U.S. Court of International Trade

Slip Op. 15–137

SOLARWORLD AMERICAS, INC., Plaintiff, v. UNITED STATES, Defendant.

Donald C. Pogue, Senior Judge
Court No. 13–00007[1]

[affirming the Department of Commerce's final determination in countervailing duty investigation]

Dated: December 11, 2015

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OPINION

Pogue, Senior Judge

In this case, Plaintiff SolarWorld Americas Incorporated ("SolarWorld") challenges the United States Department of Commerce's ("Commerce") determination, during the countervailing duty ("CVD") investigation of crystalline silicon photovoltaic cells ("solar cells") from the People's Republic of China ("PRC" or "China"), to defer examination of two subsidy allegations until a subsequent administrative review.[2]

[1] This case was previously consolidated into Consol. Ct. No. 13–00009, Order, June 12, 2013, ECF No. 37, at ¶ 3, but was subsequently severed therefrom, Order, Aug. 4, 2015, ECF No. 38; Order, Aug. 20, 2015, ECF No. 40.

[2] *See* SolarWorld's Mot. for J. on the Agency R., Consol. Ct. No. 13–00009, ECF Nos. 78 (conf. version) & 79 (pub. version) ("Pl.'s Br."); *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, 77 Fed. Reg. 63,788 (Dep't Commerce Oct. 17, 2012) (final affirmative countervailing duty determination and final affirmative critical circumstances determination) ("*Final Determination*") and accompanying Issues & Decision Mem., C-570–980, Investigation (Oct. 9, 2012) ("*I&D Mem.*") cmt. 10 at 36–38. The period of investigation (*POI*") was January 1, 2010, through December 31, 2010. *[SolarCells], Whether or Not Assembled into Modules, from [China]*, 76 Fed. Reg. 70,966, 70,966 (Dep't Commerce Nov. 16, 2011) (initiation of countervailing duty investigation) ("*Initiation Notice*").

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),[3] and 28 U.S.C. § 1581(c) (2012).

As explained below, because the challenged agency determinations are based on a reasonable reading of the record evidence and free of error of law or judgment, and are therefore not an abuse of the agency's discretion, Commerce's *Final Determination* in this CVD investigation is sustained.

BACKGROUND

"A countervailing duty investigation shall be initiated whenever [Commerce] determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under [19 U.S.C. § 1671(a)] exist."[4] In this case, Commerce initiated a CVD proceeding based on SolarWorld's petition, which initially covered twenty-seven separate Chinese government programs that SolarWorld alleged provided countervailable subsidies to the respondents during the POI.[5] Thereafter, SolarWorld submitted additional allegations regarding the aluminum extrusions and glass used to assemble solar cells into solar panels or modules. These latter two allegations are the subject of this dispute. Relevant background with respect to each of these allegations is presented below.

I. Aluminum Extrusions

SolarWorld's initial petition included an allegation that the Chinese government was providing ***primary*** aluminum to producers of subject merchandise for less than adequate remuneration.[6] Responding to Commerce's inquiries regarding this allegation, however, both

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

[4] 9 U.S.C. § 1671a(a).

[5] *Initiation Notice*, 76 Fed. Reg. at 70,968–69; *see* 19 U.S.C.§ 1671(a) (providing for the imposition of duties "equal to the amount of the net countervailable subsidy").

[6] *See* [SolarWorld's] Pet. for the Imposition of Antidumping & Countervailing Duties Pursuant to Sections 701 & 731 of the Tariff Act of 1930, As Amended, Vol. III (Information Relating to the People's Republic of China – Countervailing Duties) *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (Oct. 19, 2011), *reproduced in* Def.'s App., ECF No. 44–1 at Tab 1 ("*SolarWorld's Initial CVD Petition*"), at 39–42 (alleging governmental provision of "primary aluminum" for less than adequate remuneration); *Initiation Notice*, 76 Fed. Reg. at 70,969 (initiating investigation into "Government Provision of Aluminum for [Less Than Adequate Remuneration]").

mandatory respondents in Commerce's investigation[7] stated that they purchased and used ***extruded*** aluminum, rather than primary aluminum, in producing the subject merchandise during the POI.[8] SolarWorld then, on February 14, 2012 (Commerce's extended deadline for new subsidy allegations[9]), submitted a new subsidy allegation, claiming that the Chinese government was providing aluminum ***extrusions*** to respondents for less than adequate remuneration during the POI.[10] Finding no support on the record for an alleged price differential or other information indicating that aluminum extrusions were being sold to respondents at less than adequate prices, however,[11] Commerce determined that SolarWorld's allegation failed

[7] Commerce determined that resource constraint enabled the agency to individually examine no more than two producers/exporters, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, 77 Fed. Reg. 17,439, 17,439 (Dep't Commerce Mar. 26, 2012) (preliminary affirmative countervailing duty determination) ("*Prelim. Determination*"), and selected Changzhou Trina Solar Energy Co., Ltd. ("Trina Solar") and Wuxi Suntech Power Co., Ltd. ("Wuxi Suntech") – the "two largest producers/exporters of subject merchandise, based on aggregate value, to the United States" – as the two "mandatory respondents." *Id*. (citation omitted).

[8] CVD Questionnaire Resp. of [Trina Solar], Vol. 1, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (Jan. 31, 2012), *reproduced in* Def.'s App., ECF No. 44–5 at Tab 11, at III-49 ("Trina Solar only purchased aluminum frames, a kind of aluminum extrusion. It did not purchase primary aluminum. Moreover, Trina Solar did not purchase such frames from producers of primary aluminum."); Countervailing Duty Questionnaire Resp. of [Wuxi Suntech], *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (Jan. 31, 2012), *reproduced in* Def.'s App., ECF No. 44–5 at Tab 10, at 35 ("Wuxi Suntech did not purchase virgin aluminum during the POI, it just purchased aluminum extrusion[s] during the POI.").

[9] New subsidy allegations were initially due no later than 40 days before the scheduled date of the agency's preliminary determination. 19 C.F.R. § 351.301(d)(4)(i)(A) (2011). In this case, the scheduled date for the preliminary determination was originally January 12, 2012, *see Prelim. Results*, 77 Fed. Reg. at 17,440, although that date was ultimately extended to March 26, 2012, *id*. at 17,439 (effective date). Upon SolarWorld's request, Commerce extended the deadline for submission of additional subsidy allegations until February 14, 2012. *Id.* at 17,440.

[10] [SolarWorld's] New Subsidy Allegations, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (Feb. 15, 2012) (public version), *reproduced in* Def.'s App., ECF No. 44–5 at Tab 13, at 32–44 ("*SolarWorld's 2d Aluminum Allegation*"); *see Prelim. Determination*, 77 Fed Reg. at 17,440 (noting that SolarWorld initially submitted these new subsidy allegations on February 14, 2012).

[11] Analysis of Feb. 14, 2012 New Subsidy Allegations, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (May 11, 2012), *reproduced in* Def.'s App., ECF No. 44–6 at Tab 21 ("*Determ. Not To Initiate Aluminum Extrusions*"), at 9; *see also id*. ("[T]here is no other information on the record regarding possible benchmark prices for aluminum extrusions that could possibly be used to demonstrate a potential benefit."); *see* 19 U.S.C. § 1671(a) (providing for the imposition of CVD duties "equal to the amount of the net countervailable subsidy"); *id*. at § 1677(5)(B) (defining "countervailable subsidy" as requiring, *inter alia*,that "a benefit is thereby conferred"); *id*. at § 1677(5)(E)(iv) (defining "benefit conferred," "in the case where goods or services are provided," as where "such goods or services are provided for less than adequate remuneration," and providing that "the adequacy of remuneration shall be determined in relation to prevailing market

to satisfy the statutory requirements for initiation of a petition-based investigation pursuant to 19 U.S.C. § 1671a(b).[12] Accordingly, Commerce determined not to initiate an investigation of this alleged subsidy.[13]

In response, on May 15, 2012, SolarWorld submitted new factual information regarding aluminum extrusion prices, to support its February 14, 2012, allegation.[14] Commerce, however, determined that, at this point in the proceeding, insufficient time remained to complete the investigation of aluminum extrusions, and as such declined to initiate this additional investigation,[15] noting that the decision not to initiate was "in no way a comment on the merits of [the] allegation[], which [SolarWorld] may resubmit at the outset of any administrative review, if an order is issued in this proceeding."[16] SolarWorld now challenges Commerce's decision not to initiate an investigation into SolarWorld's aluminum extrusions subsidy allegation, and instead to defer consideration of this allegation until the next administrative review.[17]

II. Glass

Meanwhile, on December 5, 2011, SolarWorld also submitted an additional subsidy allegation claiming that the Chinese government provided glass to Chinese solar cell producers for less than adequate remuneration during the POI.[18] Commerce, however, determined not

conditions for the good or service being provided," where the prevailing market conditions are defined to "include price, quality, availability, marketability, transportation, and other conditions of purchase or sale").

[12] *See Determ. Not To Initiate Aluminum Extrusions*, ECF No. 44–6 at Tab 21, at 9; 19 U.S.C. § 1671a(b)(1) (requiring petitions for initiating CVD investigations to allege all "elements necessary for the imposition of the duty imposed by [19 U.S.C.§] 1671(a)" and to be "accompanied by information reasonably available to the petitioner supporting those allegations").

[13] *Determ. Not To Initiate Aluminum Extrusions*, ECF No. 44–6at Tab 21, at 9; *see also* Post-Prelim. Analysis, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (June 22, 2012), *reproduced in* Def.'s App., ECF No. 44–6 at Tab 23 ("*Post-Prelim. Determination*"), at 15 (explaining that Commerce "rejected [*SolarWorld's 2d Aluminum Allegation*] because it did not document prices Petitioner claimed were being paid inside and outside the PRC for aluminum extrusions") (citation omitted).

[14] [SolarWorld's] Comments on the Dep't's Analysis of Provision of Aluminum Extrusions for Less than Adequate Remuneration Allegation, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (May 15, 2012), *reproduced in* Def.'s App., ECF No. 44–6 at Tab 22 ("*SolarWorld's 3d Aluminum Allegation*"), at 4 & Ex. 1.

[15] *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 15–16.

[16] *Id.* at 16.

[17] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 13–29.

[18] [SolarWorld's] Additional Subsidy Allegation, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (Dec. 5, 2011), *reproduced in* Def.'s App., ECF No. 44–1 at Tab 2 ("*SolarWorld's 1st Glass Allegation*").

to initiate an investigation of this additional allegation, finding the allegation deficient because (1) it did not provide any information regarding the specific type of glass used in the production of subject merchandise, or explain why such information was not available; (2) it was not accompanied by documentation necessary to support the claim that several Chinese glass producers are state-owned enterprises; (3) it was not accompanied by actual source documentation supporting the allegation of benefit; and (4) the allegation of specificity[19] was unsupported and unexplained.[20]

SolarWorld then re-submitted its subsidy allegation regarding the governmental provision of glass for less than adequate remuneration.[21] In this new submission, SolarWorld alleged that the type of glass used in the production of subject merchandise "is a type of flat glass called '***float glass***,'"[22] which is "made through the 'float process,' in which glass is formed on a bath of molten tin."[23] To support its allegation that respondents received a benefit[24] from the governmental provision of glass, SolarWorld argued that "Chinese [solar cell] producers purchase float glass from [state-owned enterprises] at below-market prices,"[25] and supported its claim with pricing data exclusively specific to float glass.[26]

Based on this re-submitted glass subsidy allegation, Commerce determined to initiate "an investigation of the allegation with respect to the [Government of China]'s provision of *float glass* for [less than adequate remuneration]."[27] Responding to the agency's question-

[19] *See* 19 U.S.C. § 1677(5)(A) (providing that a countervailable subsidy must be "specific as described in [19 U.S.C. § 1677](5A)"); *id*. at § 1677(5A) (defining relevant specificity).

[20] Initiation Analysis of Dec. 5, 2011 New Subsidy Allegation, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (Dec. 22, 2011), *reproduced in* Def.'s App., ECF No. 44–1 at Tab 3 ("*Rejection of SolarWorld's 1st Glass Allegation*"), at 2–3.

[21] [SolarWorld's] Re-Submission of Additional Subsidy Allegation, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (Jan. 23, 2012), *reproduced in* [Conf. & Pub.] App. to SolarWorld's Mot. for J. on the Agency R., Ct. No. 13–00009, ECF Nos. 80–3 (conf. version) & 81–3 (pub. version) ("Pl.'s App.") at Tab 22 ("*SolarWorld's 2d Glass Allegation*").

[22] *Id*. at 2 (emphasis added).

[23] *Id*. (citation omitted).

[24] *See* 19 U.S.C. § 1677(5)(B) (providing that a "countervailable subsidy" requires that "a benefit" is conferred); *id*. at § 1677(5)(E)(iv) (providing that a benefit is conferred,*inter alia*, when "goods or services are provided for less than adequate remuneration").

[25] *SolarWorld's 2d Glass Allegation*, ECF Nos. 80–3 & 81–3 at Tab 22, at 6.

[26] *Id*. (relying on *id*. at Ex. 2 (U.S. Exports of Float Glass: 2010 Monthly Prices) & Ex. 3 (Float Glass in China: 2010 Monthly Prices)).

[27] Initiation of New Subsidy Allegation on the Provision of Glass for Less Than Adequate Remuneration, *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (Mar. 8, 2012), *reproduced in* Def.'s App., ECF No. 44–5 at Tab 14

naires, however, both mandatory respondents reported that "***rolled glass***," as distinct from float glass, was the major input used in their solar modules.[28] In reply, SolarWorld then sought to amend the scope of the investigation, "to cover *all glass* used by Chinese respondents in their production of subject merchandise,"[29]arguing that Commerce's limitation of the investigation to float glass was "not fully reflective of Petitioner's allegation,"[30] or, in the alternative, requesting permission to submit an additional allegation specific to *rolled* glass.[31]

Commerce rejected SolarWorld's contention that the subsidy allegation on which Commerce based its initiation was sufficient to cover types of glass beyond float glass, emphasizing that the "initiation memorandum stated clearly that the investigation was limited to float glass"[32] because "[t]he information provided by [SolarWorld] pertained solely to float glass, which is clearly distinct from rolled glass,"[33] and as such "there was no basis to expand the allegation to cover rolled glass."[34]

In addition, Commerce also denied SolarWorld permission to submit additional glass subsidy allegations, explaining that investigations into whether an input is being provided for less than adequate

("*Float Glass Initiation*"), at 3 (emphasis added).

[28] *See Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 12 ("While Suntech and Trina Solar each reported small purchases of 'float glass,' both respondents reported that '*rolled glass*' is the major glass input used in their solar modules, not float glass.") (emphasis added).

[29] [SolarWorld's] Comments on the Provision of Glass for Less than Adequate Remuneration Subsidy Allegation & Initiation, *[Solar Cells], Whether or Not Assembled into Modules, from [China*], C-570–980, Investigation (May 2, 2012), *reproduced in* Def.'s App., ECF No. 44–5 at Tab 19 ("*SolarWorld's 3d Glass Allegation*"), at 3 (emphasis added); *see also id*. at 4 (requesting that Commerce "amend its notice of initiation to include the provision of all glass used in the production of subject merchandise").

[30] *Id*. at 4.

[31] *See id.* at 5.

[32] *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 15.

[33] I&D Mem. cmt. 10 at 38; *see* [Suppl. Resp. of Wuxi Suntech], *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, Investigation (Apr. 10, 2012), *reproduced in* Def.'s App., ECF No. 44–5 at Tab 18, at 2–3 ("During the POI, Wuxi Suntech used both float glass and rolled glass in its module operations. Rolled glass is fundamentally different from float [g]lass . . . . Specifically, the molding process is entirely different for the two types of glasses. Rolled glass is produced by pouring molten glass onto two rollers to achieve an even thickness, which process also makes polishing easier. The end-product is used to produce patterned and wired glass. In contrast, float glass is produced by pouring molten glass onto a bed of molten tin and drawing off in continuous ribbon, which process gives high quality flat glass a fire polish finish besides even thickness. As such, rolled glass and float glass are two entirely different products, and thus cannot be treated as one of the same.").

[34] *I&D Mem*. cmt. 10 at 38.

remuneration "require gathering detailed information concerning the ownership and management of numerous producers supplying the input, evaluating extensive purchase information, and conducting extensive analysis of the input market and research into possible benchmarks,"[35] and as such "are particularly time consuming and would be difficult to complete at such a late stage in an investigation."[36]

Acknowledging that the agency may examine practices that appear to be countervailable subsidies discovered at any time during the course of an investigation, Commerce explained that it has the authority in such circumstances to "defer examination of any such practice if there is insufficient time remaining before the final determination,"[37] and noted that the agency's "rejection of [SolarWorld]'s arguments is in no way a comment on the merits of those allegations, which [SolarWorld] may resubmit at the outset of any administrative review, if an order is issued in this proceeding."[38]

Because the value of each respondent's total purchases of float glass during the POI was less than 0.005 percent of their respective total sales, Commerce found that "any benefit from this program would have no impact on the overall subsidy rate."[39] Commerce therefore determined not to include the governmental provision of float glass within the agency's net subsidy calculations in this investigation.[40]

SolarWorld now claims that "Commerce's interpretation of SolarWorld's allegation as solely pertaining to float glass, which respondents largely did not use, was unreasonable, and its failure to investigate the Chinese government's provision for [less than adequate remuneration] of the glass used by respondents . . . was unlawful."[41]

Following a brief statement of the relevant standards of review, SolarWorld's claims are addressed below.

STANDARD OF REVIEW

The court will sustain Commerce's countervailing duty determinations if they are supported by substantial evidence and are otherwise in accordance with law.[42] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a

[35] *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 16.

[36] *Id.*

[37] *Id.* (citing 19 C.F.R. § 351.311(c)).

[38] *Id.*

[39] *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 12 (citations omitted).

[40] *Id.* at 13.

[41] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 32.

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

conclusion,"[43] and the substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'"[44]

Where the statute and regulations leave the agency with some freedom to use its judgment, the court reviews such decisions for abuse of discretion.[45] "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."[46]

DISCUSSION

When an interested party like SolarWorld[47] files a timely[48] petition that (1) alleges all elements necessary for the imposition of a countervailing duty pursuant to 19 U.S.C. § 1671(a); and (2) "is accompanied by information reasonably available to the petitioner supporting those allegations,"[49] Commerce must initiate an investigation into "whether the elements necessary for the imposition of a duty under [19 U.S.C. § 1671(a)] exist."[50] Where this is not the case, but Commerce nevertheless "discovers [in the course of a CVD proceeding] a practice which appears to be a countervailable subsidy [with respect to the merchandise which is the subject of the proceeding],"[51] then Commerce "shall include the practice, subsidy, or subsidy program in the proceeding,"[52] as long as Commerce "concludes that sufficient

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[43] *Consol. Edison Co. of N.Y. v. NLRB,* 305 U.S. 197, 229 (1938).

[44] *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (citation omitted, alteration in the original).

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

[46] *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)).

[47] *See* 19 U.S.C. § 1677(9)(C) (defining "interested party" as, *inter alia*, "a manufacturer, producer, or wholesaler in the United States of a domestic like product"); Compl., ECF No. 8, at ¶ 3 (stating that SolarWorld "is a manufacturer of the domestic like product in the United States").

[48] *See* 19 U.S.C. § 1671a(b)(1) (providing that "[t]he petition may be amended at such time, and upon such conditions, as [Commerce] may permit").

[49] *Id.*

[50] *Id*. at §§ 1671a(a)-(b)(1) (providing that "[a] countervailing duty proceeding *shall be initiated*" under such circumstances) (emphasis added).

[51] 19 U.S.C. § 1677d.

[52] *Id.* at § 1677d(1).

time remains before the scheduled date for the final determination."[53] If Commerce concludes that insufficient time remains, however, then the agency may defer its examination until a subsequent administrative review, if any.[54]

Here, SolarWorld argues that Commerce unreasonably decided to defer until the next administrative review its investigations into the Chinese government's alleged provision of aluminum extrusions and rolled glass to producers of subject merchandise for less than adequate remuneration.[55] Specifically, SolarWorld argues, first, that its latest timely aluminum extrusions and glass allegations both satisfied the requirements of 19 U.S.C. §§ 1671a(b)(1) and 1671(a), such that Commerce was required to initiate investigations into these allegations during this CVD proceeding;[56] or, in the alternative, that even if these allegations were deficient under 19 U.S.C. § 1671a(b)(1), Commerce unreasonably determined that insufficient time remained to permit SolarWorld to file additional allegations, or to examine these allegations as discovered practices that appear to be countervailable[57] Each argument is addressed in turn below.

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[53] 19 C.F.R. § 351.311(b). The validity of this regulation is uncontested here. *See* Pl.'s Br., Consol. Ct. No. 13–00009,ECF Nos. 78 & 79, at 24 (relying on this regulation); *cf., e.g.*, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (quotation marks and citation omitted).

[54] 19 C.F.R. § 351.311(c).

[55] *See* Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 13–39; *cf. Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 15–16 (unchanged in the *Final Determination*, 77 Fed. Reg. 63,788; *I&D Mem.* cmt. 10 at 36–38).

[56] *See* Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 15–17 (arguing that Commerce improperly determined that SolarWorld's timely aluminum extrusions allegation was deficient); *id*. at 29–32 (arguing that Commerce improperly determined that SolarWorld's timely glass allegation was limited to float glass, which the respondents purchased only in negligible quantities, rather than all glass used by the respondents).

[57] *See id*. at 17–23 (arguing that Commerce unreasonably denied SolarWorld permission to file additional information regarding its aluminum extrusions allegation); *id*. at 23–29 (arguing that Commerce improperly failed to initiate an examination of apparent aluminum extrusions subsidies pursuant to 19 U.S.C.§ 1677d); *id*. at 32–34 (arguing that Commerce unreasonably denied SolarWorld permission to file additional information regarding its glass allegation); *id*. at 34–39 (arguing that Commerce improperly failed to initiate an examination of apparent rolled/patterned glass subsidies pursuant to 19 U.S.C.§ 1677d).

I. Petition-Based Initiation Under 19 U.S.C. § 1671a(b): Deficiencies in SolarWorld's Timely Glass and Aluminum Extrusions Allegations

First, SolarWorld challenges Commerce's determinations that SolarWorld's latest timely subsidy allegations regarding aluminum extrusions and non-float glass did not sufficiently allege and document all elements necessary for the imposition of countervailing duties.[58] Specifically, with regard to SolarWorld's latest timely aluminum extrusions allegation, Commerce found that the element of 'benefit conferred' was improperly alleged because it lacked supporting documentation.[59] With regard to glass, Commerce found that the type of glass with respect to which SolarWorld alleged and documented sufficient information to initiate an investigation was purchased in such negligible quantities by the mandatory respondents that any benefit therefrom would not affect the overall subsidy rate, and the allegation did not sufficiently allege and document all necessary elements with respect to any other type of glass.[60] SolarWorld challenges each of these determinations.

A. Aluminum Extrusions

SolarWorld claims that Commerce improperly declined to initiate a petition-based investigation under 19 U.S.C. § 1671a(b) into whether aluminum extrusions were being provided to respondents for less than adequate remuneration during the POI.[61] But as Commerce explained, SolarWorld's timely allegation regarding the provision of aluminum extrusions failed to satisfy the requirements for initiation under 19 U.S.C. § 1671a(b), because it did not provide any support for its pricing assertions.[62] Section 1671a(b)(1) requires Commerce to initiate CVD investigations when an interested party alleges all of "the elements necessary for the imposition of the duty" pursuant to 19 U.S.C. § 1671(a), and provides evidentiary support for each of those

[58] *See* Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79,at 15–17, 29–32.

[59] *Determ. Not To Initiate Aluminum Extrusions*, ECF No. 44–6at Tab 21, at 9; *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 15 (explaining that Commerce "rejected [SolarWorld's Feb. 14, 2012 aluminum extrusions] allegation because it did not document prices Petitioner claimed were being paid inside and outside the PRC for aluminum extrusions")(citation omitted) (unchanged in the *Final Determination*, 77 Fed. Reg. 63,788; *I&D Mem*. cmt. 10 at 36–38); *see supra* Background Section I.

[60] *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 12–13; *I&D Mem.* cmt. 10 at 38; *see supra* Background Section II.

[61] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 13–17.

[62] *See Determ. Not To Initiate Aluminum Extrusions*, ECF No. 44–6at Tab 21, at 9; *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 15.

allegations.[63] One of these necessary elements requires an allegation, supported with evidence, that "a benefit is . . . conferred" by the governmental provision of aluminum extrusions.[64] Such a benefit may be demonstrated by price comparisons showing that the prices paid by respondents to the Chinese government constitute "less than adequate remuneration."[65]

Here, Commerce determined that SolarWorld failed to satisfy the requirements for initiation pursuant to 19 U.S.C. § 1671a(b)(1) because there was no "supporting documentation on the record for the alleged price differential,"[66] nor any other record evidence "which indicates that aluminum extrusions are being sold at low prices in the PRC."[67] SolarWorld argues that this determination was unreasonable because SolarWorld alleged actual prices in the narrative portion of its allegation, "demonstrating the significant benefit received by Chinese solar producers during the POI."[68] But accepting this argument would undermine the statutory requirement that not only must the Petitioner *allege* all of the necessary elements, but the allegations must also be accompanied with reasonably available evidentiary support.[69] SolarWorld's allegation provided no sources for either the average U.S. export price or the average Chinese import price alleged.[70] As such, SolarWorld did not "support[] those allegations."[71]

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[63] 19 U.S.C. § 1671a(b)(1).

[64] *See* 19 U.S.C. § 1677(5)(B) (defining "countervailable subsidy" as requiring that, *inter alia*, "a benefit is thereby conferred").

[65] *Id*. at § 1677(5)(E)(iv) (defining "benefit conferred," "in the case where goods or services are provided," as where "such goods or services are provided for less than adequate remuneration").

[66] *Determ. Not To Initiate Aluminum Extrusions*, ECF No. 44–6 at Tab 21, at 9.

[67] *Id.*

[68] *See* Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 16 (citing *SolarWorld's 2d Aluminum Allegation*, ECF No. 44–5 at Tab 13, at 42).

[69] 19 U.S.C. § 1671a(b)(1).

[70] *SolarWorld's 2d Aluminum Allegation*, ECF No. 44–5 at Tab 13, at 42 & nn. 106–107 (providing no source for the Chinese import prices which SolarWorld claimed to be using "as a proxy for domestic Chinese prices," and citing to "ITC Report" for the U.S. export prices that SolarWorld claimed to be using "as a proxy for world price"); Ex. 19 to *SolarWorld's 2d Aluminum Allegation*, ECF No. 44–5 at Tab 13 (the sole report from the International Trade Commission ("ITC") that was appended to SolarWorld's submission, making no mention of prices for aluminum extrusions); *see Determ. Not To Initiate Aluminum Extrusions*, ECF No. 44–6 at Tab 21, at 9 & n.13 ("[SolarWorld] cites to an ITC report attached to its allegation to support its world export price[;] however, this report does not address aluminum, and contains no price data. We were unable to locate this price anywhere else in the submission or in previous submissions . . ., and there is no other information on the record regarding possible benchmark prices for aluminum extrusions that could possibly be used to demonstrate a potential benefit.") (noting that although SolarWorld also "did not provide a citation for the figure it relied on for the PRC domestic price," Commerce "was able to

Next, SolarWorld argues that Commerce unreasonably found no support for the benefit element in SolarWorld's timely aluminum extrusions allegation, because the allegation "included significant, documented information on the Chinese government's ownership of China's aluminum industry and on the policies instituted by the Chinese government to manage aluminum prices,"[72] which SolarWorld argues "provided further support for the pricing data included in the allegation."[73] But the sources provided in this portion of the allegation give no specific information regarding aluminum extrusion pricing during the POI.[74] And while the allegation asserts that the Chinese government "manages basic supply and demand in electrolytic aluminum (i.e., primary aluminum),"[75] and that "low prices are passed on from the primary aluminum producers through the aluminum extrusion producers to other downstream users,"[76] the allegation provides no evidence of actual pricing during the relevant time period.[77]

Finally, SolarWorld argues that Commerce itself should have filled in the evidentiary gap, either by extrapolating from the agency's findings in an entirely separate proceeding (where Commerce found that the Chinese aluminum extrusions industry was benefitting from certain countervailable subsidies during the year prior to the POI here),[78] or by "obtain[ing] the pricing data from the International Trade Commission's publicly available and easily accessible DataWeb

locate this figure as the POI average unit value of imported aluminum extrusions reported by the [Government of China] in [a prior submission]").

[71] 19 U.S.C. § 1671a(b)(1).

[72] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 16 (citing *SolarWorld's 2d Aluminum Allegation*, ECF No. 44–5 at Tab 13, at 34–42).

[73] *Id.*

[74] *See SolarWorld's 2d Aluminum Allegation*, ECF No. 44–5 at Tab 13, at 34–35 (relying on Ex. III-69 ("Notice of Guidelines on Accelerating the Adjustment of Aluminum Industry Structure," Fa Gai Yun Xing No. 589 (2006)) to *SolarWorld's Initial CVD Petition*, ECF No. 44–1 at Tab 1 Ex. III-69 ("*Notice of Guidelines*") (omitted from Pl.'s App., Consol. Ct. No. 13–00009, ECF Nos. 80 & 81 at Tab 3) (providing no information regarding aluminum extrusion prices during the POI)); *id*. at 36–42 (providing no additional sources for aluminum extrusion prices during the POI).

[75] *Id*. at 34 (citing *Notice of Guidelines*, ECF No. 44–1 at Tab 1 Ex. III-69, without providing a pinpoint citation).

[76] *Id*. (providing no citation for this proposition, but citing *Notice of Guidelines*, ECF No. 44–1 at Tab 1 Ex. III-69, without providing a pinpoint citation, for the assertion that "[t]he plan specifically addresses aluminum extrusions," *id.* at 34–35).

[77] *See id.* at 34–43.

[78] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 16 (citing *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (countervailing duty order)); *see SolarWorld's 2d Aluminum Allegation*, ECF No. 44–5 at Tab 13, at 35–36 (arguing that because Commerce "has recently found the provision of primary aluminum for

service."[79] But Commerce's previous finding, on the record of a separate proceeding, that some Chinese aluminum extrusions producers were benefitting from certain governmental subsidies does not in itself constitute evidence that the Chinese solar panel industry is therefore benefitting from the governmental provision of aluminum extrusions for less than adequate remuneration. In addition, accepting SolarWorld's argument that Commerce should have independently researched the publicly available pricing data would distort the burden of production placed on SolarWorld, as the interested party petitioning Commerce to investigate its subsidy allegation, to allege all necessary elements for the imposition of a countervailing duty, including the element of benefit conferred, and to support each element with reasonably available evidence.[80] Under Section 1671a(b)(1), it is not for Commerce to seek out evidence supporting the interested party's petition; rather, it is the interested party's burden to state and provide reasonably available evidentiary support for each legal element of the alleged countervailable subsidy to be investigated.[81] Requiring that Commerce itself should have researched the International Trade Commission's available price data to establish the evidentiary support for SolarWorld's allegation has the untenable effect of negating the statutory requirement that petitioners themselves supply the reasonably available evidence when petitioning for the initiation of specific subsidy investigations pursuant to Section 1671a(b)(1).[82]

Accordingly, because the record here supports Commerce's conclusion that SolarWorld's Section 1671a(b)(1) petition to investigate the alleged governmental provision of aluminum extrusions to respondents for less than adequate remuneration did not satisfy the requirements for initiation (because the allegation of benefit conferred was devoid of any evidentiary support), Commerce's determination not to

less than adequate remuneration to be a countervailable subsidy in *Aluminum Extrusions from China*," Commerce "should find the provision of aluminum extrusions for less than adequate remuneration to provide a countervailable subsidy in this investigation") (citing Issues & Decision Mem., *Aluminum Extrusions from the [PRC]*, C-570–968, Investigation (Mar. 28, 2011) (adopted in 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative countervailing duty determination) ("*Aluminum Extrusions from China Final CVD Determination*")) at 32–36; *compare Aluminum Extrusions from China Final CVD Determination*, 76 Fed. Reg. at 18,521 (providing the POI in the aluminum extrusions case to have been January 1, 2009, through December 31, 2009), *with Notice of Initiation*, 76 Fed. Reg. at 70,966 (providing the POI in the CVD proceeding here to have been January 1, 2010, through December 31, 2010).

[79] *See* Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79,at 17 (citation omitted).

[80] *See* 19 U.S.C. §§ 1671a(b)(1), 1677(5)(B).

[81] *See* 19 U.S.C. § 1671a(b)(1).

[82] *See id.*

initiate the investigation pursuant to 19 U.S.C. § 1671a(b)(1), on the basis of SolarWorld's incomplete allegation, is not unreasonable, and is therefore sustained.

B. Glass

SolarWorld also claims that Commerce improperly construed its latest timely glass subsidy allegation to cover solely float glass, rather than rolled or patterned glass.[83] But this argument is belied by the facts. SolarWorld's latest timely glass subsidy allegation was a renewed allegation that specifically addressed the deficiencies identified by Commerce in SolarWorld's initial glass allegation, among which was Commerce's concern that SolarWorld had failed to specify "the *type of glass* used" in the production of subject merchandise that was allegedly being subsidized by the Chinese government.[84] Responding to this specific concern, SolarWorld's renewed allegation unambiguously stated that "[t]he glass used in the production of [subject merchandise] is *a type of flat glass called 'float glass*.'"[85] Moreover, this allegation explicitly distinguished float glass from rolled glass, asserting that the type of glass used to produce the subject merchandise is specifically float glass.[86] Finally, all of the pricing information with which SolarWorld supported its allegation that respondents were receiving a benefit from the alleged subsidy was specific to float glass.[87] Accordingly, Commerce found that SolarWorld had adequately alleged the elements necessary for the imposition of a countervailing duty pursuant to 19 U.S.C. § 1671(a) solely with respect to float glass.[88] On this record, Commerce's determination that SolarWorld's allegations satisfied the requirements for initiation pursuant to 19 U.S.C. § 1671a(b) solely with respect to float glass was not unreasonable. Because this determination comports

[83] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 29–32.

[84] *Rejection of SolarWorld's 1st Glass Allegation*, ECF No. 44–1 at Tab 3, at 2 (emphasis added).

[85] *SolarWorld's 2d Glass Allegation*, Consol. Ct. No. 13–00009, ECF Nos. 80–3 & 81–3 at Tab 22, at 2 (emphasis added).

[86] *Id*. ("Depending on the manufacturing process used, flat glass comes either as float glass, sheet glass or rolled glass. The glass typically used in [the subject merchandise] is *float glass*, made through the 'float process,' in which glass is formed on a bath of molten tin.") (emphasis added, quotation marks and citations omitted).

[87] *Id*. at 6 (relying on *id*. at Exs. 2 & 3 to support pricing allegations); *id*. at Ex. 2 (providing 2010 monthly prices for "U.S. exports of *float glass*" (emphasis added)); *id*. at Ex. 3 (providing 2010 monthly prices for "*float glass* in China," sourced from the "China Glass Network, average of prices for 4 mm thickness *float glass*" (emphasis added)).

[88] *Float Glass Initiation*, ECF No. 44–5 at Tab 14, at 3 ("[SolarWorld] has provided information that indicates that *float glass* is provided through [state-owned enterprises] for [less than adequate remuneration].") (emphasis added).

with a reasonable reading of the record evidence, and is therefore supported by substantial evidence,[89] it is sustained.

II. Commerce Did Not Abuse Its Discretion in Determining to Defer the Investigations.

In the alternative, SolarWorld argues that even if Commerce correctly concluded that its timely aluminum extrusions and glass subsidy allegations did not meet the requirements for initiation pursuant to 19 U.S.C. § 1671a(b), Commerce should have either permitted SolarWorld to correct and re-submit its deficient allegations, or else self-initiated the investigations pursuant to 19 U.S.C. § 1677d.[90]

A. Commerce Did Not Abuse Its Discretion in Determining That Insufficient Time Remained to Permit SolarWorld to Re-Submit Its Deficient Allegations.

The statute vests Commerce with the discretion to determine when and upon which conditions petitioners may amend their subsidy allegations in CVD proceedings.[91] Here, by the time that Commerce's extended deadline for new subsidy allegations expired,[92] SolarWorld had presented Commerce with at least thirty-four separate subsidy allegations, including five new allegations submitted on the day of the deadline,[93] with less than a month remaining until the agency was then scheduled to present its preliminary results for the parties'

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[89] *See Nippon Steel*, 458 F.3d at 1351.

[90] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79,at 17–29, 32–39.

[91] 19 U.S.C. § 1671a(b)(1) (providing that petitions to initiate investigations of specific subsidy allegations "may be amended at such time, and upon such conditions, as [Commerce] may permit").

[92] *See supra* note 9 (providing relevant background and citations); Def.'s Resp. in Opp'n to Pl.'s Mot. for J. Upon the Admin. R., ECF No. 43 ("Def.'s Br.") at 4 (providing more detailed information in this regard, with relevant citations to the record).

[93] *See Initiation Notice*, 76 Fed. Reg. at 70,968–69 (listing twenty-seven separate subsidy allegations at initiation on November 16, 2011); *SolarWorld's 1st Glass Allegation*, ECF No. 44–1 at Tab 2 (additional allegation submitted on December 5, 2011; *SolarWorld's 2d Glass Allegation*, Consol. Ct. No. 13–00009, ECF Nos. 80–3 & 81–3 at Tab 22 (additional allegation submitted on January 23, 2012); *Prelim. Determination*, 77 Fed. Reg. at 17,440 ("Based on [a] request from [SolarWorld], [Commerce] extended the deadline until February 14, 2012, for submitting additional subsidy allegations. . . . On February 14, 2012, [SolarWorld] submitted five additional new subsidy allegations."). The twenty-seven initial allegations, plus the December 5, 2011, glass allegation, plus the January 31, 2012, additional glass allegation, plus the five additional February 14, 2012, allegations add up to a total of thirty-four.

review,[94] and therefore approximately three months remaining until the then-scheduled final determination.[95] By the time that SolarWorld sought to amend its deficient aluminum extrusions and rolled glass allegations – May 15, 2012, and May 2, 2012, respectively[96] – the re-scheduled deadline for the final determination was less than three months away.[97] And although the deadline for the final determination (newly aligned with the deadline for the final determination

[94] *See Prelim. Determination*, 77 Fed. Reg. at 17,440 (noting that the extended the deadline for submission of additional subsidy allegations was February 14, 2012); *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, 77 Fed. Reg. 4764,4765 (Dep't Commerce Jan. 31, 2012) (second postponement of preliminary determination in the countervailing duty investigation) ("*2d Postponement*") (announcing the latest postponement as of the February 14, 2012, new subsidy deadline; postponing the preliminary determination, at SolarWorld's second request, until March 2, 2012). Subsequently, the preliminary determination was postponed again because, "[d]ue to the number of companies and the complexity of the alleged countervailable subsidy practices being investigated," this CVD investigation was deemed "extraordinarily complicated." *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, 77 Fed. Reg. 10,478, 10,478 (Dep't Commerce Feb. 22, 2012) (postponement of preliminary determination in the countervailing duty investigation) ("*3d Postponement*") (postponing the preliminary determination until March 19, 2012); *but see Prelim. Determination*, 77 Fed. Reg. at 17, 439 (providing an effective date of March 26, 2012). When Commerce issued its preliminary determination, the agency had not yet reached a determination as to the five new subsidy allegations submitted by SolarWorld on the day of the final extended new subsidy deadline, *Prelim. Determination*, 77 Fed. Reg. at 17,440, but had already determined that, even without these timely new allegations, "the investigation [was] extraordinarily complicated." *3d Postponement*, 77 Fed. Reg. at 10,478 (citing 19 U.S.C.§ 1671b(c)(1)(B)(i) (permitting postponement of preliminary determination if Commerce determines, *inter alia*, that "the case is extraordinarily complicated")).

[95] *See* 19 U.S.C. § 1671d(a)(1) (requiring Commerce to issue its final determination within 75 days of the preliminary determination); *2d Postponement*, 77 Fed. Reg. at 4765 (setting the date for the preliminary determination, effective at the time of the latest extended deadline for new subsidy submissions, as March 2, 2012); *cf.* 19 C.F.R. § 351.311(c) (permitting deferral of self-initiated examination under 19 U.S.C. § 1677d if "insufficient time remains before *the scheduled date* for the final determination") (emphasis added). On April 30, 2012, however, Commerce granted SolarWorld's timely request to align the deadline for the final CVD determination with the deadline for the final determination in the companion antidumping investigation of the subject merchandise. *[SolarCells], Whether or Not Assembled into Modules, from [China]*, 77 Fed. Reg. 25,400, 25,400 (Dep't Commerce Apr. 30, 2012) (alignment of final countervailing duty determination with final antidumping duty determination) ("*Notice of Alignment*") ("The final CVD determination will be issued on the same date as the final [antidumping] determination, which is currently scheduled to be issued no later than July 30, 2012, unless postponed.") (relying on 19 U.S.C. § 1671d(a)(1) ("[W]hen [a CVD] investigation . . . is initiated simultaneously with an [antidumping] investigation . . ., which involves imports of the same class or kind of merchandise from the same or other countries, [Commerce], if requested by the petitioner, shall extend the date of the final [CVD] determination . . . to the date of the final [antidumping] determination . . . .") and 19 C.F.R. § 351.210(b)(4)(i) (providing for same)).

[96] SolarWorld's *3d Aluminum Allegation*, ECF No. 44–6 at Tab 22, at 4 & Ex. 1; *SolarWorld's 3d Glass Initiation*, ECF No. 44–5 at Tab 19, at 5.

[97] *Notice of Alignment*, 77 Fed. Reg. at 25,400.

in the companion antidumping investigation) was subsequently postponed, only three and a half months remained by the time of Commerce's decision that insufficient time remained to permit SolarWorld to re-file or to self-initiate pursuant to 19 U.S.C. § 1677d.[98] Having found SolarWorld's latest timely aluminum extrusions and non-float glass subsidy allegations to fall short of the requirements for initiation under 19 U.S.C. § 1671a(b),[99] Commerce determined that "there was simply not enough time to allow [SolarWorld] to re-file its allegations and collect and analyze the information necessary,"[100] which typically "amounts to several hundred pages of documents that must be analyzed once all questionnaires have been answered,"[101] in a proceeding that, even without these additional allegations, was already "extraordinarily complicated."[102]

SolarWorld argues that Commerce unreasonably determined that insufficient time remained to initiate the investigations after finding SolarWorld's latest timely aluminum extrusions and glass allegations to be deficient.[103] But "agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources,"[104] and here Commerce was already occupied with investigating, within strict statutory deadlines,[105] dozens of SolarWorld's additional subsidy allegations.[106] Because Commerce's conclusion that insufficient time remained to permit SolarWorld to

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[98] *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 15–16(issuing the decision that insufficient time remained on June 22, 2012); see *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, 77 Fed. Reg. 31,309, 31,324 (Dep't Commerce May 25, 2012) (preliminary determination of sales at less than fair value, postponement of final determination and affirmative preliminary determination of critical circumstances) (postponing the final determination "until no later than 135 days after the publication of this notice in the Federal Register")

[99] *See supra* Discussion Section I (affirming Commerce's determinations in this regard).

[100] *I&D Mem*. cmt. 10 at 37 (footnote omitted).

[101] *Id*. at 38

[102] *See 3d Postponement*, 77 Fed. Reg. at 10,478.

[103] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 21–23; 33–34.

[104] *Torrington Co. v. United States*, 68 F.3d 1347, 1351(Fed. Cir. 1995) (citing *Heckler v. Chaney*, 470 U.S. 821, 831(1985)); *see also Longkou Haimeng Mach. Co. v. United States*, 32 CIT 1142, 1151, 581 F. Supp. 2d 1344, 1353 (2008) ("[A]ny assessment of Commerce's operational capabilities or deadline rendering must be made by the agency itself.") (relying on *Torrington*, 68 F.3d at 1351).

[105] *Cf., e.g., Maui Pineapple Co. v. United States*, 27 CIT 580,595, 264 F. Supp. 2d 1244, 1257 (2003) ("[D]ue to deadlines and limited resources, it is vital that accurate information be provided promptly to allow the agency sufficient time for review[,] [and] Commerce . . . has broad discretion to fashion its own rules of administrative procedure, including the authority to establish and enforce time limits concerning the submission of written information and data.") (quotation marks and citations omitted).

[106] *See supra* note 93 (providing relevant citations).

re-file its subsidy allegations after the latter were found to be deficient was not demonstrably "an unreasonable judgment in weighing [the] relevant factors,"[107] Commerce did not abuse its discretion in so concluding.[108] And while SolarWorld argues that Commerce acted arbitrarily, because the agency permitted certain respondents to cure deficiencies in their questionnaire responses,[109] Commerce did not "treat[] similar situations differently,"[110] because the agency had in fact also permitted SolarWorld to cure the deficiencies in both its initial aluminum and glass allegations, and had extended the deadlines to permit SolarWorld to do so.[111]

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[107] *See WelCom Prods*., 36 CIT at __, 865 F. Supp. 2d at 1344 ("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.") (citing *Star Fruits*, 393 F.3d at 1281). Here, Commerce properly interpreted the law to grant the agency discretion, *see* 19 U.S.C. § 1671a(b)(1) (providing that new subsidy allegations "may be amended at such time, and upon such conditions, as [Commerce] may permit"), and the agency's factual findings regarding the deficiencies in SolarWorld's latest timely Section 1671a(b)(1) petitions for investigation of its aluminum extrusions and glass allegations were supported by substantial evidence. *See supra* Discussion Section I (affirming Commerce's determinations in this regard).

[108] See *Vt. Yankee Nuclear Power Corp*., 435 U.S. at 543 ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (quotation marks and citation omitted).

[109] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 18–20; 32–33 (arguing that Commerce acted arbitrarily in deciding that insufficient time remained for SolarWorld tore-file its deficient allegations, because the agency had provided respondents with opportunities to correct deficiencies in their questionnaire responses) (quoting *SKF USA, Inc. v. United States,* 263 F.3d 1369, 1382 (Fed. Cir. 2001), (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) ("[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently."))).

[110] *See SKF USA*, 263 F.3d at 1382 (quotation marks and citation omitted).

[111] *See supra* Background Section I & nn.6, 8–10 (providing background and relevant citations regarding permitted amendments to SolarWorld's initial aluminum allegation); *supra* Background Section II & nn. 18, 20–21 (providing background and relevant citations regarding permitted amendments to SolarWorld's initial glass allegation); *supra* note 93 (detailing the relevant time extensions granted at SolarWorld's request); *see also* Def.'s Br., ECF No. 43, at 20 ("[T]hroughout the proceeding, and in recognition of the extraordinary complexity of the investigation, Commerce granted several extensions of time to *both* SolarWorld and the respondents.") (emphasis in original); *cf. Royal Thai Gov't v. United States*, 28 CIT 1218, 1226,341 F. Supp. 2d 1315, 1323 (2004) ("[Petitioner] overlooks the fact that there should not have been any 'evidentiary deficiencies' to correct.") (citation omitted), *aff'd in part & rev'd in part on other grounds*, 436 F.3d 1330 (Fed. Cir.2006).

B. Commerce Did Not Abuse Its Discretion in Determining That Insufficient Time Remained to Self-Initiate Under 19 U.S.C. § 1677d.

Next, SolarWorld argues that Commerce should have nevertheless initiated investigations into whether the Chinese government provided aluminum extrusions and rolled glass to respondents for less than adequate remuneration, pursuant to the agency's authority under 19 U.S.C. § 1677d, arguing that Commerce had more than enough time in which to self-initiate and complete these additional investigations in this proceeding.[112]

Commerce acknowledged its "authority to examine practices that appear to be countervailable subsidies discovered at any time during the course of an investigation,"[113] but referenced the agency's regulations in explaining that Commerce may "defer examination of any such practice if there is insufficient time remaining before the final determination."[114] Finding that insufficient time remained in this proceeding to initiate these investigations, notwithstanding the evidentiary deficiencies in SolarWorld's allegations, Commerce specifically stated that the agency's "rejection of [SolarWorld]'s arguments is in no way a comment on the merits of those allegations, which [SolarWorld] may resubmit at the outset of any administrative review."[115] And in fact Commerce went on to investigate (and ultimately countervail for) both of these subsidy allegations in the subsequent first administrative review.[116]

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[112] Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 23–27; 34–38.

[113] *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 16; *see* 19 U.S.C. § 1677d. While SolarWorld argues that Commerce failed to undertake the inquiry as to whether self-initiation was warranted pursuant to 19 U.S.C. § 1677d, *see* Pl.'s Br., Consol. Ct. No. 13–00009, ECF Nos. 78 & 79, at 28 (quoting *Allegheny Ludlum Corp. v. United States*, 25 CIT 816, 821 (2001) (not reported in the Federal Supplement) ("Since the plain language of [19 U.S.C. § 1677d] and [19 C.F.R. § 351.311] only require Commerce to investigate where there is a practice that 'appears to be' or 'appears to provide' a countervailable subsidy, it follows that Commerce must first determine whether that threshold is met.") (SolarWorld's alteration omitted)), Commerce in fact acknowledged this possibility, *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 16, but found that insufficient time remained in this complex proceeding to act on it, *see id.*

[114] *Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 16 (citing 19 C.F.R. § 351.311(c)).

[115] *Id.*; *see* 19 C.F.R. § 351.311(c)(2) ("If [Commerce] concludes that insufficient time remains before the scheduled date for the final determination . . . to examine the practice, subsidy, or subsidy program [described by 19 U.S.C. § 1677d and 19 C.F.R.§ 351.311(b)], [Commerce] will . . . defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any.").

[116] *See* Def.'s Br., ECF No. 43, at 22, 39 (citing Issues & Decision Mem., *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, C-570–980, ARP 3/12–12/12 (July 7, 2015) (adopted in 80 Fed. Reg. 41,003, 41,004 (Dep't Commerce July 14,2015) (final results

As discussed above, Commerce's determinations that SolarWorld's latest timely aluminum extrusions and rolled glass allegations failed to satisfy the requirements for petition-based initiation are supported by substantial evidence, and the agency did not abuse its discretion in concluding that insufficient time remained in this proceeding to permit SolarWorld to re-file the allegations.[117] The agency is not mandated to unreasonably over-extend itself when faced with limited resources. It follows that Commerce also did not abuse its discretion in concluding that insufficient time remained in this proceeding to self-initiate the investigations.[118] As this Court has previously explained, "a petitioner who does not timely make a [legally complete and sufficient] subsidy allegation, even though it could, risks having Commerce defer its investigation to a subsequent administrative review."[119] That is exactly what happened here.

Accordingly, because Commerce's decisions to defer consideration of SolarWorld's untimely aluminum extrusions and rolled glass subsidy allegations until the next administrative review were based on fac-

of countervailing duty administrative review; 2012)) at 21–23 (determining the provision of aluminum extrusions for less than adequate remuneration to be countervailable), 23–25 (determining the provision of "solar glass" for less than adequate remuneration to be countervailable)). Responding to the court's inquiry as to whether, given retroactive duty assessment, Commerce's determinations to investigate and countervail for these subsidies in the subsequent administrative review mooted the issues presented here, *see* Order, Sept. 25, 2015, ECF No. 45, the parties explained that the controversy presented is not mooted because, "in the first administrative review, in which review requests for various companies were rescinded, the rescinded companies were assessed the rate calculated in the investigation." Def.'s Suppl. Br., ECF No. 51, at 2 (citing *[Solar Cells], Whether or Not Assembled into Modules, from [China]*, 80 Fed. Reg. 8597 (Dep't Commerce Feb. 18, 2015) (notice of correction to preliminary results of countervailing duty administrative review; 2012 and partial rescission of countervailing duty administrative review)); *see also* Pl. [SolarWorld]'s Suppl. Br., ECF No. 52, at 2 (listing specific respondents for whom this is the case).

[117] *Supra* Discussion Sections I & II.A.

[118] *See Post-Prelim. Determination*, ECF No. 44–6 at Tab 23, at 16 (relying on 19 C.F.R. § 351.311(c)) (unchanged in the *Final Determination*, 77 Fed. Reg. 63,788; *I&D Mem*. cmt. 10 at 36–38).

[119] *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 461 n. 12, 112 F. Supp. 2d 1141, 1151 n. 12 (2000) (explaining that 19 C.F.R. § 251.311(c)(2) "allow[s] Commerce to 'defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review' if Commerce 'concludes that insufficient time remains before the scheduled date for the final determination'" (quoting 19 C.F.R.§ 251.311(c)(2))); *see also Bethlehem Steel Corp. v. United States*, 25 CIT 307, 313, 140 F. Supp. 2d 1354, 1361 (2001)(recognizing that "when Commerce is faced with . . .extraordinarily complex subsidy allegations it may lack the resources or the time necessary to investigate the new allegations") (quotation marks omitted); *3d Postponement*, 77 Fed. Reg. at 10,478 (determining that "the investigation [was] extraordinarily complicated," even without taking into account the five new subsidy allegations SolarWorld submitted on the day of the last extended deadline for new subsidy submissions, or its subsequent attempts to re-file the aluminum extrusions and glass allegations).

tual findings that are supported by substantial evidence, were not an abuse of the agency's discretion, and were otherwise free of any legal error, these determinations are sustained.

CONCLUSION

For all of the foregoing reasons, Commerce's *Final Determination* is affirmed. Judgment will issue accordingly.

Dated: December 11, 2015
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE,
Senior Judge

Slip Op. 15–138

TAI SHAN CITY KAM KIU ALUMINIUM EXTRUSION CO. LTD., Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 14–00016

[Sustaining the U.S. Department of Commerce's remand redetermination in the first countervailing duty review of aluminum extrusions from the People's Republic of China.]

Dated: Dated: December 14, 2015

William Ellis Perry, Dorsey & Whitney, LLP, of Seattle, WA, for Plaintiff. With him on the brief was *Emily Lawson*.

Douglas Glenn Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *Jessica Marie Link*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Robert Edward DeFrancesco, III, Wiley Rein, LLP, of Washington, DC, for Defendant-Intervenor. With him on the brief was *Alan Hayden Price*.

OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce" or "Department") remand redetermination filed pursuant to the court's decision in *Tai Shan City Kam Kiu Aluminium Extrusion Co. v. United States*, 39 CIT __, 58 F. Supp. 3d 1384 (2015)

("*Tai Shan*"). *See generally* Final Results of Redetermination Pursuant to Court Remand, Aug. 13, 2015, ECF No. 60–1–3 ("Remand Results"). The court in *Tai Shan* remanded Commerce's final determination in the first administrative review of the countervailing duty ("CVD") order covering certain aluminum extrusions from the People's Republic of China ("PRC" or "China") for Commerce to reconsider its corroboration methodology in calculating Plaintiff Tai Shan City Kam Kiu Aluminium Extrusion Co. Ltd.'s ("Kam Kiu") adverse facts available ("AFA") rate.[1] *See Tai Shan*, 39 CIT at __–__, 58 F. Supp. 3d at 1391–1396; *see also Aluminum Extrusions From the People's Republic of China*, 79 Fed. Reg. 106 (Dep't Commerce Jan. 2, 2014) (final results of countervailing duty administrative review; 2010 and 2011) ("*Final Results*") and accompanying Issues and Decision Memorandum for Aluminum Extrusions from the People's Republic of China, C-570–968, (Dec. 26, 2013), *available at* http://enforcement.trade.gov/frn/summary/prc/2013–31407–1.pdf (last visited Dec. 7, 2015) ("*Final I&D Memo*"); *Aluminum Extrusions From the People's Republic of China*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (countervailing duty order). For the reasons set forth below, the court sustains Commerce's Remand Results.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in the previous opinion ordering remand to Commerce and now recounts the facts as relevant to the court's review of the Remand Results. *See Tai Shan*, 39 CIT at __–__, 58 F. Supp. 3d at 1386–87. Kam Kiu commenced this action and subsequently filed a Rule 56.2 motion for judgment on the agency record challenging Commerce's *Final Results*. In the court's review of the *Final Results*, Kam Kiu challenged Commerce's decision to use AFA and, in the alternative, Commerce's calculation of Kam Kiu's AFA rate. *See id.* at __–__, 58 F. Supp. 3d at 1385–86. Specifically, Kam Kiu alternatively argued that Commerce improperly attributed all location-specific subsidies throughout the PRC offered by the government of China and the "Export Rebate for Mechanical, Electronic, and High-Tech Products" program ("Export Rebate Program") to Kam Kiu in calculating its AFA rate. *See id.* at __, 58 F. Supp. 3d at 1386.

After considering Kam Kiu's failure to timely submit its quantity

[1] Although 19 U.S.C. § 1677e(a)–(b) (2012) and 19 C.F.R. § 351.308(a)–(c) (2013) each separately provide for the use of facts otherwise available and the subsequent application of an adverse inference to those facts, Commerce uses the shorthand term "adverse facts available" or "AFA" to refer to Commerce's use of such facts otherwise available with an adverse inference. *See e.g.*, *Final I&D Memo* at 6–11 (discussing Commerce's application of AFA to uncooperative companies).

and value ("Q&V") questionnaire response, the court in *Tai Shan* found Commerce reasonably refused to consider Kam Kiu's untimely Q&V questionnaire response for purposes of deciding whether to apply AFA in the *Final Results*. *See id.* at __–__, 58 F. Supp. 3d at 1387–91. However, the court also held that Commerce's calculation of Kam Kiu's 121.22% AFA rate was not supported by substantial evidence because Commerce failed to corroborate the location-specific subsidies and the Export Rebate Program attached to the AFA rate, resulting in an uncorroborated aggregate AFA rate. *See id.* at __–__, 58 F. Supp. 3d at 1391–96. Accordingly, the court remanded the *Final Results* for Commerce to reconsider its corroboration methodology and instructed Commerce to "either attempt to corroborate Kam Kiu's ability to benefit from these programs simultaneously in the first instance, or . . . adjust its methodology as applied to Kam Kiu and corroborate its findings under its new methodology." *Id.* at __, 58 F. Supp. 3d at 1394.

Commerce issued its draft remand redetermination on June 23, 2015 and accepted comments from interested parties until July 3, 2015. *See generally* Draft Results of Redetermination Pursuant to Court Remand, PD 2 at bar code 3285912–01 (June 23, 2015) ("Draft Remand Results"). In the Draft Remand Results, Commerce, under protest,[2] adjusted its corroboration methodology and removed the location-specific subsidies from Kam Kiu's AFA rate other than those available to companies in the area immediate to Kam Kiu's mailing address within Guangdong Province. *See id.* at 16. However, despite the adjustment, Commerce explained as part of its protest why it believed its *Final Results* were nonetheless supported by substantial evidence and in accordance with law. *See id.* at 8–17. Commerce continued to attribute the Export Rebate Program to Kam Kiu, but provided further explanation to support its determination. *See id*. at 17–20. Commerce additionally explained that corroboration of the aggregate AFA rate is achieved through corroboration of the individual subsidy programs. *See id.* at 23–29. Commerce's changes from the *Final Results* on remand resulted in a revised AFA rate of 79.80% for Kam Kiu. *See id.* at 37–38.

On July 2, 2015, Kam Kiu submitted comments to Commerce regarding the Draft Remand Results. *See generally* Comments on Draft Remand Results, PD 5 at bar code 3288298–01 (July 2, 2015). With respect to the location-specific subsidies, Kam Kiu commented that Commerce's Draft Remand Results were consistent with the court's

[2] The Court of Appeals for the Federal Circuit has held that even though Commerce may technically be the prevailing party where the Court of International Trade sustains its decision after remand, Commerce may adopt its position "under protest" to preserve its right to appeal. *See Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

order in *Tai Shan*, *see id.* at 9–10, but took issue with Commerce's protest characterizing it as "a reiteration of the Department's stated basis for application of the 121.22 percent AFA rate . . . in an attempt to support its original determination." *Id.* at 11. Kam Kiu, however, continued to challenge Commerce's inclusion of the Export Rebate Program because Commerce "makes no attempt to answer the [c]ourt's question on how . . . Kam Kiu could have availed itself of the benefits of the program." *Id.* at 21. Regarding the aggregate AFA rate, Kam Kiu contended that in order to comply with the court's remand order "[t]he Department must corroborate its information to ensure that the aggregate rate—and not just the individual rate for each program—is relevant and reliable to Tai Shan City Kam Kiu . . . by comparing this aggregate rate to the rate calculated for the mandatory respondents." *Id.* at 23–24.

Despite Kam Kiu's comments, Commerce made no substantive changes to the Draft Remand Results and submitted its final remand redetermination to the court for review on August 13, 2015. *See generally Remand Results*. On September 14, 2015, Kam Kiu filed comments with the court regarding Commerce's Remand Results. *See generally* Pl.'s Comments on the Department of Commerce Remand Redetermination, Sept. 14, 2015, ECF No. 62. Kam Kiu incorporated by reference its comments on the Draft Remand Results in support of Commerce's determination on remand to remove the location-specific subsidies, *see id.* at 3, and continues to urge the court not to consider Commerce's protest, *see id.* at 4 n.4, but has abandoned its challenge with respect to the Export Rebate Program and Commerce's corroboration of the aggregate AFA rate. *See id.* at 1–2. Accordingly, Kam Kiu asks the court to sustain the Remand Results.

On November 13, 2015, Defendant United States ("Defendant") filed its reply to Kam Kiu's comments with the court and, aside from rejecting Kam Kiu's comment that the court should not consider Commerce's protest in the Remand Results, requests the court to sustain the Remand Results. *See generally* Def.'s Resp. Pl.'s Comments Remand Redetermination, Nov. 13, 2015, ECF No. 65. Defendant-Intervenor Aluminum Extrusions Fair Trade Committee filed its reply to Kam Kiu's comments solely to voice its agreement with Commerce's protest. *See* Resp. Aluminum Extrusions Fair Trade Committee Pl.'s Comments Remand Results, Nov. 13, 2015, ECF No. 66.

JURISDICTION AND STANDARD OF REVIEW

The court continues to have jurisdiction pursuant to Section 516A(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)

(2012),[3] and 28 U.S.C. § 1581(c) (2012).[4] The court sustains Commerce's determinations, findings or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Commerce's results in its redetermination pursuant to court remand are also reviewed for "compliance with the court's remand order." *Nakornthai Strip Mill Public Co. Ltd. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008) (citing *NMB Sing. Ltd. v. United States*, 28 CIT 1252, 1259–60, 341 F. Supp. 2d 1327, 1333–34 (2004)).

DISCUSSION

The court held in its previous opinion that Commerce reasonably resorted to AFA to calculate Kam Kiu's CVD rate in the *Final Results*, but failed to corroborate Kam Kiu's AFA rate to the extent practicable. *Tai Shan*, 39 CIT at __–__, 58 F. Supp. 3d at 1387–96. Commerce has now corroborated Kam Kiu's AFA rate and Kam Kiu has abandoned its other challenges. All parties request that the court sustain the Remand Results. Commerce however makes its request under protest. The court now reviews Commerce's Remand Results to determine whether Commerce's determinations on remand are supported by substantial evidence, in accordance with law, and comply with the court's order in *Tai Shan*.[5] The court also addresses Commerce's protest.

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

[4] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

[5] The court in *Tai Shan* remanded the Final Results to Commerce because Commerce did not meet its burden to corroborate as required by 19 U.S.C. § 1677e. *See Tai Shan*, 39 CIT at __– __, 58 F. Supp. 3d at 1391–96. On June 29, 2015, President Obama signed the Trade Preferences Extension Act of 2015 ("Act"). *See* Pub. L. No. 114–27, 129 Stat. 362 (2015). Section 502 of the Act amends 19 U.S.C. § 1677e, the statute which governs Commerce's use of facts otherwise available and the subsequent application of an adverse inference to those facts, and has significantly reduced Commerce's burden to corroborate. However, the Act does not explicitly provide an effective date. The Court of Appeals for the Federal Circuit has recently held that Section 502 of the Act has prospective effect and "unambiguously applies only to Commerce determinations made after the date of enactment." *See Ad Hoc Shrimp Trade Action Committee v. United States*, 802 F.3d 1339, 1352 (Fed. Cir. 2015). Left open by the Court of Appeals for the Federal Circuit is the question of whether the Act, specifically the standard for corroboration under Section 502 of the Act, is applicable to administrative redeterminations made after the enactment of the law concerning facts that occurred prior to that date, *i.e.*, remand redeterminations that are decided after June 29, 2015 in connection with final determinations made prior to that date.

On August 6, 2015, Commerce issued a notice specifying the dates it intended to apply each statutory revision made by the Act and, in relevant part, indicated that Commerce will apply 19 U.S.C. § 1677e as amended by Section 502 of the Act to "determinations made on or after August 6, 2015." *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed.

I. Legal Framework

Commerce has discretion to use facts otherwise available to make its determinations where "necessary information is not available on the record," or a party "withholds information that has been requested by [Commerce] . . . , fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . , [or] significantly impedes a proceeding . . . , [Commerce] . . . shall, subject to section 1677m(d) . . . , use the facts otherwise available in reaching the applicable determination . . . ." 19 U.S.C. § 1677e(a). If Commerce additionally "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . , [Commerce], in reaching the applicable determination . . . , may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" to fill the factual gaps in the record. 19 U.S.C. § 1677e(b). Commerce may draw adverse inferences when relying on information from "(1) the petition, (2) a final determination in the investigation . . . , (3) any previous review . . . or determination . . . , or (4) any other information placed on the record." 19 U.S.C. § 1677e(b)(1)–(4).

To calculate a CVD rate based on AFA, Commerce is unable to rely on information that ought to have been submitted by the uncooperative respondent and must look elsewhere. As a result, Commerce may rely upon secondary information in calculating an AFA rate for an

Reg. 46,793, 46,794 (Dep't Commerce Aug. 6, 2015) ("*Application Notice*"). Commerce issued its remand redetermination in this case on August 13, 2015. In the Remand Results, Commerce avers "[b]ecause of the timing and the procedural posture of this remand (*i.e.*, we issued our draft remand on June 23, 2015, before the August 6, 2015 publication of *Application Dates Announcement*, 80 FR 46793, and our remand is due one week after such publication, on August 13, 2015), we did not apply the new law in this remand redetermination." Remand Results 10 n.38.

The law that will apply in this case is not in dispute. No party argues that the new law should apply. The court therefore applies the former version of 19 U.S.C. § 1677e and leaves for another day the question of which law applies to remand redeterminations made after June 29, 2015 in connection with final determinations made on or before June 29, 2015. In doing so, the court notes that Commerce's use of the general term "determinations" in the *Application Notice* coupled with its explanation for choosing not to apply the new law here imply that Commerce would ordinarily apply the amended law to remand redeterminations decided after June 29, 2015 that revisit final determinations made prior to that date. *See Application Notice*, 80 Fed. Reg. at 46,794 (providing that Commerce "will apply this provision to determinations made on or after August 6, 2015"); Remand Results 10 n.38. The court does not opine on Commerce's rationale for not seeking to apply the new law nor does the court endorse or adopt that rationale. Because Commerce has decided not to apply the new law in this remand redetermination, the court does not address whether Commerce could apply Section 502 of the Act to remand redeterminations decided after June 29, 2015 that revisit final determinations made prior to that date. That question is not before the court and has not been briefed by the parties.

uncooperative party, and, in such circumstances, Commerce "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [Commerce's] disposal." 19 U.S.C. § 1677e(c).[6] Notwithstanding Commerce's discretion to employ AFA in certain situations, Commerce's calculated AFA rate for an uncooperative respondent must be supported by substantial evidence. *See Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1325 (Fed. Cir. 2010). Commerce's statutory obligation to corroborate serves as a means to satisfy substantial evidence by "requir[ing that] Commerce . . . show some relationship between the AFA rate and the actual dumping rate." *Id.*

Corroboration requires Commerce to "examine whether the secondary information to be used has probative value." 19 C.F.R. 351.308(d); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–465, vol. 1, at 869–70 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 ("SAA"). Commerce assesses the probative value of secondary information by evaluating whether such information is reliable and relevant to the respondent. *See* Remand Results 9. Although Commerce has broad discretion to employ adverse inferences to ensure an uncooperative party does not obtain a more favorable result than if it had fully cooperated, *see* SAA at 4198–99, the Court of Appeals for the Federal Circuit has interpreted the corroboration requirement as a limitation on Commerce's discretion in that it requires Commerce to assign rates that are "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).

Moreover, the Court of Appeals has interpreted the corroboration requirement as an affirmative burden placed on Commerce, not the companies subject to the investigation or review. *See id.* at 1034 (characterizing the corroboration requirement as Commerce's "burden of providing a rate that was corroborated"). "Commerce must select secondary information that has some grounding in commercial reality." *Gallant Ocean*, 602 F.3d at 1324. Thus, the corroboration requirement's purpose within the statutory scheme is to temper Com-

[6] Secondary information includes information derived from "[t]he petition; [a] final determination in a countervailing duty investigation or antidumping investigation; [a]ny previous administrative review, new shipper review, expedited antidumping review, section 753 review or section 762 review." 19 C.F.R. § 351.308(c)(1)(i)–(iii); *see also* 19 U.S.C. § 1677e(b)(1)–(3); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–465, vol. 1, at 869–70 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 ("SAA"). Independent sources "include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review." 19 C.F.R. § 351.308(d); SAA at 4199.

merce's ability to maximize deterrence using potentially unreliable secondary information and ensure that the AFA rate applied remains remedial and not punitive. *See id.* at 1323; *see also Timken Co. v. United States*, 354 F. 3d 1334, 1345 (Fed. Cir. 2004) (providing that "Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance").

II. Commerce's Determination Regarding the Location-Specific Subsidies

Commerce has adopted a two-part AFA methodology for CVD investigations and reviews. Commerce first identifies all subsidies from which a party could conceivably have benefitted, "including all programs identified in the instant administrative review and the investigation." Remand Results 9. Second, it

> computes a total AFA rate for a non-cooperative company generally using program-specific rates calculated for the cooperating respondents in the instant review or in prior segments of the instant proceeding, or calculated in prior CVD cases involving the country under review (in this case, the PRC), unless it is clear that the industry in which the respondents operate cannot use the program for which the rates were calculated.

Id. at 3. Since "there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs," *id.* at 5, Commerce implements a hierarchy to choose a proxy rate to apply to the uncooperative respondents for each of the subsidy programs attached to those respondents.[7] *See id.* at 4.

For the *Final Results*, Commerce applied AFA to Kam Kiu attributing to it all location-specific subsidies throughout the PRC provided by the government of China and, using proxy rates chosen by Commerce through its hierarchy, computed Kam Kiu's AFA rate of 121.22%. *See Final I&D Memo* at 8; *see also Final Results*, 79 Fed. Reg. at 107; AFA Calculation Memorandum for the Final Results 1–3, PD 458 at bar code 317084001 (Dec. 26, 2013) ("Final AFA Mem."). Commerce explained that Kam Kiu could have used all location-specific subsidies throughout the PRC at the same time and deter-

[7] In choosing an AFA rate for a subsidy program that is attributed to uncooperative respondents, Commerce's first preference is to apply the highest calculated CVD rate that is not de minimis for an identical program from any segment of the proceeding. *See* Remand Results 4. Absent a rate for an identical program, Commerce's second preference is to apply the highest calculated CVD rate that is not de minimis for a similar program from any segment of the proceeding. *See id.* If Commerce cannot find a suitable proxy CVD rate through its first or second preference, Commerce then applies the highest calculated CVD rate that is not de minimis for the same or similar program in another proceeding in connection with the country subject to the CVD investigation or review. *See id.*

mined that drawing such an adverse inference was warranted because the record lacked any information verifying the extent of Kam Kiu's locations and cross-owned affiliates. *See Final I&D Memo* at 62.

In *Tai Shan*, Kam Kiu challenged Commerce's determination in the *Final Results* arguing that Commerce unlawfully incorporated location-specific subsidy programs spanning across the entire PRC as part of Kam Kiu's AFA calculated rate. *See Tai Shan*, 39 CIT at __, 58 F. Supp. 3d at 1392. Kam Kiu argued that attributing these location-specific programs to Kam Kiu resulted in an AFA rate that was unsupported by substantial evidence and punitive. *See id.* Defendant reiterated Commerce's position that the uncertainty concerning the extent of Kam Kiu's locations warranted application of AFA for all location-specific subsidy programs and that Commerce had corroborated the AFA rate for Kam Kiu to the extent practicable. *See id.*at __–__, 58 F. Supp. 3d at 1392–95.

After reviewing the *Final Results*, the court in *Tai Shan* held that Commerce reasonably resorted to AFA to calculate Kam Kiu's CVD rate, but failed to meet its burden to corroborate the location-specific subsidies attributed to Kam Kiu with independent sources and evidence reasonably at Commerce's disposal. *See id.* at __, 58 F. Supp. 3d at 1394. Specifically, the court found that "Commerce's methodology reasonably identifies subsidies from which Kam Kiu could have conceivably benefitted but does not link the ability to benefit from all of these programs simultaneously to Kam Kiu." *See id.* Thus, the court found Commerce's methodological approach to corroboration as applied to Kam Kiu was incomplete because Commerce did not ensure that the rate is a reasonably accurate estimate of "Kam Kiu's 'actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" *See id.*at __, 58 F. Supp. 3d at 1395 (quoting *F. lli De Cecco*, 216 F.3d at 1032). Consequently, the court held that Commerce did not satisfy its corroboration requirement and, as a result, Commerce's determination was not supported by substantial evidence. *See id.* at __–__, 58 F. Supp. 3d at 1393–94. The court instructed Commerce on remand to "either attempt to corroborate Kam Kiu's ability to benefit from these programs simultaneously in the first instance, or . . . adjust its methodology as applied to Kam Kiu and corroborate its findings under its new methodology." *Id.* at __, 58 F. Supp. 3d at 1394.

On remand, after evaluating the evidence at its disposal, Commerce, under protest, adjusted its methodology "for purposes of this remand only" and attributed to Kam Kiu the location-specific subsidies available to companies in the area immediate to Kam Kiu's

mailing address within Guangdong Province. *See* Remand Results 18–19. Although Commerce on remand did not attribute all location-specific subsidies available throughout the PRC to Kam Kiu as Commerce had in the *Final Results*, Commerce continued to apply AFA with respect to the location-specific subsidies that remain attributed to Kam Kiu. Commerce relied upon information taken from the underlying CVD investigation and other CVD proceedings involving the PRC identifying the location-specific subsidies from which other respondents have benefitted and applied the adverse inference that Kam Kiu availed itself of every accessible program to the fullest extent. *See* Remand Results 18–19, 25, Attach.: Final Remand Calculation of AFA Rate for Kam Kiu. Specifically, Commerce has relied upon "[location-specific] subsidy programs administered at the national/central-government level and provincial-government level of Guangdong Province," Remand Results 19, and "subsidy rates . . . from the current administrative review as well as other PRC CVD proceedings." Remand Results 25. Accordingly, Commerce's determination on remand regarding the location-specific subsidies, in addition to the Export Rebate Program discussed below, resulted in a revised AFA rate of 79.80% for Kam Kiu as opposed to the 121.22% AFA rate Commerce had initially calculated in the *Final Results*. *See id.* at 19; *see also Final Results*, 79 Fed. Reg. at 107.

In applying AFA to an uncooperative respondent, Commerce shall corroborate its reliance on secondary information from independent sources reasonably at its disposal to the extent practicable. *See* 19 U.S.C. § 1677e(c). Commerce satisfies its corroboration requirement by demonstrating that the secondary information relied upon has probative value. *See* 19 C.F.R. 351.308(d); SAA at 4199; *see also* Remand Results 24. Commerce considers the rate to be probative if it is reliable and relevant. *See* Remand Results 9. The Court of Appeals for the Federal Circuit has interpreted corroboration to require Commerce to demonstrate that the rate is relevant to the respondent. *See Gallant Ocean*, 602 F.3d at 1324 (providing that "Commerce must select secondary information that has some grounding in commercial reality."); *F. lli De Cecco*, 216 F.3d at 1032 (requiring an AFA rate to nonetheless remain "a reasonably accurate estimate of the respondent's actual rate").

In the Remand Results, Commerce has complied with the court's order in *Tai Shan* and has corroborated that these programs were indeed available to Kam Kiu. Kam Kiu's mailing address, as evidenced in its Q&V questionnaire response, demonstrates that the location-specific programs attributed to it are reliable and relevant to

it. *See* Remand Results 18–19; Kam Kiu Q&V Questionnaire Response Attach. 1 at 4, PD 356 at bar code 3138491–01 (June 3, 2013) ("Kam Kiu Q&V Response"). Kam Kiu could have used the location-specific subsidies offered to companies in close proximity to Kam Kiu's location. Commerce additionally explains that the CVD rates assigned to these location-specific programs to calculate Kam Kiu's AFA rate are reliable because they were "derived from actual subsidy rates calculated for cooperative PRC respondents" and relevant because they are "for the same or similar type of program in the instant or prior segments of the proceeding or other proceedings involving China." Remand Results 25. Therefore, these programs and their corresponding CVD rates are probative of Kam Kiu's rate.

It was reasonable for Commerce to infer that Kam Kiu is the type of company to benefit from these subsidies because the subsidies were available to companies operating in the aluminum extrusion industry within Guangdong Province. Kam Kiu is a company that operates in the aluminum extrusion industry located in Tai Shan City, Guangdong Province. The reasonableness of Commerce's inference is reinforced by the fact that Commerce limited its inference to only those location-specific subsidies in the immediate area encompassing Kam Kiu's mailing address within Guangdong Province. *See* Remand Results 19, Attach.: Final Remand Calculation of AFA Rate for Kam Kiu (indicating that many of the subsidies offered in Guangdong Province are not included in the AFA rate because "Kam Kiu is located in the Shiqian Industrial Park in Taishan, Dajiang"). Kam Kiu does not object to Commerce's determination and states that the Remand Results with respect to the location-specific subsidies comply with the court's remand order. Thus, Kam Kiu's mailing address corroborates Commerce's adverse inference that Kam Kiu availed itself of the location-specific subsidies offered in the area immediate to its mailing address within Guangdong Province simultaneously and to the fullest extent.

In its protest on remand, Commerce insists that the evidence reasonably at its disposal does not offer corroborative value regarding Kam Kiu's ability to use the location-specific subsidies. *See* Remand Results 10–17. In *Tai Shan*, the court suggested that Commerce on remand might consider, among other evidence at its disposal, three particular sources of information that could potentially help satisfy its corroboration requirement: Kam Kiu's response to Commerce's Q&V questionnaire, other administrative proceedings in which Kam Kiu has participated, and information pertaining to both voluntary and mandatory respondents. *See Tai Shan*, 39 CIT at __, 58 F. Supp. 3d at 1394. Commerce dismissed these sources in the Remand Re-

sults. It reasoned that the Q&V questionnaire response did not contain information pertaining to the "facility location or locations of Kam Kiu and/or the identity and locations of any potential cross-owned affiliates," Remand Results 11, and therefore would not be helpful. Further, Commerce averred that the information from other proceedings was not on the record and it was not its practice "to examine a company's business proprietary information (BPI) from a separate and distinct proceeding, unless that information is placed on the record of the instant proceeding by the company whose business proprietary information is contained in the document." *Id.* at 14. In response to the suggestion that it consider information of both mandatory and voluntary respondents, Commerce recognized that "no cooperating respondent benefitted simultaneously from all location-specific subsidy programs across the PRC" but could not assume that Kam Kiu could not have done so because it lacked "the company's cross-ownership structure and facility locations." *Id.* at 16.

Commerce's response illustrates a methodology that effectively implements a rebuttable presumption that the uncooperative company has availed itself of all identified location specific subsidies, unless it is apparent that the industry in which the company operates or a respondent could not benefit from such a program. *See* Remand Results 10–18. Commerce's protest reveals that it would only consider information to be corroborative if it could definitively show that either the respondent or the respondent's industry did not use a program. Simply put, Commerce shifts its congressionally mandated affirmative burden to the respondent. Such an approach cannot coexist with the corroboration requirement. Congress could not have possibly intended to place the burden on the interested parties, especially considering Congress requires Commerce to look beyond the record and use independent sources to corroborate secondary information. *See* SAA at 4199; 19 U.S.C. § 1677e(c).

Moreover, not only does Commerce's methodology improperly shift the burden to the respondent, it also heightens the degree of support required for corroboration. Corroboration requires Commerce to "examine whether the secondary information to be used has probative value." 19 C.F.R. 351.308(d); SAA at 4199. Under its AFA methodology, however, Commerce presumes an uncooperative company benefits from all of the identified subsidy programs, "unless it is clear that the industry in which the respondents operate cannot use the program for which the rates were calculated." Remand Results 3. Due to its misguided corroboration methodology, Commerce did not find the suggested sources of information to have corroborative value when that information had the potential to corroborate whether Kam

Kiu could or could not have availed itself of all or a number of the location-specific subsidy programs simultaneously. Commerce's obligation to corroborate requires it simply to put forth probative evidence indicating the company potentially benefitted from the subsidy program, *see* 19 C.F.R. § 351.308(d), not "dispositive" or "determinative" evidence that the company in fact did not benefit. *See* Remand Results 13, 16.

Commerce also raises the concern that its determination on remand could incentivize respondents to be uncooperative in future proceedings. *See id.* at 19–20. Commerce asserts that its decision on remand would somehow limit its ability to attribute location-specific subsidies offered in locations outside of respondents' mailing address. *See id.* The court does not agree that Commerce's determination on remand regarding the location-specific subsidies results in a perverse incentive for companies to be uncooperative in the future. Commerce could have attributed subsidies offered in any location if it was able to meet its affirmative obligation to corroborate those subsidies. A mailing address is just one means of corroboration. Commerce could use any information from independent sources reasonably at its disposal to corroborate. *See* 19 U.S.C. § 1677e(c); 19 C.F.R. § 351.308(d). Nothing in the court's order limited Commerce to only using Kam Kiu's mailing address. Therefore, Commerce's assertion that an uncooperative respondent's mailing address will have a precluding effect on Commerce's AFA rate calculations is erroneous.

Commerce's concern that its determination on remand is an inadequate deterrent is likewise misplaced. Contrary to Commerce's concerns, an AFA rate of 79.80% nevertheless remains sufficiently adverse to Kam Kiu because the rate is several times greater than the rates applied to both the mandatory respondents and the other non-selected respondents.[8] Thus, Commerce's determination on remand is in line with the underlying purpose of AFA and ensures that Kam Kiu does not obtain a more favorable result by failing to cooperate than if Kam Kiu had cooperated fully.

For the foregoing reasons, Commerce's determination in the Remand Results to calculate Kam Kiu's AFA rate including the location-based subsidies available to companies in the area immediate to Kam Kiu's mailing address within Guangdong Province is supported by substantial evidence. Commerce's decision complies with the court's order in *Tai Shan*, and is thus sustained.

[8] In the *Final Results*, Commerce assigned each of the mandatory respondents a rate of 15.97% and 1.02% for 2010 and a rate of 15.66% and 1.51% for 2011, rates which themselves carried adverse inferences, and assigned the other non-selected respondents a weight-averaged rate of 10.23% for 2010 and a weight-averaged rate of 9.67% for 2011. *See Final Results*, 79 Fed. Reg. at 107; *see also Final I&D Memo* at 10–11.

III. Commerce's Determination Regarding the Export Rebate Program

As described above, Commerce as part of its AFA methodology identifies all subsidies from which a party could conceivably have benefitted "including all the programs in the instant review and investigation," Remand Results 9, and thereafter

> computes a total AFA rate for a non-cooperative company generally using program-specific rates calculated for the cooperating respondents in the instant review or in prior segments of the instant proceeding, or calculated in prior CVD cases involving the country under review (in this case, the PRC), unless it is clear that the industry in which the respondents operate cannot use the program for which the rates were calculated.

Id. at 3. Commerce chooses a CVD rate for the identified subsidies in accordance with its proxy rate hierarchy. *See id.* at 4. In the *Final Results*, Commerce identified the Export Rebate Program as a countervailable subsidy from which a voluntary respondent benefitted in the underlying CVD investigation and thus, in accordance with its AFA methodology and proxy rate hierarchy, attributed the Export Rebate Program to Kam Kiu. *See Final I&D Memo* at 7–8; *see also* Final AFA Mem. 1–2; Questionnaire to Kromet International, Inc. III-9, PD 204 at bar code 3104383–01 (Nov. 5, 2012) (providing that Commerce found the Export Rebate Program to be countervailable in the CVD investigation).

In *Tai Shan*, Kam Kiu challenged Commerce's determination in the *Final Results* and argued that Commerce unlawfully included the Export Rebate Program within Kam Kiu's AFA rate. *See Tai Shan*, 39 CIT at __, 58 F. Supp. 3d at 1392. Specifically, Kam Kiu argued the Export Rebate Program was clearly not for the industry within which Kam Kiu operates. *See id.* Accordingly, Kam Kiu argued that attributing the Export Rebate Program to Kam Kiu resulted in an AFA rate that was unsupported by substantial evidence. *See id.* Defendant responded that Commerce properly included the Export Rebate Program in Kam Kiu's AFA rate because although the mandatory respondents did not benefit from the program in the instant review, Commerce found the program was used by a voluntary respondent in the underlying CVD investigation. *See id.* at __, 58 F. Supp. 3d at 1397. Therefore, Defendant maintained that Commerce had corroborated Kam Kiu's AFA rate to the extent practicable.

In addition to holding that Commerce failed to corroborate the

location-specific subsidies, the court in *Tai Shan* similarly held that Commerce failed to corroborate Kam Kiu's use of the Export Rebate Program to the extent practicable with independent sources reasonably at Commerce's disposal. *Tai Shan*, 39 CIT at __, 58 F. Supp. 3d at 1395. The court found that Commerce's AFA methodology failed to corroborate the assumption that Kam Kiu could have benefitted from the Export Rebate Program. *Id.* at __, 58 F. Supp. 3d at 1394. The court also noted "[e]vidence that mandatory respondents did not use the program detract[ed] from Commerce's finding." *Id.* at __, 58 F. Supp. 3d at 1395. Thus, the court found Commerce's corroboration methodology did not adequately achieve its intended purpose because it did not "ensure[] that the rate is 'a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" *Id.* at __, 58 F. Supp. 3d at 1396 (quoting *F. lli De Cecco*, 216 F.3d at 1032). Accordingly, the court held that Commerce failed to corroborate the Export Rebate Program, and, therefore, Commerce's determination was not supported by substantial evidence. *Id.* Similar to the court's instruction with regard to the location-specific subsidies, the court ordered Commerce on remand to "either attempt to corroborate Kam Kiu's ability to benefit from these programs simultaneously in the first instance, or can adjust its methodology as applied to Kam Kiu and corroborate its findings under its new methodology." *Id.* at __, 58 F. Supp. 3d at 1394.

On remand, Commerce reiterated its position that it had corroborated Kam Kiu's use of the Export Rebate Program to the extent practicable, but has provided further explanation for its determination. *See* Remand Results 20–23. Commerce explained that because a voluntary respondent examined in the underlying CVD investigation benefitted from the program and was located in the same province as Kam Kiu, it is reasonable to conclude that "the industry in which Kam Kiu operates is eligible for a grant under the program." *Id.* at 22.

In the Remand Results, Commerce has complied with the court's order in *Tai Shan* and has corroborated that Kam Kiu could have benefitted from the Export Rebate Program by relying upon the fact that Kam Kiu is a producer of subject merchandise located in Guangdong Province. Here, Commerce relied upon information taken from the underlying CVD investigation and another CVD proceeding involving the PRC and applied the adverse inference that Kam Kiu availed itself of the Export Rebate Program to the fullest extent. *See id.* at 20–21, Attach.: Final Remand Calculation of AFA Rate for Kam Kiu. Specifically, Commerce has relied upon the underlying CVD investigation for the fact that "a PRC producer of subject merchan-

dise received a grant under the 'Export Rebate for Mechanic, Electronic, and High-Tech Products' program from the Bureau of Finance of Guangdong Province," *see id.* at 20, and "an AFA rate of 0.55 percent, which is the highest calculated rate, in any PRC CVD proceeding, for a grant program."[9] *See id.* at 33, Attach.: Final Remand Calculation of AFA Rate for Kam Kiu.

To comply with the court's remand order, Commerce provided additional information and explanation regarding the Export Rebate Program to corroborate the applicability of this rate. Specifically, Commerce explains that not only did the voluntary respondent in the underlying CVD investigation use the Export Rebate Program but it was also located in Guangdong Province, making it reasonable to infer that the subsidy was available to other companies in Guangdong Province. *See id.* at 22. Commerce can corroborate the rate by showing that it is reliable and relevant to Kam Kiu, by virtue of Kam Kiu's mailing address in its Q&V questionnaire response. *See* Kam Kiu Q&V Response Attach. 1 at 4. That information and explanation suffices to establish the reasonableness of Commerce's determination concerning the Export Rebate Program and that determination is no longer challenged by Kam Kiu. Commerce's determination regarding the Export Rebate Program in the Remand Results is supported by substantial evidence and complies with the court's remand order in *Tai Shan*. Further, although Kam Kiu commented on Commerce's arguments in its draft remand determination, Kam Kiu has since abandoned its arguments with respect to this program. The court therefore sustains Commerce's determination with respect to the Export Rebate Program.

IV. Corroboration of Kam Kiu's Aggregate AFA Rate

In Kam Kiu's original challenge to Commerce's *Final Results*, Kam Kiu argued that Commerce improperly attributed all location-specific subsidies offered by the government of China throughout the PRC

[9] The voluntary respondent in the underlying CVD investigation benefitted from the Export Rebate Program. *See* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Aluminum Extrusions from the People's Republic of China (PRC) 14, 28–29, C-570–968, (Mar. 28, 2011), *available at* http://enforcement.trade.gov/frn/summary/prc/2011–7926–1.pdf (last visited Dec. 7, 2015). However, Commerce did not apply the CVD rate from the investigation because it was de minimis. *See id.* at 29. Therefore, Commerce, in accordance with its proxy rate hierarchy, selected the highest calculated CVD rate that is not de minimis for a similar program in another proceeding involving the PRC, which was 0.55%. *See* Remand Results Attach.: Final Remand Calculation of AFA Rate for Kam Kiu; *see also* Final AFA Mem. 1–2 (providing that Commerce sourced the CVD rate for the Export Rebate Program from *Utility Scale Wind Towers from the People's Republic of China*, 77 Fed. Reg. 75,978 (Dep't Commerce Dec. 26, 2012) (final affirmative countervailing duty determination)).

and the Export Rebate Program to Kam Kiu in calculating its AFA rate, and, in doing so, Kam Kiu's aggregate AFA rate was rendered uncorroborated, not supported by substantial evidence and punitive. *See Tai Shan*, 39 CIT at __, 58 F. Supp. 3d at 1392. Defendant responded that Commerce's determination to include all location-specific subsidies and the Export Rebate Program was proper and Commerce corroborated Kam Kiu's AFA rate to the extent practicable. *See id.* at __, 58 F. Supp. 3d at 1395.

In *Tai Shan*, after coming to the conclusion that Commerce failed to corroborate attributing all the location-specific subsidies and the Export Rebate Program to Kam Kiu, the court stated that the 121.22% AFA rate "applied to Kam Kiu is punitive . . . [because] Commerce has not explained how this rate relates to Kam Kiu or why it is necessary to deter noncompliance." *Id.* at __, 58 F. Supp. 3d at 1396. The court then summarized the adverse inferences Commerce used in calculating Kam Kiu's aggregate AFA rate, which included applying the highest calculated above de minimis rate for each subsidy attributed to Kam Kiu, attributing all conceivably used subsidies to Kam Kiu, and assuming that Kam Kiu availed itself of all these subsidies simultaneously. *Id.* The court explained that Commerce's failure to corroborate each of its adverse inferences as applied to Kam Kiu and the "building of adverse inferences on top of each other" compounded the error, and, as a result, concluded that the aggregate AFA rate was rendered unsupported by substantial evidence. *See id.*

On remand, Commerce explained that its practice does not involve additionally corroborating the aggregate AFA applied to uncooperative respondents. *See* Remand Results 25–26. Specifically, Commerce explained that it satisfies the corroboration requirement in CVD proceedings by corroborating to the extent practicable the individual programs and the corresponding subsidy rates. *See id.* at 26–27. Commerce additionally noted that it does not corroborate the aggregate AFA rate for an uncooperative respondent by comparing that rate to the rates assigned to the mandatory respondents. *See id.* at 25–26. Commerce interpreted the court's holding in *Tai Shan* as ordering it on remand to additionally corroborate the aggregate AFA rate as applied to Kam Kiu. *See id.* at 28. To that end, Commerce claimed that the aggregate AFA rate is related to Kam Kiu because "the rate is significantly lower than the all others rate of 137.65 percent for this CVD order" and "[t]hus, . . . aluminum extrusion producers can experience levels of subsidization higher than the AFA rate calculated for Kam Kiu in this final remand." *Id.*at 28–29.

Commerce initially stated it understands *Tai Shan* as holding that Commerce "failed to explain how the final aggregate AFA rate relates

to Kam Kiu." *Id.* at 23. Commerce interprets the language "[t]his building of adverse inferences on top of each other to create a rate that Commerce does not corroborate in the aggregate leaves the court with the impression that the rate is punitive," *Tai Shan*, 39 CIT at __, 58 F. Supp. 3d at 1396, as requiring Commerce to additionally corroborate the aggregate AFA rate applied to Kam Kiu. *See* Remand Results 23. However, the court in *Tai Shan* simply expressed concerns that the inclusion of uncorroborated subsidy programs resulted in an uncorroborated, and thus potentially punitive, aggregate AFA rate. *Tai Shan*, 39 CIT at __, 58 F. Supp. 3d at 1396. To illustrate its concerns, the court observed that Kam Kiu's applied rate of 121.22% appeared to be punitive in light of the fact that the "rate is in stark contrast to the rates applied to the mandatory respondents," and the mandatory respondents' rates included adverse inferences as well. *Id.*; *see also Gallant Ocean*, 602 F.3d at 1324 (questioning the validity of Commerce's applied AFA rate by referencing the range of dumping margins for the cooperating respondents). The court's remand order did not obligate Commerce to take an additional measure in its corroboration analysis by corroborating the aggregate AFA rate applied to Kam Kiu, nor did the remand order obligate Commerce to compare the aggregate AFA rate to the rates applied to the mandatory respondents. The court remanded to Commerce for failing to corroborate the subsidy programs attached to Kam Kiu's AFA rate, resulting in an uncorroborated aggregate AFA rate.

Commerce's approach in calculating an AFA rate for an uncooperative respondent dictates how Commerce must proceed to satisfy its obligation to corroborate. If Commerce chooses to identify all of the countervailable subsidies used by cooperating respondents in any segment of the instant proceeding and then uses the sum of the identified subsidies to reach an aggregate AFA rate, then Commerce must corroborate each of the subsidy programs included within the aggregate AFA rate to satisfy its corroboration requirement. If on the other hand Commerce chooses to carry over a previously calculated rate and apply that rate to the uncooperative respondent, then Commerce must corroborate that singular rate to satisfy its corroboration requirement. Commerce has corroborated the aggregate AFA rate here through corroboration of the individual programs included within Kam Kiu's rate.

CONCLUSION

For the reasons explained above, the court determines that the Remand Results comply with the court's remand order in *Tai Shan*, are supported by substantial evidence, and are otherwise in accordance with law. The Remand Results are therefore sustained. Judgment will be entered accordingly.

Dated: December 14, 2015
New York, New York

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