley*.

Andrew T. Schutz, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, argued for plaintiff-intervenor. With him on the brief was *Francis J. Sailer*.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Carrie A. Dunsmore*, Trial Attorney, *Joyce M. Branda*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Patrick J. Togni, King & Spalding LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief was *Joseph W. Dorn*.

OPINION AND ORDER

Goldberg, Senior Judge:

This case concerns the third administrative review of a countervailing duty order on citric acid and certain citrate salts from the People's

Republic of China ("China" or "the PRC"). *See Citric Acid and Certain Citrate Salts from the People's Republic of China*, 79 Fed. Reg. 108 (Dep't Commerce Jan. 2, 2014) (final admin. review) ("*Final Results*") (covering imports from January 1 to December 31, 2011). Plaintiffs, the RZBC Group Shareholding Co. and related companies ("RZBC" or "Plaintiffs"), sue to reduce the final countervailing duty rate imposed on them by the U.S. Department of Commerce ("Commerce" or "the agency"). The Government of the People's Republic of China, Ministry of Commerce (the "GOC" or "Plaintiff-Intervenor"), also sues, making arguments above and beyond those lodged by RZBC. Constituents of the U.S. domestic industry—including Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Ingredients Americas (the "Defendant-Intervenors")—side with the agency in defending the countervailing duty rate against these attacks.

After carefully considering the parties' briefs and the record, the court remands one issue to Commerce for reconsideration: the calculation of world benchmarks for the steam coal, sulfuric acid, and calcium carbonate subsidies. The agency must properly address whether to render the benchmarks using weighted averages or simple averages. Otherwise, the court sustains the *Final Results* in all respects.

GENERAL BACKGROUND

Countervailing duties serve the same purpose as their better-known cousins, antidumping duties: They level the playing field between U.S. manufacturers and their overseas competition. But each regime addresses a different problem. Antidumping duties ("ADs") were made to fight price discrimination, so if a foreign producer sells goods in the United States for less than in the home market, ADs bring the U.S price back to fair value. *See* 19 U.S.C. § 1673 (2012). Countervailing duties ("CVDs"), by contrast, were created to correct the cost-distorting effect of subsidies. When a foreign government lends support to a producer, CVDs boost the producer's U.S. prices to offset the net benefit from the subsidy. *See id.* § 1671(a).

This appeal challenges the Commerce Department's CVD procedure and calculations from soup to nuts. The background that follows sets the table.

A CVD investigation usually starts with a petition. The purpose of the petition is, quite simply, to alert the agency to the possibility of a subsidy. In this sense, the petition is like a civil complaint. It must allege the rough contours of the subsidy, and it has to contain "information reasonably available to the petitioner supporting those alle-

gations." *Id.* § 1671a(b)(1). But Commerce cannot refuse to investigate unless it "is convinced that the petition and supporting information fail to state a claim upon which relief can be granted." S. Rep. No. 96–249, at 47 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 433. The bar for launching a CVD inquiry is low.

After Commerce accepts a petition and begins investigating, it must decide if the alleged subsidy really exists. By statute, a subsidy may occur when a foreign government "provides a financial contribution . . . to a person and a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B). Financial contributions come in all shapes and sizes, and can include "the direct transfer of funds, . . . tax credits or deductions," and the provision of "goods and services." *Id.* § 1677(5)(D). And while all subsidies must spring from a foreign government, it does not matter if "the subsidy is provided directly or indirectly" to the producer. *Id.* § 1677(5)(C). Commerce can find a subsidy exists even if the foreign authority funneled its donation to the recipient through private parties. *See Delverde, SrL v. United States*, 202 F.3d 1360, 1366 (Fed. Cir. 2000) ("[I]n order to find that a person received a subsidy, Commerce [must] determine that that person received . . . a financial contribution and benefit, either directly or indirectly . . . .").

Once the agency pinpoints a subsidy, it must decide if the subsidy is countervailable, or eligible for CVDs. Because the statute defines "subsidy" so broadly, it is simply impossible to countervail all the benefits that foreign producers take from their governments. (Imagine what chaos would ensue if Commerce tried to slap CVDs on every government loan, tax loophole, and public project in a foreign jurisdiction). For this reason, the law lets Commerce countervail subsidies only if they are "specific." 19 U.S.C. § 1677(5)(A). A domestic subsidy is specific if the foreign authority limits the pool of recipients by law—a *de jure* subsidy—or if the subsidy is given to a select number of industries or enterprises—a *de facto* subsidy. *See id.*§ 1677(5A)(D).

Next, after it's found a specific subsidy, Commerce measures the benefit to the foreign producer or "adequacy of remuneration." *See id.* § 1677(5)(E). If a foreign power furnished subsidized goods and services, the agency calculates benefit using the following formula. First, Commerce finds the price that the foreign producer actually paid for the subsidized goods. Second, it determines the price that the producer would have paid had it bought the goods on the open market. *See id.* § 1677(5)(E)(iv). The agency can do this in at least two ways. It can draw unsubsidized market prices from the producer's home jurisdiction, 19 C.F.R. § 351.511(a)(i) (2015), or it can use "a world market price where it is reasonable to conclude that such price would

be available to purchasers in the country in question," *id.* § 351.511(a)(ii). If more than one world price is available, the agency can build a market price or "benchmark" by averaging available prices, "making due allowance for factors affecting comparability" to the home country. *Id.*

Commerce then subtracts the price actually paid for the subsidized goods from the market price. If the former is less than the latter, then the producer garnered a benefit from the subsidy. The agency can levy a CVD on the producer's exports in an amount equal to the net subsidy, expressed as a percentage of the foreign product's U.S. sale price. *See* 19 U.S.C. § 1671(a).

In the review below, the agency imposed a 35.87% total CVD on RZBC's citric acid exports. *Final Results* at 109. The duty aimed to offset the benefit RZBC received from steam coal, sulfuric acid, calcium carbonate, land-use, and other subsidies from the Chinese government. *See* Issues & Decision Mem. ("I&D Mem.") at 17–37, PD 233 (Dec. 27, 2013) (listing subsidies examined). Now, in their appeal, RZBC and the GOC contest elements of the *Final Results*, including (1) the agency's decision to investigate calcium carbonate subsidies; (2) the finding that the calcium carbonate subsidy was specific; (3) the decision to countervail subsidies passed through private trading companies; (4) the choice to offset the benefit from real estate not used to make citric acid; (5) the agency's estimation of benchmarks for steam coal, sulfuric acid, and calcium carbonate; and (6) certain adjustments made to the benchmarks for international freight costs. *See generally* Mem. of Law in Supp. of Pls. RZBC's Mot. for J. on Agency R., ECF No. 44 ("RZBC Br."); Mem. of Law in Supp. of Pl.-Intervenor's Rule 56.2 Mot. for J. on Agency R., ECF No. 43 ("GOC Br.").

The court has jurisdiction to hear these claims under 28 U.S.C. § 1581(c). The court must also uphold the agency's results 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).

DISCUSSION

In view of these standards, the court must return one matter to Commerce: the calculation of world benchmarks for the steam coal, sulfuric acid, and calcium carbonate subsidies. The Plaintiffs' and Plaintiff-Intervenor's other claims lack merit, so the court sustains the agency's reasoning in all other respects.

I. Commerce Properly Investigated the Calcium Carbonate Subsidy

RZBC's first claim concerns a new subsidy petition filed during the third review period. The petition, lodged by U.S. industry, alleged

that RZBC received subsidized calcium carbonate as an input into its citric acid. Commerce accepted the petition and later found a countervailable subsidy, but Plaintiffs argue this was a mistake, because RZBC never used a type of calcium carbonate mentioned in the petition. *See* RZBC Br. 21–24.

The court finds no flaw in the subsidy allegation or in the decision to investigate.

A. Background

The chemical at issue here, calcium carbonate ($CaCO_3$), is a versatile commercial compound. It comes in two main forms: ground calcium carbonate and precipitated calcium carbonate. Ground calcium carbonate ("GCC") is made of crushed limestone, and it's often used in industrial and pharmaceutical applications. When employed as a purifying agent, GCC may be called limestone flux. Precipitated calcium carbonate ("PCC") bears the same chemical signature as GCC ($CaCO_3$), but it is created by a chemical process that yields a fine-textured powder. PCC is especially useful in the production of paper. *See* Pet'rs' New Subsidy Allegations ("NSA") at Ex. 30, PD 44–48 (Sept. 26, 2012); *see also* The Condensed Chemical Dictionary 616 (Gessner G. Hawley, ed., 10th ed. 1981) (giving makeup and uses of limestone).

In September 2012, domestic industry alleged that Chinese state-owned enterprises ("SOEs") sold calcium carbonate to RZBC for less-than-adequate remuneration. The new subsidy petition was agnostic regarding the type of calcium carbonate Plaintiffs purchased, though. In the main body of the allegations, the petitioners referred to calcium carbonate generally, never saying which form of the chemical RZBC used to make citric acid. NSA at 27–35. The exhibits to the petition were equally unenlightening. One document explained the uses and varieties of calcium carbonate, but it did not specify which variety the Plaintiffs consumed. *Id.* at Ex. 30. Another set of exhibits described three calcium-carbonate-producing SOEs, yet one of those companies produced both PCC and GCC. *Id.* at Exs. 38–41. If anything, this implied that Plaintiffs could use either type of calcium carbonate to make its goods.

The petitioners came close to choosing between PCC and GCC in an exhibit estimating the benefit of the alleged subsidy. To calculate benefit, petitioners created a world benchmark for calcium carbonate using data from Harmonized Tariff Schedule ("HTS") 2836.50. *Id.* at Ex. 42. HTS 2836.50 covers calcium carbonate including PCC, but it excludes ground natural limestone, or GCC. RZBC Comments on Pet'rs' New Subsidy Allegations Benchmarks at Attach. 1, PD 114

(Mar. 25, 2013). By cobbling the benchmark from this information, the petitioners hinted, indirectly, that RZBC used PCC to make citric acid.

Commerce began investigating the alleged subsidy in January 2013. *See* Decision Mem. on New Subsidy Allegations ("NSA Decision Mem.") at 14–16, PD 77 (Jan. 25, 2013). Soon thereafter, RZBC urged Commerce to drop the inquiry because it "used limestone flux (powder) rather than pure or precipitated calcium carbonate" in production—in short, they thought the agency was investigating the wrong subsidy. RZBC's New Subsidy Questionnaire Resp. at 11, CD 44–50 (Mar. 1, 2013). Commerce continued anyway, and in later submissions, both respondents and petitioners furnished data from HTS 2521.10 to make calcium carbonate benchmarks. *See* RZBC's New Subsidy Allegations Benchmarks ("Pls.' NSA Benchmarks") at Attach. 1, PD 113 (Mar. 18, 2013); Pet'rs' Benchmark Pricing for New Subsidy Allegations ("Pet'rs' NSA Benchmarks") at Ex. 4, PD 111–12 (Mar. 18, 2013). HTS 2521.10 covers GCC or limestone in powdered form.

At the close of the investigation, the agency held that RZBC had received countervailable calcium carbonate subsidies. It measured the benefit using information from HTS Chapter 25, which covers GCC. *See* I&D Mem. at 25–26.

B. Discussion

RZBC argues that it was wrong to investigate the calcium carbonate subsidy, because the petition misidentified the type of calcium carbonate it used to make citric acid. RZBC Br. 21–24. But Plaintiffs read the law and the allegations too narrowly.

To trigger an investigation, petitioners must allege a subsidy as defined by statute. They also have to pad their allegations with any "information reasonably available" to them at the time of filing. 19 U.S.C. § 1671a(b)(1). If a petition meets these requirements, Commerce must proceed. The agency cannot refuse to investigate based on conjecture that the subsidy does not exist. This means most subsidy petitions are granted unless the allegations "are clearly frivolous, not reasonably supported by the facts alleged or . . . omit important facts which are reasonably available to the petitioner." H.R. Rep. No. 96–317, at 51 (1979).

These easygoing standards gave Commerce little choice. In the petition, domestic industry alleged all the elements necessary to prove a calcium carbonate subsidy. They started by claiming that government authorities furnished the input. Then they alleged that

the respondent received a financial contribution from those authorities, rendering a benefit. The petitioners rounded out their allegations by discussing specificity. *See* NSA at 27–35. And to support each of these elements, petitioners supplied evidence that was available to them. This included, among other things, the profiles of state-owned companies producing PCC and GCC, *see id.* at Exs. 38–41, and documents listing chemicals manufacturing as a state-protected industry, *see id.* at Exs. 31, 33, 35. So in all material respects, the petition complied with the law. *See* 19 U.S.C. § 1671a(b)(1) (listing petition requirements). Commerce had to begin investigating, even if the precise contours of the subsidy were still unknown.

With a touch of irony, Plaintiffs counter that the petition was *too specific* to trigger an investigation. Though the text of the petition alleged a general calcium carbonate subsidy, one of the exhibits estimated benefit using export data for PCC. *See* NSA at Ex. 42. RZBC argues that this exhibit narrowed the scope of the petition from calcium carbonate in both its forms (including GCC and PCC) to PCC only. And because it used GCC to produce citric acid, Plaintiffs say the petition was ill-suited to propose an investigation. RZBC Br. 21–24.

The court cannot subscribe to this cherry-picked argument. While it's true that the benefit estimate drew data from HTS 2836.50—the subheading for PCC—other exhibits discussed calcium carbonate in both of its commercial guises. *See, e.g.*, NSA at Exs. 30 (addressing industrial uses of GCC and PCC), 38 (naming SOE Jianxi Taihua as a manufacturer of both GCC and PCC). None of the exhibits said which form of the chemical was used to make citric acid. In light of these ambiguities, it would be unfair to read the petition as an attack on PCC alone. The petition directed its allegations at calcium carbonate generally, and the provisional benefit calculations did not change that fact.

It may help, in closing, to recall the purpose of a petition. Just as a complaint proposes a lawsuit, a CVD petition proposes an investigation. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002) (discussing petition in context of antidumping scope decision). At the outset, when a petition is drafted, domestic industry may lack the data it needs to make firm factual allegations. Hence a degree of imprecision is acceptable, so long as the parties back their claims with information reasonably available to them. *See* 19 U.S.C. § 1671a(b)(1); S. Rep. No. 96–249, at 47 (stating Commerce must investigate unless it is "convinced that the petition and supporting information fail to state a claim upon which relief can be granted"); H.R. Rep. No. 96–317, at 51 ("The Committee views the rigor of the requirements of this threshold test as roughly analogous to the rigor

of the requirements necessary to make out a cause of action for purposes of civil litigation."). The goal is to direct Commerce to investigate the right subsidy.

The petition here accomplished this purpose without question. Though it skirted whether respondent used GCC or PCC, the petition ultimately led Commerce to examine the correct input: limestone flux. RZBC also concedes that the agency used the right tariff subheading to finalize the benefit calculation. *See* RZBC Br. 5–6, 23. So whatever the petition's flaws, Commerce made no mistake when it inspected the calcium carbonate (limestone flux) subsidies. The decision to investigate was in accord with law and planted in substantial evidence.

II. Commerce Correctly Held that the Calcium Carbonate Subsidy Was Specific

The next claim—this one brought by the GOC—challenges the finding that the calcium carbonate subsidy was specific. Commerce applied adverse facts available ("AFA") to reach this result, but the GOC rejoins that it complied fully with the agency's requests for information. *See* GOC Br. 12–18.

The court rules for Commerce. Though it claims to have answered the agency's questions to the best of its ability, the GOC could have done more to discover the amount of calcium carbonate used and purchased by Chinese industry during the review period. AFA was a just and reasonable response to the GOC's intransigence.

A. Background

After confirming the existence of the calcium carbonate subsidy, Commerce had to decide if the subsidy was specific. By statute, a domestic subsidy is specific if "[t]he actual recipients of the subsidy . . . are limited in number," if "[a]n enterprise or industry is a predominant user of the subsidy," or if "[a]n enterprise or industry receives a disproportionately large amount of the subsidy." 19 U.S.C. § 1677(5A)(D)(iii)(I)–(III). These criteria seem to demand a mathematical approach. In general terms, they make specificity a function of the amount of subsidy taken by the subject industry or enterprise, divided by the total subsidy given to recipients as a whole. *See, e.g.*, *Samsung Elecs. Co. v. United States*, 38 CIT __, __, 37 F. Supp. 3d 1320, 1324–26 (2014) (finding Commerce reasonably analyzed specificity by measuring plaintiff's benefit relative to other companies).

In that spirit, Commerce asked the GOC for hard statistical data to decide if the calcium carbonate subsidy was specific. In the new subsidy questionnaire, the agency requested a list of all the indus-

tries in the PRC that purchased calcium carbonate. Then Commerce asked for more granular details, including:

> the amounts (volume and value) purchased by the industry in which the respondent companies operate, as well as the totals purchased by every other industry. In identifying the industries, please use whatever resource or classification scheme your government normally relies upon to define industries and to classify companies within an industry.

GOC New Subsidy Allegation Questionnaire Resp. ("GOC NSA Resp.") at 23, CD 54 (Mar. 1, 2013). The purchase data, broken out by volume and value, would reveal whether the chemicals industry took a disproportionate share of the subsidy.

The GOC filed a response, but the information provided was meager. Rather than furnishing purchase data by volume and value as requested, Plaintiff-Intervenor remarked that calcium carbonate was "among the most important and versatile materials used by industry." *See id.* at 24. The documents affixed to the GOC's response were also general; they noted a growing demand for calcium carbonate in China, and they spotlighted the chemical's diverse forms and uses, but they offered none of the mathematical rigor that Commerce wanted. *Id.* at Ex. 3. The GOC closed by adding that its State Statistical Bureau did "not collect any calcium carbonate data based on sales, let alone based on sales volumes by industrial sectors." *Id.* at 24.

Unimpressed by the GOC's answers, Commerce drafted another questionnaire on the specificity issue. This time, instead of asking for a list of industries that *purchased* calcium carbonate, Commerce requested a list of industries that *used or consumed* calcium carbonate. Like before, the GOC was to collate the data by volume and value. GOC Second Supplemental Questionnaire Resp. ("GOC 2d Supp. Resp.") at 6, CD 72 (May 3, 2013).

Plaintiff-Intervenor rehashed its earlier answer in the second response. After claiming that it did not "maintain statistics on either calcium carbonate production or consumption," the GOC urged Commerce to use data from the exhibits of the original questionnaire response to decide specificity. *Id.* It also invoked 19 C.F.R. § 351.301(c)(2)(iv) (2012), a regulation that lets respondents request the agency's help when they struggle to submit information in the form and manner required. Apparently, the GOC hoped Commerce would waive its demand for statistics and rely on the general commercial tracts it previously rejected.

The agency dismissed the GOC's pleas in the post-preliminary results. Instead of using Plaintiff-Intervenor's exhibits to decide specificity, Commerce held that the GOC's answers were unresponsive. Commerce also found that the GOC had not worked to the best of its ability to provide data. As a consequence, Commerce invoked AFA and held that the calcium carbonate subsidy was specific, notwithstanding the lack of evidence on the matter. Post-Prelim. Results Decision Mem. ("Post-Prelim. Mem.") at 6–7, CD 110 (Nov. 8, 2013). The agency ratified its reasoning in the *Final Results*. I&D Mem. 47–50.

B. Discussion

The GOC now claims that it was wrong to settle the specificity question using AFA. Yet the court finds nothing amiss in the agency's approach. Plaintiff-Intervenor squandered multiple opportunities to give statistical data (so Commerce could use facts available), and the record shows that the GOC spent less-than-best efforts to collect information (so Commerce could draw an adverse inference). The court explains its conclusions in more detail below.

1. Commerce Reasonably Used Facts Available to Decide Specificity

At the outset, the GOC argues that it lacked a fair chance to put passable specificity data on the record. Had it received all the opportunities to submit evidence that were its due under the statute, then Plaintiff-Intervenor might have produced compliant information, and Commerce might have held that the calcium carbonate subsidy was not specific. *See* GOC Br. 12–18.

But these arguments misconstrue the law and the help it affords struggling parties. In 19 U.S.C. § 1677e(a), Congress gave Commerce the power to complete trade remedy cases even when necessary information is not available, or where parties withhold evidence from the authorities. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 869–70 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198–99 ("SAA"). When key data are missing from the record, the law allows the agency to use facts otherwise available to reach a decision. In other words, Commerce can take proof from the far reaches of the record to close evidentiary gaps that the parties never filled.

This power comes with caveats, however. Before Commerce can use facts available, it must give the parties a chance to comply with the agency's requests for evidence. The law provides that if a party's submission is deficient, the agency "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 [relevant] time limits." 19 U.S.C. § 1677m(d). Then, if the party's supplementary response falls short, Commerce may "disregard all or part of the original and subsequent responses," *id.*, unless the data are otherwise fit for consideration, *see id.* § 1677m(e).

The statute also makes Commerce assist those who are unable to submit data in the agency's preferred form and manner. If a party explains why it cannot give the information in the form requested, if it suggests alternative ways to package the data, and if it notifies the agency of its plight within fourteen days of receiving the questionnaire, then Commerce must "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." *Id.* § 1677m(c)(1); *see also* 19 C.F.R. § 351.301(c)(2)(iv) (2012). The idea is to help respondents who face technical barriers to filing their answers. The provision does not excuse parties from submitting data altogether. *See* SAA at 865 ("Section 782(c)(1) is intended to alleviate some of the difficulties encountered by small firms and firms in developing countries, particularly with regard to the submission of data in computerized form. It is not intended to exempt small firms from the requirements of the . . . countervailing duty laws.").

Here, Commerce justifiably used facts available to decide specificity. On two occasions, the agency asked the GOC for specific statistical data regarding the use and purchases of calcium carbonate by Chinese industry. And on two occasions, Plaintiff-Intervenor responded that it kept no relevant statistics. Instead, the GOC supplied information devoid of meaningful analytical content, something more akin to an infomercial than to focused market research. *See* GOC NSA Resp. at 24 & Ex. 3; GOC 2d Supp. Resp. at 6. Because the specificity inquiry demanded some mathematical rigor—and because the GOC gave no data to populate the analysis—Commerce reasonably invoked facts available to decide the matter. *See* 19 U.S.C. § 1677e(a).

The GOC counters that the agency never alerted it to deficiencies in its questionnaire responses. GOC Br. 18. It is right in one sense. Commerce never expressly stated, "This information is useless," or "Please try again," in its letters to the GOC. That said, the agency's communications left the clear impression that Plaintiff-Intervenor's data fell short. In its first new subsidy questionnaire, Commerce asked the GOC for the volume and value of calcium carbonate purchases by industry. The GOC replied with some articles of general

interest, but it added that it kept none of the data Commerce wanted. GOC NSA Resp. at 23–24. The agency then circulated another questionnaire craving statistics on calcium carbonate use by volume and value. GOC 2d Supp. Resp. at 6. The second questionnaire made plain that the answers to the first questionnaire were deficient: Had the first response passed muster, Commerce would not have demanded similar data in its second query. So despite its protestations, the GOC had notice under § 1677m(d) that its first answers were flawed. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1337–38 (Fed. Cir. 2002) (holding agency need not give formal notice of deficiency where "party informs Commerce that it will not provide the information requested"). When the GOC recycled the same evidence in its second response, Commerce reasonably disregarded it and relied on facts available.

The GOC also complains that it never got the help it demanded under § 1677m(c)(1). This argument fails for two reasons. First, the pleas for assistance were not made on time. To secure the agency's help, parties have to tell Commerce of their hardship "within 14 days after the date of receipt of the initial questionnaire." 19 C.F.R. § 351.301(c)(2)(iv) (2012). But the GOC requested assistance in the second supplemental response, which was filed months after the first questionnaire. *See* New Subsidy Allegation Questionnaire, PD 78 (Jan. 25, 2013); GOC 2d Supp. Resp. (May 3, 2013). The agency had no duty to accept this late-coming petition.

Second, the GOC never offered compliant data in an alternative form. *See* 19 U.S.C. § 1677m(c)(1). None of the materials that Plaintiff-Intervenor filed—whether in the initial or supplemental response—came close to equipping the statistical data that the agency needed. Instead, the GOC wrote bluntly that its State Statistical Bureau did "not collect any calcium carbonate data." GOC NSA Resp. at 24. It made no additional effort to pull statistics from alternative sources or to compile data in another form. The agency did not have to help a party that was so unwilling to help itself. *See China Steel Corp. v. United States*, 27 CIT 715, 732–33, 264 F. Supp. 2d 1339, 1357–58 (2003) (finding criteria to trigger assistance not met where plaintiff failed to "suggest alternatives for providing the [requested] information").

2. Commerce Reasonably Drew an Adverse Inference

Next, after invoking facts available to decide specificity, Commerce inferred that the subsidies were specific to the chemicals industry. The inference selected was adverse to the GOC's interests; Commerce explained that it took this tack because the GOC had not spent best

efforts to supply information. I&D Mem. 47–50. The GOC now argues that it did its utmost to gather data about calcium carbonate purchases and use. Plaintiff-Intervenor also argues that the decision to draw an adverse inference was unsupported by evidence. *See* GOC Br. 12–17.

These arguments do not persuade. The law provides that if a party fails to answer questionnaires to the best of its ability, Commerce may draw an adverse inference when choosing among facts available. 19 U.S.C. § 1677e(b). The statute does not define what it means to act "to the best of [one's] ability," but precedent sheds some light. Before the agency makes an adverse inference, the Federal Circuit requires Commerce to show (1) that a "reasonable [party] would have known that the requested information was required to be kept," and (2) "that the failure to fully respond is the result of the respondent's lack of cooperation" in keeping proper records or in obtaining data. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003).

The evidence supports Commerce's decision here on both fronts. For starters, the agency made plain in prior reviews of the citric acid order that it needed statistics to decide specificity. In the first review, for instance, Commerce asked for data regarding steam coal use. *See Archer Daniels Midland Co. v. United States* ("*Archer II*"), 38 CIT __, __, 968 F. Supp. 2d 1269, 1272–73 (2014); *Citric Acid and Certain Citrate Salts from the People's Republic of China*, 76 Fed. Reg. 77,206 (Dep't Commerce Dec. 12, 2011) (final admin. review) and accompanying I&D Mem. at cmt. 6. When the GOC answered that it kept no relevant statistics, Commerce postponed ruling on the issue. But the court later reversed the decision not to rule. *See Archer Daniels Midland Co. v. United States*, 37 CIT __, __, 917 F. Supp. 2d 1331, 1339–40 (2013). Then on remand, Commerce revisited the issue and found that the steam coal subsidies were not specific—yet it only did so because it lacked the evidence it needed to go the other way. *Archer II*, 38 CIT at __, 968 F. Supp. 2d at 1272. It would be unreasonable to infer from this back-and forth that the GOC was exempt from keeping data on subsidy use. The agency clearly wanted it.

This point was hammered home in the second review. There, Commerce again requested data regarding steam coal use. When the GOC failed to give the information requested, Commerce determined that the steam coal subsidy was specific. *Citric Acid and Certain Citrate Salts from the People's Republic of China*, 77 Fed. Reg. 72,323 (Dep't Commerce Dec. 5, 2012) (final admin. review) and accompanying I&D

Mem. at cmt. 4. These back-to-back reviews put the GOC on notice that it should collect subsidy consumption data going forward.[1]

The GOC also shirked its duty to keep statistics that it knew it had to collect. *See Nippon Steel*, 337 F.3d at 1382–83. There were a number of groups besides the State Statistical Bureau that gathered data on the chemicals business, but the GOC never consulted them. For instance, the record shows that the state-affiliated China Inorganic Salts Industry Association ("CISA") compiled statistics on inorganic salts manufacturing. GOC 2d Supp. Resp. at Ex. 1. Had the GOC tried its best, it might have asked CISA for data on the industry's calcium carbonate use. The GOC might also have taken data from calcium-carbonate-producing SOEs. *See* NSA at Exs. 38–41. These companies likely recorded their calcium carbonate sales (if they were properly managed, of course), and Commerce might have used this information to decide specificity. The GOC had no excuse for failing to explore these untapped resources.

The decision to use AFA was grounded in substantial evidence and accorded with law.

III. Commerce Properly Countervailed Inputs Purchased from Trading Companies

The next claim highlights an important facet of the definition of a subsidy. During the review, Commerce countervailed certain inputs that RZBC purchased from private trading companies. But the statute requires that a subsidy's benefit result from a foreign government's financial contribution. *See* 19 U.S.C. § 1677(5)(B) ("A subsidy [occurs when] an authority provides a financial contribution . . . to a person and a benefit is *thereby* conferred." (emphasis added)). In the GOC's view, the decision to countervail the inputs was contrary to law, because Commerce never established a "causation connection" between the government's contribution to the traders and the benefit received by RZBC. *See* GOC Br. 20. The court disagrees.

A. Background

During a prior review, RZBC reported that it purchased steam coal and some of its sulfuric acid from private trading companies. The

[1] The GOC adds in its reply that Commerce did not collect subsidy purchase or use information in other proceedings. Pl.-Intervenor's Reply Br. 8–11, ECF No. 60; *see also Galvanized Steel Wire from the People's Republic of China*, 77 Fed. Reg. 17,418 (Dep't Commerce Mar. 26, 2012) and accompanying I&D Mem. at IV.A.1; *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China*, 74 Fed. Reg. 4936 (Dep't Commerce Jan. 28, 2009) and accompanying I&D Mem. at cmt. 7. But these cases have no bearing here. The agency has a proven track record of soliciting statistical information in reviews of the citric acid order, and that was enough to alert the GOC to Commerce's demands.

trading companies bought those inputs from state authorities. *See* Confidential App. to Pl.-Intervenor's Rule 56.2 Mot. for J. upon Agency R. at Ex. 7, DE 48 ("GOC Conf. App.").[2] The situation remained the same during the third review period. *See* GOC Br. 19.

In its preliminary results, Commerce decided to countervail the sulfuric acid and steam coal purchases. It did so even though RZBC bought some of the inputs from private traders. The GOC argued that this was improper, because Commerce had not established "a definitive causal connection between the government action and the benefit bestowed." I&D Mem. 50.

The agency rejected the GOC's argument in the *Final Results*. It reasoned that when the government sold subsidized goods to trading companies, the traders passed some of the benefit to producers who bought the inputs for below-market prices. Hence there was no need to prove that the government directed trading companies to dispose of their wares for less-than-adequate remuneration. The traders could sell for low prices, and the producers could reap a benefit, even without the threat of coercion. *See id.* at 51–52.

B. Discussion

The logic in the *Final Results* is spot on. As mentioned before, the law defines a subsidy as a financial contribution from a government authority to a person, imparting a benefit thereby. *See* 19 U.S.C. § 1677(5)(B). But the statute does not say how the contribution must be conferred to count as a subsidy. In fact, the law leaves that matter wide open. The statute reads, in relevant part, "The determination of whether a subsidy exists shall be made without regard . . . to whether the subsidy is provided directly or indirectly on the manufacture, production, or export of merchandise." *Id.* § 1677(5)(C).

This provision gives Commerce a broad range of options. Naturally, it means Commerce can countervail contributions passed straight from a foreign government to a producer—a direct subsidy. *See id.*§ 1677(5)(B)(i). It also means that the agency can countervail contributions from private parties acting at the direction of a public body—an indirect subsidy springing from a private source. *Id.* § 1677(5)(B)(iii). And more important for our purposes, the provision allows Commerce to counteract contributions which originate with the government, but which pass through an intermediary before going to the ultimate user. In the last variation, the middleman may

[2] The exhibit documenting RZBC's purchases from trading companies is dated September 27, 2011. This is a date long before the third administrative review began. *See* Administrative Review Request, PD 1 (May 14, 2012). It seems that the exhibits were furnished in error, but the court assumes for now that RZBC bought its inputs through trading companies as alleged. *See* GOC Br. 19.

skim some of the benefit by reselling the subsidized inputs at a markup. But if the marked-up cost that the final user pays is less than the market cost, the user still gets a benefit. Commerce can countervail these sales because the authorities made a contribution to a person (the intermediary), thereby conferring a benefit to the producer (in a sum reduced by the middleman's cut). *See id.*§ 1677(5)(B); *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 52 F. Supp. 3d 1351, 1360–67 (2015) (holding subsidy exists even if contribution and benefit received by different people); *Guangdong Wireking Housewares & Hardware Co. v. United States*, 37 CIT __, __, 900 F. Supp. 2d 1362, 1379–80 (2013) (holding subsidy passed through private trading companies was countervailable); SAA at 926 ("The Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry.").

The disputed steam coal and sulfuric acid subsidies fall in this final bucket. The record reflects that Chinese authorities sold inputs to private trading companies, which then resold the goods to RZBC. *See* GOC Conf. App. at Ex. 7. The record also indicates that RZBC bought steam coal and sulfuric acid from the traders for less-than-adequate remuneration, though the amount of benefit remains in play. I&D Mem. 20–24; *see also infra* Part V. Under the circumstances, it was reasonable for Commerce to infer that RZBC's discount stemmed from the government's contribution to the traders. The trading companies likely resold the inputs for more than they paid, of course, but the difference between the resale price and the market price was a benefit to RZBC. The agency could countervail this amount, because the government's financial contribution allowed the traders to sell sulfuric acid and steam coal for less-than-market price. *See* 19 U.S.C. § 1677(5)(B).

In response, the GOC hints that RZBC's benefit was caused by something other than government largesse. "It is certainly plausible," they posit, "that the trading companies purchased the inputs from the government authorities at higher prices and subsequently resold them to RZBC at lower prices due to prevailing market conditions or for some other reason." GOC Br. 22. If this were the case, then perhaps the benefit would not stem from an official contribution as the law requires. But the GOC marshals no facts to support its claim. It cites no data to prove that the purchase price from the government exceeded the sale price to RZBC. *See id.* And it conjures no evidence to show that the trading companies kept all the benefit they got from the state. *See Delverde*, 202 F.3d at 1368 (reversing CVD decision where record indicated that subsidy recipient passed no benefit to

successor in interest of pasta factory). Without proof to the contrary, the court must sustain the finding that the Chinese government's contribution benefitted RZBC. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1377 (Fed. Cir. 2013) ("Commerce's determination will be sustained unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" (quoting 19 U.S.C. § 1516a(b)(1)(B)(1))). We will not upend the agency's reasonable inference based on speculation that the traders sold their goods for a loss.

The GOC also suggests that Commerce could not countervail the subsidies unless the authorities ordered the traders to sell for below-market prices. GOC Br. 21–23. Yet the cases cited for this proposition address an irrelevant issue. In *AK Steel Corp. v. United States*, 192 F.3d 1367, 1370 (Fed. Cir. 1999), and *Hynix Semiconductor Inc. v. United States*, 29 CIT 995, 997–99, 391 F. Supp. 2d 1337, 1340–41 (2005), Commerce countervailed preferential loans that originated with private banks. To decide if the loans sprang from an authority, the courts had to resolve whether the government ordered the banks to lend money. *See AK Steel*, 192 F.3d at 1376; *Hynix*, 29 CIT at 1000–01, 391 F. Supp. 2d at 1343–44. Here, by contrast, no one disputes that the steam coal and sulfuric acid inputs came from an authority. Though the government passed its contribution to the traders first, RZBC reaped a benefit to the extent that it bought the inputs for less-than-adequate remuneration. So again, the purchases met all the criteria of a subsidy as defined in statute. *See* 19 U.S.C. § 1677(5)(B); *Beijing Tianhai*, 39 CIT at __, 52 F. Supp. 3d at 1360–67. There was no need to show that the GOC directed the sales.

The decision to countervail the steam coal and sulfuric acid subsidies was based in substantial evidence and accorded with law.

IV. Commerce Reasonably Countervailed Land-Use Subsidies

RZBC brings the next claim, which concerns land-use subsidies. During the review period, Plaintiffs purchased the rights to three plots of land for below market value. RZBC did not use the land to manufacture citric acid, but Commerce countervailed the subsidies anyway. The Plaintiffs now claim this was error. *See* RZBC Br. 42–43. The court finds none.

A. Background

At the dawn of the third review, the petitioners alleged that RZBC bought subsidized land-use rights from provincial and local government authorities. NSA at 3–10. The agency decided to investigate shortly thereafter. *See* NSA Decision Mem. at 2–5.

In their questionnaire responses, Plaintiffs reported that one of their companies, RZBC Juxian, bought fifty-year rights to a plot of land in November 2010. Another company, RZBC Co., bought rights to two more parcels in September 2011. Plaintiffs said the Juxian plot was not used to make citric acid. And the other two plots owned by RZBC Co. were vacant during the review period and slated to be rezoned for commercial use. Resp. to New Subsidy Questionnaire Section A ("RZBC NSA Section A Resp.") at 2–5, CD 55–64 (Mar. 8, 2013).

The agency chose to countervail all three subsidies over Plaintiffs' protest. Though none of the plots were ever used to make subject merchandise, Commerce argued that the statute permitted it to counter subsidies that did not affect production. *See* I&D Mem. 65.

B. Discussion

The agency is right again. To qualify as a subsidy, a government contribution must confer a benefit. 19 U.S.C. § 1677(5)(B). That said, the agency is *not* required to "to consider the effect of the subsidy in determining whether a subsidy exists." *Id.* § 1677(5)(C); *see also* 19 C.F.R. § 351.503(c) ("In determining whether a benefit is conferred, the Secretary is not required to consider the effect of the government action on the firm's performance, including its prices or output, or how the firm's behavior otherwise is altered."). A subsidy is a subsidy even if the government action has no influence "on the price or output of the class or kind of merchandise under investigation or review." SAA at 926.

In that spirit, Commerce acted lawfully to countervail the land-use subsidies. Even if RZBC never used its three plots to make citric acid, the law presumes that the subsidies rendered a benefit. The agency was not required to decide exactly how much the benefit reduced the price of the subject merchandise or altered RZBC's production process. *See* 19 C.F.R. § 351.503(c). Furthermore, Plaintiffs offered no proof that the land-use subsidies were tied to a product other than citric acid. *See id.* § 351.525(b)(5)(i) (stating agency must attribute subsidy to particular product if subsidy tied to production or sale of that product). While RZBC mentioned a desire to rezone one of its plots for commercial use, that parcel was not earmarked for such a purpose during the review period. *See* RZBC NSA Section A Resp. at 4–5. Accordingly, Commerce could countervail the land-use subsidies

against citric acid, without deciding the price effect on the subject goods, and without limiting the benefit to other products.[3]

V. Commerce Did Not Properly Calculate World Benchmark Prices

In the next round of claims, the Plaintiffs focus their fire on benefit—specifically, the methods and data Commerce used to make price benchmarks for the steam coal, sulfuric acid, and calcium carbonate subsidies. They argue, among other things, that it was unlawful to average prices to create benchmarks; that it was error to exclude information from countries that shipped to China; and that the combination of simple averages and aberrant price data yielded unrealistic benchmarks. *See* GOC Br. 28–33; RZBC Br. 24–35.

Of these arguments, only the last merits a remand.

A. Background

The mathematical theory driving the benefit calculation sounds simple, but the devil is in the details. In general, when goods are provided, Commerce derives benefit by subtracting the price paid for the subsidized item from the item's price on the open market. *See* 19 U.S.C. § 1677(5)(E)(iv). The agency must determine "the adequacy of remuneration . . . in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review." *Id.*

The real complications arise *before* the subtraction, when Commerce estimates the subsidized item's price on the open market. In ordinary cases, Commerce lifts this number from "actual transactions in the county in question." 19 C.F.R. § 351.511(a)(2)(i) (2015). If there are no useable market prices for the input, however, then Commerce moves to its second, or "tier-two" methodology. Under the tier-two method, Commerce adopts the world market price as a benchmark or proxy for the price in the producer's home country. The agency may use the world price only if it is "reasonable to conclude that such price would be available to purchasers in the country in question." *Id.* § 351.511(a)(2)(ii). Furthermore, if the record boasts more than one viable world price, Commerce must average "such prices to the extent practicable, making due allowance for factors affecting comparabil-

[3] RZBC also argues that Commerce used the wrong information to estimate the benefit from the land subsidies. RZBC Br. 42–43. The agency calculated benefit using Asian Marketview data for Thai industrial parks, but RZBC notes that its parcels were not developed during the review period. *See* Prelim. Results Calculation Mem. at 8, CD 95 (June 7, 2013). The court will not consider these arguments, however, because RZBC did not raise them below. *See* I&D Mem. at 64; 28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.").

ity." *Id.* These factors ensure that the composite benchmark reflects prevailing market conditions in the home country. They include "price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E).

In this case, Commerce invoked its tier-two method to construct benchmarks for the steam coal, sulfuric acid, and calcium carbonate subsidies. I&D Mem. at 21–26. It began by requesting data for each input examined, and the parties responded with export prices from a smattering of countries. For sulfuric acid and calcium carbonate, the data provided came almost exclusively from the Global Trade Atlas ("GTA"), a reporter that lists each country's exports by transaction with price and quantity terms. The transaction-level data were averaged to make country-level export prices by month (or by year for RZBC's calcium carbonate data). *See* Pls.' NSA Benchmarks at Attach. 1 (calcium carbonate); Pet'rs' NSA Benchmarks at Ex. 4 (calcium carbonate); Pet'rs' Factual Information Submission ("Pet'rs' Factual Sub.") at Tab 20, PD 64–70 (Nov. 20, 2012) (sulfuric acid); RZBC Factual Information Comments ("RZBC Factual Cmts.") at Ex. 2-C, PD 56–62 (Nov. 19, 2012) (sulfuric acid). The parties also furnished GTA data for steam coal, but to this, the petitioners added information from the International Monetary Fund ("IMF") and the Platts International Coal Report ("Platts"). *See* RZBC Factual Sub. at Ex. 1-B; Pet'rs' Factual Sub. at Tab 17. The IMF and Platts listed steam coal export prices by country by month; they did not give transaction-specific quantity information like GTA.

With this evidence in hand, Commerce set about assembling its benchmarks. For steam coal, Commerce first purged the dataset of country-level prices reflecting shipments to China. The agency reasoned that government intervention could distort the price of China-bound exports, making the data unreliable for the purpose of calculating benefit. Prelim. Results Calculation Mem. ("Prelim. Calcs.") at 5–7 & n.18, CD 95 (June 7, 2013). Commerce then simple averaged the remaining prices to form world average prices by month. The agency used simple averages instead of weighted averages because the IMF and Platts data lacked quantity terms, and it wanted to keep the IMF and Platts data in the mix to support a robust calculation. I&D Mem. at 87–88.

The agency followed a similar approach with sulfuric acid. After excluding prices from China-bound exports, Commerce simple averaged the prices that remained to form world averages by month. *Id.*; Prelim. Calcs. at 3–4. But here, the agency gave no reason why it simple averaged the data instead of weight averaging them. The

sulfuric acid prices that remained all had quantity terms. *See, e.g.*, Pet'rs' Factual Sub. at Tab 20. Presumably the agency could have weight averaged the prices had it so chosen.

Finally, for calcium carbonate, Commerce rejected RZBC's information outright. Unlike the other submissions—which provided country-level prices by month—these data gave country-specific prices averaged over the entire review period. In Commerce's view, the year-long averages would yield less precise benefit estimates than month-long averages. *See* I&D Mem. at 83–84; Post-Prelim. Mem. at 11 n.60. The data also included exports to China. *See* Pls.' NSA Benchmarks at Attach. 1. Hence the agency used only the petitioners' prices and merged the data into worldwide simple averages (again without explaining why it eschewed the weight-averaging approach). I&D Mem. at 87–88.

Prior to the *Final Results*, RZBC and the GOC challenged aspects of the benchmark calculations. They alleged that the law barred Commerce from averaging country prices to render benchmarks; that Commerce made benchmarks using country-level prices that were not reasonably available in China; that small export quantities made some of the data unreliable; and that Commerce should not have simple averaged country prices by month to create world benchmarks. *Id.* at 86–87; RZBC Case Br. at 12–30, CD 114 (Nov. 18, 2013). The agency rejected these arguments and others in the *Final Results*. *See* I&D Mem. at 74–89.

Later, RZBC lodged ministerial error comments. It noted that the datasets for calcium carbonate and sulfuric acid listed price and quantity values uniformly, meaning Commerce could have calculated benchmarks for those inputs using weighted instead of simple averages. RZBC Ministerial Error Comments ("Min. Error Cmts.") at 1–3, PD 235 (Jan. 6, 2014). The agency again rejected the arguments, declaring that it had used simple averages deliberately. Ministerial Error Allegation Mem. at 2, PD 240 (Jan. 27, 2014).

B. Commerce's Tier-Two Methodology Complies With Law

Now on appeal, the Plaintiffs and Plaintiff-Intervenor muster many of the same claims made below. The GOC leads the charge with a legal challenge. By statute, the agency must decide the extent or "adequacy" of benefit "in relation to prevailing market conditions for the good or service being provided." 19 U.S.C. § 1677(5)(E)(iv). In light of this law, Plaintiff-Intervenor would abolish the tier-two method in 19 C.F.R. § 351.511(a)(2)(ii) because it forms benchmarks from average prices. An "average" price is more than an "adequate" price, the

GOC claims, because savvy producers always choose the lowest prices available to source their inputs. *See* GOC Br. 28–33.

The court does not question the Plaintiffs' commitment to frugality. But it does take issue with the notion that the tier-two methodology violates the statute. As mentioned before, the law requires Commerce to measure benefit, or the adequacy of remuneration, "in relation to prevailing market conditions." 19 U.S.C. § 1677(5)(E)(iv). In other words, remuneration for a subsidized input is "adequate" if it conforms to prevailing market norms. The statute lists the conditions the agency should consider to determine adequacy (price, quality, availability, etc.), but it does not explain what it means for conditions to "prevail" in the home market. *Id.*

Without guidance on the matter, it was reasonable for Commerce to equate "prevailing market conditions" with average market conditions. *See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). A legal dictionary defines the verb "to prevail" as "to be commonly accepted or predominant." Black's Law Dictionary 1380 (10th ed. 2014). And when you take an average, all you are doing is finding the predominant or typical case within a sample. *See id.* at 162 (defining "average"). So when Commerce averages country-level prices under the tier-two method, it is doing just what the statute commands: It is finding the prevailing world price for the subsidized input and using that to measure the adequacy of remuneration. *See* 19 U.S.C. § 1677(5)(E)(iv). The court sees nothing unreasonable in this approach.

The GOC retorts that "adequate" prices are found "at the lower end of available market prices, not the middle." GOC Br. 31. Yet this argument turns a blind eye to the statute's text. The law defines adequate remuneration as an input price that aligns with "prevailing market conditions." *See* 19 U.S.C. § 1677(5)(E)(iv). By definition, the lowest input values are always less than prevailing or average prices. So even if penny-pinching producers buy their inputs from the cheapest sellers, that does not mean Commerce must use the lowest input values to make its benchmarks. And contrary to the GOC's claims, this court has never held otherwise. *See Dorbest Ltd. v. United States*, 30 CIT 1671, 1687–88, 462 F. Supp. 2d 1262, 1278–79 (2006) (critiquing use of import data to create AD surrogate values when domestic data available, but omitting comment on whether agency must choose lowest values on record to price inputs); *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1193–95 (2004)

(same); *Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 616–18 (2002) (same).

The agency's tier-two methodology accords with law.

C. Commerce Used Prices that Were Reasonably Available in China

RZBC builds its next claim on the regulation that the GOC tried to tear down. Under 19 C.F.R. § 351.511(a)(2)(ii), Commerce measures the adequacy of remuneration using world market prices "where it is reasonable to conclude that such price would be available to purchasers in the country in question." RZBC argues that the values used to make benchmarks here did not represent prices available in China, for two main reasons. *See* RZBC Br. 29–35.

First, the data underlying the benchmarks excluded shipments to China. After taking information from the parties, Commerce purged the datasets of country-level prices reflecting exports to the PRC. The agency did so out of concern that intervention by the PRC government artificially deflated export prices. *See, e.g.*, Prelim. Calcs. at 3 (excluding China-bound sulfuric acid export prices). RZBC alleges that by omitting these values, Commerce deleted the only prices on record that were reasonably available to purchasers in China. *See* RZBC Br. 30–35.

Second, the remaining data for steam coal, sulfuric acid, and calcium carbonate included regional export transactions. The calcium carbonate prices from Greece, for example, were based solely on shipments to Albania, a country adjacent to the exporter. Pet'rs' NSA Benchmarks at Ex. 4. The same can be said for sulfuric acid (which included prices from Egypt, Colombia, and others to nearby countries) and steam coal (which also included prices from exporters to their neighbors). *See* Pet'rs' Factual Sub. at Tabs 17, 20. Because these export prices stemmed from regional trades, RZBC argues that the data do not represent world market prices reasonably available in China. *See* RZBC Br. 30–35.

Perhaps these twin claims have merit in the abstract. Sometimes it's not sensible to use prices from one region to represent prices in another region; for example, you would not adopt European electricity prices to estimate Latin American electricity prices, because power cannot be shipped across the globe. *See Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998). Yet here, the inputs in dispute are commodities, or items that are routinely exported around the world. Because these inputs are traded so widely, the agency reasonably presumed that they have a similar price everywhere—regardless of whether they were shipped to China or to another country, and regardless of whether they were exchanged

among regional partners. *See id.* ; *High Pressure Steel Cylinders from the People's Republic of China*, 77 Fed. Reg. 26,738 (Dep't Commerce May 7, 2012) (final admin. determination) and accompanying I&D Mem. at cmt. 8 (using data from Iran, Italy, and Ukraine to evaluate steel tube prices in China). The Plaintiffs furnished no concrete evidence in rebuttal, at least with respect to sulfuric acid and calcium carbonate.

An exhibit about steam coal caused the court some concern, but not enough for a remand. In a supplemental submission, RZBC included an article explaining that the global coal trade is divided into Pacific and Atlantic spheres. RZBC Additional Factual Information Comments at Ex. 6, PD 71–74 (Nov. 21, 2012). The article seems to suggest that prices in each region differ, and that coal prices along the Atlantic Rim are not available in China. Even so, the exhibit did not mention whether prices are higher or lower in either region. *Id.* Because the evidence failed to prove how coal prices vary by region, Commerce reasonably relied on the prices available, exclusive of PRC-bound shipments, to make its benchmarks.

D. Simple Averages Distorted Commerce's Benchmarks

All this does not mean the agency escapes unscathed. In its next claim, RZBC says the agency erred when it simple averaged country prices to create benchmarks. This approach gave undue weight to small-quantity, high-cost shipments, and in Plaintiffs' estimation, the method returned benchmarks that were higher than prices in China. Remember, the law requires benchmarks to align with market conditions prevailing in the exporter's home country. 19 U.S.C. § 1677(5)(E)(iv). So couched in terms of our standard of review, Plaintiffs argue that the benchmarks were unfounded in substantial evidence and contrary to law. *See* RZBC Br. 24–29.

RZBC's arrow hits the target, and some background helps to explain why. Before this review, Commerce generally set world benchmarks by simple averaging country-level prices. *See Utility Scale Wind Towers from the People's Republic of China*, 77 Fed. Reg. 75,978 (Dep't Commerce Dec. 26, 2012) (final affirm. determination) ("*Wind Towers*") and accompanying I&D Mem. at cmt. 15 (citing *Certain Steel Wheels from the People's Republic of China*, 77 Fed. Reg. 17,017 (Dep't Commerce Mar. 23, 2012) (final affirm. determination) and accompanying I&D Mem. at cmt. 15). The agency began by gathering price data for exports of the good in question. Then it melded the data into an average, assigning each price an equal weight regardless of the quantity shipped. The method was particularly useful (and indeed the only averaging technique available) when parties provided export

price data without listing the volume shipped at each price. *See id.*

Yet even in 2012, Commerce seemed to recognize that benchmarks made with simple averages were inferior those made with weighted averages. *See id.* at cmt. 15 (explaining that agency lacked "information on the record that would allow [it] to weight-average the prices properly"). Like simple averaging, the weight-averaging method blends country-level prices into world benchmarks. But unlike simple averages, weighted averages assign each price a weight proportional to the quantity shipped at that price. What results are benchmarks that favor prices from large-quantity shipments. The method ensures that high prices from countries with low-volume exports do not skew the benchmarks upward. Commerce now prefers to use weighted averages when the parties report price and quantity in a uniform manner. *See Steel Concrete Reinforcing Bar from the Republic of Turkey*, 79 Fed. Reg. 54,963 (Dep't Commerce Sept. 15, 2014) (final affirm. determination) ("*Steel Rebar*") and accompanying I&D Mem. at cmt. 1 & n.123 (weight averaging prices after excluding data lacking quantity terms); *Certain Oil Country Tubular Goods from the Republic of Turkey*, 79 Fed. Reg. 41,964 (Dep't Commerce July 18, 2014) (final affirm. determination) and accompanying I&D Mem. at cmt. 4 ("Using weighted-average prices where possible reduces the potential distortionary effect of any specific transactions (*e.g.*, extremely small transactions) in the data.").

In this case, the agency used simple averages to build benchmarks for sulfuric acid and calcium carbonate. Yet Commerce never explained why it opted against weighted averages. *See* I&D Mem. at 87–88. To repeat, the datasets for sulfuric acid and calcium carbonate contained *both* price and quantity terms. Commerce could have used this information to draw weighted averages, and presumably, if the agency were incapable of taking weighted averages, it could have made that known during the administrative process. This lapse in explanation strikes the court as arbitrary. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (invalidating decision where agency failed to state "the basis on which [it] exercised its expert discretion"); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 314 F.3d 1373, 1380–81 (Fed. Cir. 2003) (remanding where agency failed to articulate rationale for legal interpretation). Commerce could not favor one method over another without saying why.[4]

[4] In its brief, the defendant blusters that Commerce simple averaged the sulfuric acid and calcium carbonate prices for good reasons. Def.'s Resp. to Pls.' & Pl.-Intervenor's Mots. For J. on Agency R. 24–25, ECF No. 55. Apparently, weight averaging the sulfuric acid prices would have caused rounding error, and the calcium carbonate data were not amenable to

The choice to take simple averages was not just arbitrary in the abstract, however. The method also caused real distortions in the benchmarks Commerce created. A simple average, unlike a weighted average, gives equal weight to all prices regardless of the quantities sold. High prices from small transactions can balloon the average to absurd proportions, and that seems to be what happened here. Take sulfuric acid, for example. The agency's November world market price was $376.29 per metric ton ("MT"), about $124 more than the next highest world value for the year. Final Results Calculation Mem. ("Final Calcs.") at Attach. 1, CD 120–21 (Dec. 27, 2013). And what might have inflated this figure? The Indian export price of $5,397.99/MT stands out as a likely culprit. *Id.* This country-level average was based in part on one low-quantity load (34.125 MT) for a stratospheric sum ($2,984,697.00, or $87,463.12/MT). Pet'rs' Factual Sub. at Tab 20. Yet despite the small volume of this underlying shipment, India's country-level price was weighted equally with other prices to form a world benchmark. *See* I&D Mem. at 87–88. These data, together with others like them, combined to form simple-average benchmarks that outstripped what Commerce might have calculated had it weighted its averages. The table below demonstrates how much the simple-average sulfuric acid world prices exceeded their weighted-average counterparts.

Sulfuric Acid World Average Price Comparison Chart for 2011 (USD/MT)[5]

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Simple	106.62	99.59	125.10	119.37	252.43	112.47	125.74	112.06	126.91	113.80	376.29	112.33
Weighted	67.42	80.51	84.04	84.14	85.14	84.55	97.50	90.18	100.62	91.06	95.90	87.70

We see the same pattern among the calcium carbonate benchmarks. In October 2011, for instance, the agency's world price was $314.08/MT- lower than the May zenith of $622.82/MT, but higher than all the other world prices for the year. Final Cales. at Attach. 1. The number was bloated by the Australian country-level price, which was based on a small, 18 MT shipment for $3,207.67/MT. Pet'rs' NSA Benchmarks at Ex. 4. By packing its simple averages with these and similar data, Commerce amplified the effect of high-price transactions and

weighted averages because they were given in hard copy. These excuses sound flimsy. The court will withhold judgment, however, because the agency never raised these arguments below. The court cannot sustain an agency decision backed by post-hoc justifications. *SEC v. Chenery Corp.,* 318 U.S. 80, 95 (1943).

[5] The simple-average world prices in this table (sulfuric acid) and the table following (calcium carbonate) come from the agency's final calculations. Final Calcs. at Attach. 1. The weighted-average world prices come from the Plaintiffs' ministerial error comments. Min. Error Cmts. at Exs. 1 (sulfuric acid), 2a (calcium carbonate). The court lists these prices for demonstrative purposes only; the agency may calculate new world prices as necessary to comply with the statute, the regulations, and this opinion on remand.

produced outsize benchmarks. The following table illustrates the difference between the simple-average and weighted-average world price estimates.

Calcium Carbonate World Average Price Comparison Chart for 2011 (USD/MT)												
	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Simple	191.09	152.11	134.04	280.97	622.82	144.89	191.74	304.01	273.51	314.08	175.38	239.83
Weighted	39.56	37.33	36.99	49.04	40.00	39.35	38.41	38.83	44.85	33.67	54.82	30.89

On remand, the agency must reconsider whether to make the sulfuric acid and calcium carbonate benchmarks with weighted averages. If it chooses not to, Commerce must give some logical reasons why simple averages yield more reliable benchmarks than weighted averages. The agency should keep in mind the effect of small-quantity, high-price transactions as it writes up its reasoning. The goal is to make world benchmarks that reflect prevailing market conditions in the home country, as the statute commands. *See* 19 U.S.C. § 1677(5)(E)(iv).

Steam coal presents a different challenge, but Commerce should revisit these benchmarks on remand, too. As noted earlier, the agency used country-level information from GTA, IMF, and Platts to estimate world prices. The GTA dataset boasted price and quantity terms, but IMF and Platts did not. Because the latter two sources were missing quantity information, Commerce blended the GTA, IMF, and Platts data using simple averages. Commerce thought the world prices would be more robust if they took statistics from all three reporters. I&D Mem. at 87–88.

Ordinarily this approach would cut the mustard. Commerce has been known to simple average prices where quantity terms were absent, for obvious mathematical reasons. *See Wind Towers* at 75,978 and accompanying I&D Mem. at cmt. 15. But here, the agency's explanation fell short. When Commerce averaged the steam coal data, high prices from low-quantity shipments swelled the benchmarks considerably. A single 2 MT shipment of steam coal from Turkey cost $1,457/MT, for example; Plaintiffs estimate that this transaction raised the September world price from $198.84/MT to $241.69/MT. *See* RZBC Br. 37–38; Final Calcs. at Attach. 1; Pet'rs' Factual Sub. at Tab 17. In view of this distortion, Commerce should have addressed the choice before it: Would the agency make better benchmarks using robust simple averages (including all three datasets) that gave undue weight to small shipments? Or was it better to use less robust weighted averages (excluding IMF and Platts) that gave proper weight to small shipments? Commerce dealt with similar questions in *Steel Rebar*, but here, the agency simply assumed that a

more robust simple average was the right approach. *See Steel Rebar* at 54,963 and accompanying I&D Mem. at cmt. 1. It never compared the two averaging methods to decide which would better capture prevailing market conditions in China. The agency must reconsider its choice on remand and give an explanation backed with substantial evidence.[6]

RZBC pitches arguments other than those made above, but the court will not decide them now. For example, Plaintiffs claim that some of the benchmark data came from shipments for less than what RZBC consumed; that Commerce averaged prices from transactions with zero quantity; and that benchmarks averaged by month gave undue weight to high-price, low-volume shipments. *See* RZBC Br. 30–34, 38–41. Yet each of these arguments seeks to temper the effect of small-quantity exports on the agency's simple averages. If Commerce reverses course and uses weighted averages on remand, many of these concerns could evaporate. And if the agency sticks to its original decision, Plaintiffs can resurrect their arguments in the remand comments.

VI. Commerce Properly Selected Freight Rates for Its Benchmarks

RZBC's final arguments challenge adjustments the agency made to its benchmark values. Before calculating benefit, Commerce increased the calcium carbonate benchmarks by the sum an importer would pay to ship its inputs in flat-rack collapsible containers. Plaintiffs rejoin that this rate included irrelevant charges, and that the agency could not use rates from countries with no benchmark data. RZBC Br. 43–45. The court rejects both of these last-ditch appeals.

A. Background

When forging benchmarks, Commerce tries to estimate the amount producers would pay if they imported the goods they received for a subsidy. As a first step, the agency calculates the price of the goods under market conditions. The court already discussed this process in detail. Then Commerce adjusts the benchmarks to "include delivery charges and import duties." 19 C.F.R. § 351.511(a)(2)(iv). These charges include the cost of international shipping.

In this case, Commerce asked the parties to suggest international freight rates for calcium carbonate and other items. Only the petitioners responded for calcium carbonate. In their factual submission, they provided price quotes from the Maersk Line for 40-foot flat rack

[6] RZBC suggests that Commerce could simple average the IMF and Platts data, but weight average the GTA data. The agency is welcome to consider this or another reasonable approach on remand. *See* Oral Argument at 41:09.

collapsible containers. Pet'rs' Factual Sub. at Tab 23. The quotes were for shipments to China from a number of countries, including Canada, Argentina, Russia, the Netherlands, and the United States. The prices also included a special equipment service charge comprising a substantial chunk of the quote. (For example, to move a container from Los Angeles to Shanghai cost $6,604.30, and the special charge made up $5,175.00 of the total). *Id.* Commerce ultimately adopted the Maersk information, over objections that (1) there was no proof that importers paid special service charges to ship calcium carbonate, and (2) shipping prices from countries with no benchmark data did not represent the actual cost to import to China. I&D Mem. at 91–93.

B. Discussion

RZBC unfurls the same two grievances now, but neither one leaves the harbor. First, the record supports including the special service charge in the freight price. The evidence here was sparse, of course. Petitioners were the only ones to offer information, and the proof they provided did little more than list prices and note that flat rack collapsible containers carried "heavy cargo that requires special attention." Pet'rs' Factual Sub. at Tab 23. The evidence did not reveal how people usually ship limestone across the ocean. It also failed to describe when Maersk levies the special equipment service charge. *See id.* For lack of relevant data, Commerce reasonably relied on the flat rack rates *cum* service charges to estimate freight expenses. *See Ames True Temper v. United States*, 31 CIT 1303, 1312–13 (2007) (sustaining agency's choice to use only brokerage and handling surrogate on record). If the Plaintiffs wanted Commerce to use a different price—or if it wished to exclude the special service charge as an extraneous fee—then it should have furnished some proof to that effect. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)) ("[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce.").[7]

[7] RZBC counters that the agency excluded the special service charge from freight costs in past cases. RZBC Br. 43–44. But this observation goes nowhere. In prior proceedings, Commerce deleted the charges after seeing evidence that no special services were needed to ship steel billet and rounds. *Certain Oil Country Tubular Goods from the People's Republic of China*, 74 Fed. Reg. 64,045 (Dep't Commerce Dec. 7, 2009) (final admin. determination) ("*PRC OCTG Determination*") and accompanying I&D Mem. at cmt. 13.D; *see also Certain Oil Country Tubular Goods from the People's Republic of China*, 78 Fed. Reg. 9368 (Dep't Commerce Feb. 8, 2013) and accompanying I&D Mem. at 1.A (relying on *PRC OCTG Determination* to hold that shipping billet did not incur special fees); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of*

Second, there is no evidence that freight costs from countries *with* benchmark data are any different than prices from countries *without* them. *Cf. supra* Part V.C. (holding exports did not need to go to China to represent Chinese prices). RZBC could have submitted such evidence had it been diligent, but it neglected to do so. *See QVD*, 658 F.3d at 1324. Absent proof to the contrary, Commerce reasonably averaged freight costs using prices from countries without calcium carbonate, sulfuric acid, and steam coal benchmarks. This made for a robust approximation of prevailing shipping prices to China, and fulfilled the statute's aim. *See* 19 U.S.C. § 1677(5)(E)(iv).

CONCLUSION AND ORDER

The court has reached the end of the road. Many of the arguments considered along the way lacked merit, but the issue of greatest probable import to the Plaintiffs—the calculation of world benchmarks for steam coal, sulfuric acid, and calcium carbonate—will return to the agency for review and revisions. The court expects Commerce to return a countervailing duty rate that complies with the statute, the regulations, and this opinion.

Upon consideration of all papers and proceedings herein, it is hereby:

ORDERED that the final determination of the International Trade Administration, United States Department of Commerce, published as *Certain Citrate Salts from the People's Republic of China*, 79 Fed. Reg. 108 (Dep't Commerce Jan. 2, 2014) (final admin. review), be, and hereby is, REMANDED to Commerce for redetermination; it is further

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

ORDERED that Plaintiff-Intervenor's Rule 56.2 Motion for Judgment on the Agency Record be, and hereby is, DENIED as provided in this Opinion and Order; it is further

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

ORDERED that Commerce shall reevaluate world benchmarks for the steam coal, sulfuric acid, and calcium carbonate subsidies, considering whether to calculate world average prices using weighted or simple averages in light of small-quantity, high-price transactions in the underlying data, and complying with the mandate to measure the

China, 75 Fed. Reg. 57,444 (Dep't Commerce Sept. 21, 2010) and accompanying I&D Mem. at cmt. 9.C (same). We have no evidence here of comparable utility.

adequacy of remuneration in light of prevailing market conditions in the country subject to review; it is further

ORDERED that Commerce shall recalculate Plaintiffs' countervailing duty rate consistent with the reevaluated benchmark prices for steam coal, sulfuric acid, and calcium carbonate; it is further

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

Dated: August 5, 2015
New York, New York

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

Slip Op. 15–85

MACLEAN-FOGG CO., ET AL., Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

PUBLIC VERSION
Before: Donald C. Pogue,
Senior Judge
Consol. Court No. 11–00209[1]

[remanding U.S. Department of Commerce's countervailing duty determination]

Dated: August 11, 2015

Thomas M. Keating, Hoes Keating & Pilon, of Chicago, IL, for Plaintiffs MacLean-Fogg Co. and Fiskars Brands, Inc.

Craig A. Lewis and *T. Clark Weymouth*, Hogan Lovells US LLP, of Washington, DC, for Plaintiff Evergreen Solar, Inc.

Mark B. Lehnardt, Lehnardt & Lehnardt LLC, of Liberty, MO, for Plaintiffs Eagle Metal Distributors, Inc. and Ningbo Yili Import & Export Co., Ltd.

Tara K. Hogan, Senior Trial Counsel, and *Douglas Edelschick*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T.*

[1] This case is consolidated with Ct. Nos. 11–00210, 11–00220,and 11–00221. Order, Aug. 23, 2011, ECF No. 26, at ¶ 2.

Blades, Jr., Assistant Director. Of counsel was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Alan H. Price and *Robert DeFrancesco*, Wiley Rein LLP, of Washington, DC, for the Aluminum Extrusions Fair Trade Committee.

OPINION AND ORDER

Before Pogue, Senior Judge:

This consolidated action arises from the U.S. Department of Commerce's ("Commerce") countervailing duty ("CVD") investigation of aluminum extrusions from the People's Republic of China ("China").[2] Before the court are the results of Commerce's redetermination on remand of the "all-others" CVD rate, pursuant to the Court of Appeals' decision in *MacLean-Fogg Co. v. United States*, 753 F.3d 1237, 1246 (Fed. Cir. 2014) ("*MacLean-Fogg V*").[3]

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[4] and 28 U.S.C. § 1581(c) (2012).

As explained below, because Commerce's decision to rely on simple averaging when calculating the "all-others" rate in this case was an unreasonable judgment in the application of 19 U.S.C. § 1671d(c)(5)(A)(i), this determination is remanded for reconsideration.

BACKGROUND

Where, as here, a countervailing duty investigation involves a large number of exporters and/or producers as potential respondents, Commerce is authorized to select a sample of these exporters and producers for individual examination (the "mandatory" respondents).[5] In addition, the remaining exporters and producers may request an individualized examination as "voluntary" respondents.[6] Companies not selected as mandatory or voluntary respondents receive a CVD

[2] *See Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative countervailing duty determination) ("*Final Determination*") and accompanying Issues & Decision Mem., C-570–968, Investigation (Mar. 28, 2011) ("*I&D Mem.*").

[3] *See* Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 108–1 ("*Remand Results*"); Def.-Intervenor Aluminum Extrusions Fair Trade Comm.'s [("AEFTC")] Comments on Final Results of Redetermination Pursuant to Remand, ECF No. 110 ("Pet'r's Br.") & [AEFTC's] Suppl. Briefing Rebuttal Comments, ECF Nos. 118 (conf. version) & 119 (pub. version) ("Pet'r's Suppl. Br.") (challenging Commerce's all-others rate calculation in the *Remand Results*).

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

[5] 19 U.S.C. § 1677f–1(e)(2); *MacLean-Fogg V*, 753 F.3d at 1238.

[6] 19 U.S.C. § 1677m(a); 19 C.F.R. § 351.204(d) (2011).

rate that is calculated for "all-other" companies (the "all-others" rate),[7] which must equal the weighted average of all "individually investigated" companies' rates,[8] unless all such rates are zero/*de minimis* or entirely based on "facts otherwise available," rather than the respondents' own submissions.[9] Consequently, Commerce generally constructs the all-others rates by using the weighted average of the mandatory respondents' rates.[10]

Following this statutory scheme, in the CVD investigation at issue here, Commerce selected the three companies exporting the largest volume of subject imports during the period of investigation as the mandatory respondents.[11] However, none of these three companies responded to Commerce's requests for information.[12] Commerce therefore found that the mandatory respondents "withheld requested information and significantly impeded [the] proceeding,"[13] and failed to act to the best of their abilities to cooperate in the investigation.[14] Accordingly Commerce established CVD rates for the mandatory respondents based entirely on adverse facts available ("AFA").[15] Meanwhile, two companies had requested and were granted individualized examinations as voluntary respondents, each ultimately receiving a non-zero, non-*de minimis*, non-AFA CVD rate.[16]

---

[7] 19 U.S.C. § 1671d(c)(1)(B)(i)(I).

[8] 19 U.S.C. § 1671d(c)(5)(A)(i).

[9] *See id.* at §§ 1671d(c)(5)(A)(ii), 1677e.

[10] *Cf. Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013) (discussing 19 U.S.C.§ 1673d(c)(5)(A) – the identically-worded antidumping all-others rate provision); *compare* 19 U.S.C. § 1671d(c)(5)(A)(i) ("[T]he all-others rate shall be an amount equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely under section 1677e of this title."), *with* 19 U.S.C.§ 1673d(c)(5)(A) ("[T]he estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 1677e of this title.").

[11] *MacLean–Fogg Co. v. United States*, 36 CIT __, 836 F. Supp. 2d1367, 1370 (2012) ("*MacLean–Fogg I*").

[12] *Id.*

[13] *I&D Mem.* Section VI (Use of Facts Otherwise Available and Adverse Inferences) at 10 (applying 19 U.S.C. §§ 1677e(a)(2)(A)& (C) (requiring Commerce to "use the facts otherwise available" if, *inter alia*, a respondent withholds information requested by Commerce during the investigation, or "significantly impedes" the proceeding)).

[14] *Id.* (applying 19 U.S.C. § 1677e(b) (permitting Commerce to "use an inference that is adverse to the interests of [a] party[that has failed to cooperate by not acting to the best of its ability to comply with Commerce's requests for information] in selecting from among the facts otherwise available")).

[15] *Id.*; *MacLean-Fogg I*, 36 CIT at __, 836 F. Supp. 2d at 1370–71.

[16] *MacLean-Fogg I*, 36 CIT at __, 836 F. Supp. 2d at 1371.

With regard to the all-others rate, agency regulations in force at the time of the investigation prohibited Commerce from including the voluntary respondents' CVD rates in the all-others rate calculation.[17] As this Court explained when upholding this regulation in *MacLean-Fogg I*, Commerce's basis for excluding the voluntary respondents' rates from the all-others rate calculation was the concern that voluntary respondents are unrepresentative of the remaining companies (particularly where, as here, the three largest exporters/producers did not respond to Commerce's inquiries at all).[18] The agency considered the voluntary respondents to be unrepresentative because, unlike the mandatory or the all-other respondents, the voluntary respondents are those that willingly submit their sales data of their own accord, presumably because their commercial practices are such that they have good reason to believe that their CVD rates will be lower than those set for the mandatory respondents (regardless of whether those mandatory respondents are cooperative or not), such that including the rates established for this self-selected group threatens distortion of the weighted-average of the more representative rates.[19] But the Court of Appeals reversed this decision,[20] invalidated 19 C.F.R. § 351.204(d)(3), and ordered this court to remand Commerce's all-others rate calculation, requiring the agency to include the two voluntary respondents' rates when determining the all-others rate in this case "under the general rule, [19 U.S.C.] § 1671d(c)(5)(A)(i)."[21]

On remand, Commerce applied 19 U.S.C. § 1671d(c)(5)(A)(i), as interpreted by *MacLean-Fogg V*, excluding the three mandatory respondents' AFA-based rates from the all-others calculation, but in-

[17] 19 C.F.R. § 351.204(d)(3) ("In calculating an all-others rate. . ., [Commerce] will exclude weighted-average . . .countervailable subsidy rates calculated for voluntary respondents.") (invalidated by *MacLean-Fogg V*, 753 F.3d at 1240("We hold that 19 C.F.R. § 351.204(d)(3) is invalid . . . .")).

[18] *Maclean–Fogg* I, 26 CIT at __, 836 F. Supp. 2d at 1374 (noting Commerce's concerns that voluntary respondents are a self-selecting group more likely to have a lower CVD rate, the inclusion of which could skew the all-others rate).

[19] *Id.* ; *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,310 (Dep't Commerce May 19, 1997) (final rule) (explaining Commerce's basis for the regulation).

[20] *MacLean-Fogg V*, 753 F.3d at 1246; *but see id.* at 1246–53 (Reyna, J. dissenting).

[21] *MacLean-Fogg V*, 753 F.3d at 1246; Order for Remand, ECF No. 103 (remanding to Commerce for reconsideration consistent with the Court of Appeals' opinion); *see* 19 U.S.C.§ 1671d(c)(5)(A)(i) ("For purposes of this subsection and section 1671b(d) of this title, the all-others rate shall be an amount equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely under section 1677e of this title.").

cluding the two non-zero, non-*de minimis*, non-AFA based voluntary respondents' rates.[22] Considering the two voluntary respondents' rates, however, Commerce found that it could not weight-average these rates without impermissibly revealing the two companies' business proprietary information ("BPI") to each other.[23] Normally, in such situations Commerce "would calculate a weighted-average countervailing duty rate using the publicly available, ranged values of the [individually examined] respondents' exports of subject merchandise to the United States, compare both this weighted-average rate and a simple average of [these] respondents' countervailing duty rates to the actual weighted-average rate (calculated using the proprietary export values) and assign to All Others the amount closer to the actual weighted-average countervailable subsidy rate."[24] But in this case, although agency regulations require that all BPI submissions, including numerical data, be accompanied by publicly available summaries,[25] the two voluntary respondents did not submit public, "ranged" versions of their BPI.[26] During its investigation, Commerce chose not to enforce this requirement because the agency's regulations then expressly prohibited using the voluntary respondents' countervailable subsidy rates to calculate the all-others rate.[27] Commerce therefore "did not find that it was necessary during the underlying investigation to request the publicly-ranged or indexed numerical data from the voluntary respondents."[28]

Thereafter, however, as noted above, the Court of Appeals for the Federal Circuit held that countervailable subsidy rates calculated for voluntary respondents in CVD investigations unambiguously fall within the meaning of "countervailable subsidy rates established for exporters and producers individually investigated," as used in 19 U.S.C. § 1671d(c)(5)(A)(i), and therefore that such rates *must* be used

[22] *Remand Results*, ECF No. 108–1, at 6 (explaining that Commerce did not include the net subsidy rates for the non-cooperative mandatory respondents in its all-others rate calculation because those rates were based entirely on AFA).

[23] *Id.* ; *see* 19 U.S.C. § 1677f(b) (prohibiting impermissible disclosure of BPI).

[24] Prelim. Issues & Decision Mem., *Certain Frozen Warmwater Shrimp from India*, C-533–854, Investigation (May 28, 2013) (adopted in 78 Fed. Reg. 33,344 (Dep't Commerce June 4, 2013) (preliminary countervailing duty determination)) Section VIII (Calculation of the All Others Rate) at 25 (unchanged in 78 Fed. Reg. 50,385 (Dep't Commerce Aug. 19, 2013) (final affirmative countervailing duty determination)) ("*Shrimp from India*").

[25] 19 C.F.R. § 351.304(c)(1).

[26] *See Remand Results*, ECF No. 108–1, at 6.

[27] Def.'s Supplemental Br., ECF No. 115 ("Def.'s Suppl. Br.")at 4.

[28] *Id.*

in the calculation of an all-others rate, so long as they are not zero/*de minimis* or based entirely on facts otherwise available or AFA.[29] On remand, finding that "the publicly ranged sales data that could be used to calculate a weighted average all others rate based on publicly available data [were] not on the administrative record," Commerce therefore "based the revised all others rate on a simple average of the two voluntary respondents' calculated net subsidy rates."[30]

In commenting on the remand results below, the Aluminum Extrusions Fair Trade Committee ("AEFTC") – a petitioner in the underlying countervailing duty investigation and an intervenor in this action[31] — argued, *inter alia*, that Commerce should have calculated the all-others rate using a *weighted* average of the two voluntary respondents' rates, contending that 19 C.F.R. § 351.304(c)(1) requires parties to submit publicly ranged versions of their BPI data, and that Commerce should therefore "reopen the record to obtain the publicly ranged data that is necessary for [Commerce] to calculate a weighted average all others rate."[32] Commerce, however, declined to reopen the record.[33] Rather, Commerce found that the voluntary respondents' publicly ranged sales data was neither "necessary [nor] warranted" because "the use of a simple average of the two voluntary respondents' net subsidy rates to calculate the all others rate is consistent with [Commerce's] practice in cases in which the publicly available

[29] *MacLean-Fogg V*, 753 F.3d at 1240–46 (interpreting 19 U.S.C. § 1671d(c)(5)(A)(i) ("[T]he all-others rate [in a CVD investigation] shall be an amount equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and de minimis countervailable subsidy rates, and any rates determined entirely [using facts otherwise available, pursuant to 19 U.S.C. § 1677e].")); *see id.* at 1244 ("[C]ountervailing duty rates (other than zero or de minimis [or based entirely on AFA]) of voluntary respondents must be included in the general rule for calculation of the all-others rate. Because the statute is clear that such voluntary respondent rates must be included in the general all-others rate calculation, Commerce's regulatory interpretation to the exact contrary is invalid."); *id.* at 1246 (remanding "for determination of the all-others rate under the general rule, [19 U.S.C.] § 1671d(c)(5)(A)(i)").

[30] *Remand Results*, ECF No. 108–1, at 6; *see also id.* at 6–7 (arguing that basing the all-others rate on a simple average of the individually-investigated respondents' non-zero, non-*de minimis*, non-AFA rates "is consistent with [Commerce]'s practice of determining an all others rate when there are only two companies which have been individually investigated") (citing *Utility Scale Wind Towers from the People's Republic of China*, 77 Fed. Reg. 75,978, 75,979 (Dep't Commerce Dec. 26, 2012) (final affirmative countervailing duty determination) ("*Wind Towers from China*")).

[31] Consent Mot. to Intervene as a Matter of Right, ECF No. 7; Order, July 7, 2011, ECF No. 12 (granting motion to intervene).

[32] *Remand Results*, ECF No. 108–1, at 8 (discussing Petitioners' comments below).

[33] *Id.* at 10 ("We . . . disagree with Petitioners that [Commerce] should reopen the record in order to obtain publicly ranged data that would permit [Commerce] to calculate a weighted average all others rate.").

ranged sales data are not on the record."[34] AEFTC now challenges this determination.[35] Alternatively, AEFTC also argues that Commerce should have established a single subsidy rate for both voluntary respondents, because the companies are affiliated.[36]

STANDARD OF REVIEW

The court will sustain Commerce's countervailing duty determinations on remand if they are in accordance with the remand order, are supported by substantial evidence, and are otherwise in accordance with law.[37] Where the statute and regulations leave the agency with a measure of discretion, the court reviews such decisions for abuse of discretion.[38] "An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represent an unreasonable judgment in weighing relevant factors."[39] Moreover, Commerce's discretion "is bounded at the outer limits by the obligation to carry out its statutory duty of 'determining dumping margins "as accurately as possible." ' "[40]

DISCUSSION

AEFTC argues that Commerce's calculation of the all-others rate on remand – based on a simple average of the two voluntary respondents' subsidy rates – was contrary to law because (I) Commerce had found these two companies to be affiliated, and so should have established a single rate for both and then used that rate as the all-others

[34] *Id.*; *see also* Def.'s Suppl. Br., ECF No. 115, at 5 ("Commerce decided to calculate the all-others rate in accordance with its practice and used a simple average in the Remand Results, rather than expend additional administrative resources and further delay the ultimate resolution of this proceeding.") (citing *Remand Results*, ECF No. 108–1, at 6–7, 10).

[35] Pet'r's Br., ECF No. 110, at 3–4.

[36] *Id.* at 2–3. AEFTC additionally argues that the Court of Appeals incorrectly invalidated 19 C.F.R. § 351.204(d)(3), pursuant to which Commerce had initially excluded the voluntary respondents' subsidy rates from the all-others rate calculation. *See id.* at 1–2. Because this Court is bound by the Court of Appeals' decision, however, in the absence of overruling precedent, this issue is settled. *MacLean-Fogg V*, 753 F.3dat 1244; *see supra* note 29 (quoting relevant language).

[37] *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

[38] *See, e.g.*, *Wuhu Fenglian Co. v. United States*, 36 CIT __, 836 F. Supp. 2d 1398, 1403 (2012).

[39] *Dongtai Peak Honey Indus. Co. v. United States*, 38 CIT __, 971 F. Supp. 2d 1234, 1239 (2014) (quoting *WelCom Prods., Inc. v. United States*, 36 CIT __, 865 F. Supp. 2d 1340, 1344 (2012) (citing *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281(Fed. Cir. 2005))).

[40] *Wuhu Feglian*, 36 CIT at __, 836 F. Supp. 2d at 1403 (quoting *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990))) (alteration marks omitted).

rate[41]; or, in the alternative, because (II) Commerce used a simple (rather than weighted) average of the two voluntary respondents' subsidy rates, contrary to 19 U.S.C. § 1671d(c)(5)(A)(i).[42] Each argument is addressed in turn.

I. Affiliation

AEFTC first argues that because Commerce found that the two voluntary respondents were affiliated, Commerce should have established a single rate for both and then used that rate as the all-others rate.[43] Commerce responds that its finding that the two voluntary respondent companies were "affiliated persons" under 19 U.S.C. § 1677(33) is insufficient to compel the conclusion that these companies form a single entity for which a single subsidy rate is appropriate.[44] Specifically, Commerce's regulations provide that the agency will generally attribute subsidies to (and hence establish CVD rates for) "the products produced by the corporation that received the subsidy,"[45] except "[i]f two (or more) corporations *with cross-ownership* produce the subject merchandise."[46] Where two or more corporations "with cross-ownership" produce the subject merchandise, Commerce "will attribute [and countervail for] the subsidies received by either or both corporations to the products produced by both corporations," using a single CVD rate.[47]

---

[41] *See* Pet'r's Br., ECF No. 110, at 2–3.

[42] *See id*. at 3–4.

[43] *See id.* at 2–3.

[44] *See* Def.'s Resp. to Comments Regarding the Remand Redetermination, ECF No. 112 ("Def.'s Br.") at 4–6; *see also* Def.'s Suppl. Br., ECF No. 115, at 6 ("A determination by Commerce that the two voluntary respondents were 'affiliated persons' under 19 U.S.C. § 1677(33) did not transform them into the same corporate person . . . ."); *Remand Results*, ECF No. 108–1, at 9–10 ("While [Commerce] determined that the [two voluntary respondents] were affiliated under [19 U.S.C. § 1677(33)] by virtue of familial relations that exist between the firms, [Commerce], citing to its regulations, also found that the mere affiliation was not a sufficient basis to find that firms are cross-owned. [Commerce] further determined that the [two voluntary respondents] do not meet the additional criteria that are necessary for [Commerce] to find that cross-ownership exists between the two firms. . . . Accordingly, in the *Final Determination*, [Commerce] found that the [two voluntary respondents] were not cross-owned and, [therefore,] treated [the] two firms as separate entities and, accordingly, calculated separate net subsidy rates for the two firms.") (citing *I&D Mem*. at 5–6 (citing *Countervailing Duties*, 63 Fed.Reg. 65,348, 65,401 (Dep't Commerce Nov. 25, 1998) (final rule) (explaining the basis for 19 C.F.R. § 351.525(b)(6)'s provision that mere affiliation is not sufficient for subsidy attribution); 19 C.F.R. § 351.525(b)(6)(vi)); *Final Determination*, 76 Fed. Reg. at 18,522–23).

[45] 19 C.F.R. § 351.525(b)(6)(i).

[46] *Id.* at § 351.525(b)(6)(ii) (emphasis added).

[47] *Id.*

The regulations further provide that "[c]ross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets,"[48] adding that this standard will normally be met "where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations."[49] Moreover, in explaining these regulatory provisions, Commerce has expressly stated that mere affiliation between two companies, within the meaning of 19 U.S.C. § 1677(33), is insufficient for a finding of cross-ownership which would support the establishment of a single subsidy rate for two or more companies.[50]

Here, Commerce found that the record of this investigation contained "no evidence" that the two voluntary respondents "have the ability to direct the individual assets of one another as if they were their own."[51] Commerce accordingly concluded that cross-ownership among these companies was not established, and hence determined that a single subsidy rate for both would not be appropriate.[52] As AEFTC has not provided any "new information or argument that would warrant reconsideration . . . on this point,"[53] Commerce's finding that the two voluntary respondents do not meet the regulatory criteria for cross-ownership is not contested.[54] Furthermore, AEFTC presents no specific argument to support its contention that, contrary to the agency's regulations, a finding of affiliation is sufficient to require Commerce to assign a single subsidy rate to the affiliated companies.[55]

---

[48] *Id.* at § 351.525(b)(6)(vi).

[49] *Id.*

[50] *See Countervailing Duties*, 63 Fed. Reg. at 65,401–02 ("[W]e simply do not find the affiliation standard to be a helpful basis for attributing subsidies. Nowhere in the statute or the [Statement of Administrative Action] is there any indication that the affiliated party definition [in 19 U.S.C. § 1677(33)] was intended to be used for subsidy attribution purposes. Rather, it identifies the broadest category of relationships which might be relevant to either an antidumping or a countervailing duty analysis. . . . [W]e do not intend to investigate subsidies to affiliated parties unless cross-ownership exists or other information, such as a transfer of subsidies, indicates that such subsidies may in fact benefit the subject merchandise produced by the corporation under investigation.").

[51] *I&D Mem.* Section III (Attribution of Subsidies) at 6.

[52] *See id.* ; 19 C.F.R. §§ 351.525(b)(6)(i), (ii), (vi).

[53] *Remand Results*, ECF No. 108–1, at 10.

[54] *See* Pet'r's Br., ECF No. 110, at 2–3 (conceding that AEFTC has provided no new information to warrant reconsideration of Commerce's finding that the two voluntary respondents are not cross-owned, but arguing that Commerce's *affiliation* finding should have sufficed to establish a single subsidy rate for the two affiliated companies).

[55] *See id.*

Accordingly, because Commerce's regulations provide that only companies that are cross-owned may have their subsidies attributed to one another[56] (the reasoned basis for which[57] is not explicitly challenged here[58]), and because AEFTC provides no evidentiary support or argument to impugn Commerce's finding that the two voluntary respondents here are not cross-owned,[59] Commerce's determination to calculate separate subsidy rates for these companies is therefore sustained.

II. Simple Averaging

Next, in the alternative, AEFTC argues that Commerce acted contrary to law by using a simple average of the two voluntary respondents' subsidy rates – rather than a weighted average, as required by 19 U.S.C. § 1671d(c)(5)(A)(i) – to establish the all-others rate.[60] Specifically, AEFTC argues that Commerce unreasonably determined that weight-averaging the rates would impermissibly reveal BPI, because the agency's regulations require that all BPI submissions have correlating public versions, and provide a methodology for converting BPI into public information.[61] AEFTC argues that Commerce abused its discretion by neither requesting that the respondents apply this methodology to their BPI and submit public versions of the necessary data, nor itself applying this methodology to convert the BPI to usable data.[62]

Commerce responds by pointing to 19 U.S.C. § 1677f(b) – which provides that information designated as BPI "shall not be disclosed to any person without the consent of the person submitting the information," other than to certain U.S. Government officials and authorized applicants under an administrative protective order[63] – explaining that "[a]t no point during the investigation did counsel for

[56] *See* 19 C.F.R. §§ 351.525(b)(6)(i)-(ii).

[57] *See Countervailing Duties*, 63 Fed. Reg. at 65,401–02.

[58] *See* Pet'r's Br., ECF No. 110, at 2–3.

[59] *See I&D Mem.* Section III (Attribution of Subsidies) at 6; Pet'r's Br., ECF No. 110, at 2–3.

[60] *See* Pet'r's Br., ECF No. 110, at 3–4.

[61] *Id.* ; *see* 19 C.F.R. § 351.304(c)(1) ("A person filing a submission that contains information for which business proprietary treatment is claimed must file a public version of the submission. . . . The public version must contain a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information. . . . Generally, numerical data will be considered adequately summarized if grouped or presented in terms of indices or figures within 10 percent of the actual figure. . . . .").

[62] Pet'r's Suppl. Br., ECF Nos. 118 & 119, at 2–7.

[63] Def.'s Suppl. Br., ECF No. 115, at 5 (citing 19 U.S.C. § 1677f(b), and quoting *Allegheny Ludlum Corp. v. United States*, 27 CIT 1461, 1465 (2003) (not reported in the Federal Supplement) (sustaining as reasonable Commerce's interpretation that 19 U.S.C. § 1677f(b)

either voluntary respondent authorize Commerce to reveal proprietary information to the other,"[64] and arguing that weight-averaging these subsidy rates to arrive at the all-others rate was therefore foreclosed by the fact that doing so would reveal the two companies' BPI to each other.[65]

Although Commerce acknowledges that weight-averaging would be possible (without improperly divulging the two respondents' BPI to each other) if the BPI were accompanied with public versions of the data, as required by 19 C.F.R. § 351.304(c)(1),[66] such information is not on the record here because the voluntary respondents did not submit public versions of their BPI, and Commerce "did not find that it was necessary during the underlying investigation to [enforce 19 C.F.R. § 351.304(c)(1) and] request the publicly-ranged or indexed numerical data from the voluntary respondents" because, at that time, 19 C.F.R. § 351.204(d)(3) expressly prohibited using the voluntary respondents' rates in the all-others rate calculation.[67] On remand, responding to AEFTC's suggestion that Commerce re-open the record to obtain these missing publicly ranged data, so the two voluntary respondents' rates may be weight-averaged without divulging BPI to each other, the agency continued to find that such data were neither "necessary [n]or warranted"[68] because using a simple average of the two rates, rather than "expend[ing] additional administrative resources and further delay[ing] the ultimate resolution of this proceeding," was a "reasonable choice."[69]

But the statute unequivocally and without exception requires that Commerce base the all-others rate on the *weighted* average of

provides "a limited exception to the Trade Secrets Act, 18 U.S.C. § 1905, which generally prohibits an agency from disclosing business proprietary information") (citation omitted)).

[64] *Id*. at 6 (citing 19 C.F.R. § 351.306(a)(5) (authorizing Commerce to disclose BPI to "[a]ny person to whom the submitting person specifically authorizes disclosure in writing")).

[65] *Id.* at 5–6; *see also* Def.'s Br., ECF No. 112, at 3; *Remand Results*, ECF No. 108–1, at 6 ("[W]e are unable to calculate a weighted average all others rate without also divulging the two voluntary respondents' business proprietary data to each other.").

[66] *See Remand Results*, ECF No. 108–1, at 6 ("In investigations involving two individually examined respondents where the use of a weighted average all others rate is not possible because the use of such a method would divulge the two firms' business proprietary data, . . . we may use a weighted average of their rates, weighted by the two respondents' public ranged sales data, if that data is on the administrative record.") (citations omitted); *id*. at 6 n.25 ("[W]hen available, [Commerce] may utilize publicly ranged data to determine the . . . all others rate."); 19 C.F.R. § 351.304(c)(1).

[67] Def.'s Suppl. Br., ECF No. 115, at 4.

[68] *Remand Results*, ECF No. 108–1, at 10.

[69] Def.'s Suppl. Br., ECF No. 115, at 5 (citing *Remand Results*, ECF No. 108–1, at 6–7, 10).

individually-investigated non-zero, non–*de minimis*, non-AFA rates.[70] Defendant argues that "the statute and regulation are silent as to Commerce's methodology for calculating an all-others rate when using data derived from two respondents in a weighted-average calculation would divulge the firms' business proprietary data to each other, in violation of the administrative protective order."[71] But in fact the statute (requiring Commerce to use a weighted-average when calculating the all-others rate[72]) and the regulations (requiring publicly ranged data for all BPI submissions[73]) preclude the situation Commerce describes. If "calculating an all-others rate when using data derived from two respondents in a weighted-average calculation would divulge the firms' business proprietary data to each other,"[74] 19 U.S.C. § 1671d(c)(5)(A)(i)'s requirement that Commerce use a *weighted* average may be satisfied by employing the publicly ranged data.[75]

Commerce argues that the missing public data here are nevertheless unnecessary because using a simple average is also reasonable.[76] But this argument ignores the accuracy-enhancing value placed by the statute on accounting for the individually-investigated respondents' relative sales volumes by weight-averaging to arrive at the all-others rate.[77] Moreover, as AEFTC points out, here there was a significant disparity in the volume of sales between the two respon-

---

[70] 19 U.S.C. § 1671d(c)(5)(A)(i).

[71] Def.'s Br., ECF No. 112, at 7.

[72] 19 U.S.C. § 1671d(c)(5)(A)(i).

[73] 19 C.F.R. § 351.304(c)(1) ("A person filing a submission that contains information for which business proprietary treatment is claimed *must* file a public version of the submission. . . . The public version *must* contain a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information.") (emphasis added).

[74] Def.'s Br., ECF No. 112, at 7.

[75] *See Remand Results*, ECF No. 108–1, at 6 n.25 ("[Commerce] may utilize publicly ranged data to determine the . . . all others rate.").

[76] *See id*. at 6 ("In investigations involving two individually examined respondents where the use of a weighted average all others rate is not possible because the use of such a method would divulge the two firms' business proprietary data, we have two options – we may use a simple average of the two respondents' countervailable subsidy rates, or we may use a weighted average of their rates, weighted by the two respondents' publicly ranged sales data . . . .") (citations and footnote omitted); *id.* at 6–7 ("[W]e have based the revised all others rate on a simple average of the two voluntary respondents' calculated net subsidy rates. Such a calculation is consistent with [Commerce's] practice of determining an all others rate when there are only two companies which have been individually investigated.") (citing *Wind Towers from China*, 77 Fed. Reg. at 75,979).

[77] *See* 19 U.S.C. § 1671d(c)(5)(A)(i).

dents whose rates were averaged to arrive at the all-others rate.[78] Accordingly, taking a simple average of the two gives significantly more weight to the respondent with the lower sales volume, resulting in an all-others rate that is materially different from what it would otherwise be if it were properly weighted based on the relative size of each respondent's total sales.[79] Thus Commerce's argument – that completing the record with publicly ranged values of the two voluntary respondents' BPI was neither necessary nor warranted because a simple average would suffice – is unreasonable in light of the statute's clear preference for the accuracy-enhancing value of weight-averaging and the particular facts of this case.[80]

Additionally, Commerce incompletely characterizes its practice in cases where weight-averaging two respondents' rates would impermissibly reveal their BPI to each other as *either* taking a simple average of the two *or* taking an average weighted by the respondents' publicly ranged sales values.[81] In fact Commerce's reasonable practice in such situations is to take *both* averages and compare each to the actual weighted-average (using BPI available to the agency), in order to arrive at the nearest approximation of the all-others rate

[78] Pet'r's Suppl. Br., ECF Nos. 118 & 119, at 5 ("Commerce's calculation memoranda indicate that [one of the voluntary respondent's] total sales of [subject merchandise] was [[ ]] [other voluntary respondent] during the [period of investigation].") (citing Ex. 1 to Pet'r's Suppl. Br., ECF Nos. 118 & 119 (reproducing Commerce's memoranda regarding calculations for the two voluntary respondents)).

[79] *See id.* (noting that the respondent with the lower subsidy margin comprises "[[ ]] of the total denominator");*cf.* Issues & Decision Mem., *Aluminum Extrusions from the People's Republic of China*, C-570–968, ARP 10–11 (Dec. 26, 2013) (adopted in 79 Fed. Reg. 106, 106 (Dep't Commerce Jan. 2, 2014) (final results of countervailing duty administrative review; 2010 and 2011)) ("*AR1 I&D Mem.*") cmt. 3 at 58 (faced with a similar situation in the subsequent first administrative review, where Commerce similarly could not calculate a weighted-average all-others rate without impermissibly revealing BPI, Commerce compared the results of using a simple average with those obtained from calculating a weighted-average using the public versions of the BPI, and "found that the weighted-average rate using publicly available, ranged sales values, rather than the simple-average rate, is the rate closer to the actual weighted-average subsidy rate (based on proprietary export values) and, thus, the better proxy") (citations omitted).

[80] Defendant also argues that Commerce chose to use a simple average, rather than seek to complete the record with publicly ranged values, to avoid "expend[ing] additional administrative resources and further delay[ing] the ultimate resolution of this proceeding." Def.'s Suppl. Br., ECF No. 115, at 5 (citing *Remand Results*, ECF No. 108–1, at 6–7, 10). But resource-constraint and expediency do not excuse the agency from its statutory obligations; indeed, one overarching theme of this already protracted litigation, *see* Compl., ECF No. 6 (filed June 23, 2011), is that the agency is bound by the letter of the law, even (or perhaps especially) where doing so necessitates delaying the ultimate resolution of a proceeding to correct for legal deficiencies. *Cf. Mac-Lean Fogg V*, 753 F.3d at 1246 (remanding Commerce's all-others rate calculation, more than three years after its initial finalization, to be entirely redone so as to conform to the plain language of the statute).

[81] *Remand Results*, ECF No. 108–1, at 6.

contemplated by 19 U.S.C. § 1671d(c)(5)(A)(i).[82] This practice reasonably reconciles 19 U.S.C. § 1671d(c)(5)(A)(i) (the all-others provision) with 19 U.S.C. § 1677f(b) (the BPI provision) because it most closely approximates the result contemplated by the all-others provision without violating the BPI provision. And while Commerce relies on a handful of recent contrary determinations, in which the agency has resorted to simple averaging in the absence of publicly available data,[83] none of these decisions provide any significant reasoning or explanation to indicate why the necessary public information was absent from the record or why it could not be obtained, or how such simple averaging comports with the statutory directive to weight-average individual rates when calculating the all-others rate,[84] and accordingly none of these determinations supports the agency's argument here.

---

[82] *AR1 I&D Mem.*, *supra* note 79, cmt. 3 at 58; *Shrimp from India*, *supra* note 24, at 25.

[83] Specifically, Commerce cites to four prior determinations: *Shrimp from India*, *supra* note 24, at 25; *Certain Oil Country Tubular Goods from the Republic of Turkey*, 79 Fed. Reg. 41,964,41,965 (Dep't Commerce July 18, 2014) (final affirmative countervailing duty determination and final affirmative critical circumstances determination) ("*OCTG from Turkey*"); *Chlorinated Isocyanurates from the People's Republic of China*, 79 Fed. Reg. 10,097 (Feb. 24, 2014) (preliminary [countervailing duty] determination and alignment of final determination with final antidumping determination) (unchanged in 79 Fed. Reg. 56,560,56,562 (Dep't Commerce Sept. 22, 2014) (final affirmative countervailing duty determination; 2012)) ("*Chlorinated Isocyanurates from China*"); and *Wind Towers from China*, 77 Fed. Reg. at 75,979. *Remand Results*, ECF No. 108–1, at 6–7 nn. 24 & 26.

[84] In *Shrimp from India*, Commerce explained that its normal practice is to "calculate a weighted-average countervailing duty rate using the publicly available, ranged values of the mandatory respondents' exports of subject merchandise to the United States, compare both this weighted-average rate and a simple average of the mandatory respondents' countervailing duty rates to the actual weighted-average rate (calculated using the proprietary export values) and assign to All Others the amount closer to the actual weighted-average countervailable subsidy rate," but then stated that "we do not have publicly available information on U.S. sales value for one of the selected respondents," and explained that, "[b]ecause of this," the agency used a simple average to calculate the all-others rate. *Shrimp from India*, *supra* note 24, at 25. Commerce provided no explanation for why the necessary public data were missing from the record, and no explanation as to how this approach comports with the statutory directive to weight-average individual rates when calculating the all-others rate. *See id*.; *see also* Issues & Decision Mem., *Certain Frozen Warmwater Shrimp from India*, C-533–854, Investigation (Aug. 12, 2013) (adopted in 78 Fed. Reg. 50,385 (Dep't Commerce Aug. 19, 2013) (final affirmative countervailing duty determination)) (providing no commentary on this issue). In the remaining three determinations that Commerce relies on here, the agency provided even less explanation, simply stating that, "[n]otwithstanding the language of [19 U.S.C. § 1671d(c)(5)(A)(i)]," Commerce chose not to calculate the all-others rate by weight-averaging the rates of the individually investigated respondents "because doing so risks disclosure of proprietary information" and, without any additional reasoning or explanation, therefore using a simple average of the individual rates as the all-others rate. *OCTG from Turkey*, 79 Fed. Reg. at 41,965, and accompanying Issues & Decision Mem., C-489–817, Investigation (July 10, 2014) (providing

That the necessary public data are absent from the record here is due to Commerce's own decision not to enforce its regulatory requirement and request the necessary data from the submitting parties.[85] Commerce initially "did not find that it was necessary" to complete the public record, including public versions of the voluntary respondents' BPI, because at the time 19 C.F.R. § 351.204(d)(3) precluded using the voluntary respondents' data in the all-others rate calculation.[86] But even then Commerce faced a challenge to the legality of this regulation,[87] and it was unreasonable to presume that the ultimate outcome of this litigation would favor the agency, as indeed it did not.[88]

Moreover, even if the regulation excluding the voluntary respondents' rates from the all-others rate calculation had not been challenged and invalidated, and even if Commerce had been correct that the voluntary respondents' information would be used solely to calculate their own individual rates, Commerce also failed to consider another important concern. By leaving the record of the voluntary respondents' rates calculations sealed from public scrutiny (because the voluntary respondents' rates are based on their non-public information), Commerce failed to recognize the value of ensuring that all aspects of the administrative record – including the evidentiary bases for the voluntary respondents' rates themselves (regardless of whether or not they are included in the all-others rate) – are as publicly available as they can be. There is "a fundamental public interest in transparency in government,"[89] and "[t]he parties to a lawsuit are not the only people who have a legitimate interest in the

no commentary on this issue); *Chlorinated Isocyanurates from China*, 79 Fed. Reg. at 10,098 (unchanged in the final results, 79 Fed. Reg. at 56,562, and accompanying Issues & Decision Mem., C-570–991, Investigation (Sept. 8, 2014) (providing no commentary on this issue)); *Wind Towers from China*, 77 Fed. Reg. at 75,979, and accompanying Issues & Decision Mem., C-570–982, Investigation (Dec. 17, 2012) (providing no commentary on this issue).

[85] *See* Def.'s Suppl. Br., ECF No. 115, at 4.

[86] *Id.*

[87] *See MacLean-Fogg I*, 36 CIT at __, 836 F. Supp. 2d at 1372; Case Br. of Eagle Metals Distribs., Inc., Ningbo Yili Imp. & Exp. Co., Ltd. & Zhaoqing Asia Aluminum Factory Co. Ltd., *Aluminum Extrusions from the People's Republic of China*, C-570–968, Investigation (Feb. 9, 2011), *reproduced in* [Pls.'] J.A., ECF No. 39 at Tab P, at 4 (arguing that "[Commerce]'s regulation excluding the calculated rates for voluntary respondents [from the all-others rate calculation] is void because it is contrary to the plain language of the statute").

[88] *MacLean-Fogg V*, 753 F.3d at 1244 ("Because the statute is clear that [non-zero, non-*de minimis*, non-AFA] voluntary respondent rates must be included in the general all-others rate calculation, Commerce's regulatory interpretation to the exact contrary is invalid.").

[89] *Former Emps. of Invista, S.a.r.l. v. U.S. Sec'y of Labor*, 33 CIT 1523, 1524 n.1, 657 F. Supp. 2d 1359, 1360–61 n.1 (2009) (ordering the agency to review the entire administrative record

[public] record compiled in a legal proceeding."[90] "[L]itigants in other similar cases have a legitimate need (and a right) to review the facts underlying a[n agency]'s decision" in order to "discern the relevance and significance of [that] decision vis-à-vis their own cases."[91] Here, Commerce unreasonably failed to weigh the importance of completing the public record with regard to these voluntary respondents, even if the agency were correct that their subsidy rates would not be included in the all-others rate, for by doing so Commerce automatically precluded potential future interested parties from ascertaining the reasoning underlying the voluntary respondents' rates.

Finally, Commerce's decision on remand not to expend the minimal effort required to correct the error and obtain the missing public versions of the necessary BPI was, based on the record here, clearly an unreasonable exercise of judgment. Although Commerce initially saw no apparent need for the public data, this was no longer true at the time of the remand proceeding. 19 C.F.R. § 351.304(c)(1), which requires all BPI to be accompanied by public versions "in sufficient detail to permit a reasonable understanding of the substance of the information," provides a clear and unambiguous formula for converting proprietary numerical data into publicly available summaries thereof: "numerical data will be considered adequately summarized if grouped or presented in terms of indices or figures within 10 percent of the actual figure," and "[i]f an individual portion of the numerical data is voluminous, at least one percent representative of that portion must be summarized."[92] Accordingly, all that Commerce had to do to follow the statutory prescription that individual rates be weight-averaged to arrive at the all-others rate, without impermissibly revealing BPI, was to send a letter to each of the voluntary respondents, referencing the regulation and requesting that their BPI be publicly ranged in accordance with the provided formula for doing so, or even to simply itself apply the formula to the BPI. Instead the agency chose to forego the statutory requirement and distort the accuracy of its

to ensure that it is maximally publicly available); *see also Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (Easterbrook, J.) ("What happens in the halls of government is presumptively public business.").

[90] *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) (Posner, C.J.).

[91] *Former Emps. of Invista*, 33 CIT at 1524 n.1, 657 F. Supp. 2d at 1361 n.1 (citations omitted); *see also id*. ("The public has a right to review a judge's rationale, not merely the outcome, in a case."); *cf. In re Constr. Equip. Co.*, 665 F.3d 1254, 1261 (Fed. Cir. 2011) (noting that administrative agencies "have a 'quasi-judicial' flavor" that justifies the application of judicial principles to agency decision-making); *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013) (noting that the procedures established by the Administrative Procedure Act "secure the values of government transparency").

[92] 19 C.F.R. § 351.304(c)(1).

all-others rate calculation. Thus to the extent that Commerce had discretion to avoid enforcement of the public versions requirement, the agency failed to exercise its judgment reasonably, and therefore abused its discretion.

Accordingly, while Commerce is correct that it has no *general* duty to reopen the record during remanded proceedings,[93] the particular circumstances presented here require that, where the necessary data is missing from the record due to Commerce's own failure to fully administer the legal framework, it is the agency's responsibility to go back and fix errors that are material to the remand proceeding. Commerce's determination to use a simple average of the two individually-investigated respondents' subsidy rates in this case is therefore remanded for reconsideration. On remand, Commerce may either reopen the record and enforce 19 C.F.R. § 351.304(c)(1)'s requirement that the voluntary respondents submit public versions of their BPI, or (as AETFC suggests[94]) itself publicly range the BPI, if the agency finds that doing so is appropriate here.

CONCLUSION

For all of the foregoing reasons, Commerce's determination to rely solely on simple averaging when calculating the all-others rate in this case pursuant to 19 U.S.C. § 1671d(c)(5)(A)(i) is remanded for reconsideration, consistent with this opinion. Commerce shall have until September 24, 2015, to complete and file its remand results, the parties shall have until October 9, 2015, to file any comments, and the agency shall have until October 19, 2015, to respond.

It is SO ORDERED.

Dated: August 11, 2015
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

---

[93] *See* Def.'s Br., ECF No. 112, at 6.

[94] Pet'r's Suppl. Br., ECF Nos. 118 & 119, at 4 ("Given that Commerce has the parties' total sales revenue and the subsidy calculation for both domestic and export subsidies, there is no reason that Commerce, using its inherent authority to enforce its own regulations, cannot round and range the total sales denominator within the regulatory plus or minus ten percent without reopening the record and delaying this proceeding.").

Slip Op. 15–86

FENGCHI IMP. & EXP. CO., LTD. OF HAICHENG CITY, FENGCHI REFRACTORIES CO. OF HAICHENG CITY, and FEDMET RESOURCES CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and RESCO PRODUCTS, INC., and ANH REFRACTORIES COMPANY, Defendant-Intervenors.

Before: Nicholas Tsoucalas,
Senior Judge
Court No.: 13–00186

[Commerce's Remand Results are sustained.]

Dated: August 13, 2015

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

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Joseph W. Dorn, *J. Michael Taylor*, and *Brian E. McGill*, King & Spalding LLP, of Washington, DC, for defendant-intervenor Resco Products, Inc. and Harbison Walker International (formerly ANH Refractories Company.

OPINION

Tsoucalas, Senior Judge:

Before the court are the Department of Commerce's ("Commerce") Final Results of Redetermination pursuant to Court Remand in *Fengchi Imp. & Exp. Co., Ltd. of Haicheng City v. United States*, 39 CIT __, __, Slip Op. 15–23 (Mar. 25, 2015) ("*Fengchi I*"). *See Final Results of Redetermination Pursuant to Fengchi Imp. & Exp. Co., Ltd. of Haicheng City v. United States*, ECF No. 111 (May 26, 2015) ("*Remand Results*"). The relevant facts and procedural history are set forth in *Fengchi I*. Familiarity with the court's decision in *Fengchi I* is presumed.

Plaintiffs, Fengchi Import and Export Co., Ltd. of Haicheng City, Fengchi Refractories Co. of Haicheng City and Fedmet Resources Corporation (collectively, "Plaintiffs"), challenge Commerce's redetermination. *See* Pls.' Cmts. on Remand Results, ECF No. 114 (June 25, 2015) ("Pls.' Br."). Both Commerce and Defendant-Intervenors Resco Products, Inc. ("Resco") and Harbison Walker International, formerly ANH Refractories Company ("ANH") insist that the court sustain the

Remand Results. *See* Def.'s Resp. to Cmts. on Remand Results, ECF No. 118 (July 10, 2015) ("Def.'s Br."); Def.-Intervenors's Cmts. Response to Pls.' Cmts. on Remand Results, ECF No. 120 (July 10, 2015) ("Def.-Int.'s Br.").

JURISDICTION and STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and section 516A(a)(2)(B)(iii) of the Tariff Act of 1930,[1] as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012). The court will uphold Commerce's final determination in an antidumping duty administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

Additionally, when reviewing an agency's interpretation of its regulations, the court must give substantial deference to the agency's interpretation, *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1391 (Fed. Cir. 2014) (citing *Torrington Co. v. United States*, 156 F.3d 1361, 1363–64 (Fed. Cir. 1998)), according it "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994) (citations omitted); *accord Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007). In this context, "[d]eference to an agency's interpretation of its own regulations is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own." *Viraj*, 476 F.3d at 1355 (quoting *Gose v. U.S. Postal Serv*., 451 F.3d 831, 837 (Fed. Cir. 2006).

Discussion

In the underlying administrative review of the antidumping order on certain magnesia carbon bricks ("MCBs") from China, Commerce applied a total adverse facts available ("AFA") to Fengchi as a consequence of Fengchi's refusal to respond to Commerce's request for certain sales information. *See Certain Magnesia Carbon Bricks From the People's Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review; 2010–2011*, 78

[1] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition, and all applicable amendments thereto.

Fed. Reg. 22,230 (Apr. 15, 2013) ("*Final Results*"); *see also Certain MCBs from the PRC: Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review*, (Apr. 9, 2013) PR 148 at 1–2 ("*IDM*"). Commerce assigned Fengchi a weighted-average dumping margin of 236% based on the petition rate from the investigation. *See First Administrative Review of MCBs from the PRC: Corroboration Memorandum* (Oct. 1, 2012), CR 68 at 2–3 (unchanged in final). Commerce found that the petition rate was reliable because it calculated the 236% figure as the AFA rate for the PRC-wide entity during the investigation, which it then corroborated using model-specific margins of a cooperating respondent. *See id*. Commerce determined that the rate was relevant to Fengchi by comparing the United States price from the petition to the average unit prices for five Fengchi sales of magnesia alumina carbon bricks ("MACBs") that were identified by United States Customs and Border Protection ("CBP"). *Id*. at 3. Specifically, Commerce found that the U.S. sales price from the petition rate was within the range of the average unit values for Fengchi's entries. *Id*. Additionally, Commerce found that the usage rates for the factors of production in the petition were within the range of values of Fengchi's reported usage rates. *Id*. Because the rate was both reliable and relevant to Fengchi, Commerce found that it adequately corroborated the petition rate of 236%. *Id*.

In *Fengchi I*, the Court remanded the *Final Results* to Commerce for further explanation regarding the corroboration of the AFA rate. *Fengchi I*, 39 CIT at __, Slip Op. 15–23 at 18–22. Although the Court determined that Commerce properly relied on AFA in assigning Fengchi's weighted-average dumping margin, as a consequence of the Federal Circuit's holding in *Fedmet Resources Corp. v. United States*, 755 F.3d. 912, (Fed. Cir. 2014), the court became "concerned with Commerce's potentially unreasonable use of out of scope MACB sales to corroborate the AFA rate." *Id*. at __, Slip Op. 15–23 at 21–22. Therefore, the court remanded so that Commerce could have the opportunity to address this concern at the administrative level. *Id*.

Commerce resolved these concerns in its *Remand Results*. There, Commerce reasonably explained that the Federal Circuit's ruling in *Fedmet* "only affects [Commerce's] corroboration of the AFA rate assigned to Fengchi to the extent that the record demonstrates that the entries underlying [Commerce's] corroboration analysis were actually non-subject MACBs." *Remand Results* at 5. Commerce found that Fengchi's refusal to cooperate with the review precluded it from identifying the exact nature of those entries. *Id*. Specifically, Commerce examined the CBP entry documentation for the five sales at

issue and found that the documentation described the merchandise as MACBs, but did not contain any additional details regarding the merchandise's alumina content, which is necessary to distinguish MACBs from MCBs. *Id*. at 5–6; *see also Fedmet Res. Corp. v. United States*, 755 F.3d 912, 924 (Fed. Cir. 2014). According to Commerce, nothing in this data indicated whether Fengchi's merchandise was actually out-of-scope as outlined in *Fedmet*. Since Fengchi refused to provide Commerce with any narrative clarifying the merchandise in question, Commerce reasonably found that the entry documentation was ambiguous as to the product actually sold. *Id*. at 6. Consequently, Commerce reasonably concluded that the five entries used to corroborate the AFA rate were subject merchandise. *Id*.

Commerce also examined additional record evidence regarding other sales that CBP identified as subject merchandise that Fengchi did not report for the period of review. *Id*. at 7 (citing First Antidumping Administrative Review of Certain MCBs from the PRC: Sections C and D Supplemental Questionnaire, (Aug. 3, 2012) CR 46 at Attach. II). Once again, Fengchi chose not to comment on these sales, limiting the record to only the prices and quantities of imports that were classified as subject merchandise by CBP. *Id*. at 7. Therefore, Commerce reasonably inferred that the sales were subject merchandise and found that, as with the other five CBP entries in question, the United States price from the petition was "within the range of the average unit prices for the remaining unreported sales and [was] therefore relevant to Fengchi for this period of review." *Id*. at 7.

When selecting an AFA rate, Commerce may rely on information from the petition, investigations, prior administrative reviews, or "any other information placed on the record." 19 U.S.C. § 1677e(b). However, Commerce cannot select any rate as the AFA rate, but rather, must select an AFA rate that is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). "Commerce must select secondary information that has some grounding in commercial reality." *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010). Although a higher AFA rate creates a stronger incentive to cooperate, "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Id*. at 1323 (citing *De Cecco*, 216 F.3d at 1032).

The requirements articulated by the CAFC are an extension of the statute's corroboration requirement. *See De Cecco*, 216 F.3d at 1032. Under 19 U.S.C. § 1677e(c), when Commerce relies on secondary

information, it "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). To corroborate secondary information, Commerce must find that it has "probative value." *See KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010). Secondary information has "probative value" if it is "reliable" and "relevant" to the respondent. *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007); *see KYD*, 607 F.3d at 765–67.

Plaintiffs argue that *Fedmet* renders the AFA rate unreasonable because Commerce corroborated it using sales of non-subject MACBs. Pls.' Br. at 2–3. Plaintiffs insist that Commerce is required to identify evidence on the record that the entries it relies upon for the corroboration of an AFA rate are subject merchandise. *Id*. at 3 (citing *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 37 CIT __, __, Slip Op. 13–47 (Apr. 8, 2013)). Additionally, Plaintiffs contend that although Commerce had previously requested that Fengchi respond to its antidumping duty questionnaire with respect to Fengchi's exports of MACBs, "Commerce never asked Fengchi for any additional information specifically regarding the CBP entry data, including the entries underlying the corroboration analysis." *Id*. at 4. Finally, Plaintiffs contend that Commerce erroneously continues to rely on the same "post hoc rationalizations" it offered prior to the court's remand in *Fengchi I* as justification for its corroboration of the AFA rate, instead of reviewing the evidence on the record. *Id*. at 7–8.

Plaintiffs' arguments are unpersuasive. Commerce is required to corroborate information only "to the extent practicable" on a given record. 19 U.S.C. § 1677e(c). On this record, Fengchi identifies no evidence indicating whether the alumina content of its merchandise falls within the range of out-of-scope MACBs described in *Fedmet*. *See Fedmet Res. Corp. v. United States*, 755 F.3d 912, 924 (Fed. Cir. 2014). As Commerce reasonably observed, *Fedmet* "only affects [Commerce's] corroboration of the AFA rate assigned to Fengchi to the extent that the record demonstrates that the entries underlying [Commerce's] corroboration analysis *were actually non-subject MACBs*." *Remand Results* at 5 (emphasis added). Therefore, at best, the record is ambiguous, and allows for more than one reasonable answer to that predicate question.

Moreover, it appears that Plaintiffs would prefer that Commerce do all the work in establishing whether the entries in question were or were not MACBs, that is not Commerce's role. Commerce's inability to mandate participation in its proceedings means that interested parties bear the primary burden of developing the administrative

record. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1325 (Fed. Cir. 2011). Here, rather than provide any information about its merchandise, Fengchi left it to Commerce to assemble a record which it now complains results in a less favorable outcome. The fact of the matter is that Fengchi identifies no evidence on this record that undermines the reasonableness of Commerce's corroboration. Once again, Commerce is only required to corroborate the AFA rate "to the extent practicable" on a given record. 19 U.S.C. § 1677e(c).

Furthermore, Plaintiffs mistakenly characterize Commerce's comments in its redetermination as being a "post hoc rationalization." Pls.' Br. at 7–8. Commerce developed its comments in the redetermination over the course of the remand proceedings as the court directed in *Fengchi I*. The remand proceeding is an administrative proceeding, meaning that Commerce's comments are not the post hoc rationalization of its counsel. *See Mitsubishi Heavy Indus. v. United States*, 24 CIT 275, 287 n. 9, 97 F. Supp. 2d 1203, 1209 n.9 (2000).

Accordingly, since Plaintiffs chose not to comply with Commerce's request for information, Commerce reasonably selected from the list of secondary sources as the basis for Fengchi's AFA rate. *See* 19 U.S.C. § 1677e(b). The court finds that Commerce acted reasonably when it chose to rely on the limited data on the record to select an AFA rate that was "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *De Cecco*, 216 F.3d at 1032.

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

Dated: August 13, 2015
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 15–87

DEACERO S.A.P.I. DE C.V. AND DEACERO USA, INC., Plaintiffs, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, EVRAZ PUEBLO, GERDAU AMERISTEEL U.S. INC., KEYSTONE CONSOLIDATED INDUSTRIES, INC., AND NUCOR CORPORATION Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 14–00205

[The court stays the case.]

Dated: August 17, 2015

David E. Bond, White & Case LLP, of Washington, DC, argued for plaintiffs. With him on the brief was *Jay C. Campbell*.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. Present at argument was *David W. Richardson*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Paul C. Rosenthal, Kelley Drye & Warren LLP, of Washington, DC, argued for defendant-intervenors ArcelorMittal USA LLC, Evraz Pueblo, Gerdau Ameristeel U.S. Inc., and Keystone Consolidated Industries, Inc. With him on the brief were *Kathleen W. Cannon*, *R. Alan Luberda*, *David C. Smith*, *Benjamin Blase Caryl*.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiffs Deacero S.A. de C.V. and Deacero USA, Inc. (collectively, "Deacero") take issue with the U.S. Department of Commerce's ("Commerce") continuation of the antidumping duty order on carbon and certain alloy steel wire rod from Mexico following five-year review. *Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, and Trinidad and Tobago*, 79 Fed. Reg. 38,008 (Dep't Commerce July 3, 2014) (continuation of antidumping & countervailing duty orders) ("Continuation Notice"). Deacero claims that, in the Continuation Notice, Commerce was required by law to expressly confine the scope of the antidumping duty order to wire rod with an actual diameter above 5.00 mm. Complaint 7–8, ECF No. 4.

The court does not today reach the merits of Deacero's claim but instead addresses a Motion to Dismiss or, in The Alternative, Motion to Stay Proceedings, ECF No. 32 filed by Defendant-Intervenors Arcelormittal USA LLC, Evraz Pueblo, Gerdau Ameristeel U.S. Inc., and Keystone Consolidated Industries, Inc. (collectively "Arcelormittal"). In the main, Arcelormittal moves for dismissal under USCIT Rule 12(b)(1), arguing that the court lacks jurisdiction to hear Deacero's claim under 28 U.S.C. § 1581(c) (2012) and § 1581(i)(4), the two jurisdictional bases asserted by Deacero. Alternatively, Arcelormittal asks that the court stay this case pending the Federal Circuit's decision in the appeal of a related lawsuit. The court holds that it has jurisdiction under § 1581(c) but that a stay is proper.

BACKGROUND

Because the court opts to delay the merits of this case with a stay, a brief background will do for the time being. Both this case and the Federal Circuit appeal that justifies the stay arise from the same order imposing antidumping duties on carbon and certain alloy steel wire rod from Mexico. *Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945 (Dep't Commerce Oct. 29, 2002) (notice

of antidumping duty orders) (the "Order"). Originally, the Order was bound in scope to cover wire rod "5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter." *Id.* at 65,946. But Commerce later used its circumvention procedures to bring 4.75-to-5.00-mm wire rod within the Order's scope. *Carbon and Certain Alloy Steel Wire Rod from Mexico*, 77 Fed. Reg. 59,892, 59,893 (Dep't Commerce Oct. 1, 2012) (final affirm. circumvention determination) (the "Circumvention Determination") and accompanying I&D Mem. at Scope of the Circumvention Inquiry.

At that point, Deacero filed suit challenging Commerce's Circumvention Determination (the same suit whose eventual judgment Deacero has appealed, justifying a stay of the instant proceedings). Complaint, *Deacero S.A. de C.V. v. United States* (*Deacero I*), 37 CIT __, 942 F. Supp. 2d 1321 (2012) (No. 12–345), ECF No. 5. In response, this court enjoined U.S. Customs and Border Protection ("Customs") from liquidating entries of wire rod exported by Deacero with a diameter between 4.75 and 5.00 mm. Order Granting Prelim. Inj. to Enjoin Liquidation of Certain Entries, *Deacero I*, 37 CIT __, 942 F. Supp. 2d 1321 (2012) (No. 12–345), ECF No. 12 ("Order Enjoining Liquidation"). The court's preliminary injunction is still in place today.

Before the court had a chance to rule on Deacero's Circumvention Determination claim, Commerce and the U.S. International Trade Commission (the "ITC" or "Commission") began a five-year review of the Order. *Initiation of Five-Year ("Sunset") Review*, 78 Fed. Reg. 33,063 (Dep't Commerce June 3, 2013). The statute provides that every five years, "[Commerce] and the Commission shall conduct a review to determine ...whether revocation of the...antidumping duty order...would be likely to lead to continuation or recurrence of dumping . . . and of material injury." 19 U.S.C. § 1675(c)(1). Commerce goes first, determining whether dumping is likely to recur, and the ITC follows by making the same determination only with respect to material injury. *Id.*§§ 1675(c)(5)(A), 1675a(a), (c). Upon completion of both agencies' review obligations, the law states that "[Commerce] shall revoke ...an antidumping duty order..., unless (A) [Commerce] makes a determination that dumping ...would be likely to continue or recur, and (B) the Commission makes a determination that material injury would be likely to continue or recur." *Id.*§ 1675(d)(2).

After Commerce and the ITC had begun the five-year review, but before the agencies had reached their respective dumping and injury determinations, this court reached a decision on Deacero's appeal of Commerce's Circumvention Determination. On September 30, 2013, the court held that Commerce's decision to include 4.75 mm wire rod within the scope of the Order "was unsupported by substantial evi-

dence and not in accordance with law" and remanded to Commerce with instructions to "reconsider its finding that 4.75 mm wire rod is circumventing the Order." *Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1332.

On October 17, 2013, during the middle of the court's remand, Commerce completed its five-year dumping review. *Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 78 Fed. Reg. 63,450 (Dep't Commerce Oct. 24, 2013) (final five-year dumping results) ("Five-Year Dumping Review"). Commerce did so without the input of Deacero, because Deacero did not participate in Commerce's review proceedings. *Id.* Commerce decided that "revocation of [the Order] would be likely to lead to continuation or recurrence of dumping." *Id.* In so deciding, Commerce did not mention *Deacero I* or revisit the Order's proper scope in light of the opinion. *See id.* and accompanying I&D Mem. at Scope of the Orders.

Commerce did, however, address *Deacero I*'s effect on the scope of the Order in the remand results dated January 29, 2014. Final Results of Redetermination Pursuant to Ct. Remand, *Deacero I*, 942 F. Supp. 2d 1321 (No. 12–345), ECF No. 87–1 ("First Remand Results"). In the results, Commerce recanted the position it had taken in the Circumvention Determination that 4.75 mm wire rod was within the Order's scope—but only "under respectful protest." *Id.* at 2.[1] The propriety of Commerce's initial Circumvention Determination is now before the Federal Circuit on appeal (hereinafter the "Federal Circuit appeal"). *See* Notice of Docketing, *Deacero S.A. de C.V. v. United States*, No. 15–1362 (Fed. Cir. Feb. 23, 2015).

After Commerce announced the First Remand Results in the Circumvention Determination litigation, the ITC completed its five-year injury review of the initial antidumping Order. This time, Deacero

[1] Commerce's reasoning in the First Remand Results led to a second remand. In the First Remand Results, Commerce stated that it was bound by *Deacero I* to conclude that 4.75 mm wire rod was commercially available before the Order was issued, because the court had factually found as much. *Id.* at 4, 19. On this basis, Commerce had no alternative but to conclude that reducing wire rod's diameter to 4.75 mm wire rod was not a minor alteration. *Id.* And this conclusion in turn compelled Commerce to determine that 4.75 mm wire rod was not circumventing the Order, and was therefore outside the Order's scope. *Id.*
The court remanded again to correct Commerce's misconception that the court had made a factual finding that 4.75 mm wire rod was commercially available before the Order was issued. *Deacero S.A.P.I. de C.V. v. United States*, Slip Op. 14–99, 2014 WL 4244349, at *6–7 (Aug. 28, 2014). The court clarified that it had made no factual findings in its opinion; rather, the court simply invoked Commerce's own prior commercial availability finding. *Id.* The court afforded Commerce the opportunity to revisit commercial availability on a second remand. *Id.* Commerce declined to do so however, so the court sustained the negative circumvention determination from the First Remand Results. *Deacero S.A.P.I. de C.V. v. United States*, Slip Op. 14–151, 2014 WL 7250688 (Dec. 22, 2014).

participated. *Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 79 Fed. Reg. 35,381 (Int'l Trade Comm'n June 20, 2014) (final five-year injury results) ("Five-Year Injury Review") and accompanying Views of the Comm'n at 4. On June 16, 2014, the ITC decided that "revocation of . . . [the Order] would be likely to lead to continuation or recurrence of material injury." *Id.* In so deciding, the ITC treated wire rod below 5.00 mm as nonsubject imports (i.e., merchandise not subject to, or outside the scope of, the Order). Five-Year Injury Review and accompanying Views of the Comm'n at 17 n.91; *see id.* at 7–8. The ITC explained,

> Domestic interested parties[, who are also Defendant-Intervenors in the instant case,] argue that the Commission should treat Deacero's shipments of 4.75 mm wire rod to the United States as subject imports. We are under no obligation to treat Deacero's 4.75 mm shipments of wire rod to the United States as subject imports because, as explained in section II of this opinion, 4.75 mm wire rod was not originally within the scope of these reviews and the latest Commerce decision does not include 4.75 mm wire rod within the scope. Notwithstanding that it is nonsubject merchandise, Deacero's shipments to the United States of 4.75 mm wire rod, which it acknowledges is largely substitutable for subject merchandise, shows a continued interest in the U.S. market.

Id. at 17 n.91 (citations omitted)

On June 27, 2014, because both Commerce and the ITC had reached affirmative five-year determinations, Commerce continued the Order as mandated by 19 U.S.C. § 1675(d)(2). Continuation Notice at 38,009. Commerce did not bind the continued Order's scope to wire rod above 5.00 mm in the Continuation Notice or revoke the Order as to wire rod below 5.00 mm. *Id.* at 38,008–09.[2]

Deacero responded to the Continuation Notice by filing this lawsuit on September 2, 2014. In the new filing Deacero claims that, in the Continuation Notice, Commerce was required by law to expressly confine the scope of the Order to wire rod above 5.00 mm—and to

[2] Actually, the Continuation Notice does not even mention Commerce's loss before this court in *Deacero I*, or its subsequent redetermination that 4.75 mm wire rod was not circumventing the Order. *Id.* at 38,008–09. Instead, Commerce breezily recounted the initial (but by then invalidated) Circumvention Determination. Then, in a footnote, Commerce stated that "Deacero appealed [Commerce's Circumvention Determination], and [that] the case [wa]s currently pending." *Id.* at 38,009 n.4. In the future, Commerce might chronicle the relevant proceedings before this court with more rigorous detail—whether Commerce finds those proceedings convenient or not.

revoke the Order as to sub-5.00 mm wire rod. Complaint 1–2, 8. Deacero reasons that the ITC treated wire rod below 5.00 mm as outside the scope of the Order. *See id.* Therefore, under § 1675(d)(2) Commerce had to expressly confine the scope of, and partially revoke, the Order. *Id.*

Now before the court is Defendant-Intervor Arcelormittal's Motion to Dismiss or Stay. Arcelormittal contends that the court lacks jurisdiction to consider Deacero's claim under 28 U.S.C. § 1581(c) and § 1581(i)(4), the two jurisdictional bases asserted by Deacero. In the alternative, Arcelormittal asks that the court stay this case pending decision in the Federal Circuit appeal.

JURISDICTION AND STANDARD OF REVIEW

A jurisdictional challenge raises a "threshold inquiry." *See Hartford Fire Ins. Co. v. United States*, 31 CIT 1281, 1285, 507 F. Supp. 2d 1331, 1334 (2007). When jurisdiction is challenged pursuant to USCIT Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdictional basis by a preponderance of the evidence. *See Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1383 (Fed. Cir. 2002). The plaintiff bears the same burden with respect to 12(b)(1) challenges to statutory standing, an element of jurisdiction. *See Ad Hoc Utils. Grp. v. United States*, 33 CIT 741, 746, 625 F. Supp. 2d 1330, 1336 (2009).

"The decision of '[w]hen and how to stay a proceeding is within the sound discretion of the trial court.'" *Apex Exps. v. United States*, Slip Op. 12–104, 2012 WL 3205488, at *1 (2012) (quoting *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). "A court may properly determine that it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Diamond Sawblades Mfrs. Coal. v. United States*, 34 CIT 404, 406 (2010). "However, the party moving for a stay 'must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.'" *Id.* (quoting *Landis v. North American Co.*, 299 U.S. 248, 255 (1936)).

DISCUSSION

Arcelormittal contends that neither 28 U.S.C. § 1581(c) nor § 1581(i)(4) vests the court with jurisdiction to hear Deacero's claim. By way of reminder, Deacero claims that the ITC's treatment of scope during the five-year injury review compelled Commerce to expressly confine the scope of the Order to wire rod above 5.00 mm in the Continuation Notice. Arcelormittal argues that the courts lacks § 1581(c) jurisdiction for two reasons: (1) Deacero has no standing to

sue under § 1581(c) because it did not sufficiently participate in Commerce and the ITC's five-year review, and (2) Commerce's Continuation Notice is not reviewable under § 1581(c) because it is not a final determination under 19 U.S.C. § 1675. Turning to 28 U.S.C. § 1581(i)(4), Arcelormittal maintains that jurisdiction is unavailable under that provision because Commerce's continuation of the Order is ministerial and cannot be contested. Arcelormittal also argues that § 1581(i)(4) jurisdiction, which is residual, is precluded by jurisdiction over the Federal Circuit appeal. Finally, in the alternative to its jurisdictional arguments, Arcelormittal requests that the court stay this case pending the Federal Circuit appeal.

The court holds that it has § 1581(c) jurisdiction over Deacero's claim. However, the court also holds that a stay pending decision in the Federal Circuit appeal is appropriate. There is no possibility that a stay will damage Deacero's or the United States' interests, and a stay promotes judicial economy because this case will not go forward if the Federal Circuit affirms judgment in the Circumvention Determination appeal.

I. The Court Has Jurisdiction Under 28 U.S.C. § 1581(c)

Arcelormittal contests § 1581(c) jurisdiction on grounds that Deacero's decision not to participate in Commerce's five-year injury determination deprives Deacero of statutory standing to sue over Commerce's subsequent Continuation Notice. Arcelormittal also argues that the court lacks § 1581(c) jurisdiction because the Continuation Notice is not a final determination under § 1675. The court disagrees with both arguments.

Section 1581(c) vests the court with "exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." Section 516A, codified at 19 U.S.C. § 1516a, allows an "interested party who is a party to the proceeding in connection with which the matter arises" to bring a civil cause of action contesting "[a] final determination...by [Commerce] or the Commission under section 1675 of this title." 19 U.S.C. § 1516a(a)(2)(A), (B)(iii). Commerce's regulations define the term "party to the proceeding" as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102(b)(36).

The court first considers and rejects Arcelormittal's contention that Deacero did not sufficiently participate in the five-year review to count as a "party to the proceeding." According to Arcelormittal, Deacero's failure to participate in Commerce's portion of the five-year review (the dumping determination) is fatal to Deacero's statutory

standing. But this argument fails because it misrecognizes the nature of Deacero's claim. Deacero is not contesting Commerce's five-year dumping determination. Complaint 1–2, 7–8. Rather, Deacero is challenging Commerce's Continuation Notice, on grounds that it is incompatible with the ITC's five-year injury determination. *Id.* In the five-year injury determination, the ITC treated wire rod below 5.00 mm as outside the scope of the Order. Five-Year Injury Review and accompanying Views of the Comm'n at 17 n.91. Deacero claims that, rather than continuing the Order in full, Commerce was required to expressly confine the scope to wire rod above 5.00 mm. Complaint 7–8.

Given the nature of Deacero's claim, Deacero's participation or nonparticipation in Commerce's five-year dumping determination is irrelevant to the issue of statutory standing. Deacero's claim is predicated on a disjunction between the ITC's five-year injury determination on the one hand and Commerce's Continuation Notice on the other. Commerce's separate five-year dumping determination is not the "segment of [the] proceeding" that Deacero needed to "actively participate[]" in to preserve the present claim. 19 C.F.R. § 351.102(b)(36).

And Deacero did "actively participate[]" in the "segment[s] of [the] proceeding" relevant to Deacero's claim—at least to the extent that it had the opportunity. *Id.* As Arcelormittal concedes, Deacero participated in the ITC's five-year injury determination, the proceeding that, according to Deacero, mismatches Commerce's Continuation Notice. Mem. of Def.-Intervenors in Support of Their Mot. to Dismiss or, in Alternative, Mot. to Stay Proceedings 13, ECF No 32 ("Def.-Intervenors' Br."). There was no procedure for Deacero to participate in the continuation of the Order (or subsequent publication of the Continuation Notice). *Compare* 19 U.S.C. § 1675(c)(2) (providing notice and a means for interested parties to participate in five-year reviews)*, with id.* § 1675(d)(2) (providing no such means for participating in continuations), *and id.* § 1677f(i)(1) (same). Deacero's participation was sufficient to vest it with statutory standing to pursue this § 1581(c) claim.

The sole case that Arcelormittal cites in support of its argument that Deacero had to participate in Commerce's five-year dumping determination is *Parkdale International Ltd. v. United States*, 32 CIT 1104, 581 F. Supp. 2d 1334 (2008). In *Parkdale*, Commerce issued a revocation notice dismantling an antidumping order following a five-year review. The revocation notice contained a controversial effective revocation date. *Id.* at 1106, 581 F. Supp. 2d at 1336. Parkdale sued on the revocation notice claiming that Commerce should have chosen

an earlier revocation date. But Parkdale filed suit too late to invoke jurisdiction under § 1581(c), and had no choice but to try to proceed under 28 U.S.C. § 1581(i)(4). *Id.* at 1107–09, 581 F. Supp. 2d at 1337–38. In order to do so, Parkdale needed to satisfy § 1581(i)(4)'s prerequisite that jurisdiction is not and could not have been available under another subsection of § 1581, including § 1581(c). *Id.* at 1111, 581 F. Supp. 2d at 1340.[3]

The court held that Parkdale could not satisfy § 1581(i)(4) unavailability prerequisite, because "Commerce's Revocation Notice was a final determination pursuant to § 1516a reviewable under § 1581(c)." *Id.* at 1111, 581 F. Supp. 2d at 1340. In so holding, the court rejected Parkdale's argument that insisting on § 1581(c) jurisdiction (instead of § 1581(i)(4) jurisdiction) would leave Parkdale without an opportunity for judicial review. *Id.* at 1113–14, 581 F. Supp. 2d at 1342. The court reasoned that Parkdale could have had an opportunity for judicial review under § 1581(c) if Parkdale had participated in the underlying five-year review (which Parkdale did not do: neither during Commerce's five-year dumping review nor during the ITC's five-year injury review). *Id.* Arcelormittal extrapolates from *Parkdale* the rule that a plaintiff cannot invoke § 1581(c) jurisdiction to challenge any aspect of a revocation or continuation notice unless the plaintiff participated in Commerce's five-year dumping review.

This is not the lesson of *Parkdale*. As noted, Parkdale never asserted jurisdiction under § 1581(c) and could not have done so because the statutory deadline for doing so had passed. *Id.* at 1107–09, 581 F. Supp. 2d at 1337–38. Because *Parkdale* was not a § 1581(c) case, the court never had cause to address whether Parkdale's failure to participate in Commerce's five-year review would actually keep Parkdale from suing under § 1581(c). *See id.* at 1111–14, 581 F. Supp. 2d at 1340–43. That is, the court did not say whether or not, had Parkdale filed suit within § 1581(c)'s time limits, Parkdale's suit would have been dismissed on the basis of Parkdale's failure to participate in the five-year review. The court only held that § 1581(i)(4) unavailability prerequisite was not satisfied because Parkdale could have participated in the five-year review, and clearly could have sued under § 1581(c) had it done so. *Id.* at 1113–14, 581 F. Supp. 2d at 1342. Because the *Parkdale* court never held on § 1581(c)'s participation

[3] *See also Int'l Custom Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) ("[Section 1581(i)(4)] may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.").

requirement, Arcelormittal cannot derive from *Parkdale* a rule showing Deacero's participation in the five-year review to be insufficient.[4] Deacero's participation in the ITC's five-year injury review and beyond was sufficient to vest it with statutory standing to pursue its claim.

Nor is the court convinced by Arcelormittal's second argument, that the Continuation Notice is not reviewable under § 1581(c) because it is not a final determination under § 1675. Statutory context shows why the Continuation Notice must be a final determination under § 1675. Looking first generally at 19 U.S.C. § 1516a, Congress therein provided a comprehensive scheme for judicial review of determinations in antidumping and countervailing duty proceedings. Included in this scheme is judicial oversight of final determinations that Commerce reaches when conducting five-year reviews of antidumping duty orders under § 1675. 19 U.S.C. § 1516a(a)(2)(B)(iii). Commerce's five-year review of an antidumping duty order concludes when Commerce either revokes or continues an order under § 1675(d)(2). When Commerce revokes or continues an order, 19 U.S.C. § 1677f(i)(1) provides that Commerce "shall publish the facts and conclusions supporting th[e] determination, and shall publish notice of th[e] determination"—in other words, Commerce shall publish a revocation or continuation notice—"in the Federal Register." After publication of the notice, there are no further actions for Commerce to take. *See id.* §§ 1675(d)(2), 1677f(i)(1). Because publication of the revocation or continuation notice is Commerce's last step in five-year review, it also culminates Commerce's final determination under § 1675.

Analysis of particular statutory provisions also proves the point. Looking again to § 1677f(i)(1), that subsection requires publication of "facts and conclusions supporting" a "final determination . . . under section 1675." Commerce stated that it published the Continuation Notice "pursuant to" § 1677f(i)(1), so it follows that the Continuation

[4] Even had *Parkdale* set forth a rule on § 1581(c)'s participation requirement, it would not govern this case, because Parkdale's claim is very different from Deacero's. Parkdale claimed that the effective date of revocation was too late. *Id.* at 1106, 581 F. Supp. 2d at 1336. Parkdale was on notice of this putative claim at the outset of the five-year review: Parkdale sought a revocation from Commerce, and the statute affords Commerce discretion to set the effective revocation date. *Id.* at 1110–11, 581 F. Supp. 2d at 1340 (citing 19 U.S.C. § 1675(d)(3)). So Parkdale could have alerted Commerce to its claim at some point during the five-year review.

In this case, Deacero did not have the same degree of notice of its putative claim at the outset of the five-year review. Because Commerce had not yet issued the First Remand Results in response to *Deacero I*, Deacero did not have a clear basis for believing that the ITC might treat 4.75 mm wire rod as outside the Order's scope in the ITC's five-year injury determination. *Compare* Five-Year Dumping Review (issued October 24, 2013), *with* First Remand Results (issued January 29, 2014).

Notice is a final determination under § 1675.[5] Similarly, § 1675(c)(3) provides that "[i]f no interested party responds to the notice of initiation [of a five-year review, Commerce] shall issue a final determination . . . revoking the order." A revocation following no response by interested parties is therefore unambiguously a final determination, and furthermore one reviewable under § 1581(c). *See* 19 U.S.C. § 1516a(a)(1)(D). It would make no sense for Congress to allow the court to review the terms of a revocation upon which no interested party cares to comment, but not to review a continuation that the interested parties dispute.

In rebuttal, Arcelormittal analogizes to *Canadian Wheat Board v. United States*, 32 CIT 1116, 580 F. Supp. 2d 1350 (2008), but the analogy is unavailing. In *Canadian Wheat Board*, Commerce revoked an antidumping duty order after the ITC reversed the injury finding from the original antidumping investigation in accordance with a NAFTA panel remand. 32 CIT 1118– 19, 580 F. Supp. 2d at 1354–55. Plaintiffs challenged the effective date of the revocation, as announced in a revocation notice. *Id.* at 1120, 580 F. Supp. 2d at 1356. The court held that it had § 1581(i)(4) jurisdiction because § 1581(c) jurisdiction was unavailable. *Id.* at 1121, 1124, 580 F. Supp. 2d at 1357, 1359. Although § 1581(c) provided jurisdiction over final determinations reached in investigations, the statutory provisions governing investigations did not address post-NAFTA-remand revocations or their effective dates. *Compare* 19 U.S.C. § 1516a(a)(2)(B)(i), *with* 19 U.S.C. §§ 1671d, 1673d. Therefore, the revocation notice did not announce a final determination reviewable under 19 U.S.C. §1516a. *Id.* at 1121, 1124, 580 F. Supp. 2d at 1357, 1359.

Canadian Wheat Board does not control here. Section 1581(c) provides jurisdiction over challenges to final determinations reached in five-year-reviews, and the provisions governing five-year reviews explicitly address revocations and continuations alike. *Compare* 19 U.S.C. § 1516a(a)(2)(B)(iii), *with* 19 U.S.C. § 1675(c), (d)(2). The situ-

[5] Arcelormittal attempts to invoke § 1677f(i)(1) in its favor by arguing that Deacero is really just challenging the ministerial act of publishing the Continuation Notice as it is governed by the provision. Because § 1581(c) jurisdiction is only available over determinations under § 1675, and § 1675 does not address publication, the court must lack § 1581(c) jurisdiction. The court rejects this argument as poorly premised. Deacero is not challenging the manner in which Commerce published the Continuation Notice as governed by § 1677f(i)(1). Rather, Deacero is challenging the Continuation Notice as a final determination to continue the Order without reducing its scope—a matter very much within the reach of § 1675. *See* 28 U.S.C. § 1675(d)(2).

ation is wholly unlike *Canadian Wheat Board*, where the statute made no mention of what to do following a NAFTA panel remand. In sum, the court holds that it has § 1581(c) jurisdiction over Deacero's claim.[6] [7]

II. These Proceedings Should Be Stayed Pending a Decision in the Federal Circuit Appeal

In the alternative to its jurisdictional challenge, Arcelormittal argues that these proceedings should be stayed pending a decision in the Federal Circuit appeal, primarily for the sake of judicial economy. Arcelormittal makes much of Deacero's acknowledgment that "if th[is c]ourt's opinion in [*Deacero I*] were upheld on appeal, 'the present appeal would no longer be necessary." Def.-Intervenors' Reply to Pls.' Resp. to Def.-Intervenors' Mot. to Dismiss or, in Alternative, Mot. to Stay Proceedings 12, ECF No 36 (citing Resp. in Opp'n to Def.-Intervenors' Mot. to Dismiss or, in Alternative, Mot. to Stay Proceedings 16, ECF No 35 ("Pls.' Resp. Br.")). Arcelormittal says the court should avoid using judicial resources on this case until the court is sure that doing so will not be wasteful.

Both Deacero and the United States oppose staying this case, though only Deacero offers any explanation. Pls.' Resp. Br. 15 (citing Joint Status Report & Proposed Briefing Schedule 2, ECF No. 30 ("Joint Status Report")). According to Deacero, "[a] stay would result in delayed relief to [it], and could create needless delay and inefficiency for [the United States]." *Id.*

---

[6] Arcelormittal also argues in its reply brief that Deacero's claim is "predicated on the faulty claim that the ITC reached a negative determination on 4.75 mm wire rod." Def.-Intervenors' Reply to Pls.' Resp. to Def.-Intervenors' Mot. to Dismiss or, in Alternative, Mot. to Stay Proceedings 6, ECF No 36. Arcelormittal argues that the ITC clearly did not make a negative determination on sub-5.00 mm wire rod: The Commission has no authority to determine scope, so it simply limited its injury analysis to wire rod above 5.00 mm in accordance with Commerce's most recent determination of scope—i.e. the First Remand Results. And the Commission reached an affirmative, not negative, determination, with respect to such wire rod. *Id.* at 6–8.

The court disagrees with Arcelormittal's premise. Deacero is not claiming that the Commission made a negative five-year injury determination on sub-5.00 mm wire rod. Rather, Deacero claims that, in the absence of an affirmative five-year injury determination on sub-5.00 mm wire rod, Commerce was obligated to expressly confine the Order's scope to wire rod above 5.00 mm in the Continuation Notice. Complaint 7–8.

[7] Even if the court were to lack § 1581(c) jurisdiction over Deacero's claim because the Continuation Notice is not a final determination under § 1675, the court would nonetheless have jurisdiction under § 1581(i)(4). Section 1581(i)(4) vests the court with "exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in [the rest of § 1581]." Supposing the Continuation Notice is not a final determination under § 1675, it is plainly a part of Commerce's "administration and enforcement" of § 1675, warranting § 1581(i)(4) jurisdiction.

Recall the standard for imposing a stay: "A court may properly determine that it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Diamond Sawblades*, 34 CIT at 406. "However, the party moving for a stay 'must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.'" *Id.* (quoting *Landis*, 299 U.S. at 255).

Notwithstanding Deacero's argument to the contrary, the court finds that there is no "fair possibility" that a stay will damage Deacero's and the United States' interests. At the outset of the litigation underlying the Federal Circuit appeal, Deacero itself requested that this court enjoin Customs from liquidating entries of wire rod exported by Deacero with a diameter between 4.75 and 5.00 mm. *See* Order Enjoining Liquidation. The court granted Deacero's request, "enjoin[ing liquidation] during the pendency of this [Circumvention Determination] litigation, including any and all appeals and remand proceedings." *Id.* at 1. Because the injunction on liquidation will remain in place until the Federal Circuit appeal is resolved, Deacero can obtain no remedy in this case until that time. Put another way, staying this case puts Deacero in no different a situation than it is already in. A stay cannot damage Deacero's interests.[8]

Turning to the United States' interests, the United States has not itself explained why it opposes a stay or asserted that there is a "fair possibility" that a stay would damage its interests. *See* Joint Status Report 2–3. Without hearing directly from the United States, the court cannot treat Deacero's assertion that a stay would create "needless delay and inefficiency" for the United States as anything more than speculation. Pls.' Resp. Br. 15. Because Deacero cannot establish a fair possibility that a stay would damage Deacero's or the United States' interests, the court finds Arcelormittal's invocation of judicial economy convincing. There is no reason to resolve this case until the court can be sure that Deacero will be interested in continuing it. The court therefore stays this case pending resolution of the Federal Circuit appeal.

---

[8] Perhaps the court could provide a remedy to Deacero, such that a stay would damage Deacero's interests, if Customs were currently collecting cash deposits on Deacero's entries. But, as of June 22, 2015, Customs is not doing so. *Carbon and Certain Alloy Steel Wire Rod From Mexico*, 80 Fed. Reg. 35,626, 35,626 (Dep't Commerce June 22, 2015) (final admin. review results).

CONCLUSION AND ORDER

For the foregoing reasons, this Court possesses jurisdiction under § 1581(c), and these proceedings are stayed pending resolution of the Federal Circuit appeal. Upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that Arcelormittal's Motion to Dismiss or, in The Alternative, Motion to Stay Proceedings be, and hereby is, GRANTED insofar as the court stays this case and DENIED insofar as the court declines to dismiss this case for lack of jurisdiction; it is further

ORDERED that this case be, and hereby is, stayed until 30 days after the final resolution of all appellate review proceedings in *Deacero S.A. de C.V. v. United States*, CAFC Court No. 2015–1367.

Dated: August 17, 2015
New York, New York

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