U.S. Court of International Trade

Slip Op. 17–152

ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Plaintiff, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, et al., and HABAS SINAI VE TIBBI GAZLAR ISTIHSAL ENDUSTRISI, A.S., Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Consol. Court No. 14–00267

[Final Determination sustained.]

Dated: November 17, 2017

Matthew M. Nolan, Diana D. Quaia, and *Nancy A. Noonan*, Arent Fox LLP of Washington, DC for Plaintiff Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant, United States. With him on the briefs were Chad A. Readler, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs was *Scott McBride*, Assistant Chief Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Alan H. Price, John R. Shane, and *Maureen E. Thorson*, Wiley Rein LLP of Washington, DC for Defendant-Intervenors Rebar Trade Action Coalition, Nucor Corporation, Gerdau Ameristeel U.S. Inc., Commercial Metals Company, and Byer Steel Corporation.

OPINION

Gordon, Judge:

This action involves the U.S. Department of Commerce ("Commerce") final determination in the countervailing duty ("CVD") investigation of steel concrete reinforcing bar from the Republic of Turkey. *See Steel Reinforcing Bar From the Republic of Turkey*, 79 Fed. Reg. 54,963 (Dep't of Commerce Sept. 15, 2014) (final affirm. & crit. circum. determ.) ("*Final Determination*"); *see also* Issues & Decision Memorandum for the Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination in the Countervailing Duty Investigation of Steel Concrete Reinforcing Bar from the Republic of Turkey, C-489–819 (Dep't of Commerce Sept. 8, 2014), *available at* http://enforcement.trade.gov/frn/summary/turkey/2014–21989–1.pdf (last visited this date) ("*Deci-*

sion Memorandum"); *see also Steel Concrete Reinforcing Bar from the Republic of Turkey*, 79 Fed. Reg. 65,926 (Dep't of Commerce Nov. 6, 2014) (final countervailing duty order) ("*Order*"). Before the court are the motions for judgment on the agency record of Plaintiff Icdas Celik Enerji Tersane ve Ulasim, A.S. ("Icdas") and Defendant-Intervenor Rebar Trade Action Coalition ("RTAC"), and its individual members, Nucor Corporation, Gerdau Ameristeel U.S. Inc., Commercial Metals Company, and Byer Steel Corporation. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[1], and 28 U.S.C. § 1581(c) (2012).

This opinion addresses Icdas' challenge to the *Final Determination*. *See* Pl.'s R. 56.2 Mot. for J. on the Agency R., ECF No. 52 ("Icdas' Br."); *see also* Def.'s Resp. in Opp'n to Pl.'s R. 56.2 Mots. for J. on the Agency R., ECF No. 69 ("Def.'s Resp."); RTAC's Resp. to Pl.'s R. 56.2 Mot. for J. on the Agency R., ECF No. 70 ("RTAC's Resp."); Pl.'s Reply Br., ECF No. 79 ("Icdas' Reply").

Specifically, Icdas challenges (1) Commerce's selection of benchmark prices used to calculate countervailable benefits that respondents obtained from lignite coal purchases and (2) Commerce's ex parte meeting with petitioners late in the proceeding and acceptance of untimely information. For the reasons set forth below, the court sustains the *Final Determination*.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" 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). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being sup-

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ported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2017). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2017).

II. Discussion

A. Lignite Benchmark

1. Rejection of Tier One Steam Coal Price Benchmark Data

Icdas challenges Commerce's determination of the lignite price benchmark on two separate grounds. First, Icdas alleges that Commerce's failure to use the available market-determined prices of steam-coal imports into Turkey as "tier one" data violates the Congressional statutory directive in 19 U.S.C. § 1677(5)(E) as well as Commerce's own express regulatory preference for the use of such tier one data to establish benchmarks as set forth in 19 C.F.R. § 351.511(a)(2). Second, Icdas argues that Commerce's use of the "tier two" GTIS world market lignite pricing data to compute a benchmark "includes prices that are not reasonably available to Icdas, are not commercially realistic, and resulted in a highly distorted margin." Icdas' Br. 26. This section addresses Icdas' first contention regarding Commerce's failure to use tier one steam coal import pricing data, while Section II.A.2, *infra*, addresses Icdas' challenge to Commerce's use of the tier two GTIS lignite pricing data.

All parties agree that Commerce has established an express three-tiered hierarchy for the determination of market-price benchmarks in evaluating the adequacy of remuneration for alleged subsidy programs. "Under 19 CFR 351.511(a)(2), [Commerce] sets forth the basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government provided goods or services. These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation (e.g., actual sales, actual imports or competitively run government auctions) (tier one); (2) world market prices that would be available to purchasers in the country under investigation (tier two); or (3) an assessment of whether the government price is consistent with market principles (tier three). As pro-

vided in the regulations, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation." *Decision Memorandum* at 14. Accordingly, under this hierarchy, Commerce will first look to *see* if there is evidence of a "market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2).

Icdas relies heavily on this express regulatory preference for market-determined pricing, but attempts to discard the clear limitation that such a preference only applies for market-determined pricing relating to the "good" in question. Specifically, Icdas asserts that Commerce was obligated to use the tier one pricing data resulting from actual import transactions of hard steam coal; however, Commerce explained in its decision memorandum that it had found that hard steam coal was not supplied by the Government of Turkey ("GOT"), but instead only lignite coal was provided to Icdas by a Turkish stateowned entity. For this reason, among others, Commerce determined that it would be inappropriate to use steam coal prices to derive a benchmark for lignite. *Decision Memorandum* at 14–16.

Icdas argues that all of the parties, at some point during the investigation, assumed that steam coal and lignite coal were interchangeable in their use in power generation and for purposes of Commerce's investigation. Icdas' Br. 20–22. Icdas also highlights that in its preliminary determination, Commerce expressly found lignite and hard steam coal to be interchangeable for purposes of the investigation's analysis. *Id.* at 22 (citing Commerce's preliminary determination memo at 18). With this background, Icdas asserts that "[n]o information on the record shows that any of these findings changed between the Preliminary Determination and the Final Determination . . . . Commerce provided no support in its apparent conclusion that lignite coal is different than hard steam coal for purposes of power plant consumption." *Id.* at 22–23.

More specifically, Icdas contends that Commerce relied upon mere "speculation" in determining that steam coal is not interchangeable with lignite coal for purposes of the investigation. *Id.* at 23. RTAC, in response, notes that Icdas acknowledged in its own questionnaire responses several significant differences between lignite and hard steam coal including the significant differences in caloric values of the types of coal (which in turn affect their pricing), as well as the fact that hard steam coal ashes can be resold to cement producers while lignite coal ash must be disposed of as waste. RTAC's Resp. 15 (citing Icdas' CVD Questionnaire Response at 23–24). In addition, Commerce explained that it was only after its preliminary determination

during verification that it became aware of the essential differences between the types of coal (including the differing physical characteristics and uses of hard steam coal, lignite coal, coking coal, etc.), as well as the fact that Turkish Coal Enterprises ("TKI") "mines only lignite" and that Icdas only purchased lignite domestically, while it imported hard steam coal. *Decision Memorandum* at 13–14. Commerce also noted that the administrative record indicated significant additional differences between steam coal and lignite, such as the fact that "lignite is mined close to the surface and is less expensive to extract, whereas steam coal is mined deep in the ground," and "generating energy with lignite requires a larger volume of coal than with hard coal, importing lignite requires greater freight and transportation expenses, so imports of lignite (in comparison to hard coal imports) into Turkey are negligible." Def.'s Resp. 38 (citing GOT Verification Report).

Icdas argues that Commerce improperly narrowed the scope of the petition and the investigation without good cause. Icdas' Br. 20–21. Specifically, Icdas argues that it "makes little sense for [Commerce] to exclude 'steam coal' from any potential benchmarks when, in fact, steam coal includes both lignite and hard steam coal." *Id.* at 21. Here, Icdas misses the very point of Commerce's verification and fact-finding in the course of its investigation. Commerce initially analyzed a broad petition that posited subsidies in the "Steam Coal" market, but upon gaining a better understanding of the factual circumstances during the course of its investigation, Commerce found that only the narrower lignite coal market was at issue because Icdas' only domestic coal purchases were of lignite while it imported hard steam coal. Contrary to Icdas' position, in light of this factual development, it would have made "little sense" for Commerce to continue to analyze the broader market for "steam coal" when the only potential countervailable subsidies respondents were receiving were specific to lignite coal. Commerce acted reasonably when focusing its investigation to the "Provision of Lignite for LTAR."[2] *Decision Memorandum* at 14.

Icdas' insistence that Commerce erred by rejecting the pricing data of steam coal imports into Turkey entirely relies upon the assumption that Commerce could not and did not reasonably determine on the record that steam coal and lignite coal were not interchangeable for purposes of the investigation. Commerce, however, with the benefit of further investigation after its preliminary determination, determined that lignite coal and steam coal were not interchangeable and that lignite coal was the "only government-provided good" being provided

[2] "LTAR" stands for less than adequate remuneration.

for LTAR, and reasonably found that steam coal prices from import transactions into Turkey were not appropriate sources for a benchmark for the investigation. *Decision Memorandum* at 15–16. Notably, Icdas did not dispute that the lignite coal market in Turkey was distorted, implicitly accepting Commerce's determination that domestic lignite prices from actual transactions could not serve as a tier one source of data for calculating a benchmark. *See* Icdas' Br. 17–25; Def.'s Resp. 40. Accordingly, Commerce reasonably concluded that it would proceed to evaluate tier two pricing data for world market transactions for lignite coal.

On this administrative record the court believes that a reasonable mind could reach Commerce's determination that steam coal is not interchangeable with lignite coal as well as its determination that there were no appropriate tier one data sets for evaluating the adequacy of remuneration for transactions in the lignite coal market.

2. Use of GTIS Data

On January 22, 2014, RTAC included Global Trade Information Services ("GTIS') pricing data for 2012 exports of lignite from various countries as part of its submission of factual information. *See* Non-Confidential App. to Pl. Icdas' Br. in Support of its R. 56.2 Mot. for J. on the Agency R. 50–53, 56–68 (RTAC's Submission of Factual Information Jan. 22, 2014), ECF. No. 57 ("Icdas' Br. App."). On July 29, 2014, RTAC submitted its administrative case brief in which it argued that Commerce should depart from its preliminary determination and find that lignite coal is distinguishable from hard steam coal, and that Commerce accordingly should use lignite coal world market prices to calculate the benefit received by Icdas' purchases of lignite coal from TKI. *See* Icdas' Br. App. 249–260 (Case Brief of the Rebar Trade Commission July 29, 2014). On July 31, 2014, Icdas submitted a rebuttal brief arguing that Commerce properly used imported hard steam coal prices to calculate the lignite benchmark in its preliminary determination. *See* Icdas' Br. App. 265–271 (Revised Rebuttal Brief of Icdas July 31, 2014). On September 9, 2014, Commerce issued the *Final Determination* and corresponding *Decision Memorandum* in which it explained its decision to distinguish lignite coal from hard steam coal and its refusal to use hard steam coal prices in calculating the benchmark for Icdas' benefit from the lignite purchases from TKI. *See Decision Memorandum* at 13–17. On September 15, 2014, Icdas submitted a ministerial errors allegation to Commerce, in which it attempted to argue that Commerce's selection and reliance upon the GTIS lignite data was an "unintentional error" due to the GTIS's

data's alleged inaccurate and incomplete nature. *See* Icdas' Br. App. 319–325 (Icdas' Ministerial Errors Allegation Letter Sept. 15, 2014). Commerce rejected Icdas' ministerial errors allegation, explaining that the selection and use of the GTIS data was a deliberate choice, and further noting that "[i]f Icdas had believed that the GTIS data on the record was incomplete, it had the opportunity during the investigation to add additional GTIS information to the record, and did not do so." Icdas' Br. App. 338 (Memorandum from K. Johnson to M. Skinner, re: Allegations of Ministerial Errors in the Final Determination Oct. 1, 2014).

Using arguments substantially similar to those in its ministerial errors allegation, Icdas asserts in its briefing to the court that Commerce's use of the GTIS lignite pricing data set to establish the tier two benchmark was improper, contending that such prices are "not reasonably available to Icdas, are not commercially realistic, and resulted in a highly distorted margin." Icdas' Br. 26. Commerce does not dispute Icdas' arguments on the merits, but instead contends that these arguments have been waived as Icdas failed to properly raise them before the agency during the administrative proceeding, and has thus failed to exhaust its administrative remedies. Def.'s Resp. 44–47.

The court agrees that Icdas failed to exhaust its administrative remedies. *See* 28 U.S.C. § 2637(d); *see also* Icdas' Br. App. 265–271; 19 C.F.R. § 351.309(c)(2) (case briefs should contain all relevant arguments); *Boomerang Tube LLC v. United States*, 856 F.3d 908 (Fed. Cir. 2017); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

Commerce's use of the GTIS data to determine the lignite benchmark was squarely in play. Specifically, RTAC argued in its administrative case brief that Commerce should use the GTIS lignite data in calculating the lignite benchmark. *See* Icdas' Br. App. 260 & n.40 (highlighting RTAC's submission of the GTIS lignite data in early 2014). Icdas, in its rebuttal brief, failed to directly address this argument or challenge the GTIS data specifically proposed for use by RTAC. *See* Icdas' Br. App. 266–272. Icdas had the opportunity to challenge the adequacy of the GTIS data before Commerce but chose not to do so, attempting to correct its omission through ministerial error comments submitted *after* the final determination. *See* Icdas' Br. App. 319–325 (providing substantially the same arguments as to the impropriety of using the GTIS lignite data due to its inaccuracy and incompleteness as Icdas has raised before this court). Contrary to Icdas' arguments in its reply brief, Icdas' Reply Br. at 4–5, nothing

limited its ability to respond *in toto* to the usefulness of the GTIS lignite data. And in response to the ministerial error comments, RTAC was quick to point out that Icdas did not challenge the substance of the GTIS data until it was too late. Icdas' Br. App. 329 (RTAC's Response to Icdas' Ministerial Errors Allegation Letter) ("Icdas is trying to argue now what it failed to argue in its case or rebuttal briefs. Icdas could have made an alternative argument on the GTIS data in the event the Department relied on it for the final determination. The information was on the record since Petitioner's January 22, 2014, factual information submission, but Icdas failed to criticize it until after the final determination. Instead of raising this issue at the proper time, Icdas argued that the Department should use another source to value lignite and ignored the validity of the GTIS data altogether."). It is all too clear that Icdas attempted to correct its omissions by including them in a ministerial errors allegation letter, and again tries to raise those same arguments before the court after failing to properly present them to Commerce.

The facts here are similar to *Boomerang Tube LLC v. United States*, 856 F.3d 908 (Fed. Cir. 2017), in which the Federal Circuit concluded that it was appropriate to require exhaustion of administrative remedies for interested parties attempting to raise new arguments that that they failed to raise before Commerce in their rebuttal briefs. Like the parties in *Boomerang*, Icdas here committed a similar omission and failed to raise arguments about Commerce's use of the GTIS data to determine the lignite benchmark that it could and should have raised in its rebuttal brief.

Icdas tries to avoid this result by arguing that it somehow provided skeletal "notice" to Commerce of its arguments. Icdas' Reply 3–5 (citing *Trust Chem. Co. v. United States*, 35 CIT ___, 791 F. Supp. 2d 1257, 1268 n.27 (2011) ("The determinative question is whether Commerce was put on notice of the issue, not whether Plaintiff's exact wording below is used in the subsequent litigation.")). This misunderstands the requirement of exhaustion of administrative remedies and its twin purposes of protecting administrative authority (by requiring arguments to be presented to the agency *in the first instance* so that agency may find facts, apply its expertise, and interpret statutes and regulations that it administers) and promoting judicial economy (by avoiding unnecessary remands for agency to address arguments in first instance). Providing mere notice of an argument or issue accomplishes *neither* purpose; notice is therefore not enough. As for the passing observation in a footnote in *Trust Chem. Co.* that a "determinative question" for the exhaustion requirement is whether Commerce was simply "put on notice" of the issue, this is not correct

because "mere notice" fails to accomplish the twin purposes of the exhaustion requirement, and therefore simply putting Commerce on notice cannot satisfy the exhaustion requirement. Arguments must be presented *in toto* for this entire judicial review process to work sensibly.

B. Ex Parte Meeting

Icdas challenges Commerce's decision to hold an *ex parte* meeting with RTAC late in the proceeding at which Commerce accepted untimely information (two photographs) provided by RTAC. Icdas' Br. at 32–34. Defendant responds that the procedural waiver for RTAC's photographs did not cause prejudice to Icdas because they did not depict anything material to Commerce's decision, and that Icdas had a full opportunity to convey its views on the meeting and photos, and Icdas did so, before Commerce issued the *Final Determination*. Def.'s Resp. 50–51. Icdas for its part cites a "heavy burden" to prevail on a claim of procedural unfairness. *See* Icdas' Br. 34. Problematically for Icdas (and despite the bad optics of an ex parte meeting held so late in the proceeding), Commerce is expressly authorized by statute to hold *ex parte* meetings. *See* 19 U.S.C. § 1677f(a)(3). The statute requires Commerce to maintain a record of any *ex parte* meetings and disclose any information that is submitted during the meeting, 19 U.S.C. § 1677f(a)(3), (4), which Commerce did here. *See* Icdas' Br. App. 282–86 (Memorandum from M. Skinner to The File, re: Ex Parte Meeting with Members of Domestic Industry and Counsel to Petitioners Aug. 19, 2014). As Icdas has failed to demonstrate that the untimely photographs factored into the *Final Determination*, the court sustains Commerce on this issue.

III. Conclusion

For the foregoing reasons, the court sustains the *Final Determination* for each of Icdas' issues.

Dated: November 17, 2017
New York, New York

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

Slip Op. 17–153

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Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC argued for Defendant, United States. With him on the briefs were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs was *Scott McBride*, Assistant Chief Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

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OPINION

Gordon, Judge:

This action involves the U.S. Department of Commerce ("Commerce") final determination in the countervailing duty investigation of steel concrete reinforcing bar from the Republic of Turkey. *See Steel Reinforcing Bar From the Republic of Turkey*, 79 Fed. Reg. 54,963 (Dep't of Commerce Sept. 15, 2014) (final affirm. & crit. circum. determ.) ("*Final Determination*"); *see also* Issues & Decision Memorandum for the Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination in the Countervailing Duty Investigation of Steel Concrete Reinforcing Bar from the Republic of Turkey, C-489–819 (Dep't of Commerce Sept. 8, 2014), *available at* http://enforcement.trade.gov/frn/summary/turkey/2014 21989–1.pdf (last visited this date) ("*Decision Memorandum*"); *see also Steel Concrete Reinforcing Bar from the Republic of Turkey*, 79 Fed. Reg. 65,926 (Dep't of Commerce Nov. 6, 2014) (final countervailing duty order) ("*Order*"). Before the court are the motions for judgment on the agency record of Plaintiff Icdas Celik Enerji Tersane ve Ulasim, A.S. ("Icdas") and Defendant-Intervenor Rebar Trade Action Coalition ("RTAC"), and its individual members, Nucor Corpora-

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This opinion addresses RTAC's challenge to the *Final Determination*. *See* RTAC's R. 56.2 Mot. for J. on the Agency R., ECF No. 50 ("RTAC's Br."); *see also* Pl.'s Resp. in Opp'n to Def.-Intervenor RTAC's R. 56.2 Mot. for J. on the Agency R., ECF No. 68 ("Icdas' Resp."); Def.'s Resp. in Opp'n to Pl.'s R. 56.2 Mots. for J. on the Agency R., ECF No. 69 ("Def.'s Resp."); RTAC's Reply Br., ECF No. 80 ("RTAC's Reply").

Specifically, RTAC challenges (1) Commerce's selection of benchmark prices used to calculate countervailable benefits that respondents obtained from natural gas purchases; (2) Commerce's selection of benchmark prices used to calculate countervailable benefits that respondents obtained from lignite coal purchases; (3) Commerce's refusal to exceed the largest deduction possible in applying adverse facts available to Icdas' use of an export revenue tax deduction program; and (4) Commerce's refusal to initiate an investigation on RTAC's new subsidy allegation relating to respondents' sales of electricity from the Turkish government.[2] For the reasons set forth below, the court sustains the *Final Determination* for each of these issues challenged by RTAC.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" 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). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing

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[2] The court addresses RTAC's separate argument about Commerce's refusal to consider certain documents in support of RTAC's subsidy allegation in a separate decision.

two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2017). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2017).

II. Discussion

A. Natural Gas Benchmark

RTAC challenges Commerce's selection of benchmark prices for natural gas purchases used to calculate the program benefit received by Turkish rebar producers who received countervailable subsidies by purchasing natural gas from a Turkish state-owned entity for less than adequate remuneration ("LTAR"). Once Commerce determined that the market for natural gas in Turkey was distorted, 19 C.F.R § 351.511(a)(2)(ii) directs Commerce to select a world market benchmark to measure the benefit received from the provision of natural gas for LTAR pursuant to section 19 U.S.C. § 1677(5)(E)(iv). Specifically, 19 C.F.R § 351.511(a)(2)(ii) states

> If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

19 C.F.R § 351.511(a)(2)(ii). To enable Commerce to calculate the benefit received from purchasing natural gas from a state-owned entity, RTAC submitted "a set of 'border' monthly prices for natural gas sales between various European countries, sourced from Global Trade Information Services (GTIS)." *Decision Memorandum* at 11. RTAC also placed on the record "monthly prices for natural gas sales from Russia to Germany, sourced from the International Monetary Fund (IMF)," and in addition "derived quarterly natural gas prices charged by Gasprom, a large Russian gas company, using data from

the company's financial statements." *Id.* The IMF dataset contained no value and quantity information and unlike the GTIS data could not be weight-averaged. *Id.*

In the preliminary determination Commerce first weight-averaged the GTIS data for a set of monthly benchmark prices, and then proceeded to simple average those prices with the IMF data. *Id.* Commerce rethought this approach in the final determination. Commerce determined that inclusion of the IMF data and the use of simple averaging skewed the pricing results by failing to account for the differences between minor gas supplier countries and dominant gas supplier countries. *Id.* at 12. Accordingly, Commerce weight-averaged the GTIS data and excluded the "unweightable" IMF data. *Id.* Commerce further explained that the limited IMF pricing data closely tracked the larger corresponding GTIS data. *Id.* Commerce also distinguished past administrative proceedings cited by RTAC in which Commerce used simple averaging of pricing data, noting that in these prior cases Commerce lacked sufficient data reported in a uniform manner with adequate information to engage in weight-averaging. *Id.*

Despite this facially reasonable application of the benchmark regulation, RTAC nevertheless contends that Commerce erred by not utilizing simple averaging instead of weighted-averaging, and further erred by not including the IMF data in its analysis. RTAC's Br. 31–36. This is an admittedly steep hill for RTAC to climb. After all, Commerce averaged "more than one commercially available world market price" without introducing the distortions that naturally result from using a simple average. 19 C.F.R § 351.511(a)(2)(ii); *see also RZBC Group Shareholding Co. v. United States*, 39 CIT ___, 100 F. Supp. 3d 1288, 1308–11 (2015) (holding that calculating a benchmark derived from a weighted-average methodology, if possible, is preferable to one using a simple average methodology); *id.* at 1309 (noting that "Commerce now prefers to use weighted averages when the parties report price and quantity in a uniform manner." (citing *Certain Oil Country Tubular Goods from the Republic of Turkey*, 79 Fed. Reg. 41964 (Dep't of Commerce July 18, 2014) (final affirm. determination), and accompanying issues and decision memorandum at cmt. 4 ("Using weighted-average prices where possible reduces the potential distortionary effect of any specific transaction (e.g., extremely small transactions) in the data."))). RTAC fails to demonstrate that Commerce acted unreasonably in determining that weighted averaging, rather than simple averaging, was the superior method for minimizing price distortions in establishing a natural gas benchmark on the available data.

RTAC further argues that Commerce did not "grapple with the question of robustness." RTAC's Br. 36. This is incorrect. Commerce expressly found that its ability to "derive a robust natural gas benchmark" did not hinge on the IMF data because the GTIS data held "hundreds of data points, [and was] 'weightable,' whereas the single row of IMF pricing data for sales from Russia to Germany [was] not." *Decision Memorandum* at 12. And because the GTIS dataset contained Russian gas prices that closely tracked those in the IMF dataset, Commerce's concerns about the distorting effect of using a simple average outweighed RTAC's concerns about robustness. *Id.*

RTAC also speculates that because of possible "volume discounts" and alleged non-market considerations, there are problems in claiming that large suppliers reflect the market rate, while using a simple average represents a "midpoint of various values based on different volumes and distances." RTAC's Br. 33–34. RTAC, however, never made this argument to Commerce. In its administrative case briefing RTAC objected to Commerce's preliminary determination to use what it referred to as "an unprecedented 'weighted/simple average' hybrid methodology to calculate the benchmark[,]" *see* Non-Confidential App. to RTAC's Br. in Support of its R. 56.2 Mot. for J. on the Agency R. 266 (RTAC's Case Brief July 29, 2014), ECF. No. 55 ("RTAC's Br. App."). RTAC did not argue, as it does now, the existence of "volume discounts" in the underlying investigation, nor claim that such discounts, should they exist, reflected non-market prices or were based on non-market principles. RTAC has therefore failed to exhaust its administrative remedies with respect to that particular aspect of its argument.

When reviewing Commerce's antidumping determinations, the U.S. Court of International Trade is mandated by statute to require exhaustion of administrative remedies "where appropriate." 28 U.S.C. § 2637(d); *Boomerang Tube LLC v. United States*, 856 F.3d 908 (Fed. Cir. 2017). RTAC had an opportunity to present these arguments to Commerce in the first instance and chose not to do so. The court therefore will not consider them.

Commerce's calculation of a benchmark for natural gas derived from a weighted-average of natural gas prices in the GTIS dataset is reasonable and therefore sustained.

B. Lignite Benchmark

In its preliminary determination, Commerce determined that Icdas benefited from subsidies from the Government of Turkey in the form of reduced coal prices in its purchases of coal from Turkish Coal

Enterprises ("TKI"), a state-owned entity. *Decision Memorandum* at 13–16. Applying 19 C.F.R § 351.511, Commerce preliminarily determined that the market prices of Icdas' imports of steam coal could properly be used as a tier one benchmark against which to evaluate the benefit Icdas received in purchasing coal from TKI. However, upon subsequent challenge by RTAC and further factual investigation, Commerce determined that Icdas only purchased lignite coal from TKI and that lignite coal was distinguishable from other hard steam coal that Icdas imported. Accordingly, in its final determination, Commerce excluded pricing data relating to non-lignite coal, and after determining that the Turkish lignite market was too influenced by the Government of Turkey to provide reliable market-set benchmark prices, Commerce decided to use only "world market prices for lignite itself; specifically . . . GTIS pricing data on the record submitted by Petitioner." *Id.* at 15–16. Commerce explained that because lignite coal was the only coal provided by the Turkish Government, the subsidy investigation scope was properly narrowed to data just involving lignite coal. Further, as Commerce found that the domestic lignite market was distorted by government interference, it was necessary to use "tier two" pricing data from available world prices for lignite. *Id.* at 16.

RTAC, in its administrative case briefing, argued that hard steam coal and lignite were not interchangeable as assumed initially by Commerce, and urged Commerce to calculate a lignite benchmark from a simple averaging of world market pricing data. RTAC's Br. 36–37. Although Commerce ultimately adopted the position that lignite and hard steam coal were not interchangeable, and that the subsidy investigation should be limited to lignite coal, Commerce rejected RTAC's suggestion of benchmark calculations using a simple average of world prices in favor of using a weighted average of lignite world pricing data. *Decision Memorandum* at 16–17. There were two sets of lignite world pricing data on the record: GTIS and IMF. As in its natural gas subsidy analysis, Commerce noted that the GTIS data provided monthly quantity and value pricing data for several countries lignite transactions and that such data was "weightable;" whereas the IMF data provided only contained monthly unit prices for sales of lignite from Australia and was not "weightable." *Id.* at 16. Using the same reasoning as it had applied in evaluating the natural gas benchmark, Commerce calculated a lignite benchmark from a weighted average of the pricing data, using only the "weightable" GTIS data and excluding the IMF data. *Id.*

RTAC challenges Commerce's decision to use a weighted average to calculate the lignite benchmark and Commerce's corresponding deci-

sion to exclude the IMF data. RTAC's argument is essentially identical to its challenge that Commerce improperly calculated the natural gas benchmark; both arguments urge that Commerce should have used a simple average to calculate the appropriate benchmark and that Commerce should not have excluded the "unweightable" IMF data absent a finding of defects in that data. *See* RTAC's Br. 37 (explaining that "DOC's benchmarking calculations with respect to lignite purchased by respondents from the Turkish government are flawed for the same reasons as the benchmarking calculations for natural gas.").

Here again, as with the natural gas benchmarks, Commerce acted reasonably in deciding that weight-averaging is preferable to simple averaging in calculating benchmarks upon available world market pricing data. *See* Section II.A, *supra* (Commerce's determination that the distortion-minimizing benefits of weight-averaging outweigh the benefits provided by simple averaging was reasonable). The court therefore sustains Commerce's weight-averaging of the GTIS data to determine the lignite benchmark.

C. Export Revenue Tax

Commerce determined, contrary to Icdas' representation, that Icdas had in fact used the Turkish "Deductions for Taxable Income for Export Revenue" program to reduce its taxable income in 2011. *Decision Memorandum* at 19. As a result Commerce used an adverse inference in evaluating the benefit Icdas received under the program. *Id.* Commerce explained that the program is well known to Commerce, that Commerce has examined, verified, and countervailed it in numerous Turkey countervailing duty cases. Commerce also explained that the program has two built-in limitations: (1) the amount of the deduction for undocumented expenses cannot exceed 0.5 percent of export revenue and (2) there is a cap to the amount of benefit that a company can receive under the program. Commerce therefore maintains a practice of applying, as adverse facts available ("AFA"), the largest deduction possible under the program. *Id.* (citing *Circular Welded Carbon Steel Pipes and Tubes from Turkey*, 78 Fed. Reg. 64,916 (Dep't of Commerce Oct. 30, 2013) (countervailing duty admin. rev.)). Consistent with this practice, Commerce determined the largest deduction possible for Icdas under the program, and then derived a net countervailable subsidy rate of 0.10 percent *ad valorem* for Icdas. *Id.*

RTAC challenges Commerce's selection of this rate, arguing that Commerce's decision was inconsistent with a more general prior prac-

tice of eschewing *de minimis* rates, and that the rate applied is apparently insufficient to induce interested parties to participate in the proceedings, thus frustrating the purpose of assigning an AFA rate. RTAC's Br. 38–42. RTAC argues that Commerce should have instead contrived an adverse rate greater than the maximum benefit that Icdas could possibly receive under the Turkish program.

Commerce reasonably rejected RTAC's arguments. Commerce explained that it acted in accordance with its prior practice for this specific program, applying the largest deduction possible, which was known and calculable. *Decision Memorandum* at 19. RTAC identifies no express statutory command requiring Commerce to inflate a remedial countervailing duty rate beyond the known, calculable, maximum benefit under this particular Turkish program. It also strikes the court as an overreach to seek additional duties for a benefit that has been fully countervailed, (wholly satisfying the statute's primary purpose of leveling the playing field, *see generally* 158 Cong. Rec. H1166, H1166–73 (Mar. 6, 2012), and lessening the import of whatever subordinate purpose inheres in the adverse inference provision). The court therefore sustains Commerce's decision.

D. Rejected New Subsidy Allegation

RTAC contends that Commerce should have initiated an investigation for alleged electricity subsidies.[3] In support of its allegation, RTAC argued that the Turkish government allegedly paid power producers more than adequate remuneration for the sale of electricity. *See* RTAC's Br. App. 241 (Memorandum from Kristen Johnson, Int'l Trade Compliance Analyst, to Melissa G. Skinner, Director, re: Countervailing Duty (CVD) Investigation on Steel Concrete Reinforcing Bar from Turkey: Decision Memorandum on Additional Subsidy Allegation Nov. 25, 2013). Commerce reviewed RTAC's argument and information and determined that although RTAC's submissions indicated that Independent Power Producers ("IPPs") benefitted from the Turkish government guarantees and electricity purchase prices above market rates, that same evidence distinguished IPPs from autoproducers (like respondents) and did not directly indicate that autoproducers sold surplus electricity to the government at higher than market rates. RTAC argues that Commerce unreasonably concluded from the administrative record that IPPs were distinct and separate from the autoproducers subject to RTAC's subsidy allegation. RTAC's Br. 28.

[3] The court is addressing separately RTAC's argument about Commerce's rejection of certain documents in support of RTAC's subsidy allegation.

RTAC's proffered information that IPPs were offered "above-market prices" and guarantees from the Government of Turkey, and wanted Commerce to infer that those same benefits accrued to Turkish autoproducers. Commerce though did not draw that inference, instead noting that RTAC's own submissions "consistently distinguish[ed] IPPs from autoproducers." RTAC's Br. App. 241–42. Commerce expressly noted that "[p]etitioner provided no information indicating that rebar autoproducers also operate as IPPs." *Id.* at 242.

All RTAC offers is its own inference about the absence of direct evidence. That alone though is insufficient to undermine the reasonableness of Commerce's equally reasonable inference from the available record evidence. *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Technical, Salaried & Mach. Workers, AFL–CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("The question is whether the record adequately supports the decision of [Commerce], not whether some other inference could reasonably have been drawn."). The court therefore sustains this aspect of the *Final Determination*.

III. Conclusion

For the foregoing reasons, the court sustains Commerce's *Final Determination*.

Dated: November 17, 2017
New York, New York

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

Slip Op. 17–155

VALEO NORTH AMERICA, INC. ET AL., Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION TRADE ENFORCEMENT WORKING GROUP et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 17–00264

[The Court dismisses the action for lack of subject matter jurisdiction.]

Dated: November 20, 2017

Daniel J. Cannistra and *Alexander Hume Schaefer*, Crowell & Moring, LLP, of Washington, DC, and *Frances Pierson Hadfield*, Crowell & Moring, LLP, of New York, NY, for Valeo North America, Inc.

Kristen S. Smith, Sandler, Travis & Rosenberg, P.A., of Washington, DC; *Arthur K. Purcell*, Sandler, Travis & Rosenberg, P.A., of New York, NY; *David John Craven*, Sandler, Travis & Rosenberg, P.A., of Chicago, IL; and *Emi Ito Ortiz*, Sandler, Travis & Rosenberg, P.A., of Miami, FL, for Mahle Behr Dayton, L.L.C., Mahle Behr Charleston, Inc., Mahle Behr Troy Inc., and Mahle Industries, Inc.

Hardeep K. Josan, International Trade Field Office, U.S. Department of Justice, of New York, NY, and *Joshua Ethan Kurland*, Commercial Litigation Branch – Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. 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 *Khalil N. Gharbieh*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

John M. Herrmann, II, Grace Whang Kim, Kathleen Weaver Cannon, Paul Charles Rosenthal, Kelley Drye & Warren, LLP, of Washington, DC, for Aluminum Association Trade Enforcement Working Group and its individual members.

OPINION AND ORDER

Kelly, Judge:

This matter is before the court on Plaintiffs' application for a temporary restraining order ("TRO"). Mot. [TRO] and Mem. Supp. Pl.'s Mot. App. [TRO], Nov. 6, 2017, ECF No. 6 ("Pl. TRO"). Plaintiffs Valeo North America, Inc., Mahle Behr Dayton, L.L.C., Mahle Behr Charleston, Inc., Mahle Behr Troy Inc., and Mahle Industries, Inc. (collectively "Plaintiffs")[1] are importers of subject merchandise in the antidumping investigation of certain aluminum foil from the People's Republic of China ("PRC" or "China"), in which the Department of Commerce issued an affirmative preliminary determination on November 2, 2017. *Antidumping Duty Investigation of Certain Aluminum Foil from the [PRC]*, 82 Fed. Reg. 50,858 (Dep't Commerce Nov. 2, 2017) ("*Prelim. Results*"). Plaintiffs request the court to: 1) restrain Commerce from issuing instructions to the United States Customs and Border Protection ("CBP") to collect cash deposits for antidumping duties on Plaintiff's imports of certain aluminum foil from the PRC, pursuant to the preliminary determination, and 2) enjoin CBP from collecting cash deposits on Plaintiffs' aluminum foil imports.[2] *See* Pl. TRO 1; *see also Prelim. Results*. For the reasons that follow, the case is dismissed for lack of subject matter jurisdiction.

BACKGROUND

Plaintiffs' underlying action challenges as untimely Commerce's preliminary determination in this investigation.[3] *See* Compl., Nov. 6, 2017, ECF No. 5. Plaintiffs allege that, because Commerce did not

[1] The complaint establishes that Plaintiffs are "automotive suppliers and partners to automakers worldwide," who are "based in Michigan and do business in all 50 states." Compl. 2, Nov. 6, 2017, ECF No. 5.

[2] While Plaintiffs do not request relief from suspension of liquidation, Defendant points out that the effect of granting the TRO would be to lift the suspension of liquidation on Plaintiffs' entries. *See* Teleconference 00:24:41–00:26:38, Nov. 7, 2017, ECF No. 20.

[3] For the purposes of this opinion, the court will assume the factual allegations as alleged by Plaintiffs in their complaint and briefs are true. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (citations omitted).

issue the preliminary determination within the statutorily prescribed timeframe, the preliminary determination "is invalid, unlawful, and due to be set aside." *Id.* at 1; *see* Section 733 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673b(c)(1) (2012).[4] Plaintiffs request that the court therefore declare the affirmative preliminary determination invalid and declare that, in failing to issue a determination within the statutory timeframe, Commerce effectively issued a negative preliminary determination. *Id.* at 8. Plaintiffs allege jurisdiction under 28 U.S.C. § 1581(i)(2) (2012),[5] *see* Compl. ¶ 6, which establishes the Court's jurisdiction over civil actions "commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2).

During a telephone conference held with counsel to the parties on November 7, 2017, Defendant indicated that it opposed Plaintiffs' application for a TRO on both jurisdictional and substantive grounds. Teleconference, Nov. 7, 2017, ECF No. 20. The court requested that the parties brief the issue of jurisdiction. Order, Nov. 8, 2017, ECF No. 22. The parties submitted briefs in support of their respective positions regarding the Court's jurisdiction over this action. Pls.' Br. Supp. Jurisdiction, Nov. 13, 2017, ECF No. 30 ("Pls.' Br."); Def.'s Mem. Re. Jurisdiction, Nov. 13, 2017, ECF No. 31 ("Def.'s Br."). Plaintiffs argue that the preliminary determination is *ultra vires* because, in publishing the preliminary determination after the statutory deadline, Commerce created "a seriously and irredeemably flawed investigative process," Pls.' Br. 4, in which Plaintiffs contend they should not be required to continue participating. *Id.* at 9, 13–14. Plaintiffs contend that any relief available under 28 U.S.C. § 1581(c) "would be manifestly inadequate," because 19 U.S.C. § 1516a does not explicitly permit interested parties to challenge preliminary dumping determinations and alleging that there are significant "practical consequences" to challenging the preliminary determination in a challenge to the final determination under 28 U.S.C. § 1581(c). *Id.* at 12. Defendant responds that jurisdiction under 28 U.S.C. § 1581(i) is improper because, upon completion of the investigation, Plaintiffs could seek relief pursuant to 28 U.S.C. § 1581(c). Def.'s Br. 4–5. Defendant emphasizes that relief under 1581(c) is not manifestly inadequate because "[P]laintiffs will not lose the opportunity for full relief by

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

[5] Further citation to Title 28 of the U.S. code is to the 2012 edition.

awaiting the final determination," *id.* at 1, and the harm alleged—the paying of cash deposits—is speculative and impermanent. *Id.* at 5–8.

DISCUSSION

It is well established that "federal courts . . . are courts of limited jurisdiction marked out by Congress." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (*quoting Aldinger v. Howard*, 427 U.S. 1, 15 (1976), *superseded by statute on other grounds*); *see* Judicial Improvements Act, Pub. L. No. 101–650, 104 Stat. 5089, *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 557 (2005). The court must enforce the limits of its jurisdiction, including by dismissing a case for lack of subject matter jurisdiction on its own motion when necessary. *See, e.g., Cabral v. United States*, 317 Fed. Appx. 979, 980 n.1 (Fed. Cir. 2008) (*citing Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988)).

Under 28 U.S.C. § 1581(i), the Court has jurisdiction to hear "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-- . . . (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2). However, § 1581(i) "shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable[]by the Court of International Trade under section 516A(a) of the Tariff Act of 1930[, as amended, 19 U.S.C. § 1516a(a)].. . . ." 28 U.S.C. § 1581(i). The legislative history of § 1581(i) demonstrates Congress intended "that any determination specified in section 516A of the Tariff Act of 1930, [as amended,] or any preliminary administrative action which, in the course of the proceeding, will be, directly or by implication, incorporated in or superceded by any such determination, is reviewable exclusively as provided in section 516A." H.R.Rep. No. 96–1235, at 48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759–60. Thus, the Court's § 1581(i) jurisdiction is available only if the party asserting jurisdiction can show the Court's § 1581(a)–(h) jurisdiction is unavailable, or the remedies afforded by those provisions would be manifestly inadequate. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) ("Section 1581(i) jurisdiction 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." (citations omitted)).

When jurisdiction under another provision of 28 U.S.C. § 1581 "is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate." *Miller & Co.*, 824 F.2d at 963 (citations omitted). That judicial review may be delayed by requiring a party to wait for Commerce's final determination is not enough to render judicial review under § 1581(c) manifestly inadequate. *Gov't of People's Republic of China v. United States*, 31 CIT 451, 461, 483 F. Supp. 2d 1274, 1282 (2007). Neither the burden of participating in the administrative proceeding nor the business uncertainty caused by such a proceeding is sufficient to constitute manifest inadequacy. *See, e.g., id.*, 31 CIT at 461–62, 483 F. Supp. 2d at 1283 (*citing FTC v. Standard Oil*, 449 U.S. 232, 244 (1980)); *Abitibi–Consolidated Inc. v. United States*, 30 CIT 714, 717–18, 437 F. Supp.2d 1352, 1356–57 (2006). Essentially, the type of review sought by a plaintiff asserting the Court's § 1581(i) jurisdiction must not already be provided for by 19 U.S.C. § 1516a. *Abitibi–Consolidated Inc.*, 30 CIT at 717–18, 437 F. Supp. 2d at 1356–57.

The Court's 28 U.S.C. § 1581(c) jurisdiction makes final determinations by Commerce reviewable pursuant to 19 U.S.C. § 1516a(a)(2). *See* 28 U.S.C. § 1581(c). The Court of Appeals for the Federal Circuit has held that § 1516a(a)(2) allows for judicial review of both matters of procedural correctness, as well as the substantive merits of the determination. *See Miller & Co.*, 824 F.2d at 964 ("Under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, the procedural correctness of a countervailing duty determination, as well as the merits, are subject to judicial review." (citations omitted)). That Commerce has conducted the administrative proceeding in a manner that is contrary to law is an allegation made expressly reviewable by 19 U.S.C. § 1516a(b)(1), which directs the court to "hold unlawful any determination, finding, or conclusion found--. . . (B)(i) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1).

Review under 19 U.S.C. § 1516a, brought pursuant to 28 U.S.C. § 1581(c), does not foreclose the remedy Plaintiffs seek. Plaintiffs allege that Commerce exceeded its statutory authority and acted contrary to law by publishing the preliminary determination more than 190 days after the initiation of the investigation. *See* Compl. ¶¶ 2, 16, 31 ("Federal law does not empower Commerce to make an affirmative preliminary dumping determination outside of that timeframe."), 33–34; *see* Pl. TRO 8. Plaintiffs ask the court to declare the preliminary determination invalid, such that the preliminary determination

is deemed negative. Compl. at 8. Plaintiffs can make the identical claim in a case under 19 U.S.C. § 1516a once the determination is final. The court could at that time find the determination to be contrary to law and/or not supported by substantial evidence, and remand to the agency. Importantly, Plaintiffs, if ultimately successful, would get all the relief then that they could get now.[6]

Plaintiffs have not met their burden of establishing that the available remedy pursuant to 28 U.S.C. § 1581(c) would be manifestly inadequate. *Miller & Co.*, 824 F.2d at 963 (explaining that, when jurisdiction under another provision of 28 U.S.C. § 1581 "is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate."). The court understands that Plaintiffs would prefer that the preliminary determination be deemed invalid and, therefore, negative, so that Plaintiffs' imports are not subject to the collection of cash deposits in the interim period between the publication of the preliminary determination and the final determination. *See* Pl. TRO 9. However "paying deposits pending court review is an ordinary consequence of the statutory scheme." *MacMillan Bloedel Ltd. v. United States*, 16 CIT 331, 333 (1992). The statutory scheme provides a remedy for Plaintiffs' alleged harm. Plaintiffs' remedy is to continue participating in the administrative proceedings below until they are concluded with the final determination at which point Plaintiffs may, if they choose, appeal Commerce's final determination by filing suit in this Court under § 1581(c), challenging the final determination as not supported by substantial evidence and/or contrary to law. Plaintiffs have not demonstrated that the available remedy pursuant to § 1581(c) would be manifestly inadequate. *See Miller & Co.*, 824 F.2d at 963 (explaining that, when jurisdiction under another provision of § 1581 "is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate.").

Plaintiffs contend that their case is indistinguishable from cases in which this Court has determined that jurisdiction exists under 28 U.S.C. § 1581(i), where previous plaintiffs sought "to be 'excused from further participation in an ongoing *ultra vires* proceeding.'" Pls.' Br.

[6] Plaintiffs allege that they will face "immediate harmful consequences" if subjected to the cash deposit rate established in the preliminary determination, which has the effect of extinguishing what Plaintiffs refer to as the "rightful statutory cap on provisional duties" of zero percent that would result if the preliminary determination were deemed negative. Pl. TRO 9. However, exposure to cash deposits is not a recognized harm that would render the available relief under § 1581(c) manifestly inadequate; paying cash deposits is a recognized consequence of the system. *See MacMillan Bloedel Ltd. v. United States*, 16 CIT 331, 333 (1992). Plaintiffs can be made whole in a § 1581(c) case if their claims are ultimately successful.

14 (*quoting Diamond Sawblades Mfrs. Coal. v. U.S. Dep't of Commerce*, 38 CIT __, __, 11 F. Supp. 3d 1303, 1309 (2014)). Plaintiffs contend that, similarly, here "[t]he sole issue is whether Commerce has exceeded the scope of its statutory authority in a way that renders the investigation as a whole *ultra vires*." *Id.* The cases cited by Plaintiffs involve claims that errors within the proceedings rendered the proceedings as a whole *ultra vires*, and the plaintiffs in those cases sought to stop the proceedings altogether. *See Diamond Sawblades*, 38 CIT, 11 F. Supp. 3d at 1309–10 (determining that § 1581(i) jurisdiction was proper in a challenge to a sunset review where Plaintiffs sought to halt the review on the grounds that the underlying order had been commenced too early); *Carnation Enterprises Pvt., Ltd. v. U.S. Dept. Commerce*, 13 CIT 604, 610, 719 F. Supp. 1084, 1089 (1989) (determining that § 1581(i) jurisdiction was proper in a challenge to an administrative review that Plaintiffs alleged had "become illegal because of errors found in the original order."). Similarly, in other cases relied on by Plaintiffs, the court emphasized that the opportunity for full relief would be lost by awaiting the final determination because Plaintiffs sought to stop the administrative reviews at issue due to alleged errors which Plaintiffs claimed rendered the proceedings flawed. *See, e.g., Dofasco Inc. v. United States*, 28 CIT 263, 268, 326 F. Supp.2d 1340, 1346–47 (2004) (determining that jurisdiction under § 1581(i) is appropriate where the relief under 1581(c) would be manifestly inadequate because the relief sought was "freedom from participation in the administrative review," and requiring Plaintiff to await the publication of the final determination to "challenge the lawfulness of the administrative review[]would mean that [Plaintiff's] opportunity for full relief–i.e., freedom from participation in the administrative review–would be lost."), *aff'd*, 390 F. 3d 1370 (Fed. Cir. 2004); *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 584, 586, 717 F. Supp. 847, 850 (1989) ("[Plaintiffs'] desired objective [to stop the administrative review] cannot be obtained through a judicial challenge instituted after the administrative review has been completed. By that time, this aspect of plaintiffs' action would be moot."); *Jia Farn Mfg. Co. v. United States*, 17 CIT 187, 189, 817 F. Supp. 969, 972 (1993) ("Since the opportunity for plaintiff to challenge Commerce's authority to conduct an administrative review may be lost by awaiting the final determination, the court holds that the remedy provided under § 1581(c) would be 'manifestly inadequate,' and the court has jurisdiction under § 1581(i).").

Although Plaintiffs may state that the procedural defect on which they rely here renders the proceeding itself *ultra vires, see* Pls.' Br. 4, 9, 14, they are not claiming, nor could they claim, that the proceeding should terminate as a result of the alleged defect. Plaintiffs simply contend that the preliminary determination should be negative because it was published outside the statutorily-prescribed time frame. [7] *See* Compl. 8. The court does not reach the merits of Plaintiffs' claim but notes that, even if Plaintiffs were correct, a negative preliminary determination by Commerce does not stop the proceedings. The situations presented in these cases are distinguishable from the present case, and Plaintiffs' arguments to the contrary are unsuccessful.

CONCLUSION

For the foregoing reasons, the action is dismissed for lack of subject matter jurisdiction. Judgment will enter accordingly.

Dated: November 20, 2017
New York, New York

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

Slip Op. 17–156

THE STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD., and STANLEY BLACK & DECKER, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 14–00112

[Commerce's *Final Results* are sustained and plaintiff's motion for judgment on the agency record is denied.]

Dated: November 27, 2017

Lawrence J. Bogard, Neville Peterson, LLP, of Washington, DC, argued for plaintiff. With him on the brief was *Peter J. Bogard*.

Stephen C. Tosini, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the supplemental brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director and *Carrie A.*

[7] Plaintiffs contend that "Commerce's failure to issue its preliminary determination by the statutory deadline, and Commerce's decision to backdate the preliminary determination once it was issued, have compromised the investigative process in a way that renders any result from the process unreliable." Pls.' Br. 4. However, a claim that the proceedings are rendered unreliable is not akin to a claim that the proceedings are *ultra vires*, as a claim of unreliability can be reviewed in an action brought pursuant to § 1581(c). If the court determined that a proceeding was unreliable, the court would determine that the proceeding was not supported by substantial evidence.

Dunsmore, Trial Attorney. Of counsel on the brief was *Justin Becker*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC. With them on defendant's notice of supplemental authority dated July 6, 2015, was *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and of counsel on the notice was *Michael T. Gagain*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC. With them on defendant's notice of supplemental authority dated November 7, 2017, was *Chad S. Readler*, Acting Assistant Attorney General.

OPINION

Katzmann, Judge:

Differential pricing -- an analytical method used to identify the presence of targeted dumping wherein 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 prices differ significantly among producers, regions, or time periods -- has been the subject of an evolving jurisprudence. The case before the court provides an occasion to consider myriad issues arising from the deployment of the differential pricing methodology. In the final results of the fourth antidumping duty administrative review of *Certain Steel Nails from the People's Republic of China*, the United States Department of Commerce International Trade Administration ("Commerce") found that respondents The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc. (collectively "Stanley") are subject to a weighted average antidumping duty margin of 3.92 percent. 79 Fed. Reg. 19,316, 19,316–18 (Dep't Commerce Apr. 8, 2014) (Final Results of the Fourth Antidumping Duty Administrative Review) ("*Final Results*") and accompanying Issues and Decision Memorandum ("*IDM*"). Stanley now asserts that the *Final Results* are neither in accordance with law nor supported by substantial evidence. Pl.'s Mot. for J. on the Agency R., Sept. 16, 2014, ECF No. 23 ("Pl.'s Br."). The Government opposes Stanley's motion. ECF No. 30 ("Def.'s Br."). The court concludes that: (1) Commerce's use of differential pricing to identify the presence of targeted dumping is a reasonable interpretation of § 777A of the Tariff Act of 1930, codified at 19 U.S.C. § 1677f-1 (2012),[1] does not contravene congressional intent, and is lawful; (2) Stanley failed to exhaust its administrative remedies in arguing that Commerce applied its Meaningful Difference Test unreasonably; and (3) the *Final Results* do not contravene 19 C.F.R. § 351.414(f)(1)(i) and (f)(3) (2008).

[1] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, and all applicable amendments thereto.

BACKGROUND

I. Antidumping Investigations and Analytical Tools

In an antidumping investigation, Commerce determines whether 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, pursuant to 19 U.S.C. § 1673. There are three methodologies that Commerce may use in an investigation to calculate dumping margins in accordance with the Tariff Act of 1930, as amended by the Uruguay Round Agreement Act ("URAA"), Pub L. No. 103–465, 108 Stat. 4809 (1994). *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1369 (2017). Commerce can compare the weighted average of the normal values[2] to the weighted average of the export prices[3] (or constructed export prices[4]) for comparable merchandise, per 19 U.S.C. § 1677f-1(d)(1)(A)(i), or compare the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise, per § 1677f-1(d)(1)(A)(ii). 19 U.S.C. § 1677f-1(d)(1). These comparison methods are known, respectively, as the average-to average ("A-to-A") method and the transaction-to-transaction ("T-to-T") method. When certain criteria are met, Commerce may apply a third, alternative comparison method, the average-to-transaction ("A-to-T") method, wherein it compares averaged values to the values of individual transactions.[5] Commerce uses this A-T methodology to determine whether a respondent has en-

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[2] Normal value is:

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . .

19 U.S.C. § 1677b(a)(1)(B)(i).

[3] Export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.

19 U.S.C. § 1677a(a).

[4] Constructed export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of this section.

19 U.S.C. § 1677a(b).

[5] 19 U.S.C. § 1677f-1(d)(1)(B) states:

> Exception.
>
> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the

gaged in "targeted dumping," that is, sales at less-than-fair-value made to certain purchasers, in certain regions, or during certain periods of times, despite complementary sales at fair value elsewhere. *See* 19 U.S.C. § 1677f-1(d). Commerce may utilize the A-T method so long as two conditions are met:

> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) [Commerce] explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) [the A-A methodology] or (ii) [the T-T methodology].

19 U.S.C. § 1677f-1(d)(1)(B).

In contrast to the section of the statute covering investigations, the section which addresses administrative reviews --19 U.S.C. § 1677f-1(d)(2) --contains no provision specifying the comparison method applicable to administrative reviews.[6] Commerce has stated that it promulgated 19 C.F.R. § 351.414(b)[7] to fill this gap in the statute:

> 19 C.F.R. 351.414(b) describes the methods by which NV [Normal Value] may be compared to export price or constructed export price in less-than-fair-value investigations and administrative reviews (*i.e.*, A to-A, T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or

normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—

(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and

(ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

[6] 19 U.S.C. § 1677f-1(d)(2) states:

Reviews.

In a review under section 1675 of this title, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

[7] 19 C.F.R. § 351.414(b) (2012) provides:

(1) Average-to-average method. The "average-to-average" method involves a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise.

(2) Transaction-to-transaction method. The "transaction-totransaction" method involves a comparison of the normal values of individual transactions with the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(3) Average-to-transaction method. The "average-to-transaction" method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

> A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons, a comparison is made for each group of comparable export transactions for which the export prices, or constructed export prices, have been averaged together (*i.e.*, for an averaging group). The Department does not interpret the Act or the SAA [Statement of Administrative Action] to prohibit the use of the A-to-A method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T method in administrative reviews. 19 C.F.R. 351.414(c)(l) (2012) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both less-than-fair value investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another method is appropriate in a particular case" . . . . [Commerce also] look[s] to practices employed by the Department in investigations for guidance on this issue.[8]

IDM at 19 (quoting 19 C.F.R. § 351.414(c)(l)); *see* Statement of Administrative Action, accompanying the URAA, H.R. No. 103–316, vol. 1 (1994), *reprinted in* 1994 U.S.C.CAN. 4040 ("*SAA*").[9]

To execute the statutory dictates of 19 U.S.C. § 1677f-1(d)(1)(B)(i), *supra* n.5, and to determine specifically whether to apply an alternate comparison method, Commerce conducts an analysis known as differential pricing. Preliminary Decision Memorandum ("*PDM*") at 14, P.R. 258, accompanying *Certain Steel Nails from the People's Republic of China: Preliminary Results of the Fourth Antidumping Duty Administrative Review*, 78 Fed. Reg. 56,861 (Dep't Commerce Sept. 16, 2013), P.R. 257. The differential pricing analysis consists of three tests, segregated into two stages. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1342 n.2 (Fed. Cir. 2017); *PDM* at 15.

In the first stage, Commerce utilizes two tests to determine whether there exists a pattern of prices that differ significantly, such that an alternative comparison method should be considered, pursu-

[8] "In 2012, Commerce revised its methodology in administrative reviews from using average-totransaction comparisons as its general practice in administrative reviews to average-to-average comparisons as the default method for calculating weighted average dumping margins." *JBF RAK LLC v. United States*, 790 F.3d 1358, 1361 n.2 (Fed. Cir. 2015) (citing *Union Steel v. United States*, 713 F.3d 1101, 1106 n.5 (Fed. Cir. 2013) (citing *Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101 (Feb. 14, 2012)) (codified at 19 C.F.R. pt. 351)).

[9] The *SAA*"shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

ant to 19 U.S.C. § 1677f-1(d)(1)(B)(i). *PDM* at 15. Commerce begins by applying the Cohen's d test ("CDT"), which it characterizes as "a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group."[10] *Id.*

> First, for comparable merchandise, the Cohen's d test is applied when the test and comparison groups of data each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen's d coefficient is calculated to evaluate the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen's d test: small, medium or large. Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. For this analysis, the difference was considered significant if the calculated Cohen's d coefficient is equal to or exceeds the large (i.e., 0.8) threshold.

PDM at 15.

Thus, the net price to a particular purchaser, region or time period "passes" the CDT if its calculated Cohen's d coefficient is 0.8 or greater. Commerce next applies the Ratio Test, wherein it assesses the extent of the significant price differences for all sales as measured by the CDT:

> If the value of sales to purchasers, regions, and time periods that pass the Cohen's d test account for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the consideration of the application of the AT method to all sales as an alternative to the A-A method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's d test accounts for more than 33 percent and

[10] Commerce's methodological implementation of 19 U.S.C. § 1677f-1(d)(1)(B) has evolved over time. In implementing the differential pricing analysis methodology, and displacing the previously utilized "Nails Test," Commerce stated that it "has continued to seek to refine its approach with respect to the use of an alternative comparison method. . . . The new approach is referred to as the 'differential pricing' analysis . . . ." *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720 (Dep't Commerce May 9, 2014). Commerce concurrently sought "public comment on the possible further development of its approach for use of an alternative comparison method," including the use of the CDT. *Id.* at 26,722.

> less than 66 percent of the value of total sales, then the results support consideration of the application of an A-T method to those sales identified as passing the Cohen's d test as an alternative to the A-A method, and application of the A-A method to those sales identified as not passing the Cohen's d test. If 33 percent or less of the value of total sales passes the Cohen's d test, then the results of the Cohen's d test do not support consideration of an alternative to the A-A method.

Id.

If Commerce determines that both of these tests demonstrate the existence of a pattern of prices that differ significantly enough to warrant consideration of an alternative comparison method, then Commerce proceeds to the second stage of the differential pricing analysis, in which it examines whether using only the A-A method can appropriately account for those differences, pursuant to 19 U.S.C. § 1677f-1(d)(1)(B)(ii). *PDM* at 15. Commerce makes this determination by applying the Meaningful Difference Test, a methodology which compares the dumping margin that results from the applied CDT and ratio test, as described *supra*, with the dumping margin that would result from the use of the A-A method only. *Id.* A difference in the weighted-average dumping margins is considered meaningful if (1) there is a 25 percent relative change in the weighted-average dumping margin between the A-A method and the appropriate alternative method where both rates are above the de minimis threshold, or (2) the resulting weighted-average dumping margin moves across the de minimis threshold. *Id.* at 15–16. If this determination is affirmative, Commerce submits that its statutory mandate to "explain[] why such differences cannot be taken into account using" the A-A or T-T methods, per 19 U.S.C. § 1677f-1(d)(1)(B)(i), has been fulfilled. *Id.* at 14.

II. Procedural History

Commerce issued an antidumping duty order covering certain steel nails from the People's Republic of China in August 2008. *Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 44,961 (Dep't Commerce Aug. 1, 2008). Commerce initiated the fourth *Nails from China* administrative review on September 26, 2012. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 59,168 (Dep't Commerce Sept. 26, 2012). Commerce named

Stanley a mandatory respondent pursuant to 19 U.S.C. § 1677f-1(c)(2)[11] on November 20, 2012, and issued an antidumping duty questionnaire on the following day. *See* Memorandum Re: Fourth Antidumping Duty Administrative Review of Certain Steel Nails from the People's Republic Selection of Respondents for Individual Review (Nov. 20, 2012), P.R. 62; Cover Letter enclosing the Antidumping Duty Questionnaire for the Fourth Administrative Review (Nov. 21, 2012), P.R. 65.

Commerce published notice of the preliminary results of the fourth administrative review on September 16, 2013. 78 Fed. Reg. 56,861. Commerce found that the differential pricing analysis that it had used in recent investigations "may be instructive for purposes of examining whether to apply an alternative comparison method in this administrative review." *PDM* at 14. Upon conducting the differential pricing analysis, Commerce found that between 33 and 66 percent of Stanley's United States sales confirm the existence of a pattern of constructed export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods. *Id.* at 16. Specifically, Commerce concluded that 64.7 percent of Stanley's sales "passed" the CDT, and thus displayed a pattern of significant price differences. *Id.*; Memorandum to the File Re: Preliminary Results Analysis for Stanley, September 3, 2013 at 14, P.R. 261 ("Preliminary Results Memo"). Commerce accordingly determined that there existed a meaningful difference in the results between the weighted-average dumping margin calculated using the standard A-A method for all U.S. sales and the margin calculated using the appropriate alternative comparison method. *PDM* at 16. Therefore, Commerce concluded, the A-A method could not take into account the observed differences, and the mixed alternative method was the appropriate means of calculating Stanley's weighted-average dumping margin. *Id.*

Commerce preliminarily calculated a weighted-average dumping margin of 22.90 percent for Stanley using the mixed alternative

[11] In antidumping duty investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

> If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to--
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> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
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> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

comparison methodology, wherein Commerce applied the A-T methodology to those of Stanley's United States sales that "passed" the CDT, and the A-A methodology to Stanley's other United States sales that did not. 78 Fed. Reg. at 56,862; *PDM* at 16; Preliminary Results Memo at 14. On December 18, 2013, Stanley submitted its Case Brief to Commerce. P.R. 303–05.

On April 8, 2012, Commerce published the *Final Results*. 79 Fed. Reg. 19,316. Commerce continued to find it appropriate to use the mixed alternative methodology and apply the A-T comparison methodology to those of Stanley's United States sales that "passed" the CDT, while applying the A-A methodology to Stanley's other sales that did not. *IDM* at 24. Consequently, Commerce calculated a 3.92 percent weighted-average dumping margin for Stanley. *Final Results* at 19,318.

Stanley filed this case to contest Commerce's *Final Results* on May 6, 2014. Summons, ECF No. 1; Compl., May 13, 2014, ECF No. 8. On September 16, 2014, Stanley submitted its Motion for Judgment on the Agency Record to the Court. Pl.'s Br. Specifically, Stanley asserts that the *Final Results* are neither in accordance with law nor supported by substantial evidence, because: (1) the CDT is an unreasonable means of effecting a targeted dumping analysis under 19 U.S.C. § 1677f-1(d), for several reasons; (2) even if the CDT were a reasonable methodological choice, Commerce incorrectly applied it to Stanley's sales data; and (3) Commerce's application of the Meaningful Difference Test does not satisfy Commerce's requirements under the statute. Stanley also argues that the *Final Results* contravene 19 C.F.R. § 351.414(f)(1)(i) and (f)(3) (2008). On December 15, 2014, the Government filed its brief in opposition to Stanley's motion. Def.'s Br. Stanley filed its reply on February 2, 2015. ECF No. 37 ("Pl.'s Reply").

On November 29, 2016, this court stayed this action pending resolution of *Mid Continent Nail Corp. v. United States*, CAFC Appeal No. 2016–1426 (Fed. Cir. filed Jan. 6, 2016). Order, Nov. 29, 2016, ECF No. 53. In *Mid Continent*, the issue on appeal was whether Commerce complied with notice-and-comment rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553(b), 551(5) (2006), by repealing a regulation restricting the agency's use of the AT methodology, 19 C.F.R. § 351.414(f)(2) (2008), known as the "Limiting Regulation," which provided that even in cases meeting the statutory criteria for applying the A-T methodology, the agency would "normally . . . limit [its] application . . . to those sales that constitute targeted dumping." *Mid Continent*, 846 F.3d at 1370 (quoting 19

C.F.R. § 351.414(f)(2)); *see Antidumping Duties; Countervailing Duties, Final Rule*, 62 Fed. Reg. 27,296, 27,375 (Dep't Commerce May 19, 1997). On January 27, 2017, the Federal Circuit issued its Opinion in *Mid Continent*, in which it held that Commerce failed to comply with notice-and-comment rulemaking under the APA by repealing the Limiting Regulation in the *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, Interim Final Rule*, 73 Fed. Reg. 74,931 (Dep't Commerce Dec. 10, 2008); that its failure could not be excused for good cause or harmless error; and that the agency did not err in applying the Limiting Regulation on remand. 846 F.3d at 1386. The Federal Circuit issued the Mandate in *Mid Continent* on March 20, 2017.

After teleconference with the parties on April 19, 2017, this court stayed this action a second time pending the resolution of *Apex Frozen Foods Private Ltd. v. United States*, CAFC Appeal No. 2015–2085 (Fed. Cir. filed Sept. 29, 2015) and *Apex Frozen Foods Private Ltd. v. United States*, CAFC Appeal No. 2016–1789 (Fed. Cir. filed Apr. 5, 2016). Order, April 19, 2017, ECF No. 58. The issues in those cases, as relevant here, were whether the Limiting Regulation applies to administrative reviews as well as investigations and whether Commerce's Meaningful Difference Test was a reasonable exercise of Commerce's discretion. On July 12, 2017, the Federal Circuit issued its Opinions in *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337 (Fed. Cir. 2017) ("*Apex I*") and *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322 (Fed. Cir. 2017) ("*Apex II*").

On August 9, 2017, the court ordered parties to submit supplemental briefing addressing the relevance of *Mid Continent, Apex I*, and *Apex II* to this proceeding. ECF No. 61. Stanley and the Government submitted their supplemental briefs on September 12, 2017. ECF No. 62; ECF No. 63 ("Pl.'s Suppl. Br."). The parties submitted their reply to each other's supplemental brief on September 26, 2017. ECF No. 64; ECF No. 65. Oral argument was held before the court on Tuesday, October 31, 2017. ECF No. 68. At the direction of the court, the parties submitted post-argument briefing regarding the adoption of the CDT methodology. ECF Nos. 69, 70.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(l)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

ANALYSIS

Stanley argues[12] (1) Commerce's use of differential pricing to identify the presence of targeted dumping is an unreasonable interpretation of the statute and contravenes congressional intent; (2) that Commerce applied its Meaningful Difference Test unreasonably; and (3) the *Final Results* contravene 19 C.F.R. § 351.414(f)(1)(i) and (f)(3) (2008). For the reasons set forth hereafter, the court finds Stanley's arguments unavailing and denies its motion for judgment on the agency record.

A. Commerce reasonably applied the differential pricing analysis, the Cohen's d Test, and the Meaningful Difference Test in this proceeding.

As explained *supra* pp.6–9, Commerce's differential pricing analysis is broadly divisible into three tests: (1) the CDT, (2) the Ratio Test and (3) the Meaningful Difference Test. Stanley argues that Com-

[12] Stanley initially argued that Commerce has no statutory authority to conduct a targeted dumping analysis in administrative reviews. Pl.'s Br. at 15. Stanley noted that 19 U.S.C. § 1677f-1(d)(1)(B) authorizes Commerce to deviate from A-A price comparisons, and resort to A-T price comparisons in antidumping duty investigations. *Id.* at 16. The provision governing administrative reviews, however, does not contain analogous language and thus, according to Stanley, in its initial briefing, does not confer similar authority. *Id.* at 16–17 (citing *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009)); *see GAF Italia S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002) ("It is indeed well established that the absence of a statutory prohibition cannot be the source of agency authority."). Stanley submitted that the Federal Circuit has found the absence of statutory authority of greater import than policy arguments advanced by Commerce. Pl.'s Br. at 18 (citing *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 403 (Fed. Cir. 1994) ("Even if the statute's 'primary goal' may seem to be ill-served . . ., that conclusion does not justify reading into the statute agency discretion that clearly is not there.")).

The arguments made by Stanley here regarding Commerce's authority to apply the A-T methodology in administrative reviews are effectively identical to those addressed and disposed of by the Federal Circuit in *JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015), which was issued during the pendency of this action and conclusively stated that the A-T method is statutorily authorized. The Federal Circuit stated that Commerce may perform its duties in the way it believes most suitable in the absence of any congressionally mandated procedure or methodology. *Id.* at 1362. "[I]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 1364 (quoting *Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U S. 837, 843–44 (1984)). The Federal Circuit found that Commerce, in promulgating and applying the relevant regulation, 19 C.F.R. § 351.414(b)(1)–(3), (c)(1), "exercised its gap-filling discretion by applying a comparison methodology[, i.e. the average-to-transaction, A-T, comparison method,] in reviews that parallels the methodology used in investigations." *Id.* (quoting *JBF RAK LLC v. United States*, 38 CIT ___, ___, 991 F. Supp. 2d 1343, 1347). Accordingly, "Commerce's decision to apply its average-to-transaction comparison methodology in the context of an administrative review is reasonable. Because Congress did not provide for a direct methodology, Commerce properly 'fill[ed] th[at] gap.'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

Following *JBF RAK*, the court thus holds, and the parties agreed at oral argument, that Commerce's application of the A-T methodology in the instant administrative review, as embodied in the *Final Results*, was reasonable and in accordance with law.

merce's analysis was deficient for a number of reasons. Stanley also argues that the differential pricing methodology altogether runs counter to Congressional intent and is thus unreasonable.

1. Commerce reasonably applied the Cohen's d Test.

Stanley asserts first that the CDT is designed to assess a different type of data. Pl.'s Br. at 25. Specifically, Stanley submits that Dr. Cohen, the creator of the CDT, suggests that mean differences rather than standardized mean differences (d values) should be used in measuring effect sizes when comparing groups on a variable measured in units that are well understood:

> [when] comparing groups on a variable measured in units that are well understood by your readers (IQ points, or *dollars*, or number of children, or months of survival) mean differences are excellent measures of effect sizes. When this isn't the case . . . the results can be translated into standardized mean differences (d values) or some measure of correlation or association.

Pl.'s Br. at 25 (emphasis added) (citing Jacob Cohen, "Things I Have Learned (So Far)," *American Psychologist*, v. 45, no. 12 December 1990, 1304–12). Stanley argues that, consistent with this observation, the Cohen's d statistic is not a tool used in business, finance, or other contexts in which a variable, such as dollars, can be easily quantified. Pl.'s Br. at 26. Stanley thus disputes Commerce's characterization of its antidumping analysis as a social science that analyzes a respondent's "pricing behavior," *IDM* at 26, and argues that Commerce failed to recognize that the selfsame pricing behavior is measured in easily understood units: dollars. Pl.'s Br. at 26.

Second, Stanley argues that the term "significantly," found in 19 U.S.C. § 1677f1(d)(1)(B)(i) and in the *SAA* at 843, should be read to mean "statistical significance." Pl.'s Br. at 27. Stanley thus argues that Commerce, by interpreting "significant" more generally to mean "large," did not meet its statutory obligation to determine whether "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f-1; *see IDM* at 28 ("The statute does not require that the difference be 'statistically significant' only that it be significant.").

Third, Stanley argues that the Cohen's d statistic is an estimation tool, suited for making reasonable queries as to the size of a value given only a sample of data. Pl.'s Br. at 29–30. Rather, where the entire data population is known, as here, statistical inference tools, among which the Cohen's d statistic is not, are appropriate. *Id.* (citing

Kohler, Heinz, *Statistics for Business and Economics*, 3rd Ed., Harper Collins (1994), at 293 ("The process of inferring the values of unknown population parameters from those known sample statistics is called estimation . . . .")). Further, Stanley argues that the Cohen's d statistic is unreasonably applied where no hypothesis is being tested. *Id.* at 31–32.

Fourth, Stanley argues that Commerce's classification of effect sizes as "small," "medium," and "large," is not a widely accepted division, as Commerce claims, *IDM* at 26–27, and is instead a selection of arbitrary thresholds. Pl.'s Br. at 33 (citing Cohen, Jacob, *Statistical Power for the Behavioral Sciences*, 2nd Ed., Lawrence Erlbaum Associates (1988), at 484). Per Stanley, Commerce failed to explain how these thresholds are relevant to the underlying proceeding and thus rendered the *Final Results* arbitrary.

Stanley next argues that Commerce has failed to explain how its stratification of sales that "pass" the CDT into three tiers based on the ratio of the value of "passed" sales to total sales value --those (1) below 33 percent; (2) between 33 and 66 percent; and (3) above 66 percent --identifies a "pattern" of significant price differences pursuant to 19 U.S.C. § 1677f-1(d)(1)(B)(i). Pl.'s Br. at 38. Stanley considers the segregation of "pass" rates into these thresholds to be arbitrary, and argues that the *Final Results* do not justify the selection of those numerical thresholds or explain how they reveal a pattern of United States prices that differ significantly among purchasers, regions, or periods of time. Pl.'s Br. at 38–39.

At the outset, the court notes that the question of the reasonableness of the utilization of the CDT has not been determined by the Federal Circuit. While the Federal Circuit in *Apex I* affirmed an opinion of this court holding that the CDT was a permissible exercise of Commerce's discretion under the statute, and thus a reasonable methodological choice in accordance with law, *see Apex Frozen Foods Private Ltd. v. United States*, 40 CIT ___, ___, 144 F. Supp. 3d 1308, 1323–29 (2016), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017), the Federal Circuit did not have occasion to directly address whether Commerce's use of CDT was reasonable and in accordance with law. *See Apex I*, 862 F.3d at 1344 ("Apex does not challenge the results of Commerce's application of the Cohen's d test . . . .") and *id.* at 1342 n.2 ("A high-level summary of the differential pricing analysis is sufficient for our purposes, as the parties do not dispute the use and results on appeal.").[13]

[13] The reasonableness of the CDT has been considered in two opinions of this Court. *See Xi'an Metals & Minerals Imp. & Exp. Co. v. United States*, 41 CIT ___, Slip Op. 17–120 (Sep. 6, 2017); *Tri Union Frozen Prod., Inc. v. United States*, 40 CIT ___, 163 F. Supp. 3d 1255 (2016).

When determining whether Commerce's interpretation and application of the statute is in accordance with law, this Court must consider "whether Congress has directly spoken to the precise question at issue," and, if not, whether the agency's interpretation of the statute is reasonable. *Apex I*, 862 F.3d at 1344 (quoting *Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U S. 837, 842–43 (1984)). If the Court determines that the statute is silent or ambiguous with respect to the specific issue, then the traditional second prong of the *Chevron* analysis asks what level of deference is owed Commerce's interpretation. *Chevron*, 467 U.S. at 842–43; *see United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). "*Chevron* requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable." *Koyo Seiko Co., Ltd, v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994); *see Kyocera Solar, Inc. v. United States Int'l Trade Comm'n*, 844 F.3d 1334 (Fed. Cir. 2016).

The statute does not mandate how Commerce is to conduct its targeted dumping analysis. *See* 19 U.S.C. § 1677f-1. Thus the agency's discretionary choice to employ a particular methodology, here the CDT, is entitled to deference from this court, so long as that methodological choice is reasonable. *See JBF RAK*, 790 F.3d at 1362; *Chevron*, 467 U.S. at 842–43. The court emphasizes that "[a]ntidumping . . . duty determinations involve complex economic and accounting decisions of a technical nature, for which agencies possess far greater expertise than courts." *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 764 (Fed. Cir. 2012), *cited in Apex I*, 862 F.3d at 1347. The court thus affords Commerce significant deference in those determinations. *See id.*; *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). Despite this wide discretion, Commerce "must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). The court therefore asks whether Commerce has adequately explained its methodological choice, and more generally, whether that choice is reasonable. *See CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016) ("The requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter." (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962))).

The court finds that Commerce's application of the CDT here constitutes a reasonable exercise of its discretion under the statute, and that as to each of Stanley's arguments, Commerce adequately explained on the record the choices it made in employing that methodology. The court is not persuaded by Stanley's arguments that the

CDT is inapposite to the pricing behavior under Commerce's consideration, or by Stanley's characterization of the CDT as "an estimation tool" that renders the methodology inappropriate when all data points are known to Commerce. Stanley's academic citations, Pl.'s Br. at 25–26, do not preclude the possibility that the CDT could be deployed in a pricing analysis where all of the prices are known to Commerce, even if, arguendo, another methodology were more suited to determining the presence of significant differences in price among purchasers, regions, or periods of time. "[W]e cannot say that the methodology Commerce has chosen to implement Congress's statutory scheme is unreasonable, even where its justification may be . . . less than ideal." *Apex I*, 862 F.3d at 1347 (citation omitted); *see JBF RAK*, 790 F.3d at 1364 ("Because Congress did not provide for a direct methodology, Commerce properly 'fill[ed] th[at] gap.'" (quoting *Chevron*, 467 U.S. at 843)).

Commerce explained in the *IDM* its justifications for utilizing the CDT, stressing its focus on the value of effect sizes in quantifying the differences between data points. *IDM* at 25 & n.110 (quoting *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 Fed. Reg. 33,351 (Dep't Commerce June 4, 2013) ("*Xanthan Gum*") and accompanying IDM at 24 (quoting Coe, Robert, "It's the Effect Size, Stupid: What effect size is and why it is important," paper presented at the Annual Conference of British Educational Research Association (September 12–14, 2002))). Similarly, Commerce adequately explained that the CDT may be reasonably employed to measure pricing behavior, an element of economic analysis that may not be quantified in easily understood variables in the manner of a strictly "hard" science. *IDM* at 25–26.

The court is likewise unpersuaded by Stanley's argument that Commerce's designated effect sizes -- "small," "medium," and "large" -- are arbitrary such that the CDT methodology and the *Final Results* are arbitrary and not in accordance with law. While Stanley may dispute the ubiquity of effect size divisions into those three thresholds, the court does not *see* that Commerce applies the thresholds it has chosen in an arbitrary manner. *IDM* at 26–27. Commerce explained its decision to consider the large threshold, a 0.8 Cohen's d coefficient, to be the baseline measure of a significant difference in prices. *Id.* at 27 (citing *PDM* at 15). While Commerce may not have "explain[ed] how these thresholds relate to selling nails," Pl.'s Br. at 34, per se, it did explain the relevance of the thresholds in the overall application of the CDT and its differential pricing analysis. *PDM* at 14–15. Commerce responded to Stanley's concerns, and cited an academic article in support of its deployment of the relevant thresholds. *IDM* at 26–27

(quoting *Xanthan Gum* IDM at 24 (quoting Coe, *supra* p.19)). Commerce noted that it restricts CDT "passage" to those coefficient results that meet or exceed the "large" threshold of 0.8. *Id.* at 27. Commerce thus explained its methodological choices and reasonably supplied justifications for them. *See State Farm*, 463 U.S. at 48–49. Even assuming arguendo that Commerce's justification for utilizing these thresholds is not optimal or consonant with some universal standard, the "court is not to substitute its judgment for that of the agency, and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009), *cited in Apex I*, 862 F.3d at 1347. Commerce's application of the thresholds therefore was not arbitrary. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) ("[H]ere we are evaluating the agency's reasoning, which is reviewed under the arbitrary and capricious (or contrary to law) standard.").

The court turns to Stanley's argument that the CDT does not measure "statistical significance" and thus is an unreasonable execution of the statute. Stanley's reading of 19 U.S.C. § 1677f-1 and the *SAA* is unpersuasive. The plain text of the statute commands only that Commerce, in applying an alternative methodology, must determine the presence of "a pattern of export prices (or constructed export prices) for comparable merchandise that *differ significantly* among purchasers, regions, or periods of time . . . ." 19 U.S.C. § 1677f-1(d)(1)(B)(i) (emphasis added). Meanwhile, the *SAA* explains that the alternative comparison method is appropriate where the A-A or T-T methods "cannot account for a pattern of prices that *differ significantly* among purchasers, regions, or time periods, i.e., where targeted dumping may be occurring." *SAA* at 843 (emphasis added). Stanley's argument that the phrase "differ significantly" necessarily invokes a difference of "statistical significance," as opposed to mere "significance," has no basis in the statutory language, and Stanley is unable to proffer authority which requires Commerce or this court to read "significantly" as referring to a more commanding standard. Commerce is entitled to interpret the statutory language, and the court must defer to that interpretation, so long as it is reasonable. *Chevron*, 467 U.S. at 842; *Koyo Seiko*, 36 F.3d at 1573.

Here, Commerce has deployed the CDT and the Meaningful Difference Test, *supra* pp.6–9, to assess the presence and significance of differences of United States sales prices among purchasers, regions, or periods of time. Commerce reasonably explained that it found no cause to read the statute as requiring an assessment of "statistical

significance." *IDM* at 28. As explained *supra*, the statute demands the application of no particular methodology. "When a statute fails to make clear 'any Congressionally mandated procedure or methodology for assessment of the statutory tests,' Commerce 'may perform its duties in the way it believes most suitable.'" *Apex I*, 862 F.3d at 1349 (quoting *JBF RAK*, 790 F.3d at 1363). Here, Commerce reasonably exercised its discretion under the statute by deploying the CDT. Further, Commerce directly answered Stanley's argument that "statistical significance" is the applicable statutory standard:

> Statistical significance is used to evaluate whether the results of an analysis rise above sampling error (i.e., noise) present in the analysis. The Department's application of the Cohen's d test is based on the mean and variance calculated using the entire population of the respondent's sales in the U.S. market, and, therefore, these values contain no sampling error. Accordingly, statistical significance is not a relevant consideration in this context.

IDM at 29. The agency thus did explain its decision to deploy its chosen thresholds such that its application of them is not arbitrary. Even assuming Stanley's proffered methodology, which would involve some stricter "statistical significance" standard, constituted a plausible interpretation of the statute, "it does not necessarily follow that Commerce's different interpretation would be unreasonable or impermissible." *Apex I*, 862 F.3d at 1347 (citing *Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction . . . .")).

Having found the CDT to be a reasonable methodology in exercise of Commerce's statutory discretion, the court similarly finds that Commerce did not apply the CDT to Stanley's data in an unreasonable fashion. The court is not persuaded by Stanley's submitted data, attached to its brief as Addendum A. *See* Pl.'s Br. at Add. A. Stanley states that, of 111 respondents described in its addendum, while 27 respondents either had no sales that "passed" the CDT or had "pass" rates below the 33 percent threshold, "the average CDT 'pass' rate for the remaining 84 respondents was 67.99 percent . . . . In other words, *in preliminary decisions Commerce has concluded that 75 percent of the respondents investigated each targeted more than two-thirds of their sales*. . . It is unreasonable to the point of preposterous to conclude that 75 percent of investigated companies do so." Pl.'s Br. at 40 (emphasis added).

This assertion is not correct. By Stanley's own reading of a CDT "pass" rate corresponding directly to targeting, the data in Addendum A shows that 46 respondents, and not more than 75 percent, of the 111 listed respondents "each targeted more than two-thirds [i.e., met or exceeded the 66 percent CDT "pass" rate threshold] of their sales." Pl.'s Br. at Add. A. More pertinently, Commerce applied the A-T alternative comparison method in only 18 of those instances. *Id.* Stanley's arguments that the CDT produces biased results are therefore unpersuasive.[14]

2. Stanley's arguments regarding differential pricing, the Meaningful Difference Test, and congressional intent are unpersuasive.

a. Stanley failed to exhaust its administrative remedies regarding the Meaningful Difference Test.

Stanley argues that differential pricing cannot explain, as required by 19 U.S.C. § 1677f 1(d)(1)(B)(ii), "why such differences" in United States sales prices among purchasers, regions, or periods of time, "cannot be taken into account using" the A-A or T-T methods. Pl.'s Br. at 35. In essence, Stanley argues that Commerce's Meaningful Difference Test, wherein it compares a respondent's dumping margin that results from the applied CDT and Ratio Test with the dumping margin that would result from the use of the A-A method only, does not explain, as required by the statute, why the routine methodologies are insufficient to account for those differences. *Id.* at 35–36. Stanley cites to *Beijing Tianhai* for the proposition that Commerce's "purported explanation" as to why the pattern of price differences at issue in the underlying proceeding could not be taken into account using the standard A-A methodology "says nothing more than that Commerce found a pattern of differing prices and invoked the mathematical truism that when you average a set of numbers, the differences among the numbers cease to be apparent." Pl.'s Br. at 35 (quoting *Beijing Tianhai Indus. Co. v. United States*, 38 CIT ___, ___, 7 F. Supp. 3d 1318, 1331 (2014)). Stanley offers the point made in that case that Commerce "supplied a conclusion, but not an explanation" and argues that the same is true here. *Id.* at 36 (quoting *Beijing Tianhai*, 7 F. Supp. 3d at 1332). Stanley also asserts that Commerce

[14] Stanley's remaining arguments, *see* Pl.'s Br. at 44–49, effectively request that the court manage Commerce's application of the CDT, even if, as the court has found here, the CDT is a reasonable methodology performed in exercise of Commerce's discretion under the statute. *See supra* pp. 18–23; 19 U.S.C. § 1677f-1(d)(1). The court declines that invitation, for the reasons stated *supra*.

performed its A-A to A-T comparison (the heart of the Meaningful Difference Test) on the basis of Stanley's total sales, while it performed the CDT by looking at sales of individual products as denominated by product control numbers (i.e., CONNUMs); thus the A-A to A-T comparison "was unreasonably divorced from the specific price differences that are found to exist under the CDT and failed to explain why the A-A method could not account for observed price differences." Pl.'s Br. at 36.

Citing 28 U.S.C. § 2637(d) (2012), the Government contends that Stanley failed to argue before Commerce that the agency unreasonably performed its A-A to A-T comparison on the basis of Stanley's total sales, yet performed the CDT by looking at sales of individual products (i.e., CONNUMs). Def.'s Br. at 23–24 (citing 19 C.F.R. § 351.309(c)(2)); *see* 28 U.S.C. § 2637(d) ("In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."). Because the statute does not address the issue, the Government argues, Commerce should have the first opportunity to address the argument under *Chevron*. *Id.* at 24. The Government asserts that none of the exceptions to the exhaustion requirement apply here. *Id.* at 25.

The court agrees that Stanley has failed to exhaust its administrative remedies. This Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). "The doctrine of exhaustion provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1374 (Fed. Cir. 2014) (quoting *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998)). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred *against objection made at the time appropriate under its practice*." *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

Here, Stanley did not raise any arguments regarding the Meaningful Difference Test element of the differential pricing analysis in its case brief before Commerce. *See* Stanley's Case Brief. Exhaustion serves two main purposes: "to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors," and to "promot[e] judicial efficiency by enabling an agency to correct its own

errors so as to moot judicial controversies." *Sandvik Steel*, 164 F.3d at 600. The issue here -the appropriateness of the Meaningful Difference Test -- implicates both of these concerns; had Stanley raised this argument regarding the Meaningful Difference Test during the administrative proceedings, Commerce would have had the opportunity to better develop the record and apply its expertise to assess its use of the Meaningful Difference Test.

Stanley's contention that "[i]n this case, Stanley clearly challenged the differential pricing approach at the administrative level" does not excuse its failure to exhaust administrative remedies. Pl.'s Reply at 19. Broad, generalized challenges to the differential pricing analysis do not incorporate any conceivable challenge to elements of that analysis, such as to specific applications of the Meaningful Difference Test. *See Apex II*, 862 F.3d at 1331–34 (affirming this court's refusal to consider plaintiff's unexhausted argument -- that the Meaningful Difference Test's analysis of all a respondent's sales does not speak to whether the A-A method can account for targeting specifically -- where plaintiff had only previously criticized the Meaningful Difference Test for its disparate use of zeroing in comparing A-A and A-T rates).

Further, Stanley has provided neither sufficient justification for its failure to raise its arguments regarding the Meaningful Difference Test in its case brief before Commerce nor convincing reasons why any of the exceptions to administrative exhaustion apply. Stanley's argument that *Beijing Tianhai* constitutes an intervening judicial decision exception to the requirement of administrative exhaustion is not persuasive. As an initial matter, *Beijing Tianhai* is not controlling on this court's disposition of the issue at hand. More importantly, Stanley's precise arguments regarding the Meaningful Difference Test -- specifically, that Commerce unreasonably performed that test on Stanley's total sales while applying the CDT to individual CONNUMs -- are not implicated by *Beijing Tianhai* or Stanley's citation to it. Stanley characterizes its argument as an "expan[sion] on the *Beijing Tianhai* court's conclusion that the 'meaningful difference' element did not meet its statutory obligation to explain why the A-A comparison could not account for observed price differences." Pl.'s Reply at 18. But that proffered application is too broad; Stanley effectively attempts to circumvent the administrative exhaustion requirement through reference to a non-controlling opinion holding a separate aspect of the Meaningful Difference Test inadequate. *Compare Apex II*, 862 F.3d at 1331–34. In summary, Stanley could have raised its argument before Commerce prior to the issuance of the *Beijing Tianhai* opinion.

Stanley also suggested at Oral Argument that the pure question of law exception to administrative exhaustion applies here, contending that whether the meaningful difference test fulfills the requirements of 19 U.S.C. § 1677f-1 is an issue of statutory construction. However, "[s]tatutory construction alone is not sufficient to resolve this case." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003). Rather, the question is whether the methodology is justifiable, and to resolve that issue, a factual record needs to be developed. *See id.* (determining that the pure legal question exception could not apply when the court would have to assess Commerce's justifications for its practice); *Mittal Steel Point Lisas*, 548 F.3d at 1384 (finding the pure question of law exception not applicable when argument relies on unique facts of the case); *Fuwei Films (Shandong) Co. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1381, 1384–85 (2011) (concluding that the pure legal question exception could not apply when the statute at issue did not speak to the required methodology and Commerce's interpretation was needed to fill the statutory gap).

"[A] litigant must diligently protect its rights in order to be entitled to relief." *JBF RAK*, 790 F.3d at 1367 (quoting *Mukand Int'l, Ltd. v. United States*, 502 F.3d 1366, 1370 (Fed. Cir. 2007)). Because Stanley did not raise this issue during the administrative proceedings and provides no sufficient reason for its failure to do so, the court declines to consider the merits of Stanley's total versus individual comparison argument.

b. Legislative history does not support Stanley's arguments.

Stanley argues that Commerce's application of the CDT runs counter to Congressional intent as expressed in the *SAA*. Pl.'s Br. at 40–41. Specifically, Stanley argues that the *SAA* instructs that the A-T methodology is to be applied "where targeted dumping may be occurring." Pl.'s Br. at 41 (quoting *SAA* at 843). To Stanley, this means that the A-T methodology should be applied only where United States sales are less than fair value; by contrast, Stanley contends, Commerce focuses only on significant price differences, regardless of whether those differences result from sales being higher or lower than fair value. Pl.'s Br. at 41 (quoting *IDM* at 30 ("The statutory language references prices that 'differ' and does not specify whether the prices differ by being lower or higher than the comparison sales. . . . [Commerce] explained that higher priced sales and lower priced sales do not operate independently; all sales are relevant to the analysis.")). Thus, Stanley argues, the *Final Results* do not distinguish between sales that "pass" the CDT because the weighted-

average prices of the test groups are *higher* than the weighted-average price of the comparison group, and sales that "pass" because the weighted-average prices of the test groups are *lower* than the weighted-averages of the comparison group prices. Pl.'s Br. at 41–42. This, Stanley claims, runs counter to "the SAA's clear expression of congressional intent." *Id.* at 42.

Stanley also points to the *SAA*'s statement that "in determining whether a pattern of significant price difference exists, Commerce will proceed on a case-by-case basis because small differences may be significant for one industry or one type of product but not for another." Pl.'s Br. at 44 (quoting *SAA* at 843). Stanley argues that Commerce has contravened this admonition by self-initiating targeted dumping analyses and applying differential pricing according to the same formula in every proceeding since *Xanthan Gum*. Pl.'s Br. at 44.

Stanley's arguments do not persuade the court that the differential pricing analysis runs counter to congressional intent. The statute provides only that Commerce must determine whether a pattern of prices that "differ significantly among purchasers, regions, or periods of time" exists, and does not specify whether Commerce may not consider prices that differ because they are higher or lower. 19 U.S.C. § 1677f-1(d)(1)(B). The court is not persuaded that Stanley's reading of the *SAA* takes priority over Commerce's chosen methodology. As an initial matter, the court does not find that the *SAA*'s reference to "situations . . . where targeted dumping may be occurring" necessarily confines any methodology implementing 19 U.S.C. § 1677f-1(d)(1)(B) to an analysis of sales at less-than-fair-value. Pl.'s Br. at 41 (quoting *SAA* at 843). Stanley's interpretation is not found in the plain text of § 1677f-1(d)(1)(B) and the *SAA*. More generally, as explored *supra* regarding the deference owed Commerce's interpretation of the phrase "differ significantly," Commerce is entitled to fill the statutory gap with a reasonable methodology and accompanying explanation. *Apex II*, 862 F.3d at 1330 (citing *Chevron*, 467 U.S. at 843–44). Here, Commerce explained in the *IDM*, inter alia, that "[b]y considering all sales, higher priced sales and lower priced sales, [Commerce] is able to analyze an exporter's pricing practice and to identify whether there is a pattern of prices that differ significantly." *IDM* at 30. Further, Commerce explained on the record that "higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly," and that high priced sales offset lower priced sales and thus "can mask dumping." *Id.* The court is satisfied that Commerce's methodology and explanation thereof are reasonable and in accordance with the statute, particularly where Stanley cannot

identify statutory language commanding Commerce to conform to a stricter methodology than allowed by 19 U.S.C. § 1677f-1(d)(1)(B)(i).

The court also is not persuaded that Commerce has acted contrarily to congressional intent by applying differential pricing in a rote manner. Pl.'s Br. at 44. The court understands Commerce to require that a respondent's United States sales sequentially satisfy each of multiple tests in the differential pricing analysis before determining that the application of the alternate A-T methodology is appropriate. Further, Commerce stated that it reviews comments from interested parties regarding its approach. *IDM* at 31–32; *PDM* at 16. Indeed, Commerce's responses to Stanley's comments throughout the *IDM*, though contrary to Stanley's positions, undermine the argument that Commerce here applied its methodology in a rote manner. *See generally IDM* at 23–32. The court therefore cannot say that Commerce has acted in contravention of legislative intent, nor discordantly with law, in its application of the differential pricing analysis to Stanley in the underlying proceeding.

B. 19 C.F.R. § 351.414(f)(1), (3) do not apply to this proceeding under *Mid Continent*, and *Apex II*.

Stanley argues that the *Final Results* violate 19 C.F.R. § 351.414(f) (2008),[15] which the Federal Circuit held in *Mid Continent* remained in force during the relevant Period of Review in this case. Pl.'s Br. at 22; *see generally Mid Continent*, 846 F.3d 1364. The regulation, 19 C.F.R. § 351.414(f), provides, in relevant part:

> (f) Targeted dumping-
>
> (1) In general. Notwithstanding paragraph (c)(1) of this section [Commerce] may apply the average-to-transaction method, as described in paragraph (e) of this section, in an antidumping investigation if:
>
> (i) As determined through the use of, among other things, standard and appropriate statistical techniques, there is targeted dumping in the form of a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time; and
>
> (ii) [Commerce] determines that such differences cannot be taken into account using the average-to-average method or the transaction-to-transaction method and explains the basis for that determination.

[15] All references to 19 C.F.R. § 351.414(f) are to the 2008 version, which the Federal Circuit determined in *Mid Continent*, 846 F.3d 1364, was not validly repealed that year.

> (2) Limitation of average-to-transaction method to targeted dumping. Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, [Commerce] normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.
>
> (3) Allegations concerning targeted dumping. [Commerce] normally will examine only targeted dumping described in an allegation, filed within the time indicated in § 351.301(d)(5). Allegations must include all supporting factual information, and an explanation as to why the average-to-average or transaction-totransaction method could not take into account any alleged price differences.

Specifically, Stanley argues that Commerce initiated a differential pricing analysis without an allegation of targeted dumping, in contravention of § 351.414(f)(3). Pl.'s Br. at 22. Stanley, asserting that the CDT is an inapt statistical method, also argues that the *Final Results* violate the requirement of (f)(1)(i) that Commerce "use . . . standard and appropriate statistical techniques in determining whether there is a pattern of prices that differ significantly." Pl.'s Br. at 23.

1. Stanley possesses standing to challenge Commerce's non-application of the regulatory provisions.

The Government argues that Stanley lacks standing to challenge Commerce's interpretation of 19 C.F.R. § 351.414(f) because it has not averred any concrete and particularized injury in fact fairly traceable to the challenged action. Def.'s Br. at 24 (quoting *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386 (2014))). The Government also argues that the regulation applies only to investigations, and not to administrative reviews; therefore Stanley cannot trace its alleged injury to that regulation's non-application. *Id.* at 34–35.

The court is not persuaded by the Government's standing argument, which presumes that its contention, now before the court, that the regulation does not apply to administrative reviews should prevail. The applicability of certain subsections of § 351.414(f) to the underlying administrative reviews constitutes a live issue before the court.

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred . . . in order to establish standing depends considerably

> upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992). Further, when challenging an action allegedly taken without required procedural safeguards, the plaintiff need not "establish that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiffs' interest." *Mendoza*, 754 F.3d at 1010 (citing *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1160 (D.C. Cir. 2005)). Here, as has been noted, *supra* p.9 and n.11, Stanley was a mandatory respondent in the challenged review, and thus possesses a legally protected interest in a lawful calculation of its dumping margin. Stanley's preferred interpretation of the relevant regulatory provisions --essentially, that they should apply to administrative reviews as well as investigations --would redress the alleged harm caused by their non-application to the underlying proceeding. Stanley thus possesses standing to challenge Commerce's interpretation of 19 C.F.R. § 351.414(f).

2. The relevant regulatory provisions, 19 C.F.R. § 351.414(f)(1)(i) and (f)(3), do not apply to the administrative review at issue.

The question is whether these provisions, *see supra* pp.29–30, which by their terms apply to investigations but do not mention administrative reviews, are applicable to the administrative review in this case. *See* 19 C.F.R. § 351.414(f). The Federal Circuit's ruling in *Apex II* provides this court with some guidance on the issue. In *Apex II*, the Federal Circuit considered whether Commerce was obligated to explain why it would not follow the Limiting Regulation in the Final Results of the seventh administrative review of the antidumping duty order on *Certain Frozen Warmwater Shrimp from India. Apex II*, 862 F.3d at 1335–36; *see Certain Frozen Warmwater Shrimp from India*, 78 Fed. Reg. 42,492 (Dep't Commerce July 16, 2013). The court rejected plaintiff respondent Apex's argument that Commerce, by conducting its reviews according to the investigations statute, 19 U.S.C. § 1677f-1(d)(1), "has now essentially eliminated any meaningful distinctions between its targeted dumping methodology in [antidumping] reviews and investigations." *Id.* at 1335. The Federal Circuit reasoned that "Commerce did not imply that it would assume all requirements and follow all regulations associated with investigations, merely by adopting a single statutory scheme for reviews as well. And Apex cites no authority that Commerce, in doing so, bound

itself to follow the Limiting Rule." *Id.* at 1336. The court also observed that "the Limiting Rule, § 351.414(f), was created at a time when the A-T methodology was restricted for investigations but used as a matter of course for reviews." *Id.* Finally, the Federal Circuit saw "little reason to extend the Limiting Rule's application to this case where Apex offer[ed] no compelling rationale for doing so and where Commerce's policies have clearly changed over time." *Id.*

Stanley argues that *Apex II* considers the applicability to administrative reviews of only 19 C.F.R. § 351.414(f)(2), and thus the Federal Circuit's conclusions do not address those subsections of § 351.414(f) -- specifically, (1)(i) and (3) -- that Stanley argues were contravened in this proceeding. Pl.'s Suppl. Br. at 6. Stanley characterizes (f)(2) as "the Limiting Rule," a designation which does not incorporate the other subsections of (f). *Id.* Stanley argues that the Federal Circuit's definitive conclusion, that "the 'Limiting Rule' only applies to investigations, not administrative reviews," *Apex II*, 862 F.3d at 1336, therefore does not preclude Stanley's instant arguments regarding (f)(1)(i) and (3). Pl.'s Suppl. Br. at 6.

Stanley also argues that there is a "compelling rationale" to apply (f)(1)(i) and (3) to the administrative review at issue here, in line with the Federal Circuit's notation that it "s[aw] little reason to extend the Limiting Rule's application to this case where Apex offers no compelling rationale for doing so and where Commerce's policies have changed over time." *Apex II*, 862 F.3d at 1336. In essence, Stanley contends that the "compelling rationale" for applying (f)(3) to this case is found in Commerce's statement accompanying the promulgation of that subsection:

> It is the Department's view that normally any targeted dumping examination should begin with domestic interested parties. It is the domestic industry that possesses intimate knowledge of regional markets, types of customers, and the effect of specific time periods on pricing in the U.S. market in general. Without the assistance of the domestic industry, the Department would be unable to focus appropriately any analysis of targeted dumping. For example, the Department would not know what regions may be targeted for a particular product, or what time periods are most significant and can impact prices in the U.S. market.

Antidumping Duties; Countervailing Duties, Final Rule, 62 Fed. Reg. at 27,374. Stanley argues that applying the "standard and appropriate statistical techniques" provision in (f)(1) "ensures that Commerce's analysis of price differences and patterns is reasonable, rel-

evant, statistically valid, and correctly calculated – the fundamental elements of a lawful determination." Pl.'s Suppl. Br. at 8.

The court finds that the provisions of 19 C.F.R. § 351.414(f) presented by Stanley do not apply to administrative reviews. It bears repeating that "Commerce did not imply that it would assume all requirements and follow all regulations associated with investigations, merely by adopting a single statutory scheme for reviews as well." *Apex II*, 862 F.3d at 1336. Stanley presents no authority demonstrating that Commerce had assumed the obligation of applying 19 C.F.R. § 351.414(f) in administrative reviews.

Further, Stanley has not overcome the plain regulatory language indicating that its proffered subsections apply to investigations. *See* 19 C.F.R. §§ 351.414(f)(1) ("[Commerce] may apply the [A-T] method . . . in an antidumping investigation if . . ."), (3) ("[Commerce] normally will examine only targeted dumping described in an allegation, filed within the time indicated in § 351.301(d)(5)."), 351.301(d)(5) ("In an antidumping investigation . . . "); *see Hudgens v. McDonald*, 823 F.3d 630, 638 (Fed. Cir. 2016) ("[A]n agency's interpretation of its own regulation controls, unless the interpretation is 'plainly erroneous or inconsistent with the regulation.'" (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997))).

The court further finds unpersuasive Stanley's "compelling rationale" arguments, even if applicable. To the extent that the Federal Circuit created a "compelling rationale" standard to be applied, Stanley, like the plaintiff in *Apex II*, has not offered a compelling rationale for extending the Limiting Rule's application "where Commerce's policies have clearly changed over time." *Apex II*, 862 F.3d at 1336. Stanley's submitted rationales are essentially policy arguments lacking the weight of binding authority. Pl.'s Suppl. Br. at 7–8. They do not provide grounds for this court to rewrite Commerce's regulation, or to displace Commerce's application of that regulation according to its terms. *See Hudgens*, 823 F.3d at 638 (quoting *Auer*, 519 U.S. at 461).

Accordingly, assuming the correctness of applying a "compelling rationale" standard, Stanley has offered no such rationale that would move this court to extend to administrative reviews the application of a regulation that by its terms, and under the Federal Circuit's construction, applies only to investigations.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Stanley's motion for judgment on the agency record is denied; and it is further

ORDERED that Commerce's *Final Results* are sustained.
Dated: November 27. 2017
New York, New York

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

Slip Op. 17–157

CONSOLIDATED FIBERS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 14–00222

[Denying plaintiff's application for attorneys' fees and expenses under the Equal Access to Justice Act]

Dated: November 27, 2017

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiff Consolidated Fibers, Inc. With him on the brief were *Alexandra H. Salzman* and *J. Kevin Horgan*.

Jason M. Kenner, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for defendant United States. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director.

OPINION AND ORDER

Stanceu, Chief Judge:

Consolidated Fibers, Inc. ("Consolidated Fibers") applies for attorneys' fees and other expenses pursuant to the Equal Access to Justice Act ("EAJA"). For the reasons discussed herein, the court denies the application.

I. Background

Consolidated Fibers, an importer of polyester staple fiber ("PSF") from Korea, commenced this action in 2014 to contest the denial by Customs and Border Protection ("Customs" or "CBP") of its protest of CBP's reliquidation of a single entry of PSF at an antidumping duty rate of 48.14% *ad valorum*. Summons (Sept. 19, 2014), ECF No. 1. The uncontested facts relevant to plaintiff's EAJA application, as set forth in the submissions of the parties, and relevant facts ascertainable from Federal Register publications of which the court may take judicial notice, are presented below.

Consolidated Fibers made the entry of PSF that resulted in this litigation, Entry No. 315–4707817–5, on December 7, 2005, deposit-

ing estimated antidumping duties at the rate of 7.91% *ad valorum*. At the time the entry was made, PSF from Korea was subject to an antidumping duty order. *See Certain Polyester Staple Fiber from Korea: Notice of Amended Final Determination and Amended Order Pursuant to Final Court Decision*, 68 Fed. Reg. 74,552 (Int'l Trade Admin. Dec. 24, 2003) ("*Amended Order*"). The exporter of the merchandise on the entry, Dongwoo Industry Co. ("Dongwoo"), was a reviewed exporter/producer in a periodic administrative review of the antidumping duty order conducted by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), covering a period of review from May 1, 2005 through April 30, 2006. *Certain Polyester Staple Fiber from Korea: Final Results of the 2005–2006 Antidumping Duty Administrative Review*, 72 Fed. Reg. 69,663 (Int'l Trade Admin. Dec. 10, 2007) ("*Final Results*"). As a result of the review, liquidation of the entry was administratively suspended pursuant to 19 U.S.C. § 1675.[1]

On December 10, 2007, Commerce published the final results of the administrative review, in which it assigned an antidumping duty rate of 48.14% *ad valorum* to entries of subject merchandise produced or exported by Dongwoo. *Final Results*, 72 Fed. Reg. at 69,663–66. On January 14, 2008, Commerce issued liquidation instructions directing Customs to assess antidumping duties at the 48.14% rate on shipments of PSF from Korea produced or exported by Dongwoo. Customs failed to liquidate the entry in response to the instructions.

On May 6, 2011, Customs posted a bulletin notice pursuant to its regulation, 19 C.F.R. § 159.9(c)(2)(ii),[2] announcing that the entry had been deemed liquidated on June 10, 2008 at the entered antidumping duty rate of 7.91%. On June 17, 2011, Customs notified Consolidated Fibers that it had "rate advanced" the entry to the 48.14% rate specified in the Department's January 14, 2008 liquidation instructions, with interest. Customs then took action to reliquidate the entry on July 22, 2011, assessing antidumping duties at the 48.14% rate. Consolidated Fibers filed a protest of the reliquidation on November 14, 2011, which Customs denied on May 21, 2014. Plaintiff commenced this action on September 19, 2014 to contest the denial of the protest of the reliquidation. Summons.

Defendant moved for entry of confession of judgment on December 21, 2015, in which it stated its view that it was making this motion because plaintiff "will not sign a stipulated judgment on agreed statement of facts without certain concessions regarding attorney's fees

[1] Citations to the U.S. Code are to the 2006 edition unless otherwise specified.

[2] Citations to the Code of Federal Regulations are to the 2011 edition unless otherwise specified.

pursuant to the Equal Access to Justice Act (EAJA)." Def.'s Mot. for Entry of Confession of J. in Pl.'s Favor 4 n.1 (Dec. 21, 2015) ("Mot. for Confession of J."), ECF No. 28. The judgment entered in response to defendant's motion ordered reliquidation of the entry at an antidumping duty rate of 7.91% and the payment of interest as provided by law on the duty refunds. Judgment (May 16, 2016), ECF No. 31.

Plaintiff filed its EAJA application on June 15, 2016 pursuant to 28 U.S.C. § 2412 and USCIT Rule 54.1. Pl.'s App. for Attys' Fees and Other Expenses (June 15, 2016), ECF No. 33 ("Application"). In the application, plaintiff seeks an EAJA award of $30,980.18. Attach. 1 to Application (June 15, 2016), ECF No. 33–1 (Plaintiff's Proposed Order). Defendant opposed the application in its response, filed on August 19, 2016. Resp. in Opp. To Mot. for Fees pursuant to the EAJA (Aug. 19, 2016), ECF No. 36.

II. Discussion

Plaintiff claims entitlement to attorneys' fees and expenses under § 2412(d) of the EAJA, which in pertinent part provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). As an alternative to its application under § 2412(d), plaintiff requests attorneys' fees and expenses under a separate provision of the EAJA, § 2412(b), that authorizes shifting fees and expenses to the government "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b).

A. Plaintiff Does Not Qualify for an Award under § 2412(d) Because the Government's Position Was Substantially Justified

A court must award attorneys' fees and other expenses under § 2412(d) if: (1) the claimant is a prevailing party in a civil action brought by or against the United States; (2) the government's position was not substantially justified; (3) no special circumstances make an award unjust; and (4) the fee application is timely and supported by an itemized fee statement. *Libas, Ltd. v. United States*, 314 F.3d 1362,

1365 (Fed. Cir. 2003) (citing 28 U.S.C. § 2412(d)(1)(A)-(B); *INS v. Jean*, 496 U.S. 154, 158 (1990)). In addition to these criteria, § 2412(d)(2)(B) imposes financial eligibility standards under which a for-profit company may qualify for an EAJA award only if its net worth was not more than $7,000,000 and it had not more than 500 employees at the time the civil action was filed. 28 U.S.C. § 2412(d)(2)(B)(ii).

In this litigation, plaintiff attained the benefit it sought, *i.e.*, reliquidation of the entry at the entered rate of 7.91% and the payment of duty refunds with interest, and, therefore, prevailed in the civil action. Because the court concludes, for the reasons discussed later in this Opinion and Order, that defendant's position was substantially justified, the court does not address the remaining factors.

The government bears the burden of demonstrating that its position was substantially justified. *Libas*, 314 F.3d at 1365. The term "substantially justified" means "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person. That is no different from [a] reasonable basis in both law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal quotation marks and citations omitted). To meet its burden, the government must "show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." *Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (emphasis in original) (footnote omitted). The analysis is independent of the results on the merits, and a party's prevailing in the underlying case does not give rise to a presumption that the government's position was not substantially justified. *See Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988).

Defendant expressed no litigation position before the court, the case never having reached briefing on the merits. Instead, following discovery defendant sought to conclude the litigation by satisfying plaintiff's claim in full. Mot. for Confession of J. A civil plaintiff may recover under the EAJA for a government position taken at the agency level. *See Gavette*, 808 F.2d at 1467. The government's burden, therefore, is to show that the position it took, which in this case was the one taken at the agency level in denying the protest, was substantially justified.

The issue presented in the protest, and in this litigation, was whether CBP's action to reliquidate Entry No. 315–4707817–5 at an antidumping duty rate of 48.14% had legal effect, such that Consolidated Fibers became liable as the importer of record for antidumping duties at that rate, or whether CBP's action was invalid, such that the antidumping duty liability was limited to the antidumping duty cash

deposit made upon entry, which was at the rate of 7.91%. The issue is affected by two statutory provisions. The first is section 501 of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1501, which provides Customs general statutory authority to reliquidate entries. The second is section 504(d) of the Tariff Act, 19 U.S.C. § 1504(d), under which Customs is required to liquidate an entry of merchandise subject to antidumping duties within six months after receiving notice that a suspension of liquidation has been removed. In the event Customs fails to comply with § 1504(d) by accomplishing a timely liquidation, the provision effectuates a liquidation by operation of law (a "deemed" liquidation) at the rate and amount of duty asserted by the importer of record. 19 U.S.C. § 1504(d).

Publication in the Federal Register of a final determination in an antidumping duty proceeding, including the final results of an administrative review under 19 U.S.C. § 1675, constitutes notice to Customs that the suspension of liquidation has ended. *Int'l Trading Co. v. United States*, 281 F. 3d 1268, 1275 (Fed. Cir. 2002). In this instance, Customs failed to liquidate Entry No. 315–4707817–5 within the six-month period following the December 10, 2007 publication of the Final Results. Therefore, the entry liquidated by operation of law in June 2008 at the antidumping duty cash deposit rate and amount Consolidated Fibers asserted at the time of entry, which was 7.91%.

Following the deemed liquidation, Customs was required by its regulations to issue a bulletin notice "within a reasonable period" after the deemed liquidation. 19 C.F.R. § 159.9(c)(2)(ii) ("The bulletin notice of liquidation will be posted or lodged in the customhouse within a reasonable period after each liquidation by operation of law"). In this case, Customs issued the bulletin notice nearly three years after the deemed liquidation, on May 6, 2011. Customs then issued a rate advance for the entry on June 17, 2011 and took action intending to accomplish a reliquidation at the 48.14% rate on July 22, 2011, within 90 days of issuing the notice of the original liquidation, the time period specified by 19 U.S.C. § 1501.

By regulation, a valid protest must contain a statement describing "[t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a)(6). The regulations distinguish between a protest claim and the grounds the protestant offers for the claim. The time to amend a protest to add a new claim, for example, is limited to the original protest period, whereas a protestant may submit new or additional grounds for a protest claim until Customs acts on the protest. 19 C.F.R. §§ 174.14(a), 174.28. At the time Cus-

toms denied its protest, Consolidated Fibers had not amended it or added additional grounds. Its protest claim, simply stated, was that Customs lacked authority to reliquidate the entry because the entry had been deemed liquidated six months after publication of the Final Results. The "legal basis" section of the protest relied expressly on a single case, *International Trading v. United States*, 28 CIT 1, 16–18, 306 F. Supp. 2d 1265, 1278–79 (2004), *aff'd* 412 F.3d 1303, 1309 (Fed. Cir. 2005), and, implicitly, on 19 U.S.C. § 1504(d). The protest stated its grounds as follows:

> The facts and circumstances of this protest are identical to those raised in *International Trading*: the importer entered at a low rate; the final results of review published in the Federal Register established a higher rate; and Customs waited long after six months expired from the FR publication date to liquidate the entry at the higher rate. Just as the courts held in *International Trading*, Customs' belated liquidation was not lawful. Rather, the entry liquidated at the entered rate in June 2008 after the six months expired from publication of the final results.

Ex. 1 to Compl. 4 (Oct. 10, 2014), ECF No. 11 (Consolidated Fibers' Administrative Protest and Supporting Materials).[3] The protest requested "that CBP cancel its July 22, 2011 liquidation notice, declaring it null and void; and declare that Consolidated Fibers does not owe any duties with respect to Entry No. 315–4707817–5 other than those deposited at entry." *Id.*

The protest does not mention that section 501 of the Tariff Act, 19 U.S.C. § 1501, in the form in which it was in effect at the time the entry was made, was amended in December 2004 to provide expressly that Customs may reliquidate entries deemed liquidated under section 504 of the Tariff Act, 19 U.S.C. § 1504. 19 U.S.C. § 1501 (2006) ("A liquidation made in accordance with section 1500 *or 1504* of this title . . . *may be reliquidated* in any respect by the Customs Service, notwithstanding the filing of a protest, within ninety days from the date on which notice of the original liquidation is given or transmitted to the importer[.]") (emphasis added).[4] The judicial decision Consoli-

[3] Plaintiff filed both public (ECF No. 8) and confidential (ECF No. 11) versions of the complaint, attaching exhibits only to the confidential version. While some of these exhibits contain confidential material (for example, a commercial invoice and a bill of lading), others do not. The court quotes only information not qualifying as confidential information and not designated for confidential treatment by means of bracketing.

[4] In 2016, Congress again amended section 501 of the Tariff Act to limit reliquidations to a period of ninety days following the original liquidation, including a deemed liquidation. Trade Facilitation and Enforcement Act of 2015, Pub. L. No. 114–125, § 911, 130 Stat. 122, 240 (2016) (amending 19 U.S.C. § 1501). This amendment does not affect the entry at issue in this litigation.

dated Fibers cited in its protest involved an entry made prior the effective date of that amendment. The ground Consolidated Fibers put forth in the protest failed to address the issue in this case, which arises because of the length of time (nearly three years) that elapsed between the deemed liquidation and the bulletin notice of that liquidation. There is no dispute that the reliquidation occurred within the ninety-day period following the May 6, 2011 posting of the bulletin notice. Consolidated Fibers could have raised a protest ground that was at least plausible by arguing that the bulletin notice was not issued within a "reasonable period" as required by 19 C.F.R. § 159.9(c)(2)(ii) and therefore did not constitute effective "notice of the original liquidation" for purposes of 19 U.S.C. § 1501. According to such an argument, the 90-day reliquidation window in § 1501 could not have been triggered by an invalid bulletin notice, and the reliquidation was ineffectual as a result. However, Consolidated Fibers' protest did not raise any objection of this nature, either under the statute or the regulation, and it did not mention 19 C.F.R. § 159.9(c)(2)(ii).[5]

CBP's denial of Consolidated Fibers' protest followed the issuance of a ruling by CBP's Office of Regulations and Rulings, dated April 18, 2014, which set out the legal basis for denying the protest. *See* Exs. 1–2 to Compl. (Consolidated Fibers' Administrative Protest and Supporting Materials and Letter from Myles B. Harmon, Director, Commercial and Trade Facilitation Division, U.S. Customs and Border Protection, to Stephanie Allen, Senior Import Specialist, U.S. Customs and Border Protection, HQ H215035 (Apr. 18, 2014) ("Ruling Letter")). The ruling responds to the argument Consolidated Fibers raised in the protest, *i.e.*, that the deemed liquidation of the entry was final by operation of 19 U.S.C. § 1504(d), by explaining that the December 2004 amendment of section 501 of the Tariff Act provided Customs express authority to reliquidate a deemed liquidation, provided the reliquidation occurs within 90 days from the date on which notice of the original liquidation was given to the importer. Ex. 2 to Compl. 3 (Ruling Letter).

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[5] Plaintiff eventually, in its complaint before the court, raised the issue of whether the bulletin notice was posted within a "reasonable time":

> CBP's reliquidation more than three years after original liquidation of the entry subject to the aforementioned protest was contrary to law . . . . While CBP has the authority to reliquidate within ninety days from the date on which notice of the original liquidation is given (19 U.S.C. § 1501), as a matter of law CBP is obligated to issue a bulletin notice of the original deemed liquidation "within a reasonable period" of time after the deemed liquidation . . . . The issuance of such notice some three years later cannot lawfully be found to have been issued within a reasonable time of the deemed liquidation.

Compl. ¶ 33. But as the court has explained, the government did not take a contrary litigation position in any briefing before the court.

Although nothing would have prevented Customs, upon considering the protest, from addressing the question of whether the long time period prior to the issuance of the bulletin notice of the deemed liquidation rendered the reliquidation invalid, Customs was under no obligation to do so. *See* 19 U.S.C. § 1515(a); 19 C.F.R. § 174.13(a)(6). Customs was not required to decide a protest upon a ground the protestant could have raised (and should have raised) but did not. The ruling correctly responded to the sole protest ground Consolidated Fibers presented. Under that circumstance, the court is unable to conclude that Customs took a position that was not "substantially justified."

B. Plaintiff Does Not Qualify for an EAJA Award Under 28 U.S.C. § 2412(b)

Even when a court finds the government's position substantially justified, the EAJA provides an alternative basis to award attorneys' fees and expenses when appropriate pursuant to either a separate statutory scheme or a common law cost-shifting analysis. 28 U.S.C. § 2412(b). Because plaintiff does not invoke a separate statutory scheme, the court considers whether a common law cost-shifting analysis justifies an award. While attorneys' fees typically are not recoverable in U.S. cases pursuant to the so-called "American Rule," under which parties ordinarily are responsible for their own costs, an exception to this rule applies in "certain rare circumstances . . . when a party opponent is found to have 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Delphi Petroleum, Inc. v. United States*, 34 CIT 861, 863, 717 F. Supp. 2d 1340, 1343 (2010) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991)). However, "[b]ad faith is a high standard that warrants fee-shifting when a court finds that fraud has been practiced upon it, or that the very temple of justice has been defiled." *Id.* at 863–64, 1343–44 (internal quotation marks and citation omitted).

Plaintiff complains of long delays and faults the government for forcing it to engage in "protracted litigation." Application, Mem. In Support of Pl.'s App. for Attys' Fees and Other Expenses at 7–8, 11. In this litigation, action was joined when, pursuant to two extensions to which plaintiff consented, defendant filed its answer to the complaint on February 25, 2015. Pursuant to scheduling orders that were amended, also with plaintiff's consent, discovery was to end on December 4, 2015. Amend. Scheduling Ord. (Nov. 4, 2015), ECF No. 27. Shortly thereafter, on December 21, 2015, defendant moved for a confession of judgment. So even were the court to accept, *arguendo*, plaintiff's characterization of this litigation as "protracted" (a charac-

terization the filings in this case do not support), it still would reject plaintiff's argument. The issue is not whether this litigation possibly could have been resolved earlier but whether the court could conclude that defendant "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers*, 501 U.S. at 45–46. The court sees no evidence that could support such a conclusion.

III. Conclusion

Upon consideration of plaintiff's application for attorneys' fees and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that Plaintiff's Application for Attorneys' Fees and Other Expenses Pursuant to the Equal Access to Justice Act (June 15, 2016), ECF No. 33 be, and hereby is, denied.

Dated: November 27, 2017
New York, New York

/s/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU
CHIEF JUDGE