U.S. Court of Appeals for the Federal Circuit

DOWNHOLE PIPE & EQUIPMENT, L.P., AND DP-MASTER MANUFACTURING CO., LTD., Plaintiffs-Appellants, v. UNITED STATES, VAM DRILLING USA, TEXAS STEEL CONVERSIONS, INC., ROTARY DRILLING TOOLS, AND TMK IPSCO, Defendants-Appellees, AND UNITED STATES STEEL CORPORATION, Defendant.

Appeal No. 2014–1225

Appeal from the United States Court of International Trade in No. 11–00081, Senior Judge Nicholas Tsoucalas.

Dated: January 29, 2015

MARK B. LEHNARDT, Lehnardt & Lehnardt LLC, of Liberty, Missouri, argued for plaintiffs-appellants.

MIKKI COTTET, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee United States. With her on the brief were STUART F. DELERY, Assistant Attorney General, JEANNE E. DAVIDSON, Director, and CLAUDIA BURKE, Assistant Director. Of counsel was MICHAEL THOMAS GAGAIN, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington, DC.

ROGER B. SCHAGRIN, Schagrin Associates, of Washington, DC, argued for defendants-appellees VAM Drilling USA, Texas Steel Conversion, Inc., Rotary Drilling Tools, and TMK IPSCO. With him on the brief was JOHN W. BOHN.

Before REYNA, LINN, and WALLACH, Circuit Judges.

WALLACH, Circuit Judge.

Appellants Downhole Pipe & Equipment, LP, and DP-Master Manufacturing Co., Ltd. (collectively, "Downhole Pipe") appeal the decisions of the United States Court of International Trade ("CIT") (1) affirming the United States Department of Commerce's ("Commerce") scope and industry support determinations and (2) sustaining Commerce's Final Results of Redetermination Pursuant to Court Remand. *See Downhole Pipe & Equip., LP v. United States* (*Downhole Pipe II*), 949 F. Supp. 2d 1288 (Ct. Int'l Trade 2013); *Downhole Pipe & Equip. LP v. United States* (*Downhole Pipe I*), 887 F. Supp. 2d 1311 (Ct. Int'l Trade 2012); *see also Drill Pipe From the People's Republic of China*, A-570–965 (Dep't of Commerce May 13,2013) (final results of redetermination pursuant to court remand) (Public Joint Appendix ("P.J.A.") 2388–406) ("*Remand Results*"); *Drill Pipe From the People's Republic of China*, 75 Fed. Reg. 4,531 (Dep't of Commerce Jan. 28,

2010) (initiation of antidumping duty investigations) ("*Initiation*"). Because Commerce's determinations were supported by substantial evidence and were not otherwise contrary to law, this court affirms.

BACKGROUND

I. Facts

Downhole Pipe is a United States importer of "drill pipe" produced by DP-Master Manufacturing Co., Ltd. ("DP-Master"), a Chinese producer. Drill pipe is a specialized high-strength iron alloy tube, used in oil-drilling applications, and is manufactured in three stages: first, seamless tubes called "green tube" are produced from raw steel; second, the manufacturer uses complex processes to "upset" and heat-treat green tube to thicken the ends and increase the yield strength to the desired American Petroleum Institute ("API") grade; third, the manufacturer friction-welds a specialized "tool joint" to the ends of the heat-treated and upset tube to complete the drill pipe. While green tube is the primary input in the production of drill pipe, it can also be processed into other "oil country tubular goods." Oil country tubular goods, which consist primarily of casing and tubing, are used in connection with the transport of oil and gas, while drill pipe is primarily used in drilling.

II. Proceedings

In 2009, Commerce received a petition from several domestic drill pipe producers, including Appellees VAM Drilling USA, Texas Steel Conversion, Inc., Rotary Drilling Tools, and TMK IPSCO (collectively, "Petitioners"), seeking imposition of antidumping and countervailing duties on drill pipe from the People's Republic of China ("China"). *Drill Pipe From the People's Republic of China*, No. A-570–965 (Dep't of Commerce Dec. 31, 2009) (petition for the imposition of antidumping and countervailing duties) (P.J.A. 56–230) ("*Petition*"). Some of the petitioners produce green tube for drill pipe, while others produce finished drill pipe. Prior to Commerce's initiation of the antidumping investigation, Downhole Pipe objected to the proposed scope of the investigation, arguing green tube should not be included within the scope, because it was already covered by an ongoing investigation into oil country tubular goods, and Commerce should disregard green tube production for purposes of calculating domestic industry support.

After considering these objections, Commerce revised the scope of the investigation in the *Initiation*, specifying "'[t]he scope does not include . . . unfinished tubes for casing or tubing covered by any other antidumping or countervailing duty order.'" *Downhole Pipe I*, 887 F.

Supp. 2d at 1316 (citation omitted); *Initiation*, 75 Fed. Reg. at 4,535. Commerce also found sufficient domestic industry support for the Petition, as calculated using the revised scope. Therefore, in 2010, Commerce initiated the antidumping investigation of drill pipe from China.

In its *Preliminary Determination*, Commerce determined drill pipe from China was, or was likely to be, sold in the United States at less-than-fair value. *Drill Pipe From the People's Republic of China*, 75 Fed. Reg. 51,004 (Dep't of Commerce Aug. 18, 2010) (preliminary determination of sales at less than fair value and affirmative determination of critical circumstances, and postponement of final determination) ("*Preliminary Determination*"). While Commerce maintained the scope as defined in the *Initiation* over Downhole Pipe's objections, in the *Preliminary Determination* it stated, given "concerns regarding the imprecision of the definition of 'green tubes suitable for drill pipe' currently contained in the scope," it would "request additional information regarding characteristics distinguishing green tube for drill pipe from green tube for casing and tubing covered under the orders on [oil country tubular goods from China]." *Id.* at 51,006. Further,

> [u]nless specific characteristics are provided which distinguish between green tube for drill pipe and green tube for casing and tubing, all green tubes . . . will be removed from the scope of the . . . investigations on drill pipe from [China] and will instead be considered as covered under the existing [orders on oil country tubular goods from China].

Id.

Commerce issued its *Final Determination* on January 11, 2011, continuing to find drill pipe from China was being, or was likely to be, sold in the United States at less-than-fair value. *Drill Pipe From the People's Republic of China*, 76 Fed. Reg. 1,966 (Dep't of Commerce Jan. 11, 2011) (final determination of sales at less-than-fair value and critical circumstances) ("*Final Determination*"), and accompanying Issues & Decision Memorandum ("*Issues & Dec. Mem.*") (P.J.A. 1890–938).

For the *Final Determination*, Commerce "developed characteristics for drill pipe green tubes based on numerous submissions of factual data from parties regarding the physical and chemical characteristics of drill pipe and drill pipe green tubes." *Issues & Dec. Mem.* at 11. Thus, "Commerce narrowed the scope by adding three physical criteria to the description of subject green tube." *Down-hole Pipe I*, 887 F. Supp. 2d at 1317. Specifically, Commerce narrowed the scope to green

tube: (1) that is seamless; (2) that has a certain outer diameter; and (3)that contains specific percentages of molybdenum and chromium. *Issues & Dec. Mem.* at 11. Thus, the scope specified in the *Final Determination* reads:

> The products covered by the investigation are steel drill pipe, and steel drill collars, whether or not conforming to [API] or non-API specifications. Included are finished drill pipe and drill collars without regard to the specific chemistry of the steel (*i.e.,* carbon, stainless steel, or other alloy steel), and without regard to length or outer diameter. Also included are unfinished drill collars (including all drill collar green tubes) and *unfinished drill pipe (including drill pipe green tubes, which are tubes meeting the following description: seamless tubes with an outer diameter of less than or equal to 6 5/8 inches (168.28 millimeters), containing between 0.16 and 0.75 percent molybdenum, and containing between 0.75 and 1.45 percent chromium). The scope does not include . . . unfinished tubes for casing or tubing covered by any other antidumping or countervailing duty order.*

Final Determination, 76 Fed. Reg. at 1,967 (emphasis added).

As part of its *Final Determination*, Commerce also calculated a surrogate value for the green tube input as one of the factors of production. Two sources were on the record to serve as surrogate data: (1) price quotes printed in a trade publication called *Metal Bulletin Research* for grades J and K casing and tubing ("J/K 55") and (2) the average transaction prices paid for products imported into India under the Harmonized Tariff Schedule of India ("IHTS") subheadings 7304.23 and 7304.29. Commerce ultimately determined the best available information was the average Indian import prices for sales of merchandise under these IHTS subheadings. Using this data, Commerce calculated a surrogate value of $2,511.67 for the green tube input.

Downhole Pipe appealed several of Commerce's determinations to the CIT, including its inclusion of green tube within the scope of the investigation and in the industry support calculation, as well as its choice of the surrogate data used to value the green tube input. In *Downhole Pipe I*, the CIT rejected Downhole Pipe's scope arguments, reasoning Commerce had discretion to determine scope and could not reconsider industry support after initiation of the investigation. The CIT also remanded the *Final Determination* to Commerce with instructions to reconsider the surrogate values used for green tube. In particular, the CIT found Commerce had failed to address the *Info-*

Drive India ("*InfoDrive*") import data Appellants had placed on the administrative record that called into question Commerce's finding that green tube entered India under IHTS subheadings 7304.23 and 7304.29. The CIT acknowledged data from the IHTS subheadings might be the best available information, but it could not affirm the *Final Determination* on the basis of the explanation provided by Commerce.

On remand, Commerce examined all other potential surrogate values for green tube on the record, including: (1) import statistics for goods imported into India under IHTS categories 7304.23, 7304.29, and 7304.59; (2) *Metal Bulletin Research* price data for J/K 55 and for "P110"; (3) adjusted value data for alloy steel billets processed into green tube provided by Appellants; and (4) adjusted value data for seamless tubes provided by Appellants. Commerce found the price data for products entered under IHTS 7304.59 (as opposed to IHTS 7304.23 and 7304.29) was the best available information on the record because it was most representative of the green tube used for drill pipes, contemporaneous with the period of investigation, duty and tax exclusive, publicly available, and represented a broad market average. Commerce also confirmed its analysis with a National Import Specialist at United States Customs and Border Protection ("Customs"). Although in its draft remand results Commerce used data from both IHTS 7304.59.10 and IHTS 7304.59.20, in its final *Remand Results* Commerce based the surrogate value for green tube on the average unit value of entries made under IHTS 7304.59.20 alone.

On return to the CIT, Appellants argued the *Remand Results* were unsupported by substantial evidence and were otherwise not in accordance with law. Therefore, Downhole Pipe asked the CIT to once again remand the issue of the surrogate values used to value the green tube. In *Downhole Pipe II*, the CIT sustained the *Remand Results*.

Downhole Pipe appeals. This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (2012).

DISCUSSION

I. Standard of Review

This court reviews the decisions of the CIT de novo, "apply[ing] anew the same standard used by the [CIT]." *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (internal quotation marks and citation omitted). Under that standard, this court must uphold Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in

accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). "Although such review amounts to repeating the work of the [CIT], we have noted that 'this court will not ignore the informed opinion of the [CIT].'" *Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348, 1356 (Fed. Cir. 2010) (quoting *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994)); *see also Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) ("When performing a substantial evidence review, . . . we give great weight to the informed opinion of the [CIT]. Indeed, it is nearly always the starting point of our analysis.") (internal quotation marks and citation omitted).

Substantial evidence is defined as "more than a mere scintilla," as well as evidence that a "reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). This court's review is limited to the record before Commerce in the particular review proceeding at issue and includes all "evidence that supports and detracts" from Commerce's conclusion. *Sango Int'l L.P. v. United States*, 567 F.3d 1356, 1362 (Fed. Cir. 2009). An agency finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

II. Legal Framework

The United States imposes duties on foreign-produced goods sold in the United States at less-than-fair value("antidumping duties"), 19 U.S.C. § 1673(1), or that benefit from subsidies provided by foreign governments ("countervailing duties"), *id.* § 1671(a)(1). Commerce is responsible for investigating whether there have been, or are likely to be, sales at less-than-fair value or whether a subsidy has been provided, *id.* §§ 1673(1), 1671(a)(1), while the International Trade Commission determines whether imported merchandise materially injures or threatens to materially injure the pertinent domestic industry, *id.* §§ 1673d(b)(1), 1671d(b)(1). "If both inquiries are answered in the affirmative, Commerce issues the relevant antidumping and countervailing duty orders." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002). The orders contain a description of the merchandise that is covered by the order, called the scope. 19 U.S.C. §§ 1671e(a)(2), 1673e(a)(2).

Antidumping investigations are typically initiated by a petition filed with Commerce by a domestic industry. *Duferco Steel*, 296 F.3d at 1089. The petition defines the initial scope of the investigation. *Id.* After a petition is received, several statutory criteria must be met before Commerce may initiate an investigation, including determin-

ing whether the petition was filed on behalf of the domestic industry, 19 U.S.C. § 1673a(c)(1)(A)(ii), (c)(2), and whether there is domestic industry support for the petition, *id.* § 1673a(c)(4). To determine whether there is industry support, Commerce must determine whether domestic producers or workers who support the petition "account for at least 25 percent of the total production of the domestic like product." *Id.* § 1673a(c)(4)(A)(i). If Commerce determines the petition lacks industry support, it "shall dismiss the petition [and] terminate the proceeding." *Id.* § 1673a(c)(3). If, however, Commerce "makes a determination with respect to initiating an investigation, *the determination regarding industry support shall not be reconsidered*." *Id.* § 1673a(c)(4)(E) (emphasis added).

Once an antidumping investigation has been initiated, to determine whether foreign goods are being sold or are likely to be sold in the United States at less-than-fair value, *id.* § 1673, Commerce compares the export price (or constructed export price) of a foreign producer's sales with "normal value" (the price in the foreign market), *id.* § 1677b(a). If the price of an item in the foreign market (normal value) is higher than the price for the same item in the United States (export price), dumping has occurred. *Id.* § 1677(35)(A) (The antidumping duty margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.").

Further, if Commerce considers the exporting country a "nonmarket economy country,"[1] it determines normal value by valuing the "factors of production" used in producing the merchandise in a comparable market economy[2] to come up with "surrogate values." *See id.* § 1677b(c)(1)(B). In doing so, Commerce "attempt[s] to construct a hypothetical market value of that product" in the nonmarket economy. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999). Thus, Commerce must value the factors of production "to the extent possible . . . in one or more market economy countries that are—(A) at a level of economic development compa-

[1] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 318 F. Supp. 2d 1339, 1341 (Ct. Int'l Trade 2004).

[2] Here, "Commerce selected India as the primary surrogate country, and used Indian data to calculate surrogate values for two key drill pipe inputs relevant to this case." *Downhole Pipe I*, 887 F. Supp. 2d at 1316.

rable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(A)–(B).

The statute also directs Commerce to value the factors of production "based on the *best available information* regarding the values of such factors in a market economy country." *Id.* § 1677b(c)(1)(B) (emphasis added). Commerce has discretion to determine what constitutes the best available information, as this term is not defined by statute. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). However, "Commerce generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014).

III. Commerce Properly Included Green Tube in the Scope of the Investigation and in the Calculation of Industry Support

Appellants challenge the lawfulness of including green tube within the scope of the investigation, and consequently of including green tube in the industry support calculation. In *Downhole Pipe I*, the CIT rejected Downhole Pipe's scope arguments, reasoning (1) Commerce has discretion to define the scope of the investigation, and (2) Commerce is barred by statute from reconsidering industry support after the initiation of an investigation. *Downhole Pipe I*, 887 F. Supp. 2d at 1319 (Downhole Pipe's "sole argument—that some green tube used to produce [oil country tubular goods] meet the technical specifications of the Final Determination and are thus subject to two antidumping orders—has little bearing on Commerce's decision to initiate the investigation."). In support of its conclusions, the CIT pointed to three prior International Trade Commission determinations, which describe "why technical specifications and customer expectations led it to treat green tube for drill pipe as a 'distinct like product' from green tube for [oil country tubular goods]." *Id.* at 1320 (citation omitted). Therefore, the CIT concluded, "[g]iven the end-use exception and the extensive evidence showing a distinction in channels of distribution, customer expectations, and technical specifications, it would not be appropriate for this court to usurp Commerce's exercise of discretion in defining the scope of the *Initiation*." *Id.*

Nonetheless, on appeal, Downhole Pipe continues to argue that Commerce may not include products within the scope of an investigation that are already covered by the scope of another investigation or order. As to the three criteria identified by Commerce as distinguishing green tube for drill pipe from green tube for oil country

tubular goods—i.e., that green tube for drill pipe (1) is seamless, (2) has an outside diameter of 6 5/8 inches or less, and (3) has 0.16%–0.75% molybdenum and 0.75%–1.45% Chromium—Downhole Pipe argues the record lacks substantial evidence to support these three criteria. Further, Appellants argue, "[b]ecause these three criteria do not distinguish drill-pipe green tube from [oil country tubular goods] green tube, the same green tube is impermissibly covered by two antidumping duty orders." Appellants' Br. 30.

In support, Appellants rely on record evidence that purportedly establishes that each of these three criteria may apply to green tube used to produce oil country tubular goods. Specifically, as to the first criterion, Appellants argue that while all green tube used for drill pipe must be seamless, some green tube used to produce oil country tubular goods is also seamless. As to the second criterion, Appellants note some oil country tubular goods use green tube with an outside diameter of less than or equal to 6 5/8 inches. Finally, regarding chemistry, Appellants contend there are no API specifications for "minimum alloy requirements for casing, tubing, and drill pipe." *Id.* at 31.

In addition, Appellants argue that without the inclusion of green tube production volume in its industry support calculation, the Petition lacks the requisite industry support. Appellants' Br. 32 ("A cursory review of the industry support calculation after removing green tube producers indicates that petitioners would not satisfy the required 25% industry-support threshold."). Therefore, Appellants insist the industry support calculation must be remanded. As to the statutory bar against revising this calculation post-initiation, Appellants contend it "properly raised this scope/industry support issue prior to the *Initiation*." *Id.* at 34.

These arguments are unavailing because Commerce reasonably included green tube within the scope of the investigation. First, substantial evidence supports Commerce's identification of three physical characteristics that distinguish green tube for drill pipe from that intended for oil country tubular goods. As Commerce explained, the first criterion (that green tube for drill pipe must be seamless) was "based on Petitioners' comments and submission of technical specifications." *Issues & Dec. Mem.* at 11. As to the second criterion, that the drill pipe green tube must have a certain outer diameter, Commerce explained this was "based on DP-Master Group's submission of [API] specifications for drill pipe." *Id.* As to the final criterion regarding the green tube's chemical composition, this was "based on Petitioners' submission of declarations from experienced drill pipe engineers who direct the purchase of green tubes for drill pipe based on specific

physical and chemical requirements." *Id.* While Appellants invite this court to reweigh this evidence, this court may not do so. *See Trent Tube Div., Crucible Mate rials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992) ("It is not for this court on appeal to reweigh the evidence or to reconsider questions of fact anew.").

It is important to note that Appellants have failed to identify any green tube intended for oil country tubular goods that satisfies all three of these criteria. As the Government points out, "[i]n order to be covered by the Order here, the green tube must satisfy all three of the requirements established by Commerce." United States' Br. 19. Appellants have not called into question Commerce's conclusion that, "[w]hile the DP-Master Group has provided specifications for certain [oil country tubular goods] that overlap in some characteristics with drill pipe, no specifications for [oil country tubular goods] have been placed on the record that meet *all* of the criteria for drill pipe green tube." *Issues & Dec. Mem.* at 11. Even if Downhole Pipe had been able to do so, moreover, Commerce added an explicit exception to exclude any such overlapping goods: "The scope does not include . . . unfinished tubes for casing or tubing covered by any other antidumping or countervailing duty order." *Final Determination*, 76 Fed. Reg. at 1,967. As the CIT pointed out, Downhole Pipe did "not analyze the purported overlap in light of this potentially remedial exception," *Downhole Pipe I*, 887 F. Supp. 2d at 1319, and makes no attempt to do so before this court.

As to Downhole Pipe's insistence that industry support must be recalculated using a revised scope, Appellants have not overcome the statutory obstacle to doing so. That is, while 19 U.S.C. § 1673a(c)(4)(E) provides that any potential interested party may submit comments or information on the issue of industry support prior to the initiation of an investigation, it explicitly states "[a]fter [Commerce] makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered." 19 U.S.C. § 1673a(c)(4)(E). Given this court's finding that Downhole Pipe has failed to demonstrate Commerce erred in including green tube within the scope, this statutory bar means the contention that Commerce must redetermine whether there is sufficient industry support necessarily fails. This is not to say a party may not challenge whether its goods properly fall within the scope,[3] but only that the industry support calculation is not reviewable under these circumstances.

[3] Indeed, pursuant to 19 C.F.R. § 351.225 (2012), a party can request a scope determination to determine whether its merchandise falls within the scope of an order. Here, as the CIT observed, "DP-Master does not export green tube to the U.S., and neither it nor any party below have requested a scope determination." *Downhole Pipe I*, 887 F. Supp. 2d at 1318.

Accordingly, Commerce's inclusion of green tube in the scope of the investigation and in the calculation of industry support was supported by substantial evidence and was not contrary to law.

IV. Substantial Evidence Supports Commerce's Selection of the Surrogate Value for Green Tube

Appellants also challenge the lawfulness of Commerce's selection of a surrogate value for valuing green tube, as redetermined following the remand by the CIT. In *Downhole Pipe I*, the CIT ordered a remand because "Commerce's rebuttal of each of [Downhole Pipe's] four alternative surrogates . . . d[id] not cure its inadequate explanation of its reliance upon the IHTS data," and "its failure here to explain evidence apparently contrary to a finding central to its determination leaves the court without the means necessary to affirm it as supported by the record." *Downhole Pipe I*, 887 F. Supp. 2d at 1325 (internal citations omitted). The CIT noted on remand, "Commerce [was] not barred from selecting the IHTS data," but it was required to "explain why such data is more representative of the price for drill pipe green tube than other potential surrogate values in light of *InfoDrive* data that appears to demonstrate that [IHTS] 7309.23 and 7309.29 do not actually 'capture' green tube and are highly distorted by expensive, finished tubular goods." *Id.*

As noted, on remand Commerce examined four potential data sources for valuing green tube: (1) import statistics for goods imported into India under IHTS categories 7304.23, 7304.29, and 7304.59; (2) *Metal Bulletin Research* price data for J/K 55 and P110; (3) adjusted value data for alloy steel billets processed into green tube; and (4) adjusted value data for seamless tubes. Commerce then determined it had incorrectly found that IHTS 7304.23 and 7304.29 were the proper IHTS subheadings for green tube, and instead determined that IHTS 7304.59.20 was the proper subheading.

In *Downhole Pipe II*, the CIT affirmed the *Remand Results*, holding "[a]lthough IHTS 7304.59.20 does not perfectly cover [Downhole Pipe's] [drill pipe green tubes], Commerce's decision was reasonable nonetheless given the record support for IHTS 7304.59.20 and the relative weakness of the alternative values." *Downhole Pipe II*, 949 F. Supp. 2d at 1295. Specifically, the CIT held, "Commerce reasonably determined that IHTS 7304.59.20 import data satisfied more of its selection criteria than the flawed alternatives on the record," *id.* at 1297, and, in contrast to the alternate surrogate values on the record, "Commerce found that the IHTS 7304.59.20 data is 'contemporaneous with the [period of investigation], represent[s] a broad market average, [is] tax and duty exclusive, and [is] publicly available, thus

comporting with [Commerce's] selection criteria.'" *Id.* (citations omitted). For these reasons, the CIT held Commerce reasonably determined that data from IHTS 7304.59.20 was the best available information on the record and Commerce "reasonably rejected" the alternative surrogate values. *Id.* at 1296–97 (citations omitted).

On appeal, Downhole Pipe challenges Commerce's selection of the surrogate value for green tube on three grounds. First, Appellants contend Commerce improperly rejected the alternative surrogate values on the record, and that its legal analysis in support of selecting IHTS 7304.59.20 was insufficient. Specifically, Appellants characterize "Commerce's legal analysis to support selecting IHTS 7304.59.20" as "a one-sentence assertion regarding classification under IHTS, which Commerce supported with a two-sentence memo reporting some sort of confirmation from [Customs]." Appellants' Br. 43. They therefore claim that when analyzing the competing IHTS subheadings on the record, Commerce improperly "ignore[d] basic legal principles—such as [General Rule of Interpretation] 2(a)—which require some analysis before dismissal." *Id.* In so arguing, Appellants concede "the process of selecting [surrogate values] is necessarily imprecise," but nonetheless argue that "Commerce must strive for accuracy in value to comply with its obligation to calculate margins as accurately as possible." *Id.* at 24–25.

This court declines Appellants' invitation to reweigh the evidence in order to reject Commerce's conclusions, which were well-supported and fully explained. *See id.* at 44–49 (challenging each of Commerce's conclusions regarding the alternative surrogate values on the record and offering Appellants' own interpretations). Regarding Downhole Pipe's argument that Commerce's "legal analysis" of the competing tariff headings was insufficient because Commerce failed to employ the General Rules of Interpretation of the Harmonized Tariff Schedule as part of its evidentiary determination, this is *not* a customs classification case. Commerce was not required to engage in a classification analysis to determine which IHTS subheading contained entries of drill pipe green tube; rather, it was required to determine which of the competing subheadings constituted the best available information for valuing the green tube input. In addition, as the CIT pointed out, Appellants "do not cite any legal authority demonstrating that Commerce must conduct a full classification analysis when considering import data from a particular foreign tariff heading as a surrogate value," and Appellants "provide virtually no legal analysis contravening Commerce's selection." *Downhole Pipe II*, 949 F. Supp. 2d at 1293.

As to its selection process, in the *Remand Results* Commerce explained it used "a process of elimination" to select IHTS subheadings 7304.59.10 and 7304.59.20 because "[c]ategorization of products under the HTS is a process of elimination." *Remand Results* at 5. Using this process, Commerce explained it rejected IHTS 7304.23 and 7304.29 because the former captures processed semi-finished drill pipe and the latter captures semi-finished casing and tubing, which are not inputs for drill pipe. Therefore, these headings were "no longer the best available information on the record." *Id.* at 7. Commerce further explained, "after examining all possible subcategories under IHTS heading 7304, the process of eliminating the other items entering under these headings demonstrates that categories 7304.59.10 and 7304.59.20 cover drill pipe green tube as defined in the scope of the *Order*." *Id.* at 5. Of these two subheadings, Commerce found the latter better represented green tube because further classification under these subheadings was based on tube diameters, and 7304.59.20 better reflected the diameter of the green tube covered by the Order. *Id.*

To the extent Downhole Pipe requests this court to reweigh Commerce's findings with regard to each heading, this court may not do so. "This court's duty is 'not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.'" *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 431 F. Supp. 2d 1323, 1327 (Ct. Int'l Trade 2006)). In light of Commerce's well-reasoned explanation of its selection process, this court finds Commerce's selection of data from IHTS 7304.59.20 was supported by substantial evidence.

As to Appellants' argument that Commerce unreasonably rejected the alternative surrogate values on the record, Commerce appropriately evaluated each of the alternatives on the record and provided an ample explanation as to why it should be rejected. With regard to the price data for J/K 55 from the *Metal Bulletin Research*, Commerce explained this data was not the best available information on the record because: (1) "it is not contemporaneous;" (2) "it represents only a single month of price data;" (3) "J/K 55 cannot be used to produce drill pipe;" and (4) J/K 55 "is at best comparable [to green tube], differing in alloying element content and production methods." *Remand Results* at 8. Moreover, the J/K 55 data did not reflect actual sales prices, but rather offer prices. *Id.* at 5–6. Commerce reasonably concluded the J/K 55 data did not satisfy its selection criteria. *See Qingdao Sea-Line*, 766 F.3d at 1386 ("Commerce generally selects, to

the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review.").

Commerce rejected the P110 price data from the *Metal Bulletin Research* for similar reasons, finding P110 is not representative of green tube because it is a finished oil country tubular good product that cannot be used as an input for drill pipe. *Remand Results* at 9. Additionally, the P110 data was based on offer prices and only contained one month of pricing information. *Id.* As compared to the data from IHTS 7304.59.20, Commerce reasonably found these alternatives were not the best available information for valuing the green tube input.

Similarly, Commerce reasonably explained why the adjusted value data offered by Downhole Pipe for alloy steel billets processed into green tube and for seamless tubes were not the best available information as compared to the data from IHTS 7304.59.20. Specifically, Commerce found the record lacked sufficient information to adjust the values for the required alloying costs and that calculating such adjustments required proprietary information. *Id.* at 9–11. Because Commerce's regulations direct it to use "publicly available information," 19 C.F.R. § 351.408(c)(1), Commerce rejected these adjusted values. Thus, Commerce supported with substantial evidence its determinations that it had selected the best available information and reasonably rejected the alternatives proposed by Downhole Pipe.

Appellants also argue Commerce's choice of a surrogate value for green tube is "aberrantly high" and therefore outside the bounds of commercial reality. Appellants' Br. 41. Specifically, Downhole Pipe claims Commerce's choice of the average price for goods entered under IHTS 7304.59.20 resulted in a surrogate value of $4,978.11 for green tube, which is "aberrantly high" because it is almost double the value of the $2,511.67 figure Commerce used in the *Final Determination* based on goods entered under IHTS 7304.23.90. Appellants point out IHTS 7304.59.20 is a basket category for alloy seamless tubes, while the previously-selected IHTS 7304.23.90 includes both finished and unfinished drill pipe. Therefore, Appellants argue, "[u]nder the basic principle that an input should not be valued more than the finished product, Commerce failed to select an accurate [surrogate value]," and "[e]xacerbating Commerce's error is uncontroverted industry expert testimony establishing the value of green tube at approximately 30% of the value of finished drill pipe." *Id.* at 25. In support, Downhole Pipe points to the *InfoDrive* data for entries made under IHTS 7304.59.10 and 7304.59.20 that Appellants argue "con-

clusively demonstrated that there were no entries of drill-pipe green tube under IHTS 7304.59.10, and no entries of d[r]ill pipe green tube in at least 60% of entries under IHTS 7304.59.20." *Id.* at 46.

As the Government notes, "[a]lthough Downhole succeeds in creating a stark comparison, Downhole fails to do so using substantiated reference points." United States' Br. 41. In particular, while Downhole Pipe argues the value of a finished drill pipe should not exceed the value of an individual input, like green tube, its comparison relies on the incorrect assumption that IHTS 7304.59.20 covers green tube exclusively and IHTS 7304.23.90 covers semi-finished or finished drill pipe exclusively. Appellants fail to provide any evidence in support of this proposition. For example, Appellants state "IHTS 7304.59.20 *most likely* also lacked entries of drill-pipe green tube," citing for support its own comments submitted in response to the draft remand results and the *InfoDrive* data. Appellants' Br. 45 (citing P.J.A. 2289–91, 2305–26) (emphasis added). As noted above, Commerce provided substantial evidence to support its finding that the data from IHTS 7304.59.20 was the best available information on the record.

Finally, Downhole Pipe argues Commerce erred in relying on a memo from the National Import Specialist to confirm its selection of IHTS 7304.59 as the appropriate heading for drill pipe green tube. Specifically, Appellants claim they "expose[] six significant flaws, that cannot be filled in by Commerce's four *post hoc* attempts in the *Remand* to bolster the quality of the [National Import Specialist's] Memo." *Id.* at 49. These alleged flaws include (1) that Appellants cannot determine whether Commerce contacted the National Import Specialist by "email, letter, fax, telephone, over coffee, or through a friend"; (2) there is no indication that Commerce supplied the scope language to the National Import Specialist for her consideration; (3) there is no indication that a discussion of the scope language occurred, and therefore there is no record evidence establishing what the National Import Specialist considered prior to confirming Commerce's selection; (4) "there is no indication that the [National Import Specialist] has any training regarding how to classify imports under *IHTS* categories—or whether the [National Import Specialist] had any relevant training at all"; (5) the memo does not indicate whether Customs evaluated other IHTS categories or considered legal principles regarding how to classify drill pipe green tube; and (6) there is no indication of how Customs "confirmed" Commerce's IHTS classification decision. *Id.* at 49–52.

Given Commerce's well-reasoned explanation why data from IHTS 7304.59.20 constituted the best available information for valuing

green tube, this court need not entertain this argument. As the CIT correctly noted: first, "Commerce did not rely solely on the [National Import Specialist] Memo in its analysis . . . [and] explained that it 'confirmed' [its] analysis with the [Customs] official," and second, this "argument is entirely conjectural. [Appellants] insist that the [National Import Specialist] Memo contains several possible flaws, but fail to identify any evidence in the record supporting their assertions." *Downhole Pipe II*, 949 F. Supp. 2d at 1296; *see also* Petitioners' Br. 31 ("The bulk of Downhole's argument consists of totally unsupported speculation that when contacted by Commerce, . . . a senior [Customs] official, incompetently rendered an informal opinion without reviewing any of the necessary documents or understanding any of the legal principles involved. A presumption of correctness surrounds agency proceedings."). Substantial evidence supports Commerce's selection of the surrogate value for green tube.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of International Trade is

AFFIRMED

BEST KEY TEXTILES CO. LTD., Plaintiff-Appellant, v. UNITED STATES, Defendant-Appellee.

Appeal No. 2014–1327

Appeal from the United States Court of International Trade in No. 1:13-cv-00367-RKM, Senior Judge R. Kenton Musgrave.

Dated: February 3, 2015

JOHN M. PETERSON, Neville Peterson LLP, of New York, New York, argued for plaintiff-appellant. With him on the brief were MARIA E. CELIS, RICHARD F. O'NEILL, and RUSSELL A. SEMMEL.

BEVERLY A. FARRELL, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were STUART F. DELERY, Assistant Attorney General, JEANNE E. DAVIDSON, Director, and MARCELLA POWELL, Trial Attorney, of Washington, DC, and AMY M. RUBIN, Assistant Director, International Trade Field Office, of New York, New York. Of counsel on the brief were CLAUDIA BURKE, Assistant Director, United States Department of Justice, of Washington, DC, and PAULA S. SMITH, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of Washington, DC.

PHILIP YALE SIMONS, Simons & Wiskin, of South Amboy, New Jersey, for amicus curiae. With him on the brief was JERRY P. WISKIN.

Before DYK, O'MALLEY, and WALLACH, Circuit Judges.

WALLACH, Circuit Judge.

Appellant Best Key Textiles Co., Ltd. ("Best Key") appeals the decision of the United States Court of International Trade ("CIT") denying its Motion for Judgment on the Agency Record. *Best Key Textiles Co. v. United States* (*Best Key II*), No. 13–00367, slip op. 14–22 (Ct. Int'l Trade Feb. 25, 2014) (Appellant's App. ("App.") 1–27). Because the CIT did not have jurisdiction over the case, this court vacates and remands with instructions to dismiss for lack of jurisdiction.

BACKGROUND

Best Key, a Hong Kong-based textile manufacturer, produces "Best Key Metalized Yarn" ("Best Key's yarn"), which is produced from "polyester chips melted into a slurry to which" metal nanopowders (usually zinc or aluminum) and titanium dioxide are added. *Id.* at 7. "The slurry is then 'fired' through a spinneret," forming monofilament yarns.[1] *Id.* The metal nanopowders "are permanently and inseparably combined with the polyester . . . at the moment of yarn formation." Appellant's Br. 4.

[1] "A 'monofilament' is a single-stranded polymer filament whose dimension is determined at the time of extrusion." Appellant's Br. 25–26.

On October 3, 2011, Appellant sought a pre-importation ruling from United States Customs and Border Protection ("Customs") pursuant to 19 C.F.R. § 177.2 (2011) concerning the proper tariff classification in the Harmonized Tariff Schedule of the United States ("HTSUS") of Best Key's yarn. With the request, Best Key included a laboratory report describing the yarn as having a fiber content of 100% polyester, with one type containing 0.7% metal by weight and a second type containing 0.74% metal by weight.

In Customs New York Ruling N187601 (Oct. 25, 2011)(App. 41–42) (the "Yarn Ruling"), Customs classified Best Key's yarn as metalized yarn of HTSUS 5605.00.90 (2011), dutiable at 13.2% ad valorum, based on Best Key's laboratory reports and samples of the yarn submitted to Customs. HTSUS 5605.00.90 covers: "Metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal: Other." HTSUS 5404 and 5405, referenced by HTSUS 5605.00.90, cover "synthetic and artificial monofilament [,respectively,] of 67 decitex[2] or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of [synthetic or artificial, respectively] textile materials of an apparent width not exceeding 5 mm." In the Yarn Ruling, Customs stated "[f]or tariff purposes, a yarn combined with metal in the form of powder is considered a metalized yarn." App. 41. While metalized yarns of heading 5605 carry a higher duty rate than non-metalized yarns, metalized yarns can be used to make apparel products that carry a much lower duty rate than garments made from non-metalized yarns.

On December 5, 2011, Best Key requested a Customs Ruling regarding the proper classification of a sample "Johnny Collar" men's knit pullover garment made of Best Key's yarn. Citing the Yarn Ruling, Appellant asserted the pullover was classifiable under HTSUS 6105.90.8030 as a men's shirt of other textile materials with a duty rate of 5.6% ad valorem, as opposed to HTSUS 6110.30.3053 for men's shirts made of polyester, which carries a duty rate of 32% ad valorem. Customs conducted its own laboratory report, finding trace amounts of metal in the shirt. Based on this small amount of metal and the sample's label that stated "100% polyester," Customs classified the sample as a pullover of man-made non-metalized fibers under HTSUS 6110.30.3053 in Customs New York Ruling N196161 (Apr. 13, 2012) ("the Johnny Collar Ruling") (App. 94–95).

Appellant requested a reconsideration of the Johnny Collar Ruling. In response, Customs Headquarters reviewed both the Yarn Ruling

[2] "Decitex refers to the articles' linear mass density, or fineness." *Best Key II*, at 7.

and the Johnny Collar Ruling, along with additional submissions from Best Key. On April 24, 2013, Customs published notices of proposed revocation of both rulings, providing for a thirty-day period for public comment. *Proposed Revocation of Ruling Letter & Proposed Revocation of Treatment Relating to the Tariff Classification of a "Johnny Collar" Pullover Garment*, 47 Cust. B. & Dec. No. 18, at 26 (Apr. 24, 2013) (App. 126–28); *Proposed Revocation of Ruling Letter & Proposed Revocation of Treatment Relating to the Tariff Classification of a Polyester Monofilament Yarn*, 47 Cust. B. & Dec. No. 18, at 33 (Apr. 24, 2013) (App. 129–31). Customs received comments from Best Key and one other commenter on the proposed Yarn Ruling Revocation, but received no comments on the proposed Johnny Collar Ruling Revocation.

Subsequently, pursuant to 19 U.S.C. § 1625(c) (2006), Customs revoked the Yarn Ruling, replacing it with Customs Headquarters Ruling H202560 (Sept. 17, 2013). *Revocation of Ruling Letter & Revocation of Treatment Relating to the Tariff Classification of a Polyester Mono-filament Yarn*, 47 Cust. B. & Dec. No. 41, at 20 (Oct. 2,2013) (App. 48–59) (the "Revocation"). In the Revocation, Customs reclassified Best Key's yarn as a polyester yarn (instead of a metalized yarn) under HTSUS 5402.47.90 with a duty rate of 8% ad valorum, which is lower than the 13.2% ad valorem duty rate that applies to HTSUS5605. *Id.* HTSUS 5402.47.90 covers "Synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 67 decitex: Other, of polyester: Other."

Customs also revoked the Johnny Collar Ruling because it conflicted with the Yarn Ruling and replaced it with Customs Headquarters Ruling H226262 (Sept. 17, 2013), which continued to classify the Johnny Collar pullover under HTSUS 6110.30.30 (men's shirts made of polyester). *Revocation of Ruling Letter & Revocation of Treatment Relating to the Tariff Classification of a "Johnny Collar" Pullover Garment*, 47 Cust. B. & Dec. No. 41, at 15 (Oct. 2, 2013) (App. 43–48).

Appellant challenged the Yarn Ruling Revocation, but not the revocation of the Johnny Collar Ruling, before the CIT, but the court dismissed the action for lack of subject matter jurisdiction. *Best Key Textiles Co. v. United States* (*Best Key I*), No. 13–00367, slip op. 13–148, at 1 (Ct. Int'l Trade Dec. 13, 2013) (Appellee's App. 81–88). The CIT subsequently granted Best Key's Motion for Reconsideration, and reversed its prior jurisdictional holding, finding jurisdiction existed under 28 U.S.C. § 1581(i)(4) (2012). *Best Key II*, at 2. On the merits, however, the CIT denied Best Key's Motion for Judgment on the Agency Record, thereby sustaining the Revocation. *Id.* at 27.

Best Key appeals. This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

The Government claims the CIT lacked jurisdiction over Best Key's claim, and therefore this action should be dismissed. The CIT's limited jurisdiction is articulated in 28 U.S.C. § 1581(a) through (i). While subsection (a) vests the CIT with "exclusive jurisdiction of any civil action commenced to contest the denial of a protest [by Customs]," subsections (b) through (h) delineate other specific grants of jurisdiction. Under § 1581(h), the CIT has

> exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h). In addition, an action under § 1581(h) may only be commenced "by the person who would have standing to bring a civil action under [§] 1581(a) . . . if he imported the goods involved and filed a protest which was denied." *Id.* § 2631(h). Accordingly, this court has articulated four requirements to invoke jurisdiction under § 1581(h):

> (1) judicial review must be sought *prior* to importation of goods;
>
> (2) review must be sought of a ruling, a refusal to issue a ruling or a refusal to change such ruling;
>
> (3) the ruling must relate to certain subject matter; and
>
> (4) irreparable harm must be shown unless judicial review is obtained *prior to* importation.

Am. Air Parcel Forwarding Co. v. United States, 718 F.2d 1546, 1551–52 (Fed. Cir. 1983).

The statute also contains a "residual jurisdiction" provision under § 1581(i), which provides:

> (i) In addition to the jurisdiction conferred upon the [CIT] by subsections (a)–(h) of this section. . . , the [CIT] shall have exclusive jurisdiction of any civil action commenced against the

> United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) *administration and enforcement* with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (emphasis added).

As this court has noted, "[w]hile the residual jurisdiction provision is a 'catch all provision,' '[a]n overly broad interpretation of this provision . . . would threaten to swallow the specific grants of jurisdiction contained within the other subsections and their corresponding requirements.'" *Chemsol, LLC v. United States*, 755 F.3d 1345, 1349 (Fed. Cir. 2014) (quoting *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325, 1329 (Fed. Cir. 2012)). For this reason, "this court has repeatedly held that subsection (i) 'may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.'" *Id.* (quoting *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012) (internal quotation marks omitted)). In other words, if a litigant has access to the CIT under subsections (a) through (h), "'it must avail itself of this avenue of approach by complying with all the relevant prerequisites thereto'" unless the remedy available under another subsection is "manifestly inadequate." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008) (quoting *Am. Air Parcel*, 718 F.2d at 1549).

In *Best Key I*, the CIT "conclude[d] there is no Article III case or controversy over this matter as contemplated under 28 U.S.C. § 1581(h), nor does jurisdiction alternatively lie in 28 U.S.C. § 1581(i)(4)." *Best Key I*, at 8. As to jurisdiction under § 1581(h), the CIT stated that Best Key satisfied requirements (1) and (2) for (h) jurisdiction, "but with regard to (3), [Best Key] conflates the Johnny Collar ruling with the Yarn Ruling when it avers, with respect to (4), that it suffered irreparable harm as a result of the Johnny Collar ruling by experiencing an immediate and negative impact upon its business." *Id.* at 4. The CIT explained, "[u]nder the current *status quo* resulting from the Revocation Ruling, if [Best Key] were to import the yarn into

the United States, the yarn would benefit from the lower duty rate resulting from the Revocation Ruling," and "[i]t is therefore plain that the importance to [Best Key] here is not the U.S. duty rate on the yarn, but the duty rate on garments made of it." *Id.* at 6. Therefore, the CIT concluded, Best Key "implies that an Article Ill 'case or controversy' exists over the classification of the yarn, but the harm that it pleads is not the type of cognizable injury that relief pursuant to [§] 1581(h) was intended to address." *Id.* ; *see also id.* at 5 (Best Key "contends that the Revocation Ruling, which resulted in a lower tariff for the yarn at issue in this action, has caused it harm because strangers to this action—garment manufacturers—may no longer purchase its yarn unless the garments they make from it can be imported under the 'favorable' duty rate accorded to importations of garments made of 'metalized' yarn by other strangers to this action—garment importers.").

As to jurisdiction under § 1581(i)(4), the residual jurisdiction section's "administration and enforcement" provision, the CIT first noted that "typically, 'if jurisdiction does not lie under § 1581(h), a plaintiff must import the merchandise in question, file a protest with Customs regarding the classification decision, and fully exhaust its administrative remedies.'" *Id.* at 7 (quoting *Connor v. United States,* 24 CIT 195, 200 (2000)). The CIT found Best Key failed to show that the "traditional approach" under § 1581(a) would provide a manifestly inadequate remedy, and that Best Key's actual injury amounts to garment makers not buying its yarn "because importers of those garments will not get a more favorable duty rate for items made of [Best Key's] yarn. But the duty rate charged to those importers is beyond any of [Best Key's] interests that the provisions of [§] 1581 are meant to protect." *Id.* at 8. Accordingly, the CIT concluded, "[t]he essence of the argument [Best Key] attempts to put forth amounts to a request for the protection of others' interests, namely those of importers of garments manufactured by purchasers of [Best Key's] yarn." *Id.* The court also found, "[e]ven if [Best Key] is protecting its own financial interests by extension, it has no authority or standing to assert the claims of those remote parties under [§] 1581(i)in its action here, as that statute [is] to be strictly construed." *Id.*

On rehearing, however, the CIT reversed its jurisdictional holding. In *Best Key II*, the CIT stated "it is highly questionable whether a Customs' ruling that lowers the rate of duty on a product the plaintiff has no expressed intention of importing can result in aggrievement or adverse effect to the plaintiff." *Best Key II*, at 2 (internal quotation marks and citation omitted). Nevertheless, the CIT concluded, without further explanation:

> While the court stands by its prior ruling in general, it is, nonetheless, [Best Key's] product that is the subject of the ruling at issue, and the court has undoubted exclusive jurisdiction over the general administration and enforcement of this type of matter in 28 U.S.C. § 1581(i)(4). The court will therefore *presume* Customs' ruling "reviewable," and the complaint's allegation of "aggrievement" sufficient to invoke jurisdiction under [§] 1581(i)(4).

Id. (citation omitted) (emphasis added). The CIT therefore proceeded to the merits under the *presumption* it had jurisdiction under § 1581(i)(4).

On appeal, the Government argues the CIT improperly proceeded under § 1581(i) and that its original jurisdictional holding in *Best Key I* was correct. In support, the Government notes "Best Key does not import its yarn and the Revocation Ruling actually lowered the duty rate on that product." Appellee's Br. 13. Therefore, "the true nature of Best Key's action is not the classification of the yarn in the Revocation Ruling but the classification of garments made of its yarn that would be imported into the United States by others." *Id.* In addition, the Government argues that another jurisdictional avenue exists under § 1581(a) for those injured by the Revocation, thereby rendering jurisdiction under the residual provision inappropriate. In particular, the Government points out "Best Key could import another Johnny Collar pullover made of its yarn, wait for the entry to be liquidated, protest the classification of the garment, and, if the protest is denied, bring a [§] 1581(a) action in the [CIT] to obtain the classification it seeks." *Id.* at 14 n.5. Using this approach, Best Key could even seek accelerated disposition of its protest under § 1515(b). *Id.* Further, the Government argues, § 1581(i) "was not intended to create new causes of action, nor was it meant to supersede more specific jurisdictional provisions . . . , [and] should not be used to hear issues such as a business harm occurring exclusively overseas which flows from a Customs decision." *Id.* at 14 (citations omitted).

In response, Best Key says the protest remedy under § 1581(a) is neither available nor adequate. As an initial matter, Best Key concedes it "does not import its yarn and the Revocation lowered the duty thereon, meaning a protest remedy involving the yarn is not available." Reply Br. 4 (citation omitted). At the same time, Best Key continues to argue the remedy it seeks is a reversal of the Revocation of the Yarn Ruling, even though this would result in a higher duty rate on Best Key's yarn, because the Revocation "caused Best Key's

customers to cancel orders *en masse*." *Id.* Thus, to Best Key, "a § 1581(a) action that does not directly challenge the Revocation is 'manifestly inadequate' to vindicate the status that Best Key enjoyed as a ruling holder." *Id.* at 7. Allowing a challenge to the Revocation is the only way, according to Best Key, to remedy the harm it has suffered: "harm via curtailment of *contemplated* orders for [Best Key's] yarn." *Id.* (internal quotation marks and citation omitted) (emphasis added).

The CIT erred in reversing itself and "presum[ing]" jurisdiction under § 1581(i)(4). *See Best Key II*, at 2. The CIT itself did not appear fully convinced jurisdiction was proper because Best Key is attempting to litigate on behalf of its customers who might be injured by the revocation of the Johnny Collar Ruling in an action challenging the Revocation of the Yarn Ruling. Best Key acknowledges the remedy it seeks is a reversal of the Yarn Ruling Revocation, which resulted in a more favorable duty rate for Best Key. Indeed, Best Key concedes it is attempting to vindicate its "entitlement to maintenance of the Yarn Ruling, which was revoked." Reply Br. 5. However, the harm caused by the Yarn Ruling Revocation flowed to potential customers of Best Key who produce Johnny Collar pullovers, which *might* be subject to a lower duty rate if the Yarn Ruling had remained in effect. It is worth noting, however, that Customs classified the Johnny Collar pullover under HTSUS 6110.30.30 for men's shirts made of polyester in both the Johnny Collar Ruling and the subsequent revocation of that ruling.

The proper "avenue of approach" to redress this harm is a challenge under § 1581(a). *See Hartford Fire,* 544 F.3d at 1292. That is, any producer who imports items made from Best Key's yarn and believes the merchandise should be subject to a lower duty rate should protest the classification and challenge any denial of its protest before the CIT. The present action, where Best Key seeks to undo an administrative decision made in its favor so that its customers might benefit from a lower duty rate, contemplates the creation of a new cause of action under § 1581(i), but § 1581(i) "was not intended to create new causes of action nor was it meant to supersede more specific jurisdictional provisions." *Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States*, 717 F. Supp. 847, 849 (Ct. Int'l Trade 1989) (internal quotation marks omitted), *aff'd*, 903 F.2d 1555 (Fed. Cir. 1990) (quoting H. Rep. No. 1235, 96th Cong., 2d Sess. 47, *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759).

Here, Best Key sought to have the CIT reverse the Revocation, favorable to Best Key, the effect of which would be to increase Best Key's own duty rate while benefiting manufacturers of products made

from Best Key's yarn. The statute does not provide jurisdiction over such requests. Indeed, as the CIT observed, it was "unaware of any other suit brought against the government on the claim that the plaintiff or its property should be assessed a higher rate of tax or duty," *Best Key II*, at 2 n.1, and Best Key points to none.

Accordingly, the CIT erred in exercising jurisdiction over this case and should have upheld its initial ruling that jurisdiction did not exist over this action.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of International Trade is

VACATED AND REMANDED

DONGTAI PEAK HONEY INDUSTRY CO., LTD., Plaintiff-Appellant, v. UNITED STATES OF AMERICA, AMERICAN HONEY PRODUCERS ASSOCIATION, and SIOUX HONEY ASSOCIATION, Defendants-Appellees.

Appeal No. 2014–1479

Appeal from the United States Court of International Trade in No. 1:12-cv-00411-NT, Senior Judge Nicholas Tsoucalas.

Dated: January 30, 2015

YINGCHAO XIAO, Lee & Xiao, of San Marino, California, for plaintiff-appellant. With her on the brief was DOUGLAS CAMPAU.

JANE C. DEMPSEY, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for defendant-appellee United States. With her on the brief were STUART F. DELERY, Assistant Attorney General, JEANNE E. DAVIDSON, Director, and REGINALD T. BLADES, JR., Assistant Director.

MICHAEL J. COURSEY, Kelley Drye & Warren LLP, of Washington, DC, for defendants-appellees American Honey Producers Association and the Sioux Honey Association. With him on the brief were R. ALAN LUBERDA and BENJAMIN BLASE CARYL.

Before WALLACH, TARANTO, and CHEN, Circuit Judges.

WALLACH, Circuit Judge.

Appellant Dongtai Peak Honey Industry Co., Ltd. ("Dongtai Peak") appeals the decision of the United States Court of International Trade ("CIT") denying its Motion for Judgment on the Agency Record. *See Dongtai Peak Honey Indus. Co. v. United States*, 971 F. Supp. 2d 1234 (Ct. Int'l Trade 2014). Because the United States Department of Commerce ("Commerce") properly exercised its discretion in denying Dongtai Peak's untimely filings, and because Commerce's decisions to treat Dongtai Peakas part of the China-wide entity and to impose a dumping margin based on adverse facts available were supported by substantial evidence and were in accordance with law, this court affirms.

BACKGROUND

I. Facts

In 2001, Commerce imposed an antidumping duty order on honey imported from the People's Republic of China ("China"). *Honey From the People's Republic of China*, 66 Fed. Reg. 63,670 (Dep't of Commerce Dec. 10, 2001) (notice of amended final determination of sales at less than fair value and antidumping duty order) (the "Order"). In January 2012, Commerce initiated the tenth administrative review of the Order for the period of review December 1, 2010, through Novem-

ber 30, 2011. *Initiation of Antidumping & Countervailing Duty Administrative Reviews & Requests for Revocation in Part,* 77 Fed. Reg. 4759 (Dep't of Commerce Jan. 31, 2012) ("*Initiation*"). Dongtai Peak was named a respondent in this review. *Id.* at 4761.

As part of the review, on March 2, 2012, Commerce issued a non-market economy questionnaire (the "Questionnaire") to Dongtai Peak, which included Section A (General Information), with a deadline of March 23, 2012, and Sections C (Sales to the United States) and D (Factors of Production), with a deadline of April 8, 2012. Appellant timely filed a response to Section A of the Questionnaire, and filed its responses to Sections C and D after receiving a one-day extension of the deadline from Commerce. Because Appellant's extension request was received less than six minutes before the submission deadline for Sections C and D, in granting the request Commerce stated: "To ensure that [Commerce] is fully able to consider requests of this nature, we advise Dongtai Peak to plan accordingly and file any future extension requests as soon as it suspects additional time may be necessary." J.A. 157.

On April 3, 2012, Commerce issued a Supplemental Section A Questionnaire (the "Supplemental Questionnaire") to address certain deficiencies in Dongtai Peak's original Section A response. The deadline to respond to the Supplemental Questionnaire was "COB [Close of Business], April 17, 2012." J.A. 158. However, Dongtai Peak failed to submit its response by this deadline. Instead, on April 19, 2012, Dongtai Peak filed an untimely request (the "April 19 Letter") to extend the deadline to April 27, 2012, claiming good cause for an extension existed because of the overlap with the deadline to file its responses to Sections C and D, a national holiday, and various issues with its translator, its United States-based attorneys, and its computers. In response, the American Honey Producers Association and Sioux Honey Association ("Petitioners") submitted an objection to the untimely extension request. On April 24, 2012, Appellant submitted a response to the objection, restating its claim that good cause existed for the extension. Then, on April 27,2012, Dongtai Peak submitted a second request for an additional one-day extension of the deadline (the "April 27 Letter"). Following the close of business on April 27, 2012, Appellant submitted its response to the Supplemental Questionnaire (the "Supplemental Response") without Commerce having granted the extension requests in the April 19 or April 27 Letters.

On May 22, 2012, Commerce denied Dongtai Peak's extension requests because "good cause [did] not exist . . .to extend retroactively its deadline." J.A. 190. Commerce noted although Appellant explained why it could not timely file its Supplemental Response, it

"provided no explanation as to why it was unable to file its extension request in a timely manner prior to the deadline for its questionnaire response." J.A. 190. It also noted Dongtai Peak had "previously been cautioned with respect to late extension requests when it requested an extension of the deadline to file its Section C and D questionnaire responses five minutes before the deadline for that questionnaire response." J.A. 189. Commerce therefore removed Appellant's extension requests and its Supplemental Response from the official record.

Dongtai Peak requested reconsideration of this determination, but Commerce upheld its decision to deny the extension requests and to remove the requests and the Supplemental Response from the record in its *Preliminary Results*. *Honey From the People's Republic of China*, 77 Fed. Reg. 46,699, 46,701–02 (Dep't of Commerce Aug. 6, 2012) ("*Preliminary Results*"). In doing so, Commerce again noted the April 19 Letter did not address Dongtai Peak's inability to file an extension request by the deadline, and stated the deadline was significant because Commerce had found Appellant's United States sales to be non-bona fide in prior reviews, and therefore needed time for a full analysis of the information sought in the Supplemental Questionnaire. *Id.* Accordingly, in the *Preliminary Results*, Commerce determined that without the Supplemental Response, the record lacked sufficient information to calculate a separate rate for Dongtai Peak, and therefore the company would be considered part of the China-wide entity. *Id.* at 46,702. In addition, Commerce determined the China-wide entity did not cooperate to the best of its ability during the review, and therefore Commerce relied entirely on adverse facts available ("AFA") to determine the dumping margin for the China-wide entity. *Id.* Commerce selected a rate of $2.63 per kilogram based on the rate calculated for AnhuiNative Produce Import & Export Corporation ("AnhuiNative") during the sixth administrative review, which had also been assigned to the China-wide entity in the sixth and seventh administrative reviews. *Id.* at 46,703.

On November 26, 2012, the *Final Results* of the review were issued, upholding the *Preliminary Results* in their entirety. *Administrative Review of Honey From the People's Republic of China*, 77 Fed. Reg. 70,417 (Dep't of Commerce Nov. 26, 2012) (final results of antidumping duty administrative review) ("*Final Results*"), and accompanying Issues & Decision Memorandum (Nov. 19, 2012) (J.A. 137–56) ("*Issues & Dec. Mem.*").

II. Proceedings

In December 2012, Dongtai Peak filed an action in the CIT chal-

lenging several aspects of the *Final Results*, including: (1) the denial of its extension requests and the removal of those requests and the Supplemental Response from the record; (2) Commerce's decision to consider Dongtai Peak part of the China-wide entity; (3) Commerce's use of AFA to calculate the dumping margin for the China-wide rate; and (4) the $2.63 per kilogram AFA rate itself. Dongtai Peak moved for Judgment on the Agency Record, which the CIT denied on March 21, 2014.

In response to Dongtai Peak's argument that Commerce improperly rejected its extension requests and removed the filings from the record, the CIT found Commerce's determinations were consistent with its regulations and within its discretion. In addition, the CIT found "Commerce reasonably determined that [Dongtai] Peak's extension requests were unsupported by good cause" because Commerce found (1) Appellant "failed to comply with the regulations by filing its extension requests after the deadline expired"; (2) "the facts of the instant case did not warrant granting [Dongtai] Peak's untimely requests"; and (3) Appellant "was aware of the deadline in question and its particular importance." *Dongtai Peak*, 971 F. Supp. 2d at 1240 (citing *Issues & Dec. Mem.* at 5– 6). The CIT also found Commerce's denial of the extension requests did not violate Appellant's "statutory rights" because the company had notice of the deadline and an opportunity to comply, but simply failed to file a timely extension request. *Id.* at 1240–41.

As to Dongtai Peak's argument that Commerce improperly denied it separate rate status, the CIT found Commerce reasonably concluded that without the Supplemental Response, "[t]he record lacked certain information regarding [Dongtai] Peak's separate rate eligibility because [it] failed to timely file its extension requests and failed to show good cause to extend the deadline." *Id.* at 1242. As to Appellant's initial Section A response that remained on the record, the CIT found the company did not identify any evidence in that response demonstrating the lack of government control as required for separate rate status. *Id.* Although there were translations of Chinese law and information concerning Dongtai Peak's ownership and corporate structure in the initial Section A response, the CIT found this did not render Commerce's decisions unsupported by substantial evidence. *Id.* Thus, the CIT held Commerce reasonably included Dongtai Peak in the China-wide entity.

Regarding Dongtai Peak's challenge to Commerce's use of AFA in calculating the China-wide rate, the CIT found Commerce's determi-

nation was reasonable and consistent with law. *Id.* at 1244. In particular, the CIT observed "Commerce did not simply equate [Dongtai] Peak's untimely submission with a failure to cooperate," but "considered the circumstances of [Dongtai] Peak's untimely submission." *Id.* As to the actual rate calculated using AFA, the CIT noted Dongtai Peak provided no evidence of market fluctuations or other changes in the Chinese honey industry since the 2006–2007 review, and therefore its "bare assertion that such changes occurred is insufficient to undermine Commerce's selection of [Anhui Native's] rate to determine the margin for the [China] wide entity." *Id.* at 1244. The CIT therefore concluded Commerce's selection of the rate was supported by substantial evidence.

Dongtai Peak filed a timely appeal and this court has jurisdiction under 28 U.S.C. § 1295(a)(5) (2012).

DISCUSSION

I. Standard of Review

This court reviews decisions of the CIT de novo, "apply[ing] anew the same standard used by the [CIT]." *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008). Under that standard, this court must uphold Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). "Although such review amounts to repeating the work of the [CIT], we have noted that 'this court will not ignore the informed opinion of the [CIT].'" *Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348, 1356 (Fed. Cir. 2010) (quoting *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994)); *see also Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) ("When performing a substantial evidence review, . . . we give great weight to the informed opinion of the [CIT]. Indeed, it is nearly always the starting point of our analysis.") (internal quotation marks and citation omitted).

Substantial evidence is defined as "more than a mere scintilla," as well as evidence that a "reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). This court's review is limited to the record before Commerce in the particular review proceeding at issue and includes all evidence that supports and detracts from Commerce's conclusion. *Sango Int'l L.P. v. United States*, 567 F.3d 1356, 1362 (Fed. Cir. 2009). An agency finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

II. Legal Framework

The antidumping statute authorizes Commerce to impose duties on imported goods that are sold in the United States at less-than-fair value if it is determined that a domestic industry is "materially injured, or threated with material injury." *See* 19 U.S.C. § 1673. Once an antidumping duty order covering certain goods is in place, "Commerce periodically reviews and reassesses antidumping duties" during administrative reviews. *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1321 (Fed. Cir. 2010) (citing 19 U.S.C. §§ 1673, 1675(a)).

In calculating antidumping margins, Commerce generally determines individual dumping margins (separate rates) for each known exporter or producer. 19 U.S.C. § 1677f-1(c)(1). If it is not practicable to calculate individual dumping margins for every exporter or producer, Commerce may examine a reasonable number of respondents (mandatory respondents), such as Dongtai Peak. *See id.* § 1677f-1(c)(2). In antidumping duty proceedings involving merchandise from a non-market economy,[1] however, Commerce presumes that all respondents are government-controlled and therefore subject to a single country-wide rate. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). Respondents may rebut this presumption and become eligible for a separate rate by establishing the absence of both de jure and de facto government control. *Id.* If a respondent fails to establish its independence, Commerce relies upon the presumption of government control and applies the country-wide rate to that respondent. *Transcom, Inc. v. United States*, 182 F.3d 876, 882 (Fed. Cir. 1999).

III. Commerce Properly Exercised Its Discretion in Rejecting Appellant's Extension Requests and Supplemental Response

On appeal, Dongtai Peak repeats the arguments it raised before the CIT. First, Appellant argues Commerce's rejection of and removal from the record of its extension requests and the Supplemental Response was improper and not in accordance with law because Dongtai

[1] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 318 F. Supp. 2d 1339, 1341 (Ct. Int'l Trade 2004).

Peak established good cause to extend the deadline. In particular, Appellant claims good cause was shown in the April 19 Letter which described Dongtai Peak's

> 1) difficulties encountered in overseas communication between rurally-located Appellant and its US-based counsel; 2) difficulties encountered in communication between Appellant and its translator; 3) difficulties encountered as a consequence of a 4-day-long Chinese national holiday; 4) debilitating computer system malfunctions and related time-consuming repair efforts; and 5) the unexpected burden to Appellant['s] personnel of having to prepare responses to [the Supplemental Questionnaire] and its Section C and D questionnaires over an overlapping time-frame.

Appellant's Br. 15. In addition, in contrast to Dongtai Peak's purported showing of good cause, Appellant contends Commerce "articulated no basis for [its] conclusion, such as exactly how or why the explanation provided in the [April 19 Letter] does not constitute good cause," and therefore its determination is "not supported by substantial evidence, and it remains vague as to exactly what Commerce means by good cause." *Id.* 14–15.

Relying on other administrative proceedings, Dongtai Peak argues "Commerce has a long practice of keeping [extension] requests on the case record, and approving them, even when they are submitted subsequent to the applicable time limit," and "has articulated no legally valid reason for its departure from this practice in the underlying review proceeding." *Id.* at 10–11. In addition, Appellant asserts that while Commerce claimed it needed ime to fully consider extension requests, "there were no pressing deadlines in the present case that would have made acceptance and granting of the extension request at all rushed or difficult." *Id.* at 6, 13. To Appellant, this case "involve[s] a small amount of information (*a mere supplemental questionnaire* dealing with a single section)," and when Appellant submitted its Supplemental Response, "there were many months yet before Commerce's final results were due. That is, there was ample time for Commerce to complete a very thorough and comprehensive analysis." *Id.* at 24 (emphasis added). Finally, Dongtai Peak argues "fairness and accuracy also require that Commerce accept the late submission" because "Commerce's refusal to extend the deadline unfairly prejudiced Appellant's right to receive its own calculated rate using its own information." *Id.* at 6, 25–26.

Under 19 C.F.R. § 351.302(b) (2012),[2] Commerce "may, for good cause, extend any time limit established by this part." A party may request an extension "[*b*]*efore the applicable time limit . . . expires*," and such a "request must be in writing, . . . and state the reasons for the request." *Id.* § 351.302(c) (emphasis added). If Commerce refuses to extend the time limit, it "will not consider or retain in the official record of the proceeding . . . [u]ntimely filed factual information, written argument, or other material that the Secretary rejects." *Id.* § 351.302(d)(1)(i).

The United States Supreme Court has clarified that, "[a]bsent constitutional constraints or extremely compelling circumstances[,] the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (internal quotation marks and citation omitted). "Accordingly, absent such constraints or circumstances, courts will defer to the judgment of an agency regarding the development of the agency record." *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012). In addition, "[i]n order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, it must be permitted to enforce the time frame provided in its regulations." *Yantai Timken Co. v. United States*, 521 F. Supp. 2d 1356, 1371 (Ct. Int'l Trade 2007).

Here, Commerce properly exercised its discretion in rejecting Dongtai Peak's extension requests and Supplemental Responses because (1) the extension requests were submitted after the established deadline in violation of 19 C.F.R. § 351.302(c), and (2) Appellant failed to show "good cause" for an extension as required by § 351.302(b). As to its good cause arguments, Commerce properly found Dongtai Peak's April 19 Letter describing its difficulties in completing the Supplemental Response did not demonstrate why the company was unable to file timely its extension request. Indeed, all of the causes of delay noted in the April 19 Letter were known to Appellant prior to the April 17th deadline, and did not prevent the company from filing an extension request before that date. *See Issues & Dec. Mem.* at 6 ("[N]one of these reasons explained why [Dongtai Peak] was unable to file the extension request before the existing April 17, 2012, deadline and none of these reasons constitute 'good cause' to grant a late-filed extension request, especially in the context of an administrative re-

[2] In September 2013, Commerce amended 19 C.F.R. § 351.302, effective October 21, 2013. *Extension of Time Limits*, 78 Fed. Reg. 57,790 (Dep't of Commerce Sept. 20, 2013) (final rule). However, the language quoted herein reflects the regulations in effect during the underlying review.

view it requested itself."). Indeed, the record shows the company was closed for the Chinese holiday from April 5 through 8; the computer difficulties occurred sometime between April 1 and 4; and the deadline for the Sections C and D responses was April 9. J.A. 510, 288–92.

Thus, Commerce reasonably determined Dongtai Peak was entirely capable of at least submitting an extension request on time, but simply failed to do so; therefore, good cause did not exist to retroactively extend the deadline. *Issues & Dec. Mem.* at 6; *see* 19 C.F.R. § 351.302(b), (c). Having properly denied the extension requests, Commerce also reasonably determined the Supplemental Response was untimely and removed it from the record pursuant to 19 C.F.R. § 351.302(d).

As to Dongtai Peak's claim that Commerce failed to identify why the April 19 Letter did not establish good cause, Appellant misunderstands its obligation to submit a written extension request before the time limit specified by Commerce and to "state the reasons for the request." *Id.* § 351.302(c). That is, Commerce was not required to demonstrate good cause for rejecting Dongtai Peak's untimely submissions. As the Government notes, "[i]t is not for Dongtai Peak to establish Commerce's deadlines or to dictate to Commerce whether and when Commerce actually needs the requested information." United States' Br. 23; *see PSC VSMPO*, 688 F.3d at 760–61 (It is fully within Commerce's discretion to "set and enforce deadlines" and this court "cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered.").

Appellant's argument regarding Commerce's "long practice" of approving untimely extension requests is equally unpersuasive. As noted, Commerce may grant extension requests if it determines the extension request provides good cause for extending the deadline. 19 C.F.R. § 351.302(b). In the various administrative reviews cited by Appellant, Commerce found good cause was shown and therefore exercised its discretion in granting the untimely extension requests. Here, by contrast, Commerce did not find good cause. In addition, Dongtai Peak's argument ignores the fact that Commerce also routinely *rejects* untimely-filed submissions. In this case, moreover, Commerce explicitly cautioned Dongtai Peak on several occasions against making untimely extension requests. *See, e.g.*, J.A. 157 ("To ensure that [Commerce] is fully able to consider requests of this nature, we advise Dongtai Peak to plan accordingly and file any future extension requests as soon as it suspects additional time may be necessary.").

As to Dongtai Peak's presumption that Commerce had adequate time to process this review, Commerce should not be burdened by

requiring acceptance of untimely filings closer to the final deadline for the administrative review. While Appellant claims this case involves "a mere supplemental questionnaire" that Commerce had "ample time" to review, Appellant's Br. 24, the Supplemental Questionnaire is actually comprised of nine pages of questions regarding Dongtai Peak's management, shareholders, accounting practices, affiliations, United States sales, domestic sales, and merchandise, and was due less than four months before the deadline for Commerce to issue the *Preliminary Results*, J.A. 158–77. Furthermore, as Commerce specifically noted, the deadlines in this case were important because in two prior reviews Commerce found Dongtai Peak's United States sales to be not bona fide, a determination that requires careful consideration of the totality of circumstances. *See Issues & Dec. Mem.* at 5. Thus, the Supplemental Questionnaire was intended to elicit information "regarding [Dongtai Peak's] reported quantity and value, its separate rate status, structure and affiliations, sales process, accounting and financial practices; and merchandising," information which "has proven vital to [Commerce's] prior non-bona fide analyses." *Id.* Commerce fully explained its need for a "significant amount of time and effort to gather the necessary information, consider the facts of the record, and provide interested parties with an appropriate period for comments and rebuttal comments." *Id.* at 13.

As to Dongtai Peak's fairness and accuracy argument, this court has made clear Commerce's rejection of untimely-filed factual information does not violate a respondent's due process rights when the respondent had notice of the deadline and an opportunity to reply. *See PSC VSMPO*, 688 F.3d at 761–62. Here, the record shows Dongtai Peak was afforded both notice and a meaningful opportunity to be heard. In particular, as Commerce noted, Appellant "was well aware of the established deadlines in this case"; Commerce "advised [Dongtai] Peak of the importance of submitting its documents in a timely manner"; and Dongtai Peak "was aware of the consequences of its not doing so." *Issues & Dec. Mem.* at 11 (citations omitted).

Accordingly, because Dongtai Peak failed to establish good cause with respect to its failure to submit its extension requests in a timely manner, Commerce reasonably exercised its discretion in rejecting the requests and inenforcing the applicable deadline.

IV. Commerce's Decision to Deny Appellant Separate Rate Status Was Supported by Substantial Evidence and Was in Accordance with Law

Next, Dongtai Peak argues Commerce erred in denying it separate rate status because "[t]he record contained substantial and compel-

ling evidence indicating that [Appellant] is eligible for a separate rate." Appellant's Br. 28. Specifically, Appellant claims the initial Section A Questionnaire "included no less than ten pages of questions, including extensive questions specifically addressing separate rate eligibility," and Dongtai Peak "provided extensive narrative responses to these questions, as well as all required supporting documentation." *Id.* at 29. In addition, Appellant claims, there was no record evidence that its export activities were subject to government control, so Commerce's conclusion that Appellant was not entitled to separate rate status was not based on substantial evidence. Dongtai Peak also argues the Supplemental Questionnaire "did not directly address government control at all, but merely included a handful of questions—in what Commerce labeled as the 'Separate Rates' section of its supplemental questionnaire—having to do with prior work experience and responsibilities of Appellant's management and ownership." *Id.* at 30.

As noted, in antidumping proceedings involving merchandise from a non-market economy, Commerce presumes all respondents are government-controlled and therefore subject to the country-wide rate. *See Sigma*, 117 F.3d at 1405. Respondents may rebut this presumption and establish eligibility for a separate rate through evidence of the absence of both de jure and de facto government control. *Id.* If a respondent fails to do so, however, Commerce may rely upon the presumption of government control and apply the country-wide rate to that respondent. *Transcom*, 182 F.3d at 882.

Here, substantial evidence supports Commerce's determination that Dongtai Peak failed to demonstrate the absence of de facto and de jure government control, as required for separate-rate status, and therefore that the company is part of the China-wide entity. Contrary to Dongtai Peak's contention, the company's initial Section A response was insufficient to establish its separate rate eligibility. Without a timely-filed Supplemental Response, Commerce did not have information regarding Dongtai Peak's "shareholders, management, accounting practices, corporate structure, and affiliations," and information addressing whether "several organizations to which [Dongtai] Peak belonged were state-sponsored, controlled [Dongtai] Peak's business operations or coordinated [Dongtai] Peak's export activities." *Issues & Dec. Mem.* at 12. Furthermore, Dongtai Peak does not identify any evidence in its initial Section A response that demonstrates lack of government control. As the CIT properly found, while the initial Section A response provided "some evidence of its eligibility for a separate rate," it was "insufficient to render Commerce's deci-

sion unsupported by substantial evidence." *Dongtai Peak*, 971 F. Supp. 2d at 1242.

As to Dongtai Peak's contention that there was no record evidence of government control, this argument ignores that under the law for non-market economy countries, all respondents are *presumed* to be subject to governmental control unless they meet the burden of proving otherwise. *See Sigma*, 117 F.3d at 1405. Further, while Appellant claims the Supplemental Questionnaire did not request any information that would have demonstrated Dongtai Peak's eligibility for a separate rate, the record shows the Supplemental Questionnaire contains a "Separate Rates" section requesting specific information regarding Dongtai Peak's shareholders, management, and affiliation with other entities within the Chinese honey industry, as well as information related to quantity and value, structure, sales process, accounting and financial practices, and merchandising. J.A. 158–77. Accordingly, this court agrees with the CIT that "[b]ecause [Dongtai] Peak failed to file either its [Supplemental Response] with this information or an extension request before the deadline, Commerce reasonably concluded that Peak failed to demonstrate the absence of government control." *Dongtai Peak*, 971 F. Supp. 2d at 1243.

V. Commerce's Application of AFA and Its Selection of an AFA Rate Were Supported by Substantial Evidence

Finally, Dongtai Peak argues Commerce's application of AFA was improper because Commerce had no basis to apply AFA aside from the late filing of the Supplemental Response. Appellant's Br. 32 ("[F]rom its observation that it rejected Appellant's submission as untimely, Commerce jumped to the conclusion that Appellant 'did not cooperate to the best of its ability.'" (citation omitted)). That is, to Appellant, "there is no meaningful evidence on the record indicating that Appellant did not cooperate to the best of its ability." *Id.* at 33. At center, Dongtai Peak contends

> Commerce is throwing out the entire case record, terminating the entire review proceeding, and implementing maximum punitive and penalizing measures (via the application of full [AFA]) simply because Appellant was two days late requesting a deadline extension for a mere supplemental questionnaire dealing with a single section (section A)—a supplemental questionnaire that Appellant did ultimately complete and submit to the record. This is unfair and out of balance, in violation of fundamental fairness principles of antidumping law.

Id. at 27.

As to the AFA rate Commerce selected for the China-wide entity, as noted, Commerce used the calculated rate for Anhui Native from the 2006–2007 administrative review. Appellant argues, "[g]iven fluctuations in sales prices, production and transportation costs, [and] market conditions, . . . it was unreasonable for Commerce to rely upon such an old rate, and to assume, without the least investigation or corroboration, that such a rate was reliable, relevant, or at all accurate." *Id.* at 36. Dongtai Peak further contends the AFA rate is not based on its own sales and production data for the current period of review, therefore violating the requirement that Commerce calculate the most accurate dumping rates possible. *Id.*

During its periodic administrative reviews, Commerce requests information from respondents and if a respondent "significantly impedes a proceeding," Commerce is permitted to use "facts otherwise available" to determine an antidumping duty rate. 19 U.S.C. § 1677e(a)(2)(C). If Commerce further finds a respondent has "failed to cooperate by not acting to the best of its ability to comply with a 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" (i.e., it may apply AFA). *Id.* § 1677e(b). "[T]he statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (citation omitted).

In selecting an AFA rate, Commerce may use information from the petition, investigation, prior administrative reviews, or "any other information placed on the record." 19 U.S.C. § 1677e(b); *see Gallant Ocean*, 602 F.3d at 1323 ("[I]n the case of uncooperative respondents," Commerce has discretion to "select from a list of secondary sources as a basis for its adverse inferences."); *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). However, when Commerce "relies on secondary information rather than on information obtained in the course of an investigation or review," it "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). To corroborate secondary information, Commerce must find the information has "probative value," *KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010), by demonstrating the rate is both reliable and relevant, *Gallant Ocean*, 602 F.3d at 1323–24.

Here, in the Supplemental Questionnaire, Commerce warned that "failure to properly request extensions for all or part of a questionnaire response may result in the application of partial or total facts

available, . . . which may include adverse inferences [(i.e., AFA)]." J.A. 159. Therefore, Commerce found Dongtai Peak was "fully aware of the established deadlines in this case, advised of the importance of meeting deadlines and the possible consequences should it not meet those deadlines." *Issues & Dec. Mem.* at 15. In contrast to Appellant's argument, Commerce did not simply base its "failure to cooperate" conclusion on the untimely filings; rather, the record indicates Commerce considered the circumstances of Dongtai Peak's untimely submission and found the reasons provided (i.e., computer failure, communication problems, translation problems, overlapping deadlines, and a national holiday) did not prevent Dongtai Peak from timely filing an extension request. *Id.* at 15–16. Thus, based on the record, Commerce reasonably concluded Appellant "placed itself in a position in which it could not comply with the deadline." *Id.* at 16.

As this court has noted, "[c]ompliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth *its maximum effort* to provide Commerce with full and complete answers to all inquiries," and "[w]hile the standard does not require perfection and recognizes that mistakes sometimes occur, it *does not condone inattentiveness, carelessness,* or inadequate record keeping." *Nippon Steel*, 337 F.3d at 1382 (emphases added). Because Dongtai Peak was aware of the deadline and had the opportunity to file an extension request prior to its expiration, its failure to do so indicates an inattentiveness or carelessness with regard to its obligations. This warranted application of AFA.

As to the AFA rate selected by Commerce for the China-wide entity, Commerce properly corroborated the rate by demonstrating why it was reliable and relevant. Specifically, the selected rate was reliable because it was calculated using verified sales and cost data for Anhui Native from a prior administrative review, and therefore "reflect[ed] the commercial reality of another respondent in the same industry" as Dongtai Peak. *Issues & Dec. Mem.* at 18; *see Gallant Ocean*, 602 F.3d at 1324 (To be reliable, "Commerce must select secondary information that has some grounding in commercial reality."). Furthermore, this court has clarified that when Commerce chooses a calculated dumping margin from a prior segment of the proceeding as the AFA rate, that rate is reliable. *See KYD*, 607 F.3d at 766–77 (Commerce's selection of the highest prior margin as the AFA rate reflects "a common sense inference that the highest prior margin is the most probative evidence of *current* margins because, if it were not so, the [responding party] knowing of the rule, would have produced current information showing the margin to be less."). Commerce further determined the rate was relevant because it was applied to the China-

wide entity in the sixth and seventh administrative reviews. *See Issues & Dec. Mem.* at 18–19.

In addition, Dongtai Peak has not identified any record evidence indicating this rate lacked probative value, including any evidence regarding fluctuations in sales prices, production and transportation costs, or market conditions. To the extent Appellant claims Commerce erred in choosing an AFA rate that was not based on Dongtai Peak's own sales and production data for the current period of review, this argument is meritless. Because Appellant was part of the China-wide entity, Commerce was not required to calculate a separate AFA rate for Dongtai Peak and it was unnecessary for Commerce to corroborate the AFA rate for the China-wide entity using Dongtai Peak's own data. Substantial evidence supports Commerce's use of AFA in this case andits selection of an AFA rate for the China-wide entity.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of International Trade is

AFFIRMED