

U.S. Court of International Trade

Slip Op. 19–106

CHINA STEEL CORP., Plaintiff, v. UNITED STATES, Defendant, and
ARCELORMITTAL USA LLC, NUCOR CORP., and SSAB ENTERPRISES
LLC, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 17–00152
PUBLIC VERSION

[U.S. Department of Commerce’s final determination is sustained, in part, and remanded.]

Dated: August 6, 2019

Jeffrey M. Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, DC, argued for Plaintiff.

Vito S. Solitro, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel on the brief was *Paul Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Paul C. Rosenthal, Kelley Drye & Warren, LLP, of Washington, DC, argued for Defendant-Intervenor ArcelorMittal USA LLC. With him on the brief were *R. Alan Luberd*, *David C. Smith, Jr.*, *Melissa M. Brewer*, *Joshua R. Morey*, and *Heather N. Doherty*.

Alan H. Price, *Tessa V. Capeloto*, *Adam M. Teslik*, *Christopher B. Weld*, *Laura El-Sabaawi*, *Maureen E. Thorson*, *Stephanie M. Bell*, and *Timothy C. Brightbill*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor, Nucor Corporation.

Roger B. Schagrin, *Christopher T. Cloutier*, *Elizabeth J. Drake*, *John W. Bohn*, and *Paul W. Jameson*, Schagrin Associates, of Washington, DC, for Defendant-Intervenor SSAB Enterprises LLC.

OPINION and ORDER

Eaton, Judge:

Plaintiff China Steel Corporation (“Plaintiff” or “China Steel”) moves for judgment on the agency record, challenging the United States Department of Commerce’s (“Commerce” or the “Department”) amended final determination in the antidumping investigation of certain carbon and alloy steel cut-to-length plate from Taiwan. *See Certain Carbon and Alloy Steel Cut-To-Length Plate From Taiwan*, 82 Fed. Reg. 16,372 (Dep’t Commerce Apr. 4, 2017) (“Final Determination”), amended by *Certain Carbon and Alloy Steel Cut-To-Length Plate From Austria, Belg., Fr., the Fed. Rep. of Ger., It., Japan, the Rep. of Korea, and Taiwan*, 82 Fed. Reg. 24,096 (Dep’t Commerce May

25, 2017) (“Amended Final Determination”) and accompanying Issues and Dec. Mem. (Mar. 29, 2017), P.R. 427 (“Final IDM”). The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) (2012) and 28 U.S.C. § 1581(c) (2012).

On April 8, 2016, domestic producers ArcelorMittal USA LLC (“ArcelorMittal” or “Petitioner”), Nucor Corporation, and SSAB Enterprises, LLC each filed an antidumping duty petition covering steel from various countries, including Taiwan. Thereafter, on May 5, 2016, Commerce published the notice of initiation of its less-than-fair-value investigation. See *Certain Carbon and Alloy Steel Cut-To-Length Plate From Austria, Belg., Braz., Fr., the Fed. Rep. of Ger., It., Japan, the Rep. of Korea, the People’s Rep. of China, S. Afr., Taiwan, and the Rep. of Turk.*, 81 Fed. Reg. 27,089 (Dep’t Commerce May 5, 2016) (“Initiation of Investigation”). The scope of the investigation covered products including “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).” Final Determination, 82 Fed. Reg. at 16,374, App. I.

On June 7, 2016, the Department limited the respondents selected for individual investigation to two mandatory respondents: Plaintiff China Steel, and Shang Chen Steel Co., Ltd. (“Shang Chen”). See *Certain Carbon and Alloy Steel Cut-to-Length Plate From Taiwan*, 81 Fed. Reg. 79,420 (Dep’t Commerce Nov. 14, 2016) (“Preliminary Determination”); Respondent Selection Mem. (June 7, 2016), P.R. 88 at 5.

China Steel is a Taiwanese producer and exporter of the subject steel plate, and first objects both to Commerce’s application of adverse facts available (“AFA”),¹ and to Commerce’s rejection of a supplemental questionnaire response containing unrequested data. Next, Plaintiff contends that Commerce erred when it applied AFA to some of the company’s cost of production data and when it used that AFA-adjusted data in its difference-in-merchandise (“DIFMER”) adjustment to normal value. Plaintiff also claims entitlement to a post-sale home-market price adjustment. Finally, it argues that Commerce’s decision was unfairly prejudged by a conflict of interest on the part of the Secretary of the Department, Wilbur Ross, who was formerly associated with Petitioner and Defendant-Intervenor ArcelorMittal.

¹ The statute provides that Commerce shall use facts available “[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]” or “significantly impedes a proceeding.” 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). Facts available may also be used if the information provided “cannot be verified” and is therefore unreliable. *Id.* § 1677e(a)(2)(D). Commerce may only use adverse inferences when “selecting from among the facts otherwise available” if it finds that a party has “failed to cooperate by not acting to the best of its ability to comply with a request for information.” *Id.* § 1677e(b)(1)(A).

See Pl.'s Rev. Br. Supp. Mot. J. Agency R., ECF No. 65 ("Pl.'s Br."); see also Pl.'s Reply, ECF No. 61.

Because Commerce erred when it based part of its DIFMER analysis, and thus its subsequent adjustment, on AFA-adjusted data, the Amended Final Determination is remanded. Since Plaintiff's other arguments lack merit, Commerce's determination, as to the remaining issues, is sustained.

BACKGROUND

Where goods are being sold at less than fair value, Commerce imposes an antidumping duty "equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise."² 19 U.S.C. § 1673.

During this investigation, the Department compared

all products produced and sold by China Steel in Taiwan during the [period of investigation] that fit the description in the "Scope of Investigation" section of the accompanying *Federal Register* notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the home market, where appropriate. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade.

Final IDM at 19. When appropriate, Commerce makes various adjustments to normal value, including the difference-in-merchandise ("DIFMER") adjustment for physical variations between products. See 19 U.S.C. § 1677b(a)(6)(C)(ii); 19 C.F.R. § 351.411 (2017).

Normal value, in the context of a market economy country³ such as Taiwan, is generally based on the prices of sales in the home market. See 19 U.S.C. § 1677b(a)(1)(B)(i). Commerce disregards home-market

² Commerce uses several methods to compare normal value and export price in less than-fair-value investigations. See 19 C.F.R. § 351.414(b) (2017) (listing methods). In this case, the Department used the "average-to-transaction" method. See 19 C.F.R. § 351.414(b)(3) ("The 'average-to-transaction' method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise."); Final IDM at 18 ("[F]or the [F]inal [D]etermination, the Department is applying the average-to-transaction method to all of China Steel's U.S. sales to calculate the weighted-average dumping margin for China Steel.")

³ In contrast, a "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). When the merchandise in question is exported from a nonmarket economy country, Commerce calculates the normal value of the subject merchandise based on the values of the factors of production, adding "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c)(1)(B).

sales that were made at less than the cost of production, and bases normal value on the remaining sales, or, if none remain, the merchandise's constructed value. *Id.* § 1677b(b)(1).

In this investigation, after reviewing the company's cost of production information, Commerce eventually concluded that China Steel's home-market sales were a suitable basis for normal value. *See* Final IDM at 20 (“[W]e used home market sales as the basis for [normal value] for China Steel.”). Commerce, however, calculated normal value employing AFA for some of China Steel's cost of production data. Further, Commerce rejected China Steel's preferred version of its cost of production database. Thereafter, Commerce determined that it had made a ministerial error by not using AFA-adjusted data as the basis of its DIFMER adjustment to normal value. Its correction of that claimed error resulted in an increased weighted-average dumping margin for China Steel.

I. Commerce's Preliminary Determination

Commerce issued its initial questionnaire on June 9, 2016. *See* China Steel Quest. (June 9, 2016), P.R. 96. In its Section D (cost of production) questionnaire response, Plaintiff provided its cost reporting method and cost data file, denominated as COP1. *See* China Steel Sec. D Narrative Resp. (July 28, 2016), P.R. 195 at 19–21; China Steel Sec. D Exs. (July 28, 2016), P.R. 198, Apps. D-19, D-20.

The Department identified several errors in China Steel's COP1 database. *See* Prelim. Dec. Mem. (Nov. 4, 2016), P.R. 358 at 16 (“Prelim. Dec. Mem.”). Accordingly, on September 16, 2016, it issued a supplemental questionnaire to Plaintiff asking for additional information concerning Plaintiff's Section D response.⁴ Sec. D Suppl. Quest. (Sept. 16, 2016), P.R. 298 (“Suppl. Quest. I”).

China Steel filed its Section D supplemental response on October 11, 2016. *See* China Steel Suppl. Quest. Sec. D Resp. (Oct. 11, 2016), P.R. 324 (“First COP2 Resp.”). In addition to providing the information specifically requested by the Department, however, it made additional, unrequested, revisions to its cost data file (denominated as COP2).⁵ Prelim. Dec. Mem. at 16 (noting that Plaintiff's additional

⁴ Following several requests for extensions of time, Commerce ultimately amended the deadline for Plaintiff's Section D response from September 30, 2016 to October 10, 2016. *See, e.g.*, Letter from Erin Kearney to Jeffrey M. Winton, Extension of Time to Submit Supplemental Questionnaire Responses (Sept. 28, 2016), P.R. 312. Since October 10, 2016 was a non-business day, pursuant to Commerce's regulations, it was permissible for Plaintiff to submit its filing on the following day. *See* 19 C.F.R. § 351.303(b).

⁵ These revisions were primarily comprised of China Steel's claimed discovery of, and attempt to correct, errors in “the coding of product-matching control numbers . . . in [its] July 28 [COP1] submission, particularly in the reporting of the ‘Quality’ characteristic.” First COP2 Resp. at 1.

revisions “were not made in response to a supplemental questionnaire or otherwise solicited by the Department”).

In its Preliminary Determination, Commerce found all of China Steel’s reported cost data, “unreliable for use.” Prelim. Dec. Mem. at 16. The statute provides that Commerce shall use facts available “[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]” or “significantly impedes a proceeding” 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). Here, Commerce found that China Steel’s changes, between COP1 and COP2, to certain product-matching control numbers (“CONNUMs”) affected the calculation of the cost of production and rendered all of China Steel’s reported cost information unusable. *See* Prelim. Dec. Mem. at 16 (emphasis added) (“[T]he Department preliminarily finds that China Steel failed to provide requested information in the form and manner requested and by the deadlines established by the Department. By revising its costs so extensively and significantly, and by doing so *in such close proximity to the statutory date*⁶ for the [P]reliminary [D]etermination, China Steel has also significantly impeded the proceeding.”).

Where Commerce determines that the use of facts available is warranted, it must make the requisite additional finding that a party has “failed to cooperate by not acting to the best of its ability to comply with a request for information” before it may use an adverse inference when “selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b)(1)(A). In the Preliminary Determination, the Department found that because China Steel “fail[ed] to explain the extensive, significant, and unsolicited changes to its cost database,” an adverse inference when selecting from among the facts available was warranted. *See* Prelim. Dec. Mem. at 17. Applying “total AFA,”⁷ the Department preliminarily assigned China Steel a margin of 28 percent, which constituted “the highest calculated dumping margin

“Quality code” refers to one of the product characteristics, assigned by Commerce, that respondents use for reporting cost of production data in the course of an investigation. *See* Letter from Robert James to Jeffrey M. Winton, Product Characteristics for the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Taiwan (June 14, 2016), P.R. 111. These codes are used to define product-matching control numbers, called CONNUMs. “A ‘CONNUM’ is a control number assigned to materially-identical products to distinguish them from non-identical, i.e., similar, products.” *Eregli Demir ve Celik Fabrikalari T.A.S v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1297, 1321 n.34 (2018) (citation omitted).

⁶ China Steel’s supplemental questionnaire response was submitted on October 11, 2016. The Preliminary Determination was issued on November 14, 2016.

⁷ Since the 1994 amendments to section 1677e, Commerce has adopted the practice, under certain circumstances, of using what it calls “total adverse facts available” when determining dumping margins. “Total adverse facts available” is not defined by statute or agency regulation. Commerce has used “total adverse facts available” administratively “to refer to

[assigned] in the investigation.” Prelim. Dec. Mem. at 8, 18–19; *see* Preliminary Determination, 81 Fed. Reg. at 79,420 (“Because mandatory respondent China Steel failed to cooperate to the best of its ability in responding to the Department’s questionnaires, we preliminarily determine to use adverse facts available (AFA) with respect to this respondent.”).⁸ In other words, in the Preliminary Determination, Commerce found that total AFA should be applied, thus using AFA not only for China Steel’s costs of production, but also for its reported sales information. As a result, China Steel’s preliminary antidumping duty rate was 28 percent. Preliminary Determination, 81 Fed. Reg. at 79,421.

II. Post-Preliminary Determination and Second Supplemental Questionnaire

Although it applied total AFA to China Steel’s products in the Preliminary Determination, Commerce stated that it “intend[ed] to issue a supplemental questionnaire after the [P]reliminary [D]etermination to provide China Steel with an opportunity to explain the changes made to its cost database.” Prelim. Dec. Mem. at 17. In a supplemental questionnaire dated November 9, 2016, the Department did just that, and asked Plaintiff to explain its revised cost data file, COP2. Sec. D Suppl. Quest. (Nov. 14, 2016), P.R. 361 (“Suppl.

Commerce’s application of adverse facts available not only to the facts pertaining to specific sales for which information was not provided, but to the facts respecting all of respondents’ sales encompassed by the relevant antidumping duty order.” *Mukand, Ltd. v. United States*, 37 CIT ___, ___, 2013 WL 1339399, at *7 (Mar. 25, 2013) (not reported in Federal Supplement), *aff’d*, 767 F.3d 1300 (Fed. Cir. 2014) (citation omitted).

This Court has sustained Commerce’s use of total adverse facts available in certain tightly defined circumstances, *e.g.*, (1) the record contained no usable information for core components of Commerce’s dumping analysis, or (2) substantial evidence showed that the respondent was egregious in its failure or refusal to comply with Commerce’s requests for information. *See, e.g., Mukand*, 37 CIT at ___, 2013 WL 1339399, at *7 (citations omitted); *Papierfabrik August Koehler Se v. United States*, 38 CIT ___, ___, 7 F. Supp. 3d 1304, 1314 (2014). Where, on the other hand, some of the information could be used, or the deficiency was only “with respect to a discrete category of information,” the use of “partial adverse facts available” is directed by the statute. *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 35 CIT 1398, 1416, 2011 WL 4829947, at *14 (Oct. 12, 2011); *see also Nat’l Nail Corp. v. United States*, 43 CIT ___, ___, 2019 WL 2537931, at *14 (June 12, 2019) (not reported in Federal Supplement) (“[I]n order to apply ‘total adverse facts available,’ Commerce must first find, based on the record, that the use of facts available is warranted with respect to all requested information.”).

⁸ As noted, the resulting preliminary antidumping duty rate for China Steel was 28 percent. Preliminary Determination, 81 Fed. Reg. at 79,421. This number represented mandatory respondent Shang Chen’s transaction-specific margin. Prelim. Dec. Mem. at 19. In the Preliminary Determination, however, Commerce calculated a weighted-average dumping margin of 3.51 percent for Shang Chen, and assigned this rate to all other, non-mandatory respondents. *See* Preliminary Determination, 81 Fed. Reg. at 79,421. In the Amended Final Determination, the “all others” rate was the average of the two mandatory respondents’ recalculated rates (now 75.42 percent for China Steel and 3.62 percent for Shang Chen), resulting in a weighted-average dumping margin of 39.52 percent. Amended Final Determination, 82 Fed. Reg. at 24,098.

Quest. II”). On November 30, 2016, Plaintiff provided the explanations concerning COP2, but also submitted additional changes to its data file. *See* China Steel Sec. D Suppl. Quest. Resp. (Nov. 30, 2016), P.R. 378 (“Rejected COP3 Resp.”). These revisions—which, among other things, incorporated corrections to a computing error that overstated standard costs of production and resulted in an overstated “calculated total aggregate standard cost for all products”—were denominated as data file COP3. Pl.’s Br. 19; *see* Rejected COP3 Resp. at 2–7; Letter from Erin Kearney to Jeffrey M. Winton, Rejection of Unsolicited Database (Dec. 29, 2016), P.R. 395 (“Rejection of Unsolicited Database”).

Commerce rejected COP3 as untimely new factual information, and instructed China Steel to resubmit its supplemental response with only an explanation as to the differences between COP1 and COP2. *See* Rejection of Unsolicited Database. Accordingly, the additional revisions contained in COP3 are not part of the record. China Steel complied and submitted its final, revised response without the additional changes to the data file. *See* China Steel Sec. D Suppl. Quest. Resp. (Jan. 4, 2017), P.R. 398 (“Final COP2 Resp.”).

Commerce then conducted its verification of China Steel’s costs of production. *See* Cost Verification Rep. (Feb. 9, 2017), P.R. 408. In the cost verification report, Commerce identified new computer programming errors in COP2—the database it was attempting to verify—that caused the costs of three CONNUMs⁹ to be misstated, as well as an incorrect calculation of weighted-average per-unit costs for a number of other CONNUMs.¹⁰ Final IDM at 6–7.

III. Facts Available and Adverse Inferences in the Final Determination

Commerce issued its Final Determination on April 4, 2017, calculating a dumping margin for China Steel of 6.95 percent, which Plaintiff found “not insanelly punitive.” Pl.’s Br. 26; *see* Final Determination, 82 Fed. Reg. at 16,373. Commerce based its normal value calculation on China Steel’s home-market sales, after removing those products for which more than twenty percent of home-market sales were made at less than the cost of production. Final IDM at 20, 23–24.

Commerce’s cost of production analysis, underlying its normal value calculation, was based on China Steel’s finalized COP2 data-

⁹ In total, sixty-one of a total 143 CONNUMs were affected by errors. These sixty-one included the three that Commerce singles out in its analysis. *See* Final COP2 Resp., P.R. 398, C.R. 598 at 13–14; China Steel Cost Calculation Mem. (Mar. 29, 2017), P.R. 435, C.R. 662 at 1–2 (“Cost Calculation Mem.”).

¹⁰ Specifically, there was an incorrect calculation of weighted-average per-unit costs for sixty-one CONNUMs. *See* Cost Calculation Mem. at 1–2.

base. *See* Final IDM at 6–7. Commerce used AFA for China Steel’s cost of production, its overall cost of manufacturing,¹¹ and certain of its U.S. sales.¹² Final IDM at 6–7. Further, Commerce determined that China Steel was not permitted post-sale price adjustments it sought to make for certain home-market sales, because the terms and conditions were not known by its customers at the time of sale. *See* Final IDM at 44–47.

Regarding cost of production, Commerce applied facts available to the affected CONNUMs based on the errors remaining in China Steel’s COP2 database following verification. *See* Final IDM at 6–7. Further, Commerce determined that China Steel’s reporting of inaccurate data amounted to a failure to cooperate to the best of its ability, and then drew an adverse inference for the purpose of calculating cost of production. *See* Final IDM at 6–7 (“Regarding the three CONNUMs . . . for which costs were understated, we have increased the costs for these CONNUMs by substituting the highest reported cost of any CONNUM for the reported cost of these three CONNUMs. Regarding the CONNUMs . . . for which China Steel incorrectly calculated its weighted-average per-unit costs, we have increased the costs for these CONNUMs by substituting the highest reported cost of any CONNUM for the reported cost of the effected [sic] CONNUMs.”). Commerce determined that China Steel had not cooperated to the best of its ability “by not providing the Department with timely and accurate cost data for certain CONNUMs” and by misrepresenting “its reported costs in its last two supplemental questionnaire re-

¹¹ Commerce applied an adverse inference when it increased China Steel’s total reported cost of manufacturing in COP2. Cost Calculation Mem. at 2; *see* Final IDM at 7. Commerce disregarded China Steel’s own so-called “favorable variance adjustment,” which the company had applied to account for the difference between its standard costs and actual costs of manufacturing and increased the total cost of manufacturing by [[]]. *See* Cost Calculation Mem. at 2; Final IDM at 7.

¹² China Steel does not dispute Commerce’s use of AFA for certain of the company’s U.S. sales. At sales verification, which took place from December 11 to 15, 2016, Commerce asked for, and received, information from China Steel about how changes to its quality code data affected sales. *See* Sales Verification Rep. (Feb. 15, 2017), P.R. 410 at 1–2. China Steel indicated that the errors only affected its home-market sales data, not its U.S. sales data, and submitted an exhibit explaining the quality code changes. *See* Sales Verification Rep. at 2.

In the Final Determination, Commerce found that “China Steel’s incorrect reporting of quality codes shifted home market sales from one unique product group (*i.e.*, matching control number (CONNUM)) to another.” Final IDM at 7. This incorrect assignment of quality codes caused the transaction margins for certain U.S. sales of products associated with those CONNUMs to be misstated. Final IDM at 7. Having found that China Steel failed to act “to the best of its ability” when complying with Commerce’s request for information about the company’s quality codes, the Department drew an adverse inference when selecting from among the facts available with respect “to all U.S. sales which match to CONNUMs containing the commercial products at issue.” Final IDM at 7. Commerce replaced any transaction margin for a U.S. sale that it found to be distorted with “the highest transaction margin of any U.S. sale of subject merchandise.” Final IDM at 7.

sponses by reporting to the Department that it reported actual CONNUM-specific costs for all CONNUMs when there were errors in its reported costs.” Final IDM at 29.

IV. Allegation of Ministerial Error Regarding DIFMER Adjustment

After the Final Determination was issued, Petitioner and Defendant-Intervenor ArcelorMittal submitted a ministerial error allegation. *See* Letter from David C. Smith to Sec’y Wilbur Ross, Petitioner’s Ministerial Error Allegations Concerning China Steel Corporation (Apr. 17, 2017), P.R. 444 (“Pet.’s Letter”). For Petitioner, Commerce’s calculated margin for Plaintiff was flawed because Commerce based part of its difference-in-merchandise (DIFMER) analysis on China Steel’s original COP1 cost of production database rather than on the AFA-adjusted COP2 database on record. *See* Pet.’s Letter at 3; *See* Mem. Re: Allegation of Ministerial Error for China Steel Corporation (May 19, 2017), P.R. 449 (“Ministerial Error Mem.”).

The DIFMER adjustment to normal value is made where identical products are not sold in the United States and the comparison market (or otherwise cannot be compared). *See* 19 C.F.R. § 351.411(a)-(b); *Policy Bulletin 92.2: Differences in Merchandise; 20% Rule*, ENFT & COMPLIANCE (July 29, 1992), <https://enforcement.trade.gov/policy/bull92-2.txt> (“Policy Bulletin 92.2”). In order to make an apples-to-apples comparison between products, Commerce looked at the subject merchandise sold in the United States and compared it to the foreign like product sold in the comparison (or in this case, home) market that had the most similar *actual* physical characteristics. *See* Policy Bulletin 92.2; *see also* Pl.’s Br. 39. When selecting the home-market products to be compared to the subject merchandise, Commerce relied on reported characteristics (*e.g.*, strength and thickness) to identify the best potential matches. *See, e.g.*, China Steel Final Programming Mem., Attach. 2, Margin Calculation Log and Output: U.S. Sales Margin Program (July 11, 2019), C.R. 667 at 37, 46 (“U.S. Sales Margin Program”).¹³

The Department agreed with ArcelorMittal that it had erred in using COP1 data as part of the basis for the DIFMER adjustment.

¹³ A portion of this attachment includes confidential information. *See* “U.S. Sales Margin Program” at 37, 46 (including sections titled “Concordance Check - Top 5 Possible Matches for Sample U.S. Models” and “Full Concordance - The Best Model Match Selections,” which provide numerical values for a number of product characteristics). Having identified the most similar matches, Commerce then calculated the cost differences associated with the physical variations between the similar products. *See* U.S. Sales Margin Program at 49 (showing the field “COSTDIFF” for cost differences between similar products); *see id.* at 66 (showing the field “DIFMER” next to “COSTDIFF”).

Commerce recalculated China Steel's products' cost of manufacturing and the subsequent DIFMER adjustment using only the AFA-adjusted COP2 cost database. *See* Ministerial Error Mem. at 4–5. Based on ArcelorMittal's allegations and further findings of its own, on May 25, 2017, the Department published its Amended Final Determination, calculating a dumping margin of 75.42 percent for China Steel. *See* Amended Final Determination, 82 Fed. Reg. at 24,098.

Plaintiff filed its rule 56.2 motion for judgment on the agency record on January 12, 2018. Pl.'s Not. Mot. J. Agency R., ECF No. 47. On April 9, 2018, Defendant and Defendant-Intervenors filed briefs opposing Plaintiff's motion. *See* Def.'s Resp. Mot. J. Agency R., ECF No. 53 ("Def.'s Br."); *see also* Def.-Ints.' Resp. Opp'n Mot. J. Agency R., ECF No. 55.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence . . . or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

Normally, when calculating a dumping margin for products made in a market economy country, Commerce compares sales of the subject merchandise made in the home market (normal value based on price) to sales made in the United States (export price). 19 U.S.C. § 1673.

Where Commerce "has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product," it determines whether home-market sales "were made at less than the cost of production." 19 U.S.C. § 1677b(b)(1). After the enactment of the Trade Preferences Extension Act of 2015, Commerce no longer requires an outside cost of production allegation before it conducts this analysis. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 505(a), 129 Stat. 362, 386 (2015) ("In an investigation . . . [Commerce] shall request information necessary to calculate the constructed value and cost of production . . . to determine whether there are reasonable grounds to believe or suspect that sales [were made at less than the cost of production]."); *see also* Initiation of Investigation, 81 Fed. Reg. at 27,093 n.40 ("The Department will no longer require a [cost of production] allegation to conduct this analysis.").

Upon finding that sales were made at less than the cost of production, Commerce disregards those sales in the determination of normal

value if such sales “have been made within an extended period of time in substantial quantities,^[14] and . . . were not at prices which permit recovery of all costs within a reasonable period of time.” *Id.* § 1677b(b)(1)(A)-(B). When “such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade,” but “[i]f no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value^[15] of the merchandise.” *Id.* § 1677b(b)(1).

Constructed value is the total of

the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade . . . [plus] the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country[;] . . . [and] the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States.

Id. § 1677b(e)(1)-(2)(A), (3). Because Taiwan is a market economy, Commerce requested cost of production information from the respondent itself rather than constructing cost of production from surrogate values.¹⁶

“If . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]” or “significantly impedes a

¹⁴ Here, and generally, “substantial quantities” exist where “the volume of such sales represents 20 percent or more of the volume of sales under consideration for the determination of normal value.” 19 U.S.C. § 1677b(b)(2)(C)(i).

¹⁵ The purpose of using constructed value in this case is not the same as when a product is produced in a nonmarket economy country. *See, e.g., Sigma Corp. v. United States*, 117 F.3d 1401, 1404 (Fed. Cir. 1997); *see also Downhole Pipe & Equip. LP v. United States*, 36 CIT 1509, 1516, 887 F. Supp. 2d 1311, 1320 (2012) (quoting *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT 53, 57, 815 F. Supp. 2d 1311, 1316 (2012)) (“Commerce ordinarily determines the normal value of subject merchandise of an exporter or producer from a nonmarket economy . . . country ‘on the basis of the value of the factors of production utilized in producing the merchandise.’”).

¹⁶ In nonmarket economy proceedings, Commerce’s practice in selecting the best available information for valuing factors of production is to “choose surrogate values that represent broad market-average prices, prices specific to the input, prices that are net of taxes and import duties, prices that are contemporaneous with the POR, and publicly available non-aberrational data from a single surrogate market-economy.” *Clearon Corp. v. United States*, 37 CIT __, __, 2013 WL 646390, at *3 (Feb. 20, 2013) (not reported in Federal Supplement) (citation omitted).

proceeding,” Commerce uses facts available to calculate normal value. 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). Where Commerce determines that the use of facts available is warranted, it may apply adverse inferences (AFA) if it makes the requisite additional finding that a party has “failed to cooperate by not acting to the best of its ability to comply with a request for information.” 19 U.S.C. § 1677e(b)(1). “To the best of one’s ability” is interpreted by the Federal Circuit to mean “one’s maximum effort.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). The question of whether a respondent has cooperated to the “best of its ability” is case-specific, and an AFA rate is not based on the conduct of a “hypothetical, well-resourced respondent.” *Nat’l Nail Corp. v. United States*, 43 CIT __, __, 2019 WL 2537931, at *12 (June 12, 2019) (not reported in Federal Supplement). The Federal Circuit has held that “Commerce should consider the overall facts and circumstances of each case, including the level of culpability” and “the seriousness of the type of misconduct’ committed by the uncooperative party” before applying AFA. *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1301 (Fed. Cir. 2019).

DISCUSSION

I. Commerce’s Amended Final Determination

A. Commerce Acted in Accordance with Law in Rejecting Plaintiff’s Unrequested Supplemental Information, and in Drawing Adverse Inferences when Selecting from Among the Facts Otherwise Available

Commerce shall use facts available “[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]” or “significantly impedes a proceeding.” 19 U.S.C. § 1677e(a)(1)-(2)(A), (C). Facts available may also be used if the information provided “cannot be verified” and is therefore unreliable. *Id.* § 1677e(a)(2)(D). Here, in its Preliminary Determination, Commerce found that the data was unreliable because the changes made by China Steel were extensive and unexplained. Prelim. Dec. Mem. at 16 (“Because these unsolicited and unexplained changes [in COP2] are significant and extensive, because they cannot be differentiated from solicited changes [in COP1], and because [cost of production] is integral to the margin calculations, we find that China Steel’s reported cost data is unreliable for use in this [P]reliminary [D]etermination.”).

Further, when Commerce determines that facts available should be used, and it makes an additional finding that a party has “failed to cooperate by not acting to the best of its ability to comply with a request for information,” it may use an adverse inference when “selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b)(1)(A). Commerce looks not only to the objective reasonableness of a party’s behavior, but must also

make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent’s lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Nippon Steel, 337 F.3d at 1382–83; see *Nat’l Nail*, 43 CIT at __, 2019 WL 2537931, at *12 (“[A] reviewing court must be able to conclude that Commerce looked at the respondent’s ability to comply as well as its performance in complying.”).

Here, Commerce determined that China Steel had not cooperated to the best of its ability by failing to explain adequately the changes it made between COP1 and COP2, and by submitting those changes, unsolicited, nearly three months after the initial submission. Prelim. Dec. Mem. at 17 (emphasis added) (“China Steel merely stated [that there were newly discovered errors in COP1] and provided no further explanation. . . . [T]his is an insufficient explanation. Furthermore, China Steel *had the opportunity to provide its [COP2] cost database on July 28, 2016, but failed to provide these significant changes until October 11, 2016*, as part of an unrelated set of corrections. By submitting an unexplained and new cost database when it did, China Steel has prevented the Department from determining, in time for the [P]reliminary [D]etermination, which set of cost data is reliable.”).

Therefore, Commerce found, at the Preliminary Determination stage, that “China Steel failed to cooperate to the best of its ability by failing to explain the extensive, significant, and unsolicited changes to its cost database.” Prelim. Dec. Mem. at 17. The Department indicated, however, that it “intend[ed] to issue a supplemental questionnaire after the [P]reliminary [D]etermination to provide China Steel with an opportunity to explain the changes made to its cost database.” Prelim. Dec. Mem. at 17.

Commerce then sent questions to Plaintiff to obtain information about COP2. See Suppl. Quest. II at 3 (“Based on these coding errors, please answer the following questions pertaining to the changes

made and resulting differences between the cost databases submitted for the Companies in the September 28, 2016 cost data bases (“COP1”) and the revised, October 11, 2016 data bases (“COP2”). On November 30, 2016, China Steel submitted an explanation of the differences between COP1 and COP2, as requested, but also submitted a new cost database (COP3). *See* Rejected COP3 Resp.; Rejection of Unsolicited Database.

Following a request from Petitioner, Commerce rejected the new COP3 information as untimely, but gave China Steel an opportunity to comply with its prior instructions as to the differences between COP1 and COP2. *See* Rejection of Unsolicited Database (“China Steel may refile its November 30, 2016 submission after removing the new ‘COP3’ cost database and all references to the information contained in that database”); *see also* Letter from David C. Smith to Sec’y Penny Pritzker, Petitioner’s Comments on the Nov. 30, 2016 Second Supplemental Section D Questionnaire Response of China Steel Corporation and Dragon Steel Corporation (Dec. 9, 2016), P.R. 383 at 2 (urging Commerce to reject COP3). In its data filings, China Steel complied by filing a new response. *See* Final COP2 Resp. As it had in its first COP3 filing dated November 30, 2016, China Steel explained the differences between COP1 and COP2:

[T]here were three changes between the COP1 and COP2 data files. First, the Quality codes were modified for a number of CONNUMs, which resulted in changes in production quantities for some CONNUMs and the elimination of other CONNUMs (whose production quantity was reduced to zero), as well as the addition of new CONNUMs. Second, there was a programming error that resulted in a failure to include slab¹⁷ costs in the standard costs for some production line-items. And, third, there was a change in the materials cost variance due to the increase in standard costs as a result of the inclusion of the additional slab costs.

Final COP2 Resp. at 15–16. In other words, China Steel pointed out how certain “quality codes” had been mismatched with certain CONNUMs, and how programming errors had led to an incorrect calculation of standard costs.

Although Commerce, in its Preliminary Determination, stated that it had applied “total AFA” to China Steel’s data, in the Final and Amended Final Determinations, the Department, as directed by the

¹⁷ According to China Steel, during the course of correcting the “mis-assignment of quality codes” to certain CONNUMs—an error that had been present in the COP1 data file—China Steel discovered that it had failed to include the cost of steel slabs in its product costs. The correction affected cost of production. *See* Final COP2 Resp. at 3.

statute, drew an adverse inference when selecting from among the facts available with respect to some of the cost of production information and the transaction margins of certain U.S. sales. *See* Prelim. Dec. Mem. at 8; Final IDM at 6–7. In other words, Commerce did not apply total AFA in either final determination. As to cost of production information, Commerce applied AFA to certain CONNUMs affected by computer programming errors or for which weighted-average per-unit costs had been misstated. *See* Final IDM at 6–7. With respect to U.S. sales, Commerce applied AFA to a number of sales where China Steel had erroneously reported quality codes, affecting the transaction margins of those sales. *See* Final IDM at 7.

With respect to the misstated CONNUM costs, Commerce substituted “the highest reported cost of any CONNUM for the reported cost of the effected [sic] CONNUMs” to increase the cost. Final IDM at 7.¹⁸

Concerning China Steel’s sales, Commerce applied facts available, with an adverse inference, to some transaction margins of certain U.S. sales for which China Steel had reported incorrect and unverifiable “corrected” codes. Final IDM at 7. Specifically, Commerce applied “the highest transaction margin of any U.S. sale of subject merchandise to all U.S. sales which match to CONNUMs containing the commercial products at issue. . . .”¹⁹ Final IDM at 7. Therefore, with respect to the U.S. sales data, AFA was used for only some of China Steel’s transaction margins.

¹⁸ *See* Cost Calculation Mem. at 1–2 (“We are adjusting the costs of 61 CONNUMs in [the COP2 database] due to what [China Steel] described as an obscure programming error that affected the reported costs of these CONNUMs. . . . We are assigning the CONNUMs affected with the highest reported cost during the POI (*i.e.*, the cost of manufacturing for CONNUM 782111331314022 to these 61 CONNUMs as partial adverse facts available We are adjusting the cost for three additional CONNUMs that we found at verification to be reported with positive quantities and materials costs, but with negative variable overhead costs [due to an obscure programming error]. . . . For these three CONNUMs (*i.e.*, CONNUMs 782111221514022, 765111221414022, and 760111225314022), we also are assigning the highest reported costs during the POI (*i.e.*, CONNUM 782111331314022) as partial adverse facts available. We note that these three CONNUMs are already included in the list of 61.”).

¹⁹ *See* China Steel Final Analysis Mem. (Mar. 29, 2017), P.R. 443 at 8–10 (“Final Analysis Mem.”) (“[I]nformation collected at verification indicated that QUALITYH [quality codes] and CONNUMH [matching CONNUMs] were inaccurately reported for certain [home market] product codes Accordingly, . . . as AFA, we are applying the highest transaction margin of any U.S. sale of subject merchandise to all U.S. sales which match to CONNUMs containing the commercial products at issue, according to either China Steel’s erroneously reported QUALITYH or to China Steel’s ‘corrected’ QUALITYH. We accomplished this in a three-step process. First we ran the margin program with . . . language inserted . . . to identify the U.S. CONNUMs affected Second, we ran the margin program with . . . language inserted . . . to identify and remove the U.S. CONNUMs affected and calculate the weighted-average margin based on the other U.S. CONNUMs Third, we calculated a weighted-average of the margins calculated based on the affected CONNUMs having the highest transaction margin and on the weighted-average margin of the remaining CONNUMs.”).

1. Commerce Reasonably Rejected China Steel's Unsolicited COP3 Database

The court finds that Commerce's decision not to allow China Steel's submission of the COP3 database was reasonable because of the timing of the submission in relation to the stage of investigation. China Steel's submission of COP3 (November 30, 2016), coming as it did more than two weeks after the Preliminary Determination was issued (November 14, 2016), would have required Commerce to again determine whether the new data was usable, a clearly necessary process since China Steel had twice provided information that turned out to be flawed. China Steel's failure to flag all inaccuracies was again apparent at cost verification, when Commerce found previously unidentified errors in COP2. *See* Final IDM at 28–29.

Commerce gave China Steel enough chances to satisfy the statute²⁰ and any sense of fairness. The Department had been willing to consider the first unsolicited corrections provided by China Steel (COP2), and to accept China Steel's efforts to harmonize the cost information in COP1 and COP2. Thereafter, China Steel had been provided an opportunity to resubmit the asked-for explanation of how COP1 and COP2 differed without the unsolicited information contained in COP3. Commerce's refusal to accept a third cost of production database was reasonable since it was not seeking new information at the post-Preliminary Determination stage, and, prior to cost verification, had no way of knowing that COP2 contained more errors than those already identified. Indeed, the investigation was already well underway by November 30, 2016; more than five months had passed since the initial questionnaire had been issued and only approximately four months remained prior to the April 4, 2017 Final Determination. Further, sales verification began on December 11, 2016, less than two weeks after the November 30 submission of COP3. *See* Sales Verification Rep. (Feb. 15, 2017), P.R. 410.

Commerce rejected the unsolicited COP3 database on December 29, 2016, and notified China Steel that it could resubmit the requested explanations of the COP2 data, excluding the COP3 database, by January 4, 2017. *See* Rejection of Unsolicited Database. China Steel complied, resubmitting its response on January 4, 2017. *See* Letter from Jeffrey M. Winton to Sec'y Penny Pritzker, Response to November 9 Supplemental Questionnaire (Jan. 4, 2017), P.R. 397 at 1 (“[W]e

²⁰ Upon receiving a noncompliant submission in response to its request, the Department “shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the [established] time limits.” 19 U.S.C. § 1677m(d).

have enclosed a revised version of our November 30 submission from which all references to the [COP3] data file have been redacted.”). Cost verification took place from January 9 to 13, 2017. *See* Cost Verification Rep. At verification, Commerce determined that the existence of errors, previously unidentified by China Steel, made certain CONNUMs and quality codes in the COP2 submission unverifiable. *See* Final IDM at 28–29; Cost Verification Rep. Accordingly, Commerce applied facts available to the erroneously calculated cost of production information and to the U.S. sales affected by the misstated cost of production information, specifically, the quality codes and matching CONNUMs. Final IDM at 6–7, 29. Commerce uses facts available when the information provided “cannot be verified” and is therefore unreliable, or when that party “significantly impedes a proceeding.” 19 U.S.C. § 1677e(a)(2)(C), (D). Therefore, in this instance, Commerce relied on facts available for certain incorrect CONNUMs and inaccurately reported quality codes, where China Steel’s failure to timely correct errors and clarify its cost data resulted in the Department’s alleged inability to verify the data. Final IDM at 27–29 (“China Steel did not provide enough information to the Department to indicate that its reporting methodology for these CONNUMs might be deficient until verification. It was not until [cost] verification that the Department was aware of these errors. By this time, it was too late to notify China Steel of any deficiencies, obtain the new data, and examine the methodologies and data for deficiencies.”).

Considering the progress of the investigation and the history of China Steel’s failing efforts to get it right, Commerce acted reasonably and in accordance with law when rejecting the new information contained in COP3.

2. Commerce’s Application of Adverse Inferences to Cost Data Was Reasonable

If Commerce intends to draw an adverse inference from among the facts available, it may only do so if it determines that a party has “failed to cooperate by not acting to the best of its ability to comply with a request for information.” 19 U.S.C. § 1677e(b)(1)(A). “It is worth noting that the subjective component of the ‘best of its ability’ standard judges what constitutes the maximum effort that a particular respondent is capable of doing, not some hypothetical, well-resourced respondent.” *Nat’l Nail*, 43 CIT at __, 2019 WL 2537931, at *12. The Federal Circuit has recently emphasized that Commerce must look not only to respondent culpability but also to the serious-

ness of the uncooperative behavior. *See BMW*, 926 F.3d at 1302 (“Commerce must consider the totality of the circumstances in selecting an AFA rate, including, if relevant, the seriousness of the conduct of the uncooperative party.”).

The Federal Circuit has also held that Commerce should assess whether a party has complied to the “best of its ability” by considering “whether [the party] has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel*, 337 F.3d at 1382. While such efforts need not be perfect, the standard “does not condone inattentiveness, carelessness, or inadequate record keeping.” *Id.* Specifically, a party should

- (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers’ ability to do so.

Id.

Here, when determining that an adverse inference was appropriate, Commerce cited China Steel’s repeated failures to timely notify Commerce of errors in its cost data, with respect to the affected CONNUMs and the quality codes. *See* Final IDM at 29 (“China Steel misrepresented the nature of its reported costs in its last two supplemental questionnaire responses by reporting to the Department that it reported actual CONNUM-specific costs for all CONNUMs when there were errors in its reported costs. . . . China Steel’s misrepresentation prevented the Department from issuing supplemental questions that might otherwise have resulted in changes to the methodology We find that China Steel did not act to the best of its ability in reporting costs for certain CONNUMs.”); *see also* Final IDM at 7 (“China Steel’s incorrect reporting of quality codes shifted home market sales from one unique product group (*i.e.*, matching control number (CONNUM)) to another. . . . [W]e find that China Steel failed to cooperate by not acting to the best of its ability to comply with a request for information with respect to the full reporting of its quality codes.”).

China Steel argues that cooperation to the extent Commerce demands was not possible under the circumstances. The company points to three typhoons that struck Taiwan as having affected China Steel’s ability to fully reassess its own data. Pl.’s Br. 16. This expla-

nation, however, does not account for the initial errors in COP1, which was submitted prior to the typhoons. The errors in COP1 were so extensive that China Steel itself wished to replace it, first with COP2, then with COP3. *See* First COP2 Resp.; Rejected COP3 Resp. Moreover, China Steel sought and obtained time extensions to its originally prescribed deadlines for further explanation. *See* Letter from Erin Kearney to Jeffrey M. Winton, Extension of Time to Submit Supplemental Questionnaire Responses (Sept. 28, 2016), P.R. 312.

Given the full context of these circumstances, China Steel's arguments are unpersuasive. Commerce's finding that Plaintiff failed to cooperate to the best of its ability, and its resulting decision to draw an adverse inference when selecting from among the facts available, was based on Plaintiff's failure to accurately report data from records that were in its possession. China Steel's failure to identify errors completely and consistently in information exclusively in its possession supports a finding that it did not exert its maximum effort (or even much effort at all) when completing the questionnaire relating to cost data. In its brief, Defendant points out that "[h]ad China Steel undertaken a more careful review of its [cost] data prior to its initial submission, or even prior to submission of the corrected database, China Steel could have identified these additional errors for correction in a timely manner." Def.'s Br. 12. Plaintiff could have "take[n] reasonable steps" to ensure that its reports were accurate and complete, but Plaintiff did not do so. *See Nippon Steel*, 337 F.3d at 1382. Further, Plaintiff had more than one opportunity to comply with Commerce's requests for clarification, but submitted unrequested information in the form of its new cost databases (COP2 and COP3), even at the verification stage, when Commerce reasonably limits its acceptance of new information to minor corrections and clarifications. *See, e.g., Maui Pineapple Co. v. United States*, 27 CIT 580, 595-96, 264 F. Supp. 2d 1244, 1257-58 (2003). Here, Plaintiff did not offer new information to assist in verification of information already on the record, but rather offered the COP3 information as a substitute for existing record information.

Commerce accepted Plaintiff's substitution of a second, modified cost of production database (COP2) for the original submission (COP1), and Plaintiff explained and harmonized the differences between the two databases. After it had issued the Preliminary Determination, however, Commerce refused to accept and verify a "new" or "corrected," unsolicited cost of production database (COP3). Commerce must accept new information between the preliminary and final determination stages if it is reasonable to do so. Commerce's refusal to retrace its steps in the review process was reasonable here,

since China Steel had repeatedly submitted unrequested cost of production information that Commerce determined was unverifiable, after the deadlines for submitting such information had passed. The facts of this case demonstrate that China Steel did not act to the best of its ability when providing information that was exclusively in its custody and control. Not only did the company fail to provide accurate information in response to the initial questionnaire (COP1), but it continued to amend its answers in COP2 and COP3, at times without explanation. These efforts to get things right continued until after sales verification, the Preliminary Determination, and long after the issuance of the initial questionnaire. The primary explanation China Steel provided for its failures was the weather.

It is apparent, then, that Commerce's finding that "China Steel failed to cooperate by not acting to the best of its ability to comply with the Department's request for information" satisfies both the factual and legal requirements to support the use of AFA. Final IDM at 29; see *Nat'l Nail*, 43 CIT at __, 2019 WL 2537931, at *12. Therefore, Commerce's decision to use facts available, and to apply an adverse inference when selecting from among those facts, was supported by substantial evidence and in accordance with law.

B. Commerce Erred in Using an AFA-Adjusted Cost Database in its Calculation of China Steel's DIFMER Adjustment

Difference-in-merchandise (DIFMER) adjustments apply where identical products are not sold in the United States and in the home market (or otherwise cannot be compared).²¹ See 19 U.S.C. § 1677b(a)(6)(C)(ii); 19 C.F.R. § 351.411; Policy Bulletin 92.2. Here, the products sold in each market were not physically identical, so Commerce compared the subject merchandise sold in the United States to the Taiwan-market products that had the most similar physical characteristics. Commerce then made an adjustment to normal value for the variable manufacturing costs of physical differences. See 19 C.F.R. § 351.411; 1 JOSEPH E. PATTISON, *ANTIDUMPING & COUNTERVAILING DUTY LAWS* 985 (2017) ("If the variable manufacturing costs are less for the U.S. product, a deduction is made from [normal value]. If the variable manufacturing costs are less for the [comparison market]

²¹ The normal value statute, 19 U.S.C. § 1677b, permits an increase or decrease "by the amount of any difference (or lack thereof) between the export price or constructed export price and [normal value] . . . that is established to the satisfaction of [Commerce] to be wholly or partly due to . . . the fact [foreign like products are] . . . used in determining normal value." 19 U.S.C. § 1677b(a)(6)(C)(ii); see 19 U.S.C. § 1677(16) (foreign like product). Commerce's DIFMER regulation states that "[i]n deciding what is a reasonable allowance for differences in physical characteristics, the [Department] will consider only differences in variable costs associated with the physical differences." 19 C.F.R. § 351.411(b).

product, an addition is made to [normal value].”). The adjustment is based on actual costs related to physical differences, not on unrelated cost of production differences. *See* 19 C.F.R. § 351.411; Policy Bulletin 92.2. That is, the costs Commerce was to take into account were those related to what made the products different—not those costs related to portions of the product that were the same. The DIFMER adjustment is calculated on the basis of direct manufacturing costs by assessing three components: (1) materials, (2) labor, and (3) variable factory overhead. PATTISON at 983; *see also* Policy Bulletin 92.2.

The Department’s policy guidelines set out its method:

[I]t is important in any consideration of a [DIFMER adjustment] to isolate the costs attributable to the difference, not just assume that all cost of production differences are caused by the physical differences. When it is impossible to isolate the cost differences, we should at least determine that conditions unrelated to the physical difference are not the source of the cost differences, such as when different facilities are used, or the cost differences are high but the actual physical differences appear small. If the costs of the physical difference cannot be isolated or it is not reasonably clear that the differences in production cost are related to the physical difference, no adjustment should be made.

Policy Bulletin 92.2. “[U]nder Commerce’s difmer practice, a finding that the difmer adjustment to normal value exceeds twenty percent is a presumptive finding that the products may not be reasonably be compared.” *Mitsubishi Heavy Indus., Ltd. v. United States*, 24 CIT 727, 731, 112 F. Supp. 2d 1170, 1174 (2000) (citing Policy Bulletin 92.2); *see also Mitsubishi Heavy Indus., Ltd. v. United States*, 24 CIT 275, 279, 97 F. Supp. 2d 1203, 1207 (2000), *aff’d*, 275 F.3d 1056 (Fed. Cir. 2001) (approving Commerce’s twenty percent DIFMER rule). When such a finding is made, it is Commerce’s policy to calculate the constructed value of those physically different products to account for the fact that there are no comparable products. *See* Policy Bulletin 92.2.

In the Final Determination, Commerce used the cost database COP1 to calculate the U.S. products’ cost of manufacturing, which would be compared to the cost of production of home-market products to determine whether a DIFMER adjustment was needed. *See* Pet.’s Letter at 2 4; Ministerial Error Mem. at 3. China Steel submitted COP1 in response to the Department’s initial request for information to be used in its cost of production analysis, but because both the company and the Department identified extensive errors within COP1, it was not used at any other point in Commerce’s analysis and

determinations. *See* Prelim. Dec. Mem. at 16. Thereafter, Commerce relied on the COP2 adjusted database to calculate its home-market cost of production. *See* Ministerial Error Mem. at 3. As addressed above, in its normal value calculation, Commerce made various adjustments to the COP2 cost database submitted by China Steel, some of which involved the application of an adverse inference (with respect to certain affected CONNUMs and overall reported cost of manufacturing). *See* Final IDM at 6–7.

In reaching its DIFMER conclusions, Commerce first identified which of China Steel's products were similar, but not identical, to each other. *See* U.S. Sales Margin Program at 37, 46. The Department then calculated the cost of manufacturing for those products to find what, if any, costs were quantifiably associated with physical differences between these products, and to determine if the differences could be accounted for with a DIFMER adjustment (*i.e.*, the difference in costs associated with physical differences was not more than twenty percent). *See* U.S. Sales Margin Program at 49 (showing sample numerical cost differences); Ministerial Error Mem. at 4; *see also* Policy Bulletin 92.2 (“We do not make an adjustment because the cost of production is different; we are measuring the difference in cost attributable to the difference in physical characteristics.”). For some of the compared products, Commerce determined that a potential adjustment would exceed twenty percent, and thus, the products were too physically different to be compared. *See* Ministerial Error Mem. at 4. This determination was based, in part, on Commerce's use of the COP1 data, although it had not used the COP1 information for any other purpose.

After Commerce issued its Final Determination, Petitioner and Defendant-Intervenor ArcelorMittal submitted a letter claiming that Commerce had made a ministerial error in its calculation of the costs of China Steel's U.S. products, for the purpose of the DIFMER adjustment and “product concordance.” Pet.'s Letter at 2–4. ArcelorMittal claimed that Commerce made an error in programming that caused the U.S. costs of manufacturing to be derived from COP1, while home-market costs of manufacturing were derived from COP2. Pet.'s Letter at 4; *see* Ministerial Error Mem. at 3. The use of COP1 for one half of the comparison, Petitioner argued, erroneously reduced Commerce's normal value determination, resulting in an inaccurate final margin for China Steel. Petitioner asked Commerce to “correct the ministerial error that produced an unwarranted reduction to the normal value because of the inadvertent omission of corresponding adjustments to the CONNUM-specific costs for [China Steel's] U.S. sales.” Pet.'s Letter at 5.

Commerce agreed with Petitioner that it had made a ministerial error in using the COP1 database, since Commerce had previously found COP1 to be unreliable. *See* Ministerial Error Mem. at 4–6. In its recalculation, Commerce did not use the COP2 data as submitted, however, it used the AFA-adjusted COP2 database for both U.S. products’ costs of manufacturing and the home-market products’ costs of manufacturing. *See* Ministerial Error Mem. at 5. The use of the AFA-adjusted database apparently caused the difference between a greater number of products to exceed twenty percent, excluding those products from the normal value calculation and yielding an amended weighted-average dumping margin of 75.42 percent for China Steel. *See* Amended Final Determination, 82 Fed. Reg. at 24,097–98; Ministerial Error Mem. at 4–5.

After ArcelorMittal sent its ministerial adjustment letter, but before Commerce readjusted the DIFMER calculation, China Steel objected to Petitioner’s position. The company argued that Commerce had properly assessed the DIFMER adjustment in its initial determination, basing the adjustment on physical differences, which were ascertainable precisely because AFA had not yet distorted the cost data. China Steel Resp. to Cmt. Alleged Ministerial Error (Apr. 21, 2017), P.R. 445; *see also* Pl.’s Br. 40 (“In its initial [F]inal [D]etermination, however, Commerce calculated the difference-in-merchandise adjustment based on the costs *before* application of the AFA adjustment. . . . Consequently, Commerce was able to compare the sales of nearly identical homemarket and U.S. products without distortion.”). For China Steel, “[t]he AFA adjustment that Commerce made to the costs for certain products was not intended to account for specific *characteristics* of those products.” Pl.’s Br. 41 (emphasis added). Further, China Steel claimed that Commerce’s adjustment “represented a punishment for [China Steel’s] alleged failure to cooperate,” which resulted in a difference between costs based on Commerce’s use of AFA, rather than physical differences between home-market and U.S. products. Pl.’s Br. 41.

A ministerial error is one “in addition, subtraction, or other arithmetic function, [a] clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.” 19 C.F.R. § 351.224(f). Commerce is permitted to identify and correct ministerial errors, where that error is the sort of clerical, number-input-related miscalculation that falls under the statutory and regulatory definitions. *See* 19 U.S.C. § 1675(h). Commerce is not empowered, however, to correct an error in a manner unsupported by substantial evidence

or not in accordance with law. *See generally* 19 U.S.C. § 1516a(b)(1)(B)(i).

Here, both Commerce and China Steel are wrong. First, the DIFMER regulation, 19 C.F.R. § 351.411, says nothing about using information to which an adverse inference has been applied to determine if a product is identical or similar. And with good reason. Information to which an adverse inference has been applied would distort the results. This is because the application of an adverse inference to facts available says nothing about how one product differs from another; it only speaks to a respondent's *behavior*. 19 U.S.C. § 1677e(b)(1)(A) ("If [Commerce] finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . [Commerce], in reaching the applicable determination under this subtitle . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."). Thus, it does not follow that the use of an adverse inference is lawful when making a determination as to the actual physical comparability of products. Therefore, Commerce erred in its use of an AFA-adjusted database to make the DIFMER comparison.

China Steel's position, however, is also incorrect. The COP1 database is of no use here. China Steel conceded that its COP1 database was not usable, and submitted a new database for Commerce's reliance (COP2). As it was used for all other purposes, the COP2 database must be used for the DIFMER adjustment.

Accordingly, the court remands this matter to Commerce and directs the Department to compute the DIFMER adjustment using information from the COP2 database without the application of an adverse inference.

II. Commerce Did Not Err When It Denied Plaintiff's Post-Sale Home-Market Price Adjustment

When calculating normal value based on price, the Department generally uses a "a price that is net of price adjustments." 19 C.F.R. § 351.401(c). These adjustments, however, exclude post-sale price adjustments "unless the interested party demonstrates . . . its entitlement to such an adjustment." *Id.*

China Steel asked Commerce to recognize a type of billing adjustment it made for its home-market customers. The company made post-sale adjustments if the price it charged its customers for a product subsequently went down during the quarter in which that sale was made. In that event, the customers were given the benefit of the price reduction for products already purchased. *See* China Steel Resp. Suppl. Quest. (Oct. 7, 2016), P.R. 321 at 31 ("Sec. A-C Suppl.

Resp.”); China Steel Secs. B & C Narrative Resp. (July 28, 2016), P.R. 194, C.R. 240–43, App. B-6 (“B & C Narratives”) (referencing the retroactive price adjustments under the field code “BILLADJ7H,” one of seven possible billing adjustments). As a respondent, China Steel reported the amount of each retroactive price adjustment in its sales listing by showing a decrease in price after the initial sale. *See* B & C Narratives at 33 (“[B]illing adjustments that decrease the price have been reported as negative amounts.”). For China Steel, the BILLADJ7H retroactive adjustment, or rebate, represented a long-established business practice and course of dealing reaching back for at least thirty years. *See, e.g.*, China Steel Rebuttal Br. (Mar. 6, 2017), P.R. 420 at 15.

Commerce determined that China Steel was not entitled to the adjustment in this investigation. The Department did not dispute that China Steel had a business practice of granting rebates, nor that the practice was a long-established one of which its customers were aware. Commerce was not persuaded, however, that the adjustment was the kind that it intended to incorporate in normal value calculations. Final IDM at 46.

When determining a party’s entitlement to its claimed adjustment, the Department considers a non-exhaustive list of factors, which have been reduced to regulation, *see* 19 C.F.R. § 351.401(c), as follows:

- (1) *Whether the terms and conditions of the adjustment were established and/or known to the customer at the time of sale, and whether this can be demonstrated through documentation;*
- (2) *how common such post-sale price adjustments are for the company and/or industry;*
- (3) *the timing of the adjustment;*
- (4) *the number of such adjustments in the proceeding;* and
- (5) *any other factors tending to reflect on the legitimacy of the claimed adjustment.*

Modification of Regulations Regarding Price Adjustments in Anti-dumping Duty Proceedings, 81 Fed. Reg. 15,641, 15,644–45 (Dep’t Commerce Mar. 24, 2016) (“Modification of Regulations”) (emphasis added). Commerce weighs these factors singly or in combination. *See id.* at 15,644–45.

While Commerce’s regulation does consider a party’s established business practice when determining whether to allow a post-sale adjustment, it does not consider this factor to be independently sufficient for entitlement. Commerce “believe[s] that allowing a company to simply show that certain adjustments are part of its standard business practice might permit certain adjustments . . . that have the potential to manipulate the dumping margins.” *Id.* at 15,645. As this Court has noted, by “the potential to manipulate . . . dumping mar-

gins,” Commerce refers to the possibility that companies would grant rebates after it became known that certain sales would be subject to review, thus decreasing an already established sales price, and thus decreasing dumping margins. *See, e.g., Papierfabrik August Koehler AG v. United States*, 38 CIT __, __, 971 F. Supp. 2d 1246, 1255 (2014) (superseded by regulation on other grounds). Commerce itself has also stated that its “purpose” in requiring proof that buyers were “aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of the sale is to protect against manipulation of the dumping margins by a respondent once it learns that certain sales will be subject to review.” *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Can.*, 61 Fed. Reg. 13,815, 13,823 (Dep’t Commerce Mar. 28, 1996).

Disposing of first things first, to the extent that Plaintiff’s brief before the court raises new arguments in support of its claimed entitlement to the BILLADJ7H post-sale adjustment, the court will not address them. These arguments include China Steel’s contention that the adjustments it made for its customers were not truly retroactive, and that “circumstances of sales” differing in the United States and Taiwan necessitated the adjustments. *See* Def.’s Br. 19–20; *compare* Pl.’s Br. 42–44, *with* China Steel Rebuttal Br. 14–16, *and* China Steel Case Br. (Feb. 28, 2017), P.R. 414; *see also* Sec. A-C Suppl. Resp. at 31. Because China Steel first made these arguments here, and not to the agency below, they will not be considered by the court. *See* 28 U.S.C. § 2637(d).

In the Final IDM, Commerce primarily based its rationale for rejecting China Steel’s post-sale price adjustments on customer knowledge. Commerce concluded that the timeline of the adjustments was inconsistent with a finding that the customers, at the time of sale, knew a sufficient amount about the adjustments to justify their use in Commerce’s deliberations: “[T]he terms and conditions of the rebates were not established and/or known to the customer at the time of sale,” because “neither the actual rebates, nor the prices on which the actual rebates are based, are set or known by the customer until after the end of the quarter in which the sales occur.” Final IDM at 46.

China Steel contests this characterization of its practice as a matter of fact, pointing to documentary evidence showing that “course of dealing” and the “longstanding” nature of its practice made its customers aware that, should they be eligible for a post-invoice price adjustment, they would receive such an adjustment. Pl.’s Br. 44.

For Commerce, the evidence on the record supports no more than a finding that China Steel's customers were generally aware that such a practice existed, and that customers, if eligible, would receive reductions if prices should be reduced later in the same quarter. Final IDM at 46; *see, e.g.*, B & C Narratives, App. B-7-7 (showing a 1987 record of the practice). Commerce found, however, that this evidence was insufficient to show that customers knew "[either] the actual rebates, [or] the prices on which the actual rebates are based" at the time of sale. Final IDM at 46, 47 ("[W]e find that the terms and conditions of the adjustments were not established and/or known to the customer at the time of sale."). The facts Commerce relied on to reach this conclusion were those showing that price adjustments would not be finalized until after the end of the quarter in which the sales occurred.²² *See* Final IDM at 46.

Here, China Steel's record evidence, included in its responses to Commerce's questionnaires, indicated that its customers were aware only that China Steel had a policy of giving its customers the benefit of a downward price shift, and that those changes would be retroactively effective for customers when prices for their purchases decreased. Sec. A-C Suppl. Resp. at 31. Company records indicated that the downward shift in price was dependent on the market. *See* B & C Narratives at 33 n.11 ("In accordance with market conditions, [China Steel] may adjust its home-market prices for sales during a quarter sometime after the quarter has already begun."). China Steel does not contend, nor does its evidence support a finding, that (1) its customers were assured of a rebate, or (2) that the amount of a potential rebate was known, or could be ascertained by its customers, at the time of sale.

Commerce does not contest, in the Final IDM, that China Steel's rebates were part of its normal course of business. Rather, Commerce concludes that that fact alone does not equal customer knowledge, because customers could not have known that they would in fact be entitled to such an adjustment or its amount. *See* Final IDM at 46-47 ("[W]e find that the existence of this rebate program as a feature of China Steel's normal practice does not constitute a customer's awareness of any potential rebate at the time prior to sale because the customer does not know whether it will actually receive a rebate on any particular product at the time of such sale. . . . Record evidence also indicates that neither the actual rebates, nor the prices on which the actual rebates are based, are set or known by the customer until after the end of the quarter in which the sales occur."). In other words, Commerce asserts that it would have been necessary for China Steel's

²² "[[]]" *See* B & C Narratives, App. B-7-8.

customers to know that they would receive a rebate on a particular product, but since any rebate was dependent on unknown price changes in the future, whether there would be a rebate, and its amount, would be unknown at the time of sale.

Commerce's decision to disallow China Steel's post-sale adjustment was reasonable because of the uncertainty surrounding the company's proposed adjustments. The Department's concern is that price manipulation can occur after an administrative proceeding is commenced, where, as here, it is unknown whether there will be a rebate or what the amount of that rebate would be, at the time of sale. Here, based on the uncertainty of whether the rebates would occur, and the undetermined amount of the rebates, Commerce found "that the terms and conditions of the rebates were not established and/or known to the customer at the time of sale." Final IDM at 46. Thus, while China Steel's customers may have been aware that they would receive a rebate of some amount should prices go down, the amount of the rebate was unknown at the time of sale, and there is no record evidence that the customers could have calculated it. These unknowns invite the kind of price manipulation Commerce hopes to guard against. Therefore, it was not unreasonable for Commerce to believe that China Steel's desired adjustment could be used to manipulate its dumping margin.

III. Commerce's Decision Was Not Biased or Otherwise Impeded by Secretary Ross

Plaintiff is statutorily entitled to a fair proceeding unimpeded by a decision-maker's prejudgment under 19 U.S.C. § 1677c (hearings) and 19 U.S.C. § 1677m (submissions). *See NEC Corp. v. U.S. Dep't Commerce*, 21 CIT 933, 946, 978 F. Supp. 314, 326–27 (1997), *aff'd sub nom. NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998) (quoting *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 321 (1933)) ("[The] statute . . . 'command[s] by implication' that the procedures and hearing be fair."); *see also id.*, 21 CIT at 946, 978 F. Supp. at 327 (holding that prejudgment would render an anti-dumping investigation unfair and invalid if "the decisionmaker has a closed mind at initiation.").

China Steel contends that Commerce's Final Determination was prejudged, and thus fundamentally flawed, because the appointment and subsequent involvement of Secretary of Commerce Wilbur Ross created a conflict of interest that invalidated Commerce's decision. *See* Pl.'s Br. 44–47. China Steel points out that Secretary Ross was a director of ArcelorMittal at the time that Defendant-Intervenor ArcelorMittal USA LLC, the U.S. subsidiary, filed a petition in this

case.²³ Pl.'s Br. 44. Thereafter, according to Plaintiff, Secretary Ross improperly intervened when he "publicly announc[ed] the results of [the] investigation that was initiated by ArcelorMittal's . . . subsidiary." Pl.'s Br. 45. This alleged intervention, along with Secretary Ross's previously expressed views on Taiwanese steel dumping, form the basis of China Steel's argument that Secretary Ross's role as decision-maker fatally flawed Commerce's eventual determination. *See* Pl.'s Br. 46.

The Federal Circuit has held that the bifurcated nature of an antidumping proceeding makes it difficult for a plaintiff to successfully allege prejudgment and bias. *NEC Corp.*, 151 F.3d at 1373. A plaintiff "can prevail on its claim of prejudgment only if it can establish that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.* (citations omitted). Moreover, the Federal Circuit has weighed the earlier stages of the proceeding more heavily when considering the possibility of prejudgment: "The fact that the final decision maker in this case . . . was to a large extent insulated from the earlier machinations within the Department weighs importantly against the fixed mindset thesis." *Id.* at 1374.

Plaintiff's argument rests on Secretary Ross's alleged role as a decision-maker while at Commerce, not in any position he might have held prior to his appointment. As Commerce addresses in its brief, however, the initiation of the investigation itself and Commerce's Preliminary Determination both occurred prior to Secretary Ross's nomination, confirmation, and swearing-in. *See* Initiation of Investigation, 81 Fed. Reg. at 27,089 (dated May 5, 2016); Preliminary Determination, 81 Fed. Reg. at 79,420 (dated November 14, 2016); Def.'s Br. 24 (noting that Secretary Ross's confirmation was on February 27, 2017, and his swearing-in was on February 28, 2017). As to Secretary Ross's role, Commerce contends that he never acted as a decision-maker in this case because the Final Determination was issued under Ronald K. Lorentzen, the then-Acting Assistant Secretary for Enforcement and Compliance. *See* Final Determination, 82 Fed. Reg. at 16,374.

In *NEC Corp.*, the final decision-maker did not oversee the preliminary stages of the relevant investigation, which led this Court to find that it was necessary to determine whether the prior decision-maker had prejudged the outcome of the proceeding in such a way as to constrain the judgment of the final decision-maker. *See NEC Corp.*, 21 CIT at 949, 978 F. Supp. at 330 ("Acting Assistant Secretary

²³ Plaintiff notes that Secretary Ross, *after* his confirmation, resigned his position as a director and divested from ArcelorMittal. *See* Pl.'s Br. 8.

Robert LaRussa[, the new decision-maker,] has had only a cursory involvement with the matters in dispute here.”).

Here, only one alleged decision-maker’s act is under scrutiny. For China Steel, Secretary Ross’s appointment, coming as it did during the investigation, after the Preliminary Determination, and before the Final Determination was issued, made Secretary Ross a decision-maker who engaged in prejudgment of China Steel’s case by announcing the result (via press release) and by influencing Department officials after his appointment. *See* Pl.’s Br. 30–31 (“Mr. Ross personally announced Commerce’s decision in the investigation that is the subject of this appeal on March 30 Furthermore, during the period in which Commerce was considering the [F]inal [D]etermination and the subsequent request to amend that determination, none of the ‘political’ positions that ordinarily might have created a buffer between Mr. Ross and the career officials in Commerce’s ‘Enforcement and Compliance’ agency . . . had been filled.”).

Secretary Ross’s role, as described by China Steel, does not actually involve decision-making, since the press release was issued after the Final Determination was signed by Acting Assistant Secretary Lorentzen. *See* Final Determination, 82 Fed. Reg. at 16,374; Final IDM at 78 (signed on March 29, 2017); Press Release, Dep’t of Commerce, Int’l Trade Adm., Department of Commerce Finds Dumping and Subsidization in the Investigations of Imports of Certain Carbon and Alloy Cut-To-Length Plate from Austria, Belg., Fr., Ger., It., Japan, Rep. of Korea, and Taiwan (Mar. 30, 2017), ECF No. 66–1, Doc. 30. While the optics of the press release might not be good (it could easily be seen as a victory lap), there is nothing here to suggest that Secretary Ross actually affected the outcome of the investigation.²⁴

China Steel’s remaining arguments, insofar as they attempt to establish Secretary Ross’s anti-Taiwan bias and inappropriate influence over other officials of Commerce, are not supported by substantial evidence. The Federal Circuit has made clear that the risk of bias and prejudgment in antidumping investigations is difficult for a plaintiff to prove. *NEC Corp.*, 151 F.3d at 1374 (quoting *Withrow v. Larkin*, 421 U.S. 35, 57 (1975)) (“We are particularly reluctant to hold Commerce to [a] stringent prejudgment standard [I]t is not uncommon for Commerce to modify its position between the preliminary determination and the final determination. Therefore, in an

²⁴ China Steel also contends that Secretary Ross violated Federal Ethics Regulation 5 C.F.R. § 2635.502 (2017), which directs employees who “know[] that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of . . . [a]ny person for whom the employee has, within the last year, served as . . . director” to refrain from “participat[ing] in the matter unless” the relevant agency (here, Commerce) authorizes them to do so. 5 C.F.R. § 2635.502(a), (b)(iv). This matter is outside the scope of the court’s review.

antidumping investigation, “[t]he risk of bias or prejudice in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently grave possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.”). Moreover, with regard to Secretary Ross’s statements criticizing the Taiwanese steel industry, “[i]t is well established that “[a]dministrators . . . may hold policy views on questions of law prior to participating in a proceeding.” *In re Nat’l Security Agency Telecomm. Records Litig.*, 671 F.3d 881, 900 (9th Cir. 2011) (citations omitted); see also *id.* (citing *Withrow*, 421 U.S. at 47) (“[E]xpressing an opinion, even a strong one, on legislation, does not disqualify an official from later responding to a congressional mandate incorporating that opinion.”).

Secretary Ross’s appointment does not compel the conclusion that he was involved in reaching the Final or Amended Final Determination in this case. Nor does his appointment invalidate the process by which Commerce reached its conclusions as to China Steel’s submissions and eventual margin. In the absence of any evidence showing improper control by Secretary Ross over this investigation, the court does not find that Commerce’s determination in this case was flawed by prejudice or bias.

CONCLUSION and ORDER

Commerce’s use of the COP2 cost database, with the application of AFA, as the basis for its difference-in-merchandise (DIFMER) adjustment to normal value is not in accordance with law. That is, the law does not support the use of adverse inferences when calculating costs specifically related to the physical differences of some of China Steel’s products. Therefore, it is hereby

ORDERED that the Amended Final Determination is sustained in part and remanded; it is further

ORDERED that, on remand, Commerce issues a revised Amended Final Determination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that, on remand, Commerce shall compute the DIFMER adjustment to normal value using information from China Steel’s final COP2 cost database, without the application of an adverse inference, and may use facts available in filling in missing or replacing unverifiable necessary information; and it is further

ORDERED that the revised Amended Final Determination shall be due ninety (90) days following the date of this Opinion and Order; any comments to the revised Amended Final Determination shall be

due thirty (30) days following the filing of the revised Amended Final Determination; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: August 6, 2019

New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE

Slip Op. 19–112

WANXIANG AMERICA CORPORATION, Plaintiff, v. UNITED STATES,
Defendant.

Before: Gary S. Katzmann, Judge
Court No. 18–00120

[The court grants defendant’s motion to dismiss for lack of subject matter jurisdiction.]

Dated: August 19, 2019

William R. Isasi, Alexander D. Chinoy, Elisa S. Solomon, and T. Scott Shelton, Covington & Burling, LLP, of Washington, DC, argued for plaintiff.

Stephen C. Tosini, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. With them on the supplemental brief was *Joseph H. Hunt*, Assistant Attorney General. Of counsel was *James Ahrens*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC. With him on the brief was *Steven J. Holtkamp*, U.S. Customs and Border Protection, of Chicago, IL.

OPINION

Katzmann, Judge:

This is a case about jurisdiction through the lenses of the anti-dumping statute and the Administrative Procedure Act. At its center is a challenge brought by an importer to a memorandum prepared by one government component for another in an anti-dumping investigation. Plaintiff Wanxiang America Corporation (“WAC”) imported goods from Wanxiang Qinchao, Co., Ltd., (“WQ”). Both WAC and WQ are subsidiaries of Wanxiang Group Corporation (“WG”). WG and WAC participated in previous anti-dumping administrative reviews and were determined not to be subject to anti-dumping duties on Chinese tapered roller bearings (“TRBs”);¹ WQ, however, was never reviewed.

¹ A “bearing” is “a machine part in which another part (such as a journal or pin) turns or slides.” *Bearing*, Merriam Webster, <https://www.merriam-webster.com/dictionary/bearing> (last visited Aug. 15, 2019). “TRBs are a type of antifriction bearing made up of an inner ring (cone) and an outer ring (cup). Cups and cones sell either individually or as a pre-assembled ‘set.’” *NTN Bearing Corp. of Am. v. United States*, 127 F.3d 1061, 1063 (Fed. Cir. 1997).

WAC now invokes this court’s residual jurisdiction under 28 U.S.C. § 1581(i), arguing that the United States Department of Commerce (“Commerce”) violated anti-dumping duty laws and due process principles by providing guidance to the United States Customs and Border Protection (“CBP”) in a memorandum stating that WQ had never been reviewed and thus was not entitled to WG’s 0% anti-dumping rate. According to WAC, this communication constituted a final agency action improperly made, without notice, outside established anti-dumping duty procedures. For its part, Defendant the United States (“the Government”) counters that the proper way to obtain relief would have been to subject WQ to administrative reviews — just as WAC and WG had been — and to seek redress in this court under 28 U.S.C. § 1581(c). According to the Government, because this court could have had jurisdiction under 28 U.S.C. § 1581(c), this suit is itself an improper attempt to circumvent established anti-dumping procedures and to transform an information memorandum into a new final agency action.

The court concludes that because jurisdiction could have been invoked under 28 U.S.C. § 1581(c), residual jurisdiction under 28 U.S.C. § 1581(i) is not available. Moreover, although WAC contends otherwise, the Commerce guidance to CBP is not a reviewable Administrative Procedure Act (“APA”) final agency action. The court grants the Government’s motion to dismiss for lack of subject matter jurisdiction.

BACKGROUND

I. Legal Framework

A. Anti-Dumping and Countervailing Duty Proceedings

Dumping occurs when a foreign company sells a product in the United States for less than fair value — that is, for a lower price than in its home market. *Sioux Honey Ass’n v. Hartford Fire Ins.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Similarly, a foreign country may provide a countervailable subsidy to a product and thus artificially lower its price. *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1355 n.1 (Fed. Cir. 1996). To empower Commerce to offset economic distortions caused by dumping and countervailable subsidies, Congress enacted the Tariff Act of 1930.² *Sioux Honey Ass’n*, 672 F.3d at 1046–47. Under the Tariff Act’s framework, Commerce may — either upon petition by

² Further citations of the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition.

a domestic producer or of its own initiative — begin an investigation into potential dumping or subsidies and, if appropriate, issue orders imposing duties on the subject merchandise. *Id.*

19 U.S.C. § 1592 grants CBP the authority to impose a monetary penalty for tariff misclassification.³ If CBP determines that a company has failed to deposit required anti-dumping duties or has misclassified merchandise, it may issue a pre-penalty notice to inform the company that it is contemplating issuing a claim for a monetary penalty under 19 U.S.C. § 1592(b)(1). CBP then investigates to determine whether there was a violation of anti-dumping laws and, if applicable, the appropriate penalty amount. CBP must prove both that an entry occurred through the use of a material false statement (or omission) and that such statement occurred as a result of the alleged violator’s culpability. 19 U.S.C. § 1592(a). 19 U.S.C. § 1592(e) provides for de novo judicial review of “all issues, including the amount of penalty” in any proceeding to recover a penalty under the statute. Thus, the classification of the merchandise, giving rise to both a claim for additional duties owed and penalties in this case, would be open to review by the court in a judicial action to recover the penalty regardless of the fact that the entries in question have been liquidated, or of any conclusions of the auditors or import specialists regarding this issue.

B. Jurisdiction

The court’s jurisdiction is governed by 28 U.S.C. § 1581. Relevant to this case are subsections (c) and (i). Under 28 U.S.C. § 1581(c), the court has exclusive jurisdiction over any civil action commenced under section 516A or 517 of the Tariff Act of 1930.⁴ Under 28 U.S.C. § 1581(i), the court has residual jurisdiction to hear any civil action against the United States “that arises out of any law of the United States providing for” importation revenues, tariffs and duties, embargoes, and administration and enforcement of matters involving section 515 of the Tariff Act.⁵ The court’s residual jurisdiction under 28

³ Under 19 U.S.C. § 1592(b)(1)(A): “If [CBP] has reasonable cause to believe that there has been a violation of subsection (a) and determines that further proceedings are warranted, it shall issue to the person concerned a written notice of its intention to issue a claim for a monetary penalty.”

⁴ Under 28 U.S.C. § 1581(c), the court has exclusive jurisdiction over “any civil action commenced under section 516A or 517 of the Tariff Act of 1930.” Sections 516A and 517 of the Act describe various types of decisions that can be challenged, including the final results of an anti-dumping or countervailing duty administrative review or investigation, changed circumstances review, or a decision reached by the International Trade Commission during the course of such an investigation.

⁵ 28 U.S.C. § 1581(i) provides that the court has exclusive jurisdiction over: 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—(1) revenue from imports or

U.S.C. § 1581(i) may not be invoked when jurisdiction under another subsection of 28 U.S.C. § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate. *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012).

II. Factual Background and Procedural History

Although Commerce’s memorandum memorializing its guidance to CBP concerning the entities entitled to WG’s 0% AD rate was published approximately three years ago, the origins of this dispute date back almost three decades. Commerce first published the anti-dumping on TRBs from China on May 27, 1987. *See Tapered Roller Bearings From the People’s Republic of China; Final Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 19748 (Dep’t Commerce May 27, 1987) (“AD Order”). Following Commerce’s publication of the AD Order, WG participated in several administrative reviews between 1995 and 2001. Public Compl., ¶¶ 21–24, 43–45, May 23, 2018, ECF No. 5 (“Compl.”). Commerce applied a de minimis rate of .11% for the administrative review for the 1995 to 1996 period and a rate of 0% for the periods covering 1996 to 1997, 1998 to 1999, 1999 to 2000, and 2000 to 2001. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China; Amended Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 46176, 46177 (Dep’t Commerce July 12, 2002) (“Amended Final Results of the 2000–2001 Administrative Review”); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China; Final Results of 1996–1997 Antidumping Duty Administrative Review and New Shipper Review and Determination Not To Revoke Order in Part*, 63 Fed. Reg. 63842, 63859 (Dep’t Commerce Nov. 17, 1998); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished; Amended Final Results of 1998–1999 Administrative Review*, 66 Fed. Reg. 11562, 11563–64 (Dept’ Commerce Feb. 26, 2001); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished; Final Results of 1999–2000 Administrative Review*, 66 Fed. Reg. 57420, 57421–22 (Dep’t Commerce Nov. 15, 2001) (“Final Results of the 1999–2000 Administrative Review”); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the*

tonnage; (2) tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

People's Republic of China: Amended Final Results of 2000–2001 Administrative Review, 67 Fed. Reg. 72147 (Dep't Commerce Dec. 4, 2002). In the administrative reviews covering Chinese TRBs for 1999 to 2000 and 2000 to 2001, WG had asked Commerce to rescind the *AD Order* as it applied to WG because WG had a de minimis or 0% antidumping duty margin during the preceding three years. Commerce rejected these requests and thus the *AD Order* remained in force as to WG at the time of the subject entries. *Final Results of the 1999–2000 Administrative Review*, 66 Fed. Reg. at 57422; *Amended Final Results of the 2000–2001 Administrative Review*, 67 Fed. Reg. at 72147. Because Commerce has not examined WG since 2002, the 0% anti-dumping rate continues to apply to WG.

According to the complaint, WAC is a WG “subsidiary” and “has customarily acted as importer of record for these entries” of merchandise produced or exported by WG. Compl. ¶¶ 8, 28. Despite Commerce’s refusal to rescind the *AD Order*, as discussed above, WAC nonetheless imported the subject entries as type “01” ordinary consumption entries, rather than type “03” anti-dumping or countervailing duty entries on its CF7501 commercial entry forms. Public Def.’s Mot. to Dis. at 6–7, Jul. 26, 2018, ECF No. 25 (“Def.’s Br.”) (citing Decl. of Amy Johnson at Conf. Ex. B, Jul. 20, 2018, ECF No. 24).⁶

Commerce never reviewed WQ, the alleged exporter of the subject wheel hub assemblies in this case, and thus never assigned WQ a separate rate during an anti-dumping proceeding. Compl. at Ex. 1, Department of Commerce, Customs Liaison Unit, Memorandum to Customs and Border Protection (May 25, 2016) (“*CLU Memo*”), at Attach. 1, Department’s February 25, 2015 Guidance to CBP. According to the complaint, although another WG subsidiary, the Wanxiang Import and Export Company (“WIE”), acted as WG’s primary exporter between April 2011 and early 2012, WQ exported the group’s automobile components, which are the entries underlying this dispute. Compl. ¶ 28. On December 27, 2012, after WQ began exporting the subject merchandise, CBP informed WAC that it would perform an audit to investigate classification and AD duty issues. *Id.* at ¶ 33. On June 26, 2013, Commerce announced that Wanxiang Special Bearing Company (“WSB”) and WIE were subsidiaries of WG in an

⁶ CBP’s regulation, 19 C.F.R. § 142.3, sets forth the required content of what is commonly called an “entry packet.” This includes the “entry summary” or “CBP Form 7501” (“CF7501”). Additionally, importers must file at the time of entry “evidence of the right to make entry”; a “commercial invoice”; and a “packing list.” See generally 19 C.F.R. § 142.3(b)(1). “The entry summary filed for merchandise subject to an antidumping or countervailing duty order shall include the unique identifying number assigned by the Department of Commerce . . .” 19 C.F.R. § 141.61(c).

Automated Commercial Environment (“ACE”)⁷ note. *CLU Memo* at Attachment 3, *Note in ACE*. The ACE note was silent on WQ. *Id.*

CBP issued its initial audit results on October 22, 2014, in which it concluded that WQ was not considered to be part of WG and that the PRC-wide rate of 92.84% applied to its entries.⁸ Compl. ¶ 34. WAC responded to CBP’s initial audit results on November 5, 2014 through counsel. Compl. ¶ 35. WAC asserted that WQ was entitled to WG’s anti-dumping rate because it was a subsidiary of WG and because WQ and WIE share exporting personnel. *Id.*

CBP issued the final results of its audit to WAC on September 2, 2015, in which it reiterated that WQ was not eligible for WG’s anti-dumping rate and that the merchandise was subject to the *AD Order*. Compl. ¶ 36 (citing Excerpt of Final Results of CBP Audit at Ex. 4 (Sept. 2, 2015)). Because WAC was not satisfied with CBP’s audit results regarding WQ’s anti-dumping rate, it met with the Secretary of Commerce and the Under Secretary of Commerce for International Trade in September 2015 to request that Commerce review CBP’s views. Compl. ¶ 39 (citing Letter from Department of Commerce to File at Ex. 5 (Jan. 6, 2016)).

On May 25, 2016, Commerce’s Customs Liaison Unit published a memorandum on the record: “Tapered Roller Bearing and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Guidance to CBP.” *CLU Memo*. The *CLU Memo* stated:

In response to a request from [CBP], on February 25, 2015, the Department of Commerce . . . provided guidance to CBP regarding the entities in the 1994–2001 administrative review periods that were entitled to the Wanxiang Group Corporation’s cash deposit rate. Attached is the Department’s guidance to CBP’s inquiry.

Please note that this memorandum does not constitute new factual information on the record of this closed segment of the proceeding.

Id. The memorandum included three attachments: (1) Commerce’s February 25, 2015 guidance to CBP; (2) the organizational chart provided by WG (summarizing the information submitted by WG

⁷ ACE is a secure portal system that CBP uses to communicate with the trade community including trade-focused government agencies. CUSTOMS AND BORDER PROTECTION, ACE AUTOMATED BROKER INTERFACE (ABI) AND CBP AND TRADE AUTOMATED INTERFACE REQUIREMENTS (CATAIR), <https://www.cbp.gov/trade/ace/catair> (last visited Jul. 24, 2019).

⁸ During the administrative review period covering June 1, 2010 through May 31, 2011, Commerce established that it would apply a PRC-wide rate of 92.84% to entities that had failed to establish that they were not under the control of the PRC government. See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished; Final Results of 2010–2011 Administrative Review*, 78 Fed. Reg. 3396, 3397 (Dep’t Commerce Jan. 26, 2013).

during the 1994 to 2001 administrative review periods) that was attached to the February 25, 2015 guidance; and (3) the June 26, 2013 ACE note, referenced above. The February 25, 2015 guidance to CBP concerned the entities entitled to WG's 0% anti-dumping rate. *See* Department's February 25, 2015 Guidance to CBP. In it, Commerce indicated that it had reviewed WG's original questionnaire responses from 1994 to 2001 and determined that WIE and WSB were the group's only producers and exporters of record. *See id.* However, none of the document submissions suggested that WQ occupied a similar relationship to WG or was a manufacturer or exporter of the subject merchandise.⁹ *Id.*

On January 17, 2018 CBP issued a pre-penalty notice to WAC under 19 U.S.C. § 1592(b). Compl. ¶ 12 (citing Excerpt of Customs and Border Protection Pre-Penalty Notice at Ex. 2 (Jan. 18, 2018)). The notice stated that CBP was "contemplating issuing a demand for . . . lost revenue and . . . penalty" in connection with WAC's failure to disclose that its entries were subject to anti-dumping duties." *Id.* at ¶ 53. The notice stated that CBP intended to apply the PRC-wide rate of 92.84% rather than WG's 0% anti-dumping rate. *Id.* CBP's investigation remains ongoing. Def.'s Br. at 17 (citing Excerpt of Customs and Border Protection Pre-Penalty Notice); Joint Status Report, July 24, 2019, ECF No. 51.

On May 23, 2018, WAC filed a complaint in this court challenging "Commerce's determination published in May 2016 concerning the entities that are entitled to [WG]'s AD rate as well as the policy or practice through which Commerce reached that determination." Compl. ¶¶ 55–69. On July 26, 2018, the Government filed a motion to dismiss for lack of subject matter jurisdiction. Def.'s Br. On September 18, 2018, WAC filed its response to the Government's motion to dismiss. Pl.'s Opp'n to Mot. to Dismiss at 13, Sept. 18, 2018, ECF No.

⁹ The February 25, 2015 memorandum to CBP stated: "Commerce based its decision to treat . . . WSB and . . . WIE as part of [WG] on a review of [WG's] questionnaire responses, . . . organizational charts, and . . . a verification report. Department's February 25, 2015 Guidance to CBP. Commerce further explained that "neither Commerce nor [WG] identified any entity other than WIE and WSB as being producers and/or exporters of subject merchandise. *Id.* In other words, while [WG] provided organizational charts and identified and described other affiliates, [WG] did not identify these affiliates as either a manufacturer or an exporter of the subject merchandise . . . and did not make determinations" for any other affiliates. *Id.* Further, it stated with respect to WQ: "WQ appears in [WG's] organizational charts beginning in the 1994–1995 (administrative review periods), in which it is identified only as a subsidiary, not a wholly-owned subsidiary. The first description [WG] provides of WQ is in the 1998–1999 (administrative review period)" in which WG describes WQ as "a stock company that handles all of the manufacturing of the group" and describes WSB as "the exclusive producer of subject merchandise." *Id.* But, none of the documents, Commerce notes, "clearly identified WQ itself as being a manufacturer or exporter of subject merchandise." *Id.* Finally, Commerce concluded that "no evidence [it] reviewed suggested that WQ exported the subject merchandise during" the 1994–2001 administrative review periods. *Id.*

27 (“Pl.’s Br.”). The Government filed its reply on October 17, 2018. Def.’s Public Reply in Support of Mot. to Dismiss, Oct. 17, 2018, ECF No. 29 (Def.’s Reply”). Oral argument was held in this court on June 25, 2019. ECF No. 44.

STANDARD OF REVIEW

The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law.”

DISCUSSION

WAC argues that Commerce violated basic due process principles and the procedural requirements of anti-dumping law by giving guidance to CBP without providing WAC with (1) contemporaneous notice of its decisions; (2) an evidentiary basis for its decisions; and (3) an opportunity to comment or review the evidence before decisions were made. Compl. ¶ 2. WAC further argues that Commerce has made a practice or policy of making ad hoc, undocumented, undisclosed, and individualized determinations. *Id.* at ¶ 3. WAC also contends that this court has jurisdiction over its challenge because Commerce’s guidance constituted a final agency action. For the reasons stated below, the court grants the Government’s motion to dismiss for lack of subject matter jurisdiction.

I. The court does not have jurisdiction under 28 U.S.C. § 1581(i) over WAC’s challenge to Commerce’s memorandum to CBP because WAC could have invoked jurisdiction under 28 U.S.C. § 1581(c).

In matters brought under 28 U.S.C. § 1581(i), “jurisdiction may not be invoked when jurisdiction under another subsection of 28 U.S.C. § 1581 *is or could have been available*, unless the remedy provided under that other subsection would be manifestly inadequate.” *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)); *see also Erwin Hymer Grp. N. Am. v. United States*, 930 F.3d 1370 (Fed. Cir. 2019). WAC argues that the court has residual jurisdiction over this case under 28 U.S.C. § 1581(i) because it could not seek relief in any other way. WAC contends that Commerce’s memorandum was the product of a determination “made outside of any administrative review proceeding” and “rendered in a manner devoid of basic due process.” Pl.’s Br. at 2. WAC characterizes Commerce’s *CLU Memo* as emblematic of Commerce’s “fundamen-

tally flawed policy of making . . . secretive determinations.” *Id.* The court is not persuaded.

As has been noted, the *CLU Memo*, which details the attached February 25, 2015 guidance, was a communication to CBP regarding the entities in the 1994–2001 administrative review periods that were entitled to WG’s cash deposit rate. *See CLU Memo*; Department’s February 25, 2015 Guidance to CBP. Commerce did not make a new determination in the *CLU Memo*; it merely reviewed WAC’s old questionnaire responses and communicated that “neither Commerce nor [WG] identified any entity other than WIE and WSB as being producers and/or exporters of subject merchandise” in prior administrative reviews. *Id.* Commerce further noted that its “memorandum does not constitute new factual information on the record of this closed segment of the proceeding.” *Id.*

“In ascertaining whether jurisdiction is proper, we look to ‘the true nature of the action.’” *Juancheng Kangtai Chemical Co., Ltd. v. United States*, — F.3d —, 2019 WL 3676346, at *3 (Fed. Cir. July 15, 2019) (quoting *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)). Here, in challenging the *CLU Memo*’s conveyance of information from long-completed reviews, WAC is seeking a reconsideration of WQ’s AD rate based on the records of those reviews. If WG wanted to challenge Commerce’s finding with respect to WQ’s anti-dumping rate, it should have done so by timely challenging the results of those administrative reviews under 28 U.S.C. § 1581(c). WG chose not to do so. Because that type of relief could have been available under a 28 U.S.C. § 1581(c) action,¹⁰ the court’s residual jurisdiction cannot be invoked.¹¹ *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018); *Juancheng Kangtai*, 2019 WL 3676346, at *4.

¹⁰ WAC does not argue in the alternative that a remedy provided under a 28 U.S.C. § 1581(c) proceeding would be “manifestly inadequate.” *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002).

¹¹ WAC’s claim that *Consolidated Bearings Co. v. United States* supports the notion that 28 U.S.C. § 1581(i) jurisdiction is available is unavailing. 348 F.3d 997, 999 (Fed. Cir. 2003). WAC argues that *Consolidated Bearings* is on point because the plaintiff did not challenge “. . . the final results of any administrative review but [rather] the ‘administration and enforcement’ of the AD rates determined during the course of administrative reviews.” Pl.’s Br. at 17. WAC’s reliance on this case is misplaced because the nature of the guidance in the two cases is distinct. There, Commerce’s liquidation instructions “arbitrarily departed from its well-established liquidation practices” of determining the rate of dumping to be applied to imports at the liquidation instruction stage of an administrative review. *Consol. Bearings*, 25 CIT 546, 166 F. Supp. 2d 580 (CIT 2001). But the final results of the administrative review were silent regarding the plaintiff’s entries. *Id.* This involved a separate proceeding and final determination that departed from the results of the administrative review. By contrast, here, Commerce’s guidance to CBP was part of the same proceeding, and it reiterated — and rather than deviating from — the results of the administrative reviews from 1994 to 2001.

This conclusion is consistent with Federal Circuit precedent. In *Sunpreme Inc. v. United States*, plaintiff Sunpreme challenged in this court CBP's collection of anti-dumping and countervailing duty cash deposits on Sunpreme's solar cells before Commerce had the opportunity to conduct requested scope ruling proceedings to determine whether the products were subject to antidumping or countervailing duty orders. *Sunpreme*, 892 F.3d at 1190. The Federal Circuit determined that this court lacked jurisdiction under 19 U.S.C. § 1581(i) to hear Sunpreme's case because "it failed to wait until it had a formal scope ruling in hand prior to filing suit." *Id.* at 1192. Because a scope ruling would have determined whether an anti-dumping order covered Sunpreme's products, "Sunpreme was required to exhaust the administrative remedies available to it in the form of a scope ruling inquiry and scope ruling determination." *Id.* at 1192–93. Had Sunpreme exhausted its administrative remedies and been dissatisfied with the scope ruling determination, it could have obtained judicial relief pursuant to 19 U.S.C. § 1581(c); thus, the Federal Circuit held, residual jurisdiction under 19 U.S.C. § 1581(i) did not exist. *Id.* at 1193.

Similarly, in *Juancheng Kangtai Chemical Co., Ltd. v. United States*, plaintiff Kangtai alleged that Commerce incorrectly instructed CBP to liquidate certain sales made during the ninth administrative review of the relevant duty order at the higher rate applicable to the tenth administrative review and sought jurisdiction under 19 U.S.C. § 1581(i). 2019 WL 3676346, at *4. The Federal Circuit noted that, although the pertinent sales were made during the ninth administrative review, the associated entries were not made until the tenth administrative review period. *Id.* at *5. Additionally, "Commerce [has] flexibility in deciding how to measure the twelve-month [period of review] covered in an administrative review, whether it be based on date of entry, export, or sale" and Commerce repeatedly indicated throughout the administrative review process that it would be relying on the date of entry to assess anti-dumping duties. *Id.* (citing 19 C.F.R. § 351.213(e)(1)(i) (2019)). "During the administrative proceedings, Kangtai did not directly challenge Commerce's decision to rely on entries, even though it could have;" moreover, had it done so, Kangtai would have had recourse to judicial review under 19 U.S.C. § 1581(c). *Id.* at *6. For these reasons, the Federal Circuit concluded that this court lacked jurisdiction under 19 U.S.C. § 1581(i). *Id.*

Like Sunpreme and Kangtai, WAC forewent an available administrative procedure and instead sought to challenge an agency decision by filing a complaint in this court under its residual jurisdiction.

Specifically, as has been noted, WAC failed to seek an administrative review to determine whether WQ was entitled to the WG 0% rate. Indeed, WAC seeks the very relief associated with administrative reviews — determinations (1) that an exporter is not controlled by the Chinese government;¹² and (2) to ‘collapse’ WQ with other WG companies without any analysis of WQ’s alleged exports of subject merchandise.¹³ WAC would have possessed an adequate remedy under 28 U.S.C. § 1581(c) had it disclosed its entries of TRB merchandise as subject to the *AD Order* and then asked Commerce to review WQ. WAC thus attempts to invoke the court’s residual jurisdiction to circumvent its failure to exhaust the administrative remedies provided to it through normal anti-dumping administrative review procedures. In sum, WAC could have challenged the results of such administrative reviews in a 28 U.S.C. § 1581(c) action if it were dissatisfied with the results, and thus 28 U.S.C. § 1581(i) jurisdiction is unavailable.

II. Commerce’s guidance to CBP is not a reviewable final agency action ripe for judicial review.

In a further effort to establish jurisdiction, WAC contends that Commerce’s memorandum memorializing its guidance to CPB is a final agency action and ripe for judicial review. The court is not persuaded. The APA defines an “agency action” as including “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). Generally, for an agency action to be “final,” two conditions must be satisfied: (1) “the action must mark the ‘consummation’ of the agency’s decision-making process — it must not be of a merely tentative or interlocutory nature;” and (2) “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal conse-

¹² The question whether a particular producer/exporter is part of a “PRC-wide entity” must be raised during the course of antidumping duty proceedings, see *Dongtai Peak Honey Indus. v. United States*, 777 F.3d 1343, 1353 (Fed. Cir. 2015), and are therefore reviewable exclusively under 28 U.S.C. § 1581(c). See *Dongtai Peak Honey Indus. v. United States*, 777 F.3d 1343, 1353 (Fed. Cir. 2015).

¹³ The Government has stated that in the ongoing 19 U.S.C. § 1592 proceeding, CBP may determine whether WAC violated anti-dumping laws. “WAC may provide written and oral comments to CBP in response to the pre-penalty notice, and, if CBP agrees with WAC’s arguments, the agency must issue a ‘written determination’ ‘that there was no violation.’” Def.’s Br. at 22 (citing 19 U.S.C. § 1592(b)(2)). “Any penalty may also be reviewed by CBP Headquarters under 19 U.S.C. § 1618 should WAC elect to avail itself of this permissive remedy.” Def.’s Br. at 22. Should CBP determine that there was a violation, WAC can challenge CBP’s findings in a 19 U.S.C. § 1592(e) action, see *supra* p.4 (a defendant is entitled to a trial de novo “on all issues”), making the court’s residual jurisdiction again unavailable. As the Government has represented in its filings in this court, WAC could raise its due process claims in that action because Commerce’s memorandum was a communication to CBP during the course of its investigation.

quences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citing *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948); *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

Bennett provides an instructive example of a final agency action. In that case, the Department of the Interior (“DOI”) issued a biological opinion concluding that a federal water project would jeopardize two endangered species of fish. 520 U.S. at 157. But the DOI’s opinion also stated that maintaining minimum water levels in two of the project’s lakes would minimize harm to the fish, and that the federal agency administering the project could continue with the project if it complied with the DOI biological opinion. *Id.* at 159. The Supreme Court held that the DOI biological opinion was “final” because it (1) stated the DOI’s conclusion that the project would jeopardize the existence of two species and (2) obliged the federal agency administering the project to comply with certain conditions to carry out the project. *Id.* at 178. Because the federal agency could only continue with the project by complying with the stipulations, the biological opinion “alter[ed] the legal regime” to which the administering agency was subject. *Id.*

By contrast, an agency action is not “final” if it “serve[s] more like a tentative recommendation than a final and binding determination.” *Id.* (discussing *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992)) (internal quotations omitted). Similarly, an agency action is not “final” if it is “purely advisory” and does not “affect[] the legal rights of the parties.” *Id.* In *Franklin*, Commerce’s presentation to the President regarding the results of the decennial census did not constitute a final agency action because it had “no direct consequences” and was not a “binding determination.” 505 U.S. at 798. Similarly, in *Dalton v. Specter*, an agency’s recommendations that were not binding on the President were not “final” because the President had discretion to accept or reject them. 511 U.S. 462, 478 (1994).

In the present case, Commerce’s communication to CBP does not constitute a final agency action because it does not satisfy the *Bennett* prongs — the memorandum neither marks the completion of an agency’s decision-making process nor affects the legal rights of the parties. *Bennett*, 520 U.S. at 177–78. First, Commerce’s communication does not mark the consummation of its decision-making process because the agency did not make a decision concerning WQ’s AD rate. Instead, it reported the results of the 1994 to 2001 administrative reviews. Compl. ¶ 31. Like Commerce’s presentation to the President in *Franklin*, the determination communicated what Commerce had previously determined, and it was not binding given that a 19 U.S.C.

§ 1592(e) enforcement action is not necessarily forthcoming and there are no other “direct consequences” that follow the determination. 505 U.S. at 798. Consequently, its memorandum is “advisory” and “interlocutory in nature” because CBP ultimately determines whether to bring a 19 U.S.C. § 1592(e) enforcement action. *Id.* (holding that a report making a recommendation but carrying no direct consequences is not a final agency action). While CBP does not have authority to modify Commerce’s determination concerning the anti-dumping rate, see *J.S. Stone, Inc. v. United States*, 27 CIT 1688, 1691, 297 F. Supp. 2d 1333, 1338 (2003), *aff’d*, 111 F. App’x 611 (Fed. Cir. 2004), as discussed above, it is the responsibility of WQ to establish its independence in an administrative review to ensure the anti-dumping rate it desires applies to it. Therefore, the memorandum fails to meet the first prong because it did not communicate a new Commerce decision. The agency merely reported the results of prior administrative reviews to CBP, and CBP — not Commerce — will ultimately decide whether to bring a 19 U.S.C. § 1592(e) enforcement action against WQ. Because Commerce’s *CLU Memo* is not a final determination, it is not ripe for judicial review.¹⁴

Commerce’s communication also fails to meet the second *Bennett* prong — that agency action requires “legal consequences” for the parties. *Bennett*, 520 U.S. at 177–78. Informing CBP which affiliates of WG had been reviewed during the 1994 to 2001 period does not “affect[] the legal rights of the parties” because WQ’s AD rate has remained unchanged for approximately three decades. *Bennett*, 520 U.S. at 177–78; Letter from Department of Commerce to File; Pl.’s Br. at 7. The question of whether the WG AD rate applies to WQ was settled during the 1994 to 2001 administrative reviews of WG. During the reviews, which were conducted over two decades prior to Commerce’s communication, WQ was not reviewed because it did not identify itself as an exporter for the group. To be reviewed, WQ “should [have been] identified on the organizational chart submitted to Commerce in 1996.” See Letter from Department of Commerce to File. If Commerce did not review WQ, then that company was part of the China-wide entity at the time of the subject entries. Because WQ was not reviewed, it received the country-wide rate when it exported the subject merchandise. Commerce’s 2015 communication did not change the parties’ “rights or obligations” because, as previously discussed, it did not alter WQ’s AD rate, but instead advised CBP on

¹⁴ Courts generally consider two principal factors in determining whether an agency action is ripe: (1) whether it is final and (2) the hardship to the parties of withholding court consideration. *Abbott Labs v. Gardner*, 387 U.S. 136, 148–49 (1967). Because Commerce’s communication does not meet the first prong, it is not ripe for judicial review.

its previous proceedings. *See Franklin*, 505 U.S. at 798. By contrast, a CBP enforcement action requiring WQ to pay a penalty would alter WQ's obligations. But like the agency's recommendations in *Dalton*, CBP may elect not to take an enforcement action against the parties upon completion of its investigation. 511 U.S. at 478. Since Commerce's communication to CBP does not alter WQ's rights or obligations, it fails to constitute a final agency action. Instead, what WAC asks for resembles an advisory opinion.

Finally, the facts of this case are distinguishable from those in *Bennett* because there, the DOI granted petitioners newfound permission to act in a prescribed manner; DOI did not merely restate preexisting facts. Commerce did not direct CBP to apply a certain rate to WQ; instead, Commerce informed CBP of what the WG rate had been and to whom it applied. It merely reiterated that WQ had not been reviewed. In short, Commerce did not issue a new determination or alter the legal regime. The memorandum to CBP was not a final agency action.

CONCLUSION

For the foregoing reasons, the court grants the Government's motion to dismiss the complaint for lack of subject matter jurisdiction.
Dated: August 19, 2019

New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE



Slip Op. 19–113

TRENDIUM POOL PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 18–00132

[Plaintiff's motion for judgment on the agency record is granted.]

Dated: August 20, 2019

Arthur K. Purcell and *Kristen Smith*, Sandler Travis & Rosenberg, P.A., of New York, NY and Washington, DC, argued for plaintiff. With them on the brief were *Mark Tallo* and *Sarah E. Yuskaitis*.

Elizabeth A. Speck, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara Hogan*, Assistant Director. Of counsel was *Rachel Bogdan*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Katzmann, Judge:

This case calls for diving into the deep end of proper scope interpretation. Plaintiff Trendium Pool Products, Inc. (“Trendium”) imports finished pool kits and pool walls (collectively “pool products”) from Canada to the United States that are ready to construct into above ground pools with no further modification by customers. Trendium requested a scope inquiry clarifying that its pool products, partially made from corrosion resistant steel (“CORES”) from Italy and the People’s Republic of China (“China”), did not fall within the antidumping duty order for CORES from subject countries, including Italy and China. After reviewing Trendium’s request, the United States Department of Commerce (“Commerce”) determined that Trendium’s pool products were mixed-media items — products that are merely combinations of subject and non-subject merchandise — and no published guidance existed to overcome the presumption that mixed-media items fall within the scope of Commerce’s Final Order (“Order”). Thus, Trendium’s products were subject to the antidumping duty. Trendium now challenges the scope ruling of Commerce, arguing that the plain language of the *Order* does not cover downstream products¹ like their pool products. As discussed below, the court grants Trendium’s motion for judgment on the agency record and holds that Commerce’s determination that Trendium’s finished pool products are within the scope of the *Order* on CORES from subject countries is unsupported by substantial evidence and not in accordance with law. The court remands to Commerce for further explanation or reconsideration consistent with this opinion.

BACKGROUND

I. Legal and Regulatory Framework of Scope Determinations Generally

“When participants in a domestic industry believe that competing foreign goods are being sold in the United States at less than their fair value, they may petition Commerce to impose antidumping duties on importers.” *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1297–98 (Fed Cir. 2013) (citing 19 U.S.C. § 1673a(b)). If Commerce determines that “the subject merchandise is being, or is

¹ The Merriam-Webster dictionary defines “downstream” as “in or toward the latter stages of a usually industrial process or the stages (such as marketing) after manufacture.” Downstream, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/downstream> (last visited Aug. 16, 2019); see also *Dillinger France S.A. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1349, 1357 n.3 (2018).

likely to be sold in the United States at less than its fair value,” and the United States International Trade Commission (“ITC”) determines that a domestic industry is injured as a result, Commerce issues an antidumping duty order. *See* 19 U.S.C. § 1673d(a), (b). Once the order is issued, importers may ask for scope rulings, seeking to clarify the scope of the order as it relates to their particular product. *See generally* 19 C.F.R. § 351.225.

Commerce often must determine whether a product is included within the scope of an antidumping or countervailing duty order because it necessarily writes scope language in general terms. *See* 19 C.F.R. § 351.225(a). Commerce’s determinations concerning a particular product are made in accordance with its regulations. *See* 19 C.F.R. § 351.225. Although “Commerce is entitled to substantial deference with regard to its interpretation of its own antidumping duty orders,” *King Supply Co. v. United States*, 674 F.3d 1343, 1348 (Fed Cir. 2012) (citing *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed Cir. 2005)), “the question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law” that the court reviews *de novo*. *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1382 (Fed Cir. 2017) (citing *Alleghany Bradford Corp. v. United States*, 28 CIT __, __, 342 F. Supp. 2d 1172, 1183 (2004)). “The question of whether a product meets the unambiguous scope terms presents a question of fact reviewed for substantial evidence.” *Novosteel SA v. United States*, 284 F.3d 1261, 1269 (Fed Cir. 2002)).

The framework for evaluating the application of the scope of an order is set forth in Commerce’s regulations. 19 C.F.R. § 351.225(k) provides:

In considering whether a particular product is included within the scope of an order or a suspended investigation, the Secretary will take into account the following:

1. The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.
2. When the above criteria are not dispositive, the Secretary will further consider:
 - i. The physical characteristics of the product;
 - ii. The expectations of the ultimate purchasers;
 - iii. The ultimate use of the product;
 - iv. The channels of trade in which the product is sold; and

v. The manner in which the product is advertised and displayed

The Federal Circuit has elaborated on the test set forth in 19 C.F.R. § 351.225(k) by establishing that Commerce should engage in a three-step analysis to determine whether merchandise falls within the scope of an order, providing:

First, Commerce must look to the text of an order's scope; second, Commerce will consult descriptions of the merchandise in other sources; and third, if still necessary, Commerce may consider additional factors comparing the merchandise in question to the merchandise subject to the order. Commerce's inquiry must begin with the order's scope to determine whether it contains an ambiguity and, thus, is susceptible to interpretation If the scope is unambiguous, it governs.

Meridian, 961 F.3d at 1381.

For the plain meaning in a scope determination to be dispositive, it must be "supported by substantial evidence." *See* 19 U.S.C. 1516(a)(1)(B)(i). The Federal Circuit has held that such a review "requires an examination of the record as a whole, taking into account both the evidence that justifies and detracts from an agency's opinion." *Falko-Gunter Falkner v. Inglis*, 448 F.3d 1357, 1363 (Fed Cir. 2006). Even when merchandise is facially covered by the literal language of the order, it may still be outside the scope "if the order can reasonably be interpreted so as to exclude it." *Mid Continent*, 725 F.3d at 1301.

II. Factual and Procedural History of the CORES Order

United States Steel Corporation, Nucor Corporation, Steel Dynamics Inc., California Steel Industries, ArcelorMittal USA LLC, and AK Steel Corporation ("Petitioners") filed antidumping and countervailing duty petitions on June 3, 2015 with Commerce and the ITC, requesting the initiation of investigations with respect to imports of certain CORES products from China, the Republic of Korea, India, Italy, and Taiwan ("*Petition*"). *See Certain Corrosion-Resistant Steel Products from China, India, Italy, Korea, and Taiwan: Determinations*, 81 Fed. Reg. 47,177 (July 20, 2016) ("*ITC Investigation*"). On June 30, 2015, Commerce initiated the antidumping and countervailing duty investigations on CORES products from these areas, and on June 2, 2016, Commerce published determinations. *Id.* On July 15, 2016, the ITC issued a notice of its affirmative finding that the domestic steel industry in the United States is materially injured by reason of imports of certain CORES products from China, India, Italy, Korea, and Taiwan. *Id.* On July 25, 2016, Commerce issued anti-

dumping and countervailing duty orders on these products. *Order*, 81 Fed. Reg. at 48,391, 48,389, App. I. The scope of the *Order* covers, in pertinent part:

[C]ertain flat-rolled steel products, either clad, plated, or coated with corrosion resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel- or iron-based alloys, whether or not corrugated or painted, varnished, laminated, or coated with plastics or other non-metallic substances in addition to the metallic coating . . . coils that have a width of 12.7 mm or greater, regardless of form of coil . . .; products not in coils (*e.g.*, in straight lengths) of a thickness less than 4.75 mm and a width of 12.7 mm or greater and that measures at least 10 times the thickness . . .; products not in coils (*e.g.*, in straight lengths) of 4.75 mm or more and a width exceeding 150 mm and measuring at least twice the thickness . . .; products . . . may be rectangular, square, circular, or other shape and include products of either rectangular or non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process. . . . For purposes of the width and thickness requirements referenced above:

- (1) where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above; and
- (2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain non-rectangular shape, etc.), the measurement at its greatest width or thickness applies.

For example, specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (“IF”)) steels and high strength low alloy (“HSLA”) steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. Furthermore, this scope also includes Advanced High Strength Steels (“AHSS”) and Ultra High Strength Steels (“UHSS”), both of which are considered high tensile strength

and high elongation steels. Subject merchandise also includes corrosion-resistant steel that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching and/or slitting or any other processing that would not otherwise remove the merchandise from the scope of the *Orders* if performed in the country of manufacture of the in-scope corrosion resistant steel. All products that meet the written physical description, and in which the chemistry quantities do not exceed any one of the noted element levels listed above, are within the scope of these *Orders* unless specifically excluded.

See *Order*, 81 Fed. Reg. at 48,389, 48,391, App. I.

III. Factual and Procedural History of This Case

The products under consideration in Trendium's scope ruling request are finished pool products made of steel and non-steel components. See Letter from Trendium to the Department, *Re: Certain Corrosion-Resistant Steel Products from India, Italy, the People's Republic of China, Korea, and Taiwan, Scope Ruling Request for Finished Pool Kits and Pool Walls* (Nov. 28, 2017) ("*Trendium's Initial Scope Request*") P.R. 1 at 5. The pool walls include CORES from Italy and China. *Id.* While subject CORES from China and Italy is used to produce part of the pool products, the steel undergoes further processing and manufacturing in Canada. *Id.*

To produce the merchandise at issue, Trendium paints the imported galvanized coil from Italy and China as a first step. *Id.* at 8. The coil are then stamped or flattened as part of a roll-form process into individual pieces, shaped to fit the appropriate size needed for the specific pool component, cut, finished, and hemmed into the pool wall. *Id.* The process begins with the creation of a hem on the top and the bottom of the wall using a roll form technique. *Id.* at 7. After hemming, the wall is corrugated, and a notch is cut at both ends of the wall to account for the added thickness due to hemming. *Id.* The end of the wall is folded and then folded again to increase stability and support when the walls are joined together. *Id.* Each end of the wall is punched with 36 holes to attach the steel reinforcing bars when assembling the pool. *Id.* After incorporation of the steel product into the pool walls, pool kits are ready to be shipped to respective customers. *Id.* When shipped, Trendium's products require no additional manufacturing by the consumer and no additional pieces. *Id.* This processing renders the CORES components unusable for any other purpose.

On November 28, 2017, Trendium filed a scope ruling request with Commerce to determine whether its finished pool products were subject to the *Order*. See *Trendium's Initial Scope Request*. Commerce found the information in Trendium's initial scope request insufficient to make a determination and issued a supplemental questionnaire. See Letter from Mark Hoadley to Trendium Pool Products, Inc., *Re: Scope Ruling Request: Supplemental Questionnaire* (Dec. 15, 2017) ("*Supplemental Questionnaire*"). On February 9, 2018, Trendium filed a supplemental scope ruling request with Commerce to determine whether finished pool products were subject to the *Order*. See *Response to Secretary of Commerce Pertaining to Trendium Pool Supplemental Questionnaire Response* (Feb. 9, 2018) P.R. 7. On May 10, 2018, Commerce issued a scope ruling to Trendium stating that its finished pools kits and individual pool walls fell within the scope of the *Order*. See Memo from Commerce, *Re: Transfer of Scope Ruling Request* (May 10, 2018) ("*Final Scope Ruling*") P.R. 15. Commerce reasoned that its practice for evaluating products in which potentially subject merchandise is included in a larger product is governed by the Federal Circuit's decision in *Mid Continent* and that the inclusion of CORES in Trendium's pools did not bring the CORES outside the scope of the *Order*. See *Final Scope Ruling*.

Trendium filed a complaint against the United States ("the Government") challenging Commerce's *Final Scope Ruling* on July 16, 2018, ECF No. 17, and amended its complaint on July 26, 2018, ECF No. 20. Trendium filed its motion for judgment on the agency record on January 7, 2019. Pl.'s Mot. for J. on the Agency R., ECF No. 37 ("Pl.'s Br."). The Government filed its response brief on April 8, 2019. Def.'s Resp. Br., Apr. 8, 2019, ECF No. 41 ("Def.'s Br."). Trendium filed a reply brief on April 22, 2019. ECF No. 43 ("Pl.'s Reply"). Oral argument was held on July 9, 2019. ECF No. 49.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516(a)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

DISCUSSION

Trendium argues that (1) Commerce's *Final Scope Ruling* failed to consider the plain language of the *Order*, as Trendium's pool products fall outside the scope of the *Order*; (2) Commerce unlawfully expanded the scope of the *Order* to include merchandise not considered during the underlying injury determination; (3) its product is not a

mixed-media item subject to the *Mid Continent* analysis; and (4) the *Order* does not cover merchandise that has been substantially transformed into a new product, like its pool products. *See generally* Pl.’s Br. The Government counters that Trendium’s product is a mixed-media item subject to the two-step analysis in *Mid Continent*, and Trendium cannot overcome the presumption that mixed-media items are included within the scope of the orders absent explicit language to the contrary. *See generally* Def.’s Br. For the reasons stated below, the court finds that Commerce’s determination that Trendium’s products are covered by the *Order* is unsupported by substantial evidence and is not in accordance with law.

I. Trendium’s Pool Products Do Not Fit Within the Plain Language of the Scope of the Order.

A. The Scope of the Order Does Not Cover Downstream Products.

Trendium argues Commerce’s *Final Scope Ruling* failed to consider the plain language of the *Order* in applying the antidumping duty for CORES from China and Italy to its finished pool products because the pool products were neither specifically included nor reasonably interpreted to be included under the *Order*, as required by *Duferco Steel, Inc. v. United States*. 296 F.3d 1087, 1089 (Fed. Cir. 2002) (“Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it.”); Pl.’s Br. at 10. Specifically, the scope of the *Order* covers CORES from Italy and China, not finished pool products that can no longer be used as a raw input. Furthermore, Commerce’s argument that Trendium’s product is merely processed within the language of the *Order* is unavailing. Thus, Commerce’s determination was not based upon substantial evidence or otherwise in accordance with law.

Trendium relies on *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 779 (Fed. Cir. 2014) to argue that fully finished downstream products, like its pools and pool walls, were never intended to be included by the Petitioners as part of the scope of the investigation. Pl.’s Br. at 16. While *Patterson* is an unpublished opinion and thus nonprecedential, the court may look to it for guidance or persuasive reasoning.² The court agrees that it is instructive and persuasive.

² Federal Circuit Rules of Practice Rule 32.1(d) states “[t]he court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent.”

In *Patterson*, the Federal Circuit considered whether an order's scope includes merchandise facially covered by the terms of the antidumping order, but which had not been a part of the underlying investigation. The *Patterson* court ultimately rejected Commerce's determination that steel coil rods imported from China fell within the scope of an antidumping order on steel threaded rods because coil rods were a distinct product occupying a different domestic industry than the steel threaded rods the ITC investigated. 585 Fed. Appx. at 784–85. Furthermore, Commerce did not offer any evidence to support the conclusion that the imported coil rods fell within the domestic industry the ITC investigated. *Id.* at 785–86. Instead, evidence showed that Patterson's coil rods were physically distinguishable from the steel threaded rods that were the focus of the original petition, the petition neither mentioned coil rods nor any of the uses of coil rods, no domestic producers of coil rods were included in the description of the domestic threaded rod industry, and there was no evidence that at the time of the petition coil rods were interchangeable with threaded rods or intended to be subject to the duties. *Id.* at 784–86. In this case, as in *Patterson*, there is nothing on the record of the original investigation that demonstrates that Petitioners intended to include fully finished downstream products as part of the scope of the investigation. *See generally ITC Investigation*. While the language of the *Order* thoroughly details the chemical content of the subject merchandise and intended uses, nowhere does it state that the scope covers downstream products such as cars, appliances or pools. *See generally Order*. In *Patterson*, review of the record as a whole included evidence that coil rods were excluded from Commerce's and the ITC's investigations. There, because no evidence showed that when the petition was filed it intended to include or mention coil rods, the record did not support a finding that coil rods were covered by the order. *Patterson*, 585 Fed Appx. at 784. Similarly here, because the plain language of the *Order* does not discuss downstream products and the Government can point to no evidence on the record of consideration of downstream products within the *Petition* filed with Commerce or the ITC investigation, they are reasonably interpreted to be excluded from the scope of the *Order*.

The Government tries to distinguish *Patterson* by pointing out that, in this case, the CORES used in Trendium's finished pool products is specifically covered by the *Order*, whereas in *Patterson* no part of the coil rods was under the order. Def.'s Br. at 17. The Government contends that because the CORES components fall within the plain language of the scope of the *Order*, considering other sources in

determining the plain meaning of the *Order* is inconsistent with *Mid Continent's* guidance that Commerce should consider the (k)(1) sources as part of the first step of a mixed-media analysis only if it identifies an ambiguity in an order's plain language.³ *Id.* Here, as the Government argues, Trendium's pools fall directly within the language of the *Order*, as Trendium's pool walls undergo exactly the same type of "further processing" that the *Order* encompasses. Def.'s Br. at 18 (citing the *Order*, 81 Fed. Reg. at 48,389 ("Subject merchandise also includes corrosion-resistant steel that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching and/or slitting or any other processing that would not otherwise remove the merchandise from the scope of the *Order*")). However, the key language the court gleans from this part of the *Order* is "any other processing that would not otherwise remove the merchandise from the scope of the *Order*." While certain processing of CORES in a third country would not be sufficient to bring the steel outside the scope of the *Order*, Trendium's processing, detailed *supra* pp. 6–7, is so extensive and particular to the product's use as pool walls that the CORES is no longer CORES for the purposes of a scope determination. Put another way, the amount of processing the CORES components underwent transformed them from a raw input into a finished product, with the only practical use as an above-ground pool. Just as the steel

³ Commerce's reliance on *Mid Continent* and a mixed-media analysis is misplaced. Before Commerce engages in a mixed-media analysis, it must make a threshold inquiry: whether the item as imported in its assembled condition qualifies as a mixed-media item in the first instance. See *Maclean Power, L.L.C. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1367 (2019). Only if this initial inquiry is satisfied does Commerce engage in the mixed-media analysis from *Mid Continent*. In *Walgreen Co. v. United States*, the Federal Circuit defines "mixed-media" in the context of scope rulings as a set of products that are "merely a combination of subject and non-subject merchandise, and not a unique product." 620 F.3d 1350 (Fed. Cir. 2010). Furthermore, *Mid Continent* explains that whether or not an item falls within the scope of an order "depend[s] on whether the mixed-media item is treated as a single, unitary item, or a mere aggregation of items." 725 F.3d at 1298. But *Mid Continent* considered whether subject merchandise (nails) packaged and imported with non-subject merchandise (assorted household tools) as a part of a mixed-media tool kit was subject to an antidumping order that in its terms covered the nails. In this case, the Government fails to point to anything in the record that shows that Trendium's finished products are mixed-media items consisting of multiple independent items packaged and sold together as a set. By simply jumping into the mixed-media analysis, Commerce failed to explain why Trendium's products should be considered mixed-media items or grapple with the precedent from *Walgreen* or *Maclean*. In this case, the record evidence — including evidence that the end use of Trendium's products are pools in customers' backyards, and not separable raw inputs — shows that Trendium's pool products are single unitary items, not mixed-media goods. Thus, by failing to consider the record as a whole before applying *Mid Continent*, Commerce's reliance on *Mid Continent* in its *Final Scope Ruling* was unsupported by substantial evidence in the underlying record and not in accordance with law.

coil rods were outside the scope of the order in *Patterson* because they were a distinct product occupying a different market than the steel threaded rods, so too here are Trendium's products distinct from the CORES subject to the *Order*.

The use of the word "corrugation" in the *Order* is also instructive. The beginning of the *Order* references "certain flat-rolled steel products, either clad, plated, or coated with corrosion resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel- or iron-based alloys, *whether or not corrugated* or painted, varnished, laminated, or coated with plastics or other non-metallic substances in addition to the metallic coating." *Order* at 2 (emphasis added). However, corrugation is notably absent from the list of types of third-country processing that would keep the subject CORES within the *Order*. *Id.* at 4. ("Subject merchandise also includes corrosion-resistant steel that has been further processed in a third country, including but not limited to *annealing, tempering, painting, varnishing, trimming, cutting, pinching, and/or slitting.*") (emphasis added). Had corrugation been intended to be a part of the third-country further processing techniques listed as within the *Order*, it could have been stated explicitly. Instead, the *Order* incorporated other processing techniques but excluded corrugation. While the scope of the *Order* allows for some additional processing of the CORES in a third country, the sum total of the more extensive processing at issue here, which creates a finished product distinct from the original use of the subject CORES, is outside the scope of the *Order*. Trendium's substantial processing, as detailed *supra* p. 6, creates a finished product fit only for use in Trendium's pools. Pools are a product that is absent from the plain language of the *Order* and not considered in the record as within the scope of the *Order*. As such, the processing is sufficient to bring Trendium's product outside the scope of the *Order*.

Commerce also fails to address, and the Government does not sufficiently explain, why the pool products were merely processed as opposed to substantially transformed, as Trendium contends. Instead, in its brief the Government simply states that "the further processing Trendium's CORE[S] components undergo is not to such an extent that the CORE[S] becomes physically distinguishable as a separate product or is transformed into a different product, like the steel threaded rod in *Patterson*." Def.'s Br. at 18. First, as discussed above, the processing that the CORES components undergo here essentially transforms them into a specific pool product. Second, although the *Patterson* court did consider the differences between Patterson's coil rod product and in-scope merchandise to be relevant, the Federal Circuit primarily relied upon and emphasized how the

coil rod product did not overlap in use with in-scope products and how it was a distinct product occupying a different market from the thread rods. *Patterson*, 585 Fed. Appx. at 784–85. So too here are the pool products a distinct product; due to the processing they undergo, they do not overlap in use with typical CORES products. Thus, the Government’s argument that the “processing” Trendium’s CORES undergoes keeps it within the scope of the *Order* is unavailing.

The Government further contends — as Commerce did in its scope ruling — that the *Petition* and *ITC Final Determination* specifically discussed the use of CORES in many applications, including construction applications similar to Trendium’s use. *Final Scope Ruling* at 9 (CORES is used “in the manufacture of automobile bodies, in appliances, and in commercial and residential buildings and other construction applications”). The Government argues Commerce reasonably determined that the (k)(1) sources indicate that it was contemplated during the investigations that CORES would continue to be subject merchandise if included with larger products like Trendium’s finished pool products. Def.’s Br. at 15–16. However, the Government relies on no authority for the proposition that discussing downstream products includes those downstream products within the scope of an order. Indeed, in the *Final Scope Ruling*, Commerce summarily concluded that, because the *Petition* and *ITC Final Determination* discussed the use of CORES in many applications, the *Order* necessarily included downstream products. *Final Scope Ruling*.⁴ Without more, the passing references to the type of finished products produced from subject CORES cannot be interpreted as proof that the parties contemplated that finished products would be subject to the scope of the *Order*. Furthermore, accepting such an argument may lead to unintended outcomes. If the court were to adopt Commerce’s interpretation of the *Order* — that any downstream product discussed during the underlying ITC investigation in terms of end-usage should be covered by the scope of the *Order* — then an array of finished consumer products with CORES inputs would be covered by the *Order*.

⁴ Specifically, Commerce asserted that:

Both the petitions and the ITC report indicate that CORE is used in many applications and is selected by consumers and further manufacturers due to its precise chemical and physical composition, *i.e.*, corrosion-resistance. These characteristics result in a strong and consistent product that resists corrosion better than non-CORE steel alternatives while ultimately extending the life of the consumer product. Thus, these (k)(1) sources indicate that, during the investigations, it was contemplated that CORE would not cease to be subject merchandise if incorporated into larger products.

Final Scope Ruling at 9.

***B. Commerce Cannot Apply an Antidumping Duty
Absent an Injury Determination.***

Commerce's decision was also not in accordance with law because Trendium's products were never considered as part of the ITC's injury analysis despite the requirement of an injury determination prior to the imposition of antidumping duties. *See* 19 U.S.C. § 1673 (requiring an industry in the United States be "materially injured, or threatened with material injury" prior to the imposition of antidumping duties). Instead, the ITC's injury investigations focused on pricing data for CORES and other raw inputs, not fully finished products like Trendium's pools and pool walls. *See Trendium's Initial Scope Request* at 9; *Id.* at Attach. 7 (U.S. Importer Questionnaire); Pl.'s Reply at 11–13. Allowing Commerce to include downstream products would "frustrate the purpose of the antidumping laws because it would allow Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998). That the producers of CORES and not domestic producers of above ground pools or other similar downstream products filed the Petition is further evidence that the original injury determination made by Commerce did not encompass Trendium's products. As Trendium highlights, the names and addresses in the investigation of the entities affected by the purported dumping are those who produce the raw input of CORES, not finished products. *See Petition* at Attach. 1, 2.; Pl.'s Reply at 11–12. Furthermore, the ITC questionnaires for the preliminary phase of the original investigation only collected pricing data for mill sheet products, not downstream items. *See ITC Injury Report*, P.R. 15 at Attach. 2, IV 9– 13. Thus, Commerce's determination that Trendium's product fell within the scope of the *Order* is not in accordance with law, as it applies an antidumping duty on a good that lacked a proper injury determination. The Government maintains that the ITC made an injury determination on CORES from Italy and China, and Trendium's product includes this CORES. Thus, they argue, because Trendium's products are subject to the *Order*, and the ITC injury determination applies to the *Order*, there was in fact a proper determination of injury to a domestic industry. *See* Def.'s Br. at 2. However, the Government's argument is unavailing because, as discussed *supra*, Trendium's products do not fall within the literal terms of the *Order*. Thus, the injury determination for subject-CORES is not applicable to Trendium's products.

CONCLUSION

The plain meaning of the unambiguous language of the *Order* excludes Trendium's finished pool products, as the *Order* does not

cover downstream products. While the *Order* incorporates CORES that has been “further processed” in a third country, it does not include such further processing that would “otherwise bring it outside the scope of the order.” As detailed in the record, the manufacturing process that occurs in Canada, including the corrugation, rolling, and folding, is to such an extent that the CORES loses its identity as a raw input and can only be used for practical purposes as an above ground pool. Additionally, the subject CORES cannot practically be separated from Trendium’s products, and the ITC did not evaluate or determine that a domestic industry in the United States would be hurt by the importation of above ground pools or similar downstream products. Because the court finds that Trendium’s products are unambiguously outside the scope of the *Order*, the court need not address the substantial transformation test nor consider the (k)(2) criteria in its analysis. In short, the court finds that Commerce’s determination is not supported by substantial evidence and is not in accordance with law. Accordingly, the court remands to Commerce for further proceedings consistent with this opinion. Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination to the court, and the parties shall have 15 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: August 20, 2019

New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 19–114

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

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

[The court remands to Commerce for a further analysis of the Export Buyer’s Credit Program. All other determinations made by the Department are sustained.]

Dated: August 21, 2019

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 Todor, 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 *Joseph H. Hunt*, 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.

OPINION AND ORDER

Goldberg, Senior Judge:

Now before the court are the Final Results of Redetermination Pursuant to Court Remand, ECF 93–1 (Mar. 5, 2019) (“Remand Results”), of the Department of Commerce (“the Department” or “Commerce”) in the countervailing duty (“CVD”) investigation of off-the-road tires from the People’s Republic of China (“PRC”) during the period of review between January 1, 2014 and December 31, 2014, *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*”) and accompanying Issues & Decision Mem. Following the court’s remand, *Guizhou Tyre Co. v. United States*, 42 CIT ___, 348 F. Supp. 3d 1261 (2018) (“*Guizhou I*”), the Department has reconsidered its ocean freight costs for nylon cord benchmarks; reviewed its value-added tax (“VAT”) export rebate calculation; and reviewed certain evidence regarding the Export Buyer’s Credit Program (“EBCP” or “the Program”). The Department made several changes following the court’s remand order. First, Commerce removed the additional ocean freight amount from the Tier 1 benchmark for nylon cord. *See* Remand Results at 17–18. Second, the Department revised the benefit calculation for the VAT and Import Duty Exemption of Imported Raw Materials program by attributing the subsidy to total sales instead of total export sales. *Id.* at 18–19. Finally, the Department provided additional reasoning to support its decision that, as an adverse inference, Plaintiffs used and benefited from the EBCP. *Id.* at 15–17. *Guizhou Tyre Co.* and *Guizhou Tyre Import and Export Co.* (collectively “*Guizhou*”) as well as *Xuzhou Xugong Tyres Co.* (“*Xugong*”) continue to challenge the administrative proceedings.

Plaintiffs do not oppose Commerce’s Remand Results as they relate to the benchmark calculation and the VAT and Import Duty Exemption for Imported Raw Materials Program. Instead, Plaintiffs’ comments are directed solely at Commerce’s “revised” explanation for the

Department's adverse inferences as applied to the EBCP. *See* Pls.' Comments on Final Remand Redetermination, ECF No. 102 (May 8, 2019) ("Pls.' Comments"). *See also* Comments of Xuzhou Xugong Tyres Co. on Final Results of Redetermination Pursuant to Court Remand, ECF No. 101 (May 8, 2019) ("Xugong's Comments"). The court agrees. Department's newfangled explanation is nothing more than an attempt by Commerce to manufacture a conclusion that is not supported by record evidence and in violation of the applicable statute, 19 U.S.C. § 1677e. Therefore, because substantial evidence does not support the requisite threshold finding that there is a gap in the record warranting the use of adverse facts available ("AFA"), the court again remands this issue back to Commerce for reconsideration in accordance with this opinion.

DISCUSSION

The court exercises jurisdiction under 28 U.S.C. § 1581(c). 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). Further, "[t]he results of a redetermination pursuant to court remand are also reviewed for 'compliance with the court's remand order.'" *SolarWorld Ams., Inc. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1362, 1365 (2017) (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F.Supp.2d 1255, 1259 (2014)).

Commerce continues to misapply the AFA statute. Commerce may select from facts otherwise available when a party to a proceeding withholds necessary information that is requested, fails to provide the information in the form or manner requested, significantly impedes a proceeding, or provides information that cannot be verified. 19 U.S.C. § 1677e(a). For any use of facts otherwise available with an adverse inference, "Commerce must still explain what information is missing and what adverse inferences reasonably lead[] to its conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). And importantly, the Department may select from facts available in a matter adverse to the respondent if the gap in the record was caused by a failure of a respondent to cooperate to the best of its ability. 19 U.S.C. § 1677e(b). So when a government respondent does not cooperate with the Department's questionnaires—as here—a gap in the record *may* exist; but the Department cannot rely solely on the government's failure to comply in order to invoke AFA without first identifying such a gap. As Commerce has failed to conform its determination with § 1677e(b)'s dictates, the Department's remand determination is still unsupported by substantial evidence on the

record. First, the Department has again failed to demonstrate why information about EBCP and the 2013 rule change is relevant to verifying claims of non-use. Second, the Department has inconsistently interpreted what constitutes a “gap” in the record under 19 U.S.C. § 1677e(b). And finally, the Department’s conclusion that verification of the non-use declarations would be unreasonably onerous (if not impossible) is not grounded in any fact developed by the record before us. As a result, the court remands.

For the purposes of this opinion, familiarity with the facts is presumed. *See Guizhou I*, 42 CIT at __, 348 F. Supp. 3d at 1267–69. In this administrative review, Commerce examined whether Plaintiffs benefited from the EBCP, a loan program instituted by the Government of China (“GOC”) that provides loans to foreign companies to promote the export of Chinese goods, *id.* at 1270. Previously, in response to each of Commerce’s questions regarding the Program’s operation, the GOC responded that “none of their relevant customers used the Program.” *Id.* In support thereof, Guizhou submitted declarations from its U.S. customers confirming non-use. *Id.* at 1271. In its Amended Final Results, the Department determined that the GOC both withheld requested information and significantly impeded the proceeding such that the Department has applied an AFA rate for each respondent based on Plaintiffs’ presumed benefit from the EBCP program. I&D Mem. at 24. According to Commerce, there is a “‘gap’ in the record [which] . . . prevents complete and effective verification of the customer’s [*sic*] certifications of non-use,” *id.*, such that the Department cannot verify the respondent’s non-use declarations. Consequently, Commerce continues to apply an adverse inference that Plaintiffs use and benefit from the Program.

The court’s prior order faulted Commerce for applying AFA under 19 U.S.C. § 1677e(b) without substantial evidence to support the finding that there was a gap in the record warranting the use of facts available. *Id.* at 1270. Specifically, Commerce failed to show the “requisite gap needed to make an adverse inference” (and how that gap would be filled by the information it is requesting) and Commerce “declined to consider” relevant information submitted by Plaintiffs demonstrating non-use of the EBCP. *Id.* This is now the ninth time this issue has come before this court, and the Department is still no closer to complying with either the court’s previous rulings or with the prescribed law. *See, e.g., Clearon Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1344 (2019); *Guizhou Tyre Co. v. United States*, Slip Op. 19–59, 2019 WL 2156538, 43 CIT __, __ F. Supp. 3d __, (May 15, 2019); *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 18–167, 2018 WL 6271653 (CIT Nov. 30, 2018) (“*Changzhou III*”);

Changzhou Trina Solar Energy Co. v. United States, 42 CIT ___, 352 F. Supp. 3d 1316 (2018); *Changzhou Trina Solar Energy Co. v. United States*, 41 CIT ___, 255 F. Supp. 3d 1312 (2017) (“*Changzhou I*”); *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, 229 F. Supp. 3d 1362 (2017); *RZBC Group Shareholding Co. v. United States*, Slip Op. 16–64, 2016 WL 3880773 (CIT June 30, 2016). In nearly all of the court’s decisions dealing with the EBCP and submitted declarations demonstrating non-use, Commerce was ordered to address *and correct* the blatant deficiencies in its AFA analyses. The Department’s Remand Results here fare no better and, therefore, the Department is ordered to reconsider its reasoning and determination in accordance with this opinion.

The Department’s major dilemma with the EBCP stems from a purported change in the Program’s operation in 2013¹. See Remand Results at 10. According to the Remand Results, during a CVD investigation of chlorinated isocyanurates in 2012, the Department “learned for the first time that the rules for administering the EBCP had been revised in 2013.” Remand Results at 10. During that investigation, the “GOC refused to disclose the 2013 revisions to Commerce, stating that “[t]he Export-Import Bank of China has also confirmed to the GOC that the *Administrative Measures/Internal Guidelines* relating to this program that were revised in 2013 are internal to the bank, non-public, and not available for release.” *Id.* This revision shifted the Department’s original position on the EBCP. In this case and others like it, the Department has dug its heels in the ground to maintain its (now) unfaltering position that, by way of an adverse inference, firms in China like Guizhou use and benefit from the EBCP— despite direct evidence to the contrary.

In *Guizhou I*, the court held that Commerce had misapplied AFA under 19 U.S.C. § 1677e when it failed to make “an initial finding . . . that material information was missing from the record.” *Guizhou I*, 348 F. Supp. 3d at 1270. In response on remand, the Department has recounted the investigatory history of the EBCP in an attempt to explain why Commerce’s complete understanding of how the operation of the “new” EBCP is integral to verification. See Remand Results at 9–14. Plaintiffs and the GOC maintain that the rule change was “internal to the bank” and “non-public,” *id.* at 10, and moreover, that the change has little relevance to Commerce because Guizhou already demonstrated that its U.S. customers do not use the Program. Once again, the Department has failed to demonstrate how knowledge of

¹ Prior to the alleged change, the Department was able to verify declarations from U.S. customers demonstrating non-use of the EBCP. See generally *Changzhou I*, 41 CIT ___, 255 F. Supp. 3d 1312 (2017).

the 2013 revisions—whatever they may be—is integral to their ability to verify claims of non-use at all. Despite the fact that Commerce “no longer attempts to verify usage” at all, *id.* at 13 n.36, Commerce notes that the change in EBCP operations upended the (theoretical) verification steps such that it now “require[s] knowing the names of the intermediary banks,” *id.* at 12, or else verification “would be unreasonably onerous, if not impossible,” *id.* at 13.

The Department has “reconsidered” and again invokes the authority to use an adverse inference based on a finding that the GOC did not act to the best of its ability in responding to the Department’s request for “the 2013 administrative rules, as well as other information concerning the operation of the EBCP.” *Id.* at 15. But for any use of AFA, “Commerce must still explain what information is missing and what adverse inferences reasonably lead[] to its conclusion.” *Changzhou III*, 2018 WL 6271653, at *3. Despite the court’s instruction, there are still integral flaws in the Department’s reasoning on remand. The court again concludes that Commerce erred in invoking its “adverse inference” authority with respect to the (purportedly) missing information that Commerce references in its Remand Results. Both the law and the record are clear, and there is more than enough reason to support the Plaintiffs’ position.

First, the Department has failed to demonstrate why information about EBCP and the 2013 rule change is relevant to verifying demonstrative claims of non-use. *See also Clearon Corp.*, 43 CIT at ___, 359 F. Supp. 3d at 1349 (“At no point, including in the Post-Preliminary Memorandum, did Commerce say why it needed this information or connect its request with respondents, respondents’ products, or their customers.”). Commerce states that its “understanding of the operation of the EBCP began to change [] after the chlorinated isocyanurates investigation had been completed,” when it “learned for the first time that the rules for administering the EBCP had been revised.” Remand Results at 10. However, Commerce does not state *why* the purported 2013 rule change gave the Department reason to think verification was “unreasonably onerous” or no longer possible. And importantly, the Department has not explained how or why the rule change affected the way the Department *conducts verification of non-use declarations*. Commerce offers only one reason for why verifying would be challenging—that it would require access to intermediate Chinese banks. But that does not address why this challenge is insurmountable, or why Commerce did not initially solicit information from Guizhou or Guizhou’s U.S. customers that would enable it to gain access to (or identify) the intermediate banks and any corre-

sponding bank loans or disbursements. Nor does Commerce adequately explain the connection between the intermediate Chinese banks and verification; surely that is not the *only* way Commerce can verify the submitted non-use declarations. Moreover, it is evident to the court that even though the 2010 EBCP rules “indicate[d] that [payments] were disbursed to U.S. customers via an intermediary Chinese Bank,” Remand Results at 11, Commerce *still* accepted customer non-use declarations as “sufficiently establish[ing] non-use of the program” back in 2016. *See Changzhou I*, 255 F. Supp. 3d at 1317. The Department has not pointed to any new (and inaccessible) information that would change its verification methods, and therefore, the court struggles again to find how the 2013 rule change is relevant to verifying demonstrative claims of non-use.

Second, and relatedly, the Department still hangs its hat on the fact that verification of the non-use declarations is now practically impossible given the rule change. But once again, that conclusion puts the cart before the horse: Commerce does not know what the 2013 rule change was, and consequently, the court finds no record support for the Department’s determination that the rule change is tied to verification. And, while Commerce has consistently read the AFA statute to require a finding of a “gap” in the record, the Department has inconsistently interpreted what constitutes a “gap.” *See Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1371 (Fed. Cir. 2011) (“We have indicated that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.”). Just a few years earlier, during the 2013 investigation of the EBCP program, Commerce was able to determine that there was no gap in the administrative record which—like here—consisted of non-use affidavits without any evidence contradicting non-use. *Changzhou I*, 41 CIT ___, 255 F. Supp. 3d 1312. In *Changzhou I*, the GOC “failed to fully cooperate with Commerce’s verification of non-use of the [P]rogram,” and instead, the respondent “cooperated with Commerce and submitted declarations of non-use from its U.S. customers.” *Id.* at 1316. Not only did the “declarations from its U.S. customers sufficiently establish[] non-use of the program,” Commerce stated that “verification of [the respondent’s] customers’ declarations was *unnecessary* . . . because no record evidence contradicted the declarations’ accuracy.” *Id.* at 1317 (emphasis added). The exact situation is presented here, except now Commerce alleges that without knowledge of the (updated) EBCP rules, the Department is left with a “gap” in the record. But if the Department was once able to take the declarations at their word “because no record evidence contradicted the declarations’ accuracy,” *id.* at 1316—as in this case—Commerce should have no issue

treating this situation similarly. *Dongbu Steel*, 635 F.3d at 1371. Otherwise, the Department's reasoning is subject to inconsistent interpretations of what qualifies as a "gap" in the record under 19 U.S.C. § 1677e.

Finally, not only has Commerce failed to adequately support its conclusion that verification is "practically impossible," the Department also impermissibly found a failure to cooperate when the record's inadequacies originated with Commerce. "Fairness requires that Commerce, before invoking an adverse inference, must have communicated its information requests clearly and adequately," and a "party's failing to take actions never requested cannot be the basis for a finding of a lack of cooperation under § 1677e(b)." *Peer Bearing Co.-Changshan v. United States*, 36 CIT 1115, 1130, 853 F. Supp. 2d 1365, 1377-78 (2012). Here, what Commerce labels a "failure to cooperate" is actually a failure by the Department to request the proper information. Under 19 U.S.C. § 1677e, Commerce may select from facts available in a matter adverse to the respondent *only if* the gap in the record was caused by a failure of a respondent to cooperate to the best of its ability. If there is any gap in the record at all, the missing information could have resulted only from Commerce's poorly-tailored fact-finding. *See Peer Bearing*, 36 CIT at 1129, 853 F. Supp. 2d at 1377 ("The court cannot overlook the obvious point that the Department's dissatisfaction with the answers was a result of the narrowly circumscribed manner in which the Department drafted its questions."). Instead of seeking additional information that would aid in the Department's verification process, Commerce has focused its inquiry on the operation of the program rather than Guizhou's alleged use. Commerce had an opportunity to "clearly and adequately" request additional information that would have helped the Department verify the non-use declarations (or ascertain Plaintiffs' alleged use of the Program);² it failed to do so, and the court will not fault Plaintiffs for the Department's shortcomings. As a result, Commerce can neither support its claim that verification would be too onerous nor that Plaintiffs are responsible for the situation in which the Department finds itself. Certainly, if the Department premised its conclusion that verifying the declarations was "unreasonably onerous, if not impossible" on information drawn from the record, that would bring the Department's determination closer to demonstrating substantial evidence that there is a gap in the record warranting the

² As Plaintiffs suggest, Commerce is at will to ask additional questions "seeking [] specific information" such as which "U.S. banks [] [Export-Import Bank] partners with," or "in the alternative, Commerce could request a list of banks from the respondents' U.S. customer that issued their loans and then ask [Export-Import] bank if it partners with those banks." Pls.' Comments at 5; Xugong's Comments at 4-5.

use of facts available. But as it stands, based on the record and the demonstrative evidence available, the Department's position is unconvincing and fails to adhere to the court's previous Opinion and Order. *Guizhou I*, 348 F. Supp. 3d at 1270.

The Department's determination remains unsupported by substantial evidence on the record, and on that record its use of an adverse inference is contrary to law. Commerce has failed to demonstrate why the 2013 EBCP rule change is relevant to verifying claims of non-use, and how that constitutes a "gap" in the record. Additionally, Commerce's anemic conclusion that verification of the non-use declarations would be unreasonably onerous is based on speculation that stems from the Department's own failure to "clearly and adequately" request information to aid in its verification. The court is hopeful that Commerce will see the light (and the law) and apply it accordingly.

CONCLUSION AND ORDER

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, as in accordance with this Opinion and in adherence to the law; 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 Plaintiffs shall have thirty (30) days from the filing of the redetermination 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: August 21, 2019

New York, New York

/s/ Richard W. Goldberg

RICHARD W. GOLDBERG

SENIOR JUDGE