U.S. Court of International Trade

Slip Op. 18–136

ZHEJIANG QUZHOU LIANZHOU REFRIGERANTS CO., LTD. and ZHEJIANG QUHUA FLUOR-CHEMISTRY CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and ARKEMA INC., THE CHEMOURS COMPANY FC LLC, HONEYWELL INTERNATIONAL INC., and MEXICHEM FLUOR INC., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 17–00121
PUBLIC VERSION

[Plaintiffs' motion for judgment on the agency record is denied. Commerce's Final Determination is supported by substantial evidence and otherwise in accordance with law; therefore, the Final Determination is sustained and judgment will enter for Defendant.]

Dated: October 11, 2018

Jordan C. Kahn, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for Plaintiffs. With him on the brief were *Ned H. Marshak* and *Max F. Schutzman*.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *David Richardson*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jonathan Zielinski, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for Defendant-Intervenors. With him on the brief were *James R. Cannon, Jr.* and *Ulrika K. Swanson*.

OPINION

Barnett, Judge:

Plaintiffs Zhejiang Quzhou Lianzhou Refrigerants Co., Ltd. ("Lianzhou"), and Zhejiang Quhua Fluor-Chemistry Co., Ltd. ("Quhua") (together, "Plaintiffs"), challenge the United States Department of Commerce's ("Commerce" or the "agency") final determination in the antidumping duty investigation of 1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China ("PRC" or "China"). *See 1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China*, 82 Fed. Reg. 12,192 (Dep't Commerce March 1, 2017) (final determination of sales at less than fair value and aff. determination of critical circumstances, in part) ("*Final Determination*"), ECF No. 19–4, and accompanying Issues and Decision Memorandum ("I&D Mem."),

A-570–044 (Feb. 21, 2017), ECF No. 19–5.[1] Specifically, Plaintiffs challenge Commerce's denials of Lianzhou's and Quhua's requests for separate rates and assignment thereto of the China-wide antidumping duty rate. *See* Confidential Pls.' Mot. for J. on the Agency R. and Mem. of Law in Supp. of Pls.' Mot. for J. on the Agency R. ("Pls.' Mem."), ECF No. 26. Defendant United States ("Defendant") and Defendant-Intervenors[2] support Commerce's determination. *See* Def.'s Resp. to Pls.' Mots. [sic] for J. on the Agency R. ("Def.'s Resp."), ECF No. 32; Confidential Resp. Br. of Arkema Inc., The Chemours Co. FC, LLC, Honeywell International Inc., and Mexichem Fluor, Inc. ("Def.-Ints.' Resp."), ECF No. 33. For the following reasons, Plaintiffs' motion is denied.

BACKGROUND

On March 23, 2016, Commerce initiated an investigation into 1,1,1,2 Tetrafluoroethane (R-134a) from China alleged to have been sold in the United States at less than fair value. *See 1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China*, 81 Fed. Reg. 18,830, 18,830 (Dep't Commerce April 1, 2016) (initiation of less than fair value investigation), PR 27, CJA Tab 3, PJA Tab 3, ECF No. 40.[3] In the notice of initiation, Commerce directed exporters and producers seeking a separate rate to submit a separate rate application and respond to Commerce's quantity and value questionnaire. *Id.* at 18,834. Commerce further instructed that companies selected as mandatory respondents must respond to all parts of the agency's antidumping questionnaire to be eligible for a separate rate. *Id.*

Quhua timely submitted its separate rate application. *See* Quhua Separate Rate Appl. (May 9, 2016) ("Quhua SRA"), CR 50–54, PR 70–71, CJA Tab 4, PJA Tab 4, ECF No. 40. Commerce selected Lianzhou as a mandatory respondent; thus, Lianzhou submitted its request for a separate rate in Section A of its questionnaire response. *See* Respondent Selection Mem. (Apr. 26, 2016) at 1, CR 34, PR 60, CJA Tab 10, PJA Tab 10, ECF No. 40; Lianzhou Sec. A Questionnaire Resp. (May 31, 2016) ("Lianzhou AQR") at 2–22, CR 66–83, PR 87–92, CJA Tab 5A, PJA Tab 5, ECF No. 40.

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[1] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 19–1, and a Confidential Administrative Record ("CR"), ECF No. 19–2. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public JA ("PJA"), ECF No. 42; Confidential JA ("CJA"), ECF Nos. 40–41. The court references the confidential versions of the relevant record documents, if applicable, throughout this opinion, unless otherwise specified.

[2] Defendant-Intervenors include Arkema Inc., The Chemours Co. FC, LLC, Honeywell International Inc., and Mexichem Fluor, Inc. (collectively, "Defendant-Intervenors").

[3] The period of investigation is July 1, 2015 to December 31, 2015. *Final Determination*, 82 Fed. Reg. at 12,192.

In September 2016, Commerce preliminarily denied Lianzhou's and Quhua's separate rate requests. *See* Decision Mem. for Prelim. Determination (Sept. 29, 2016) ("Prelim. Mem.") at 17, PR 172, CJA Tab 6, PJA Tab 6, ECF No. 41; Prelim. Denial of Separate Rates (Sept. 29, 2016) ("Separate Rate Mem."), CR 151, PR 176, CJA Tab 7, PJA Tab 7, ECF No. 41.[4] Commerce determined that Plaintiffs' respective chains of ownership each extended to the Chinese government because Lianzhou and Quhua are wholly-owned by Zhejiang Juhua Co., Ltd. ("Zhejiang Juhua"),[5] which, in turn, is majority owned (55.86 percent) by Juhua Group Corporation ("Juhua Group"), a state-owned enterprise ("SOE") supervised by the State-owned Assets Supervision and Administration Commission ("SASAC") of Zhejiang province. *Id*. at 2 & n.9 (citing Quhua SRA at 16, Exs. 7D, 12).[6] Commerce also noted that Juhua Group may "elect Zhejiang Juhua's directors . . . in accordance with the number of shares it owns, i.e., 55.86 percent." *Id*. at 2.[7] Zhejiang Juhua, in turn, appoints Lianzhou's and Quhua's executive director, supervisor, and general manager. *Id*. at 2 & nn.7,10 (citing, *inter alia*, Lianzhou AQR at 22;[8] Quhua SRA at 16, Exs. 7D, 12). With respect to Lianzhou, Commerce explained that "the general manager appoints other managers, including deputy general managers." Separate Rate Mem. at 2. With respect to Quhua, Commerce explained that Article 9 of Quhua's articles of association "establishes that all operations, profit distribution, *etc*. are subject to review by Zhejiang Juhua, whose management is subject to government control." Separate Rate Mem. at 2 & n.11 (citing Quhua SRA at 16, Exs. 7D, 12).[9]

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[4] Thereafter, Lianzhou did not participate as a mandatory respondent. *See* Prelim. Mem. at 3 (explaining that Commerce did not issue supplemental questionnaires to Lianzhou on the basis of its preliminary finding of ineligibility for a separate rate).

[5] Zhejiang Juhua is a "publicly-traded company listed on the Shanghai Stock Exchange." Lianzhou AQR at 11 (emphasis omitted); *see also* Quhua SRA at 12.

[6] Exhibit 7D consists of various public announcements regarding actions taken at Zhejiang Juhua's annual shareholder meetings. *See* Quhua SRA, Ex. 7D. Exhibit 12 consists of letters documenting Zhejiang Juhua's appointment of Quhua's executive director, supervisor, general manager, and person in charge of finance. *See* Quhua SRA, Ex. 12.

[7] Certain information treated as business proprietary in the Separate Rate Memorandum and other record documents is disclosed herein on the basis of Plaintiffs' representation to the court that the information is now public.

[8] Commerce also cited to "Ex. A-9 at Art. 9" of Lianzhou's Section A Questionnaire Response. Separate Rate Mem. at 2 n.7. Exhibit A-9 consists of letters documenting Zhejiang Juhua's appointment of Lianzhou's executive director, supervisor, and general manager; thus, there is no Article 9 therein. *See* Lianzhou AQR, Ex. A-9. Article 9 of Lianzhou's articles of association, however, provides for Zhejiang Juhua's appointment of Lianzhou's executive director, supervisor, and general manager. *See* Lianzhou AQR, Ex. A-7 at Art. 9.

[9] Quhua's articles of association are appended to its separate rate application at Exhibit 10. Article 9 governs Zhejiang Juhua's responsibilities as sole shareholder. *See* Quhua SRA, Ex. 10 at Art. 9.

On March 1, 2017, Commerce affirmed its preliminary finding in the *Final Determination*. 82 Fed. Reg. at 12,194 n.16. Commerce confirmed that Plaintiffs are each "indirectly majority-owned by an SOE," i.e, Juhua Group, and explained that it "would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the [company's] profitability." I&D Mem. at 12 & n.65 (citing Lianzhou AQR at 11; Quhua SRA at 12). According to Commerce, "the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company's operations generally." *Id*. at 11. Commerce pointed to the "various responsibilities" assigned to Juhua Group in Zhejiang Juhua's articles of association, *id*. at 13 & n. 68 (citing Quhua SRA, Ex. 7C ("Zhejiang Juhua Arts. of Assoc.")), and Zhejiang Juhua's active participation in Plaintiffs' daily operations, *id*. at 12–13 & n.67 (citing Lianzhou AQR at 25).

Commerce disagreed with Plaintiffs' argument that Chinese law insulates them from government control, finding instead that the various legal provisions relied upon by Plaintiffs enable the government to "control the business activities of a company when the government is a controlling shareholder." *Id*. at 13 & n.73 (citation omitted).

Commerce further disagreed with Plaintiffs' argument that their respective articles of association place control over their day-to-day operations with their respective managers. *Id*. at 14–15. Upon review of those documents, Commerce determined that "Quhua's and Lianzhou's management is beholden to Zhejiang Juhua, the sole owner of each company, whose board is controlled by Juhua Group, which is wholly state-owned." *Id*. at 14 & n.81 (citing Lianzhou AQR, Ex. A-7; Quhua SRA, Ex. 10). According to Commerce, "[t]he fact that Quhua's and Lianzhou's shareholder appoints and changes the executive directors, general managers, and supervisors does not prove the absence of government control when the only shareholder, who is majority owned by SASAC, controls all shareholder decisions." *Id*. at 15.

Commerce also rejected Plaintiffs' argument that the agency had impermissibly relied on the mere potential for government control by failing to cite to a specific instance of Juhua Group exercising its legal right to control or influence Plaintiffs' exports of subject merchandise. *Id*. Commerce noted that Plaintiffs bear the burden of rebutting the presumption of government control, and evidence demonstrated that "Juhua Group, has the right to '[perform] supervision on, making suggestion for or inquiry on the operation of Zhejiang Juhua, the sole

shareholder of Quhua and Lianzhou.'" *Id*. at 15 & n.89 (citing Zhejiang Juhua Arts. of Assoc., Art. 32(III)).

On May 18, 2017 Plaintiffs initiated this action challenging Commerce's *Final Determination*. Summons, ECF No. 1; Compl., ECF No. 8. Plaintiffs' joint Rule 56.2 motion is fully briefed, and on September 11, 2018, the court heard oral argument. ECF No. 47.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i)(2012),[10] and 28 U.S.C. § 1581(c) (2012). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB.*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Legal Framework Governing Separate Rate Status in Proceedings Involving Nonmarket Economy Countries

In antidumping duty proceedings involving a country, such as China, that Commerce considers to have a nonmarket economy, Commerce employs a rebuttable presumption that all enterprises operating within that country are controlled by the government. *See Huaiyin Foreign Trade Corp.,* 322 F.3d at 1372; *Sigma Corp. v. United States,* 117 F.3d 1401, 1405 (Fed. Cir. 1997) (reviewing and affirming Commerce's use of the presumption); *Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States* ("*Jiasheng I*"), 38 CIT ___, ___, 28 F. Supp. 3d 1317, 1338 (2014). Commerce assigns each exporter of subject merchandise a single countrywide rate, unless the exporter requests an "individualized antidumping duty margin" and "demonstrate[s] an absence of state control" over its export-related activities, *Huaiyin Foreign Trade Corp.,* 322 F.3d at 1372, both in law (*de jure*) and in fact (*de facto*), *Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States* ("*Jiasheng II*"), 39 CIT ___, ___, 121 F. Supp. 3d 1263, 1266 (2015); *see also Sigma Corp.*, 117 F.3d at 1405 ("no manufacturer would receive a separate antidumping duty rate unless it could demonstrate that it enjoyed both *de jure* and *de facto* independence from the central government"). The exporter of subject merchandise bears

[10] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, unless otherwise stated.

the burden of showing it is autonomous of government control. *AMS Assoc., Inc. v. United States*, 719 F.3d 1376, 1379–80 (Fed. Cir. 2013); *see also Sigma Corp.*, 117 F.3d at 1405–06 (Commerce's decision to place the burden on exporters is justified because exporters have best access to information) (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)).

To establish whether an exporter is eligible for a separate rate, Commerce applies a test it first set forth in *Sparklers from the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Dep't Commerce May 6, 1991) (final determination of sales at less than fair value), and modified in *Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22,585, 22,586–87 (Dep't Commerce May 2, 1994) (final determination of sales at less than fair value); *see also* Policy Bulletin on the Topic of Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries (April 5, 2005) ("Policy Bulletin 05.1") at 1–2, *available at* http://enforcement.trade.gov/policy/bull05–1.pdf (last visited Oct. 4, 2018) (restating the *de jure* and *de facto* criteria). Only Commerce's finding pursuant to the *de facto* test is challenged here.[11]

To determine whether an exporter is free of *de facto* government control, Commerce considers four factors: (i) whether export prices are set by or subject to the approval of a governmental authority; (ii) whether the exporter has authority to negotiate and sign contracts and other agreements; (iii) whether the exporter has autonomy from the government in making decisions regarding the selection of its management; and (iv) whether the exporter retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. Policy Bulletin 05.1 at 2; *see also Jiasheng I*, 28 F. Supp. 3d at 1349.

Here, Commerce's denial of a separate rate turned on Plaintiffs' failure to establish that it met the third criterion regarding management selection. I&D Mem. at 12–15. Plaintiffs challenge Commerce's determination as lacking substantial evidence and unlawful. *See generally* Pls.' Mem.

II. Whether Commerce's Determination is Supported by Substantial Evidence

A. Parties' Contentions

Plaintiffs contend that Commerce erroneously treated them as part of the PRC-wide entity on the basis of mere potential for government control over management selection through indirect majority ownership. Pls.' Mem. at 31–35; Confidential Pls.' Reply Br. ("Pls.' Reply") at

[11] Commerce made no findings regarding *de jure* control. *See* I&D Mem. at 10–16.

2–5, ECF No. 38. Plaintiffs further contend that extensive record evidence demonstrates their autonomy from the government with regard to management selection. Pls.' Mem. at 28–31. Specifically, Plaintiffs contend that Zhejiang Juhua's articles of association and Chinese law together protect Zhejiang Juhua from its controlling shareholder and ensure that "[t]he democratically elected Zhejiang Juhua board selects its own management, as well as that for Plaintiffs." *Id*. at 31 (asserting that "the public ownership of Zhejiang Juhua extinguishes any ability for Juhua Group or SASAC to control the selection of Plaintiffs' management."). Plaintiffs also contend that Commerce impermissibly denied their separate rate requests on the basis of a single *de facto* criterion, *id*. at 24–28, and misapplied relevant judicial precedent, *id*. at 35–41; *see also* Pls.' Reply at 14–17 (seeking to distinguish cases affirming separate rate denials when a state-owned enterprise held indirect majority ownership).[12]

Defendant and Defendant-Intervenors contend that Commerce's reliance on indirect majority ownership to find that Plaintiffs failed to rebut the presumption of government control is supported by substantial evidence. Def.'s Resp. at 16–17, 19–25; Def.-Ints.' Resp. at 7–11. Defendant further asserts that Commerce properly relied on Plaintiffs' failure to demonstrate autonomy with regard to management selection to deny their separate rate requests, Def.'s Resp. at 18–19, and Commerce's determination is consistent with relevant judicial precedent, *id*. at 26–31; *see also* Def.-Ints.' Resp. at 11–14.

B. Commerce's Determination that Plaintiffs Failed to Rebut the Presumption of Government Control is Supported by Substantial Evidence

Plaintiffs first challenge Commerce's determination as "based entirely on speculation" and "the mere potential for control" by their indirect majority government owner. Pls.' Mem. at 32, 35. Plaintiffs' argument fails to recognize Commerce's reevaluation of the manner in which it interprets evidence of government ownership in connection with the presumption of government control as a result of a series of court opinions issued in response to the *Diamond Sawblades* proceeding. *See Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29,303 (Dep't Commerce May

[12] Plaintiffs also contend that Defendant-Intervenors have advanced several arguments supporting Commerce's determination that Commerce itself did not rely upon. Pls.' Reply at 7–8 (citing Def.-Ints.' Resp. at 4, 11–19). It is well settled that the court may only sustain the agency's decision "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). Accordingly, the court limits its consideration to the grounds advanced by Commerce.

22, 2006) (final determination of sales at less than fair value and final partial aff. determination of critical circumstances), as amended, 71 Fed. Reg. 35,864 (Dep't Commerce June 22, 2006); *Advanced Tech. & Materials Co., Ltd. v. United States* ("*AT&M I*"), Slip. Op. 11–122, 2011 WL 5191016, at *1 (CIT Oct. 12, 2011); *Advanced Tech. & Materials Co., Ltd. v. United States* ("*AT&M II*"), 36 CIT ___, 885 F. Supp. 2d 1343 (2012); *Advanced Tech. & Materials Co., Ltd. v. United States* ("*AT&M III*"), 37 CIT ___, 938 F. Supp. 2d 1342 (2013), *aff'd*, 581 F. App'x. 900, 901 (Fed. Cir. 2014);[13] I&D Mem. at 11 (noting Commerce's ongoing evaluation of its practice).

In litigation arising out of the *Diamond Sawblades* proceeding, the domestic industry challenged Commerce's grant of a separate rate to Advanced Technology & Materials Co. Ltd., Beijing Gang Yan Diamond Products Company, and Gang Yan Diamond Products, Inc. (collectively, "AT&M"). *See AT&M I*, 2011 WL 5191016, at *1. Commerce had initially granted AT&M a separate rate even though AT&M was majority-owned by the Central Iron and Steel Institute ("CISRI"), which, in turn, was wholly-owned and controlled by SASAC. *Id.* at *5. At the time, Commerce did not consider the "activities of [an exporter's] owner, or its owner's parent company," when conducting its separate rate analysis and, thus, had not addressed evidence showing that certain of CISRI's board-members sat on AT&M's board and that AT&M's president and vice chairman sat on CISRI's board. *Id.* at *10, *12. The court remanded Commerce's determination for further consideration of the implications of this indirect government majority ownership. *See id.* at *10, *12, *14.

On remand, Commerce initially affirmed its separate rate determination. *See AT&M II*, 885 F. Supp. 2d at 1348–49. Commerce did not find the overlapping board membership between AT&M and CISRI compelling on the basis that candidates nominated by CISRI to sit on AT&M's board required unanimous consent to gain appointment and, thus, CISRI did not "'control' AT&M's board," and further noted that "CISRI's representatives on the board are a minority in number." *Id.* at 1348–49.

The court again remanded Commerce's determination for failure "to consider important aspects of the problem." *Id.* at 1349. The court noted that four of AT&M's nine directors were CISRI representatives and the absence of evidence that the five "non-CISRI" directors were free from government control. *Id.* at 1358–59. The court further noted that two of the "non-CISRI" directors occupied AT&M management positions and, thus, were "beholden to the board that controls their

[13] The affirmance is nonprecedential. *See* Fed. Cir. Rule 32.1(b).

pay." *Id*. Because "board members are properly presumed subject to governmental control, directly or indirectly," the court concluded that "true independence and autonomy remain[ed] in doubt until proven otherwise." *Id.* The court characterized Commerce's reliance on the absence of record evidence demonstrating SASAC's exercise of its legal right to intervene "in the selection of management and board members . . . as an evisceration of the presumption of state control." *Id.* at 1358. The court opined that the presumption had not been rebutted to the point of shifting the burden to the domestic industry to prove actual instances of government intervention. *Id.*

In the second remand redetermination, Commerce, under protest,[14] denied AT&M's separate rate request on the basis that it had not demonstrated autonomy from the government with regard to management selection. *AT&M III*, 938 F. Supp. 2d at 1344. Commerce explained that "government control had the potential to pass from SASAC through to [AT&M] via CISRI," and this potential was exercised by CISRI's nomination of five AT&M board members and its placement of four of its officials on AT&M's board. *Id.* at 1345. The court sustained Commerce's determination. *Id.* at 1353.

Commerce's "protest" notwithstanding, in subsequent proceedings Commerce has viewed evidence of majority government ownership as "mean[ing] that the government exercises or has the potential to exercise control over the company's operations generally, which may include control over, for example, the selection of management . . . ." Decision Mem. for the Prelim. Determination of the Antidumping Duty Investigation of Carbon and Certain Alloy Steel Wire Rod from the PRC, A-570012 (Aug. 29, 2014) ("Steel Wire Rod Mem.") at 6–7, *available at* https://enforcement.trade.gov/frn/summary/prc/2014–21335–1.pdf (last visited Oct. 4, 2018). Accordingly, Commerce now "consider[s] the level of government ownership where necessary." *Id.* at 7; *see also id.* at 8–9 (denying separate rates to certain exporters on the basis of evidence of indirect majority government ownership); Issues and Decision Mem. for the Final Aff. Determination in the Less-Than-Fair-Value Investigation of Hydrofluorocarbon Blends and Components Thereof from the PRC, A-570-028 (June 21, 2016) at 50–53, *available at* https://enforcement.trade.gov/frn/summary/prc/2016–15298–1.pdf (last visited Oct. 4, 2018) (same); 1,1,1,2-Tetrafluoroethane from the PRC: Issues and Decision Mem. for the Final Determination of Sales at Less Than Fair Value Antidumping

[14] By issuing a redetermination under protest, Commerce signals its disagreement with the court's opinion and preserves its right to appeal. *See Meridian Prods. v. United States*, 890 F.3d 1272, 1276 n.3 (Fed. Cir. 2018) (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)).

Duty Investigation, A-570–998 (Oct. 14, 2014) at 8–10, *available at* https://enforcement.trade.gov/frn/summary/prc/2014–24903–1.pdf (last visited Oct. 4, 2018) (same).

The court recently addressed Commerce's use of the word "potential" as it now relates to government control in cases involving majority and minority government ownership. *See An Giang Fisheries Imp. and Exp. Joint Stock Co. v. United States* ("*An Giang II*"), 42 CIT ___, ___, 284 F. Supp. 3d 1350, 1361–64 (2018).[15] In *An Giang II*, the court explained that, in the context of majority government ownership, "potential control . . . is, for all intents and purposes, actual control" because "the majority shareholder can typically control the operations of a company without actually removing directors or management since it is clear that directors or management *could be* removed." *Id.* at 1359 (citing *AT&M III*, 938 F. Supp. 2d at 1348; *Jiasheng II*,121 F. Supp. 3d at 1266) (emphasis added). In contrast, when, as in *An Giang II*, there is minority government ownership, the phrase "potential control" may not suggest "actual control." *Id*. Under those circumstances, "Commerce has required additional indicia of control prior to concluding that a respondent company could not rebut the presumption of *de facto* government control." *Id.*; *see also id.* at 1361–1364 (affirming Commerce's denial of a separate rate in light of evidence that an exporter's general director was "beholden" to the minority government shareholder responsible for appointing him, as well as evidence that company employees were "beholden" to the general director that controlled their pay and had the ability to fire them).

The foregoing discussion demonstrates that Commerce views government ownership differently depending on whether the government is a majority or minority owner. Evidence of legal separation between an exporter subject to the nonmarket economy presumption of government control and its parent company (and its parent's state-owned parent company) of the type relied upon by Plaintiffs here *may* rebut the presumption of *de facto* control over management selection when the government holds a *minority* stake. *Cf. Jiasheng II*, 121 F. Supp. 3d at 1268–73 (affirming Commerce's grant of a separate rate on the basis that evidence of minority ownership alone was insufficient to demonstrate *de facto* control); *An Giang II*, 284 F. Supp. 3d at 1361–64 (affirming Commerce's denial of a separate rate in light of evidence of minority ownership plus instances of actual control). In

[15] *An Giang II* represents the court's opinion following the remand ordered in *An Giang Fisheries Imp. and Exp. Joint Stock Co. v. United States* ("*An Giang I*"), 41 CIT ___, ___, 203 F. Supp. 3d 1256 (2017).

contrast, when, as here, the government owns a *majority* stake, legal separation between the exporter and its direct and indirect parent companies *does not* rebut the presumption because of the ever-present potential for the government to exert *de facto* control over the exporter's operations and management selection, and the expectation that it would do so. *See* I&D Mem. at 11–12. In the latter instance, absent contrary evidence,[16] Commerce reasonably infers that the government exerts *de facto* control by exercising its legal rights as a majority shareholder of the exporter's parent company, rendering each link in the chain of ownership ultimately beholden to the government. *See id*. at 14; *Jiasheng I*, 28 F. Supp. 3d at 1339 ("In both its *de jure* and *de facto* determinations, Commerce may make reasonable inferences from the record evidence.") (citing *Daewoo Elecs. Co. v. United States,* 6 F.3d 1511, 1520 (Fed. Cir. 1993)); *cf. AT&M II*, 885 F. Supp. 2d at 1353 (explaining that Chinese corporate law protects the rights of investors; thus, when the government is the controlling investor/shareholder, the law "subject[s] the investee to governmental control") (emphasis omitted).[17]

Plaintiffs do not contest Commerce's factual findings regarding Lianzhou's and Quhua's respective chains of ownership. Pls.' Mem. at 31–32 (citing I&D Mem. at 12). Plaintiffs assert that record evidence nevertheless demonstrates autonomy with regard to management selection. Pls.' Mem. at 28–31. Plaintiffs' assertion is unavailing.

Plaintiffs first point to the lack of direct involvement of SASAC/Juhua Group in the selection or activities of Plaintiffs' respective boards, and the lack of SASAC's direct involvement in the selection or activities of Zhejiang Juhua's board. Pls.' Mem. at 28 (citations omitted). Plaintiffs' argument ignores that Juhua Group, an SOE, is the majority owner of Zhejiang Juhua, and that Zhejiang Juhua, subject to that majority ownership, is the sole owner of the Plaintiffs. *See, e.g.*, I&D Mem. at 12 (discussing evidence of indirect majority ownership).

Plaintiffs also point to various aspects of Zhejiang Juhua's articles of association. Pls.' Mem. at 28–30. Plaintiffs argue that Article 39 "ensur[es] that [] Juhua Group is a passive investor." Pls.' Mem. at 28;

[16] The court addresses Plaintiffs' assertion that Commerce has effectively rendered the presumption "irrebuttable" *infra*, pp. 27–28.

[17] Plaintiffs assert that, since 1994, Commerce has granted exporters a separate rate despite "significant—and even 100 percent—government ownership." Pls.' Mem. at 1819 (citations omitted). In the only cited determination that post-dates the *AT&M* litigation, the government held a *minority* stake in the relevant entity. *See* Issues and Decision Mem. for the Admin. Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the PRC; 2014–2015, A-570–929 (Sept. 2, 2016) at 18–19, *available at* https://enforcement.trade.gov/frn/summary/prc/2016–21782–1.pdf (last visited Oct. 4, 2018).

see also id. at 29 ("Zhejiang Juhua is required by its [articles of association] to conduct its business operations as if it were 100 percent owned by the public, without any ownership interest of Juhua Group.)." However, Article 39—which provides, *inter alia*, that "[a] controlling shareholder . . . shall not take advantage of its relationship to harm the interests of The Company," and owes "a fiduciary duty to The Company"—does not render Juhua Group a passive investor. *See* Zhejiang Juhua Arts. of Assoc., Art. 39. Article 39 simply requires that any actions Juhua Group takes as majority owner of Zhejiang Juhua are not harmful to Zhejiang Juhua's financial interest. *See id.*

Plaintiffs next assert that Articles 40, 42, and 199 of Zhejiang Juhua's articles of association, along with Articles 37, 39, 99, and 100 of the Company Law of the People's Republic of China ensure the democratic and transparent election of Zhejiang Juhua's board. Pls.' Mem at 29; *see also* Lianzhou AQR, Ex. A-15 (Company Law of the People's Republic of China (effective March 1, 2014) ("PRC Company Law"). Article 39 of the PRC Company Law provides for the classification of shareholder meetings into regular and interim meetings. PRC Company Law, Art. 39. Article 99 cross-references and makes applicable Article 37, which provides for a company's shareholders to elect and replace its directors and supervisors, and to decide their pay. *Id.*, Arts. 37, 99. Article 100 states that "[t]he general meeting of a company shall hold an annual meeting once every year." *Id.*, Art. 100. Articles 40 and 42 of Zhejiang Juhua's articles of association mirror those provisions. *See* Zhejiang Juhua Arts. of Assoc., Art. 40 (discussing the shareholders' general meeting and associated functions, including appointment and remuneration powers), Art. 42 (discussing the classification of shareholder meetings).[18] None of these provisions, however, constrain Juhua Group's ability to elect Zhejiang Juhua's directors in accordance with its majority shareholding. *See* Separate Rate Mem. at 2; Zhejiang Juhua Arts. of Assoc., Art. 32(II) (providing for voting in accordance with shareholdings).

Plaintiffs further assert that Articles 20 and 21 of the Code of Corporate Governance for Listed Companies and Articles 56 and 86[19] of Zhejiang Juhua's articles of association protect Zhejiang Juhua from its controlling shareholder. Pls.' Mem. at 2930; *see also* Lianzhou AQR, Ex. A-16 (Circular of the China Securities Regulatory Commis-

[18] Article 199 of Zhejiang Juhua's articles of association sets forth rules governing dissolution in the event of Zhejiang Juhua's liquidation; thus, its relevance to Plaintiffs' argument is unclear. *See* Zhejiang Juhua Arts. of Assoc., Art. 199.

[19] Plaintiffs' reference is to Article 82; however, their discussion suggests that this reference is a typographical error and they intended to refer to Article 86. *See* Pls.' Mem. at 29. Article 82 is discussed below. *See infra*, note 21 and accompanying text.

sion and the State Economic and Trade Commission on the Issuance of the Code of Corporate Governance for Listed Companies, Jan. 7, 2002) ("Corp. Code Circular"). Pursuant to Article 20, "controlling shareholders shall nominate the candidates for directors and supervisors in strict compliance with . . . laws, regulations and the company's articles of association." Corp. Code Circular, Art. 20. Article 21 prohibits "controlling shareholders [from] . . . directly or indirectly interfer[ing] with the company's [lawful] decisions or business activities." *Id.*, Art. 21. Articles 56 and 86 of Zhejiang Juhua's articles of association require "candidates for directors and supervisors" to disclose affiliations with controlling shareholders, and prevent shareholders from voting on matters in which they retain an interest. Zhejiang Juhua Arts. of Assoc., Arts. 56, 86. These rules and requirements, however, exist alongside, and do not undermine, Juhua Group's "right to [perform] supervision on, making suggestion for or inquiry on the operation of Zhejiang Juhua, the sole shareholder of Quhua and Lianzhou." I&D Mem. at 15 & n.89 (citing, *inter alia*, Zhejiang Juhua Arts. of Assoc., Art. 32(III)) (internal quotation marks and additional citations omitted).[20]

Plaintiffs additionally point to Zhejiang Juhua's "cumulative voting"[21] system and online voting procedures that permit "smaller shareholders to have greater representation in voting." Pls.' Mem. at 30 (citing Zhejiang Juhua Arts. of Assoc., Art. 82). Even if that were true, Plaintiffs have not shown that these provisions constrain Juhua Group's exercise of its rights as majority shareholder.

Plaintiffs' reliance on Articles 125, 127, and 137 of Zhejiang Juhua's articles of association also lacks merit. *See id*. at 30. Article 127 provides that each board member holds one vote, while Article 125 provides that resolutions require more than half of all votes to pass. *See* Zhejiang Juhua Arts. of Assoc., Arts. 125, 127. Juhua Group's ability to elect the majority of the board, however, means that it

[20] Plaintiffs seek to rely on additional provisions of the Corp. Code Circular to demonstrate Zhejiang Juhua's independence from Juhua Group. *See* Pls.' Mem. at 9-10 (citing Corp. Code Circular, Arts. 22–27). While these provisions may demonstrate *de jure* autonomy, the issue here is *de facto* control, which the cited provisions fail to rebut.

[21] Cumulative voting

> allows shareholders to cast all of their votes for a single nominee for the board of directors when the company has multiple openings on its board. In contrast, in "regular" or "statutory" voting, shareholders may not give more than one vote per share to any single nominee. For example, if the election is for four directors and you hold 500 shares (with one vote per share), under the regular method you could vote a maximum of 500 shares for each one candidate (giving you 2,000 votes total—500 votes per each of the four candidates). With cumulative voting, you are afforded the 2,000 votes from the start and could choose to vote all 2,000 votes for one candidate, 1,000 each to two candidates, or otherwise divide your votes whichever way you wanted.

Quhua SRA, Ex. 7D (definition of "Cumulative Voting"); *see also* Zhejiang Juhua Art. of Assoc., Art. 82 (governing cumulative voting procedures).

effectively controls the majority of the votes. *See id*., Art. 32(II). Article 137 bars "[t]he person, who assumes the posts other than the director in a controlling shareholder or an actual controller," from "assum[ing] the post of senior management in [Zhejiang Juhua]." *Id.*, Art. 137. This provision, however, appears to leave open the possibility that Juhua Group's "directors" or "controllers" may in fact assume positions within Zhejiang Juhua's senior management, which positions include "general manager, deputy general manager, person in charge of finance, and secretary of the Board of Directors." *See id*., Art. 135.

In sum, Plaintiffs' insistence that Zhejiang Juhua's articles of association, the PRC Company Law, and the Corp. Code Circular "extinguish[]" the government's *de facto* control of Lianzhou and Quhua fails to persuade. *See* Pls.' Mem. at 32. Instead, the cited provisions represent the legal vehicles through which Juhua Group exercises its control over Zhejiang Juhua and, thus, Quhua and Lianzhou. There is, therefore, substantial evidence supporting Commerce's determination that Quhua's and Lianzhou's management is "beholden" to Zhejiang Juhua, whose board is controlled by the government-owned Juhua Group. *See* I&D Mem. at 14; Separate Rate Mem. at 2.

Having determined that Plaintiffs failed to demonstrate autonomy vis-à-vis management selection, Commerce was not required to conduct further analysis.[22] "The absence of *de facto* government control can be shown by evidence that the exporter sets its prices independently of the government and of other exporters, negotiates its own contracts, keeps the proceeds of its sales (taxation aside), *and* selects its management autonomously." *AMS Assoc.*, 719 F.3d at 1379 (citation omitted) (emphasis added). The test is conjunctive; thus, "Commerce requires that exporters satisfy all four factors of the *de facto* control test in order to qualify for separate rate status." *Yantai CMC Bearing Co. Ltd. v. United States*, 203 F. Supp. 3d 1317, 1326 (2017) (citing *AT&M III*, 938 F. Supp. 2d at 1349). Because Plaintiffs failed to satisfy one *de facto* criterion, "Commerce had no further obligation

[22] Plaintiffs rely on *Jiasheng I* and *Jiasheng II* to support the proposition that Commerce failed to consider "the totality of the circumstances," including the *de jure* prong of the separate rate test and the three additional *de facto* criteria. Pls.' Mem. at 24–25 (citing *Jiasheng I*, 28 F. Supp. 3d at 1339 n.160; *Jiasheng II*, 121 F. Supp. 3d at 1266); *id.* at 39. In neither case, however, does the court state that Commerce must consider each criterion and prong and evaluate or weigh the exporter's relative fulfillment of each. The *Jiasheng II* court also recognized that Commerce's post-*Diamond Sawblades* practice generally precludes an exporter or producer from obtaining a separate rate when it is majority-owned by the government, either directly or indirectly. 121 F. Supp. 3d at 1267.

to continue with the analysis." *Id.* at 1326; *see also Shandong Rongxin Imp. & Exp. Co., Ltd. v. United States* ("*Rongxin III*"),[23] 42 CIT ___, Slip Op. 18–107 at 19 (Aug. 29, 2018).[24]

Finally, Plaintiffs' argument that Commerce's determination is inconsistent with relevant judicial precedent lacks merit. Plaintiffs seek to distinguish the *Diamond Sawblades* proceeding and *Yantai CMC* on the basis that those cases involved instances of actual control and on the basis that those cases did not address the protections afforded to publicly-traded companies by the Corp. Code Circular. Pls.' Mem. at 36–37 (citing *AT&M II*, 885 F. Supp. 2d at 1352, 1356); Pls.' Mem. at 39 (citing *Yantai CMC*, 203 F. Supp. 3d at 1326). Plaintiffs appear to misunderstand their burden. Commerce presumes that exporters from a nonmarket economy country, such as China, are government-controlled unless the exporter demonstrates otherwise. *See, e.g.*, *Huaiyin Foreign Trade Corp.,* 322 F.3d at 1372. Plaintiffs' evidence, which documented the unbroken chain of ownership from the Chinese government to Lianzhou and Quhua and set forth the corporate and legal mechanisms pursuant to which Juhua Group and Zhejiang Juhua discharge their ownership duties, failed to rebut the presumption. *Cf. AT&M II*, 885 F. Supp. 3d at 1358.[25] The lack of evidence of specific instances of actual control does not render Commerce's finding unsupported by substantial evidence; indeed, in the context of majority government ownership, requiring Commerce to point to such evidence turns the presumption on its head by placing the burden on petitioners to prove the absence of autonomy. *See AMS Assoc., Inc.*, 719 F.3d at 1379–80 (the respondent/exporter bears the burden of demonstrating autonomy from government control); *cf. An Giang II*, 284 F. Supp. 3d at 1359 (noting that, in the context of minority ownership, Commerce requires additional evidence of control before concluding that an exporter has failed to rebut the presumption). Plaintiffs' attempts to analogize the facts of this case to

[23] The court decided *Rongxin III* following the court ordered remands in *Shandong Rongxin Imp. & Exp. Co., Ltd. v. United States* ("*Rongxin II*"), 41 CIT ___, 203 F. Supp. 3d 1327 (2017), and *Shandong Rongxin Imp. & Exp. Co., Ltd. v. United States*, 40 CIT ___, 163 F. Supp. 3d 1249 (2016).

[24] Accordingly, the court does not address Plaintiffs' arguments regarding evidence demonstrating the absence of *de jure* control or the absence of *de facto* control vis-à-vis the remaining criteria. *See* Pls.' Mem. at 25–28.

[25] Plaintiffs' assertion that "Juhua Group would violate the PRC Company Law if it were to appoint Zhejiang Juhua's board members," Pls.' Mem. at 38 (emphasis omitted), misses the point because Commerce made no such finding. Rather, Commerce relied upon Juhua Group's ability *as majority shareholder* to control "the operations of the company, including the selection of management," and its interest in so doing. I&D Mem. at 12.

those in which the court has remanded Commerce's separate rate determinations are also unavailing.[26]

In sum, Commerce's finding that Plaintiffs failed to rebut the presumption of government control is supported by substantial evidence.

III. Whether Commerce's Determination is in Accordance with Law

A. Parties' Contentions

Plaintiffs contend that Commerce misapplied the presumption of government control. Pls.' Mem. at 41–42. According to Plaintiffs, the evidence they submitted rebutted the presumption; thus, Commerce impermissibly denied their separate rate applications absent evidence of specific instances of actual control. *Id*. at 41–42; *see also* Pls' Reply at 10–14. Plaintiffs also assert that Commerce has "convert[ed] the presumption into an irrebuttable finding of government control based on indirect ownership" without "indicat[ing] what type of evidence would have been sufficient for separate rates." Pls.' Mem. at 42. Plaintiffs further contend that Commerce departed from the separate rate methodology stated in Policy Bulletin 05.1 without adequately acknowledging or explaining its departure therefrom. *Id*.

Defendant contends that Commerce applied properly the presumption of government control and correctly found that Plaintiffs' evidence failed to address Juhua Group's indirect control over Lianzhou and Quhua. Def.'s Resp. at 31. Defendant further contends that Commerce adhered to its long-standing separate rate methodology, and Plaintiffs' arguments "amount to mere disagreement" with the agency's conclusion. Def.'s Resp. at 31–32.[27]

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[26] Plaintiffs point to the *Jiasheng I* court's statement "that Commerce considers the 'totality of the circumstances' and does not rely solely on 'the *possibility* for governmental control over export activities.'" Pls.' Mem. at 39 (quoting *Jiasheng I*, 28 F. Supp. 3d at 1339 n.160, 1348). That case, however, involved minority government ownership. Thus, evidence tracing ownership to the government did not merit the denial of a separate rate. *Jiasheng I*, 28 F. Supp. 3d at 1349. Plaintiffs assert that *An Giang I* "compels remand" on the basis of the court's finding that Commerce had impermissibly relied on potential control to deny a separate rate request. Pls.' Mem. at 40 (citing *An Giang I*, 203 F. Supp. 3d at 1291–92). In *An Giang II*, however, the court clarified the relevance of potential control in cases concerning majority and minority government control and affirmed Commerce's determination. 284 F. Supp. 3d at 1359. Plaintiffs also assert that *Rongxin II* "compels remand" on the basis of the court's remand therein for Commerce to explain the propriety of its reliance on a respondent's failure to fulfill one *de facto* criterion to deny a separate rate. Pls.' Mem. at 40–41 (citing *Rongxin II,* 203 F. Supp. 3d at 1348). Following remand, however, the *Rongxin III* court affirmed Commerce's determination that the exporter had failed to establish the absence of *de facto* control solely on the basis of its failure to demonstrate autonomy regarding management selection. *Rongxin III*, Slip Op. 18–107 at 19.

[27] Defendant-Intervenors did not respond to Plaintiffs' arguments regarding the lawfulness of Commerce's determination. *See* Def.-Ints.' Resp. at 6–7 (presenting arguments pertaining solely to the court's substantial evidence review).

B. Commerce Applied Properly the Presumption of Government Control

Plaintiffs assert that Commerce's analysis ran afoul of Federal Circuit precedent regarding the operation of presumptions. *See* Pls.' Mem. at 41–42 (citing *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020 (Fed. Cir. 1992), *abrogated on unrelated grounds by SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S.Ct. 954, 959 (2017)). Quoting *Aukerman*'s discussion of Federal Rule of Evidence 301, which governs what is referred to as the "bursting bubble" theory of presumptions,[28] Plaintiffs assert they met their burden of producing the "minimum quantum of evidence" necessary to rebut the presumption. Pls.' Mem. at 41–42 (quoting *Aukerman*, 960 F.2d at 1037). The foregoing discussion demonstrates, however, that Commerce properly found that Plaintiffs' evidence wholly failed to rebut the presumption of government control. *See supra* pp.18–25; I&D Mem. at 12–15. Thus, to the extent *Aukerman* informs the court's analysis, it is unhelpful to Plaintiffs' position.

Additionally, the court disagrees with Plaintiffs' assertion that Commerce has "convert[ed] the presumption into an irrebuttable finding of government control based on indirect ownership." Pls.' Mem. at 42. The presence of direct or indirect majority government ownership may require exporters to surmount a high bar to demonstrate the absence of *de facto* control, but it does not necessarily preclude exporters from obtaining a separate rate. *See* Def.'s Resp. at 22–23 (noting, for example, the absence of evidence "that [] Juhua Group did not actually vote its shares");[29] *cf. Yantai CMC*, 203 F. Supp. 3d at 1325–26 ("That particular facts (majority ownership) may be sufficient to support an agency determination of control, and the existence of those facts in this particular case (*i.e.*, indirect majority control by SASAC), does not alter the test into an irrebuttable pre-

[28] Pursuant to the bursting bubble theory, "a presumption is not merely rebuttable but completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact." *Aukerman*, 960 F.2d at 1037–38 (discussing the amount of evidence a patentee must proffer to rebut an alleged infringer's assertion that the patentee waited too long to file an infringement action).

[29] Two opinions addressing Commerce's separate rate analysis have suggested otherwise. *See An Giang II*, 284 F. Supp. 3d at 1362 ("A respondent may rebut th[e] presumption [of government control], unless record evidence demonstrates that the majority shareholder is controlled by the government."); *Jiasheng II*, 121 F. Supp. 3d at 1267 (Commerce's practice "holds that . . . majority ownership [] 'in and of itself' precludes a finding of *de facto* autonomy.") (citation omitted). At oral argument, however, Defendant clarified that Commerce has not taken the position that majority government ownership *per se* bars separate rate eligibility. Defendant posited the possibility that evidence in the form of an article of association limiting a government-owned entity from voting in accordance with its majority shareholding may compose affirmative evidence breaking the chain of control, but noted that such evidence was absent here. Oral Arg. Recording at 30:10–32:33.

sumption; instead, it means that, on the basis of these facts, Plaintiff failed to rebut the presumption."). That Commerce did not forecast the type of evidence that would be sufficient to rebut the presumption does not render its determination unreasonable or unsupported by substantial evidence.

C. Commerce Adhered to its Longstanding Separate Rate Analysis

Plaintiffs assert that Commerce deviated from Policy Bulletin 05.1 by (1) denying a separate rate on the basis of a single *de facto* criterion and thereby treating government ownership as dispositive; (2) relying on the potential for government control instead of actual control; and (3) acting contrary to a prior proceeding in which Commerce granted a separate rate notwithstanding evidence of government involvement in management selection. Pls.' Mem. at 42–43 (citations omitted); *see also* Pls.' Reply at 17–21. The court has largely dispensed with these arguments elsewhere. *See supra* pp. 23 & n.22 (Commerce properly may rely on a single criterion); *id.* pp. 1517 (clarifying Commerce's consideration of potential control in the context of majority versus minority ownership and the implications thereto with regard to rebutting the presumption); *id.* pp. 24–25 & n.26 (squaring this case with judicial precedent).

Briefly, Policy Bulletin 05.1 does not direct or otherwise require Commerce to address each *de facto* criterion and the *de jure* prong of its separate rate test before denying an exporter a separate rate. Policy Bulletin 05.1 at 1–2 (summarizing Commerce's separate rate test); *see also Yantai CMC*, 203 F. Supp. 3d at 1326; *Rongxin III*, Slip Op. 18–107 at 19. Plaintiffs' assertion that Commerce "treated government ownership as dispositive," Pls.' Mem. at 43, overlooks Commerce's consideration of the degree of government ownership (majority or minority), and fails to disprove the evidentiary bases supporting Commerce's determination. Plaintiffs' reliance on *Jiasheng II*[30] to support the assertion that Commerce's decision contradicts prior determinations is unavailing. *See id*. (citing *Jiasheng II*, 121 F. Supp. 3d at 1269). *Jiasheng II* concerned minority government ownership, *see* 121 F. Supp. 3d at 1269; thus, government ownership was not dispositive of the degree of government control.

In sum, though Commerce now accords more weight to evidence of an exporter's government ownership as a consequence of the *Diamond Sawblades* proceeding, it does so within the confines of its longstanding separate rate test. *See* I&D Mem. at 10–12. Commerce

[30] Plaintiffs identify the case as "*Jiansheng I*"; however, the accompanying reporter volume and pin cite suggests that Plaintiffs intended to cite to *Jiasheng II*.

has, moreover, placed exporters on notice of this change. *See, e.g.*, Steel Wire Rod Mem. at 6–7. Plaintiffs may disagree with the conclusions Commerce reaches on the basis of this evidence, but mere disagreement is not a sufficient basis to remand Commerce's determination. Accordingly, Commerce's decision to deny Plaintiffs' requests for separate rates is in accordance with law.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion is denied. Judgment will enter accordingly.

Dated: October 11, 2018
New York, New York

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

Slip Op. 18–137

HITACHI METALS, LTD. and HITACHI METALS AMERICA LLC, Plaintiffs, and DAIDO STEEL CO., LTD., Consolidated Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION and ARCELORMITTAL USA LLC, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 17–00140
PUBLIC VERSION

[Denying Plaintiffs' Motions for Judgment on the Agency Record. The Commission's finding of a single domestic like product, inclusive of tool steel, is supported by substantial evidence and otherwise in accordance with law. The Commission's determination is sustained and judgment will enter for Defendant.]

Dated: October 11, 2018

Daniel J. Cannistra and *Robert L. LaFrankie*, Crowell & Moring, LLP, of Washington, DC, argued for Plaintiffs Hitachi Metals, Ltd. and Hitachi Metals America LLC.

Mathew R. Nicely, Hughes Hubbard & Reed LLP, of Washington, DC, argued for Consolidated-Plaintiff Daido Steel Co., Ltd. With him on the brief was *Daniel M. Witkowski*.

Peter L. Sultan, Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, argued for Defendant United States. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

R. Alan Luberda, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenor ArcelorMittal USA LLC. With him on the brief were *Paul C. Rosenthal*, *Kathleen W. Cannon*, and *Brook M. Ringel*.

Alan H. Price, *Timothy C. Brightbill*, and *Christopher B. Weld*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Nucor Corporation.

OPINION

Barnett, Judge:

This consolidated action is before the court on two motions for judgment on the agency record challenging the United States International Trade Commission's ("ITC" or "Commission") domestic like product determination in the investigation of carbon and alloy steel cut-to-length plate ("CTL plate") from Japan.[1] *See Carbon and Alloy Steel Cut-to-Length Plate From Austria, Belgium, France, Germany, Italy, Japan, Korea, and Taiwan* ("*Final Japan Determination*"), 82 Fed. Reg. 23,592 (ITC May 23, 2017) (final determinations), PR 529, PJA Tab 41, CJA Tab 41, ECF No. 61.

Specifically, Hitachi Metals, Ltd. and Hitachi Metals America, Inc. (together, "Hitachi") and Consolidated-Plaintiff Daido Steel Co., Ltd. ("Daido") (collectively, "Plaintiffs") challenge the ITC's inclusion of tool steel in the domestic like product as unsupported by substantial evidence and not in accordance with law. *See* Confidential Pls.' 56.2 Mot. for J. on the Agency R., ECF No. 45, and Confidential Mem. of Law in Supp. of Pls.' Confidential Rule 56.2 Mot. for J. Upon the Agency R. ("Hitachi Mem."), ECF No. 45–1; Confidential Consol. Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 46, and Consol. Pl.'s Confidential Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Daido Mem."), ECF No. 46–1. Defendant United States ("Defen-

[1] Defendant filed the confidential administrative record ("CR") at ECF No. 29, and the public administrative record ("PR") at ECF No. 30. The parties also submitted joint appendices containing record documents cited in their briefs. *See* Confidential JA ("CJA"), ECF No. 61; Public JA ("PJA"), ECF No. 62; Confidential Pls.' Resps. to the August 30, 2018 Court Order ("Suppl. CJA"), ECF Nos. 65, 67. The Commission's staff report and views for all countries (including Japan) are contained in the following publications filed in the administrative record: *Carbon and Alloy Steel Cut-to-Length Plate from Brazil, South Africa, and Turkey*, Inv. Nos. 731-TA-1319, 1326, and 1328, USITC Pub. 4664 (Jan. 2017) (Final), PR 444, ECF No. 30–1, and its corresponding confidential version, Mem. No. INV-OO-119, Inv. Nos. 701-TA-560–561 and 731-TA-1317–1328 (Final): *Carbon and Alloy Steel Cut-to-Length Plate from Austria, et al.* (Dec. 2016) ("*Staff Report and Views I*"), CR 1014, ECF No. 29–1; *Carbon and Alloy Steel Cut-to-Length Plate from China*, Inv. Nos. 701-TA-560 and 731-TA-1320, USITC Pub. 4675 (March 2017) (Final), PR 485, ECF No. 30–2, and its corresponding confidential version, Mem. No. INV-PP-027, Inv. Nos. 701-TA-560 and 731-TA-1320 (Final): *Carbon and Alloy Steel Cut-to-Length Plate from China* (Feb. 2017), CR 1016, ECF No. 29–2; *Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, France, Germany, Italy, Japan, Korea, and Taiwan*, Inv. Nos. 701-TA-561 and 731-TA-1317–1318, 1321-1325, and 1327, USITC Pub. 4691 (May 2017) (Final), PR 515, ECF No. 30–3, and its corresponding confidential version, Mem. No. INV-PP-055, Inv. Nos. 701-TA-561 and 731-TA-1317–1318, 1321–1325, and 1327 (Final): *Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, France, Germany, Italy, Japan, Korea, and Taiwan* (Apr. 2017), CR 1021, ECF No. 29–3. Because the staff report and views prepared in connection with Japan incorporate the domestic like product findings of *Staff Report and Views I*, the court references the Commission's findings in *Staff Report and Views I* unless otherwise specified. For ease of reference, the court will cite to the staff report and views, respectively, as *Staff Report I* and *Views I*. The court references the confidential versions of the record documents and ITC determinations, unless otherwise specified.

dant" or the "Government") and Defendant-Intervenors ArcelorMittal USA LLC ("ArcelorMittal") and Nucor Corp. ("Nucor") (together, "Defendant-Intervenors") support the Commission's determination. *See* Confidential Def. United States Int'l Trade Comm'n's Mem. in Opp'n to Pls.' and Consol. Pl.'s Mots. for J. on the Agency R. ("Gov. Resp."), ECF No. 49; Confidential Def.-Ints.' Resp. in Opp'n to Pl. Hitachi's and Consol. Pl. Daido's Respective Mots. for J. on the Agency R. ("Def.-Int. Resp."), ECF No. 48. For the reasons discussed below, Plaintiffs' motions are denied.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012), and 28 U.S.C. § 1581(c) (2012).[2] An ITC determination is "presumed to be correct," and the burden of proving otherwise rests upon the challenging party. 28 U.S.C. § 2639(a)(1). The court will uphold an ITC determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It "requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)).

BACKGROUND

I. Legal Framework

"Under the unfair trade laws, [the U.S. Department of Commerce ("Commerce")] determines whether foreign imports into the United States are either being dumped or subsidized (or both)," and the Commission "determine[s] whether these dumped or subsidized imports are causing material injury to a domestic industry in the United States." *Changzhou Trina Solar Energy Co., Ltd. v. U.S. Int'l Trade Comm'n*, 39 CIT ___, ___, 100 F. Supp. 3d 1314, 1319 (2015) (citation omitted); *see also* 19 U.S.C. §§ 1671, 1673. Accordingly, "Commerce determines the scope of [an] investigation," establishing the class or kind of foreign merchandise that would be subject to any resulting antidumping or countervailing duty order, *Cleo Inc. v. United States*,

[2] Further citations to the Tariff Act of 1930, as amended are to the relevant portions of Title 19 of U.S. Code, and all references to the U.S. Code are to the 2012 edition.

30 CIT 1380, 1382 (2006), *aff'd*, 501 F.3d 1291 (Fed. Cir. 2007), while the Commission "identif[ies] the corresponding universe of items produced in the United States [by the affected industry] that are like, or in the absence of like, most similar in characteristics and uses with the items in the scope of the investigation," *Changzhou Trina Solar*, 100 F. Supp. 3d at 1319 (citing 19 U.S.C. §§ 1673(i), 1671(a)) (additional citation and quotation and formatting marks omitted); *see also* 19 U.S.C. § 1677(10) ("The term 'domestic like product' means a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation."). Although the scope of an investigation "is necessarily the starting point of the Commission's like product analysis," *Cleo Inc. v. United States*, 501 F.3d 1291, 1298 n.1 (Fed. Cir. 2007) (citing 19 U.S.C. § 1677(10)), the scope "does not control the Commission's determination," *id.* ; *see also Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85 F.3d 1561, 1567 (Fed. Cir. 1996) (citation omitted).

The domestic like product determination is a fact-specific inquiry pursuant to which the Commission weighs "six factors relating to the products in question: (1) physical characteristics and uses; (2) common manufacturing facilities and production employees; (3) interchangeability; (4) customer perceptions; (5) channels of distribution; and, where appropriate, (6) price." *Cleo*, 501 F.3d at 1295. "When weighing those factors, the Commission disregards minor differences and focuses on whether there are any clear dividing lines between the products being examined." *Id*.

II. Factual and Procedural History

On April 8, 2016, domestic CTL[3] plate producers ArcelorMittal, Nucor, and SSAB Enterprises, Inc. (collectively, the "Petitioners") filed an antidumping and countervailing duty petition with Commerce and the ITC regarding certain carbon and alloy steel CTL plate imported from several countries. Antidumping and Countervailing Duty Petition, Vol. 1, General and Injury Sections (Apr. 8, 2016) ("Petition"), PR 1, CR 1, PJA Tab 1, CJA Tab 1, ECF No. 61. Therein, the Petitioners framed the scope of the investigation as "certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate)." *Id.* at 9. The Petitioners proposed various requirements regarding width and thickness, permissible amounts of iron and carbon content, and third

[3] "The term 'cut-to-length' [CTL] refers to a flat plate product with a defined length." *Staff Report I* at I-36.

country processing. *Id.* at 10. The Petitioners further proposed excluding seven categories of products from the scope, including stainless steel, and set forth additional exclusions on the basis of existing antidumping or countervailing duty orders involving the People's Republic of China and South Korea. *Id.* at 10–15. According to the Petitioners, by including "all alloy CTL plate other than stainless plate," the proposed scope was broader than in past investigations, but such broadening was necessary to "reflect[] changes in steelmaking and the types of CTL plate being produced by the domestic CTL plate industry." *Id.* at 16. The Petitioners urged the ITC to find a single domestic like product coextensive with the scope of the investigation. *Id.* at 22–24.

The Commission subsequently instituted an antidumping and countervailing duty injury investigation into certain carbon and alloy steel cut-to-length plate from Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey. Notice of Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Prelim. Phase Investigation (Apr. 8, 2016), PR 17, PJA Tab 2, CJA Tab 2, ECF No. 61. In May 2016, the Commission made a preliminarily affirmative injury finding regarding imports of certain carbon and alloy steel cut-to-length plate from several countries, including Japan, which were alleged to be sold in the United States at less than fair value. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey*, Inv. Nos. 701-TA-559–561 and 73-TA-1317–1328, USITC Pub. 4615 (May 2016) (Prelim.) at 1, PR 159, PJA Tab 5, CJA Tab 5, ECF No. 61. The Commission preliminarily found "a single domestic like product consisting of all CTL plate coextensive with the scope of these investigations" as announced by Commerce in its notices of initiation. *Id.* at 14. The scope included:

> Certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances. Subject merchandise includes plate that is produced by being cut-to-length from coils and plate that is rolled or forged into a discrete length. The products covered include (1) Universal mill plates (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thick-

> ness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, i.e., products which have been "worked after rolling," (*e.g.*, products which have been beveled or rounded at the edges).

Id. at 6–7. The scope also adopted Petitioners' proposals regarding width and thickness measurements, iron and carbon content, third country processing, seven categories of excluded products, and exclusions on the basis of existing antidumping and countervailing duty orders. *See id.* at 7–11 & n.26 (citations omitted); *cf.* Petition at 9–15.

Following the preliminary determination, the Commission invited interested parties to comment on draft questionnaires to be issued to producers, importers, and purchasers for the final investigation. *See* U.S. Producer; Importer; Purchaser; and Foreign Producer Draft Questionnaires, PR 180, PJA Tab 6, CJA Tab 6, ECF No. 61. Hitachi, Daido, and other interested tool steel producers (collectively the "Tool Steel Respondents") recommended revisions to the questionnaires for the purpose of obtaining tool steel-specific information relevant to the Commission's domestic like product determination. Hitachi Metals' Draft Questionnaire Comments (Sept. 13, 2016) ("Hitachi QRE Cmts") at 3–7, PR 187, PJA Tab 8, CJA Tab 8, ECF No. 61, Suppl. CJA Tab 8, ECF No. 65–2; Comments on the Draft Producer, Importer, Purchaser, and Foreign Producer Final-phase Questionnaires (Deutsche Edelstahlwerke GmbH ("DEW")) (Sept. 13, 2016) ("DEW QRE Cmts") at 1–3, PR 189, PJA Tab 9, CJA Tab 9, ECF No. 61; Comments on Draft Questionnaires (Voestalpine) (Sept. 13, 2016) ("Voestalpine QRE Cmts") at 5, PR 191, PJA Tab 10, CJA Tab 10, ECF No. 61. Hitachi asserted that those revisions were "needed for the Commission to fully examine the domestic like product issues, domestic industry issues, or separate injury analyses implicated by tool steel or forged tool steel." Hitachi QRE Cmts at 3. Hitachi also requested the Commission to issue producer questionnaires to U.S. tool steel producers. Hitachi Metals' Request to Issue U.S. Producer Questionnaires to U.S. Tool Steel Producers (Oct. 14, 2016) ("Hitachi QRE Request"), PR 207, PJA Tab 12, Suppl. CJA Tab 12, ECF No. 65–1.

The Commission initially declined to seek additional tool steel-specific data on the basis that the Tool Steel Respondents "had not presented sufficient information—in terms of the six factors that the Commission generally considers—to warrant collecting this additional information." Prehearing Report (Nov. 15, 2016) ("Prehearing Staff Report") at I-49, PR 270, PJA Tab 14, CR 836, CJA Tab 14, ECF

No 61. However, the Commission ultimately issued questionnaires to at least some of the U.S. tool steel producers identified in Hitachi's request, *compare* Hitachi QRE Request, Attach. 1 (listing producers), *with Staff Report I* at III-2 n.3 (stating which of those producers failed to respond),[4] as well as supplemental questionnaires to four[5] additional U.S. tool steel producers, *Staff Report I* at III-3 n.3. The Commission also obtained information from two[6] U.S. tool steel producers via e-mail and telephone. *Staff Report I* at III-2 n.3; *Views I* at 19 n.42, 20 n.47.

On January 26, 2017, the Commission published its final affirmative determination regarding carbon and alloy steel cut-to-length plate from Brazil, South Africa, and Turkey. *Carbon and Alloy Steel Cut-to-Length Plate From Brazil, South Africa, and Turkey*, 82 Fed. Reg. 8,541 (ITC Jan. 26, 2017), PR 456, PJA Tab 36, CJA Tab 36, ECF No. 61–1.[7] The Commission confirmed its preliminary finding of "a single domestic like product, consisting of all CTL plate, that is coextensive with the scope of the investigations." *Views I* at 16. After comparing tool steel to other carbon and alloy steel CTL plate products pursuant to its six-factor test, the Commission rejected the Tool Steel Respondents' argument that tool steel constituted a separate like product. *See id.* at 17–24. The Commission explained that when, as here, the

> domestically manufactured merchandise is made up of a grouping of similar products or involves niche products, the Commission does not consider each item of merchandise to be a separate like product that is only "like" its identical counterpart in the scope, but considers the grouping itself to constitute the domestic like product and "disregards minor variations," absent a "clear dividing line" between particular products in the group.

Id. at 22–23 (footnote citations omitted). The Commission did not reach an explicit finding with regard to whether each factor favored a particular determination; rather, the Commission concluded that although the evidence as a whole was "mixed," "the acknowledged

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[4] Six producers did not respond to the Commission's questionnaire. *Staff Report I* at III-3 n.3. One producer stated that it never received the questionnaire. *Id.*

[5] [[ ]].

[6] [[ ]]. Finkl Steel is one of the largest U.S. tool steel producers. *See Staff Report I* at III-2 n.3.

[7] On March 17, 2017, the Commission published its final affirmative determination regarding carbon and alloy steel cut-to-length plate from China. *Carbon and Alloy Steel Cut-to-Length Plate From China*, 82 Fed. Reg. 14,230 (ITC Mar. 17, 2017), PR 488, PJA Tab 39, CJA Tab 39, ECF No. 61–1. On May 23, 2017, the Commission published its final affirmative determination regarding carbon and alloy steel cut-to-length plate from Austria, Belgium, France, Germany, Italy, Japan, Korea, and Taiwan. *Final Japan Determination*, 82 Fed. Reg. 23,592.

differences between tool steel and high speed steel[8] and other types of CTL plate" did not support finding a clear dividing line between tool steel and other CTL plate products. *Id.* at 22–23.

On June 6, 2017, Hitachi initiated this action challenging the Commission's domestic like product determination. Summons, ECF No. 1. On June 23, 2017, Daido initiated a separate action likewise challenging the Commission's domestic like product determination. *See* Summons, ECF No. 1, Court No. 17–00165. On September 1, 2017, the court consolidated the two actions under lead court no. 17–00140. Order (Sept. 1, 2017), ECF No. 36. Hitachi's and Daido's respective Rule 56.2 motions are fully briefed, and the court heard oral argument on September 6, 2018. *See* Docket Entry, ECF No. 66.

DISCUSSION

I. Whether the Commission's Determination is in Accordance with Law

A. Parties' Contentions

Plaintiffs contend that the Commission's domestic like product determination is contrary to law because it departs from 35 years of agency practice treating tool steel as distinct from other types of carbon and alloy steel, and the Commission failed to provide a reasoned explanation for its departure from that practice. Hitachi Mem. at 9–20; Confidential Pls.' Reply to Def.'s Mem. in Opp'n to Pls.' Mots. for J. on the Agency R. ("Hitachi Reply") at 9, ECF No. 53; Daido Mem. at 24–33; Consol. Pl.'s Reply Br. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Daido Reply") at 5–10, ECF No. 54.[9] Plaintiffs further contend that the Commission acted arbitrarily by including tool steel within the domestic like product while excluding stainless steel, to which tool steel is similar, irrespective of stainless steel's exclusion from the scope of the investigation. Hitachi Mem. at 21–22; Hitachi Reply at 10–12; Daido Mem. at 35–38. Daido contends that

[8] High speed steel is a type of tool steel. Daido Mem. at 2.

[9] Hitachi asserts that the Commission's finding of a domestic like product coextensive with the scope of the investigation reflects the Commission's abandonment of its statutory obligation to independently determine the domestic like product. Hitachi Mem. at 10–11; Hitachi Reply at 2–5. At oral argument, however, Hitachi acknowledged that the Commission did not summarily adopt Commerce's scope determination and did conduct its six-factor domestic like product analysis. Oral Arg. at 8:20–9:40 (reflecting the time stamp from the recording). Hitachi's argument is premised on the Commission's alleged failure to (1) adhere to agency practice, (2) explain its departure from agency practice, or (3) address the inclusion of tool steel in light of the exclusion of other CTL plate products. *See* Hitachi Mem. at 11–22. Accordingly, Hitachi's arguments are addressed in that fashion.

the Commission's failure to address the Tool Steel Respondents' arguments in this regard requires a remand. Daido Mem. at 38; Daido Reply at 10–11.

Defendant and Defendant-Intervenors contend that Plaintiffs have not established that the Commission had a practice of treating tool steel as a separate like product distinct from other carbon and alloy CTL plate. Gov. Resp. at 31–36; Def.-Int. Resp. at 13–24. Defendant further contends that the Commission did not affirmatively exclude from the domestic like product the categories of alloy steel products that were not in scope; rather, it had no occasion to address those products because none of the interested parties argued for their inclusion or exclusion. Gov. Resp. at 37.

B. Plaintiffs Have Not Demonstrated the Existence of an Agency Practice Vis-à-Vis Tool Steel

Generally, ITC determinations are *sui generis*, i.e., "necessarily confined to a specific period of investigation with its attendant, peculiar set of circumstances." *Nucor Corp. v. United States*, 28 CIT 188, 233, 318 F. Supp. 2d 1207, 1247 (2004) (citation omitted). Those circumstances include the "particular record at issue [and] the arguments raised by the parties." *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988) (citation and emphasis omitted).

Nevertheless, when the Commission has "a uniform and established procedure [] that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established . . . procedure," that procedure rises to the level of "agency practice." *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999). When the Commission has an agency practice, it must conform its determinations to that practice or explain its reasons for departing therefrom. *See Citrosuco Paulista*, 12 CIT at 1209, 704 F. Supp. at 1088. In the absence of an agency practice, the Commission is not required to explain discrepancies between its findings in a particular determination and past determinations. *See Nucor*, 28 CIT at 233, 318 F. Supp. 2d at 1247.

In the underlying administrative proceeding, the Commission rejected the Tool Steel Respondents' argument that it "had an established practice of treating tool steel as a separate domestic like product." *Views I* at 23. The Commission reasoned that the Tool Steel Respondents had failed to "identif[y] any prior antidumping or countervailing duty investigation in which the scope included carbon and alloy steel (including tool steel) and the Commission decided that tool steel was a separate like product." *Id.* at 23–24.

Plaintiffs again cite to several steel safeguard investigations and antidumping and countervailing duty ("AD/CVD") investigations and sunset reviews to support their arguments regarding the existence of an agency practice. *See* Hitachi Mem. at 13–17 & Attach. 1;[10] Daido Mem. at 25–31. As noted above, however, the Commission's domestic like product analysis begins with Commerce's description of the scope of the subject merchandise. *See Cleo*, 501 F.3d at 1298 n.1. And as discussed more fully below, the starting point for the Commission's like product analysis in the determinations relied upon by Plaintiffs differed from the scope that formed the starting point for the Commission's determination at issue here. For those reasons, the cited determinations lack precedential value and otherwise fail to establish an agency practice regarding tool steel. *See Citrosuco Paulista*, 12 CIT at 1209, 704 F. Supp. at 1088 (ITC determinations are generally confined to specific records and arguments).

Safeguard Investigations

Plaintiffs cite to three safeguard investigations as ostensibly supporting the treatment of tool steel as a separate like product. Hitachi Mem. at 13–15 (citing *Steel*, Inv. No. TA-201–73, USITC Pub. 3479 (Dec. 2001) ("*2001 Steel 201*"); *Stainless Steel and Alloy Tool Steel*, Inv. No. TA-201–48, USITC Pub. 1377 (May 1983) ("*1983 Stainless and Alloy Tool Steels 201*"); *Stainless Steel and Alloy Tool Steel*, Inv. No. TA-201–5, USITC Pub. 756 (Jan. 1976) ("*1976 Stainless and Alloy Tool Steels 201*")); Daido Mem. at 25–27 (citing same). Safeguard investigations, however, arise under a different statutory scheme[11] and serve different purposes.[12] Thus, Section 201 like product

[10] Hitachi's Attachment lists steel proceedings from 1978 to 2016. *See* Hitachi Mem., Attach. 1.

[11] Safeguard investigations arise under Section 201 of the Trade Act of 1974, which governs ITC investigations into "whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." Trade Act of 1974 § 201(B)(1), 19 U.S.C. § 2251. In making like product determinations in safeguard investigations, the Commission typically considers "the physical properties of the product, its customs treatment, its manufacturing process . . ., its uses, and the marketing channels through which the product is sold." *2001 Steel 201* at 30. Antidumping and countervailing duty investigations arise under Title VII of the Tariff Act of 1930, 19 U.S.C. §§ 1671 *et seq*. In Title VII investigations, the Commission makes domestic like product determinations after considering "(1) physical characteristics and uses; (2) common manufacturing facilities and production employees; (3) interchangeability; (4) customer perceptions; (5) channels of distribution; and, where appropriate, (6) price." *Cleo*, 501 F.3d at 1295. Thus, the Title VII determinations must account for several factors not considered in Section 201 proceedings.

[12] "Title VII is narrowly aimed at remedying the specific advantages imports may be receiving from unfair trade practices," whereas "[t]he purpose of [S]ection 201 either is to prevent or remedy serious injury to domestic productive resources from all imports" entering in increased quantities. *2001 Steel 201* at 30 & n.30 (citation omitted).

determinations are "of limited usefulness" in Title VII (antidumping and countervailing duty) domestic like product determinations. *Cut-to-Length Plate from China, Russia, South Africa, and Ukraine*, Inv. Nos. 731-TA-753–756, USITC Pub. 3626 (Sept. 2003) (Review) at 7 n.20 (rejecting a party's reliance on the *2001 Steel 201* investigation to support its proposed domestic like product determination in a Title VII investigation). Nevertheless, to the extent the safeguard investigations could be considered as informing the Commission's practice with regard to tool steel, the cited determinations fail to support Plaintiffs' position.

In 2001, the Commission investigated increased imports of four categories of steel products: "(1) certain carbon and alloy flat products, (2) certain carbon and alloy long products, (3) certain carbon and alloy pipe and tube products, and (4) certain stainless steel and alloy tool steel products." *2001 Steel 201* at 31–32. The Commission subsequently made domestic industry determinations on the basis of like product determinations within each category; thus, the Commission considered tool steel solely in relation to stainless steel. *Id.* at 190, 200. The Commission found the existence of ten domestic industries producing products like or corresponding to the stainless steel and tool steel category, with one industry specific to tool steel. *Id.* at 190. In so doing, the Commission rejected one party's argument that it should find a single like product and one domestic industry producing stainless and tool steel products. *Id.* at 192. The Commission found several differences between tool steel and stainless steel with regard to production, physical characteristics, end uses, and channels of distribution. *Id.* at 200.

Plaintiffs assert that the Commission's grouping of tool steel with stainless steel in the 2001 safeguard investigation suggests that it considers tool steel to be more like stainless steel than other steel products. Hitachi Mem. at 15; Daido Mem. at 27. Plaintiffs further assert that the Commission concluded therein that "tool steel was a separate like product from all other carbon, alloy, and stainless steel flat products." Hitachi Mem. at 15; *see also* Daido Mem. 27.

Contrary to Plaintiffs' assertions, the four categories of investigated steel products were defined by the U.S. Trade Representative and the U.S. Senate Committee on Finance, each of which sent a request to the Commission to institute its investigation. *2001 Steel 201* at 28, 31. Although the Commission characterized the groupings as a "useful starting point" in its like product analysis, it noted that it "is not bound in any way by [those] groupings." *Id.* at 32. Moreover, the Commission did not make findings with regard to tool steel's likeness to all other steel products; instead, the Commission considered tool

steel solely in relation to stainless steel, and noted differences between those products sufficient to consider them to be distinct like products. *Id.* at 190, 200.

In 1976 and 1983, the Commission addressed increased imports of stainless steel and alloy tool steel. *See 1976 Stainless and Alloy Tool Steels* at 3; *1983 Stainless and Alloy Tool Steels 201* at 4. In the 1976 safeguard investigation, three Commissioners concluded that tool steel was part of the same domestic industry as stainless steel. *1976 Stainless and Alloy Tool Steels* at 8 (Views of Commissioners George Moore and Catherine Bedell), 50–51 (Views of Commissioner Italo H. Ablondi). In contrast, two Commissioners concluded that tool steel and stainless steel were produced by distinct domestic industries. *Id.* at 17 (Views of Chairman Will E. Leonard), 37 (Views of Vice Chairman Daniel Minchew). In 1983, the Commission unanimously found that tool steel and stainless steel constituted distinct industries. *1983 Stainless and Alloy Tool Steels 201* at 13–14.

Plaintiffs seek to rely on these earlier determinations. They point to the 1983 findings to buttress their assertion that tool steel should have been considered a separate like product in the underlying proceeding, and to the 1976 findings to buttress their assertions that tool steel should not have been included in the domestic like product when stainless steel was not so included. *See* Hitachi Mem. at 13–14 (citing *1976 Stainless and Alloy Tool Steels 201* at A-3; *1983 Stainless and Alloy Tool Steels 201* at 13–14); Daido Mem. at 25–26 (citing *1976 Stainless and Alloy Tool Steels 201* at 8, 17, 37, 50–51; *1983 Stainless and Alloy Tool Steels 201* at 13).[13]

However, the differing conclusions reached by the Commission regarding tool steel and stainless steel in the section 201 investigations demonstrate the *sui generis* nature of like product determinations and the high bar Plaintiffs must surmount to prove the existence of an agency practice. *See Nucor*, 28 CIT at 233, 318 F. Supp. 2d at 1247. Additionally, the Commission's Section 201 determinations regarding

[13] Plaintiffs further point to various statements by the Commission observing differences between tool steel or stainless steel and carbon steel. *See* Hitachi Mem. at 13–14 (citing *1976 Stainless and Alloy Tool Steels 201* at A-3; *1983 Stainless and Alloy Tool Steels 201* at 13–14); Daido Mem. at 25–26 (citing *1976 Stainless and Alloy Tool Steels 201* at A-3; *1983 Stainless and Alloy Tool Steels 201* at A-11). However, general references to certain distinctions between steel products made in one investigation on the basis of the record in that investigation do not bind the Commission in subsequent determinations made on different records and in response to different arguments. *See Citrosuco Paulista*, 12 CIT at 1209, 704 F. Supp. at 1088. With regard to the 1983 safeguard investigation, Daido also appears to find it significant that the Commission did not include other carbon and alloy products as part of the product that is like tool steel. Daido Mem. at 26. However, there is no indication that any interested party raised arguments that would have prompted the Commission to consider the inclusion of those products.

tool steel's comparability to stainless steel cannot reasonably be considered a practice binding upon the Commission in a subsequent Title VII determination concerning tool steel's comparability to the broader category of carbon and alloy steel CTL plate products at issue here. *See Apex Frozen Foods Private Ltd. v. United States*, 38 CIT ___, ___, 37 F. Supp. 3d 1286, 1301 (2014) ("Agency actions become binding when practice produces reasonable reliance.") (citing *Ranchers-Cattlemen*, 23 CIT at 884–85, 74 F. Supp. 2d at 1374).

Antidumping and Countervailing Duty Investigations and Sunset Reviews

Plaintiffs' reliance on certain AD/CVD investigations likewise fails for the reason that the inquiry confronting the Commission in the cited investigations differed from the inquiry that confronted the Commission in the underlying investigation. Plaintiffs point to the Commission's determination in *Certain Tool Steels from Brazil and the Federal Republic of Germany*, Inv. No. 701-TA0187, USITC Pub. 1403 (July 1983) (Final) ("*Tool Steel from Brazil and Germany*"). Hitachi Mem. at 14 (citing *Tool Steel from Brazil and Germany* at 6); Daido Mem. at 27–28 (citing *Tool Steel from Brazil and Germany* at 6, 8). Hitachi asserts that, in that investigation, the Commission found tool steel to be distinct from carbon steel. Hitachi Mem. at 14. The scope of that investigation, however, and, thus, the starting point for the Commission's inquiry, was limited to alloy tool steel bar and rod. *Tool Steel from Brazil and Germany* at 6. The Commission referred to differences between tool steel and carbon steel with regard to metallurgy and performance characteristics as part of its discussion about the nature of the domestic industry producing tool steel, but it was not addressing, nor was it called upon to address, whether to include carbon steel as part of the domestic like product. *See id.* at 6. The only question confronting the Commission was whether to separate tool steel into several categories of separate like products, which it declined to do. *Id.* at 7–8.

Plaintiffs point to additional AD/CVD investigations involving some combination of carbon, micro-alloy, and alloy steels. Hitachi Mem. at 15–17 & Attach. 1 (citations omitted); Daido Mem. at 28–30 (citations omitted). As Daido acknowledges, however, the scope of each investigation, and, thus, the Commission's starting point, either (1) was limited to carbon or carbon-quality steel products, or (2) specifically excluded tool steel. *See* Daido Mem. at 28–30. The court's review of those investigations finds no case in which the Commission was

requested to include tool steel in the domestic like product.[14] As noted above, the Commission makes its domestic like product determinations in relation to the particular scope as described by Commerce and on the basis of the relevant record and arguments. *See Cleo*, 501 F.3d at 1298 n.1; *Citrosuco Paulista*, 12 CIT at 1209, 704 F. Supp. at 1088. Because the scope description, record evidence, and arguments differed in the cited determinations, the Commission made no explicit findings therein suggesting an agency practice regarding tool steel upon which Plaintiffs could reasonably rely. *See Apex Frozen Foods*, 37 F. Supp. 3d at 1301.

Hitachi also points to the Commission's domestic like product determination in a recent sunset review of AD/CVD orders on carbon-quality steel plate. *See* Hitachi Reply at 6. Hitachi asserts that "the Commission found clear dividing lines" in the sunset review "between other alloy steel plate, which would include tool steel, and non-alloy tool steel." *Id.* (citing *Cut-to-Length Carbon-Quality Steel Plate From India, Indonesia, and Korea*, Inv. Nos. 701-TA-388, 389, and 391 and 731-TA-817, 818, and 821, USITC Pub. 4764 (Feb. 2018) (Third Re-

[14] *See generally Cold-Rolled Steel Flat Products from Brazil, India, Korea, Russia, and the United Kingdom*, Inv. Nos. 701-TA-540, 542–544 and 731-TA-1283, 1285, 1287, and 1289–1290, USITC Pub. 4637 (Sept. 2016) (Final); *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, Inv. Nos. 701 -TA-545–547 and 731 TA 1291–1297, USITC Pub. 4638 (Sept. 2016) (Final); *Cold-Rolled Steel Flat Products from China and Japan*, Inv. Nos. 701-TA-541 and 731-TA-1284 and 1286, USITC Pub. 4619 (July 2016) (Final); *Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, Korea, Netherlands, Russia, and the United Kingdom*, Inv. Nos. 701-TA-540–544 and 731-TA-1283–1290, USITC Pub. 4564 (Sept. 2015) (Prelim.); *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, Japan, and Russia*, Inv. Nos. 701-TA-384 and 731-TA-806–808, USITC Pub. 4237 (June 2011) (Second Review); *Certain Cold-Rolled Steel Products from Australia, India, Japan, Sweden, and Thailand*, Inv. Nos. 731-TA-965, 971–972, 979, and 981, USITC Pub. 3536 (Sept. 2002) (Final); *Certain Cold-Rolled Steel Products from Argentina, Belgium, Brazil, China, France, Germany, Korea, the Netherlands, New Zealand, Russia, South Africa, Spain, Taiwan, Turkey, and Venezuela*, Inv. Nos. 701-TA-423–425 and 731-TA-964, 966–970, 973–978, 980, and 982–983, USITC Pub. 3551 (Nov. 2002) (Final); *Hot Rolled Steel Products from China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, Inv. Nos. 701-TA-405–408 and 731-TA-899–904 and 906–908, USITC Pub. 3468 (Nov. 2001) (Final); *Cut-to-Length Carbon-Quality Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Inv. Nos. 701-TA-388–391 and 731-TA-816–821, USITC Pub. 3816 (Nov. 2005) (Reviews); *Hot Rolled Steel Products from Argentina and South Africa*, Inv. Nos. 701-TA-404 and 731-TA-898 and 905, USITC Pub. 3446 (Aug. 2001) (Final); *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829–830, 833–834, 836, and 838, USITC Pub. 3283 (Mar. 2000) (Final); *Certain Cold-Rolled Steel Products from Turkey and Venezuela*, Inv. Nos. 731-TA-839–840, USITC Pub. 3297 (May 2000) (Final); *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, Inv. Nos. 731-TA-753–756, USITC Pub. 3076 (Dec. 1997) (Final); *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319–332, 334, 336–342, 344, and 347–353 and 731-TA-573–579, 581–592, 594–597, 599–609, and 612–619, USITC Pub. 2664 (Aug. 1993) (Final).

view) ("*Carbon-Quality Steel Plate*") at 8 n.18). According to Hitachi, the sunset review reflects the Commission's reversion "to excluding tool steel from the like product, consistent with its normal practice." Hitachi Mem. at 17. Hitachi has misconstrued the Commission's determination.

The passage cited by Hitachi contains the Commission's summary of its domestic like product determination in the preliminary phase of the original 1999 investigation. *See Carbon-Quality Steel Plate* at 8 n.18 (citing *Certain Cut-to-Length Carbon Steel Plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea and Macedonia*, Inv. Nos. 701-TA-387–392 and 731-TA-815–822, USITC Pub. 3181 (Apr. 1999) (Prelim.) ("*Carbon Steel Prelim.*") at 6–7). The scope of that investigation consisted, *inter alia*, of "certain hot-rolled carbon-quality steel," which, in turn, included "universal mill plates . . . of iron or non-alloy-quality steel" and "flat-rolled products, hot-rolled, . . . and which are cut-to-length." *Carbon Steel Prelim.* at 4. The scope specifically excluded tool steel. *Id.* at 5. Although the Harmonized Tariff Schedule of the United States distinguishes non-alloy steel plate from other alloy steel plate, the domestic producers urged the Commission to include micro-alloy steel plate in the domestic like product. *Id.* at 5–6. The Commission subsequently did so on the basis of micro-alloy steel plate's greater similarity to non-alloy steels than to alloy steel. *Id.* at 7. The Commission noted that "the differences between micro[-]alloy steels and non-alloy cut-to-length steel plate are not so pronounced as to constitute clear dividing lines, but that other alloy steel plate exhibits marked differences from both non-alloy and micro[-]alloy CTL plate." *Id.* The Commission ultimately found a single domestic like product consisting of non-alloy steel plate and micro-alloy steel plate. *Id.*

The arguments and evidence confronting the Commission in *Carbon Steel Prelim.*related to whether the Commission should include a subset of alloy steels, i.e., micro-alloy steel plate, in the domestic product that is like the carbon-quality steel plate at issue in the investigation. *See id.* at 6–7. Although the Commission noted differences between micro-alloy steel plate/non-alloy steel plate and other alloy steel plate, the Commission did not address, in terms of its six-factor test, whether to include alloy steel plate *in toto* in the domestic like product. *See id*. In the sunset review cited by Hitachi, the Commission pointed to the absence of new information meriting revision of its domestic like product determination and the lack of requests from interested parties seeking review thereof. *Carbon-Quality Steel Plate* at 8. The Commission did not, as Hitachi asserts, recently find "clear dividing lines" between alloy steel plate and

non-alloy CTL plate, and its original domestic like product determination made in the context of the narrower scope of that investigation is not inconsistent with the instant determination reached on the basis of the current record.

In sum, the scope of the instant investigation was broader than past AD/CVD investigations by reason of the inclusion of all alloy CTL plate (including tool steel, but excluding stainless steel). *See* Petition at 16. Accordingly, this appears to be the first time interested parties have presented the Commission with specific arguments and evidence regarding tool steel's inclusion in the domestic like product (or exclusion therefrom) in that context. The Commission's previous like product determinations made in connection with different scope descriptions and on the basis of different arguments and evidence did not compel the Commission to exclude tool steel from the domestic like product in this case. Accordingly, Plaintiffs' appeal to agency practice is unavailing.

C. The Commission's Determination Was Not Arbitrary or Unreasonable

In the underlying proceeding, the Tool Steel Respondents urged the Commission to treat tool steel as a separate like product because it is more similar to the CTL plate products excluded from the scope than it is to the products in scope. Tool Steel Respondents' Post-Hr'g Br. (Dec. 8, 2016) at 3, Ex. 1 at 6, PR 349, CR 877, PJA Tab 18, CJA Tab 18, ECF No. 61. The Commission did not explicitly address this argument, *see generally Views I* ; however, the "law does not require that an agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency's determination be discussed so that the path of the agency may reasonably be discerned by a reviewing court," *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1354 (Fed. Cir. 2005) (quoting Uruguay Round Agreements Act: Statement of Administrative Action, H.R. Doc. No. 103–316, Vol. I at 892 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4215) (internal quotation marks and citations omitted); *see also Bowman Transp. v. Ark.-Best Freight Sys.,* 419 U.S. 281, 286 (1974) (articulating the discernible path standard).

The material issue in the Commission's domestic like product determination concerned tool steel's likeness or similarity to the carbon and alloy CTL plate products within the scope of the investigation. *See Changzhou Trina Solar*, 100 F. Supp. 3d at 1319. The Commission discussed this issue in detail; thus, this is not a case where the Commission has "entirely failed to consider an important aspect of

the problem." *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (agency action is arbitrary when it "entirely fail[s] to consider an important aspect of the problem"). Tool steel's *relative* likeness to products that were excluded from the scope is immaterial because any such likeness does not preclude a finding that tool steel is also like the products in the scope. Thus, the Commission's failure to explicitly respond to this argument does not require a remand.[15] The Commission's determination was not arbitrary and is otherwise in accordance with law.

II. Whether the Commission's Determination is Supported by Substantial Evidence

A. Parties' Contentions

Plaintiffs contend the Commission's domestic like product determination is unsupported by substantial evidence because the Commission failed to adequately collect and investigate data regarding tool steel. Hitachi Mem. at 22–25; Daido Mem. at 33–35. Plaintiffs further contend that the conclusions the Commission drew on the basis of its six-factor analysis are contrary to the record evidence. Hitachi Mem. at 25–42; Daido Mem. at 11–24. Defendant and Defendant-Intervenors contend that the Commission properly collected and considered all relevant evidence in accordance with its six factor test, and its conclusions are supported by substantial evidence. Gov. Resp. at 9–31; Def.-Int. Resp. at 24–43.

B. The Commission Adequately Investigated the Material Issues

According to Commission regulations, "[t]he Director shall circulate draft questionnaires for the final phase of an investigation to parties to the investigation for comment. . . . All requests for collecting new

[15] At oral argument, Plaintiffs emphasized their view that the Commission implicitly found stainless steel to be a separate like product, and faulted the Commission for failing to explain the correctness of that finding in light of tool steel's inclusion in the domestic like product and the similarities between tool steel and stainless steel. Oral Arg. 14:40–16:30. The Commission was not, however, required to address stainless steel because the Tool Steel Respondents never put the status of stainless steel at issue by, for example, arguing that the Commission should expand the domestic like product beyond the scope to include stainless steel; indeed, Plaintiffs agree that stainless steel should be considered a separate like product. *See id.* Instead, Plaintiffs focused their arguments on tool steel as a separate like product, which the Commission squarely addressed. Daido's argument that the Commission departed from its past treatment of tool steel as more like stainless steel than other types of carbon and alloy steel also fails. Daido Mem. at 37 (asserting that "no rational argument or factual developments have been presented for now finding that tool steel is more similar to other carbon and alloy steel than it is to stainless steel"). The Commission made no such finding because tool steel's relative similarity to stainless steel as compared to the carbon and alloy steel products under investigation was irrelevant to its determination.

information shall be presented at this time." 19 C.F.R. § 207.20(b). When parties seek additional information regarding a proposed "like product breakout that is different from the way in which the like product was defined in the Commission's preliminary determination," they must make a "reasonable showing" under the six-factor test to warrant the collection. Gov. Resp. at 10; *see also* Prehr'g Report at I-49 (denying the Tool Steel Respondents' request to collect additional tool steel-specific information because they failed to show that its collection was merited pursuant to the Commission's six-factor test). Plaintiffs challenge the Commission's initial denial of the Tool Steel Respondents' request for the collection of tool steel-specific information as unsupported by substantial evidence, arbitrary, and unlawful. Hitachi Mem. at 23–25; Daido Mem. at 33–34; Hitachi Reply at 12–17. Plaintiffs' challenge lacks merit.

In the underlying proceeding, as noted above, Hitachi, DEW, and Voestalpine submitted requests for the collection of additional information about tool steel. Hitachi QRE Cmts at 3; DEW QRE Cmts at 1–3; Voestalpine QRE Cmts at 5. According to Hitachi, it submitted "over 300 pages of information regarding the Commission's six like product factors" in support of its request. Hitachi Reply at 14; *see also* Hitachi Mem. at 24. That information, however, constituted Hitachi's and five other companies' submission to *Commerce* regarding the exclusion of tool steel from the scope of the investigations. *See* Hitachi QRE Cmts at 3 (asserting that the submission nevertheless "contained substantial information related to the Commission's like product factors"); *see also id.*, Attach. 1 (excerpt of scope comments). Although the standards applicable to scope rulings and domestic like product determinations may seem similar, they are quite distinct.[16] Commerce's scope rulings assess factors in relation to the foreign like product and subject merchandise produced in the country(ies) subject to investigation, whereas the ITC's domestic like product determinations assess factors in relation to the production and sale of domestic like product by the domestic industry. Hitachi's scope-related com-

[16] In certain circumstances involving ambiguous scope language, to determine whether imported merchandise is subject to an antidumping or countervailing duty order Commerce may consider "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2). Although the (k)(2) are similar to the Commission's six factors, see *Cleo*, 501 F.3d at 1295; *supra* pp.5–6, as the Government points out, "the information pertaining to the subject merchandise produced abroad will not necessarily apply to the domestically-produced product." Gov. Resp. at 12 n.8.

ments, therefore, were not directly relevant to the Commission's domestic like product determination.[17]

Hitachi and DEW also urged the ITC to collect additional information by asserting that "U.S. producers . . . do not produce and do not have the capacity to produce *most* types of tool steel." Hitachi QRE Cmts at 1 (emphasis added); *see also* DEW QRE Cmts at 2. Their assertion however, may be viewed as an admission that at least *some* types of tool steel are domestically produced. Moreover, the lack of domestic production of identical merchandise is not a basis for recognizing a separate domestic like product. 19 U.S.C. § 1677(10) (defining domestic like product as a product "like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation").

Hitachi and Voestalpine pointed to the Commission's treatment of tool steel in prior determinations, including the 2001 steel safeguard investigation. Hitachi QRE Cmts at 2; Voestalpine QRE Cmts at 2 & nn.1–2 (citations omitted). DEW pointed to the exclusion of tool steel from the *scope* of prior CTL plate investigations by Commerce as evidence that it "is not part of the like product." DEW QRE Cmts at 2 & n.8 (citation omitted). As discussed *supra*, however, the comparison of tool steel with stainless steel in the 2001 steel safeguard investigation is not determinative of the relationship between tool steel and carbon and alloy steel in these investigations. Further, the exclusion of tool steel from the scope of prior investigations is inapposite to whether the Commission must include it in the domestic like product when it is included in the scope of the investigation.

Nevertheless, as Plaintiffs acknowledge, the Commission ultimately issued questionnaires and supplemental questionnaires to U.S. tool steel producers. Hitachi Mem. at 24; Daido Mem. at 34; *see also Staff Report I* at III-2—III-3 & n.3. The Commission also obtained additional information from two producers that did not respond to the questionnaire—including one of the largest U.S. tool steel producers. *Staff Report I* at III-2 n.3; *Views I* at 19 n.42.

Hitachi emphasizes the failure of some of U.S. tool steel producers to respond to the Commission's questionnaire, Hitachi Mem. at 24, and asserts the Commission's statement that it had "limited information" regarding the applicability of "several of the six factors" to tool steel was an "admission" that it "lacked complete information" to undertake the analysis, *id*. at 25. Plaintiffs contend the court should remand the Commission's determination with instructions to re-open

[17] Moreover, Hitachi and other proponents of this submission made no effort to distinguish any information that might have been relevant to the Commission's analysis and, instead, expected the Commission to wade through the submission in search of anything relevant.

the record to collect additional information. *Id*. at 25; Daido Mem. at 35.[18]

Plaintiffs' criticism of the determination on the basis of the failure of some tool steel producers to respond to the Commission's questionnaire is inapposite. As discussed herein, the determination is supported by substantial evidence. Not only did the Commission utilize the data it did receive from domestic tool steel manufacturers, it also sought out non-responding manufacturers, obtaining information and data from them to incorporate into its analysis. *Staff Report I* at III-2 n.3; *Views I* at 19 n. 42; *see also infra*, note 22.[19]

Hitachi is also wrong to assert that the Commission conceded that it had limited information regarding "several of the six factors." Hitachi Mem. at 25. The Commission noted that there was "limited information in the record on channels of distribution" only. *Views I* at 22 (summarizing the Commission's findings). Plaintiffs appear to assert there was substantial record evidence for the finding that tool steel constituted a separate like product, but not the contrary finding that tool steel is part of a single domestic like product. *See* Hitachi Mem. at 25 ("Notwithstanding the Commission's failure to collect all relevant information, . . . the record of this proceeding nevertheless still demonstrates that tool steel is a separate like product."); Daido Mem. at 35 ("The limited record, if anything, supports a finding that tool steel is a separate like product."). Plaintiffs' assertions reflect disagreement with the conclusion the Commission drew from the available evidence, but that is not a proper basis for a remand. *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (the court is not to reweigh the evidence). As dis-

[18] Hitachi also contends that the Commission failed to fulfill its obligation under 19 U.S.C. § 1677(7)(C)(iii) to "evaluate all relevant factors which have a bearing on the state of the industry." Hitachi Mem. at 22–23. As the Government points out, however, the statute instructs the Commission to "evaluate all relevant *economic* factors which [bear] on the state of the industry in the United States" as part of its inquiry into the impact of the subject imports on the domestic industry. 19 U.S.C. § 1677(7)(C)(iii) (emphasis added); Gov. Resp. at 15 n.10. This inquiry forms part of the Commission's material injury determination, which is subject to its domestic like product and subsequent domestic industry determinations.

[19] At oral argument, Plaintiffs asserted the Commission could have utilized its subpoena power to gather additional information. Oral Arg. at 1:40:30–1:40:45; *see also* 19 U.S.C. § 1333(a) (setting forth the Commission's subpoena power); 19 C.F.R. § 207.8. Time constraints limit the Commission's practical ability to utilize its subpoena power in AD/CVD proceedings. *See, e.g.*, *Chevron U.S.A., Inc. v. United States*, 11 CIT 76, 79 (1987) (citing *Atl. Sugar, Ltd. v. United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984)). In any event, this argument was neither exhausted before the Commission nor addressed in Plaintiffs' court filings. Accordingly, the court does not further address it. *See, e.g.*, 28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."); *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) ("[A] arty waives arguments based on what appears [or does not appear] in its brief.").

cussed *infra*, the Commission's domestic like product determination is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co.*, 305 U.S. at 229, even if substantial evidence may also support the contrary conclusion, *see Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).[20]

C. The Commission's Determination is Supported by Substantial Evidence

Plaintiffs challenge the Commission's analysis of the six factors and the conclusions it reached on the basis of that analysis. Hitachi Mem. at 25–42; Daido Mem. at 11–24. As discussed below, the Commission's findings are supported by substantial evidence. Plaintiffs' challenges rest primarily on disagreements with the Commission's view of the record evidence. Each of the six factors is discussed, in turn.

Physical Characteristics and Uses

Plaintiffs assert that differences in tool steel's chemical composition and metallurgy—in particular, its higher alloy content—support finding a clear dividing line between tool steel and other CTL plate products. Hitachi Mem. at 27–28; Daido Mem. at 13–14.[21] Plaintiffs further point to tool steel's different mechanical properties to support their view.[22] Hitachi Mem. at 28–30; Daido Mem. at 15.

The Commission acknowledged the different mechanical properties in tool steel as compared to other CTL plate. *Views I* at 18.[23] The

[20] At oral argument, Plaintiffs asserted that the Commission's determination cannot be based on substantial evidence because it is based on data from companies accounting for roughly ten percent of domestic tool steel production; in other words, an insubstantial amount of the potentially available data. Oral Arg. at 36:50–37:03, 45:12–45:20; *see also Views I* at 19 n.42 (noting the Tool Steel Respondents' similar assertion). Plaintiffs' assertion is belied by the fact that the Commission also took account of information and data obtained through correspondence and telephone communication with certain tool steel producers which had not responded to the domestic producer questionnaire.

[21] Hitachi asserts that carbon and other alloy steel grades contain alloying elements that range from [[ ]] by weight, whereas tool steel contains alloying elements ranging from [[ ]] by weight. Hitachi Mem. at 28. As discussed *infra*, the Commission considered this data but found that the existence of some CTL plate products with relatively high levels of alloy and at least one type of tool steel with a relatively low alloy level was did not necessitate distinguishing tool steel on this basis.

[22] Relevant mechanical properties that differ between tool steel and other CTL plate include wear resistance, toughness, hot or red hardness, general hardness, ductability, and weldability. Hitachi Mem. at 28–29; Daido Mem. at 15.

[23] Daido argues that the Commission's conclusion failed to account for differences in mechanical properties. Daido Mem. at 17. Although the Commission did not expressly mention mechanical properties in its conclusion, *Views I* at 22, it considered its implications in its discussion of tool steel's physical characteristics, *id.* at 18. The Commission further noted that the evidence as to this factor was "mixed," *id.* at 23, thereby accounting for evidence demonstrating differences among the products.

Commission noted, however, that "[t]ool steel and high speed steel share basic physical characteristics in terms of chemical composition and dimensions with other CTL plate products." *Id.* at 17 &n.32 (citing *Staff Report I* at I-36; Petition at 24). Although tool steel "generally [has] higher levels of alloys than other CTL plate," high alloy content "is not a unique feature." *Id.* The Commission pointed to evidence that some "CTL plate products [also] have relatively high levels of alloy[,] and there is at least one type of tool steel with a relatively low alloy level." *Id.* at 17–18 & n.35 (citing ArcelorMittal USA LLC Posthearing Br. (Dec. 8, 2016) ("AMUSA Post-Hr'g Br."), Ex. 1 at 9, PR 351, PJA Tab 19, CR 869, CJA Tab 19, ECF No. 61)).[24]

Plaintiffs also assert that tool steel and other CTL plate products have different end uses. Hitachi Mem. at 30–31; Daido Mem. at 15–16. For example, "[t]ool steel is extremely hard and is used for cutting, pressing, extruding, and coining of metals and other materials; forming tools . . .; and the stamping of surfaces of machinery," specific purposes for which other types of CTL plate products cannot be used. Hitachi Mem. at 30. Other CTL plate products are used in load bearing and structural applications, among others, which do not require the specialized mechanical properties of tool steel, which is also more expensive. Hitachi Mem. at 31; Daido Mem. at 15.

The Commission concluded that specificity of end use is not unique to tool steel because "other CTL plate products are also designed for specific end uses and customer requirements." *Views I* at 18 & n.37 (citing *Staff Report I* at Table I-6, II-1). The Commission's staff report listed several applications in which "commodity-grade CTL plate" is used, "such as the manufacture of storage tanks, heavy machinery and machinery parts, ships and barges, agriculture and construction equipment, and general load-bearing structures." *Staff Report I* at II-1. While tool steel and non-tool steel CTL plate products are used for different purposes, as the Commission noted, specificity of end use may not carry much weight when, as here, the domestic like product "is made up of a grouping of similar products or involves niche products," *Views I* at 22, which serve a variety of purposes, *see Staff Report I* at I-36 - I-37, II-1 (citations omitted).

Hitachi further asserts the Commission's findings in this proceeding contradict its recognition of tool steel's unique chemical composition in prior safeguard investigations. Hitachi Mem. at 27 (citing

[24] Daido argues that "a single example of low alloy tool steel and a single example of high alloy non-tool steel plate" do not undermine the "general rule" that tool steel has a higher alloy content than other CTL plate. Daido Mem. at 16 (noting that the Commission has relied upon general rules in past determinations to find separate like products despite some overlap in product features) (citations omitted). It is not the court's role, however, to reweigh the evidence demonstrating shared alloy content against the evidence demonstrating tool steel's generally higher alloy content. *See, e.g.*, *Downhole Pipe*, 776 F.3d at 1377.

2001 Steel 201 at 200; *1983 Stainless and Alloy Tool Steels 201* at 10). The Commission has acknowledged certain metallurgical differences between tool steel and carbon or stainless steels. *See 2001 Steel 201* at 200; *1983 Stainless and Alloy Tool Steels 201* at 10. However, the record of this proceeding reflected shared characteristics in terms of carbon content and some overlapping alloy content with regard to the broader category of carbon and alloy CTL plate products at issue. *See Views I* at 17–18 & nn.32, 35 (citations omitted). The Commission also noted that reliance on its comparisons in prior safeguard cases lacks merit because "the Commission was not comparing tool steel to other types of carbon *and* alloy steel, as it is here." *Views I* at 18 & n.35.

In sum, the Commission's findings as to this factor are supported by substantial evidence.

Manufacturing Facilities and Production Employees

Plaintiffs contend the record evidence demonstrates "a clear divide between those entities producing and selling tool steel and those producing other types of CTL plate." Hitachi Mem. at 32; *see also* Daido Mem. at 17–18 ("The largest U.S. producers of tool steel do not make non-tool steel CTL plate products."). Plaintiffs also point to different manufacturing and production processes. Hitachi Mem. at 32–35; Daido Mem. at 18.

The Commission found that tool steel and other CTL plate products may be "made in the same facilities, using at least some of the same production processes and the same employees." *Views I* at 18. The Commission supported this finding by pointing to evidence that one U.S. tool steel producer—ArcelorMittal—makes tool steel and other CTL plate products "in the same plants, using the same equipment, and the same employees," while another U.S. tool steel producer—Niagara—makes "other types of CTL plate on the same equipment as it uses to make tool steel." *Id.* at 18 & nn.38–39 (citing, *inter alia*, AMUSA Post-Hr'g Br., Ex. 1 at 13; Niagara U.S. Producers' Questionnaire Resp. (Oct. 13, 2016) at II-11, CR 510, Suppl. CJA,[25] ECF No. 67).

The Commission acknowledged, however, that only a minority of tool steel producers manufacture both tool steel and other CTL plate products. *Id.* at 18–19 & n.40.[26] The Commission also acknowledged that tool steel and other CTL plate products are not always made in the same facilities, and evidence suggested that "the largest U.S.

[25] There is no tab number for this document.

[26] "AMUSA, Nucor, and Niagara accounted for [[ ]] percent of the [[ ]] short tons of tool steel and high speed steel produced by the four reporting producers in 2015." *Views I* at 18–19 & n.40 (citation omitted).

producers of tool steel and high speed steel, which did not respond to the Commission's questionnaire, are specialty steel producers that do not make other CTL plate products." *Id.* at 19 & n.42 (citation omitted). The Commission recognized that tool steel may undergo "additional production processes (such as argon oxygen decarburization and electro-slag remelting) that are not used in the production of other CTL plate." *Id.* at 19 & n.43 (citation omitted). According to the Commission, therefore, the evidence on this factor was "mixed." *Id.* at 22.

Plaintiffs emphasize the additional production processes that are "typically" applicable to tool steel. Hitachi Mem. at 33–35; Daido Mem. at 18. However, the Commission recognized certain differences in production when it determined that the evidence on this factor was "mixed." *Views I* at 19, 22. Moreover, those differences do not undermine the Commission's specific findings regarding the existence of some shared production processes, manufacturing facilities, equipment, and employees, which are supported by substantial evidence.

Interchangeability

Plaintiffs contend this factor supports finding a clear dividing line because tool steel generally is not used in load bearing and structural applications that require welding, for which other CTL plate products are more suitable. Hitachi Mem. at 35–36; Daido Mem. at 19. Although tool steel *may* be used in some instances instead of other CTL plate products, it would be cost-prohibitive to do so. Hitachi Mem. at 35; Daido Mem. at 19

The Commission agreed there is a general lack of interchangeability. *Views I* at 20 & n.50 (citation omitted). The Commission noted, however, that "the same could be said for other specialized CTL plate products." *Views I* at 22. Plaintiffs do not disagree with this finding, which is supported by substantial evidence. *Staff Report I* at Table I-6 (noting the applications for selected types of specialized CTL plate).

Producer and Customer Perceptions

Plaintiffs contend that producers and consumers consider tool steel to be a distinct product. Hitachi Mem. at 37–38; Daido Mem. at 21. According to Plaintiffs, few U.S. customers purchase both tool steel and other CTL plate products, a minority of responsive U.S. producers reported any tool steel production, and tool steel is advertised separately from other CTL plate products. Hitachi Mem. at 37–38; Daido Mem. at 19–21.

The Commission recognized that some producers and customers consider tool steel to be a distinct product. *Views I* at 21. The Commission found, however, that other "producers and consumers view tool steel . . . as part of a range of different types of CTL plate products," and tool steel is "marketed by some producers and distributors along with other CTL plate products." *Id.* at 21 & nn.52–53 (citing Comm'n Hr'g Tr. (Rev.) (Feb. 15, 2017) ("Hr'g Tr.") at 56, 111, PR 465, PJA Tab 37, CJA Tab 37, ECF No. 61–1 (statement of Robert Insetta); AMUSA Post-Hr'g Br., Exs. 1 at 18, 17 (ArcelorMittal product brochure); Nucor Corp.'s Post-Hr'g Br. (Dec. 8, 2016) ("Nucor Post-Hr'g Br."), Exs. 1, 6, 9, PR 355, CR 875, PJA Tab 20, CJA Tab 20, ECF No. 61–1; Hr'g Tr. at 115 (statement of Denton Nordhues)). Accordingly, the Commission determined that evidence on this factor was "mixed." *Id.* at 22.

Daido asserts the Commission's supporting evidence consists of "conclusory statements by one of the U.S. Petitioners" that are "mostly uninformative" of the perceptions of U.S. producers and "completely uninformative as to how customers view tool steel." 20 (citing Hr'g Tr. at 56, 111). The Commission cited to statements by an ArcelorMittal official that "every type of cut-to-length plate" considered as part of the investigation, including tool steel, "is part of a broad continuum of the same product." Hr'g Tr. at 56. That statement is supported, however, by the explanation that "[a]ll [CTL] plate is produced to meet a variety of globally recognized manufacturing standards and is produced using the same equipment and on the same facilities." *Id.* The official further explained that tool steel and other CTL plate products "are made in the same melt shop in which we produce . . . structural grades of steel. They are rolled on the same rolling mills. They are heat-treated in the same heat treat facilities, and they are produced by the same employees that produce the rest of this full spectrum of plate products." *Id.* at 111.

Daido further asserts that evidence of producer perceptions in the form of shared marketing "is meager" and "rebutted by evidence of tool-steel-specific trade conferences," evidence of separate marketing, and the omission of references to tool steel in the petitions. Daido Mem. at 20–21. Evidence of shared marketing included ArcelorMittal and Nucor brochures advertising several varieties of CTL plate products along with tool steel. AMUSA Post-Hr'g Br., Ex. 17; Nucor Post-Hr'g Br., Ex. 9. The Commission also noted that many types of CTL plate may be marketed separately, *see Views I* at 21 & n.53 (citing AMUSA Post-Hr'g Br., Ex. 1 at 18), suggesting that the degree to which CTL plate products are marketed together was not a weighty consideration in the Commission's domestic like product analysis.

The evidence relied upon by Daido does not "rebut" the Commission's evidence; rather, it points to the possibility of drawing a different conclusion. It is not the court's role, however, to reweigh the evidence. *See Downhole Pipe*, 776 F.3d at 1377.

Lastly, Daido asserts that evidence that customers perceive tool steel to be "a distinct product was *essentially* unrebutted." Daido Mem. at 21 (emphasis added). Hitachi asserts "[t]here is *virtually* no overlap in U.S. customers for tool steel and other CTL plate." Hitachi Mem. at 37 (emphasis added). The Commission supported its findings regarding customer perceptions by citing solely to statements by an ArcelorMittal official regarding producer perceptions. *Views I* at 21 & n.52 (citing Hr'g Tr. at 56, 111). The Commission subsequently cited, however, to statements by an official of Leeco Steel, *id.* at 21 & n.53 (citing Hr'g Tr. at 115), who noted that the company buys a small amount of tool steel along with other CTL plate, Hr'g Tr. at 114–15. Officials from ArcelorMittal and Nucor likewise asserted that their customers buy tool steel and other CTL plate products. Hr'g Tr. at 114. The Commission's conclusion, therefore, regarding the "mixed" nature of the evidence on producer and customer perceptions is supported by substantial evidence. *Views I* at 22.

Channels of Distribution

Plaintiffs contend that tool steel and other CTL plate products are sold in different channels of distribution and to different customers. Hitachi Mem. at 38–40. Daido Mem. at 19–20, 22.

Based on the questionnaire responses, the Commission found that the majority[27] of tool steel (and high speed steel) was shipped to distributors. *Views I* at 19 & n.44 (citing *Staff Report I*, Table I-7). In contrast, the distribution of other CTL plate products was more evenly divided between distributors and end users. *See Views I* at 20.[28] Communications between Commission staff and a Finkl Steel official suggested, however, that the channels of tool steel distribution "are [also] likely more evenly divided than the questionnaire response

[27] According to the Commission, [[ ]] percent of tool steel and high speed steel was shipped to distributors in 2015. *Views I* at 19 & n.44 (citing *Staff Report I* at Table I-7). However, the staff report indicates that [[ ]] percent of tool steel and high speed steel went to distributors in calendar year 2015, and [[ ]] percent went to distributors for the period January to September 2015. *Staff Report I* at Table I-7. This apparent discrepancy does not undermine the Commission's finding that "[t]he great majority" of shipments of tool steel and high speed steel reported by the questionnaire respondents went to distributors. *Views I* at 19.

[28] [[ ]] percent of all other CTL plate was shipped to distributors in calendar year 2015, and [[ ]] percent was shipped to end users. *Id.* at 20; *Staff Report I* at Table I-7.

data indicate." *Views I* at 20.[29] The Commission concluded that the "limited information in the record" suggests that tool steel "is more often sold through distributors than other CTL plate," but that it is also sold to end users. *Id.* at 22.

Hitachi characterizes the Commission's findings as "inexplicabl[e]" and "muddled," and asserts that "substantial record evidence demonstrat[es] that tool steel is sold in different channels of distribution. Hitachi Mem. at 38–39. But that is not the inquiry; rather, the court must examine whether the Commission's conclusion is supported by substantial evidence. In view of the record as a whole, the Commission's conclusion regarding tool steel's distribution as between distributors and end users is supported by substantial evidence.

Price

Plaintiffs assert that tool steel costs "two to four times the price of other steel CTL plate [], and even two times the price of other alloy CTL plate steel." Hitachi Mem. at 40–41; Daido Mem. at 23. According to Hitachi, the higher price is due to tool steel's higher alloy content and the additional manufacturing processes required to produce it. Hitachi Mem. at 42.

The Commission generally agreed, finding that "[t]ool steel . . . tend[s] to command a much higher price than other CTL plate." *Views I* at 21. The Commission further found, however, that some alloy CTL plate products cost more than tool steel. *Views I* at 21 & n.55 (citing Nucor Post-Hr'g Br., Ex. 6 ¶ 8 & Attach. 2 (comparing prices for different grades of CTL plate used in different applications)); *see also Views I* at 22.

Hitachi asserts the Commission's finding is unexplained "in light of the overwhelming evidence to the contrary." Hitachi Mem. at 41. Daido asserts the Commission should disregard some overlap in pricing as it "has disregarded isolated incidents of minor overlap . . . in the past." Daido Mem. at 23. Once again, Plaintiffs' assertions reflect simple disagreement with the Commission's conclusions. Substantial evidence supports the Commission's findings that tool steel typically—but not always—costs more than other CTL plate products.

In sum, the Commission's conclusion that the record evidence did not support finding a clear dividing line between tool steel and other CTL plate is supported by substantial evidence. Plaintiffs essentially urge the court to draw the opposite conclusion from the evidence.

[29] Finkl Steel informed the Commission that [[ ]] percent of its tool steel was sold to end users while [[ ]] percent was sold to distributors. *Views I* at 20 & n.46 (citing Finkl Steel E-Mail Req. for Information (Dec. 16, 2016), CR 983, PJA Tab 25, CJA Tab 25, ECF No. 61–1).

However, "when adequate evidence exists on both sides of an issue, assigning evidentiary weight falls exclusively within the authority of the Commission." *Nippon Steel Corp. v. United States,* 458 F.3d 1345, 1358 (Fed. Cir. 2006). The court will not disturb the Commission's domestic like product determination.

III. Daido's Additional Challenges Are Unavailing

Daido contends the Commission's determination that U.S. tool steel production does not constitute a domestic industry separate from non-tool steel production is unsupported by substantial evidence and otherwise not in accordance with law. Daido Mem. at 38. Daido further contends that imports of tool steel were negligible and that the domestic tool steel industry is not materially injured or threatened with material injury by imports of Japanese tool steel. *Id*. at 39–41. The Government contends these arguments are premature. Gov. Resp. at 37–38.

The determination of the relevant domestic industry turns on the Commission's domestic like product determination. *See* 19 U.S.C. § 1677(4)(A) ("The term 'industry' means the producers as a whole of a domestic like product . . . ."). Because the court sustains the Commission's domestic like product finding, Daido's arguments both with regard to negligibility and material injury, which are premised on tool steel being a separate domestic like product, are unavailing.

CONCLUSION

In accordance with the foregoing, Plaintiffs' motions are denied. Judgment will be entered accordingly.

Dated: October 11, 2018
New York, New York

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

Slip Op. 18–138

TABACOS DE WILSON, INC., TOBACCO RAG PROCESSORS, INC., BROWN-USA, INC., NIPPON AMERICA GROUP/OKURA USA INC., SKATE ONE CORPORATION, ALLIANCE INTERNATIONAL, CHB, INC., C.J. HOLT & COMPANY, INC., and CUSTOMS ADVISORY SERVICES, INC., Plaintiffs, v. UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, STEVEN T. MNUCHIN, in His Official Capacity as Secretary of the Treasury, and ACTING COMMISSIONER KEVIN K. MCALEENAN, in His Official Capacity as Commissioner, U.S. CUSTOMS & BORDER PROTECTION, Defendants.

Before: Jane A. Restani, Judge
Court No. 18–00059

[Finding a failure to issue statutorily required drawback regulations within the congressionally-mandated time frame; granting relief to expedite promulgation of final regulations.]

Dated: October 12, 2018

John Peterson, *Richard O'Neill*, and *Russell Semmel*, Neville Peterson, LLP, of New York, NY, for Plaintiffs Tabacos de Wilson, Inc., Tobacco Rag Processors, Inc., Brown-USA, Inc., Nippon America Group/Okura USA Inc., Skate One Corporation, Alliance International, CHB, Inc., C.J. Holt & Company, Inc., and Customs Advisory Services, Inc.

Claudia Burke, Assistant Director, *Justin Miller*, Senior Trial Counsel, and *Jamie Shookman*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for Defendants United States; United States Customs and Border Protection; Steven T. Mnuchin, Secretary of Treasury; and Kevin K. McAleenan, Acting Commissioner of U.S. Customs & Border Protection. Of counsel on the brief were *Alexandra Khrebtukova*, Attorney, International Trade Litigation, Office of Chief Counsel, U.S. Customs and Border Protection, and *Daniel Paisley*, Counsel for Tax, Trade & Tariff Policy, U.S. Department of the Treasury, of Washington, D.C.

OPINION

Restani, Judge:

In this action seeking to expedite promulgation of final regulations implementing Section 906 of the Trade Facilitation and Trade Enforcement Act of 2015 ("TFTEA"), Tabacos de Wilson, Inc., Tobacco Rag Processors, Inc., Brown-USA Inc., Nippon America, Inc., Skate One Corporation, Alliance International, CHB, Inc., C.J. Holt & Company, Inc., and Customs Advisory Services, Inc. (collectively, "Plaintiffs") request that the court direct United States Customs and Border Protection ("CBP") and the United States Department of the Treasury ("Treasury") to issue, as an interim final rule ("IFR"), certain regulations recently published as part of a notice of proposed rulemaking ("NPRM"). The court concludes an interim final rule is not an appropriate remedy, but concludes that expedited promulgation of a final rule is warranted to prevent continued harm to plaintiffs as members of the importing public. Thus, the court orders that the final rule be published in the Federal Register by December 17, 2018, as set forth specifically in the accompanying order.

BACKGROUND

The court assumes all parties are familiar with the facts of the case as discussed in *Tabacos de Wilson, Inc. v. United States*, Slip Op. 18–81, 2018 WL 3203389 (CIT June 29, 2018) ("*Tabacos I*"), in which the court dismissed some of the plaintiffs' claims but permitted the

claim at issue to proceed. For the sake of convenience, the facts relevant to this opinion are summarized herein. Section 906 of the TFTEA, Pub. L. No. 114–125, 130 Stat. 122 (2016), amended the Tariff Act (as codified in 19 U.S.C. § 1313 (2016),[1] the statute governing duty drawback claims and payments ("drawbacks").[2] The changes mandated by the law were supposed to simplify drawback claims, making them less burdensome for both claimants and CBP. *See* Defendants' Memorandum in Support of its Motion to Dismiss and Opposition to Plaintiffs' Motion for Preliminary Injunction: Defendant's Exhibit 1, Doc. No. 23–2, 2–3(Apr. 13, 2018). Congress provided Treasury two years from the enactment of the TFTEA to promulgate regulations implementing the TFTEA's drawback amendments. TFTEA § 906(g)(l)(2)(A).[3] Treasury did not meet the two-year deadline, which lapsed on February 24, 2018. This date also marked the beginning of a transition year, set to end on February 23, 2019, TFTEA § 906(q)(1)(B), during which drawback claimants could file drawback claims under 19 U.S.C. § 1313, as it was pre-TFTEA, or under that statutory provision as amended by the TFTEA. TFTEA § 906(q)(3). Had regulations been promulgated promptly, this transition period would have allowed importers a chance to understand and adjust to the new regulations and its associated programmatic changes, as well as to obtain the regulatory benefits associated with the new statute.

In lieu of new regulations, CBP published an "interim guidance document." *See generally* U.S. CUSTOMS AND BORDER PROTECTION, DRAWBACK: INTERIM GUIDANCE FOR FILING TFTEA DRAWBACK CLAIMS, VERSION 3 (Mar. 26, 2018) ("IGD").[4] The IGD indicates CBP will accept claims filed under the new TFTEA rules, but will not process these claims

[1] Unless otherwise indicated, all citations to the Tariff Act of 1930 concern portions of Title 19 of the U.S. Code, as amended by the TFTEA.

[2] Drawbacks are refunds of a customs duty, fee, or internal revenue tax paid on imported merchandise. 19 C.F.R. § 191.2(i) (2010). Drawbacks are available where, *inter alia*, imported goods are directly used in producing a good for export, 19 U.S.C. § 1313(a); 19 C.F.R. § 191.2(h) ("direct identification drawbacks"), imported and substitute goods of the "same kind and quality" are used to produce goods for both domestic use and export, 19 U.S.C. § 1313(b); 19 C.F.R. § 191.2(x)(1) ("substitution manufacturing drawbacks"), imported goods do not conform to specifications and are exported, 19 U.S.C. § 1313(c) ("rejected merchandise drawbacks"), imported goods are exported without having been used in the United States, *id.* § 1313(j)(1)(A)(i) ("unused merchandise drawbacks"), and "substituted" goods are exported without having been used in the United States, *id.* § 1313(j)(2) ("substitution unused merchandise drawbacks").

[3] The statute requires that "[n]ot later than the date that is 2 years after the date of the enactment of the Trade Facilitation and Trade Enforcement Act of 2015, the Secretary shall prescribe regulations for determining the calculation of amounts refunded as drawback under this section." TFTEA § 906(g)(l)(2)(A).

[4] All citations to the interim guidance document refer to Version 3, the most current version as of October 2, 2018.

until Section 906 implementing regulations are developed by Treasury, published in a NPRM, subjected to notice and comment, edited as necessary, and issued as final rules. *See* IGD at 15. Of greatest concern to plaintiffs, because regulations implementing the new law were not in place, plaintiffs could not receive payment preliquidation, i.e. accelerated drawback. *See Tabacos I*, at *6. In *Tabacos I*, the court found the IGD did not fulfill the statutory mandate and concluded, "[i]n failing to promulgate the implementing regulations by February 24, 2018, Defendants have exceeded a legislative deadline imposed by Section 906(g)(l)(2)(A)." *Tabacos I*, at *8.

After a year of internal review, on April 6, 2018, Treasury transmitted an NPRM which included, *inter alia*, regulations implementing Section 906, to the Office of Management and Budget ("OMB") for interagency review. *See* Defendants' Memorandum in Support of its Motion to Dismiss and Opposition to Plaintiffs' Motion for Preliminary Injunction, Doc. No. 23–1, at 9–10. (Apr. 13, 2018). At the time of *Tabacos I*, the court found that "Treasury is proceeding through the notice-and-comment process as expeditiously as is now possible," but admonished the government that "[i]f . . . [it] fails to promulgate the regulation within a reasonable timeframe, for example, if it is unable to produce the proposed regulation for notice-and-comment on or about July 5, 2018, approximately 90 days after April 6, 2018,[5] the court will consider imposing its own deadline so that the Congressional requirement is not abrogated through excessive delay." *Tabacos I*, at *8.

Ultimately, however, the NPRM was not presented to the Office of the Federal Register for publication until July 25, 2018. Defendants' Response to Plaintiffs' Motion for the Entry of a Judgment Order, Doc. No. 44, at 3 (Aug. 10, 2018) ("Def. Br."). Plaintiffs received a copy when the NPRM was made electronically available on July 27, 2018, *id.*, the same day *Tabacos I* had directed Plaintiffs to update the court as to the status of the matter, *Tabacos I*, at *9. The NPRM was published for notice and comment in the Federal Register on August 2, 2018. *Modernized Drawback*, 83 Fed. Reg. 37,886 (CBP & Treasury, Aug. 2, 2018). The Federal Register notice provided for a public comment period concluding on September 17, 2018. 83 Fed. Reg. at 37,886.

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[5] The period for interagency review is 90 days, unless "OIRA has previously reviewed the information and, since that review, there has been no material changes in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days[.]" Exec. Order No. 12,866, 58 Fed. Reg. 51,735, at § 6(b)(2)(B) (Sept. 30, 1993) ("Exec. Order No. 12,866"). The Court has considered the 45-day period in formulating its Order.

Prior to publication of the NPRM, the parties complied with the court's directive in *Tabacos I* to "consider what remedies are administratively feasible and . . . meet to discuss possible remedies." *Tabacos I*, at *9. On July 20, 2018, certain CBP representatives[6] met with representatives of the Plaintiffs and discussed, *inter alia*, the possibility of severing the Section 906 implementing regulations and implementing those as an IFR while the notice and comment process for the full NPRM continued in parallel. *See* Def. Br. at 5; Plaintiffs' Memorandum in Support of Motion for Entry of Judgment Order, Doc. No. 40, at 3–4 (July 27, 2018) ("Pl. Br."). In deciding not to issue an IFR, CBP

> informed plaintiffs that [it] could not take this approach because (1) the drawback calculation aspects are interwoven throughout the entire package, (2) the time that it would take to start over and go back through the interagency process to seek clearance to promulgate . . . interim final rules may be just as long as complying with the notice and comment requirements . . . and (3) the . . . circumstances of this case do not meet the legal standard for departing from [notice and comment] requirements.

Def. Br. at 5. The parties were ultimately unable to reach an agreement,[7] and Plaintiffs filed a motion for entry of judgment. Plaintiff's Motion for Entry of Judgment Order, Doc. No. 39 (July, 27, 2018).

The court then held two status conferences. In-Person Conference, Doc. No. 46 (Aug. 23, 2018) ("Conf. 1"); In-Person Conference, Doc. No. 52 (Oct. 2, 2018) ("Conf. 2"). After the first conference, parties each submitted briefs listing which provisions of the total rule package they believed concerned drawback calculations and would need to be implemented in order to satisfy Section 906. Government Response, Doc. No. 48 (Sept. 6, 2018) ("Gov. Resp."); Plaintiff's Response, Doc. No. 50 (Sept. 21, 2018) ("Pl. Resp."). During the second status conference, the Government stated that review of the comments received during the comment period was continuing apace, that there appeared to be no changes to the drawback provisions that were so substantial that republication would be necessary, and that any changes would be ready for submission to the OMB for its review by October 30th, and transmitted on October 31st, with an expectation

[6] No Treasury representatives were present at this meeting. Plaintiffs' Memorandum in Support of Motion for Entry of Judgment Order, Doc. No. 40, at 8 n.7 (July 27, 2018); *see* Def. Br. at 4.

[7] The parties also discussed the court's suggested "double filing" remedy, *see Tabacos I*, at *9, but determined that the resulting benefit would be outweighed by the increased burden on both Plaintiffs and the Government, *see* Def. Br. at 4; Pl. Br. at 4 n.3.

that the final rules would be published and effective by the end of the transition period on February 23, 2018.[8] Conf. 2. The Court expressed continued concern that the importing public would not have the benefits that should have been available during the transition period nor would it have any useful notice prior to the implementation of the new regulations, if the regulations were not published well before the expiration of the transition period. *Id.* With this in mind, the court ordered parties to propose a joint order establishing which NPRM provisions needed to be made effective to address the drawback claims at issue so that the court could order those effective as final regulations on a specified date. *Id.*

JURISDICTION AND STANDARD OF REVIEW

As discussed in further detail in *Tabacos I*, the court has jurisdiction over this action under:

> 28 U.S.C. § 1581(i)(4) as it relates to 28 U.S.C. § 1581(i)(1). Together, these statutes grant the court "jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for--administration and enforcement with respect to [, *inter alia*, import revenues]." 28 U.S.C. § 1581(i)(1), (i)(4). Plaintiffs challenge CBP's "administration and enforcement" of the duty drawback provisions, which are a feature of import revenue collection.

Tabacos I, at *3; *see also id.* at *4. In reviewing agency action under the Administrative Procedure Act ("APA"), the court will uphold Defendants' actions unless, *inter alia*, they are "found to be-- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." 5 U.S.C. § 706(2) (2012); *see also Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 18 C.I.T. 754, 758–59, 861 F. Supp. 121, 127 (1994), *aff'd*, 59 F.3d 1219 (Fed. Cir. 1995). The court will furthermore "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1).

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[8] In a written order to the parties, the Court raised the issued whether any regulations might need to be published 60 days prior to their effective date in order to comply with section 5 U.S.C. § 801. Order Doc. No. 51 at 2 (Sept. 21, 2018). During the conference, the Government asserted that the NPRM falls under the 5 U.S.C. § 808 good cause exception to this publishing rule and the NPRM specifies that the regulation will become effective upon publication, except for a limited set of provisions regarding the drawback of excise taxes. *See Modernized Drawback*, 83 Fed. Reg. 37,886, 37,920 (CBP & Treasury, Aug. 2, 2018).

DISCUSSION

Plaintiffs request that the court order Defendants to publish selected portions of the NPRM which implement TFTEA Section 906 as an IFR. Pl. Br. at 2; Supplement to Plaintiffs' Motion for Entry of Judgment, Doc. No. 41–1, at 7 (Aug. 3, 2018) ("Pl. Supp. Br.") (listing specific draft regulations which would accomplish this). Plaintiffs contend that drawback calculation regulations must be in force for Defendants to satisfy their obligations under TFTEA § 906(g). *See* Pl. Br. at 7. In order to achieve this, Plaintiffs first contend that the court can and should find "good cause," within the meaning of 5 U.S.C. § 553(b)(B), to dispense with the APA's standard notice and comment procedures. *See* Pl. Br. at 9–15.

The Government, on the other hand, has renewed its earlier contention that Plaintiffs are essentially seeking a writ of mandamus, Def. Br. at 2 n.1. As in *Tabacos I*, however, the court is not persuaded that this action, which states a claim under the APA, should be analyzed as seeking a writ of mandamus. *See Tabacos I*, at *8 n.11. Writs of mandamus are only proper in the "absence of an adequate alternative remedy." *Timken Co. v. United States*, 893 F.2d 337, 339 (Fed. Cir. 1990); *see also* 28 U.S.C. § 2643(c)(1) (1993).[9] The U.S. Court of Appeals for the Seventh Circuit has stated that "[the APA] authorizes district courts to 'compel agency action unlawfully withheld or unreasonably delayed' without the need of a separate action seeking mandamus." *Valona v. U.S. Parole Com'n*, 165 F.3d 508, 510 (7th Cir. 1998) (quoting 5 U.S.C. § 706(1)). Where claims for relief may qualify under either the APA or 28 U.S.C. § 1361, various Circuit Courts of Appeals have likewise analyzed such claims under the APA. *See Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1268 (11th Cir. 2011); *Stehney v. Perry*, 101 F.3d 925, 934 (3d Cir. 1996); *Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir.

[9] Alternatively, were the APA not to supply an "adequate alternative remedy," the court would find the other elements of the mandamus test to be satisfied. A plaintiff must demonstrate "(1) a clear duty on the part of the defendant to perform the act in question; (2) a clear right on the part of the plaintiff to demand the relief sought." *Timken*, 893 F.2d at 339. As discussed *infra* in Section I, Defendants have a duty to publish certain regulations under TFTEA § 906(g). The contours of this duty are clear, non-discretionary, and not subject to any unfulfilled prerequisites. Defendants' statutory violation is current and ongoing. Additionally, given the paralysis and confusion which would result were the regulations required by TFTEA § 906(g) not in force significantly before the end of the transition year, and given the loss of the benefit of claim processing under the new statute during the transition period, Plaintiffs have clearly established their right to this "extraordinary remedy." *In re Vistaprint Ltd.*, 628 F.3d 1342, 1344 (Fed. Cir. 2010).

1997); *see also Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986) (characterizing a mandamus claim as "in essence" one seeking action under APA Section 706(1)).[10]

The court is persuaded by these decisions and accordingly will apply the APA. In doing so, the court must determine: (1) if and how Defendants have not satisfied their obligations under TFTEA § 906; (2) to the extent issuance of an IFR is the proper course and whether the court has power to order publication of an IFR based on a judicial finding of "good cause;" and (3) to the extent it is unnecessary or impossible to order the issuance of an IFR, what other relief the court may order.

I. Defendants' Obligations under the TFTEA and other Applicable Drawback Laws

As discussed at length in *Tabacos I*, Defendants failed to comply with the mandate of TFTEA §906(g):

> The TFTEA states: "Not later than the date that is 2 years after the date of the enactment of the [TFTEA], the Secretary [of the Treasury] shall prescribe regulations for determining the calculation of amounts refunded as drawback under this section." TFTEA § 906(g)(l)(2)(A). The date two years after the TFTEA's enactment was February 24, 2018 . . . , drawback calculation regulations have still not been published.

Tabacos I, at *7. The court then concluded that implementing regulations had been withheld in violation of law. *Id.* at *8. To the extent that Defendants now argue that the regulatory "prescription" required by TFTEA § 906(g) is satisfied by the NPRM, the court is unconvinced. The NPRM merely contains proposed regulations. *See* Def. Br. at 9. It is well-established that "proposed regulations . . . have no legal effect." *United States v. Springer*, 354 F.3d 772, 776 (8th Cir.

[10] Cases previously cited by Defendants do not concern the interplay between writs of mandamus and injunctive relief sought under the APA, and do not compel a different result. *See* Defendants' Memorandum in Support of its Motion to Dismiss and Opposition to Plaintiffs' Motion for Preliminary Injunction, Doc. No. 23–1, at 35 (Apr. 13, 2018) (citing *Timken Co.*, 893 F.2d at 339–42 (granting a writ of mandamus to compel the U.S. Department of Commerce to publish notice of an adverse decision of the U.S. Court of International trade in the Federal Register, as required by 19 U.S.C. § 1516a(e) (1988), and finding that injunctive relief under 19 U.S.C. § 1516a(c)(2) is not an adequate alternative); *Cheney v. United States Dist. Court for Dist. Of Columbia*, 542 U.S. 367, 378 (2004) (remanding for consideration of a mandamus claim seeking to compel compliance with procedural and disclosure requirements of the Federal Advisory Committee Act)); *see also In re Cheney*, 334 F.3d 1096, 1113 n.1 (D.C. Cir. 2003), *vacated and remanded sub nom. Cheney*, 542 U.S. 367 (2004) (decision below, finding that the APA did not apply because the advisory committee whose actions plaintiffs challenged was not an "agency" within the meaning of the APA); *Timken Co. v. United States*, 715 F. Supp. 337, 338 (CIT 1989), *aff'd*, 893 F.2d 337 (Fed. Cir. 1990) (decision below, impliedly finding that 19 U.S.C. § 1516a did not provide an adequate alternative remedy).

2004) (quoting *Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000)); *see also, e.g.*, *United States v. Utesch*, 596 F.3d 302, 310 (6th Cir. 2010); *United States v. Ryals*, 480 F.3d 1101, 1107 n.8 (11th Cir. 2007). The court concludes that TFTEA § 906(g) requires the adoption of legally enforceable regulations within the timeframe indicated.

Defendants reliance on provisions governing the transition period[11] and resolution through liquidation[12] are unavailing. *See* Def. Br. at 13–14. The ability to file under both the old and new statutes during the transition period pre-supposed regulations in place that would make clear what technical compliance the new statute required and would allow accelerated drawback under the new statute, as well as the old. Further, the right to liquidation within a certain time period does not give plaintiffs the benefits they should have pre-liquidation.[13] Both these provisions are irrelevant to this dispute as it now stands.

II. Whether the Issuance of an IFR is Appropriate at this Stage in the Proceedings

As the government has both elicited and received comments from the public through notice and comment procedures, the court finds that considerations regarding good cause needed for an agency to promulgate a pre-notice and comment interim regulation moot. *See* 5 U.S.C. § 553. Even if this issue were not moot, the court is not convinced that 5 U.S.C. § 553 applies to remedies a court finds necessary in the face of a statutory violation. Rather, it governs discretionary agency action. Thus, the court understands that the proper course of action is not to order publication of an IFR, but to provide an alternative form of relief.

III. Whether the APA Provides Alternative Relief to Address Defendants' Unlawful Delay.

Under the APA, "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702 (1976). The court has already determined that the IGD itself constituted final

[11] Defendants rely on 5 U.S.C. § 906(q) which states, in relevant part: "During the one-year period beginning on the date that is 2 years after the date of the enactment of this Act, a person may elect to file a claim for drawback under— (A) section 313 of the Tariff Act of 1930, as amended by this section; or (B) section 313 of the Tariff Act of 1930, as in effect on the day before the date of the enactment of this Act." 5 U.S.C. § 906(q)(3).

[12] The relevant statute governing liquidation of entries or claims for drawback provides: "Except as provided in subparagraph (B) or (C), unless an entry or claim for drawback is extended under subsection (b) or suspended as required by statute or court order, an entry or claim for drawback not liquidated within 1 year from the date of entry or claim shall be deemed liquidated at the drawback amount asserted by the claimant or claim. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated." 19 U.S.C. § 1505(a)(2)(A).

[13] In this context, liquidation is the final determination of a claim for drawback.

and reviewable agency action, *Tabacos I*, at *3–*4, and concluded that publication of the NPRM, which carries out the course of action prescribed by the IGD, *see* IGD at 15, still "operates to indefinitely dictate Plaintiffs' drawback rights under the TFTEA." *Tabacos I*, at *4. As discussed *supra*, the court has already determined that the agencies' failure to timely promulgate regulations governing TFTEA drawback calculation is not in accordance with law and that any further delay causes continuing detriment to importers, including plaintiffs.

The APA provides: "To the extent necessary to decision and when presented, the reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see also Tabacos I*, at *8. The court considers that continued delay in promulgating the NPRM, despite the court's clear directive in *Tabacos I*, the fast-approaching end of the transition year, and the agencies' unwillingness to coordinate and propose a schedule that allows for useful notice to importers for final preparation of claims under the new statute and receipt of payment in advance of liquidation as provided by regulation,[14] requires court action.

IV. Which Portions of the NPRM Correspond to Section 906 and are Necessary to Finalized Drawback Regulations

As indicated, after a status conference on October 2, 2018, the court ordered parties to confer and draft an order specifying which portions of the NPRM needed to be promulgated in order to implement the regulations required by TFTEA § 906(g). The parties were unable to come to an agreement and instead proposed two separate orders. The Plaintiff objects to the scope of the order proposed by the government. The government asserts that the entire rules package must be promulgated to avoid administrative problems. The Court defers to the government on this matter. As the Court, however, finds neither of the proposed orders entirely acceptable, it has modified the government's proposed order.

CONCLUSION

Plaintiffs' Motion for Entry of Judgment is **GRANTED** in part.

Dated: October 12, 2018
New York, New York

/*s*/*Jane A. Restani*
JANE A. RESTANI, JUDGE

[14] Once accelerated payment regulations applicable to "TFTEA-Drawback" claims become operational, that is the calculation regulations are in effect, CBP shall process the delayed claims seeking accelerated payments as soon as possible.

Slip Op. 18–138

TABACOS DE WILSON, INC., TOBACCO RAG PROCESSORS, INC., BROWN-USA, INC., NIPPON AMERICA GROUP/OKURA USA INC., SKATE ONE CORPORATION, ALLIANCE INTERNATIONAL, CHB, INC., C.J. HOLT & COMPANY, INC., and CUSTOMS ADVISORY SERVICES, INC., Plaintiffs, v. UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, STEVEN T. MNUCHIN, in his Official Capacity as Secretary of the Treasury, and ACTING COMMISSIONER KEVIN K. MCALEENAN, in His Official Capacity as Commissioner, U.S. CUSTOMS & BORDER PROTECTION, DEFENDANTS.

Before: Jane A. Restani, Judge
Court No. 18–00059

ORDER

Upon consideration of the parties' claims and arguments, upon all filings and proceedings had in this action, and upon due deliberation; it is hereby

ORDERED that, on or before December 17, 2018, the United States shall file with the Office of the Federal Register (*see* 44 U.S.C. § 1503) the final rule developed pursuant to the notice announced in *Modernized Drawback*, 83 Fed. Reg. 37,886 (Dep't of the Treasury Aug. 2, 2018); and it is further

ORDERED that the final rule filed pursuant to the preceding paragraph shall become effective on the day of its filing with the Office of the Federal Register, except that the provisions related to drawback of excise taxes, denoted as 19 C.F.R. §§ 190.22(a)(1)(C), 190.32(b)(3), 191.22(a), 191.32(b)(4), and 191.171(d) in the proposed rule, may become effective 60 days after publication in the Federal Register as noted in the text of the proposed rule.

ORDERED that the government may, in its discretion, choose to withhold from promulgation on December 17, 2018, any of the provisions beyond those listed in plaintiffs' proposed order.

Dated: October 12, 2018
New York, New York

/*s*/*Jane A. Restani*
JANE A. RESTANI, JUDGE

Slip Op. 18–139

UNITED STATES STEEL CORPORATION et al., Plaintiff and Consolidated Plaintiffs, and MAVERICK TUBE CORPORATION et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and MAVERICK TUBE CORPORATION et al., Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 14–00263

[Granting in part Plaintiff's motion for enforcement of judgment and instructing Commerce to issue a revised Timken Notice.]

Dated: October 17, 2018

Luke A. Meisner, Schagrin Associates, of Washington, DC, for Plaintiff and Consolidated Defendant-Intervenor United States Steel Corporation.

Lizbeth R. Levinson and *Ronald M. Wisla*, Fox Rothschild LLP, of Washington, DC, for Consolidated Plaintiffs GVN Fuels Limited, Maharashtra Seamless Limited, and Jindal Pipes Limited.

Alan Hayden Price, *Adam Milan Teslik*, *Laura El-Sabaawi*, and *Robert Edward DeFrancesco, III*, Wiley Rein, LLP, of Washington, DC, for Plaintiff-Intervenor and Consolidated Defendant-Intervenor Maverick Tube Corporation.

Roger Brian Schagrin, *Christopher Todd Cloutier*, *John Winthrop Bohn*, and *Paul Wright Jameson,* Schagrin Associates, of Washington, DC, for Plaintiff-Intervenors and Consolidated Defendant-Intervenors Boomerang Tube LLC, Energex Tube, Tejas Tubular Products, TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc.

Justin Reinhart Miller, Senior Trial Counsel, U.S. Department of Justice, Civil Division, International Trade Field Office of New York, NY, for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director, of Washington, DC. Of counsel on the brief was *Reza Karamloo*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court is United States Steel Corporation's ("U.S. Steel" or "Plaintiff") motion to enforce the judgment issued in *United States Steel Corp. v. United States*, 41 CIT __, 219 F. Supp. 3d 1300 (2017) ("*U.S. Steel II*"). *See* Mot. to Enforce J., June 19, 2018, ECF No. 154. U.S. Steel contends that the U.S. Department of Commerce ("Department" or "Commerce") failed to recalculate the "all-others rate" pursuant to section 735(c)(5)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(c)(5)(A) (2012), after Commerce altered the dumping margins for mandatory respondents in its Final Results of Redetermination Pursuant to Remand, Aug. 31, 2016, ECF No. 114 ("*Remand Results*"), and this court sustained Commerce's *Remand Results*.[1] *See U.S. Steel II*, 41 CIT __, __, 219 F. Supp. 3d 1300, 1325 (2017). U.S. Steel requests that the court enforce the judgment in *U.S. Steel II* by requiring Commerce to recalculate the all-others rate based on the revised dumping margins. Mot. to Enforce J. at 2. The United States ("Defendant") opposes, arguing, inter alia, that Commerce fully effectuated the court's judgment in *U.S. Steel II*. Def.'s Resp. Opp. Pl.'s Mot. for Enforcement of the Court's J. at 6, July 27, 2018, ECF No.

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, unless otherwise specified.

158 ("Def.'s Br."). For the reasons that follow, U.S. Steel's motion is granted in part, and Commerce will issue a revised Timken notice either reconsidering or further explaining its determination.

BACKGROUND

Commerce initiated the underlying antidumping duty ("ADD") investigation of certain oil country tubular goods ("OCTG") from India on July 29, 2013. *See Certain [OCTG] from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam*, 78 Fed. Reg. 45,505, 45,506–12 (Dep't Commerce July 29, 2013) (initiation of [ADD] investigations). Commerce published a final affirmative determination in the investigation on July 18, 2014, *see Certain [OCTG] From India*, 79 Fed. Reg. 41,981 (Dep't Commerce July 18, 2014) (final determination of sales at less than fair value and final negative determination of critical circumstances) ("*Final Results*"), and issued the initial ADD order on September 10, 2014. *See Certain [OCTG] from India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 53,691 (Dep't Commerce Sept. 10, 2014) ([ADD] orders) ("*ADD Order*").

The rates set for respondents Jindal SAW Ltd. ("Jindal SAW") and GVN Fuels Limited ("GVN") were challenged before this court. *See, e.g.*, Compl. ¶¶ 19, 25, Nov. 10, 2014, ECF No. 9; Summons, Oct. 10, 2014, ECF No. 1. No party challenged the all-others rate. The court remanded several issues for further consideration or explanation, *see United States Steel Corp. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1114, 1156 (2016) ("*U.S. Steel I*"), and Commerce issued the results of its remand redetermination pursuant to the remand order in *U.S. Steel I* on August 31, 2016. *See Remand Results*. The court sustained Commerce's *Remand Results* in *U.S. Steel II*. *See U.S.* Steel II, 41 CIT at __, 219 F. Supp. 3d at 1325.

To conform the *Final Results* with the court's decisions in *U.S. Steel I* and *U.S. Steel II*, Commerce published a notice in the Federal Register announcing a court decision not in harmony with a prior determination (also referred to as a "Timken Notice") and amended the *Final Results*.[2] *See Certain [OCTG] From India*, 82 Fed. Reg. 17,631 (Dep't Commerce Apr. 12, 2017) (notice of court decision not in

[2] The Timken Notice stems from *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), as clarified by *Diamond Sawblades Mfrs. Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010), where the Court of Appeals for the Federal Circuit clarified the requirements of 19 U.S.C. § 1516a(c)(1). Commerce must notify the public when a court's final judgment in a case is "not in harmony" with an original agency determination, and Commerce will suspend liquidations to ensure that post-notice entries are liquidated at a rate consistent with a conclusive court decision. *Timken Co.*, 893 F.2d at 341.

harmony with final determination of sales at less than fair value and final negative determination of critical circumstances and notice of amended final determination) ("*Amended Final Results*"). Although the *Amended Final Results* lists new rates for the mandatory respondents, it makes no reference to the all-others rate. Subsequently, on June 20, 2017, Commerce published an amendment to the *ADD Order*, listing the estimated weighted-average dumping margins for Jindal SAW at 11.24% and for all others at 5.79%.[3] *See Certain [OCTG] From India*, 82 Fed. Reg. 28,045, 28,046 (Dep't Commerce June 20, 2017) (amendment of [ADD] order) ("*Amended ADD Order*").

Following the publication of the *Amended ADD Order*, counsel for U.S. Steel contacted Commerce and requested that Commerce revise the all-others rate based on the revised dumping margins calculated for GVN and Jindal SAW that were sustained by this court. *See United States Steel Corp. v. United States*, 42 CIT __, __, 319 F. Supp. 3d 1295, 1298–99 (2018) ("*U.S. Steel III*") (citing to U.S. Steel's submission); *see also* 19 U.S.C. § 1673d(c)(5)(A) ("the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins . . . .") Commerce responded that the *Amended ADD Order* "fully effectuate[s] the court's affirmed remand." *See id.* (citing to Commerce's response).

On July 20, 2017, U.S. Steel commenced suit in this court challenging the all-others rate published in the *Amended ADD Order*. *See U.S. Steel III*, 42 CIT at __, 319 F. Supp. 3d at 1295. The court granted the defendant's motion to dismiss, holding, inter alia, that U.S. Steel's claim was precluded because U.S. Steel could have challenged the all-others rate at the time it challenged the individual respondents' rates in *U.S. Steel I*. *See id.* at 9–10. The court explained that U.S. Steel had all of the facts it required to seek a change to the all-others rate in *U.S. Steel I* and *U.S. Steel II*, and therefore could have sought a change to the all-others rate in addition to challenging the mandatory respondents' rates. *See id.* at 9–10. As a result, U.S. Steel's challenge to the all-others rate was merged into the *U.S. Steel II*

[3] In the *Final Results*, the all-others rate was 5.79%, an average of the calculated weighted-average dumping margins for Jindal SAW (9.91%) and GVN (2.05%). *See Final Results*, 79 Fed. Reg. at 41,982. As a result of modifications pursuant to *U.S. Steel I* and *U.S Steel II*, Commerce revised Jindal SAW's weighted-average dumping margin to 11.24% and GVN's weighted-average dumping margin to 1.07% (de minimis) in the *Amended Final Results*. *See Amended Final Results*, 82 Fed. Reg. at 17,631. Had Commerce recalculated the all-others rate following the decision in *U.S. Steel II*, the all-others rate would have increased to 11.24%, since GVN's de minimis rate would have been excluded. *See* 19 U.S.C. § 1673d(c)(5)(A) (providing that the all-others rate should equal the weighted average of the estimated weighted average dumping margins established for exporters individually investigated, excluding any zero and de minimis margins).

judgment. *Id.* at 10. The court explained that U.S. Steel, "in essence, contends that the judgment in *U.S. Steel II* required Commerce to recalculate the all-others rate," and that if U.S. Steel believes that the *U.S. Steel II* judgment requires such action by Commerce, U.S. Steel may seek to enforce the judgment issued in *U.S. Steel II*. *Id.* at 10–11. U.S. Steel brought the present motion seeking to compel Commerce to recalculate the all-others rate. Mot. to Enforce J. at 2.

U.S. Steel makes several arguments in support of its assertion that enforcement of the *U.S. Steel II* judgment requires Commerce to recalculate the all-others rate. First, U.S. Steel argues that 19 U.S.C. § 1673d(c)(5)(A) requires that Commerce recalculate the all-others rate when the dumping margins for mandatory respondents change in the course of judicial review. Pl. [U.S. Steel's] Br. Supp. Mot. Enforce J. at 6, June 19, 2018, ECF No. 154 ("Pl.'s Br."). Second, U.S. Steel argues that Commerce's determination of the all-others rate contravenes the line of cases holding that Commerce may not rely on dumping margins that have been invalidated by the courts. *Id.* at 6. Third, U.S. Steel argues that Commerce's determination of the all-others rate in the *Amended ADD Order* departed from Commerce's established practice of revising the all-others rate after its final remand determination is sustained by the court. *Id.* at 6–7.

JURISDICTION AND STANDARD OF REVIEW

The court has inherent authority to enforce its own judgments. *See B.F. Goodrich Co. v. United States*, 18 CIT 35, 36, 843 F. Supp. 713, 714 (1994). This authority includes the "power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments." *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996). The court will grant a motion to enforce a judgment "when a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it, even if the noncompliance was due to misinterpretation of the judgment." *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004); *GPX Int'l Tire Corp. v. United States*, 39 CIT __, __, 70 F. Supp. 3d 1266, 1272 (2015).

DISCUSSION

When Commerce conducts an ADD investigation and makes an affirmative determination, it calculates the "estimated weighted average dumping margin for each exporter and producer individually investigated," ("mandatory respondent rates") as well as an estimated all-others rate for those exporters and producers not individually examined. *See* 19 U.S.C. § 1673d(c)(1)(B)(i). The all-others rate is the weighted average of the mandatory respondent rates, excluding

any zero and de minimis rates. 19 U.S.C. § 1673d(c)(5)(A). Parties may challenge Commerce's findings made in an ADD investigation before this court, *see* 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), and this court in some cases will remand Commerce's findings for further consideration. Commerce, pursuant to a remand order, may alter its methodology in a manner that affects the calculation of the mandatory respondent rates, as Commerce did in its *Remand Results* pursuant to the remand order in *U.S. Steel I*. *See Remand Results* at 51–52. Because the all-others rate is a function of the mandatory respondent rates, a change to the mandatory respondent rates implicates the all-others rate. The question before the court is whether enforcement of a judgment sustaining Commerce's *Remand Results*, which involves changes to the mandatory respondent rates but contains no mention of the all-others rate, requires that Commerce also revise the all-others rate.

The court finds that Commerce has a practice of revising the all-others rate when mandatory respondent rates change in the course of judicial review, even when the plaintiff does not raise a challenge to the all-others rate in its complaint or during remand proceedings. Agency action becomes an established practice "when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to" the agency's past action. *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1295, 1312 (2017) (quoting *Ranchers–Cattlemen Action Legal Found v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999)). The court has held that "two prior determinations are not enough to constitute an agency practice that is binding on Commerce." *Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 1293 n.23, 435 F. Supp. 2d 1261, 1282 n.23 (2006). On the other hand, a methodology utilized by Commerce in five consecutive stages of an antidumping proceeding constituted an agency practice. *See Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 422 (1992). Similarly, the court has found that a methodology used not exclusively but "repeatedly and regularly" constituted a binding agency practice. *See Huvis Corp. v. United States*, 31 CIT 1803, 1811, 525 F. Supp. 2d 1370, 1379 (2007) (holding that Commerce established a practice of testing the arm's-length nature of a transfer price for purposes of 19 U.S.C. § 1677e (2000) by repeatedly accepting cost of production data alone when market price data was not available).

As recently as May 11, 2018, Commerce acknowledged that its practice is to revise the all-others rate when the mandatory respondent rates change in the course of judicial review. Final Results of

Redetermination Pursuant to Court Remand in *Hyundai Steel Co. v. United States* at 15, Court. No. 16–00161, May 11, 2018, ECF No. 80–1 ("*Hyundai Remand Results*"). In its *Hyundai Remand Results*, after making changes to its methodology which altered the mandatory respondent rates, Commerce explained its practice with respect to the all-others rate:[4]

> Although no party has challenged the all others rate in this proceeding, it does not follow that Commerce has no authority to adjust this rate in this remand proceeding. We regard adjusting the all others rate as a consequential (*i.e.,* collateral) change properly within the scope of the litigation. If the Court affirms this remand redetermination and Commerce consequently issues an amended final determination effectuating this remand redetermination, it will be governed by section 735 of the Act, which provides for both the determination of weighted-average dumping margins for individually investigated respondents and an all others rate that, as a general rule, derives from the weighted-average dumping margins determined for the individually investigated respondents. Therefore, because we intend to change the all others rate in any future amended final determination issued pursuant to this litigation, we are announcing this intent now. Provided the statutory scheme in section 735 of the Act, we do not agree with the petitioner that adjusting the all others rate within this remand proceeding in accordance with the change made to [respondent's] calculated margin is outside the scope of the remand proceeding.[5]

Hyundai Remand Results at 15. Commerce, therefore, affirmed that its practice is to revise the all-others rate when the mandatory

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[4] U.S. Steel made the opposite argument before Commerce in *Hyundai Steel Co. v. United States*, 42 CIT __, Slip Op. 18–2 (Jan. 10, 2018) that it makes here, arguing that Commerce should not revise the all-others rate when mandatory respondent rates change pursuant to judicial review, where the all-others rate was not raised as a legal issue. *See* Final Results of Redetermination Pursuant to Court Remand at 15, May 11, 2018, ECF No. 80–1 (addressing U.S. Steel's argument that Commerce should not recalculate the all-others rate on remand). Although U.S. Steel has shifted its position on this matter across cases, this shift does not preclude the court from finding (in part) for U.S. Steel here. The question before the court is whether Commerce acted in accordance with the law, which includes the requirement that Commerce adhere to its established practice, as well as the requirement that it not act in an arbitrary manner. 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* Administrative Procedure Act, § 706, 5 U.S.C. § 706 (2012).

[5] To the extent that Commerce intends this explanation to mean that 19 U.S.C. § 1673d(c)(5)(A)'s obligations only come into play when Commerce announces that it intends to change the all-others rate in an amended final determination, this position is unavailing. Such a position is circular, arbitrary, and it belies Commerce's established practice of revising the all-others rate whenever individually examined respondent rates change pursuant to judicial review.

respondent rates change in the course of judicial review, even when the all-others rate is not specifically raised in the plaintiff's complaint or during remand proceedings.

Examination of Commerce's prior determinations also shows that its practice is to revise the all-others rate in accordance with changes to the mandatory respondent rates, even if not requested to do so in a complaint. For example, in [*OCTG] From Turkey*, Commerce revised the all-others rate after the mandatory respondents' rates changed pursuant to remand. See *[OCTG] From Turkey* (notice of court decision not in harmony with the final determination of the countervailing duty investigation), 81 Fed. Reg. 12,691 (Dep't Commerce Mar. 10, 2016). There, as here, the all-others rate was the average of the two mandatory respondent rates. *Id.* at 12,692. The mandatory respondents' rates were challenged in separate actions before this court, and this court remanded the cases to Commerce. *See Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. and Borusan Istikbal Ticaret v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1306 (2015); *Maverick Tube Corporation v. United States*, 39 CIT __, Slip Op. 15–59 (June 15, 2015). The cases were consolidated, and on remand, Commerce modified the rates for both mandatory respondents, with one rate decreasing to a level considered de minimis. *See* Final Results of Remand Redetermination, (Aug. 31, 2015), *available at* https://enforcement.trade.gov/remands/15–59.pdf (last visited Oct. 12, 2018). Commerce did not announce a revised all-others rate during remand proceedings, and the court sustained Commerce's remand redetermination without mentioning the all-others rate in its opinion. *See Maverick Tube Corporation v. United States*, 40 CIT __, Slip Op. 16–16 (Feb. 22, 2016). In its Timken Notice, Commerce revised the all-others rate to match the rate of the sole remaining non de minimis rate—that of respondent Borusan. [*OCTG] From Turkey*, 81 Fed. Reg. at 12,692. Commerce explained that:

> Section 705(c)(5)(i) of the Act stipulates that the 'all others' rate should exclude zero and *de minimis* rates calculated for the companies individually investigated. Therefore, for purposes of this amended Final Determination, [Commerce] will instruct [Customs and Border Protection] that the 'all-others' cash deposit rate is to be amended to Borusan's revised calculated subsidy rate . . .

Id.[6] Commerce adjusted the all-others rate, despite the fact that none of the parties challenged the all-others rate specifically in their complaints, and Commerce did not discuss the rate in its final remand redetermination.

Commerce revised the all-others rate under similar circumstances in other proceedings as well. *See* Final Results of Redetermination Pursuant to Court Remand in *Ozdemir Boru San. Ve Tic. Ltd. Sti. v. United States* at 6–7, Consol. Court. No. 16–00206, Dec. 12, 2017, ECF No. 59 (revising the all-others rate where the mandatory respondent rates changed, and where the all-others rate was not raised in the complaint); Final Results of Redetermination Pursuant to Court Remand in *Rebar Trade Action Coalition v. United States* at 45, Consol. Court. No. 14–00268, Jan. 13, 2017, ECF No. 109–1 (revising the all-others rate to match the adjusted rate of the only mandatory respondent with a non de minimis weighted average dumping margin, where the all-others rate was not raised in the complaint); *Stainless Steel Sheet and Strip in Coils From Germany*, 67 Fed. Reg. 15,178 (Dep't Commerce Mar. 29, 2002) (amended final determination of antidumping duty investigation) (revising the all-others rate pursuant to the court sustaining Commerce's remand redetermination during which a mandatory respondent's rate changed, where the plaintiff did not raise the all-others rate in the complaint); *Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands*, 61 Fed. Reg. 47,871 (Dep't Commerce Sept. 11, 1996) (amended final determination pursuant to CIT decision) (revising the all-others rate pursuant to the court sustaining Commerce's remand redetermination which resulted in a change to the mandatory respondent's rate, where plaintiff did not raise the all-others rate in its complaint). Each of these proceedings together make up a practice such that a party could "reasonably . . . expect adherence to" the agency's past action. *Ranchers–Cattlemen Action Legal Found v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999).

Defendant argues that Commerce does not have an established practice of revising the all-others rate after the court upholds Commerce's remand redeterminations, and attempts to distinguish [*OCTG] From Turkey*, 81 Fed. Reg. 12,691, by pointing out that it involved a plaintiff that was not selected as a mandatory respondent,

[6] Section 705(c)(5)(i) of the Act, as amended, 19 U.S.C. § 1671d(c)(5)(A)(i), provides the general rule for calculating the all-others rate in countervailing duty investigations. The statute provides the same formula as 19 U.S.C. § 1673d(c)(5)(A).

i.e., a plaintiff subject to the all-others rate.[7] *See* Def.'s Br. at 14–17. Defendant maintains that the involvement of a plaintiff subject to the all-others rate served to implicitly raise—since the all-others plaintiff did not expressly raise the issue in its complaint—the issue of the all-others rate's accuracy. Def.'s Br. at 15. The court is not persuaded. Even if the involvement of an all-others plaintiff serves to implicitly raise the issue of the all-others rate's accuracy, Commerce has not, in practice, utilized the presence of an all-others plaintiff as the dispositive factor. The facts of [*OCTG] From Turkey* may be distinct, but Commerce regularly revises the all-others rate upon a change to the mandatory respondent rates in the course of judicial review, regardless of whether the case involves an all-others plaintiff. *See, e.g.*, *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey*, 83 Fed. Reg. at 11,174; *Stainless Steel Sheet and Strip in Coils From Germany*, 67 Fed. Reg. at 15,178; *Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands*, 61 Fed. Reg. at 47,871. The manner in which Commerce revised the all-others rate in each of these proceedings belies the notion that [*OCTG] From Turkey* turned solely on the fact that an all-others plaintiff participated in the litigation.

Defendant points out that in Commerce's ADD investigation into OCTG from Turkey, *Certain [OCTG] From the Republic of Turkey*, 81 Fed. Reg. 36,876 (Dep't Commerce June 8, 2016) (notice of court decision not in harmony with the final determination of the less than fair value investigation and notice of amended final determination of sales at less than fair value), Commerce did not revise the all-others rate following a remand in which Commerce modified the mandatory respondent rates. Def.'s Br. at 16. Defendant argues that this outcome demonstrates that Commerce does not have an established practice, and that U.S. Steel could not have relied on Commerce adhering to its practice, since U.S. Steel participated in litigation related to the above determination. Def.'s Br. at 16 (*citing Maverick Tube Corp. v. Toscelik Profil ve Sac Endustrisi A.S.*, 861 F.3d 1269, 1269 (Fed. Cir. 2017), to show U.S. Steel's participation). One example of an alternative result is not sufficient to show a lack of practice, when a host

[7] Defendant also argues that if Commerce has a practice of recalculating the all-others rate, its practice is to publish the revised rate in an amended final determination accompanying a Timken Notice, and because Commerce did not do that here, it would contravene its practice to publish another amended order with a revised all-others rate. Def.'s Resp. Opp. Pl.'s Mot. Enforce J. at 17–18, July 27, 2018, ECF No. 158. This argument, at its core, amounts to claiming that Commerce's practice is to revise the all-others rate, when it tells the parties that it will do so. Such an approach would be standardless and therefore arbitrary. The practice dictates the Timken Notice; the Timken notice does not dictate the practice. Commerce must maintain a consistent practice, explain why it reasonably chose to deviate here, or announce a change in practice.

of determinations show Commerce reaching a different result. *See, e.g.*, *Huvis Corp. v.* United States, 31 CIT at 1811, 525 F. Supp. 2d at 1379 (for an example of a case where Commerce established a practice by "repeatedly and regularly" utilizing a methodology, though not exclusively). Moreover, the lack of a motion to enforce judgment in *Maverick Tube Corp.* does not preclude a finding that Commerce has a practice and departed from it here.

Although Plaintiff argues successfully that Commerce has a practice of revising the all-others rate, Plaintiff's other arguments fail. Plaintiff argues that Commerce's determination of the all-others rate contravenes the long-standing principle that Commerce may not rely on dumping margins that have previously been invalidated by the courts. *See* Pl.'s Br. at 6 (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1410 (Fed. Cir. 1997); *D & L Supply Co. v. United States*, 113 F.3d 1220, 1221 (Fed. Cir. 1997); *Ferro Union, Inc. v. United States*, 23 CIT 178, 204, 44 F. Supp. 2d 1310, 1335 (1999)). The cases cited by Plaintiff do not control here.[8]

The issue in *D & L Supply* was whether Commerce could continue relying on, as best information available ("BIA"), an antidumping duty rate from a prior review that was found to be invalid by this court. *D & L Supply*, 113 F.3d at 1222–24. The court held that by refusing to adjust the rate, Commerce did not follow its statutory directive to rely on the BIA to calculate an accurate dumping margin. *Id.* at 1223. The court's holding in *D & L Supply*, therefore, applies to situations in which Commerce relies on a rate from a separate review that has been declared invalid. *See id.* at 1224 ("when the dumping margin on which the BIA rate is based is invalidated before the BIA rate has become final, it is irrational to ignore the invalidity of the underlying rate . . . ."). Here, by contrast, Commerce based the all-others rate on the estimated dumping margins assigned to the two mandatory respondents in this review. The mandatory respondent rates had not been declared invalid, as they were determined pursuant to this review. The question here is not whether Commerce relied on valid rates to calculate the all-others rate, but whether Commerce

[8] In *Ferro Union*, the court was asked to decide whether Commerce's selection of a dumping margin from a prior administrative review of the same order met Commerce's statutory obligation pursuant to 19 U.S.C. § 1677e(c) (1994) to corroborate secondary information. *See Ferro Union*, 23 CIT at 202–05, 44 F. Supp. 2d at 1332–35. The issue was whether the selected margin was relevant and reliable, notwithstanding that it "was calculated eight years prior to the relevant [period of review], and [] was calculated for another producer of the subject merchandise." *Id.*, 23 CIT at 204, 44 F. Supp. 2d at 1335. The court subsequently remanded the issue because Commerce did not explain the probative value of the rate, nor its connection to the relevant period of review and producer. *Id.*, 23 CIT at 205, 44 F. Supp. 2d at 1335. *Ferro Union* did not, therefore, present a case of Commerce relying on an invalidated rate, and is thus factually distinct from this case.

must recalculate an all-others rate once a mandatory respondent's rate changes as a result of judicial review. Therefore, Plaintiff's argument that Commerce contravened the principles established in *D & L Supply Co.* fails.[9]

Plaintiff also argues that 19 U.S.C. § 1673d(c)(5)(A) requires Commerce to recalculate the all-others rate when the mandatory respondent rates change. *See* Pl.'s Br. at 5–6. Defendant counters that U.S. Steel waived its claim by not raising the issue of the all-others rate in its complaint in *U.S. Steel I* or in the remand proceedings. Def.'s Br. at 8. Failure to raise and adequately develop a legal claim results in waiver. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990); *Home Products Int'l, Inc. v. United States*, 38 CIT __, __, 810 F. Supp. 2d 1373,1378 (2012); *MTZ Polyfilms, Ltd. v. United States*, 33 CIT __, __, 638 F. Supp. 2d 1325, 1350 (2009); *Fujian Lianfu Forestry Co., Ltd. v. United States*, 33 CIT __, __, 638 F. Supp. 2d 1325, 1350 (2009). U.S. Steel, in its complaint and ensuing brief pursuant to *U.S. Steel I*, raised several issues, each of which pertained to Commerce's methodology in its final determination and the propriety of respondents' dumping margins. *See* Mot. Pl. [U.S. Steel] J. Agency R. at 15–74, Mar. 23, 2015, ECF No. 31; Compl. ¶¶ 17–27, Nov. 10, 2014, ECF No. 9. Missing from U.S. Steel's argument, however, is any explanation of how these issues should affect Commerce's calculation of the all-others rate. U.S. Steel might have argued, as it did on this motion, that the plain language of 19 U.S.C. § 1673d(c)(5)(A) requires Commerce to recalculate the all-others rate when the mandatory respondent rates change. U.S. Steel made no such argument, however, in its complaint pursuant to *U.S. Steel I* or during the remand proceedings before Commerce. Defendant is therefore correct that U.S. Steel waived its claim that Commerce is required by statute to recalculate the all-others rate.[10]

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[9] Plaintiff cites *Sigma Corp. v. United States* for the same proposition, i.e., that Commerce cannot use a dumping margin that has been invalidated by the courts to calculate the all-others rate. *See* Pl.'s Resp. at 6 (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1410 (Fed. Cir. 1997)). Plaintiff's reliance on *Sigma* is equally unpersuasive. *Sigma* addressed two distinct issues: whether the plaintiffs preserved the issue of Commerce's use of a respondent's rate from a previous review as BIA, and whether Commerce correctly calculated that rate. *See Sigma*, 117 F.3d at 1411. With respect to the latter issue, the *Sigma* Court held that its holding in *D & L Supply Co.* controlled, since the same rate in the same ADD order was at issue. *See Sigma*, 117 F.3d at 1411–12 ("[w]ith respect to the merits, our decision in *D & L Supply* controls."). The preservation issue is discussed in detail below.

[10] To the extent that Plaintiff relies on *Sigma* to overcome the waiver obstacle, such reliance is unavailing. Although the plaintiffs in *Sigma* did not object to Commerce's use of the prior rate, the court found that the plaintiffs' complaint encompassed a challenge to the rate for other exporters. *See Sigma*, 117 F.3d at 1411. The complaint filed in *Sigma* referred to both the all-others rate and the margins applicable to the subject merchandise produced by the mandatory respondent and all other producers. *See Sigma*, 117 F.3d at 1411. Consequently,

Nonetheless, the issue before the court is what the judgment in *U.S. Steel II* required. The judgment required that Commerce act in accordance with law to effectuate the judgment. *See* 19 U.S.C. § 1516a(b)(1). In order to act in accordance with law, Commerce must follow its established practice or explain why it is reasonable for it to deviate from its practice. Where Commerce deviates from its practice, it has two options. First, Commerce may explain why it is reasonable under the circumstances to deviate from that practice. Second, Commerce may announce a change to its practice, unless the party in the instant case can be shown to have detrimentally relied on such practice. *See e.g.*, *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 386, 795 F. Supp. 417, 420 (1992) (holding that the plaintiff's reliance interest was sufficient to preclude Commerce from changing its methodology during the fifth and sixth reviews of the relevant ADD order); *Brother Industries, Ltd. v. United States*, 15 CIT 332, 338, 771 F. Supp. 374, 382 (1991) (noting that the purpose of prospective application of agency methodology is to avoid assigning a quality to conduct or acts already performed) (quoting *Union Pacific R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)). Because it is Commerce's practice to recalculate the all-others rate, it is of no moment that U.S. Steel failed to seek such relief in its complaint. Commerce must act in accordance with law to effectuate the judgment.

Defendant also argues that Commerce properly effectuated the court's decisions in *U.S. Steel I* and *U.S. Steel II*, *see* Def.'s Br. at 6, and that U.S. Steel's argument regarding the all-others rate asks the court to entertain "an entirely new legal argument challenging Commerce's final determination." *Id.* at 7. This argument sidesteps the question before the court, i.e., whether Commerce effectuated the court's judgment in *U.S.* Steel II. The court's judgment required that Commerce adjust the rates in accordance with law, or explain why it was deviating from its practice. Where Commerce has an established practice, such practice is part of the law Commerce must follow, unless it explains why it is reasonable to deviate from its practice or it changes its practice. *See Fed. Comm. Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (explaining that an agency must acknowledge when it changes its position and show good reasons for adopting the new position); *Huvis Corp. v. United States*, 570 F.3d 1347, 1354 (Fed. Cir. 2009). Commerce provided no such explanation, and therefore Commerce failed to "properly effectuate" the court's judgment.

Sigma held that the complaint demonstrated to the court's satisfaction that the importers' claim was preserved for review by both this Court and the United States Court of Appeals for the Federal Circuit. By contrast, the complaint filed here makes no similar reference.

Finally, Defendant argues that U.S. Steel failed to exhaust its administrative remedies by not raising the issue of the all-others rate before Commerce during the remand proceeding, and therefore the court should not consider the issue. Def.'s Br. at 12. This argument misses the mark. The court shall require exhaustion of administrative remedies where appropriate. 28 U.S.C. § 2637(d). Exhaustion typically requires that the party submit a case brief to the agency that presents all arguments that continue to be relevant to Commerce's final determination or results. *See* 19 C.F.R. § 351.309(c)(2) (2016). The exhaustion doctrine may not preclude judicial review, however, where a party raises an issue before the court that Commerce did not address until its final decision, as the party must have a full and fair opportunity to raise the issue before the agency. *See Qingdao Taifa Group Co., Ltd. v. United States*, 33 CIT 1090, 1093, 637 F. Supp. 2d 1231, 1236–37 (2009) (holding that a respondent did not have a fair opportunity to challenge two issues where Commerce's preliminary results were favorable to respondent and Commerce did not address the issue until after the deadline for case briefs passed for the first issue, and where Commerce did not address the second issue until the final results).

Here, Commerce issued its *Remand Results* on August 31, 2016. *See Remand Results*. Commerce did not list an all-others rate in its *Remand Results*. *See id.* Commerce first acknowledged that it would not adjust the all-others rate in accordance with the revised mandatory respondent rates in its *Amended ADD Order*, issued on June 20, 2017. *See Amended ADD Order*, 82 Fed. Reg. 28,045 (listing the all-others rate as 5.79%, the rate based on the dumping margins calculated for GVN and Jindal SAW Consol. pursuant to the *Final Results*). Thus, Commerce did not address the all-others rate until after the remand proceedings, and given Commerce's practice of revising the all-others rate, U.S. Steel had no reason to challenge the all-others rate during the remand proceedings. At issue is not a prescribed administrative remedy, but rather the requirement that Commerce effectuate the court's judgment in accordance with law, which includes Commerce's practice, and U.S. Steel was not required to petition Commerce to follow the law. U.S. Steel could not have been expected to speculate that Commerce might not follow its practice when issuing its Timken notice. U.S. Steel did not, therefore, fail to exhaust its administrative remedies with respect to the all-others rate.

CONCLUSION

For the reasons discussed above, U.S. Steel demonstrates that Defendant has not complied with the court's judgment. Therefore, in accordance with the foregoing, it is

ORDERED that Plaintiff's motion to enforce the judgment is granted in part; and it is further

ORDERED that Commerce shall issue a revised Timken Notice consistent with this opinion.

Dated: October 17, 2018
New York, New York

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

Slip Op. 18–140

GUIZHOU TYRE CO., LTD., GUIZHOU TYRE IMPORT AND EXPORT CO., LTD, and XUZHOU XUGONG TYRES CO., LTD., Plaintiffs, and TIAJIN UNITED TIRE AND RUBBER INTERNATIONAL CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Consolidated Court No. 17–00101

[Sustaining in part and remanding in part the determinations of the Department of Commerce.]

Dated: October 17, 2018

Ned H. Marshak & *Andrew T. Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, and *Richard P. Ferrin* & *Douglas J. Heffner*, Drinker Biddle & Reath, LLP, of Washington, D.C., for plaintiffs.

John Tudor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Mark B. Lehnardt, Baker Hostetler, LLP, of Washington, D.C., for plaintiff-intervenor.

OPINION AND ORDER

Goldberg, Senior Judge:

This action arises from a challenge by plaintiffs, Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd., (collectively, "Guizhou" or "GTC"), consolidated plaintiff Xuzhou Xugong Tyres Co., Ltd., ("Xugong"), and intervenor-plaintiff Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC") (collectively "Plaintiffs") to

certain aspects of the final results published by the Department of Commerce ("the Department" or "Commerce") of the underlying administrative review of the countervailing duty order on off-the-road tires ("OTR tires") from the People's Republic of China ("PRC"). *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 82 Fed. Reg. 18,285 (Dep't Commerce Apr. 18, 2017) (final results), *amended by Certain New Pneumatic Off-the-Road Tires from the People's Republic of China,* 82 Fed. Reg. 40,554 (Dep't Commerce Aug. 25, 2017) (am. final results) ("*Amended Final Results*"). Plaintiffs have filed summary judgment motions, Pls'. Mot. for J. on Agency R., ECF No. 63 (Jan. 5, 2018) ("Pls.' Br."), challenging Commerce's *Amended Final Results* with respect to: (1) Commerce's use of an adverse inference—and subsequent application of an adverse rate—in determining use of the China Export-Import Bank's Export Buyer's Credit program; (2) various aspects of the benchmarks used in calculating the benefits associated with several programs for less than adequate remuneration; and (3) Commerce's decision to countervail the Import Duty Exemption For Imported Raw Materials Program. Xugong filed a separate motion for judgment on the pleadings, Xugong Mot. for J. on Agency R., ECF No. 62 (Jan. 5, 2018) ("Xugong Br."), and TUTRIC has adopted and incorporated the challenges brought by both Guizhou and Xugong, TUTRIC Mot. for J. on Agency R., ECF No. 64 (Jan. 5, 2018).

For the reasons discussed below, the court remands the Department's findings with respect to the adverse inference applied to the Expert Buyer's Credit program, remands and sustains in part the Department's benchmark calculations, and sustains the Department's decision to countervail the Import Duty Exemption for Imported Raw Materials Program.

BACKGROUND

On November 9, 2015, Commerce initiated a review of the countervailing duty order on certain OTR tires from the PRC based upon timely requests from interested parties during the period of review between January 1, 2014 and December 31, 2014. *Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 69,193 (Dep't Commerce Nov. 9, 2015) (initiation). On February 3, 2016, Commerce selected Guizhou and Xugong as mandatory respondents. Resp't Selection Mem., Joint Appendix, ECF No. 79 ("J.A.") Tab 2 (Jan. 29, 2016). Both parties, as well as the Government of China ("GOC"), responded to the Department's initial and supplemental questionnaires. GOC Initial Questionnaire Resp., J.A. Tab 4 (Apr. 13, 2016) ("GOC Initial Questionnaire Resp."); GTC Initial Questionnaire

Resp., J.A. Tab 5 (Apr. 19, 2016) ("GTC Initial Questionnaire Resp."); GOC New Subsidy Allegations ("NSA") Questionnaire Resp., J.A. Tab 15 (Aug. 19, 2016) ("GOC NSA Questionnaire Resp."); GTC NSA Questionnaire Resp., J.A. Tab 14 (Aug. 19, 2016) ("GTC NSA Questionnaire Resp."); GTC First Supp. Resp., J.A. Tab 13 (Aug. 19, 2016) ("GTC First Supp. Resp.").

On October 14, 2016, Commerce issued its preliminary results from the administrative review based on the parties' questionnaire responses. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China*, 81 Fed. Reg. 71,056 (Dep't Commerce Oct. 14, 2016) (prelim. results) ("*Preliminary Results*") and accompanying Prelim. Decision Mem., J.A. Tab 25 (Oct. 5, 2016) ("PDM"). In its preliminary findings, the Department determined that (1) the GOC failed to provide answers regarding the China Export-Import Bank Buyer's Credit Program, PDM at 14; (2) Guizhou and Xugong benefited from the provision of certain inputs at less-than-adequate remuneration, using Tier 2 benchmark measurements for carbon black and nylon cord, and Tier 1 benchmark measurements for the import prices of natural and synthetic rubber, *id*. at 22; and (3) the import duty and value added tax (VAT) exemptions on imports of raw materials were countervailable subsidies, *id*. at 35. Commerce determined that because the GOC failed to provide responses to a series of questions related to the Export Buyer's Credit Program—countering the GOC's allegation of non-use—the Department was permitted to apply an adverse inference in selecting from the facts otherwise available that Guizhou and Xugong used and benefited from the program. *Id*. at 38.

The Department's final decision largely echoed its preliminary findings. *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 82 Fed. Reg. 18,285 (Dep't Commerce Apr. 18, 2017) (final results) ("*Final Results*") and accompanying Issues & Decision Mem., J.A. Tab 33 (Apr. 12, 2017) ("I&D Mem."). Commerce continued to include ocean and inland freight delivery charges and added import duty and VAT payments into the benchmark prices, despite Guizhou's position that these duties should not be included because it does not pay import duties or VAT on imported inputs. I&D Mem. at 9. As a result, the Department found a 34.46 percent *ad valorem* countervailable subsidy rate for Guizhou, and a 46.01 percent subsidy rate for Xugong. *Id*. Later, the Department issued a memorandum, amending the *Final Results* to include quarterly *synthetic* rubber benchmark data, as submitted by petitioners, following

the Department's initial error in using figures for *natural* rubber benchmarks. Ministerial Error Mem., J.A. Tab 38 (Aug. 21, 2017) ("Ministerial Error Mem."). The amended final results were published on August 25, 2017. *See generally Amended Final Results*.

Plaintiffs' motion for judgment followed, challenging Commerce's *Amended Final Results* with respect to: (1) Commerce's use of an adverse inference in selecting from among the facts available in determining use of the China Export-Import Bank's Export Buyer's Credit program by both Xugong and Guizhou; (2) Commerce's selection of the adverse rate applied to the Export Buyer's Credit program; (3) various aspects of the benchmarks used in calculating the benefits associated with several programs for less than adequate remuneration, including nylon cord, synthetic rubber, and carbon black; and (4) Commerce's decision to countervail the Import Duty Exemption For Imported Raw Materials Program. Pls.' Br. Xugong filed a separate motion for judgment on the pleadings. Xugong Br. For the reasons discussed below, the court sustains in part and remands in part Commerce's *Amended Final Results*.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction to hear this appeal under 28 U.S.C. § 1581(c). The court will sustain Commerce's determination unless the court concludes that the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence amounts to "more than a mere scintilla" of evidence. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* In other words, "substantial evidence" "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

DISCUSSION

Plaintiffs raise challenges to the Department's determinations regarding: (1) China's Export-Import Bank Buyer's Credit Program; (2) the Department's calculation of benchmarks measuring adequate remuneration for synthetic rubber, carbon black, and nylon cord; (3) China's VAT and Import Duty Exemption for Imported Raw Materials Program as a countervailing subsidy; and (4) the rate calculations formulated for the VAT aspect of the VAT and Import Duty Exemption for Imported Raw Materials Program. The court sustains Commerce's decision to countervail the VAT and Import Duty Exemption for Imported Raw Materials Program. For the remaining issues raised by plaintiffs, the court remands in part, pursuant to the below.

I. China Export Import Bank Buyer's Credit Program

In its review, Commerce examined whether Plaintiffs potentially benefited from China's Export Buyer's Credit Program (the "Program"), which provides loans to foreign companies to promote the export of Chinese goods. *See Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 69,193 (Dep't Commerce Nov. 9, 2015) (initiation). Commerce issued two questionnaires to the respondents, both seeking information regarding the Program. Commerce NSA Questionnaire to Xugong, J.A. Tab 9 (July 26, 2016); Commerce NSA Questionnaire to GOC, J.A. Tab 10 (July 26, 2016); Commerce NSA Questionnaire to Guizhou, J.A. Tab 12 (July 26, 2016). Plaintiffs each responded that none of their relevant customers used the Program. GOC NSA Questionnaire Resp. at 22; GTC NSA Questionnaire Resp. at 14. For its part, the GOC declined to provide questionnaire responses concerning the operation of the Program. As a result of the GOC's failure to cooperate, Commerce determined that Xugong and Guizhou benefitted from the Program. I&D Mem. at 23.

Pursuant to 19 U.S.C. § 1677e, the U.S. Department of Commerce ("Commerce") may select from facts otherwise available when a party to a proceeding: (A) withholds information that is requested; (B) fails to provide such information in the form and manner requested; (C) significantly impedes a proceeding; or (D) provides information which cannot be verified. *See* 19 U.S.C. § 1677e(a)(2). Further, Commerce may select from the facts available in a manner adverse to the respondent if the gap in the record was caused by the failure of the respondent to cooperate to the best of its ability. 19 U.S.C. § 1677e(b). Compliance with the "best of its ability" standard is determined by assessing whether the respondent puts forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. *See Nippon Steel Corp. v. United States,*337 F.3d 1373, 1382 (Fed. Cir. 2003). Therefore, Commerce can apply adverse facts available ("AFA") only when it has first made a supported finding under §1677e(a) that information is missing from the record for an enumerated reason, followed by a separate finding under § 1677e(b) that there has been a failure to cooperate.

The court finds that Commerce applied AFA without substantial evidence to support the requisite threshold finding that there was a gap in the record warranting the use of facts available. Commerce determined that the GOC failed to comply, to the best of its ability, with Commerce's request for information regarding an amendment to the operation of the Program and thus, the use of an adverse inference was warranted under 19 U.S.C § 1677e(b)(1). Crucially missing from this assessment is an initial finding by Commerce that material

information was missing from the record. While the Department did note that information as to the functioning of the Program was missing, this finding was rendered immaterial by responses from both Guizhou and the GOC as to the Program's use. This defect proves fatal to Commerce's imposition of AFA.

Generally, while respondent companies will have "information pertaining to the existence and amount of the benefit conferred by the program," "foreign governments are in the best position to provide information regarding the administration of their alleged subsidy programs." *Archer Daniels Midland Co. v. United States*, 37 CIT __, __, 917 F. Supp. 2d 1331, 1342 (2013). When a foreign government fails to respond to the best of its ability, Commerce will typically find that the government provided a financial contribution to a specific industry. *Id.* When the application of AFA under such circumstances may adversely impact a cooperating party, however, Commerce should seek to avoid such impact if, as is the case here, relevant information exists elsewhere on the record. *Id.* To apply AFA in circumstances where relevant information exists elsewhere on the record—that is, solely to deter non-cooperation or "simply to punish"—would make the agency's determination based on an incomplete (and therefore, inaccurate) account of the record; that is a fate this court should sidestep. *See Changzhou Trina Solar Energy Co. v. United States*, 41 CIT __, __, 255 F. Supp. 3d 1312, 1319 (2017) (sustaining Commerce's decision to refrain from using AFA where information existed elsewhere on the record because to do otherwise would "apply AFA for no reason other than to deter the GOC's non-cooperation in future proceedings . . . .").

Although GOC failed to fully respond to Commerce's requests for information, this failure did not create the requisite gap needed to make an adverse inference. Regardless of GOC's questionnaire responses to several questions posed by Commerce, GOC unequivocally stated that the respondents' customers did not use the Export Buyers Credit Program. There is no ambiguity or uncertainty surrounding the use of the Program by Plaintiffs or their customers, as this information consisted of signed declarations from Plaintiffs' U.S. customers certifying non-use, and is corroborated by GOC's statements. *See* GTC NSA Questionnaire Resp. at 13–14. Therefore, the only gap of information on the record are facts regarding certain aspects of the *operation* of the Program. In turn, the only factual issues potentially appropriate for facts otherwise available, § 1677e(a), and adverse inferences, § 1677e(b), are those that concern the operation of the Program, factors entirely irrelevant to Guizhou's apparent non-use.

Although Commerce possessed declarations covering Plaintiffs' affiliated and unaffiliated customers in the United States, Commerce declined to consider these declarations, thereby abandoning its longstanding practice. *See Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 73 Fed. Reg. 9993 (Feb. 25, 2008) (final results) and accompanying Issues & Decision Mem. cmt. 2 (explaining that in instances where the foreign government fails to adequately respond to Commerce's questionnaires, Commerce must "calculate[] the benefit by relying, to the extent possible, on information supplied by the respondent firm."). Commerce's argument that because it lacked a "complete and verifiable understanding of the program's operation, especially with regard to the involvement of third-party banks, the information provided by [the] respondents is [] unverifiable," I&D Mem. at 24, is without merit, because Commerce improperly conflates the program's operation with its use. Plaintiffs have knowledge of their own usage of this program, however it operates, and certified its non-use by its customers. Commerce's obligation when drawing an adverse inference based on a lack of cooperation by a foreign government is to avoid collaterally impacting respondents to the extent practicable by examining the record for replacement information.

In sum, Commerce had a clear path to find non-use by either accepting the declarations submitted by Plaintiffs and their U.S. customers or by verifying these declarations. Instead, Commerce has chosen a more convoluted route in substituting facts derived from the record with its own unsupported conclusions. Such a determination cannot be sustained by the court.

II. The AFA Rate for the Buyer's Credit Program

Having concluded that Commerce inappropriately applied AFA without substantial evidence to support the requisite threshold finding that there was a gap in the record warranting the use of AFA, the Department's application of an adverse countervailing subsidy rate of 10.54 percent *ad valorem* is rendered moot.[1] In any event, the court notes that the Department improperly applied its regulatory hierarchy for the selection of rates for the Buyer's Credit Program. As it

[1] The Department also argues that Guizhou failed to exhaust its administrative remedies with respect to the adverse rate of 10.54 percent applied to the Export Buyer's Credit Program. Def.'s Resp. to Pls.' Mot. for J. on Agency R. 25, ECF No. 71 (May 25, 2018). This argument is also rendered moot by the court's remanding the Department's use of AFA for the Buyer's Credit Program. However, despite failing to specifically rebut the 10.54 percent adverse rate ultimately applied by Commerce, Guizhou implicitly raised objections to the AFA rate when it raised evidence of non-use on the record and disputed the application of an AFA rate generally. GTC Admin. Case Br. 18, J.A. Tab 27 (Dec. 12, 2016).

stands, the Department's explanation of its application of the rate hierarchy is lacking. Commerce has explained its AFA rate selection hierarchy as follows:

> Consistent with section 776(d) of the Act and our established practice, we selected the highest calculated rate for the same or similar program as AFA. When selecting rates in an administrative review, we first determine if there is an identical program from any segment of the proceeding and use the highest calculated rate for the identical program (excluding *de minimis* rates). If no such identical program exists, we then determine if there is a similar/comparable program (based on the treatment of the benefit) within the same proceeding and apply the highest calculated rate for the similar/comparable program, excluding *de minimis* rates. Where there is no comparable program, we apply the highest calculated rate from any non-company specific program in any CVD case involving the same country, but we do not use a rate from a program if the industry in the proceeding cannot use that program. We are using an AFA rate of 10.54 percent *ad valorem*, the highest rate determined for a similar program in the *Coated Paper from the PRC* proceeding, as the rate for these companies.

PDM at 14 (footnotes omitted).

The Government claims that "Commerce determined that there were no calculated rates for the Export Buyer's Credit program in the proceeding—and, thus, no rates were available to Commerce under step one or step two of its review hierarchy." Def.'s Resp. to Pls.' Mot. for J. on Agency R. 30, ECF No. 71 (May 25, 2018) ("Def.'s Br."). However, step two calls upon Commerce to apply the highest calculated rate for a *similar* program (determined by the type of benefit) from any segment within the same proceeding. I&D Mem. at 14. Commerce apparently did not seek out a rate from a *similar* program in the same proceeding (as required pursuant to the hierarchy) before moving immediately—and inexplicably—to step three upon determining that there was no rate for the *identical* program. On remand, Commerce is encouraged to take a closer look at the regulation it depends upon, in order to issue a supported and reasoned determination based on—if necessary—the highest *de minimis* calculated rate from a similar program in the same proceeding.

III. Calculation of Tier 2 Benchmarks

Plaintiffs raise several challenges to the Department's calculation of benchmarks measuring whether adequate remuneration was paid for synthetic rubber, carbon black, and nylon cord. Specifically,

Xugong argues that Commerce's use of quarterly—rather than monthly—data to measure synthetic rubber benchmark prices was in error, Xugong Br. at 10; and Guizhou argues that neither VAT nor ocean freight inputs should have been added to the benchmark calculations, Pls.' Br. at 40. Because Commerce used a Tier 2 benchmark for synthetic rubber and carbon black, the Department's decision to include VAT and import duties in its benchmark analyses—based on quarterly data—was reasonable and supported by substantial evidence. However, the court cannot support the Department's decision to include ocean freight charges in its Tier 1 benchmark calculation for nylon cord. On remand for further consideration, the court orders Commerce to carefully—and in its totality—review the evidence submitted by the plaintiffs to determine whether Chinese import statistics are already freight inclusive, thereby rendering the inclusion of ocean freight data in its benchmark calculation entirely duplicative.

A. Legal Framework

A countervailable subsidy exists where (1) a financial contribution is provided, (2) a benefit is thus conferred, and (3) the subsidy is specific. *See* 19 U.S.C. § 1677(5). When a financial contribution is provided through goods or services, the statute defines a benefit as arising where goods or services "are provided for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). The adequacy of remuneration "shall be determined in relation to prevailing market conditions for the good or service being provided" in the country that is subject to review. 19 U.S.C. § 1677(5)(E). Usual market conditions comprise of "price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E).

Commerce employs a hierarchical framework to measure the adequacy of remuneration. *See* 19 C.F.R. § 351.511. First, by use of a "Tier 1" benchmark, Commerce typically compares the price the government sold the goods or service to the respondent with a market-determined price in the country in question. 19 C.F.R. § 351.511(a)(2)(i). In contrast, a "Tier 2" benchmark, employed when market prices are not accessible, allows Commerce to "compar[e] the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511 (a)(2)(ii). If a world market price cannot be used, then Commerce will "measure the adequacy of remuneration by assessing whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii). This is a "Tier 3" benchmark. *See Zhaoqing New Zhongya Aluminum Co. v. United States*, 37 CIT __, __, 929 F. Supp. 2d 1324, 1327 (2013)

(concluding that Commerce's decision to use Tier 2 "world market" pricing only after determining that Tier 1 pricing is "unusable" is part of a "reasonable benchmark" calculation and "is well grounded in the applicable regulations.").

Here, Commerce used a Tier 2 benchmark. No party disputes that determination. Therefore, Commerce was required to "adopt[] the world market price as a benchmark or proxy for the price in the producer's home country," and if the record presented more than one viable world market price, Commerce was required to average the prices as permitted, considering factors such as "price, quality, availability, marketability, transportation, and other conditions of purchase or sale." *RZBC Grp. Shareholding Co. v. United States*, 39 CIT __, ___, 100 F. Supp. 3d 1288, 1304 (2015) (citing 19 U.S.C. § 1677(5)(E)).

B. Quarterly Data

Commerce used quarterly Tier 2 benchmark data submitted by petitioners for synthetic rubber in determining Xugong's and Guizhou's subsidy rates. Ministerial Error Mem. at 4. Xugong argues that monthly benchmark data provided by Guizhou is more appropriate. In the *Final Results*, Commerce also included VAT, import duties, and ocean freight costs in its Tier 2 benchmark calculations of nylon cord, carbon black, and synthetic rubber. I&D Mem. at 9–15. Xugong argues that Commerce's use of quarterly benchmark data, when alternative monthly data is available, conflicts with Commerce's past practice. Xugong Br. at 10. Nevertheless, Xugong relies on a prior review that explicitly states the opposite. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, 81 Fed. Reg. 46,904 (Dep't Commerce July 19, 2016) (final results) and accompanying Issues & Decision Mem. cmt. 6 ("The factors relied upon by the Department when determining appropriate benchmark(s) for valuing an input depend on the facts surrounding the data/information placed on the record of a proceeding and therefore must be evaluated on a *case-by-case* basis." (emphasis added)).

The court's role is not to assess whether the benchmark data Commerce used was the "best available," but rather whether Commerce's choice was reasonable. *Peer Bearing Company-Changshan v. United States*, 27 CIT 1763, 1770, 298 F. Supp. 2d 1328, 1336 (2003). The Department's "reasoned analysis or explanation for [its] decision," then, determines "whether a particular decision is arbitrary, capricious, or an abuse of discretion." *Wheatland Tube Co. v. United States,* 161 F.3d 1365, 1369 (Fed. Cir. 1998).

As illustrated by the regulatory hierarchy, Commerce prefers to derive a benchmark to measure adequacy of remuneration for an input from "a market-determined price for the good . . . resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i). After a reevaluation of its *Preliminary Results*, which were based on Tier 1 calculations, Commerce determined that the Chinese synthetic rubber market was distorted, causing the prices from the Chinese market to be unusable. I&D Mem. at 13. As a result, Commerce opted instead to use a Tier 2 benchmark for measuring adequacy of remuneration from the provision of synthetic rubber. *Id*. at 13.

In selecting the Tier 2 benchmark, Commerce stated that it would use the monthly *synthetic* rubber prices provided by petitioners from the International Rubber Study Group Statistical Bulletin. *Id.* In its *Final Results*, Commerce erroneously used *natural* rubber benchmark data, which it then remedied in its *Amended Final Results*. *Amended Final Results* at 40,555. Commerce clarified that it had intended to use the Tier 2 synthetic rubber benchmark data submitted by petitioners from the International Rubber Study Group Statistical Bulletin. Ministerial Error Mem. at 3–4. The only synthetic rubber benchmark data provided by petitioners on the record are quarterly and annual data.

Xugong argues that Commerce's reliance on quarterly data is distortive. However, this argument is meritless, because no specific support was offered. In contrast, Commerce's decision is supported by a reasonable reading of record evidence. Therefore, this Court will not cast doubt on Commerce's reasonable selection of quarterly benchmark data, even though alternative data sets are available.

C. VAT and Import Duties

Commerce identified and included VAT and import duties in its Tier 2 benchmark analysis of the less-than-adequate remuneration programs for synthetic rubber and carbon black, claiming that such costs are required adjustments to a Tier 2 benchmark. I&D Mem. at 10. Guizhou argues that Commerce should not include VAT in its calculations because, as Guizhou claims, it did not actually pay VAT upon import. Pls.' Br. at 42. Guizhou continues that because VAT is not expressly enumerated in 19 C.F.R. § 351.511(a)(2)(iv) as a "delivery charge[]" or an "import dut[y]," it does not fall within the class of adjustments that Commerce would normally include. *Id*.

The regulation provides that in measuring adequate remuneration, Commerce must adjust the comparison price to reflect the price that a firm "actually paid or would pay if it imported the product," includ-

ing "delivery charges and import duties." 19 C.F.R. § 351.511(a)(2)(iv). Although Commerce's regulations direct it to use the "delivered price" when calculating a benchmark price, 19 C.F.R. § 351.511(a)(2)(iv), it is not "plainly erroneous or inconsistent with the regulation" to "permit inclusion of expenses other than delivery charges and import duties in benchmark calculations . . . ." *Changzhou Trina Solar Energy Co. v. United States,* 41 CIT __, __, 255 F. Supp. 3d 1312, 1325 (2017) (citing *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013)). As this court has previously stated, the regulation's reference to a "firm" "refers to a hypothetical firm located in the PRC" and the fact that *Plaintiffs* "might not pay the VAT or import duties" is "irrelevant, given that a *firm* located in the PRC . . . would ordinarily have paid these duties." *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 52 F. Supp. 3d 1351, 1374 (2015). Therefore, the inclusion of a VAT in the Department's Tier 2 calculation is reasonable so long as a PRC firm would have ordinarily paid the duties. Moreover, including VAT in benchmark calculations generally falls in line with the court's prior decisions addressing this particular charge. *See Juancheng Kangtai Chem. Co. v. United States*, Slip Op. 17–3, 2017 WL 218910, at *11 (CIT Jan. 19, 2017) ("Commerce properly interpreted 'other charges imposed' to include 'costs,' and irrecoverable VAT is just such a cost."); *Jacobi Carbons AB v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1159, 1188 (2017) ("Accordingly, the Chinese VAT is permissibly construed as an 'other charge' that is 'imposed by [China] upon the exportation of the subject merchandise.'"); *Beijing Tianhai Indus. Co.*, 39 CIT at __, 52 F. Supp. 3d at 1374 (permitting VAT calculation in a Tier 2 benchmark analysis because "a firm located in the PRC that imported steel tube would ordinarily have paid these duties."). Guizhou's reference to Exhibit II.E.2—the GTC VAT and Import Tariff Exemptions Table for Imported Materials, indicating that the "actual VAT paid" was 0, GTC First Supp. Resp. at 27—is overall immaterial because, as Guizhou states, it demonstrates what GTC did pay, not what a "hypothetical firm" in China *would* pay.

Guizhou's arguments are, therefore, inapposite to the Department's espoused practices, which this court has already appraised as a reasonable interpretation of 19 C.F.R. § 351.511(a)(2)(iv). The court is not compelled to indulge in a drawn out interpretative analysis in order to determine whether the agency had *intended* to include VAT in its calculations. The court's role is limited to ascertaining whether Commerce *reasonably* included VAT and import duties in its benchmark calculations. Here, the Federal Circuit has already previously acknowledged that the inclusion of import charges not actually incurred

by the parties in order to calculate a Tier 2 benchmark price is still "consistent with the relevant statute and regulation" because that is the prerogative of a "world market price" calculation. *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1274 (Fed. Cir. 2012). The regulation itself "does not explicitly limit adjustments to . . . the two [charges] listed;" and because the regulation mandates that Commerce adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product, "[t]o interpret the regulation as requiring Commerce to adjust benchmark prices *only* for delivery charges and import duties would render this mandate meaningless . . . ." *Changzhou Trina Solar Energy Co.*, 255 F. Supp. 3d at 1325 (emphasis added). Accordingly, Commerce's determination was not a "plainly erroneous or inconsistent" application of 19 C.F.R. § 351.511(a)(2)(iv).

To that end, the Department did not act unreasonably when it included VAT and import duties in its Tier 2 benchmark calculations for synthetic rubber and carbon black. Commerce's decision to add VAT and import duties to the benchmark prices is consistent with the relevant statute and regulation and is supported by substantial evidence.

D. Ocean Freight

In its *Final Results*, the Department included ocean freight costs in its nylon cord Tier 1 benchmark calculations. I&D Mem. at 10–13. Guizhou argues that Commerce's addition of ocean freight to the nylon cord benchmark was "unsupported by substantial evidence on the record" because Chinese import statistics are "already freight inclusive." Pls.' Br. at 43. Xugong also disputed this inclusion, largely adopting Guizhou's position, and adding that the "GOC argued that record evidence demonstrated that Chinese import statistics are reported on a CIF basis." Xugong Br. at 21.

As the Department acknowledges in its briefing, where Chinese import prices include "cost, insurance, and freight" (CIF) prices, those charges already account for freight charges— including ocean freight. Def.'s Br. at 40. The Government argues that Commerce did "not find evidence on the record that indicated that the Chinese import statistics were reported on a CIF basis." *Id*. However, the record demonstrates that Guizhou submitted factual information for the calculation of benchmarks used in the less than adequate remuneration programs, which noted specifically and on two separate instances that "imports are valued on a CIF basis and exports on a FOB basis." GTC Second Benchmark Submission, J.A. Tab 19 attach. 4 n. 2.1.1, 2.4.1. It is puzzling how Commerce concluded that there was no

evidence indicating that the import prices were CIF inclusive, if Commerce judiciously reviewed the record before it.

Putting aside the substantive issue of whether Chinese import statistics *are* reported on a CIF basis—therefore rendering the ocean freight costs duplicative in the benchmark calculations—the Department is required by the "substantial evidence" analysis to consider all of the evidence in the record in order to make a reasonable determination on the merits. Indeed, "substantial evidence 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" which also includes consideration of "whatever in the record fairly detracts from its weight." *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). Certainly, evidence in the record demonstrating that imports may be valued on a CIF basis would detract from the Department's ultimate decision to include ocean freight costs to the nylon cord benchmark. Based on its explanations, Commerce clearly declined to consider—and made no mention of—this evidence. The court cannot sustain the Department's decision to turn a blind eye on evidence that is entirely pertinent to its ultimate conclusion.

In light of this evidence having been placed on the record and properly raised before the Department, Commerce has unreasonably concluded that there was "no[] . . . information on the record that indicates these Chinese import statistics are reported on a CIF basis." I&D Mem. at 15. The court orders Commerce to review the record in its totality, including evidence submitted by Guizhou, in order to come to a reasonable conclusion; until then, the Department's decision to include ocean freight is not supported by substantial evidence and must be remanded for further consideration.

IV. The VAT and the Import Duty Exemption for Imported Raw Materials Program

As it explained in its *Amended Final Results*, the Department concluded that the import duty exemptions and VAT exemptions on imports of raw materials—under the VAT and Import Duty Exemption for Imported Raw Materials Program—were countervailable subsidies. This determination was reasonable and supported by substantial evidence drawn from the record.

Pursuant to 19 C.F.R. § 351.519(a)(1)(ii), "a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product." In analyzing whether a program for exemption of import charges upon export results in a countervailable benefit, Commerce must consider whether the government in question "maintains controls adequate to ensure that any remission or exemption of import duties does not extend to duties on

inputs not consumed in production for export." *GGB Bearing Tech. (Suzhou) Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1233, 1241–42 (2017). Commerce will consider the entire amount of an exemption to confer a benefit unless the government has a specifically delineated procedure "to confirm which inputs are consumed in the production of the exported products and in what amounts, and the system or procedure is reasonable, effective for the purposes intended, and is based on generally accepted commercial practices in the country of export." 19 C.F.R. § 351.519(a)(4)(i). Based on this framework, Commerce determined that the import duty and VAT exemptions were specific and provided a financial contribution sufficient to countervail the import duty aspect of the program.

Plaintiffs argue that GTC has "placed sufficient information on the record to demonstrate either that the system in place was reasonable or that its actual consumption was verified by the GOC," referring to the Processing Trade Goods Handbook and a Customs verification process that allegedly reviews GTC's accounting books and records "including unit consumptions." Pls.' Br. at 34. GTC further contends that at the time of its First Supplemental Response, GTC was "in the process of providing actual consumption figures to customs," *id.* at 35, and that Commerce "ignored all information submitted by GTC in making its determination under 19 C.F.R. § 351.519(a)(4) that the GOC did not have an effective system in place to ensure that [the] exempted imported inputs were not used in [the] exported product," *id.* at 32.

The court does not find merit in Plaintiffs' arguments that Commerce failed to consider all record evidence before concluding that the program provided countervailable benefits. In accordance with 19 C.F.R. § 351.519(a)(4)(i), Commerce examined whether the Government of China had a defined and reasonable procedure to confirm which inputs, and in what amounts, are consumed in the production of the exported products. After its review, Commerce found that the GOC did not have an effective system in place to qualify for a valid exception, based on the fact that the GOC failed to explain "how it determined the quantity of material . . . consumed in the production process and to provide sample documentation or reports to support its explanation." I&D Mem. at 19. Indeed, the GOC provided generic responses to Commerce's questions concerning consumed materials in the OTR tires production, and referred generally to Customs Measures and the Processing Trade Goods handbook, while utterly neglecting to provide specific details on *how* the GOC determined the quantity of rubber, nylon cord, and carbon black consumed in the production process. *See* GOC Initial Questionnaire Resp. at 59.

Guizhou's argument that Commerce failed to consider GTC's responses—in lieu of the GOC's— when reviewing the record fares no better. First, Commerce is entitled to focus on the GOC's responses in light of the fact that its regulations specifically require that the Department determine that the "*government* in question has in place and applies" the appropriate procedure confirming which inputs are consumed in the production and in what amounts. 19 C.F.R. § 351.519(a)(4)(i) (emphasis added). Moreover, GTC's responses still fail to show that the Department's determination that the program provided countervailable benefits and failed to meet the exception requirements under § 351.519(a)(4) was either unreasonable or unsupported by substantial evidence. Responding to the Department's question about how the quantity of the material was consumed in the production, GTC similarly described the basic material consumption process but neglected to detail specifically how it initially determined the quantity of rubber, nylon cord, or carbon black consumed in the production of tires by Guizhou. GTC Initial Questionnaire Resp. at 12; GTC First Supp. Resp. at 27.

The Department calls attention to this flaw, evident in both the GOC's and GTC's questionnaire responses, when it concluded that the GOC failed to show that "it *applied* the process outlined in the Customs Measures and Measures of Unit Consumption," a step necessary to determine the quantity of rubber, nylon cord, and carbon black actually consumed in the production. I&D Mem. at 20 (emphasis supplied). Therefore, the Department concluded, the GOC failed to provide a sufficient basis for non-countervailability under the regulation. *Id*.

The court agrees. To its credit, GTC does provide a cursory reference to the standard procedure it must undergo in order to verify input consumption to the GOC; however, the analysis and corresponding documentation fall short of demonstrating that the GOC maintains a process to verify GTC's actual consumption of rubber, nylon cord, or carbon black for the production of tires by Guizhou or other tire producers. GTC Initial Questionnaire Resp. at 12, 16, Exs. II.E.1, II.E.2; GTC First Supp. Resp. at 27. For example, in response to a supplemental questionnaire requesting a "*detailed* explanation of *how* the documents provided at Exhibit II.E.1 establish the quantity of imported material consumed in the production process and in the production of exports in particular"—that is, the core of a 19 C.F.R. § 351.519 analysis— Guizhou responded merely that "[t]he quantity and value of imported material listed in Exhibit II.E.1]]" were GTC estimates, and that the "actual quantity of imported material can be

determined based on Exhibit II.E.2."[2] GTC First Supp. Resp. at 27. Devoting little airtime to any semblance of a detailed explanation of the government system in place, Guizhou directs Commerce instead to Exhibit II.E.2, a VAT and Import Tariff Exemptions Table detailing the imported materials during the POR. Though that may be part of the regulatory analysis, the underlying concern is whether the government maintains and applies a consistent procedure in order to confirm the inputs consumed in the production. The results—provided by Guizhou in Exhibit II.E.2—are just business records listing the outputs of the system in question.

All in all, Commerce's review of the record evidence was reasonable and its decision to countervail the VAT and the Import Duty Exemption for Imported Raw Materials Program is supported by substantial evidence that the court will not now disturb.

V. Voluntary Remand of VAT

Although no longer in dispute, Commerce did calculate a 17 percent VAT rate on imports of natural and synthetic rubber. Prelim. Results Calculations 9, J.A. Tab 26 (Oct. 5, 2016) (unchanged in *Final Results*). Because the parties are in agreement, the court remands to Commerce for further consideration of this issue.

Without admitting error, as here, Commerce "may request a remand . . . in order to reconsider its previous position" by "simply stat[ing] that it ha[s] doubts about the correctness of its decision," and if the agency's concern is substantial and legitimate, a remand is usually appropriate. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Commerce's concerns are considered substantial and legitimate when "(1) Commerce has a compelling justification for the remand, (2) the justification for remand is not outweighed by the need for finality, and (3) the scope of the remand is appropriate." *Timken Co. v. United States*, Slip Op. 14–51, 2014 WL 1760033, at *3 (2014) (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT __, __, 882 F. Supp. 2d 1377, 1381 (2013)). However, "if the Government's request for a remand 'is frivolous or in bad faith,' the court may deny the remand." *SeAH Steel VINA Corp., v. United*

[2] Moreover, GTC argues that Commerce failed to notify the GOC of a deficiency in its response and that the failure to do so "was contrary to law," given the Department's "statutory obligation to inform parties of deficiencies in their submission[s] to permit them an opportunity to cure those deficiencies." Pls.' Br. at 30. This characterization of the record also misses the mark. Contrary to GTC's contention, Commerce did not find a gap in neither the GTC's nor the GOC's responses. Rather, the Department considered the evidence presented on the record and concluded that the parties failed to demonstrate that *the GOC* maintained (and applied) a specific procedure to determine the quantity of rubber, nylon cord, or carbon black consumed.

States, 40 CIT __, __, 182 F. Supp. 3d 1316, 1333 (2016) (citing *SKF USA Inc.*, 254 F.3d at 1029).

Plaintiffs argue that the Department should revise its calculations for the VAT and Import Duty Exemption for Imported Raw Materials Program to account for two errors in Commerce's benefit calculation. Pls.' Br. at 36. To that end, the Department requests that the Court grant a voluntary remand regarding the program in order to reconsider the two aspects of the *ad valorem* rate calculation identified by Guizhou. Def.'s Br. at 45.

The Court finds no evidence of frivolousness in the Department's request for a voluntary remand on this issue. Indeed, there are two limited and compelling grounds for a remand that both Guizhou and Commerce have recognized. First, the Department notes that the VAT export rebate rate should have been reduced by 9 percent—bringing the VAT export rebate rate down to 8 percent instead of the originally identified 17 percent—to account for the rebate of VAT for OTR tires. *Id*. Second, the Department requests reconsideration of the proper sales denominator used to calculate the *ad valorem* rate for the program. *Id*. at 46. Guizhou argues—and Commerce agrees—that the "export sales only denominator" that was used to calculate the *ad valorem* rate in Commerce's *Final Results* is in error because Commerce has already previously found that the benefit for this program is used for *both* export and domestic sales. Pls.' Br. at 38; Def.'s Br. at 45. Commerce acknowledges that it "did not fully address the[se] arguments raised by Guizhou in its brief" and requests a remand, without admitting error, in order to "obviate the need for the Court to rule on an issue that Commerce itself wishes to reconsider." Def.'s Br. at 46. Furthermore, the interest in protecting the administrative proceeding from material inaccuracies is not outweighed by a need for finality because the court has already concluded that several issues are in need of reconsideration by the Department, thereby mooting any concerns over finality. Because Commerce presented undisputed and compelling justifications for remand that are not outweighed by the (now moot) need for finality, Commerce's request for a voluntary remand to reconsider its determinations regarding the VAT program is granted. On remand, Commerce is to review its decision to issue a 17 percent VAT export rebate rate in light of the fact that there is generally a 9 percent rate of VAT for OTR tires; and Commerce may reconsider its calculations when attributing the subsidy benefit only to export sales.

CONCLUSION

The court sustains the Department's decision to countervail the Import Duty Exemption for Imported Raw Materials Program, but grants the Department's request for voluntary remand to reconsider the VAT export rebate rate and the *ad valorem* rate for the Program. The court also sustains the Department's selection of quarterly benchmark data in its LTAR calculations, and finds that the Department did not act unreasonably when it included VAT and import duties in the benchmark calculations for synthetic rubber and carbon black.

However, the Department's decision to apply AFA regarding China's Export-Import Bank Buyer's Credit Program was unreasonable because material information was not missing from the record. The GOC had provided sufficient responses to the Department's questionnaires reflecting non-use of the Program, and the Department's AFA determination to the contrary was not supported by substantial evidence. The court also finds that the Department's decision to include ocean freight costs in its nylon cord Tier 1 benchmark calculations was not supported by substantial evidence because the Department failed to consider evidence demonstrating that Chinese imports are already freight inclusive; on remand, the court orders the Department to consider the evidence submitted by the parties to determine whether ocean freight costs would be duplicative to its benchmark calculations.

For the foregoing reasons, after careful review of all papers, it is hereby

ORDERED that the Department reconsider its decision to apply AFA as to China's Export Import Bank Buyer's Credit Program, taking into account the GOC's evidence of nonuse, as in accordance with the Opinion and Order; it is further

ORDERED that the Department consider the evidence submitted by GTC as to the ocean freight costs for the nylon cord benchmarks and apply its analysis to the Department's redetermination as in accordance with the Opinion and Order; and it is further

ORDERED that the Department review on remand its VAT export rebate rate calculation as well as the proper sales denominator used to calculate the *ad valorem* rate for the VAT and Import Duty Exemption for Imported Raw Materials Program; it is further

ORDERED that all other challenged determinations of Commerce are sustained; and it is further;

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiff shall have thirty (30) days from the filing of the redeter-

mination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiff's comments to file comments.

Dated: October 17, 2018
New York, New York

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

Slip Op. 18–141

BELL SUPPLY COMPANY, LLC, Plaintiff, v. UNITED STATES, Defendant, and BOOMERANG TUBE LLC et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 14–00066
PUBLIC VERSION

[Remanding the U.S. Department of Commerce's Final Scope Ruling on Green Tubes Manufactured in the People's Republic of China and Finished in Countries other than the United States and the People's Republic of China.]

Dated: October 18, 2018

Donald Bertrand Cameron, *Julie Clark Mendoza*, *Rudi Will Planert*, *Brady Warfield Mills*, and *Mary Shannon Hodgins*, Morris, Manning & Martin, LLP, of Washington, DC, for plaintiff.

Agatha Koprowski, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her representing the Defendant were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Loren Misha Preheim*, Assistant Director.

Roger Brian Schagrin, Schagrin Associates, of Washington, DC, for defendant-intervenors Boomerang Tube LLC, TMK IPSCO Tubulars, V&M Star L.P., and Wheatland Tube Company.

Robert Edward DeFrancesco, III, and *Alan Hayden Price*, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor Maverick Tube Corporation.

Thomas M. Beline, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenor United States Steel Corporation.

OPINION AND ORDER

Kelly, Judge:

This case is on remand from the U.S. Court of Appeals for the Federal Circuit. The Court of Appeals vacated and remanded this court's decision in *Bell Supply Co., LLC v. United States*, 39 CIT __, 83 F. Supp. 3d 1311 (2015) ("*Bell Supply I*"), which held that section 781 of the Tariff Act of 1930, 19 U.S.C. § 1677j (2012), precluded the U.S. Department of Commerce's ("Department" or "Commerce") use of a "substantial transformation test" to determine whether certain oil country tubular goods ("OCTG") originated in the People's Repub-

lic of China ("PRC" or "China") and was subject to the antidumping order on OCTG from China.[1] As a result, the sole issue before the court is whether Commerce's application of its substantial transformation test is supported by substantial evidence. In both its Preliminary and Final Scope Rulings, Commerce found that seamless unfinished OCTG produced in China and finished in third countries had not undergone a substantial transformation, and is thus within the scope of the antidumping and countervailing duty orders on OCTG from China. *See* Preliminary Scope Ruling on Green Tubes manufactured in the [PRC] and Finished in Countries Other than the United States and the PRC at 31, AD CD 48 (May 31, 2013) ("Preliminary Scope Ruling"); Final Scope Ruling on Green Tubes Manufactured in the People's Republic of China and Finished in Countries Other than the United States and the People's Republic of China at 24, Feb. 7, 2014, ECF 31–1 ("Final Scope Ruling"); *see also Certain [OCTG] From the People's Republic of China*, 75 Fed. Reg. 28,551 (Dep't Commerce May 21, 2010) (amended final determination of sales at less than fair market value and antidumping order) ("*ADD Order*"); *Certain [OCTG] From the People's Republic of China*, 75 Fed. Reg. 3,203 (Dep't Commerce Jan. 20, 2010) (amended final affirmative countervailing duty determination and countervailing duty order) ("*CVD Order*") (collectively "Orders"). For the reasons that follow, Commerce's determination is remanded for reconsideration or further explanation consistent with this opinion.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in the previous opinions and now recounts the facts relevant to the issue currently before the court. *See Bell Supply I*, 39 CIT __, 83 F. Supp. 3d 1311; *Bell Supply Co., LLC v. United States*, 40 CIT __, 179 F. Supp. 3d 1082 (2016) ("*Bell Supply II*"); *Bell Supply Co., LLC v. United States*, 40 CIT __, 190 F. Supp. 3d 1244 (2016) ("*Bell Supply III*"); *Bell Supply Co., LLC v.* United States, 888 F.3d 1222 (2018) ("*Bell Supply IV*"). On January 20, 2010 and May 21, 2010, respectively, Commerce published the countervailing and antidumping duty orders on OCTG from the PRC. *See CVD Order*, 75 Fed. Reg. 3,203; *ADD Order*, 75 Fed. Reg. 28,551. The Orders define the subject merchandise as:

> certain [OCTG], which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seam-

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

> less or welded, regardless of end finish (e.g., whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute ("API") or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the order also covers OCTG coupling stock. Excluded from the scope of the order are: casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.

CVD Order, 75 Fed. Reg. at 3,203–04; *ADD Order*, 75 Fed. Reg. at 28,553.

Following a determination by U.S. Customs and Border Protection ("CBP"), *see* Petition for Scope Inquiry at Ex. 1, 39, AD PD 1, bar code 3065185–01 (Mar. 26, 2012),[2] that OCTG made from unfinished OCTG from the PRC—but finished in third countries—had a country of origin other than the PRC, several domestic steel companies sought clarification from Commerce regarding the scope of the Orders.[3] On June 20, 2012, pursuant to a request from several domestic companies, United States Steel Corporation, TMK IPSCO, Wheatland Tube Company, Boomerang Tube LLC, and V&M Star L.P, Commerce initiated a scope inquiry regarding Plaintiff's merchandise. *See* Initiation of Scope Inquiry, AD PD 25, bar code 3082712–01/CVD PD 25, 3082735–01 (June 20, 2012); *see also* 19 C.F.R. § 351.225(e) (2012). Specifically, these domestic companies sought clarification on whether the Orders covered OCTG finished in third countries but made from unfinished OCTG (including green tubes) produced in the

[2] On May 14, 2014, Defendant filed on the docket the indices to the public and confidential administrative records of this review. *See* Administrative Record for Department of Commerce, May 14, 2014, ECF No. 31–3–6. All further references to documents from the administrative record are identified by the numbers assigned by Commerce in these indices. References to the administrative record for the antidumping investigation will contain "AD," and references to the administrative record for the countervailing duties investigation will contain "CVD."

[3] *See* Petition for Scope Inquiry, at Ex. 1, 39, ADD, PD 1, bar code 3065185–01 (Mar. 26, 2012) (CBP Ruling N118180 Re: The country of origin of steel tubing processed in Korea or Japan from green tubes originating in India, China, or Russia (Sept. 3, 2010)). Petitioners requested a country of origin determination ruling from CBP on steel threaded and coupled OCTG casing and tubing that is imported from Korea or Japan, where the original material was green tube or unfinished seamless steel pipe made in India, China or Russia. CBP held that the product was substantially transformed and therefore had a country of origin of Korea or Japan. CBP noted that although threading and coupling alone would not constitute substantial transformation, heat treating would because the heat treating imparts critical high yield strength required by American Petroleum Institute ("API") specifications for oil well tubing.

PRC.[4] The domestic companies argued that CBP's ruling conflicted with the mandate of the Orders on OCTG from the PRC, and that the Orders should cover the OCTG. *Id.* On February 7, 2014, Commerce issued a final scope ruling determining that unfinished green tubes manufactured in China and processed into finished OCTG in third countries are subject to the Orders because the merchandise is not substantially transformed during the finishing process. *See* Final Scope Ruling at 2.

Plaintiff, Bell Supply Company, LLC ("Bell Supply") is a U.S. importer of OCTG sourced from Chinese green tubes later heat-treated and finished in Indonesia. Plaintiff challenged Commerce's Final Scope Ruling in this court, arguing, inter alia, that Commerce's determination unlawfully expanded the scope of the Orders and relied on a substantial transformation analysis unsupported by substantial evidence and otherwise not in accordance with law. Compl. ¶¶ 21, 25, Apr. 4, 2014, ECF No. 8; *see Bell Supply I*, 39 CIT at __, 83 F. Supp. 3d at 1313–14.

This court held that Commerce erred by applying the substantial transformation test, and that Commerce failed to follow the interpretive framework established in its regulations and thus unlawfully expanded the scope of the Orders to include Plaintiff's merchandise. *See Bell Supply I*, 39 CIT at __, 83 F. Supp. 3d at 1328–30. This court remanded Commerce's scope determination with instructions to "identify actual language from the scope of the Orders that could be reasonably interpreted to include OCTG finished in third countries in order to find that the merchandise is covered by the scope of the Orders," as required by the regulatory scheme. *Id.* at 1329.

On remand, Commerce again found that the Orders cover OCTG made from green tubes from the PRC, even where they are finished in a third country.[5] Under protest, Commerce abandoned its substantial transformation analysis, instead invoking the plain language of the Orders. *See* Final Results of Redetermination Pursuant to Remand, at 2, 15, 20, Nov. 9, 2015, ECF No. 88–1 ("*First Remand Results*").

[4] Green tube is a type of unfinished OCTG, and references to unfinished OCTG will therefore include green tubes. Final Results of Redetermination Pursuant to Remand at 1, Nov. 9, 2015, ECF No. 88–1.

[5] Commerce conducted the first remand redetermination under protest, noting that it "respectfully disagree[d] with the CIT that the Department improperly conducted a 'substantial transformation' test in this proceeding." Final Results of Redetermination Pursuant to Remand, at 14, Nov. 9, 2015, ECF No. 88–1. By adopting a position "under protest," Commerce preserved its right to appeal; the Court of Appeals has held that Commerce preserves its right to appeal in instances where Commerce makes a determination under protest and the Court of International Trade sustains its decision after remand. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

This court determined that Commerce's *First Remand Results* did not comply with the court's remand order in *Bell Supply I*, and that the results were not supported by substantial evidence and not in accordance with law. *Bell Supply Co. II*, 40 CIT at __, 179 F. Supp. 3d 1082, 1090 (2016). Although Commerce identified language in the Orders that Commerce believed covered green tubes manufactured in China and finished in third countries, this court held that the language was insufficient to permit such a conclusion. *See Bell Supply II*, 40 CIT at __, 179 F. Supp. 3d 1082, 1091, 1094–95. The court remanded Commerce's *First Remand Results* for further consideration and instructed that Commerce must interpret the Orders pursuant to the regulatory framework enumerated by 19 C.F.R. § 351.225(k)(1) (2013) and 19 C.F.R. § 351.225(k)(2) (2013) or, alternatively, conduct a circumvention analysis pursuant to 19 U.S.C. § 1677j(b) and 19 C.F.R. § 351.225(h) (2013). *Id.* at 1098–99, 1105.

In its Final Results of Second Redetermination Pursuant to Remand ("*Second Remand Redetermination*"), Commerce determined that (1) the language of the Orders does not cover unfinished OCTG manufactured in the PRC and finished in third countries, and (2) that imports of finished OCTG from Indonesia processed from unfinished green tubes from China do not circumvent the Orders pursuant to 19 U.S.C. § 1677j(b). *See Second Remand Redetermination*, at 1, 5, 19–20, 33–35, Aug. 11, 2016, ECF No. 132–1. Per this court's instruction, Commerce utilized the 19 C.F.R. § 351.225(k)(1) and (2) factors in its analysis regarding whether OCTG finished in third countries fall within the orders. *See id.* at 5, 14–19. Commerce found that the (k)(1) and (k)(2) factors did not support a finding that the OCTG finished in Indonesia were covered by the Orders. *Id.* at 15–19. With respect to its circumvention analysis under § 1677j, Commerce explained that "the process of assembly or completion performed . . . in Indonesia is neither minor nor insignificant." *Id.* at 33. Commerce, therefore, found that OCTG finished in Indonesia and made from green tubes from the PRC are not covered by the Orders.

Defendant-Intervenors appealed Commerce's scope ruling, and this court upheld the ruling. *See Bell Supply III*, 40 CIT __, 190 F. Supp. 3d 1244, 1246 (2016) (reasoning that Commerce, in its *Second Remand Redetermination*, complied with the court's order in *Bell Supply II* and that Commerce's conclusions were supported by substantial evidence). Defendant-Intervenors appealed this court's decision to the Court of Appeals for the Federal Circuit. *See Bell Supply IV*, 888 F.3d 1222 (2018). The Court of Appeals vacated and remanded

this court's decision in *Bell Supply III*, holding that Commerce may use the substantial transformation analysis to determine country of origin prior to conducting a circumvention inquiry. *Bell Supply IV*, 888 F.3d at 1224–25, 1229. The Court of Appeals clarified that the substantial transformation analysis, used to determine where goods are from, precedes the circumvention inquiry, and that the circumvention analysis enters the fray only when Commerce determines that goods are from a country not covered by the relevant AD or CVD orders. *Id.* at 1229. Thus, this court must now determine whether Commerce's application of the substantial transformation analysis is supported by substantial evidence. For the reasons that follow, the court remands Commerce's determination that OCTG made from green tubes from the PRC and finished in third countries were not substantially transformed.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction over Plaintiff's claim under 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting scope determinations that find certain merchandise to be within the class or kind of merchandise described in an antidumping or countervailing duty order. The court must "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

An antidumping or countervailing duty order must "include[ ] a description of the subject merchandise, in such detail as the administering authority deems necessary." 19 U.S.C. §§ 1671e(a)(2), 1673e(a)(2). This description creates the scope of the order. Issues arise regarding whether a particular product falls within the scope of an antidumping or countervailing duty, in part because federal regulations require Commerce to write the descriptions in "general terms." 19 C.F.R. § 351.225(a) (2012). The Court of Appeals held in *Bell Supply IV* that Commerce may use the substantial transformation analysis to determine country of origin for an imported article, *see Bell Supply IV*, 888 F.3d at 1229, noting that a "substantial transformation occurs where, 'as a result of manufacturing or processing steps ... [,] the [product] loses its identity and is transformed into a new product having a new name, character and use." *Bell Supply IV*, 888 F.3d at 1228–29 (quoting *Bestfoods v. United States*,

165 F.3d 1371, 1373 (Fed. Cir. 1999)).[6] To determine if substantial transformation has occurred, Commerce considers five factors: (1) the class or kind of merchandise; (2) the nature and sophistication of processing in the country of exportation; (3) the product properties, essential component of the merchandise, and intended end-use; (4) the cost of production/value added; and (5) the level of investment. *See* Preliminary Scope Ruling at 14–29; Final Scope Ruling at 16–23. Products that undergo a substantial transformation in a foreign coun-

[6] Although the Court of Appeals quotes *Bestfoods* to invoke the name, character or use test, *Bestfoods* involved a North American Free Trade Agreement country of origin determination applying statutory tariff-shift rules as opposed to *Gibson-Thomsen's* "name, character and use" test, which evolved in Customs law. The *Gibson-Thomsen* name, character and use test provides that a product undergoes substantial transformation if, as a result of manufacturing or processing steps, the imported product loses its identity and is transformed into a new product having "a new name, character and use." *See United States v. Gibson-Thomsen Co.*, 27 CCPA 267, C.A.D. 98 (1940); *see also Bestfoods*, 165 F.3d at 1372–73.

The courts and Customs have employed a variety of factors to assess whether a product has acquired a new name, character or use depending upon the product at issue. For example, Customs cases have enquired as to whether an article will become an "integral part" of another product, such that it acquires a new name, character and use. *See, e.g.*, *Diamond Match Co. v. United States*, 45 Cust. Ct. 198, C.D. 2223 (1960) (ice cream sticks imported in bundles became an integral part of the ice cream-on-a-stick, taking on a new name, character, and use.); *Grafton Spools, Ltd. v. United States*, 45 Cust. Ct. 16, C.D. 2190 (1960) (empty spools for ribbons for business machines became an integral part of the machine and had a new name, character, and use). *Compare Uniroyal, Inc. v. United States*, 3 CIT 220, 226, 542 F.Supp. 1026, 1031 (1982), aff'd, 702 F.2d 1022 (Fed. Cir.1983) (finding that uppers were already the essence of a finished shoe). Other Customs cases have focused more particularly on the change in the use of the product as a result of processing. *See, e.g.*, *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 477, 664 F.Supp. 535, 541 (1987) (finding the process of continuous hot-dip galvanizing of Japanese full hard cold-rolled sheet changed the uses and character of the sheet by changing the chemical composition and providing corrosion resistance). *Compare Superior Wire v. United States*, 11 CIT 608, 616, 669 F.Supp. 472, 479 (1987) (finding no substantial transformation because of, inter alia, the lack of different uses after processing). More specifically, the court has also enquired as to whether products, as a result of processing, change from producers' goods to consumers' goods. *See, e.g.*, *Midwood Indus., Inc. v. United States*, 64 Cust. Ct. 499, 508, C.D. 4026, 313 F. Supp. 951, 957 (Cust. Ct. 1970) (finding imported forgings were producers' goods which after processing became consumers' goods, specifically fittings and flanges, having a different name, character and use). *See also Boltex Mfg. Co., L.P. v. U.S.*, 24 CIT 972, 140 F. Supp. 2d 1339 (2000) (chronicling various approaches to the substantial transformation inquiry within Customs law).

For green tube or unfinished seamless steel pipe, Customs, in the ruling that prompted the petitioners to seek a scope ruling from Commerce, focuses on the fact that "heat treating imparts the critical high yield strength required by A.P.I. specifications for oil well tubing." Petition for Scope Inquiry at Ex. 1, 39, AD PD 1, bar code 3065185–01 (Mar. 26, 2012) (CBP Ruling N118180 Re: The country of origin of steel tubing processed in Korea or Japan from green tubes originating in India, China, or Russia (Sept. 3, 2010)).

In *Bell Supply IV*, although the Court of Appeals speaks of the name, character or use test, it does not invoke any of the factors used in Customs cases and specifically states the factors Commerce considers to determine whether there has been a substantial transformation. *See Bell Supply IV*, 888 F.3d at 1228–29. Specifically, these factors are "(1) the class or kind of merchandise; (2) the nature and sophistication of processing in the country of exportation; (3) the product properties, essential component of the merchandise, and intended end-use; (4) the cost of production/value added; and (5) level of investment." *Id.*

try may be considered to be from that country, effectively removing them from the ambit of AD or CVD orders applying to the original country.

In both its Preliminary and Final Scope Rulings, Commerce determined that the processing of seamless unfinished OCTG from the PRC into finished OCTG in Indonesia does not constitute substantial transformation. Preliminary Scope Ruling at 31; Final Scope Ruling at 24. In reaching its conclusion, Commerce appears to rely upon its findings with respect to all five factors of its test comprising its totality of the circumstances analysis. *See, e.g.*, Preliminary Scope Ruling at 31 (relying on each factor "to the extent practicable" and "the totality of the circumstances" to reach its conclusion that the downstream processing of seamless unfinished OCTG from the PRC into finished OCTG does not constitute substantial transformation). Commerce fails to explain how three of the factors upon which it relies support its determination. Therefore, the court remands the matter for further explanation or reconsideration consistent with this opinion.

Commerce first considered whether the product falls within the same class or kind of merchandise before and after processing. Preliminary Scope Ruling at 16. Commerce found that green tube and finished OCTG fell within the same class or kind of merchandise, noting that "the clear language of the scope indicates finished and unfinished OCTG are of the same class or kind." Preliminary Scope Ruling at 16.

Commerce does not explain how its finding that the two products are of the same class or kind of merchandise supports its ultimate conclusion that there has not been a substantial transformation. Commerce states that it has "continued to accord the class or kind of merchandise criterion with the consideration required under the Department's standard analysis." Final Scope Ruling at 16. Commerce incorporates this factor into its analysis and appears to rely on it as part of its totality of the circumstances analysis, yet nowhere does it explain how this factor supports its determination, and its rationale is not reasonably discernable. Finished and unfinished OCTG are part of the same class only because the petitioners requested that Commerce investigate the two together. *See* Petition for Scope Inquiry 2, AD PD 1, bar code 3065185–01 (Mar. 26, 2012); *Certain [OCTG] from the People's Republic of China*, 74 Fed. Reg. 20,671 (Dep't Commerce May 5, 2009) (notice of init.). Without further explanation, it is not clear how this factor does any work in this case. Commerce does not explain, and it is not reasonably discernible, how this factor bears any relationship to whether the downstream pro-

cessing was sufficient to cause a substantial transformation. Although Commerce seems to minimize the importance of this factor, stating that no one factor is dispositive,[7] Final Scope Ruling at 16, the weight to be accorded to this factor does not substitute for explaining its usefulness.[8] Commerce must provide a reasonable explanation regarding how this factor contributes to its conclusion.

Commerce next considered the nature/sophistication of processing in the country of exportation, determining that the finishing process performed in Indonesia did not warrant a finding of substantial transformation. Preliminary Scope Ruling at 19; Final Scope Ruling at 17. In its Preliminary Scope Ruling, Commerce explained that it does not base its analysis on whether the upstream production is more or less sophisticated than the downstream processing, but that it does not exclude the upstream production from its analysis. Preliminary Scope Ruling at 19. The analysis instead focuses on the extent and complexity of the downstream processing, and the changes to the product imparted by the processing. *Id.* Commerce described the processing conducted in Indonesia, noting that it entails "quenching and tempering, upsetting on certain merchandise, threading (for external or integral joint), and coupling (for some merchandise)." Preliminary Scope Ruling at 19. Commerce noted that, although the processing is "not insignificant," *id.*, the heat treatment process is completed with relative ease and with the help of standardized equipment. *Id.* at 19–20. Moreover, Commerce noted that the threading process is standardized, and is commonly utilized by companies on tubing prior to its sale. Accordingly, Commerce concluded that this process was not more sophisticated than techniques commonly used in the steel industry, and thus did not warrant a finding of substantial transformation. *Id.* at 20.

In its Final Scope Ruling, Commerce departed from the analytical approach described above. Commerce emphasized the importance of the unfinished OCTG product relative to the contribution of the finishing process, and explained that it would not be possible to produce a finished, heat-treated OCTG product without first creating

[7] Commerce explains that although a finding that products belong to the same class or kind is "an important factor" in the substantial transformation analysis, it is not dispositive. Preliminary Scope Ruling at 16. In its Final Scope Ruling, Commerce noted that although the issue of class or kind "may have lesser importance" in some situations than others (seeming to imply this was one such case), it is still a factor that Commerce considers as part of the substantial transformation analysis. Final Scope Ruling at 16.

[8] Although Commerce attempts to minimize the impact of the class or kind of merchandise factor by stating that no one factor is dispositive, Final Scope Ruling at 16, Commerce invokes the same factor in its discussion of the cost of production/value added in its Preliminary Scope Ruling, suggesting that the product's class or kind of merchandise served as one of the more important factors in its analysis. *See* Preliminary Scope Ruling at 25.

the upstream, unfinished OCTG product. Final Scope Ruling at 17. Commerce thus concluded that, compared to the complex production process used to create unfinished OCTG in the PRC, the heat treatment process conducted in Indonesia was not more sophisticated. *Id.* Consideration of the nature of the production process did not, according to Commerce, warrant a finding of substantial transformation.

This approach is not reasonable. Commerce abandoned its previous analytical approach—an examination of the extent and complexity of the downstream processing and any changes imparted to the product by that processing—in favor of a strict comparative methodology. Yet, as Commerce correctly noted in its Preliminary Scope Ruling, "if every downstream steel production process were compared to the making of hot-rolled steel, the Department might potentially find it difficult to separate classes or kinds of steel products beyond the hot-rolled steel stage." Preliminary Scope Ruling at 19. Indeed, this type of strict comparative analysis could preclude a finding of substantial transformation for any downstream processing. Such an approach strays from the focus of the inquiry, i.e., whether substantial transformation occurs as a result of the downstream processing. Plaintiff correctly notes that Commerce's comparative approach necessarily implies that the only situation where third-country processing could result in substantial transformation is when the processing is more sophisticated than any other step in producing the entire product. Reply Br. Pl. [Bell Supply] Supp. Mot. J. Agency R. at 19, Feb. 11, 2015, ECF 68 ("Pl. Reply Br."); *see also* Final Scope Ruling at 17 (determining that the "heat treatment conducted in Indonesia is not more sophisticated than . . . producing the unfinished OCTG in the PRC."). A scenario could conceivably arise in which a downstream production process, though less sophisticated than the upstream production process, is still sophisticated for purposes of the substantial transformation test. Without further explanation, Commerce's determination regarding the nature/sophistication of the processing fails to support its conclusion that substantial transformation did not occur.[9]

[9] It is not unreasonable for Commerce to consider the production process required to produce unfinished OCTG in its evaluation of the sophistication of the downstream processing. Doing so enables Commerce to contextualize the analysis in the relevant industry. Moreover, bearing in mind the salient question of whether the product has been substantially transformed, permitting Commerce to examine the heat treating process against the backdrop of the upstream production process seems logical. Requiring Commerce to examine the downstream processing in a vacuum, without any reference to the production required to create the input for the third-country processing, would deprive Commerce of important data that goes to the heart of the country of origin inquiry. Nonetheless, reducing the analysis to a mere comparison between the downstream and upstream processing does

Commerce next considered the product properties, the essential component of the merchandise, and the intended end-use, concluding that this factor did not support a finding of substantial transformation. Commerce stated in its Preliminary Scope Ruling that although the finishing process in Indonesia conferred different mechanical properties on the finished OCTC compared to the green tubes, the major physical and chemical properties of both finished and unfinished OCTG are imparted during the steel forming process. Preliminary Scope Ruling at 22. Additionally, despite the fact that the downstream processing conducted in Indonesia altered the OCTG's mechanical properties, Commerce concluded that the essential component of the merchandise—both finished and unfinished OCTG—is the green tube produced in the PRC. *Id.* at 22. Commerce explained this determination by noting that although heat-treated (and threaded and coupled) OCTG is not necessarily interchangeable with the unfinished OCTG in question, unfinished OCTG may still be used as a vehicle for oil and gas extraction. *Id.* at 22–23. Commerce cited several examples of pipe grades under the American Petroleum Institute ("API")-5CT specification that do not require heat treatment to qualify for such specifications. *Id.* at 23. Commerce emphasized that although heat treatment conferred new mechanical properties, these mechanical alterations did not change the essential component of the merchandise, since the record indicates that unfinished OCTG can be used for oil and gas extraction. *Id.* at 22–23. Because the physical and chemical properties of the OCTG did not change significantly as a result of the third-country processing, and because the heat treatment was not required in order for the product to be used for oil and gas extraction, Commerce concluded that the physical and chemical characteristics of green tube, rather than the subsequent heat treating in Indonesia, determined the green tube's ultimate use as OCTG. *Id.* at 23.

In its Final Scope Ruling, Commerce affirmed its preliminary determination, noting that all of a product's characteristics—physical, chemical, and mechanical—are equally important and are evaluated on a case-by-case basis. Final Scope Ruling at 19. Commerce explained that while the finishing process in Indonesia altered the mechanical and microstructure of the green tubes, the physical and chemical properties of the heat-treated OCTG product are equally important with regard to the product's structure, its size, and its end-use, and these properties are established during the production

not aid in the substantial transformation inquiry in this case. Commerce must determine whether the downstream processing is so significant "as to require that the resulting merchandise be considered the product of the country in which the transformation occurred." *Bell Supply IV*, 888. F.3d at 1229 (quoting *E.I. Du Pont*, 8 F. Supp. 2d at 858).

of the unfinished OCTG in the PRC. *Id*. Commerce therefore declined to use the mechanical properties of OCTG as the "dividing line," as doing so would diminish the importance of the production process necessary to create the unfinished OCTG in the PRC.[10] *Id.*

Commerce's analysis regarding this factor is reasonable. Plaintiff concedes that the chemical properties of finished OCTG are established by the chemistry of the green tube. *See* Pl.'s Resp. to Scope Inquiry at 12, AD PD 33, bar code 3086198–01 (July 13, 2012). Moreover, the record supports Commerce's determination that there are "few physical and chemical differences" between green tubes and heat-treated OCTG.[11] Preliminary Scope Ruling at 23. The fact that the third-country processing is not necessary for the product to be used for oil and gas extraction reasonably cuts in favor of a finding that the product's essential component is the green tubes from the PRC, and therefore the processing did not constitute substantial transformation. *See* Preliminary Scope Ruling at 22–23.

Plaintiff argues that it is the mechanical properties that enable the products to be sold as P-110, T-95, and Q-125 OCTG, thus enabling the OCTG to be used for its intended end-use. Mot. Pl. [Bell Supply] Supp. Mot. J. Agency R. 39 n.11, Sept. 19, 2014, ECF No. 36–1 ("Pl. Br."). As previously described, however, this alteration does not impact the physical and chemical properties of the product, all of which Commerce properly considered. Indeed, the record indicates that Bell Supply and Citra Tubindo, the company responsible for processing in Indonesia, are responsible for selecting the appropriate physical and chemical requirements of the green tubes, and the processing does not change these properties. Preliminary Scope Ruling at 23. Also, the intended end-use—oil and gas extraction—remains the same, even where the API certification changes. Preliminary Scope Ruling

[10] Commerce states that "the physical (dimensional) and chemical characteristics of that unfinished OCTG are what allow a company such as Citra Tubindo to conduct its further processing in the first place." Final Scope Ruling at 19. Plaintiff argues that Commerce's analysis is unreasonable because it reduces the analysis to a mere comparison between the importance of the upstream production and that of the downstream processing. Mot. Pl. [Bell Supply] Supp. Mot. J. Agency R. 40–41, Sept. 19, 2014, ECF No. 36–1. Such an analysis would be unreasonable, the argument goes, because it would preclude downstream processing from ever constituting substantial transformation, since without the upstream production, there would not be a product to undergo downstream processing. Commerce's analysis is not as narrow as Plaintiff describes. Commerce examined the physical, chemical, and mechanical properties of the finished OCTG, and determined that, based on the record, the physical and chemical properties were just as important in determining the product's essential component and end-use, and these properties are determined prior to the downstream processing.

[11] For example, the ITC found that green tubes and other unfinished OCTG are useable in the extraction of oil and gas without treatment and further finishing. Final Scope Ruling at 18–19.

at 23 ("worth noting is that the application (*i.e.*, oil and gas extraction) remains identical across all grades of OCTG"). Thus, although the mechanical alterations may mean the products are more desirable for use in certain environments, Commerce did not act unreasonably by concluding that the essential component and intended end-use remain unchanged.

Plaintiff also argues that Commerce's conclusion regarding the properties, essential component, and intended end-use factor conflicts with previous determinations. Specifically, Plaintiff invokes two prior determinations for the proposition that Commerce found the mechanical properties of steel to be a critical part of the finished merchandise and that processing that imparts such properties constitutes substantial transformation. Pl. Br. at 39 (citing Pl.'s Comments on Preliminary Scope Ruling at 30, AD CD 50 (June 24, 2013) ("*Pure Magnesium from China*"); Final Results of Redetermination Pursuant to Court Remand in *Peer Bearing Co.-Changshan v. United States*, Court No. 10–00013, Apr. 11, 2012, ECF 107–1 ("*Peer Bearing*")). Commerce reasonably concluded that it was not bound by these decisions. In *Pure Magnesium from China*, the third-country processing transformed the input product—pure magnesium—into an alloy of magnesium in a new shape and with different chemical and mechanical properties. Pl.'s Resp. to Scope Inquiry at Ex. 2 and 3, AD PD 35 (Sept. 6, 2006). This change in physical and chemical properties is lacking here. Moreover, *Peer Bearing* involved parts and components that, prior to assembly, could not perform their respective functions as tapered roller bearings parts because they had not been ground and polished into their final dimensions, see *Peer Bearing Co.-Changshan v. United States*, 37 CIT __, 914 F. Supp. 2d 1343, 1353 (2013), whereas here, the physical and chemical properties of the OCTG remain largely unchanged, Final Scope Ruling at 19, and the OCTG is capable of being used for oil and gas extraction before and after processing. Preliminary Scope Ruling at 23. Examination of mechanical properties is just one part of the analysis, and Commerce's analysis did not rest solely on the assertion that unfinished OCTG is the product's essential element. As described above, Commerce considered the importance of the mechanical alterations imparted by the third-country processing, and ultimately found that the physical and chemical properties of the finished OCTG were just as important to the product's structure, size, and end-use, and that these properties were established prior to the downstream processing. Commerce correctly notes that it evaluates the physical, chemical, and mechanical properties on a case-by-case basis, and no individual category of characteristic is more determinative than another. Final

Scope Ruling at 19. Accordingly, Commerce's determination that the product characteristics, essential component, and intended end-use do not warrant a finding of substantial transformation is supported by substantial evidence.

Commerce next considered the cost of production/value added, determining in its Preliminary Scope Ruling that the value added by the third-country processing "ranged from under [[ ]] percent for certain products to approximately [[ ]] percent for other products." Preliminary Scope Ruling at 25. Additionally, Commerce determined that for the heat treatment process, the value added is less than [[ ]] percent of the total value of all OCTG products. *Id.* at 25. Commerce noted that no established threshold exists for determining whether a certain value-added figure constitutes substantial transformation, and the required amount can vary across industries. Preliminary Scope Ruling at 25. Moreover, Commerce emphasized that the cost of production/value added should be considered within the context of the broader case, and that the Department is not required to place equal weight on each factor when making a substantial transformation determination. *Id.* at 25.

For its Final Scope Ruling, Commerce revised the value-added analysis for certain products based on supporting calculations provided by Plaintiff. This modification enabled Commerce to convert Plaintiff's aggregated U.S. sales prices for certain sizes to per-unit sales prices, as required by Commerce's value-added formula. *See* Final Scope Ruling at 20. Commerce noted that, as a result of these changes, the value added for certain products increased, *id.* at 20, but nevertheless concluded that, as a whole, the value added by the third-country processing is not significant. *Id.* at 22. Commerce noted that although the value added for one of the products in question increased to a point that may, under certain circumstances, be considered significant, this particular product was not representative "on a quantitative basis" of the entire population of products in question. *Id.* at 22. Commerce based this determination on the low sales quantity of this product relative to that of all OCTG for which a U.S. sales price was provided, as well as to all OCTG covered by the scope ruling generally for which processing costs were reported. *Id.* at 21.

Commerce's handling of the cost of production/value added factor is not supported by substantial evidence. It is reasonably discernible that Commerce, in arriving at this conclusion, relied at least in part on the weighted-average of value added for all products, which was [[ ]] after processing. Final Scope Analysis Memo at 2, AD CR 54, bar code 3181447–01 (Feb. 7, 2014); Final Scope Ruling at 22

("Based on the weighted-average value added percentage for all of the products covered by this scope ruling, we find that the value added . . . is not significant."). It is also reasonably discernible that Commerce, to some extent, considers the percentage of value added a proxy for the degree of transformation. Such an approach is reasonable; where a product's value sees a marked increase as a result of downstream processing, such processing could reasonably be perceived as probative of transformation. What is not reasonably discernible, however, is why Commerce found the percentage of value added in this case insignificant. Commerce provides little to no explanation on this point, and it is not clear at what percentage Commerce would consider value added significant under the circumstances. Also unclear is the extent to which the value-added factor was of greater or lesser importance in this case relative to other cases. Commerce reasonably notes that it does not have an established threshold for determining whether a certain value-added figure constitutes substantial transformation on its own, and that the amount of value added required to substantially transform a product will vary significantly across industries. *See* Preliminary Scope Ruling at 25. Commerce is not obliged to establish a threshold, but without an established threshold or additional explanation relating to the facts of this case, Commerce's determination that the percentage of value added in this case is not significant lacks any rationale. *See* Final Scope Ruling at 22. For instance, Commerce would do well to explain why a level of [[ ]] overall value added is not significant within the context of the OCTG industry.[12] Moreover, Commerce could explain the extent to which it relies less on this factor than on other factors for reasons specific to this case. In its Preliminary Scope Ruling, Commerce states that the value-added factor is of less importance in this case than the physical, chemical, and mechanical characteristics of the OCTG, the product's intended end-use, and the class or kind of merchandise factor. Preliminary Scope Ruling at 25. However, Commerce does not reiterate this determination in its Final Scope Ruling, and given its seemingly diminished reliance on the class or kind of merchandise factor, the court cannot reasonably infer that Commerce carried this position over into its Final Scope Ruling. Although a totality of the circumstances analysis eschews bright line rules for balancing, Commerce must explain how each factor weighs in the balance and why. The failure to explain the reasonableness and

[12] It may be that a [[ ]] overall value added is insignificant under the circumstances, but Commerce must provide an explanation for such a determination that is supported by substantial evidence. Stating that Commerce has no established threshold and that the amount of value added needed to substantially transform a product can vary across industries does not constitute a reasonable explanation. *See* Preliminary Scope Ruling at 25.

weight of each factor results in an "I know it when I see it test," which is no test at all. Commerce's determination that the level of value added by the third-country processing was not significant is therefore unreasonable.

With respect to the final factor—level of investment—Commerce found in its Preliminary Scope Ruling that the investment in the third-country processing was small in comparison to the investment required to build "a complete pipe mill." Preliminary Scope Ruling at 27. Commerce explained that previously adopted methods were inapplicable in this case because of the unique factual circumstances, paving the way for a "tailored" analysis based on the information in the record. *Id.* at 23 and 29. Accordingly, Commerce deemed the investment required for the processing performed in Indonesia "small in comparison" to that necessary for a complete pipe mill. *Id.* In its Final Scope Ruling, Commerce affirmed its position and explained that this analytical method is appropriate for a substantial transformation test, since the "primary purpose" of the test is to determine whether the third-country processing is significant relative to the production of finished or unfinished OCTG. Final Scope Ruling at 23.

Commerce's determination on the level of investment factor is supported by substantial evidence. Commerce's analysis determined that the investment required to conduct processing in Indonesia was insignificant in comparison to the investment required for a complete pipe mill. Final Scope Analysis Memo at 2, CD 54, bar code 3181447–01 (Feb. 7, 2014). Record evidence supports this conclusion.[13]

Plaintiff challenges Commerce's method of comparing the investment required for the finishing operations with that required to build a complete pipe mill. *See* Pl.'s Br. at 42–43. Here, as Commerce noted, the ideal analytical approach would be to compare the level of investment for the processing of OCTG in Indonesia to the investment required for the processing company to completely produce OCTG in Indonesia. *See* Preliminary Scope Ruling at 28. Because the processing company in this case does not engage in complete production of OCTG, the record does not allow such an analysis. Consequently, Commerce performed a tailored analysis based on information available on the record, comparing the investment in the processing in

[13] The record indicates that the investment made by Citra Tubindo in its processing facility in Indonesia constitutes approximately of the investment required by Tenaris S.A. in its complete seamless pipe mill. *See* Final Analysis Memo, at Attachment 5, AD CR 54, bar code 3181447–01 (Feb. 7, 2014).

Indonesia with the investment made by Tenaris in its Bay City, Texas seamless pipe production facility.[14] Final Scope Ruling at 29.

It was reasonable for Commerce to compare the investment made in Indonesia to that required for complete pipe production. It is reasonably discernable that Commerce examines the capital investment required for downstream processing as a proxy for the degree of transformation. The greater the investment, the analysis goes, the greater the transformation of the product. This approach is reasonable, so as not to evaluate the level of investment in a vacuum. Different industries have different barriers to entry—a small capital investment in one industry might be significant in another. Therefore, in order to contextualize the investment in further processing, it is reasonable to compare the level of investment required at different processing stages within the same industry. A comparatively small investment in downstream processing indicates a lack of substantial transformation. Nowhere does Commerce state that in order to constitute a substantial transformation, the level of investment for the processing of unfinished OCTG must be equal to or greater than the cost of investing in a complete pipe mill. Commerce merely uses pipe mill investment as a comparative reference.[15] The goal of the substantial transformation test is to determine whether the processing is "of such significance as to require" that the merchandise be deemed to be from that country. *Bell Supply IV*, 888. F.3d at 1229 (quoting *E.I. Du Pont*, 8 F. Supp. 2d at 858). In assessing significance, the investment required to produce the product is probative. Given the disparity between the investment in the processing in Indonesia and the investment required for complete pipe production and finishing op-

[14] Although Commerce could have relied on investment data provided by suppliers from the PRC pursuant to the Department's investigation, Commerce reasonably declined to do so, noting that it would be inappropriate to rely on investment information from a company operating in a non-market economy. Commerce also declined to use other examples provided by the petitioners. Preliminary Scope Ruling at 29.

[15] Although Plaintiff argues that the amount of investment and qualitative information pertaining to the investment should be the relevant inquiry for Commerce's analysis, it does not put forth record evidence to show why Commerce's choice to compare the processing investment to the investment required for a "greenfield pipe mill" is unreasonable. *See* Pl. Br. at 43. Plaintiff suggests an alternative methodology; it does not show Commerce's chosen methodology was unreasonable, and the court's task is to assess whether Commerce's methodological choice is reasonable and whether its conclusions are supported by substantial evidence. See *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 48–49 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner."); see *Smith Corona Grp. v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (granting Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature"); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), aff'd, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

erations, Commerce reasonably concluded that the level of investment was not significant for purposes of the substantial transformation test.

CONCLUSION

For the reasons discussed above, Commerce's determination is not supported by substantial evidence. Therefore, in accordance with the foregoing, it is

ORDERED that Commerce's determination is remanded for reconsideration or further explanation consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to comments on the remand redetermination.

Dated: October 18, 2018
New York, New York

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