U.S. Court of International Trade

Slip Op. 19–56

ONE WORLD TECHNOLOGIES, INC., Plaintiff, v. UNITED STATES, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND COMMISSIONER KEVIN K. MCALEENAN, Defendants, and THE CHAMBERLAIN GROUP, INC. AND UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 19–00017

[Granting Plaintiff's motion to dismiss under USCIT Rule 41(a)(2).]

Dated: May 9, 2019

Jason C. White, *Michael J. Abernathy*, and *Nicholas A. Restauri*, Morgan, Lewis & Bockius, LLP, of Chicago, IL, for Plaintiff One World Technologies, Inc.

Guy R. Eddon, *Amy M. Rubin*, and *Marcella Powell*, International Trade Field Office, U.S. Department of Justice, of New York, N.Y., and *Edward F. Kenny* and *Alexander J. Vanderweide*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendants United States, U.S. Department of Homeland Security, U.S. Customs and Border Protection, and Commissioner Kevin K. McAleenan. With them on the brief was *Joseph H. Hunt*, Assistant Attorney General. Of counsel was *Michael Heydrich*, Office of Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

Sidney A. Rosenzweig and *Carl P. Bretscher*, U.S. International Trade Commission, of Washington, D.C., for Defendant-Intervenor U.S. International Trade Commission.

Joseph V. Colaianni, Jr., *Benjamin Elacqua*, and *John T. Johnson*, Fish & Richardson, P.C., of Washington, D.C., Houston, TX, and New York, N.Y., for Defendant-Intervenor The Chamberlain Group, Inc.

OPINION

Choe-Groves, Judge:

This opinion concludes the ongoing litigation in the U.S. Court of International Trade between Plaintiff One World Technologies, Inc. ("Plaintiff" or "One World") and the United States, United States Department of Homeland Security, United States Customs and Border Protection, and Commissioner Kevin K. McAleenan (collectively, "Defendants" or "the Government"). Before the court is One World's Joint Motion to Dismiss or to Stay the Case Pending Dismissal of Appeals, May 1, 2019, ECF No. 162 ("Joint Motion to Dismiss"). For the reasons that follow, the court grants Plaintiff's Joint Motion to Dismiss.

BACKGROUND

One World produces Garage Door Openers ("GDOs") under the brand name Ryobi. Pl. Am. Compl. ¶ 8, Apr. 2, 2019, ECF No. 120 ("Pl. Am. Compl."). One World redesigned its GDOs ("Redesigned GDOs") following proceedings before the U.S. International Trade Commission ("ITC"). Pl. Am. Compl. ¶ 1. On March 30, 2018, One World requested a pre-importation administrative ruling under 19 C.F.R. § 177 ("One World's Ruling Request") from U.S. Customs and Border Protection ("CBP" or "Customs"). Pl. Am. Compl. ¶ 68; Pl. Am. Compl. Ex. V, Apr. 2, 2019, ECF No. 120–22 ("Pl. Am. Compl. Ex. V"). One World's Ruling Request asked Customs to determine that Redesigned GDOs fall outside the scope of the Limited Exclusion Order issued by the ITC. Pl. Am. Compl. ¶ 69; Pl. Am. Compl. Ex. V at 2, 11–14.

While awaiting Customs' ruling letter, One World attempted to import a shipment of Redesigned GDOs on or about June 29, 2018 (Entry No. 442–75629994). Pl. Am. Compl. ¶ 77. Customs denied entry of the shipment, One World protested (Protest No. 160118100231), and Customs issued HQ H300129. *Id.* ; *see* Pl. Am. Compl. Ex. F, at 1, Apr. 2, 2019, ECF No. 120–6 ("Pl. Am. Compl. Ex. F"). In HQ H300129, Customs found that the merchandise in the shipment "appears to meet all of the limitations of at least independent claims 1 and 9 of the '319 patent" and One World "has not met its burden to establish that the merchandise at issue does not infringe these claims." Pl. Am. Compl. Ex. F at 38.

Customs responded to One World's Ruling Request and issued a pre-importation ruling, designated HQ H295697, on July 20, 2018. Pl. Am. Compl. ¶ 73; Pl. Am. Compl. Ex. W, Apr. 2, 2019, ECF No. 120–23 ("Pl. Am. Compl. Ex. W"); *see also* Defs' Mem. in Supp. of Mot. to Dismiss 2, 6, Apr. 16, 2019, ECF No. 143. In HQ H295697, Customs again found that One World did not meet its burden to establish that the Redesigned GDOs did not infringe the '319 patent. Pl. Am. Compl. Ex. W at 35.

Plaintiff filed suit in the U.S. Court of International Trade to challenge Customs' protest decision and requested a Temporary Restraining Order ("TRO") and Preliminary Injunction ("PI") on September 13, 2018. Summons, *One World Techs., Inc. v. United States*, No. 18-cv00200-JCG (CIT Sept. 13, 2018), ECF No. 1; Complaint, *One World Techs., Inc. v. United States*, No. 18-cv-00200-JCG (CIT Sept. 13, 2018), ECF No. 6; Pl. One World Tech.'s Mot. for TRO & Prelim. Inj., *One World Techs., Inc. v. United States*, No. 18-cv-00200-JCG (CIT Sept. 13, 2018), ECF No. 5. The court issued an opinion in *One World Techs., Inc. v. United States*, 42 CIT __, 357 F. Supp. 3d 1278

(2018) ("*One World I*"), on December 14, 2018, which conducted a claim construction analysis and infringement analysis of the Redesigned GDOs. *Id.* at __, 357 F. Supp. 3d at 1289–93. The court concluded that because One World's Redesigned GDOs did not contain all the limitations of the '319 Patent, One World's Redesigned GDOs did not infringe the '319 Patent and Customs determined improperly that One World's Redesigned GDOs fell within the scope of the ITC's Limited Exclusion Order. *Id.* at 1293. The preliminary injunction directed release of the shipment in that case. Order at 2, *One World Techs., Inc. v. United States*, No. 18-cv-00200-JCG (CIT Dec. 14, 2018), ECF No. 72.

Plaintiff then attempted to import two shipments of Redesigned GDOs (Entry Nos. 442–75658274 ("First Shipment") and 442–75658266 ("Second Shipment")) on January 2, 2019. *See* Entry Summary, No. 442–75658274, Jan. 30, 2019, ECF No. 21–1; Detention Notice, Entry No. 442–75658274, Pl. Am. Compl. Ex. H, Apr. 2, 2019, ECF No. 120–8; Entry Summary, No. 442–75658266, Jan. 30, 2019, ECF No. 21–2. Customs detained the First and Second Shipments on January 15, 2019 and January 17, 2019, respectively. Pl. Am. Compl. ¶¶ 11–16; Pl. Am. Compl. Ex. H, Apr. 2, 2019, ECF No. 120–8; Pl. Am. Compl. Ex. I, Apr. 2, 2019, ECF No. 120–9. Plaintiff attempted to import an additional shipment of Redesigned GDOs on January 22, 2019 (Entry No. 442–75661187 ("Third Shipment")), and filed this suit on January 25, 2019, shortly before another shipment of Redesigned GDOs was imported on January 29, 2019 (Entry No. 442–75661948 ("Fourth Shipment")). Pl. Am. Compl. ¶¶ 17–22; Pl. Am. Compl. Ex. Q, Apr. 2, 2019, ECF No. 120–17; Summons, Jan. 25, 2019, ECF No. 1; Compl., Jan. 25, 2019, ECF No. 6 ("Compl."); Pl. Am. Compl. Ex. R, Apr. 2, 2019, ECF No. 120–18.

The court held a TRO, PI, and Subject Matter Jurisdiction Hearing ("TRO & PI Hr'g") on February 11, 2019. TRO & PI Hr'g, Feb. 11, 2019, ECF No. 50; TRO & PI Hr'g Tr., Feb. 11, 2019, ECF No. 60. Following the hearing, the court issued a TRO directing Defendants not to seize the First, Second, Third, and Fourth Shipments. Order, Feb. 11, 2019, ECF No. 51. The court extended the TRO on February 21, 2019. Order, Feb. 21, 2019, ECF No. 70.

Chamberlain filed a writ of mandamus in the U.S. Court of Appeals for the Federal Circuit on February 13, 2019, which was denied on March 7, 2019. Emergency Pet. for a Writ of Mandamus, *In Re The Chamberlain Group, Inc.*, No. 19–111 (Fed. Cir. Feb. 13, 2019), ECF No. 3; Order, *In Re The Chamberlain Group, Inc.*, No. 19–111 (Fed. Cir. Mar. 7, 2019), ECF No. 29.

While the motion for the preliminary injunction was pending, Plaintiff attempted to import two additional shipments of Redesigned GDOs (Entry Nos. 442–75662557 ("Fifth Shipment") and 442–75665436 ("Sixth Shipment")). Pl. Am. Compl. ¶¶ 23–28. The Fifth and Sixth Shipments were not subject to the original complaint in this case. *See* Compl. Customs proffers that the Fifth Shipment was seized on March 8, 2019 and the Sixth Shipment was seized on March 11, 2019. Defs.' Resp. to Pl.'s Mot. for Leave to File Am. Compl. 3, Mar. 29, 2019, ECF No. 113.[1]

The court issued a preliminary injunction on March 11, 2019. *One World Techs., Inc. v. United States, et al.*, Slip Op. 19–33, 2019 WL 2005746 (CIT Mar. 11, 2019) ("*One World II*"); Order, Mar. 11, 2019, ECF No. 87. The preliminary injunction granted the requested relief in part, directing that the entries of Redesigned GDOs could not be seized. Order, Mar. 11, 2019, ECF No. 87.

The ITC filed a notice of appeal of the preliminary injunction on March 13, 2019. Notice of Appeal, Mar. 13, 2019, ECF No. 90. The Chamberlain Group, Inc. ("Chamberlain") filed a notice of appeal on March 19, 2019. Chamberlain's Notice of Appeal, Mar. 19, 2019, ECF No. 95. After the ITC filed notice of its appeal to the U.S. Court of Appeals for the Federal Circuit, the ITC filed a motion to stay the preliminary injunction and proceedings in the U.S. Court of International Trade on March 13, 2019. Mot. of the ITC to Stay the Prelim. Inj. & All Further Proceedings, Mar. 13, 2019, ECF No. 91.

The Parties submitted a Scheduling Order on March 20, 2019. Corrected Consent Mot. for Scheduling Order, Mar. 20, 2019, ECF No. 97. The court issued a scheduling order on March 21, 2019. Scheduling Order, Mar. 21, 2019, ECF No. 99.

Defendants moved for rehearing or reconsideration pursuant to USCIT Rule 60 on March 21, 2019. Defendants' Mot. for Reh'g or Recons., Mar. 21, 2019, ECF No. 100. One World, Chamberlain, and the ITC responded. Pl.'s Opp'n to Defs' Mot. to Reconsider, Apr. 3, 2019, ECF No. 122; Chamberlain's Resp. to Defs' Mot. for Reh'g or Recons., Apr. 3, 2019, ECF No. 124; Resp. of the ITC to U.S. Defs' Mot. for Reh'g or Recons., Mar. 29, 2019, ECF No. 112.

The ITC moved separately for a stay pending appeal in the U.S. Court of Appeals for the Federal Circuit on March 22, 2019. Non-

[1] Plaintiff initially notified the court of the seizure by letter. Ltr. from Jason C. White to Hon. Jennifer Choe-Groves, Mar. 11, 2019, ECF No. 85. Defendants moved to strike Plaintiff's letter. Defs.' Mot. to Strike, Mar. 12, 2019, ECF No. 88. The court denied Defendants' Motion to Strike on March 13, 2019. Order, Mar. 13, 2019, ECF No. 89; *see also* Defs.' Resp. to Pl.'s Mot. for Leave to File Am. Compl., Mar. 29, 2019, ECF No. 113 (proffering that "these entries have been seized by U.S. Customs and Border Protection").

Confidential Emergency Mot. of Appellant ITC to Stay the Trial Ct.'s Prelim. Inj. & Further Proceedings Below Until Subject Matter Jurisdiction is Established, *One World Techs., Inc. v. United States*, No. 19–1663 (Fed. Cir. Mar. 22, 2019), ECF No. 6–1.

Plaintiff filed a motion to amend the complaint and a motion for supplemental injunctive relief on March 25, 2019. Pl.'s Mot. for Leave to File Am. Compl., Mar. 25, 2019, ECF No. 101; Emergency Mot. for Additional Injunctive Relief, Mar. 25, 2019, ECF No. 103 ("Motion for Additional Injunctive Relief"). Defendants filed an Answer to Plaintiff's original complaint, ECF No. 6, on March 26, 2019. Defs.' Answer & Affirmative Defense, Mar. 26, 2019, ECF No. 104.

Customs filed the administrative record in this case on March 26, 2019. Confidential Administrative R. for U.S. Customs and Border Protection, Mar. 26, 2019, ECF No. 105; Public Administrative R. for CBP, Mar. 26, 2019, ECF No. 106.

Plaintiff filed a motion to supplement its Motion for Additional Injunctive Relief on March 28, 2019. Mot. to Suppl. Emergency Mot. for Additional Injunctive Relief, Mar. 28, 2019, ECF Nos. 108 & 109.

Defendants, Chamberlain, and the ITC responded to One World's motion to amend the complaint. Defs' Resp. to Pl.'s Mot. for Leave to File Am. Compl., Mar. 29, 2019, ECF No. 113; Chamberlain's Opp'n to Pl.'s Mot. for Leave to File Am. Compl., Mar. 29, 2019, ECF No. 114; Opp'n of the ITC to Pl's Mot. for Leave to File Am. Compl., Mar. 28, 2019, ECF No. 110.

The court granted Plaintiff's motion to amend the complaint, and Plaintiff's Amended Complaint was deemed filed on April 2, 2019. Order, Apr. 2, 2019, ECF No. 119; *see also* Pl. Am. Compl. Plaintiff's Amended Complaint alleged two counts. Count I requested injunctive relief and challenged Custom's decision to detain and exclude the First, Second, Third, and Fourth Shipments, and seize the Fifth and Sixth Shipments. Pl. Am. Compl. ¶¶ 83–94. Count II requested declaratory relief and challenged, *inter alia*, Customs' application of HQ H295697 to detain, exclude, or seize present and future shipments of Redesigned GDOs, as well as modify or revoke HQ H295697. Pl. Am. Compl. ¶¶ 95–117.

Defendants, Chamberlain, and the ITC responded to and opposed One World's Motion for Additional Injunctive Relief. Defs.' Resp. to Pl.'s Emergency Mot. for Additional Injunctive Relief, Apr. 2, 2019, ECF No. 117; Chamberlain's Resp. in Opp'n to Pl.'s Suppl. Emergency Mot. for Additional Injunctive Relief, Apr. 2, 2019, ECF No. 116; Opp'n of the ITC to Appellant's Mots. for Additional Injunctive Relief, Apr. 2, 2019, ECF No. 115.

Defendants filed a motion to withdraw their Motion for Rehearing or Reconsideration. Defs.' Mot. for Leave to Withdraw its Mot. for Reh'g or Recons., Apr. 5, 2019, ECF No. 129. One World, Chamberlain, and the ITC responded. Pl.'s Resp. to Defs.' Mot. to Withdraw Their Mot. for Reh'g or Recons., Apr. 10, 2019, ECF No. 136; Chamberlain's Resp. to the Government's Mot. to Withdraw Its Mot. for Reh'g or Recons., Apr. 9, 2019, ECF No. 132; Resp. of the ITC to U.S. Defs.' Mot. to Withdraw Its Mot. for Reh'g or Recons., ECF No. 133.

The court requested that Plaintiff provide additional information regarding the evidence for Plaintiff's Motion for Additional Injunctive Relief to clarify the record. Ltr. from Ct., Apr. 8, 2019, ECF No. 131. One World filed a Table of Evidence on April 10, 2019. Pl.'s Table of Evid., Apr. 10, 2019, ECF No. 135. Defendants and Chamberlain filed objections. Defs.' Resp. to Pl.'s Table of Evid., Apr. 11, 2019, ECF No. 139; Chamberlain's Objs. to Pl.'s Table of Evid., Apr. 11, 2019, ECF Nos. 137 & 138. One World responded to Defendants' and Chamberlain's objections. Pl.'s Resp. to the Government's and Chamberlain's Objs. to Pl.'s Table of Evid., Apr. 12, 2019, ECF Nos. 140 & 141.

Chamberlain filed a motion to partially dismiss Plaintiff's Amended Complaint on April 12, 2019. Chamberlain's Mot. to Partially Dismiss Am. Compl., Apr. 12, 2019, ECF No. 142. Defendants filed a motion to dismiss Plaintiff's Amended Complaint on April 16, 2019. Defs.' Mot. to Dismiss, Apr. 16, 2019, ECF No. 143.

Defendants filed a notice of appeal to the U.S. Court of Appeals for the Federal Circuit on April 17, 2019. Notice of Appeal, Apr. 17, 2019, ECF No. 144. The ITC's motion for a stay pending appeal before the U.S. Court of Appeals for the Federal Circuit was denied on April 17, 2019. Order, *One World Techs., Inc. v. United States*, No. 19–1663 (Fed. Cir. Apr. 17, 2019), ECF No. 37.

Plaintiff provided a status update regarding its Motion for Additional Injunctive Relief on April 19, 2019. Ltr. from One World to Ct., Apr. 19, 2019, ECF Nos. 146 & 147. The court requested that Plaintiff submit evidence in support of One World's status update. Ltr. from Ct., Apr. 24, 2019, ECF No. 154. One World filed a declaration and supporting exhibits on April 25, 2019. Ltr. from One World to Ct., Apr. 25, 2019, ECF Nos. 156 & 157.

One World notified the court of the ITC's Chief Administrative Law Judge's ("ALJ") Recommended Determination in the ITC's modification proceedings regarding the Redesigned GDOs on April 23, 2019, which concluded that the Redesigned GDOs do not infringe Chamberlain's patent and recommended that the ITC amend the prior Limited Exclusion Order to exclude the Redesigned GDOs. Pl. One World's Notice of Suppl. Authority in Supp. of Its Emergency Mot. for

Additional Injunctive Relief, Apr. 23, 2019, ECF Nos. 151 & 152 ("One World's Notice of Supplemental Authority"); Recommended Determination, Ex. A, April 23, 2019, ECF No. 151–1. Chamberlain and the ITC responded. Resp. of Chamberlain to One World's Notice of Suppl. Authority, April 25, 2019, ECF No. 155; Resp. of the ITC to One World's Notice of Suppl. Authority, April 24, 2019, ECF No. 153.

The court denied the ITC's motion to stay on May 2, 2019. *One World Techs., Inc., v. United States, et al.*, Slip Op. 19–53, 2019 WL 1975941 (CIT May 2, 2019).

Plaintiff and Defendants reached a Settlement Agreement on May 1, 2019 and filed the present Joint Motion to Dismiss. Joint Mot. to Dismiss, May 1, 2019, ECF No. 162. Chamberlain opposed the Joint Motion to Dismiss. Resp. of Chamberlain to Joint Mot. to Dismiss, May 2, 2019, ECF No. 163. The ITC took no position. Resp. of the ITC to the Mot. to Dismiss, May 2, 2019, ECF No. 165. Defendants replied on May 2, 2019. Defs.' Reply to Chamberlain's Resp. to the Joint Mot. to Dismiss, May 2, 2019, ECF No. 167. Defendants filed a clarification of their position regarding a stay on May 3, 2019. Clarification of Defs.' Position Regarding a Stay, May 3, 2019, ECF No. 169.

The court held a telephonic status conference on May 3, 2019, ECF No. 168. Following the status conference, the court suspended all briefing, discovery, and further proceeding deadlines occurring on or after May 1, 2019 in Court No. 19–00017. Order, May 3, 2019, ECF No. 171. The court also ordered proceedings in Court No. 18–00200 to be stayed effective May 3, 2019. Order, *One World Techs., Inc. v. United States*, No. 18-cv-00200-JCG (CIT May 3, 2019), ECF No. 119.

Defendants moved to dismiss their appeal to the U.S. Court of Appeals for the Federal Circuit. Federal Defendants-Appellants' Mot. to Dismiss Appeal No. 2019–1783, *One World Techs., Inc. v. United States*, Nos. 19–1663, 19–1681, 19–1783 (Fed. Cir. May 3, 2019), ECF No. 49. The U.S. Court of Appeals for the Federal Circuit granted Defendants' motion and dismissed Defendants' appeal. Order, *One World Techs., Inc. v. United States*, No. 19–1783 (Fed. Cir. May 6, 2019), ECF No. 50. Chamberlain's appeal, Court No. 19–1681, and the ITC's appeal, Ct. No. 19–1663, currently remain pending before the U.S. Court of Appeals for the Federal Circuit. *See One World Techs., Inc. v. United States*, Nos. 19–1663, 19–1681 (Fed. Cir. filed Mar. 18, 2019 & Mar. 21, 2019).

JURISDICTION

The court found jurisdiction previously in this action pursuant to 28 U.S.C. 1581(i) (2012). *See One World II*. This court has jurisdiction over Plaintiff's Joint Motion to Dismiss, as Federal Rule of Appellate

Practice 4(a)(4)(B)(i) suspends the effect of the notices of appeal until the U.S. Court of International Trade rules on the motions to alter or amend the judgment under USCIT Rule 59 and for relief under USCIT Rule 60.[2] *See* Order, Apr. 2, 2019, ECF No. 119; *Bd. of Trs. of Bay Med. Ctr. v. Humana Military Healthcare Servs., Inc.*, 123 F. App'x 995, 997 (Fed. Cir. 2005) ("Under Fed. R. App. P. 4(a)(4)(B)(i), the notice of appeal was not effective until the district court had disposed of the motion for reconsideration on the merits."); Fed. R. App. P. Rule 4(a)(4)(A)(iv), (vi); Fed. R. Civ. P. 62.1 Advisory Committee Notes, 2009 Adoption ("Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. [sic]"). As Plaintiff has a pending motion under USCIT Rule 59, Plaintiff's Emergency Motion for Additional Injunctive Relief, Mar. 25, 2019, ECF Nos. 102 & 103, and Defendants have a pending motion under USCIT Rule 60, Defs.' Mot. for Reh'g or Recons., Mar. 21, 2019, ECF No. 100, this court retains jurisdiction to rule on the present Joint Motion to Dismiss.

DISCUSSION

I. Voluntary Dismissal Under USCIT Rule 41(a)(2)

Plaintiff's Joint Motion to Dismiss requests dismissal of Count I of the Amended Complaint with prejudice, and dismissal of Count II of the Amended Complaint without prejudice. Joint Motion to Dismiss 3. Although Plaintiff and Defendants consent to the motion, Defendant-Intervenor Chamberlain does not consent to the Joint Motion to Dismiss, Resp. of Chamberlain to Joint Motion to Dismiss 1, May 2, 2019, ECF No. 163, and the motion is adjudicated under USCIT Rule 41(a)(2). *See Garber v. Chicago Mercantile Exch.*, 570 F.3d 1361, 1365 (Fed. Cir. 2009) (stating that "Rule 41(a) contemplates the voluntary dismissal of actions . . . . Rule 41(a)(1)(A)(ii) permits dismissal at any time during the proceedings if all parties sign a stipulation of dismissal. In contrast, Rule 41(a)(2) contemplates dismissal of the action by the plaintiff at a latter stage of the proceedings without agreement from all parties involved.").

Dismissal under USCIT Rule 41(a)(2) is within the discretion of the court. USCIT Rule 41(a)(2) ("[A]n action may be dismissed at the plaintiff's request only by court order, on terms that the court consid-

[2] Federal Rule of Appellate Practice 4(a)(4)(A) references the Federal Rules of Civil Procedure. The Rules of the United States Court of International Trade ("CIT Rules") are styled, numbered and arranged to the maximum extent practicable in conformity with the Federal Rules of Civil Procedure and the CIT Rules are the appropriate cross-reference in this matter. *See* Preface, CIT Rules.

ers proper."); *see Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, 479 F.3d 1330, 1336–37 (Fed. Cir. 2007); *Tomoegawa (U.S.A.), Inc. v. United States*, 15 CIT 182, 190 (1991). The primary purpose of USCIT Rule 41(a)(2) is to prevent voluntary dismissals that unfairly affect the other side, and to permit the imposition of curative conditions. Legal prejudice to the defendant is the foremost factor for the court to consider in exercising its discretion over a Rule 41(a)(2) motion to dismiss. *Tomoegawa*, 15 CIT at 190; *see also Zhengzhou Harmoni Spice Co. v. United States*, 34 CIT 40, 47–49 (2010) (discussing that dismissal without prejudice has a greater risk of legal prejudice than dismissal with prejudice).

As an initial matter, the court finds that there is no legal prejudice to the Defendants, as Defendants consent to Plaintiff's Joint Motion to Dismiss and raise no assertion of prejudice to Defendants' interests. Joint Mot. to Dismiss, May 1, 2019, ECF No. 162; *see* Defs.' Reply to Chamberlain's Resp. to the Joint Mot. to Dismiss, May 2, 2019, ECF No. 167.

The court also considers prejudice to Defendant-Intervenors. *See Zhengzhou Harmoni Spice*, 34 CIT at 49. Defendant-Intervenor ITC does not assert any prejudice as a result of Plaintiff's Joint Motion to Dismiss. Resp. of the ITC to the Mot. to Dismiss 1, May 2, 2019, ECF No. 165 (taking "no position" on the Joint Motion to Dismiss). The court finds that there is no legal prejudice to the ITC.

Defendant-Intervenor Chamberlain asserts prejudice from Plaintiff's voluntary dismissal. Resp. of Chamberlain to Joint Mot. to Dismiss 5, May 2, 2019, ECF No. 163. Chamberlain argues that the Settlement Agreement will prejudice Chamberlain by giving effect prematurely to the ITC ALJ's Recommended Determination before the ITC decides whether to adopt the ALJ's recommendation. *Id.* Defendants counter that the Settlement Agreement will not give effect to the ITC ALJ's Recommended Determination, but explain instead that the "reasoning underlying the recommendations . . . caused Customs to reevaluate the appropriateness of continuing to exclude and seize One World's Redesigned GDOs." Defs.' Reply to Chamberlain's Resp. to the Joint Mot. to Dismiss 3, May 2, 2019, ECF No. 167. Defendants also contend that as a Defendant-Intervenor, "Chamberlain's role is limited to defending the Government's actions" and that Chamberlain requests relief which is beyond the scope of Plaintiff's Amended Complaint and "does not support the position of the [D]efendants." *Id.* at 2–3.

First, the court notes that Chamberlain has not filed any crossclaim or counterclaim in this action, and Chamberlain's interests in the

present action are limited to that of a Defendant-Intervenor. *United States v. T.J. Manalo, Inc.*, 33 CIT 1530, 1536 (2009) (noting that "because no counterclaim was asserted in this case, there can be no concern that such a claim might be compromised by a dismissal"). As Plaintiff and Defendants have resolved their dispute by means of a Settlement Agreement, the court finds that Chamberlain cannot insist that Plaintiff maintain the present action for the purposes of serving Chamberlain's interests as a Defendant-Intervenor. *See Zhengzhou Harmoni Spice*, 34 CIT at 50.

Second, the court finds that Chamberlain is not prejudiced by the dismissal of Plaintiff's claims that seek relief contrary to Chamberlain's interests, including Chamberlain's interest in protecting its patent rights. *See*, *e.g.*, Resp. of Chamberlain to Joint Mot. to Dismiss 3, May 2, 2019, ECF No. 163 (noting Chamberlain's interest in its patent rights). On the contrary, dismissal benefits Chamberlain by removing the possibility that the court could grant Plaintiff's requested relief by finding that One World's products do not infringe Chamberlain's patent. The court concludes that dismissal also benefits Chamberlain because Chamberlain itself requested that the court partially dismiss the Amended Complaint, and the court is thus partially granting Chamberlain's requested relief. *See* Chamberlain's Mot. to Partially Dismiss Am. Compl., Apr. 12, 2019, ECF No. 142.

Third, Chamberlain asserts that it will be prejudiced by dismissal because Chamberlain disagrees with the Settlement Agreement between One World and Defendants. *See* Resp. of Chamberlain to Joint Mot. to Dismiss 5, May 2, 2019, ECF No. 163. Chamberlain argues that the ITC's orders do not permit Customs to release the Redesigned GDOs for consumption in the United States. *See id.* at 4–5. Defendants counter that Customs is permitted to conditionally release the subject merchandise under bond. *See* Defs.' Reply to Chamberlain's Resp. to the Joint Mot. to Dismiss 3–4, May 2, 2019, ECF No. 167. The court finds that Chamberlain's concerns with the Settlement Agreement are not appropriately addressed in the context of Plaintiff's motion for voluntary dismissal. *See In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 504 F. App'x 900, 906 n.3 (Fed. Cir. 2013) (noting that a settlement agreement is akin to a contract).

The court concludes that Chamberlain does not demonstrate that Chamberlain will suffer prejudice in this action if the court grants Plaintiff's Joint Motion to Dismiss. The court exercises its discretion to grant Plaintiff's Joint Motion to Dismiss.

II. Jurisdiction Over the Settlement Agreement

Pursuant to USCIT Rule 41(a)(2) and as a term of the dismissal, the court exercises its discretion to retain jurisdiction over enforcement of and compliance with the Settlement Agreement. USCIT Rule 41(a)(2); *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994); *Nissim Corp. v. ClearPlay, Inc.*, 499 F. App'x 23, 30 (Fed. Cir. 2012) (citing *Kokkonen* for the holding that a court "has the discretion to retain ancillary jurisdiction to enforce a settlement agreement"); *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 504 F. App'x at 909 n.6; *Schaefer Fan Co. v. J & D Mfg.*, 265 F.3d 1282, 1287 (Fed. Cir. 2001); *see also* 28 U.S.C. §§ 1585, 2201. The court notes that the Government agreed to conditionally release the First, Second, Third and Fourth Shipments in Section 1.3 of the Settlement Agreement, and the Government agreed to conditionally release all future shipments of Redesigned GDOs in Section 1.5 of the Settlement Agreement. *See* Settlement Agreement, Ex. A, May 1, 2019, ECF No. 162–3. The court expects that One World and Defendants will abide by the terms of the Settlement Agreement.

III. Pending Motions in This Action

For the foregoing reasons, the court dismisses the complaint, and the court denies the following pending motions as moot: Defendants' Motion for Rehearing or Reconsideration, March 21, 2019, ECF No. 100, Plaintiff's Emergency Motion for Additional Injunctive Relief, March 25, 2019, ECF Nos. 102 & 103, Plaintiff's Motion to Supplement Emergency Motion for Additional Injunctive Relief, March 28, 2019, ECF Nos. 108 & 109, Defendants' Motion for Leave to Withdraw its Motion for Rehearing or Reconsideration, April 5, 2019, ECF No. 129, Chamberlain's Motion to Partially Dismiss Amended Complaint, April 12, 2019, ECF No. 142, Defendants' Motion to Dismiss, April 16, 2019, ECF No. 143, and Plaintiff's Emergency Motion to Release the Merchandise, May 9, 2019, ECF No. 176.

A judgment will issue accordingly.

Dated: May 9, 2019
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 19–58

OMG, INC., Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 17–00036

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

Dated: May 14, 2019

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for plaintiff. With him on the brief were *David M. Murphy* and *Andrew T. Schutz*.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joseph H. Hunt*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *David W. Campbell*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Adam H. Gordon, The Bristol Group PLLC, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Ping Gong*.

OPINION

Katzmann, Judge:

The court returns again to the question of whether plaintiff OMG, Inc.'s ("OMG's") zinc anchor products are nails. Before the court now is the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand (Dep't Commerce Aug. 27, 2018) ("*Remand Results*"), ECF No. 49, which the court ordered in *OMG, Inc. v. United States*, 42 CIT __, 321 F. Supp. 3d 1262 (2018). Under protest, Commerce found that OMG's zinc anchors were outside the scope of *Certain Steel Nails from the Socialist Republic of Vietnam: Countervailing Duty Order*, 80 Fed. Reg. 41,006 (July 14, 2015) and *Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39,994 (July 13, 2015) (collectively the "*Orders*"). OMG requests that the court sustain the *Remand Results* and clarify the bases of its original remand order. Pl.'s Comments on the Dep't of Commerce's Final Results of Redetermination Pursuant to Court Remand ("Pl.'s Br."), Sept. 26, 2018, ECF No. 52. Defendant-Intervenor Mid Continent Steel & Wire, Inc. ("Mid Continent") requests that the court reconsider its previous decision and remand order. Def.-Inter.'s Comments on Remand Redetermination ("Def-Inter.'s Br."), Sept. 28, 2018, ECF No. 28. The court sustains Commerce's *Remand Results*.

BACKGROUND

The relevant legal and factual background of the proceedings involving OMG has been set forth in greater detail in *OMG*, 321 F. Supp. 3d at 1265–68. Information pertinent to the instant case is set forth below.

On February 6, 2017, Commerce determined that OMG's zinc anchors fell within the scope of antidumping and countervailing duty orders covering steels nails from Vietnam. *Certain Steel Nails from the Socialist Republic of Vietnam: Final Scope Ruling on OMG, Inc.'s Zinc Anchors* (Feb. 6, 2017), P.D. 29 ("*Final Scope Ruling*"). OMG appealed the *Final Scope Ruling* to this court, arguing that its anchors are not steel nails and, thus, could not fall within the scope of the orders. In *OMG*, 321 F. Supp. 3d at 1268–69, the court held that the plain language of the *Orders* excluded OMG's zinc anchors, and remanded to Commerce for redetermination consistent with its opinion. On July 31, 2018, Commerce issued a Draft Remand Redetermination in which it found, under respectful protest, that OMG's anchors are outside the scope of the *Orders*. *See Remand Results* at 2. OMG and Mid Continent submitted timely comments in response, *see id.*, and Commerce issued its *Remand Results* on August 27, 2018, *see generally id.* Under respectful protest, Commerce again found that OMG's zinc anchors fell outside the scope of the *Orders*. *Id.* at 2, 4, 6–8. OMG and Mid Continent submitted their comments on the *Remand Results* on September 26, 2018, and September 28, 2018, respectively. Pl.'s Br.; Def.-Inter.'s Br. Defendant the United States submitted its reply to these comments on October 11, 2018. Def.'s Resp. to Pl.'s Comments on the Dep't of Commerce's Final Result of Redetermination, ECF No. 55.

DISCUSSION

Commerce's *Remand Results* are consistent with the court's remand order and previous opinion. Even so, Commerce and Mid Continent express concerns about the court's use of dictionaries in interpreting the plain language of the scope, whether the court considered the scope language stating that "steel nails may . . . be constructed of two or more pieces," and whether the court's decision is consistent with the Federal Circuit's opinion in *Meridian Prods., LLC v. United States*, 890 F.3d 1272 (Fed. Cir. 2018). *Remand Results* at 6–8; Def.-Inter.'s Br. at 2–5. These asserted concerns are not meritorious. The court based its conclusion in *OMG*, 321 F. Supp. 3d at 1268–69, not only on dictionary definitions of nails, *see NEC Corp. v. Dep't Commerce*, 23 CIT 727, 731, 74 F. Supp. 2d 1302, 1307 (1999), but also

upon close consideration of all of the scope language in the *Orders* — including the phrase "of two or more pieces" — and record evidence, including evidence of trade usage, *see ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012). OMG's zinc anchor is simply not a nail "constructed of two or more pieces" because, as discussed in *OMG*, 321 F. Supp. 3d at 1269, it does not function like a nail and because record evidence demonstrates that anchors like OMG's are considered a separate type of product from nails by the relevant industry. *Meridian Prods.*, 890 F.3d 1272, does not undermine this analysis or determination.

CONCLUSION

Commerce's *Remand Results* are sustained.

SO ORDERED.

Dated: May 14, 2019
New York, New York

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

Slip Op. 19–59

GUIZHOU TYRE CO., LTD.; GUIZHOU TYRE IMPORT & EXPORT CO., LTD., Plaintiffs, and TIANJIN UNITED TIRE & RUBBER INTERNATIONAL CO., LTD.;WEIHAI ZHONGWEI RUBBER CO., LTD.; CONSOLIDATED Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Consolidated Court No. 18–00100

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

Dated: May 15, 2019

Matthew P. McCullough, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiffs.

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

Mark B. Lehnardt, Baker Hostetler, LLP, of Washington, D.C., for consolidated plaintiff Tianjin United Tire and Rubber International Co., Ltd.

R. Kevin Williams, *Mark R. Ludwikowski*, *Lara A. Austrins*, Clark Hill PLC, of Chicago, IL, for consolidated plaintiff Weihai Zhongwei Rubber Co., Ltd.

OPINION AND ORDER

Goldberg, Senior Judge:

This action arises from a challenge by plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd., (collectively "Guizhou") as well as consolidated plaintiffs Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC") and Weihai Zhongwei Rubber Co., Ltd. ("Zhongwei") (collectively "Plaintiffs") to certain aspects of the final results published by the Department of Commerce ("the Department" or "Commerce") of the 2015 Administrative Review of the countervailing duty order on off-the-road tires ("OTR tires") from the People's Republic of China ("PRC"). *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 83 Fed. Reg. 16,055 (Dep't Commerce Apr. 13, 2018) (final results) ("*Final Results*") and accompanying Issues & Decision Mem. ("I&D Mem."), *amended by Certain New Pneumatic Off-the-Road Tires from the People's Republic of China,* 83 Fed. Reg. 32,078 (Dep't Commerce Jul. 11, 2018) (am. final results) ("*Amended Final Results*"). Guizhou filed a motion for judgment on the agency record, Pls'. Mot. for J. on Agency R., ECF No. 25 (Sept. 21, 2018) ("Pls.' Br."), challenging

Commerce's *Amended Final Results* with respect to: (1) Commerce's benchmark calculations to determine the extent of subsidies received by Guizhou; (2) Commerce's application of adverse facts available in finding use and benefit from the Export Buyer's Credit Program; and (3) Commerce's decision to countervail the Processing Trade Program. TUTRIC and Zhongwei have adopted and incorporated the challenges brought by Guizhou. TUTRIC Mot. for J. on Agency R., ECF No. 28 (Oct. 12, 2018); Zhongwei Mot. for J. on Agency R., ECF No. 29 (Oct. 14, 2018).

For the reasons discussed below, the court remands the Department's findings with respect to the adverse inference applied to the Export Buyer's Credit Program, sustains and remands in part the Department's benchmark calculations, and sustains the Department's decision to countervail the Processing Trade Program.

BACKGROUND

In November 2016, Commerce initiated a review of the countervailing duty order on certain OTR tires from the PRC based upon timely requests from interested parties during the period of review between January 1, 2015 and December 31, 2015. *Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 78,778 (Dep't Commerce Nov. 9, 2016) (initiation). Mandatory respondent Guizhou, as well as the Government of China ("GOC"), responded to the Department's initial and supplemental questionnaires. GOC Initial Questionnaire Resp., ECF No 38, J.A. Tab 11 (May 4, 2017) ("GOC Initial Questionnaire Resp."); Guizhou Initial Questionnaire Resp., J.A. Tab 10 (May 4, 2017) ("Guizhou Initial Questionnaire Resp."); GOC First Supp. Resp., J.A. Tab 12 (June 26, 2017) ("GOC First Supp. Resp."). Commerce also conducted a verification of Guizhou's questionnaire responses in December 2017. Verification of the Questionnaire Resps. of Guizhou, J.A. Tab 13 (Feb. 1, 2018) ("Verification Report").

In October 2017, Commerce issued its preliminary results from the administrative review based on the parties' questionnaire responses. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China*, 82 Fed. Reg. 46,754 (Dep't Commerce Oct. 6, 2017) (prelim. results) ("*Preliminary Results*") and accompanying Prelim. Decision Mem., J.A. Tab 1 (Oct. 2, 2017) ("PDM"). In its preliminary findings, the Department determined that: (1) the Export Buyer's Credit Program was countervailable based on an adverse inference that Guizhou used and benefited from the program, PDM at 14–17; (2) the Processing Trade Program was countervailable because the GOC failed to demonstrate that it had a system or procedure in place

to determine the quantity of natural rubber, synthetic rubber, carbon black, and nylon cord Guizhou consumed in the production of OTR tires, *id*. at 35–36; (3) there was "no basis to find the domestic synthetic rubber market to be distorted," *id.* at 25; and (4) benchmarks for synthetic rubber, natural rubber, carbon black, and nylon cord inputs appropriately included actual ocean freight and import duty costs, *id.* at 33–35. As to the Export Buyer's Program, Commerce applied adverse facts available ("AFA") to countervail the program because the GOC allegedly refused to answer Commerce's questions regarding the operation of the program. *Id.* at 14–17.

The Department's final decision largely echoed its preliminary findings. Commerce continued to find that the market for synthetic rubber was not distorted during the period of review. I&D Mem. at 10–12. Commerce also employed both Tier 1 and Tier 2 benchmarks in relation to certain less-than-adequate remuneration ("LTAR") findings for synthetic and natural rubber (Tier 1), carbon black (Tier 2), and nylon cord (Tier 2). *Id.* at 12–13. These benchmarks included ocean freight and import duties. Additionally, Commerce applied an adverse inference to find that Guizhou used and benefited from the Export Buyer's Credit Program and concluded that "the record does not support finding non-use of the [Program]." *Id.* at 14. Finally, Commerce concluded that Guizhou received a countervailable subsidy from the Processing Trade Program because "the record [did] not support a finding that the GOC has an effective system in place to confirm which inputs are consumed in the production of exported products and in what amounts." *Id.* at 17. This finding was based on the GOC's alleged failure to "explain or document how it determined the quantity of rubber, nylon cord or carbon black consumed in the production process of OTR [t]ires." *Id.* at 16. In the *Amended Final Results*, Commerce assigned Guizhou a countervailable subsidy rate of 31.48%. *Amended Final Results*, 83 Fed. Reg. at 32,078. Commerce assigned this same rate to the "non-selected companies," *id*., which included TUTRIC and Zhongwei, *id*. at 32,079.

Guizhou's motion for judgment challenges each of Commerce's findings above. *See generally* Pls.' Br. For the reasons discussed below, the court sustains in part and remands in part Commerce's *Amended Final Results*.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction to hear this appeal under 28 U.S.C. § 1581(c). The court will sustain Commerce's determination unless the court concludes that the determination is "unsupported by sub-

stantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence amounts to "more than a mere scintilla" of evidence. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* Moreover, the substantiality of evidence is evaluated "on the record as a whole, including [any evidence that] fairly detracts from its weight." *Target Corp. v. United States*, 609 F.3d 1352, 1358 (Fed. Cir. 2010) (internal quotation marks and citation omitted). In other words, "substantial evidence" "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

DISCUSSION

Plaintiffs raise challenges to the Department's determinations regarding: (1) the PRC's Export Buyer's Credit Program (the "Export Program"); (2) the Department's calculation of benchmarks measuring adequate remuneration for synthetic rubber, carbon black, and nylon cord; and (3) the PRC's Processing Trade Program as a countervailable subsidy. The court sustains Commerce's decision to countervail the Processing Trade Program. For the remaining issues raised by Plaintiffs, the court sustains and remands in part, pursuant to the below.

I. China Export Import Bank Buyer's Credit Program

As in the 2014 Administrative Review,[1] it is the Department's failure to identify a gap in the record that proves fatal to its application of AFA. Commerce's finding that "the record does not support [] non-use," I&D Mem. at 14, is itself unsupported by substantial evidence because the *only* evidence on the record supports non-use. *See* Guizhou Initial Questionnaire Resp. at 55, ex. I39. Further, because Commerce failed to explain *what* information the GOC has failed to provide and *how* that information was required for verification of the respondent's claims and declarations demonstrating non-use of the Export Program, Commerce's finding that the GOC did not provide

[1] The Export Program was also challenged in the previous administrative review, where Guizhou brought substantially similar challenges (based on similar findings) before this court. *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 82 Fed. Reg. 18,285 (Dep't Commerce Apr. 18, 2017) (final results) and accompanying Issues & Decision Mem. (Apr. 12, 2017). Echoing the challenge presented here, Guizhou disputed the Department's application of AFA in determining use of the Export Program. There, the court ordered that the Department reconsider its decision to apply AFA as to the Export Program, and further ordered that the Department take into account Guizhou's and the GOC's submitted evidence of non-use. *Guizhou Tyre Co. v. United States*, 42 CIT __, 348 F. Supp. 3d 1261 (2018).

information necessary to develop a complete understanding of the program was not supported by substantial evidence.

In its review, Commerce examined whether Plaintiffs potentially benefited from the PRC's Export Program, which provides loans to foreign companies to promote the export of Chinese goods. *See Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 78,778 (Dep't Commerce Nov. 9, 2016) (initiation). Commerce issued several questionnaires to the respondents seeking information regarding the Export Program, and both Guizhou and the GOC responded that none of Guizhou's customers used the Program. Guizhou Initial Questionnaire Resp. at 54–55; GOC Initial Questionnaire Resp. at 139–140. Guizhou also submitted affidavits from its United States customers confirming non-use as exhibits to the initial questionnaire responses. *See* Guizhou Initial Questionnaire Resp. at 54, ex. I38; *see also id.* at 55, ex. I39. In a subsequent questionnaire response concerning the operation of the Export Program, the GOC responded that the "question [was] not applicable" because "none of the U.S. customers of the respondents used the Expert Buyer's Credit from [Export-Import] Bank during the [period of review]." GOC First Supp. Resp. at 10–11. Nonetheless, Commerce determined in its preliminary results that the GOC both withheld requested information and significantly impeded the proceeding such that the Department applied an AFA rate for each respondent based on Plaintiffs' alleged benefit from the Export Program. PDM at 15–16 (citing, *inter alia*, 19 U.S.C. 1677e(a)(2)(A), (C)). In its *Final Results*, Commerce continued to apply the AFA because it was "without a complete and verifiable understanding of the program's operation." I&D Mem. at 15.

Commerce may select from facts otherwise available when necessary information is not available in the record or when a party to a proceeding: (A) withholds information that is requested; (B) fails to provide such information in the form and manner requested; (C) significantly impedes a proceeding; or (D) provides information which cannot be verified. 19 U.S.C. § 1677e(a). Once it has identified a basis under § 1677e(a), the Department may then select from facts available in a matter adverse to the respondent—that is, apply AFA—only if the gap in the record was caused by a failure of a respondent to cooperate to the best of its ability. 19 U.S.C. § 1677e(b). Therefore, before Commerce can apply AFA, it must first determine under § 1677e(a) that information is missing from the record *and* that the gap was caused by a respondent's failure to cooperate. Once again, Commerce missed the mark and applied AFA to the Export Program without first establishing the statutory prerequisites of such a determination.

Here, upon requests from Commerce, Guizhou indicated it did not benefit from the Program and provided declarations from its U.S. customers stating as much. *See* Guizhou Initial Questionnaire Resp., at 54, ex. I38. The GOC also informed Commerce that it "contacted the responding companies to ask for their customer lists" and the GOC confirmed that "no listed importers of the respondent companies obtained any Export Buyers Credits from [the Export-Import Bank]," indicating that the importers did not use the Program. GOC Initial Questionnaire Resp. at 140. Additionally, in its supplemental questionnaire responses, the GOC further confirmed that Plaintiffs received no benefit from the program. GOC First Supplemental Resp. at 11. Despite this, Commerce sought information on the operation of the Export Program—a program which all record evidence indicated Plaintiffs did not use. Based upon the GOC's noncompliance with this final, unrelated request, Commerce applied AFA. Because the findings underlying Commerce's application of AFA are unsupported by substantial evidence, the court cannot sustain the ultimate AFA determination. *See also Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 18–167, 2018 WL 6271653, at *3 (CIT Nov. 30, 2018) ("Commerce does not point to information on the record that allows Commerce to reasonably conclude, even with appropriate adverse inferences, that [the plaintiff] used [the Export Program].").

Specifically, Commerce did not explain what additional information was necessary to assess the GOC's claim of non-use, and why other information available in the record (and provided by the parties) was insufficient to fill whatever gap was left by the GOC's noncompliance. *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1327 (2018). In any review, the Department must consider record evidence that "fairly detracts" from its ultimate determination. *See CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). Instead, Commerce concluded that "the record does not support finding non-use of the [Program] by Guizhou Tyre." I&D Mem. at 14. In so doing, however, the Department blatantly ignored the eighty-five U.S. customer declarations that were submitted as exhibits to Guizhou's questionnaire responses, each of which stated that the customers "did not finance [their] purchases through either the use of the . . . export buyer's credit program or any other Chinese banks' export buyer's credit program." *See* Guizhou Initial Questionnaire Resp. at 55, ex. I39. The Department contends that the "GOC has not provided the requested information and documentation necessary for Commerce to develop a complete understanding of this program" and therefore, "absent [this] information, the GOC's claims that the respondent companies did not use this program are not

verifiable." I&D Mem. at 14. But more than just uncorroborated claims, Guizhou stated that it, first, "confirmed non-usage" by "contact[ing] all of its export customers and confirm[ing] that none of them applied for, used, or benefited from this program during the POR," and second, by "contact[ing] all of its unaffiliated export customers in the United States in 2015 and inquir[ing] whether the companies used the export buyer's credit program or otherwise received credit facilities from EXIM." *See* Guizhou Initial Questionnaire Resp. at 55. The corresponding U.S. declarations then *affirmed* those claims made by Guizhou. The Department's contention that non-use is unverifiable is simply not supported by the administrative record—which, as it stands, "fairly detracts" from Commerce's unsubstantiated finding of countervailability and benefits conferred, *CS Wind Viet. Co.*, 832 F.3d at 1373. Indeed, not only has the Department failed to account for evidence pointing to the contrary, Commerce has also failed to provide "more than a mere scintilla" of evidence to support its finding that it was unable to determine that Guizhou did not use the Export Buyer's Credit Program. *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1339 (Fed. Cir. 2009).

Commerce attempts to (unsuccessfully) fall back on its claim that in order to "verify the accuracy of the respondents' claimed non-use of the program," Commerce needs "supporting information and documentation" from "EX-IM Bank, as the lender" to "fully understand the operation of the program." I&D Mem. at 14. There are two glaring problems with this finding. First, Commerce did not explain why the information that *was* provided—Guizhou's and the GOC's responses and accompanying declarations—was unverifiable on its own. The Department had the tools at its disposal to substantiate the accuracy of the declarations—and it had to try to do so before claiming that the record evidence is unverifiable. Second, it is unclear how or why the information about the program's operations are even necessary to verify Guizhou's claims of non-use. *See Changzhou Trina Solar Energy Co.*, 352 F. Supp. 3d at 1326–27 ("Commerce, however, did not explain why the GOC's failure to explain this program was necessary to assess claims of non-use and why other information accessible to respondents was insufficient to fill whatever gap was left by the GOC's refusal to provide internal bank records."). Commerce did not identify what information about the Export Program's operations would have the tendency to prove (or disprove) Guizhou's allegation of non-use.[2] Through the fog and mist, what is clear to the court is that

[2] Perhaps, as the court previously opined, Commerce is "curious as to the inner workings of many Chinese programs." *Clearon Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1344, 1360 (2019). But once again, "mere curiosity is not enough." *Id*.

Commerce's determination—that information about the program's operations is "missing" from the record and is integral to Commerce's countervailability findings—is unsupported by substantial evidence on the record and therefore, not in accordance with the law under 19 U.S.C. § 1677e(a).

And finally, we are left with Commerce's misunderstanding of basic AFA principles. Once again, as in *Changzhou*, *Guizhou I*, and *Clearon*, the court is puzzled by Commerce's immediate jump to AFA without first explaining how information it claims to be missing or unverifiable regarding the Program's operations leads to an adverse inference that the respondents used the program. For any use of facts otherwise available with an adverse inference, "Commerce must still explain what information is missing and what adverse inferences reasonably lead[] to its conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). The Department's anemic reasoning to support its decision flunks this standard under § 1677e(b) and it will not be sustained by the court.

As it stands, Commerce's decision to find the Export Program countervailing as a benefit conferred on Guizhou was based on an improper application of §§ 1677e(a) and (b). Commerce cannot readily identify any material information missing from the record, and Guizhou and the GOC provided responses to the Department's questionnaires constituting evidence of non-use of the Export Program. Commerce must explain why the evidence as currently provided by the respondents was insufficient and could not have been verified by Commerce as it stands.

II. Calculation of LTAR Benchmarks

Plaintiffs raise several challenges to the Department's calculation of benchmarks measuring whether adequate remuneration was paid for synthetic rubber, natural rubber, carbon black, and nylon cord. First, Guizhou argues that the Department failed to use the proper benchmark to determine the extent of the subsidy received by Guizhou with regard to synthetic rubber. Specifically, Guizhou urges the court to compel Commerce to further provide an explanation for its change in position from its 2014 Administrative Review on market distortion for synthetic rubber. Second, Guizhou argues that Commerce's failure to adjust the input benchmarks to reflect market conditions—including domestic production of the inputs—was not supported by substantial evidence.

A. Legal Framework

A countervailable subsidy exists where: (1) a financial contribution is provided, (2) a benefit is thus conferred, and (3) the subsidy is

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

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

To measure the adequacy of remuneration for carbon black and nylon cord, Commerce used a Tier 2 benchmark, PDM 24–25; for natural and synthetic rubber, Commerce used Tier 1 benchmarks. PDM at 25–26.

B. Market Distortion for Synthetic Rubber

Commerce found that the synthetic rubber market in the PRC was not distorted during the period of review. Therefore, Commerce used Tier 1 benchmarks for imports to measure the adequacy of remuneration for this input. Plaintiffs challenge Commerce's distortion findings, arguing that the Department failed to distinguish its findings of lack of distortion in this review from its finding in a prior administrative review where the synthetic rubber market was distorted.

Where available, Commerce "prefers to compare prices to actual transactions in the country in question." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1358 (Fed. Cir. 2017) (citing 19 C.F.R. §

351.511(a)(2)(i)). But if the market in that country is distorted by government involvement—such that the "government provider constitutes a majority or . . . a substantial portion of the market," *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998) (final rule)—the prices "may no longer be concluded the result of a 'competitive' market-pricing mechanism." *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1306, 1327 (2015), *aff'd sub nom. Maverick Tube Corp.*, 857 F.3d 1353. At that point, the Department will then "consider the prices paid in that country as not an appropriate basis of comparison . . . and will instead look to world market prices." *Maverick Tube Corp.*, 857 F.3d at 1358.

Commerce found that the market in the PRC for synthetic rubber was not distorted by government presence in the market. PDM at 25 (sustained in IDM at 6, 10–12). Plaintiffs dispute this finding as inconsistent with Commerce's distortion findings from the 2014 Administrative Review, where the Department found that the market *was* distorted by government presence "on a nearly identical set of facts," Pls.' Br. at 9. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China*, 82 Fed. Reg. 18,285 (Dep't Commerce Apr. 18, 2017) (final results) and accompanying Issues and Decision Mem. at 13. The market distortion findings for synthetic rubber in the 2014 and 2015 Administrative Reviews are distinguished by a few percentage points: a 2.03% decrease from 2014 to 2015 in the percentage of GOC production; 3.65% decrease from 2014 to 2015 in the GOC production percent of consumption; 10.50% increase from 2014 to 2015 in the import percent of production; and a 6.04% increase from 2014 to 2015 in the import percent of consumption, Pls.' Br. at 9–10.

Although Commerce attempts to justify its finding in the 2015 review as based on a "significant[]" change "between 2014 and 2015," IDM at 11–12, the small percentage shifts listed above suggest otherwise. Additionally, as Plaintiffs assert, Commerce's explanation does little to provide support for its finding that synthetic rubber was not distorted. For example, the *Final Results* explain that the "significant[]" change between the two administrative reviews are reflected by the GOC's "decreased [] volume of [] synthetic rubber production by 8.7%" and the 33.36% increase in the volume of imports overall. *Id.* at 12. But that provides little analysis as to how these changes affected the Department's distortion calculation. And Commerce's analysis of market distortion from the agency record provides no further insight into Commerce's finding, as it simply charts the input data that was provided by GOC's initial questionnaire re-

sponses. *See Market Distortion Mem. from Jun Jack Zhao to Tom Gilgun*, J.A. Tab 3 (Oct. 2, 2017).

Both Plaintiffs and the court are left, then, to take Commerce at its word regarding its distortion findings. But Commerce is required to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Commerce's barebones explanation does no such thing and leaves the parties with an arbitrary decision, particularly in light of the fact that similar input data points from the 2014 Administrative Review compelled a contrary finding. *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1371 (Fed. Cir. 2011) ("We have indicated that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.").

In its briefing, the Government explains the "gap" between its distortion conclusion and the data presented, noting that "[b]ecause substantial government involvement in the market likely would have suppressed the share of imports of synthetic rubber as a portion of consumption in China, the high level of imports is reasonably indicative of limited government involvement in the market, and therefore of a market that is not distorted." Def.'s Br. at 12–13. The Government's "*post hoc* rationalizations"—as articulated in its brief—cannot be used to support the underlying determination.[3] *Burlington Truck Lines*, 371 U.S. at 168; *see also Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). "The court restricts its review to matters found in the Final Determination"—that is, the grounds invoked at the agency level in the preliminary memorandum and the Issues and Decisions memorandum—and "does not consider such *post hoc* rationales for an agency's decision," *Altx, Inc. v. United States*, 25 CIT 1100, 1103 n.5, 167 F. Supp. 2d 1353, 1359 n.5 (2001).

Therefore, on remand, the court orders Commerce to reconsider its findings and upon reconsideration specifically explain how the market for synthetic rubber in the PRC changed between 2014 and 2015 and what aspects of those changes caused Commerce to find that the market was not distorted in 2015.

[3] The court relies only on the administrative record to determine whether the Department's findings are supported by substantial evidence; however, this is precisely the type of analysis that—if supported by substantial evidence on the administrative record—may have cogently justified the Department's distortion findings.

C. Market Condition Adjustments

Commerce used Tier 1 benchmarks to measure the adequacy of remuneration for natural and synthetic rubber, and Tier 2 benchmarks for carbon black and nylon cord. Plaintiffs dispute the Department's calculations because, they claim, Commerce did not adjust the benchmarks to reflect prevailing market conditions in the PRC—specifically, the extent to which the market is served by domestic inputs. Here, the Department has made an AFA finding that the domestic suppliers of the four inputs purchased were government "authorities," and were inappropriate comparatives for benchmark calculations. Based on this underlying finding, the Department's resultant benchmark findings are reasonable and supported by substantial evidence.

Where goods are provided for less than adequate remuneration, a benefit is treated as "conferred upon the recipient" and it is up to Commerce to calculate the benefit received. *TMK IPSCO v. United States*, 40 CIT __, ___, 179 F. Supp. 3d 1328, 1344 (2016). Section 1677(5)(E)(iv) provides that, once a good or service is deemed a "benefit," the adequacy of remuneration "shall be determined in relation to prevailing market conditions for [that] good or service." 19 U.S.C. § 1677(5)(E)(iv). A "prevailing market condition" may include "price, quality, availability, marketability, transportation, and other conditions of purchase or sale," *id*., and the adequacy of the remuneration must be "adjust[ed] . . . to reflect the price that a firm actually paid or would pay if it imported the product," 19 C.F.R. § 351.511(a)(iv). And as iterated above, "Commerce's regulations provide that the agency shall measure the adequacy of remuneration by comparing the government price to a multi-tiered series of benchmark prices." *Nucor Corp. v. United States*, 42 CIT __, __, 286 F. Supp. 3d 1364, 1371 (2018).

Guizhou is correct that delivery adjustments "are not without limit." Pls.' Br. at 13. Commerce is required to make adjustments to its LTAR benchmarks in line with the statute and the regulations; however, in terms of implementation, "Commerce has broad discretion to determine how to adjust the world market benchmark price to reflect delivery charges . . . so long as such adjustments are reasonable." *TMK IPSCO v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1306, 1320 (2017). Here, because the Department's calculation was contingent on an AFA finding, the court reviews Commerce's application of the Tier 1 and Tier 2 benchmarks for the Department's conformance with 19 U.S.C. § 1677e. The court upholds the finding that

the input's producers are "authorities" within the meaning of section 771(5)(B) of the Act because Commerce's application of AFA was reasonable.

Guizhou asserts that Commerce should have adjusted the benchmarks for ocean freight and import duties to account for China's domestic supply of the inputs. Pls' Br. at 15. Prevailing market conditions, Guizhou continues, should account for the fact that some of the input imports "are but a small fraction of deliveries in the Chinese market." *Id*. However, integral to its LTAR determinations, the Department explained that because it found that the GOC "did not act to the best of its ability to comply with [its] request for information regarding ownership and control of the producers that supplied inputs to respondents," it concluded that the domestic suppliers of the inputs purchased were "authorities," pursuant to the definition provided by 19 U.S.C. § 1677(5)(B). I&D Mem. at 11. Ultimately, then, the Department's decision to omit evidence of the PRC's domestic supply of the inputs was contingent on its AFA finding that the supplying producers were authorities. To this integral finding, Guizhou provides no substantive response.

In its preliminary determination, Commerce explained its use of facts otherwise available to infer that "all of Guizhou Tyre's supplying producers are 'authorities.'" PDM at 24. For example, in calculating an appropriate benchmark for all four inputs, the Department noted that "the GOC did not act to the best of its ability to comply with the Department's request for information with regard to ownership and control of the producers that supplied the input to respondent." *Id.* Therefore, the Department concluded, "none of the respondent's domestic purchases of the input is appropriate for benchmarking." *Id*. This makes sense: Commerce is tasked with measuring the adequacy of remuneration by comparing the government price to a hierarchy of benchmarked prices. During the administrative review (and then again in this litigation), Guizhou offers the Department a "supply ratio" "solution" to the benchmark adjustment, which would apportion the adjustments to the share of the market attributed to imports. Pls.' Br. at 15. But because that ratio would include Guizhou's domestic purchases— *which were found to be an inappropriate comparative for benchmarking*—their inclusion would distort the benchmark analysis. This same analysis was echoed in the Department's *Final Results*: in light of the AFA finding that the domestic producers of the inputs are authorities, Commerce only used import prices (for synthetic rubber, for example), to calculate a Tier 1 benchmark, and not its domestic prices. I&D Mem. at 13.

The court does not generally presume the reasonableness of the AFA determination. However, Guizhou does not adequately address Commerce's conclusion that the supplying producers were "authorities" in its briefing, dismissing this AFA finding as "say[ing] nothing about the benchmark calculation." Pls.' Reply Br. In Support of Mot. for J. 9, ECF No. 37 (Jan. 18, 2019). Nor did Plaintiffs actually dispute the application of AFA to the LTAR calculations in its case briefs to the Department during the administrative review. Commerce may use AFA if the gap in the record was caused by the failure of the respondent to cooperate to the best of its ability. *JSW Steel Ltd. v. United States*, 42 CIT __, ___, 315 F. Supp. 3d 1379, 1382 (2018) (citing 19 U.S.C. § 1677e(a)(2)(A)–(D)). However, there is no indication—either in the record or briefed by the parties—that the Department's AFA finding was not properly applied. Indeed, Guizhou had the opportunity to dispute the AFA finding and chose not to do so. *See Fuwei Films (Shandong) Co. v. United States*, 35 CIT 1229, 1230–31, 791 F. Supp. 2d 1381, 1384–85 (2011) (failure to challenge issue before Commerce leaves court without a record to review on the issue). Based on the underlying premise that domestic purchases of the inputs are inappropriate for benchmarking, the Department's finding was supported by substantial evidence.

III. Processing Trade Program

Commerce investigated import duty and VAT exemptions on imports of raw materials from the Processing Trade Program and concluded that the program provided countervailable subsidies. Plaintiffs dispute these findings as unsupported by substantial evidence and contrary to law. The court upholds the Department's determination as to the Processing Trade Program as supported by substantial evidence drawn from the record.

The regulatory scheme under 19 C.F.R. § 351.519(a)(1)(i) requires respondents to demonstrate that the foreign government has a reasonable system or procedure in place to confirm which inputs are consumed in the production process and in what amounts. Under the regulation, "a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product." 19 C.F.R. § 351.519(a)(1)(ii). In analyzing whether a program for exemption of import charges upon export results in a countervailable benefit, Commerce is to consider whether the government in question "maintains controls adequate to ensure that any remission or exemption of import duties does not extend to duties on inputs not consumed in production for export." *GGB Bearing Tech. (Suzhou) Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1233, 1241–42

(2017). Commerce will find import duty exemptions to be countervailable unless the government has a specifically delineated procedure "to confirm which inputs are consumed in the production of the exported products and in what amounts, and the system or procedure is reasonable, effective for the purposes intended, and is based on generally accepted commercial practices in the country of export." 19 C.F.R. § 351.519(a)(4)(i). Alternatively, even where the government does not have in place a system or procedure to confirm input consumption, Commerce may find these schemes to not be countervailable if the "government in question has carried out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts." 19 C.F.R. § 351.519(a)(4)(ii). Here, Commerce found that the GOC did not sufficiently address Commerce's questions about the Processing Trade Program, and thus applied an adverse inference when it found the exemptions provided under the Program to be countervailable. PDM at 35–36; I&D Mem. at 16–17.

Plaintiffs now dispute the Department's finding that the exemptions provided under the program were countervailable. This issue was also raised in the 2014 Administrative Review and was previously discussed in detail by the court. *Guizhou Tyre Co.*, 348 F. Supp. 3d at 1268. Plaintiffs raise largely the same claims today. First, Guizhou argues that it submitted detailed records as to unit consumption of raw materials, receipt of raw materials under the program, reexport of goods produced from those raw materials, and any entry of such materials into the domestic market. Pls.' Br. at 34. According to Guizhou, the Department ignored these submissions during its review when it countervailed duty exemptions on the premise that the Program failed to satisfy the requirements under 19 C.F.R. § 351.519(a)(4)(i). Second, Guizhou argues in the alternative that the submitted records can also demonstrate that the GOC has "carried out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts," pursuant to section 351.519(a)(4)(ii). *Id*. at 37.

As before, when prompted to explain how the GOC determined the quantity of the materials consumed in the production process, the GOC first referred Commerce to the Customs Measure, attached as Exhibit E.7 to its questionnaire response. GOC Initial Questionnaire Resp. at 97. As to Guizhou specifically, the GOC referred Commerce to "Guizhou Tire's response for a more comprehensive response and for sample documentation supporting its explanation." *Id*. at 98. But again, as before, these generic responses concerning consumed materials in the production falls short of demonstrating how the GOC

determines the quantity of the inputs consumed in the production process: rubber, nylon cord, and carbon black. And that is precisely what Commerce focused on in its *Final Results*: that the GOC failed to "specifically explain or document how it determined the quantity of rubber, nylon cord or carbon black consumed in the production process." I&D Mem. at 16. Moreover, it was not unreasonable for Commerce to find that even Guizhou's questionnaire responses failed to indicate that the GOC has the requisite system or procedure in place. Guizhou stated first that at the time of the application, it "was not legally obligated to report the unit consumption to the Customs for the record." Guizhou Initial Questionnaire Resp. at 22. Guizhou's continued response outlined the general process of unit consumption verification ("[t]o verify the authenticity and accuracy of unit consumption, Customs . . . examine[d] the supporting documents and conduct an on-site inspection," *id*.), but certainly, the Department maintains discretion "and 'authority to determine the extent of investigation and information it needs.'" *Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT 1418, 1433, 2005 WL 3555812, at *12 (2005) (citing *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed. Cir. 1992)).

The same goes for the Department's decision to discount verification evidence submitted by Guizhou. Guizhou claims that the verification reports allowed Commerce officials to trace the reported value of the inputs through the company accounts and verify that the GOC detected certain inputs were sold into the local market by Guizhou and Guizhou paid the duties for these inputs. Verification Report at 11, Ex. VE-11a. But again, while Commerce is required to "fairly request" data from interested parties, it possesses the discretion to determine whether the respondent has fully complied with an information request, *Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 931, 24 F. Supp. 2d 304, 308 (1998), and has "considerable discretion in deciding whether a party has sufficiently replied to an information request." *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 849, 77 F. Supp. 2d 1302, 1321 (1999).

All in all, Commerce's review of the record evidence was reasonable and its decision to countervail the Processing Trade Program is supported by substantial evidence that the court will not now disturb.

CONCLUSION

The court sustains the Department's decision to countervail the Processing Trade Program. The court also sustains the Department's Tier 1 benchmark calculations to measure the adequacy of remuneration for natural and synthetic rubber, and Tier 2 benchmarks for

carbon black and nylon card, despite Guizhou's argument that the benchmarks did not reflect prevailing market conditions in China. However, the Department's decision to apply AFA regarding China's Export-Import Bank Buyer's Credit Program was unreasonable because Commerce reached unsupported findings as to missing material information and verifiability. Additionally, the Department is ordered on remand to reconsider and explain fully how it came to its distortion findings for the synthetic rubber market—specifically, as it diverges from its opposite findings in the 2014 Administrative Review.

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

ORDERED that the Department's decision to apply AFA as to the PRC's Export Buyer's Credit Program based on an alleged lack of cooperation was unlawful because Commerce demonstrated no gap in the record, the respondents submitted evidence of non-use of the Program, and the Department's findings of unverifiability of necessary information was unsupported by record evidence; it is further

ORDERED that Commerce, on remand, reconsider its adverse inference that the PRC's Export Buyer's Credit Program was used by Guizhou's customers and reach a new determination on this issue based on findings supported by substantial record evidence; it is further

ORDERED that the Department reconsider its findings and upon reconsideration, explain how the market for synthetic rubber in China changed between 2014 and 2015 and what aspects of those changes caused Commerce to find that the market was not distorted in 2015; it is further

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

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

Dated: May 15, 2019
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
Senior Judge