U.S. Court of International Trade

Slip Op. 19–119

VALEO NORTH AMERICA, INC., Plaintiff, and PROAMPAC INTERMEDIATE, INC., AMPAC HOLDINGS, LLC, JEN-COAT, INC., MAHLE BEHR TROY INC., MAHLE BEHR USA INC., MAHLE BEHR DAYTON L.L.C., MAHLE BEHR CHARLESTON INC., MAHLE BEHR MANUFACTURING MANAGEMENT, INC., and MAHLE MANUFACTURING MANAGEMENT, INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION TRADE ENFORCEMENT WORKING GROUP and its individual members, JW ALUMINUM COMPANY, NOVELIS CORPORATION, and REYNOLDS CONSUMER PRODUCTS LLC, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 18–00087
PUBLIC VERSION

[Denying Plaintiffs' motions for judgment on the agency record. The U.S. International Trade Commission's finding of a single domestic like product, inclusive of ultra-thin gauge aluminum foil and certain fin stock, is supported by substantial evidence and in accordance with law.]

Dated: September 9, 2019

Daniel Cannistra, *Robert L. LaFrankie*, and *Alexander H. Schaefer*, Crowell & Moring, LLP, of Washington, DC, for Plaintiff Valeo North America, Inc.

Mark R. Ludwikowski and *R. Kevin Williams*, Clark Hill PLC, of Washington, DC, for Plaintiff-Intervenors ProAmpac Intermediate, Inc., Ampac Holdings, LLC, Jen-Coat, Inc., MAHLE Behr Troy Inc., MAHLE Behr USA Inc., MAHLE Behr Dayton L.L.C., MAHLE Behr Charleston Inc., MAHLE Behr Manufacturing Management, Inc., and MAHLE Manufacturing Management, Inc.

Benjamin L. Allen, Attorney, 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.

John M. Herrmann, *Paul C. Rosenthal*, *Kathleen W. Cannon*, *Grace W. Kim*, and *Joshua R. Morey*, Kelley Drye & Warren, LLP, of Washington, DC, for Defendant-Intervenors Aluminum Association Trade Enforcement Working Group and its Individual Members, JW Aluminum Company, Novelis Corporation, and Reynolds Consumer Products LLC.

OPINION

Barnett, Judge:

This consolidated action is before the court on three motions for judgment on the agency record challenging the United States International Trade Commission's ("ITC" or "the Commission") domestic like product determination in the antidumping and countervailing duty investigations of aluminum foil from the People's Republic of

China ("China"). *See Aluminum Foil From China*, 83 Fed. Reg. 16,128 (ITC Apr. 13, 2018) (final determinations) ("*Final Determinations*"),[1] PR 240, CJA Tab 42. Specifically, Plaintiff, Valeo North America Inc. ("Valeo"), and Plaintiff-Intervenors—MAHLE Behr Troy Inc. ("MAHLE BT"), MAHLE Behr USA Inc., MAHLE Behr Dayton L.L.C., MAHLE Behr Charleston Inc., MAHLE Behr Manufacturing Management, Inc., and MAHLE Manufacturing Management, Inc. (collectively, "MAHLE")—challenge the ITC's inclusion of certain fin stock in the domestic like product as unsupported by substantial evidence and not in accordance with law. *See* Confidential Pl.'s 56.2 Mot. for J. on the Agency R. and Mem. of Law in Supp. of Pl.'s Confidential Rule 56.2 Mot. for J. Upon the Agency R. ("Valeo Mem."), ECF No. 74; Pl.-Ints.' Rule 56.2 Mot. for J. on the Agency R., and Pl.-Ints. MAHLE Behr Charleston Inc., MAHLE Behr Dayton L.L.C., MAHLE Behr Manufacturing Management, Inc., MAHLE Behr Troy Inc., MAHLE Behr USA Inc., MAHLE Manufacturing Management, Inc.'s Rule 56.2 Mem. of Law in Supp. of Mot. for J. on the Agency R. ("MAHLE Mem."), ECF No. 69. Plaintiff-Intervenors—ProAmpac Intermediate, Inc., Ampac Holdings, LLC, and Jen-Coat, Inc., doing business as Prolamina (collectively, "ProAmpac")—challenge the ITC's inclusion of ultra-thin gauge aluminum foil in the domestic like product as unsupported by substantial evidence and not in accordance with law. *See* Pl.-Ints.' Rule 56.2 Mot. for J. on the Agency R. and Mem. of Law in Supp. of Pls.' Rule 56.2 Mot. for J. on the Agency R. ("ProAmpac Mem."), ECF No. 67.

Defendant, United States ("the Government"), and Defendant-Intervenors, the Aluminum Association Trade Enforcement Working Group and its individual members (collectively, the "Aluminum Association"),[2] support the Commission's determinations. *See* Def. United States' Confidential Mem. in Opp'n to Pls.' Mots. for J. on the

[1] Defendant filed the confidential administrative record ("CR") at ECF No. 32, and the public administrative record ("PR") at ECF Nos. 33, 76. The parties also submitted joint appendices containing record documents cited in their briefs. *See* Public J.A., ECF No. 92; Confidential J.A. ("CJA"), ECF No. 91; Public Suppl. J.A., ECF No. 95; Confidential Suppl. J.A. ("CSJA"), ECF No. 94. The Commission's staff report and views are contained in the following publications filed in the administrative record: Aluminum Foil from China (Apr. 2018), Inv. Nos. 701-TA-570 and 731-TA-1346, USITC Pub. 4771 (Apr. 2018) (Final) PR 239, CJA Tab 41, ECF No. 33, and its corresponding confidential versions, Confidential Views of the Commission ("Final Views") and Confidential Staff Report (Final) (Mar. 6, 2018) ("Final Staff Report"), ECF No. 32. The court references the confidential versions of the record documents and the ITC determinations, unless otherwise specified.

[2] The Aluminum Association's members are JW Aluminum Company, Novelis Corporation ("Novelis"), and Reynolds Consumer Products, LLC. Confidential Def.-Ints.' Resp. Br. ("Aluminum Ass'n Resp.") at 1, ECF No. 77.

Agency R. ("Gov. Resp."), ECF No. 78; Aluminum Ass'n Resp. For the reasons discussed below, Valeo's, MAHLE's, and ProAmpac's motions are denied.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[3] and 28 U.S.C. § 1581(c) (2012). The ITC's factual determinations are "presumed to be correct," and "[t]he burden of proving otherwise . . . rest[s] upon the party challenging such decision." 28 U.S.C. § 2639(a)(1). The court will uphold an ITC determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Changzhou Trina Solar Energy Co., Ltd. v. U.S. Int'l Trade Comm'n.*, 879 F.3d 1377, 1380 (Fed. Cir. 2018). It "requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)).

BACKGROUND

I. Legal Framework

The U.S. Department of Commerce ("Commerce") and the ITC have distinct functions in antidumping and countervailing duty proceedings. *See Ad Hoc Shrimp Trade Action Comm. v. United States,* 515 F.3d 1372, 1375 (Fed. Cir. 2008). "Commerce determines whether foreign imports into the United States are either being dumped or subsidized (or both)," and the ITC "determine[s] whether these dumped or subsidized imports are causing material injury to a domestic industry in the United States." *Changzhou Trina Solar Energy Co., Ltd. v. U.S. Int'l Trade Comm'n*, 39 CIT___, ___, 100 F. Supp. 3d 1314, 1319 (2015) (citation omitted); *see also* 19 U.S.C. §§ 1671, 1673. Accordingly, "Commerce determines the scope of [an] investigation," establishing the class or kind of foreign merchandise that would be subject to any resulting antidumping or countervailing duty order, *Cleo Inc. v. United States*, 30 CIT 1380, 1382 (2006), *aff'd*, 501 F.3d 1291 (Fed. Cir. 2007), while the Commission "identif[ies] the corre-

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

sponding universe of items produced in the United States [by the affected industry] that are like, or in the absence of like, most similar in characteristics and uses with the items in the scope of the investigation," *Changzhou Trina Solar*, 100 F. Supp. 3d at 1319 (citing 19 U.S.C. §§ 1673(i), 1671(a)) (additional citation and quotation and formatting marks omitted).[4] Although the scope of an investigation "is necessarily the starting point of the Commission's like product analysis," *Cleo Inc. v. United States*, 501 F.3d 1291, 1298 n.1 (Fed. Cir. 2007) (citing 19 U.S.C. § 1677(10)), the scope "does not control the Commission's determination," *id.*; *see also Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85 F.3d 1561, 1567 (Fed. Cir. 1996) (citation omitted).

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

II. Factual and Procedural History

On March 6, 2017, the Aluminum Association, domestic producers of aluminum foil, filed antidumping and countervailing duty petitions with Commerce and the ITC regarding imports of aluminum foil from China. *See* Petitions for Imposition of Antidumping and Countervailing Duties (Mar. 9, 2017), CR 1, PR 1, CJA Tab 1. The petitions covered aluminum foil with a thickness of 0.2 millimeters ("mm") or less,[5] in reels exceeding 25 pounds, regardless of width. *Id.* at 6–7. The petitions listed a range of uses for aluminum foil, including its use in the "manufacture [of] thermal insulation for the construction industry, fin stock for air conditioners, electrical coils for transformers, capacitors for radios and televisions, and insulation for storage tanks." *Id.* at 7.

On March 15, 2017, the ITC instituted antidumping ("AD") and countervailing duty ("CVD") investigations of aluminum foil imports from China. *See Aluminum Foil From China; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of*

[4] "The term 'domestic like product' means a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an [antidumping or countervailing duty] investigation." 19 U.S.C. § 1677(10).

[5] In other words, 200 micrometers ("microns") or 0.00787 inches. Microns "represent one thousandth of a millimeter, or one millionth of a meter." Final Staff Report at I-16 n.39.

Preliminary Phase Investigations, 82 Fed. Reg. 13,853 (Mar. 15, 2017), PR 7, CJA Tab 2. During the preliminary phase of the investigations, several parties raised arguments as to the appropriate definition(s) of the domestic like product(s). Specifically, Valeo and MAHLE BT claimed that fin stock, "defined as flat-rolled aluminum of 45 microns ([0.045 mm or] 0.00177 inches) or more in thickness, containing 1 percent or more, by weight, of manganese" was a separate domestic like product. Post-Conference Br. (Apr. 4, 2017) ("Valeo & MAHLE BT Postconf. Br.") at 1, CR 100, PR 79, CJA Tab 6. Other parties urged the ITC to treat ultra-thin gauge aluminum foil, less than eight microns (0.008 mm or 0.0003 inches) thick, as a separate domestic like product. *See* Confidential Views of the Commission (Prelim.) (May 2, 2017) ("Prelim. Views") at 9 & n.24, CR 135, CJA Tab 10B, CSJA Tab 45 (citations omitted); *see also* Bracket Corrections to the Apr. 4, 2017 Post-Conference Br. of the Flexible Packaging Ass'n et. al. (Apr. 5, 2017) ("FPA Postconf. Br"), CR 99, PR 88, CJA Tab 5.

On April 28, 2017, the ITC issued its affirmative preliminary determinations finding a "reasonable indication that an industry in the United States is materially injured by reason of the imports of aluminum foil from China . . . ." *Aluminum Foil From China*, 82 Fed. Reg. 19,751, 19,751 (ITC Apr. 28, 2017) (prelim. determinations), PR 129, CJA Tab 9; *see also* Prelim. Views at 46. The Commission preliminarily found "a single domestic like product consisting of all aluminum foil coextensive with the scope of the investigations." Prelim. Views at 10. The scope included: "[A]luminum foil having a thickness of 0.2 mm [(200 microns; 0.00787 inches)] or less, in reels exceeding 25 pounds, regardless of width . . . made from an aluminum alloy that contains more than 92 percent aluminum." *Id.* at 8. While the ITC preliminarily determined that fin stock is part of the single domestic like product, it acknowledged its intention to further examine this issue and collect additional data regarding the domestic production of fin stock in the final phase of the investigations. *Id.* at 10, 18. The ITC declined to classify ultrathin gauge aluminum foil as a separate domestic like product because the record did not identify a clear dividing line separating it from the other aluminum foil products described by the scope definition. *Id.* at 15.

On September 28, 2017, the ITC invited interested parties to comment on draft questionnaires to be issued to producers, importers, and purchasers in the final phase of the investigations. *See* Letter from Michael G. Anderson, Director, U.S. Int'l Trade Comm'n to Counsel (Sept. 28, 2017) ("Letter Re: Questionnaire Cmts."), PR 277, CJA Tab 12; U.S. Producers' Questionnaire ("Draft Questionnaire"),

PR 278, CJA Tab 13. In the draft questionnaire to U.S. producers, the Commission defined "[i]n scope fin stock aluminum foil" consistent with Valeo's proposed definition as "flat-rolled aluminum of greater than or equal to 45 microns (0.045 mm; 0.00177 inches) and less than or equal to 200 microns (0.2 mm, 0.00787 inches) in thickness, containing 1 percent or more, by weight, of manganese." Draft Questionnaire at 2; *see also* Valeo & MAHLE BT Postconf. Br. at 1. Valeo and MAHLE BT recommended changing "in scope fin stock aluminum foil" to "fin stock," but did not otherwise recommend any changes to the definition. *See* Valeo's Draft Questionnaire Comments (Oct. 13, 2017) ("Valeo's Draft Questionnaire Cmts.") at 3, PR 152, CJA Tab 14; MAHLE Behr Troy Inc. Comments on Draft Questionnaires (Oct. 13, 2017) at 4, PR 155, CJA Tab 15. In contrast, the Aluminum Association asserted that the proposed definition for "in scope fin stock aluminum foil" did not encompass all the different aluminum foil products used in fin stock applications. Domestic Indus. Comments on Draft Questionnaires for Final Phase Investigations (Oct. 13, 2017) ("Aluminum Ass'n Draft Questionnaire Cmts.") at 2–3, PR 156, CJA Tab 16. It proposed revising the definition to exclude any reference to manganese content (so as to not exclude various alloy series) and to reduce the minimum thickness to 35 microns (0.035 mm or 0.001378 inches). *Id.* at 3.

Subsequently, the Commission issued its final questionnaires, in which it addressed the parties' comments by requesting from U.S. producers information for "certain fin stock"[6] and "other in-scope fin stock"[7] aluminum foil, among other aluminum foil products. *See* U.S. Producers' Questionnaire at 2.[8] Six domestic producers of aluminum foil, which collectively "accounted for the vast majority of domestic production," responded to the Commission's U.S. Producers' Questionnaire. Final Views at 4; Final Staff Report at I-5.

On January 25, 2018, the Commission issued its prehearing staff report. *See* Prehearing Report (Jan. 25, 2018), PR 282, CJA Tab 21.

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[6] The ITC defined "certain fin stock" in conformity with Valeo and MAHLE BT's proposed definition "as flat-rolled aluminum of greater than or equal to 45 microns (0.045 mm; 0.00177 inches) and less than or equal to 200 microns (0.2 mm, 0.00787 inches) in thickness, containing 1 percent or more, by weight, of manganese." U.S. Producers' Questionnaire (undated) ("U.S. Producers' Questionnaire") at 2, PR 162, CJA Tab 18; *see also* Valeo & MAHLE BT Postconf. Br. at 1; Valeo's Draft Questionnaire Cmts. at 2.

[7] Consistent with the Aluminum Association's recommendations, the ITC defined "other in-scope stock" to include: "Any other types of fin stock your firm sells to U.S. customers that meets the definition of 'aluminum foil' but not 'certain fin stock' (e.g., fin stock made from 1000 and 7000 series alloys)." U.S. Producers' Questionnaire at 2; *see also* Aluminum Ass'n Draft Questionnaire Cmts. at 3.

[8] Among other information, the Commission requested data regarding production, sales, and channels of distribution, specific to fin stock based on the supplied definitions. *See* U.S Producers' Questionnaire at 44–53.

Thereafter, the parties filed their prehearing briefs. *See* Prehr'g Br. (Feb. 1, 2018) ("Valeo Prehr'g Br."), CR 287, 289, PR 196, CJA Tab 22; Prehr'g Br. of ProAmpac Intermediate, Inc., Ampac Holdings, LLC, and Jen-Coat, Inc., d.b.a. Prolamina (Feb. 1, 2018), CR 287, 295, PR 199, CJA Tab 24; Pet'rs' Prehr'g Br. (Feb. 1, 2018) ("Aluminum Ass'n Prehr'g Br."), CR 290, 294, PR 198, CJA Tab 23. In its prehearing brief, Valeo revised its proposed definition of fin stock to add to that definition that the aluminum "meet[s] the specification for fin stock as defined by the Aluminum Association."[9] Valeo Prehr'g Br. at 5. Valeo subsequently revised its proposed definition of fin stock again and requested that the Commission define it as "[c]oiled sheet or foil suitable and intended for the manufacture of fins for heat-exchanger applications and in accordance with the chemical, mechanical and tolerance specifications provided for by the Aluminum Association for fin stock." Posthr'g Br. (Feb. 15, 2018) ("Valeo Posthr'g Br.") at 2, CR 322, PR 214, CJA Tab 28.

On April 13, 2018, the ITC published its final affirmative determinations. *See Final Determinations*, 83 Fed. Reg. 16,128. The Commission defined a single domestic like product inclusive of ultra-thin gauge aluminum foil and "certain fin stock." Final Views at 15, 22. The Commission stated that Valeo had "vacillated about how to frame its request for a separate domestic like product concerning fin stock, proposing three different domestic like product definitions over the course of the final phase of these investigations, each more broad than the last." *Id.* at 16. The Commission explained that it based its analysis on the definition that Valeo proposed in its comments on the draft questionnaires—which definition the Commission incorporated into the final questionnaires—and the data collected in response to the questionnaires. *Id.*

After comparing certain fin stock to other aluminum foil products pursuant to its six-factor test, the ITC rejected Valeo's argument that certain fin stock constituted a separate like product.[10] *See id.* at 15–22. The Commission explained that when, as here:

> [the] domestically manufactured merchandise is made up of a grouping of similar products or involves niche products, the Commission does not consider each item of merchandise to be a separate like product that is only "like" its identical counterpart in the scope, but considers the grouping itself to constitute the

[9] Thus, in full, Valeo's new proposed definition was: "Fin stock . . . is defined as flat-rolled aluminum of 45 microns (0.00177 inches) or more in thickness, containing 1 percent or more, by weight, of manganese and meeting the specifications for fin stock as defined by the Aluminum Association." Valeo Prehr'g Br. at 5.

[10] In the administrative proceeding, MAHLE BT and MAHLE Behr USA Inc. incorporated Valeo's arguments by reference. *See* Final Views at 4 n.5.

> domestic like product and "disregards minor variations," absent a "clear dividing line" between particular products in the group.

Id. at 20 (footnote citations omitted).

The Commission determined that the evidence developed in the final phase of the investigations did not warrant modifications to the Commission's preliminary finding that there was no clear dividing line between ultra-thin gauge aluminum foil and other foil products described in the scope definition. *Id.* at 14.

On April 23, 2018, Valeo commenced this action challenging the Commission's like product determination. Summons, ECF No. 1. ProAmpac initiated a separate action likewise challenging the Commission's like product determination. *See ProAmpac Intermediate, Inc. et al v. United States*, No. 18-cv-00105 (Ct. Int'l Trade filed May 11, 2018). On July 12, 2018, the court consolidated that action under this lead action. Order (July 12, 2018), ECF No. 35.[11]

DISCUSSION

I. ProAmpac's Motion

ProAmpac avers that the ITC improperly defined a single domestic like product inclusive of ultra-thin gauge aluminum foil because the Commission failed to independently analyze this issue and instead "defined the domestic like product as coextensive with the scope of the investigation," and the Commission's like product determination is not supported by substantial evidence. ProAmpac Mem. at 7–9. Concerning its second claim, ProAmpac contends that differences in physical characteristics, production processes, interchangeability, and price establish that ultrathin gauge aluminum foil is a separate like product. *Id.* at 9. The Government argues that the Commission's determination, which was based on an evaluation of the six factors, is supported by substantial evidence, and ProAmpac's claims amount to an impermissible attempt to reweigh the evidence. *See* Gov. Resp. at 40–45. The Aluminum Association contends that ProAmpac failed to develop, and therefore waived, its arguments, Aluminum Ass'n Resp. at 35–36, and ProAmpac's arguments are otherwise baseless, *id.* at 32–34.

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[11] The consolidation order also included *Trinidad/Benham Corp. v. United States*, No. 18-cv-00115 (Ct. Int'l Trade filed May 18, 2018), which has been dismissed by stipulation. *See* Order (July 12, 2018), Docket Entry 35; Stip. of Partial Dismissal (July 25, 2018), ECF No. 62.

A. Whether the Commission Properly Considered Whether Ultra-Thin Gauge Aluminum Foil is a Separate Domestic Like Product

As noted, the Commission analyzes six factors when it evaluates the domestic like product relative to the scope of an AD or CVD investigation. *See Cleo Inc.*, 501 F.3d at 1295. Consistent with this policy, the ITC considered these factors when it analyzed whether ultra-thin gauge aluminum foil is a separate domestic like product. *See* Prelim. Views at 10–15 (conducting a like product analysis pursuant to the six-factor test); Final Views at 13–15 (reexamining its preliminary findings in light of the evidence developed in the final phase of the investigations). Indeed, ProAmpac itself observes that "[t]he Commission considered these [six] factors in this case and found a single domestic like product encompassing all subject aluminum foil," ProAmpac Mem. at 8, thereby contradicting the premise of its own argument. The Commission's analysis is not lessened by the fact that it led the Commission to find that the domestic like product is coextensive with the scope of these investigations. Therefore, the court finds that the Commission independently analyzed whether ultra-thin gauge aluminum foil is a separate like product from other in-scope aluminum foil.

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

ProAmpac asserts that "[t]he Commission's six-factor test clearly shows that ultra-thin aluminum foil is in fact a separate product. The Commission erred in finding otherwise." *Id.* With no developed argumentation, ProAmpac recites four alleged differences between ultra-thin gauge aluminum foil and other in-scope aluminum foil that purport to establish "clear dividing lines" between the two products:

> Physical characteristics: Ultra-thin gauge foil is more formable while thicker gauges are more durable;
>
> Production processes: Ultra-thin gauge foil requires additional equipment and production steps;
>
> Interchangeability: Ultra-thin gauge foil and thicker foils are not interchangeable; and
>
> Price: The price of ultra-thin gauge foil is significantly higher than other domestic foils.

Id. at 9 (footnote omitted). Aside from generally citing to the Commission's preliminary findings, *id.* at 9 & n.1 (citation omitted), ProAmpac fails to identify any record evidence in support of its claims or explain why the Commission's determination is unsupported by substantial evidence, *see id.* at 8–9.

In its reply, ProAmpac develops *some* of its opening brief arguments, *see* Confidential Pl.-Ints.' Reply Br. in Supp. of Rule 56.2 Mot. For J. on the Agency R. ("ProAmpac Reply") at 5–6, ECF No. 81, but makes additional claims not previously raised, *see id.* at 2–4 (arguing that the ITC failed to establish material injury "by reason of" imports of ultra-thin gauge aluminum foil); *id.* at 6–7 (arguing the channels of distribution factor). "It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived." *United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013). While the court will consider arguments raised in ProAmpac's opening brief, to which the Government and the Aluminum Association had an opportunity to, and did, respond, it will not consider arguments raised for the first time in ProAmpac's reply. *Cf. Fuji Photo Film Co. v. Jazz Photo Corp.*, 394 F.3d 1368, 1375 n.4 (Fed. Cir. 2005) (declining to consider an argument inappropriately raised in a footnote in an opening brief that was more fully developed in a reply brief). As discussed below, contrary to ProAmpac's claims, substantial evidence supports the Commission's determination that ultra-thin gauge aluminum foil is not a separate like product.

Physical Characteristics and Uses

ProAmpac's claim that ultra-thin gauge aluminum foil has different physical characteristics from other aluminum foil rests on its assertions that "the domestic industry recognizes 0.0003 [inches] as a globally-accepted cutoff within the industry" and that ultra-thin gauge aluminum foil has unique end uses. ProAmpac Reply at 5. With respect to the latter, ProAmpac contends that ultra-thin gauge aluminum foil is utilized by the flexible packaging industry because of its flexibility and is not suited for household use because it "cannot maintain the durability of standard thicker foil." *Id.* ProAmpac's claims are unpersuasive.

The Commission considered whether a thickness of 0.0003 inches or less represented a clear dividing line between ultra-thin gauge aluminum foil and other aluminum foil and, based on record evidence, found that it did not. Prelim. Views at 10 & nn.29–30 (citing, *inter alia*, Pet'rs' Postconf. Br. (Apr. 4, 2017) ("Aluminum Ass'n Postconf.

Br.") at 6–7 & Ex. 8, CR 102, 108, PR 87, CJA Tab 7, CSJA Tab 46).[12] Moreover, the Commission recognized that ultra-thin gauge aluminum foil is generally lighter and more flexible but noted that it generally has the same qualities as thicker gauge foil. *Id.* at 11; *see also id.* at 14 (stating that ultra-thin gauge aluminum foil and thicker foils "share many of the same physical characteristics and properties"). Additionally, the Commission acknowledged that ultra-thin gauge aluminum foil tends to be primarily used in flexible packaging applications, *id.* at 11 & n.35 (citation omitted), but concluded that "varying uses are typical where a grouping of similar products is involved," *id.* at 14.[13] The Commission's conclusion is supported by substantial evidence and otherwise reasonable. *See Hitachi Metals, Ltd. v. United States*, 43 CIT ___, ___, 350 F. Supp. 3d 1325, 1345 (2018) (sustaining the ITC's finding that "specificity of end use may not carry much weight when, as here, the domestic like product is made up of a grouping of similar products or involves niche products, which serve a variety of purposes") (internal quotation marks and citation omitted).

ProAmpac does not discuss the evidence upon which the Commission relied, nor does it point to evidence that detracts from the Commission's findings. ProAmpac's position reflects simple disagreement with the conclusions that the Commission drew from the available evidence; however, that is not a proper basis for the court to disturb the Commission's findings. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (the court is not to reweigh the evidence).

Common Manufacturing Facilities and Production Employees

ProAmpac's claim that ultra-thin gauge aluminum foil has different production processes from other aluminum foil rests on a passing notation in its reply brief that a Chinese manufacturer testified to using different equipment to make ultra-thin gauge foil. *See* ProAmpac Reply at 6. ProAmpac did not otherwise develop this argument. The Commission considered this evidence and concluded that it was unclear whether any additional processes and machinery were employed by other manufacturers or are unique to this Chinese company's production model. *See* Prelim. Views at 12 & n.39 (citing Tr. of ITC Staff Conference Hr'g (Mar. 30, 2017) at 122–23, PR 66, CJA Tab 4, CSJA Tab 50 (testimony of Mr. Jack Morrison, former CEO of

[12] For example, [[
]] and "an aluminum foil distributor uses a demarcation line of 0.0004 to distinguish between 'thin' and standard foil." Prelim. Views at 10; *see also* Aluminum Ass'n Postconf. Br. at 6–7.

[13] The Commission's preliminary findings with respect to ultra-thin gauge aluminum foil were largely undisturbed in its final determination. *See* Final Views at 14.

Xiashun Xiamen Holdings Ltd.)). Other record evidence indicated that the production process for ultra-thin gauge aluminum foil involved the same equipment and employees as are involved in thicker gauge foil. *Id.* at 11. "[W]hen adequate evidence exists on both sides of an issue, assigning evidentiary weight falls exclusively within the authority of the Commission." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1358 (Fed. Cir. 2006). Based on the Commission's reasoning and the evidence upon which it relied, *see* Prelim. Views at 11–22, the Commission's findings with respect to this factor are supported by substantial evidence.

Interchangeability and Price

ProAmpac alleges that interchangeability and price establish clear dividing lines between ultra-thin gauge aluminum foil and other aluminum foil; however, it does not challenge the Commission's findings with respect to these factors or explain how those findings fail to support the Commission's conclusion. *See* ProAmpac Mem. at 9; ProAmpac Reply. The Commission found limited interchangeability between ultra-thin gauge aluminum foil and thicker foil but explained that "varying uses are typical whe[n] a grouping of similar products is involved." Final Views at 12–13, 14. The Commission determined that the price of ultra-thin gauge aluminum foil is higher than other aluminum foil, *id.* at 13, but this factor alone did not establish a clear dividing line, *id*. at 13–15. In addition to the factors addressed above, the Commission also found similarities in channels of distribution and observed that a majority of domestic producers and U.S. importers and purchasers "indicated that ultra-thin gauge aluminum foil was mostly or somewhat comparable with all other aluminum foil with respect to market perceptions." *Id.* at 14 & nn. 50–51 (citing Staff Report Table I-8, Table I-7).

In sum, substantial evidence supports the Commission's conclusion that the record evidence did not support finding a clear dividing line between ultra-thin gauge aluminum foil and thicker foil products. Accordingly, the court will not disturb the ITC's determination on this issue.

II. Valeo's and MAHLE's Motions[14]

Valeo contends that the Commission's finding of a single domestic like product, inclusive of certain fin stock, is contrary to law and unsupported by substantial evidence. Valeo Mem. at 1, 8. According to

[14] As explained in MAHLE's moving brief and its letter submitted in lieu of a reply brief, it has adopted Valeo's arguments by reference. *See* MAHLE Mem. at 4; Letter in Lieu of a Reply Brief in Supp. of Pl.'s and Int.-Pls.' Mot. for J. Upon Agency R. Pursuant to Rule 56.2 (May 6, 2019), ECF No. 83. Therefore, the court's reference to Valeo's arguments includes MAHLE's arguments.

Valeo, the Commission's determination is contrary to law because "the Commission failed to draw [an] adverse inference from [the] domestic industr[y's] repeated refusal to provide accurate and reliable information." *Id.* at 10 (capitalization omitted); *see also* Pl.'s Reply Br. in Supp. of 56.2 Mot. for J. on the Agency R. ("Valeo Reply") at 3, ECF No. 84. Valeo further contends that substantial evidence does not support the Commission's findings that certain fin stock and other aluminum foil share common physical characteristics; manufacturing facilities, production processes and employees; and distribution channels. Valeo Mem. at 16–21. Additionally, Valeo argues that the Commission failed to evaluate conflicting information with respect to those findings, *id.* at 21–28, and failed to explain "how it applied the totality of circumstances test," *id.* at 28–29 (capitalization omitted). The Government and the Aluminum Association support the Commission's findings and decisions on each issue. *See* Gov. Resp. at 20–45; Aluminum Ass'n Resp. at 22–32.

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

i. Legal Standard

When "necessary information is not available on the record," or an interested party "withholds information" requested by the Commission," "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), the Commission "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a).[15] Additionally, if the Commission determines that the 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."[16] *Id.* § 1677e(b). The Commission's decision whether to use an adverse inference is discretionary. *See Timken U.S. Corp. v. United States*, 28 CIT 62, 84–85, 310 F. Supp. 2d 1327, 1346 (2004) ("Neither the statute's plain language nor its legislative history obligates the Commission to make adverse inferences in any situation."). In fact, unlike Commerce, "which often draws adverse inferences against particular non-cooperative companies when calculating dumping margins, . . . the Commission rarely draws adverse

[15] The Commission's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(c), (d), and (e).

[16] In evaluating a Commerce decision to use an adverse inference, the U.S. Court of Appeals for the Federal Circuit has explained that Commerce determines whether a respondent has complied to the "best of its ability" by "assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

inferences because its decisions affect all industry participants." *GEO Specialty Chems., Inc. v. United States*, 33 CIT 125, 136 (2009) (internal citations omitted); *see also* Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–316, Vol. I at 869 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4198–99 (explaining differential use of facts available by Commerce and the ITC).[17]

ii. Parties' Arguments

Valeo contends that the Commission erred as a matter of law by failing to apply an adverse inference against the domestic industry due to a U.S. producer's "careless[] or reckless[] fail[ure] to cooperate in the Commission's investigation[s] . . . ." Valeo Mem. at 10. According to Valeo, the producer, Novelis, initially withheld all information related to certain fin stock production, *see id*. at 13, Valeo Reply at 1–2, and submitted a revised questionnaire response providing (for the first time) information related to certain fin stock "a mere sixteen days before the Commission's vote," Valeo Reply at 2; Valeo Mem. at 6, and further revised that response only "nine days before the Commission's vote," Valeo Mem. at 6. Due to Novelis' actions, the "Commission's pre-hearing report, the [parties'] briefs, and hearing were all prepared using incorrect data." *Id.* at 12. Moreover, Valeo avers that it was deprived of an opportunity to meaningfully comment on Novelis' belated submissions. *Id.* at 13–14; Valeo Reply at 22.

Valeo also argues that Novelis never reported information concerning its fin stock production facility in Oswego, New York.[18] It states that, because of this omission, the Commission relied on "misleading and incomplete" information when evaluating the "manufacturing facilities, production processes, and employees" factor for its final determination.[19] Valeo Mem. at 11–12, 26 & n.2; Valeo Reply at

[17] The SAA is the authoritative interpretation of the statute. 19 U.S.C. § 3512(d). The SAA explains that Commerce generally makes determinations regarding specific companies; however, "the Commission makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole and by drawing reasonable inferences from the evidence it finds most persuasive." SSA at 869. Consequently, section 1677e(a) generally allows the Commission "to reach a determination by making such inferences as the evidence of record supports even if that evidence is less than complete." *Id.*

[18] Valeo asserts that it had previously purchased certain fin stock directly from Novelis; thus, "it had firsthand knowledge that Novelis had produced and sold [certain fin stock] during the [period of investigation] and that key data was missing" with respect to the Oswego, New York facility. Valeo Reply at 3; *see also* Valeo Mem. at 12.

[19] Valeo argued that fin stock requires different production steps, machinery, and equipment from other aluminum foil. Valeo Posthr'g Br. at 8–10. It argued that fin stock production requires industry certification, and cannot be produced in non-certified plants, which produce other aluminum foil. *Id.* at 8–9 & n.19; *see also id.*, Ex. 7. The Commission acknowledged Valeo's arguments but determined that the record was "mixed as to whether

20–21. Furthermore, in its reply, Valeo adds that the record continued to be devoid of information related to Novelis' customers and the origin of the aluminum that Novelis used to make certain fin stock. Valeo Reply at 4, 17. Additionally, Valeo complains that the Commission never addressed Valeo's arguments regarding the application of an adverse inference, and avers that "in the absence of any explanation," the court "must remand to the Commission to provide a reviewable determination." *Id.* at 5.

The Government contends that the Commission was not required to apply an adverse inference against the domestic industry because Novelis complied with the Commission's information requests and cooperated fully throughout the investigations. Gov. Resp. at 23, 25–26. The Government further contends that the "petitioners provided specific evidence concerning the nature of the production activities at Novelis' Oswego, [New York] facility and highlighted this information in their final comments." Gov. Resp. at 25 (citing Pet'rs' Posthr'g Br. (Feb 15, 2018) ("Aluminum Ass'n Posthr'g Br."), Ex. 10 ¶ 3, Ex. 20 ¶ 7, CR 318, PR 218, CJA Tab 30; Pet'rs' Final Comments (Mar. 13, 2018) at 3 n.1, CR 369, PR 235, CJA Tab 39). Moreover, Valeo had an opportunity to comment on Novelis' revised questionnaire responses, and the Commission incorporated the revised responses in its final determination. *See* Gov. Resp. at 26–27. The Government asserts that the Commission cannot apply an adverse inference against an entire industry. *See id.* at 24. The Aluminum Association similarly argues that the domestic industry, including Novelis, cooperated with the Commission's investigations and, otherwise, its arguments parallel the Government's arguments. *See generally* Aluminum Ass'n Resp.

iii. Analysis

The Commission's decision not to draw an adverse inference against the domestic industry is supported by substantial evidence and otherwise in accordance with law. Pursuant to the legal standard set forth above, before the Commission may apply an adverse inference, at least one of the conditions of section 1677e(a) must be satisfied in order to use the facts available, then the Commission also must find that the party failed to cooperate to the best of its ability. *See* 19 U.S.C. § 1677e(a),(b). The Commission did not find that any of the conditions of section 1677e(a) were satisfied such that the use of facts

certain fin stock is produced on the same equipment, using the same production processes, and the same employees as other in-scope aluminum foil." Final Views at 18 & n.67 (citing Valeo Posthr'g Br. at 1, 8–9); *see also* Final Staff Report at I-33 & n.100 (citing Aluminum Ass'n Postconf. Br., Ex.9) (addressing conflicting evidence).

available was appropriate and did not find that Novelis or any other member of the domestic industry failed to cooperate to the best of its ability. *See generally* Final Views.

To the contrary, the Commission explained that it was satisfied by the level of response from the domestic industry, noting that it received questionnaire responses that accounted for "the vast majority of domestic production of aluminum foil in 2016," Final Views at 4, and received "usable financial data on [the U.S. producers'] aluminum foil operations," Final Staff Report at VI-1. The level of response received by the Commission was representative of the domestic "industry" as defined by the statute. *See* 19 U.S.C. § 1677(4)(A) (defining industry to include "those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product").

The Commission acknowledged that in Novelis' original questionnaire response submitted on December 14, 2017, the company "[[ ]]." Verification Report (Feb. 27, 2018), CR 329, CJA Tab 32; *see also* Final Staff Report at VI-1 & n.2 (referencing the Verification Report); Novelis' Resp. to U.S. Producers' Questionnaire (Dec. 14, 2017), CR 158, CJA Tab 20. Nevertheless, by February 2018, Novelis "[[ ]]." Verification Report at 5; *see also* Novelis U.S. Producer's Questionnaire Resp. (Revised) (Feb. 27, 2018) ("Novelis Feb. 27th Resp."), CR 328, CJA Tab 31. The Commission conducted a verification of Novelis during which it received [[ ]], Verification Report at 3; *see also id. at* 4 n.1, reviewed [[ ]], and determined that "[[ ]]," and "the methodologies used [[ ]] were deemed reasonable," *id.* at 5. Moreover, the Commission verified the locations of Novelis' production facilities involved in aluminum foil production, which did not include the Oswego, New York facility. *See id.* at 4. The Commission incorporated the verification adjustments into the final staff report. Final Staff Report at VI-1.

While Valeo repeatedly claims that Novelis withheld requested information, significantly impeded the Commission's investigations, failed the Commission's verification, and failed to cooperate to the best of its ability, Valeo Mem. at 2, 6, 10, 14; Valeo Reply at 3, those claims are not supported by the Commission's record. Valeo's argument that the Commission erred in failing to apply an adverse inference against the domestic industry therefore fails because the Commission was not required to make an adverse inference when no

findings pursuant to sections 1677e(a) and (b) had been made. *See AWP Indus., Inc. v. United States*, 35 CIT 774, 782 n.25, 783 F. Supp. 2d 1266, 1277 n.25 (2011).

The court is unpersuaded that Valeo did not have a meaningful opportunity to comment on Novelis' revised questionnaire responses. *See* Valeo Mem. at 13–14; Valeo Reply at 22. Novelis provided the revised responses on February 27 and March 6, 2018. *See* Novelis Feb. 27th Resp.; Novelis' U.S. Producers' Questionnaire Resp. (Revised) (Mar. 6, 2018), CR 353, 354, CJA Tab 36. Pursuant to the scheduling notice for the final phase of the investigations, on March 9, 2018, the Commission made available to parties all information on which they did not have an opportunity to comment. *See* Scheduling of the Final Phase of Countervailing Duty and Antidumping Duty Investigations (Nov. 2, 2017) ("Scheduling Notice") at 3, PR 161, CJA Tab 17. The parties were permitted to "submit final comments on this information on or before March 13, 2018 . . . ." *Id.* Valeo availed itself of the opportunity to submit final comments by this deadline. *See* Final Comments on Behalf of Valeo North America Inc. (Mar. 13, 2018), CR 370, PR 231, CJA Tab 38. In its comments, however, Valeo did not address any of the new information, electing instead to urge the agency to apply an adverse inference against the domestic industry due to Novelis' belated submissions.[20] *See id.* at 3–5.

Lastly, Valeo is correct that the Commission did not explicitly address Valeo's argument that the Commission should apply an adverse inference. Valeo Reply at 5; s*ee generally* Final Views. However, the agency need not respond to every argument made by a party, so long as the path of the agency's reasoning is reasonably discernable by the court. *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1354 (Fed. Cir. 2005); *see also Bowman Transp. V. Ark.-Best Freight Sys.*, 419 U.S. 281, 285–86 (1974) (articulating the discernible path standard). Here, the Commission explained that it received questionnaire responses accounting for the vast majority of U.S. domestic production of aluminum foil and was able to incorporate Novelis' revised questionnaire responses and verification adjustments into its final deter-

[20] Valeo asserts that it was "constrained by the fact that the statute forecloses the use [of] new factual information to rebut Novelis' submissions." Valeo Reply at 22 (citing, *inter alia*, 19 C.F.R § 207.30(b)). Valeo does not identify what information it was prevented from submitting and how that information would have rebutted Novelis' submissions. *See id.* It is undisputed that the Commission complied with its statutory and regulatory directives to permit Valeo to comment on Novelis' submissions, *see* 19 U.S.C. § 1677m(g); 19 C.F.R. § 207.30(a), and complied with the scheduling notice established following the Commission's preliminary determinations, *see* Scheduling Notice at 3. For these reasons, the court finds that Valeo was not deprived of a meaningful opportunity to comment on the new information.

mination. *See* Final Views at 4; Final Staff Report at I-5, VI-1. Thus, the court finds it was unnecessary for the Commission to reach Valeo's adverse inference argument because the Commission did not find that there was a gap in the record to be filled with any facts available, let alone facts available with an adverse inference.

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

Valeo challenges the Commission's findings with respect to the following factors: physical characteristics; manufacturing facilities, production processes and employees; and distribution channels.[21] Valeo Mem. at 16–21. Valeo argues that substantial evidence does not support the Commission's findings, and the Commission failed to account for other evidence that contradicts its findings. *Id.* at 16–21, 22–28. As discussed below, the Commission's findings are supported by substantial evidence and the Commission properly evaluated the record evidence.

Definition of Certain Fin Stock

As a preliminary matter, although Valeo does not explicitly challenge the Commission's reliance on the questionnaire definition of "certain fin stock," it nevertheless faults the Commission for basing its analysis on a "narrow technical definition" of the product. *Id.* at 17; *see also id.* at 20 (arguing that the Commission's analysis of the channels of distribution factor "was premised on the overly narrow technical definition of fin stock," and that "no record evidence supports a reasonable basis on which the Commission relied by narrowly defining fin stock in terms of gauge and manganese content"). The Commission defined "certain fin stock" as "flat-rolled aluminum foil of greater than or equal to 45 microns (0.045 mm or 0.00177 inches) and less than or equal to 200 microns (0.2 mm or 0.00787 inches) in thickness, containing 1 percent or more, by weight, of manganese." Final Views at 16 n.55 (citation omitted). "Other in-scope fin stock" consisted of aluminum foil meeting the scope definition and used as

[21] Valeo does not dispute the Commission's findings with respect to interchangeability, producer and consumer perceptions, and price. Valeo Mem. at 1. The Commission found that certain fin stock and other aluminum foil are limited in their interchangeability, that producers and consumers do not perceive them to be comparable, and that the price for certain fin stock is higher. Final Views at 19–20. Nevertheless, it concluded that:

> [w]hile the interchangeability between certain fin stock and other aluminum foil is limited, such limited interchangeability is also true for other types of aluminum foil that serve a range of applications. Although customers perceive certain fin stock and other aluminum foil as different products, the record is unclear as to whether customers perceive certain fin stock and other in-scope fin stock to be different products.

Id. at 21. Valeo argues that those findings are contrary to the Commission's determination of a single like product. Valeo Reply at 16–17; *see generally* Final Views at 7.

fin stock, but not meeting the definition of "certain fin stock"; therefore, the Commission's domestic like product analysis was based on a subset of in-scope aluminum foil used in fin stock applications. *See id.* at 16–17 & n.60.

The Commission reasonably based its domestic like product analysis on the definition of "certain fin stock" included in the questionnaires and the data received in response thereto. *See id*. at 16–17. Pursuant to 19 C.F.R. § 207.20(b), the Commission is required to "circulate draft questionnaires for the final phase of an investigation to parties to the investigation for comment." Once the Commission complies with that directive, "[a]ny party desiring to comment on draft questionnaires shall submit such comments in writing to the Commission" and "[a]ll requests for collecting new information shall be presented at this time." *Id.* Consistent with this regulation, the Commission circulated the draft questionnaires in which it defined fin stock in accordance with Valeo's initial proposal. *See* Letter Re: Questionnaire Cmts.; *Compare* Draft Questionnaire at 2 (defining "[i]n scope fin stock aluminum foil"), *with* Valeo & MAHLE BT Postconf. Br. at 1 (defining fin stock). Valeo submitted comments on the draft questionnaires, agreeing with that definition. Final Views at 16 & n.55; *see also* Valeo's Draft Questionnaire Cmts. at 3. Although Valeo proposed changing that definition after the Commission issued questionnaires to industry participants, the Commission did not have time to recollect data based on the revised definitions. Final Views at 16 n.54. The court finds no error in the Commission's decision to rely upon the data collected in response to information requests pertaining to "certain fin stock" as defined in the questionnaires. Valeo's arguments attacking the Commission's reliance on what turned out to be Valeo's own "narrow technical definition of fin stock" are unavailing. *See* Valeo Mem. at 17, 20.

Physical Characteristics and Uses

Valeo asserts that the Aluminum Association's separate publication of specification standards for fin stock and aluminum foil renders the Commission's determination unsupported by substantial evidence.[22] *See* Valeo Mem. at 16. Additionally, it asserts that differences in end uses support finding a clear dividing line between certain fin stock

[22] As the Government observes, this information is more relevant to the producers and consumers' perceptions factor and the "Commission expressly recognized this, noting that the record indicated 'producers and customers do not perceive certain fin stock and other aluminum foil to be comparable,' and [t]he Aluminum Association separately categorizes and collects data regarding fin stock and aluminum foil.'" Gov. Resp. at 31 (quoting Final Views at 19).

and other aluminum foil.[23] *Id*. at 17.

The Commission reasonably determined that certain fin stock and aluminum foil share some physical characteristics. Final Views at 21. The Commission explained that record evidence indicated that certain fin stock overlaps in gauge and in manganese content with other in-scope aluminum foil used as fin stock. *Id.* at 16–17 & n.59 (citing Final Staff Report at Table III-9). The record showed that U.S. producers "shipped a substantial quantity of thinner aluminum foil with a manganese content equivalent to that used in certain fin stock." *Id.* at 17 & n.61 (citing Final Staff Report Table III-9). Additionally, the Commission explained that the alloy series commonly used in certain fin stock appear also to be used in the production of other aluminum foil. *Id.* at 17 & n.62 (citing Final Staff Report at I-33). While the Commission acknowledged that certain fin stock and other aluminum foil differ in end uses; it observed that there was no evidence of a similar distinction between certain fin stock and other in-scope fin stock. *Id.* at 21. Again, the Commission explained that varying uses are common when a grouping of similar products is involved and there was no evidence that certain fin stock differs in uses from other in-scope fin stock. *Id*.

Valeo argues that the Commission failed to consider that Aluminum Association standards distinguish fin stock from other aluminum foil based on mechanical properties, including alloy, temper, field strength, elongation, and bow tolerances. Valeo Mem. at 22 (citing Valeo Prehr'g Br. at 9 & Exs. 3, 4). Contrary to Valeo's assertions, the Commission acknowledged the mechanical properties of certain fin stock, explaining that it "is characterized by higher strength, improved corrosion resistances, increased fatigue strength, enhanced formability, higher thermal conductivity, improved sagging resistance, and improved high temperature properties." Final Views at 16 & n.57 (citing Final Staff Report at I-31). Nevertheless, certain fin stock overlaps in thickness and in manganese content with other in-scope aluminum foil used as fin stock. *Id.* at 16–17. Valeo further contends that the Commission failed to consider evidence "indicating that fin stock is a specialty alloy aluminum that has a significantly different chemical composition from other aluminum foil." Valeo Mem. at 23. The Commission considered this evidence, expressly acknowledging that "certain fin stock may be made with proprietary

[23] Valeo relies on the Commission's observation that "[c]ertain fin stock is used in the production of fins used in heat exchangers for automotive and HVAC applications, including air coolers, condensers, evaporators, heater cores, oil coolers and radiators," whereas, "thinner aluminum foil is used in a variety of end use applications such as flexible packaging, containers, and household foil products." Valeo Mem. at 17 (quoting Final Views at 17).

alloys." Final Views at 16 (citing Final Staff Report at I-31). In sum, the Commission considered conflicting evidence relating to this factor and its findings as to this factor are supported by substantial evidence.

Common Manufacturing Facilities and Production Employees

Valeo argues that substantial evidence does not support the Commission's finding that "production processes used to produce both [certain fin stock and aluminum foil] are largely similar." Valeo Mem. at 18 (quoting Final Views at 21) (alteration in original). It avers that the Commission reached an unreasonable conclusion when compared to the specific findings it made regarding this factor. *See id.* at 18. Valeo argues that the chemical composition of fin stock alloys requires unique manufacturing requirements, which indicates a clear dividing line in production facilities, processes, and employees between fin stock and other aluminum foil. *Id.* at 18–19.

The Commission noted that "[t]he record is mixed as to whether certain fin stock is produced on the same equipment, using the same production processes, and the same employees as other in-scope aluminum foil." Final Views at 18, 21. Some record evidence indicated that manufacturing facilities for certain fin stock require industry certification and that the production process for certain fin stock includes proprietary processes and a higher level of process controls, such as a 15-step manufacturing process that includes direct chill casting.[24] Final Views at 18 & nn.66–67 (citing, *inter alia*, Valeo Prehr'g Br. at 17; Valeo Posthr'g Br. at 1, 8–9); Final Staff Report at I-32–33. Other evidence, however, indicated "that certain fin stock could be produced on the same equipment as other in-scope aluminum foil, *using either the direct chill casting process* or the continuous casting process." Final Views at 18 n.66 (citing, *inter alia*, Aluminum Ass'n Posthr'g Br. at 4) (emphasis added); *see also* Aluminum Ass'n Prehr'g Br. at 10.

The majority of responding U.S. producers (3 of 5) indicated that certain fin stock and other aluminum foil are fully or mostly comparable with respect to manufacturing facilities and employees while half of the responding U.S. importers (5 of 10) and a majority of U.S. purchasers (11 of 17) indicated that they are fully, mostly, or somewhat comparable in that respect. Final Views at 18 & n.68 (citing Final Staff Report at Table I-4). While Valeo contends that a majority of U.S. importers and U.S. purchasers rated certain fin stock as somewhat or not at all comparable with respect to production pro-

[24] Although Valeo contends that the Commission failed to consider this evidence, *see* Valeo Mem. at 25, that contention is belied by the Commission's statements that show the contrary, *see* Final Views at 18; Final Staff Report at I-32–33.

cesses, Valeo Mem. at 24, the difference between Valeo and the Commission is in whether they count the "somewhat" responses with those responding favorably or disfavorably to the comparability question. Importantly, "when adequate evidence exists on both sides of an issue, assigning evidentiary weight falls exclusively within the authority of the Commission." *Nippon Steel Corp.*, 458 F.3d at 1358. The Commission reasonably concluded that "while the manufacturing facilities for certain fin stock and other aluminum foil may themselves be different, the production processes used to produce both products are largely similar." Final Views at 21. Additionally, as the Commission observed, "there is nothing on the record that indicates that the production process for other in-scope fin stock differs to a significant degree from that for certain fin stock." *Id.* In sum, the Commission's findings as to this factor are supported by substantial evidence.

Channels of Distribution

Valeo argues that certain fin stock is largely sold to industrial end-users while other aluminum foil is sold to "non-industrial users, including distributor, consumer packaging, and household users." Valeo Mem. at 19 (citing Final Staff Report at I-38, Table I-5). It contends that the record shows that certain fin stock is shipped "strictly for use in the specific applications for which it is destined (*i.e.*, heat exchanger/heating, ventilation, and air conditioning . . .)." *Id.* at 19–20 (citing Final Staff Report at I-35 Fig. I-7). Valeo contends that the Commission failed to address the significance of this evidence. *Id.* at 27.

Substantial evidence supports the ITC's finding that there is "overlap in the channels of distribution between certain fin stock and all other aluminum foil with regard to end use channels into which they are sold, particularly for shipments for industrial use and consumer packaging." Final Views at 18 & n.69.[25] The Commission noted that all responding U.S. producers indicated that certain fin stock and

[25] The Commission noted that "more than [[ ]] percent of U.S. producers' [shipments of] certain fin stock were made to the [[ ]] channel in each year of the period of investigation." Final Views at 18 n.69 (citing Final Staff Report at Table I5). Table I-5 shows that between [[ ]] and [[ ]] percent of U.S. producers' shipments of certain fin stock and between [[ ]] and [[ ]] percent of U.S. shipments of all other aluminum foil went to the consumer packaging end use. Final Staff Report at Table I-5. Between [[ ]] and [[ ]] percent of U.S. producers' shipments of certain fin stock and between [[ ]] and [[ ]] percent of U.S. producers' shipments of all other aluminum foil went to industrial end uses. Staff Report at I-38, Table I-5. Valeo relies on the statement of one U.S. producer [[ ]]. Valeo Mem. at 19 (citing Final Staff Report at I-37). While the Commission acknowledged this fact, it also noted that [[ ]]. Final Staff Report at I-37. The court will not reweigh the evidence and "the possibility of drawing two inconsistent conclusions from the evidence does not prevent [the Commission's] finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citation omitted).

other aluminum foil are either fully, mostly, or somewhat comparable in their channels of distribution, "while a majority of responding U.S. importers (6 of 10) and U.S. purchasers (9 of 15) indicated that they are fully, mostly, or somewhat comparable." *Id.* at 19 & n.71 (citing Final Staff Report at I-4). Additionally, the respondents did not dispute that there is an overlap in the channels of distribution. *See id.* ("Respondents do not dispute that certain fin stock and aluminum foil are sold directly to household and industrial end users").

C. The Commission Considered the Record as a Whole in Determining that Certain Fin Stock was not a Separate Like Product

Valeo argues that the Commission failed to consider the "totality of the circumstances" in reaching its determination that record evidence did not indicate a clear dividing line between certain fin stock and other in-scope aluminum foil products. Valeo Mem. at 28–29. It claims that the Commission failed to consider information regarding distinct end uses, interchangeability, producers and customers' perception, and price that detract from the Commission's determinations. *Id.* at 29.

The Commission assessed each of the six factors individually, and weighed the supporting and detracting evidence relating to the factors as a whole. *See* Final Views at 16–22. As discussed herein, the Commission considered the evidence and arguments that Valeo complains the Commission failed to consider. Valeo's arguments to the court largely amount to disagreements with the Commission's findings and attempts to have the court reweigh the evidence. This the court will not do.

CONCLUSION

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

Dated: September 9, 2019
New York, New York

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

Slip Op. 19–121

BOSUN TOOLS CO., LTD. AND CHENGDU HUIFENG CO., LTD., NEW MATERIAL TECHNOLOGY Plaintiff and Consolidated Plaintiff, and DANYANG NYCL TOOLS MANUFACTURING CO., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS' COALITION, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00102

[Denying Zhejiang Wanli Tools Group Co., Ltd.'s motion to reverse liquidation.]

Dated: September 13, 2019

Ronald M. Wisla, Fox Rothschild LLP, of Washington, DC, argued for plaintiff-intervenor Zhejiang Wanli Tools Group Co., Ltd. With him on the brief were *Lizbeth R. Levinson* and *Brittney Renee Powell*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Franklin E. White, Jr.*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H.* Hunt, Assistant Attorney General. Of Counsel was *Paul Kent Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court is Plaintiff-Intervenor Zhejiang Wanli Tools Group Co., Ltd.'s ("Wanli") motion to reverse liquidation of entry MH-92053940–9. *See* Zhejiang Wanli Tools Group Co., Ltd.'s Mot. Reverse Liquidation Entry Made Violation Ct.'s Injunction Order, Dec. 13, 2018, ECF No. 40 ("Wanli's Mot."). Wanli claims the entry was liquidated in violation of the Court's May 24, 2018, injunctive order. *Id.* at 2; *see generally* Order Statutory Injunction Upon Consent, May 24, 2018, ECF No. 19 ("Injunction"). Defendant objects and argues that U.S. Customs and Border Protection ("Customs" or "CBP") rightfully liquidated the entry because Wanli is the manufacturer, not the exporter, of the entry in question and the Injunction only covers entries for which Wanli is the exporter. Def.'s Resp. Mot. Reverse Liquidation at 2–5, Feb. 21, 2019, ECF No. 51 ("Def.'s Resp."). For the following reasons, Wanli's motion is denied.

BACKGROUND

On January 13, 2017, the U.S. Department of Commerce ("Commerce") initiated the seventh administrative review of the antidumping duty ("ADD") order covering diamond sawblades and parts

thereof from the People's Republic of China ("PRC" or "China") entered during the period of review, November 1, 2015, through October 31, 2016. *Initiation of Antidumping & Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 4,294, 4,296 (Dep't Commerce Jan. 13, 2017). In its final determination, Commerce calculated a weighted-average dumping margin of 82.05% for Wanli. *Diamond Sawblades & Parts Thereof From the [PRC]*, 83 Fed. Reg. 17,527, 17,528 (Dep't Commerce Apr. 20, 2018) (final results of [ADD] admin. review; 2015–2016) ("*Final Results*"). Wanli intervened as a matter of right in this action challenging the *Final Results*. *See generally* Order [Granting Mot. Intervene], May 24, 2018, ECF No. 20. On May 24, 2018, the Court enjoined Commerce and CBP from "issuing instructions to liquidate or making or permitting liquidation" of "diamond sawblades and parts thereof" entered during the period of review and that were exported by eight companies, one of which is Wanli. Injunction at 1. On June 8, 2018, CBP liquidated entry MH-92053940–9 at a rate of 82.05%, the weighted-average dumping margin assigned to Wanli in the *Final Results*. Believing that liquidation occurred by way of "inadvertent error," Wanli's counsel engaged in a series of discussions with Defendant to resolve the issue. *See* Wanli's Mot. at 2. As a result, counsel for Wanli provided Defendant and CBP with additional documents purporting to show Wanli as the exporter of the goods covered by the entry in question. *Id.* at 2–4; Def.'s Resp. at 2. Upon review, CBP reaffirmed its decision to liquidate because the entry in question was not exported by Wanli and was therefore not enjoined from liquidation per the terms of the Injunction. In response to Wanli's Motion to Compel, Commerce filed with the court the affidavit of a CBP customs officer attesting to the review process and evidence supporting the decision to liquidate. [Ex. A Decl. CBP Supervisory Import Specialist] ¶¶ 1–10, Feb. 21, 2019, ECF No. 51–1(attached to Def.'s Resp.) ("CBP Import Specialist Decl.").

After filing its motion to compel, Wanli's counsel alerted Defendant that it was in the process of acquiring additional supporting documentation from the Chinese Government. Def.'s Resp. at 5 n.2. Defendant notified the court of Wanli's counsel's attempt to acquire new information. *Id.* To ensure that all parties had a meaningful opportunity to be heard and that all relevant fact evidence was before the court, Wanli was ordered to produce the documentation by March 20, 2019. Letter, Mar. 13, 2019, ECF No. 56. Wanli complied, *see* [Wanli's] Resp. Ct.'s [Mar. 13, 2019] Letter, Mar. 20, 2019, ECF No. 61 ("Wanli's Suppl. Resp."), and Defendant had the opportunity to respond. *See* Def.'s Resp. Submission Re Mot. Reverse Liquidation, Mar. 27, 2019, ECF No. 63. On July 30, 2019, the court heard oral argument.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012), and 28 U.S.C. § 1581(c) (2012). An allegation that goods were liquidated against a statutory injunction does not deprive the Court of jurisdiction. *See Argo Dutch Industries v. United States*, 589 F.3d 1187 (Fed. Cir. 2009). The Court's scope and standard of review is governed by 28 U.S.C. § 2640. A motion to reverse liquidation of an entry purportedly enjoined by a statutory injunction is reviewed under section 706 of the Administrative Procedure Act ("APA"), as amended, 5 U.S.C. § 706 (2012). 28 U.S.C. § 2640(e). The court will conduct de novo review and set aside any determination not warranted by the facts. 5 U.S.C. § 706 (2)(F).[1] The court will assess the facts to determine whether the motion's proponent carried its burden under the preponderance of the evidence standard. *See St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 768–69 (Fed. Cir. 1993). In a civil action, preponderance of the evidence means "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." *Hale v. Dep't of Transp., Fed. Aviation Admin.*, 772 F.2d 882, 885 (Fed. Cir. 1985).

DISCUSSION

Wanli's motion to reverse the liquidation of entry MH-92053940–9 is denied. Here, Danyang NYCL Tools Manufacturing Co., Ltd., Danyang Weiwang Tools Manufacturing Co., Ltd., Hangzhou Deer King Industrial and Trading Co., Ltd., Guilin Tebon Superhard Material Co., Ltd., Jiangsu Youhe Tool Manufacturer Co., Ltd., Quanzhou Zhongzhi Diamond Tool Co., Ltd., Rizhao Hein Saw Co., Ltd., and Wanli (collectively "Plaintiff-Intervenors") filed a proposed statutory injunction upon consent. *See* Form 24 Proposed Order for Statutory Injunction Upon Consent, May 24, 2018, ECF No. 14. In its filing, Plaintiff-Intervenors named the eight companies whose entries would be covered by the statutory injunction and identified each of those companies as exporters. *Id.* at 2. Plaintiff-Intervenors, therefore, limited the scope of the injunction to companies who acted as exporters and did so even though the form injunction allows the filer to identify any company listed as a foreign producer, exporter, or both. *See* USCIT, Form 24 Order for Statutory Injunction Upon Consent at 2

[1] Wanli's motion is styled as a motion to reverse liquidation of entry MH-92053940–9 and is based on Wanli's allegation that CBP violated the terms of the court's Injunction. The underlying relief sought is an order from this court compelling CBP to reverse liquidation and come into compliance with the Injunction.

(Oct. 23, 2017), *available at* https://www.cit.uscourts.gov/sites/cit/files/Form%2024.pdf; *see also* Injunction (demonstrating the options available to the Plaintiff-Intervenors). On May 24, 2018, the court granted the proposed injunction, as filed, and no party has sought to amend the terms of the Injunction. Here, although the Injunction enjoins Commerce and CBP from liquidating diamond sawblades and parts thereof imported during the relevant period of review, it is limited to entries that Wanli exported,[2] not entries that Wanli produced but which were exported by another company. *See id.* The party seeking to reverse liquidation must demonstrate by a preponderance of the evidence that the liquidated entry was within the scope of the relevant injunction. *See St. Paul Fire*, 6 F.3d at 768–69. Therefore, to conclude that CBP failed to comply with the terms of the Injunction, the court would need to find that Wanli exported the goods in entry MH-92053940–9. The evidence before the court does not support such a conclusion.

Evidence before the court shows that Jiarong Enterprises Co., Ltd. ("Jiarong"), not Wanli, was the exporter for all the goods imported in entry MH-92053940–9.[3] The Entry Summary Form (CBP Form 7501) for the entry in question contains thirteen lines of goods. *See generally* Attach. 3 to Wanli's Mot. at 2–4, Dec. 13, 2018, ECF No. 40–1 ("Entry Summary Form"). Wanli alleges that it exported the goods described on Line No. 012 ("line 12") of the Entry Summary Form. *See* Wanli's Mot. at 2–4. However, the Entry Summary Form, which denotes the bill of lading by the letters "MBL," identifies a single bill of lading for all thirteen lines of goods encompassed in the entry. Entry Summary Form at 1; *see also* CBP Import Specialist Decl. ¶¶ 4, 7. That bill of lading, number CMDUNBLF016753, lists Jiarong as the shipper exporter. *See* [Ex. B to Def.'s Resp.], Feb. 21, 2019, ECF No. 51–2. In fact, Wanli's counsel, in an email, concedes that "on Entry MH-92053940, only Jiarong Enterprises Co., Ltd. (and not Zhejiang Wanli) was listed as the shipper [e]xporter." *Id.* No evidence before the court demonstrates that anyone other than Jiarong exported the goods covered by the entry in question. Given that the Injunction specifically limits the scope of its application to Wanli as an exporter of the subject merchandise entered during the relevant

[2] In addition to Wanli, the Injunction identifies seven other exporter companies whose entries are enjoined from liquidation. Injunction at 2. The identity of those companies is not relevant for the purposes of ruling on Wanli's motion.

[3] The Injunction does not list Jiarong among the companies whose entries are enjoined from liquidation and no evidence before the court suggests that Jiarong and Wanli are the same entity. In fact, Wanli's counsel confirmed that the two companies are unrelated in response to a question posed by the court during oral argument. Oral Arg. at 00:02:58–00:03:01.

period of review and Wanli has not shown that it is the exporter for the entry in question, CBP properly liquidated the entry at issue.

The four pieces of information Wanli identifies in support of its contention that it is the exporter of the goods in line 12 are unavailing. Wanli's Mot. at 2–4; Wanli's Suppl. Resp. at 2–3. The inclusion of Wanli's manufacturer ID number, CNZHEWANHAN, in line 12, shows Wanli's status as the manufacturer of the goods referenced, not the exporter.[4] Although Invoice 2 (NBJR16016–1) was issued by Wanli and relates to line 12 of the entry, the invoice does not refer to Wanli as the exporter of the goods at issue. *See* Entry Summary Form at 3; Attach. 4 to Wanli's Mot., Dec. 13, 2018, ECF No. 40–1. Further, although line 12 contains Wanli's unique exporter ID (A-570–900–060), as the CBP Import Specialist explains, CBP does not rely on that identification number alone and instead requests additional documentation, as it did in this case. CBP Import Specialist Decl. ¶ 6. Here, the additional documentation available to CBP was the Bill of Lading which identifies Jiarong as the exporter, not Wanli. The two documents comprising the Chinese export documentation are similarly unavailing. Although both documents list Wanli as the "Export unit," neither document bears any seal nor any insignia indicating that either was issued by the Chinese Government. *See* Wanli's Suppl. Resp. at Attach. I (producing two documents—"Notification of Paperless Export Release for Customs Clearance" and "Customs Declaration for Export of the Peoples' Republic of China"). In fact, during oral argument, Wanli's counsel confirmed that both documents are copies of forms the exporter broker filed with the Chinese Government. Oral Arg. at 00:05:06–00:05:31. Further, both documents reference the Bill of Lading that clearly identifies Jiarong, not Wanli, as the exporter of the goods at issue. Wanli's Suppl. Resp. at Attach. I (referring to "Customs Declaration for Export of the Peoples' Republic of China"). Accordingly, evidence before the court fails to show that Wanli is the exporter of the merchandise and that CBP or Commerce failed to comply with the court's order enjoining liquidation.

CONCLUSION

For the foregoing reasons, it is **ORDERED** that Wanli's motion to reverse liquidation is denied.

[4] Although Defendant challenges Wanli's assertion that manufacturer ID CNZHEWANHAN corresponds to Wanli and argues that ID number actually corresponds to Zhejiang Wanda Tools Co., Ltd., Defendant does not contest, for the purposes of this motion, that Wanli was the manufacturer of the goods in the entry at issue here. Def.'s Resp. at 4. The correctness of the manufacturer ID is not dipositive of who exported the goods in line 12.

Dated: September 13, 2019
New York, New York

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

Slip Op. 19–122

JIANGSU ZHONGJI LAMINATION MATERIALS CO., LTD., SHANTOU WANSHUN PACKAGE MATERIAL STOCK CO., LTD., JIANGSU HUAFENG ALUMINUM INDUSTRY CO., LTD., AND JIANGSU ZHONGJI LAMINATION MATERIALS CO., (HK) LTD, Plaintiffs, v. UNITED STATES, Defendant, ALUMINUM ASSOCIATION TRADE ENFORCEMENT WORKING GROUP and its INDIVIDUAL MEMBERS, JW ALUMINUM COMPANY, NOVELIS CORPORATION, and REYNOLDS CONSUMER PRODUCTS LLC, Defendant-Intervenors.

Before: Jane A. Restani, Judge
Court No. 18–00089

[Commerce's final affirmative countervailing duty determination with respect to certain aluminum foil from the People's Republic of China is partially sustained and partially remanded for reconsideration consistent with this opinion.]

Dated: September 18, 2019

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for Plaintiffs Jiangsu Zhongji Lamination Materials Co., Ltd., Shantou Wanshun Package Material Stock Co., Ltd., Jiangsu Huafeng Aluminum Industry Co., Ltd., and Jiangsu Zhongji Lamination Materials Co., (HK) Ltd. With him on the briefs were *Jill A. Cramer*, *Sara M. Wyss, Yuzhe PengLing*, *James C. Beaty*, and *Bryan P. Cenko*.

Aimee Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Mercedes Morno*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

John M. Herrmann, II and *Grace W. Kim*, Kelley Drye & Warren, LLP, of Washington, D.C., for Defendant-Intervenors Aluminum Association Trade Enforcement Working Group and its Individual Members, JW Aluminum Company, Novelis Corporation, and Reynolds Consumer Products LLC.

OPINION AND ORDER

Restani, Judge:

In this action challenging a final determination and countervailing duty order issued by the United States Department of Commerce ("Commerce") regarding certain aluminum foil from the People's Republic of China ("PRC"), covering the period from January 1, 2016, through December 31, 2016, Jiangsu Zhongji Lamination Materials Co., Ltd. ("Zhongji"), and its affiliated companies, Shantou Wanshun Package Material Stock Co., Ltd. ("Shantou Wanshun"), Jiangsu

Huafeng Aluminum Industry Co., Ltd. ("Jiangsu Huafeng"), and Jiangsu Zhongji Lamination Materials Co., (HK) Ltd. ("Zhongji HK"), request that the court hold Commerce's countervailing duty determination to be unsupported by substantial evidence or otherwise not in accordance with law.

BACKGROUND

Following a petition filed by the Aluminum Association Trade Enforcement Working Group and its individual members, JW Aluminum Company, Novelis Corporation, Reynolds Consumer Products LLC (collectively "Petitioners" or "Defendant-Intervenors"), Commerce initiated a countervailing duty ("CVD") investigation into various subsidy programs concerning imports of certain aluminum foil from the PRC. *See Certain Aluminum Foil from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 82 Fed. Reg. 15,688 (Dep't Commerce Mar. 30, 2017). Commerce selected Zhongji as a mandatory respondent and issued questionnaires to Zhongji and the Government of the PRC ("GOC"). *See Certain Aluminum Foil from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 37,844 (Dep't Commerce Aug. 14, 2017) ("*Prelim. Determination*") and accompanying *Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China*, C-570–054, POI 1/1/2016–12/31/2016 at 9–10 (Dep't Commerce Aug. 7, 2017) ("*Prelim. I&D Memo*"). Commerce sought, inter alia, supporting sales documentation for Zhongji's requested export value adjustment.[1] *See Prelim. I&D Memo* at 9–10. Zhongji, responding on behalf of itself and all affiliated companies, reported that, during the period of investigation, all of its sales to the United States were made through Zhongji HK, a Hong Kong-incorporated company wholly owned by Zhongji. *See Prelim. I&D Memo* at 10; *see also Preliminary Determination Calculation Memorandum for Zhongji Lamination Materials Co., Ltd* at 3, P.R.[2] 293 (Dep't Commerce Aug. 7, 2017) ("*Prelim. Calc. Memo*") (examining "Zhongji HK together with Zhongji as a cross-owned, affiliated trad-

[1] Although Commerce uses the term "export value adjustment," it has also referred to this adjustment as an "entered value adjustment." *See Decision Memorandum for the Final Results of Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China; 2015* at 47 n.258, C-570980, POI 01/01/2015–12/31/2015 (Dep't Commerce July 12, 2018) ("*CSP Cells from the PRC*").

[2] "P.R." refers to a document contained in the public administrative record. "C.R." refers to a document contained in the confidential administrative record.

ing company" pursuant to 19 C.F.R. § 351.525(c)).[3] Zhongji also submitted supporting documentation for its requested export value adjustment. *See Zhongji Initial Questionnaire Response* at Vol. IV, Ex. 6, P. R. 126–30, C.R. 58–80 (June 12, 2017); *Zhongji Second Supplemental Section III Questionnaire Response*, C.R. 136, P.R. 212 (July 14, 2017).

In its preliminary determination, Commerce granted Zhongji's requested export value adjustment, adjusting the subsidy rate to account for the mark-up between the export value from the PRC and the value of subject merchandise produced by Zhongji as entered into the United States. *See Prelim I&D Memo* at 10–11. Commerce used Maersk Shipping Line ("Maersk") price quotes to calculate the benchmark to value ocean freight expenses, excluding Zhongji's proffered freight rates from Xeneta, a freight rate market intelligence firm. *See id.* at 17–18. Commerce, however, concluded that the GOC withheld information that was requested of it and failed to cooperate to the best of its ability with respect to certain information regarding the Export Buyer's Credit Program ("EBCP"), the provision of electricity at less than adequate remuneration ("LTAR"), and "Other Subsidies" self-reported by Zhongji. *See id.* at 26–29, 37–42. Accordingly, pursuant to 19 U.S.C. §1677e(a)–(b), Commerce relied on facts otherwise available and drew adverse inferences to find these programs countervailable. *Id.* at 45, 52–54. Commerce also countervailed "policy" loans received from PRC state-owned commercial banks ("SOCBs") that were outstanding during the period of review ("POI"). *Id.* at 42–44. Between October 16, 2017 and October 20, 2017, Commerce verified questionnaire responses submitted by Zhongji pursuant to 19 U.S.C. § 1677m(i). *See Verification Report for Zhongji Lamination Materials Co., Ltd*, C.R. 285, P.R. 350 (Dep't Commerce Dec. 5, 2017).

After receiving submissions from interested parties, Commerce issued its final determination and assigned Zhongji a 17.14 percent subsidy rate. *See Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 Fed. Reg. 9,274, 9,275 (Dep't Commerce Mar. 5, 2018) ("*Final Determination*"), amended by *Certain Aluminum Foil from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 Fed. Reg. 17,360 (Dep't Commerce Apr. 19, 2018)

[3] 19 C.F.R. § 351.525(c) states that "[b]enefits from subsidies provided to a trading company which exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company, regardless of whether the trading company and the producing firm are affiliated." Accordingly, benefits attributed to Zhongji and to Zhongji HK are cumulated. *See Prelim. Calc. Memo* at 3.

("*Amended Final Determination*");[4] *see also Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China*, C-570–054, POR 1/1/2016–12/31/2016 (Dep't Commerce Feb. 26, 2018) ("*I&D Memo*"). In accordance with its verification findings, Commerce denied Zhongji's export value adjustment request. *I&D Memo* at 42–45. Commerce continued to use an adverse inference from facts otherwise available ("AFA") to countervail subsidies received with respect to the EBCP, the provision of electricity at LTAR, and Zhongji's "Other Subsidies," and continued to find that the SOCB loans were countervailable. *I&D Memo* at 14–16, 20–23, 29–35, 62–65. Finally, Commerce further relied solely on the Maersk data for the freight benchmark. *I&D Memo* at 65–66. Zhongji challenges these determinations.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). Commerce's countervailing duty determinations are upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Export Value Adjustment

Commerce must impose countervailing duties equal to the amount of the net countervailable subsidy. 19 U.S.C. § 1671(a). Countervailing duties are imposed through the calculation of individual countervailable subsidy rates for each investigated exporter and producer. *See* 19 U.S.C. §§ 1671d(c)(1)(B)(i)(I), 1671b(d)(1)(A)(i), 1675(a). The subsidy rate is calculated by "dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the products to which [Commerce] attributes the subsidy."[5] 19 C.F.R. § 351.525(a). If the product is exported, the sales value will normally be determined on a free on board ("F.O.B.") (port) basis. *Id.* Assuming, the F.O.B. export price of the merchandise leaving the foreign country and the import value of the

[4] The *Final Determination* was amended in order to correct ministerial errors. *See Amended Final Determination*, 83 Fed. Reg. at 17,360. The *Amended Final Determination* did not affect Zhongji's subsidy rate. *Id.* at 17,361.

[5] The benefit received is referred to as the "numerator" and the sales value referred to as the "denominator" of the subsidy rate.

merchandise entering the United States are identical, the collection of duties, based on the import value,[6] is equal to the net countervailable subsidy, based on the F.O.B. export price. *See Ball Bearings and Parts Thereof from Thailand; Final Results of Countervailing Duty Administrative Review*, 57 Fed. Reg. 26,646, 26,6647 (Dep't Commerce June 15, 1992) ("*Ball Bearings from Thailand*"). In other circumstances, however, merchandise leaves a foreign country at an F.O.B. price that is lower than the value at which the merchandise enters the United States. *Id.* The higher entered value can result when a parent company sells merchandise in a back-to-back intercompany sales transaction to a foreign affiliate, which then sells the merchandise to the United States with a mark-up. *Id.* Commerce first explained this scenario in *Ball Bearings from Thailand*:

> [I]n this case, there are two F.O.B. export prices for the same sale: the one on which subsidies are applied for and received by [the parent company], and the one which includes [the affiliate's] mark-up and which is the value listed on the [parent company's] invoice accompanying the merchandise to the United States. At verification, [the parent company] demonstrated that their accounting systems are set up to track the mark-up for each individual shipment of bearings via back-to-back invoices that are identical except for price. When [the parent company] ha[s] a shipment ready for export, [it] will electronically transmit a copy of the invoice to [its affiliate], who then adds the mark-up amount and transmits the invoice back to Thailand. This marked-up invoice is then cut in Thailand and packed with the shipment for export from Thailand. Even though [the affiliate] determines the mark-up, the merchandise is shipped from Thailand to the United States accompanied by the marked-up invoice.

Id. When entering the United States, therefore, the mark-up creates a mismatch between the previously calculated subsidy rate and the final invoiced price to which the subsidy rate is applied, resulting in a potential over-collection of duties. The mark-up thus skews the subsidies attributed to the merchandise by an amount equal to the percentage of the mark-up. In *Ball Bearings from Thailand*, because the two invoices had a "one-to-one correlation" and because the merchandise was "shipped directly from Thailand to the United States and [was] not transshipped, combined with other merchandise, or

[6] The import value, or customs value, to which countervailing duties would be applied is established by the invoice that accompanies Customs Form 7501.

repackaged with other merchandise," Commerce was able to adjust the subsidy rate to reflect the amount of subsidies actually bestowed. *Id.* To adjust the rate, Commerce first divided the F.O.B. value of the exports of the subject merchandise before the mark-up by the value of the same merchandise after the mark-up, as entered into the United States, which reflected the difference in the export and import values. *Id.* Commerce then multiplied the resulting ratio by the subsidy rate to obtain an *ad valorem* subsidy rate for each countervailable program. *Id.* ; *see also Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China* at Comment 21, C-570–907, POI 1/1/2006–12/31/2006 (Dep't Commerce Oct. 25, 2007) ("*CFS from the PRC*") (outlining the same calculation to obtain the subsidy rate where a company was eligible for the export value adjustment).

In subsequent investigations, Commerce stated that it has established a practice of adjusting the calculation of the subsidy rate "when the sales value used to calculate that subsidy does not match the entered value of the merchandise, *e.g.*, where subject merchandise is exported to the United States with a mark-up from an affiliated company." *Countervailing Duty Investigation of Certain Uncoated Paper from Indonesia: Issues and Decision Memorandum for the Final Affirmative Determination* at 12, C-560–829, POI 1/1/2014–12/31/2014 (Dep't Commerce Jan. 8, 2016). Based on the determination in *Ball Bearings from Thailand*, Commerce's existing practice grants an export value adjustment where the respondent's sales to the United States meet the following six criteria:

> 1) the price on which the alleged subsidy is based differs from the U.S. invoiced price, 2) the exporters and the party that invoices the customer are affiliated, 3) the U.S. invoice establishes the customs value to which the CVD duties are applied, 4) there is a one-to-one correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment, 5) the merchandise is shipped directly to the United States, and 6) the invoices can be tracked as back-to-back invoices that are identical except for price.

See CFS from the PRC at Comment 21. According to Commerce, the six criteria listed above must be met to ensure that "the sales value adjustment properly reflects an upward adjustment to the sales value of all merchandise that entered the United States, and on which

[Customs] assessed dutiable value." *CSP Cells from the PRC* at 47–48.

Here, based on information provided by Zhongji, Commerce preliminary determined that Zhongji met all six criteria and made an export value adjustment to the entered value of Zhongji's sales made through Zhongji HK, the Hong Kong-incorporated affiliated company, based on information provided by Zhongji. *Prelim I&D Memo* at 11. To determine the sales value, Commerce included all sales by Zhongji HK, i.e. the higher valued sales, instead of all sales by Zhongji to Zhongji HK, i.e. the lower valued sales. *Id.*; *Prelim. Calc. Memo* at 4. As a result, the denominator was larger because it included the mark-up reflected in the invoices that accompany shipments to the United States.[7] The result is a lower CVD percentage rate.

But Commerce's subsequent verification appeared to call into question Zhongji's ability to meet all six criteria; in particular, the requirement that Zhongji HK ship the subject merchandise directly to the United States. *I&D Memo* at 44. At verification, Commerce discovered that "Zhongji's export sales ledger contained all exports and was not sub-divided by country or region." *Verification Report* at 11. Zhongji identified companies they considered to be U.S. customers for each sale in the ledger.[8] *See Verification Report* at 11; *see also Pre-Verification Minor Corrections by Jiangsu Zhongji Lamination Materials Co., Ltd.* at 8, P.R. 331 (Oct. 23, 2017) ("the segregation of US and non-US sales are based on manual identification, transaction-by-transaction."). Verification revealed that some companies characterized as U.S. customers were trading companies. *Verification Report* at 12. One of those trading companies withheld the identity of its final customers and another stated that its customers were located in the United States and also in a foreign country. *Id.* Commerce also examined five sale documentation packages that Zhongji characterized as sales to U.S. customers. *Id.* at 2. The examination revealed that some of the sales involved merchandise shipped directly to the United States, one sale was shipped directly to a foreign country, i.e., it never made entry into the United States, and another sale was shipped to a customer in a foreign country through a trading company characterized as a U.S. customer, who changed the commercial invoice

[7] This calculation is different from the one in *Ball Bearings from Thailand*. There, in its final determination, Commerce adjusted the subsidy rate calculated in the preliminary determination, which did not account for an export value adjustment, and multiplied that rate by the mark-up ratio. 57 Fed. Reg. at 26,647. Here, by contrast, in the preliminary determination, Commerce adjusted the sales value (i.e., the denominator) in calculating a subsidy rate that is reflective of an export value adjustment. Apparently, it is not administratively feasible for Customs to simply lower the entered value to a pre-markup level.

[8] Zhongji then manually summed the value of sales to U.S. customers to determine the total value of U.S. sales during the period of investigation. *Verification Report* at 11.

before sending it to the final customer. *Id.* at 2, 12.

Commerce concluded in its final determination that Zhongji's identification of U.S. sales was faulty because Commerce discovered that some merchandise did not enter the United States or was shipped via trading companies outside of the United States. *I&D Memo* at 44. Thus, Commerce found, "Zhongji was unable to identify its U.S. sales with certainty, [and could] no longer claim that all of its sales of subject merchandise to the U.S. meet the six criteria." *Id.* Moreover, Commerce was concerned that, because the unaffiliated trading companies are able to change the invoice before sending it to the final customer, it could no longer verify a one-to-one correlation between "the invoice that reflects the price on which subsidies are received (i.e., the invoice from Zhongji) and the invoice that accompanies the shipment." *Id.* Commerce concluded that Zhongji could not show that an export value adjustment would properly reflect an upward adjustment to the sales value of all merchandise that entered the United States. *Id.* at 44–45. Accordingly, Commerce's final determination did not adjust the sales value for sales through Zhongji HK. *Id.* at 45.

Zhongji challenges Commerce's reasons for denying the adjustment originally granted and argues that that there was no regulatory or reasonable basis for distinguishing between exports to U.S. and non-U.S. customers. Zhongji Br. at 9, 15–16. Zhongji claims that the existence of non-U.S. sales, its inability to identify U.S. sales with certainty, or its use of U.S. trading companies does not disqualify it from an export value adjustment ("EVA") under Commerce's past practice and statutory obligation. *Id.* at 9, 14. Zhongji emphasizes that there were no inconsistencies regarding any shipment's compliance with the six criteria regardless of the ultimate destination, and that the focus of the inquiry should be on whether sales that did enter the United States were subject to the mark-up. *Id.* at 13, 14. Moreover, Zhongji argues, because the regulations rely on total sales or total export sales as the denominator, and do not limit the CVD calculation denominator to U.S. sales, this distinction for purposes of calculating an EVA is irrelevant. *Id.* at 9–10, 15–16.

In response, the government argues that Commerce correctly determined that Zhongji's sales through Zhongji HK failed to meet the requisite criteria, that Commerce's denial of an EVA is consistent with prior practice, that its requirement that Zhongji identify U.S. sales is supported by regulation, and that Commerce did not improperly rely on intracompany sales. Gov't Br. at 11–22. The government points out that Zhongji's methodology was faulty, and could not identify its U.S. sales with certainty, even though Commerce requested

sales "ledgers to cross-check Zhongji's list of U.S. customers." *Id.* at 14, 16 (citations omitted). It claims that Commerce was unable to verify whether sales made by the affiliate through the unaffiliated trading company were shipped directly to the United States because of Zhongji's use of trading companies and that there was no "one-to-one correlation" between the invoices because an unaffiliated trading company could change the commercial invoice before sending it to the final customer. *Id.* at 15.

Defendant-Intervenors emphasize that Commerce could not verify "that *all* of Zhongji HK's reported shipments of subject merchandise were provided directly to U.S. customers, with a one-to-one correlation between Zhongji's invoice and the final U.S. customer." Def.-Ints. Br. at 10. They add that Zhongji "did not know the destination of any merchandise shipped to this customer, nor did it know whether such sales were actually U.S. sales." *Id.* at 11. Accordingly, they argue, Commerce could not use the information initially reported as the basis for making an EVA determination. *Id.* at 13. Defendant-Intervenors point out that the regulation addresses subsidies tied to particular markets to counter Zhongji's claim that the regulation does not limit the CVD calculation denominator to U.S. sales. Def-Ints. Br. at 13–14 (citing 19 C.F.R. § 351.525(b)(4) ("[I]f a subsidy is tied to sales to a particular market, [Commerce] will attribute the subsidy only to products sold by the firm to that market.")). Central to Commerce's EVA analysis, they claim, is the "location of the ultimate customer, as well as Zhongji's lack of knowledge of the customer's location." *Id.* at 14.

In reply, Zhongji argues that an EVA is not conditioned on the United States being the only export destination and that the calculation relies on total sales and total export sales without distinguishing between U.S. and non-U.S. sales. *Plaintiff's Reply Brief in Support of Rule 56.2 Motion for Judgment on the Agency Record* at 2, ECF. No. 38 (June 7, 2019) ("Reply Br."). Zhongji contends that the examined set of shipments that were not "U.S. sales entering the United States" are immaterial, and that an unaffiliated trading company's ability to change the commercial invoice prior to the final sale does not bear on whether Zhongji HK's invoices bore a one-to-one correlation with Zhongji's initial invoice. Reply Br. at 2–4.

Commerce's reasoning is lacking in several critical aspects. Commerce does not adequately explain why, given the calculation methodology employed in this case, the identification of U.S. sales or U.S. customers is relevant to the EVA determination or, specifically, to the criterion that merchandise be shipped directly to the United States. Over-collection of duties occurs when Customs imposes a duty based

on a subsidy rate that did not account for a mark-up reflected on the invoice used by Customs to calculate the duty owed. What matters, then, is the point at which Customs assesses a countervailing duty and the accuracy of the sales value, reflected on the relevant entry forms, on which Customs computes that duty. *See, e.g.*, *CSP Cells from the PRC* at 47–48 ("[The EVA] properly reflects an upward adjustment to the sales value . . . on which [Customs] assessed dutiable value."). The record indicates that all of Zhongji's shipments that enter the United States are processed through Zhongji HK and that Zhongji HK marks-up all of its invoices. *See Prelim I&D Memo* at 10–11; *Prelim Calc. Memo* at 3. If so, all invoices that make entry into the United States include the mark-up. Moreover, Commerce does not claim that Zhongji's merchandise shipped to the United States undergoes transshipment, combinations, or repackaging, the concerns addressed in *Ball Bearings from Thailand*, such that the entered value would be altered for reasons other than the mark-up or that the Hong Kong mark-up does not really exist. *See* 57 Fed. Reg. at 26,647.

Specifically, Commerce does not explain why it could no longer subtract all sales to Zhongji HK and then add sales by Zhongji HK to adequately account for the upward adjustment to the sales value as it enters the United States, even after discovering that some sales were to foreign markets, U.S. trading companies, or where final customers were unidentified. To ensure that the universe of sales represents the universe of subsidies, Commerce must adjust the subsidy rate to properly reflect the subsidy bestowed. Where there is a mark-up by the affiliated trading company on the entered value, an adjustment to the sales value would result in the imposition of duties equal to the subsidies bestowed.

Moreover, in *Ball Bearings from Thailand*, Commerce granted an EVA to a respondent that exported to U.S. and non-U.S. markets. 57 Fed. Reg. at 26,647. In fact, Commerce rejected the petitioner's argument that the accuracy of the adjustment was dependent on "the accuracy of the allocation of subsidies to U.S. exports as opposed to all exports." *Id.* The petitioners claimed that the producers did not show "that the mark-up on shipments to other countries is equal to the mark-up on shipments to the United States" and that "the allocation of subsidies to exports to different countries may be skewed" because "transfer prices may vary by country of destination." *Id.* Commerce concluded, however, that because the adjustment was "based on the existence of the one-to-one invoice tracking system for U.S. shipments, it is not necessary for [Commerce] to allocate subsidies by country." *Id*

Accordingly, Commerce does not adequately explain how the six criteria are all relevant to the facts of this case and how those that are relevant are not satisfied. Moreover, Commerce does not explain why the adjustment of the sales value in the subsidy calculation must be limited to sales that ultimately reach U.S. customers when the subsidy benefits are allocated over all sales. Thus, if Commerce's failure to grant an EVA was based on Zhongji's failure to specifically identify U.S. sales or U.S. customers or because of the existence of sales to non-U.S. customers, it is not supported by the relied upon evidence of record and clear reasoning. If it is actually based on something else, Commerce should explain it clearly. The matter is remanded for further consideration consistent with this opinion. On remand, Commerce must explain what information uncovered at verification caused it to find the EVA request unsupported. It may be that Commerce had reason to believe there was an alteration that made its way into entered value that negated all or some of the Hong Kong mark-up. If that is what is meant by a failure to meet the direct shipment to the United States criterion, Commerce should explain that and cite the relevant evidence of record.

II. Export Buyer's Credit Program

The Export Buyer's Credit Program ("EBCP") of the Export-Import Bank of China ("Ex-Im Bank") is used to promote exports by providing credit at preferential rates to foreign purchasers of goods exported by Chinese companies. *See Clearon Corp v. United States*, 359 F. Supp. 3d 1344, 1347 (CIT 2019).

In response to Commerce's initial and supplemental questionnaires regarding the possible use of the EBCP, Zhongji submitted affiliate and customer certifications of non-use applicable to the POI stating that U.S.-based customers had not benefitted from the EBCP, which the GOC confirmed to be accurate. *Prelim I&D Memo* at 27–28; *Zhongji Initial Questionnaire Response* at Vol I, Ex. 12; *GOC Initial Questionnaire Response* at 13, P.R. 132, 146, 151, 152, 158 (June 12, 2017). The GOC, however, refused to provide the 2013 Implementing Rules of the Ex-Im Bank and information regarding potential third-party bank involvement in the EBCP, stating that this information was not public and irrelevant to Commerce's determination regarding whether respondent's customers used the program. *See I&D Memo* at 24, 29. The GOC further claimed that all necessary information relevant to confirming non-use was provided. *See id.* at 23–24, 29–31. Commerce, however, claimed that the withheld information necessary for Commerce to fully understand the operations of the program.

Id. at 29. Specifically, the information would identify whether the Ex-Im Bank uses third-party banks to disburse credits, provide information on the size of contracts to which credits are applicable, and help Commerce "understand how export buyer's credits flow to and from foreign buyers and China Ex-Im." *Id.* Therefore, Commerce concluded, the information was necessary to verify non-use of the program. *Id.* at 29–30. Commerce further explained that the certifications were unverifiable without the information requested of the GOC because its understanding of the program was incomplete and unreliable and reasoned that verifying the certificates was impossible without information regarding the EBCP's operation and involvement with third-party banks. *Id.* at 31–32. Moreover, Commerce claimed, it could not otherwise verify non-use because the primary entity that possesses such supporting information is the Ex-Im Bank. *Id.* at 31. Absent this information, Commerce concluded, "the [GOC]'s claims that the respondent companies did not use the program are not reliable." *Id.* at 29–30. Accordingly, Commerce concluded that the GOC "withheld necessary information that was requested and significantly impeded the proceeding" and failed to cooperate by "not acting to the best of its ability." *Id.* at 31. Despite respondent's full cooperation and provision of non-use certifications, Commerce applied adverse inferences to facts otherwise available ("AFA") and concluded that respondents benefited from the EBCP. *Id.* at 29.

Zhongji argues that Commerce unlawfully used AFA in determining that respondents benefited from the EBCP. Zhongji Br. at 18. Specifically, Zhongji claims that Commerce's imposition was not supported by record evidence because Commerce ignored uncontradicted non-use evidence and conflated its desire to know the operation of the EBCP with its need to know whether the program was used. Zhongji Br. at 19–20, 23–26. Zhongji contends that there was no missing information on the record to warrant Commerce's use of AFA and that Commerce had "no reasonable basis to make the threshold finding of non-cooperation" when the GOC provided Commerce with "all the information necessary for understanding the program." Zhongji Br. at 20–21. Additionally, Zhongji argues that even if Commerce's use of AFA was reasonable, Commerce did not reasonably apply the benchmark rate for use of the EBCP. Zhongji Br. at 27–30. The government contends that Commerce's use of AFA in determining that respondents benefitted from the EBCP and Commerce's selection of the AFA rate for the EBCP was in accordance with law and supported by substantial evidence. Gov't Br. at 22–23, 29–30.

When Commerce is unable to render a decision because "necessary information is not available on the record" or an interested party has

withheld requested information, significantly impeded the investigation, or provided unverifiable information, Commerce may "use the facts otherwise available" to reach a decision. 19 U.S.C. § 1677e(a). Commerce may apply adverse inferences to the facts otherwise available when it finds "that an interested party has failed to cooperate by not acting to the best of its ability." 19 U.S.C. § 1677e(b). An interested party has failed to cooperate "to the best of its ability" when it has not "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). If a foreign government fails to cooperate under 19 U.S.C. § 1677e(b), Commerce may apply AFA to an otherwise cooperating party but should "seek to avoid such impact if relevant information exists elsewhere on the record." *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013).

The court has recently issued several opinions that address the use of adverse inferences to determine that a cooperating party has benefited from the EBCP due to GOC's withholding of requested information. Most have held that Commerce fails to provide a reasonable explanation as to its need for the withheld information to verify non-use when it merely states that a reliable understanding of EBCP's operation is a prerequisite to verifying non-use. *See Clearon Corp. v. United States*, 359 F. Supp. 3d 1344, 1360, 1363 (CIT 2019) (remanding Commerce's use of AFA and holding that Commerce needs to give an "adequate answer as to why the information it seeks . . . is necessary to fill a gap . . . or rely on the information it has on the record."); *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316, 1327 (CIT 2018) ("Changzhou II") (remanding Commerce's use of AFA and holding that in order to apply AFA Commerce must explain "if and how certifications of non-use are unverifiable in the absence of the GOC's cooperation."); *Guizhou Tyre Co. v. United States* Slip Op. 19–114, 2019 WL 3948913, at *3 (CIT Aug. 21, 2019) ("Guizhou II") (collecting cases). *But see Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1355 (CIT 2016) ("Changzhou I") (upholding Commerce's use of AFA when Commerce explained that it had no way of identifying use within the program without knowing how the exporter and its customers were involved in the distribution of credits, but where customer certifications of non-use were not submitted). In *Guizhou II*, the court faulted Commerce for failing to correct blatant deficiencies in its AFA analysis. 2019 WL 3948913, at *3. The court concluded that Commerce failed to demonstrate why information about the EBCP and the 2013 rule change is relevant to verifying the claims of non-use and why

verification of those claims was impossible due to the rule change. *Id.* at *4.

Accordingly, to apply an adverse inference that a cooperating party benefited from the EBCP based on the GOC's failure to cooperate, Commerce must: (1) define the gap in the record by explaining exactly what information is missing from the record necessary to verify non-use; (2) establish how the withheld information creates this gap by explaining why the information the GOC refused to give was necessary to verify claims of non-use; and (3) show that only the withheld information can fill the gap by explaining why other information, on the record or accessible by respondents, is insufficient or impossible to verify. *See Changzhou II*, 352 F. Supp. 3d at 1326–27 (instructing Commerce to explain specifically why the information the GOC withheld created a gap that resulted in the use of AFA); *Guizhou II*, 2019 WL 3948913, at *5 (remanding for Commerce to explain why verification was impossible); *see also Clearon Corp.*, 359 F. Supp. 3d at 1360.

Here, Commerce again does not explain why a complete understanding of the operation of the program is necessary to verify non-use of the program.[9] In this investigation, Commerce now specifies that record evidence indicates that third-party banks may be involved in the program as intermediaries between the Ex-Im Bank and U.S. customers. But Commerce does not explain why an understanding of third-party bank involvement, if any, or any other aspect of the 2013 rule change, was necessary to verify claims of non-use. In its brief to the court, for example, the government provides one such explanation: that the identities of third-party banks allegedly involved are unknown to Commerce, and those names, not "China-Ex-Im Bank," would appear in the records of U.S. customers that received EBCP credits. Gov't Br. at 27–28. Thus, if Commerce were to verify the ledgers of U.S. customers, it could check for credits from those third-party banks.[10] Commerce, however, did not provide even this bit of explanation in its *Final Determination*, and it is thus a *post hoc* rationalization that cannot be the basis to find Commerce's use of AFA supported by substantial evidence. *See SEC v. Chenery Corp.*,

[9] Commerce acted under 19 U.S.C. § 1677e(a) and (b) because of the GOC's failure to answer. *See I&D Memo* at 31–32. It did not expressly invoke 19 U.S.C. § 1677m(e)(2) here by rejecting respondents' information as unverifiable.

[10] It is worth nothing that the government provided some doubt as to whether this information would be helpful. The government stated that "[e]ven if Commerce were to attempt to verify the respondent's non-use of the program notwithstanding its lack of knowledge of which banks are intermediary/correspondent banks by examining each loan received by each of the respondent's U.S. customers, Commerce would still not be able to verify which loans were normal loans versus program loans due to its lack of understanding concerning China Ex-Im Bank involvement." Gov't Br. at 28.

318 U.S. 80, 95 (1943); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). But that argument still fails to explain how the 2013 rule change "affected the way [Commerce] conducts verification" of non-use claims. *See Guizhou II*, 2019 WL 3948913, at *4. Critically, Commerce does not explain why it could not identify the intermediate banks and the corresponding bank disbursement information by soliciting information from respondents. *See id.* at *4 (stating that "surely [information regarding and access to intermediate banks] is not the only way Commerce can verify the submitted non-use declarations"). Instead, Commerce summarily declares that, as the "primary entity" involved, the Ex-Im Bank is the only entity that possesses records sufficient to verify claims of non-use.

The EBCP has resulted in much litigation of late, and the parties appear to have retreated to their respective corners. Contestant number 1, the Department of Commerce, asserts that because the GOC will not answer all of its questions about the program, a specific financial contribution from a governmental authority conferring a benefit on respondents and their customers has resulted, i.e., a subsidy exists for which duties may be imposed to countervail it. *See* 19 U.S.C. § 1677(5). Contestant number 2, the respondents, asserts that certificates of nonuse of the program by their customers is all that Commerce needs to conclude that no subsidy was bestowed. The referee, for her part, is not ready to declare the victor.

Neither of their assertions has been demonstrated to satisfy statutory investigative requirements. Rather than resting on the failure of the GOC and causing cooperating respondents to bear the brunt of the adverse action, Commerce must consider what information could be verified that would show non-use. The private parties and Commerce are in the best position to figure out what could answer the question as the private parties understand their own operations, and Commerce, for its part, can determine how much certainty is required.[11] As the court has stated, effort should be made to avoid the collateral consequences to cooperating parties of another's non-cooperation. *See Archer Daniels*, 917 F. Supp. 2d at 1342.

If Commerce does not make further efforts to investigate, it is unlikely that the court will be able to find that the statutory requirements for imposing countervailing duties have been met. If the respondents are unwilling to provide more than certificates of non-use, where other steps may reasonably be taken, they are unlikely to be viewed as cooperating. In one case, the domestic industry may suffer

[11] The court sees one possibility. The court assumes the credits come through some Chinese financial institution, even if not the Ex-Im Bank. If a customer certifies that no loans from Chinese entities were received, corporate records would reflect that. This is only a suggestion to spur thinking.

underserved consequences because countervailable subsidies may have occurred but insufficient investigative behavior prevented them from being imposed. On the other hand, if respondents do not make greater efforts, countervailing duties perhaps may be imposed when no subsidy was received. Either situation would be unfortunate.

There is no indication that this program will end, so an acceptable solution that will avoid continued remands would be in everyone's interest. Thus, the parties are directed to contemplate a solution to the impasse and to confer. This issue is remanded.

III. Electricity at Less Than Adequate Remuneration and Benchmark Selection

A subsidy is countervailable where "a government of a country or any public entity within the territory of the country" provides "a financial contribution . . . to a person and a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B). A "financial contribution" may be provided in the form of "goods or services, other than general infrastructure." 19 U.S.C. § 1677(5)(D)(iii). Where goods and services are provided, a benefit is conferred when "such goods or services are provided for less than adequate remuneration," where the adequacy of the remuneration is "determined in relation to the prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E)(iv). The subsidy must also be "specific" in one of several enumerated ways. *See* 19 U.S.C. § 1677(5A).

To determine whether a benefit is conferred through the provision of a good or service, Commerce generally compares a calculated benchmark price with the respondent's reported government price for the good or service provided. *See* 19 C.F.R. § 351.511; *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,378 (Dep't Commerce Nov. 25, 1998). Determining the adequacy of the remuneration in this manner is problematic when the government is the sole supplier of a good or service, because "'there may be no alternative market prices available' to use as a benchmark against which to measure the supplier's price." *Maverick Tube Corporation v. United States*, 273 F. Supp. 3d 1293, 1298 (CIT 2017) (citations omitted). Where the government is the only source of the good available to consumers, as is the case here, Commerce determines the adequacy of remuneration by "assessing whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii) (referred to as the "tier three" bench-

mark analysis).[12] Commerce assesses consistency with market principles using "such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination." *Countervailing Duties*, 63 Fed. Reg. at 65,377–78 (stating that these factors are not hierarchical, and that Commerce can rely on one or more of them). Commerce's experience suggests that "these types of analyses may be necessary for such goods or services as electricity, land leases, or water." *Id.* Following its practice with respect to government-provided goods such as electricity, Commerce "first examines how the government-owned utility company sets its rates and then determines whether a respondent receives a price that is better than that afforded other companies or industries purchasing comparable amounts of electricity." *Maverick Tube*, 273 F. Supp. 3d at 1300 (citing *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, C-122–815, 57 Fed. Reg. 30,946, 30,950 (Dep't Commerce July 13, 1992) ("If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other industries which purchase comparable amounts of electricity, [Commerce] would probably not find a countervailable subsidy.")).

During the investigation, Commerce first requested that the GOC provide information regarding the roles and nature of the cooperation between Chinese provinces and the National Development and Reform Commission ("NDRC"). *Prelim I&D Memo* at 37. Commerce requested information about the NDRC's role in deriving electricity price adjustments, including "Provincial Price Proposals" for each province in which mandatory respondents were located, to enable Commerce to determine whether the provision of electricity was a countervailable subsidy. *Id.* at 37. Specifically, Commerce sought "to determine the process by which electricity prices and price adjustments are derived, identify entities that manage and impact price adjustment processes, and examine cost elements included in the derivation of electricity prices in effect throughout the PRC during the POI." *Id.* at 38. In its responses, the GOC claimed that the NDRC "no longer reviews, i.e. approves, electricity pricing schedules submit-

[12] Commerce developed a three-tiered hierarchical approach to determine whether a benefit was conferred. *See* 19 C.F.R. § 351.511(a)(2)(i)–(iii). Under tier one, Commerce compares the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. 19 C.F.R. § 351.511(a)(2)(i). Under tier two, which applies where a market-determined price is unavailable, Commerce compares the government price to a world market price. 19 C.F.R. § 351.511(a)(2)(ii).

ted to it by the provinces." *Id.* (citing *GOC Initial Questionnaire Response* at Exhibit E4–1 ("Notice 748")). In essence, the GOC claimed that the NDRC no longer had an impact on electricity prices, that prices were set autonomously by the provinces, and that those prices and any adjustments were based on market principles. *Id.* Commerce, however, concluded that Notice 748 and Notice 3105, price adjustment notices developed by the NDRC and the National Energy Administration, "explicitly direct provinces to reduce prices and to report the enactment of those changes to the NDRC." *Id.* at 39. In addition, Commerce also requested information regarding the derivation of the price at the provincial level, the pricing values indicated in the Appendix to Notice 748, and the price reduction amounts indicated in Notices 748 and 3105. *Id.* at 39–40. Commerce was unsatisfied with the GOC's responses, which restated the claims that the Notices merely delegate pricing authority to the provinces and that price adjustments are based on supply and demand. *Id.* at 40–41.

Commerce made three final determinations related to the GOC's provision of electricity to respondents. Commerce first concluded that the provision of electricity was a financial contribution of a good, and not of general infrastructure, relying on this court's decision in *Royal Thai Gov't v. United States*, 441 F. Supp. 2d 1350 (CIT 2006). *I&D Memo* at 65. Second, in the light of the GOC's withholding of information[13] and failure to comply to the best of its ability, Commerce applied an adverse inference to determine that the provision of electricity constituted a financial contribution that was specific. *I&D Memo* at 62–63; *Prelim I&D Memo* at 37–41. Third, in selecting the benchmark for determining the existence and amount of the benefit, Commerce also applied an adverse inference to select the highest non-seasonal provincial electricity rates on the record for various industry categories used by respondent. *I&D Memo* at 60; *Prelim I&D Memo* at 52–53 (listing the categories as "large industry," "general industry and commerce," and "base charge").

Zhongji first challenges Commerce's reliance on *Royal Thai* and its finding that the provision of electricity is not "general infrastructure." Zhongji Br. at 30; Reply Br. at 20–21. Zhongji claims that, because the electricity service is available to the public, i.e., "developed for the

[13] Commerce summarized the information withheld from it by the GOC:

> Provincial Price Proposals; the specific derivation of increases in cost elements and the methodology used to calculated cost element increases; legislation that may have eliminated the Price Proposals; explanation, with supporting documents, how pricing values in the Appendix to Notice 748 were derived; information concerning the coincidence of provincial price changes with Notices 748 and 3105; and explanation of the factors and information that Jiangsu and Guangdong Province relied upon to generate their submitted price adjustments and tariffs.

I&D Memo at 63.

benefit of society as a whole," and openly traded on the market, Commerce was precluded from finding a financial contribution. Zhongji Br. at 31; Reply Br. at 21 (quoting *Countervailing Duties*, 63 Fed. Reg. at 65,378). But Zhongji misunderstands the nature of the financial contribution at issue here. The regulations provide that "general infrastructure" is "infrastructure created for the broad societal welfare of a country, region, state or municipality." 19 C.F.R. § 351.511(d). In *Royal Thai*, the court specified that the provision of electricity was not considered general infrastructure because the use of a kilowatt of electricity by a single consumer is not shared by the entire public. 441 F. Supp. 2d at 1356–57. By contrast, the court reasoned, the provision of electric power facilities or distribution grids, which are "used repeatedly by the entire consuming public," is general infrastructure under the statute. *Id.* at 1356 (distinguishing *Bethlehem Steel Corp. v. United States*, 223 F. Supp. 2d 1372 (CIT 2002)). Here, as in *Royal Thai*, although the electricity service may be available to the public, the subsidy at issue is the electricity provided by the GOC at LTAR to respondents. Accordingly, Commerce properly concluded that the provision of electricity at LTAR, the subsidy at issue, was not general infrastructure.

Zhongji then challenges Commerce's determination, through the use of AFA, that the electricity program is specific. Zhongji Br. at 31–32. Zhongji claims that Commerce failed to make a specificity determination and establish the relationship between the GOC's withholding of information and a finding of specificity. *Id.*; Reply Br. at 20. The government, for its part, supports Commerce's use of AFA to find specificity generally and claims that such a use was proper here because the GOC failed "to explain the relationship between provincial tariff schedules and cost, as well as the nature of the cooperation in price setting practices between the [NDRC] and provinces in electricity price adjustments." Gov. Br. at 33–34. Defendant-Intervenors claim that "GOC's failure to provide information on the relationship between government-established electricity prices and the relevant power generation costs – both within and among the Chinese provinces – hindered Commerce's ability to assess the program's specificity." *See* Def.-Ints. Br. at 34. They claim that without "source documents demonstrating that high-cost end users of electricity paid a higher price than low-cost end users," Commerce could not verify that price differentials between these consumers were founded on market principles and not policy goals. *Id.* at 34–35.

Under the statute, a domestic subsidy is specific as a "matter of fact" if "[t]he actual recipients of the subsidy . . . are limited in number," if "[a]n enterprise or industry is a predominant user of the

subsidy," if "[a]n enterprise or industry receives a disproportionately large amount of the subsidy," or if "[t]he manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others," or it may be specific where it "is limited to an enterprise or industry located within a designated geographical region." 19 U.S.C. § 1677(5A)(D)(iii), (iv). In *Changzhou II*, the court stated that Commerce could not apply AFA simply because of GOC's failure to cooperate but must "actually engage in an analysis of the information on the record and explain how adverse inferences lead to the conclusion that the provision of electricity in [the PRC] is a countervailable subsidy." 352 F. Supp. 3d at 1342. In *Changzhou II*, unlike here, the GOC refused to answer any questions related to regional electrical differences, including differences between industries, and did not place the notices related to the NDRC on the record. *Id.* On this basis alone, Commerce applied AFA and concluded that the subsidy was specific because it could not determine whether electricity prices were set in accordance with market principles. *Id.* Here, similarly, Commerce stated that the GOC withheld requested information for its analysis of specificity and applied AFA without determining exactly how the subsidy was specific.[14] *See Prelim I&D Memo* at 41; *I&D Memo* at 63. Yet, unlike in *Changzhou II*, the record strongly suggests that the GOC's failure to provide information regarding the provinces' control over electricity pricing inhibited Commerce from determining specificity.

For example, Notice 748, cited by Commerce, stipulates a lowering of on-grid electricity sales prices in varying amounts for industrial and commercial use. *Prelim I&D Memo* at 37–41. In addition, it directs the reduction of that sales price, indicates that provincial authorities shall make plans reflecting that price reduction and submit it to the NDRC, and ensures that departments guarantee the implementation of the price adjustment. *Id.* at 38–39. Notice 3105 similarly directs the provinces to implement additional electricity price reductions. *Id.* at 39. These notices undermine the GOC's claim that the NDRC no longer controls electricity prices and led Commerce to ask the GOC supplemental questions. But when Commerce sought more information on the setting of electricity prices by the provinces,

[14] Commerce did not state how GOC's withholding of information led to the finding that, for example, the recipients are limited in number, that the aluminum industry is the predominant user or receives a disproportionately large amount of the subsidy, or that discretion over the subsidy suggests the GOC favors the aluminum industry. *See* 19 U.S.C. § 1677(5A)(D)(iii). Although Zhongji suggests that Commerce found specificity because the subsidy is limited to a region, the record does not fully support this finding. *See* Zhongji Br. at 33

the GOC repeated its previous statements and "failed to explain how final price increases were allocated across the respondents' provinces and across tariff end-user categories." *Id.* More information regarding the setting of the electricity prices by the provinces would reveal how the price reductions may have been allocated to certain industries. Pricing data stating which end-user categories received certain price reductions or increases, for example, would reveal whether the aluminum industry took a disproportionate share of the subsidy. *See RZBC Grp. Shareholding Co. v. United States*, 100 F. Supp. 3d 1288, 1298, 1301 (CIT 2015) (finding that information in response to Commerce's request for more granular details about industries in the PRC that purchased calcium carbonate might have revealed whether there was a disproportionate allocation of the GOC's subsidies). Given that record evidence suggests that the GOC controls electricity pricing, the GOC's failure to provide information regarding how electricity pricing is set prevented Commerce from determining specificity. Accordingly, Commerce's use of AFA to find specificity is supported by substantial evidence.

Zhongji also challenges Commerce's selection of the electricity benchmark. Zhongji Br. at 32–34. Zhongji first claims that Commerce's selection led to a benchmark derived from multiple regions in which no aluminum foil producer could logically be present at the same time. *Id.* at 32–33. The government responds that Commerce's selection of a benchmark under the statute is based on market conditions in the country subject to the investigation, and not in particular provinces, and that its application of AFA is supported by this court's previous decisions. Gov't Br. at 36. Defendant-Intervenors argue that because the GOC failed to provide information regarding "price differences between the provinces, how the provinces derive electricity price adjustments, and how they cooperate with the NDRC," Commerce could not assess whether the price was consistent with market principles under a tier three benchmark analysis. Def.-Ints. Br. at 37. The court agrees. As the court has previously stated, where

> [t]he GOC refuse[s] to provide certain details regarding variation of provincial electricity rates and whether these rates were calculated based on market principles. Accordingly, Commerce can apply an adverse inference to the GOC's electricity rate submissions and select the highest rates for each electrical category and use those to set a benchmark.

Changzhou II, 352 F. Supp. 3d at 1343 (stating that Commerce's "goal in setting a benchmark rate is to best approximate the market rate of

electricity, not to choose the rate respondents were most likely to pay in an electricity market Commerce argues is tainted by the GOC's interference") (citations omitted); *see also Fine Furniture v. United States*, 865 F. Supp. 2d 1254, 1260–1263 (CIT 2012) (upholding Commerce's decision to set the benchmark rate for electricity equal to the highest rate reported in the provincial price schedules). Commerce's decision to select the highest rate was within its lawful discretion and Zhongji provides no argument for why Commerce's selection of the highest rate from various provinces is less reflective of the market rate for electricity absent government interference. *See Changzhou II*, 352 F. Supp. 3d at 1343. Accordingly, Commerce's calculation of the benchmark is consistent with its regulations and is in accordance with law.

IV. Reliance on Maersk Data

In determining the proper ocean freight charge to be added for the benchmark calculations, Commerce relied on actual price quotes sourced from Maersk for shipping cargo to Shanghai, China. *I&D Memo* at 65–66; *see also Prelim I&D Memo* at 17–18. Commerce rejected Zhongji's proffered Xeneta rates because its data inconsistently included or excluded terminal handling charges in calculating freight rates to Asia. *I&D Memo* at 65.

Zhongji argues that Commerce's decision is not supported by substantial evidence because the Maersk data is flawed and the Xeneta rates is superior. Zhongji Br. 34–37. First, Zhongji argues that the Maersk data is not contemporaneous with the POI and only includes the first eight days of the months between January 2015 and August 2015. Zhongji Br. 34–35. Zhongji asserts that the Maersk data was affected by a "dockworker strike on the West Coast of the United States," which did not impact rates in POI. Zhongji Br. at 36. Second, Zhongji contends the data is not representative of the market rate for ocean freight because it consisted of price quotes, not final payments, and thus subject to change. Zhongji Br. 34. Zhongji claims Commerce should instead use the Xeneta data, or, if the court determines that the Maersk data is reasonably reliable, average the data set from Maersk and Xeneta. Zhongji Br. 34, 37. The government claims that Zhongji is barred from arguing that the Maersk data set is non-contemporaneous because it failed to raise the issue in its administrative case brief. *See* Gov't Br. at 38. Moreover, the government and defendant-intervenors argue that Commerce properly refrained from using the Xeneta data, relying on Maersk price quotes used in the Silica Fabric investigation. Gov't Br. at 39; Def-Int Br. at 38–42.

As a preliminary matter, the court considers whether Zhongji is barred from raising the claim that the Maersk data is non-contemporaneous because it did not clearly raise before Commerce. Commerce's regulations further require that an interested party's case brief "present all arguments that continue in the submitter's view to be relevant to [Commerce's] final determination or final results." 19 C.F.R § 351.309(c)(2); *see also Gerber Food (Yunnan) Co. v. United States*, 601 F. Supp. 2d 1370, 1379 (CIT 2009) (the "court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives [Commerce] of an opportunity to consider the matter, make its ruling, and state the reasons for its action"). Zhongji contends that a contemporaneity argument was included, if not implicit, in its case brief when it argued against using "Maersk rates from another investigation." Reply Br. at 21–22. Although Zhonji's case brief does not explicitly challenge the data on contemporaneity grounds, the concerns underlying the exhaustion principle do not apply here. Zhongji argued that the Maersk data was not the best available information in the light of the Xeneta data. Commerce had the opportunity to address why the Maersk data was the best available information and why it excluded the Xeneta data. Because Commerce generally looks to contemporaneity to select the best available information, Zhongji's failure to expressly raise that factor did not deprive Commerce the opportunity to address it. *See* Import Admin., Dep't Commerce, *Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process* (Mar. 1, 2004), *available at* http://ia.ita.doc.gov/policy/bull04–1.html (last visited Sept. 12, 2019) (listing contemporaneity as a factor Commerce uses to select the best available information). Thus, Commerce was aware, or should have been aware, that it chose a non-contemporaneous data set from a previous investigation in contravention of its policy. *See Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, Form the People's Republic of China; 2013* at Comment 7, POI 1/1/2013–12/31/2013, C-570–980 (Dep't Commerce July 12, 2016) ("[Commerce] preference, where possible is to rely on contemporaneous data over non-contemporaneous data" for the ocean freight benchmark). The court will exercise its discretion under 28 U.S.C. § 2637(d) not to bar Zhongji's contemporaneity argument on exhaustion grounds.

Regardless, Zhongji's argument that the contemporaneity problem with regard to the Maersk data is determinative fails. "[N]on-contemporaneous freight rate data [can be] affected by factors not

present during the POR, for example, changes in demand for freight from year-to-year, changing energy costs, or construction of new ports, or *inability to use particular ports*." *Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1323 (CIT 2017) (emphasis added). Zhongji, however, provides no evidence that the dockworker strike restricted access to ports or significantly impacted shipping rates from Asian markets to the United States. Zhongji's only evidence is the statement that the labor dispute lasted for nine months and "snarled international trade at seaports handling about $1 trillion worth of cargo annually." Zhongji Br. at 36; Mem. from John Corrigan to the File re: Placing Information on the Record at Attach. 1, p. 3 (Aug. 2, 2017) (P.R. 276). Moreover, the record in the Silica Fabric investigation suggests that Commerce excluded certain data points that may have been affected by the dockworker's strike. Critically, this court has previously affirmed Commerce's use of Maersk data points from a period prior to the POI. *See, e.g.*, *Issues and Decision Memorandum for the Final Results of Expedited Review of the Countervailing Duty Order on Certain Carbon and Alloy Steel Cut-to-Length Plate from the People's Republic of China* POI 1/1/2015–12/31/2015, C-570–048 (Dep't Commerce July 13, 2018). Zhongji has failed to distinguish the Commerce's use of Maersk data here from its previous reasonable use of that data.

Zhongji's contention that the Maersk data is flawed because it is based on price quotes is also unavailing. In measuring adequate remuneration, Commerce is required to calculate "the price that a firm actually paid *or would pay* if it imported" the product at issue. 19 C.F.R. § 351.511(a)(2)(iv) (emphasis added). The court has consistently held that price quotes can reasonably be used to calculate ocean freight benchmarks when they are sourced from a reputable authority. *See TMK IPSCO v. United States*, 222 F.Supp.3d 1306, 1320–21 (CIT 2017); *Changzhou II*, 352 F. Supp. 3d at 1339. As the court stated in *Changzhou Trina*, "[g]iven Maersk's prominent position in the shipping market, Commerce properly considered the Maersk data to be a reliable world market price." *Id.* Accordingly, Commerce's use of the Maersk data, despite its lack of contemporaneity with the POI, is supported by substantial evidence.

Commerce was also not required to average the Xeneta data with the Maersk data because the Xeneta data did not meet the standards of consistency set forth by the regulations. Although Commerce's regulations require that Commerce average commercially available world market prices to the extent practicable, see 19 C.F.R. 351.511(a)(2)(ii), those prices must "reflect the price that a firm actu-

ally paid or would pay if it imported the product." 19 C.F.R. § 351.511(a)(2)(iv). The regulations require that Commerce "include delivery charges and import duties" in the comparison price. *Id.* The Xeneta data, however, includes or excludes terminal handling charges—a type of delivery charge incident to all shipments —in its freight rate data depending on the origin and destination of each shipment. *Zhongji Benchmark Submission* at Ex. 2, P.R. 235 (July 21, 2017). In other words, the shipment costs in the Xeneta data varies in its inclusion of origin and destination terminal handling charges. *Id.* Commerce, therefore, reasonably concluded that the Xeneta data failed to consistently include delivery charges, and that Commerce could not rely on the data in calculating adequate remuneration.[15] Accordingly, Commerce's decision to calculate an ocean freight benchmark based solely on the Maersk data is supported by substantial evidence.

V. Countervailed "Other Subsidies"

Generally, investigations into potentially countervailable subsidies are either self-initiated by Commerce or a result of a petition by a domestic interested party on behalf of an industry. 19 U.S.C. § 1671a(a), (b). If, during a proceeding, Commerce "discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition," then Commerce includes "the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding." 19 U.S.C. § 1677d; *see also* 19 C.F.R. § 351.311. The regulations specify that Commerce will examine such a practice if it "concludes that sufficient time remains" before the final determination. 19 C.F.R. § 351.311(b). The regulations also permit the deferral of the examination of a program that appears to be countervailable if insufficient time remains. 19 C.F.R. § 351.311(c). In *Allegheny Ludlum Corp. v. United States*, this court examined the level of inquiry required to determine whether a subsidy "appears" to be countervailable, given the statute and regulation's silence on the issue. *See* 25 CIT 816, 822–24 (2001). The court concluded that, although the statute "offers a petitioner the opportunity to call Commerce's attention to a potentially countervailable subsidy, . . . it does

[15] In addition, pricing data must be "publicly available." 19 C.F.R. § 351.102(b)(21)(iii). Zhongji "request[ed] business proprietary treatment of the Xeneta freight rates in order to accord appropriate protection to the intellectual property of Xeneta because the freight rates are for-purchase." *Zhongji Benchmark Submission* at 2. This indicates that the Xeneta data is not "publicly available" as required by the regulation, supporting its unsuitability.

not force Commerce to fully investigate any subsidy." *Id.* at 824. Moreover, the court held, Commerce must review the record, "weigh-[ing] and analyz[ing] both negative evidence and positive evidence," to "determine whether the business practice appears to be a countervailable subsidy." *Id.* (quotations omitted).

In its initial questionnaire response, Zhongji reported receiving various "other subsidies" from the GOC during the POI. *Prelim I&D Memo* at 41 (citing *Zhongji Initial Questionnaire Response* at Vol. I p. 31, Vol. II p. 26, Vol. III p. 21). In its initial questionnaire to the GOC, Commerce asked it "if it provided any other forms of assistance to subject producers," and "to coordinate with the Respondents on any additional subsidies reported by the companies in order to provide detailed information." *I&D Memo* at 22. The GOC responded by stating that Commerce's request was "premature absent a more direct inquiry supported by credible evidence and the initiation of a discrete investigation." *I&D Memo* at 23; *see also Prelim I&D Memo* at 42. In supplemental questionnaires regarding these "other subsidies," the GOC submitted previously reported information and "withheld all additional information required by Commerce to determine the countervailability of the reported grants." *I&D Memo* at 23. Because necessary information to determine specificity was not available on the record, and because the GOC withheld information and failed to cooperate to the best of its ability, Commerce applied AFA to find the "other subsidies" countervailable. *Prelim I&D Memo* at 42; *I&D Memo* at 23. In its Final Determination, in response to arguments that it could not initiate an investigation into these subsidies, Commerce concluded that its decision to investigate "other subsidies" reported by the respondents "fell squarely within the guidelines established under [19 U.S.C. §1677d] and 19 C.F.R. § 351.311(b)." *I&D Memo* at 23.

Zhongji argues that Commerce unlawfully investigated "other subsidy" programs because it failed to identify any evidence that the subsidies appeared to be specific and countervailable before initiating an investigation into the programs, in violation of 19 U.S.C. § 1677d. Zhongji Br. at 38–39. Zhongji claims that Commerce cannot initiate an investigation into a program without an analysis, based on credible evidence, as to whether the program "appears to be countervailable." *Id.* Accordingly, Zhongji contends, Commerce's reliance on AFA for the GOC's refusal to provide information related to "other subsidies" rendered Commerce's determination contrary to law. *Id.*

Zhongji's argument is misguided. First, the elements of a countervailable subsidy need not be identified before examining non-alleged subsidies. Rather, given the nature of the subsidies self-reported by

Zhongji, Commerce could reasonably find that it required supplementary documentation to determine whether these "other subsidies" were countervailable. *See* Def.-Ints. Br. at 44 (citing *Zhongji Initial Questionnaire Response* at Vol. I at 31 & Ex. 22); *I&D Memo* at 22. Second, as stated in *Allegheny*, Commerce must determine whether a program appears to be countervailable by looking at record evidence. *See* 25 CIT at 824–25. In order to make that determination, therefore, Commerce is permitted to request that information be placed on the record regarding any reported subsidies. Zhongji's argument to the contrary would permit Commerce to examine unalleged subsidies only where record evidence tangentially demonstrates that a subsidy is actually countervailable. This reading of the statute is too restrictive. Rather, because Commerce is urged to ensure "proper aggregation of subsidization practices," see S. Rep. No. 96–249, at 98 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 484, and given its investigative authority under 19 U.S.C. §§ 1671a(a) and 1677d, Commerce is permitted to request that documentation be placed on the record so that it may determine whether subsidies discovered during the investigation are countervailable. Here, because the GOC withheld information as to the specificity of the subsidies and failed to cooperate to the best of its ability, Commerce reasonably applied AFA. Accordingly, Commerce's decision to countervail "other subsidies" self-reported by Zhongji is supported by substantial evidence.

VI. Policy Loans

Commerce determined that loans reported by Zhongji from state owned commercial banks ("SOCBs") provided countervailable subsidies under a lending program that encouraged the development of the aluminum foil industry. *I&D Memo* at 14–21; *Prelim I&D Memo* at 42–44. When analyzing a lending program supporting a policy initiative, Commerce examines whether "government plans or other policy directives lay out objectives or goals for developing the industry and call for lending to support objectives or goals." *I&D Memo* at 14 (citing *Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011)); *Prelim I&D Memo* at 42–41 (citing *CFS from the PRC* at Comment 8). Commerce found that extensive record evidence indicated that the GOC sought to target the aluminum foil industry for development in recent and current years. *Prelim I&D Memo* at 43–44. Specifically, the GOC's plans seek to accelerate the transformation of aluminum industry development, develop aluminum processing and enhance utilization levels, and improve the

competitiveness of the industry. *I&D Memo* at 14–15; *Prelim I&D Memo* at 43–44. Commerce also found that the banking sector in the PRC remained under state control, resulting in the allocation of credit in accordance with government policies directed specifically at encouraged industries, including the aluminum industry. *I&D Memo* at 15–16; *Prelim I&D Memo* at 44. Policy guidance, for example, identifies the aluminum industry, with a priority for aluminum foil, as an "encouraged" industry that shall receive "credit support in compliance with credit principles." *I&D Memo* at 16; *Prelim I&D Memo* at 43. Thus, Commerce concluded, the GOC provides target support to the aluminum foil industry through preferential loans, such that the subsidy is specific under 19 U.S.C. § 1677(5A). *I&D Memo* at 16; *Prelim I&D Memo* at 44. Relying on its analysis in *CFS from the PRC*, Commerce further concluded that SOCBs under the program constitute a "financial contribution" from an "authority" that transfer loans to producers of aluminum because SOCBs "act in accordance with government policies and effectuate government interests in providing the lending." *I&D Memo* at 18–19. Accordingly, Commerce calculated a benefit conferred to Zhongji equal to the difference between the amount Zhongji paid on the loans and the amount Zhongji would have paid on a comparable commercial loan. *Prelim I&D Memo* at 44. To calculate the benefit from this program, Commerce used benchmarks for countries similar to the PRC in gross national income based on the World Bank classification. *Prelim I&D Memo* at 14, 44. Commerce then used the lending and inflation rates by those similar countries reported to the International Monetary Fund for the benchmark interest rate. *Id.* at 14.

Zhongji first argues that substantial evidence does not support a finding that a "financial contribution" was provided by an "authority." Zhongji Br. at 40–42. Zhongji claims that Commerce misconstrued broad industrial policies as financial support to the aluminum foil industry, where the policies instead sought to curb blind expansion of the industry. *Id.* at 41; Reply at 25–26. Moreover, Zhongji then contends that evidence on the record showing a diversified and competitive banking sector in the PRC, including market-oriented reforms liberalizing loan management, such that the banking sector is not an authority as defined under section 1677(5)(B). Zhongji Br. at 40. Zhongji further argues without citation to specific record evidence that a benefit was not conferred because the bank loans were not provided at below commercial interest rates, because they "fluctuated in line with macroeconomic conditions during the POI," including those in the United States. *Id.* at 41–42; Reply Br. at 25. The government argues that Commerce's conclusion that SOCBs are "authori-

ties" under section 1677(5) because they "pursue and effectuate government policies" is consistent with its prior policies and assessment of the lending system in the PRC. Gov't Br. at 44. The government and Defendant-Intervenors claim that substantial evidence supports Commerce's findings that the subsidies were specific and conferred a benefit on Zhongji. Gov't Br. at 45–46; Def.-Ints. Br. at 47–50.

Here, Commerce properly determined that SOCBs act as "authorities" that provide a "financial contribution" in the form of loans. *See* 19 U.S.C. § 1677(5). As in *CFS from the PRC*, Commerce determined that "the record indicates that the [PRC] banking system remains under State control and continues to suffer from the legacies associated with the longstanding pursuit of government policy objectives. These factors undermine the SOCBs ability to act on a commercial basis and allow for continued government control resulting in the allocation of credit in accordance with government policies" *I&D Memo* at 18. Commerce based the determination that SOCBs in the PRC cannot be treated as commercial banks on a 2017 evaluation of the financial system in the PRC. *See I&D Memo* at 18–19; *Review of China's Financial System Memorandum* at 7, P.R. 270–275 (Dep't Commerce Aug. 1, 2017) ("*Financial System Memorandum*") (stating that the GOC uses "the banking sector as a key policy instrument to allocate capital to priority industries."). Moreover, record evidence substantially supports the finding that these loans were specific to the aluminum industry, including producers of aluminum foil, because several PRC development plans specifically identify aluminum foil for priority development among more general policy goals of improving the development of the aluminum sector. *I&D Memo* at 14, 15 (citing *GOC Initial Questionnaire Response* at 9, Exs. A1–17, A1–19, A1–20, & A1–21). In addition, the PRC's current five-year economic and social development plan explicitly encourages the development of the aluminum industry and states that these policy goals should be achieved with financial support from industrial authorities "at all levels." *See I&D Memo* at 15. Thus, Commerce's finding that the SOCB loans were a "financial contribution" from an "authority" is supported by substantial evidence.

Finally, contrary to Zhongji's argument, Commerce did find on the record that the policy loans were given at preferential rates and thus conferred a benefit to Zhongji. A benefit is conferred, "in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." 19 U.S.C. § 1677(E)(ii). After concluding that the SOCBs loans constituted a specific financial contribution by an au-

thority, Commerce stated that "[t]he loans provide a benefit equal to the difference between what the recipients paid on their loans and the amount they would have paid on comparable commercial loans." *Prelim I&D Memo* at 44. Commerce concluded that loans provided by PRC banks do not reflect rates found in a functioning market and that, based on its *Financial System Memorandum*, the GOC's role in the financial system distorts the lending practices enough to preclude the use of interest rates in the PRC for CVD benchmarking. *Prelim I&D Memo* at 12. Commerce rejected the GOC's argument that the determinations in the *Financial System Memorandum* are inaccurate and outdated. *I&D Memo* at 20–21 Thus, in determining the amount Zhongji would pay on a commercial loan that it could actually obtain on the market, Commerce reasonably relied on market rates issued by commercial banks in similar countries, as published by the IMF, to compare to the SOCBs rates. *Prelim I&D Memo* at 13–14 Commerce then calculated a benefit as a result of the difference between the effective interest rate charged to Zhongji and the benchmark rate used. *See id.*; *Prelim. Calc. Memo* at Attachment 2. Accordingly, Commerce's use of market rates of similar countries provided by the IMF to compare to Zhongji's SOCBs loans was in accordance with law and its determination that Zhongji received a benefit from the policy loans supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the court remands Commerce's challenged determinations as regards to its determination on the export value adjustment and the Export Buyer's Credit Program. All other determinations are sustained. The court remands for proceedings consistent with this opinion. Remand results should be filed by November 18, 2019. Objections are due December 18, 2019 and Responses to Objections are due January 17, 2020.

Dated: September 18, 2019
New York, New York

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

Slip Op. 19–123

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiffs, v. UNITED STATES, Defendant.

Court No. 18–00134

[The court remands the determinations of the U.S. Department of Commerce.]

Dated: September 19, 2019

Daniel B. Pickard, *Maureen E. Thorson*, *Stephanie M. Bell*, Wiley Rein LLP, of Washington, D.C., for plaintiffs.

John J. 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 *Paul K. Keith*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiff Diamond Sawblades Manufacturers' Coalition ("DSMC") challenges the decision of the U.S. Department of Commerce ("Commerce") to interpret the scope of an antidumping order to exclude certain cupwheels that Lyke Industrial Tool, LLC ("Lyke") imports. DSMC moves for judgment on the agency record, arguing that Commerce's determination of what constitutes a "sawblade" and the Department's application thereof to Lyke's merchandise was not supported by substantial evidence. Pl.'s Mot. for J. on Agency R., ECF No. 16 (Nov. 28, 2018); *see also* PI. 's Mem. in Support of its Mot. for J. on the motion. Def.'s Resp. to Pl.'s Mot. for J. on Agency R., ECF No. 21 (Mar. 22, 2019) ("Def.'s Br.").

Commerce's final scope determination on Lyke's cupwheels did not adhere to the regulatory framework pursuant to 19 C.F.R. § 351.225. Therefore, the court remands the final scope ruling to Commerce for further consideration in accordance with this opinion and order.

BACKGROUND

In November 2009, Commerce issued an antidumping order covering diamond sawblades and parts thereof from the People's Republic of China ("China" or "PRC"). *See Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea*, 74 Fed. Reg. 57,145 (Dep't Commerce Nov. 4, 2009) (antidumping duty order) ("*Order*"). The antidumping duty order includes within its Scope:

> [A]ll finished circular sawblades, whether slotted or not, with a working part that is comprised of a diamond segment or segments, and parts thereof, regardless of specification or size, except as specifically excluded below. Within the scope of these orders are semifinished diamond sawblades, including diamond sawblade cores and diamond sawblade segments. Diamond sawblade cores are circular steel plates, whether or not attached to non-steel plates, with slots. Diamond sawblade cores are

> manufactured principally, but not exclusively, from alloy steel. A diamond sawblade segment consists of a mixture of diamonds (whether natural or synthetic, and regardless of the quantity of diamonds) and metal powders (including, but not limited to, iron, cobalt, nickel, tungsten carbide) that are formed together into a solid shape (from generally, but not limited to, a heating and pressing process).

Order, 74 Fed. Reg. at 57,145.

The Order excludes from its scope:

> Sawblades with diamonds directly attached to the core with a resin or electroplated bond, which thereby do not contain a diamond segment, are not included within the scope of the order. Diamond sawblades and/or sawblade cores with a thickness of less than 0.025 inches, or with a thickness greater than 1.1 inches, are excluded from the scope of the order. Circular steel plates that have a cutting edge of non-diamond material, such as external teeth that protrude from the outer diameter of the plate, whether or not finished, are excluded from the scope of the order. Diamond sawblade cores with a Rockwell C hardness of less than 25 are excluded from the scope of the order. Diamond sawblades and/or diamond segment(s) with diamonds that predominantly have a mesh size number greater than 240 (such as 250 or 260) are excluded from the scope of the order.

Id.

In February 2018, Lyke requested a scope ruling to determine whether two of its products, diamond sawblades and cupwheels, fell within the scope of the Order. Lyke Scope Request 2, P.R. 1 (Feb. 23, 2018). Commerce determined that Lyke's finished diamond sawblades are covered by the scope of the order, and so, only one product remains at issue today: Lyke's cupwheels. Final Scope Determination for Scope Request from Lyke Industrial Tool, LLC 8, P.R. 23 (May 17, 2018) ("Final Scope Ruling"). In the scope ruling request, Lyke requested that the agency find that cupwheels are not diamond sawblades and should be excluded from the antidumping duty order. Lyke Scope Request 2. Lyke noted that in-scope diamond sawblades have the following characteristics: (1) they must contain circular plates; (2) diamond segments must be installed on the outer periphery of the core; and (3) the sawblades must be used to cut materials. *Id.* at 11. According to Lyke, its cupwheels did not satisfy these requirements. First, while the diamond segments in diamond

sawblades "are [] installed in the outer diameter (periphery) of the cores," the diamond segments in a Lyke cupwheel are "installed on the flat surface of the cores." *Id*. at 10. Additionally, "[a] cupwheel does not cut through the materials on which it is working," and instead works to "polish or clean the surface." *Id*. Therefore, Lyke argued, the cupwheels do not satisfy the requirements of an in-scope diamond sawblade and fall outside of the scope of the Order. *Id*.

Thereafter, Commerce requested additional information from Lyke concerning its scope ruling request and Lyke responded by way of a revised scope ruling request. Lyke Industrial Supplemental Questionnaire, P.R. 11 (Mar. 22, 2018); Revised Scope Ruling Request, P.R. 13 (Apr. 3, 2018). Specifically, Lyke stated in its supplemental questionnaire response that Lyke's cupwheels are not grinding wheels because "the steel core spins parallel rather than perpendicular to the material being cut; therefore there is no rubbing." Revised Scope Ruling Request 15. After a subsequent exchange of comments and rebuttal comments from DSMC and Lyke, respectively, Commerce issued its scope determination.

In its final scope ruling, Commerce concluded that Lyke's cupwheels fall outside of the scope of the Order based primarily on their use and their physical characteristics. *See* Final Scope Ruling. At the outset, Commere "clarified that, for the scope of the investigation, diamond segments [of the merchandise] must be attached to the outer periphery of the core to be within the scope." *Id*. at 9. As to the product, Commerce first explained that "Lyke's cupwheels have diamond segments attached to the bottoms of the cores, not the outer periphery." *Id*. Second, because the cupwheels "are designed to rotate parallel, rather than perpendicular, . . . to the plane of the material," "Lyke's cupwheels, in contrast to diamond sawblades . . . , do not have an 'attacking edge' to 'penetrate the material.'" *Id*. at 10. Commerce recognized that "while the scope language does not describe in-scope merchandise . . . by their cutting function, grinding function, or spin direction, statements from the petitioner and the ITC in the investigation stage . . . clarify that a product that does not have an attacking edge that penetrates the material is not subject merchandise." *Id*. Therefore, Commerce concluded that "[a]lthough the scope language covers diamond sawblades regardless of specification," because Lyke's cupwheels are "physically distinguishable from diamond sawblades," they are not covered by the Order. *Id*. at 9–10.

DSMC moved for judgment on the agency record, arguing that Commerce's finding that Lyke's cupwheels are out of scope was not supported by substantial evidence, and that Commerce's failure to obtain sufficient information regarding Lyke's cupwheels renders its

determination unsupported by substantial evidence. *See generally* Pl.'s Br.

JURISDICTION

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and will sustain Commerce's determinations 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).

"Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping duty orders." *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (citing *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005)). "This broad deference is not unlimited, however, since 'Commerce cannot interpret an antidumping duty order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.'" *Id.* (quoting *Walgreen Co. v. United States*, 620 F.3d 1350, 1354 (Fed. Cir. 2010)). "Substantial evidence requires 'more than a mere scintilla,' but is satisfied by 'something less than the weight of the evidence.'" *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (citations omitted). Commerce's consideration should reflect a sound decision-making process, *see Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962), taking into account all evidence on the record, including that which may detract from the ultimate conclusion, *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). But, whatever the result, the agency's rationale must not be arbitrary, capricious, or an abuse of discretion. *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998).

DISCUSSION

The court remands Commerce's scope ruling. Although the text of the scope order is "susceptible to interpretation," *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) (citing *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013)), the evidentiary record as relied upon by Commerce does not support its conclusion that Lyke's cupwheels fall outside the scope of the antidumping order. Additionally, the Department misapplied the regulatory framework in its analysis when it considered function and ultimate use of Lyke's cupwheels in its 19 C.F.R. § 351.225(k)(1) analysis. As such, Commerce's scope ruling is unsupported by substantial evidence.

Because descriptions of the subject merchandise must be written in general terms, "it is often difficult to determine whether a particular product is included within the scope of an antidumping or counter-

vailing duty order." *OTR Wheel Eng'g, Inc. v. United States*, 36 CIT 988, 992, 853 F. Supp. 2d 1281, 1285 (2012) (citing 19 C.F.R. § 351.225(a)). Therefore, after an antidumping duty order is published, importers can request that Commerce clarify the scope of the order. *See* 19 C.F.R. § 351.225(a), (c). Although "no specific statutory provision govern[s] the interpretation of the scope of antidumping or countervailing orders," *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015), any scope ruling must begin by reading the language of the order itself, *Tak Fat Trading*, 396 F.3d at 1382. "Commerce's inquiry must begin with the order's scope to determine whether it contains an ambiguity and, thus, is susceptible to interpretation." *Meridian Prods., LLC*, 851 F.3d at 1381. If the order is unambiguous, its terms govern. *Id.* But in interpreting the plain language of a duty order—"whether a particular product is included within the scope of an order," 19 C.F.R. § 351.225(k)—Commerce must examine "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). These materials are called the "(k)(1)" factors. If these factors are dispositive—that is, they clarify the scope of the order—Commerce's inquiry ends there, and Commerce can issue a final ruling. *Tak Fat Trading Co.*, 396 F.3d at 1382. If not, the Department may consider the following additional criteria, called the "(k)(2)" factors: "(i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2)(i)ií(v).

Because the scope does not define "sawblade," Commerce appropriately looked to the sources identified in its scope regulations at 19 C.F.R. § 351.225(k)(1) (the (k)(1) factors) for guidance in interpreting the scope. However, the agency did not come to a reasonable conclusion in consideration of the entire administrative record and its findings pursuant to the (k)(1) factors did not "definitively answer the scope question." *Meridian Prods., LLC*, 851 F.3d at 1382 n.8. As a result, the court remands the Department's determination.

I. The Text of the Scope Order Does Not Resolve the Scope Dispute

In interpreting the scope of an order, the language therein is paramount. *Mitsubishi Polyester Film, Inc. v. United States*, 41 CIT __, __, 228 F. Supp. 3d 1359, 1371 (2017). Therefore, our inquiry begins by determining if the terms of the scope order are clear on its face. *See Mid Continent Nail Corp.*, 725 F.3d at 1302 (explaining that the

inquiry begins with "the language of the final order" and turns to other sources when the "literal terms of the order" do not clarify the dispute). If the scope is unambiguous, it governs. *ArcelorMittal Stainless Belg. N.V. v. United States,* 694 F.3d 82, 87 (Fed. Cir. 2012). "The relevant scope terms are 'unambiguous' if they have 'a single clearly defined or stated meaning.'" *Atkore Steel Components, Inc. v. United States*, 42 CIT __, __, 313 F. Supp. 3d 1374, 1380 (2018) (citing *Meridian Prods., LLC*, 851 F.3d at 1385). *See also Laminated Woven Sacks Comm. v. United States*, 34 CIT 906, 914, 716 F. Supp. 2d 1316, 1325 (2010) ("Commerce need only meet a low threshold to show that it justifiably found an ambiguity in scope language.").

And so the court turns first to the plain language of the antidumping duty order. The Department found that the scope language was ambiguous as to the definition of the term "sawblade." The court agrees. The Order defines both "diamond sawblade cores" ("circular steel plates, whether or not attached to non-steel plates, with slots") and "diamond sawblade segments" ("a mixture of diamonds and metal powders that are formed together into a solid shape"), Final Scope Ruling 2, but notably omits what constitutes a "sawblade" in the first place. There is nothing in the record to suggest that the term "sawblade" has a single meaning, and so, the plain language of the Order does not resolve the scope request. *See Maquilacero S.A. de C.V. v. United States*, 41 CIT __, __, 256 F. Supp. 3d 1294, 1307 (2017) (where there is "nothing to suggest that [a term] has a single definition" and the term is "not defined in the Order," Commerce's finding of ambiguity is in accordance with law). *See also TMB 440AE, Inc. v. United States*, Slip Op. 19–109, 2019 WL 3800207, at *5 (CIT Aug. 13, 2019) (requiring analysis of (k)(1) sources "because [a term] is undefined" in the order).

Therefore, relying solely on the scope language does not compel "a single clearly defined or stated meaning" of a sawblade. *Atkore Steel Components, Inc.*, 42 CIT at __, 313 F. Supp. 3d at 1380 (citations omitted). Without a "single clearly defined or stated meaning" evident from other sources as described by regulation." *Meridian Prods., LLC*, 851 F.3d at 1381–82 (internal quotations omitted). Specifically, Commerce must consider "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1).

II. Commerce's Determination Under 19 C.F.R. § 351.225(k)(1) That Lyke's Cupwheels Fall Outside of the Scope Order is Not Supported by Substantial Evidence

The court's inquiry continues beyond the text of the Order. Here, Commerce sought to clarify the scope of the order and its application to Lyke's cupwheels under 19 C.F.R. § 351.225(k)(1) by examining the petition and the antidumping investigation record. Specifically, the "(k)(1)" analysis prompts the Department to review "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1). If these sources are sufficient to determine whether the product falls within the scope of the order, the court will sustain the final scope ruling. *Tak Fat Trading*, 396 F.3d at 1382. Although a party's description of merchandise in these sources may aid Commerce in making its determination, that description "cannot substitute for language in the order itself" because "[i]t is the responsibility of [Commerce], not those who [participated in] the proceedings, to determine the scope of the final orders." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). Commerce's analysis of these sources against the product in question produces factual findings reviewed for substantial evidence. *See Fedmet Res. Corp. v. United States*, 755 F.3d 912, 919–22 (Fed. Cir. 2014). The court grants Commerce "substantial deference" with regard to its interpretation of its own antidumping duty and countervailing duty orders, *King Supply Co.*, 674 F.3d at 1348; but "Commerce cannot interpret an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms," *Ethan Allen Operations, Inc. v. United States*, 39 CIT __, __, 121 F. Supp. 3d 1342, 1348 (2015) (internal quotations omitted).

In its analysis, the Department intrinsically intertwined the functionality of a diamond sawblade (or "the ultimate use of the product," a (k)(2) factor) with the scope order's description of the product (a (k)(1) factor). Simply put, Commerce has failed to demonstrate that Lyke's cupwheels are not within the scope of the order based solely on the three sources available under 19 C.F.R. § 351.225(k)(1): the description of the merchandise contained in the petition; the initial investigation; and prior determinations of Commerce and the International Trade Commission ("ITC"). Based on those materials alone, the court does not find the factors dispositive—that is, they do not clarify the scope of the order as it relates to Lyke's cupwheels. There-

fore, on remand, Commerce is ordered to conduct a (k)(2) analysis, wherein it may then appropriately consider evidence as it relates to a diamond sawblade's ultimate use.

a. The (k)(1) materials Commerce relied upon do not "definitively answer the scope question"

Commerce examined the (k)(1) sources to determine if they sufficiently resolved the scope dispute as applied to Lyke's cupwheels. Ultimately, because Commerce impermissibly relied on (k)(2) materials in its (k)(1) analysis, Commerce's final scope determination is not adequately supported by the record evidence. Therefore, the court remands the Department's determination in accordance with this opinion.

In determining whether Lyke's cupwheels are in-scope merchandise, Commerce considered "the description of the merchandise contained in the investigation," as well as prior scope rulings that involved similar merchandise. Final Scope Ruling 9. According to Commerce, a review of these materials lead to its conclusion that all in-scope merchandise must have "diamond segments . . . attached to the outer periphery of the core." *Id.* Specifically, Commerce stated that it considered prior scope rulings on merchandise with diamond grinding segments at "the outer edge of the core," as compared to Lyke's cupwheels, which "have diamond segments attached to the bottoms of the cores." *Id.* Commerce also relied on an ITC decision that analyzed a "segment, or rim, [that was] slightly wider than the core to permit the leading edge to penetrate the material without the core rubbing against it," as compared to Lyke's cupwheels, which lack such a "leading edge to penetrate [] material[s]." *Id.* And finally, Commerce reviewed the descriptions of the merchandise as discussed in the petition, as well as evidence derived from the underlying investigation, in order to make its determination that Lyke's cupwheels are not covered by the scope of the order. However, for each of these (purportedly) (k)(1) materials, Commerce relies on one fundamental—and currently unsupported—finding: that the physical characteristics of a sawblade *must* allow for an "attacking edge" that can "penetrate [] materials," *id.* at 10, such as "tile, porcelain, granite, stone, and glass," id. at 9. Not only is this finding—that diamond segments must be attached to the outer periphery in order to create an "attacking edge"—currently unsupported by the record evidence, it is also a factor that more squarely falls under a (k)(2) analysis. That is, *only* when the (k)(1) sources fail to clarify the scope of the order can Commerce consider additional materials, such as the physical characteristics of the product and its ultimate use. 19 C.F.R. § 351.225(k)(2)(i)–(v). Otherwise, "purpose or use cannot be the test

when conducting a § 351.225(k)(1) determination." *Toys "R" Us, Inc. v. United States*, 32 CIT 814, 819, 2008 WL 2764982 at *4 (2008).

Starting with Commerce's analysis of "the description of the merchandise contained in the investigation," 19 C.F.R. § 351.225(k)(1), the Department concludes—without drawing any logical inferences from the available evidence—that "diamond segments must be attached to the outer periphery of the core to be within the scope." Final Scope Ruling 10. This is because, as Commerce further explains, the location of the diamond segments as "attached to the outer periphery" creates an "'attacking edge' that 'penetrates the material.'" *Id.* This determination falls dangerously close to "stray[ing] beyond the limits of [the scope's] interpretation and into the realm of amendment." *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995). While the court "afford[s] significant deference to Commerce's own interpretation of its orders," *Fedmet Res. Corp.*, 755 F.3d 912, 918, Commerce cannot "impose[] a requirement not contained in the Order," *Maquilacero S.A. de C.V.*, 256 F. Supp. 3d at 1310, as it does here. Here, the scope language lists that it covers "all finished circular sawblades . . . with a working part that is comprised of a diamond segment . . . *regardless of specification or size.*" Order, 74 Fed. Reg. at 57,145. By imputing a location requirement on the diamond segment, the Department is inherently amending the Order to, indeed, *include a specification*. The only limitation from the Order that even mentions the sawblades' attachment to the core excludes only those "sawblades with diamonds directly attached to the core *with a resin or electroplated bond*." *Id.* The Order's written exclusions provide no additional insight: the Order excludes sawblade with certain thickness specifications; steel plates with non-diamond cutting edge material; and diamond sawblades of a specified level of hardness and diamond mesh size numbers. *Id.* The Order notably does not mention diamond segment placement or the purpose of such placement. Nor does the Department explain how ambiguity as to the location of the diamond segment leads to its conclusion (or, "clarification," Final Scope Ruling 9) that the segments must be attached to the outer periphery of the core to be within the scope. But because the scope language is the "cornerstone" of any scope determination, Commerce is bound by "the general requirement of defining the scope of antidumping and countervailing duty orders by the actual language of the orders." *Duferco Steel*, 296 F.3d at 1097. Here, Commerce went beyond the limits of its discretion when it created additional requirements beyond those prescribed by the language of the Order. *See also Maquilacero S.A.*, 256 F. Supp. 3d at 1311 (remanding where Com-

merce added an additional "stenciling" requirement to a final scope order that did not mention such a specification).

The prior scope determinations made by Commerce and the ITC do not provide additional support for the Department's reasoning. Commerce states that "statements from the petitioner and the ITC in the investigation stage . . . clarify that a product that does not have an attacking edge that penetrates the material is not subject merchandise." Final Scope Ruling 10. There are two issues with that determination. First, the Department's prior scope determination for *one* product's grinding wheels does not adequately address why the segment placement on the outer periphery of the sawblade is required for *all* in-scope merchandise. Moreover, the Department misapplied the regulatory framework when it inappropriately relied on (k)(2) evidence—that is, the function and use of a diamond sawblade—in its (k)(1) analysis.

In considering prior scope rulings, Commerce explained that Lyke's cupwheels differed from 1A1R grinding wheels produced by Ehwa Diamond Industrial Company ("Ehwa"), which Commerce had previously concluded fell within the scope of the Diamond Sawblades Order. Final Scope Ruling 9. According to Commerce, the Department "included Ehwa's 1A1R grinding wheels within the scope because . . . [they] have a grinding segment made of metal powders and diamonds attached to the outer edge of the core, and thus, meet the physical description of the subject merchandise." *Id.* This prior scope determination, and its findings therein, allegedly support Commerce's determination that if a product "does not have an attacking edge that penetrates the material"—like Lyke's cupwheels—that product "is not subject merchandise." *Id.* at 10.

But neither the investigation nor the Ehwa prior scope determination demonstrably support this finding. To start, the investigatory scope memo from Ehwa's scope request mentions diamond segment placement on the outer edge of the core only *twice*—and both references were from Ehwa's *own* description of its products. *See* Consideration of Scope Exclusion and Clarification Request, P.R. 16, Attach. 1, Ex. 5 (Dec. 20, 2005) ("Ehwa Investigatory Scope Memo") ("Ehwa's own description of grinding wheels demonstrates that such products should be covered by the scope of the investigation, *e.g.*, circular wheel, diamond cutting element on the outer diameter, *etc.*"). The Department made no further reference to segment placement as a (now) fundamental aspect of an in-scope sawblade[1]. But "[a]lthough a

[1] The only additional evidence that the Government points to is a portion of the Lyke Final Scope Ruling, where Commerce "clarifi[es] that, for the scope of the investigation, diamond segments must be attached to the outer periphery of the core to be within the scope," citing to the 2006 Final Determination of Sales at Less Than Fair Value. *See* Final Scope Ruling

party's [own] description of merchandise . . . may aid Commerce in making its determination, that description 'cannot substitute for language in the order itself[.]" *Duferco*, 296 F.3d at 1097. And importantly, Commerce spent a significant portion of the Ehwa scope memo explaining that the scope's language, "diamond segment or segments . . . *regardless of specification*," means just that: the scope covers products that meet certain physical characteristics specified in the text of the order, "*irrespective of end-use*" or function of the subject merchandise. *See* Ehwa Investigatory Scope Memo 5 (rejecting Ehwa's argument that the term "sawblades" should refer only to those blades that are used on saws in order to avoid using "end-use" characteristics in the scope determination). This is in direct contrast to the Department's focus in the Lyke investigation: a sawblades' ability to functionally "penetrate [] material[s]" with its "attacking edge." Final Scope Ruling 10. Therefore, the Department's heavy reliance on the Ehwa prior scope determination fails to support the Department's conclusion that the diamond segments *must* be attached to the outer edge of the core. Indeed, this, too, is a logical fallacy: the fact that *one* in-scope product had a certain additional characteristic (diamond segments on the outer core) does not necessarily require that all subject merchandise have that same additional characteristic. Compounded by the fact that the Ehwa scope memo does not even *address* diamond segments on the outer core as a (fundamental or otherwise) element of an in-scope product, the Department has little to support its determination that Lyke's cupwheels are out of scope based solely on the product's diamond segment placement or ultimate use.

b. Commerce's final scope determination under 19 C.F.R. § 351.225(k)(1) was not confined to the (k)(1) sources.

Commerce's final scope determination failed to adhere to the regulatory framework pursuant to 19 C.F.R. § 351.225. Specifically, the Department's reasoning improperly analyzes (k)(2) evidence—ultimate use and function of the product—despite Commerce's determination that that the (k)(1) factors were dispositive and contained sufficient information to determine whether Lyke's cupwheels should

9 (citing *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29,303 (Dep't Commerce May 22, 2006) (final determ. of sales at less than fair value), and accompanying Issues and Decision Memorandum at cmt. 3 ("*2006 Final Determination*")). The 2006 Final Determination contains one sentence that states "diamond segments must be attached to the outer periphery of the core." 2006 Final Determination at cmt. 3. The Department did not provide any further explanation for this requirement then, nor does it do so today. Therefore, although that is (k)(1) evidence that Commerce *may* rely on, it fails to carry the day and Commerce still falls short of the substantial evidence standard required under our review.

be subject to the Order. In interpreting the plain language of a duty order, the Department is limited to considering "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determination of the Secretary . . . and the Commission." 19 C.F.R. § 351.225(k)(1). It is only when the (k)(1) sources are not dispositive that Commerce may consider additional (k)(2) factors, which include the "physical characteristics of the product," the "expectations of the ultimate purchasers," the "ultimate use of the product," the "channels of trade in which the product is sold," and the "manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2). Therefore, where, as here, the Department finds that the (k)(1) sources "definitively answer the scope question," *Meridian Prods., LLC*, 851 F.3d at 1382 n.8, the (k)(2) factors "cannot be the test when conducting a § 351.225(k)(1) determination," *Toys "R" Us, Inc.*, 32 CIT at 819, 2008 WL 2764982 at *4.

The Department made its final scope determination pursuant to the criteria under 19 C.F.R. § 351.225(k)(1) when it found that Lyke's finished diamond sawblades are outside the scope of the Order. However, the reasoning underlying the Department's determination is fixated on whether or not Lyke's cupwheels are functionally capable of "penetrat[ing] . . . materials," which "include, among others, tile, porcelain, granite, stone, and glass." Final Scope Ruling 9. A product's function, or "ultimate use of the product," is explicitly a (k)(2) factor and has no place in a (k)(1) analysis, as was purportedly undertaken here. *See* 19 C.F.R. § 351.225(k)(2)(iii) ("When the above criteria are not dispositive, the Secretary will further consider . . . .the ultimate use of the product."). *See also Toys "R" Us, Inc.*, 32 CIT at 819 ("[P]urpose or use cannot be the test when conducting a § 351.225(k)(1) determination . . . they are factors relevant only to a § 351.225(k)(2) inquiry[.]"). The focus on the product's use as a penetrating source is evident throughout the determination: "Lyke's cupwheels are not suitable for penetrating [] material," Final Scope Ruling 10; "a product that does not have an attacking edge that penetrates the material is not subject merchandise," *id.*; "[t]he segment . . . is slightly wider than the core to permit the leading edge to penetrate the material . . . ," *id.* at 9. The Department concedes that "the scope language does not describe in-scope merchandise and non-subject merchandise by their cutting function, grinding function, or spin direction," but in the same breath explains "that a product that does not have an attacking edge that penetrate the material is not subject merchandise." *Id.* at 10. Evidence relating to the product's function or use requires an inquiry under § 351.225(k)(2)—which the

Department alleges it did not need to undergo. What's more, in the prior scope ruling for Ehwa's products—which Commerce relies upon in this investigation—the Department made clear that it would *not* make its scope determination based on end-use or function of the item. *See* Ehwa Investigatory Scope Memo 5 ("[T]he Department's decision on whether to exclude an item from the scope of an investigation or order is typically not based upon the claimed end-use of the item."). And here, Commerce based its determination almost *entirely* on the product's function, use, and physical characteristics—all additional sources outlined in 19 C.F.R. § 351.225(k)(2). Therefore, it seems quite unlikely that Commerce can confine itself to a limited § 351.225(k)(1) analysis here and reach a supported conclusion about whether Lyke's cupwheels are designed for "penetrating [] material[s]." Final Scope Ruling 10.

Moreover, the Government also relies on the 1A1R specification as listed in the Order ("the term sawblade is defined as those products that meet the 1A1R specification," *Order*, 74 Fed. Reg. at 57,146) by way of demonstrating that the in-scope products must have "grinding wheels" with grinding segments "attached to the outer edge of the core," Final Scope Ruling 9. The Department specifies that 1A1R products have a "segment thickness [that] is larger than the thickness of the core." *Order*, 74 Fed. Reg. at 57,146. That is yet another (k)(2) factor ("[t]he physical characteristics of the product," 19 C.F.R. § 351.225(k)(2)(i)) that the Department inappropriately relies upon in its (k)(1) analysis. But even putting that aside, Department attempts to draw a conclusion about the *use* of the in-scope sawblade ("grinding" or "penetrating") from the 1A1R physical characteristic ("segment thickness [that] is larger than the thickness of the core," *Order*, 74 Fed. Reg. at 57,146). But then it is unclear to the court why the Department also stated that "[it] do[es] *not* need information on . . . the thickness of segments attached to cores of Lyke's cupwheels," Final Scope Ruling 10, when that is one of the few physical characteristics available for determining whether a product is in-scope. This brings the court to the next logical question: *are the segments attached to the cores of Lyke's cupwheels thicker than the thickness of the core?* To the confusion of the court, the Department notably refused to answer this relevant question in its analysis.

What is clear to the court, however, is that the criteria under 19 C.F.R. § 351.225(k)(1) is not dispositive for a scope inquiry and a determination pursuant to § 351.225(k)(2) is warranted. *See Legacy Classic Furniture, Inc. v. United States*, 35 CIT 1754, 1755, 807 F. Supp. 2d 1353, 1356 (2011) ("Only when these so-called '(k)(1)' sources are not dispositive is Commerce to proceed to consider the '(k)(2)'

factors[.]"). Although the court expresses no inclination as to the correct outcome, Commerce must still explain how its findings were "reached by 'reasoned decision-making,' including . . . a reasoned explanation supported by a stated connection between the facts and the choice made," *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm'n*, 747 F.2d 1511, 1513 (D.C. Cir. 1984) (citing *Burlington Truck Lines*, 371 U.S. at 168)—even if that means delving into a (k)(2) inquiry. Therefore, the court orders the Department to proceed with a full inquiry using the factors enumerated in § 351.225(k)(2).

CONCLUSION AND ORDER

The sources used by Commerce in its (k)(1) analysis do not "definitively answer" the question of whether Lyke's cupwheels are excluded from the scope of the Order. As demonstrated by the record, there are questions left unanswered that require a more reaching analysis under 19 C.F.R. § 351.225(k)(2). Therefore, it is necessary for Commerce to further address whether the subject merchandise falls within the scope of the order using the factors enumerated in § 351.225(k)(2).

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

ORDERED that because the Department's determination under 19 C.F.R. § 351.225(k)(1) did not definitively answer the scope question, Commerce must proceed to conduct a full inquiry under 19 C.F.R. § 351.225(k)(2); 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: September 19, 2019
New York, New York

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