

# U.S. Court of International Trade

Slip Op. 16–62

TMK IPSCO et al., Plaintiffs and Consolidated Plaintiffs, and MAVERICK TUBE CORPORATION et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and TIANJIN PIPE (GROUP) CORP. et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge  
Consol. Court No. 10–00055  
Public Version

[Sustaining in part and remanding in part the U.S. Department of Commerce’s final determination in the countervailing duty investigation of certain oil country tubular goods from the People’s Republic of China.]

Dated: June 24, 2016

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## **OPINION AND ORDER**

### **Kelly, Judge:**

This consolidated action comes before the court on USCIT Rule 56.2 motions for judgment on the agency record challenging the U.S.

Department of Commerce's ("Department" or "Commerce") determination in the countervailing duty investigation of certain oil country tubular goods ("OCTG") from the People's Republic of China. See *Certain Oil Country Tubular Goods From the People's Republic of China*, 74 Fed. Reg. 64,045 (Dep't Commerce Dec. 7, 2009) (final affirmative countervailing duty determination, final negative critical circumstances determination) ("*Final Results*"), as amended, 75 Fed. Reg. 3,203 (Dep't Commerce Jan. 20, 2010) (amended final affirmative countervailing duty determination and countervailing duty order) ("*Amended Final Results*"); see also Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Oil Country Tubular Goods ("OCTG") from the People's Republic of China, C-570-944, (Nov. 23, 2009), available at <http://ia.ita.doc.gov/frn/summary/prc/E9-28779-1.pdf> (last visited June 3, 2016) ("Final Decision Memo").

Plaintiffs TMK IPSCO, V&M Star L.P., Evraz Rocky Mountain Steel, Wheatland Tube Corp., and United Steelworkers (collectively "TMK"), domestic producers of OCTG and a union of OCTG workers, commenced this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (2006).<sup>1</sup> The court consolidated TMK's action with actions filed by: (1) Tianjin Pipe (Group) Corp. ("TPCO") and Tianjin Pipe International Economic & Trading Corp. (collectively "TPCO Group"), exporters of OCTG; (2) Maverick Tube Corporation ("Maverick"), a domestic producer of OCTG; and (3) United States Steel Corporation ("U.S. Steel"), also a domestic producer of OCTG. See Order, Oct. 6, 2010, ECF No. 46. TMK, TPCO Group, Maverick, U.S. Steel, and Plaintiff-Intervenor Bureau of Fair Trade Imports & Exports, Ministry of Commerce, People's Republic of China ("Bureau of Fair Trade") filed Rule 56.2 motions for judgment on the agency record. See Mem. in Supp. Mot. J. Agency R. of TMK IPSCO, V&M Star L.P., Wheatland Tube Corp., Evraz Rocky Mountain Steel, and the United Steelworkers, Oct. 6, 2010, ECF No. 55 ("TMK Mot."); Pls. Tianjin Pipe (Group) Corp.'s and Tianjin Pipe International Economic and Trading Corp.'s Mem. P. & A. Supp. Mot. J. Agency R., Oct. 6, 2010, ECF No. 54; Mem. in Supp. Maverick Tube Corporation's 56.2 Mot. J. Agency R., Oct. 7, 2010, ECF No. 71 ("Maverick Mot."); Mem. in Supp. Pl. United States Steel Corporation's Mot. J. Agency R. Under Rule 56.2, Oct. 6, 2010, ECF No. 67 ("U.S. Steel Mot."); Rule 56.2 Mot. J. Agency R. of Pl.-Intervenor Bureau of Fair Trade for Imports and Exports, Ministry of Commerce, The

<sup>1</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

People's Republic of China, Oct. 6, 2010, ECF No. 56. Defendant thereafter filed a response to the Rule 56.2 motions for judgment on the agency record filed by the above named parties. *See* Def.'s Resp. Opp'n to Pls., Pl.-Intervenors, and Def.-Intervenors' Mots. J. Agency R., May 5, 2011, ECF No. 86 ("Def. Resp."). U.S. Steel also filed a supplemental brief and Defendant submitted a supplemental response brief.<sup>2</sup> *See* Opening Suppl. Br. Suppl. Pl. United States Steel Corporation's Mot. J. Agency R. Under Rule 56.2, Sept. 30, 2015, ECF No. 142 ("U.S. Steel Suppl. Br."); Def.'s Suppl. Resp. Br. Pursuant to This Ct.'s July 2, 2015 Scheduling Order, Dec. 17, 2015, ECF No. 145 ("Def. Suppl. Resp."). TMK and U.S. Steel each filed replies to Defendant's response to their motions for judgment on the agency record. *See* Reply Mem. Suppl. Mot. J. Agency R. of TMK IPSCO, V&M Star L.P., Wheatland Tube Corp., Evraz Rocky Mountain Steel, and the United Steelworkers, Feb. 16, 2016, ECF No. 146; Reply Br. Suppl. Pl. United States Steel Corp.'s Mot. J. Agency R. Under Rule 56.2, Feb. 16, 2016, ECF No. 147 ("U.S. Steel Reply").

## BACKGROUND

On April 28, 2009, in response to a petition filed by TMK, Maverick, U.S. Steel, and other domestic companies (collectively "Petitioners"), Commerce initiated a countervailing duty investigation of OCTG from the People's Republic of China for the period of January 1, 2008 through December 31, 2008. *See Certain Oil Country Tubular Goods from the People's Republic of China*, 74 Fed. Reg. 20,678, 20,679–80 (Dep't Commerce May 5, 2009) (initiation of countervailing duty investigation); *see also* Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Oil Country Tubular Goods From the

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<sup>2</sup> On June 16, 2011, the court stayed this action pending the final resolution by the U.S. Court of Appeals for the Federal Circuit of the appeal of *GPX Int'l Tire Corp. et al. v. United States*, Consol. Court No. 08–00285. *See* Order, June 16, 2011, ECF No. 106. On May 7, 2015, the court lifted the stay and directed the parties to submit a status report. *See* Order, May 7 2015, ECF No. 124. On June 18, 2015, the parties filed a joint status report in which TPCO Group and Bureau of Fair Trade requested dismissal of their claims. *See* Joint Status Report Pursuant to Ct.'s May 7, 2015 and June 7, 2015 Orders, June 18, 2015, ECF No. 128. In the same document, TPCO Group indicated it wished to remain in the action as Defendant-Intervenors and Bureau of Fair Trade indicated it would no longer participate in the action in any capacity. *See id.* at 2. The parties also requested an opportunity to submit supplemental briefs limited to discussing the surviving issues that were raised in each party's opening brief. *See id.* at 2–3.

The court dismissed all claims of TPCO Group and Bureau of Fair Trade with TPCO Group remaining in the action as Defendant-Intervenors, and permitted the parties to submit supplemental briefs limited to the surviving issues in the case. *See* Order, July 2, 2015, ECF No. 131; Order, July 2, 2015, ECF No. 132; Order, July 9, 2015, ECF No. 133.

People's Republic of China, PD 3 (Apr. 8, 2009) ("Petition").<sup>3</sup> Commerce selected four Chinese producers and exporters of subject merchandise as mandatory respondents: Jiangsu Changbao Steel Tube Co., Ltd. ("Changbao"), TPCO, Wuxi Seamless Oil Pipe Co., Ltd. ("Wuxi"), and Zhejiang Jianli Enterprise Co., Ltd. ("Jianli"). See Respondent Selection Memorandum at 6, PD 69 (June 3, 2009). Commerce issued its final determination on November 23, 2009, see *Final Results*, 74 Fed. Reg. at 64,045, which Commerce later amended to correct certain ministerial errors resulting in final net countervailing duty rates of 12.46% for Changbao, 10.49% for TPCO, 14.95% for Wuxi, and 15.78% for Jianli, from which Commerce calculated an all others rate of 13.41%. *Amended Final Results*, 75 Fed. Reg. at 3,204–05.

The parties in this action make the following challenges to Commerce's final determination: (i) TMK, Maverick, and U.S. Steel (collectively "Plaintiffs") challenge Commerce's decision to postpone its investigation of certain subsidies first alleged during the course of the investigation and its refusal to investigate alleged export restraints on steel rounds and billets;<sup>4</sup> (ii) TMK challenges Commerce's refusal to investigate alleged subsidies received by Changbao; (iii) Plaintiffs challenge Commerce's refusal to investigate subsidies prior to the date that China acceded to the World Trade Organization ("WTO"); (iv) Maverick and U.S. Steel contest Commerce's inclusion of certain benchmarks for steel rounds and billets; (v) Plaintiffs challenge Commerce's refusal to make a quality adjustment to the benchmarks for steel rounds and billets; (vi) U.S. Steel disputes Commerce's freight cost adjustments to the benchmark for steel rounds and billets; (vii) TMK and U.S. Steel argue that Commerce erroneously attributed subsidies received by Changbao and Changbao's subsidiary Jiangsu Changbao Precision Steel Tube Co., Ltd. ("Precision"); (viii) U.S. Steel argues that Commerce incorrectly attributed subsidies received by TPCO and four of TPCO's subsidiaries; (ix) U.S. Steel argues that Commerce failed to tie the provision of steel rounds and billets for less-than-adequate-remuneration ("LTAR") only to TPCO's sales of

<sup>3</sup> On May 12, 2010, Defendant submitted an index with a complete list of the confidential and public documents comprising the administrative record, which can be found at ECF No. 40. All further references to the administrative record may be located in that index.

<sup>4</sup> In its Rule 56.2 motion, U.S. Steel additionally claims Commerce failed to countervail export restraints on coke. See U.S. Steel Mot. 42–46. However, U.S. Steel abandoned this argument in its supplemental brief because Commerce found export restraints on coke to be a countervailable subsidy in a subsequent administrative review. See U.S. Steel Suppl. Br. 20.

steel pipe; and (x) Maverick challenges Commerce's decision not to apply facts otherwise available with an adverse inference ("AFA")<sup>5</sup> to Jianli's purchases of steel rounds and billets. *See* TMK Mot. 12–40; Maverick Mot. 13–49; U.S. Steel Mot. 13–42, 46–65.

For the reasons set forth below, the court finds that Commerce failed to adequately explain its decision to use China's WTO accession date as a cut-off for identifying and measuring countervailable subsidies, failed to reasonably explain how the Maersk and Jianli freight rates included in the benchmark price for steel rounds and billets are both representative of what an importer would pay, erred in attributing subsidies received by Precision to the sales of Changbao's other subsidiaries and in attributing subsidies received by four of TPCO's subsidiaries to the sales of TPCO's other subsidiaries, and failed to make a determination regarding whether the provision of steel rounds and billets at LTAR to TPCO were tied to its sales of seamless steel pipe. Additionally, the court grants Defendant's remand request for Commerce to recalculate its benchmark excluding the SBB East Asia pricing data. The court sustains Commerce's decision in all other respects.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2006),<sup>6</sup> which grant the court authority to review actions contesting the final determination in a countervailing duty investigation. The court will uphold Commerce's determination 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).

## DISCUSSION

### I. Commerce's Decision to Defer Investigation of Certain New Subsidy Allegations Until First Administrative Review

Plaintiffs argue that both the relevant statute and regulations preclude Commerce from deferring its investigation of new subsidy allegations timely raised during the investigation. *See* TMK Mot. 12–17; Maverick Mot. 13–18; U.S. Steel Mot. 30–37. Defendant argues Commerce deferred its investigation in accordance with 19

<sup>5</sup> Although 19 U.S.C. § 1677e(a)–(b) and 19 C.F.R. § 351.308(a)–(c) (2009) each separately provide for the use of facts otherwise available and the subsequent application of adverse inferences 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 Decision Memo at 3–6, 55–63, 125–126.

<sup>6</sup> Further citations to Title 28 of the U.S. Code are to the 2006 edition.

U.S.C. § 1671a(b)(1) and 19 C.F.R. § 351.311(b) (2009).<sup>7</sup> *See* Def. Resp. 76–83. The court finds that Commerce’s postponement of its investigation of new subsidies is in accordance with law and not an abuse of discretion.

If Commerce discovers a practice during the course of a countervailing duty proceeding which appears to be a countervailable subsidy that was not alleged in the petition, Commerce “shall include the practice, subsidy, or subsidy program in the proceeding.” 19 U.S.C. § 1677d(1). An interested party may submit new subsidy allegations during the course of the investigation no later than “40 days before the scheduled date of the preliminary determination.” 19 C.F.R. § 351.301(d)(4)(i)(A). Commerce shall initiate an investigation where an interested party “alleges the elements necessary” along with “information reasonably available to the petitioner supporting those allegations.” 19 U.S.C. § 1671a(b)(1). Commerce investigates alleged subsidies meeting such requirements “if [it] concludes that sufficient time remains before the scheduled date for the final determination.” 19 C.F.R. § 351.311(b). Should Commerce find that insufficient time remains, it “defer[s] consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any.” 19 C.F.R. § 351.311(c).

On July 30, 2009, Petitioners timely submitted new subsidy allegations. Commerce initiated investigations into nine of the alleged subsidies. *See* Memorandum Regarding New Subsidy Allegations at 3–12, PD 209 (Sept. 18, 2009) (“New Subsidy Allegations Memo”). However, Commerce ultimately postponed its investigation of these newly alleged subsidies until the first administrative review because “the number and complexity of the newly alleged subsidies, and the short time the Department has to complete its investigation makes it impossible to conduct a meaningful examination of the subsidies validly alleged by petitioners.” Memorandum Regarding Status of New Subsidy Allegations at 6, PD 260 (Oct. 21, 2009) (“Status of New Subsidy Allegations”).

Commerce did not act contrary to law or abuse its discretion by postponing its investigation into the new subsidy allegations because it reasonably determined that there was insufficient time remaining to investigate the new subsidy allegations. An interested party may submit new subsidy allegations during the course of the investigation no later than “40 days before the scheduled date of the preliminary determination.” 19 C.F.R. § 351.301(d)(4)(i)(A). The plain meaning of this regulatory provision imposes a burden on the interested party to timely raise new subsidy allegations, but it does not require Com-

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<sup>7</sup> Further citations to Title 19 of the Code of Federal Regulations are to the 2009 edition.

merce to investigate all timely raised allegations. This regulatory provision must be read together with 19 C.F.R. § 351.311(b) which obligates Commerce to investigate potentially countervailable subsidies first alleged during a proceeding if it “concludes that sufficient time remains before the scheduled date for the final determination.” 19 C.F.R. § 351.311(b). Commerce has discretion under the regulation to determine whether “sufficient time remains” in a proceeding to investigate new subsidy allegations.<sup>8</sup> *Id.* Thus, the question is whether Commerce abused its discretion in determining that insufficient time remained in the proceeding to complete its investigation of the newly alleged subsidies. The court finds Commerce has not.

Commerce explained that the subsidy allegations cover complex subsidies requiring a laborious and difficult investigation. Status of New Subsidy Allegations at 5. Commerce specifically determined that investigating the provision of land for LTAR is complicated because it requires “investigat[ing] the pricing policies of the local government providing the land-use rights.” *Id.* Commerce added that even the more straightforward alleged subsidy programs were provided by different levels of the PRC government (*e.g.*, national, regional, municipal), which would further add to the time necessary to develop a proper investigative record. *Id.* Commerce cited numerous tasks it would have had to complete in the short time remaining given that the deadline in the countervailing duty proceeding had not been aligned with the antidumping duty proceeding.<sup>9</sup> *Id.* Commerce also relied on the fact the subsidies alleged had not previously been in-

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<sup>8</sup> Plaintiffs argue that the regulatory deadline for new subsidy allegations stripped Commerce of its discretion if the allegations are timely made because the 40-day regulatory deadline ensures that Commerce is given sufficient time for its investigation. TMK Mot. 13–14; Maverick Mot. 14–18; U.S. Steel Mot. 30–32. While the submission deadline for new subsidy allegations may have been intended to inform Commerce of potentially countervailable subsidies sufficiently early in the proceeding, Commerce’s regulations do not specify how much time is sufficient to investigate such subsidies because “the time necessary to investigate a particular subsidy practice will vary from case to case.” *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,342–43 (Dep’t Commerce May 19, 1997).

<sup>9</sup> Section 1671d(a)(1) of Title 19 of the U.S. Code provides that petitioners may request that the final determination in a countervailing duty and antidumping duty investigation be due at the same time if the investigations are initiated simultaneously and involve the same class or kind of merchandise. 19 U.S.C. § 1671d(a)(1). Because the statutory timeframe for completing a countervailing duty investigation is shorter than in an antidumping duty investigation, aligning the deadlines in parallel antidumping and countervailing duty investigations affects Commerce’s timeframe to complete the countervailing duty investigation. Commerce noted that because the petitioners opted not to align the parallel antidumping and countervailing duty investigations, the deadline in the countervailing duty investigation was November 23, 2009. *See* Status of New Subsidy Allegations at 3–5.

Plaintiffs contest Commerce’s reliance on Petitioners’ decision not to align the antidumping and countervailing duty proceedings in deciding to postpone the investigation. TMK Mot. 16–17; Maverick Mot. 18; U.S. Steel Mot. 34. However, Commerce did not postpone its investigation because the proceedings were not aligned, but rather because they were too

vestigated. *Id.* at 5–6. Based on Commerce’s workload in the investigation, the number of new subsidy allegations, the complexity of those allegations, and the limited time period in which to complete its investigation, the court cannot say that Commerce unreasonably determined it lacked sufficient time to investigate these new subsidies.<sup>10</sup>

Maverick argues that Commerce’s acceptance of a significant amount of new factual information submitted by the respondents at the “eleventh hour” contradicts its position that it lacked time to complete its investigation. Maverick Mot. 15. Maverick suggests that Commerce was required to investigate the new subsidy allegations rather than accepting and reviewing the new factual information. However, it is not appropriate for the court to substitute its judgment for the agency’s regarding the allocation of resources here. *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995). Further, Commerce’s acceptance of new factual information is not relevant to evaluating the reasonableness of Commerce’s determination that it lacked sufficient time to investigate new subsidies given their novelty and complexity.<sup>11</sup>

TMK argues that Commerce acted contrary to its own practice by declining to investigate timely raised new subsidy allegations. TMK Mot. 16. TMK does not point to any case in which Commerce articulates such a practice, but instead asserts that it “can find no case in which the Department refused to investigate allegations that were complex. *See* Status of New Subsidy Allegations at 5. Commerce merely noted the decision not to align had the consequence of giving Commerce a smaller window of time in which to complete its investigation. *See id.* At oral argument, TMK argued that Commerce penalized petitioners for choosing not to align the proceedings. *See* Oral Arg., 00:09:07–00:14:15, May 4, 2016, ECF No. 151. However, TMK has not offered any record evidence to substantiate this claim.

<sup>10</sup> In deciding to defer its investigation of these subsidies, Commerce in part relied upon previous court decisions in *Bethlehem Steel Corp. v. United States*, 25 CIT 307, 140 F. Supp. 2d 1354 (2001) and *Royal Thai Gov’t v. United States*, 28 CIT 1218, 341 F. Supp. 2d 1315 (2004). *See* Status of New Subsidy Allegations at 3–5. Plaintiffs argue that Commerce’s reliance upon *Bethlehem Steel* and *Royal Thai Gov’t* is misplaced because, in both cases, Commerce deferred its investigation of untimely new subsidy allegations, while here petitioners raised new subsidy allegations in a timely manner. TMK Mot. 16; Maverick Mot. 17–18; U.S. Steel Mot. 35–36. However, nothing in these cases suggests that Commerce does not retain discretion to postpone investigating timely raised new subsidy allegations.

<sup>11</sup> Maverick cites to *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 33 CIT 1125, 1129, 637 F. Supp. 2d 1260, 1263–64 (2015), arguing that Commerce cannot base its decision to postpone investigating timely raised new subsidy allegations on workload concerns. *See* Maverick Mot. 17–18. However, the issue before the court in *Zhejiang Native Produce* involved the standard for limiting the number of respondents that are individually examined, not the “sufficient time remaining” standard under 19 C.F.R. § 351.311(c). *See Zhejiang Native Produce*, 33 CIT at 1129, 637 F. Supp. 2d at 1263–64.

timely under its regulations and that otherwise constituted proper subsidy allegations.” TMK Mot. 16. Even if Commerce has such a practice, it may provide a reasonable explanation for departing from it. *See Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004) (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). Commerce reasonably explained why there was insufficient time in this case to investigate the alleged subsidies even though the allegations were timely submitted.

## II. Commerce’s Refusal to Investigate Certain New Subsidy Allegations

While Commerce deferred its investigation of the subsidies discussed above, Commerce declined to investigate other new subsidy allegations.<sup>12</sup> Plaintiffs argue that Commerce’s refusal to investigate alleged export restraints on steel rounds and billets based on a heightened initiation standard is contrary to law and, alternatively, unsupported by substantial evidence. *See* TMK Mot. 17–25; Maverick Mot. 19–23; U.S. Steel Mot. 37–42. TMK also argues that Commerce’s refusal to investigate land-use rights, a steel mill, and equipment allegedly provided to Changbao at LTAR is unsupported by substantial evidence and contrary to law. *See* TMK Mot. 25–32. Commerce’s refusal to investigate each of these alleged subsidies is supported by substantial evidence and in accordance with law.

### A. Commerce’s Refusal to Investigate Alleged Export Restraints on Steel Rounds and Billets

An investigation into a particular subsidy program is warranted if an interested party, using information reasonably available to it, sufficiently alleges that: (1) a government or public authority has provided a financial contribution,<sup>13</sup> (2) to a specific enterprise or

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<sup>12</sup> Commerce declined to investigate the following new subsidy allegations: (1) alleged export restraints on steel rounds and billets, *see* New Subsidy Allegations Memo at 2–3; (2) Changbao’s alleged receipt of land-use rights from the Government of China for LTAR, *see id.* at 6–7; and (3) Changbao’s alleged receipt of a steel mill and equipment from a state owned enterprise, Changzhou Baosteel, at LTAR. *See id.* at 12–13.

<sup>13</sup> The statute defines “financial contribution” 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).

industry,<sup>14</sup> and (3) a benefit is conferred upon the recipient of the financial contribution.<sup>15</sup> See 19 U.S.C. §§ 1671a(b)(1), 1677(5)–(5A). Upon receipt of an allegation, Commerce determines whether the petition alleges the necessary elements and contains information supporting the allegations. 19 U.S.C. § 1671a(c)(1)(A). Commerce applies the same standard to subsidies not raised in the petition that are alleged for the first time during the course of an investigation. See *New Subsidy Allegations Memo* at 2.

While export restraints are not financial contributions that directly provide goods or services at LTAR, such restraints may function in a manner that indirectly confers a benefit on producers. Commerce may countervail export restraints in these circumstances.<sup>16</sup> See 19 U.S.C. § 1677(5)(B)(iii), (5)(D)(iii), (5)(E)(iv); see also 19 U.S.C. § 1671(a). Commerce has developed a practice of requiring petitioners to demonstrate a long-term correlation by presenting historical data before initiating an investigation into export restraints that allegedly constitute countervailable subsidies. See, e.g., *Leather From Argentina*, 55 Fed. Reg. 40,212, 40,213–14 (Dep’t Commerce Oct. 2, 1990) (final affirmative countervailing duty determination and countervail-

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<sup>14</sup> A subsidy is specific if it is conditioned upon export performance or upon preferring domestic goods over imported goods. 19 U.S.C. § 1677(5A)(B)–(C). The statute further provides that a subsidy can be specific as a matter of law (de jure) or specific as a matter of fact (de facto). 19 U.S.C. § 1677(5A)(D). A subsidy is specific as a matter of law if “the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry.” 19 U.S.C. § 1677(5A)(D)(i). A subsidy is specific as a matter of fact if: (i) the number of actual recipient enterprises or industries is limited; (ii) the subsidy is predominantly used by a particular enterprise or industry; (iii) a large amount of the subsidy is disproportionately received by a particular enterprise or industry; or (iv) the subsidy is administered in a manner that indicates an enterprise or industry is favored over others. See 19 U.S.C. § 1677(5A)(D)(iii). A subsidy is also considered specific if it “is limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy.” 19 U.S.C. § 1677(5A)(D)(iv).

<sup>15</sup> In relevant part, the statute views the following as a “benefit conferred”:

- (iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.

19 U.S.C. § 1677(5)(E)(iv). The statute further provides that “the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided.” 19 U.S.C. § 1677(5)(E).

<sup>16</sup> The Statement of Administrative Action (“SAA”) accompanying the Uruguay Round Agreements Act acknowledged Commerce’s past treatment of export restraints and did not reject Commerce’s view that 19 U.S.C. § 1677(5)(B)(iii) encompasses indirect subsidies such as export restraints so long as the standard under that statutory provision has been met. SAA, H.R. Doc. No. 103–316, vol. 1, at 925–26, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4239–40.

ing duty order);<sup>17</sup> *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22,570, 22,604–605 (Dep’t Commerce May 28, 1992) (final affirmative duty determination); *Certain Hot-Rolled Carbon Steel Flat Products From Argentina, India, Indonesia, South Africa, and Thailand*, 65 Fed. Reg. 77,580, 77,584 (Dep’t Commerce Dec. 12, 2000) (notice of initiation of countervailing duty investigations); *Coated Free Sheet Paper from Indonesia*, 72 Fed. Reg. 60,642 (Dep’t Commerce Oct. 25, 2007) (final affirmative countervailing duty determination).

Petitioners alleged that the Government of China’s (“GOC”) tax increase on exports of steel billets, including steel rounds, from fifteen percent to twenty-five percent, effective January 1, 2008, had the effect of substantially increasing the domestic supply of steel rounds in the first two months of 2008. Country-wide New Subsidy Allegations for the Provision of Steel Rounds for Less Than Adequate Remuneration at 2–6, PD 130 (July 30, 2009) (“Petitioners’ New Subsidy Allegations”). In an effort to establish a correlation between the export tax increase and the price decrease, Petitioners observed that from 2006 to approximately March 2008 “[s]teel billets exports fell 92.6 percent on an annual basis in the first two months of the year and were zero in the month of February.” *Id.* at 3. Petitioners additionally noted that, as a result of the dramatic decrease in exports, “world steel prices rose by 38.1 percent year on year to 221.9 points, compared with an increase in China’s domestic price index of 29.61 percent to 142.31 points.” *Id.* at 3–4. Petitioners therefore claimed that Chinese producers received a subsidy because the export tax had the effect of causing Chinese steel prices to increase at a slower pace than the price increase for steel prices worldwide.

Commerce declined to investigate the alleged export restraints because the information does not show a sufficient relationship between the price difference and the export restraints. Final Decision Memo at 113. Specifically, Commerce referenced its practice in prior cases that it requires “long-term historical price comparisons that demonstrate [ ] a clear link between the imposition of the [restraint] and the

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<sup>17</sup> In *Leather From Argentina* Commerce “held petitioners to an extremely high standard of proof” in alleging that an Argentine cattle hide embargo was a countervailable subsidy, requiring petitioners “to substantiate their claim that the embargo had a direct and discernible effect on hide prices in Argentina.” *Leather From Argentina*, 55 Fed. Reg. 40,212, 40,213 (Dep’t Commerce Oct. 2, 1990) (final affirmative countervailing duty determination and countervailing duty order). Commerce found “[t]he historical comparison of the U.S. and Argentine hide price data for the period 1962 to 1989 shows a clear link between the imposition of the 1972 embargo and a divergence between U.S. and Argentine hide prices.” *Id.*

divergence of prices” to investigate subsidy allegations arising from export restraint programs. *Id.*

Commerce’s determination not to investigate the Petitioners’ export restraint allegations is reasonable. Commerce’s practice required Petitioners to support their allegation of an indirect subsidy with long term historical pricing data, and Petitioners provided less than two years of data. Final Decision Memo at 113 (citing *Leather From Argentina*, 55 Fed. Reg. 40,212). “[I]n the case of an indirect subsidy, evidence of a causal nexus between the program and the benefit is also required.” *AK Steel Corp. v. United States*, 192 F.3d 1367, 1372 (Fed. Cir. 1999). Petitioners were unable to offer the sort of long-term historical data that Commerce requires to sufficiently allege such a causal relationship. *See* Petitioners’ New Subsidy Allegations at 3–4. Thus, Commerce reasonably determined that Petitioners’ export restraint allegation failed to allege the necessary elements for the imposition of countervailing duties.<sup>18</sup>

U.S. Steel argues that “since the export restraints in question had only been in place since January 1, 2007, it is difficult to imagine how additional historical pricing information would have been at all relevant to the Department’s analysis.” U.S. Steel Mot. 40–41. Maverick echoes this argument, claiming that “domestic steel round and billet pricing in China was not consistently available prior to 2006.” Maverick Mot. 22. Commerce is not obligated to initiate an investigation based on speculative allegations, and U.S. Steel and Maverick point to nothing in the statute limiting Commerce’s discretion to set a reasonable threshold for demonstrating a causal relationship between an export restraint program and pricing trends. Commerce is required to “examine the accuracy and adequacy of the evidence provided in the petition,” 19 U.S.C. § 1671a(c)(1)(A), and establishing a causal nexus reasonably follows from that statutory mandate for indirect subsidy allegations. Notwithstanding the difficulty in obtaining supporting evidence, Commerce’s practice required Petitioners to sufficiently allege that the export tax functioned as a countervailable subsidy and to make some threshold showing of a causal relationship. Commerce found Petitioners failed to do so and reasonably declined to investigate the export restraints allegation.

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<sup>18</sup> In its supplemental brief, U.S. Steel argues that the court recently confirmed that “[t]he bar for launching a [countervailing duty] inquiry is low.” *See* U.S. Steel Suppl. Br. 16 (quoting *RZBC Grp. Shareholding Co. v. United States*, 39 CIT \_\_\_, 100 F. Supp. 3d 1288, 1292 (2015)). However, that case did not involve an allegation of indirect subsidies, such as an export tax, where it is Commerce’s practice to hold petitioners to a higher standard of proof before initiating an investigation. *See, e.g., Leather From Argentina*, 55 Fed. Reg. at 40,213–14.

## **B. Commerce's Refusal to Investigate Land-Use Rights Allegedly Provided to Changbao for LTAR**

TMK argues that Commerce's refusal to investigate land-use rights allegedly provided to Changbao by the GOC at LTAR is unsupported by substantial evidence and contrary to law. *See* TMK Mot. 25–29. Defendant disagrees because Commerce found TMK failed to allege that the land-use rights provided to Changbao were specific. *See* Def. Resp. 98–101.

A subsidy is considered specific, among other reasons, if it “is limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy,” or it is administered in a manner that indicates an enterprise or industry is favored over others. 19 U.S.C. § 1677(5A)(D)(iii)(IV)–(iv). TMK alleged during the course of the investigation that Changbao received land-use rights from the GOC for LTAR. *See* New Subsidies Allegations on Behalf of TMK IPSCO, V&M Star L.P., Wheatland Tube Corp., Evraz Rocky Mountain Steel, and the United Steelworks in the Countervailing Duty Investigation of Certain Oil Country Tubular Goods From the People's Republic of China at 14, CD 31 (July 30, 2009) (“TMK New Subsidy Allegations re: Changbao”). In support of its allegation, TMK submitted information to show that Changzhou Baogang Steel Pipe Co., Ltd. (“Changzhou Baosteel”), the state owned enterprise (“SOE”) predecessor of Changbao, was given rights to land designated for industrial use by the Changzhou municipal government in Jiangsu Province. TMK New Subsidy Allegations re: Changbao at 14, Attachs. 11, 13.

Commerce reasonably refused to investigate the provision of land-use rights to Changbao for LTAR because TMK failed to allege that the program was specific. *See* Final Decision Memo at 124. TMK argued that, according to 19 U.S.C. § 1677(5A)(D)(iv), the land-use rights are specific to Changbao because it received the rights as a result of being located in the jurisdiction of the granting authority, the Changzhou municipal government. TMK New Subsidy Allegations re: Changbao at 15. After examining TMK's allegation, Commerce found that TMK's allegation only included information pertaining to the location of one of Changbao's subsidiaries and failed to show that Changbao is located within the jurisdiction of the Changzhou municipal government. *See* Final Decision Memo at 124; *see also* New Subsidy Allegations at 7.

TMK also argued the land-use rights provided to Changbao are specific according to 19 U.S.C. § 1677(5A)(D)(iii)(IV) because the rights were valued at 63,542,750 renmimbi by the government, but Changbao paid less than 3% of the value for such rights. TMK New

Subsidy Allegations re: Changbao at 15. TMK submitted information showing that Changbao allegedly received land-use rights at less than the appraised value, however, TMK did not submit information to show that the government favored Changbao over other enterprises or industries in providing those land-use rights. Commerce reasonably found this allegation to be purely speculative because TMK failed to offer any support. *See* Final Decision Memo at 124; New Subsidy Allegations Memo at 7. Commerce's determination not to investigate these subsidy allegations is reasonable because TMK failed to allege specificity.

### **C. Commerce's Refusal to Investigate a Steel Mill and Equipment Allegedly Provided to Changbao for LTAR**

TMK argues that Commerce's refusal to investigate the alleged provision of a steel mill and equipment to Changbao by the GOC for LTAR is unsupported by substantial evidence and contrary to law. *See* TMK Mot. 29–32. In response, Defendant argues that Commerce correctly refused to investigate the alleged subsidy because TMK failed to sufficiently allege with supporting evidence that a benefit had been conferred upon Changbao. *See* Def. Resp. 96–98. The court agrees with Defendant.

TMK alleged during the course of the investigation that Changbao received a steel mill and equipment from the GOC for LTAR. *See* TMK New Subsidy Allegations re: Changbao at 6–7. To show that the GOC made a financial contribution that conferred a benefit upon Changbao, TMK alleged that Changzhou Baosteel obtained the mill and equipment when [[ ] sold all its shares in Changzhou Baosteel to [[ ] who then organized Changbao as a private company. *See id.* at 6 (citing Questionnaire Response of Jiangsu Changbao Steel Tube Co., Ltd. and Jiangsu Changbao Precision Steel Tube Co., Ltd. at 4, CD 22 (July 22, 2009) (“Changbao Questionnaire Response”). TMK alleged that Changbao effectively received the steel mill and equipment at LTAR because “Changbao has provided no evidence that any price was paid for its predecessor's assets” when Changbao was privatized. *Id.* at 7. After examining TMK's allegation, Commerce found it insufficient on a prima facie basis. New Subsidy Allegations Memo at 13.

Commerce found that simply alleging privatization was insufficient to show that a benefit was conferred upon Changbao. *See* New Subsidy Allegations Memo at 13; Final Decision Memo at 124. Commerce found that neither Changbao's questionnaire response regarding the company's history nor any other record evidence supports that

Changbao did not pay for the mill and equipment. *See* Final Decision Memo at 124. TMK submitted no other information supporting its allegation. Therefore, Commerce reasonably determined that TMK's allegation was purely speculative and insufficient to initiate an investigation.

### III. Commerce's Refusal to Identify and Measure Subsidies Prior to the Date China Acceded to the WTO

Plaintiffs challenge Commerce's determination to uniformly apply the date of China's accession to the WTO, *i.e.*, December 11, 2001, as the earliest date it could identify and measure subsidies by the Chinese government in this countervailing duty investigation as contrary to law. *See* TMK Mot. 33–36; U.S. Steel Mot. 26–30; Maverick Mot. 34–42. Defendant argues that Commerce's application of this uniform cut-off date is a reasonable exercise of its discretion to allocate investigative resources. *See* Def. Resp. 45–49. Commerce has failed to reasonably explain its adoption of a uniform cutoff date for the identification and measurement of subsidies.

Commerce arbitrarily picked China's accession to the WTO as the date when economic conditions in China made subsidies identifiable and measurable. The statute requires that Commerce impose countervailing duties on merchandise from an NME country if subsidies can be identified and measured.<sup>19</sup> *See* 19 U.S.C. § 1671(f)(1)–(2) (2012).<sup>20</sup> Here, Commerce found that reforms in the years leading up to China's WTO accession brought changes in the Chinese economy that permit it to identify and measure countervailable subsidies. Final Decision Memo at 52. Yet, Commerce articulates no relationship between China's WTO accession date and China's implementation of such reforms. In fact, Commerce acknowledged there “was not a single moment or single reform law that suddenly permitted [it] to

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<sup>19</sup> When allocating the benefit for nonrecurring subsidies, Commerce normally allocates the benefit “to a firm over the number of years corresponding to the average useful life (“AUL”) of renewable physical assets.” 19 C.F.R. § 351.524(b)(1). Commerce determined the AUL for the production assets for subject merchandise is 15 years. Final Decision Memo at 6. Therefore, by selecting December 11, 2001 as a cut-off date for identifying and measuring subsidies, Commerce may be failing to allocate subsidies attributable to years of the AUL of production assets prior to the cut-off date.

<sup>20</sup> Although this countervailing duty investigation was initiated on April 28, 2009, the 2012 version of 19 U.S.C. § 1671(f) applies here because the March 13, 2012 amendment applies to all countervailing duty proceedings initiated on or after November 20, 2006 and all civil actions relating to such proceedings. *See* 19 U.S.C. § 1671 note (2012) (Effective and Applicability Provisions 2012 Acts).

find countervailable subsidies” in the Chinese economy. *Id.* at 53. Commerce also acknowledged the reform process “may take hold in some sectors of the economy or areas of the country before others.”<sup>21</sup> *Id.* at 54. None of the reforms Commerce identified occurred on the date of China’s accession to the WTO.

Commerce has not explained why China’s accession date was the first date where subsidies were identifiable and measurable, although the statute requires Commerce to countervail subsidies when they can be identified and measured. *See* 19 U.S.C. § 1671(f)(1)–(2) (2012). Therefore, on remand Commerce must investigate each subsidy program and allocate subsidies beginning on the first date it could identify and measure the subsidy considering the particular program in question and the impact of relevant economic reforms on that program. Administrative burden alone does not excuse Commerce of this statutory responsibility.

Defendant argues Commerce chose China’s WTO accession date because it corresponds to the time the most significant Chinese economic reforms occurred. Def. Resp. 48. However, Commerce identifies no specific economic reforms that occurred on that date. The only fact Commerce mentions that relates to China’s accession date is that China’s WTO Accession Protocol contemplates application of the countervailing duty law. Final Decision Memo at 52. Commerce’s analysis indicates the reforms themselves, not China’s recognition that countervailing duty law applies to it, controls when Commerce can identify and measure subsidies.<sup>22</sup> *See id.* Commerce also recognized that many reforms, including the elimination of price controls on most products, were in place before China’s accession to the WTO.

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<sup>21</sup> Commerce recognized that China’s reform process was uneven because it noted certain reforms, such as the elimination of price controls, had been in place for decades, while other areas continue to exhibit non-market characteristics today. Final Decision Memo at 54 (citing Countervailing Duty Investigation of Coated Free Sheet Paper from People’s Republic of China – Whether the Analytical elements of the *Georgetown Steel* Opinion are Applicable to China’s Present Day Economy at 3, C-570–907, (Mar. 29, 2007), available at <http://ia.ita.doc.gov/download/nme-sep-rates/prc-cfsp/china-cfs-georgetown-applicability.pdf> last visited June 4, 2016) (“*Georgetown Steel Memo*”). Commerce cited its *Georgetown Steel Memo*, which found subsidies identifiable and measurable, recognizing five major categories of reforms but also that certain indirect government controls over aspects of the economy remained in place despite these reforms. *Georgetown Steel Memo* at 5–8. Therefore, Commerce implied that a full range of market reforms is not a necessary precondition to the identification and measurement of subsidies.

<sup>22</sup> Defendant argues that China’s recognition in the Accession Protocol that assumed obligations with respect to subsidies supports “the notion the PRC economy had reached the stage where subsidies and disciplines on subsidies” were identifiable and measurable. Def. Resp. 47 (quoting Final Decision Memo at 53). Even if it were true that China’s recognition of the Accession Protocol signified it felt countervailing duty law could apply to it, it would not mean that China’s accession date was the first date when Commerce could identify and measure Chinese subsidies.

*Id.* at 54. Therefore, Commerce has not explained why China's WTO accession date was the first date it could identify and measure subsidies in the Chinese economy.

#### IV. Benchmark Calculation for Steel Rounds and Billets

##### A. Inclusion of London Metal Exchange Benchmark Data

U.S. Steel and Maverick challenge Commerce's determination to include the London Metal Exchange ("LME") Far East and Mediterranean benchmark data in its benchmark calculation. U.S. Steel Mot. 57–60; Maverick Mot. 32–34. Defendant counters that Commerce properly included the LME benchmarks in its benchmark calculations for steel rounds because there is no record evidence to support the notion that all reported steel round purchases were of OCTG-grade steel rounds. Def. Resp. 118. The court sustains Commerce's determination.

Where goods are provided for LTAR, a benefit shall normally be treated as conferred upon the recipient. 19 U.S.C. § 1677(5)(E). If actual market prices are unavailable, Commerce will measure remuneration against "a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question," *i.e.*, a tier two benchmark price.<sup>23</sup> 19 C.F.R. § 351.511(a)(2)(ii). Commerce averages prices where there is more than one commercially available world market price, "making due allowance for factors affecting comparability." *Id.*

Commerce included the LME benchmarks on the record in its benchmark calculation for steel rounds and billet. Final Decision Memo at 77. Commerce reasoned that it asked respondents to report purchases of all "steel rounds (*e.g.*, billets, blooms) because petitioners alleged the terms "billets" and "rounds" were used interchangeably. Final Decision Memo at 77. Commerce included the LME benchmark because it included all purchases in its LTAR calculation. *Id.* Commerce's regulation requires that it average all world benchmark

<sup>23</sup> Commerce measures the adequacy of remuneration using: (1) market prices for the good from actual transactions in the subject country; (2) a world market price for the good that is commercially available to purchasers in the subject country; or (3) government-set prices that are consistent with market principles. 19 C.F.R. § 351.511(a)(2). Because Commerce prefers actual market-determined prices as an appropriate benchmark price from these options, Commerce refers to market-determined prices as "tier one" benchmarks and each option further removed from an actual market price as a numbered "tier," corresponding to Commerce's level of preference, as a shorthand. *See, e.g.*, Final Decision Memo at 13–14. Thus, a world market price where no actual market-determined price is available to purchasers is also referred to as a "tier two" benchmark.

data on the record to measure the adequacy of remuneration. *See* 19 C.F.R. § 351.511(a)(2)(ii). Neither U.S. Steel nor Maverick argue that the LME benchmark pricing is not commercially available to producers in China. Although Commerce's regulation requires it to make allowance for factors affecting comparability in its benchmark calculation, *see id.*, U.S. Steel and Maverick cite no authority requiring Commerce to exclude a commercially available benchmark price to measure the adequacy of remuneration for respondents' purchases of steel inputs.

U.S. Steel and Maverick argue that Commerce erred in including the LME benchmarks in its average calculation because record evidence shows that LME data reflects standard commodity grade steel billets, which are not generally used to produce OCTG.<sup>24</sup> U.S. Steel Br. 58; Maverick Br. 32. Commerce noted that it requested that respondents report purchases other than rounds used to produce OCTG "based on petitioners' allegations that interchanged the terms 'billets' and 'rounds.'" Final Decision Memo at 77.

U.S. Steel's argument to exclude benchmark pricing that includes standard steel billets depends upon the assumption that respondents purchased only OCTG-grade steel rounds. If respondents used steel inputs that are included in the LME pricing data, then Commerce's regulations require that it average all prices that are commercially available in the producing country. *See* 19 C.F.R. § 351.511(a)(2)(ii). None of the respondents' questionnaire responses indicate that they

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<sup>24</sup> Maverick also argues that Commerce must exclude the LME benchmarks from its benchmark calculations because it includes Chinese billet pricing, which distorts the benchmark and benefit analysis because the benchmark used to measure the benefit includes subsidized Chinese billet prices. Maverick Mot. 33 (citing Maverick Submission of New Relevant Information at Attach. Petitioners' Surrogate Value Submission at Tab R at Attach. "LME Steel Billet Futures Brand Registration", PD 236 (Oct. 9, 2009) ("Maverick New Relevant Information"). Defendant counters that Maverick failed to raise this argument before Commerce in the underlying proceeding. Def. Resp. 119. "[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). If a party fails to exhaust available administrative remedies before the agency, "judicial review of Commerce's actions is inappropriate." *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003). Despite the fact that Commerce only elected to include LME pricing in its benchmark calculation in its final results, Maverick was on notice that Commerce was considering including LME pricing well before Commerce issued its final determination. Maverick submitted this information on October 9, 2009, well before it submitted its case brief on November 11, 2009 challenging the inclusion of LME benchmark data. *See* Maverick New Relevant Information; Maverick Case Brief, PD 289 (Nov. 9, 2009). Maverick also challenged the inclusion of LME benchmarks in its rebuttal brief on the grounds that the data lacks comparability in terms of quality and is distortive because it includes only data for the second half of the period of investigation. *See* Maverick Rebuttal Brief at 32-34, PD 309 (Nov. 16, 2009). However, Maverick did not raise this objection. *Id.* Therefore, the court does not address Maverick's argument.

produced solely OCTG. *See* TPCO Response to the Department of Commerce’s CVD Questionnaire at 8–9, PD 111 (July 21, 2009) (reporting TPCO produces mainly petroleum casing pipe, oil tubing, line pipes, boiler pipes, and mechanical pipes); Wuxi Seamless Oil Pipe Co. Ltd. CVD Questionnaire Response at 7, PD 112 (July 20, 2009) (reporting Wuxi primarily produces OCTG and drill pipe, but also produces line pipe, tubes for perforating guns, plain-end pipes, heat insulated tubings, seamless pressure pipes used in high-pressure boiler, and other pipe products while an affiliate sells green pipe, high pressure boiler pipe, and drill pipe); Jianli Group’s Initial CVD Questionnaire Response at 25–26, PD 112 (July 21, 2009) (reporting Jianli’s billet purchases for production of OCTG and bearing tube). Although U.S. Steel asserts that the questionnaire responses indicate all respondents primarily produce seamless-pipe products, U.S. Steel cites no record evidence that the seamless-pipe products respondents reported producing require only OCTG-quality rounds or that the products included in the LME benchmarks cannot be used to make such products.<sup>25</sup> Neither U.S. Steel nor Maverick cite any record evidence that made it unreasonable for Commerce to conclude that respondents purchased products other than OCTG-quality billets.

U.S. Steel also argues that Commerce’s justification for including the LME benchmarks data fails to justify its determination to include benchmarks reflecting standard commodity billets because the only non-OCTG quality rounds reported by respondents were seamless pipe quality rounds. U.S. Steel Mot. 59. Although U.S. Steel correctly notes that the record does not contain evidence that respondents reported steel rounds not used for seamless pipe production, *id.*, U.S. Steel points to no record evidence detracting from the notion that the steel billets included in the LME benchmark pricing could be used in seamless pipe production.<sup>26</sup>

<sup>25</sup> U.S. Steel cites evidence that only premium-grade rounds are typically used for OCTG production, that producing subject merchandise from square commodity-grade billets may be cost prohibitive, and that OCTG-quality billets demand a significant price premium. *See, e.g.,* Maverick New Factual Information at Attachs. “Roland Balkenende Affidavit”, “Petitioners’ Surrogate Value Submission” at Tab R. It is uncontested that respondents reported producing products other than OCTG and reported all purchases of billets and rounds for all those products. *See* Memo to File re: Changbao Steel Round Suppliers, PD 178 (Aug. 28, 2009); Wuxi Seamless Oil Pipe Co., Ltd. Revised Appendix 5 for Billets at 2, PD 181 (Aug. 31, 2009); Memo to File re: Steel Round Suppliers for Tianjin Pipe (Group) Corporation, Tianjin Pipe Iron Manufacturing Co., Ltd., Tianguan Yuantong Pipe Product Co., Ltd., Tianjin Pipe International Economic and Trading Co., Ltd., and TPCO Charging Development Co., Ltd. (collectively “TPCO”), PD 186 (Sept. 2, 2009); Jianli Group First Supplemental Questionnaire Response at 10, PD 161 (Aug. 21, 2009). Respondents cite no record information that non-OCTG seamless products require OCTG-quality billets.

<sup>26</sup> U.S. Steel argues Jianli separately identified its steel round purchases, which included purchases used for OCTG production and for bearing tube. U.S. Steel Mot. 52–53 (citing

U.S. Steel also argues Commerce erred in using the LME benchmark data because the LME data reflects only prices for square steel billets used to produce concrete reinforcing bar (“rebar”), which is not used in the production of OCTG. U.S. Steel Mot. 58 (citing TPCO Submission of New Factual Information at Attach. 2 at 5, 8); U.S. Steel Suppl. Br. at 23. U.S. Steel supports its argument that LME prices are for rebar citing statements in the LME publication that LME prices are for “the most commonly traded grade” of steel billet material and that there is a “high level of price correlation” between LME prices and rebar prices. U.S. Steel Mot. 58 (citing TPCO Submission of New Factual Information at Attach. 2 at 5, 8). However, it does not follow from either statement that LME pricing only reflects rebar prices.<sup>27</sup>

## B. Inclusion of SBB “East Asia” Benchmark Data

U.S. Steel and Maverick also challenge Commerce’s decision to include the Steel Business Briefing (“SBB”) benchmark data on monthly export prices for billets from East Asia in its benchmark calculation for the provision of steel rounds and billets. *See* U.S. Steel Mot. 55–57; Maverick Mot. 30–32. Defendant requests remand for Commerce to recalculate the benchmark without the SBB East Asia data. *See* Def.’s Resp. 116. The court grants Defendant’s request for remand.

The court has discretion to grant a remand request when Commerce wishes to reconsider its previous position without confessing substantive error. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Generally, a request for a “remand due to substantial and legitimate agency concerns should be granted.” *Timken Co. v. United States*, 38 CIT \_\_, \_\_, Slip Op. 14–51, at \*5 (May 2, 2014) (citing *SKF USA Inc.*, 254 F.3d at 1029). Commerce has substantial and legitimate concerns if (1) there is a compelling justi-

Jianli Group First Supplemental Questionnaire Response at 10, Ex. S-11, PD 161 (Aug. 21, 2009)). U.S. Steel further argues that billets used to produce seamless bearing tube are also not the type of commercial quality steel billets represented in the LME benchmark data. *Id.* at 53 (citing Maverick Submission of New Factual Information at “Petitioners’ Surrogate Value Submission” at Tab R (stating that standard round commodity grade steel billets are not classified as seamless tube quality billets and are not subject to stricter quality requirements)). However, even if Jianli segregated its purchases, U.S. Steel cites no record evidence that the three other mandatory respondents did. U.S. Steel offers no authority indicating Commerce must exclude benchmark data that reflects merchandise commercially available from its calculation even if the data reflects some non-comparable pricing. *See* 19 C.F.R. § 351.511(a)(2)(ii).

<sup>27</sup> In fact, the document cited by U.S. Steel suggests a methodology for deriving a price for rebar using the LME steel billet price as a benchmark. TPCO Submission of New Factual Information at Attach. 2 at 8. If the LME data itself reflected rebar pricing, as U.S. Steel suggests, no adjustment to the LME benchmark price would be necessary to derive a price for rebar.

fication for remand, (2) that justification is not outweighed by the need for finality, and (3) the scope of the requested remand is appropriate. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT \_\_, \_\_, 882 F. Supp. 2d 1377, 1381 (2013).

Here, Defendant's request for remand satisfies the three-prong test, and Commerce's concerns are substantial and legitimate. First, a remand request for Commerce to correct a potentially erroneous calculation of countervailing duty rates is a compelling justification. *Cf. Baroque Timber Industries (Zhongshan) Co. v. United States*, 37 CIT \_\_, \_\_, 925 F. Supp. 2d 1332, 1339 (2013) (citing *Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007)). Second, the need for finality in this case does not outweigh the need to calculate accurate countervailing duty rates, particularly because Maverick and U.S. Steel seek remand on this very issue. Moreover, no party objects to Defendant's request. Third, the scope of Defendant's remand request is appropriate for the issue. Accordingly, Defendant's remand request is based on a substantial and legitimate concern, and it is therefore granted.

### **C. Comparability Adjustment to the Benchmark Calculation**

Plaintiffs argue that Commerce was required to adjust the benchmark prices to reflect the higher value of OCTG-quality steel rounds used in the production of subject merchandise. *See* TMK Mot. 25; U.S. Steel Mot. 47–53; Maverick Mot. 24–29. Defendant responds that Commerce properly declined to make a premium quality adjustment because all purchases of steel rounds by producers were included in its benefit calculations, not just those for premium quality steel rounds. *See* Def. Resp. 120. Commerce's decision not to adjust the benchmark prices to reflect premium quality steel rounds is reasonable.

To determine whether a benefit is conferred, Commerce determines the adequacy of remuneration relative to prevailing market conditions for the good being provided in the country which is subject to the investigation. 19 U.S.C. § 1677(5)(E)(iv). "Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E). Commerce's regulations also provide that Commerce shall make allowance for factors affecting comparability in its benchmark calculation. 19 C.F.R. § 351.511(a)(2)(ii).

Commerce recognized that some steel products purchased by Chinese producers are OCTG-grade products, but it included all steel purchases in its benefit calculation because respondents reported all steel billet purchases regardless of the ultimate product they were

used to produce. *See* Final Decision Memo at 78. Commerce found it would be inappropriate to adjust the benchmark to reflect only premium-quality steel purchases where Commerce must measure the adequacy of remuneration for all steel purchases, not just OCTG-grade steel round purchases. *Id.* Although U.S. Steel and Maverick argue that all of the products respondents reported producing also require steel rounds of higher quality than those included in the benchmarks used here, no record evidence supports that assertion. Therefore, Commerce reasonably concluded that it could not inflate all benchmark prices to reflect premium-quality products.

U.S. Steel and Maverick argue that the statute and the regulations require Commerce to adjust for premium quality rounds because seamless pipe quality rounds are premium steel products that are not similar or commercially interchangeable with the products included in the SBB or LME benchmarks, which reflect lower value commercial quality steel billets. U.S. Steel Mot. 49–50; Maverick Mot. 32–33. They further argue that Commerce’s practice is to select benchmarks that are comparable in physical characteristics and that are commercially interchangeable with the government-provided input. U.S. Steel Mot. 47; Maverick Mot. 23. Nothing in the petition indicates that the GOC program provided only OCTG-quality steel rounds to Chinese producers. The petition defined steel rounds for the production of OCTG broadly to include “round steel billets,” “round billets,” or simply “billets” without reference to any specific quality grades or physical or chemical properties. *See* Petition at 23 n. 263. Defendant does not contest that the benchmarks used by Commerce reflected products other than OCTG-quality billet. However, neither U.S. Steel nor Maverick point to any record evidence that the GOC provided only OCTG-quality billet to producers of subject merchandise. Therefore, Commerce reasonably declined to adjust the benchmark to reflect only premium-quality goods.

U.S. Steel and Maverick also argue that Commerce had no basis to conclude respondents reported steel rounds or billets that were not used to produce OCTG. U.S. Steel Mot. 50; Maverick Mot. 28. First, U.S. Steel and Maverick argue that, by instructing the companies to report “steel rounds (e.g. billets, blooms) purchase[d] for the production of the subject merchandise during the POI” in its questionnaire, Commerce only requested that respondents report OCTG-quality steel rounds. U.S. Steel Mot. 50 (quoting Countervailing Duty Questionnaire at Section III at Question S, PD 72 (June 4, 2009) (“CVD Questionnaire”)); Maverick Mot. 28 (citing CVD Questionnaire at Question S). Commerce noted that it did not limit its request to respondents’ purchases to OCTG-grade product because the allega-

tion in the petition “interchanged the terms ‘billets’ and ‘rounds.’” Final Decision Memo at 77. U.S. Steel and Maverick argue that the petition and Commerce’s questionnaire were framed narrowly, but that interpretation is belied by the broad wording of the petition and by Maverick’s specific request that Jianli report all purchases of steel rounds regardless of the product the rounds were being used to produce. *See* Petition at 23 n. 263; Maverick Deficiency Comments Regarding Jianli’s July 20, 2009 Countervailing Duty Questionnaire Responses at 20, PD 127 (July 30, 2009). Respondents reported purchasing inputs for non-OCTG products.<sup>28</sup> *See* Changbao Steel Round Purchases (stating Changbao reported purchases of all steel rounds, not only those used in production of OCTG); Wuxi Revised Appendix 5 at 2 (stating Wuxi reported all billet purchases, not just those used for production of subject merchandise and that billet purchase information is not segregated based on finished product); TPCO Steel Round Purchases (stating TPCO reported purchases of all steel rounds, not only those used in production of OCTG); Jianli Group First Supplemental Questionnaire Response at 10, PD 161 (Aug. 21, 2009) (including Jianli’s purchases for production of core rod and bearing tube purchases in addition to purchases used in the production of OCTG). Petitioners cannot have it both ways. Since they requested that Commerce frame the investigation of the benefit conferred broadly, Commerce had to measure the benefit conferred by the whole program, not just that conferred by the highest quality inputs.

Second, U.S. Steel and Maverick argue that Commerce had no basis to conclude that respondents reported purchasing a variety of steel billets. U.S. Steel Mot. 51; Maverick Mot. 28–29. U.S. Steel argues that information obtained at verification indicates respondents purchased high-quality rounds.<sup>29</sup> U.S. Steel Mot. 51–52. However, their argument is based on an assumption that all seamless steel products require premium quality steel rounds. Neither U.S. Steel nor Maverick point to any record evidence that all seamless tube products respondents reported producing require OCTG-grade steel rounds or

<sup>28</sup> Although U.S. Steel argues that Jianli reported its purchases of OCTG-grade rounds separately from those used to produce other merchandise, Commerce reasonably declined to adjust the benchmark because it had to measure the adequacy of remuneration of the entire program including the provision of steel rounds to OCTG producers, regardless of what products they were ultimately used to produce. Even if the purchases designated for different products could be separated from those for OCTG, the petition alleged generally that inputs referred to as round steel billets, round billets and simply billets were provided to Chinese producers. *See* Petition at 23 n. 263.

<sup>29</sup> Specifically, U.S. Steel argues that the Department confirmed at verification that [[  
]]. U.S. Steel Mot. 51–52.

that the seamless pipe products produced by respondents require similar quality inputs to those used to produce OCTG.<sup>30</sup>

#### **D. Ocean Freight Adjustments to the Benchmark Calculation**

U.S. Steel challenges Commerce's freight adjustments to the benchmark calculation for steel rounds and billets to reflect delivery charges, including Commerce's decision to use a freight quote from Jianli's freight provider and its decision to exclude a special equipment surcharge from the Maersk freight rate. *See* U.S. Steel Mot. 60–65. Defendant argues that U.S. Steel's arguments regarding the inclusion of Jianli's freight quote are "mere conjecture" and Commerce reasonably excluded the surcharge for using flat rack containers from the Maersk data because importers of steel rounds and billets would not necessarily pay such a charge to import steel rounds and billets. *See* Def. Resp. 122–23. Commerce's decision to exclude the special equipment surcharge is reasonable, but Commerce must reconsider or further explain its decision to use an average of the Jianli freight quote and the Maersk data to adjust the benchmark calculation for freight costs.

Commerce adjusts its world market benchmark price for ocean freight costs "to reflect the price that a firm actually paid or would pay if it imported the product." 19 C.F.R. § 351.511(a)(2)(iv). Commerce's regulations neither require nor preclude Commerce from averaging freight costs when adjusting the world market benchmark for import costs. 19 C.F.R. § 351.511(a)(iv). Therefore, Commerce has broad discretion in determining how to adjust the world market benchmark price to reflect freight costs incurred by purchasers so long as it does so reasonably. Here, Commerce has not done so reasonably. In the preliminary results, Commerce adjusted the benchmark price for steel rounds and billets to include ocean freight costs a company would incur to import products to China based on pricing data from the international shipping line Maersk. *See Prelim. Results*, 74 Fed. Reg. at 47,219; *see also* U.S. Steel Pre-Preliminary Comments at Exs. 6–10, PD 164 (Aug. 25, 2009) ("U.S. Steel Pre-Prelim. Comments"). Jianli subsequently submitted a price quote from its freight forwarder for shipping steel rounds and billets to China. *See* Jianli Group's Submission of Factual Information at Attachs. 1–2, PD 230 (Oct. 5, 2009) ("Jianli Freight Quote"). Commerce found that the two

<sup>30</sup> U.S. Steel and Maverick argue that Commerce unreasonably concluded that Jianli purchased non premium steel rounds because the only other products Jianli reported producing are bearing tubes, which also they assert require premium steel rounds. U.S. Steel Mot. 52; Maverick Mot. 29. However, the parties point to no record evidence that indicates bearing tubes require premium steel rounds.

freight rates reflect what a company would have paid to import the merchandise and used an average of the Jianli freight quote and the Maersk data to adjust the benchmark for ocean freight costs. Final Decision Memo at 84–85.

Commerce included the Jianli freight quote and continued to use the Maersk data because it found both “reflective of what an importer would have paid to import steel rounds.” Final Decision Memo at 84. Commerce rejected Jianli’s argument to exclude the Maersk data, stating “so long as the ocean freight costs are reflective of market rates for ocean freight, and representative of the rates an importer – and not necessarily the respondent specifically – would have paid, then the prices are appropriate to include in our benchmark.” *Id.* at 85. Implicit in Commerce’s reasoning is that it is inappropriate to include unrepresentative data in the benchmark. Commerce found both freight rates to be representative because the record lacked information that would lead it “to question the accuracy of these submitted ocean freight rates.” *Id.* at 84. However, a simple comparison of the two quotes undermines the representativeness of one of them.

Both of the rates offered ocean freight costs for each month during the period of the investigation from the same origin locations, yet the two freight rates widely differ. During the period of investigation, the Jianli freight quote ranged from \$290–\$540 per container, *see* Jianli Freight Quote at Attach. 2, whereas the Maersk data ranged from \$2,705.12–\$3,821.96 per container. *See* U.S. Steel Pre-Prelim. Comments at Ex. 1 at Figure 2. This price comparison is based on the two rates without the adjustments Commerce had made in its final calculations, however, the price disparity remained significant even with those adjustments. After Commerce’s final adjustments,<sup>31</sup> the Jianli freight quote ranged from \$510–\$860 per container, *see* Jianli Freight Quote at Attach. 2, and the Maersk data ranged from \$909.09–\$2,197.62 per container during the period of investigation. *See id.* No matter how the two rates are compared, whether adjusted or unadjusted, there is a considerable price difference that calls into

<sup>31</sup> For Jianli’s freight quote, Commerce added fees for freight, terminal handling charge, handling charges, documentation, and custom clearance, which ranged from a total of \$410–\$510 per container. *See* Final Decision Memo at 84–85; Calculations for the Final Determination for Zhejiang Jianli Company Limited (“Jianli”), Zhejiang Jianli Steel Tube Co., Ltd. (“Jianli Steel Tube”), Zhuji Jiansheng Machinery Co., Ltd. (“Jiansheng”), and Zhejiang Jianli Industry Group Co., Ltd. (“Jianli Industry”) (collectively, the “Jianli Group”) at Attach. 3, PD 311 (Nov. 23, 2009) (“Jianli Final Calculations”). For the Maersk data, Commerce excluded the “special equipment surcharge” after finding that a company would not necessarily incur such an expense to import the product, which was an additional cost that ranged from \$1,000–\$2,100 per container. *See* Final Decision Memo at 85; Jianli Final Calculations at Attach. 3.

question the representativeness of the rates. However, at no point did Commerce address this price disparity. Although Commerce bases its decision on the representativeness of both rates, it failed to explain how such different rates are each representative, and thus reflect the price a firm actually paid or would pay if it imported the product as required by 19 C.F.R. § 351.511(a)(iv).<sup>32</sup> On remand, Commerce must explain how Jianli's freight quote and the Maersk data represent the costs a company would have paid to import the merchandise despite their significant price differences in order to continue using an average of both rates or reconsider its freight adjustment.

However, Commerce's decision to exclude the special equipment surcharge from the freight adjustment is reasonable. Commerce excluded the flat rack charge because Jianli's freight provider's statement indicated that a company would not necessarily pay the flat rack charge to import steel rounds and billets. Final Decision Memo at 85 (citing U.S. Steel Pre-Prelim. Comments at Exs. 5, 12; Jianli Freight Quote at Attach. 1 ¶5). U.S. Steel submitted information stating that the "[c]ommodities commonly shipped in the flat rack container include machinery, industrial boilers, tractors, parts packed in cases, steel tubes, steel pipes, steel bars and cables" and that flat rack containers are "ideal for items such as heavy machinery pipes and boats." U.S. Steel Pre-Prelim. Comments at Exs. 5, 12. However, Commerce found the information submitted by U.S. Steel pertained to finished or high-quality steel products, not steel rounds and billets. Final Decision Memo at 85. U.S. Steel points to no record evidence detracting from this finding. Thus, Commerce reasonably excluded the special equipment surcharge from the Maersk data because the record only contained information indicating that flat rack containers were not used to ship steel rounds and billets.

U.S. Steel contends that it is Commerce's practice to include all of the itemized shipping costs in the Maersk data in determining freight costs. U.S. Steel Mot. 60 (citing U.S. Steel Pre-Prelim. Comments at Exs. 2-3). Yet, U.S. Steel's argument fails to show that Commerce's practice is to use all of the costs reported by Maersk even in the face of record evidence that a company would not necessarily pay for one of the itemized costs in the Maersk rate. Commerce reasonably used

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<sup>32</sup> At oral argument, Defendant argued that the quote from Jianli's freight provider might simply be a bargain, *see* Oral Arg., 01:28:32-01:29:12, May 4, 2016, ECF No. 151, but that explanation suggests that the Jianli freight quote does not necessarily reflect what a company would have paid to import the merchandise. That is not to say that the Jianli freight quote cannot be considered representative or that it is improper for Commerce to use an average of two ocean freight rates. However, without further explanation the court cannot accept that two widely divergent quotes are both representative of what an importer would pay.

the Maersk data here only to the extent that those costs reflected costs to import steel rounds and billets.

U.S. Steel argues that Commerce's reliance on the freight quote and accompanying affidavit submitted by Jianli to exclude flat rack fee is inappropriate because, while Jianli's freight provider might not use flat rack containers to ship steel rounds and billets, other shippers would impose such a charge. U.S. Steel Reply 19–20. However, Commerce found that the only pertinent evidence on the record regarding the use of flat rack containers to ship steel rounds and billets indicated that a shipper would not use them and thus a company would not pay a premium to ship such goods. Final Decision Memo at 85. U.S. Steel heavily relies upon its submissions which state that flat rack containers are used to ship "machinery, industrial boilers, tractors, parts packed in cases, steel tubes, steel pipes and cables," and that flat rack containers are "ideal for items such as heavy machinery pipes and boats." U.S. Steel Pre-Prelim. Comments at Exs. 5, 12. However, Commerce found that this information discusses the use of flat rack containers for finished or high-quality goods and is not reflective of costs to transport steel rounds and billets. Final Decision Memo at 85. U.S. Steel is unable to point to any record evidence that refutes Commerce's finding. U.S. Steel asserts its information showed that flat rack containers are used to ship heavyweight cargo and not only finished or high-quality merchandise. U.S. Steel Mot. 62. Based upon the goods mentioned in the information submitted by U.S. Steel, the court cannot say that it was unreasonable for Commerce to infer that flat rack containers are used to ship finished or high-quality merchandise.

U.S. Steel argues that Commerce lacked substantial evidence to exclude the flat rack charge because "there is no evidence that Maersk Lines would ship steel rounds to China by flat rack container without requiring customers to pay the special equipment surcharge," U.S. Steel Mot. 62. Commerce did not find that Chinese shippers did not charge Chinese producers a premium to use flat rack containers, but rather that those shippers did not necessarily use flat rack containers to ship steel rounds and billets to China. See Final Decision Memo at 85. U.S. Steel cites to *RZBC Grp. Shareholding Co. v. United States*, 39 CIT \_\_, \_\_\_, 100 F. Supp. 3d 1288, 1312–1313 (2015), where the court affirmed the inclusion of Maersk's special equipment surcharge in calculating shipping costs to China. U.S. Steel Suppl. Br. 25. However, the record in that case contained no evidence that producers did not pay an equipment surcharge. *RZBC Grp.*, 39 CIT at \_\_, 100 F. Supp. 2d at 1312. Here, Jianli submitted information from its freight provider stating that it did not use flat

rack containers to ship steel rounds and billets to China. In *RZBC Grp.*, the court did not hold Commerce must include a flat rack surcharge where no evidence in the record indicates producers paid such a charge. *See id.* at \_\_– \_\_, 100 F. Supp. 2d at 1312–13. Therefore, Commerce’s decision to exclude the special equipment surcharge from the Maersk data is reasonable.

## V. Attribution of Subsidies

TMK and U.S. Steel argue that Commerce incorrectly calculated the ad valorem subsidy rates for Changbao and TPCO. *See* TMK Mot. 35–40; U.S. Steel Mot. 13–26; U.S. Steel Suppl. Br. 4–10. Commerce’s decision to allocate subsidies received by Changbao and TPCO to the sales of each of their subsidiaries in addition to their own sales is in accordance with law. However, Commerce acted contrary to law in attributing the subsidies received by Precision to the sales of Changbao’s other subsidiaries and attributing the subsidies received by four of TPCO’s subsidiaries to the sales of TPCO’s other subsidiaries. Further, Commerce failed to reasonably explain its decision not to tie the provision of steel rounds and billets at LTAR only to TPCO’s sales of seamless steel pipe.

### A. Attribution of Subsidies Received by a Parent Company

TMK and U.S. Steel argue that Commerce incorrectly attributed the subsidies received by Changbao to the consolidated sales of Changbao and its subsidiaries without additionally investigating the subsidies received by Changbao’s subsidiaries. *See* TMK Mot. 35–36; U.S. Steel Mot. 24–26. U.S. Steel additionally argues that Commerce made the same error in attributing the subsidies received by TPCO to its own sales as well as the sales of its subsidiaries. *See* U.S. Steel Mot. 13–19. Defendant responds that Commerce’s allocation of subsidies received by Changbao and TPCO is reasonable and in accordance with law. *See* Def. Resp. 99–105.

In general, Commerce “calculate[s] an ad valorem subsidy rate by dividing the amount of the benefit allocated to the period of investigation . . . by the sales value during the same period of the product or products to which [Commerce] attributes the subsidy.” 19 C.F.R. § 351.525(a). Commerce ordinarily divides the subsidies received by a company only by the sales of that company, even if there is cross-ownership between corporations.<sup>33</sup> *See* 19 C.F.R. § 351.525(b)(6)(i).

<sup>33</sup> Commerce’s regulations provide that “[c]ross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets.” 19 C.F.R. § 351.525(6)(vi).

However, Commerce's regulations provide an exception to its default attribution rule if the company that receives a subsidy is a holding or parent company. 19 C.F.R. § 351.525(6)(b)(iii). Where a holding or parent company receives a subsidy and does not merely serve as a conduit for transferring the subsidy to a subsidiary, Commerce attributes the subsidy not only to the holding or parent company's own sales, but also to the sales of its subsidiaries.

Commerce's decision to attribute the subsidies received by Changbao and TPCO to each of their sales as well as the sales of each of their subsidiaries is reasonable. Attributing subsidies received by a parent company to the sales of its subsidiaries is not conditioned upon the parent company reporting, or Commerce additionally investigating, subsidies received by its subsidiaries. See 19 C.F.R. § 351.525(b)(6)(iii). TMK and U.S. Steel point to no authority that supports its assertions that restrict the application of 19 C.F.R. § 351.525(b)(6)(iii) beyond the conditions expressed in the provision.

With respect to Changbao, Commerce learned at verification that Changbao's reported sales reflected not only its own sales, but also the sales of all of its subsidiaries. See Final Decision Memo at 8 (citing Jiangsu Changbao Steel Tube Co., Ltd. and Jiangsu Changbao Precision Steel Tube Co., Ltd. Verification Report at 6, PD 268 (Oct. 29, 2009)). Because Commerce found that Changbao is a parent company, Commerce attributed the subsidies received by Changbao to the consolidated sales of Changbao and its subsidiaries pursuant to 19 C.F.R. § 351.525(b)(6)(iii). *Id.* Likewise, TPCO's reported sales included its own sales and the sales of all of its subsidiaries. See *id.* at 9. Commerce also found that TPCO is a parent company and attributed the subsidies received by TPCO to the consolidated sales of TPCO and its subsidiaries. See *id.* (citing *Certain Oil Country Tubular Goods From the People's Republic of China*, 74 Fed. Reg. 47,210, 47,215 (Dep't Commerce Sept. 15, 2009) (preliminary affirmative countervailing duty determination, preliminary negative critical circumstances determination) ("*Prelim. Results*"). Because Commerce found that both Changbao and TPCO are parent companies, Commerce reasonably attributed the subsidies received by Changbao and TPCO to each of their own sales in addition to each of their subsidiaries' sales.

U.S. Steel argues that "it is essential that the universe of subsidies reported matches the universe of sales that the subsidies benefit." U.S. Steel Mot. 16 (citing *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 473, 112 F. Supp. 2d 1141, 1160–61 (2000)). U.S. Steel's reliance on *Allegheny Ludlum* is of no avail because the sales of a parent company and its subsidiaries benefit equally from a subsidy received by the parent company given the relationship between the

companies. *See* 19 C.F.R. § 351.525(b)(6)(iii). Thus, the universe of subsidies matched the universe of sales because the subsidies received by Changbao and TPCO also benefitted the sales of each of their subsidiaries. U.S. Steel further argues that 19 C.F.R. § 351.525(a) requires that “both the numerator (the benefit) and denominator (the universe of sales to which the benefit applies) used in . . . calculation of a subsidy” must reflect the same universe of goods. U.S. Steel Suppl. Br. 4–5 (citing *Samsung Elecs. Co. v. United States*, 38 CIT \_\_, \_\_, 973 F. Supp. 2d 1321, 1324 (2014); *Yama Ribbons & Bows Co. v. United States*, 36 CIT \_\_, \_\_, 865 F. Supp. 2d 1294, 1298 (2012)). However, 19 C.F.R. § 351.525(a) instructs Commerce to attribute subsidies in accordance with § 351.525(b), which Commerce has done here.

TMK argues that, by accepting Changbao’s explanation at verification that its reported sales included its own sales as well as all of its subsidiaries, Commerce improperly accepted untimely new factual information. *See* TMK Mot. 37–38. In a countervailing duty investigation, submission of factual information “requested by the verifying officials . . . normally will be due no later than seven days after the date on which the verification of that person is completed.” 19 C.F.R. § 351.301(b)(1). Thus, Commerce’s regulations anticipate the need for Commerce to obtain new factual information before, during, or even after verification.<sup>34</sup> TMK argues that Commerce is barred from obtaining new factual information at verification if such information is favorable to the respondent. *See* TMK Mot. 38. However, TMK does not offer any authority to support its position. Therefore, Commerce did not err in attributing subsidies received by Changbao and TPCO.

## **B. Attribution of Subsidies Received by Certain Subsidiaries**

TMK claims Commerce had no regulatory basis to attribute subsidies received by Precision, a subsidiary of Changbao, to the sales of Changbao’s other subsidiaries. *See* TMK Mot. 36–40. U.S. Steel argues that Commerce erred in attributing the subsidies received by Precision as well as four of TPCO’s subsidiaries because 19 C.F.R. § 351.525(b)(6)(iii) “allows subsidies received by a ‘holding company’ to be attributed to the consolidated sales of the ‘holding company and its subsidiaries,’ but it does not authorize the attribution to the entire

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<sup>34</sup> Although obtaining new factual information is not the primary purpose of verification, Commerce has developed a practice of accepting new factual information at verification when “(1) the need for that information was not evident previously, (2) the information makes minor corrections to information already on the record, or (3) the information corroborates, supports, or clarifies information already on the record.” *Citic Trading Co. v. United States*, 27 CIT 356, 373 (2003) (citing previous determinations where Commerce has set forth circumstances where it accepts new factual information at verification).

corporate group of subsidiaries received by a *subsidiary*.” U.S. Steel Suppl. Br. 7–8.

### 1. Waiver and Exhaustion

Defendant argues U.S. Steel waived its argument by failing to raise it in its opening brief, *see* Def. Suppl. Resp. 8, and invokes the exhaustion doctrine with respect to TMK’s argument. *See* Def. Resp. 105–06.

U.S. Steel raised the argument relating to Commerce’s method for attributing the subsidies received by Precision and TPCO’s four subsidiaries in its opening brief. Generally, “arguments not raised in the opening brief are waived.” *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (citing *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1320–21 n.3 (Fed. Cir. 2005)). However, U.S. Steel argued in its opening brief that “Changbao reported only those subsidies that were received by it and one of its subsidiaries, Precision Steel . . . , therefore, the Department should have attributed the subsidies reported for Changbao Steel and Precision Steel to their combined unconsolidated sales, net of sales between the two companies.” U.S. Steel Mot. 25. U.S. Steel clearly argued that Commerce erred in attributing the subsidies received by Changbao and Precision to more than only the sales of the two companies investigated. U.S. Steel’s argument encompasses a challenge to Commerce’s decision to attribute the subsidies received by Precision to the sales of Changbao’s other subsidiaries. U.S. Steel additionally argued that Commerce had no basis for attributing the subsidies received by four of TPCO’s cross-owned affiliates to the consolidated sales of TPCO and all of its subsidiaries. *See* U.S. Steel Mot. 16–19. Thus, U.S. Steel did not fail to raise the argument in its opening brief and has not waived the argument.

As a separate matter, Defendant claims TMK has failed to exhaust its administrative remedies. *See* Def. Resp. 105–06. The Court “shall, where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d). The foundational principle of the exhaustion requirement is “that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003). At the administrative level, interested parties are afforded an opportunity to submit a case brief following the preliminary results to “present all argument that continue . . . to be relevant to [Commerce’s] final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results.” 19

C.F.R. § 351.309(c). The Court of Appeals for the Federal Circuit has consistently held that requiring exhaustion prior to judicial review is exercised with a measure of discretion by the court. *See, e.g., Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007); *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1356 n.17 (Fed. Cir. 2006); *Consol. Bearings Co.*, 348 F.3d at 1003.

Before Commerce, TMK did not contest Commerce's application of the attribution rules in its case brief. *See* Domestic Interested Parties' Case Brief, PD 282 (Nov. 9, 2009). U.S. Steel, however, contested Commerce's application of the attribution rules with respect to subsidies received by subsidiaries in its case brief and, as discussed above, has not waived that argument before the court. The exhaustion requirement is imposed to "allow[] the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 88–90 (2006)). Courts have allowed litigants who have failed to raise an issue at the administrative level to argue the issue if it was raised before the agency by another party because, in such situations, the concerns that are meant to be addressed by the exhaustion doctrine might not be implicated. *See, e.g., Kessler v. Surface Transp. Bd.*, 635 F.3d 1, 7–8 (D.C. Cir. 2011); *Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir. 2006). Because U.S. Steel raised the argument before Commerce and the agency was given an opportunity to address the issue, it would be a meaningless exercise to enforce the exhaustion requirement under these circumstances. Having determined that U.S. Steel has not waived the argument and that requiring TMK to exhaust its administrative remedies does not serve the doctrine's purpose in this case, the court now turns to the merits of these arguments.

## 2. Analysis

Generally, even in the case of cross-owned companies, Commerce's default rule is to "attribute a subsidy to the products produced by the corporation that received the subsidy." 19 C.F.R. § 351.525(b)(6)(i). Commerce's regulations provide several exceptions to its default attribution rule. *See* 19 C.F.R. § 351.525(b). However, none of these attribution rules provides a regulatory basis for attributing the subsidies received by Precision and four of TPCO's subsidiaries to the sales of other subsidiaries.

Changbao submitted its questionnaire response on behalf of itself and Precision. *See* Questionnaire Response of Jiangsu Changbao Steel Tube Co., Ltd. and Jiangsu Changbao Precision Steel Tube Co., Ltd., PD 110 (July 20, 2009). Commerce found that Changbao and Precision are cross-owned companies that produce subject merchandise and attributed the subsidies received by Precision to Changbao's sales and vice versa pursuant to 19 C.F.R. § 351.525(b)(6)(ii). *See* Final Decision Memo at 7–8 (citing *Prelim. Results*, 74 Fed. Reg. at 47,215). Commerce additionally found that Changbao is a parent company and attributed the subsidies received by Changbao to the consolidated sales of Changbao and all of its subsidiaries pursuant to 19 C.F.R. § 351.525(b)(6)(iii). Final Decision Memo at 8. Based on a combined application of 19 C.F.R. § 351.525(b)(6)(ii) and (iii), Commerce attributed the subsidies received by Precision not only to Changbao's sales, but also to the sales of Changbao's other subsidiaries. *Id.*

For TPCO, Commerce attributed the subsidies received by four of TPCO's subsidiaries to the consolidated sales of TPCO and all of its subsidiaries. TPCO submitted its questionnaire response on behalf of itself and four of its subsidiaries. *See* TPCO's Response to the Department of Commerce's CVD Questionnaire, PD 111 (July 21, 2009). The subsidiaries are Tianjin Pipe Iron Manufacturing Co., Ltd. ("TPCO Iron"); Tianguan Yuantong Pipe Product Co., Ltd. ("TPCO Yuantong"); Tianjin Pipe International Economic and Trading Co., Ltd. ("TPCO IETC"); and TPCO Charging Development Co., Ltd. ("TPCO Charging"). Commerce found that TPCO is a parent company to these subsidiaries and attributed the subsidies received by TPCO to the consolidated sales of TPCO and all of its subsidiaries pursuant to 19 C.F.R. § 351.525(b)(6)(iii). *See* Final Decision Memo at 9 (citing *Prelim. Results*, 74 Fed. Reg. at 47,215). Commerce additionally attributed the subsidies received by these four subsidiaries to TPCO's sales: (1) pursuant to 19 C.F.R. § 351.525(b)(6)(iv) because TPCO Iron produced an input used in TPCO's production of subject merchandise; (2) pursuant to § 351.525(b)(6)(ii) because TPCO Yuantong produced subject merchandise during the period of investigation; (3) pursuant to § 351.525(c) because TPCO IETC was a trading company exporting subject merchandise; and (4) pursuant to 19 C.F.R. § 351.525(b)(6)(v) because TPCO Charging transferred steel rounds at LTAR to TPCO. *See id.* (citing *Prelim. Results*, 74 Fed. Reg. at 47,215). Commerce then attributed the subsidies received by TPCO Iron, TPCO Yuantong, TPCO IETC, and TPCO Charging to the consolidated sales of TPCO and all of its subsidiaries through a joint application of mul-

multiple attribution rules because Commerce determined that the subsidies received by these four subsidiaries are attributable to TPCO and TPCO is a parent company. *See id.* (citing *Prelim. Results*, 74 Fed. Reg. at 47,215).

As previously discussed, 19 C.F.R. § 351.525(b)(6)(iii) authorized Commerce to attribute subsidies received by Changbao and TPCO to each of their sales as well as the sales of each of their subsidiaries. Commerce was additionally authorized to attribute subsidies received by Precision to Changbao and those received by TPCO's four subsidiaries to TPCO because Commerce found that one of the enumerated attribution rules under 19 C.F.R. § 351.525 was met. However, Commerce's regulations do not authorize Commerce to attribute subsidies received by Precision and TPCO's four subsidiaries to the sales of Changbao's and TPCO's other subsidiaries.

Commerce claimed that it had authority to attribute subsidies received by Precision and TPCO's four subsidiaries to the sales of Changbao's and TPCO's other subsidiaries pursuant to 19 C.F.R. § 351.525(b)(6)(iii). That regulation states that "[i]f the firm that received a subsidy is a holding company, including a parent company with its own operations, [Commerce] will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries." 19 C.F.R. § 351.525(b)(6)(iii). Commerce stated that because the subsidies received by Precision are attributable to Changbao (and those received by TPCO's four subsidiaries are attributable to TPCO), Commerce was authorized to additionally attribute these subsidies to sales of Changbao's (and TPCO's) other subsidiaries under 19 C.F.R. § 351.525(b)(6)(iii). This attribution rule allows Commerce to attribute subsidies received by a parent company to the consolidated sales of the parent company and its subsidiaries. However, the plain language of the regulation does not give Commerce authority to additionally attribute subsidies received by a subsidiary to the consolidated sales of the parent company's other subsidiaries.

The correct method for attributing a subsidy here was dictated by which company received the subsidy. Commerce could not attribute subsidies received by one of Changbao's or TPCO's subsidiaries to other subsidiaries pursuant to 19 C.F.R. § 351.525(b)(ii), (b)(iv), (b)(v), or (c) by way of § 351.525(b)(6)(iii) because the latter is limited to subsidies received by a parent company. The subsidies at issue here were not received by Changbao or TPCO. The subsidies were received by Precision, TPCO Iron, TPCO Yuantong, TPCO IETC, and TPCO Charging. Thus, contrary to Commerce's claim in its final determination, 19 C.F.R. § 351.525(b)(6)(iii) did not grant Commerce authority to attribute these subsidies to the sales of Changbao's and TPCO's

other subsidiaries. On remand, Commerce must explain what authority allows it to attribute subsidies received by subsidiaries in this manner or reconsider its attribution methodology with respect to Precision and TPCO's four subsidiaries.

### **C. Commerce's Decision Not to Tie the Provision of Steel Rounds and Billets for LTAR Only to TPCO's Sales of Steel Pipe**

U.S. Steel argues that Commerce was required to attribute the benefit received by TPCO from the provision of steel rounds at LTAR only to TPCO's sales of seamless steel pipe products, including OCTG, as opposed to TPCO's consolidated sales because the subsidy was tied to sales of such products. *See* U.S. Steel Mot. 19–24. U.S. Steel claims that the tying regulation applied because the steel rounds provided by the GOC were intended to benefit only TPCO's sales of steel pipe. *Id.* at 19. Defendant responds that Commerce properly attributed the provision of steel rounds at LTAR to TPCO's consolidated sales rather than tie the benefit only to its sales of seamless steel pipe. *See* Def. Resp. 107–10.

“If a subsidy is tied to the production or sale of a particular product, [Commerce] will attribute the subsidy only to that product.” 19 C.F.R. § 351.525(b)(5)(i). To determine whether a subsidy is tied to a particular product, Commerce “analyze[s] the purpose of the subsidy based on information available at the time of bestowal,” not what a company ultimately uses the funds for after they have been received. *See Countervailing Duties*, 63 Fed. Reg. 65,348, 65,403 (Dep't Commerce Nov. 25, 1998).

Commerce has failed to explain its decision not to tie the provision of steel rounds and billets at LTAR only to sales of seamless steel pipe. Because TPCO is a parent company, Commerce found that 19 C.F.R. § 351.525(b)(6)(iii) clearly applied, which instructs Commerce to attribute subsidies received by a parent company to the sales of that company and its subsidiaries. *Id.* Commerce additionally found that “[a]t the same time, the facts in this case indicate that the regulation governing the attribution of subsidies tied to a particular product, 19 CFR [§] 351.525(b)(5), may also be applicable.” *Id.* Thus, Commerce found that two of the attribution rules may apply to TPCO, 19 C.F.R. § 351.525(b)(5) and (b)(6)(iii). Commerce acknowledged that multiple attribution rules may apply to a particular company. *See* Final Decision Memo at 129. However, without even determining whether the provision of steel rounds at LTAR was tied to the production of seamless steel pipe, Commerce attributed the subsidy to TPCO's consolidated sales because 19 C.F.R. § 351.525(b)(6)(iii) clearly

applied while it was less clear that 19 C.F.R. § 351.525(b)(5) also applied. *Id.*

The court is unable to discern whether Commerce in fact made a determination that the provision of steel rounds at LTAR is not tied to sales of seamless steel pipe in deciding to attribute the subsidy to TPCO's consolidated sales. It is likewise unclear whether Commerce determined that the subsidy is tied to sales of seamless steel pipe, but found it impossible to harmoniously apply 19 C.F.R. § 351.525(b)(5) and § 351.525(b)(6)(iii). Commerce ultimately applied 19 C.F.R. § 351.525(b)(6)(iii) because it found that "it is less clear that the product tying regulation under 19 CFR [§] 351.525(b)(5) is also applicable." *Id.* Commerce was required to determine whether the subsidy was tied to the production of seamless steel pipe. Without making such a determination, Commerce's decision to attribute the subsidy to TPCO's consolidated sales is unsupported by substantial evidence. On remand, Commerce must determine whether the tying regulation applies to TPCO based on the record of this case.

## **VI. Commerce's Decision Not to Use Facts Otherwise Available and Apply Adverse Inferences to Jianli's Purchases of Steel Rounds and Billets**

Maverick challenges Commerce's decision not to use AFA in calculating Jianli's steel round purchases. *See* Maverick Mot. 42–49. Maverick argues Jianli's failure to report steel rounds and billet purchases from a certain supplier justified using AFA. *See id.* Defendant argues that Commerce reasonably declined to apply AFA. *See* Def. Resp. 123–28.

Commerce must use facts otherwise available to make determinations under certain circumstances.<sup>35</sup> *See* 19 U.S.C. § 1677e. If Commerce finds a party did not act "to the best of its ability to comply with a request for information," Commerce may use an adverse inference in selecting from among the facts otherwise available. 19 U.S.C. § 1677e(b). Thus, the statute grants Commerce's considerable discretion to apply adverse inferences in selecting among the facts otherwise available.

Commerce reasonably declined to exercise its discretion to apply AFA to Jianli. At verification, Commerce requested that Jianli provide records for select purchases of steel rounds and billets from certain months and suppliers during the period of investigation. *See* Verification Report: Jianli Group at 11, CD 104 (Oct. 28, 2009) ("Jianli

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<sup>35</sup> More specifically, Commerce shall use facts otherwise available where "necessary information is not available on the record," or a party "withholds information that has been requested by [Commerce] . . . [or] significantly impedes a proceeding." 19 U.S.C. § 1677e(a).

Verification Report”). Commerce traced the sample purchases from Jianli’s reported steel rounds purchases to Jianli’s records, and at no point did Commerce discover any unreported purchases.<sup>36</sup> See Jianli Verification Report at Attach. 1 at Ex. 10; Final Decision Memo at 126. Commerce also requested original mill certificates for all steel rounds and billets purchased during the period of investigation. See Jianli Verification Report at 10–11. Out of the mill certificates provided by Jianli, Commerce selected five mill certificates at random to confirm that the suppliers were reported in Jianli’s reported purchases. See Jianli Verification Report at 10–11. One of the randomly selected mill certificates listed [[ ] as a supplier, from which Jianli had not reported purchasing steel inputs. See Jianli Verification Report at 11. Jianli explained in its case brief that this discrepancy results from the fact that [[ ] is the parent company of [[ ]], and both companies are listed on the mill certificate and Jianli reported these purchases as purchases from [[ ]].<sup>37</sup> See Jianli Group’s Case Brief at 9 n.6, Attach. 1, CD 114 (Nov. 9, 2009). Despite this inconsistency, Commerce was satisfied with the accuracy and completeness of Jianli’s reported information. Final Decision Memo at 126.

Maverick argues that the existence of the [[ ] mill certificate indicates that there are purchases that were not reported. Maverick Mot. 45–46. However, Commerce accepted Jianli’s explanation that the rounds produced by [[ ] were reflected in Jianli’s reported purchases from [[ ]]. See Final Decision Memo at 126; Jianli Group’s Case Brief at 9 n.6, Attach. 1, CD 114 (Nov. 9, 2009).

Maverick further contests the reliability of Jianli’s reported pur-

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<sup>36</sup> As requested, Jianli provided original records to substantiate its reported purchase information for randomly selected suppliers and months during the period of investigation. See Verification Agenda/Schedule – Jianli Group, CD 93 (Oct. 9, 2009). At verification, Commerce reviewed (1) bank receipts for pre-payments to suppliers, (2) ledgers for each supplier showing pre-payment entries, (3) value added tax invoices and quality certificates for purchases from each supplier, and (4) vouchers and corresponding credit entries. See Jianli Verification Report at 11, Attach. 1 at Ex. 10.

<sup>37</sup> Initially, Commerce accepted statements made by Jianli company officials that [[ ] is an alternative English spelling of [[ ]] as a satisfactory explanation for the discrepancy. See Jianli Verification Report at 11. Maverick argues that this explanation is false and was an attempt to mislead Commerce in its verification process. See Maverick Mot. 43–44. However, Jianli rectified any erroneous statement made by its officials at the first opportune moment in its case brief where Jianli explained that [[ ] is the parent company of [[ ]] and both companies are named on the mill certificate. See Jianli Group’s Case Brief at 9 n.6, Attach. 1, CD 114 (Nov. 9, 2009). Commerce accepted this explanation and found that “Jianli has not failed to cooperate or comply in any way.” Final Decision Memo at 126.

chases of steel rounds and billets. *See* Maverick Mot. 47–49. Maverick notes that many of Jianli’s purchases are from suppliers that are subsidiaries of a common parent company. *See id.* (citing Jianli Group’s First Supplemental Questionnaire Response at Ex. S-11, CD 44 (Aug. 21, 2009)). Maverick argues that Jianli is inexplicably not listed as one of the parent company’s largest customers in an annual report even though Jianli’s combined steel purchases from the subsidiaries would make Jianli the [[ ]] largest customer of the parent company. *See id.* at 48; *see also* Pre-Preliminary Comments at Ex. 7 at 12, CD 52 (Aug. 25, 2009). Commerce addressed this purported discrepancy and found that Jianli’s absence from a third party’s annual report did not warrant the application of AFA. *See* Final Decision Memo at 126. Commerce examined a representative sample of Jianli’s purchases and mill certificates, and Commerce was able to verify the accuracy and completeness of Jianli’s information. Commerce found that Jianli provided all necessary information and was cooperative. Thus, Commerce disagreed that the statutory requirements for applying AFA were met. Commerce’s refusal to exercise its discretion and apply AFA is reasonable.

### CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

**ORDERED** that Commerce’s final determination is sustained with respect to the following decisions: (i) to defer its investigation into certain new subsidy allegations until the first administrative review; (ii) not to initiate an investigation into allegations of export restraints on steel rounds and billets, land-use rights provided to Changbao at LTAR, and a steel mill and equipment provided to Changbao at LTAR; (iii) to include LME benchmark data in its benchmark calculation for steel rounds and billets; (iv) not to adjust the benchmarks used to reflect premium quality steel rounds and billets; (v) to exclude the special equipment surcharge from the steel round and billet benchmarks; (vi) to attribute subsidies received by Changbao and TPCO to each of their consolidated sales; and (vii) not to apply AFA to Jianli for its purchases of steel rounds and billets; and it is further

**ORDERED** that Commerce’s final determination is remanded for Commerce to clarify or reconsider: (i) its use of China’s WTO accession date as a uniform cut-off date for identifying and measuring subsidies; (ii) its attribution methodology for subsidies received by Precision and TPCO’s four subsidiaries; (iii) its decision to include Jianli’s freight quote in the benchmark price for steel rounds and billets; and (iv) its decision not to tie the benefit received by TPCO from the provision of steel rounds and billets at LTAR to sales of seamless steel pipe; and it is further

**ORDERED** that Defendant's remand request is granted for Commerce to recalculate the benchmark for steel rounds without the SBB East Asia pricing data; and it is further

**ORDERED** that Commerce shall file its remand determination with the court within 60 days of this date; and it is further

**ORDERED** that the parties shall have 30 days thereafter to file comments; and it is further

**ORDERED** that the parties shall have 15 days thereafter to file replies to comments on the remand determination.

Dated: June 24, 2016

New York, New York

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

Slip Op. 16-68

FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC., Plaintiffs, HEBEI GOLDEN BIRD TRADING CO. LTD., CHENGWU COUNTY YUANXIANG INDUSTRY & COMMERCE CO., LTD., QINGDAO XINTIANFENG FOODS CO., LTD., SHENZHEN BAINONG CO., LTD., YANTAI JINYAN TRADING, INC., JINING YIFA GARLIC PRODUCE CO., LTD., JINAN FARMLADY TRADING CO., LTD., WEIFANG HONGQIAO INTERNATIONAL LOGISTICS CO., LTD., and SHIJIAZHUANG GOODMAN TRADING CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, SHENZHEN XINBODA INDUSTRIAL CO., LTD., JINXIANG MERRY VEGETABLE CO., LTD., and CANGSHAN QINGSHUI VEGETABLE FOODS CO., LTD., Defendant-Intervenors.

Jane A. Restani, Judge  
Consol. Court No. 14-00180

[Commerce's final results of redetermination in antidumping duty administrative review sustained in part and remanded in part.]

Dated: July 7, 2016

*Michael J. Coursey, John M. Herrmann, II, and Joshua R. Morey*, Kelley Drye & Warren, LLP, of Washington, DC, for plaintiffs.

*Robert T. Hume*, Hume & Associates, LLC, of El Prado, NM, for consolidated plaintiffs Hebei Golden Bird Trading Co. Ltd., Qingdao Xintianfeng Foods Co., Ltd., Shenzhen Bainong Co., Ltd., Yantai Jinyan Trading, Inc., Jining Yifa Garlic Produce Co., Ltd., Jinan Farmlady Trading Co., Ltd., Weifang Hongqiao International Logistics Co., Ltd., and Shijiazhuang Goodman Trading Co., Ltd.

*Yingchao Xiao and Jianquan Wu*, Lee & Xiao, of San Marino, CA, and *Robert T. Hume*, Hume & Associates, LLC, of El Prado, NM, for consolidated plaintiff Chengwu County Yuanxiang Industry & Commerce Co., Ltd.

*Richard P. Schroeder*, 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 *Khalil N. Gharbieh*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

*Gregory S. Menegaz*, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for defendant-intervenor Shenzhen Xinboda Industrial Co., Ltd.

*John J. Kenkel*, deKieffer & Horgan PLLC, of Washington, DC, for defendant-intervenors Jinxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd.

## OPINION

### Restani, Judge:

Currently before the court are the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Remand, ECF No. 88 ("*Remand Results*"), concerning the eighteenth annual administrative review of the antidumping ("AD") duty order on fresh garlic from the People's Republic of China ("PRC"). See *Antidumping Duty Order: Fresh Garlic from the People's Republic of China*, 59 Fed. Reg. 59,209, 59,209 (Dep't Commerce Nov. 16, 1994). The court remanded this matter to Commerce for reconsideration and further explanation of Commerce's AD duty margin for one of the mandatory respondents, Hebei Golden Bird Trading Co. Ltd. ("Golden Bird"), and Commerce's selection of the Philippines as the surrogate country. *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1328, 1340 (CIT 2015) ("*FGPA*").

## BACKGROUND

The court presumes familiarity with the facts of the case as discussed in *FGPA*, 121 F. Supp. 3d at 1317–20; however, the facts relevant to the *Remand Results* are summarized below for ease of reference.

To calculate the dumping margin in AD duty cases involving non-market economies ("NME"), Commerce compares the goods' normal value,<sup>1</sup> derived from factors of production ("FOP") as valued in a surrogate market economy, to the goods' export price.<sup>2</sup> 19 U.S.C. §

<sup>1</sup> Normal value is

the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price,

"at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A), (B)(i).

<sup>2</sup> Export price is "the price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter of the subject merchandise outside of the United

1677b(c). By statute, in selecting the surrogate country, Commerce, must use the “best available information,” and choose a country “at a level of economic development comparable to that of the [NME, that is a] . . . significant producer of comparable merchandise.” *Id.*

For the eighteenth review, covering the period of review (“POR”) from November 1, 2011 through October 31, 2012, Commerce selected Shenzhen Xinboda Industrial Co., Ltd. (“Xinboda”) and Golden Bird as the mandatory respondents. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 77,017, 77,020–22 (Dep’t Commerce Dec. 31, 2012). In the *Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 36,721, 36,722 (Dep’t Commerce June 30, 2014) (“*Final Results*”), Commerce selected total adverse facts available<sup>3</sup> (“total AFA”) for Golden Bird and the PRC-wide rate<sup>4</sup> of \$4.71/kg as Golden Bird’s total AFA rate. Golden Bird appealed, and the court upheld Commerce’s decision to select total AFA for Golden Bird. *FGPA*, 121 F. Supp. 3d at 1320, 1327. The court, however, rejected Commerce’s selection of the PRC-wide rate as Golden Bird’s total AFA rate because Commerce had failed to make a finding that Golden Bird’s separate rate certification was deficient or unreliable. *Id.* at 1328.

On remand, Commerce found, under protest, Golden Bird eligible for a separate rate. *Remand Results* at 14. Commerce reiterated its position that “the severity of Golden Bird’s failure to cooperate and the centrality of the deficient response to the calculation of a dumping margin” sufficiently call into question the integrity of Golden Bird’s information regarding its operation as a separate entity. *Id.* at 15

States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States[.]” 19 U.S.C. § 1677a(a).

<sup>3</sup> Although neither the statute nor the regulations explicitly use the phrase “total adverse facts available,” the term refers to Commerce’s use of “the facts otherwise available” and “adverse inferences” provisions of 19 U.S.C. § 1677e. Under subsections (a) and (b) of that provision, if the “necessary information is not available on the record,” or certain other similar circumstances are present, Commerce may rely on facts otherwise available, and if Commerce determines that an entity

has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . , [Commerce, in calculating a dumping margin] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available[.]

*Id.* § 1677e(a)–(b).

<sup>4</sup> In the NME context, Commerce employs a rebuttable presumption of state control whereby a company is assigned the rate applicable to all entities controlled by the government, i.e. a country-wide rate. *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). Here, the country-wide rate is the PRC-wide rate. According to Commerce’s procedures, to receive a non-country-wide rate, a company must file a separate rate certification indicating that it is *de jure* and *de facto* independent of government control. *Id.*

(quoting *FGPA*, 121 F. Supp. 3d at 1326). Commerce, however, refused to make a specific finding regarding the deficiency of Golden Bird's separate rate information because it reasoned that such a finding could be reached only by "follow[ing] the same logic that the Department applied [previously] and [which] the Court rejected." *Id.* at 16. Commerce ultimately assigned Golden Bird a total AFA rate of \$2.24/kg. *Id.* at 6. That margin represents Xinboda's highest transaction-specific margin from the instant review. Commerce selected such a rate by reasoning that "Golden Bird should 'not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'" *Id.* (quoting Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 870 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4199 ("SAA")).

Golden Bird does not object to the assignment of a total AFA rate based on Xinboda's highest transaction-specific margin from the POR. Cmts. on Commerce Dep't's Final Results of Redetermination Pursuant to Remand 3, ECF No. 90 ("Golden Bird & QXF Cmts.").<sup>5</sup> The Fresh Garlic Producers Association, Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively, "FGPA") do oppose Commerce's separate rate determination in the *Remand Results*. Pls.' Cmts. on Dep't's Redetermination Pursuant to Ct. Order 2, ECF No. 91 ("FGPA Cmts."). FGPA argues that Golden Bird's separate rate certification suffers from some of the same deficiencies as the sales information, namely that the same individual attests to the accuracy of both sets of documents. *Id.* at 2, attach. 1 at 2-3. Accordingly, FGPA reiterates its previous arguments supporting the assignment of the PRC-wide rate as Golden Bird's total AFA rate. *Id.* at 3, attach. 1 at 11-14.

In the *Final Results*, Commerce also selected the Philippines as the surrogate country for calculating FOPs. Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China; 2011-2012 Administrative Review at 5-10, A-570-831, (June 23, 2014), available at <http://enforcement.trade.gov/frn/summary/prc/2014-15279->

<sup>5</sup> Golden Bird merely asks, based on the surrogate country issue, that if Xinboda's highest transaction-specific rate changes, Golden Bird's rate change accordingly. Golden Bird & QXF Cmts. at 3. In addition, Jinan Farmlady Trading Co., Ltd., Qingdao Xintianfeng Foods Co., Ltd., Shenzhen Bainong Co., Ltd., Jining Yifa Garlic Produce Co., Ltd., Weifang Hongqiao International Logistics Co., Ltd., Yantai Jinyan Trading, Inc. (collectively, "QXF") all submitted comments on the remand results in conjunction with Golden Bird. Accordingly, the court will refer to those comments as "Golden Bird & QXF Cmts." The court also notes that Shijiazhuang Goodman Trading Co., Ltd., indicated that it was withdrawing from the action and not was not submitting comments on the *Remand Results*. See generally Golden Bird & QXF Cmts.

1.pdf (last visited June 30, 2016) (“*I&D Memo*”). On initial appeal, Jinan Farmlady Trading Co., Ltd., Qingdao Xintianfeng Foods Co., Ltd., Shenzhen Bainong Co., Ltd., Jining Yifa Garlic Produce Co., Ltd., Weifang Hongqiao International Logistics Co., Ltd., Yantai Jinyan Trading, Inc. (collectively, “QXF”), and Xinboda challenged Commerce’s choice of the Philippines as the surrogate country, arguing that the Philippines is not a significant producer of fresh garlic and that the Philippine data was not the best available information. *FGPA*, 121 F. Supp. 3d at 1336. In response, Commerce explained that the Philippines is a significant producer because the Philippines had a “noticeably or measurabl[y] large” amount of fresh garlic production during the POR. See *I&D Memo* at 8 n.22. Commerce deviated from its typical significant producer analysis where it takes into account “world production . . . and trade.” Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process (Mar. 1, 2004), available at <http://enforcement.trade.gov/policy/bull04-1.html> (last visited June 30, 2016) (“Policy Bulletin 04.1”)<sup>6</sup> (“[A] judgement [sic] should be made consistent with the characteristics of world production . . . and trade. . . .”); see *Dupont Teijin Films v. United States*, 997 F. Supp. 2d 1338, 1342 (CIT 2014) (“Commerce assesses the output of the potential surrogate country in relation to world production and trade in comparable merchandise.”); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 774 F. Supp. 2d 1307, 1316 (CIT 2011) (defining “significant” as “having or likely to have influence or effect”), *aff’d sub nom.*, *China First Pencil Co. v. United States*, 466 F. App’x 881 (Fed. Cir. 2012). Commerce explained that such deviation was warranted given world garlic market conditions and the dominance of the PRC’s production. *FGPA*, 121 F. Supp. 3d at 1339. The court held that because there was no comparative aspect to Commerce’s analysis, Commerce had improperly determined that “any commercially meaningful production” was significant. *Id.*; see Policy Bulletin 04.1 (permitting “any commercially meaningful production” to be significant when, for example, only three countries produce the goods in question).

The court instructed Commerce “to reconsider its surrogate country selection.” *FGPA*, 121 F. Supp. 3d at 1342. The court further held that because the selection of the Philippines was unsupported by substantial evidence, the court did not need to address specific challenges to

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<sup>6</sup> This bulletin is a compilation of the International Trade Administration’s guidelines for AD investigations and administrative reviews. Though not binding authority, courts, including this one, view this bulletin as indicative of Commerce’s best practices and Commerce’s statutory interpretation for reviews of AD duty orders. See, e.g., *DuPont Teijin Films v. United States*, 997 F. Supp. 2d 1338, 1342–45 (CIT 2014); *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 896 F. Supp. 2d 1313, 1320–23 (CIT 2013).

the Philippine data, such as the use of net weights, adjustments to the import statistics, or whether the Philippines provided the best quality data. *Id.* at 1340. The court, however, suggested that should Commerce continue to rely on the Philippines, Commerce should “take a fresh look at its use of net weights and adjustments to import statistics and provide clear explanation for its decisions.” *Id.* at 1342 n.21.

On remand, Commerce did not reconsider its surrogate country selection, but rather, attempted to further explain its original rationale. Commerce again noted that the dictionary definition of “significant” includes “a noticeably or measurably large amount.” *Remand Results* at 9. Commerce then determined that “the production level of 9,056 [metric tons] of garlic was significant because that amount was ‘noticeably or measurably large’ enough to reasonably assume that the data reflect transactions among buyers and suppliers in a normal marketplace.” *Id.* Once more, Commerce emphasized the “paucity of candidates to serve as surrogate market economy countries” to justify its conclusion that its typical definition of significant producer was inappropriate. *Id.* Although Commerce “disagree[d] with the court that there is an inherent ‘comparative aspect of the significant producer analysis,’” Commerce tried to explain how a comparative analysis also supports the selection of the Philippines. *Id.* at 11 (quoting *FGPA*, 121 F. Supp. 3d at 1340). Excluding the PRC, of the ninety-five countries that produced fresh garlic in 2011, the Philippines ranked forty-third, meaning it was in the top half of all producers, and thus, according to Commerce, comparatively significant. *Id.*

In their comments on the *Remand Results*, Xinboda, QXF, and Golden Bird (collectively “Respondents”) contest the use of the Philippines as the surrogate country on the grounds that it is not a significant producer, its data is not reliable, and Commerce incorrectly used the available data. Golden Bird & QXF Cmts. at 3–7; Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Cmts. on U.S. Dep’t of Commerce Remand Redetermination 2–19, ECF No. 92 (“Xinboda Cmts.”). Xinboda contends that Commerce failed to comply with the court’s order to further explain the selection of the Philippines, asserting that Commerce’s “half-hearted comparative analysis makes no sense.” Xinboda Cmts. at 12. Xinboda specifically argues that Commerce’s comparative analysis overlooked the fact that, even after excluding India’s and the PRC’s production, the Philippines “still only produces 0.26 percent of the remaining garlic production.”<sup>7</sup> *Id.* More-

<sup>7</sup> Xinboda, citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 882 F. Supp. 2d 1366 (CIT 2012), first repeats its argument that Commerce’s sequential analysis (where it first examines economically comparability) is legally flawed. Xinboda Cmts. at 5–6. As noted in

over, Xinboda argues that by Commerce’s own admission, Commerce assumed that Philippine data “reflect[ed] transactions . . . *in a normal marketplace*” and that several factors make the Philippines an abnormal market. *Id.* at 6–7 (quoting *Remand Results* at 9).<sup>8</sup> QXF specifically argues that the differences in the production levels of the Philippines and the PRC and resulting differences in economies of scale render any comparison between export price and normal value not a “fair comparison” in contravention of the statute. *Golden Bird & QXF Cmts.* at 4. Instead, QXF argues that by looking at per capita fresh garlic production it is apparent that the Philippines is not a significant producer.<sup>9</sup> *Id.* at 4–5.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce’s final results in an administrative review of an AD duty order are upheld unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Golden Bird’s Total AFA Rate

On remand, Commerce was not able to identify any “deficiencies in Golden Bird’s [separate rate certification] or Section A responses specific to government control of its export activities[.]” *Remand Results* at 14–15. Accordingly, in compliance with the court’s order and because Commerce was unable to point to any relevant record evidence related to government control, Commerce properly determined Golden Bird to be eligible for a separate rate. *See id.* at 14–17. FGPA contends that Commerce should have found Golden Bird’s separate rate information deficient, essentially reiterating its prior position *FGPA*, Commerce’s sequential approach was not impermissible as an initial approach. 121 F. Supp. 3d. at 1336.

<sup>8</sup> FGPA did not comment on Commerce’s continued selection of the Philippines as the surrogate country. *FGPA Cmts.* at 3 n.2.

<sup>9</sup> QXF also argues that Commerce failed to articulate “particular, specific and objective evidence” on the record to support excluding or adjusting certain parts of the Philippine import statistics. *Golden Bird & QXF Cmts.* at 6. (citing *China Nat’l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT 255, 266–67, 264 F. Supp. 2d 1229, 1239–40 (2003), *aff’d* 104 F. App’x 183 (Fed. Cir. 2004)); *see also* Mem. in Supp. of Pls.’ Mot. for J. on the Agency R. 10–12, ECF No. 32 (challenging generally the adjustments to Philippine data). Finally, Respondents also challenge Commerce’s rationale for using gross values, but net (rather than gross) weights in calculating surrogate values. *Golden Bird & QXF Cmts.* at 6–7; *Xinboda Cmts.* at 15–19.

that Golden Bird should be assigned the PRC-wide rate. FGPA Cmts. at 3, attach. 1 at 7–11. As Commerce correctly notes, FGPA’s line of reasoning “largely mirror[s]” Commerce’s argument in the original *I&D Memo*, Def.’s Resp. to Cmts. Regarding Remand Redetermination 7, ECF No. 96 (“Gov’t Resp.”), which the court previously rejected, *FGPA*, 121 F. Supp. 3d at 1325–27, and declines to reconsider. The evidence on the record calls into question only sales information, and “Commerce cannot ignore a party’s separate rate information solely because it selects AFA due to defects related to sales data.” *Id.* at 1328.<sup>10</sup> Accordingly, Commerce’s determination that Golden Bird is entitled to a separate rate is sustained.

Commerce assigned Golden Bird a separate rate of \$2.24/kg, which is the highest rate of any Xinboda transaction during the POR. *Remand Results* at 6. Normally, when calculating a separate rate, “accuracy and fairness must be Commerce’s primary objectives.” *Albermarle Corp. & Subsidiaries v. United States*, Nos. 2015–1288, 2015–1289, 2015–1290, 2016 WL 1730359, at \*6 (Fed. Cir. May 2, 2016). In selecting an AFA rate, however, “Commerce must balance the statutory objectives of finding an accurate margin and inducing compliance, rather than creating an overly punitive result.” *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004).

Recently, the Federal Circuit affirmed Commerce’s use of one mandatory respondent’s highest transaction-specific margin from the relevant POR as a total AFA rate for another mandatory respondent. *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1345 (Fed. Cir. 2016) (“*Nan Ya*”).<sup>11</sup> In the instant case, Commerce based Golden Bird’s total AFA rate on Xinboda’s highest-transaction rate, reasoning that “Golden Bird should ‘not obtain a more favorable result by failing to cooperate than if it had cooperated fully.’” *Remand Results* at 6 (quoting SAA, H.R. Doc. 103–316 Vol. 1 at 870, 1994 U.S.C.C.A.N. at 4199). Commerce also determined that the underlying sale was “non-

<sup>10</sup> Additionally this is not a case where Commerce made a determination that directly related to a party’s responses about government control and the veracity of information related to separate rate eligibility, such as where it concerned that party’s alleged corporate affiliations, see *Ad Hoc Shrimp Action Committee v. United States*, 802 F.3d 1339, 1355–57 (Fed. Cir. 2015) (affirming application of country-wide rate as an AFA rate where unreliable responses concerned a respondent’s corporate affiliations), or where Commerce made a finding of fraud on the proceedings, see *Chang Tieh Industry Co. v. United States*, 17 CIT 1314, 1318, 840 F. Supp. 141, 146 (1993) (acknowledging that Commerce has authority to prevent fraud upon its proceedings).

<sup>11</sup> The court notes that *Nan Ya* appears to question prior Federal Circuit precedent. As the opinion was not rendered en banc, however, the court presumes that *Nan Ya* is to be interpreted consistently with other Federal Circuit precedent, so that clearly aberrational rates are not to be sustained. Reasonable choices are required.

aberrational.” *Id.* None of the parties have challenged the rate as aberrational.<sup>12</sup> When compared to Xinboda’s non-AFA rate, Golden Bird’s assigned total AFA rate, which is only 23% greater, does not appear to be aberrational or unreasonable, especially given Commerce’s deterrence objective. Thus, based on the record as it stands now Commerce’s selection of Xinboda’s highest transaction-specific, non-aberrational rate from the POR as Golden Bird’s total AFA rate is permissible.<sup>13</sup>

## II. Surrogate Country Selection

On remand, Commerce has not revised its selection of the Philippines as the surrogate country for valuing the FOPs during the POR. Rather than conducting a meaningful comparative analysis to explain why the Philippines’ seemingly meager production is significant, as the court instructed, Commerce simply stated in the *Remand Results* that the Philippines ranks forty-third out of the ninety-five countries which produced fresh garlic during the POR (excluding the PRC). *Id.* at 11. A mid-range rank in a list of countries with insignificant production does not make the Philippines a significant producer

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<sup>12</sup> The court has previously remanded at least one case where Commerce, relying on primary information, failed to demonstrate that a separate AFA rate was “a reasonably accurate estimate of the respondent’s actual rate” and was not aberrational. *Dongguan Sunrise Furniture Co. v. United States*, 931 F. Supp. 2d 1346, 1352–54 (CIT 2013) (remanding where Commerce calculated a partial AFA rate for a mandatory respondent from the respondent’s own POR data, but based the rate only on a small number of individual transactions “[w]ithout a rational explanation linking the chosen AFA rates to [the respondent’s] actual rate”). In that case, however, Commerce selected only partial AFA. Thus, *Dongguan* was not “a total AFA case where the record [was] devoid of all [trustworthy] sales data” for the respondent. *Dongguan Sunrise Furniture Co. v. United States*, 865 F. Supp. 2d 1216, 1234 (CIT 2012)

Here, Golden Bird’s previous two separate rates were \$0.14/kg in the sixteenth administrative review and de minimis in the seventeenth review. *Fresh Garlic from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 36,168, 36,169 (Dep’t Commerce June 17, 2013) (seventeenth administrative review); *Fresh Garlic from the People’s Republic of China: Final Results of the 2009–2010 Administrative Review of the Antidumping Duty Order*, 77 Fed. Reg. 34,346, 34,348 (Dep’t Commerce June 11, 2012) (sixteenth administrative review). Xinboda’s rate for this POR also significantly increased from de minimis in the prior review to \$1.82/kg, which indicates that market conditions and the change in surrogate country account for a substantial portion of the large increase from Golden Bird’s recent past rates.

<sup>13</sup> The court assumes that, even if a new primary surrogate country is selected, Commerce will continue to use one or more of Xinboda’s high margin transactions as the AFA margin for Golden Bird. If so, in assigning an AFA rate to Golden Bird and bearing in mind the statutory goals of deterrence and reasonable accuracy, Commerce should consider resulting changes to any such of Xinboda’s high margin transactions, due to either the revised surrogate country selection or otherwise.

overall. Such “further explanation” is insufficient and the court once again holds that Commerce’s selection of the Philippines is not supported by substantial evidence.

By statute, when selecting a surrogate country, Commerce “shall utilize, to the extent possible, the prices or costs of [FOPs] in one or more market economy countries that are . . . significant producers of comparable merchandise.” 19 U.S.C. § 1677b(c)(4). As discussed in the court’s prior opinion, “significant producer ‘is not statutorily defined, and is inherently ambiguous.’” *FGPA*, 121 F. Supp. 3d at 1338 (quoting *Shandong Rongxin*, 774 F. Supp. 2d at 1316). Under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1989), to determine whether Commerce’s interpretation of the AD statute is entitled to deference the court conducts a two-part test. Where Congress has spoken directly to the question at issue, the court and Commerce must give effect to the unambiguously expressed intent of Congress. *See id.* If, however, the statute is vague or silent on an issue, as it is here, the court upholds Commerce’s interpretation so long as the interpretation is reasonable. *See id.* at 843; *DuPont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005). Because the statute is ambiguous as to significant producer, the court must determine whether Commerce’s definition of significant producer is “based on a permissible construction of the statute.” *Shandong Rongxin*, 774 F. Supp. 2d at 1316 (quoting *Chevron*, 467 U.S. at 843).

In its prior opinion, the court held that Commerce’s definition for this case of “significant producer” as one whose production is “noticeably or measurably large” was not a permissible construction of the statute because it did not include a comparative aspect linking the volume to industry conditions. *FGPA*, 121 F. Supp. 3d at 1340. Commerce’s interpretation thus did not comport with the statute’s directive to derive reasonable FOPs from a market economy to use to determine hypothetical prices in the NME.<sup>14</sup> *See Shandong Rongxin*, 774 F. Supp. 2d at 1309 (“The purpose of [19 U.S.C. § 1677b(c)] is ‘to assess the price or costs of [FOPs] of the subject merchandise in a surrogate market economy country, in an attempt to construct a hypothetical market value of that product in the [NME] country.’” (alterations omitted) (quoting *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999))). On remand, Commerce’s

<sup>14</sup> The court previously determined that Commerce’s deviation from its typical straightforward significant producer analysis, consisting of evaluating a potential surrogate country’s production as a percentage of world production and trade was permissible based on the unique circumstances of the fresh garlic industry. Commerce, however, was required to devise some standard and support its selection of the Philippines or another country with substantial evidence and it has failed to do so.

comparative analysis consisted of conclusory reasoning where Commerce explained that the Philippines was in the top half of world producers. Such superficial analysis does not address the court's concern that using the Philippines, whose production is minimal, might create an unreasonable basis for FOPs in the PRC where there are undoubtedly significant economies of scale. For example, if there were five producers of a good and the largest producer produced a hundred pounds of the good, the second largest produced ninety-seven, the third produced three, the fourth producer two, and the fifth produced one, it cannot reasonably be maintained that the third producer is "significant." Commerce's "comparative analysis" thus adds nothing and does not aid the court in determining whether the Philippines is a significant producer.<sup>15</sup> Determining that because the Philippines is in the top half of fresh garlic producers it is a significant producer is arbitrary and unreasonable. Commerce has failed to comply with the court's instruction, and the court, once again, is forced to conclude that Commerce's determination is unsupported by substantial evidence.

Next, Commerce's conclusion that the Philippine production was significant irrespective of any comparative analysis is unsupported. Simply because nine million metric tons is a large number in the abstract, does not mean that such level of production is significant. Also, whether such level of production can be assumed to create reliable market-based transaction information again depends on the industry and, as described below, given the small production in the Philippines, such an assumption is unsupported by substantial evidence. Further, the court is unpersuaded by Commerce's rationale that the "paucity of candidates" make its selection of the Philippines supported by substantial evidence. Commerce created the situation where there were a paucity of candidates by limiting the number of economically comparable countries on the surrogate country list.<sup>16</sup> It

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<sup>15</sup> Conversely, the court notes that given the available data and lack thereof, it could be reasonable for Commerce to look at the mean of fresh garlic production among the non-PRC producers, which would be approximately 529,000 metric tons. See Golden Bird's Submission of Surrogate Country Selection Cmts. and Surrogate Value Info. at Ex. 1, PD 110-15 (June 26, 2013). India's production exceeds that mean. See *id.* Excluding both the PRC's and India's production results in a mean of approximately 148,000 metric tons and yields eight additional countries producing more than the resulting mean. See *id.*

<sup>16</sup> Additionally, in at least one prior case, the court has sustained a determination by Commerce selecting a surrogate country that was not on the original surrogate country list of economically comparable countries. See *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, Slip Op. 16-55, 2016 WL 3369235, at \*8 (CIT June 7, 2016). In that case, Commerce explained that the surrogate country list is simply a list of countries at the same level of economic development as the NME in question, but that it is not exhaustive and there may be other countries which are also economically comparable to the NME. See *id.* at \*3, \*5. In sustaining Commerce's determination, the court stated, "[w]hile Commerce

cannot now cite that paucity as a reason requiring a flexible interpretation of significant producer to essentially render that criterion meaningless.

Moreover, this is not a situation where there are no significant producers besides the NME. India produces nearly 5% of the world's fresh garlic and excluding fresh garlic produced in the PRC, India represents 23.5% of the market. *See* Golden Bird's Submission of Surrogate Country Selection Cmts. and Surrogate Value Info. at Ex. 1, PD 110–15 (June 26, 2013) (“Golden Bird's SV Info.”). Additionally, there are four countries who produce at least 5% of the fresh garlic production when the PRC's production is excluded. *See id.* Thus, contrary to the government's argument, the production excluding the PRC is not evenly divided. The Philippines, which represents only 0.2% of production excluding the PRC's production, is a small producer, and Commerce has said nothing which could somehow render such data suitable for a fair comparison between export price and normal value. Further, when the PRC is excluded, the remaining top nine producers each represent almost 4% of the market and together make up more than 63% of the market. Policy Bulletin 4.01 indicates that where there are ten large producers and a variety of small producers, “significant producer” could be interpreted to mean one of the top ten.” Thus, Commerce has not established that this is a case requiring the selection of a surrogate country which is not a significant producer because there are other potential surrogate countries which are significant producers.

In ordinary cases, Commerce's multi-part surrogate selection process should result in a usable surrogate country. When, as here, however, the countries on the economically comparable list may not be significant producers and the significant producers are not on the economically comparable country list, Commerce must utilize a reasonable methodology to select a surrogate country or countries. *Cf. An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, Slip Op. 16–55, 2016 WL 3369235, at \*8 (CIT June 7, 2016); *see also* Policy Bulletin 04.1. Commerce has a duty to act reasonably and should bear in mind the purpose of the surrogate country section of the statute, namely to identify reliable market-based prices upon which to value an NME producer's FOPs to conduct a fair comparison between nor-

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acknowledged that Indonesia is less economically comparable to Vietnam as compared to the countries on the [surrogate country list], Commerce reasonably concluded that data considerations . . . outweigh the fact that Indonesia is not at the same level of economic development as Vietnam.” *Id.* at \*8 (internal quotation marks omitted). Commerce has not explained why significant producer considerations may not similarly outweigh differences in economic comparability.

mal value and export price. See 19 U.S.C. § 1677b(a) (“In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value.”); *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (“In determining the valuation of the [FOP], the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible.”). Commerce’s methodology here, determining that any producer with a measurable amount of production that is above the median of world producers, is not reasonable and provides no assurance that reasonably accurate margins will result.

It may be that the only significant producer is not “economically comparable,” as defined by Commerce, however, Commerce must construct a reasonable method of selecting a surrogate country when the significant producers are not closely economically comparable and the chosen economically comparable countries may not be significant producers. It has not done so in this review. Simply because it is difficult, or may require adjusting surrogate values, or using multiple surrogate countries does not mean that Commerce may select a surrogate country which is not a significant producer. Commerce is to meaningfully evaluate the statutory directive and come up with a method that addresses the statute’s goals while balancing the statutory factors to use the best available information. Commerce’s half-hearted attempt to comply with the court’s order requiring a comparative aspect to the significant producer analysis does not persuade the court that substantial evidence supports Commerce’s determination. Commerce has not explained why the gains achieved in selecting a more economically comparable surrogate country are infinitely greater than the loss of not selecting a truly significant producer of subject merchandise. The court is persuaded by the reasoning in *Ad Hoc Shrimp Trade Action Committee v. United States*, 882 F. Supp. 2d 1366, 1374 (CIT 2012) (“*Ad Hoc Shrimp I*”), where it stated that “none of the three surrogate country eligibility criteria—economic comparability, significant production of comparable merchandise, and quality data—is preeminent.”<sup>17</sup> Here, Commerce has arbitrarily dis-

<sup>17</sup> Indeed, the statute’s directive to use the best available information requires remand. See 19 U.S.C. § 1677b(c)(1); see also *Vinh Hoan Corp. v. United States*, 49 F. Supp. 3d 1285, 1302–06 (CIT 2015) (holding that based on its duty to use the best available information in selecting a surrogate country or countries, Commerce is required to compare the relative economic comparability of potential surrogate countries where data quality does not clearly support one surrogate country’s selection over another and stating “the ultimate question

counted the value of significant production. *See id.* It has created a broad test for significant producer and apparently a narrow test for economic comparability. Accordingly, the court remands this matter to Commerce to address surrogate country selection.<sup>18</sup>

### CONCLUSION

For the foregoing reasons Commerce's *Remand Results* are sustained in part and remanded in part for Commerce to reconsider its surrogate country selection. Commerce shall have until September 6, 2016, to file its remand results. The parties shall have until October 6, 2016, to file objections, and the government shall have until October 20, 2016, to file its response.

Dated: July 7, 2016

New York, New York

*/s/ Jane A. Restani*

JANE A. RESTANI

JUDGE

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is what is the best available information to value the respondents' factors of production? Thus, Commerce must choose the country that furthers this goal. The analysis suggested by [*Ad Hoc Shrimp I*], and adopted here, is that Commerce must compare differences in economic comparability with differences in the other factors, including data quality, when the facts so require").

<sup>18</sup> There is no need to address specific surrogate value issues as there likely will be a new principal surrogate country selected on remand. In using whatever surrogate data it chooses, Commerce must support adjustments to import statistics with contemporaneous "particular, specific, and objective evidence" and in the face of challenges to reliability provide clear explanations for its decisions. Such explanations largely were lacking in the previous determinations.