U.S. Customs and Border Protection

Slip Op. 13–30

XINJIAMEI FURNITURE (ZHANGZHOU) CO., LTD. Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 11–00456

[Plaintiff's motion for judgment on the agency record is granted, and the matter is remanded to the Department of Commerce.]

Dated: March 11, 2013

Kutak Rock LLP (*Lizbeth R. Levinson* and *Ronald M. Wisla*), for plaintiff.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, *Douglas G. Edelschick*, Trial Attorney, Civil Division, Commercial Litigation Branch, United States Department of Justice; Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Whitney Rolig*), of counsel, for defendant.

OPINION

Eaton, Judge:

At issue is whether Commerce's selection of the surrogate value for cold-rolled steel coil as part of a new shipper review under the antidumping duty order on Folding Metal Tables and Chairs from the People's Republic of China ("PRC") was supported by substantial evidence. Before the court is the motion for judgment on the agency record, made pursuant to USCIT Rule 56.2, of plaintiff Xinjiamei Furniture (Zhangzhou) Co., Ltd. ("plaintiff" Court No. 11–00456 Page 2 or "Xinjiamei"), an exporter of metal folding chairs from the PRC. By this motion, Xinjiamei challenges the surrogate value for cold-rolled steel coil used in the Department of Commerce's ("Commerce" or the "Department") Final Results. *See* Folding Metal Tables and Chairs from the PRC, 76 Fed. Reg. 66,036 (Dep't of Commerce Oct. 25, 2011) (final results of antidumping review and new shipper review) ("Final Results"), and accompanying Issues and Decision Memorandum for the Annual 2009–2010 New Shipper Review of the Antidumping Duty Order on Folding Metal Tables and Chairs from the PRC (Dep't of Commerce Oct. 18, 2011) ("Issues & Dec. Mem.").

In making its argument, Xinjiamei insists that Commerce selected a "surrogate value [for cold-rolled steel coil that] was aberrational" because 1) the sample size, on which Commerce's selected value is based, "was infinitesimal when compared" with that of plaintiff's proposed surrogate value and when compared with "Indian consumption of cold-rolled steel coil during the Indian fiscal year coinciding with the POR"; 2) the selected value was three times higher than other surrogate values on the record; and 3) Commerce's selected value was not corroborated by other record evidence, while plaintiff's proposed surrogate value was corroborated by values it placed on the record. Pl.'s Mem. of Points & Authorities in Supp. of Mot. for J. on Agency R. 2 (ECF Dkt. No. 21–1) ("Pl.'s Br.").

Defendant argues that Commerce's selection of a surrogate value was based on the best available information (and its determination was thus supported by substantial evidence) because the surrogate value "(1) was publicly available, (2) reflected broad market averages, (3) was contemporaneous with the POR, (4) was tax-exclusive, and (5) was the most specific [Harmonized Tariff Schedule ("HTS")] category" to the type of steel used by plaintiff. Def.'s Mem. in Opp. to Pl.'s Mot. for J. on Agency R. 4 (ECF Dkt. No. 23) ("Def.'s Br."). Defendant further maintains that the surrogate value was not aberrational. Def.'s Br. 4.

For the following reasons, the plaintiff's motion is granted and the matter is remanded.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

DISCUSSION

I. Background

On July 29, 2010, at Xinjiamei's request, Commerce initiated a new shipper review under the 2002 antidumping duty order covering the subject metal folding chairs. Folding Metal Tables and Chairs from the PRC, 75 Fed. Reg. 44,767 (Dep't of Commerce July 29, 2010) (initiation of the new shipper review); Folding Metal Tables and Chairs from the PRC, 67 Fed. Reg. 43,277 (Dep't of Commerce June 27, 2002) (antidumping order). The period of review ("POR") was June 1, 2009 through May 31, 2010. Because the PRC is a non-market economy country ("NME"), Commerce was required to "calculate[ ] a

normal value[1] for [Plaintiff] according to its factors of production methodology."[2] Def.'s Br. 2. Plaintiff "participated in the new shipper review by responding to all information requests issued by the Department and by submitting surrogate value information to Commerce both before and after the preliminary results." Pl.'s Br. 3; *see* Def.'s Br. 2. "In the preliminary results, Commerce selected India as the surrogate country[3] and used the [Global Trade Atlas ("GTA")] data for HTS[4] category 7211.2990[5] to generate a surrogate value for cold-rolled steel coil of . . . approximately $1,942.80/metric ton (MT) based on an import quantity of 716.882 MT." Def.'s Br. 2; Folding Metal Tables and Chairs from the PRC, 76 Fed. Reg. 35,832, 35,839 (Dep't of Commerce June 20, 2011) (preliminary results of antidumping and new shipper review).

During the administrative proceedings, plaintiff challenged Commerce's use of the GTA data and the surrogate value derived from it as failing to meet the "best available information" standard.[6] In addition to its case brief, plaintiff submitted information for an alternate surrogate value to Commerce and other data it claimed reflected the value of cold-rolled steel coil outside of India. Based on its submission, plaintiff argued that Commerce's preferred value, based on the GTA data, was aberrationally high and that its own proposed surrogate value constituted the best available information. Pl.'s Final Surrogate Value Submission (P.R. 51) (Pl.'s Data Submission).

Specifically, plaintiff submitted, as an alternative value, advertising data from "JSW Steel Limited, one of the four largest Indian

[1] To determine an exporter's "dumping margin" Commerce subtracts the "export price or constructed export price of the subject merchandise" from the "normal value". *See* 19 U.S.C. § 1677(35)(A).

[2] Commerce's factors of production methodology is used to determine the normal value of exported merchandise by pricing the factors of production used to produce the merchandise. Commerce does so by using surrogate data from "one or more market economy countries that are—(A) at a level of economic development comparable to that of the [exporter's] country, and (B) significant producers of comparable merchandise" and then "add[ing] an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. §§ 1677b(c) (1), (4)(A)–(B) (2006).

[3] Neither party challenges the selection of India as the surrogate country.

[4] "HTS" refers to the Indian Harmonized Tariff System. Def's Br. 6. The HTS is India's analogue to the Harmonized Tariff System of the United States ("HTSUS"). Both systems are based on the World Customs Organization's Harmonized Commodity Coding and Classification System, and are used to determine the tariff classifications of goods entered into India and the United States, respectively. Commerce regularly relies upon this type of data when valuing inputs.

[5] The GTA data is "data from the Indian Import Statistics as reported in the Global Trade Atlas (GTA) for Indian Harmonized Tariff System (HTS) category 7211.2990." Def's Br. 6.

[6] Pursuant to statute, the information used by Commerce to value the factors of production must be the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate." 19 U.S.C. § 1677b(c)(1).

producers of steel products" ("JSW advertised data") which covered the June 2009 to May 2010 POR. Pl.'s Data Submission 2. This data was derived from information published on JSW's website and the submission included calculations made by plaintiff to adjust the pricing by backing out taxes. Pl.'s Data Submission 2. The surrogate value from the adjusted JSW advertised data was substantially lower than the value derived from the GTA data.[7] To corroborate the proposed surrogate value, plaintiff submitted documents showing "the average unit price of cold-rolled steel coil and sheet sold by JSW Steel [rather than the advertised price] during the fiscal year April 1, 2009 and March 31, 2010" of $712.94/MT ("JSW sales data") taken from JSW's Annual Report 2009–2010. Pl.'s Br. 5. As shall be seen, this latter information did not coincide precisely with the POR.

In addition to the JSW data, Xinjiamei provided evidence relating to non-Indian pricing of cold-rolled steel. This evidence included "monthly cold roll steel coil prices from Brazil" ("Brazilian data") reflecting the period of June 2009 to February 2010, "ex factory cold-rolled steel prices from Northern Europe" ("Northern European data") covering the period of February 23, 2009 to April 27, 2009, and "world export market 'benchmark' prices" ("Benchmark data") covering the period of July 2010 to December 2010, all of which were taken from the metals.com website. Pl.'s Br. 5. The values reflected in these sources ranged from $524.12/MT [8] to $743/MT. Pl.'s Br. 5.

With respect to the volume of cold-rolled steel found in the data plaintiff placed on the record, the JSW sales data also showed that Commerce's GTA data represented less than one-fiftieth of one percent of the cold-rolled steel production of only *one* Indian domestic producer, JSW Steel. Commerce does not dispute that this is the case.

In the Final Results, Commerce continued to use the GTA data. *See* Final Results Fed. Reg. at 66,037; Issues & Dec. Mem. at 3. The department acknowledged that "in the past [it] considered high average unit values . . . based on relatively small aggregate quantities to be potentially aberrational data." Issues & Dec. Mem. at 3. Nonetheless, it stated that "it [did] not automatically reject" data based on a small quantity if "other market data indicates that the per unit values of those imports fall within a reasonable range." Issues & Dec. Mem. at 3. It is worth noting that, having made this statement,

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[7] The value in dollars fluctuates from $733.11/MT to $681.54/MT in plaintiff's brief and its submission to Commerce. *Compare* Pl.'s Br. 4, *with* Pl.'s Data Submission 2. Although the difference is not explicitly explained, the value in rupees is uniformly 32.99 rs/kg in all sets of papers. Therefore, the fluctuation seems to be due to currency valuation changes between the submissions.

[8] This number appears in the parties' submissions in gross tons but has been converted into MT here for ease of comparison.

Commerce pointed to no other market information indicating that its chosen surrogate value was within a reasonable range.

The Department also found that the other data offered by Xinjiamei was insufficient "to demonstrate that the per-unit value under [the GTA data was] aberrational." Issues & Dec. Mem. 3–4. According to Commerce, it disregarded the Brazilian data, the Northern European data, and the Benchmark data because they did not sufficiently overlap with the POR and because they represented export data from countries that were not potential surrogate countries. Issues & Dec. Mem. at 4. For Commerce, "these export prices [were] not relevant to the prices paid by producers [of the subject merchandise] in India because [they] do not reflect the domestic or import prices paid by producers [of the subject merchandise] in India." Issues & Dec. Mem. at 4. The Department therefore concluded that Xinjiamei's corroborative data did not demonstrate that the GTA data was aberrational or that the JSW data was the best available information. Issues & Dec. Mem. at 4.

Commerce also determined that the GTA data was more reflective of domestic prices in India. Commerce "disagree[d] . . . that the existence of lower AUV prices of a single company [JSW] constitutes sufficient evidence to compel the Department to question the use of the [GTA] data." Issues & Dec. Mem. at 5. Commerce reasoned that the JSW data was unreliable because the data was sales offers, not records of actual sales, and came from only one company. Issues & Dec. Mem. at 5. Because Commerce "prefers to value factors using prices that are broad market averages," the GTA data, representing all Indian imports, was preferable. Issues & Dec. Mem. at 5.

Based on these findings, Commerce took no steps to evaluate independently the reliability or non-distortive quality of its preferred GTA data, even though it was aware that it was dealing with a data set more than a thousand times smaller than others on the record. Notably, Commerce did not discuss the sample size of its preferred GTA data at all, other than to observe that in one prior review it had found country-wide import statistics from a small data set preferable to a specific company's statistics based on a larger data set.[9] In other words, Commerce only indicated that it preferred country-wide data here, even though that data represented a comparatively tiny sample.

[9] The determination to which Commerce cites, Prestressed Concrete Wire Strand from the PRC, 75 Fed. Reg. 28,560 (Dep't of Commerce May 21, 2010) (final determination of sales at less than fair value) ("PC Strand"), was never appealed to this Court. It also deals with a distinguishable ratio from that present here. There, the ratio of sample size of the underlying import statistics to the sample size of the underlying company data was roughly 1:3. PC Strand's Issues & Dec. Mem. at Comment 1.b, 75 ITADOC 28560, 2010 WL 2150320 (ITA). Here, the ratio of imports to sales is roughly 1:2000. Pl.'s Br. 12.

Commerce did not explain how such a small sample, even if based on country-wide data, yielded a non-aberrational surrogate value.

II. Legal Framework

Under 19 U.S.C. § 1675(a)(2)(B), Commerce shall, upon request, conduct administrative reviews "for new exporters and producers." The purpose of these new shipper reviews is to determine whether exporters or producers, whose sales have not been previously examined, are (1) entitled to their own antidumping duty rates under an order, and (2) if so, to calculate those rates. *See Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT 603, 604, 374 F. Supp. 2d 1333, 1335 (2005).

Here, Commerce found that plaintiff was entitled to its own rate and commenced to determine that rate by calculating normal value. When merchandise that is the subject of a new shipper review is exported from a nonmarket economy country,[10] such as the PRC, Commerce, under most circumstances, determines normal value by valuing the factors of production used in producing the merchandise by employing surrogate data.[11] The statute directs Commerce to value the factors of production "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [Department]." 19 U.S.C. § 1677b(c)(1). Specifically, Commerce's task in a nonmarket economy review is to determine, using surrogate costs, what a producer's costs would be if the inputs were valued at market prices. *See Tianjin Mach. Imp. & Ex. Corp. v. United States*, 16 CIT 931, 940, 806 F. Supp. 1008, 1018 (1992).

When determining prices for the factors of production, Commerce must decide what evidence constitutes the best available information to determine their value. A reviewing court determines not whether "the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the

[10] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004). Therefore, because the subject merchandise comes from the PRC, Commerce constructed normal value by pricing the factors of production using surrogate data from India. *See* 19 U.S.C. § 1677b(c)(4).

[11] Section 1677b(c)(4)(A) requires that "in valuing factors of production, [the Department] shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country."

best available information." *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (citation and internal quotation marks omitted). Nonetheless, Commerce's determination cannot be opaque as to methodology. Indeed, in making the determination, "Commerce must provide a rational explanation for its choice." *Peer Bearing Co.-Changshan v. United States*, 35 CIT __, ___, 752 F. Supp. 2d 1353, 1372 (2011) (citations omitted).

Commerce is further obligated to "establish[] antidumping margins as accurately as possible." *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). Thus, "[w]hen confronted with a colorable claim that the data that Commerce is considering is aberrational, Commerce must examine the data and provide a reasoned explanation as to why the data it chooses is reliable and non-distortive." *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1135, 502 F. Supp. 2d 1295, 1308 (2007) (citation omitted). In such a case, it is not enough for Commerce to "summarily discard the alternatives as flawed," Commerce must also "evaluate the reliability of its own choice." *Shanghai Foreign Trade Enters. Co., Ltd. v. United States*, 28 CIT 480, 495, 318 F. Supp. 2d 1339, 1352 (2004); *see also Guangdong Chem. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1417, 460 F. Supp. 2d. 1365, 1369 (2006).

III. Commerce's Selection of the GTA Data is Not Supported By Substantial Evidence

From a review of the record and of the facts and reasoning found in the Issues and Decision Memorandum, the court concludes that Commerce has failed to provide a rational explanation for its selection of the GTA data as the best available information on the record. Commerce's discussion in the Issues and Decision Memorandum skips a critical analytical step by failing "to question the use of the" GTA data when other evidence on the record casts doubt on the reliability of its choice. Issues & Dec. Mem. 5.

As noted above, this Court has repeatedly held that questionable data may not be chosen "only on the claim that the data selected was better than other data" on the record. *Mittal Steel Galati*, 31 CIT at 1135, 502 F. Supp. 2d at 1308 ("When confronted with a colorable claim that the data that Commerce is considering is aberrational, Commerce must examine the data and provide a reasoned explanation as to why the data it chooses is reliable and non-distortive. Here, confronted with data that indicates that Commerce chose low volume, aberrational data, Commerce did not evaluate the data on the record in comparison to benchmarks, but instead relied only on the claim that the data selected was better than other data from the acceptable

surrogate countries. Therefore, Commerce's decision skips over [plaintiff's] claim that [the selected] data is outside Commerce's own standard of acceptability, and thus avoids an important aspect of the problem presented." (citations omitted)). When data, giving a basis to question the reliability of a surrogate value Commerce has selected is placed on the record, however, the Department must explain why its selected data meets its "own standard of acceptability." *Id.* ; *Shanghai Foreign Trade Enters.*, 28 CIT at 495, 318 F. Supp. 2d at 1352 ("Commerce did not explain its decision to deviate from its past practice, under which it normally would ensure that a small quantity of imports did not produce a price that is aberrational relative to other sources of market value. Before Commerce can choose among various values to select the most accurate, it must, consistent with its practice, discard those that are unreliable. . . . Commerce [must] evaluate the reliability of its own choice."); *Guangdong Chem.*, 30 CIT at 1417, 460 F. Supp. 2d. at 1369 ("Commerce's analysis must do more than simply identify flaws in the data sets it rejects.").

The Department's position is that it need not evaluate the GTA data as potentially aberrational because Xinjiamei did not place sufficient evidence on the record indicating that the GTA data was outside of the norm. In other words, Commerce argues that its rejection of the Brazilian data, Northern European data, and Benchmark data left the record bare of any evidence that the GTA data was aberrational. Curiously, in reaching this conclusion, Commerce did not address whether the JSW data provided a basis to doubt the accuracy of the GTA data.

The Department's position is untenable. Xinjiamei did indeed place sufficient data on the record for a reasonable mind to question whether the GTA data was aberrational. To start, Xinjiamei demonstrated that the GTA data represented less than one-fiftieth of one percent of the cold-rolled steel production of only *one* domestic producer, JSW Steel. *See* Issues & Dec. Mem. at 3 ("[Plaintiff] avers that the import statistics' 716.882 metric tons of cold rolled steel coil imports is 'infinitesimal' as compared to the consumption of cold rolled steel coil in India since the import statistics represent 0.047 percent of JSW Steel Limited's production of cold rolled steel coils and sheet."). Commerce does not dispute that this is the case. Indeed, the Department does not quarrel with plaintiff's conclusion that, because JSW steel was but one of four large Indian producers of cold-rolled steel, the small size of the GTA data when compared to the JSW data also indicates that the GTA data represents a truly miniscule percentage of overall Indian cold-rolled steel production.

It is apparent that Commerce skipped a critical step by failing to explain why, in light of the foregoing, its GTA data would not produce an aberrational surrogate value. That is, the evidence produced by plaintiff is sufficient to cause any reasonable mind to seek some explanation as to how such a small sample could be non-distortive and potentially "the best available information." *See Zhejiang DunAn Hetian Metal*, 652 F.3d at 1341. Indeed, where "the Commerce decision fails to establish that the small amount [of imports underlying the selected data] was statistically or commercially significant," remand is appropriate for Commerce to do so, including issuance of an instruction that Commerce "state its method for determining what is an insignificant quantity." *Shanghai Foreign Trade Enters.*, 28 CIT at 495–96, 318 F. Supp. 2d at 1352–53. *Cf. Trust Chem Co. v. United States*, 35 CIT __, __, 791 F. Supp. 2d 1257, 1265 (2011) (indicating that evidence showing that the "relative quantity of imports [underlying a surrogate value] is distortive" may be enough, even absent evidence of price, to render data aberrational).

It is worth noting that the proposition that a small import volume *may indicate* that the data relied upon is aberrational is not the same as the proposition that a small import volume *makes* the data aberrational. Thus, the Government's position that Commerce's ordinary practice is not to "automatically reject import data based on a low aggregate value if a comparison with other market data indicates that the per-unit values of those imports fall within a reasonable range" is not inconsistent with this opinion. Issues & Dec. Mem. at 3. Rather, a very small relative quantity of imports triggers an obligation for Commerce to explain why the data is not aberrational. It does not mean the data must be "automatically rejected."

Commerce, in its Issues and Decision Memorandum, states that it will not "automatically reject" a value based on a small sample *if other market data indicates that the value falls within a reasonable range of market-driven prices*. Here, however, the Department points to no evidence, let alone market evidence, that the GTA data yields a value within a reasonable range, and has chosen to disregard evidence that the value is outside of this range. Issues & Dec. Mem. at 4.

As to the value of the steel coil itself, the disregarded evidence that Xinjiamei placed on the record indicates that the per-unit value derived from the GTA data is significantly higher than other values for cold-rolled steel coil on the world market. As noted, the additional data sets reflected values ranging from $524.12/MT to $743/MT. When compared with the $1,943.80/MT value derived from the GTA data, the difference in price, between two hundred and nearly four

hundred percent, is clearly substantial. *See, e.g.*, *Peer Bearing*, 35 CIT at __, 752 F. Supp. 2d at 1372–4 (remarking that a sixty percent price differential was substantial).

The Department, however, concluded that the Brazilian data, the Northern European data, and the Benchmark data were not probative because they did not overlap the POR precisely and because they represented export data from countries that were not potential surrogates. It can be presumed, however, that these countries were not candidates to be surrogates because they are at a different stage of development than China, not because the prices were determined by other than market forces. *Peer Bearing Co. Changshan v. United States*, 35 CIT __, at __, 804 F. Supp. 2d. 1337, 1354 (2011) ("The statute contemplates the use of data from countries at a comparable level of development as the nonmarket economy country as the source of a surrogate value; it does not prohibit Commerce from considering data from developed countries as evidence to determine which information is the best available.") (citation omitted). Thus, while the prices might not satisfy the requirements for surrogate values, they are sufficient to call into question the reliability of the GTA data.

Next, Commerce failed to discuss further evidence that the GTA data did not represent Indian domestic prices. That is, there was a significant disparity between the values derived from the JSW advertised data, as confirmed by the JSW pricing data, and Commerce's selected value. *See* Pl.'s Br. 10 ("Commerce's chosen surrogate of $1,943.80 per metric ton is almost three times higher than the [advertised] JSW Steel price of $681.53 per metric ton."). The per-unit value derived from the JSW advertised data is $681.53/MT reflecting a divergence between the GTA data and the other values on the record that is still well in excess of two hundred percent. Commerce's argument that the JSW data was not probative because it represented offered prices and not actual sales is unconvincing. There is no evidence that the offered prices were not legitimate and plaintiff placed on the record evidence that actual sales were made at prices not markedly different from the offered prices. *See* Pl.'s Br. 5 ("[T]he average unit price of cold-rolled steel coil and sheet sold by JSW Steel during the fiscal year . . . coinciding with 10 months of the period of review . . . [was] $712.94 per metric ton."). While JSW's average sales price does not cover the entire POR, it represents sales for ten months of the twelve month period and is strong evidence supporting the reliability of the offered prices.

It is evident that Commerce was premature in finding that the GTA data was preferable to the JSW advertised data. That is, the Department was required to first determine whether the GTA data was

reliable and that it was not aberrational before comparing it to the JSW advertised data. Where there are valid questions raised about the reliability of data based upon a small number of imports this "court remands [the] issue to Commerce for further explanation in light of the [conflicting] data." *Mittal Steel Galati*, 31 CIT at 1135, 502 F. Supp. 2d at 1307; *Shanghai Foreign Trade Enters.*, 28 CIT at 495, 318 F. Supp. 2d at 1352 ("Before Commerce can choose among various values to select the most accurate, it must, consistent with its practice, discard those that are unreliable."). As a consequence, the Final Results lack a lawful explanation, supported by substantial evidence, for Commerce's selection of the GTA data as the surrogate value for the input of cold-rolled steel coil.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record is GRANTED, and Commerce's Final Results are REMANDED; it is further

ORDERED that, upon remand, Commerce shall issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that, should Commerce continue using the GTA data, it must provide an adequate explanation, supported by substantial evidence, as to why that data is reliable and non-aberrational. In making this determination, Commerce must take into account the Brazilian data, the Northern European data, the Benchmark data, the JSW advertised data, and the JSW price data. Following that determination, the department shall determine a surrogate value for cold-rolled steel coil based on the best available information standard. In reaching its determination as to the best information available, Commerce shall expressly compare the merits of any acceptable data sets on the record; it is further

ORDERED that the Department may reopen the record to solicit any information it determines to be necessary to make its determination; it is further

ORDERED that the remand results shall be due on July 8, 2013; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: March 11, 2013
New York, New York

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

Slip Op. 13–31

GUANGDONG WIREKING HOUSEWARES & HARDWARE CO., LTD., Plaintiff, and BUREAU OF FAIR TRADE FOR IMPORTS & EXPORTS, MINISTRY OF COMMERCE, PEOPLE'S REPUBLIC OF CHINA, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and NASHVILLE WIRE PRODUCTS, et al., Defendant-Intervenors.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 09–00422

Held: Plaintiff and plaintiff-intervenor's motion for judgment on the agency record is denied because Public Law 112–99 is constitutional and the Department of Commerce's determination is supported by substantial evidence and is otherwise in accord with the law.

Dated: March 12, 2013

Curtis, Mallet-Prevost, Colt & Mosle LLP, (*William H. Barringer*, *Daniel L. Porter*, *James P. Durling*, *Matthew P. McCullough*, and *Ross Bidlingmaier*) for Guangdong Wireking Housewares & Hardware Co., Ltd., Plaintiff, and for Bureau of Fair Trade for Imports & Exports, Ministry of Commerce, People's Republic of China, Plaintiff-Intervenor.

Stuart F. Delery, Principal Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Alexander V. Sverdlov*); Office of the Chief Counsel for Import Administration, United States Department of Commerce, Daniel J. Calhoun, Of Counsel, for the United States, Defendant.

Kelley Drye & Warren, LLP, (*Kathleen W. Cannon*, *Paul C. Rosenthal*, *Brooke M. Ringel*, and *David C. Smith*) for Nashville Wire Products, Inc. and SSW Holdings Co., Inc., Defendant-Intervenors.

OPINION AND ORDER

TSOUCALAS, Senior Judge:

Plaintiff Guangdong Wireking Housewares & Hardware Co., Ltd. ("GWK") and plaintiff-intervenor Bureau of Fair Trade for Imports & Exports, Ministry of Commerce, People's Republic of China (collectively "Plaintiffs") challenge several aspects of the determination by the Department of Commerce ("Commerce") in *Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 Fed. Reg. 37,012 (July 27, 2009) ("*Final Determination*"). Plaintiffs also challenge the constitutionality of a new law amending sections 701 and 777A of the Tariff Act of 1930.[1] *See* Pub. L. No. 112–99, 126 Stat. 265–67 (2012) (the "new law"). Commerce and defendant-intervenors, Nashville Wire

[1] All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition, unless otherwise specified.

Products, Inc. and SSW Holdings Co., Inc., oppose Plaintiffs' motion. For the following reasons, the court finds that the new law is constitutional and that the *Final Determination* is supported by substantial evidence and is otherwise in accord with the law.

Background

I. Procedural History

On August 26, 2008 Commerce initiated a countervailing duty ("CVD") investigation on certain kitchen appliance shelving and racks ("KASR") imported from the People's Republic of China ("PRC") during the calendar year of 2007. *See Notice of Initiation of CVD Investigation: Certain KASR from the PRC*, 73 Fed. Reg. 50,304 (Aug. 26, 2008). Shortly thereafter, Commerce designated GWK as a "mandatory respondent" for the investigation. *See Certain KASR* From the PRC: Preliminary Affirmative CVD Determination and *Alignment of Final CVD Determination with Final Antidumping Duty Determination*, 74 Fed. Reg. 683, 683–684 (Jan. 7, 2009) (citing Memorandum to Stephen J. Claeys, "Respondent Selection Memo" (Sept. 17, 2008), Public Rec. 38)).[2]

Commerce also initiated a parallel antidumping duty ("AD") investigation covering KASR imported from the PRC between January 1, 2008 and June 30, 2008. *Certain KASR from the PRC: Initiation of AD Investigation*, 73 Fed. Reg. 50,596 (Aug. 27, 2008).[3]

On July 27, 2009, Commerce issued the final results of its CVD investigation. *Final Determination*, 74 Fed. Reg. at 37,012. Commerce made several findings relevant to the instant litigation. First, Commerce determined that it could impose CVDs on goods from the PRC despite the PRC's NME status in the AD investigation. *See Issues and Decision Memorandum for the Final Determination in the CVD Investigation of Certain KASR from the PRC* at 25–30, C-570–942 (July 20, 2009) ("*I&D Memo*"). Commerce also determined that GWK received a countervailable subsidy through the provision of wire rod by the government of China ("GOC") and State-Owned Enterprises ("SOEs") within the PRC at less than adequate remunera-

[2] Hereinafter all documents in the public record will be designated "P.R." without further specification except where relevant.

[3] In the AD investigation, Commerce utilized its non-market economy ("NME") methodology to calculate a weighted average dumping margin of 95.99% for GWK. *See Certain KASR From the PRC: Final Determination of Sales at Less Than Fair Value*, 74 Fed. Reg. 36,656, 36,661 (July 24, 2009). Under its NME methodology, Commerce determines normal value by valuing factors of production using surrogate data from a market economy "in an attempt to construct a hypothetical market value of that product." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

tion ("LTAR"). *See id.* at 14–16. Commerce determined that market price for wire rod in the PRC was distorted by the GOC's substantial presence in the market and therefore used a "world average price" as a benchmark against which to measure the adequacy of remuneration. *Id.* at 15. Commerce assigned GWK a "Net Subsidy Rate" of 13.30%. *See Final Determination*, 74 Fed. Reg. at 37,014.

Plaintiffs allege that Commerce made several errors in the *Final Determination*. Specifically, Plaintiffs argue that (1) Commerce's policy of imposing CVDs on goods from NME countries is contrary to 19 U.S.C. § 1671(a); (2) Commerce's policy of imposing CVDs on goods from NME countries is unreasonable even if 19 U.S.C. § 1671(a) is ambiguous; (3) Commerce erred in finding that certain of GWK's wire rod suppliers that are majority-owned by the GOC are "authorities" under 19 U.S.C. § 1677(5)(B); (4) Commerce erred in finding that certain of GWK's wire rod suppliers that are minority-owned by the GOC are "authorities" under 19 U.S.C. § 1677(5)(B); (5) Commerce erroneously countervailed GWK's wire rod purchases from privately-owned trading companies without first determining that GWK received a financial contribution; and (6) Commerce erroneously discarded in-country benchmarks for the price of wire rod based on the GOC's presence in the wire rod market. Pl. & Pl.Intervenor's Br. Supp. Mot. J. Agency R. at 1–4 ("Pls.' Br.").

II. *GPX* and the New Law

Parallel to the instant case, GPX International Tire Corp., an importer of tires from the PRC, challenged Commerce's policy of imposing CVDs on goods from NME countries. *GPX Int'l Tire Corp. v. United States*, 33 CIT __, __, 645 F. Supp. 2d 1231, 1239 (2009). Prior to 2007, Commerce refrained from imposing CVDs on goods from NME countries, as it could not identify and measure the effects of government subsidies in a centralized economy. *See Carbon Steel Wire Rod from Czechoslovakia: Final Negative CVD Determination*, 49 Fed. Reg. 19,370, 19,372–73 (May 7, 1984). The Court of Appeals for the Federal Circuit ("CAFC") upheld this policy as a reasonable interpretation of CVD law. *See Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1309 (Fed. Cir. 1986). However, in 2006, Commerce announced that it was reconsidering the PRC's status as a NME country. *See AD Investigation of Certain Lined Paper Products from the PRC - China's status as a NME*, A-570–901 (Aug. 30, 2006) ("*CLPP from the PRC*"). Although it did not alter China's NME status, *id.* at 82, Commerce subsequently determined that it could identify and measure the effects of subsidies in the PRC, *see CVD Investigation of Coated Free Sheet Paper from the PRC -Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's*

Present-Day Economy at 10, C-570–907 (Mar. 29, 2007) (“*CFSP from the PRC*”), and therefore began imposing CVDs on goods from the PRC. *See Coated Free Sheet Paper from the PRC: Final Affirmative CVD Determination*, 72 Fed. Reg. 60,645 (Oct. 25, 2007).

In 2011, the CAFC found that “in amending and reenacting the trade laws in 1988 and 1994, Congress adopted the position that [CVD] law does not apply to NME countries.” *GPX Int’l Tire Corp. v. United States*, 666 F.3d 732, 745 (Fed. Cir. 2011) (“*GPX II*”). Therefore, the CAFC concluded that “[CVDs] cannot be applied to goods from NME countries.” *Id.*

Before the CAFC’s mandate was issued in *GPX II*, Congress enacted the new law. *See* 126 Stat. at 265–67. The new law has two sections. *Id.* Section 1 of the new law directs Commerce to impose CVDs on goods from NME countries except where Commerce is “unable to identify and measure subsidies provided by the government of the [NME] country or a public entity within the territory of the [NME] country because the economy of that country is essentially comprised of a single entity.” § 1(a), 126 Stat. at 265. Section 1 applies to all proceedings initiated by Commerce on or after November 20, 2006. § 1(b), 126 Stat. at 265. Section 2, which applies only to proceedings initiated following the enactment of the new law, directs Commerce to “reduce” the AD in all proceedings involving the concurrent imposition of CVDs and ADs where it can “reasonably estimate the extent to which the countervailable subsidy . . . increased the weighted average dumping margin” for subject merchandise. § 2, 126 Stat. at 266.

Following the passage of the new law, the CAFC requested additional briefing concerning the impact of the new law on Commerce’s petition for rehearing *GPX II*. *See GPX Int’l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012) (“*GPX III*”). In assessing the impact of new law, the CAFC concluded that by enacting section 1 “Congress clearly sought to overrule” the holding in *GPX II*. *Id.* at 1311. It also noted that section 2 changed CVD law prospectively, as the former law did not include protection against potential double-counting of remedies. *Id.* at 1311–12. The CAFC remanded so that this Court could evaluate the constitutional claims GPX raised for the first time in its opposition to the petition for rehearing. *See id.* at 1312–13.

On remand, GPX argued that the new law was a retroactive change to CVD law which “violate[d] the Ex Post Facto Clause of the Constitution, as well as due process and equal protection rights of the Fifth Amendment.” *See GPX Int’l Tire Corp. v. United States*, 37 CIT

__, __, Slip Op. 13–2 at 8 (Jan. 7, 2013) ("*GPX IV*").[4] This Court did not rule on whether the new law retroactively changed CVD law, *id.* at __, Slip Op. 13–2 at 14, but found that the new law was nonetheless constitutional even assuming that it did make a retroactive change. *See id.* at __, Slip Op. 13–2 at 14–31.

During the course of the *GPX* litigation, parties to the instant case submitted supplemental briefs concerning the constitutionality of the new law. Plaintiffs contend that section 1(b) of new law retroactively changes the CVD statute and violates the Ex Post Facto Clause, as well as the Fifth Amendment guarantees of due process and equal protection. *See* Pl. & Pl.-Intervenor's Supplemental Br. Supp. Mot. J. Agency R. at 1 ("Pls.' Supplemental Br."). Plaintiffs ask the court to sever section 1(b) of the new law "to preserve the broader legislation." *Id.* at 38.

JURISDICTION and STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final determination in a CVD investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Constitutional challenges are subject to a de novo review. *NationsBank of Tex., N.A. v. United States*, 269 F.3d 1332, 1335 (Fed. Cir. 2001). Due process claims concerning economic legislation come before the court with a "presumption of constitutionality," and "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 637 (1993). With regard to equal protection challenges, where neither a fundamental right nor suspect class is at issue the legislation will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993).

[4] Although *GPX IV* was decided after the completion of supplemental briefing in this case, Commerce submitted it as supplemental authority. *See* Def.'s Notice of Supplemental Authority, Dkt. No. 93 (Jan. 11, 2013). All parties referenced the decision throughout the oral argument before the court. *See generally*, Oral Argument, *Guangdong Wireking Housewares & Hardware Co. v. United States*, Court No. 09–00422 (Ct. Int'l Trade Jan. 16, 2013) ("Oral Arg.").

DISCUSSION

Plaintiffs argue that the court should remand the *Final Determination* because the new law is unconstitutional and because several of Commerce's findings are not based on substantial evidence or are not otherwise in accord with the law.

I. Constitutional Issues

A. Retroactive Application of the New Law

As a preliminary matter, the parties dispute whether section 1 of the new law retroactively changes CVD law, as it directs Commerce to impose CVDs on goods from NME countries in all proceedings initiated on or after November 20, 2006. *See* § 1, 126 Stat. at 265. Plaintiffs allege that section 1 retroactively changes CVD law, which unambiguously prohibited the imposition of CVDs on goods from NME countries prior to the enactment of the new law. Pl. & Pl.-Intervenor's Reply Br. Concerning Const. Issues at 2–5 ("Pls.' Supplemental Reply"). Commerce argues that section 1 does not make a retroactive change to CVD law, but rather "clarif[ies]" the law as it was before *GPX II*. Def.'s Resp. Pls.' Supplemental Br. at 6–10 ("Def.'s Supplemental Br."). Even if the new law is a retroactive change as Plaintiffs contend, the court need not decide this issue because, for the reasons articulated below, Plaintiffs fail to demonstrate that section 1 is unconstitutional.

B. Ex Post Facto Clause

The Ex Post Facto Clause states that "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. An ex post facto law is a law that "renders an act punishable in a manner in which it was not punishable when it was committed," *Fletcher v. Peck*, 10 U.S. 87, 138 (1810), or "inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 390 (1798). While the Ex Post Facto Clause does not prohibit all retroactive laws, it "flatly prohibits retroactive application of penal legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). "Penal legislation" often refers to criminal laws, but certain non-criminal retroactive laws are penal in nature and are thus subject to the prohibition of ex post facto laws. *See, e.g., Burgess v. Salmon*, 97 U.S. 381, 384 (1878); *Cummings v. Missouri*, 71 U.S. 277, 329 (1866).

To demonstrate that a civil law is penal in nature, the challenger must show by the "clearest proof" that the law is "so punitive either in purpose or effect as to negate the State's intention to deem it civil."

Smith v. Doe, 538 U.S. 84, 92 (2003) (internal citations and brackets omitted). In determining whether a law is penal in nature, courts consider a three-prong test:

> A statute imposes a penalty only when: (1) the costs imposed are unrelated to the amount of actual harm suffered and are related more to the penalized party's conduct, (2) the proceeds from infractions are collected by the state, rather than paid to the individual harmed, and (3) the statute is meant to address a harm to the public, as opposed to remedying a harm to an individual.

Huaiyin Foreign Trade Corp. (30) v. United States, 322 F.3d 1369, 1380 (Fed. Cir. 2003) (citing *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 978 (Fed. Cir. 1997)). The party challenging the law must demonstrate that the law satisfies all three prongs of the *Huaiyin* test. *Id.* Plaintiffs fail to meet this burden.

It is well established that trade duties are remedial, not punitive. *See Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990); *Peer Bearing Co. v. United States*, 25 CIT 1199, 1221, 182 F. Supp. 2d 1285, 1310 (2001); *Badger-Powhatan v. United States*, 9 CIT 213, 216, 608 F. Supp. 653, 656 (1985). The specific purpose of CVD law is to "offset" the harmful effects of foreign subsidies. *See* S. Rep. No. 1221, 92d Cong., 2d Sess. 8 (1972) (cited in *Chaparral*, 901 F.2d at 1103–04). The remedial purpose is reflected in the language of the CVD statute, which directs Commerce to calculate a CVD "equal to the amount of the net countervailable subsidy." 19 U.S.C. § 1671(a). In fact, this Court found that the CVDs imposed under section 1 were not penalties because "they remain mathematically linked to the measured harm." *GPX IV*, 37 CIT at __, Slip Op. 13–2 at 17.

However, Plaintiffs insist that the focus on the mathematical relationship between the subsidy and the CVD in *GPX IV* is misplaced. Plaintiffs contend that the court's focus should be on the nature of the new law itself, specifically whether it imposes duties that exceed those Commerce imposed under the previous legal regime. *See* Oral Arg. at 18:01. According to Plaintiffs, the CVDs imposed under section 1 are disproportionate to the harm caused by the unfair pricing of goods imported from NME countries because they are imposed on top of the special NME AD, which was the "complete and exclusive remedy" for such unfair pricing under the old legal regime. *Id.* at 18:22. Plaintiffs insist that the new law is analogous to the retroactive tax increase struck down in *Salmon*, 97 U.S. at 384, which also retroactively imposed a greater liability than the affected party was subject to at the time the cost was assessed. *See* Oral Arg. at 21:00.

Plaintiffs' argument is unpersuasive because it misinterprets the first prong of the *Huaiyin* test. Plaintiffs essentially argue that any retroactive increase in the costs assessed will be disproportionate to the harm. That is simply not the case. The test requires the party challenging the statute to demonstrate "the absence of an association between the costs imposed and the actual harm done." *Ingalls*, 119 F.3d at 978 (citing *Huntington v. Atrill*, 146 U.S. 657, 676 (1892)). Here, the imposition of CVDs under the new law is associated with the harm caused by subsidies. ADs and CVDs are separate remedies that counteract different anticompetitive behaviors. *See* 19 U.S.C. §§ 1671, 1673. The imposition of one type of duty does not obviate the need for the other, nor does it address the harm caused by the conduct the other duty is designed to remedy. Accordingly, CVDs are the proper remedy to address the harms caused by foreign subsidies. *Id.* at 1671(a).[5]

Similarly, Plaintiffs fail to demonstrate that section 1 addresses a public rather than a private harm. Plaintiffs contend that the imposition of duplicative duties evidences Congress's intent to address public harms such as "the need to punish China . . . and address 'illegal' subsidies." Pls.' Supplemental Br. at 20. However, Plaintiffs' argument overlooks the fact that CVDs are imposed only where a domestic industry has been "materially injured" or "threatened with material injury" by foreign subsidies. 19 U.S.C. § 1671(a); *see GPX IV*, 37 CIT at __, Slip Op. 13–2 at 17 (noting that CVD are "collected to primarily counter the individual harm to particular domestic industries in an attempt to provide relief from the imports which are causing or threatening material injury"). Moreover, in their assessment of legislative intent, Plaintiffs overlook evidence indicating Congress's substantial interest in "leveling the playing field" for domestic industries. *See generally*, 158 Cong. Rec. H1166, H1166–73 (Mar. 6, 2012). As section 1 primarily addresses a private harm to individual domestic industries, the fact that it also addresses certain public harms does not render it penal in nature. Because they fail to demonstrate that the new law is "penal legislation," Plaintiffs cannot show that the new law violates the Ex Post Facto Clause.

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[5] Plaintiffs also claim that the new law has "tainted" past ITC determinations because artificially high AD margins make a finding of injury to the domestic industry more likely. Pls.' Supplemental Br. at 18 (citing 19 U.S.C. § 1677(7)(C)(iii)(V)). Dumping margin, however, is but one of a number of factors the ITC considers when making an injury determination. *See* 19 U.S.C. § 1677(7)(C). Moreover, a dumping margin does not in and of itself demonstrate injury to a domestic industry, but rather identifies differences in price between a respondent's home market and the U.S. market. *See* 19 U.S.C. § 1677(35)(A).

C. Due Process

Plaintiffs also argue that the new law violates the due process guarantees of the Fifth Amendment by retroactively impeding importers' vested interests in the "finality and repose" of their transactions. *See* Pls.' Supplemental Br. at 28–33. Specifically, Plaintiffs argue that section 1 levies a "harsh and oppressive" retroactive tax which violates the prohibition against wholly new retroactive taxes, exceeds recognized limits on the retroactive application of tax legislation, and imposes excess duties upon importers that they reasonably believed they would not be liable for at the time they entered their goods. *See id.* at 30—33. Alternatively, Plaintiffs argue that even if it is considered general economic legislation, the new law still violates due process because section 1 does not achieve a legitimate government purpose. *See id.* at 33–35. In response, Commerce argues that the new law does not violate due process because it was enacted in order to correct an erroneous judicial decision and protect domestic industries. *See* Def.'s Supplemental Br. at 21–25. According to Commerce, the new law is general economic legislation rather than tax legislation, but is nonetheless constitutional as tax legislation because subjected importers like GWK had notice of and therefore could reasonably expect potential CVD liability. *See id.* at 26—30.

General economic legislation faces "a presumption of constitutionality" and is analyzed under a rational basis review. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). "[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Id.* Thus, retroactive economic legislation will be upheld if the retroactive application "is itself justified by a rational legislative purpose." *Id.* at 730. With regard to retroactive tax legislation, courts have considered "whether 'retroactive application is so harsh and oppressive as to transgress the constitutional limitation.'" *United States v. Carlton*, 512 U.S. 26, 30 (1994) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)). The "harsh and oppressive" standard, however, "'does not differ from the prohibition against arbitrary and irrational legislation' that applies generally to enactments in the sphere of economic policy." *Id.* (quoting *R.A. Gray*, 467 U.S. at 733). Thus, whether the new law is considered tax legislation or general economic legislation, Plaintiffs must demonstrate that Congress acted in an irrational and arbitrary manner. *See id.* In determining whether a retroactive law passes a rational basis review, courts may consider "the reliance interests of the parties affected, whether the impairment of the private interest is effected in an area previously subjected

to regulatory control, the equities of imposing the legislative burdens, and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 592 F.2d 947, 960 (7th Cir. 1979), *aff'd* 446 U.S. 359 (1980) (internal citations omitted).

On the reliance factor, Plaintiffs cite Justice O'Connor's concurring opinion in *Carlton*, which states that "[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose." 512 U.S. at 37–38 (O'Connor, J., concurring). According to Plaintiffs, importers like GWK reasonably relied on the unambiguous prohibition against the imposition of CVDs on goods from NME countries when they entered their goods. Pls.' Supplemental Br. at 32. Now, years later, section 1 retroactively imposes previously illegal CVDs, upsetting their interest in a rate without such CVDs. *Id.* Essentially, Plaintiffs argue that GWK's reliance interests were upset because GWK and other similarly situated importers would not have entered goods had they knowledge of the retroactive tax. *Id.*

However, Plaintiffs fail to identify a vested interest. *See Carlton*, 512 U.S. at 33 (holding that a party's detrimental reliance on a statute prior to retroactive change is insufficient to demonstrate a due process violation where there is no vested interest). GWK and similarly situated importers could not rely on a specific CVD-free duty assessment at the time of entry. *See Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933) ("No one has a legal right to the maintenance of an existing rate or duty."). Moreover, importers who entered goods from NME countries during the retroactive period of section 1 were on notice of the PRC's shifting status and their own potential CVD liability as early as 2006. *See CLPP from the PRC* at 1–4; *CFSP from the PRC* at 10. Additionally, Plaintiffs cannot have relied on the holding in *GPX II* to demonstrate their interest in a duty rate exclusive of CVDs because the CAFC never issued a mandate. *See GPX III*, 678 F.3d at 1312. As importers subject to section 1 did not have a vested right in duty assessments that excluded CVDs, Plaintiffs cannot show that section 1 interfered with such a right.

With regard to the second *Nachman* factor, Plaintiffs insist that the new law "retroactively introduces a wholly new tax" that violates the prohibition against such taxes recognized by the Supreme Court in *Carlton*. *See* Pls.' Supplemental Br. at 30–31. However, Plaintiffs' reliance on *Carlton* is misplaced. Section 1 is not a "wholly new" tax, it amends the operation of CVD law, applying it to goods imported

from NME countries. *See* § 1, 126 Stat. at 265; *see also GPX IV*, 37 CIT at __, Slip Op. 13–2 at 26 ("Section 1 of the [new law] merely extends or expressly recognizes the ability of Commerce to impose CVDs in the NME context."). In *Carlton*, the Supreme Court specifically excluded such legislative acts from the prohibition of wholly new retroactive taxes, stating that the prohibition "'is of limited value in assessing the constitutionality of subsequent amendments that bring about certain changes in operation of the tax laws.'" *Carlton*, 512 U.S. at 34 (citing *United States v. Hemme*, 476 U.S. 558, 568 (1986)).

Plaintiffs also insist that the new law "retroactively, without notice, grant[s] [Commerce] authority where none previously existed to impose [CVDs]." Pls.' Supplemental Br. at 25. However, as noted above, Commerce announced in 2006 that it was reconsidering the PRC's NME status, *see CLPP from the PRC* at 1–4, and shortly thereafter determined it could identify subsidies in the PRC. *See CFSP from the PRC* at 10. Whether Commerce's policy shift was consistent with CVD law at the time does not bear on the issue of whether GWK had notice of potential CVD liability. Therefore, GWK was aware of the regulatory control Commerce intended to exert over goods from NME countries before the enactment of the new law.

With regard to the balance of burdens, the court finds that the need to protect the domestic industry and to correct an unexpected judicial decision form a rational basis for the retroactive application of section 1. The Supreme Court has recognized that correcting an erroneous or unexpected interpretation of a statute is a legitimate purpose for enacting retroactive legislation. *See Carlton*, 512 U.S. at 32 (closing an unexpected loophole in an estate tax statute was a "legitimate legislative purpose" for a retroactive amendment to that statute); *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (upholding retroactive legislation that corrected the unexpected results of a judicial opinion). Congress's curative intent is demonstrated by the language of section 1, which essentially overturns *GPX II*. *See* § 1, 126 Stat. at 265; *see also GPX III*, 678 F.3d at 131 1 ("Congress clearly sought to overrule our decision in [*GPX II*]."). The legislative history of the new law also evidences Congress's intent to overturn *GPX II*. *See generally* 158 Cong. Rec. at H1166–73.[6]

The retroactive period of section 1, although lengthy, is a rational means of achieving Congress's objectives. The Supreme Court upheld a retroactive period that stretched back multiple years where it was

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[6] Representative Camp stated that the new law "overturns an erroneous decision by the [CAFC]." 158 Cong. Rec. at H1167. Representative Rohrabacher stated that the new law "overturns a faulty court decision." *Id.* at H1168. Representative Critz stated that "[w]e must take action today and pass [the new law] to overturn a flawed court ruling." *Id.* at H1170.

necessary to correct the unexpected results of a judicial decision. *See Romein*, 503 U.S. at 191. Here, a shorter retroactive period would have resulted in the possible termination of approximately twenty four CVD orders and investigations, harming domestic industries. *See* 158 Cong. Rec. at H1173. Furthermore, as this Court recognized in *GPX IV*, it was reasonable for Congress to "defer[ ] to Commerce's expertise in determining when Commerce first might have been able to identify and measure subsidies in the PRC." 37 CIT at __, Slip Op. 13–2 at 26. Accordingly, the court finds that the new law does not violate the due process guarantees of the Fifth Amendment.[7]

D. Equal Protection

Finally, Plaintiffs argue that the new law violates the right to equal protection under the Fifth Amendment by creating an arbitrary distinction between importers subject to section 1 of the new law and importers subject to section 2. Pls.' Supplemental Br. at 35–37. The classification at issue arises from the different effective dates of the new law's two sections. Section 1 directs Commerce to impose CVDs on goods from NME countries in all proceedings initiated on or after November 20, 2006, with no protection from potential double counting of remedies. § 1, 126 Stat. at 265. Section 2, on the other hand, provides protection against double counting of remedies resulting from the concurrent imposition of ADs and CVDs, but only for those importers whose goods are subject to proceedings initiated after the enactment of the new law. § 2, 126 Stat. 265–66. Plaintiffs do not argue that the classification at issue involves a suspect class. Pls.' Supplemental Br. at 36.

"'[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" Armour v.

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[7] Plaintiffs also insist that the new law unduly burdens past importers without providing any protection to the domestic industry. *See* Pls.' Supplemental Br. at 33–35. According to Plaintiffs, the domestic industry is adequately protected from the effects of subsidies by the deposits on CVD orders importers paid in 2007. *Id.* at 34. As the new law does not provide any additional protection and merely imposes duplicative duties on past importers, Plaintiffs insist that it is not supported by a rational basis. *Id.* at 34–35. Plaintiffs add that the refund of those deposits would not harm the domestic industry because the importers receiving refunds would still be subject to "substantial" ADs. *Id.* at 35. However, this argument is inconsistent with trade law. First, ADs and CVDs are separate remedies that address different anticompetitive behaviors. *See* 19 U.S.C. §§ 1671, 1673. Second, Plaintiffs do not cite any authority for the proposition that a domestic industry is adequately protected by the payment of cash deposits which will be refunded in the future.

City of Indianapolis, 132 S. Ct. 2073, 2080 (2012) (quoting *Heller*, 509 U.S. at 319–320). A court will uphold such a classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

Plaintiffs insist that the new law violates equal protection because importers whose goods are subject to section 1 receive "much more harsh treatment" than those whose goods are subject to section 2. Pls.' Supplemental Reply at 12. According to Plaintiffs, section 2 provides a legislative fix against double counting and is thus consistent with Congress's intent to create a "level playing field" for the domestic industry. *See* Pls.' Supplemental Br. at 37. Because section 1 does not provide the same protection against potentially overlapping remedies, Plaintiffs contend that it "patently slanted the playing field against exporters and importers subject to CVD orders and investigations prior to passage of the [new law]." *Id.*

Commerce argues that administrative efficiency and finality justify the retroactive application of section 1. Def.'s Supplemental Br. at 32–33. Specifically, Commerce contends that the retroactive application of section 1 prevented Commerce from having to reopen "numerous [CVD] investigations and reviews that were initiated before the implementation of section 2." *Id.* at 32. Additionally, Commerce argues that the retroactive application of section 2 would entail "tremendously complex undertakings that almost certainly require factual information and analytical tools not present on most earlier administrative records." *Id.* Commerce also notes that Congress did not need to apply section 2 retroactively because it was enacted in order to "implement an adverse WTO decision." *Id.* at 33. Because statutes enacted to give effect to WTO decisions are implemented prospectively, Commerce concludes that it was reasonable for Congress to decline to apply section 2 to past CVD investigations unnecessarily. *Id.*

The court finds that Commerce proffers a legitimate rationale for Congress's decision to apply section 1 retroactively. The Supreme Court has recognized that administrative efficiency and finality are legitimate legislative interests. *See Armour*, 132 S. Ct. at 2081. In *Armour*, the Supreme Court upheld a law that provided prospective relief to city residents who owed future installment payments while denying refunds to those residents who paid in full because such refunds would require the expenditure of considerable administrative resources. *Id.* The instant case involves similar legislative interests, as the retroactive application of section 2 would require Commerce to recalculate AD margins for numerous completed CVD investigations

and orders.[8] Moreover, the decision to apply section 2 prospectively only is consistent with Congress's obligations when implementing adverse WTO decisions. *See* 19 U.S.C. § 3538. Accordingly, the court finds that the new law is supported by a rational basis and therefore does not violate equal protection rights under the Fifth Amendment.

E. Severability

Because the court finds that section 1 law is constitutional, it need not reach a decision on the issue of severability.

II. CVD Determination

As the new law is constitutional, the court must now address the claims Plaintiffs raise in their original brief challenging certain aspects of the *Final Determination*, specifically: (1) whether Commerce erred in treating GWK's suppliers of wire rod that were majority-owned by the GOC as "authorities" under 19 U.S.C. § 1677(5)(B); (2) whether Commerce erred in treating GWK's suppliers of wire rod that were minority-owned by the GOC as "authorities" under 19 U.S.C. § 1677(5)(B); (3) whether Commerce erroneously countervailed wire rod provided to GWK by privately-owned trading companies; and (4) whether Commerce erroneously discarded in-country benchmarks for the price of wire rod. *See* Pls.' Br. at 5.[9]

A. "Authority" Status of GWK's Wire Rod Suppliers

A subsidy occurs when "an authority provides a financial contribution . . . to a person and a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B). The statute defines "authority" as "a government of a country or any public entity within the territory of the country." *Id.* Commerce treats entities that are owned by a government as "authorities." *Countervailing Duties; Final Rule*, 63 Fed. Reg. 65,348, 65,402 (Nov. 25, 1998) ("*CVD Final Rule*"). However, "where it [is] unclear whether a firm [is] an authority based on ownership information alone," Commerce consults five relevant factors: "(1) government ownership; (2) the government's presence on the entity's board of directors; (3) the government's control over the entity's activities; (4) the entity's pursuit of governmental policies or interests; and (5)

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[8] Plaintiffs insist that the burden of recalculating ADs is insubstantial compared to the administrative burden the city of Indianapolis faced in *Armour*. *See* Pls.' Supplemental Reply at 13. However, the relative burden is irrelevant. As this Court recognized in *GPX IV*, "at least some significant effort would be required to apply [Section 2] methodology to this case and other completed investigations." 37 CIT at __, Slip Op. 13–2 at 31.

[9] However, the court will not address arguments Plaintiffs raise in their original brief concerning Commerce's interpretation of CVD law prior to the enactment of the new law because they are moot in light of the court's decision upholding the constitutionality of the new law.

whether the entity is created by statute." *I&D Memo* at 43.

1. Wire Rod Suppliers Majority-Owned by the GOC

Commerce determined that the GOC held "a majority ownership position in certain of the wire rod producers that supply [GWK]," and thus "treat[ed] these producers as 'authorities'" during the investigation. *Id.* at 44; *see* P.R. 193 at 2–3. Accordingly, Commerce countervailed purchases of wire rod by GWK from these entities at LTAR. *I&D Memo* at 44.

Plaintiffs argue that this determination was erroneous because Commerce "simply equated government 'control' in the form of an ownership interest with the existence of a government authority," Pls.' Br. at 38, and therefore ignored record evidence of legal reforms in China which indicated that entities owned by the GOC do not exercise government authority. *Id.* at 40–43. Plaintiffs insist that this conclusion ignored the actual issue: "whether an entity exercises elements of government authority." *Id.* at 39. According to Plaintiffs, the five-factor test is the proper means of addressing this question. *Id.* In essence, Plaintiffs challenge Commerce's interpretation of 19 U.S.C. § 1677(5)(B), alleging that Commerce unreasonably construed "public entities" to include any entity that is majority-owned by a government.

"Public entity" is not defined in statutes or regulations. Where a statute is silent or ambiguous concerning the meaning of a term, the court must determine whether Commerce's interpretation is "based on a permissible construction of the statute." *Chevron v. NRDC*, 467 U.S. 837, 843 (1984). A reviewing court "is obliged to accept [Commerce's] position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (citing *Chevron*, 467 U.S. at 842–45). The issue here is whether it was reasonable for Commerce to treat GWK's wire rod suppliers as "authorities" within the meaning of 19 U.S.C. § 1677(5)(B) based solely on the GOC's majority-ownership interest in those suppliers.

Commerce explained that majority-ownership of an entity by the government creates a rebuttable presumption of government control over that entity. *See I&D Memo* at 43. It does not consult the five-factor test in this scenario because "a careful examination of the five factors reveals that when a government is the majority owner of a firm, factors one through four are largely redundant." *Id.* The redundancy occurs because "the government would normally appoint a majority of the members of the firm's board of directors who, in turn, would select the firm's managers, giving the government control over

the entity's activities." *Id.* Commerce notes that a respondent may overcome this presumption if it can "demonstrate that majority ownership does not result in control of the firm." *Id.*

The court finds that Commerce's interpretation of "public entity" is reasonable. Because the purpose of CVD law is to offset the harm to domestic industries caused by foreign subsidies, *see* S. Rep. No. 1221, 92d Cong., 2d Sess. 8 (cited in *Chaparral*, 901 F.2d at 1103–04), it is reasonable for Commerce to attempt to detect and counteract all forms of foreign subsidies. Commerce's interpretation of "public entities" reflects the realities of corporate ownership and control and enables it to detect certain forms of subsidization which are not provided directly by the government but instead pass through private or quasi-private channels. Furthermore, Commerce provides interested parties the opportunity to present evidence that the entity in question is not government controlled. *See I&D Memo* at 43. Accordingly, the court upholds Commerce's interpretation of "public entity." *See Mead Corp.*, 533 U.S. at 229.

Ultimately, the standard for which Plaintiffs advocate is improper. Plaintiffs do not cite any instances in which Commerce evaluated "authority" status by determining whether the entity in question exercised elements of governmental authority. Plaintiffs ignore Commerce's "longstanding practice of treating most government-owned corporations as the government itself." *CVD Final Rule*, 63 Fed. Reg. at 65,402.[10] Although Plaintiffs correctly point out that Commerce previously declined to treat entities majority-owned by a government as authorities, *see Issues and Decision Memorandum for the Final Determination in the CVD Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea* at 17, C-580–851 (June 16, 2003) ("*DRAMS Memo*"), Plaintiffs overlook the fact that the *DRAMS Memo* involved a factually distinct scenario concerning the temporary government takeover of private banks due to a financial crisis. *See Preliminary Affirmative CVD Determination: Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 16,766, 16,772 (Apr. 7, 2003). Plaintiffs simply fail to provide sufficient authority to support their preferred standard for evaluating government control.

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[10] Commerce has employed this practice in numerous CVD investigations and determinations. *See Issues and Decision Memorandum for Final Determination in the CVD Investigation on Certain Welded Austenitic Stainless Pressure Pipe from the PRC* at 16–17, C-570–931 (Jan. 21, 2009); *Issues and Decision Memorandum for the Final Affirmative CVD Determination: Certain New Pneumatic Off-the-Road Tires from the PRC* at 77, C-570–913 (July 7, 2008); *Issues and Decision Memorandum for the Final Determination in the CVD Investigation of Circular Welded Carbon Quality Steel Pipe from the PRC* at 62–63, C-570–911 (May 29, 2008).

Turning to Commerce's decision, the court must determine whether Commerce reasonably concluded that wire rod producers majority-owned by the GOC were "authorities." Plaintiffs argue that Commerce's decision was erroneous because it ignored reforms in the PRC over the past twenty-five years that "effectively severed any public function from the commercial operations of SOEs such that SOEs do not exercise elements of governmental authority." Pls.' Br. at 40. Plaintiffs cite several reforms directly, including the 1988 State-Owned Enterprises Law, the 1993 Company Law, and the establishment of the State-Owned Assets Supervision and Administration Committee ("SASAC") in 2003. *Id.* at 40–42 (citing P.R. 129 at 3–4 & Ex. 8). Because reforms in China demonstrate that GOC ownership of an entity does not result in that entity undertaking public functions, Plaintiffs insist that Commerce's determination was contrary to record evidence.[11]

Plaintiffs' argument must fail. First, as noted above, Plaintiffs' argument addresses the wrong standard for government control. The issue is whether Plaintiffs provided sufficient evidence to demonstrate that government ownership does not result in government control. *I&D Memo* at 43. Plaintiffs evidence, however, indicates that under Chinese law, SOEs are directed not to perform public functions. *See* Pls.' Br. at 40–42. Second, Plaintiffs' argument fails to address any of Commerce's specific findings concerning the GOC-owned entities at issue. Plaintiffs provide general information regarding the operation of SOEs in the Chinese economy, but do not offer evidence that negates any of Commerce's specific findings. Finally, Plaintiffs appear to overstate the level of separation between government ownership and government control under Chinese law. As Plaintiffs themselves admit, the "SASAC is accorded the same rights of any shareholder in the enterprises in which it invests." Pls.' Br. at 41. Therefore, as a majority shareholder in an entity, SASAC would enjoy the rights belonging to any majority shareholder, including the right to appoint directors. Accordingly, Commerce's determination was supported by substantial evidence.

2. Wire Rod Suppliers Minority-Owned by the GOC

Commerce also determined that certain of GWK's wire rod suppliers were "authorities" even though they were minority-owned by the GOC and therefore countervailed wire rod purchases by GWK from

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[11] Plaintiffs also assert that Commerce's determination was erroneous because steel pricing in the PRC is set by the market not by the GOC. *See* Pls.' Br. at 42–43. However, the relative commerciality of an act by a government or public entity is not relevant to the "authority" issue. *See Hynix Semiconductor Inc. v. United States*, 30 CIT 288, 309, 425 F. Supp. 2d 1287, 1306 (2006).

these suppliers at LTAR. *I&D Memo* at 44. Because Commerce could not determine whether these suppliers were "authorities" on the basis of ownership information alone, Commerce consulted the five-factor test to determine the extent of government control. *See* P.R. 193 at 3–10. Plaintiffs argue that Commerce did not consider "whether the entities in question were exercising elements of government authority," and failed to address evidence concerning substantial reforms in the PRC and the "lack of any price controls" in the PRC's wire rod market. *See* Pls.' Br. at 50.

Here, Commerce's determination is supported by substantial evidence. Commerce properly performed the five-factor test in accord with its prior practice. *See I&D Memo* at 43. Plaintiffs rehash the same flawed arguments they raised concerning wire rod suppliers that are majority-owned by the GOC. As noted above, Plaintiffs advocate for the wrong standard of reviewing "authority" status. Moreover, Plaintiffs' evidence concerning the reforms in the PRC and the relative commerciality of wire rod prices does not contradict Commerce's findings concerning the state-ownership of individual wire rod suppliers. Plaintiffs fail to demonstrate that Commerce's determination was unsupported by substantial evidence. Therefore, Commerce's decision to treat wire rod suppliers minority-owned by the GOC as "authorities" was proper.

C. Wire Rod Purchased from Privately-Owned Trading Companies

Commerce also countervailed wire rod purchases GWK made from certain privately-owned trading companies. *I&D Memo* at 45. Although it did not find that the GOC provided GWK with a financial contribution directly, Commerce nonetheless found that GWK received a subsidy because the trading companies received a financial contribution when they purchased wire rod from the GOC at LTAR, which enabled GWK to obtain wire rod from those trading companies at LTAR. *Id.* Plaintiffs argue that Commerce's decision is contrary to law because GWK never received a financial contribution. Pls.' Br. at 44. Alternatively, if the court finds that GWK received a financial contribution, Plaintiffs insist that Commerce's decision is still erroneous because Commerce neither conducted an upstream subsidy investigation nor demonstrated that the privately-owned trading companies were "authorities." *See id.* at 44–45.

A countervailable subsidy exists where an (1) "authority provides a financial contribution . . . to a person" and (2) "a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B). Plaintiffs insist that the financial contribution requirement was not satisfied. Pls.' Br. at 44. A "financial contribution" is defined as:

> (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,
> (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,
> (iii) providing goods or services, other than general infrastructure, or
> (iv) purchasing goods.

19 U.S.C. § 1677(5)(D). The GOC provided the private trading companies a financial contribution through the provision of wire rod. *See I&D Memo* at 45; 19 U.S.C. § 1677(5)(D)(iii). The issue is whether that financial contribution is sufficient to satisfy the requirements of 19 U.S.C. § 1677(5)(B) with regards to GWK.

Plaintiffs argue that 19 U.S.C. § 1677(5)(B) requires Commerce to "find a financial contribution *and* a benefit to the respondent end user" in order to determine the existence of a countervailable subsidy. Pls.' Br. at 44 (emphasis in original). Plaintiffs rely on a passage from *Delverde, SrL v. United States*, in which the CAFC states that "[i]n order to conclude that a 'person' received a subsidy, Commerce must determine that a government provided that person with both a 'financial contribution' . . . and a 'benefit.'" 202 F.3d 1360, 1365 (2000); *see* Pls.' Br. at 44. Because Commerce did not find that the GOC provided GWK with a financial contribution directly, Plaintiffs insist Commerce's determination was erroneous. *See* Pls.' Br. at 44.

However, a close look at the CAFC's opinion in *Delverde* reveals that Plaintiffs' argument is flawed. In *Delverde*, the respondent challenged Commerce's decision to impose CVDs on corporate assets it purchased after the provision of the subsidy to the prior owner, arguing that it never received a financial contribution.[12] *See* 202 F.3d at 1362–63. The CAFC held that in the case of a sale of corporate assets the meaning of "subsidy" under 19 U.S.C. § 1677(5) did not change. *See id.* at 1366. According to the CAFC, Commerce still must determine whether "a government provided both a financial contribution and a benefit to a person, either directly or indirectly, by one of the acts enumerated, before charging it with receipt of a subsidy." *Id.* Thus, the respondent end user need not directly receive the financial contribution as Plaintiffs insist.

Applying the CAFC's interpretation of 19 U.S.C. § 1677(5) to the instant case, the court finds that Commerce's determination was in accord with the law. The GOC provided a financial contribution to

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[12] Although *Delverde* concerned the imposition of CVDs on corporate assets rather than merchandise, *see* 202 F.3d at 1362, the CAFC's analysis of 19 U.S.C. § 1677(5) is instructive.

private trading companies. *See* 19 U.S.C. § 1677(5)(D)(iii). A benefit was conferred upon GWK through the provision of wire rod from said trading companies at LTAR. *See* 19 U.S.C. § 1677(5)(E)(iv) (A benefit is conferred "in the case where goods or services are provided, if such goods or services are provided for [LTAR]."). Essentially, Commerce found that GWK received the benefits of an indirect financial contribution, enabling it to purchase wire rod below the benchmark price. As the requirements of 19 U.S.C. § 1677(5) were satisfied, Commerce was not required to undergo an upstream subsidies analysis or determine that the trading companies in question were "authorities." Accordingly, Commerce's decision to countervail wire rod purchases from private trading companies was in accord with the law.

D. Benchmark Price for Wire Rod

When determining a benchmark price for wire rod against which to measure the adequacy of GWK's remuneration, Commerce selected a "world average price" instead of using the domestic market price in the PRC. *I&D Memo* at 52. Commerce bypassed market prices for wire rod in the PRC because it found that the prices were distorted as a result of the GOC's significant presence in the market. *Id.* at 51–52. Specifically, Commerce found that (1) "the GOC has direct ownership or control of at least 47.97[%] of wire rod production" in the PRC;[13] (2) wire rod imports comprised only 1.53% of the PRC's wire rod market; and (3) the GOC implemented export controls on wire rod including a "10[%] export tariff" and an "export licensing requirement." *Id.* at 15. Plaintiffs claim that Commerce's determination is inconsistent with mainstream economic theory and is unsupported by substantial evidence. *See* Pls.' Br. at 45–49.[14]

Commerce prefers to measure adequacy of remuneration "by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i). However, "[i]f there is no useable market-determined price with which to make the comparison," Commerce measures adequacy of remuneration "by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the

[13] Commerce noted that the GOC's market share may exceed 47.97% because "some companies that were classified as [Foreign Investment Enterprises ("FIEs")] by the GOC could be majority owned or controlled by the [GOC]." *I&D Memo* at 51. According to Commerce, information provided by the GOC indicates that the GOC treats any firms with at least 25% foreign invested ownership as FIEs. *Id.*

[14] Plaintiffs cite three works which they claim undermine Commerce's decision: Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* (2d ed. 2004); Clement G. Krouse, *Theory of Industrial Economics* (1990); and Stephen Martin, *Industrial Economics: Economic Analysis and Public Policy* (2d ed. 1988).

country in question." *Id.* at § 351.511(a)(2)(ii). When determining whether the domestic market price is "useable," Commerce undertakes the following analysis:

> While we recognize that government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy.

CVD Final Rule, 63 Fed. Reg. at 65,377. Thus, the issue is whether Commerce reasonably determined that wire rod prices were distorted as a result of the GOC's substantial involvement in the market.

According to Plaintiffs, "[e]conomic theory says that when there are a large number of non-affiliated firms there is little to no scope for strategic interaction among the firms." Pls.' Br. at 47. Given the large number of non-affiliated firms in the PRC's wire rod market, Plaintiffs contend that "[t]he competitive nature of the non-affiliated firms means their pricing decisions are driven by their costs and not by the strategic influence of the GOC's alleged control of other firms." *Id.* Plaintiffs add that in a market with a large number of sellers, "'sellers are likely to have at least slightly divergent notions about the most advantageous price,'" and it is likely that "'at least one will be a maverick, pursuing an independent and aggressive pricing policy.'" *Id.* at 48 (quoting Frederic M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* at 277 (Houghton Mifflin Co. 3d ed. 1990)). Accordingly, Plaintiffs insist that wire rod prices in the PRC "reflect competitive market principles, not allegedly GOC-controlled SOE prices." *Id.* at 47.

Here, Plaintiffs fail to show that Commerce's determination was unreasonable or unsupported by substantial evidence. Commerce reasonably concluded, based on information provided by the GOC, that the GOC had an interest in a substantial, near-majority share of the wire rod market. *See I&D Memo* at 15. Plaintiffs reliance on abstract economic theory fails to undermine this evidence. At best, Plaintiffs' evidence indicates a theoretical level of competition between wire rod suppliers in the PRC. Pls.' Br. at 47–48. However, Commerce reasonably determined that the level of competition amongst these entities was not relevant, concluding that the GOC's substantial market share made it a "price leader, with which private

firms are forced to compete." *I&D Memo* at 52.

Plaintiffs also argue that Commerce's conclusion that export controls on wire rod contribute to market distortion is not supported by substantial evidence. Pls.' Br. at 48–49. Specifically, Plaintiffs insist that Commerce "offered no evidence as to how the referenced measures significantly affected either pricing or volume of domestic production, exports or imports." *Id.* at 49. In fact, Plaintiffs suggest that Commerce ignored evidence of the PRC's significant importation and exportation of wire rod in terms of volume, which indicated that the GOC does not distort market prices. *Id.* Therefore, Plaintiffs insist that it was erroneous for Commerce to conclude that the GOC's involvement in the wire rod market distorted prices. *Id.*

Plaintiffs' claims concerning the sufficiency of Commerce's evidence are also unavailing. Plaintiffs' argument appears to be based on the mistaken belief that Commerce must demonstrate with substantial evidence the specific distortive effect of each government action on wire rod prices. *Id.* However, the regulations only require Commerce to determine whether the GOC constitutes a substantial portion of the wire rod market, such that Commerce may reasonably conclude that prices are distorted. *See CVD Final Rule*, 63 Fed. Reg. at 65,377. As described above, Commerce relied on a number of factors indicating the substantial influence the GOC held over the wire rod market, including the GOC's near-majority market share, the low market share of wire rod imports, and regulations on the exportation of wire rod. *See I&D Memo* at 15, 51–52. Commerce reasonably concluded that the evidence, taken as a whole, demonstrated "the GOC's predominant role and contributed to the distortion of the domestic market in the PRC for wire rod." *Id.* at 51. Therefore, Commerce's determination to abandon the market price for wire rod in the PRC is consistent with its own regulations and is supported by substantial evidence. *See CVD Final Rule*, 63 Fed. Reg. at 65,377.

CONCLUSION

For the foregoing reasons, the court finds that the new law, Pub. L. No 112–99, is constitutional. The court also finds that the *Final Determination* is supported by substantial evidence and is otherwise in accord with the law.

ORDER

In accordance with the above, it is hereby

ORDERED that the determination of Commerce is **SUSTAINED**; and it is further

ORDERED that this action is dismissed.

Dated: March 12, 2013
New York, New York

/s/ NICHOLAS TSOUCALAS
NICHOLAS TSOUCALAS
SENIOR JUDGE