U.S. Court of International Trade

Slip Op. 17–38

XIPING OPECK FOOD CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and CRAWFISH PROCESSORS ALLIANCE, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 12–00112
PUBLIC VERSION

[Commerce's Final Results of Redetermination are sustained.]

Dated: April 5, 2017

Yingchao Xiao, Lee & Xiao, of San Marino, CA, argued for plaintiff.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Rebecca Cantu*, Attorney, International Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

John C. Steinberger, Adduci, Mastriani & Schaumberg, LLP, of Washington, DC, for defendant-intervenor. With him on the brief was *Will E. Leonard*.

OPINION AND ORDER

Eaton, Judge:

Before the court are the United States Department of Commerce's ("Commerce" or the "Department") Final Results of Redetermination Pursuant to Court Remand. *See Final Results of Redetermination Pursuant to Ct. Remand* (Dep't Commerce June 9, 2015), ECF No. 57–1 ("Remand Results"). These results follow the court's order remanding the final results of the Department's 2009–2010 administrative review of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China ("PRC"). *Xiping Opeck Food Co. v. United States*, 38 CIT __, 34 F. Supp. 3d 1331 (2014) ("*Xiping Opeck I*"); *Freshwater Crawfish Tail Meat From the People's Republic of China*, 77 Fed. Reg. 21,529 (Dep't Commerce Apr. 10, 2012) (final results of antidumping duty admin. rev.) ("Final Results"), and accompanying Issues and Decision Memorandum,

A-570–848, (Apr. 4, 2012), PD[1] 35 ("Issues & Dec. Mem."); *Freshwater Crawfish Tail Meat From the PRC*, 62 Fed. Reg. 48,218 (Dep't Commerce Sept. 15, 1997) (notice of amendment to final determination of sales at less than fair value and antidumping duty order) (the "Order").[2]

Shifting from the dumping analysis applied in the Final Results, in the Remand Results the Department employed a modification of its middleman dumping methodology to capture the transactions by which the subject crawfish tail meat entered the United States. In its comments, plaintiff Xiping Opeck Food Co. Ltd. ("plaintiff" or "Xiping") argues that the court should reject the Remand Results as unsupported by substantial evidence and not in accordance with law. *See* Pl.'s Cmts. on Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 60 ("Pl.'s Cmts."). The United States Government, on behalf of Commerce, urges the court to sustain the Remand Results.[3] *See* Def.'s Resp. Pl.'s Cmts. Final Results of Remand Redetermination, ECF No. 64.

Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2012).[4] For the reasons discussed below, the court sustains the Remand Results.

BACKGROUND

In the Final Results, and now in the Remand Results, the Department concluded that Xiping's crawfish tail meat was sold into the United States at less than fair value. In the Remand Results, the Department calculated an antidumping duty rate for Xiping's entries of 70.12 percent.[5] Remand Results at 3.

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[1] "PD" refers to a document contained in the public administrative record, and "CD" refers to a document contained in the confidential administrative record, both of which are found in ECF No. 21, unless otherwise noted.

[2] The merchandise subject to the Order is described as:

> freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or un-purged), grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared. Excluded from the scope of the order are live crawfish and other whole crawfish, whether boiled, frozen, fresh, or chilled. Also excluded are saltwater crawfish of any type, and parts thereof.

Final Results, 77 Fed. Reg. at 21,529–30.

[3] Defendant-intervenor Crawfish Processors Alliance did not file comments on the Remand Results.

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

[5] Commerce only calculated a dumping margin for Xiping's crawfish tail meat for the September 1, 2009, through August 31, 2010 period of review. Remand Results at 19 n.60 ("We note that given the timing, this rate will only be used for purposes of assessing duties on the entries subject to the review and not serve as a cash deposit rate. For cash deposit purposes, Xiping Opecks's [sic] rate in this review has been superseded by subsequent reviews, and the only issue that remains is the proper liquidation of the entries at issue.");

I. THE TRANSACTION CHAIN

Xiping characterized the transaction chain by which its crawfish tail meat was exported to the United States as follows: (1) Xiping, as exporter, sold its crawfish tail meat to GB Import & Export, Inc. ("GBIE"), a U.S. corporation, which acted as Xiping's importer and was its first unaffiliated U.S. customer; (2) GBIE sold the crawfish tail meat to Chinese Company A[6] (another unaffiliated down-stream purchaser); and (3) Chinese Company A then sold the crawfish tail meat to U.S. wholesalers.[7] Pl.'s Cmts. 19–20.

On remand, the Department has ignored the claimed first sale to GBIE after finding it to be commercially unreasonable. Thus, Commerce re-characterized the transaction chain as being (1) a sale from Xiping, as producer, to Chinese Company A; and (2) a sale from Chinese Company A, as exporter, to the U.S. wholesalers. *See* Remand Results at 11–12.

II. MIDDLEMAN DUMPING ALLEGATION LETTER

On September 8, 1997, the Department published the antidumping duty order on crawfish tail meat from the PRC. *See* Order, 62 Fed. Reg. at 48,218. On October 28, 2010, after defendant-intervenor Crawfish Processors Alliance ("defendant-intervenor") filed a letter alleging middleman dumping[8] by Chinese Company A, the Department initiated an administrative review of the Order for the period of review of September 1, 2009, through August 31, 2010 ("POR"). *See Freshwater Crawfish Tail Meat From the PRC*, 75 Fed. Reg. 66,349, 66,350 (Dep't Commerce Oct. 28, 2010) (initiation of antidumping and countervailing duty admin. revs.); Letter from John C. Steinberger,

see Freshwater Crawfish Tail Meat From the PRC, 75 Fed. Reg. 66,349, 66,350 (Dep't Commerce Oct. 28, 2010) (initiation of antidumping and countervailing duty admin. revs.).

[6] The identity of Chinese Company A [[ ]] is confidential at the request of GBIE. Issues & Dec. Mem. at 2 n.2; Mem. for Evaluation of Middleman Dumping and Nature of Transactions, CD 12 (Sept. 30, 2011) ("Transactions Mem.") at 2.

[7] Because Chinese Company A failed to answer Commerce's questionnaires regarding its U.S. sales, specific information regarding those sales is missing from the record. Remand Results at 5. Nevertheless, Commerce found that the record contained convincing evidence that four U.S. wholesalers—Ocean Harvest, Propax, Corrigan, and Fishline—"handl[ed] Xiping Opeck's product," and therefore, because "[[ ]] percent of Xiping Opeck's U.S. sales during the POR were made through the same GBIE-[Chinese Company A] channel," Commerce determined that "all four entities were downstream purchasers from [Chinese Company A]." Transactions Mem. at 2–3, 9.

[8] Although there have been few of these investigations, middleman dumping is normally thought of as less than fair value sales into the United States by a foreign reseller of a foreign respondent producer's merchandise, rather than by the respondent producer itself. *See* S. REP.NO. 96–249, at 94 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 381, 480. As shall be seen, although the Department used information from defendant-intervenor's Middleman Dumping Allegation Letter, it did not pursue a middleman dumping investigation in its Final Results. In its Remand Results, however, the Department conducted a middleman dumping inquiry.

Counsel for the Crawfish Processors Alliance, to the Honorable Gary Locke, Secretary of Commerce, U.S. Department of Commerce, CD 27 (June 6, 2011) ("Middleman Dumping Allegation Letter") at 2.

In its letter, the defendant-intervenor described Xiping's sales of crawfish tail meat to GBIE, and the subsequent sales of the merchandise to Chinese Company A. The letter asserted that Chinese Company A resold Xiping's merchandise to U.S. wholesalers at prices below its acquisition cost. Defendant-intervenor alleged that the various sales made prior to the sales to U.S. wholesalers were designed to avoid dumping duties by creating the appearance of fair value sales from Xiping to GBIE. For defendant-intervenor, these claimed sales to GBIE were intended to obscure their true nature, as well as Chinese Company A's acquisition price and its sales prices to the U.S. wholesalers. *See* Middleman Dumping Allegation Letter at 6–7. In other words, according to defendant-intervenor, Xiping was engaged in middleman dumping, and the sales were structured to mask that dumping.

III. *XIPING OPECK I:* REVIEW OF COMMERCE'S FINAL RESULTS

Commerce is charged with determining if goods are being sold, or are likely to be sold, in the United States at less than fair value. This determination is based on a comparison of normal value and export price. 19 U.S.C. § 1673. The Department calculates a dumping margin for the subject merchandise by determining the amount by which normal value (home market price) exceeds export price (U.S. price). 19 U.S.C. § 1677(35)(A). Commerce then uses this margin to determine an antidumping duty rate.

Under the usual set of facts, middleman dumping is the below cost sale in the United States by a reseller of a respondent producer's merchandise. *See Tung Mung Dev. Co. v. United States*, 354 F.3d 1371, 1374 (Fed. Cir. 2004) ("*Tung Mung III*") (citing S. REP.NO. 96–249, at 94 (1979), *as reprinted in* 1979 U.S.C.C.A.N. at 480). That is, middleman dumping occurs when a producer sells its merchandise to a middleman or reseller, and then the middleman resells the merchandise at less than fair value into the United States.[9] Accordingly, a middleman dumping analysis may be appropriate when there is more than one sale before the subject merchandise is sold to an unaffiliated U.S. purchaser. *See id*.

Despite defendant-intervenor's middleman dumping allegation, in its preliminary results Commerce determined that the middleman

[9] Under the usual middleman dumping facts the Department may find dumping both in the sale (1) by the producer to the reseller and (2) by the reseller to the U.S. purchaser. As shall be seen, Commerce was unable to determine two instances of dumping here.

dumping analysis was not "the appropriate vehicle by which to examine the transactions relevant to the entries subject to this review." *Freshwater Crawfish Tail Meat From the PRC*, 76 Fed. Reg. 62,349 (Dep't Commerce Oct. 7, 2011) (prelim. results of antidumping duty admin. rev. and rescission of rev. in part). Thereafter, in its Final Results, Commerce calculated a dumping margin for Xiping based upon Chinese Company A's purchase and sales prices. *See* Final Results, 77 Fed. Reg. at 21,530. The Department applied the resulting dumping margin to Xiping based upon Xiping's knowledge that its goods were sold into the United States at less than fair value. *Xiping Opeck I*, 38 CIT at __, 34 F. Supp. 3d at 1340–41 & n.18. The court remanded the Final Results, and because of the structure of the transactions, suggested that the Department might reconsider whether a middleman dumping analysis was appropriate. *Id.* at __, 34 F. Supp. 3d at 1354 ("Because of the odd structure of the transaction, the Department's suspicions about the bona fides of the behavior of the entities involved are fully justified. There appears to be no other explanation for these gyrations than to avoid a finding of dumping. Indeed, the defendant-intervenor seems to have made out a good case that the transaction amounted to middleman dumping. Thus, on remand, if the Department wishes, it may pursue a middleman dumping investigation as part of its determination to capture the dumping of Xiping's merchandise in the United States.").

IV. THE REMAND RESULTS

On remand, the Department changed course and applied a modified middleman dumping analysis. Remand Results at 3, 11. The Department found that Xiping's product had been sold at less than fair value by Chinese Company A, even though Chinese Company A had purchased the product from the supposed U.S. importer GBIE. The structure of the transactions thus presented a methodological problem for the Department because, in a traditional middleman dumping case, the first sale would be by the producer to an unaffiliated purchaser in its home country, in this case China. The purchaser would then sell the product to U.S. purchasers. This methodology is set out in Commerce's Antidumping Manual:

> D. Special Circumstances Involving Unaffiliated Middleman Sales
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> Very infrequently, a manufacturer or producer may sell to an unaffiliated trading company, or middleman, in the home market or in a third country, and this company may resell the merchandise to the United States at prices which do not permit recovery of its acquisition and selling costs. At the time of the

> sale to the middleman, the producer has knowledge[10] of U.S. destination. If this is the case and the Department receives a documented allegation that the trading company is reselling to the United States at prices which do not permit the recovery of its acquisition and selling costs, we will initiate a middleman dumping investigation.

U.S. DEP'T OF COMM., ENFORCEMENT AND COMPLIANCE ANTIDUMPING MANUAL, ch. 7 at 5 (Mar. 16, 2015) ("ANTIDUMPING MANUAL"). Here, according to Xiping, the first purported sales were to GBIE, a claimed U.S. importer, rather than to a purchaser in China. Xiping asserts that U.S. importer GBIE then sold the crawfish tail meat to Chinese Company A, which then sold it to the U.S. wholesalers. The methodological problem for Commerce, then, was that there appeared to be no first sale to a Chinese reseller before the crawfish tail meat was exported to the United States.

An examination of the transaction chain, however, convinced the Department that the claimed sales by Xiping (as exporter) to GBIE (as importer) were not legitimate because they were not commercially reasonable. This being the case, Commerce determined that the purported sales to GBIE should be ignored. Remand Results at 11–12.

After excluding the Xiping-to-GBIE sales, the Department then reviewed the transactions very much as it would in a traditional middleman dumping analysis, finding (1) sales directly from producer Xiping to Chinese Company A; and (2) sales by Chinese Company A, as the exporter, to the U.S. wholesalers as the first unrelated U.S. purchasers. *See id.* Thus, the Department found a sale by a home market producer to a home market reseller/exporter before the first sale to an unaffiliated U.S. purchaser. As it had in the Final Results, Commerce then used Chinese Company A's acquisition costs as normal value and its sales prices to U.S. wholesalers as the export price and determined that Chinese Company A's U.S. sales were at less than fair value. In addition, the Department used adverse facts avail-

[10] As shall be seen, the Federal Circuit has held that, under Commerce's middleman dumping approach, mere knowledge that the product is bound for the U.S. is not enough to apply a middleman's dumping margin to a producer. Rather, the producer must have knowledge that the product is likely to be dumped. *Tung Mung III*, 354 F.3d at 1377–78; *see also* Remand Results at 18 n.58 ("The issue [before the CIT] was whether or not to apply a single rate to the exporter when it had two different channels of distribution: (1) direct sales by [the producers of the subject merchandise], and (2) sales by [the producers] to a middleman . . . who resold that merchandise to United States customers. The Department applied a 'knowledge-based' standard, i.e., it considered whether the producer was aware or should have been aware that the middleman would be likely to dump subject merchandise into the United States. If the Department found such knowledge, it combined all sales, direct and through the middleman, to determine a single margin for the exporter. If the Department did not find such knowledge, it would calculate two rates for the exporter, one for the direct sales, and one for the sales through the middleman.").

able ("AFA")[11] to determine both export price and normal value. The Department then used the resulting margin to calculate an antidumping duty rate for Xiping's entries. Remand Results at 21.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. MIDDLEMAN DUMPING ANALYSIS

A. Middleman Dumping Methodology

While the unfair trade statute does not specifically provide for a middleman dumping analysis, much less a specific methodology, case law and legislative history make it clear that Commerce has the authority to develop methodologies to examine transactions through middlemen to determine if they constitute sales at less than fair value. *See Tung Mung III*, 354 F.3d at 1374 (citing S. REP. NO. 96–249, at 94 (stating that the Department has the authority to address "sales from the foreign producer to middlemen and any sales between middlemen before sale to the first unrelated U.S. purchaser" so as to "avoid below cost sales by the middlemen")).

B. The Department's Finding that the Sales from Xiping to GBIE were Not Commercially Reasonable is Supported by Substantial Evidence and in Accordance with Law

On remand, Commerce found that the series of transactions resulting in the ultimate sales to the U.S. wholesalers did "not . . . fit squarely into a traditional middleman dumping framework," which generally involves "a foreign producer selling to a middleman located in the producer's home market or in a third country" before the sale to the unaffiliated U.S. purchaser. Remand Results at 11 (citing *Tung Mung III*, 354 F.3d at 1374).

[11] If Commerce concludes that it should use "facts available" to calculate a dumping rate and it "finds that a respondent has 'failed to cooperate by not acting to the best of its ability to comply with a request for information,' the statute permits the agency to draw adverse inferences commonly known as 'adverse facts available' when selecting from among the available facts." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1338 (Fed. Cir. 2016) (quoting 19 U.S.C. § 1677e(b) (2006)). This adverse inference, applied to the facts Commerce has available to it, often results in a higher dumping margin for an uncooperative interested party.

The added element in this case is Xiping's sale to GBIE, and GBIE's sale to Chinese Company A. *Id.* Unlike the previous situations where the department has found middleman dumping, Xiping claimed that it was an exporter that sold the crawfish tail meat to GBIE as the U.S. importer. *See id.* According to Xiping, GBIE then sold the product to Chinese Company A, which sold the crawfish tail meat to the U.S. wholesalers. *See id*. On remand, the Department found that in order to analyze the transactions properly, and determine if they resulted in less than fair value sales of Xiping's merchandise to U.S. purchasers, it had to adjust its middleman dumping analysis. *See id.* Primarily, this adjustment was reflected in Commerce's determination to ignore the sales from Xiping, as the exporter, to GBIE, as the U.S. importer, because they were commercially unreasonable. *Id.*

Xiping argues that Commerce improperly excluded the sales from Xiping to GBIE. Pl.'s Cmts. 7. For Xiping, the Department failed to explain how the transactions were "at all unusual or uncommon in the context of trade between [the PRC] and the [United States] in general." Pl.'s Cmts. 8.

Commerce may, in limited circumstances, exclude commercially unreasonable sales from its dumping determinations. *See Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1263, 641 F. Supp. 2d 1362, 1369 (2009) ("If the weight of the evidence indicates that a sale is not typical of a company's normal business practices, the sale is not consistent with good business practices, or the transaction has been so artificially structured as to be commercially unreasonable, Commerce excludes the non-bona fide transaction from review."); *see also Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 39 CIT __, __, 71 F. Supp. 3d 1338, 1345 (2015). In order to determine whether a sale is commercially reasonable, Commerce looks at the transaction in light of the "totality of the circumstances." *Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT 603, 610, 374 F. Supp. 2d 1333, 1339 (2005).

On remand, the Department examined the Xiping-to-GBIE sales and found that, remarkably, both Xiping's prices and sales quantity for its crawfish tail meat increased dramatically from the previous period of review.[12] Remand Results at 13–14. That is, were the Department to look only to the claimed sales from Xiping to GBIE, it would appear that Xiping was able to increase both its sales prices

[12] Specifically, Xiping's prices "increased by [[ ]] percent from the last [period of review] and increased by [[ ]] percent more than an increase in its competitors' prices; Xiping's sales quantity increased by [[ ]] percent from [the] last [period of review] and increased by [[ ]] percent more than an increase in its competitors' sales quantity." Transactions Mem. at 6.

and the amount of product it sold into the United States. *Id.* at 14. This increase in volume was achieved even though Xiping Opeck's sales prices to GBIE "were substantially higher than the average prevailing U.S. market price at the wholesale level." *Id.* Put another way, if the sales to GBIE were legitimate, somehow Xiping had found a way to be paid more than the prevailing U.S. wholesale market price for its product, while at the same time selling more crawfish tail meat than it had previously. *See id.* Based on this evidence, Commerce concluded that Xiping's ability to increase sales quantity while simultaneously charging more than its competitors "defies normal commercial considerations." *Id.* at 15.

Commerce further found that the nature of the transactions and the relationships between Xiping and GBIE, and GBIE and Chinese Company A, did not conform to ordinary business principles reflecting arm's length transactions, because the record was devoid of any attempt by Xiping to find other U.S. customers after it established its relationship with GBIE. Remand Results at 16. In other words, once GBIE was incorporated it became the sole vehicle for Xiping's product, and only Xiping's product, to enter the United States.[13]

Moreover, the Department determined that GBIE's incorporation was suspect. Remand Results at 17. The Department supported this finding with record evidence that: GBIE incorporated in the State of Washington immediately prior to its first purchases from Xiping; GBIE's place of incorporation was the personal United States residence of Xiao Huan Xu; the registered phone number for the company was Xiao Huan Xu's mobile phone number; and although Xiao Huan Xu was GBIE's registered agent, GBIE's president was a Chinese national living in the PRC. *Id.* ; Transactions Mem. at 13.

Commerce further found that Chinese Company A had a motive for having an entity in the United States act as an importer. If Commerce calculated export price as it normally would, based on the first sale to an unrelated U.S. purchaser, then export price would be determined based on the sale from Xiping to GBIE. *See* 19 U.S.C. § 1677a(a); Remand Results at 17–18. If this were the case, the inflated sales prices, present in those sales, would make it appear that the subject merchandise was sold at fair value into the United States. *See* Remand Results at 14–15. Thus, Chinese Company A's sales to the U.S. wholesalers at dumped prices would be hidden from view.

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[13] The record supports this finding. Specifically, the record shows that (1) Xiping sold [[ ]] percent of its crawfish tail meat to GBIE; (2) GBIE purchased [[ ]] percent of its crawfish tail meat from Xiping; (3) all crawfish tail meat purchased by GBIE is destined for the United States; (4) GBIE's [[ ]] business [[ ]]; and (5) GBIE resold [[ ]] percent of the crawfish tail meat it purchased to Chinese Company A. Remand Results at 16.

Finally, absent from the record was any evidence of sales negotiating activities by GBIE in the United States.[14] *Id.* at 17. That is, there was no information on the record indicating that if, in fact, GBIE imported subject merchandise into the United States, it had attempted to sell the merchandise to U.S. customers rather than to Chinese Company A. *Id.* at 16.

It is apparent that the purported sales by Xiping to GBIE, and GBIE's claimed sales to Chinese Company A, were devised to conceal the true nature of the transactions. The unnecessary step of the sale to GBIE, which was no more than a single purpose shell corporation, was clearly conducted for the sole purpose of obscuring the sales to the U.S. wholesalers at less than fair value. This is demonstrated by the nature of the transactions among Xiping, GBIE, and Chinese Company A, as well as the circumstances surrounding GBIE's incorporation and sales activities. Therefore, the Department's conclusion that the sales from Xiping to GBIE were commercially unreasonable is supported by substantial evidence on the record and is in accordance with law.

C. The Department's Export Price and Normal Value Determinations and its Determination to Calculate a Single Dumping Margin are in Accordance with Law and Supported by Substantial Evidence

In the Remand Results, the Department calculated a single dumping margin based on Chinese Company A's acquisition costs (as normal value) and sales prices to the U.S. wholesalers (as export price) and applied that margin to Xiping. The dumping margin was used to determine an antidumping duty rate for Xiping.

Once it found that the claimed sale from Xiping to GBIE should be ignored as not commercially reasonable, the Department viewed the actual transaction chain as a direct sale from Xiping to Chinese Company A. Commerce further found that, in accordance with its traditional middleman dumping methodology, it should calculate a dumping margin for Chinese Company A based on its acquisition costs and sales prices. For Commerce, once the Xiping-to-GBIE sales were excluded, the chain of transactions looked very much like a traditional middleman dumping scenario, *i.e.*, a sale by a foreign producer to a home market reseller prior to importation into the United States. Therefore, Commerce applied its normal methodology

[14] GBIE was only capitalized with [[ ]] and no fixed assets. Remand Results at 17; Transactions Mem. at 13. In addition, GBIE [[ ]] dealt in the crawfish tail meat business, and [[ ]] conducted business with Xiping and Chinese Company A. Remand Results at 17.

for determining export price. *See generally Tung Mung III*, 354 F.3d 1371.

Export price is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a). Here, to calculate export price, Commerce relied on the prices realized by Chinese Company A in its sales to the U.S. wholesalers. Thus, the Department employed its normal middleman dumping analysis to find the export price. Next, Commerce applied an adverse inference to the facts establishing the export price. Accordingly, it used the lowest price paid by the U.S. wholesalers as the export price. Remand Results at 39–40.

Plaintiff maintains that the Department (1) should have used the sales information from the Xiping-to-GBIE transaction to calculate a separate export price for Xiping for comparison to its normal value; and (2) should not have used the prices paid by the U.S. wholesalers to calculate the export price, because the price information for the U.S. wholesalers was unreliable. *See* Pl.'s Cmts. 13. For plaintiff, "even if the Department finds middleman dumping in the underl[ying] review," a dumping margin that represents a margin determined for Xiping alone would more accurately reflect that company's behavior. *See* Pl.'s Cmts. 20–21.

Commerce explained why it calculated export price as it did, including its reasons for not determining an export price (and hence a dumping margin) for the Xiping-to-GBIE purported sales or for the now constructed Xiping-to-Chinese Company A sales:

> [W]e now find that the facts in this case are akin to those in a traditional middleman dumping scenario in that we are left with two relevant sales, the Xiping-[Chinese Company A] (through GBIE) "sale" and the [Chinese Company A]-U.S. customer sale. Based on the channel of U.S. sales in this review, it is appropriate to calculate a single dumping rate for the entries under review. Because calculating a margin for a constructed Xiping Opeck-[Chinese Company A] (through GBIE) "sale" and incorporating it in our weighted-average rate for all of Xiping Opeck's merchandise would mean relying on information related to sales we have determined are not *bona fide* (Xiping Opeck's sales to GBIE), we have relied strictly on the margin determined for the [Chinese Company A]-U.S. customer sales to calculate the single rate in this case. . . . Thus, for U.S. price [i.e., export price] we relied on record evidence for the prices charged by [Chinese

> Company A] in the United States, *i.e.*, the U.S. wholesalers' aggregate price data, and calculated an estimated average U.S. wholesalers' market price of USD 10.14 per kilogram for the period of review.

Remand Results at 40–41.

The court finds that the Department's determination not to calculate an export price for the claimed Xiping-to-GBIE sales is reasonable, supported by substantial evidence, and in accordance with law. Although Xiping believes otherwise, Commerce reasonably determined that the Xiping-to-GBIE purported sales were commercially unreasonable. Because the sales were not commercially reasonable, the claimed sales prices from Xiping-to-GBIE were not reliable. Thus, there was no reliable sales information on the record from which to determine accurate sales prices between Xiping and GBIE (or, for that matter, between Xiping and anyone else). As such, the Department reasonably determined that it could not calculate an accurate export price for Xiping based on these sales and, therefore, could not calculate a dumping margin based on the claimed Xiping-to-GBIE sales.

Normal value is the value of the merchandise in the foreign home market. *See* 19 U.S.C. § 1677b(a)(1)(B) (Normal value is "the price at which the foreign like product is first sold . . . for consumption in the exporting country"). To determine normal value, on remand, the Department relied on Chinese Company A's highest acquisition cost during the POR:

> [W]ith respect to normal value, we relied on [Chinese Company A's] acquisition costs because such costs represent GBIE's sales prices of Xiping Opeck's product to [Chinese Company A] throughout the POR. Specifically, as adverse facts available, we used [Chinese Company A's] highest acquisition cost during the POR, which we identified by examining all the prices that GBIE invoiced for crawfish tail meat to [Chinese Company A].

Remand Results at 20–21.

As to normal value, plaintiff seems to indicate that the Department should have used factors of production to construct Xiping's normal value and compared it to Xiping's sales price to GBIE (as export price) to produce a dumping margin. *See* Pl.'s Cmts. 13; *see also* Pl.'s Br. 1. Indeed, in nonmarket economy reviews, "Commerce determines normal value by using the 'best available information' from the surrogate country to value the factors of production." *DuPont Teijin Films v. United States*, 37 CIT __, __, 896 F. Supp. 2d 1302, 1310 (2013) (quoting 19 U.S.C. § 1677b(c)(1)). As has been seen, however, calcu-

lating a normal value for Xiping would have served no purpose because there was no reliable export price (using the purported Xiping-to-GBIE sales) to which to compare normal value.

As discussed above, Commerce's decision not to use the sales prices from Xiping-to-GBIE transactions to determine export price was reasonable. Because these transactions yielded no reliable sales from which an export price and, hence, a dumping margin could be determined, it would be a useless act to calculate normal value using Xiping's factors of production and compare it to the Xiping-GBIE sales prices as export price. Therefore, the determination not to construct normal value from Xiping's factors of production is reasonable, too.

As with export price, the Department has used its traditional middleman dumping methodology to calculate normal value. Xiping has provided no convincing reason why the traditional methodology should not be employed. The use of the middleman's (here, Chinese Company A's) sales and acquisition prices to calculate export price and normal value has been approved by the courts, is supported by legislative history, and accords with the methodology set forth in Commerce's manual. *See Tung Mung III*, 354 F.3d at 1374; S. REP. NO. 96–249, at 94; ANTIDUMPING MANUAL, Ch. 7 at 5. Accordingly, the court finds that Commerce's decision to base Chinese Company A's export price solely on the prices paid by the U.S. wholesalers to Chinese Company A and its decision to base normal value on Chinese Company A's acquisition costs to be reasonable, supported by substantial evidence, and in accordance with law.

Next, Xiping seems to argue that its dumping margin should not be based solely on the dumping margin determined for Chinese Company A. Rather, Xiping believes it should have its own rate. Here, however, the facts provide no basis for giving Xiping its own rate. While in *Tung Mung*, the Federal Circuit affirmed Commerce's determination of two dumping margins, *i.e.*, one for the producer and one for the reseller, the facts in that case were different than the facts here. Unlike the case now before the court, in *Tung Mung III*, Commerce found that the producer could not be charged with knowledge that its reseller was selling its goods in the United States at less than fair value. This lack of knowledge of dumping provided a reason for a separate rate for the producer from the one calculated for the dumping reseller. *Tung Mung III*, 354 F.3d at 1377–78.

Here, the Department has demonstrated that Xiping knew its merchandise was to be sold into the United States by Chinese Company A and was also aware, or should have been aware, that its product was being dumped. First, Xiping knew its product was bound for the

United States since it claimed to be exporting it to the United States through its sales to GBIE. Xiping also knew its claimed sales price to GBIE. Xiping further acknowledged that it had significant U.S. market share and that it effectively set the controlling sales prices in the U.S. market. Remand Results at 18 n.58. Based on this evidence, Commerce's conclusion that Xiping knew, or should have known, its goods were sold at less than fair value by Chinese Company A into the United States was supported by the record. *See* Transactions Mem. at 4 ("[B]ecause both Xiping Opeck and GBIE claimed to have knowledge of the prevailing prices for crawfish tail meat in the U.S. market during the POR, it is highly likely that Xiping Opeck and GBIE were aware that [Chinese Company A] was reselling the subject merchandise in the United States at prices that were substantially below its acquisition costs."). Because Xiping can be charged with knowledge that its product was being dumped, the facts do not direct the conclusion that it should have a dumping margin other than that calculated for Chinese Company A.

With respect to Xiping's argument that the determination of Chinese Company A's sales prices were somehow unreasonable, the court is not convinced. Because Chinese Company A did not answer Commerce's questionnaires, there was no evidence on the record of reported sales prices paid by the U.S. wholesalers. Therefore, Commerce constructed the prices at which Chinese Company A sold the crawfish tail meat into the United States using advertised retail offering prices of the U.S. wholesalers. Transactions Mem. at 8–9. Commerce relied on these prices to determine Chinese Company A's export price. Remand Results at 20. This was the same method proposed by the defendant-intervenor and used in the Final Results:

> [D]efendant-intervenor constructed an export price (U.S. sales price) based on the prices offered by the U.S. wholesalers of the crawfish tail meat to their retailers. Because defendant-intervenor was unable to determine [Chinese Company A's] resale prices of the crawfish tail meat to the U.S. wholesalers directly, it "relied on prices offered by four different U.S. wholesalers . . . of subject merchandise" that appeared to be "produced by Xiping[,] . . . as indirect evidence of the prices charged by" [Chinese Company A], to calculate a wholesale market price. That is, defendant-intervenor reasoned that the wholesalers would necessarily have paid [Chinese Company A] no more than the price at which they were offering to sell the merchandise to their retailers.

Xiping Opeck I, 38 CIT at __, 34 F. Supp. 3d at 1338 (footnotes and internal citations omitted).

While Xiping spends some pages in its brief attacking the use of these offered prices, it cites no record evidence indicating that the use of the prices was unreasonable. In fact, it cites no record evidence at all. *See* Pl.'s Cmts. 13 (referring to Pl.'s Br. 27–29). In addition, although Commerce's prices are from the same U.S. wholesalers that actually purchased Xiping's crawfish tail meat, there is no record evidence that Xiping's proposed price information sources[15] actually bought Xiping's product.[16] *See* Transactions Mem. at 10.

Finally, the Department pointed to some evidence on the record that the price information that Xiping presented was from sources for which crawfish tail meat would be at "premium prices" and thus command a higher price. *See* Transactions Mem. at 9 ("According to [defendant-intervenor], . . . sales of crawfish tail meat in states that do not border Louisiana are not common and, thus, command premium prices as the product is considered a specialty item.").

Because the Department was reasonable in finding that the record was devoid of Chinese Company A's resale price, and that the most reliable facts available on the record were the U.S. wholesalers' offering prices, the calculation of export price from the U.S. wholesalers' offered prices was supported by substantial evidence on the record. Accordingly, the Department's determination to use Chinese Company A's sales prices to the U.S. wholesalers as export price and its acquisition costs from GBIE to establish normal value and to calculate a single dumping margin that was applied to Xiping is supported by substantial evidence and in accordance with law.

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[15] Xiping provided certain U.S. retail prices for crawfish tail meat imported from the PRC. Specifically, Xiping provided a purchase price paid by Walmart as well as pricing information taken from www.cajunsupermarket.com. *See* Transactions Mem. at 9–10.

[16] In particular, Commerce found it convincing that "[defendant-intervenor] relied on prices offered by four different U.S. wholesalers or distributors of subject merchandise produced by Xiping Opeck as indirect evidence of the prices charged by [Chinese Company A] . . . [defendant-intervenor also] provided an affidavit from [the sales manager] of a competing U.S. wholesaler in support of [defendant-intervenor's] assertion that the four U.S. wholesalers did *not* handle product produced by Xiping Opeck's competitors," and therefore Commerce determined that "because all of these U.S. wholesalers or distributors were handling Xiping Opeck product and [[ ]] percent of Xiping Opeck's U.S. sales during the POR were made through the same . . . channel, all four entities were downstream purchasers from [Chinese Company A]." Transactions Mem. at 3 (emphasis added); *see* Remand Results at 20.

D. The Department's Determination to Apply Adverse Facts Available to the Calculation of Chinese Company A's Export Price and Normal Value is Supported by Substantial Evidence and in Accordance with Law

As has been discussed, Commerce, in accordance with its traditional middleman dumping methodology, used Chinese Company A's sales price to the U.S. wholesalers as the export price and its acquisition costs for normal value. In addition, Commerce determined to use "facts available" and apply "adverse inferences" to the facts used to determine export price and normal value.[17]

(1) *Commerce Properly Found Chinese Company A to be an Interested Party*

Under normal circumstances, the Department may only use facts available or apply adverse inferences to those facts if an interested party has failed in its duty to produce information and cooperate with an investigation or review. Therefore, before applying adverse inferences to Chinese Company A's acquisition cost information or its sales prices to the U.S. wholesalers, the Department examined whether it was an interested party. *See* 19 U.S.C. §§ 1677e(a), (b). Among those interested parties listed in the statute is the "exporter . . . of subject merchandise." 19 U.S.C. § 1677(9)(A).

The Department found that Chinese Company A was an interested party even though the company insisted that it was a downstream purchaser unrelated to Xiping. Moreover, Chinese Company A maintained that it was not required to answer Commerce's questionnaires because it was not a party. Remand Results at 5 ("[Chinese Company A] did not provide any information regarding its U.S. sales or the pricing of entries under review. Instead, [Chinese Company A] filed a letter claiming that it had never exported subject merchandise to the United States, that it was not an exporter of subject merchandise, that the Department's questionnaire was not applicable to it, and that it was unable to respond to the questionnaire.").

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[17] Commerce explained:

> [A]s export price, we selected the *lowest prices* charged by [Chinese Company A] in the United States (*i.e.*, the U.S. wholesalers' aggregate price data, as a proxy for [Chinese Company A's] U.S. sale prices) and calculated an estimated average U.S. wholesalers' market price for the POR of USD 10.14 per kilogram. For normal value, we examined all of the prices that GBIE invoiced for crawfish tail meat to [Chinese Company A], and used [Chinese Company A's] *highest acquisition cost* during the POR, *i.e.*, USD [[ ]] per kilogram. Using this information, we calculated an AFA rate of 70.12 percent for Xiping Opeck in this review.

Remand Results at 40 (emphasis added and footnotes omitted).

The court has found reasonable Commerce's decision to ignore the purported sales from Xiping to GBIE because they were commercially unreasonable. The resulting transaction structure, therefore, was one of sales directly from Xiping (as producer) to Chinese Company A and from Chinese Company A (as exporter) to the U.S. wholesalers (as first unaffiliated purchasers in the United States). This restructuring of the transaction chain demonstrates that Chinese Company A was the exporter of Xiping's product, and as such, Commerce reasonably found Chinese Company A to be an interested party. *See* 19 U.S.C. § 1677(9)(A).

Commerce, however, has provided an additional reason. After evaluating Chinese Company A's role in the transaction chain, the Department found that the company was an exporter within the meaning of the statute because it was a "price discriminator" or a "party who, with its customer, determines the U.S. sales price ([export price or constructed export price]) of the subject merchandise entering the United States market." Remand Results at 22.

The idea of finding a price discriminator to be an interested party has been previously found in our law.[18] *See Taiwan Semiconductor Mfg. Co. v. United States*, 25 CIT 324, 331, 143 F. Supp. 2d 958, 966 (2001) ("Commerce's *Remand Response* defines 'relevant sale' as 'the first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market.' Because such a company's 'pricing represents all relevant elements of value,' it 'functions as the "price setter" or potential "price discriminator . . . ."'" (citation omitted)). This is

> a reasonable construction of the statute because it furthers congressional intent for Commerce to determine whether subject merchandise is being, or is likely to be, sold in the United States at less than its fair value. In order to make a less-than-fair-value determination, Commerce must first determine the exporter or producer of the subject merchandise who controls the export price (or constructed export price) that Commerce compares to normal values to determine dumping margins.

Id. (citations omitted).

Since the true nature of the transaction was that Chinese Company A set the price (was the price discriminator) at which the merchandise was sold to the U.S. wholesalers, the Department's decision to treat Chinese Company A as an exporter is clearly reasonable. Chi-

[18] Although the concept of "price discriminator" was used in *Taiwan Semiconductor* to identify the producer, the idea is equally applicable here. *Taiwan Semiconductor*, 25 CIT at 331, 143 F. Supp. 2d at 966.

nese Company A's role as the seller who agreed on the sales price at which the crawfish tail meat was sold into the United States confirms its role as an exporter and price discriminator and provides further support for Commerce's determination to treat the company as an exporter and thus an interested party.

(2) *Commerce Properly Used Facts Available and Applied Adverse Inferences to Those Facts*

Commerce solicits information from domestic and foreign companies to accurately assess if dumping has occurred and to determine a dumping margin. If, after Commerce requests information, any party "withholds information that has been requested by [Commerce]," "fails to provide such information by the deadlines . . . or in the form and manner requested," "significantly impedes a proceeding," or "provides such information but the information cannot be verified," the Department "shall . . . use the facts otherwise available" on the record to determine export price and normal value. 19 U.S.C. § 1677e(a)(2)(A)-(D); *see Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337–38 (Fed. Cir. 2016).

In addition, an interested party must cooperate "to the best of its ability" with Commerce's requests for information. 19 U.S.C. § 1677e(b). If Commerce further finds that an interested party has "failed to cooperate by not acting to the best of its ability to comply with the request for information," then it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1)(A).

Here, on remand, the Department found Chinese Company A was an interested party that both failed to provide information and failed to cooperate. It therefore used facts available to determine normal value and export price and applied adverse inferences in selecting those facts.[19] Remand Results at 40. Commerce acted lawfully here since, by not answering the questionnaire at all, Chinese Company A met the statutory tests for both the use of facts available and the application of adverse inferences. Therefore, Commerce properly applied adverse inferences in selecting the available facts used to calculate Chinese Company A's dumping margin.

[19] Xiping does not assert that Chinese Company A cooperated with Commerce's investigation, but instead only argues that Chinese Company A was not required to cooperate because it was not an interested party. Pl.'s Cmts. 20.

(3) *Commerce Properly Applied Chinese Company A's Margin to Xiping*

As has been discussed, Xiping can reasonably be charged with knowledge that its product was being dumped. Because Commerce properly applied its middleman dumping methodology when determining a rate for Chinese Company A, its determination to apply this rate to Xiping was made in conformance with law. *Tung Mung III*, 354 F.3d at 1374. Moreover, Xiping's participation in the claimed sale to GBIE, a sale with no reasonable commercial purpose, adds additional weight to the determination.

When complying with the court's remand instructions, though, the Department supplied additional reasons for applying Chinese Company A's dumping margin to Xiping, even though Xiping cooperated with the review. The court's remand opinion directed Commerce to address the "inducement/evasion considerations" found in *Mueller Comercial de Mex., S. de R.L. de C.V. v. United States*, 753 F.3d 1227 (Fed. Cir. 2014). *Xiping Opeck I*, 38 CIT at __, 34 F. Supp. 3d at 1354 ("[I]n light of the Federal Circuit's decision in *Mueller*, the Department is to fully explain, what, if any, relevance *Mueller* has to the calculation of Xiping's dumping margin. That is, Commerce is to explain the relevance of *Mueller's* 'inducement/evasion considerations,' which might permit the application of AFA to a cooperating party in the context of the facts of this case."); *Mueller*, 753 F.3d at 1233 ("Commerce found that Mueller could and should have induced [its supplier's] cooperation by refusing to do business with [it], and [the supplier] would not be sufficiently deterred if Mueller were unaffected by [the supplier's] non-cooperation, stating that [the supplier] could otherwise evade its antidumping rate by funneling its goods through Mueller. We conclude that Commerce may rely on such policies as part of a margin determination for a cooperating party like Mueller . . . . ").

Discussing inducement and evasion, the Department concluded that, although the specific facts in *Mueller* and *KYD, Inc. v. United States*, 607 F.3d 760 (Fed. Cir. 2010) were distinguishable from the facts presented here, the cases were instructive and supported its determination to apply Chinese Company A's rate to Xiping. Remand Results at 45. Commerce found that "Xiping Opeck was in a position to induce cooperation on the part of" Chinese Company A because "[Chinese Company A] was not in a position to evade a dumping margin assigned to Xiping Opeck by sourcing from a different supplier." *Id*. This conclusion was drawn from the nature of their relationship and from Xiping's statement that it dominated and set pre-

vailing prices in the U.S. market.[20] *Id.* Accordingly, the Department found that "Xiping Opeck could have, by refusing to supply GBIE ([Chinese Company A's] . . . supplier), induced [Chinese Company A] to ensure it sold Xiping Opeck's product at or above its acquisition costs." *Id.* at 46.

The Federal Circuit has recognized that Commerce may rely on inducement and evasion policies "as part of a margin determination for a cooperating party . . . as long as the application of those policies is reasonable on the particular facts and the predominant interest in accuracy is properly taken into account." *Mueller*, 753 F.3d at 1233. Specifically, the Court has concluded that an exporter, possessing an existing relationship with its producer, may refuse to do business with that producer in the future "as a tactic to force [the supplier] to cooperate." *Id.* at 1235. The *Mueller* Court compared the relationship between Mueller and its producer to the importer-exporter relationship in its earlier inducement and evasion case, *KYD*, where the Court found that as a result of a pre-existing relationship, the importer could refuse to import the exporter's subject merchandise as a means to induce cooperation with Commerce's review. *See id.* (discussing *KYD*, 607 F.3d at 768).

As to evasion, in *Mueller*, the Federal Circuit noted that because "there [was] a possibility that [the supplier] could evade its own AFA rate by exporting its goods through Mueller if Mueller were assigned a favorable dumping rate," applying AFA to cooperating party Mueller based on the producer's non-compliance was in accordance with law. *Id.* That is, where there is a pre-existing relationship, application of an AFA rate to a cooperating party transacting with a non-cooperating party prevents the non-cooperating party from evading a higher dumping rate based on its own sales by engaging in sales with a cooperating party that is not dumping. *Id.; KYD*, 607 F.3d at 768. In addition, the *KYD* Court stated that permitting a cooperative importer to receive a different dumping rate from its uncooperative exporter "would allow [that] uncooperative foreign exporter to avoid the adverse inferences permitted by statute simply by selecting an unrelated importer, resulting in easy evasion of the means Congress intended for Commerce to use to induce cooperation with its anti-dumping investigations." *KYD*, 607 F.3d at 768. Thus, the Federal Circuit has found that, under certain circumstances, the application of AFA to a cooperating party is permitted.

[20] Specifically, the record reflects that Xiping sold [[ ]] of its crawfish tail meat to GBIE, and GBIE sold [[ ]] of its product to Chinese Company A. Remand Results at 45.

The court finds that the Department adequately supported its determination with record evidence and can rely on inducement and evasion considerations to apply an AFA-based margin to cooperating party Xiping's crawfish tail meat entries. *See Mueller*, 753 F.3d at 1233. As to its inducement considerations, the Department's finding that Xiping Opeck could induce Chinese Company A's cooperation was supported by record evidence.[21] Next, Xiping acknowledged that it dominated the U.S. market and effectively set the market prices of crawfish tail meat, leaving Chinese Company A unable to purchase from another exporter at competitive prices. Remand Results at 45. As a result of the exclusive relationship among the companies, and Xiping's conceded dominance in the market, the Department's finding that Xiping could have refused to supply Chinese Company A (through GBIE) and induced its cooperation is supported by substantial evidence. Therefore, the court finds that it was reasonable on these particular facts to conclude that Xiping could have induced Chinese Company A to cooperate. *See Mueller*, 753 F.3d at 1233.

The court further finds that the evasion considerations discussed in *Mueller* equally apply here. In *Mueller*, Commerce was concerned that the non-cooperating party sought to evade its own dumping margin through sales to cooperating parties, whereas here, it appears that the cooperating party Xiping and Chinese Company A participated in sales with no commercial purpose other than for Xiping to evade the dumping margin that would result from Chinese Company A's dumped sales. *Cf. Mueller*, 753 F.3d at 1230. As the court has previously noted, it is difficult to *see* these transactions as anything other than an attempt to make it appear as though Xiping's merchandise entered the country based on invoices that did not accurately reflect the true relationship between normal value and export price. Thus, it is apparent that the transactions were tied together in an effort to evade an antidumping finding. While here the purpose of the transactions was to allow the producer Xiping to evade antidumping duties, the theory and, hence, the reason for citing the policy is the same. Therefore, the Department's use of its evasion policy found in *Mueller* as a further justification for the application of AFA to determine Xiping's margin is in accordance with law and supported by substantial evidence in this instance.

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[21] Specifically, Xiping had an [[ ]] with GBIE which had an [[ ]] with Chinese Company A. *See* Remand Results at 17, 45.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Commerce's Final Results as supplemented by the Remand Results are sustained. Judgement shall be entered accordingly.

Dated: April 5, 2017
New York, New York

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

Slip Op. 17–52

CC METALS and ALLOYS, LLC, and GLOBE SPECIALTY METALS, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 14–00202

[Remand results sustained.]

Dated: April 28, 2017

William D. Kramer and *Martin Schaefermeier*, DLA Piper LLP (US), of Washington, DC for Plaintiffs CC Metals and Alloys, LLC and Globe Specialty Metals, Inc.

Peter A. Gwynne, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC for Defendant United States. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Devin S. Sikes*, Senior Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Sydney H. Mintzer and *Jing Zhang*, Mayer Brown LLP, of Washington, DC for Defendant-Intervenors Kuznetsk Ferroalloys OAO, Chelyabinsk Electro-Metallurgical Plant OAO and RFA International LP, Calgary (Kanada) Schaffausen.

OPINION

Gordon, Judge:

The U.S. Department of Commerce has filed its Final Results of Redetermination ("*Remand Results*"), ECF No. 61, pursuant to *CC Metals and Alloys, LLC v. United States*, 40 CIT ___, 145 F. Supp. 3d 1299 (2016) ("*CC Metals*"). The court in *CC Metals* sustained most of the issues Plaintiffs raised, but remanded two minor issues for Commerce to address: (1) Commerce's treatment of certain post-sale home market warehousing expenses and revenue, *CC Metals*, 40 CIT at ___, 145 F. Supp. 3d at 1308; and (2) Commerce's possible error using a simple, as opposed to a weighted, average in calculating home market imputed credit expenses, *id.*, 40 CIT at ___, 145 F. Supp. 3d at 1311.

The court notes that it erred in remanding these issues to Commerce without first ascertaining whether either issue had a material effect on the less than fair value determinations. As Commerce explains in the *Remand Results*, neither issue does, and any error was therefore harmless. It was therefore a waste of administrative resources for the court to require a remand in this case. The court below briefly reviews Plaintiffs' challenges to the *Remand Results*, familiarity with which is presumed.

Treatment of Home Market Warehousing Expenses And Revenue

Commerce provides a detailed explanation in the *Remand Results* that its narrative description in the final determination was not consistent with its actual treatment of home market warehousing expenses and revenue in the margin calculation program, and that despite the error in its narrative, it did in fact account for those items lawfully under the statute, as well as under its regulations and practice. *Remand Results* at 7–13, 16–19. Commerce does identify one immaterial wrinkle: the inability to distinguish on-site and off-site warehousing revenue reported in one field of the margin program. *Id.* at 11–12. Commerce explains that this issue had no material effect on the margin (and also provides an alternative calculation as further support of the issue's immateriality). *Id.* Although Plaintiffs note that on-site and off-site warehousing revenue are not separately distinguished in the margin program, they proffer no alternative calculations that demonstrate a material effect on the margin.[1]

Plaintiffs instead argue that the only way to address the issue of on-site warehousing is for Commerce to adjust for it as a miscellaneous income item, but Plaintiffs fail to provide any authority for this proposed treatment. Instead, they argue that on-site warehousing has to be treated the same as sizing revenue. Commerce, however, reasonably explained in the *Remand Results* why similar treatment was unwarranted. *See Remand Results* at 18 ("[W]e treated sizing as an offset to cost because we considered it to be a step in the manufacturing process, rather than a service or expense for finished merchandise.") (citing Issues and Decision Memorandum at 25)). The court therefore sustains Commerce's treatment of warehousing expenses and revenue.

[1] Plaintiffs suggest it is possible to ascertain which portion of total reported revenue is related to on-site warehousing and off-site warehousing, respectively, *see* Pls.' Comments at 4–5 n.3–4, ECF Nos. 65, 66, but for whatever reason plaintiffs chose not to present these figures and argument to Commerce in the first instance during the remand proceeding, and the court must therefore deem these arguments waived. *See* 28 U.S.C. § 2637(d); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010).

Imputed Credit Expenses

In the *Remand Results* Commerce explained that it "inadvertently applied a simple average of the short-term interest rates, rather than a weighted-average of the short-term interest rates," and Commerce corrected the calculation. *Remand Results* at 13. Commerce calculates the weighted-average interest rate for credit expenses based on the weighted-average interest rate paid by the respondent for short-term loans in the currency of sale. If "the respondent (the seller) has short-term borrowings in the same currency as that of the transaction, [Commerce uses] the respondent's own weighted-average short-term borrowing rate realized in that currency to quantify the credit expenses incurred." Policy Bulletin 98.2: Imputed credit expenses and interest rates, ("Policy Bulletin 98.2") dated February 23, 1998, found at: http://enforcement.trade.gov/policy/bull98–2.htm (last visited on this date). If a respondent has no short-term borrowings in the currency of the transaction, Commerce "will use publicly available information to establish a short-term interest rate applicable to the currency of the transaction." *Id.* "Irrespective of whether the short term rate is derived from a respondent's actual borrowing experience or from a published source, it is always *reflective of* all short-term loans with maturities of one year or less." *Certain Oil Country Tubular Goods from the Republic of Philippines*, 79 Fed. Reg. 41,976 (Dep't Commerce July 18, 2014) (final determ.), Issues and Decision Memorandum at 18 (Comment 3) (emphasis added).

In the final determination Commerce used a "simple" average of short-term rates derived from a small set of Chelyabinsk Electrometallurgical Integrated Plant Joint Stock Company's ("CHEMK") factoring arrangements that Commerce examined at verification. In the investigation Commerce had not specifically requested interest rate data for *all* of CHEMK's factoring arrangements during the period of investigation ("POI"). At verification Commerce did, however, examine a small set of CHEMK's factoring arrangements. Commerce, in turn, used the rates from those verified transactions to derive the short-term interest rate for imputed credit expense. As noted, Commerce inadvertently applied a simple rather than a weighted-average in the calculation, an error it corrected in the *Remand Results*.

Plaintiffs make a "legal" argument that Commerce's use of the relatively small set of CHEMK's factoring arrangements to derive the weighted-average short term rate violates Commerce's interest rate selection practice because Commerce failed to use *all* of CHEMK's factoring arrangements during the POI. Plaintiffs instead prefer that Commerce use ruble-denominated rates from published sources that were used in the preliminary determination.

Plaintiffs misunderstand Commerce's practice. As noted above, Commerce attempts to select an interest rate that is "reflective of" all short-term borrowings. In this case CHEMK's complete short-term borrowing data was (for a variety of non-nefarious reasons) not on the record. Properly framed, the issue is simply which of the two proposed rates best reflects CHEMK's short-term borrowing. A reasonable mind could choose a rate derived from CHEMK's verified data as being more reflective of CHEMK's borrowing experience than a rate derived from published rates with no connection to CHEMK. Accordingly, Commerce's short-term borrowing rate selection is sustained.

Conclusion

For the foregoing reasons, the *Remand Results* are sustained. Judgment will enter accordingly.

Dated: April 28, 2017
New York, New York

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

Slip Op. 17–53

CS WIND VIETNAM CO., LTD., and CS WIND CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, WIND TOWER TRADE COALITION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 13–00102

[Motion for an injunction of liquidation granted in part.]

Dated: April 28, 2017

Bruce M. Mitchell, Ned H. Marshak, Andrew B. Schroth, and *Dharmendra N. Choudhary*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, for plaintiffs.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Emily R. Beline*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, Daniel B. Pickard, Robert E. DeFrancesco, III, and *Derick G. Holt*, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor.

OPINION

Restani, Judge:

This matter is before the court on plaintiffs CS Wind Vietnam Co., Ltd. and CS Wind Corporation (collectively "CS Wind")'s "Consent Motion for Preliminary Injunction," ECF No. 121 ("Mot. for Prelim. Inj.").[1] The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the following reasons, the court grants the injunction of liquidation.

BACKGROUND

CS Wind is a producer and exporter of utility scale wind towers from Vietnam. Such merchandise is subject to an antidumping ("AD") duty order. *See Utility Scale Wind Towers from the Socialist Republic of Vietnam: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 78 Fed. Reg. 11,150, 11,150 (Dep't Commerce Feb. 15, 2013) ("*AD Order*"); *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 75,984 (Dep't Commerce Dec. 26, 2012) ("*Final Determination*"). CS Wind challenged this *Final Determination* for the investigatory stage of the proceedings in *CS Wind Vietnam Co. v. United States*, 971 F. Supp. 2d 1271, 1275 (CIT 2014). Following multiple remands and appeal to the Court of Appeals for the Federal Circuit ("Federal Circuit"), *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367 (Fed. Cir. 2016), the U.S. Department of Commerce ("Commerce") concluded that the estimated AD duty margin on CS Wind's towers was now 0.00 percent. Final Results of [Third] Redetermination Pursuant to Ct. Order 20, ECF No. 104–1 ("*Post-Appeal Remand Results*"). After the *Post-Appeal Remand Results* and prior to the court's decision on those results, CS Wind moved for an injunction suspending liquidation of unliquidated subject merchandise entered on or after February 13, 2013, until this matter is finally resolved, including all appeals. Mot. for Prelim. Inj. at 1. The court sustained the *Post-Appeal Remand Results* in *CS Wind Vietnam Co. v. United States*, Slip Op. 17–26, 2017 WL 1032646, at *1 (CIT Mar. 16, 2017) ("*CS Wind V*"), essentially resulting in CS Wind eventually being excluded from coverage by the AD duty order. Defendant-intervenor the Wind Tower Trade Coalition ("WTTC") appealed the court's latest decision to the Federal Circuit. Notice of Appeal, ECF No. 126.

[1] Although CS Wind entitled its motion a "Consent Motion," the government opposes the motion. *See* Def.'s Resp. in Opp'n to Pls.' Mot. for Prelim. Inj., ECF No. 124 ("Gov't Resp."). Defendant-intervenor the Wind Tower Trade Coalition ("WTTC") takes no position on the motion. Mot. for Prelim. Inj. at 12.

In its motion, CS Wind argues that entries of subject merchandise made during the first and fourth periods of review may be liquidated prior to the resolution of this case,[2] and that there is a possibility that the final review rates may be other than zero. Mot. for Prelim. Inj. at 4, 6. CS Wind contends that such liquidation would cause irreparable injury, that the government will not suffer material harm from any delay in liquidation, that CS Wind is likely to succeed on the merits because Commerce found a weighted-average dumping margin of 0.00 percent in the *Post-Appeal Remand Results*, and that the public interest would be best served by granting the injunction. *Id.* at 7–11. In addition, CS Wind contends that "good cause" exists for its "untimely" motion because no reason existed for seeking an injunction of liquidation at the time the U.S. Court of International Trade Rule 56.2(a) 30-day deadline ran. *Id.* at 2–3. The government responds that any potential harm is not "immediate" because all of CS Wind's unliquidated entries are either enjoined or administratively suspended from liquidation, and are currently subject to a 0.00 percent AD duty rate or duty deposit rate as a result of the first administrative review. Def.'s Resp. in Opp'n to Pls.' Mot. for Prelim. Inj. 1, 4–5, 7–10, ECF No. 124 ("Gov't Resp."). The government further argues that the other factors do not support an injunction. *Id.* at 10–11. Lastly, the government contends that "good cause" does not exist for the court to consider CS Wind's "untimely" motion. *Id.* at 6–7.

DISCUSSION

Normally, injunction prior to the conclusion of litigation is extraordinary relief, which may be awarded when the movant establishes: "(1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the [movant]." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983); *see FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). No one factor is dispositive and the court typically applies a "sliding scale"

[2] The second and third periodic reviews were rescinded. *See Utility Scale Wind Towers from the Socialist Republic of Vietnam: Notice of Rescission of Antidumping Duty Administrative Review; 2015–2016*, 81 Fed. Reg. 72,776, 72,776 (Dep't Commerce Oct. 21, 2016); *Utility Scale Wind Towers from the Socialist Republic of Vietnam Notice of Rescission of Antidumping Duty Administrative Review; 2014–2015*, 80 Fed. Reg. 60,880, 60,880 (Dep't Commerce Oct. 8, 2015). CS Wind retained a zero duty rate from the first administrative review. *Utility Scale Wind Towers from the Socialist Republic [sic] Vietnam: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 80 Fed. Reg. 55,333, 55,334 (Dep't Commerce Sept. 15, 2015). Thus, as far as an exact rate of duty is involved, for the purpose of collecting cash deposits, this action is moot. It continues for the purpose of CS Wind's inclusion or exclusion from the AD order.

approach to this determination, whereby the "weakness of the showing regarding one factor may be overborne by the strength of the others." *See Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (first quoting *Corus Grp. PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1353 (2002); then quoting *FMC Corp.*, 3 F.3d at 427).[3]

As a preliminary matter, this is not the usual statutory injunction case. CS Wind has already succeeded on the merits before this court and few arguments that plausibly could be made on appeal to the Federal Circuit remain. *See CS Wind V*, 2017 WL 1032646, at *4–8. There are no public interest issues that are not coextensive with the other factors. There are no balance of hardship issues because the government does not allege that any harm would be caused by the injunction and the WTTC's indifference evidences its view that no harm would befall it.

That leaves the issue of whether irreparable harm will occur in the absence of the injunction sought. The government agrees that once entries are liquidated the court, cannot in the normal course, compel changes to AD duties and effective judicial review may be foreclosed. *See Zenith Radio Corp.*, 710 F.2d at 810; Gov't Resp. at 4. Instead, it argues that any threat of irreparable harm to CS Wind is not "immediate" because unliquidated entries are either currently enjoined or suspended from liquidation,[4] and the cash deposit rate on unliquidated entries is 0.00 percent. Accordingly, the issue is whether CS Wind is already protected from the irreparable harm of premature liquidation.

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[3] "Good cause" exists for the seeking of this injunction even though more than 30 days have passed since CS Wind filed its complaint, on April 9, 2013. *See* Compl., ECF No. 9. At that time, liquidation was suspended because, until the proceedings for the first administrative review were completed, liquidation would not occur. 19 U.S.C. § 1673e(a)–(b). In addition, the circumstances giving rise to CS Wind seeking this injunction—Commerce adjusting CS Wind's rate in the *Final Determination* from a positive margin to 0.00 percent—did not occur until December 9, 2016. *Post-Appeal Remand Results* at 20.

[4] Liquidation of entries during the first period of review were first administratively suspended pursuant to Commerce's instructions, *AD Order*, 78 Fed. Reg. at 11,152, and then enjoined by the court on October 9, 2015, pending resolution of challenges to the first administrative review. Order, *Wind Tower Trade Coal. v. United States*, Ct. No. 15–00276 (Oct. 19, 2015), ECF No. 14. Resolution of that case remains ongoing. CS Wind and the WTTC both filed requests for review of CS Wind's entries made during the period covered by the fourth review. Utility Scale Wind Towers from the Socialist Republic of Vietnam: Req. for Administrative Review at 2, A-552–814, POR 02/01/16–01/31/17, (Feb. 28, 2017) (ACCESS bar code 3547324–01) (WTTC); Req. for Administrative Review: Utility Scale Wind Towers from the Socialist Republic of Vietnam at 1, A-552–814, POR 02/01/16–01/31/17, (Feb. 28, 2017) (ACCESS bar code 3546989–01) (CS Wind). The government avers that because an administrative review is pending entries made during the fourth period of review, February 1, 2016, to January 1, 2017, are suspended and will liquidate at the zero rate if review is rescinded.

As well-summarized by the late Judge Donald Pogue in *Snap-on, Inc. v. United States*, 949 F. Supp. 2d 1346, 1352 (CIT 2013), the statutory scheme works as follows:

> In general, when a dumping margin established in a CVD [or AD] investigation or review is challenged in this court, a preliminary injunction is entered suspending liquidation of entries subject to the challenged margin. *See* 19 U.S.C. § 1516a(c)(2); *SKF USA Inc. v. United States,* 28 C.I.T. 170, 316 F. Supp. 2d 1322 (2004). If litigation results in court approval of a revised rate, all entries for which liquidation was suspended pursuant to court order and section 1516a(c)(2), and all entries that occur after publication of notice of the court decision in the Federal Register, are subject to liquidation at the revised rate. *See* 19 U.S.C. § 1516a(e). The same is not true, however, for other entries prior to notice of the court decision. Rather, the statute specifically provides that "[u]nless liquidation is enjoined by the court under [§ 1516a(c)(2)] entries of merchandise . . . shall be liquidated in accordance with the determination of [Commerce], if they are entered . . . on or before the date of publication in the Federal Register by [Commerce] of a notice of a decision of the [CIT] . . . not in harmony with that determination." 19 U.S.C. § 1516a(c)(1).

(internal footnotes omitted) (second through sixth alterations in original).

Here, two *Timken*[5] notices, to which Judge Pogue refers, were issued—one prior to the first appeal to the Federal Circuit, *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Notice of Court Decision Not in Harmony with the Final Determination of Less Than Fair Value Investigation and Notice of Amended Final Determination of Investigation*, 80 Fed. Reg. 30,211, 20,211 (Dep't Commerce May 27, 2015), and one after this court's last decision, *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Notice of Court Decision Not in Harmony with the Final Determination of Less Than Fair Value Investigation and Notice of Amended Final Determination of Investigation*, 82 Fed. Reg. 15,493, 15,494 (Dep't Commerce Mar. 29, 2017). Thus, liquidation is suspended until the completion of this action, including all appeals. If plaintiff maintains a zero rate in the investigatory stage, it will be excluded from the AD

[5] *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990) (holding that, under § 1516a(e), Commerce must publish notice of a court decision that is "not in harmony" with the agency's determination and must suspend liquidation of subsequent entries pending a "conclusive" court decision).

order and all of its entries suspended after the first *Timken* order should be liquidated at zero.

That leaves the one entry made before the first *Timken* notice. As indicated, liquidation of that entry was suspended and enjoined by an order of the court on October 19, 2015. *See* Order, *Wind Tower Trade Coal. v. United States*, Ct. No 15–00276 (Oct. 19, 2015), ECF No. 14. There remains an issue, however, as to whether that entry could be liquidated at other than zero despite the result of this litigation. A zero rate was set in the first administrative review but, as noted, that rate has been judicially challenged. Furthermore, both 19 U.S.C. § 1516a(c) and (e) and also the court injunction require liquidation, when it is permitted, only in accordance with the outcome of that litigation. So, what happens if that litigation results in a positive margin and this litigation results in exclusion? Or, what happens if the litigation as to the first review ends first and with a positive margin?

As to the first question, Judge Pogue has answered it:

> Thus, the court has consistently held that when a party secures a right to a revised rate through judicial review, all unliquidated entries of that party which are subject to the revised rate must be liquidated at that rate regardless of whether entry occurred before or after judicial review. Furthermore, as noted above, a determination that is found to be contrary to law cannot be the basis of a duty assessment with respect to the prevailing litigant

Snap-on, 949 F. Supp. 2d at 1353–54. The court does not know if Commerce considers itself bound by this view of the law and will proceed accordingly. As to the second, the court does not know what will transpire if the first review litigation ends before the instant litigation.

Thus, given the lack of harm to anyone but CS Wind and the uncertainty of harm to it, the court will grant an injunction covering the first entry. If the government agrees that the court's understanding that the first *Timken* notice fully protects CS Wind as to the fourth review period and thereafter, an open ended injunction is not needed.[6]

Accordingly, the court will issue the limited injunction if the government gives the requested assurance or the government may decide to consent to the broader injunction. The latter action is likely what it should have done from the outset, given the lack of harm.

[6] The government did not brief the effect of the first *Timken* notice. If the fourth review period entries are not protected, failure here to grant an injunction covering them may encourage litigation just to obtain an injunction for that review period.

CONCLUSION

For the foregoing reasons, the court (1) grants CS Wind's motion for an injunction of liquidation in part; and (2) orders that by May 5, 2017, the government shall advise the court of its view of the effect of the first *Timken* notice and, relatedly, on whether it now consents to the injunction proposed by CS Wind. The court will then issue an appropriate injunction.

Dated: April 28, 2017
New York, New York

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

Slip Op. 17–54

TMK IPSCO et al., Plaintiffs and Consolidated Plaintiffs, and MAVERICK TUBE CORPORATION et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and TIANJIN PIPE (GROUP) CORP. and TIANJIN PIPE INTERNATIONAL ECONOMIC & TRADING CORP., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 10–00055

[Sustaining the remand results issued by the U.S. Department of Commerce concerning its final determination in the countervailing duty investigation of certain oil country tubular goods from the People's Republic of China.]

Dated: May 3, 2017

Roger Brian Schagrin, Christopher Todd Cloutier, John Winthrop Bohn, Jordan Charles Kahn, and *Paul Wright Jameson*, Schagrin Associates, of Washington, DC, for plaintiffs and consolidated plaintiff-intervenors TMK IPSCO, V&M Star L.P., Wheatland Tube Corp., Evraz Rocky Mountain Steel, and United Steelworkers.

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

Debbie Leilani Shon, Jon David Corey, Jonathan Gordon Cooper, and *Kelsey Marie Rule*, Quinn Emanuel Urquhart & Sullivan, LLP, of Washington, DC, for consolidated plaintiff and consolidated plaintiff-intervenor United States Steel Corporation.

Loren Misha Preheim, Assistant Director, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, of Washington, DC. for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Shelby Mitchell Anderson*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance, of Washington, DC.

Daniel Lewis Porter, William Henry Barringer, and *Matthew Paul McCullough*, Curtis Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for defendant-intervenors and consolidated defendant-intervenors.

OPINION

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Department" or "Commerce") Final Results of Redetermination Pursuant to Court Remand filed pursuant to the court's decision in *TMK IPSCO v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1328 (2016). *See* Final Results of Redetermination Pursuant to Court Remand, Dec. 21, 2016, ECF No. 171 ("*Remand Results*"). The court remanded Commerce's final determination in its countervailing duty ("CVD") investigation of certain oil country tubular goods ("OCTG") from the People's Republic of China ("China") to explain or reconsider its determinations: (1) to use China's World Trade Organization ("WTO") accession date as a cut-off for identifying and measuring countervailable subsidies; (2) to include two disparate freight rates in Commerce's benchmark price for the benefit conferred by the provision of steel rounds for less than adequate remuneration ("LTAR") as representative of what an importer would pay; (3) to attribute subsidies received by Changbao Precision Steel Tube Co., Ltd. ("Precision") to its parent company Jiangsu Changbao Steel Tube Co., Ltd. ("Changbao") and to all of Changbao's other subsidiaries; (4) to attribute subsidies received by four subsidiaries of Tianjin Pipe (Group) Corp. ("TPCO") to sales of other subsidiaries of TPCO; (5) that the provision of steel rounds and billets at LTAR is tied to sales of seamless steel pipe; and (6) to include the Steel Business Briefing ("SBB") "East Asia" benchmark data for billets in the benchmark calculation for the provision of steel rounds and billets. *See TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1335; *see generally Certain Oil Country Tubular Goods From the People's Republic of China*, 74 Fed. Reg. 64,045 (Dep't Commerce Dec. 7, 2009) (final affirmative countervailing duty determination, final negative critical circumstances determination) ("*Final Results*") and accompanying Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Oil Country Tubular Goods ("OCTG") from the People's Republic of China, PD 318 (Nov. 23, 2009) ("Final Decision Memo").[1] Commerce's *Remand Results* adequately

[1] On May 12, 2010, Defendant submitted indices to the public and confidential administrative records for its final results, which identify the documents that comprise the public and confidential administrative records to the Commerce's final determination. The indices to the public and confidential administrative records to Commerce's final determination can be located at ECF No. 40. On January 3, 2017, Defendant submitted indices to the public and confidential administrative records for its *Remand Results*, which identify documents that comprise the public and confidential administrative records to Commerce's *Remand Results*. Those indices can be located at ECF Nos. 173–1 and 173–2, respectively. All further

address the concerns raised in the court's prior decision, and Commerce's revised results are supported by substantial evidence. Therefore, the *Remand Results* are sustained.

BACKGROUND

The court presumes familiarity with the facts as discussed in *TMK IPSCO*. Nevertheless, the court briefly summarizes facts relevant to the discussion here for ease of reference. First, in its final determination, Commerce declined to identify and measure non-recurring subsidies alleged in the petition to have predated China's accession to the WTO on December 11, 2001 because Commerce concluded that it could not identify and measure subsidies prior to that date. *See* Final Decision Memo at 53. The court held that Commerce did not articulate a relationship between China's WTO accession date and the implementation of reforms that would enable Commerce to identify and measure countervailable subsidies. *TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1343. Therefore, the court held that Commerce failed to countervail all identifiable and measurable subsidies, as the statute requires it to do. *See id.; see generally* Section 701(f) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671(f)(1)–(2) (2012).[2] The court remanded to Commerce to

> investigate each subsidy program and allocate subsidies beginning on the first date it could identify and measure the subsidy considering the particular program in question and the impact of relevant economic reforms on that program.

TMK IPSCO, 40 CIT at __, 179 F. Supp. 3d at 1344.

Second, Commerce included ocean freight quotes from both Maersk and an unaffiliated freight forwarder used by mandatory respondent Zhejiang Jianli Enterprise Co., Ltd. ("Jianli") to generate an average price for ocean freight in calculating its world market price benchmark to measure the adequacy of remuneration for steel rounds provided to Jianli in its final determination. *See* Final Decision Memo at 84. The court remanded the issue to Commerce to reconsider or further explain its decision to use an average of these two freight

references to the documents from the administrative records to the final results and the remand results are identified by the numbers assigned by Commerce in these administrative records.

[2] Although this countervailing duty investigation was initiated on April 28, 2009, the 2012 version of 19 U.S.C. § 1671(f) applies here because the March 13, 2012 amendment to the statute applies to all countervailing duty proceedings initiated on or after November 20, 2006 and all civil actions relating to such proceedings. *See* Section 701 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671 note (2012) (Effective and Applicability Provisions 2012 Acts). All further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition unless otherwise indicated.

quotes because Commerce had inadequately explained how both quotes could be representative given the significant disparity between them. *See TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1350–51.

Third, Commerce included monthly export pricing data for billets from SBB "East Asia" among the data included in its benchmark calculation for determining the adequacy of remuneration of the provision of steel rounds and billets in its final determination. *See* Final Decision Memo at 77. The court granted Commerce's request for a remand to allow it to reconsider its determination to include the SBB "East Asia" series pricing data in its benchmark calculation. *See TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1347.

Fourth, Commerce attributed subsidies received by Precision to Changbao, Precision's parent company, and to all of Changbao's other subsidiaries. *See* Final Decision Memo at 8. Commerce likewise attributed or cumulated subsidies received by four of TPCO's subsidiaries to the consolidated sales of TPCO and all of its subsidiaries. *See* Final Decision Memo at 9 (citing *Certain Oil Country Tubular Goods From the People's Republic of China*, 74 Fed. Reg. 47,210, 47,215 (Dep't Commerce Sept. 15, 2009) (preliminary affirmative countervailing duty determination, preliminary negative critical circumstances determination) ("*Prelim. Results*"). The court held that 19 C.F.R. § 351.525(b)(6)(iii) (2009)[3] does not give Commerce authority to attribute subsidies received by a subsidiary to the consolidated sales of the parent company's other subsidiaries. *TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1357. The court remanded to Commerce to explain what other authority allows it to attribute subsidies received by certain subsidiaries of Changbao and TPCO to the consolidated sales of all subsidiaries of each respective company or reconsider its determination. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1358.

Lastly, in its final determination, Commerce attributed the provision of steel rounds to TPCO's consolidated sales of all merchandise, not just to its sales of seamless steel pipe products. *See* Final Decision Memo 128–29. The court held that Commerce's attribution decision is not supported by substantial evidence because the court could not "discern whether Commerce determined that the provision of steel rounds at LTAR is tied to sales of seamless pipe." *TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1359. The court remanded Commerce's determination to determine whether its tying regulation applies to TPCO and support its determination with record evidence. *See id.*

[3] Further references to the Code of Federal Regulations are to the 2009 edition.

In its remand determination Commerce makes the following determinations. Under protest, Commerce no longer adopts China's WTO accession date as a uniform date when subsidy programs were identifiable and measurable in China.[4] *See Remand Results* 11. Instead, Commerce identified four categories of programs alleged in the petition to assess when "a sufficiently developed legal framework relevant" to each existed such that Commerce could appropriately evaluate whether a subsidy had been bestowed. *See Remand Results* 11, 13–19. Commerce applies the benefit conferred on the earliest date when the government bestowal was identifiable or measurable. *See id.* at 31–35. Commerce continues to use the ocean freight quotes provided by Maersk and by Jianli's freight forwarder. *See id.* at 42. Commerce reverses its prior conclusion regarding the attribution of subsidies received by TPCO's and Changbao's subsidiaries. *See id.* at 38–39. Commerce maintains its determination to attribute steel rounds and billets provided at LTAR program to TPCO's applicable total sales and not solely to sales of seamless steel pipe. *See id.* at 46. Finally, Commerce excludes the SBB East Asia pricing data from its benchmark calculation for steel rounds. *See id.* at 48.

Commerce's changes in approach resulted in revised subsidy rates for all mandatory respondents and for all respondents not individually investigated. *See Remand Results* 56. On remand, Commerce assigned mandatory respondents the following subsidy rates: (1) Changbao a subsidy rate of 28.70%; (2) Jianli a subsidy rate of 30.56%; (3) TPCO a subsidy rate of 21.48%; (4) Wuxi a subsidy rate of 29.48%. *Id.* For all other exporters not individually investigated, Commerce assigned a subsidy rate of 27.08%.

STANDARD OF REVIEW

The court continues to have jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2006), which grant the court authority to review actions contesting the final determination in an investigation of a CVD order. *See* 19 U.S.C. § 1516a(a)(2)(B)(i); 28 U.S.C. § 1581(c) (2012). "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014)

[4] The Court of Appeals for the Federal Circuit held that Defendant may preserve its standing to pursue an appeal even though Defendant may technically be the prevailing party by adopting a position "under protest". *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

(quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

I. Commerce's Evaluation of Non-Recurring Subsidy Programs

In *TMK IPSCO*, the court held that by cutting off its investigation and measurement of subsidies on December 11, 2001, the date China acceded to the WTO, Commerce had failed to countervail all identifiable and measurable subsidies, as the statute requires it to do. *See id.; see generally* 19 U.S.C. § 1671(f)(1)–(2). The court remanded to Commerce to investigate each subsidy program and allocate subsidies beginning on the first date it could identify and measure the subsidy considering the particular program in question and the impact of relevant economic reforms on that program. *TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1344. Consolidated Plaintiff, United States Steel Corporation ("U.S. Steel"), contends that Commerce's determination on remand to evaluate the subsidy programs in the petition by type of program does not comply with the court's order that Commerce investigate "each subsidy program and allocate subsidies beginning on the first date it could identify and measure the subsidy considering the particular program in question." United States Steel Corporation's Comments Def.'s Final Results of Redetermination Pursuant to Remand Order 3–6, Jan. 23, 2017, ECF. No. 174 ("U.S. Steel Remand Comments"). Alternatively, U.S. Steel argues even if Commerce's approach of evaluating subsidy programs by type is legally supported, Commerce's conclusions about when credit-oriented subsidy programs and land-oriented subsidy programs were first identifiable and measurable are unsupported by substantial evidence. U.S. Steel Remand Comments 6–7. Commerce's evaluation of subsidy programs in this investigation is reasonable and consistent with its statutory obligations. Commerce's conclusions as to when credit-oriented and land-oriented subsidy programs were first identifiable and measurable are also supported by substantial evidence.

Commerce generally must impose countervailing duties on merchandise from a non-market economy ("NME") country if Commerce makes the findings necessary to countervail a subsidy more generally under the statute. *See* 19 U.S.C. § 1671(f)(1) (2012); *see also* 19 U.S.C. §§ 1677(5)–(5A) (2006) (setting forth the determinations Commerce must make before imposing a CVD generally). However, Commerce need not countervail a subsidy imported from a NME country if Commerce determines it cannot identify and measure the subsidy in question "because the economy of that country is essentially com-

prised of a single entity." *See* 19 U.S.C. § 1671(f)(2) (2012). Commerce has significant discretion in determining whether it can identify and measure subsidies provided by the government or a public entity within the NME country because the statute is silent as to when Commerce can identify and measure a subsidy. *See* 19 U.S.C. § 1671(f)(1)–(2) (2012). Normally, a reviewing court should not disrupt the agency's exercise of discretion in fashioning an approach to a problem delegated to it unless the agency has not supplied a reasoned basis for its action. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted). Nonetheless, the "agency must cogently explain why it has exercised its discretion in a given manner." *Id.* at 48 (citations omitted).

On remand Commerce articulated a rational relationship between specific legal reforms in China and the effect of such reforms on Commerce's ability to identify and measure subsidies.[5] *See Remand Results* 13–19. Commerce "assessed when a sufficiently developed legal framework relevant to th[e] particular type of subsidy existed that would enable [it] to identify the sphere of commercial activity involved, the economic actors involved and the government action required to bestow that type of subsidy." *Id.* at 11. Commerce identified four types of subsidies alleged in the petition: grants, credit-oriented subsidies, tax-related subsidies and land-oriented subsidies. *See id*. at 11–19. Commerce explained that it evaluated each type of non-recurring subsidy to determine when China first developed a sufficient "legal framework relevant to that particular type of subsidy . . . that would enable [it] to identify the sphere of commercial activity involved, the economic actors involved and the government action required to bestow that type of subsidy." *Remand Results* 11.

Commerce determined that grant programs could first be identified and measured as of 1994. *Id.* at 14. Commerce reasoned that the first Company Law took effect in 1994, which marks a point "where distinct economic actors were legally extended the flexibility to engage in commercial activity" for the first time. *Id.* Commerce concluded that credit-oriented subsidies could be identified and measured starting from 1996, which Commerce grounded in two economic reforms: the 1995 Commercial Bank Law and the 1996 General Rules on Loans. *Id.* at 15–16. Commerce deduced that the former reform defined a commercial bank, made commercial banks legally responsible for their own profits and losses, and afforded commercial banks legal

[5] Commerce only evaluated the countervailability of programs that provided a non-recurring benefit as early as 1994 because it only allocates the benefit conferred of a non-recurring subsidy program over the average useful life of the assets involved. *See* 19 C.F.R. § 351.401(a)–(b). The average useful life of the assets used in the production of subject merchandise was 15 years. *Remand Results* 12.

autonomy from the state in certain matters. *Id.* at 15. Commerce resolved that the General Rules on Loans set out legal rights and obligations for lenders and borrowers. *Id.* at 15–16. Commerce concluded that both reforms were necessary to "identify distinct legal economic actors in the credit market as well as to examine specific loans and potential forgiveness of such loans." *Id.* at 16. Commerce determined that "it may have been able to evaluate the countervailability of tax-related subsidies" starting from 1994. *Id.* at 18. Commerce supported its decision by highlighting that before the entry into force of a series of tax laws, including regulations regarding the value-added tax, consumption taxes, business taxes, enterprise income taxes, individual income taxes, and resources, China lacked a comprehensive legal framework that would be necessary to identify tax payers and assess and collect taxes. *Id.* at 16. Commerce also explained that the adoption of the Foreign Trade Law on May 12, 1994 allowed all individuals and legal persons to engage in foreign trade, which had been restricted to a monopoly of state-trading enterprises managed by a Chinese government ministry before the Foreign Trade Law took effect. *Remand Results* 17. Therefore, Commerce implied that, prior to the adoption of the Foreign Trade Law, individual actors could not have taken advantage of certain tax-related subsidies. *See id.* Lastly, Commerce discerned that it could identify and measure land-oriented subsidies as of 1999. *Id.* at 19. Commerce resolved that until 1999, the year that both the Revised Land Administration Law and its implementing regulations came into effect, the Chinese government had not established the legal framework for the basic elements of land transactions. *See id.* Therefore, Commerce has articulated a logical relationship between specific types of Chinese reforms and the legal conditions necessary to permit Commerce to identify and measure countervailable subsidies for individual actors within the Chinese economy.

For programs that Commerce determined were established prior to December 11, 2001, Commerce next proceeded to consider each specific subsidy program alleged in the petition to determine the extent to which any investigated programs may have provided a benefit prior to December 11, 2001.[6] *See id.* at 19–35. Depending upon the extent of the information available on the record, Commerce deter-

[6] Commerce did not change its determination with respect to the identification and measurement of certain non-recurring subsidy programs that it determined based on record information had been established after December 11, 2001 because the full benefit conferred by such programs had already been assessed and applied in Commerce's final determination. *See Remand Results* 20–25.

Specifically, the subsidy programs that Commerce determined were unaffected by its application of the December 11, 2001 cut-off date include: (1) Tianjin Binhai New Area; (2) the Tianjin Economic and Technological Development Area (Science and Technology Fund);

mined that each program conferred a benefit either based on facts otherwise available or adverse facts available ("AFA") because neither the Government of China ("GOC") nor the mandatory respondents responded to additional questionnaires issued by Commerce.[7] *See Remand Results* 25–29. Although Commerce analyzed the programs by creating categories, Commerce grouped programs together by category because it concluded that the nature of the government bestowals are similar for the individual programs examined under each type.[8] *See id.* at 50. Commerce states that "[t]he next step in the process would have been to evaluate the countervailability of each program from the starting point or year established for a particular category." *Id.* at 50. It is reasonably discernible that Commerce categorized the investigated programs by type in order to efficiently allocate its resources. *See id.*

(3) the Sub-central Government Programs to Promote Famous Export Brands and China World Top Brands; (4) the Jiangsu Province Brands; (5) the Stamp Exemption on Share Transfers Under Non-Tradeable Share Reform: (6) the Foreign Trade Development Fund (Northeast Revitalization Program); (7) the Five Points, One Line Program; (8) the Forgiveness of Tax Arrears For Enterprises in the Old Industrial of Northeast China; (9) the Debt-to-Equity Swap for Pangang; (10) the Bohai Fund's equity infusion in TPCO; (11) the Exemptions for State Owned Enterprises from Distributing Dividents to the State; (12) all lending programs offered through government entities; and (13) the VAT and Tariff Exemptions for the Purchase of Fixed Assets Under the Foreign Trade Development Fund. *See id.*

[7] Although 19 U.S.C. § 1677e(a)–(b) and 19 C.F.R. § 351.308(a)–(c) each separately provide for the use of facts otherwise available and the subsequent application of an adverse inference to those facts, Commerce uses the shorthand term "adverse facts available" or "AFA" to refer to Commerce's use of such facts otherwise available with an adverse inference. *See, e.g., Remand Results* 27–35.

Commerce requested information regarding the alleged subsidy programs for other programs alleged in the petition for which it lacked information to determine whether they had begun prior to December 11, 2001 by sending questionnaires to the Government of China ("GOC") and to the mandatory respondents. *See id.* at 4 (citing Letter Pertaining to GOC Questionnaire, Rem. PD 2, bar code 3490597–01 (July 25, 2016); Letter Pertaining to Jianli Questionnaire, Rem PD 3, bar code 3490598–01 (July 25, 2016); Letter Pertaining to TPCO Questionnaire, Rem. PD 4, bar code 3490600–01 (July 25, 2016); Letter Pertaining to Wuxi Questionnaire, Rem. PD 5, bar code 3490602–01 (July 25, 2016)). Commerce states that it received no responses to its request for information. *Remand Results* 19 (citing Memorandum Pertaining to Changbao, Jianli, TPCO, Wuxi Status of Respondent Representation, Rem. PD 7, bar code 3591043–01 (July 27, 2016)). As a result, Commerce based its CVD rates for these programs on AFA in its *Remand Results*.

[8] For example, Commerce first determined identifying and measuring grants does not require a "specific legal framework guiding government action," but does require that Commerce can "identify distinct economic actors." *Remand Results* 13. Commerce then identified that the entry into force of the first Company Law in 1994, which recognized the legal standing of privatized firms and "setting forth principles of business autonomy, responsibility for profits and losses, and right to own assets," represents the threshold where China transitioned "to a phase of economic development where distinct economic actors were legally extended the flexibility to engage in commercial activity." *See id.* at 14–15. Therefore, it is reasonably discernible that Commerce concludes that identifying and measuring all grants requires it to identify benefits to distinct economic actors and match such benefits to individual economic actors. *See id.*

Lacking information on the record for certain subsidy programs alleged in the petition, Commerce applied an adverse inference that they were in effect prior to December 11, 2001 and that the respondents benefited from the program.[9] *Remand Results* 31. Commerce used its standard AFA rate selection methodology to apply an AFA rate for these individual programs.[10] *Id.* at 31–35. For the State Key Technology Project Fund grant program, Commerce found it had adequate record information to determine that the program was established on September 10, 1999. *Remand Results* 32. Lacking any information on the usage of the program by individual mandatory respondents prior to December 11, 2001, Commerce inferred that the program conferred a benefit on all mandatory respondents for the years 1999–2001 and applied an AFA rate of 0.58 percent, the highest above de minimis rate calculated from any similar program in any CVD proceeding involving China, to mandatory respondents Changbao Jianli, and Wuxi Seamless Oil Pipe Co., Ltd. ("Wuxi"). *Id.* at 33. For mandatory respondent TPCO, although Commerce had information on the company's use of this program from December 11, 2001 through the end of 2008, Commerce states it lacked information on TPCO's use of the program from 1999 through December 11, 2001. *Id.* To fill in the missing information, Commerce added an AFA rate of 0.03 percent to the calculated rate from its final determination of 0.01 (*i.e.*, a combined rate of 0.04 percent) to reflect the inferred benefit

[9] Specifically, Commerce applied an adverse inference that the following individual nonrecurring subsidy programs were countervailable from the time the category of bestowal was first identifiable and measurable: (1) Export Assistance Grants, Program to Rebate Antidumping Fees, and Grants to Loss-Making SOEs; and (2) Provision of Land and/or Land Use Rights for SOEs for LTAR. *See Remand Results* 31–32; 34–35.

[10] For purposes of calculating the AFA rate, Commerce found all alleged programs for which it requested a questionnaire response countervailable because respondents withheld requested information and significantly impeded the proceeding. *See Remand Results* 28. Because the GOC and the mandatory respondents failed to participate, Commerce applied the following hierarchy to select appropriate subsidy rates for the subsidy programs for which it applied AFA:

> (a) [Commerce] first applied, where available, the highest above *de minimis* subsidy rate calculated for an identical program from any segment of this proceeding; (b) absent such a rate, [Commerce] applied, where available, the highest above *de minimis* subsidy rate calculated for a similar program for any segment of this proceeding; (c) absent an above *de minimis* subsidy rate calculated for the same or similar program in any segment of proceeding, [Commerce] applied the highest above *de minimis* calculated subsidy rate for identical, or if not available, a similar program from any CVD proceeding involving the country in which the subject merchandise is produced (*i.e.*, [China]), provided the producer of the subject merchandise or the industry to which it belongs could have used the program for which the rates were calculated. Absent an above *de minimis* rate for the same or similar program from any CVD proceeding involving [China], [Commerce] applied the highest calculated rate from any program in any CVD proceeding for [China].

Id. at 28–29.

received during the years TPCO had not provided a response. *Id.* Commerce found that most of the preferences provided by the exemption of customs duties for the importation of instruments and equipment in the High-Tech Industrial Development Zones program were already properly allocated in its final determination because they represented recurring benefits allocated in the year received.[11] *Remand Results* 33. Nonetheless, Commerce applied an AFA rate of 9.71 percent to this program to reflect the exemption of customs duties for the importation of instruments and equipment aspect of the program, which Commerce found is a non-recurring benefit. *Id.* at 33–34.

U.S. Steel argues that the cut-off dates adopted by Commerce for each type of program are as arbitrary as Commerce's use of China's accession to the WTO in its final determination. *See* U.S. Steel Remand Comments 4–5. The court labeled Commerce's selection of China's WTO accession date as arbitrary because Commerce failed to identify specific economic reforms that occurred on China's accession date and match those reforms to conditions it deemed necessary to identify and measure subsidies. *TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1343. Here, the dates adopted for each type of subsidy program tie specific reforms to Commerce's ability to identify the sphere of commercial activity involved, the economic actors involved, and the government action required to bestow the type of subsidy. *See Remand Results* 13–19. Therefore, Commerce identifies the dates that specific reforms are implemented and connects those reforms to the presence of legal conditions it reasonably deemed necessary to identifying and measuring a particular type of bestowal. U.S. Steel points to no reason or instance where one program of a particular type would be identifiable and measurable before another program of the same type. Therefore, Commerce's determination to establish categories of programs and determine when each type of program would first be countervailable and measurable is reasonable and consistent with the statutory obligations to countervail all identifiable and measurable subsidies in a NME country.

U.S. Steel also argues that Commerce's adoption of a uniform cut-off date for each type of subsidy is arbitrary because it is inconsistent with Commerce's conclusion that the process of economic reform is uneven and may take hold in some sectors before others. U.S. Steel Comments 4. But the court faulted Commerce's adoption of the De-

[11] For recurring benefits, Commerce allocates those benefits or expenses to the year in which the benefit is received. 19 C.F.R. § 351.524(a). In other words, only recurring benefits bestowed during the POI could possibly be countervailable. *See* id. Therefore, recurring programs were unaffected by Commerce's determination to apply a cut-off date for identifying and measuring non-recurring subsidies.

cember 11, 2001 cut-off date as arbitrary because Commerce failed to identify reforms that occurred on December 11, 2001 or explain how any such reforms permitted it to identify and measure subsidies. *See TMK IPSCO*, 40 CIT __, 179 F. Supp. 3d at 1343. Even if reforms identified are uneven and take hold in different sectors of the economy or areas of the country before others, as U.S. Steel contends, Commerce's investigation of types of programs focused on the most basic legal conditions that would be necessary to identify a specific type of subsidy program. *See Remand Results* 13–19. Commerce cannot, for example, identify and measure the benefit provided by a specific loan to a specific party before it is possible to identify a loan as a legal, binding contract between distinct parties generally. Based on Commerce's logic, it is possible that a specific program could be identifiable and measurable later than the category of program to which it belongs, but not earlier. Commerce has articulated a logical relationship between specific types of reforms and the legal conditions necessary to permit Commerce to identify and measure countervailable subsidies for individual actors within the Chinese economy. *See Remand Results* 13–19. Therefore, in this investigation Commerce's adoption of a uniform cut-off date for each category of subsidy program is reasonable.

In the alternative, U.S. Steel argues that, even if Commerce's practice of examining subsidy programs by type is reasonable, the specific cut-off dates adopted for land-oriented subsidies and credit-oriented subsidies are not supported by substantial evidence.[12] U.S. Steel Remand Comments 6–7. For credit-oriented subsidies, U.S. Steel "disagrees with Commerce's conclusion that the earliest it could evaluate the countervailability of credit-oriented subsidies is 1996." *Id.* at 6 (citing *Remand Results* 16). U.S. Steel focuses on Commerce's acknowledgment that specific economic actors involved in providing credit in China could be identified as of 1993, and U.S. Steel contends this evidence renders Commerce's conclusion that credit-oriented subsidies could not be identified and measured until 1996 unsupported by substantial evidence. *Id.* at 7. Commerce notes that before a credit-oriented subsidy can be considered countervailable in an NME, Commerce "needs to be able to identify the loan as a legal, binding contract between distinct parties." *Remand Results* 15. Although Commerce says that it could identify specific actors involved in the provision of credit as early as 1993, it is reasonably discernible

[12] The court considers any substantial evidence challenges to Commerce's determinations of when it could identify and measure other alleged subsidy programs waived because U.S. Steel challenges the specific cut-off dates selected for only land-oriented subsidies and credit-oriented subsidies. *See* U.S. Steel Remand Comments 6–7.

that Commerce determined the banking sector reforms leading up to 1993 did not permit the identification of a binding contract between distinct parties. *See id.* Commerce notes that, until the passage of the 1995 Commercial Bank Law, commercial banks were not responsible for their own profits and losses, and banks lacked legal autonomy from the state. *See id.* In addition, Commerce states that the General Rules on Loans, enacted in 1996, regulated activities related to loans and protected the lawful rights and interests of all parties. *Id.* at 15–16. In particular, Commerce credited the 1996 General Rules on Loans as setting the legal rights and obligations for both lenders and borrowers as providing the legal basis for defining the legal terms of a given loan. *Id.* at 16. Commerce reasonably determined that both the identification of distinct legal actors and the legal underpinnings required to render a loan legally binding are necessary to identifying and measuring credit-oriented subsidies. *See id.* at 15–16. U.S. Steel offers no evidence that the legal requirements to render a loan legally binding between independent economic actors occurred earlier than 1996. The court declines to reweigh the evidence.

Likewise, for land-oriented subsidies, U.S. Steel argues that Commerce's own analysis indicates that it can identify and measure these subsidies from 1986 when the Land Administration Law first "allowed for the ownership of land-use rights and, in certain circumstances, their transfer." U.S. Steel Remand Comments 7 (citing *Remand Results* 18). U.S. Steel contends, that, although subsequent reforms may have provided additional incentive, it is unreasonable for Commerce to conclude that those reforms were necessary to first identify and measure such subsidies. *Id.* Commerce justified its assessment that the conditions were insufficient to allow for the identification and measurement of land-oriented subsidies in 1986 by highlighting: (1) the fact that the Land Administration law of 1986 conflicted with China's constitution, which banned selling, leasing, and transferring land; and (2) that land-use rights were vague and ill-defined until the legal framework for basic elements of land transactions took effect in 1999. *Remand Results* 18–19. The court defers to Commerce's reasonable determination that the legal framework for the basic elements of property transactions is necessary for identifying and measuring subsidies. U.S. Steel highlights no record evidence indicating that the necessary legal conditions were in place prior to 1999.

II. Continued Inclusion of the Ocean Freight Quote from Jianli's Freight Forwarder

The court remanded to Commerce to reconsider or further explain its decision to use an average of two freight quotes from Maersk and Jianli's freight-forwarder because Commerce had not adequately explained how two such disparate quotes could be representative of freight prices available to respondents. *See TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1350–51. U.S. Steel continues to challenge Commerce's explanation. *See* U.S. Steel Remand Comments 10–12. Commerce has now adequately explained how both quotes could be reflective of market rates and, as a result, its determination is supported by substantial evidence.

If Commerce determines that the government of a country or any public entity is providing, directly or indirectly, a countervailable subsidy, then Commerce shall impose a duty equal to the amount of the benefit conferred by the subsidy subject to certain adjustments. *See* 19 U.S.C. §§ 1671(a),1677(6). Where a good or service is provided to a recipient by a government or state-owned entity, if such goods are provided for less than adequate remuneration, a benefit shall normally be treated as conferred. *See* 19 U.S.C. § 1677(5)(E)(iv). Commerce generally seeks to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good from actual transactions in the country in question (*i.e.*, a tier i benchmark). 19 C.F.R. § 351.511(a)(2)(i). However, if there is no useable market-determined price with which to make the comparison, Commerce will measure the adequacy of remuneration by comparing the government price to a world market price "where it is reasonable to conclude that such price would be available to purchasers in the country in question" (*i.e.*, a tier ii benchmark). 19 C.F.R. § 351.511(a)(2)(ii). Further, when measuring the adequacy of remuneration, Commerce must adjust the benchmark price to reflect the price that a firm actually paid or would pay if it imported the product, including delivery charges. 19 C.F.R. § 351.511(a)(2)(iv). Commerce has broad discretion to determine how to adjust the world market benchmark price to reflect delivery charges, such as freight charges that may be incurred by purchasers so long as such adjustments are reasonable.

On remand, Commerce continued to find that the ocean freight quotes provided by Maersk and by Jianli's freight forwarder are both reflective of market rates that the importer would have paid to import steel rounds and billets notwithstanding the pricing disparity. *Remand Results* 42. Commerce explained that the pricing disparity

results from the avenue the importer chooses to import the products, but both paths reflect market rates for ocean freight and are representative of the rates an importer would have paid. *See id.* at 43. Commerce reasoned that working directly with a shipping company may result in a different freight cost than contracting with a freight forwarder that works with a shipping company. *Id.* Commerce supports its conclusion that both the Maersk rate and that of Jianli's freight forwarder are representative of market rates by relying upon a statement from Jianli's freight forwarder explaining that "most shipping companies and freight forwarders that work with them arrange for the shipment of goods from China to the destinations identified . . . and then offer lower rates on the China-bound leg of their voyage." *Id.* at 42 (citing Jianli Group Submission of Factual Information at Attach. 1, CD 87 (Oct. 5, 2009) ("Jianli Freight Quote")). Moreover, Commerce concluded that this "deadfreight rate" is negotiated between the freight forwarder and the shipping company because the service contracts submitted by Jianli reflect the practice of offering lower rates on the China-bound leg.[13] *Id.* at 43. Commerce found that record evidence demonstrates that the prices provided to Jianli by its freight forwarder are actual shipping charges paid by the freight forwarder's customers, and not solely by Jianli, during the calendar year 2008, *see id.* at 54, which coincides with the period of investigation ("POI"). *See id.* at 3. Therefore, Commerce's determination that Jianli's freight forwarder's freight pricing reflects market rates that an importer would have paid is supported by substantial evidence.

U.S. Steel implies that it is unreasonable to conclude that two freight options available in the marketplace could be so disparate because no importer would choose the higher-priced route in such an environment. *See* U.S. Steel Remand Comments 11. It is reasonably discernible that Commerce concluded both the Maersk price quote data and that of Jianli's freight forwarder are market prices available to importers of steel billets because no evidence indicates these rates were not available to importers other than Jianli and market-driven reasons other than price could motivate some importers to contract with a freight provider directly rather than through a freight forwarder for a "deadfreight" rate. *See Remand Results* 43. U.S. Steel offers no evidence importers always prefer a "deadfreight" rate that represents the lowest aggregate price at the expense of any other considerations driven by the needs of their business or of their cus-

[13] Commerce specifically notes that the contracts between Jianli and its freight forwarder include the line item "3.) DEADFREIGHT APPLIES IF FINAL CGO QTTY IS LESS THAN OR CGO DIMENSION IS DIFFERENT FROM DESCRIBED IN PARA2.)" *Remand Results* 42 (citing Jianli Freight Quote at Attach. 1).

tomers. The court declines to speculate why an importer may have selected a shipping path that may result in a higher aggregate rate or to reweigh the evidence. The existence of market-driven reasons to prefer either option renders Commerce's determination that both freight rates are market rates supported by substantial evidence.

U.S. Steel also questions the reliability of the rate of Jianli's freight forwarder, implying that it "is not normal market price, but rather a sweetheart deal." U.S. Steel Remand Comments 11. However, Commerce references the affidavit provided by Jianli's freight forwarder, which indicates that the prices provided are actual shipping charges paid by the freight forwarder's customers from multiple countries to Shanghai throughout the PO. *Remand Results* 54 (citing Jianli Freight Quote at 2–3, Attach. 1). U.S. Steel provides no record evidence supporting its speculation that the prices reflect a special deal not available to other importers. In fact, Defendant points out that Jianli's pricing data, which is relied upon by Commerce, reflects a series of transactions from more than one customer throughout the POI. *See* Def.'s Resp. United States Steel Corporation's Comments Remand Redetermination 14, Mar. 7, 2017, ECF No. 182.

III. Exclusion of SBB East Asia Pricing Data From Tier ii Benchmark

The court remanded Commerce's determination to include the SBB East Asia pricing from its tier ii benchmark price for steel rounds and billets because Commerce's inclusion of this pricing data in its benchmark calculation is not supported by substantial evidence. *See TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1347. On remand, Commerce determined that the SBB East Asia pricing data should be excluded from its tier ii benchmark pricing for steel rounds. *Remand Results* 48.

As already discussed, if there is no useable market-determined price with which to make the comparison, Commerce will measure the adequacy of remuneration by comparing the government price to a world market price "where it is reasonable to conclude that such price would be available to purchasers in the country in question" (*i.e.*, a tier ii benchmark).[14] 19 C.F.R. § 351.511(a)(2)(ii). Here, Commerce concludes that the fact that the SBB East Asia pricing data could include Chinese import prices presents "a more compelling rationale for removing the data source from [its] benchmark." *Remand Results* 48. To support its determination to move from a tier i benchmark, based on actual transactions in China, to a tier ii bench-

[14] Commerce generally seeks to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good from actual transactions in the country in question (*i.e.*, a tier i benchmark). 19 C.F.R. § 351.511(a)(2)(i).

mark, based on world market prices, Commerce relies on the potential that Chinese prices for steel rounds and billets could distort the SBB East Asia data. *See id.* Commerce reasonably concluded that it could not reconcile including distorted prices in a world market price benchmark. *See id.* No party challenges the exclusion of the SBB East Asia pricing data from Commerce's tier ii benchmark for steel billets and rounds. Commerce has complied with the court's remand order.

IV. Subsidy Attribution

The court held that Commerce did not explain what authority allowed it to attribute steel rounds and billets received by one subsidiary of TPCO or Changbao for LTAR to the consolidated sales of all of each respective parent company's subsidiaries in its final determination. *TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1357–58. The court remanded to Commerce to explain its attribution methodology or reconsider its determination. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1358. On remand, Commerce reconsidered its determination and agreed it should not have attributed subsidies received by certain TPCO and Changbao subsidiaries to all of each company's respective subsidiaries. *See id.* at 38. In its *Remand Results*, Commerce attributed subsidies received by Precision to the combined unconsolidated sales of Changbao and to Precision's sales under 19 C.F.R. § 351.525(b)(6)(ii). *Id.* Commerce likewise revisited its attribution of subsidies for the TPCO entities, and declined to attribute subsidies received by TPCO's subsidiaries Tianguan Yuantong Pipe Product Co., Ltd. ("TPCO Yuantong"), Tianjin Pipe Iron Manufacturing Co., Ltd. ("TPCO Iron"), Tianjin Pipe International Economic and Trading Co., Ltd. ("TPCO IETC"), and TPCO Charging Development Co., Ltd. ("TPCO Charging") to all of TPCO's subsidiaries. *See Remand Results* 38–39. Commerce's determinations on remand comply with the court's remand order.

In general, Commerce "calculate[s] an ad valorem subsidy rate by dividing the amount of the benefit allocated to the period of investigation . . . by the sales value during the same period of the product or products to which [Commerce] attributes the subsidy." 19 C.F.R. § 351.525(a). Ordinarily, Commerce divides the subsidies received by a company only by the sales of that company. *See* 19 C.F.R. § 351.525(b)(6)(i). However, if two or more corporations are cross-owned, Commerce's regulations provide a number of exceptions to its

default attribution rule.[15] *See* 19 C.F.R. § 351.525(b)(6)(ii)–(v). If two cross-owned corporations produce the same subject merchandise, Commerce will attribute subsidies received by either or both corporations to the products produced by both corporations. 19 C.F.R. § 351.525(b)(6)(ii). If the firm that received a subsidy is a holding company, including a parent company with its own operations, Commerce will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries. 19 C.F.R. § 351.525(b)(6)(iii). If an input supplier and a downstream producer are cross-owned, and production of the input product is primarily dedicated to production of the downstream product, Commerce will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding sales between the two corporations). 19 C.F.R. § 351.525(b)(6)(iv). Where the other attribution exceptions do not apply, "if a corporation producing non-subject merchandise received a subsidy and transferred the subsidy to a corporation with cross-ownership, [Commerce] will attributed the subsidy to products sold by the recipient of the transferred subsidy." 19 C.F.R. § 351.525(b)(6)(v). Commerce also cumulates subsidies provided to a trading company exporting subject merchandise with benefits from subsidies provided to a firm producing subject merchandise that is sold through a trading company regardless of whether those firms are affiliated. 19 C.F.R. § 351.525(c).

Here, Commerce attributed subsidies received by Precision to the combined unconsolidated sales of Changbao and to sales of Precision under 19 C.F.R. § 351.525(b)(6)(ii) because it found that both corporations are cross-owned and produce subject merchandise. *See Remand Results* 38; *see also* Final Decision Memo at 7–8 (citing *Prelim Results*, 74 Fed. Reg. at 47,214 (stating that Changbao and Precision are cross-owned and that Precision is a producer of subject merchandise just like Changbao, a mandatory respondent in this investigation). Commerce applied the same attribution rule to attribute subsidies received by TPCO Yuantong to TPCO because it found that TPCO and its cross-owned subsidiary, TPCO Yuantong, both produced subject merchandise. *Remand Results* 38. In addition, Commerce included service sales in TPCO Yuantong's sales value of subject merchandise because Commerce credited TPCO Yuantong's description of the sales as related to "heat treatment processing." *Id.* at 38–39 (citing TPCO Verification Report at 13, PD 271 (Oct. 29, 2009)). Commerce supported its determination to attribute the steel

[15] Commerce's regulations define cross ownership as "exist[ing] between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets." 19 C.F.R. § 351.525(6)(vi).

rounds and billets provided to TPCO Iron under 19 C.F.R § 351.525(b)(6)(iv) to the combined sales of TPCO Iron, TPCO Yuantong, and TPCO, less intercompany sales, by noting that all three companies are cross-owned and TPCO Iron was identified in the investigation as a producer of inputs primarily dedicated to producing downstream products produced by TPCO and TPCO Yuantong. *Id.* at 39. Commerce supported its determination to attribute the steel rounds provided at LTAR to TPCO Charging to the unconsolidated sales of TPCO by noting that TPCO Charging does not meet any attribution method under 19 C.F.R. §§ 351.525(b)(6)(ii)–(iv) and that TPCO Charging, which does not produce subject merchandise, provided steel rounds to TPCO. *Id.; see also Prelim. Results*, 74 Fed. Reg. at 47, 215 (stating that TPCO stated that Charging acts as a trading company and does not produce any merchandise). Lastly, Commerce cumulated steel rounds and billets provided for LTAR to TPCO IETC, which was identified as a trading company, with those received by TPCO as well benefits received by TPCO's other subsidiaries TPCO Yuantong, and TPCO Charging. *Id.* at 39–40. Therefore, Commerce used TPCO IETC's total unconsolidated sales value without removing inter-company sales. *Id.* at 39–40.

No party challenges Commerce's attribution methodology. Commerce has explained its attribution methodology and supports its attribution methodology by referring to uncontroverted record evidence. Therefore, Commerce has complied with the court's order.

V. Provision of Steel Rounds Tied to Production of Subject Merchandise

The court remanded Commerce's decision to attribute the benefit received by TPCO from the provision of steel rounds at LTAR because the court could not "discern whether Commerce determined that the provision of steel rounds at LTAR is tied to sales of seamless pipe." *TMK IPSCO*, 40 CIT at __, 179 F. Supp. 3d at 1359. On remand, Commerce finds no record evidence as to the purpose or intended use of the steel rounds and billets under the subsidy program. *See Remand Results* 46. Therefore, Commerce again attributes the subsidies at issue to TPCO's applicable total sales, not just sales of seamless pipe. *See id.* U.S. Steel continues to challenge that substantial evidence supports Commerce's determination. U.S. Steel Remand Comments 8–10. The court disagrees with U.S. Steel.

Commerce attributes the benefits of subsidies to all products exported by a firm. 19 C.F.R. § 351.525(b)(3). However, if a firm produces more than one product, Commerce will attribute the subsidy only to sales of a particular product if the subsidy is tied to the

production or sale of only that product. *See* 19 C.F.R. § 351.525(b)(5). If Commerce cannot determine that the subsidy is tied to the production or sale of a particular product, then Commerce follows its default rule of attributing subsidies to all products exported by the firm. *See* 19 C.F.R. §§ 351.525(b)(3), (b)(5). Commerce has discretion in determining how to evaluate whether a subsidy is tied to the production or sale of a particular product because neither the statute nor Commerce's regulation defines when a subsidy is tied to the production or sale of a particular product. *See* 19 U.S.C. § 1677(5)(E)(iv); 19 C.F.R. §§ 351.525(b)(2), (b)(5). As a matter of practice Commerce evaluates the purpose of the subsidy based on information available at the time of bestowal and does not trace how the subsidy is actually used by companies. *See id.* at 45 (citing *Large Residential Washers From the Republic of Korea*, 77 Fed. Reg. 75,975 (Dep't Commerce Dec. 26, 2012) (final affirmative CVD determination); and accompanying Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea at 41, C-580–869, (Dec. 18, 2012), *available at* http://ia.ita.doc.gov/frn/summary/korea-south/2012–31078–1.pdf (last visited Apr. 28, 2017) ("Large Residential Washers from Korea I&D")).

Here, Commerce attributed the provision of steel rounds and billets at LTAR to all sales of TPCO rather than to only sales of seamless pipe tubes because record evidence does not establish that the GOC intended the subsidy to benefit or knew that the subsidy would benefit the production of seamless pipe and tube at the time of bestowal. *Remand Results* 46. Commerce evaluated the subsidy based upon information at the time of bestowal and there were no documents or statements from the GOC or from state-owned producers and suppliers on the purpose or intended use of steel rounds and billets under the program. *Id.* at 46. U.S. Steel points to no evidence demonstrating that the GOC intended the subsidy to benefit or knew that the subsidy would benefit the production of seamless pipe and tube at the time of bestowal.

U.S. Steel contends that the GOC's statement in its response to Commerce's request for a list of industries in China that directly purchase steel rounds that "[s]teel rounds (billets in round shape that can be used to produce OCTG) are [purchased] by the OCTG industry," renders Commerce's conclusion unreasonable. U.S. Steel Remand Comments 9 (citing Response of the Government of the People's Republic of China to the Department's Initial Questionnaire at 49, PD 107 (July 20, 2009)). However, Commerce reasoned that "the mere

fact that a good 'can be used' does not demonstrate that the provision of that good is tied to a particular product within the meaning of 19 C.F.R. § 351.525(b)(5)." *Remand Results* 53. In its final determination, Commerce noted that the GOC states that steel billet was used "in a number of industries, including rebar, plain bar, merchant bar, light sections, narrow strip, wire rod, and seamless tubes." Final Decision Memo at 75. Moreover, Commerce states that its practice is to only "find that a subsidy is tied to a particular product when the intended use is known to the subsidy giver (in this case the GOC) and so acknowledged prior to [or] concurrent with the bestowal of the subsidy." *Remand Results* 46 (citing *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,403 (Dep't Commerce Nov. 25, 1998) (final rule) (explaining that Commerce looks at information available at the time of bestowal to analyze the purpose of the subsidy)). The POI for Commerce's investigation of OCTG from China is January 1, 2008 through December 31, 2008. *See id.* at 3. It is therefore reasonably discernible that Commerce concluded that that the GOC's questionnaire response is not an acknowledgment that the purpose of the subsidy is to benefit producers of OCTG prior to or concurrent with the bestowal of the subsidy because the statement was made in response to Commerce's questionnaire issued in 2009. *See id.* (citing *Countervailing Duties*, 63 Fed. Reg. at 65,403).

U.S. Steel also argues that Commerce's statement that the GOC has a policy of "supporting and promoting the production of innovative and high-value added products, including OCTG" contradicts Commerce's tying determination. U.S. Steel Remand Comments 9 (citing *Prelim. Results*, 74 Fed. Reg. at 47,217). It is also reasonably discernible that Commerce did not consider this statement inconsistent with its tying determination because the GOC's acknowledgment of support for one of several products does not mean that it knew and acknowledged prior to or concurrent with the bestowal of the subsidy that the program was intended to benefit any one of those products. *See Remand Results* 46 (citing *Countervailing Duties*, 63 Fed. Reg. at 65,403 (stating that Commerce analyzes the purpose of the subsidy based on information available at the time of bestowal)).

Lastly, U.S. Steel argues that Commerce's tying determination is unsupported because there is no affirmative evidence suggesting that the steel rounds and billets provided at LTAR are used to produce any products other than OCTG. *See* U.S. Steel Remand Comments 10. However, Commerce makes clear that its practice does not consider the actual use of the products provided under the subsidy program in evaluating whether the subsidy program is tied to the production of

subject merchandise. *See Remand Results* 45 (citing Large Residential Washers from Korea I&D at 41). Commerce has explained this practice in the past by noting that tracing funds only establishes whether funds are actually used for their stated purpose or the purpose Commerce evinces from record evidence and not whether a benefit is conferred or what specific products the grantor intended to benefit. *See Countervailing Duties*, 63 Fed. Reg. at 65,403. U.S. Steel highlights no reason this practice is unreasonable generally or as applied here. Commerce's determination is therefore supported by substantial evidence.

CONCLUSION

Therefore, for the reasons discussed, the court sustains the *Remand Results*. Judgment will enter accordingly.

Dated: May 3, 2017
New York, New York

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