U.S. Court of International Trade

Slip Op. 18–154

U.S. Auto Parts Network, Inc., Plaintiff, v. United States, United States Department of Homeland Security, Secretary Kirstjen Nielsen, and Chief Frederick J. Eisler, III, Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00068

[Granting Defendants' motion to dismiss and denying Plaintiff's motion for default judgment.]

Dated: November 8, 2018

Barry F. Irwin, *Christopher D. Eggert*, *Iftekhar A. Zaim*, and *Reid P. Huefner*, Irwin IP LLC, of Chicago, IL, appeared for Plaintiff U.S. Auto Parts Network, Inc.

Beverly A. Farrell and *Monica P. Triana*, Trial Attorneys, and *Amy M. Rubin*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., appeared for Defendants United States, U.S. Department of Homeland Security, Secretary Kirstjen Nielsen, and Chief Frederick J. Eisler, III. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director.

OPINION

Choe-Groves, Judge:

Plaintiff U.S. Auto Parts Network, Inc. ("U.S. Auto") imports vehicle repair parts. U.S. Auto initiated this action to contest the imposition of an enhanced single entry bond requirement assessed at three times the amount of the entire shipment value on each container of merchandise imported by U.S. Auto ("SEB Requirement") at the Port of Norfolk, which U.S. Customs and Border Protection ("Customs") mandated in response to Plaintiff's continued importation of goods alleged to infringe trademarks in violation of 15 U.S.C. § 1124 (2012) and 19 U.S.C. § 1526(e). The SEB Requirement, enforced against each of U.S. Auto's shipments, resulted in a single entry bond totaling approximately $9 million at the time of imposition. This was in contrast to the previous continuous bond of $200,000 for all of U.S. Auto's annual shipments. The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(4).

PROCEDURAL HISTORY

The court presumes familiarity with the facts of this case. *See U.S. Auto Parts Network, Inc. v. United States*, 42 CIT __, 307 F. Supp. 3d 1373 (2018) ("*U.S. Auto I*") (granting in part temporary restraining

order); *U.S. Auto Parts Network, Inc. v. United States*, 42 CIT __, 319 F. Supp. 3d 1303 (2018) ("*U.S. Auto II*") (granting preliminary injunction). The court issued a preliminary injunction on May 25, 2018, which enjoined Defendants' enforcement of the SEB Requirement, required Defendants to process all of Plaintiff's backlogged shipping containers, and required the release of Plaintiff's imports not implicated in the underlying trademark infringement allegations. *See U.S. Auto II*, 42 CIT at __, 319 F. Supp. 3d at 1311–12.

The Parties notified the court on August 13, 2018 that the Port of Norfolk had released all containers to U.S. Auto. *See* Pl.'s Status Report 4, Aug. 13, 2018, ECF No. 80; Defs.' Status Report 1, Aug. 13, 2018, ECF No. 78. U.S. Auto represented also that the company stopped importing goods through the Port of Norfolk. *See* Pl.'s Status Report 4, Aug. 13, 2018, ECF No. 80. The court set an expedited briefing schedule on the merits of the case. *See* Notice from the Court, Aug. 15, 2018, ECF No. 81.

Before the court are cross-motions filed by the Parties. Plaintiff filed a Motion for Default Judgment, contending that Defendants failed to respond to the complaint and that Plaintiff is entitled to a default judgment pursuant to USCIT Rule 55(a). *See* Pl.'s Mot. Default J. 4, Aug. 22, 2018, ECF No. 82. Defendants filed a Motion to Dismiss under USCIT Rule 12(b)(6), alleging, *inter alia*, that U.S. Auto's claims are moot due to events occurring after U.S. Auto filed its amended complaint. *See* Defs.' Mot. Dismiss, Aug. 22, 2018, ECF No. 83; *see also* Mem. L. Supp. Defs.' Mot. Dismiss 6–7, Aug. 22, 2018, ECF No. 83 ("Defs.' Mot."). For the following reasons, the court grants Defendants' motion and dismisses this action. Plaintiff's motion is denied as moot.

ANALYSIS

The court addresses first Defendants' Motion to Dismiss. Defendants contend that Counts I and II of Plaintiff's complaint, which allege harm under the Administrative Procedure Act, should be dismissed as moot. *See* Defs.' Mot. 6. Defendants argue that Counts III and IV of Plaintiff's complaint, which allege harm under the Eighth and Fifth Amendments respectively, should be dismissed as legally insufficient. *See id.* at 6–7.

An Article III court has authority only over actions in which there is a live case or controversy. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 (1964); *3V, Inc. v. United States*, 23 CIT 1047, 1049, 83 F. Supp. 2d 1351, 1352–53 (1999). If a claim does not meet the criteria set forth in Article III of the U.S. Constitution, then the court must dismiss the claim as non-justiciable.

I. Plaintiff's Claims as to Past Shipments

A claim is non-justiciable if it is moot, which occurs when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). A case becomes moot when (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *Davis*, 440 U.S. at 631. A cause of action becomes moot, for instance, when the relief sought has been attained. *See Int'l Custom Prods., Inc. v. United States*, 29 CIT 1292, 1297 (2005).

U.S. Auto's complaint alleges four causes of action pursuant to the Administrative Procedure Act, the Eighth Amendment's Excessive Fines Clause, and the Fifth Amendment's Due Process Clause. *See* Am. Verified Compl. ¶ 22, Apr. 5, 2018, ECF No. 17. The complaint requests both injunctive and monetary relief. *See id.* at ¶¶ A–H. Although U.S. Auto cites three different legal bases to support its claims, U.S. Auto's entire case stems from Customs' imposition of the SEB Requirement with respect to numerous entries made at the Port of Norfolk, which Customs has stopped enforcing since the initiation of this action. Customs has released, furthermore, all backlogged containers to Plaintiff. U.S. Auto has received its requested relief. Because there is no reasonable expectation that the alleged violation will recur, and because the effects of the alleged violation no longer exist, Plaintiff's case is moot.

II. Plaintiff's Claims as to Future Shipments

A claim is also non-justiciable if it is not ripe for judicial resolution, which requires the court to evaluate two factors: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Issues are fit for judicial review if the agency action was final and if the issues presented are purely legal. *Abbott Labs.*, 387 U.S. at 149; *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1384 (Fed. Cir. 2012). In contrast, a claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Int'l Customs Prods.*, 29 CIT at 1298 (quoting *Texas v. United States*, 523 U.S. 296, 296 (1998)).

Plaintiff argues that it plans to import more shipments in the near future and that a risk remains that Customs will impose a similar

bond requirement. *See* U.S. Auto's Opp'n Defs.' Mot. Dismiss 9–10, Sept. 5, 2018, ECF No. 84. Plaintiff has not imported new entries, and Customs has not imposed any new bond requirements. Because there is no final agency action for the court to review, Plaintiff fails to meet the first factor of the ripeness doctrine. Plaintiff's speculative set of facts do not present a justiciable controversy for the court to decide. The court concludes that Plaintiff's claims with respect to future entries are not ripe for adjudication and must be dismissed.

CONCLUSION

For the aforementioned reasons, the court concludes that Plaintiff's causes of action with respect to entries already made are moot because Plaintiff has obtained its requested relief. Plaintiff's causes of action with respect to future entries are too speculative and are not ripe for review. Defendants' Motion to Dismiss is granted. Because the court dismisses this case in its entirety, Plaintiff's Motion for Default Judgment is denied as moot.

Judgment will be entered accordingly.

Dated: November 8, 2018
New York, New York

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

Slip Op. 18–155

DEACERO S.A.P.I. DE C.V. and DEACERO USA, INC., Plaintiffs, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 17–00183

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the administrative review of carbon and certain alloy steel wire rod from Mexico.]

Dated: Dated: November 8, 2018

Rosa S. Jeong and *Irwin P. Altschuler*, Greenberg Traurig, LLP, of Washington, DC, argued for plaintiffs, Deacero S.A.P.I. de C.V. and Deacero USA, Inc.

Elizabeth Anne Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Tara K. Hogan*, Assistant Director, *Jeanne E. Davidson*, Director, and *Chad A. Readler*, Acting Assistant Attorney General. Of Counsel on the brief was *Emma Thomson Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Derick G. Holt and *Daniel Brian Pickard*, Wiley Rein, LLP, of Washington, DC, argued for defendant intervenor, Nucor Corporation. With them on the brief was *Alan Hayden Price*.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on a motion for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the administrative review of the antidumping duty ("ADD") order covering carbon and certain alloy steel wire rod from Mexico. *See* Pls.' Mot. J. Agency R., Dec. 15, 2017, ECF No. 24; *see also Carbon and Certain Alloy Steel Wire Rod From Mexico*, 82 Fed. Reg. 23,190 (Dep't Commerce May 22, 2017) (final results of [ADD] administrative review and final determination of no shipments; 2014–2015) ("*Final Results*") and accompanying Decision Mem. for [the] Final Results of 2014/15 [ADD] Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Mexico, A-201–830, (May 15, 2017), ECF No. 21–5 ("Final Decision Memo"); *Carbon and Certain Alloy Steel Wire Rod From Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945 (Dep't Commerce Oct. 29, 2002) (notice of [ADD] orders). Deacero S.A.P.I. de C.V., a Mexican producer and exporter of the subject merchandise and Deacero USA, Inc., an importer of the subject merchandise, commenced this action pursuant to section 516A(a)(2)(A)(i)(I) and 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and 1516a(a)(2)(B)(iii) (2012).[1] *See*Summons, July 17, 2017, ECF No. 1; Compl., July 17, 2017, ECF No. 2.

Deacero S.A.P.I. de C.V. and Deacero USA, Inc., (collectively "Plaintiffs") challenge six aspects of Commerce's final determination. *See* Br. Supp. Pls.' Mot. J. Agency R., Dec. 18, 2017, ECF No. 26 ("Pls.' Br."). Plaintiffs challenge as not in accordance with law and unsupported by substantial evidence Commerce's decision (i) to use total facts available and (ii) to apply an adverse inference to those facts to calculate Deacero's final dumping margin, *see id.* at 16–30,[2] and

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are to the unofficial U.S. Code Annotated 2018 edition, which reflects the amendments made to 19 U.S.C. § 1677e by the Trade Preferences Extension Act of 2015. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015).

[2] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b). The phrase "total adverse inferences" or "total AFA" encompasses a series of steps that Commerce takes to reach the conclusion that all of a party's reported information

related decision to disregard Deacero's revised cost dataset, *see id.* at 35; (iii) to select the highest rate alleged in the 2001 petition, 40.52%, as Deacero's AFA rate and final dumping margin, *see id.* at 30– 35; (iv) not to recalculate the general and administrative expense ratio of Deacero's U.S. affiliate, *see id.* at 36–37; (v) not to correct certain clerical errors made in calculating Deacero's preliminary dumping margin, *see id.* at 37–39; and (vi) to use zeroing, instead of the average-to-average method, to calculate Deacero's dumping margin. *See id.* at 39–41.[3]

For the reasons that follow, the court sustains the agency's determination to apply total facts available with an adverse inference ("AFA"). However, the court remands Commerce's selection of 40.52% as the AFA rate for further explanation or reconsideration consistent with this opinion.

BACKGROUND

Commerce initiated this administrative review covering the subject merchandise entered during the period of review ("POR"), October 1, 2014 through September 30, 2015. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 75,657, 75,658 (Dep't Commerce Dec. 3, 2015) ("*Initiation of Reviews*"). Commerce's review covered respondent Deacero S.A.P.I de C.V. ("Deacero").[4] *Id.*

On July 21, 2016, in response to Commerce's first supplemental questionnaire response, Deacero submitted a revised section D cost dataset. *See* Deacero's Resp. Suppl. Sections A–E at Exs. Supp. D-6–7, PD 50–52, bar codes 3490088–02–04 (July 21, 2016) ("Deacero's First Suppl. Resp."). On November 7, 2016, Commerce preliminarily calculated a 17.02% dumping margin for Deacero, relying on the revised cost dataset. *Carbon and Certain Alloy Steel Wire Rod From Mexico*, 81 Fed. Reg. 80,638, 89,639 (Dep't Commerce Nov. 16, 2016) (preliminary results of [ADD] administrative review; 2014–2015) and accompanying Decision Mem. for [the] Prelim. Results of 2014/15 [ADD]

is unreliable or unusable and that as a result of a party's failure to cooperate to the best of its ability, it must use an adverse inference in selecting among the facts otherwise available.

[3] On September 5, 2017, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 21–2–3. All further references in this opinion to administrative record documents are identified by the numbers assigned by Commerce in these indices.

[4] The review also covered respondent ArcelorMittal Las Truchas, S.A. de C.V. ("AMLT"). *See Initiation of Reviews*, 80 Fed. Reg. at 75,658. In the preliminary determination, Commerce explained that AMLT claimed that it did not make any shipments during the POR; that information was not contradicted. *See* Prelim. Decision Memo at 2. The *Final Results* do not indicate that Commerce changed its position from the preliminary determination. Further, no party here challenges Commerce's determinations as to AMLT.

Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Mexico at 12, A-201–830, PD 66, bar code 3519579–01 (Nov. 3, 2016) ("Prelim. Decision Memo"); Final Decision Memo at 22.

In the final determination, Commerce used total AFA to calculate Deacero's final dumping margin. *See* Final Decision Memo at 4–8, 12. Pursuant to 19 U.S.C. § 1677e(b), Commerce chose the highest margin alleged in the 2001 petition—40.52%, as Deacero's final average-dumping margin. *See id.* at 8–9; *Final Results*, 82 Fed. Reg. at 23,190. The court heard oral argument on September 28, 2018. *See* Oral Arg., Sept. 28, 2018, ECF No. 45.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Decision to Apply Total Facts Otherwise Available

Plaintiffs challenge Commerce's decision to apply total facts otherwise available to calculate Deacero's final dumping margin. *See* Pls.' Br. at 16–25. Defendant argues that Commerce's determination is in accordance with law and supported by substantial evidence because Deacero withheld information, submitted untimely responses to Commerce and, as a result, significantly impeded Commerce's review. *See* Def.'s Resp. to Pls.' Mot. J. Agency R. at 13–26, Apr. 13, 2018, ECF No. 32 ("Def.'s Resp. Br."). For the following reasons, Commerce's decision is in accordance with law and is supported by substantial evidence.

Under certain circumstances, Commerce may use facts otherwise available. *See* 19 U.S.C. § 1677e(a). Commerce shall use facts otherwise available to reach its final determination when "necessary information is not available on the record," a party "withholds information that has been requested by [Commerce]," fails to provide the information timely or in the manner requested, "significantly impedes a proceeding," or provides information Commerce is unable to verify. 19 U.S.C. § 1677e(a)(1)–(2). However, prior to resorting to facts otherwise available, Commerce must explain why the information it has is insufficient and provide, where practicable, the non-complying

party with an opportunity to comply. *See* 19 U.S.C. § 1677m(d). If a party is provided with an opportunity to comply and does so, Commerce may nevertheless "disregard all or part of the original and subsequent responses" if it determines that the information provided is not satisfactory or untimely, subject to 19 U.S.C. § 1677m(e). *Id.*

Pursuant to 19 U.S.C. § 1677m(e), Commerce "shall not decline to consider" information that is "necessary to the determination but does not meet all the applicable requirements," if

> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information, and
>
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e). Commerce's regulations do not specifically address whether an original submitter of information can correct its own mistakes and do not provide a time frame within which such corrections should be submitted. The regulations do address submissions of untimely or unsolicited questionnaire responses, stating that Commerce will "provide, to the extent practicable, written notice stating the reasons for rejection [of untimely or unsolicited material]." 19 C.F.R. § 351.302(d)(1) (2015).[5] Commerce has the discretion to decide whether to accept corrective information on a case-by-case basis. *See Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006). In reaching its decision Commerce should balance "the desire for accuracy . . . with the need for finality at the final results stage." *Id.* The corrections submitted may address errors of a clerical, substantive, or methodological nature. *See id.*

In the final determination, Commerce applied total facts otherwise available, explaining that Deacero impeded Commerce's review when it made changes to its cost dataset, misrepresented the effects of those changes, and did not provide supporting record evidence to explain the changes. *See* Final Decision Memo at 4–8 (relying on 19 U.S.C. § 1677e(a)(2)(B) and (C) as the basis for its determination). Commerce contends that as a result of Deacero's revisions, the costs associated

[5] Further citations to Title 19 of the Code of Federal Regulations are to the 2015 edition.

with production of a billet control-number ("CONNUM") that accounts for a large portion of Deacero's sales to the United States decreased and, for the first time, revealed that Deacero's initial submission reported costs on a "planned production" basis, despite Commerce's directive to provide all costs on an actual costs basis. *Id.* at 6–7; *see* [Initial ADD] Questionnaire at D-2, PD 5, bar code 3422658–02 (Dec. 4, 2015). In effect, Commerce contends that Deacero's revisions resulted in "an entirely new section D dataset[.]" Final Decision Memo at 6. Given that Deacero was always in control of its cost of production information, Commerce determined that it impeded Commerce's review by withholding information responsive to Commerce's requests. *Id.* at 7. Further, Commerce contends that it provided Deacero with an opportunity to explain the revisions made, as required by 19 U.S.C. § 1677m(d), but that Deacero's response was "not satisfactory" because it invoked an allocation methodology not mentioned in Deacero's initial or supplemental questionnaire responses. *Id.* Commerce explains that it disregarded all of Deacero's information pursuant to 19 U.S.C. § 1677m(e) because Deacero's explanations were incomplete and unreliable. *Id.* at 7, 12.

Commerce reasonably determined that Deacero's responses impeded the review process and that its revised section D dataset should be disregarded as unreliable. In providing the revised section D dataset, Deacero did not fully explain why the revisions were necessary, what record evidence substantiated the changes it made to the billet grades and the associated reallocation of costs, and/or what effect, if any, the changes had on the actual costs reported by Deacero.[6] Instead, Deacero only generally explained that it "corrected the assignment of steel scrap costs to each grade of billet produced during the POR[,]" and attached the revised section D dataset for costs of production and a revised factor calculation worksheet to its response. *See* Deacero's First Suppl. Resp. at 31, Exs. Supp. D-6–7. In fact, during the hearing before the agency, counsel for Deacero admitted that it did not proffer "a complete explanation" of the changes until the

[6] The parties dispute whether Deacero mischaracterized the extent and nature of its revisions by referring to the revisions as "minor." *See*Pls.' Br. at 17–18; Def.'s Resp. Br. at 18–19. Commerce's decision to resort to total facts otherwise available, however, is not based on how Deacero characterized the revisions. *See* Final Decision Memo at 12. In the final determination, Commerce explains that although "the cost information contained in the revised section D dataset builds up to Deacero's financial statement," it decided to disregard Deacero's revised submission because Deacero did not substantiate its reallocation methodology with record evidence. *Id.* The question of how Deacero characterized its revisions, however, was relevant to Commerce's evaluation of whether Deacero acted to the best of its ability to comply with Commerce's requests for information and decision to apply adverse inferences. *See id.* at 6–8 (explaining that Deacero did not act to the best of its ability to inform Commerce of the nature of the changes made and the resulting effect on the costs reported for the CONNUM accounting for the vast majority of Deacero's U.S. sales).

post-preliminary questionnaire, and that its initial correction was "a more general answer or explanation." Hearing Tr. [Jan. 31, 2017] in the Matter of the Administrative Review of [ADD] Order on Carbon & Certain Alloy Steel Wire Rod from Mexico at 42, PD 93, bar code 3541550–01 (Feb. 7, 2017) ("Hearing Tr.").

After the issuance of the preliminary results, and in accordance with 19 U.S.C. § 1677m(d),[7] Commerce issued a third supplemental questionnaire in which it sought further support for and explanation of the revisions Deacero made. *See* Post-Prelim Suppl. Questionnaire Sections B & D at 3, PD 71, bar code 3519678–01 (Nov. 7, 2016) ("Post-Prelim. Questionnaire") (requesting Deacero to explain in detail "billet cost changes during the POR" and the changes made to CONNUMs reported during the POR). The explanation Deacero provided was insufficient because it did not substantiate the revisions made. *See generally* Deacero's Resp. Post-Prelim. Suppl. Questionnaire Secs. B & D at 2–4, Ex. 3rd Supp.-1, PD 77, bar code 3525445–01 (Nov. 25, 2016) ("Deacero's Post-Prelim. Resp."). Specifically, Commerce explains that the documents Deacero used to reconcile the initial and revised datasets make no reference to planned or actual production of billets and do not indicate how Deacero's accounting system tracks reallocation of costs based on reclassification of billets.[8] *See* Final Decision Memo at 7. Further, Deacero did not identify where it had previously explained to Commerce that if a produced billet does not meet the grade specifications for which it was intended, costs may be reallocated. Deacero also did not explain how the initial section D dataset was constructed and what record evi-

[7] Plaintiffs also argue that even if Deacero's explanation of the revised cost dataset was deficient, Commerce did not adhere to its obligations under 19 U.S.C. § 1677m(d) to notify Deacero of the problem and provide it with an opportunity to remedy or explain the identified deficiency. *See* Pls.' Br. at 18; *see also* 19 U.S.C. § 1677m(d). However, Commerce's post-preliminary questionnaire did identify the deficiency and provided Deacero with an opportunity to further explain the changes made. *See*Post-Prelim. Questionnaire at 3. Pursuant to 19 U.S.C. § 1677m(d), Commerce may disregard the clarifying information, in whole or in part. In the final determination, Commerce explains that it was unable to verify the costs in Deacero's revised section D dataset because Deacero's explanation was inadequate and its changes unsupported by record evidence. *See* Final Decision Memo at 7–8, 12. Commerce's decision to disregard the information was reasonable.

[8] Plaintiffs argue that Commerce did not ask it to produce evidence demonstrating how costs were reallocated in its accounting system and therefore, cannot now find that Deacero failed to produce such information. *See* Pls.' Br. at 19. However, in its post-preliminary questionnaire, Commerce specifically asked Deacero to explain how billet costs changed during the POR and to produce a revised build-up of costs for a CONNUM that decreased in cost as a result of Deacero's revisions to the section D cost dataset. *See* Post-Prelim. Questionnaire at 3. In its response, Deacero only stated that the costs reported in the initial section D dataset had to be corrected because they were based on planned, and not actual, production of billets. *See*Deacero's Post-Prelim. Resp. at 3–4. Deacero did not produce or cite to any supporting record evidence that would demonstrate how the planned costs were recorded and how those costs were reallocated after billets' grades were reclassified in the revised section D dataset.

dence supports the allocation of costs in it, or identify what record evidence supports the cost reallocations in the revised section D dataset. Commerce has the discretion to accept, reject, or disregard corrective information.[9] *See Timken*, 434 F.3d at 1353; 19 U.S.C. § 1677m(d). Given the lack of explanation and evidence provided by Deacero, it was reasonable for Commerce to determine that Deacero's responses were incomplete and unreliable, disregard the corrected information, and rely on total facts otherwise available.

II. Application of Adverse Inferences

Plaintiffs challenge Commerce's determination to apply adverse inferences in selection from the facts otherwise available. *See* Pls.' Br. at 26–30. Defendant argues that Commerce's decision is in accordance with law and supported by substantial evidence because Deacero failed to cooperate to the best of its ability to explain the revi-

[9] Plaintiffs challenge Commerce's determination that Deacero's responses were untimely as a basis for applying total facts otherwise available. *See*Pls.' Br. at 21–24. Specifically, Plaintiffs argue that Deacero complied with all of Commerce's deadlines and submitted a corrected dataset as soon as the error was discovered. *See id.*Further, Plaintiffs contend that if any of its submissions were untimely, Commerce should have rejected the information, as its regulation requires. *See id.* at 24; *see also* 19 C.F.R. § 351.302(d). In fact, Plaintiffs note that Commerce relied upon the revised section D data set to calculate the preliminary weighted-average dumping margin. Pls.' Br. at 24.

Commerce's regulation addresses the rejection of untimely or unsolicited material. *See* 19 C.F.R. § 351.302(d). Here, Commerce did not reject Deacero's information, but instead disregarded the submission as unreliable. *See* Final Decision Memo at 8. Pursuant to 19 U.S.C. § 1677m(d), Commerce can disregard information submitted by a party, in response to a request from Commerce to explain or remedy an identified deficiency, if the information does not meet the requirements set out in 19 U.S.C. § 1677m(e). The data submitted to clarify or remedy has to be reliable, 19 U.S.C. § 1677m(e)(3), and here, for the reasons provided above, Commerce reasonably determined that Deacero's was not.

In the final determination, Commerce also discusses the untimeliness of Deacero's responses. *See* Final Decision Memo at 7–8. However, it is reasonably discernable that Commerce's ultimate basis for applying total facts otherwise available was its determination that Deacero impeded the review process by withholding information necessary to verify the reliability of the revised section D dataset. *See id.* The issue, therefore, is not Deacero's timeliness, but the adequacy of Deacero's explanation and evidence for the revisions made. Deacero made the error and it was its burden to explain the reallocation methodology and substantiate the costs associated with billet reclassification. Instead, Deacero merely asserted that the initial section D dataset did not account for billet reclassification following quality control and, as a result, the billet costs needed to be reallocated. *See* Deacero's Post-Prelim. Resp. at 2–4. Deacero does not explain or support with record evidence how or where Deacero recorded such changes.

The parties also disagree whether, as a result of the reallocation, the total costs reported by Deacero changed. *See* Pls.' Br. at 17; Resp. Br. of Def.-Intervenor Nucor Corp. [] to Deacero's Mot. J. Agency R. at 18–19, Apr. 16, 2018, ECF No. 35 ("Nucor's Resp. Br."); Oral Arg. at 01:29:04–01:29:58 (Plaintiffs' counsel arguing that the change to total costs was a "small fraction of a percent"), 01:41:35–01:41:49 (identifying record document supporting its argument regarding impact on total cost of steel scrap); 00:13:13–00:13:33, 01:40:35–01:41:17 (Defendant Intervenor's counsel arguing that the changes made affected a "vast majority" of U.S. sales). Whether the total actual costs changed, however, is not dispositive as to whether Commerce's determination is supported by substantial evidence. Here, Deacero did not adequately explain the revised section D dataset or how either the initial or revised datasets were constructed.

sions it made to the section D cost dataset. *See* Def.'s Resp. Br. at 26–29. For the reasons that follow, Commerce's application of adverse inferences is supported by substantial evidence.

Commerce will determine whether to apply an adverse inference after deciding that use of facts otherwise available is warranted. *See* 19 U.S.C. § 1677e(b)(1)(A); 19 U.S.C. § 1677e(a). Pursuant to 19 U.S.C. § 1677e(b), Commerce may apply an adverse inference if it "finds that an interested party has failed to cooperate by not acting to the best of its ability[.]" 19 U.S.C. § 1677e(b). "The statute does not provide an express definition of 'the best of its ability.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). However, as *Nippon Steel* explained, a respondent acts to "the best of its ability" when it "do[es] the maximum it is able to do." *Id.*

In the final determination, Commerce explains that it applied an adverse inference because Deacero did not act to the best of its ability to explain and support with record evidence the revisions it made to its section D dataset. *See* Final Decision Memo at 8. Commerce states that Deacero was in possession of its cost information at all times and was afforded an opportunity to explain to Commerce how and why the revisions were made, but did not. *Id.* at 8, 12. Further, Commerce explains that without supporting evidence, it could not determine that Deacero's cost information was reliable. *Id.*

Deacero did not act to the best of its ability to substantiate the revisions it made to its section D dataset. A party acts to the best of its ability when it applies its maximum efforts to comply with Commerce's requests for information. *Nippon Steel*, 337 F.3d at 1382. Further, it is Deacero's responsibility to populate the record with relevant information. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). Accordingly, here, Deacero had a responsibility to provide Commerce with information that would help Commerce understand the revisions made and would substantiate those revisions. In providing the revised section D dataset to Commerce, Deacero simply states that it needed to reallocate costs to accurately reflect the "steel scrap costs [assigned] to each grade of billet produced during the POR." Deacero's First Suppl. Resp. at 31. However, the resulting revised dataset was not supported by sources demonstrating how the costs were reallocated or why it was necessary to alter the assignment of steel scrap costs. Subsequently, in a post-preliminary supplemental questionnaire, Commerce provided Deacero with an opportunity to explain and substantiate the revisions made to the dataset. *See* Post-Prelim. Questionnaire at 3. Deacero's response, although more detailed in its explanation of why a billet

may be reclassified and prompt the reallocation of steel scrap costs to reflect the grade of billets actually produced, was not substantiated by sources demonstrating a shift in costs. *See*Deacero's Post-Prelim. Resp. at 2–4. Further, the sources produced by Deacero to reconcile the costs reported in the initial and revised section D datasets do not explain or substantiate the reallocation methodology. *See id.* at Ex. 3rd Supp.-1 (screenshot from Deacero's accounting system); Final Decision Memo at 12. Here, Deacero did not, in any of its responses, produce record evidence supporting the costs used to create the initial and revised cost datasets.

Additionally, record evidence indicates that as early as September of 2016, Deacero was on notice that the explanation for the revisions it made was inadequate. Nucor Corporation's ("Nucor") September 2016 deficiency comments specifically addressed the lack of explanation and supporting evidence Deacero provided for the "significant changes" it made to the dataset. *See* [Nucor's] Additional Deficiency Cmmts. on Deacero's Suppl. A-E Questionnaire Resp. at 2–5, PD 55, bar code 3511019–01 (Sept. 30, 2016). In responding to Nucor's comments, Deacero merely repeated the explanation it initially provided with the revised dataset. *See* Deacero's Resp. Secs. B & C of Sept. 26, 2016, Suppl. Questionnaire at 5–6, PD 58, bar code 3513208–01 (Oct. 11, 2016). At the hearing before the agency, Deacero's counsel acknowledged that explanation to be general in nature. *See* Hearing Tr. at 42. Deacero was also not forthcoming in explaining that it reallocated costs because of errors in identifying billet grades until after the *Preliminary Results*were published.[10] Deacero did not do the maximum it was able to do to educate Commerce regarding its allocation

[10] Plaintiffs challenge Commerce's finding that Deacero did not explain previously that its allocation methodology is based on planned production. *See* Pls.' Br. at 19–21 (explaining how and when Deacero disclosed the information to Commerce), 28–30 (explaining why Deacero's efforts demonstrate it acted to the best of its ability); *see also* Final Decision Memo at 7. Specifically, Plaintiffs argue that Deacero always reported its costs on an actual costs basis and that Deacero explained to Commerce that because the actual costs are based on planned billet production, actual costs may be reallocated if, for quality control reasons, a produced billet's grade has to be reclassified. *See id.* at 21 (citing [Deacero's] Resp. Secs. D&E Antidumping Questionnaire at D-24–25, PD 37, bar code 3441821–01 (Feb. 11, 2016)). Plaintiffs contend that Deacero simply made an error in reporting the costs in the original section D dataset and that Commerce did not request a more detailed explanation of Deacero's allocation methodology until the post-preliminary questionnaire. *See id.* at 19–21, 28.

In the final determination, Commerce contends that Deacero's questionnaire responses did not explain that costs were reported on a planned production basis and that Deacero represented that it was providing actual costs. *See*Final Decision Memo at 4–6. Commerce, therefore, concluded that it could not understand the magnitude of the changes made to the revised section D cost dataset until Deacero explained, in its post-preliminary questionnaire response, the connection to planned production. *See id.* at 6. Nucor also contends that Plaintiffs misrepresent record evidence because Deacero only disclosed that wire rod costs are reallocated, not billets costs. *See* Nucor's Resp. Br. at 19–20. Even if Plaintiffs are correct and Deacero did disclose its methodology and merely made a reporting error in its

methodology and the possibility of cost reallocation, or how the cost shifts were recorded when a billet was reclassified. Therefore, it was not unreasonable for Commerce, on this record, to determine that Deacero did not act to the best of its ability to cooperate with Commerce's requests for information.

III. Corroboration of Total AFA Rate of 40.52%

Plaintiffs argue that the rate Commerce assigned to Deacero, as a result of resorting to total AFA, is not in accordance with law and is unsupported by substantial evidence. *See* Pls.' Br. at 30–35. Specifically, Plaintiffs challenge the highest rate alleged in the petition as overly punitive and uncorroborated. *See id.* at 33–35. Defendant argues that Commerce's determination is in accordance with law and supported by substantial evidence because the rate assigned was corroborated, has probative value, and that there is no legal precedent supporting the proposition that a high AFA rate is punitive or lacks in probative value and cannot be corroborated. *See* Def.'s Resp. Br. at 29–32. For the reasons that follow, Commerce's decision to rely on the petition rate is remanded for further explanation or reconsideration consistent with this opinion.

Commerce can derive an adverse inference from four statutorily identified sources of information. *See* 19 U.S.C. § 1677e(b)(2). Commerce's practice is to choose either the highest weighted-average dumping rate calculated for any respondent in the investigation or the highest margin alleged in the petition, whichever is higher, as the AFA rate. *See* Final Decision Memo at 8 (citing *e.g.*, *Certain Stilbenic Optical Brightening Agents From the [PRC]*, 77 Fed. Reg. 17,436, 17,438 (Dep't Commerce Mar. 26, 2012) (final determination of sales at less than fair value); Issues & Decision Mem. for the Antidumping Investigation of Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from the [PRC]; Notice of Final Determination of Sales at Less Than Fair Value, A-570–854, (May 31, 2000), *available at* http://ia.ita.doc.gov/frn/summary/prc/00–135811.txt (last visited Nov. 5, 2018)). "When [Commerce] relies on secondary information rather than on information obtained in the course of an investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). "Secondary information" includes information derived from "[t]he petition; [a] final determination in a countervailing duty investigation or antidumping investigation; [a]ny

original section D dataset, Deacero failed to fully explain and reconcile the revisions made. Deacero made the error, and to ensure that Commerce was aware of and understood the revisions made, Deacero should have been more forthcoming in providing supporting evidence and explanations that would not lead to further confusion.

previous administrative review, new shipper review, expedited antidumping review, section 753 review or section 762 review." 19 C.F.R. § 351.308(c)(1)(i)–(iii). To corroborate, means Commerce "will examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d); *see also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–465, vol. 1, at 869–70 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4198–99.

The court must base its review of Commerce's determination upon the record of the proceeding, which consists of

> (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and
>
> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

19 U.S.C. § 1516a(b)(2)(A)(i)–(ii). Commerce's regulations require it to maintain "the official record of each segment of the proceeding" that will form the record reviewed by this Court. 19 C.F.R. § 351.104(a)(1). The official record will contain,

> all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding. . . . [and] government memoranda pertaining to the proceeding, memoranda of ex parte meetings, determinations, notices published in the Federal Register, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified.

Id.

In the final determination, Commerce chose the highest alleged rate in the petition as Deacero's AFA rate. *See* Final Decision Memo at 8–9. Commerce explains that the chosen rate was corroborated during the "pre-initiation analysis," i.e., during the initiation of the investigation, using independent sources and was determined to be reliable and probative then. *Id.* at 9 (citing *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Ukraine, and Venezuela*, 66 Fed. Reg. 50,164, 50,165, 50,169 (Dep't Commerce Oct.

2, 2001) (notice of initiation of [ADD] investigations) ("*Initiation of ADD Investigations*")).

Commerce has not corroborated Deacero's AFA rate. In the final determination, Commerce presents conclusions of an analysis that was undertaken in 2001 without placing on the record any of the relevant documents, and only cites to a Federal Register notice announcing the conclusions reached. *See* Final Decision Memo at 8–9 (citing *Initiation of ADD Investigations*, 66 Fed. Reg. at 50,165, 50,169). The standard of review in this Court is whether Commerce's determination is supported by substantial evidence placed on the record of the relevant proceeding. *See* 19 U.S.C. § 1516a(b)(2)(A)(i)–(ii); 19 U.S.C. § 1516a(b)(1)(B)(i). Here, although Commerce purports to rely upon information it obtained during the initiation of the investigation, namely a pre-initiation analysis memorandum and documentation supporting the calculations in the petition, that information has not been placed on the record of this proceeding. *See* Final Decision Memo at 8–9 (citing *Initiation of ADD Investigations*, 66 Fed. Reg. at 50,165, 50,169); *see also* Oral Arg. Tr. at 1:27:40–1:28:02 (Defendant's explaining that although "Commerce did not put the Federal Register notice from the initiation on the record," such notices "are publicly available documents" and that "no reason [has been given] to discount Commerce's analysis when it determined that the original rates alleged in the petition had probative value, which is the standard under the Statement of Administrative Action").

The statute requires Commerce to corroborate, "to the extent practicable," the information relied upon. 19 U.S.C. § 1677e(c)(1). Here, Commerce did not place any corroborating information on the record. To the extent practicable, at a bare minimum, requires Commerce to produce the documents it relied upon to analyze why the chosen rate is probative. Commerce did not corroborate the AFA rate and therefore, its decision to rely on the petition rate is remanded for further explanation or reconsideration consistent with this opinion.

IV. Plaintiffs' Remaining Challenges

Plaintiffs remaining challenges are dependent on this court finding that Commerce's determination to apply total AFA is unsupported by substantial evidence. *See* Pls.' Br. at 35–41. Specifically, Plaintiffs challenge as not in accordance with law and unsupported by substantial evidence Commerce's (1) decision to calculate a U.S. affiliate's general and administrative expenses without accounting for further manufacturing costs incurred, (2) failure to address certain clerical errors made in the preliminary determination, and (3) use of zeroing

to calculate Deacero's dumping margin. *See id.* In the final determination, Commerce explains that all three challenges are moot in light of its determination to apply total AFA and assign as Deacero's weighted-average dumping margin the highest margin available in the petition. *See* Final Decision Memo at 13–16. The court does not reach Plaintiffs' three remaining challenges, in light of its decision to sustain Commerce's reliance on total AFA to calculate Deacero's dumping margin.

CONCLUSION

For the foregoing reasons, the *Final Results* are sustained in part and remanded in part. Accordingly, it is

ORDERED that Commerce's decision to apply total AFA to calculate Commerce's final weighted-average dumping margin is sustained; and it is further

ORDERED that Commerce's decision to rely on the 40.52% petition rate is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days thereafter to file their replies to comments on the remand redetermination.

Dated: November 8, 2018
New York, New York

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

Slip Op. 18–158

SOLARWORLD AMERICAS, INC., Plaintiff, SINO-AMERICAN SILICON PRODUCTS INC. and SOLARTECH ENERGY CORP., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and MOTECH INDUSTRIES, INC., KYOCERA SOLAR, INC., and KYOCERA MEXICANA S.A. DE C.V., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00208

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results following an administrative review of the antidumping duty order on certain crystalline silicon photovoltaic products from Taiwan.]

Dated: November 13, 2018

Timothy C. Brightbill, *Laura El-Sabaawi*, and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, D.C., for Plaintiff SolarWorld Americas, Inc. *Adam M. Teslik*, *Cynthia C. Galvez*, *Maureen E. Thorson*, and *Tessa V. Capeloto* also appeared.

Robert G. Gosselink, *Jarrod M. Goldfeder*, and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiffs and Defendant-Intervenors Sino-American Silicon Products Inc. and Solartech Energy Corp. and Defendant-Intervenor Motech Industries, Inc.

Stephen C. Tosini, Senior Trial Counsel, and *Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Reza Karamloo*, Office of the Chief Counsel for Trade and Enforcement Compliance, U.S. Department of Commerce, of Washington, D.C.

James K. Horgan and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., for Defendant-Intervenors Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. *Gregory S. Menegaz* and *John J. Kenkel* also appeared.

OPINION AND ORDER

Choe-Groves, Judge:

This case involves crystalline silicon photovoltaic products (typically, solar cells) from Taiwan. The Department of Commerce ("Commerce" or "Department") conducted an administrative review of the antidumping duty order on crystalline silicon photovoltaic products, in which Commerce concluded that two producers, Sino-American Silicon Products Inc. ("SAS") and its affiliated entity Solartech Energy Corp. ("Solartech") (collectively, "SAS-Solartech"), and Motech Industries, Inc. ("Motech") sold the subject merchandise at prices below the normal value during the period of review. *See Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 82 Fed. Reg. 31,555 (Dep't Commerce July 7, 2017) (final results of antidumping duty administrative review; 2014–2016) ("*Final Results*"); *see also* Issues and Decision Memorandum for the Final Results of the 2014–2016 Administrative Review of the Antidumping Duty Order on Certain Crystalline Silicon Photovoltaic Products from Taiwan, A-583–853, (June 29, 2017), *available at* https://enforcement.trade.gov/frn/summary/taiwan/2017–14281–1.pdf (last visited Nov. 7, 2018) ("Final IDM"). This matter is before the court on the Rule 56.2 motion for judgment on the agency record filed by Plaintiff SolarWorld Americas, Inc. ("SolarWorld") and the Rule 56.2 motion for judgment on the agency record filed by SAS-Solartech challenging various aspects of the Department's *Final Results*. *See* SolarWorld's Mot. J. Agency R., Feb. 27, 2018, ECF No. 51 ("SolarWorld's Motion"); Mem. Pl. SolarWorld Americas, Inc. Supp. Mot. J. Agency R., Feb. 28, 2018, ECF No. 57 ("SolarWorld's Br."); Consol.

Pls.' Rule 56.2 Mot J. Agency R., Feb. 27, 2018, ECF No. 53 ("SAS-Solartech's Motion"); Mem. Supp. Rule 56.2 Mot. Consol. Pls. J. Agency R., Feb. 27, 2018, ECF No. 55 ("SAS-Solartech's Br.").

ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce properly adjusted Motech's reported per-unit costs when it declined to apply partial adverse facts available;
2. Whether Commerce properly adjusted SAS-Solartech's reported costs for different grades of merchandise when it declined to apply partial adverse facts available; and
3. Whether Commerce properly determined that all merchandise shipped by SAS during the period of review were United States sales.

PROCEDURAL HISTORY

Commerce commenced an administrative review of the antidumping duty order on crystalline silicon photovoltaic products from Taiwan on April 7, 2016 at the request of domestic petitioners, including SolarWorld. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 20,324 (Dep't Commerce Apr. 7, 2016). The administrative review covered 14 exporters of the subject merchandise, including mandatory respondents Motech and SAS, which Commerce treated as one entity with Solartech. *See* Decision Memorandum for Preliminary Results of the 2014–2016 Antidumping Duty Administrative Review of Certain Crystalline Silicon Photovoltaic Products from Taiwan, A-583–853, (Feb. 28, 2017), *available at* https://enforcement.trade.gov/frn/summary/taiwan/201704413–1.pdf (last visited Nov. 7, 2018) ("Prelim. IDM").

Commerce published its preliminary results on March 7, 2017. *See Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 82 Fed. Reg. 12,802 (Dep't Commerce Mar. 7, 2017) (preliminary results of antidumping duty administrative review and partial rescission of antidumping duty administrative review; 2014–2016) ("*Prelim. Results*"); *see also* Prelim. IDM. The Department labeled Defendant-Intervenor Kyocera Mexicana S.A. de C.V. ("Kyocera") an "unexamined respondent" because it was subject to the administrative review, but was not a mandatory respondent. Prelim. IDM at 5–6. The Department concluded that sales of subject merchandise by SAS-Solartech and Motech were made below normal value. *Id.* at 1.

Following the preliminary results, the Department received case briefs and rebuttal briefs from SolarWorld, SAS-Solartech, and Motech. *See* Final IDM at 2. Commerce issued its *Final Results* on June 29, 2017. *See Final Results*. The Department assigned a weighted-average dumping margin of 4.20 percent to Motech and 3.56 percent to SAS-Solartech. *Id.* at 31,556. Non-selected companies such as Kyocera were assigned a rate of 4.10 percent. *Id.*

Commerce adjusted the costs for both mandatory respondents. *See* Final IDM at 23, 36. Commerce adjusted Motech's costs for grade B crystalline silicon photovoltaic products to reflect the full value of prime merchandise, and adjusted all grade Z merchandise to reflect the reduced value assigned by Motech in its books and records. *Id.* at 36. Commerce also adjusted SAS-Solartech's costs for its grade 4 non-prime crystalline silicon photovoltaic products to reflect their net realizable values because the market price of grade 4 merchandise was "considerably less" than production costs. *Id.* at 25.

SolarWorld and SAS-Solartech initiated separate actions contesting Commerce's *Final Results*, which the court consolidated. *See* Order, Sept. 26, 2017, ECF No. 20. SolarWorld filed a Rule 56.2 motion for judgment on the agency record challenging Commerce's decisions not to apply partial adverse facts available ("AFA") to SAS-Solartech and Motech as unsupported by substantial evidence and otherwise contrary to law. *See* SolarWorld's Motion. Kyocera joined Defendant's opposition to SolarWorld's motion. *See* Statement of Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. Concurring Def.'s Opp'n Pl.'s Rule 56.2 Mot. J. Agency R., July 10, 2018, ECF No. 63. SAS-Solartech and Motech filed a joint response in opposition. *See* Resp. Def.-Intervenors SAS-Solartech and Motech to SolarWorld's Mot. J. Agency R., July 10, 2018, ECF No. 64. SolarWorld filed a reply brief. *See* Reply Br. Pl. SolarWorld, Aug. 8, 2018, ECF No. 75.

SAS-Solartech filed a Rule 56.2 motion for judgment on the agency record, contesting Commerce's decision to include in its margin calculation for the *Final Results* certain sales made via United States foreign trade zones ("FTZs") to Mexico. *See* SAS-Solartech's Motion. Kyocera joined SAS-Solartech's arguments that Commerce should not include these sales in its margin calculation. *See* Notice Statement SAS-Solartech's Rule 56.2 Mot. Mem. Supp., Feb. 27, 2018, ECF No. 50. Defendant filed a consolidated response to both Rule 56.2 motions. *See* Def.'s Resp. Pl.'s Mots. J. Agency R., June 19, 2018, ECF No. 62 ("Def.'s Br."). SolarWorld submitted a response brief to statements filed by SAS-Solartech. *See* Resp. Br. Def.-Intervenor SolarWorld, July 11, 2018, ECF No. 67. Consolidated Plaintiffs submitted

a reply brief. *See* Reply Consol. Pls. SAS-Solartech Def.'s SolarWorld's Mem. Opp'n Consol. Pls.' Rule 56.2 Mot. J. Agency R., Aug. 7, 2018, ECF No. 72. SolarWorld also submitted a reply brief. *See* Reply Br. SolarWorld, Aug. 8, 2018, ECF No. 75 ("SolarWorld's Reply").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and Sections 516A(a)(2)(A)(i)(I) and (B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (B)(iii). The court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

I. SolarWorld's Rule 56.2 Motion for Judgment on the Agency Record

Plaintiff SolarWorld's Rule 56.2 motion for judgment on the agency record contests Commerce's adjustments of Motech's and SAS-Solartech's reported costs instead of applying adverse facts available to Motech and SAS-Solartech in the *Final Results*. For the following reasons, the court finds that Commerce properly adjusted both Motech's and SAS-Solartech's costs.

A. Commerce's Cost Adjustments for Motech

Pursuant to the Tariff Act, Commerce has the authority to conduct antidumping duty investigations to determine if a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and to impose antidumping duties if appropriate. *Id.* § 1673. In order to calculate the dumping duty, Commerce compares the foreign market value (the normal value) of the product to the United States price (the export price or constructed export price). *See id.* If the United States price is greater than the normal value, dumping has occurred. *See id.* In determining both the normal value and the United States price of a product, Commerce makes adjustments to the costs that go into the calculation of those prices to obtain comparable prices for goods sold in the foreign market and for export to the United States. *See id.* §§ 1677a(c), 1677b(a)(6). The Tariff Act provides that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the mer-

chandise." *Id.* § 1677b(f)(1)(A). Commerce's practice in evaluating costs for non-prime merchandise is to determine if that merchandise can be used in the same applications as prime merchandise. *See* Final IDM at 23.

SolarWorld argues that Commerce's adjustments of Motech's reported per-unit costs are not supported by substantial evidence because Commerce relied on Motech's assignment of grades to its crystalline silicon photovoltaic products, but Motech failed to provide a complete and accurate description of these grades. SolarWorld's Br. 12. The court disagrees. In its Supplemental Section D Questionnaire Response, Motech explained the difference between its prime grade A merchandise, and grade B merchandise, stating that "Grade B cells have full efficiency and electrical function. They are distinguished from Grade A cells by certain cosmetic defects," and "[b]ecause of these defects, Grade B cells are often sold to module producers that do not care about these defects, generally in non-prime markets." Motech Supplemental Section D Questionnaire Response at 4, PD 241, bar code 3537552–01 (Jan. 18, 2017). Motech reported that its grade B crystalline silicon photovoltaic products had the same use as prime merchandise "*in addition* [to being] used in street lights, small modules or calculators." *See id.* (emphasis added). Because both grades of crystalline silicon photovoltaic products can be used in the same applications, Commerce adjusted Motech's grade B merchandise to reflect the full value of prime merchandise. The court concludes that Commerce's adjustment is reasonable and supported by substantial evidence.

SolarWorld argues that Commerce's reliance on Motech's assignments of grades to its merchandise is unreasonable and unsupported by substantial evidence because Motech identified a number of product grades in its Initial Section B Questionnaire Response that were not in its Initial or Supplemental Section D Questionnaire Response. *See* SolarWorld's Br. 12–15. Commerce found in its *Final Results* that Motech's reporting was consistent because "[a]lthough additional grades are noted in [Motech's Initial Section B Questionnaire Response], these grades relate to the same below top-grade products (*i.e.*, products with either cosmetic or electrical defects)." Final IDM at 36. The additional grades outlined in Motech's Initial Section B Questionnaire Response list defective crystalline silicon photovoltaic products by type of defect such as cosmetic, whereas the grades in Motech's Initial Section D Questionnaire Response combine merchandise with these types of defects. *See* Final IDM at 36 (citing Motech Sections B and C Questionnaire Response at Exhibit B-11, PD 134, bar code 3485696–02 (July 8, 2016), Motech Section D Questionnaire

Response at D-25, PD 141, bar code 3487335–01 (July 14, 2016)). The difference in type of defect would not change the cost adjustments, which are based on the merchandise's end-use, and Commerce's reliance on Motech's grade reporting is therefore reasonable and supported by substantial evidence on the record.

B. Commerce's Cost Adjustments for SAS-Solartech

SolarWorld argues that Commerce erred in reallocating SAS-Solartech's reported costs for certain non-prime merchandise in the *Final Results* because Commerce applied a flawed calculation of the total costs to assign to grade 4 crystalline silicon photovoltaic products. *See* SolarWorld's Reply 8. Specifically, SolarWorld contends that Commerce based the costs for grade 4 merchandise on the control numbers for which "no power output" was reported in the cost file and there is not a one-to-one correlation between code "04" and "no power output." *See id.* SolarWorld agrees that an adjustment needed to be made to SAS-Solartech's costs. *See* Final IDM at 22. The fact that there is not a "one-to-one correlation" between grade 4 merchandise and crystalline silicon photovoltaic products that had no power output is not enough to conclude that Commerce's reallocation is unreasonable. Even though merchandise with no power output can be found under multiple codes and not just under code "04," Commerce's reallocation of the costs of grade 4 crystalline silicon photovoltaic products based on control numbers is reasonable because Commerce's analysis of grade 4 merchandise demonstrated that their market prices were "considerably less than the full production costs that the company assigns to them in the normal course of business." *Id.* at 25. Even though a "precise reallocation" is not possible, it is reasonable for Commerce to reduce the costs for grade 4 crystalline silicon photovoltaic products based on evidence on the record that the grade 4 merchandise could not be used for the same applications as prime merchandise. *See id.* at 24. Commerce's reallocation is therefore reasonable and supported by substantial evidence.

C. Commerce's Decisions Not to Apply AFA to Motech and SAS-Solartech

Section 776 of the Tariff Act provides that if necessary information is not available on the record or if a respondent fails to provide such information by the deadline for submission of the information or in the form and manner requested, then the agency shall use the facts otherwise available in reaching its determination. 19 U.S.C. §§ 1677e(a)(1), (a)(2)(B). If the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to

comply with a request for information from the agency, then the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. *Id.* § 1677e(b)(1)(A). Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record when making an adverse inference. *See id.* § 1677e(b)(2); 19 C.F.R. § 351.308(c) (2015). 19 U.S.C. § 1677e grants the Department discretion to decide whether to apply AFA in each case. *See* 19 U.S.C. § 1677e. When Commerce can independently fill in gaps in the record, adverse inferences are not appropriate. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011).

SolarWorld argues that Commerce should have applied partial AFA to Motech because Motech failed to provide a complete and accurate description of the grades it assigned to its cells, and therefore failed to cooperate with Commerce. *See* SolarWorld's Br. 2, 12. SolarWorld contends that "Motech clearly maintained clear and extensive information and data on its products by grade, which it did not provide to the agency, thus failing to cooperate." *Id.* at 17. Because Commerce did not have this data, SolarWorld argues that Commerce's failure to apply partial AFA is "unsupported by substantial evidence, arbitrary, and an abuse of discretion." *See id.* at 18. In this case, Commerce was able to fill in the gaps regarding the different grades Motech reported in its Initial Section B and Section D Questionnaire Responses. *See* Final IDM at 36. Because Commerce found that the record data provided by Motech allowed Commerce to reallocate costs, adverse inferences are not warranted. The court concludes that substantial evidence supports the Department's decision not to apply partial AFA to Motech.

SolarWorld argues that AFA should have been applied to SAS-Solartech's reported costs. *See* SolarWorld's Br. 2–3. As with Motech, Commerce determined in the review that SAS-Solartech was "fully responsive to [Commerce's] supplemental questions with regard to non-prime merchandise" and explained any "anomalies" in its reporting. *See* Final IDM at 25. Because SAS-Solartech complied with Commerce's requests, Commerce declined to apply AFA. *Id.* The court concludes that substantial evidence supports the Department's decision not to apply AFA because SAS-Solartech complied fully with Commerce's requests.

II. SAS-Solartech's Rule 56.2 Motion for Judgment on the Agency Record

Consolidated Plaintiff SAS-Solartech's Rule 56.2 motion for judgment on the agency record contests Commerce's decision to include in

its margin calculations certain sales made by SAS because the sales were destined for Mexico via transit through United States FTZs. For the following reasons, the court finds that Commerce's inclusion of certain SAS sales as destined for the United States in its antidumping duty calculation is unreasonable and not supported by substantial evidence.

A. Commerce's Inclusion of the Sales at Issue in its Dumping Calculation

The court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court must determine whether the evidence and reasonable inferences from the record support Commerce's findings. *Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (citing *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). The court reviews whether Commerce has taken the record evidence into account and provided an adequate explanation for its reasonable determination. *See Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007).

SAS-Solartech argues that Commerce unreasonably ignored evidence establishing that SAS knew at the time of sale that its merchandise entered United States FTZs in transit, but was destined for sale in Mexico. SAS-Solartech's Br. 3. SAS-Solartech alleges that Commerce unreasonably included the sales to Mexico in its United States price calculations, despite no evidence on the record demonstrating that the merchandise actually entered the United States for consumption. *Id.* at 14–15. SAS-Solartech claims also that Commerce's determination to base export price on sales to a third country directly violated Commerce's statutory mandate. *See id.* at 17.

SAS-Solartech argues that sufficient evidence demonstrates that SAS knew at the time of sale that its merchandise was ultimately shipped to Mexico, including: (1) verbal instruction from its customers that the final destination of the merchandise was Mexico; (2) SAS' knowledge that its customers had manufacturing facilities in Mexico; (3) the sales documentation generated at the time of sale listed "Mexico as the ultimate 'ship to' destination and a Mexican entity as the 'notify' party, meaning that a Mexican entity was the intended recipient of the merchandise;" and (4) the United States addresses on the sales documentation were of "consignee freight forwarders that operated within approved" United States FTZs. *See* SAS-Solartech Br. 10; SAS-Solartech's Reply 5. Defendant contends that Commerce need not take this evidence into consideration because it is neither physical evidence nor contemporaneous, and SAS obtained the sales

documentation "after the fact." *See* Def.'s Br. 18. Commerce argues also that the sales documentation only "relat[es] to a few of the sales at issue." *Id.*

The court notes that the four documents cited by SAS-Solartech are evidence on the record. In its Supplemental Section A Response, SAS writes that during the sales process its "customers verbally advised SAS that the sales were ultimately destined for Mexico." SAS' Supplemental Section A Response at SA-3, PD 166, bar code 3497125–01 (Aug. 11, 2016). SAS states that it "knows that both customers had factories" in a non-United States country and that its customers did not intend for the merchandise to enter into the United States customs territory. *See id.* at SA-4. Commerce acknowledged that "[t]he sales and shipping documentation *at the*time of the sales indicate the names of Mexican entities to be notified." Final IDM at 10–11 (emphasis added). Commerce acknowledged also that the "shipping addresses are FTZ-designated addresses." *Id.* at 10. SAS is not able to provide all sales information because one of its customers filed for bankruptcy. SAS' Supplemental Section A Response at SA-3–SA-4, PD 166, bar code 3497125–01 (Aug. 11, 2016). Because evidence on the record establishes sales to customers in Mexico and demonstrates that the merchandise was shipped to United States FTZ addresses, with no actual United States customers identified and no evidence showing that merchandise entered the United States customs territory for sale, the court concludes that it is unreasonable for Commerce to have ignored the record evidence regarding SAS sales shipped through United States FTZs destined for sale in Mexico. The court concludes that Commerce's decision to include certain SAS sales as sales to United States customers is unreasonable and not supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the court concludes that:

1. Commerce's adjustments of Motech's and SAS-Solartech's costs are proper;
2. Commerce's decisions not to apply AFA against Motech and SAS-Solartech are proper; and
3. Commerce's decision to include certain SAS sales as sales to United States customers is unreasonable and not supported by substantial evidence.

The court remands the *Final Results* for redetermination on the issue of United States sales consistent with this opinion. Accordingly, it is hereby

ORDERED that Commerce shall file its remand redetermination on or before January 11, 2019; and it is further

ORDERED that Commerce shall file the administrative record on remand on or before January 24, 2019; and it is further

ORDERED that the Parties shall file any comments on the remand redetermination on or before February 11, 2019; and it is further

ORDERED that the Parties shall file replies to the comments on or before March 13, 2019; and it is further

ORDERED that the joint appendix shall be filed on or before March 27, 2019.

Dated: November 13, 2018
New York, New York

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

Slip Op. 18–159

COLUMBIA FOREST PRODUCTS, et al., Plaintiffs, v. UNITED STATES, Defendant, SHELTER FOREST INTERNATIONAL ACQUISITION, INC., et al., Defendant-Intervenors,

Before: Jane A. Restani, Judge
Court No. 18–00098

[Motion to stay proceedings is denied]

Dated: November 13, 2018

Timothy Brightbill, Wiley Rein LLP, of Washington, DC, for Plaintiffs Columbia Forest Products, Commonwealth Plywood Inc., States Industries, Inc., and Timber Products Company. With him on the motion were *Tessa Capeloto*, *Stephanie Bell*, and *Elizabeth Lee*.

Joshua Kurland, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the memorandum in opposition were *Joseph Hunt*, Assistant Attorney General, *Jeanne Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was Caroline Bisk, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Kirsten Smith, Sandler Travis & Rosenberg, P.A., of Washington, DC, for defendant-intervenors IKEA Supply AG. With him on the memorandum in opposition was *Sarah Yuskaitis*, *Arthur Purcell*, of New York, NY, and *Ami Ito Ortiz*, of Miami, FL.

OPINION AND ORDER

Restani, Judge:

Columbia Forest Products, Commonwealth Plywood Inc., States Industries, Inc., and Timber Products Company (collectively, "plaintiffs") seek to stay proceedings in this action pending the final determination by the Department of Commerce ("Commerce") in the anti-circumvention inquiry regarding the antidumping and countervailing

duty ("AD/CVD") orders on certain hardwood plywood from the People's Republic of China ("China") with respect to certain plywood with face and back veneers of radiate and/or agathis pine. Plaintiffs Motion to Stay Proceedings 1–5 (Oct. 18, 2018), Doc. No. 53 ("Mot. to Stay").

Plaintiffs initiated this action challenging Commerce's decision to not initiate an anti-circumvention inquiry with respect to the AD/CVD orders on hardwood plywood from China. Complaint, Doc. No. 9 (May 2, 2018). Commerce subsequently initiated a separate anti-circumvention inquiry concerning the same AD/CVD orders with respect to a subset of the merchandise covered by Plaintiff's request for an inquiry. *See Certain Hardwood Plywood Products from China: Initiation of Anti-Circumvention Inquiry on the Antidumping Duty and Countervailing Duty Orders*, 83 Fed. Reg. 47,883 (Dep't Commerce Sept. 21, 2018).

A decision to stay a proceeding is within the sound discretion of the court. *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). A moving party must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay will damage someone else. *Landis v. North American Co.*, 299 U.S. 248, 255 (1936); *see also Tak Fat Trading Co. v. United States*, 24 CIT 1376, 1377 (2000) ("[A] movant must 'make a strong showing' that a stay is necessary and that 'the disadvantageous effect on others would be clearly outweighed.'").

Plaintiffs argue that a stay is warranted because if Commerce makes an affirmative final determination that the inquiry merchandise is covered by the AD/CVD orders, it will "eliminate the need" for plaintiff to pursue this action. Mot. to Stay at 3. Further, they contend that a stay would not cause harm to any party and would promote judicial economy and efficiency. *Id.*

The Court is not persuaded. Plaintiffs fail to meet the standard for a stay because they merely attempt to show that no harm would result from the stay, rather than presenting a clear showing of hardship or inequity in being required to go forward. Plaintiffs ground their argument on a likelihood that their desire to proceed in this action may change. But this possibility does not rise to the standard of clear hardship or inequity from having to go forward with the litigation. Moreover, the outcome of the administrative proceeding is uncertain and a stay will likely delay the resolution of this action. Thus, absent a strong showing that a stay is necessary, plaintiffs request must fail.

Accordingly, upon consideration of the motion to stay filed by plaintiffs, defendant's response in opposition thereto, and all other pertinent papers in this action, it is hereby

ORDERED that plaintiff's motion to stay is **DENIED**.

Dated: November 13, 2018
New York, New York

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