U.S. Court of International Trade

Slip Op. 19–81

ARKEMA, INC., THE CHEMOURS COMPANY FC, LLC, HONEYWELL INTERNATIONAL INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 16–00179
PUBLIC VERSION

[ITC's *Second Remand Results* sustained.]

Dated: July 3, 2019

James R. Cannon, Jr. and *Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for the Plaintiffs Arkema, Inc., The Chemours Company FC, LLC, Honeywell International Inc. and Plaintiff-Intervenors The American HFC Coalition, and its Members.

Patrick V. Gallagher, Jr., Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for Defendant United States. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Ned H. Marshak, *Max F. Schutzman* and *Jordan C. Kahn*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for Defendant-Intervenors Shandong Dongyue Chemical Co. Ltd., Zhejiang Sanmei Chemical Ind. Co., Ltd., Sinochem Environmental Protection Chemicals Co., Ltd., and Zhejiang Quhua Fluor-Chemistry Co., Ltd.

Jarrod M. Goldfeder and *Jonathan M. Freed*, Trade Pacific PLLC, of Washington, DC, for Defendant-Intervenor National Refrigerants, Inc.

OPINION

Gordon, Judge:

This action involves the final affirmative material injury determination by the U.S. International Trade Commission ("ITC" or the "Commission") in the antidumping duty investigation covering hydrofluorocarbon ("HFC") blends and components from the People's Republic of China ("PRC"). *See Hydrofluorocarbon Blends and Components from China*, 81 Fed. Reg. 53,157 (Int'l Trade Comm'n Aug. 11, 2016) ("*Final Determination*"); *see also Views of the Commission*, USITC Pub. 4629, Inv. No. 731-TA-1279 (Final) (Aug. 2016), ECF No. 33–3 ("*Views*"); *ITC Staff Report*, Inv. No. 731-TA-1279 (July 8, 2016), as revised by Mem. INV-OO-062 (July 13, 2016), ECF Nos. 33–1 & 33–2 ("*Staff Report*").[1]

Before the court are the Views of the Commission on Remand, ECF No. 98 ("*Second Remand Results*") filed by the ITC pursuant to

[1] All citations to the *Views, Second Remand Results*, the agency record, and the parties' briefs are to their confidential versions.

Arkema, Inc. v. United States, 42 CIT ___, 355 F. Supp. 3d 1197 (2018) ("*Arkema II*"), as well as the comments of Plaintiffs Arkema, Inc., The Chemours Company FC, LLC, Honeywell International Inc. and Plaintiff-Intervenors The American HFC Coalition, and its members, (collectively, "Plaintiffs"). *See* Pls.' & Pl.-Intervenors' Remand Comments in Opp'n to the Commission's Remand Results, ECF No. 103 ("Pls.' Cmts."); *see also* Def.'s Resp. to Pls.' & Pl.-Intervenors' Remand Comments, ECF No. 107 ("Def.'s Resp."); Def.–Intervenor National Refrigerants, Inc.'s Opp'n Pls.' Cmts., ECF No. 109; Def.–Intervenors Shandong Dongyue Chemical Co. Ltd., Zhejiang Sanmei Chemical Ind. Co., Ltd., Sinochem Environmental Protection Chemicals Co., Ltd., and Zhejiang Quhua Fluor–Chemistry Co. Ltd.'s Opp'n Pls.' Cmts., ECF No. 111. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[2] and 28 U.S.C. § 1581(c) (2012). Familiarity with the court's decisions in *Arkema II* and *Arkema, Inc. v. United States*, 42 CIT ___, 290 F. Supp. 3d 1363 ("*Arkema I*"), is presumed.

In *Arkema II*, the court reviewed the ITC's first remand results to confirm that the agency had re-examined and provided further explanation with respect to the (1) dedicated for use and (2) differences in costs or value prongs of its semi-finished product analysis. *See Arkema II*, 42 CIT at ___, 355 F. Supp. 3d at 1199. The court concluded that although the ITC had corrected certain inaccuracies identified in *Arkema I*, the ITC had "failed to reasonably explain its findings in the dedicated for use and differences in value prongs." *Id.*, 42 CIT at ___, 355 F. Supp. 3d at 1206. As a result, the court remanded the matter back to the ITC for reconsideration and further explanation of these two prongs, and if necessary, reconsideration of the agency's ultimate conclusion of its semi-finished product analysis that HFC Blends and HFC Components do not constitute a single like product. *Id.*

On remand, the ITC "reopened the administrative record for the purpose of requesting more precise data addressing the percentage of in-scope components that were used to produce in-scope [HFC] blends and out-of-scope refrigerant blends with respect to consideration of the 'dedicated for use' factor." *See Second Remand Results* at 3, 15–19. Additionally, the Commission provided additional explanation with respect to its analysis of the "differences in value" factor and the use of average unit values ("AUVs") in continuing to find significant "differences in value between HFC components and HFC blends." *See id.* at 19–20. Plaintiffs challenge the reasonableness of the ITC's

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

findings in the *Second Remand Results* as to the "dedicated for use" and "differences in value" factors, as well as the reasonableness of the Commission's overarching conclusion that HFC Blends and HFC Components are distinct domestic like products.

I. Standard of Review

The court sustains the Commission's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A West's Fed. Forms, *National Courts* § 3.6 (5th ed. 2019).

II. Discussion

A. Differences in Value

On remand the ITC again found that the cost/value prong of its semi-finished product analysis supported treating HFC components and blends as separate like products. *See Second Remand Results* at 19–20. In *Arkema II*, the court held that the Commission's newly emphasized reliance on the ratio of the AUVs of the U.S. industry's commercial shipments of HFC components to the AUVs of the U.S. industry's commercial shipments of HFC blends as a factor in determining "differences in value" on remand may be unreasonable in light

of Plaintiffs' comments. 42 CIT at ___, 355 F. Supp. 3d at 1202. As a result, the court remanded this issue back to the agency so that the agency could address Plaintiffs' comments and provide further explanation, or if appropriate, reconsider its conclusion. *Id.* In the second remand, the Commission found that the value added by blending operations of the integrated producers Arkema, Chemours, and Honeywell in transforming HFC components into HFC blends ranged from [[ ]] percent to [[ ]] percent, while the percentage of value added for independent blender National was [[ ]] to [[ ]] percent. *Second Remand Results* at 19. The Commission also found that the AUVs of the U.S. industry's commercial shipments of HFC components to the AUVs of the U.S. industry's commercial shipments of HFC blends ranged from [[ ]] percent to [[ ]] percent. *Id.* at 19–20. Based on these data, the Commission determined that the record regarding the AUVs and value added by blending operations indicated that there were differences in value between HFC blends and HFC components. *Id.* at 20.

Plaintiffs argue that the Commission has not explained why a comparison of AUVs is superior to comparing the actual costs of producing the HFC components with the total cost of the finished product. Pls.' Cmts. at 2. In addition, Plaintiffs contend that a comparison of the AUVs of U.S. industry's commercial shipments of HFC blends and HFC components does not reflect an "apples-to-apples" comparison between the value of the components and the value of the finished HFC blends. *Id.* at 2–3. The court disagrees.

As the Commission explained, an underlying assumption of Plaintiffs' arguments regarding AUVs appears to be that the Commission is confined to analyzing the "differences in costs or value" factor based on the cost of goods sold ("COGS"). *See* Pls.' Cmts. at 2–3. Plaintiffs overlook that the Commission's approach here is consistent with that of other investigations in which it likewise examined differences in value, as well as costs, between vertically integrated products in making a finding under this factor. *See, e.g., Certain Oil Country Tubular Goods from India, Korea, the Philippines, Taiwan, Thailand, Turkey, Ukraine, and Vietnam*, Inv. Nos. 701-TA-499–500 and 731-TA-1215–1217 and 1219–1223 (Final), USITC Pub. 4489, at 11 (Sept. 2014), available at 2014 WL 11804767. Similarly, it was reasonable here for the Commission to consider any differences between values of HFC blends and HFC components from a revenue perspective, *i.e.* "differences in value." In addition, the AUVs are based on commercial shipments of HFC blends and HFC components and represent arms-length sales. *See Staff Report* at Tables C-2a & C-2b. Thus, contrary to Plaintiffs' assertions, the AUVs represent "apples-to-apples" com-

parisons from a revenue perspective and indicate that the valuation of HFC Blends differ from the valuation of HFC Components on this record.

As the Commission also explained in the *Second Remand Results*, the use of AUVs was intended to determine the relative value for purchasers of HFC components and HFC blends in the marketplace and was not intended be a measure of the relative "value" to producers (*i.e.*, profit margin) of the HFC blends and HFC components. *Second Remand Results* at 20. Consequently, profitability, or the lack thereof, does not detract from the Commission's analysis of the U.S. shipment AUV data, and the Commission reasonably concluded that an assessment of profitability is neither necessary nor relevant to the analysis of the "differences in value" factor in this case. *Id.*

As Plaintiffs have failed to show that the Commission's findings regarding the remanded aspects of the "different cost or value" factor are unreasonable, the court sustains the *Second Remand Results* with respect to this issue.

B. Dedication for Use

On remand, the ITC again found that HFC components were not dedicated for use in the production of HFC blends:

> **Dedicated for Use.** As a preliminary matter, we emphasize that the Commission has no established empirical threshold for its analysis of the "dedicated for use" factor. Indeed, given the fact-specific nature of the domestic like product inquiry, the Commission has not established a numerical threshold for determining whether a product is dedicated for use in the production of a downstream article. Instead, the Commission has based its finding for the "dedicated for use" factor, as it does for the domestic like product determination as a whole, on the facts presented in a particular investigation
>
> In light of the Court's ruling that the [[ ]] percent figure used in the original determination and first remand determination was not reliable, and because the record lacked more precise empirical data, we reopened the administrative record to obtain further information about the extent to which HFC components are used to make HFC blends. These data indicate that a large majority of the domestic industry's production of HFC components were internally consumed, swapped with other domestic producers, or sold to independent HFC blenders for the production of in-scope HFC blends. In addition, they show that approximately [[ ]] percent of the domestic blend producers' consumption of HFC components over the three-year POI was consumed in the manufacture of out-of-scope refrigerant blends. Generally,

parties agree and the record supports the contention that approximately one percent of HFC components are used for purposes other than the production of refrigerant blends. Thus, the percentage of HFC components used for purposes other than the production of in-scope HFC blends would be approximately one percentage point higher to account for these stand-alone uses, or about [[ ]] percent for the POI.

Although we have derived an average consumption figure for the three-year POI, the record also indicates that there is considerable variation in the proportion of HFC components used to produce out-of-scope refrigerants in different years of the POI and among different domestic producers. Petitioners argue that the Commission should focus its analysis on the consumption of HFC components in the production of out-of-scope refrigerant blends for 2014 and 2015, rather than 2013, because production of out-of-scope refrigerant blends declined sharply after 2013. They contend this decline is attributable to the EPA decision in April 2013 to permit an increase in the supply of R-22. As a result, they claim that a large and increasing percentage of HFC components was consumed in the production of HFC blends over the POI. While we are cognizant of the trend alleged by Petitioners, we have examined the data for the entire POI for our analysis, as annual consumption percentages can fluctuate due to extrinsic factors such as demand trends and patent expirations

Indeed, the record indicates that there were a substantial number of out-of-scope refrigerants produced during the POI that contained at least one in-scope HFC component. As described in the Commission Report, domestic producers Arkema, Chemours, Honeywell, National, and ICOR reported production of 25 out-of-scope HFC, HCFC/CFC, and HFO blends during the POI. This production totaled over 18,000 short tons. As further explained in the Commission Report, 23 of the 25 out-of-scope blends that the domestic producers reported producing during the POI contained at least one in-scope HFC component. These data contained in the Commission Report were compiled based on questionnaire responses submitted by the domestic producers regarding their production during the POI and are not simply formulas that have been registered with the American Society of Heating, Refrigeration, and Air Conditioning Engineers ("ASHRAE"), as has been suggested by petitioners. Consequently, the record shows that the domestic producers used

> in-scope HFC components during the POI for numerous uses other than in the production of the five in-scope HFC blends.
>
> Further, HFC components R-32 and R-125 have stand-alone end uses in addition to being used as components for refrigerant blends. Specifically, R-32 was approved by the EPA in February 2015 for use in some self-contained air conditioning units. Also, R-125 has independent uses as a stand-alone refrigerant, in fire suppression systems, as a blanketing gas for aluminum and magnesium casting, and in foam blowing, smelting operations, semiconductor silicon wafer processing, and certain medical applications. As noted above, however, petitioners and respondent parties agree that no more than [[ ]] percent of in-scope HFC components are used as stand-alone products.
>
> We have evaluated the more comprehensive and reliable empirical data collected in this second remand proceeding concerning the percentage of HFC components used to produce out-of-scope blends and for stand-alone purposes together with the data concerning the number of out-of-scope uses. The record now shows that approximately [[ ]] percent of HFC components were used in out-of-scope applications during the POI. This percentage, however, differed greatly among individual producers and also was not consistent on a year-to-year basis for the industry as a whole. An analysis of those out-of-scope applications shows that, in addition to stand-alone uses, there were at least 23 different out-of-scope refrigerant blends produced by the domestic industry using in-scope HFC components during the years of the original investigation. Taken together, we find that HFC components are not dedicated for use in the production of in-scope HFC blends.

Second Remand Results at 15–19.

As indicated above, in the second remand the Commission collected additional data about the extent to which HFC components are used to make HFC blends and it determined, based on these new data, that approximately [[ ]] percent of the domestic producers' consumption of HFC components over the period of investigation ("POI") was used in the manufacture of out-of-scope blends. *See id.* at 15–16 & n.47. Taken together with the approximately one percent of HFC components used for purposes other than the production of refrigerant blends, the Commission determined that the percentage of HFC components used for purposes other than the production of in-scope HFC

blends was approximately [[ ]] percent for the POI. *Id.* at 16. The Commission also determined that a substantial number of out-of-scope refrigerant blends were produced during the POI that contained at least one in-scope HFC component. *Id.* at 16–17.

Plaintiffs contend that "the Data Collected on Remand Confirm the Testimony that Only a Small Percentage of HFC Components were used to Produce Out-of-Scope HFC Blends." *See* Pls.' Cmts. at 4–6. Plaintiffs additionally maintain that in the *Second Remand Results*, the ITC unreasonably presented the evidence on the record in a manner that "inflates the actual usage of HFC Components in Out-of-Scope Blends." *Id.* at 6–8. Lastly, Plaintiffs argue that the *Second Remand Results* are inconsistent with the ITC's precedent in other matters involving the Commission's semi-finished product analysis. *Id.* at 8–10. The court disagrees with Plaintiffs' contentions and concludes that the ITC's analysis of the "dedication for use" factor in the *Second Remand Results* was reasonable.

Plaintiffs acknowledge that, by their calculation, [[ ]] percent of in-scope HFC components were not used to produce in-scope refrigerant blends over the POI. Pls.' Cmts. at 4. Rather than argue that the [[ ]] percentage point difference between their calculation and the Commission's is material, Plaintiffs focus on minute aspects of the Commission's calculations. Initially, they contend that the Commission should have given greater weight to data for 2014 and 2015. *Id.* The Commission addressed Plaintiffs' argument, noting that the agency examined the trends identified by Plaintiffs, but that the proper focus of its analysis was the record data covering the entire POI, and not specific periods or years within the POI. *See Second Remand Results* at 17. In this regard, the Commission observed that the annual consumption percentage can fluctuate within the POI due to other extrinsic factors such as demand trends and patent expirations. *Id.* at 17 & n.51. In any event, Plaintiffs have failed to demonstrate that the ITC acted unreasonably by considering data for the entire POI.

Plaintiffs also argue that the Commission improperly reduced the denominator in the usage rate calculation to determine the ratio of HFC components used to manufacture out-of-scope refrigerants by excluding HFC components "used or sold in unprocessed form." *See* Pls.' Cmts. at 6–7. The ITC addressed this contention fully by explaining that the ITC collected data on the quantity of HFC components produced by the U.S. industry that were "used or sold in unprocessed form," which comprised all the HFC components the domestic producers did not consume in the production of either in-

scope HFC blends or out-of-scope refrigerant blends. *Second Remand Results* at 16 & n.47. The ultimate disposition of components reported by the U.S. industry as "used or sold in unprocessed form" during the POI could not be determined. *Id.* Because the Commission could not ascertain the final disposition of these components, the ITC reasonably excluded them from the denominator in the calculation because their inclusion within the denominator would not provide an accurate measure of the share of HFC components used for the production of out-of-scope refrigerant blends over the POI. *Id.*

The Commission further emphasized that, notwithstanding the small percentage of in-scope components used for purposes other than the production of in-scope blends, "HFC components were used for purposes other than HFC blends." *Second Remand Results* at 21. In particular, the domestic producers' questionnaire responses showed there were at least 23 different out-of-scope refrigerant blends produced by the domestic industry using in-scope HFC components during the POI. *See id.* at 19, 21 & n.63. Plaintiffs cannot and do not contest the accuracy of this data on the record; rather, they maintain that the Commission afforded it undue weight in its semi-finished product analysis. *See* Pls.' Cmts. at 10. Plaintiffs may prefer that the Commission have weighed the evidence on the record differently, but they are not entitled to have the agency's reasonable determination remanded on that basis. *See, e.g., Samsung Elecs. Co. v. United States*, 39 CIT ___, ___, 70 F. Supp. 3d 1350, 1358 (2015) (explaining that for a plaintiff to prevail under substantial evidence standard on judicial review of fact-intensive issues, plaintiff must demonstrate that the administrative record supports "one and only one determination"); *Tianjin Wanhua Co. v. United States*, 40 CIT ___, ___, 179 F. Supp. 3d 1062, 1071 (2016) ("For the court to remand for Commerce to use [plaintiff's preferred] dataset, [plaintiff] needed to establish that [its preferred dataset], when compared with [the dataset selected by Commerce], is the one and only reasonable surrogate selection on this administrative record, not simply that [plaintiff's preferred dataset] may have constituted another possible reasonable choice." (citing *Globe Metallurgical, Inc. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1269, 1276 (2012))).

The court also rejects Plaintiffs' argument that the ITC's "dedication for use" analysis in the *Second Remand Results* is contrary to the Commission's prior precedent. *See* Pls.' Cmts at 8–10. In *Arkema I*, the court considered and rejected Plaintiffs' contentions that the ITC's "dedication for use" analysis conflicted with its precedent involving a comparable analysis of other products. *See Arkema I*, 42 CIT at ___, 290 F. Supp. 3d at 1370 ("The court agrees with the ITC that it did

not, as Plaintiffs contend, adopt a 100 percent threshold in considering whether HFC Components are dedicated for use in the production of HFC Blends. Rather the Commission based its 'dedicated for use' finding on the record as a whole rather than a simple numerical threshold. Accordingly, the ITC reasonably explained the differences between this proceeding and its prior 'dedicated for use' treatment." (internal citation omitted)).

Plaintiffs seek to relitigate this issue, arguing that the Commission's decision to continue to find that HFC Components and Blends constitute separate like products is unreasonable in light of the Commission's precedent and its finding on second remand of a reduced figure for the percentage of HFC Components not used in the production of HFC Blends. *See* Pls.' Cmts. at 8–10. The court remains unpersuaded. The Commission on remand reopened the record to find a more reliable estimation of the percentage of HFC Components consumed in the production of out-of-scope blends, and it found that the revised figure of [[ ]] was sizeable enough to conclude that HFC Components are not "dedicated for use" in the production of HFC Blends. *See Second Remand Results* at 15–19. The Commission also explained that its conclusion that HFC Components and Blends are separate like products was based on an analysis of "all five factors of the Commission's semifinished products analysis including the Commission's findings on the three factors affirmed by the Court in *Arkema I*, with no one factor being dispositive." *Id.* at 20–21. While the ITC acknowledged "that the substantial majority of in-scope HFC components are used to produce HFC blends;" it explained that based on its review of the record as a whole, the "facts weigh in favor of finding that HFC components are not dedicated for use in the production of in-scope HFC blends." *Id.* at 21. The court has already rejected Plaintiffs' contention that the ITC has inexplicably deviated from its precedent, and Plaintiffs have subsequently failed to demonstrate that the ITC's analysis on this issue was unreasonable.

Finally, while the court concludes that the ITC's analysis and findings with respect to the "dedication for use" and "differences in value" prongs of its semi-finished product analysis in the *Second Remand Results* were reasonable, the court also concludes that the Commission reasonably reached its overarching determination that "HFC blends and HFC components are distinct domestic like products." *See Second Remand Results* at 20. As noted in *Arkema I*, the court's purpose for remanding the ITC's separate like products determination was to ensure that the agency was not relying on inaccurate data and to gain clarification "as to how much weight the ITC placed on this data and how it weighed the [each] prong in comparison to the

other four prongs in reaching the ultimate determination." *See Arkema I*, 42 CIT at ___, 290 F. Supp. 3d at 1370.

After reviewing the record as a whole and the agency's explanation of its analysis in the second remand, the court concludes that the ITC has reasonably addressed both of the court's concerns. First, by gathering more precise data, the agency has ensured that it is not reaching conclusions based on admittedly erroneous data. *See Second Remand Results* at 15–19. Second, the ITC provided additional explanation as to how the agency considered the entirety of the record and reasonably reached its determination that HFC Components and Blends are separate like products based on all five factors of its semi-finished product analysis. *See id.* at 20–25.

III. Conclusion

For the foregoing reasons, the court sustains the *Second Remand Results*. Judgment will enter accordingly.

Dated: July 3, 2019
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 19–82

THE CHEMOURS COMPANY FC LLC, Plaintiff, v. UNITED STATES, Defendant, and AGC CHEMICALS AMERICA, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 18–00174
PUBLIC VERSION

[Denying Plaintiff's motion to supplement the administrative record, amend its complaints, and remand the matter to the U.S. International Trade Commission. Denying as moot Defendant-Intervenor's motion to supplement the administrative record.]

Dated: July 3, 2019

James R. Cannon, Jr., *Mary J. Alves*, *Ulrika K. Swanson*, and *James E. Ransdell*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Plaintiff.

Karl S. Von Schriltz, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for Defendant. With him on the brief were *Andrea C. Casson*, Assistant General Counsel for Litigation, and *Roop K. Bhatti*, Attorney-Advisor.

John M. Gurley, *Matthew M. Nolan*, and *Nancy A. Noonan*, Arent Fox LLP, of Washington, DC, for Defendant-Intervenor Gujarat Fluorochemicals Limited.

Jordan C. Kahn, *Max F. Schutzman*, *Dharmendra N. Choudhary*, and *Eve Q. Wang*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of New York, NY, for Defendant-Intervenor PTFE Processors Alliance and Consolidated Defendant-

Intervenors Zhejiang Jusheng Fluorochemical Co., Ltd., Shandong Dongyue Polymer Material Co., Ltd., Shanghai Huayi 3F New Materials Sales Co., Ltd., Zhonghao Chenguang Research Institute of Chemical Industry Co., Ltd., Jiangxi Lee & Man Chemical Ltd., Jiangsu Meilan Chemical Co., Ltd., and China Chamber of Commerce of Metals, Minerals & Chemical Importers.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court on Plaintiff's motion to supplement the administrative record, amend its complaints, and remand the matter to the U.S. International Trade Commission ("the ITC" or "the Commission"). Confidential Mot. to Suppl. the Admin. R., to Am. the Compls., and to Remand the Case to the Agency ("Pl.'s Mot."), ECF No. 49. Defendant United States ("Defendant" or "the ITC") and Defendant-Intervenors oppose the motion. Confidential Def.'s Mem. in Opp'n to Pl.'s Mot. to Suppl. the Admin. R., to Am. the Compls., and to Remand the Case to the Agency ("Def.'s Opp'n"), ECF No. 60; Def.-Ints.' Resp. in Opp'n to Pl.'s Mot., ECF No. 62; Confidential Gujarat Fluorochemicals Ltd.'s Resp. to Pl.'s Mot. to Suppl. the Admin. R., to Am. the Complaints and to Remand the Case to the Agency and Gujarat Fluorochemicals Ltd.'s Mot. to Suppl. the Admin. R. in the Event that the Court Grants Pl.'s Mot. ("GFL's Opp'n and Cross-Mot."), ECF No. 64. Defendant-Intervenor Gujarat Fluorochemicals Ltd. ("GFL") cross-moves to supplement the administrative record in the event the court grants Chemours' motion. GFL's Opp'n and Cross-Mot. at 28. For the reasons discussed herein, Plaintiff's motion is denied; GFL's cross-motion is denied as moot.

BACKGROUND

In July 2018, the ITC issued a negative injury determining regarding polytetrafluoroethylene resin ("PTFE resin" or "PTFE") from India found by the U.S. Department of Commerce ("Commerce") to be subsidized by the Government of India.[1] *See Polytetrafluoroethylene Resin from China and India*, Inv. Nos. 701-TA-588 and 731-TA-

[1] Defendant filed a confidential administrative record ("CR") and a public administrative record ("PR") associated with the countervailing duty ("CVD") investigation at ECF Nos. 33 and 34, respectively. Defendant filed a supplemental confidential administrative record ("SCR") and a supplemental public administrative record ("SPR") associated with the antidumping duty ("AD") investigation at ECF Nos. 52 and 51, respectively. The respective administrative records contain the confidential versions of the relevant staff report and views of the commission. *See* Confidential Views of the Commission ("CVD Views"), CR 321, ECF No. 33–1; Confidential Staff Report (June 11, 2008) ("CVD Staff Report"), CR 285, ECF No. 33–2; Confidential Views of the Commission ("AD Views"), SCR 324, ECF No. 52–2; Confidential Staff Report (Oct. 24, 2018) ("AD Staff Report"), SCR 323, ECF No. 52–1 (concerning the antidumping investigation). In the AD Views, the Commission adopted the findings set forth in the CVD Views. *See* AD Views at 4–5. The court references the confidential staff reports and views.

1392–1393, USITC Pub. 4801 (July 2018) (final) ("*ITC Final I*"), PR 127, ECF No. 34.[2] In November 2018, the ITC issued a negative injury determination regarding PTFE resin from the People's Republic of China ("China") and India found by Commerce to have been sold in the United States at less than fair value. *See Polytetrafluoroethylene Resin from China and India*, Inv. Nos. 731-TA-1392–1393, USITC Pub. 4841 (Nov. 2018) (final) ("*ITC Final II*"), SPR 138, ECF No. 51–1. In making its determinations regarding material injury and threat of material injury, the ITC cumulated subject imports from India and China. CVD Views at 29, 58.[3]

Plaintiff, The Chemours Company FC LLC ("Chemours"), initiated separate actions challenging *ITC Final I* and *ITC Final II*, which the court consolidated under this lead action. *See* Order to Consol. (Feb. 6, 2019), ECF No. 42. Chemours alleges that the ITC's determinations lack substantial evidence or are otherwise contrary to law with respect to the Commission's definition of the domestic injury and its analyses of material injury and the threat of material injury. *See, e.g.*, Compl. ¶¶ 34–49, ECF No. 8.

On March 8, 2019, Chemours filed the instant motion. *See generally* Pl.'s Mot. Chemours seeks to supplement the administrative record to include "information impugning the veracity of the foreign producer questionnaire[responses] submitted by [GFL], a foreign producer and exporter of [PTFE] from India." *Id.* at 1. Chemours also seeks leave to amend the complaints filed in the consolidated actions to reflect its allegations of fraud in the questionnaire responses. *Id.* at 2. Chemours further requests the court to remand *ITC Final I* and *ITC Final II* to the Commission to reconsider its injury determinations in light of this information. *See id.* The court has jurisdiction pursuant to Section 516A(a)(2)(B)(ii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(ii) (2012), and 28 U.S.C. § 1581(c) (2012).[4]

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[2] Subject PTFE resin consists of granular, dispersion, and fine powder PTFE. CVD Staff Report at I-8—I-9. PTFE resin in the form of micropowder is excluded from the scope of the investigation. *See id.* at I-9. GFL produces micropowder PTFE in addition to in-scope PTFE. *See, e.g.*, GFL's Opp'n & Cross Mot. at 12 & n.22 (citation omitted)

[3] To assess whether domestic producers are materially injured or threatened with material injury "by reason of" the subject imports, 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1), the Commission considers "the volume of imports of the subject merchandise"; "the effect of imports of [subject] merchandise on prices in the United States for domestic like products"; and "the impact of imports of [subject] merchandise on domestic producers of domestic like products . . . in the context of [domestic] production operations," *id.* § 1677(7)(B)(i). The ITC's findings as to these factors rest on data compiled from both subject countries. CVD Views at 42–43, 48, 58–61; *see also* CVD Staff Report, Table VII-8.

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

LEGAL STANDARDS

I. Supplementing the Administrative Record

The court's review of an ITC determination is limited to the administrative record. 19 U.S.C. § 1516a(b)(1)(B)(i). The record consists of "all information presented to or obtained by . . . the Commission during the course of the administrative proceeding, *id.* § 1516a(b)(2)(A)(i);[5] that is, "information which was before the relevant decision-maker and was presented and considered at the time the decision was rendered," *Nucor Corp. v. United States*, 28 CIT 188, 229, 318 F. Supp. 2d 1207, 1244 (2004) (quoting *Beker Indus. Corp. v. United States,* 7 CIT 313, 315 (1984)) (internal quotation marks omitted).[6] Limiting the court's review to the agency record furthers important efficiency and finality considerations. *See Vt. Yankee Nuclear Power Corp*. v. *Nat'l Res. Def. Council, Inc*., 435 U.S. 519, 554–55 (1978); *Essar Steel Ltd. v. United States* ("*Essar Steel I*"), 678 F.3d 1268, 1277 (Fed. Cir. 2012). Nevertheless, supplementation of the administrative record and a remand for reconsideration by the Commission may be appropriate when "a party brings to light clear and convincing new evidence sufficient to make a prima facie case that the agency proceedings under review were tainted by material fraud." *Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1378 (Fed. Cir. 2011).

II. Amending the Complaints

Pursuant to U.S. Court of International Trade ("USCIT") Rule 15(a), a plaintiff may amend its complaint after 21 days of serving it "only with the opposing party's written consent or the court's leave." USCIT Rule 15(a)(2) (applicable to pleadings); *see also* USCIT Rule 7(a)(1) (a complaint is a pleading).[7] Whether to grant leave to amend a complaint is committed to the court's discretion. *See, e.g.*, *Foman v.*

[5] The record also includes "a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register." 19 U.S.C § 1516a(b)(2)(A)(ii).

[6] Before issuing a final determination, the Commission must "cease collecting information" and permit interested parties "a final opportunity" to submit comments on information "the parties have not previously had an opportunity to comment." 19 U.S.C. § 1677m(g). By regulation, the administrative record is closed on the date that final comments are due. 19 C.F.R. § 207.30(b). There are exceptions to that rule, though none are relevant here. *See id.*

[7] Rule 15 permits amendments to pleadings without leave of court "once . . . within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." USCIT Rule 15(a)(1). A responsive pleading is not required in an action arising under the court's jurisdiction pursuant to 28 U.S.C. § 1581(c), *see* USCIT Rule 7(a)(2), and no motions were filed pursuant to Rule 12.

Davis, 371 U.S. 178, 182 (1962); *Fuwei Films (Shandong) Co. v. United States*, 35 CIT 1229, 1229, 791 F. Supp. 2d 1381, 1383 (2011). "The court should freely give leave when justice so requires." USCIT Rule 15(a)(2). Leave may be denied when the court finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman*, 371 U.S. at 182.

DISCUSSION

I. Chemours' Motion to Supplement the Administrative Record, Amend its Complaints, and Remand the Matter to the ITC[8]

A. Parties' Contentions

Chemours contends that the information it seeks to add to the administrative record provides clear and convincing evidence that GFL submitted fraudulent foreign producer questionnaire responses that were material to the Commission's negative final determination. Pl.'s Mot. at 4–13.[9] Chemours further contends that leave to amend its complaints should be granted because it was not until the Commission released its determinations that Chemours' company officials were alerted to discrepancies between business intelligence it routinely collected on GFL and the Commission's findings concerning GFL's questionnaire responses. *Id.* at 14–15.

The ITC contends that leave to amend and a remand should be denied because Plaintiff failed to exhaust its administrative remedies by timely alerting the Commission to the information during the pendency of the investigations. Def.'s Opp'n at 9–15. The ITC further contends that Chemours has failed to satisfy the standards for supplementation of the record and remand as established by the Federal Circuit. *Id.* at 15–20. The ITC also contends that Chemours has not provided clear and convincing evidence that GFL's question-

[8] The court considers Chemours motion without regard to GFL's proposed record documents, which GFL seeks to introduce into the record solely on a contingent basis. In other words, the court does not weigh the degree to which GFL's evidence detracts from Chemours' evidence when deciding whether Chemours has met its burden.

[9] Subject producers, including GFL, reported information to the Commission based on "[a]ctual experience" for the years 2015 through 2017 and provided projections for 2018 and 2019. CVD Staff Report at VII-19, Table VII-8. Chemours argues that GFL's allegedly fraudulent questionnaire responses were material to various aspects of the Commission's findings regarding the threat of material injury to domestic producers. Pl.'s Mot. at 5–6.

naire responses were fraudulent or materially incorrect. *Id.* at 20–32.[10]

GFL contends that Chemours has not supplied clear and convincing new evidence of fraudulent questionnaire responses, GFL's Opp'n and Cross-Mot. at 3, and materially misstates facts regarding GFL's capacity and production, *id.* at 4–6. GFL further asserts that Chemours' allegations, even if true, are immaterial to the Commission's injury determination. *Id.* at 6–7. GFL contends that it responded to the Commission's foreign producer questionnaires truthfully and accurately. *Id.* at 9; *see also id.* at 11–13 (arguing that Chemours capacity and production allegations are incorrect); *id.* at 13–26 (responding to the evidence underlying Chemours' allegations). GFL cross-moves the court to supplement the administrative record with additional documents in the event the court grants Chemours' motion. *Id.* at 28.[11] GFL further contends that leave to amend the complaints should be denied on the basis of undue delay, lack of good faith by Chemours, and prejudice. *Id.* at 8.

B. Chemours Failed to Exhaust its Administrative Remedies Before the Commission; Thus, Supplementation of the Record Must Be Denied

"[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The statute "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (citation omitted). This permits the agency to address the issue in the first instance, prior to judicial review. *See id.* at 912–13; *Vinh Hoan Corp. v. United States*, 40 CIT ___, ___, 179 F. Supp. 3d 1208, 1226 (2016) (exhaustion "allow[s] the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency") (citation omitted); *Diamond Sawblades Mfrs. Coalition v. United States*, 33 CIT 48, 65–66 (2009) (requiring a respondent to have exhausted its arguments before the ITC). There are exceptions to the exhaustion requirement, such as when "the party had no opportunity to raise the

[10] Consolidated Defendant-Intervenors that were interested parties in the Commission' s investigation into PTFE from China adopted the ITC's opposition by reference. Def.- Ints.' Resp. in Opp'n to Pl.'s Mot. at 1–2.

[11] Chemours filed a response indicating its support for GFL's cross-motion. Confidential Pl.'s Resp. to Def. GFL's Apr. 12, 2019 Contingent Mot. to Suppl. the Admin. R. at 1, ECF No. 72. However, as discussed below, GFL's cross-motion is moot.

issue before the agency." *Essar Steel, Ltd. v. United States* ("*Essar Steel II*"), 753 F.3d 1368, 1374 (Fed. Cir. 2014) (internal quotation marks and citation omitted).

The exhaustion requirement is complemented by the recognition that reopening the record may be appropriate when "there is *new* evidence indicating that the original record was tainted by fraud." *Home Prods.*, 633 F.3d at 1379 (emphasis added); *see also id.* at 1379–80 (joining the U.S. Court of Appeals for the Ninth Circuit in permitting supplementation of the record when there is "[n]ewly discovered evidence of fraud . . . in an administrative proceeding" and "administrative remedies have been exhausted"). Nevertheless, the court exceeds its authority when it orders an agency to reopen the record to include documents a respondent withheld during an investigation. *Essar Steel I*, 678 F.3d at 1275–1279.

The factual record for the AD and CVD investigations closed on June 15, 2018. *See Polytetrafluoroethylene (PTFE) Resin From China and India*, *Scheduling of the Final Phase of Countervailing Duty and Anti-Dumping Duty Investigations*, 83 Fed. Reg. 12,815, 12,816 (ITC March 23, 2018) (noting the Commission's deadline for disclosing factual information on which parties have not had an opportunity to comment). Nevertheless, even after the factual record closes, for good cause the Commission may accept additional written submissions. *See id*. Those submissions may include action requests pursuant to 19 C.F.R. § 201.12, which allows "[a]ny party to a nonadjudicative investigation [to] request the Commission to take particular action with respect to that investigation." A review of the evidence submitted in support of Chemours' motion demonstrates that Chemours had the opportunity to present the evidence to the Commission during the investigations or, at a minimum, alert the Commission to the existence of the evidence and request reopening of the record.

Chemours' motion to supplement relies heavily on a June 2017 Pre-Feasibility Report GFL prepared with respect to expanding PTFE production capacity ("Pre-Feasibility Report"), GFL's third quarter fiscal year 2018 conference call with analysts and investors ("Q3 FY18 Conference Call"), which occurred in February 2018, and an environmental impact assessment report ("EIA") issued in March 2018. *See generally* Pl.'s Mot. at 7–13; *see also id.*, App. 1, ECF No. 49–1 (the Pre-Feasibility Report); *id.*, App. 2, ECF No. 49–1 (the EIA); *id.*, App. 4, ECF No. 49–2 (transcript of the Q3 FY18 Conference Call). All three documents are dated prior to the close of the factual record. Indeed, Chemours acknowledges that the Pre-Feasibility Report and EIA were obtained "through an online environmental clearance por-

tal," *id.*, App. 6 (Decl. of Denise Dignam) ("Dignam Decl.") ¶ 8, suggesting ease of access and a lack of due diligence in obtaining or submitting the information in a timely manner. *Cf. Jacobi Carbons AB v. United States*, 41 CIT ___, ___, 222 F. Supp. 3d 1159, 1195 (2017) (denying motion to supplement when respondent "ha[d] not shown that it *could not* have obtained the information in question in time to submit it to the agency, but rather, that it *did not* obtain the information until it had the financial incentive to do so").

In addition to the documents discussed above, Chemours had in its possession corporate intelligence on GFL's operations before it appealed *ITC Final I* to this court. *See* Pl.'s Mot., App. 3, ECF No. 49–2 (intelligence report dated July 20, 2018); Summons, ECF No. 1 (dated Aug. 9, 2018). Two additional documents were also available before Chemours appealed *ITC Final II* to this court. *See* Pl.'s Mot., App. 5, ECF No. 49–2 (an August 2018 investor presentation ("Investor Presentation")); *id.*, App. 6, ECF No. 49–2 (GFL's second quarter fiscal year 2019 conference call ("Q2 FY19 Conference Call"), which occurred in November 2018). With the exception of the Q2 FY19 Conference Call, all of the documents were available to Chemours before the Commission's October 31, 2018 vote in the AD investigation. *See* AD Staff Report at I-2 (noting the scheduled date for the Commission's vote in the AD investigation). Thus, Chemours could have alerted the Commission to the existence of the documentation and requested reopening of the record in either the CVD or AD investigations. *See* 19 C.F.R. § 201.12; *cf. Home Prods.*, 633 F.3d at 1377 (recognizing an agency's inherent authority to reopen the record to consider evidence of fraud prior to the filing of an appeal); *Sebacic Acid From China*, 70 Fed. Reg. 4,150 (ITC Jan. 28, 2005) (reopening the record of the subject review).

Chemours' argument that it was unaware of the need to submit additional information to the Commission before the record closed because company officials did not have access to the proprietary questionnaire responses is unpersuasive. *See* Pl.'s Mot. at 14. Chemours' counsel had access to the proprietary responses and access to the information in Chemours' possession. Chemours acknowledges that the company "routinely collect[s] intelligence about the operations of [its] competitors, including [GFL]" in "the ordinary course of business." Dignam Decl. ¶ 6. It was incumbent upon Chemours and its counsel to exercise due diligence and ensure that all relevant information in Chemours' possession was identified and submitted to the Commission in a timely manner. Supplementing the administrative record is not a remedy for a lack of due diligence. *See id.* ¶ 11

(explaining that Chemours provided documents to legal counsel *after* the Commission rendered its determinations when it found that its "competitive intelligence and experience in the market" differed from the ITC's findings). Allowing Chemours to supplement the record at this late date would undermine the Commission's investigatory deadlines and reward Chemours for failing to share potentially relevant information with its counsel in a timely fashion.

In sum, Chemours had the opportunity to present arguments and evidence to the Commission and, thus, is not excused from exhausting its administrative remedies. *See Essar Steel II*, 753 F.3d at 1374. For the same reasons, supplementation of the record must be denied. *See Essar Steel I*, 678 F.3d at 1275–1279.

C. Chemours' Failure to Present *Clear and Convincing* Evidence of Fraud Provides an Additional Basis for Denying the Motion

Fraud is a serious allegation, one which concerns conduct that has been characterized as "conscious wrongdoing, an intention to cheat or be dishonest." *United States v. Wunderlich*, 342 U.S. 98, 100 (1951). Accordingly, a prima facie case of fraud in the agency proceedings must be established by clear and convincing evidence—more than a mere preponderance. *See Home Prods.*, 633 F.3d at 1378. Evidence is clear and convincing when it "creates in the trier of fact 'an abiding conviction that the truth of a factual contention is highly probable.'" *SKF USA Inc. v. United States*, 29 CIT 969, 971, 391 F. Supp. 2d 1327, 1329 (2005) (quoting *Price v. Symsek,* 988 F.2d 1187, 1191 (Fed. Cir. 1993) (internal quotation marks omitted)). Chemours' motion focuses on GFL's allegedly fraudulent reporting with respect to (1) Tetrafluoroethylene ("TFE") capacity;[12] (2) PTFE capacity and production; and (3) GFL's home market growth projections. Pl.'s Mot. at 6–7. Even if the court did not find that Chemours failed to exhaust its administrative remedies, Chemours has not met its burden with respect to any of the contested areas of inquiry.

i. TFE Capacity

Chemours asserts that GFL's Q3 FY18 Conference Call and the EIA show that GFL understated its capacity to produce TFE, implicating its reported capacity to produce PTFE.[13] *Id*. at 6, 8–9. In the Q3 FY18

[12] TFE is used to produce PTFE. *See, e.g.*, CVD Staff Report at I-15.

[13] GFL reported that (1) [[
]]; (2) GFL has "[[
]]"; and (3) "GFL is [[
]]." GFL's Opp'n & Cross-Mot., Ex. 2 at II-4d (excerpt of GFL's questionnaire response).

Conference Call, GFL reported on the company's efforts to increase TFE capacity from 50 metric tons ("MT") per day to 90–95 MT per day by May 2018. *Id*., App. 4 at 6–7. Chemours relies on these figures to assert that GFL's annual capacity to produce TFE would almost double, from 18,250 MT up to 34,675 MT, which would increase GFL's ability to produce PTFE because PTFE production consumes the majority of GFL's TFE. *See id*. at 8–9 & n.24 (citing *id*., App. 2 at 2.9, 2.12–2.13).

Chemours' calculations wrongly assume that GFL produces TFE 365 days per year, thereby overstating any increase in TFE capacity. *See* GFL's Opp'n & Cross-Mot. at 12–13. In fact, GFL's facilities operate less than a full year.[14] More importantly, TFE is not the subject of this investigation and the Commission did not request data on TFE-specific capacity or production. *See id*. at 16. TFE is used by GFL to produce subject and non-subject merchandise. *Id*. at 9, Ex. 2 at II-4d. Any increase in TFE capacity does not necessarily mean an increase in GFL's capacity to produce PTFE, which is subject to several additional constraints.[15] Increased TFE capacity is, however, consistent with GFL's ability to increase production of subject PTFE resin up to its PTFE production capacity, which is consistent with GFL's questionnaire responses.[16] Accordingly, Chemours has not presented clear and convincing evidence that GFL made fraudulent statements with respect to TFE.

ii. PTFE Capacity and Production

Chemours asserts that GFL understated its 2019 projections for PTFE capacity and production volumes. Pl.'s Mot. at 9–12. To support this assertion, Chemours relies on the Pre-Feasibility Report, EIA, Investor Presentation, Q3 FY18 Conference Call, and Q2 FY19 Conference Call. *Id*. at 10–12. In that Q2 FY19 Conference Call, GFL reported that it anticipated producing about 1,300 MT of PTFE per month in 2018; 1,550 to 1,600 MT per month in 2019; and 1,750 MT per month in 2020, which represents GFL's "fully expanded capacity

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[14] GFL reported that its production facilities operate "[[ ]]." *Id*., Ex. 2 at II-4b—4c; CVD Staff Report, Table VII-6.

[15] Additional constraints include the [[ ]]. GFL's Opp'n & Cross-Mot., Ex. 2 at II-4d.

[16] GFL projected [[ ]] in its production of PTFE resin for 2018 and 2019. *See* CVD Staff Report, Table VII-6 (compiling GFL's questionnaire responses regarding the three forms of subject PTFE resin). GFL also reported [[ ]] capacity utilization from 2017 ([[ ]] percent) to 2019 ([[ ]] percent). *Id.*

of PTFE." *Id*., App. 6 at 6. Chemours claims that these figures show that GFL wildly understated its PTFE capacity. *See id*. at 11–12.[17]

In fact, Chemours misstates GFL's reported 2019 production volume and errs in its comparison to the Q2 FY19 Conference Call information.[18] The amounts stated in the Q2 FY19 Conference Call also appear to include all forms of PTFE, which would include non-subject PTFE micropowder. *See id*., App. 6 at 6. GFL also informed investors in 2018 that it "expects a ramp up in volumes of new grades of PTFE," *id*., App. 5 at 18, which is consistent with GFL's questionnaire response.[19] The seven months of time between the questionnaire response and the Q2 FY19 Conference Call could also have caused some changes in the information used to make the projections. *Compare* GFL's Opp'n & Cross-Mot., Ex. 2 (cover page), *with* Pl.'s Mot., App. 6 at 1.[20]

Any differences in the figures also appear to be immaterial to the Commission's negative determination, which was based on cumulated subject imports. CVD Views at 42–43, 58–61; *see also* CVD Staff Report, Table VII-8.[21] A minor increase in cumulated production totals for 2019 is unlikely to affect the "appreciable quantities of excess capacity" the Commission identified in the subject industries but deemed immaterial because "responding subject producers' export shipments to the United States increased only from 2016 to 2017, when U.S. demand rose." CVD Views at 59.

The Pre-Feasibility Report discusses a proposed increase in PTFE production, with construction beginning once GFL obtained regulatory approvals and taking roughly 18 to 24 months to complete. Pl.'s

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[17] Specifically, Chemours asserts that prior to filing its final questionnaire response, GFL told investors it would be producing about 42.3 million pounds of PTFE in 2019, which is "[[ ]]." Pl.'s Mot. at 12 & n.36 (citing CVD Staff Report, Table VII-6). Chemours presumably calculated "42.3 million pounds" by multiplying 1,600 by 12 months, and then multiplying the result by 2204 to convert the figure from metric tons to pounds. *See* GFL's Opp'n & Cross-Mot. at 19 (converting the figures).

[18] Contrary to Chemours' assertion, GFL projected producing [[ ]] pounds , or roughly [[ ]] MT in 2019. *See* CVD Staff Report, Table VII-6.

[19] GFL reported its efforts to "[[ ]]," GFL's Opp'n & Cross-Mot., Ex. 2 at II-4d, which could include PTFE micropowder due to its need for "further processing," CVD Staff Report at I-9.

[20] GFL based its projections on several variables, including "[[ ]]." GFL's Opp'n & Cross-Mot., Ex. 2 at II-9a—9c.

[21] Cumulated subject producers' projected PTFE resin production volume for 2019 totaled [[ ]] pounds, CVD Staff Report, Table VII-8, which is about [[ ]] MT.

Mot., App. 1 at 5, 11.[22] The Terms of Reference ("TOR") appended to the EIA indicate that some approvals were obtained in February 2018, *id*., App. 2, TOR (cover page), permitting GFL to increase PTFE production from 1,500 MT to 2,000 MT per month, *id*., App. 2, TOR at 1. Chemours relies on these documents to assert that "GFL expanded production of PTFE by 500 MT per month." *Id*. at 10 & n.31 (citing *id*., App. 2, TOR at 2).

While the EIA and the Pre-Feasibility Report indicate preparation for increased capacity, they are not evidence of actual increases in either capacity or production. The Pre-Feasibility Report indicates that construction would take 18 to 24 months from the time that GFL obtained certain regulatory approvals, which did not occur until February 2018. *See id*., App. 1 at 11; *id.*, App. 2, TOR (cover page). Chemours points to no evidence that construction began, *see id*., App. 1 at 11,[23] and any increased production could not occur until GFL obtained a "Consent & Authorization" from the Gujarat Pollution Control Board, and Chemours provides no evidence this occurred either, *see id.*

In the Q3 FY18 Conference Call, GFL reported on "increased [] PTFE capacity" and noted that, "in the next 6 to 8 months[, GFL] will see even [its] expanded PTFE capacity being fully-utilized." *Id*., App. 4 at 6. GFL also referenced the development of "new PTFE grades," *id*., App. 6 at 12, and the existence of a "blueprint" to expand its PTFE capacity at an additional site, *id.*, App. 6 at 9, 15. In the Investor Presentation, GFL reported on "[g]rowth in PTFE," including increased "volumes of the new grades of PTFE." *Id*., App. 5 at 18. Chemours reliance on these statements to support its claims that GFL submitted fraudulent questionnaire responses, *id*. at 11–12, are also unpersuasive.

That GFL expected to see its "expanded PTFE capacity being fully-utilized" in "the next 6 to 8 months" does not mean that GFL failed to

[22] GFL was required to obtain an "Environment Clearance" from the State Level Expert Appraisal Committee and a "No Objection Certificate" from the Gujarat Pollution Control Board. Pl.'s Mot., App. 1 at 11; *see also id*., App. 2 at xi (abbreviations and acronyms). Production could not begin until GFL also obtained a "Consent & Authorization" from the Gujarat Pollution Control Board. *Id*., App. 1 at 11.

[23] Chemours attempts to link the estimated cost of the project to capital expenditures discussed in the Q2 FY19 Conference Call to bolster its contention that the proposed expansion project must be underway. *See id*. at 11–12 & n.35 (citing *id*., App. 6 at 9); *id*., App. 1 at 11 (containing the cost estimate for the project). However, there is no indication that the capital expenditures discussed in the Q2 FY19 Conference Call are related to the PTFE expansion discussed in the Pre-Feasibility Report. As GFL points out, the capital expenditures discussed in the Q2 FY19 Conference Call covered GFL's entire "Chemicals business." *Id*., App. 6 at 9; GFL's Opp'n & Cross-Mot. at 18.

report an increase in PTFE capacity to the Commission. *See id*., App. 4 at 6. In fact, evidence submitted by Chemours reflects that GFL increased PTFE capacity between 2013 and 2017, coincident with increased production. *See id*., App. 3 at 46. GFL's questionnaire responses are not inconsistent with its statements in the Q3 FY18 Conference Call regarding capacity utilization.[24] Chemours' reliance on GFL's "blueprint" for expansion similarly indicates nothing more than a plan that may or may not come to fruition. *See id*. at 12 & n.37 (citing, *inter alia, id*., App. 6 at 9, 15). Indeed, in the Q2 FY19 Conference Call, GFL explained that the blueprint pertained to fiscal year 2020 and was "yet to be finalized." *Id*., App. 6 at 9, 15.

Accordingly, Chemours has not presented clear and convincing evidence that GFL made fraudulent statements with respect to PTFE.

iii. Home Market Growth Projections

Chemours asserts that GFL overstated its home market growth to the Commission, thereby understating the extent to which its U.S. exports are likely to increase.[25] *Id*. at 12–13. Chemours relies primarily on GFL's Investor Presentation in which GFL explained that the "domestic market [is] growing at around 12–15 [percent] per annum." *Id*. at 12–13, App. 5 at 15. According to Chemours, "[g]iven these growth rates in its domestic market, GFL would have to increase its exports in order to achieve its projected production levels." *Id*. at 12; *see also id.* at 13 & n.41 (pointing to GFL's assertion in the Q2 FY19 Conference Call that it "expect[s a] fairly significant increase in sales in the [United States]") (citing *id*., App. 6 at 8). Chemours' assertions are unconvincing.

The market growth reported in the Investor Presentation applies to all fluoropolymers sold by GFL. *See id*., App. 5 at 15 (titled, "GFL positioning in the fluoropolymer market"); *id.* at 19–26 (discussing the range of fluoropolymers produced). Accordingly, direct comparisons between the figures in the Investor Presentation and those reported to the Commission (which are limited to subject PTFE) are misplaced. Moreover, the Investor Presentation does not specify the precise timeframe covered by the reference to 12 to 15 percent annual growth, s*ee id*., App. 5 at 15, so a comparison to GFL's questionnaire response is speculative.[26]

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[24] GFL anticipated reaching [[ ]] percent capacity utilization in 2019, CVD Staff Report, Table VII-6, thus [[ ]].

[25] GFL projected a [[ ]] percent [[ ]] in its home market shipments from 2017 to 2018 and [[ ]] of [[ ]] percent from 2018 to 2019. *Id*.

[26] GFL's projected [[ ]] percent [[ ]] in home market shipments of PTFE resin from 2018 to 2019 is not necessarily inconsistent with the projected 12 to 15 percent annual domestic growth contemplated for all fluoropolymers. *See id*; Pl.'s Mot., App. 5 at 15.

Chemours' focus on the Q2 FY19 Conference Call also ignores the context in which GFL's comments were made. In the seven months between GFL's questionnaire response and the conference call, the United States imposed additional duties on PTFE imported from China. *See* GFL's Opp'n & Cross Mot. at 25 & n.94 (citing *Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 40,823, 40,826 (USTR Aug. 16, 2018)). Indeed, the transcript of the conference call demonstrates that GFL premised its expectations on events that occurred after April 2018: the ITC's negative injury determination in this proceeding and the implementation of the aforementioned duties on Chinese PTFE. *See* Pl.'s Mot., App. 6 at 8. Accordingly, Chemours has not presented clear and convincing evidence that GFL made fraudulent statements with respect to its home market growth.

In sum, Chemours has failed to present "clear and convincing new evidence sufficient to make a prima facie case that the agency proceedings under review were tainted by material fraud" on the part of GFL. *See Home Prods.*, 633 F.3d at 1378. Instead, Chemours offers arguments of interpretation in connection with evidence that Chemours could—and should—have presented to the Commission in the first instance, underscoring the importance of due diligence and the exhaustion of administrative remedies. Countenancing Chemours' dilatory tactics would undermine the efficiency and finality interests that are served by limiting the court's review to the agency record. *See Vt. Yankee*, 435 U.S. at 554–55; *Essar Steel I*, 678 F.3d at 1277. Accordingly, Chemours' motion to supplement the administrative record is denied.

D. Chemours' Motion for Leave to Amend its Complaints is Also Denied

Leave to amend a complaint may be denied when the amendment would be futile. *See, e.g., Foman*, 371 U.S. at 182. Amendment is futile when the claims would not survive a motion to dismiss for failure to state a claim upon which relief may be granted. *See United States v. Active Frontier Int'l, Inc.*, Slip Op. 13–8, 2013 WL 174254, at *2 (CIT Jan. 16, 2013) (citing *Kemin Foods v. Pigmentos Vegetales Del Centro,* 464 F.3d 1339, 1354–55 (Fed. Cir. 2006)); *cf. Cultor Corp. v. A.E. Staley Mfg. Co.*, 224 F.3d 1328, 1333 (Fed. Cir. 2000) (additional claims futile when they lacked any "colorable argument of possible success").

The court's review of the determinations at issue here is limited to the administrative record. 19 U.S.C. § 1516a(a)(2)(A). Chemours

seeks to amend its complaint to allege that fraudulent evidence submitted by GFL renders the Commission's determinations unsupported by substantial evidence and unlawful. *See* [Proposed] Am. Consol. Compl. ¶ 59, ECF No. 48. Because the court has denied Chemours' related motion to supplement the administrative record with documentation relevant to this claim, assessing the merits of this claim would require the court to consider evidence outside of the record, which it cannot do. *See* 19 U.S.C. § 1516a(b)(2)(A); S. Rep. No. 96–249, at 248 (1979), 1979 U.S.C.C.A.N. 381, 633 ("The court is not to conduct a trial *de novo* in reviewing [agency] determinations" pursuant to 19 U.S.C. § 1516a). Because Chemours' proposed claim thus fails to state a claim upon which the court may grant relief, amendment would be futile. Accordingly, Chemours' motion is denied.

II. GFL's Contingent Cross-Motion

GFL moved to add several additional documents to the administrative record "[i]n the event that the [c]ourt grants Chemours' motion." GFL's Opp'n & Cross-Mot. at 28. Because the court is denying Chemours' motion, GFL's motion is denied as moot.

CONCLUSION AND ORDER

For the foregoing reasons, Chemours' motion to supplement the administrative record, amend its complaints, and remand the matter to the ITC is hereby **DENIED**. GFL's contingent cross-motion to supplement the administrative record is hereby **DENIED AS MOOT**.

Dated: July 3, 2019
New York, New York

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

Slip Op. 19–84

STAR PIPE PRODUCTS, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 17–00229
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's scope determination regarding steel threaded rod from the People's Republic of China and denying Plaintiff's challenge to Commerce's liquidation instructions to U.S. Customs and Border Protection associated with the scope determination as moot.]

Dated: July 8, 2019

Kavita Mohan and *Ned H. Marshak*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, argued for Plaintiff. With them on the brief was *Francis J. Sailer*.

Patricia M. McCarthy, Assistant Director, 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 *Elizabeth A. Speck*, Senior Trial Counsel. Of counsel on the brief was *Khalil N. Gharbieh*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Barnett, Judge:

This action involves a challenge to a U.S. Department of Commerce ("Commerce" or "the agency") scope determination for the antidumping duty order on steel threaded rod ("STR") from the People's Republic of China ("the PRC" or "China"). *See Certain Steel Threaded Rod from the People's Republic of China*, 74 Fed. Reg. 17,154 (Dep't Commerce Apr. 14, 2009) (notice of antidumping duty order) ("*STR Order*"); Final Scope Ruling for Star Pipe Products' Joint Restraint Kits, A-570-932 (July 31, 2017) ("Final Scope Ruling"), ECF No. 16–3; Compl., ECF No. 2.[1] Plaintiff, Star Pipe Products ("Star Pipe"), seeks judgment on the agency record pursuant to U.S. Court of International Trade ("CIT") Rule 56.2 regarding Commerce's determination that the STR components of Star Pipe's Joint Restraint Kits are subject to the *STR Order*. *See* Pl.'s Mot. for J. on the Admin. R. and Mem. of Law in Supp. of Pl.'s Mot. for J. on the Agency R. ("Pl.'s Mem.") at 9–28, ECF No. 21; Star Pipe Prods.' Reply Br. ("Pl.'s Reply") at 1–13, ECF No. 28. Star Pipe further argues that Commerce improperly issued liquidation instructions ordering U.S. Customs and Border Protection ("CBP") to retroactively suspend liquidation of, or assess antidumping duties on, the STR components of the Joint Restraint Kits that Star Pipe entered before the date on which Commerce initiated a formal scope inquiry. *See* Pl.'s Mem. at 28–34; Pl.'s Reply at 13–21. Defendant, United States ("the Government"), urges the court to sustain Commerce's scope determination and asserts that Commerce has issued lawful liquidation instructions to CBP. Def.'s Resp. to Pl.'s Mot. for J. Upon the Agency R. ("Def.'s Resp.") at 5–28, ECF No. 25. For the reasons discussed herein, the court sustains Commerce's scope determination and denies as moot Plaintiff's challenge to the liquidation instructions.

[1] The administrative record filed in connection with the Final Scope Ruling is divided into a Public Administrative Record ("PR"), ECF No. 16–1, and a Confidential Administrative Record ("CR"), ECF No. 16–2. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public J.A., ECF No. 30; Confidential J.A., ECF No. 29. The court references the confidential versions of the relevant record documents, unless otherwise specified.

BACKGROUND

Commerce issued the *STR Order* on April 14, 2009. *See STR Order*, 74 Fed. Reg. at 17,154. Therein, Commerce defined the scope of the order as follows:

> The merchandise covered by this order is steel threaded rod. Steel threaded rod is certain threaded rod, bar, or studs, of carbon quality steel, having a solid, circular cross section, of any diameter, in any straight length, that have been forged, turned, cold-drawn, cold-rolled, machine straightened, or otherwise cold-finished, and into which threaded grooves have been applied. In addition, the steel threaded rod, bar, or studs subject to this order are non-headed and threaded along greater than 25 percent of their total length. A variety of finishes or coatings, such as plain oil finish as a temporary rust protectant, zinc coating (i.e., galvanized, whether by electroplating or hot-dipping), paint, and other similar finishes and coatings, may be applied to the merchandise.

Id. at 17,155. Commerce also set forth certain metallurgical requirements for in-scope products; several exclusions from the scope; and the relevant Harmonized Tariff Schedule ("HTSUS") subheadings for "convenience and customs purposes." *Id.*

On October 5, 2016, Star Pipe, a U.S. importer, requested a scope determination regarding its Joint Restraint Kits. *See* Scope Ruling Req. for Joint Restraint Kits (Oct. 5, 2016), CR 1, PR 1–2. The Joint Restraint Kits in question consist of a combination of castings, bolts, bolt nuts, washers, and STR components and "are used in the water and wastewater industry to connect and secure pipes and to bolt together pipe joints, so that the pipe joints form a water tight restraint to maintain the free and controlled flow of water/waste water." *Id.* at 2.

Star Pipe acknowledged that the kits contain STR components that, if imported alone, would be subject to the *STR Order*. *Id.* Star Pipe argued, however, that because the STR components are "incidental to the kit itself," the Joint Restraint Kits should not be subject to the *STR Order*. *Id.* at 2–3. Vulcan Threaded Products, Inc. ("Vulcan"), a U.S. producer of steel threaded rod, opposed Star Pipe's request. *See* Vulcan's Opp'n to Tianjin Star's Scope Ruling Req. (Nov. 18, 2016) ("Vulcan's Opp'n"), PR 4.[2] On January 3, 2017, Star Pipe provided

[2] It is unclear why Vulcan attributed the scope ruling request to Tianjin Port Free Trade Zone Tianjin Star International Trade Co., Ltd. ("Tianjin Star"). *See* Vulcan's Opp'n at 1. Star Pipe [[ ]]. *See* Confidential Joint Status Report in Resp. to the Court's Order ("Jt. Status Report"), Ex. B (Decl. of David M. Murphy Responding to Decl. of Merlin A. Hymel, Jr.), Attach. 1–2, ECF No. 49–2.

Commerce with additional information requested by the agency. *See* Scope Ruling Req. for Joint Restraint Kits (Jan. 3, 2017), CR 2, PR 6 (supplement). Thereafter, Commerce extended the deadline for issuing a final scope ruling to April 3, 2017. *See* Ext. of Deadline for Final Scope Ruling (Feb. 13, 2017), PR 9.

On March 31, 2017, Commerce initiated a formal scope inquiry. *See* Scope Inquiry Initiation (March 31, 2017) ("Inquiry Initiation Notice"), PR 11. Commerce explained that it initiated the inquiry pursuant to 19 C.F.R. § 351.225(e) "[i]n order to fully consider the submissions that we have received in connection with Star Pipe's scope ruling request." *Id.* at 1. Commerce noted that "formal initiation does not preclude [the agency] from issuing a decision based on the criteria enumerated in 19 [C.F.R. §] 351.225(k)(1)." *Id.* Star Pipe and Vulcan filed comments in the scope inquiry. *See* Comments on Initiation of Scope Inquiry Concerning Joint Restraint Kits (Apr. 10, 2017) ("Star Pipe's Cmts."), PR 12; Vulcan's Rebuttal to Star Pipe's Scope Ruling Initiation Comments (Apr. 17, 2017), PR 13.

On July 31, 2017, Commerce issued its scope determination in which it concluded that the STR components within Star Pipe's Joint Restraint Kits are subject to the *STR Order*. *See* Final Scope Ruling at 1. Commerce further explained that, "[a]s to . . . the effective date of a final affirmative scope determination," it would "issue instructions to [CBP] in accordance with [its] regulations," 19 C.F.R. § 351.225(f)(4) and (l)(3). *Id.* at 9. On August 10, 2017, Commerce instructed CBP to

> [c]ontinue to suspend liquidation of entries of steel threaded rod from the People's Republic of China, including the steel threaded rod components of Star Pipe Products' Joint Restraint Kits, imported by Star Pipe Products . . . , subject to the antidumping duty order on steel threaded rod from the People's Republic of China.

Req. for Clarification on the Dep't's Final Scope Ruling for Joint Restraint Kits (Aug. 21, 2017), Attach. 1 (CBP Message No. 7222301 (Aug. 10, 2017)), PR 21.

On August 21, 2017, Star Pipe requested Commerce to clarify whether "the instructions . . . are intended to suspend liquidation and assess [antidumping duties] on Star Pipe's imports of Joint Restraint Kits entered prior to the date of initiation or are intended . . . to be prospective only." *Id.* at 3. Commerce did not respond to Star Pipe's request for clarification before the court assumed jurisdiction over the matter on August 30, 2017. *See* Summons, ECF No. 1; Def.'s Resp. at 23 n.6. On October 3, 2017, the court enjoined liquidation of unliqui-

dated entries of Star Pipe's Joint Restraint Kits. Order (Oct. 3, 2017) ("Oct. 3, 2017 Order"), ECF No. 15.

On November 30, 2018, the court ordered the parties to file a joint status report explaining whether liquidation of Star Pipe's Joint Restraint Kits that entered before Commerce initiated the scope inquiry on March 31, 2017, had been suspended and as of what date any suspension occurred. *See* Order (Nov. 30, 2018) ("Nov. 30, 2018 Order"), ECF No. 32 (noting the Parties' inconsistent statements on the matter). Following several extensions, on March 4, 2019, the parties filed a Joint Status Report. *See* Jt. Status Report. On May 22, 2019, the court heard oral argument on Star Pipe's motion for judgment on the agency record. *See* Docket Entry, ECF No. 57.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi)(2012),[3] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Plaintiff's Challenge to Commerce's Scope Determination

A. Legal Framework for Mixed Media Scope Determinations

Because descriptions of merchandise covered by the scope of an antidumping or countervailing duty order must be written in general terms, issues may arise as to whether a particular product is included within the scope of such an order. *See* 19 C.F.R. § 351.225(a). When those issues arise, Commerce's regulations provide for the agency to issue "scope rulings" that clarify whether the contested product falls within an antidumping or countervailing duty order's scope. *Id*. Although there are no specific statutory provisions that govern the interpretation of the scope of an order, the determination of whether a product is included within the scope of an order is governed by case law and the regulations published at 19 C.F.R. § 351.225. *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) (citation omitted); *see also Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071–72 (Fed. Cir. 2001) (noting that 19 C.F.R. § 351.225 governs the determination whether an antidumping duty order covers a product).

[3] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code and all citations to the U.S. code are to the 2012 edition, unless otherwise specified.

Scope determinations for particular products generally proceed in the following order. Initially, Commerce examines the relevant scope language. *See, e.g.*, *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (explaining that the language in the order is the "predicate for the interpretive process" and the "cornerstone" of a scope analysis). If the language is ambiguous, Commerce next interprets the scope "with the aid of" the sources set forth in 19 C.F.R. § 351.225(k)(1). *Meridian Prods*., 851 F.3d at 1382 (quoting *Duferco Steel*, 296 F.3d at 1097). Specifically, Commerce considers the description of the merchandise in the petition and initial investigation, and prior determinations by Commerce (including scope determinations) and the International Trade Commission ("ITC"). *See Meridian Prods*., 851 F.3d at 1381 (citing 19 C.F.R. § 351.225(k)(1) (the "(k)(1) factors")). If the (k)(1) materials are dispositive, Commerce issues a final scope ruling. *See* 19 C.F.R. § 351.225(d).[4] When the (k)(1) materials are not dispositive, Commerce considers the factors stated in subsection (k)(2) of the regulation. *See* 19 C.F.R. § 351.225(k)(2).[5]

In addition to being imported as a distinct item, subject merchandise may be imported as a component of another product or packaged with non-subject merchandise (referred to as "mixed media"). *See Walgreen Co. of Deerfield, Ill. v. United States*, 620 F.3d 1350, 1353–54 (Fed. Cir. 2010). The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has recognized Commerce's discretion to decide whether "a set of related products is merely a combination of subject and non-subject merchandise" or "a unique product." *Walgreen*, 620 F.3d at 1355; *id.* at 1354–57 (affirming Commerce's decision to treat gift bag sets containing tissue paper and a bow as packages of subject and non-subject merchandise and not as unique products). In prior determinations, Commerce has excluded unique products from the scope of an order arguably applicable to a subject component while including subject merchandise merely packaged with non-subject items when such sets did not constitute a unique product. *See Mid Continent Nail Corp. v. United States* ("*Mid Continent III*"),[6] 725 F.3d 1295, 1298 (Fed. Cir. 2013) (Commerce has "historically" answered the question whether potentially-subject merchandise "packaged and imported together with non-subject merchandise" was within the

[4] To be dispositive, the (k)(1) materials "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Sango Int'l L.P. v. Unite*d *States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007).

[5] Specifically, Commerce will consider: "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2) (the "(k)(2) factors").

[6] There are five judicial opinions in the *Mid Continent* line of cases. The CIT issued two opinions prior to the Federal Circuit's opinion in *Mid Continent III* and two thereafter.

scope of a particular order "as depending on whether the mixed media item is to be treated as a single, unitary item, or a mere aggregation of separate items") (citing *Walgreen*, 620 F.3d at 1355–56); *cf. Walgreen*, 620 F.3d at 1357 (sustaining Commerce's decision that subject tissue paper in the gift bag sets was covered by an antidumping duty order on certain tissue paper from China).

The underlying scope determination in *Walgreen* was affirmative: the tissue paper component of a gift bag set remained within the scope of the order on tissue paper. By contrast, in the *Mid Continent* cases, the underlying determination was negative: the otherwise subject nails were excluded from the scope of an order on nails when included as a component in a tool kit based on an analysis of the (k)(2) factors. *See Mid Continent Nail Corp. v. United States* ("*Mid Continent I*"), 35 CIT 566, 572, 770 F. Supp. 2d 1372, 1377 (2011); *Mid Continent Nail Corp. v. United States* ("*Mid Continent II*"), 36 CIT 372, 373, 825 F. Supp. 2d 1290, 1292 (2012). The *Mid Continent* line of cases represents a dividing line in the analysis of mixed media sets relative to scope questions and necessitates a full discussion.

In *Mid Continent*, after Commerce found that otherwise subject nails were excluded from the relevant order when included as part of a tool kit worth more than twenty times the value of the nails, domestic interests appealed that ruling to the CIT. *See Mid Continent I*, 35 CIT at 572, 770 F. Supp. 2d at 1377. Initially, the CIT remanded Commerce's scope determination for the agency to identify "a test it will employ consistently" to determine the subject of the scope inquiry (i.e., the mixed media set as a whole or the subject component) and "the legal justification for employing such a test at all." *See id.* at 578, 770 F. Supp. 2d at 1383. On remand, Commerce sought to ground its mixed media analysis in legal authority[7] and set forth criteria the agency would apply to identify the relevant subject of the scope inquiry. *Mid Continent II*, 36 CIT at 373–75, 825 F. Supp. 2d at 1293–94 (citations omitted). The court, however, rejected Commerce's criteria because they "invite[d] analysis of the product in question rather than interpretation of the [order]" and were unsupported by the cited authority. *See id.* at 375, 825 F. Supp. 2d at 1294. The court found that the nails at issue were covered by the scope of the order "and there [was] no support in the law or the record for concluding otherwise." *Id.* at 378, 825 F. Supp. 2d at 1296.

[7] Specifically, Commerce pointed to the antidumping statute, 19 U.S.C. § 1673, which requires Commerce to impose duties on "a class or kind of merchandise"; agency regulations, 19 C.F.R. § 351.225(a), which recognize that orders "must be written in general terms" and authorize Commerce to issue scope determinations; and the Federal Circuit's opinions in *Walgreen*, 620 F.3d at 1350, and *Crawfish Processors Alliance v. United States,* 483 F.3d 1358 (Fed. Cir. 2007). *See Mid Continent II*, 36 CIT at 373–74, 825 F. Supp. 2d at 1293 (citations omitted).

On appeal,[8] the Federal Circuit disagreed with the CIT, finding that "[b]ecause orders are subject to interpretation," Commerce has "the authority to conduct a mixed media inquiry and to exclude from the scope of the order otherwise-subject merchandise included within a mixed media item." *Mid Continent III*, 725 F.3d at 1301. Principles of due process require, however, "that before an agency may enforce an order or regulation by means of a penalty or monetary sanction, it must 'provide regulated parties fair warning of the conduct [the order or regulation] prohibits or requires.'" *Id.* at 1300–01 (quoting *Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 156 (2012) (alteration original)); *see also id.* at 1298 (Commerce must write its orders with sufficient detail so as to provide "[]adequate notice to regulated parties") (citing 19 U.S.C. § 1673e(a)(2)). On that basis, the Federal Circuit also rejected Commerce's criteria for interpreting the order (provided in the first remand determination) because "it did not exist at the time that the order was issued." *Id.* at 1302. The Federal Circuit then provided "Commerce one last opportunity to interpret its order" and provided "guidance" for the agency to consider on remand and in "future cases." *Id.* at 1302. That guidance, which was necessarily advisory, consisted of a two-step interpretive process for conducting mixed media scope inquiries. *See id.* at 1302–05.

First, the Federal Circuit called for the agency to "determine whether the potentially-subject merchandise included within the mixed media item is within the literal terms of the antidumping order." *Id.* at 1302. When there is a dispute as to this step, Commerce would follow the procedures specified in its regulations and judicial precedent to interpret the scope of the order in relation to the component at issue. *Id.* (citing 19 C.F.R. § 351.225(k); *Walgreen*, 620 F.3d at 1352).

The Federal Circuit went on to state that, when the merchandise is subject to the order, the agency would next "determine whether the inclusion of that merchandise within a mixed media item should nonetheless result in its exclusion from the scope of the order." *Id.* at 1302–03. Here again, Commerce "must begin with the language of the order." *Id.* at 1303. If the scope of the order expressly states that the order includes subject merchandise within a mixed media set, the

[8] On remand pursuant to *Mid Continent II*, Commerce issued a scope determination under protest in which it found the nails within the tool kits to be within the scope of the order, and the CIT affirmed. *See Mid Continent III*, 725 F.3d at 1300; *Mid Continent Nail Corp. v. United States*, Slip Op. 12–97, 2012 WL 3024229, at *1 (CIT July 25, 2012) (rendering judgment). The defendant and defendant-intervenor appealed to the Federal Circuit. *Mid Continent III*, 725 F.3d at 1300.

scope inquiry ends. *Id.* If, instead, the order sets forth criteria for applying the order to subject merchandise shipped or sold with non-subject merchandise, then Commerce must consider that criteria in conducting the inquiry. *Id.* When, as here, "the order is silent, Commerce must next determine whether the (k)(1) materials help to interpret the order"—i.e., (1) the petition; (2) Commerce's initial investigation; and (3) prior agency determinations by Commerce (including scope rulings) and the ITC. *Id.*

When the "the history of the antidumping order"—the first and second of the (k)(1) materials—does not suggest "that subject merchandise should be treated differently on the basis of its inclusion within a mixed media item, . . . a presumption arises that the included merchandise is subject to the order." *Id.* at 1303–04. "[T]o overcome this presumption, Commerce must identify published guidance issued prior to the date of the original antidumping order . . . that provides a basis for interpreting the order contrary to its literal language." *Id.* at 1304; *see also id.* at 1305 (noting "the requirement that any implicit mixed media exception to the literal scope of the order must be based on preexisting public sources").

The Federal Circuit identified several sources that Commerce could consult to ascertain whether the presumption of inclusion is overcome. Those sources included Commerce's prior scope rulings—provided they were publicly available when the order in question was issued. *Id.* at 1304.[9] The appellate court noted, however, that the scope rulings submitted in that proceeding "lack clarity," *id.* at 1305, and reiterated that Commerce's mixed media scope determinations typically lack "'formal definition[s],' 'generally applicable criteria,' or 'bright line rule[s]' for conducting mixed media inquiries," and instead evince "'ad hoc determinations,'" *id.* (quoting *Walgreen,* 620 F.3d at 1355–56) (alterations in original). The Federal Circuit acknowledged that prior scope rulings interpreting the order in question may also be consulted, provided "they do not articulate new interpretive criteria . . . not announced when the antidumping order was originally issued." *Id.* at 1304 n.4 (citing *Walgreen*, 620 F.3d at 1356). The appellate court also suggested that Commerce could consider "the (k)(2) factors, to the extent that they are relevant to resolving the mixed media inquiry," or "the HTSUS classification system" to deter-

[9] At oral argument, the parties agreed that Commerce's scope rulings are publicly available in Commerce's Public File Room and are listed in a Federal Register notice alerting the public to the nature of the scope ruling. Oral Arg. 20:30–21:46, 22:30–24:15 (time stamps from the recording); *see also Mid Continent Nail Corp. v. United States* ("*Mid Continent IV*"), 38 CIT ___, ___, 24 F. Supp. 3d 1279, 1286 (2014) (finding that Commerce's scope rulings were publicly available).

mine "whether a tool kit is a single, unitary item or a mere aggregation of items, if Commerce can point to prior published rulings in support of this practice." *Id.* at 1305. The appellate court emphasized that it was not "decid[ing] whether by relying on these sources Commerce could reasonably interpret its antidumping order to exclude [from the order] the nails included within [the] toolkits," but that "Commerce may attempt to develop such an interpretation utilizing the sources we have identified." *Id.*

On remand, Commerce reviewed prior mixed media scope rulings and attempted to use them to articulate an ascertainable standard to guide the identification of the proper subject for a mixed media scope inquiry. *Mid Continent IV*, 24 F. Supp. 3d at 1283. In particular, Commerce developed a four-factor test[10] and applied those factors to the nails and toolkits at issue, finding that it should "focus the scope inquiry on the toolkits rather than the steel nails." *Id.* at 1283–84. Commerce then analyzed the toolkits pursuant to the (k)(2) factors and concluded that the nails included within the toolkits should be excluded from the scope of the order. *Id.* at 1284.

The CIT again rejected Commerce's test. *Id.* at 1285–89. The court found that the cited scope rulings "do not identify a broader ascertainable mixed media standard" and instead demonstrate that Commerce has determined the subject of the scope inquiry "based on the facts and circumstances in each particular case." *Id.* at 1289. The court further found that "Commerce failed to explicitly address how its mixed media test reflects [the] presumption" articulated in *Mid Continent III*. *Id.* Following that decision, Commerce issued its fourth remand determination, under protest; considered the nails in isolation without regard to the toolkits; and determined that the nails contained within the imported toolkits were within the scope of the order. *See Mid Continent Nail Corp. v. United States*, 39 CIT ___, ___, 61 F. Supp. 3d 1287, 1289 (2015) (affirming Commerce's scope determination). The Government did not appeal the court's affirmance of the fourth remand determination.

B. Issue of Waiver

Before addressing the merits of Plaintiff's arguments, the court addresses whether Plaintiff has waived its challenges to the scope

[10] The factors included:

> (1) the "unique language of the order"; (2) the "practicability of separating the component merchandise for repackaging or resale"; (3) the "value of the component merchandise as compared to the value of the product as a whole"; and (4) the "ultimate use or function of the component merchandise relative to the ultimate use or function of the mixed-media set as a whole[.]"

Mid Continent IV, 24 F. Supp. 3d at 1283 (citation omitted).

determination. Plaintiff's moving and reply briefs largely advance the argument that Commerce incorrectly determined that the Joint Restraint Kits were within the scope of the *STR Order*. *See, e.g.*, Pl.'s Mem. at 1–2 (framing the issue as whether Commerce correctly determined "that Joint Restraint Kits are included within the scope of the Order"); *id.* at 15–17 (presenting arguments as to why "Star Pipe's Joint Restraint Kits are not subject STR"); *id.* at 21–24 (applying the (k)(2) factors to the Joint Restraint Kits). At oral argument, Star Pipe averred that it used the term "Joint Restraint Kits" as a short-hand reference for in-scope products, and any lack of precision arose from difficulties in discussing mixed media products. Oral Arg. 13:53–14:03, 15:36–15:38, 19:50–19:56. The Government acknowledged that it was likewise imprecise in its brief but noted that Commerce had properly focused the scope inquiry on the STR components of the Joint Restraint Kits. Oral Arg. 17:58–18:17.

Plaintiff's representations at oral argument are difficult to square with its briefs, which clearly distinguish subject STR from the Joint Restraint Kits and analyze *Mid Continent III* from the perspective of the Joint Restraint Kits. *See, e.g.*, Pl.'s Reply at 2 ("The question at issue is not whether the STR components should be considered out of scope merely because they are part of a mixed media set, but rather whether the mixed media set (the joint restraint kit), as a whole, should be considered in-scope or out of scope."); Pl.'s Reply at 3, 6 (referring to the presumption in relation to the mixed media set). By focusing on the purported inclusion of the Joint Restraint Kits in the scope of the *STR Order*, Plaintiff largely failed to develop arguments clearly responsive to the scope determination Commerce actually made. Nevertheless, the court does not find that Star Pipe has waived its ability to challenge the scope determination and will address Star Pipe's principal challenges to Commerce's application of the *Mid Continent III* mixed media test.

C. Commerce's Determination that Star Pipe's Subject STR Components are Presumptively In-Scope[11]

Pursuant to the Federal Circuit's guidance, subject merchandise contained in a mixed media set is presumptively in-scope when the relevant order is silent on the matter and the petition and investigation documents do not suggest the product's exclusion. *Mid Continent III*, 725 F.3d at 1303–04. Here, as Commerce explained, the *STR Order* is silent on the issue of mixed media. Final Scope Ruling at 7;

[11] Star Pipe conceded that its Joint Restraint Kits contain subject STR components. Final Scope Ruling at 7. Accordingly, Commerce proceeded to determine whether the inclusion of the subject STR in the Joint Restraint Kits should result in their exclusion from the scope of the *STR Order*. *Id*.

STR Order, 74 Fed. Reg. at 17,155. Following the Federal Circuit's guidance, Commerce turned to the (k)(1) materials to determine whether a presumption of inclusion arose. Final Scope Ruling at 7. Commerce considered it "important[]" that the petition and the ITC's final determination noted that steel threaded rod is used in "waterworks applications," which application is the purpose of Star Pipe's Joint Restraint Kits. *Id.* at 8 & nn.48–49 (citations omitted).[12] Commerce therefore concluded that the STR components of the Joint Restraint Kits were presumptively subject to the *STR Order*. *Id.* at 8.

Although Commerce did not clearly explain why the uses of subject STR discussed in the (k)(1) materials supported a presumption of inclusion, *see* Final Scope Ruling at 8, the court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). At a minimum, Commerce's discussion does not suggest that STR components imported in a set intended for a particular use "should be treated differently on the basis of [their] inclusion within [such a set]." *Mid Continent III*, 725 F.3d at 1304.

Star Pipe's argument that the petition and the ITC's final determination do not suggest the inclusion of joint restraint systems in the scope of the *STR Order* misses the mark. *See* Pl.'s Mem. at 16–17; Pl.'s Reply at 5–6. As discussed above, the issue is whether the STR components—not the Joint Restraint Kits—are presumptively in-scope. *See supra* Section I.B. Additionally, the Federal Circuit explained that the presumption arises when "neither the text of the order nor its history indicates that subject merchandise should be treated differently"—i.e., excluded from the scope—based on "its inclusion within a mixed media item." *Mid Continent III*, 725 F.3d at 1304. The presumption does not depend upon the (k)(1) materials affirmatively indicating the *inclusion* of subject components of mixed media items in the scope. Accordingly, Commerce's determination that Star Pipe's STR components are presumptively in-scope is supported by substantial evidence.

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[12] Commerce also reviewed prior scope rulings interpreting the *STR Order* and noted that none have addressed mixed media sets. Final Scope Ruling at 8 & n.47 (citation omitted). While Commerce considered these rulings to determine whether a presumption should arise that Star Pipe's STR components are within the scope of the *STR Order*, *see id.*, *Mid Continent III* contemplated consideration of prior scope rulings interpreting the order at issue (provided they do not include criteria post-dating the order) to determine whether any presumption of inclusion may be overcome, 725 F.3d at 1304 n.4.

D. Commerce's Determination that the Presumption Was not Overcome

After finding that the STR components are presumptively in-scope, Commerce rejected Star Pipe's arguments that the presumption was overcome. Final Scope Ruling at 8–9. Commerce declined Star Pipe's invitation to revisit earlier scope rulings issued in connection with the antidumping duty order on cased pencils from China in which Commerce excluded various mixed media kits from the scope of the order. *Id.* at 8. Commerce explained that those scope rulings turned on fact-specific analyses of the (k)(2) factors and the CIT had found several of the rulings to lack "a coherent and ascertainable standard . . . that would allow importers to predict how Commerce would treat their mixed media products." *Id.* at 8 & n.54 (quoting *Mid Continent IV*, 24 F. Supp. 3d at 1286–87); *see also* Star Pipe's Cmts. at 7–8 & n.5 (citing *Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 66,909 (Dep't Commerce Dec. 28, 1994) (antidumping duty order) ("*Pencils Order*")). Commerce dismissed Star Pipe's reliance on the absence of the HTSUS classification covering Joint Restraint Kits from the scope of the *STR Order* because the scope contemplated that subject merchandise could enter under a different tariff provision. *See* Final Scope Ruling at 9 & n.56 (quoting *STR Order*, 74 Fed. Reg. at 17,155) ("While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.") (alteration omitted).[13] Commerce also determined that an analysis of the (k)(2) factors was "not necessary." *Id.* at 7.

Plaintiff now contends that *Mid Continent III* required Commerce to consider each of the sources identified by the Federal Circuit as possible bases for overcoming the presumption of inclusion; i.e., scope rulings issued in connection with the *Pencils Order*, the (k)(2) factors, and the HTSUS classification system. *See* Pl.'s Mem. at 18, 24–28; Pl.'s Reply at 7–8, 10–13. Plaintiff further contends that Commerce was required to consider the (k)(2) factors by reason of the agency's initiation of a formal scope inquiry. Pl.'s Mem. at 19; Pl.'s Reply at 8–9.

Defendant contends that Commerce correctly declined to revisit the scope rulings issued under the *Pencils Order*; an analysis of the (k)(2) factors would not supplant the rule that Commerce may not exclude subject merchandise imported as part of a mixed media set from the

[13] Commerce disagreed with Star Pipe's suggestion that *Mid Continent III* was wrongly decided and should not be followed, noting that although the agency had submitted its ultimate redetermination under protest, it did not appeal the CIT's decision affirming that determination. Final Scope Ruling at 9.

scope of an order absent a preexisting public basis for doing so; and Star Pipe has not identified preexisting published guidance supporting Commerce's consideration of HTSUS subheadings. Def.'s Resp. at 16, 19–22. Defendant further avers that Commerce was not required to consider the (k)(2) factors simply because the agency initiated a scope inquiry. According to Defendant, the agency disclaimed any need to refer to the (k)(2) factors in the Initiation Notice, *id.* at 18 (citing Inquiry Initiation Notice at 1), and the Federal Circuit afforded Commerce discretion to decide whether such analysis was warranted, *id.* at 19 (citing *Mid Continent III*, 725 F.3d at 1305).

The court finds that a remand for further consideration of the sources discussed in *Mid Continent III* is unwarranted. Moreover, Commerce did not need to conduct a (k)(2) analysis solely by reason of its initiation of a formal scope inquiry.

The *Mid Continent III* court was clearly guided by the concern that Commerce provide adequate notice to the importing community about conduct that is regulated by its antidumping duty orders. 725 F.3d at 1300–01. "[T]he requirement that antidumping orders only be applied to merchandise that they may be reasonably interpreted to include ensures that before imposing a significant exaction in the form of an antidumping duty, Commerce will provide adequate notice of what conduct is regulated by the order." *Id.* at 1300 (internal quotation marks and citation omitted). By the same token, however, "merchandise facially covered by an order may not be *excluded* from the scope of the order unless the order can reasonably be interpreted so as to exclude it." *Id.* at 1301. For purposes of scope interpretation in the context of mixed media inquiries, Commerce has elected to adopt the guidance provided in *Mid Continent III* and at the same time declined to adopt regulations or other prospective criteria that would articulate the bases upon which Commerce could interpret an order to exclude otherwise-subject merchandise when included in a sufficiently distinct mixed media set. See Final Scope Ruling at 4–5 (identifying *Mid Continent III* as supplying the relevant legal framework). Thus, the agency is left with a paradigm in which a component of a mixed media set is presumed to remain within the scope of an order and the paths available for exclusion are seemingly limited.

While *Mid Continent III* permitted Commerce to attempt to interpret an order using the identified sources, the appellate court did not *require* Commerce to conduct its mixed media analysis in any particular fashion. *See id.* at 1305 ("We simply hold that Commerce *may* attempt to develop such an interpretation utilizing the sources we have identified.") (emphasis added). Moreover, the court did not require Commerce to use the suggested sources. *See id.* at 1304 (noting

that "guidance *may* be found in . . . prior scope determinations[]"); *id.* at 1305 ("Commerce *may* attempt to draw an ascertainable standard from [prior scope rulings] . . . . ."); *id.* at 1305 ("Commerce . . . *may* [] rely on the (k)(2) factors, to the extent that they are relevant . . . ."); *id.* at 1305 ("Commerce *may* also consult the HTSUS classification system . . . .") (emphases added). *Mid Continent III* thus instructs that subject components of a mixed media kit remain in-scope unless and until Commerce identifies a basis for interpreting the order to exclude the components that is rooted in preexisting published guidance. *Id.* at 1304. The parameters for inquiring into whether any such basis exists are, however, left to Commerce's discretion.

In view of the foregoing, the court cannot find that Commerce erred in concluding that the presumption of inclusion was not overcome. Commerce was under no obligation to revisit the scope rulings issued in connection with the *Pencils Order*. Commerce abandoned any effort to identify and amalgamate any individual teachings of these rulings and instead concluded that the rulings were resolved based on the characteristics of the products at issue. Final Scope Ruling at 8. Commerce effectively adopted the CIT's finding that most of the rulings lack an ascertainable standard "allow[ing] importers to predict how Commerce would treat their mixed media products." *Mid Continent IV*, 24 F. Supp. 3d at 1289; *see also* Final Scope Ruling at 8 & n.54 (citation omitted). Star Pipe argues that even if the scope rulings "do not create a specific set of guidelines allowing 'importers to predict' how Commerce would treat their mixed media products," they "would at least have placed importers on notice that there is no presumption that mixed media sets are in scope." Pl.'s Reply at 11 (emphasis omitted); *see also* Pl.'s Mem. at 26–27 (making a similar argument). Star Pipe misunderstands the inquiry. Following *Mid Continent III*, Commerce may apply a presumption of inclusion to the subject component, distinct from the mixed media kit. 725 F.3d at 1304. Overcoming that presumption *requires* guidance that would be ascertainable to an importer so as to place them on notice about conduct regulated (i.e., merchandise covered and merchandise excluded) by the scope of an antidumping duty order. *Id.* at 1300–01, 1305. Commerce reasonably concluded that the scope rulings failed to provide that guidance.

Star Pipe also fails to persuade the court that Commerce erred in declining to consider the (k)(2) factors. Star Pipe argues that a (k)(2) analysis "would have demonstrated . . . that Joint Restraint Kits are distinct from in-scope STR." Pl.'s Mem. at 21. Star Pipe's argument does not speak to the relevance of a (k)(2) analysis for purposes of demonstrating that the presumption of inclusion applicable to the

STR components of the Joint Restraint Kits might be overcome. Star Pipe also presents no arguments reconciling its requested analysis with the due process concerns identified in *Mid Continent III* or the requirement that any exclusion "be based on preexisting public sources." *See Mid Continent III*, 725 F.3d at 1300–01, 1305.

Star Pipe further argues that Commerce erred in relying on "standard [HTSUS] language contained in every scope description" to dismiss the purported significance of the Joint Restraint Kits' particular tariff provision. Pl.'s Reply at 12; *see also* Pl.'s Mem. at 28. Again, Star Pipe points to no "prior published rulings" supporting Commerce's consideration of HTSUS subheadings as part of its scope interpretation.[14] *See Mid Continent III*, 725 F.3d at 1305.[15] Accordingly, Commerce's determination that the presumption of inclusion was not overcome is supported by substantial evidence and in accordance with law.

Additionally, Commerce was not required to consider the (k)(2) factors simply because it initiated a formal scope inquiry. When the agency "finds that the issue of whether a product is included within the scope of an order . . . cannot be determined based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of this section," the agency will initiate a scope inquiry. 19 C.F.R. § 351.225(e). When the (k)(1) materials "are not dispositive," the agency "will further consider" the (k)(2) factors. *Id.* § 351.225(k)(2). Star Pipe conflates the decision to initiate a scope inquiry with the conclusion that the (k)(1) materials are not dispositive. *See* Pl.'s Reply at 9.[16] While an agency finding that it cannot resolve a scope inquiry "based solely" on the application and the (k)(1)

[14] To the extent that Commerce did consider and dismiss Star Pipe's argument that the STR components should be excluded from the scope based on the Joint Restraint Kits' HTSUS classification, Final Scope Ruling at 9, such consideration could be considered harmlessly erroneous. *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996). Correcting Commerce's error would not change the outcome because it would involve declining to address Star Pipe's argument rather than rejecting it on the merits. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372, 1383 n.8 (Fed. Cir. 2008).

[15] In fact, the Federal Circuit instructed that "Commerce may also consult the HTSUS classification system *in deciding whether a tool kit is a single, unitary item or a mere aggregation of items*, if Commerce can point to prior published rulings in support of this practice." *Mid Continent III*, 725 F.3d at 1305 (emphasis added). The court previously used the phrase "single, unitary item" as synonymous with "unique product." *See id.* at 1298 (noting Commerce's distinction between mixed media items "treated as a single, unitary item" as compared to those constituting "a mere aggregation of separate items") (citing *Walgreen,* 620 F.3d at 1355–56). The court's statement suggests that overcoming the presumption is tantamount to finding that the mixed media set at issue is a unique product. Here, Star Pipe declined to assert any argument that its Joint Restraint Kits represent a unique product. Oral Arg. 43:30–45:33.

[16] Star Pipe also cites several cases in support of its argument that Commerce was required to consider the (k)(2) factors. Pl.'s Mem. at 18–19; Pl.'s Reply at 8. However, the cited cases simply hold that Commerce must consider the (k)(2) factors when its decision that the (k)(1)

materials will always precede a finding that the (k)(1) materials "are not dispositive," they are not the same. Subsection 351.225(e) of Commerce's regulations simply suggests that Commerce will initiate a scope inquiry when something more than the application and (k)(1) materials is required—for example, as occurred here, further input from the interested parties. *See* Final Scope Ruling at 2. While the regulatory framework directs Commerce to consider the (k)(2) factors only in the context of a formal scope inquiry, Commerce is not required to consider the (k)(2) factors in every scope inquiry. *See Meridian Prods., LLC v. United States*, 39 CIT ___, ___, 125 F. Supp. 3d 1306, 1311 (2015), *rev'd on other grounds*, 890 F.3d 1272 (19 C.F.R. § 351.225(e) does not preclude Commerce "from [] resolving a scope issue without resorting to the factors of § 351.225(k)(2)" when it initiates a scope inquiry).

In sum, Commerce's determination that Star Pipe's STR components are within the scope of the *STR Order* is supported by substantial evidence and in accordance with law. Accordingly, Commerce's scope determination will be sustained.

II. Plaintiff's Challenge to Commerce's Liquidation Instructions

Star Pipe contends that Commerce may not order CBP to retroactively suspend liquidation of, or assess antidumping duties on, Star Pipe's Joint Restraint Kits that entered before the date on which Commerce initiated the scope inquiry. *See* Pl.'s Mem. at 28–34; Pl.'s Reply at 13–21.[17] Star Pipe argues that Commerce's initiation of a formal scope inquiry and subsequent clarification of an ambiguous order means that the agency may only issue liquidation instructions ordering CBP to collect antidumping duties prospectively, on entries made after the date on which Commerce initiated the scope inquiry.

materials dispose of the inquiry lacks substantial evidence. *See Sango*, 484 F.3d at 1381–82; *Toys "R" Us, Inc. v. United States*, 32 CIT 814, 819 (2008); *OTR Wheel Eng'g, Inc. v. United States*, 36 CIT 988, 996–97, 853 F. Supp. 2d 1281, 1289–90 (2012). The cases do not stand for the proposition that Commerce must consider the (k)(2) factors because it initiated a scope inquiry.

[17] When Commerce conducts a scope inquiry pursuant to 19 C.F.R. § 351.225(e) "and the product in question is already subject to suspension of liquidation, that suspension of liquidation will be continued, pending a preliminary or a final scope ruling." 19 C.F.R. § 351.225(l)(1). When Commerce issues a final scope ruling pursuant to subsection 351.225(f)(4) and finds "that the product in question is included within the scope of the order, any suspension of liquidation under paragraph (l)(1) . . . of this section will continue." *Id.* § 351.225(l)(3). If, however, "there has been no suspension of liquidation, [Commerce] will instruct [CBP] to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry." *Id.*

See Pl.'s Mem. at 33–34; Pl.'s Reply at 20–21. The Joint Status Report filed in this case demonstrates that Star Pipe's challenge to the liquidation instructions is now moot.

As noted in the Background section, on November 30, 2018, the court ordered the Parties to provide a joint status report addressing the status of Star Pipe's entries that entered prior to the initiation of the scope inquiry. Nov. 30, 2018 Order. In short, that status report indicates that all of Star Pipe's pre-initiation entries have been liquidated. Jt. Status Report at 3. While the Joint Status Report provides more detail with respect to Star Pipe's pre-initiation entries and when they were liquidated, after close review, the court has determined that no further action by the court is warranted.

In particular, while certain entries were liquidated after the court entered an injunction, that injunction, proposed by Plaintiff and consented to by Defendant, specifically and simply referred to "Joint Restraint Kits" that were the subject of the final scope ruling. *See* Oct. 3, 2017 Order at 1. As Star Pipe acknowledges in the Joint Status Report, in the pre-initiation entries in question, Star Pipe did not designate the goods as "Joint Restraint Kits." Jt. Status Report at 4. Instead, Star Pipe apparently assumed that the injunction's reference to "Joint Restraint Kits" in connection with the scope ruling would suffice to notify CBP officials that more than 200 different types of joint restraint systems identified by various names other than "Joint Restraint Kits" in the entry documents were covered by the terms of the injunction simply because Star Pipe had attached a list of those products to its scope request presented to Commerce. *Id.* at 4–5. The court disagrees. The terms of the injunction were vague as to the full range of products subject thereto and, thus, the court declines to find that CBP liquidated the entries contrary to the terms of the injunction.[18] When CBP liquidated Star Pipe's pre-initiation entries, CBP did not assess antidumping duties on those line items. Jt. Status Report, Ex. A (Decl. of Merlin A. Hymel, Jr.) ("Hymel Decl.") ¶¶ 14–16, 19, ECF No. 49–1. Those liquidations are now final.[19]

[18] In any event, neither Party has moved the court to take any action in response to the liquidations. *Cf. Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1192 (Fed. Cir. 2009) (noting the options available to the court to remedy liquidations in violation of an injunction).

[19] Voluntary reliquidation by CBP is governed by 19 U.S.C. § 1501. Pursuant to the relevant version of the statute in effect when the entries were made, CBP is time-barred from reliquidating those entries to include the assessment of antidumping duties. *See* 19 U.S.C. § 1501 (2012) (providing for reliquidation within 90 days "from the date on which notice of the original liquidation is given or transmitted to the importer, his consignee or agent"); 19 U.S.C. § 1501 (Supp. V 2012) (providing for reliquidation within "[90] days from the date of the original liquidation"); Trade Facilitation and Enforcement Act of 2015, Pub. L. No. 114–125, § 911, 130 Stat. 122, 240 (2016) (amending section 1501 on a prospective basis);

At oral argument, Star Pipe alerted the court to the existence of [[ ]].[20] Star Pipe asserted that the existence of [[ ]] requires the court to rule on its challenge to Commerce's liquidation instructions in the event the court sustains Commerce's scope determination. Star Pipe pointed to *Heartland By-Products, Inc. v. United States* ("*Heartland VII*"), 568 F.3d 1360 (Fed. Cir. 2009) in support of its argument that the issue is not moot.[21]

In *Heartland VII*, the Federal Circuit explained that "a defendant's voluntary cessation of a challenged practice does not" render an issue moot "*unless* 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" 568 F.3d at 1368 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000)) (emphasis added). Here, the "allegedly wrongful behavior" is the assessment of antidumping duties on Star Pipe's pre-initiation entries. However, the finality of liquidation of all of these entries and the conclusion of the pre-initiation period means that the retroactive assessment of duties "could not reasonably be expected to recur." *Heartland VII*, 568 F.3d at 1368.

Moreover, [[ ]] is governed by a statutory and regulatory framework that is separate and distinct from Commerce's authority to issue instructions to CBP regarding the suspension of liquidation and collection of antidumping duties. *Compare* [[ ]], *with* 19 C.F.R. § 351.225(l). To the extent Star Pipe seeks the court's views on an issue potentially relevant to [[ ]][22] but which is not directly implicated here, Star Pipe seeks an impermissible advisory opinion. *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961).[23]

The U.S. Supreme Court has made it clear that "judicial [p]ower" is to be used "to render dispositive judgments, not advisory opinions."

United States v. Great Am. Ins. Co. of New York, 41 CIT ___, ___, 229 F. Supp. 3d 1306, 1326 (2017) ("[T]he court is guided by the plain language of the statute in effect when the subject entries were made."); Hymel Decl., Ex. 1 (dates of entry).

[20] Specifically, [[ ]].

[21] See *Heartland VII*, 568 F. 3d at 1361–64, for a summary of the six opinions leading up to that Federal Circuit opinion.

[22] In other words, whether [[ ]].

[23] While the liquidation of Star Pipe's pre-initiation entries currently moots Plaintiff's challenge to those instructions, should the issue be properly joined at some point in the future, Star Pipe may seek to have the court consider whether relief is appropriate through a motion pursuant to CIT Rule 60 or application of the court's ancillary jurisdiction, as may be appropriate. *See., e.g.*, *Heartland By-Prods., Inc. v. United States*, 424 F.3d 1244, 1251 (Fed. Cir. 2004) (*Heartland V*).

Camreta v. Greene, 563 U.S. 692, 717 (2011) (internal quotation marks and citation omitted). "[A]n opinion advising what the law would be upon a hypothetical state of facts" is an advisory opinion. *Verson, a Div. of Allied Prods. Corp. v. United States*, 22 CIT 151, 153, 5 F. Supp. 2d 963, 966 (1998) (quoting *North Carolina v. Rice,* 404 U.S. 244, 246 (1971)). Finality of liquidation renders the retroactive assessment of antidumping duties on Star Pipe's entries entirely hypothetical. While the degree to which [[

]], the resolution of which may ultimately turn on the effective date of Commerce's scope determination, "a federal court does not have the 'power to render an advisory opinion on a question simply because [it] may have to face the same question in the future.'" *Verson*, 22 CIT at 153–54, 5 F. Supp. 2d at 966 (quoting *Nat'l Labor Relations Bd. v. Globe Sec. Servs., Inc.,* 548 F.2d 1115, 1118 (3rd Cir. 1977)). Under these circumstances, the court concludes that this issue is moot and any opinion on retroactivity would be impermissibly advisory.[24]

CONCLUSION

For the foregoing reasons, the court finds that Commerce's determination that STR components of Star Pipe's Joint Restraint Kits are within the scope of the *STR Order* is supported by substantial evidence and in accordance with law. The court further denies Plaintiff's challenge to Commerce's liquidation instructions as moot. Judgment will enter accordingly.

Dated: July 8, 2019
New York, New York

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

[24] Additionally, Star Pipe has waived any argument that [[

]] represents *a retroactive assessment* of duties by CBP in accordance with Commerce's liquidation instructions by failing to present the argument in its briefs, which were filed after the entries liquidated. *See Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) ("[A] party waives arguments based on what appears [or does not appear] in its brief."); Hymel Decl., Ex. 1 (dates of liquidation from April to May 2018). *See generally* Pl.'s Mem. (filed June 22, 2018); Pl.'s Reply (filed Oct. 30, 2018).

Slip Op. 19–87

AG DER DILLINGER HUTTENWERKE, Plaintiff, ILSENBURGER GROBBLECH GMBH, SALZGITTER MANNESMANN GROBBLECH GMBH, SALZGITTER FLACHSTAHL GMBH, SALZGITTER MANNESMANN INTERNATIONAL GMBH, and FRIEDR. LOHMANN GMBH, Consolidated Plaintiffs, and THYSSENKRUPP STEEL EUROPE AG, Plaintiff-Intervenor, v. UNITED STATES, Defendant, NUCOR CORPORATION and SSAB ENTERPRISES LLC, Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Consol. Court No. 17–00158

[Considering Commerce's *Final Determination* on the application of partial adverse facts available.]

Dated: July 16, 2019

Marc E. Montalbine, *Gregory S. Menegaz*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC for Plaintiff AG der Dillinger Hüttenwerke and Consolidated Plaintiff Friedr. Lohmann GmbH.

David E. Bond, *Richard G. King*, *Ron Kendler*, and *Allison J. Kepkay*, White and Case LLP, of Washington, DC, for Consolidated Plaintiffs Ilsenburger Grobblech GmbH, Salzgitter Mannesmann Grobblech GmbH, Salzgitter Flachstahl GmbH, and Salzgitter Mannesmann International GmbH.

Robert L. LaFrankie, Crowell & Moring LLP, of Washington, DC, for Plaintiff-Intervenor thyssenkrupp Steel Europe AG.

Vito S. Solitro, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Natan P. L. Tubman*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, DC.

Alan H. Price, *Christopher B. Weld*, and *Stephanie M. Bell*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Nucor Corporation.

OPINION and ORDER

Gordon, Judge:

This action involves the final affirmative antidumping duty investigation of certain carbon and alloy steel cut-to-length plate ("CTL plate") from the Federal Republic of Germany. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany*, 82 Fed. Reg. 16,360 (Dep't of Commerce Apr. 4, 2017) ("*Final Determination*"), and accompanying Issues and Decision Memorandum, A428–844 (Dep't of Commerce Mar. 29, 2017), available at http://enforcement.trade.gov/frn/summary/germany/2017–06628–1.pdf (last visited this date) ("*Decision Memorandum*").

Before the court are the motions for judgment on the agency record filed by Plaintiff AG der Dillinger Hüttenwerke ("Dillinger") and Consolidated Plaintiffs Ilsenburger Grobblech GmbH, Salzgitter

Mannesmann Grobblech GmbH, Salzgitter Flachstahl GmbH, Salzgitter Mannesmann International GmbH (collectively, "Salzgitter"), and Friedr, Lohmann GmbH (all, together with Dillinger, "Plaintiffs"). *See* Pl. Dillinger Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 40[1] ("Dillinger Br."); Salzgitter Consol. Pls.' Rule 56.2 Mot. for J. on the Agency R., ECF No. 43 ("Salzgitter Br."); Def.'s Mem. Opp. Pls.' Rule 56.2 Mots. for J. on the Admin. R., ECF No. 55 ("Def.'s Resp."); Def.-Intervenor Nucor Corporation Resp. Br., ECF No. 58; Reply Br. of Pl. Dillinger, ECF No. 62 ("Dillinger Reply"); Reply in Supp. of Consol. Pls.' Rule 56.2 Mot. for J. on the Agency R., ECF No. 64 ("Salzgitter Reply"). Plaintiff-Intervenor thyssenkrupp Steel Europe AG ("thyssenkrupp") has also filed a brief in support of Plaintiff Salzgitter's Rule 56.2 Motion. *See* Pl.-Intervenor's Memorandum of Law in Support of Pl. Salzgitter's Rule 56.2 Mot., ECF No. 41 ("thyssenkrupp Br."). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[2] and 28 U.S.C. § 1581(c) (2012).

This opinion addresses Plaintiffs' claims regarding the application of partial adverse facts available ("AFA") by the U.S. Department of Commerce ("Commerce") for certain home market CTL plate sales made by their respective affiliates. The remaining issues, which are raised only by Dillinger, will be addressed in a separate opinion.

I. BACKGROUND

In its initial questionnaire, Commerce asked respondents Dillinger and Salzgitter to provide, among other things, the identity of the manufacturer of each CTL plate sold during the period of investigation ("POI") (April 1, 2015, through March 31, 2016), along with its respective price, in their respective United States' and German sales databases. *See* Salzgitter Questionnaire at B-25, C-31; Dillinger Questionnaire at B-25, C-31. Commerce sent multiple supplemental questionnaires to Dillinger and Salzgitter requesting additional information covering various subjects, including the identity of the manufacturer(s) of certain home market CTL plate sales that they claimed could not be provided without inordinate difficulty.

Dillinger and Salzgitter made sales during the POI in the home market to affiliated parties, as defined in 19 U.S.C. § 1677(33). Commerce accordingly tested those sales to determine whether they were made at arm's-length prices. *See* 19 C.F.R. § 351.403(c).

[1] All citations to parties' briefs and the agency record are to their confidential versions unless otherwise noted.

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

Commerce preliminarily found that Dillinger's reported sales to two affiliated resellers did not pass the arm's-length test. *Id.* Because of gaps in the reported downstream sales of those affiliates, Commerce preliminarily treated all of their sales as being Dillinger-produced CTL plate. *Id.* Commerce then requested additional information from Dillinger for consideration of these sales for the final determination. Dillinger's affiliates were eventually able to gather some of the missing CTL plate manufacturer information. *See* Dillinger's Third Supplemental Section B&C Questionnaire Response at 5, PD 434.

Salzgitter, for its part, responded to Commerce's initial questionnaire by stating that certain downstream sales by its affiliated reseller were not being reported because it could not identify the original manufacturer of the CTL plate sold without performing a burdensome manual check. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany*, 81 Fed. Reg. 79,446 (Dep't of Commerce Nov. 14, 2016) and accompanying Preliminary Decision Memorandum at 12, PD 436, available at http://ia.ita.doc.gov/frn/summary/germany/2016–27313–1.pdf (last visited this date). Salzgitter specifically noted that "while it is able to do so for customers upon request, its accounting system does not track merchandise by manufacturer once placed into inventory and, thus, it would be 'unreasonably burdensome' to obtain the requested information." *Id.* Commerce requested in two separate supplemental questionnaires that Salzgitter provide these unreported sales in case the sales to the affiliated reseller failed the arm's-length test. Commerce preliminarily found that Salzgitter was able to report these sales but chose not to identify all of its affiliated reseller's sales of Salzgitter-produced merchandise, therefore Commerce applied facts available, in part, with an adverse inference to account for the affiliated reseller's unreported downstream sales. *Id.* Commerce indicated that it intended to examine the issue further at verification before coming to a conclusion in the final determination. *See id.*

In the end, Commerce found both Dillinger's and Salzgitter's efforts insufficient to complete identification of the manufacturer and applied partial AFA to those CTL plate sales when determining the applicable dumping margins. *See Decision Memorandum* at 27–34, 61–64. For Dillinger, because its sales to its home market affiliate failed the arm's-length test and exceeded five percent of Dillinger's total reported home market sales during the POI, Commerce continued to include all affiliate transactions of CTL plate of unidentified manufacturers but substituted for Dillinger's reported prices the "highest non-aberrational net price among Dillinger's downstream

home market sales." For Salzgitter, Commerce included all of Salzgitter's affiliates' downstream home market CTL plate sales with unidentified manufacturers, but applied the highest non-aberrational net price among those sales to all such sales.

II. STANDARD OF REVIEW

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2019).

III. DISCUSSION

A. Resort to "Facts Available"

"The manufacturer information is critical for the Department's margin analysis because the Department matches sales by, among other criteria, manufacturer." *Decision Memorandum* at 32. Without the identity on the record of the manufacturers of all CTL plate transactions sold in the home market, Commerce faced the dilemma of how to treat those sales in the margin calculation. The sole issue for the purpose of this opinion is whether, as a solution to that problem, Commerce's resort to "facts otherwise available" (or "facts available") with an adverse inference in its selection is reasonable (supported by substantial evidence).

Dillinger first challenges Commerce's determination by arguing that it notified Commerce of its difficulty in tracing the CTL plate manufacturer for some transactions and requested accommodation pursuant to 19 U.S.C. § 1677m(c)(1) and contending that Commerce never properly responded to that notification. Dillinger Br. at 20 (citations omitted). However, as explained in *Dillinger France S.A., v. United States*, 42 CIT ___, ___, 350 F. Supp. 3d 1349, 1364 (2018), a § 1677m(c)(1) notice to Commerce must include "a full explanation and suggested alternative forms in which" the information could be provided. Dillinger's notification to Commerce in the underlying proceeding here did not suggest any alternative form(s) of information that Commerce could use in place of the missing information. Dillinger's notification lacked the required "suggested" alternatives, and therefore did not trigger Commerce's obligations under § 1677m(c). By contrast, Commerce properly alerted Dillinger and Salzgitter of their deficiencies in providing the identities of all the manufacturers of all CTL plate sold by their affiliates. *See* 19 U.S.C. § 1677m(d) (upon receipt of non-compliant response to request for information, Commerce required to inform respondent promptly about "the nature of the deficiency").

Whenever information necessary to a determination is missing from the record, Commerce must rely on other facts of record as an appropriate surrogate. 19 U.S.C. § 1677e(a)(1). Subsection 1677e(a)(2) specifies that whenever an interested party or other person (A) "withholds," or (B) "fails" to provide requested information by the deadlines set for its submission and in the form and manner requested, or (C) "significantly impedes" the proceeding, or (D) provides requested information that cannot be verified, Commerce must resort to facts available. 19 U.S.C. § 1677e(a)(2).

A § 1677e(a)(2)(B) "failure" generally covers, but is not limited to, the process of responding to and providing requested information. Such a "failure" is subject to the notification to Commerce of difficulties in responding, discussed above. *See* 19 U.S.C. § 1677m(c). It is also subject to 19 U.S.C. § 1677m(e), which provides that Commerce "shall not decline to consider" necessary "information" if (1) the submission is timely, (2) the information is verifiable, (3) it is "not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination," (4) the interested party "acted to the best of its ability" to provide it, and (5) the information can be used without undue difficulties. 19 U.S.C. § 1677m(e).

Plaintiffs argue that their submissions in response to Commerce's questionnaires met all of these criteria. However, the "information" to which § 1677m(e) refers, in the context of this proceeding, is the

missing manufacturer information, not the remainder of "the information" that Plaintiffs submitted. Plaintiffs acknowledge that the identity of the CTL plate manufacturers is relevant to whether home market transactions should or should not be included in margin calculations, and that they did not identify all of them. Plaintiffs thus cannot escape the conclusion that they failed to satisfy § 1677m(e) with respect to that information. In short, Plaintiffs' reliance upon § 1677m(e) is misplaced.

As noted, Commerce disagreed with Plaintiffs that there was no "gap" in the record. Plaintiffs argue, however, that the affected transactions were "small," and they attempt to minimize the lack of full information on the identities of the CTL plate manufacturers and that information's relevance by arguing that there were no "gaps" in their respective, verified, affiliate home market price databases. *See* Salzgitter Br. at 4–16; Dillinger Br. at 20–22, 24.

However, the price data for those transactions were not the problem. Indeed, they were irrelevant to solving Commerce's conundrum of an incomplete record. The real problem for Commerce was that it could not determine whether to include or exclude the CTL plate transactions from Dillinger's and Salzgitter's margin calculations because of the missing manufacturer information. Accordingly, Commerce reasonably determined that it must resort to "facts available" pursuant to 19 U.S.C. § 1677e(a).

B. Adverse Inference

Having determined that it had to resort to facts available to substitute for the missing CTL plate manufacturer information, Commerce then faced the related question of whether the circumstances called for an adverse inference. Commerce concluded that the responsibility for the dilemma before it rested with respondents Dillinger and Salzgitter, who had failed to provide the necessary information. *Cf. QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (adequacy of record).

19 U.S.C. § 1677e(b) provides that 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, it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." This standard "requires the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability,

regardless of motivation or intent." *Id.* Pursuant to this standard, it is irrelevant whether the respondent was intentionally evasive, or whether respondent thought it had a valid legal basis for withholding the requested information. *See Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1347 (Fed. Cir. 2016) ("Congress decided what requirements Commerce must fulfill in reaching its determinations, § 1677e(b), and we do not impose conditions not present in or suggested by the statute's text").

Respondents are required to "(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." *Nippon Steel*, 337 F.3d at 1382. Applying these standards, Commerce explained that "[t]he information in question . . . is the type of information that a large steel manufacturer such as Dillinger should reasonably be able to provide, in order to provide its customers with the mill test certificates for the CTL plate they purchase." *Decision Memorandum* at 64. Commerce presumed that Dillinger was "familiar with all of the records" maintained by its affiliates and that those affiliates "possessed information about the manufacturers of the CTL plate at issue, yet reported the producers of only some of the CTL plate, but not all." *Id.* Commerce found that "Dillinger's failure to report the requested manufacturer information, accurately and in the manner requested, using the records over which it maintained control, indicates that Dillinger did not act to the best of its ability to comply with our requests for information." *Id.*

Commerce reasoned similarly as to Salzgitter that the identity of the manufacturers of the CTL plate resold by its affiliate "is the type of information that a respondent should have reasonably anticipated being required to provide to its customers for quality assurance and warranty claims[,]" and at verification "Salzgitter was able to identify the manufacturer of a sale in the [separate] sales database when it attempted to obtain that information." Decision Memorandum at 33.

Commerce stressed that it provided Dillinger and Salzgitter "multiple" opportunities to remedy the deficiencies in their affiliates' downstream sales, and that Plaintiffs did not remedy those deficiencies. *Id.* at 33–34, 64. Because the additional requested information was not forthcoming, Commerce determined that Dillinger and Salzgitter had not cooperated to the best of their ability by providing

the necessary information to determine how to attribute the transactions with unknown manufacturers.

Plaintiffs vigorously contest this determination. They argue that they exerted their best efforts to comply with Commerce's requests for information, and that there was no need or justification for imposing an adverse inference upon resort to facts available. Both Plaintiffs contend that it was unreasonable for Commerce to determine that they "withheld" information or "failed" to (fully) respond because *Nippon Steel* does not require perfection.

Dillinger argues that it exerted considerable efforts in complying with Commerce's information requests, and that "[f]ar from showing that Dillinger failed to put forth its maximum effort to provide the Department with information, the record shows that Dillinger expended Herculean efforts to provide the Department with all the information it requested." Dillinger Reply at 30–32. Dillinger also maintains that the very fact that Commerce treated all the transactions for which a manufacturer could not be identified as if they had been produced by Dillinger and included all of them in the margin calculation implies that this "fully resolved" the issue of the missing manufacturer information. *Id.* Dillinger's conclusion, though, is not apparent from the record. The record does not disclose whether attribution of the manufacture of all downstream sales of CTL plate in the home market to Dillinger and inclusion of unadjusted prices for all such sales in the margin calculation would have been adverse, neutral, or beneficial. Dillinger's best efforts arguments are therefore unpersuasive.

Salzgitter, for its part, emphasizes that it "did not refuse" to provide requested information. It contends that its affiliate's record-keeping systems during the POI complied with the rules and regulations that apply to its commercial activities, and that a manual search for the missing information was only theoretically possible. Further, Salzgitter argues that Commerce "verified," based on the 10-minute turnaround time it took to locate and match one CTL plate manufacturer at that time, that it would have taken 4,667 hours for Salzgitter to provide the missing manufacturer information by manually correlating its two disparate financial accounting and mill certificate management systems. *See* Salzgitter Reply at 4–5 (citations omitted).

Nevertheless, whether that single incident amounts to verification of the time and effort involved to "resolve" the missing manufacturer information for the affected CTL plate transactions, it neither excuses nor resolves the problem that Commerce still faced as to whether to include or exclude those transactions in Salzgitter's margin calculation. Salzgitter reiterates that in response to one of Commerce's

requests, it submitted a "separate database" of CTL plate sales pertaining to transactions with missing manufacturer data. Salzgitter proposed three options to Commerce for using this "separate"/revised database in its margin calculation, namely, that Commerce could (1) treat all such sales as if they were not Salzgitter-manufactured plate, (2) treat all such sales as if they were Salzgitter-manufactured plate, or (3) treat some of the sales in the separate database as if they were Salzgitter-manufactured plate based on the ratio of plate purchased from Salzgitter affiliates versus other mills during the period of investigation, and that if any of these proposals had been adopted the dumping margins "would have been nil." Salzgitter Br. at 14–15; Salzgitter Reply at 10.

Commerce interpreted Salzgitter's proposals as arguing for "neutral" facts available to substitute for the missing CTL plate manufacturer information. *See Decision Memorandum* at 31. Commerce, at verification, highlighted that Salzgitter "was able to identify the manufacturer of a sale in the additional SMSD sales database when it attempted to obtain that information" for the final determination. *Decision Memorandum* at 32 (footnote omitted). Commerce further found that Salzgitter's three proposals lacked the type of "connectivity" or indication that any of these proposals would reasonably reflect the missing CTL plate manufacturer information for the relevant transactions.

The court cannot understand why Salzgitter did not just simply conduct a statistical analysis of the 28,000 CTL plate sales with missing manufacturer information, using a sufficient and randomized sample size that was then manually matched to the missing manufacturer information from its legacy mill certificate management system. This approach might have established a statistically valid extrapolation, rather than Salzgitter's mere speculation, of the missing manufacturer information based on the sample's actual ratio of Salzgitter-manufactured to non-Salzgitter-manufactured CTL plate sales. This approach would also have presented Commerce with an evidentiary proffer that Commerce would have been hard pressed to reasonably reject, and it would have better carried Salzgitter's burden to create an adequate record. *QVD Food*, *supra*, 658 F.3d at 1324. And the court cannot understand why Salzgitter, having failed to figure out that relatively straightforward approach out on its own, did not more completely avail itself of the full operation of 19 U.S.C. § 1677m(c)(1) & (2) and promptly disclose its difficulties to Commerce *and* request assistance to figure out a path to ascertain the necessary information. An interested party's unilateral assertion of difficulty, like Salzgitter's here, rather than a more straightforward request for

help, is fraught with risk. *See Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360–61 (Fed. Cir. 2018) (affirming Commerce's application of AFA where respondent failed to indicate that it was *unable* to provide relevant information nor suggest alternative for provision of that information).

In conclusion, the record does not appear as detailed with Plaintiffs' efforts to obtain the missing information as they argue before the court, and on those points the court mainly confronts only self-serving statements or interpretations of the record. Importantly, Plaintiffs fail to identify where the record indicates the effect, if any, on Dillinger's and Salzgitter's margins if complete manufacturer information had been provided for all home market CTL plate sales. Accordingly, taking the record as a whole, Commerce's imposition of an adverse inference in the selection of facts available is reasonable.

C. The Selected Adverse Facts Available

As partial AFA, for the final margin calculations Commerce applied the highest non-aberrational net price observed among Plaintiffs' downstream home market sales for which the identity of the manufacturer of the CTL plate had not been reported to all such sales. *Decision Memorandum* at 10, 11, 34, 64. Given this determination, Plaintiffs challenge whether it was reasonable for Commerce to substitute downstream price information covering CTL plate for which manufacturer information was missing from the record.

In *Dillinger France*, *supra*, the court was confronted with a near identical issue. *Compare* Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of *Certain Carbon and Alloy Steel Cut-To-Length Plate from France*, A-427–828, at Cmt. 5 (Dep't of Commerce Mar. 29, 2017), *available at* https://enforcement.trade.gov/frn/summary/france/2017–06627–1.pdf (last visited this date), *with Decision Memorandum* at Cmts. 2 & 20; *see also Dillinger France*, 42 CIT at ___, 350 F. Supp. 3d at 1361–64 (discussing application of partial AFA to Dillinger France for failure to report manufacturer of CTL plate in certain downstream home market sales of affiliates). Plaintiff in that case argued that it (1) put forth its best efforts to provide the price and manufacturer data requested by Commerce, and that (2) for transactions where the manufacturer data was unknown but the sales price was contained in the record, Commerce impermissibly replaced the record sales prices with the highest non-aberrational net price among that plaintiff's downstream home market sales. There, the court upheld Commerce's decision that an adverse inference was warranted, but also noted that "Commerce did not explain what

authority permitted it to replace known information with adverse facts available[,]" 42 CIT at ___, 350 F. Supp. 3d at 1364, and remanded for further consideration. Here, the court does not reach the same conclusion, as Commerce has clear statutory authority pursuant to 19 U.S.C. § 1677m(d) to "*disregard all or part* of the original and subsequent responses" in an adverse inference scenario. 19 U.S.C. § 1677m(d) (emphasis added).

In any event, and importantly as to this issue, on remand Commerce "relied on the Court's statement that 'the reliability of the reported sales prices has not been called into question and there is no informational gap in the sale prices for Commerce to fill." *See* Final Results of Redetermination Pursuant to Court Remand at 6, *Dillinger France S.A. v. United States*, No. 17–00159 (CIT Mar. 11, 2019), ECF No. 56–1. Commerce elaborated that "[g]iven this holding, and contrary to Nucor's argument that we should use the highest non-aberrational price as partial AFA, we find that we cannot ignore record information that is not in dispute, pursuant to the facts on the record of this investigation and the Court's decision." *Id.* As a result, Commerce changed its application of partial AFA and "1) treated these downstream home market sales transactions as Dillinger-France produced plate, rather than treating these transactions as sales of plate produced by an unrelated manufacturer; and 2) relied on the sales prices as reported." *Id.* at 6–7. However, in doing so, Commerce found that "because of the small number of affected transactions whose prices are used as a basis for normal value and which are actually compared to U.S. sale prices, these home market transactions have no measurable impact on Dillinger-France's estimated weighted-average dumping margin." *Id.* at 6.

Reasoned decision-making requires a certain measure of consistency, which is not present across the France and Germany investigations. As noted, the cases share near identical (almost verbatim) Issues and Decision Memoranda on the AFA issue. The court therefore orders Commerce and the parties to review whether the same correction made in *Dillinger France* would have any material effect on the margins in this case, or if it would be immaterial. If the parties conclude that a similar correction as ordered in *Dillinger France* would materially affect the margins, the court will then remand this matter to Commerce to make a similar adjustment to its application of partial AFA to Dillinger and Salzgitter as it did in the *Dillinger France* remand with resulting adjustment of the investigation's margins.[3] Accordingly, it is hereby

[3] Including the "All Others" rate. *See* thyssenkrupp Br. at 4.

ORDERED that Commerce shall determine whether a similar correction as ordered in *Dillinger France* would materially affect the margins in this action; and it is further

ORDERED that Commerce shall notify the court with the results of its analysis on or before August 7, 2019.

Dated: July 16, 2019
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 19–88

DILLINGER FRANCE S.A., Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION and SSAB ENTERPRISES LLC, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 17–00159

[Commerce's Final Results of Redetermination Pursuant to Court Remand are sustained.]

Dated: July 17, 2019

Marc E. Montalbine, DeKieffer & Horgan PLCC, of Washington, DC, for plaintiff. With him on the brief were *Gregory S. Menegaz* and *Alexandra H. Salzman*.

Kelly Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director and *Vito S. Solitro*, Attorney. Of counsel on the brief was *Jessica DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, Wiley Rein,LLP, of Washington, DC, for defendant-intervenor, Nucor Corporation. With him on the brief were *Christopher B. Weld* and *Stephanie M. Bell.*

Roger B. Schagrin, Schagrin Associates, of Washington DC, for defendant-intervenor, SSAB Enterprises LLC.

OPINION

Katzmann, Judge:

The court returns to Plaintiff Dillinger France S.A.'s ("Dillinger") challenge to the Department of Commerce's ("Commerce") final affirmative determination of sales at less-than-fair value in its antidumping investigation of certain carbon and alloy steel cut-to-length plate from France. *Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Determinations for France, the Federal Republic of Germany, the Republic of Korea and Taiwan and Antidump-*

ing Duty Orders ("*Final Determination*"), 82 Fed. Reg. 24,096 (May 25, 2017), P.R. 456 and accompanying Issues and Decision Memorandum (Mar. 29, 2017), P.R. 445. Before the court now are Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Remand Results*") (Dep't Commerce Mar. 11, 2019), ECF No. 56, which the court ordered in *Dillinger France S.A. v. United States*, 42 CIT __, 350 F. Supp. 3d 1349 (2018). In its previous decision, *id.* at 1377, the court sustained most of Commerce's determination, including Commerce's use of partial adverse facts available ("AFA"), but remanded to Commerce to reconsider and explain how it applied partial AFA to certain of Dillinger's affiliated service center sales. On remand, Commerce modified and explained its application of partial AFA, though Dillinger's antidumping margin remained unchanged. *Remand Results* at 1–2. Defendant the United States ("the Government") and Dillinger request that the court sustain Commerce's *Remand Results*. Def.'s Resp. to Comments on the Dep't of Commerce's Remand Results ("Def.'s Br."), Apr. 24, 2019, ECF No. 59; Pl.'s Reply to Comments on Remand Results ("Pl.'s Br."), Apr. 24, 2019, ECF No. 60. Defendant-Intervenor Nucor Corporation ("Nucor"), however, argues that Commerce's *Remand Results* are unsupported by substantial evidence and contrary to law because Commerce failed to adequately explain its use of record price data and that use of this data is contrary to the purpose of the AFA statute. Def.-Inter. Nucor Corp.'s Comments on Final Results of Redetermination Pursuant to Court Remand ("Nucor's Br."), Apr. 9, 2019, ECF No. 58. The court sustains Commerce's *Remand Results*.

BACKGROUND

The relevant legal and factual background of the proceedings involving Dillinger has been set forth in greater detail in *Dillinger*, 350 F. Supp. 3d at 1356–58. Information pertinent to the instant opinion is set forth below.

On May 15, 2017, Commerce issued its *Final Determination* imposing an antidumping margin of 6.15 percent on Dillinger's cut-to-length plate products. *Id.* at 1357. Dillinger challenged several aspects of Commerce's *Final Determination*, including its application of partial AFA to the downstream sales of some affiliated service centers. *Id.* at 1361. Dillinger had been able to report the prices for all of its affiliated service centers' sales, but for some of the transactions, Dillinger had been unable to identify which manufacturer produced the plate that had been sold. *Id.* at 1357. For those transactions in which the manufacturer remained unknown, Commerce applied par-

tial AFA, specifically by (1) attributing all unidentified producer sales to Dillinger and (2) replacing the reported sales prices for these transactions with the "highest non-aberrational net price." *Id.* at 1357–58.

The court determined that Commerce "permissibly resorted to partial AFA," but that "Commerce did not adequately justify its decision to ignore existing record price data and replace this record evidence with the highest non-aberrational net price." *Id.* at 1361. Noting that AFA can only be applied to fill gaps in the record and that the accuracy of the price data had not been called into question, the court held that "Commerce did not explain what authority permitted it to replace known [price] information with adverse facts available." *Id.* at 1364. The court remanded to Commerce to better explain or reconsider how it applied AFA and otherwise sustained its *Final Determination*. *Id.* at 1377.

On remand, Commerce continued to apply partial AFA to sales where the plate manufacturer was unknown but did not use the highest non-aberrational net price. Instead, "recogniz[ing] the [c]ourt's statement that 'the reliability of the reported sales prices has not been called into question and there is no informational gap in the sales prices for Commerce to fill,'" *Remand Results* at 4, Commerce treated the relevant "transactions as Dillinger-produced plate" and "relied on the sale prices as reported." *Id.* at 6–7. Commerce also noted that "in our application of partial AFA, there is no impact on Dillinger France's estimated weighted-average dumping margin." *Id.* at 4. Nucor submitted its comments on the *Remand Results* on April 9, 2019, and Dillinger and the Government responded to Nucor's comments on April 24, 2019. Nucor's Br.; Pl.'s Br.; Def.'s Br.

DISCUSSION

Commerce's *Remand Results* are consistent with the court's remand order and previous opinion. Nonetheless, Nucor contends that the *Remand Results* were unsupported by substantial evidence and not in accordance with law because (1) Commerce's decision to use the reported sales price data, rather than the highest non-aberrational net price, is not sufficiently adverse to Dillinger to "effectuate the purpose of the AFA statute" and (2) Commerce did not adequately explain its reasons for applying AFA in this manner. Nucor's Br. at 5–8. The court is not persuaded by these arguments.

Contrary to Nucor's assertions, Commerce complied with the court's instruction to adequately explain and justify its method of applying partial AFA:

> [W]e understand the [c]ourt's decision to mean that, while Commerce's application of partial AFA to these downstream sales was supported by substantial evidence, our method of applying partial AFA (by replacing the reported sales prices with the highest non-aberrational net price among Dillinger France's downstream sales), in this particular case, was not adequately justified. Specifically, we relied on the [c]ourt's statement that 'the reliability of the reported sales prices has not been called into question and there is no informational gap in the sales prices for Commerce to fill.' Given this holding, and contrary to Nucor's argument that we should use the highest non-aberrational price as partial AFA, we find that we cannot ignore record information that is not in dispute, pursuant to the facts on the record of this investigation and the [c]ourt's decision . . . [W]e have reevaluated the record evidence and determine that, because of the small number of affected transactions whose prices are used as a basis for normal value and which are actually compared to U.S. sale prices, these home market transactions have no measurable impact on Dillinger France's estimated weighted-average dumping margin. Thus, as our application of partial AFA to calculate the estimated weighted-average dumping margin, we: 1) treated these downstream home market sales transactions as Dillinger France-produced plate, rather than treating these transactions as sales of plate produced by an unrelated manufacturer; and 2) relied on the sale prices as reported.

Remand Results at 6–7.

Commerce's method of applying partial AFA also comports with the statutory purpose of AFA. "An AFA rate selected by Commerce must reasonably balance the objectives of inducing compliance and determining an accurate rate," *SolarWorld Americas, Inc. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1362, 1366 (2017) (citing *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)), and as discussed in *Dillinger*, 350 F. Supp. 3d at 1364, Commerce may apply AFA only to informational gaps in the record. Here, Commerce permissibly applied partial AFA to replace information that is missing from the record — the manufacturer of some of the plate in the disputed transaction — by attributing all sales to Dillinger.

Nucor contends that Commerce should have also substituted the highest non-aberrational net price for the reported sales data to adequately deter future noncooperation by Dillinger. Nucor's Br. at 4, 6–7. However, Nucor provides no evidence that the rate selected is not

sufficiently adverse; indeed, as Commerce notes in the *Remand Results*, using the reported sales prices had "no impact on Dillinger France's estimated weighted-average dumping margin." *Remand Results* at 4. Additionally, as the "reliability of the reported sales prices has not been called into question," *Dillinger*, 350 F. Supp. 3d at 1364, Commerce's decision to use the sales prices "balance[s] the objectives of inducing compliance and determining an accurate rate," *see SolarWorld*, 229 F. Supp. 3d at 1366 (citing *F.lli De Cecco*, 216 F.3d at 1032). Commerce's use of the reported sales data is thus consistent with the statutory purpose of AFA, and its detailed explanation fulfills the court's directive to justify its method of applying partial AFA in this case.

CONCLUSION

Commerce's *Remand Results* are sustained.

SO ORDERED.

Dated: July 17, 2019
New York, New York

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