Slip Op. 19–30

STUPP CORPORATION et al., Plaintiffs and Consolidated Plaintiffs, and MAVERICK TUBE CORPORATION et al., Plaintiff-Intervenor and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SEAH STEEL CORPORATION et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00334

[Denying SeAH Steel Corporation's motion for reconsideration.]

Dated: March 7, 2019

Jeffrey Michael Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, DC, for defendant-intervenor, consolidated plaintiff, and consolidated defendant-intervenor SeAH Steel Corporation.

Elizabeth Anne Speck, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Claudia Burke*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Assistant Attorney General. Of Counsel on the brief was *Reza Karamloo*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court is a motion for reconsideration filed by SeAH Steel Corporation ("SeAH")[1] pursuant to Rule 59(e) of the Rules of the U.S. Court of International Trade ("USCIT").[2] *See* [SeAH's] Mot. [ ] Reconsideration Ct.'s Jan. 8, 2019 Order, Jan. 28, 2019, ECF No. 127 ("SeAH's Mot."). SeAH requests that the court reconsider its decision sustaining the U.S. Department of Commerce's ("Department" or "Commerce") application of its differential pricing analysis and revise Slip Opinion 19–2, dated January 8, 2019, accordingly. *See Stupp Corp. v. United States*, 43 CIT __, __, Slip Op. 19–2 at 7–11, 20–23, 34 (Jan. 8, 2019) ("*Stupp I*"). In *Stupp I*, the court addressed various challenges to the final determination in the less than fair value

[1] SeAH is the defendant-intervenor, consolidated plaintiff, and consolidated defendant-intervenor in this consolidated action.

[2] Pursuant to USCIT R. 59(e), a party may file motion for reconsideration after judgment is entered. No judgment has been entered in this action. However, the court did, in *Stupp I*, sustain Commerce's application of its differential pricing analysis and its decision is final as to that issue. *See Stupp I*, 43 CIT at __, Slip Op. 19–2 at 12–20, 34. The court will therefore rule on SeAH's motion.

("LTFV") investigation of imports of welded line pipe from the Republic of Korea ("Korea") for the period October 1, 2013, through September 30, 2014, which resulted in an antidumping duty order ("ADD"). *See Welded Line Pipe From [Korea]*, 80 Fed. Reg. 61,366 (Dep't Commerce Oct. 13, 2015) (final determination of sales at [LTFV]), as amended by *Welded Line Pipe From [Korea]*, 80 Fed. Reg. 69,637 (Dep't Commerce Nov. 10, 2015) (amended final determination of sales at [LTFV]) and accompanying Issues & Decision Mem. for the Final Affirmative Determination in the [LTFV] Investigation of Welded Line Pipe from [Korea], A-580–876, (Oct. 5, 2015), ECF No. 30–3 ("Final Decision Memo"); *Welded Line Pipe From [Korea] and the Republic of Turkey*, 80 Fed. Reg. 75,056, 75,057 (Dep't Commerce Dec. 1, 2015) ([ADD] orders). Specifically, in *Stupp I*, the court denied SeAH's three challenges to Commerce's final determination. *See Stupp I*, 43 CIT at __, Slip Op. 19–2 at 7–23, 34; *see generally* Br. SeAH [ ] Supp. Rule 56.2 Mot. J. Agency R. at 26–50, July 5, 2016, ECF No. 40 ("SeAH's Moving Br."). Relevant here, in *Stupp I*, the court held that Commerce's application of its differential pricing analysis was in accordance with law and supported by substantial evidence. *See Stupp I*, 43 CIT at __, Slip Op. 19–2 at 12– 20, 34.[3] SeAH contends that Commerce's differential pricing analysis is merely a policy, necessitating Commerce to, on a case-by-case basis, justify and support with substantial evidence, "any factual findings embodied in the 'Differential Pricing Analysis.'" SeAH's Mot. at 4. Defendant contends that SeAH failed to demonstrate that the court's determination was the result of "manifest error" and should be denied. *See* Def.'s Resp. Opp'n Def.-Intervenor [SeAH's] Mot. Reconsideration at 4–5, Feb. 15, 2019, ECF No. 130. For the reasons that follow, SeAH's motion is denied.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[4] and 28 U.S.C. § 1581(c) (2012), which grant the Court authority to review actions contesting the final determination in an investigation of an antidumping duty order.

A motion for reconsideration rests within the sound discretion of

[3] The court also sustained Commerce's decision to reject portions of SeAH's case brief to the agency and calculation of credit expenses on SeAH's back-to-back sales. *See Stupp I*, 43 CIT at __, Slip Op. 19–2 at 7–11, 20–23, 34. SeAH's motion for reconsideration does not request the court reconsider and revise its determinations as to those two challenges.

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

the court. *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). The court will grant such a motion "to address a fundamental or significant flaw in the original proceeding." *USEC, Inc. v. United States*, 25 CIT 229, 230, 138 F. Supp. 2d 1335, 1336–37 (2001) (citations omitted).

DISCUSSION

"[A] motion for reconsideration serves as 'a mechanism to correct a significant flaw in the original judgment' by directing the court to review material points of law or fact previously overlooked[.]" *RHI Refractories Liaoning Co. v. United States*, 35 CIT __, __, 752 F. Supp. 2d 1377, 1380 (2011) (quoting *United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT 745, 748, 714 F. Supp. 2d 1296, 1301 (2010)). Although a court may exercise its "discretion 'to rectify a significant flaw in the conduct of the original proceeding, a court should not disturb its prior decision unless it is manifestly erroneous.'" *Marvin Furniture (Shanghai) Co. v. United States*, 37 CIT __, __, 899 F. Supp. 2d 1352, 1353 (2013) (quoting *Dorsey v. U.S. Dep't Agric.*, 32 CIT 270, 270 (2008)). Grounds for finding a prior decision to be "manifestly erroneous" include "an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice." *Ford Motor Co. v. United States*, 30 CIT 1587, 1588 (2006). A motion for reconsideration, however, is not an opportunity for the losing party "to re-litigate the case or present arguments it previously raised." *Totes–Isotoner Corp. v. United States*, 32 CIT 1172, 1173, 580 F. Supp. 2d 1371, 1374 (2008).

At the root of SeAH's motion is its belief that the court transgressed the principles of administrative law by allowing Commerce to apply its differential pricing analysis without necessitating that Commerce support, with substantial evidence, the "factual findings" that underlay the analysis. *See* SeAH's Mot. at 1–2. SeAH contends that the court abandoned the substantial evidence standard when evaluating whether the individual components of Commerce's differential pricing analysis can establish the existence of significant price differences constituting a pattern.[5] SeAH's motion for reconsideration demon-

[5] In arguing that *Stupp I* applied the incorrect standard of review, SeAH reiterates the rationale it relied upon in its moving brief and which the court addressed in *Stupp I*. Specifically, that Commerce must support with substantial evidence its reliance on the "factual findings" imbedded within Commerce's differential pricing analysis. These "factual findings," SeAH contends, include the differential pricing analysis' use of effect size, Cohen's d, and various numerical thresholds. *Compare* SeAH's Mot. at 6–7, *with* SeAH's Moving Br. at 27. The court addressed this argument in *Stupp I*:

strates both a misreading of *Stupp I* and a misunderstanding of how this Court reviews methodologies Commerce develops in response to meeting its statutory obligations.

The relevant statute provides that Commerce may rely on the Average-to-Transaction ("A-to-T") methodology 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) [Commerce] explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) [(Average-to-Average)] or [(1)(A)(i)](ii) [(Transaction-to-Transaction)].

19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). As the court explained in *Tri Union*, neither the statute nor Commerce's regulations direct Commerce on how it is to determine whether the two statutory preconditions have been met. *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1297–98 (2016), *aff'd*, 741 F. App'x 801 (Fed. Cir. 2018) (per curiam). As a result, Commerce developed a methodology, which it calls the differential pricing analysis, to "evaluate whether the conditions for the A-T exception are met[.]" *Apex Frozen Foods Private Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1316 (2016) (citation omitted), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *Abbott v. Donovan*, 6 CIT 92, 570 F. Supp. 41, 46–47 (1983), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)). Further, "complex economic and accounting decisions of a technical nature" that Commerce makes are afforded discretion, the differential pricing analysis constitutes "precisely"

SeAH argues that because Commerce's differential pricing analysis is not the result of formal rule making, Commerce must justify its use on a case-by-case basis. *See* SeAH's [Moving] Br. at 26–32. Commerce has explained the reasonableness of the specific thresholds it employs in its differential pricing analysis. *See* Final Decision Memo at 22–25. The reasonableness of the steps underlying the analysis, as applied by Commerce, has been addressed by this Court and upheld by the U.S. Court of Appeals for the Federal Circuit. *See Apex [Frozen Foods Private Ltd. v. United States]*, 862 F.3d [1337,] 1345–51 [(Fed. Cir. 2017)]; *Apex [Frozen Foods Private Ltd. v. United States]*, 41 CIT [__ ,] __, 208 F. Supp. 3d [1398,] 1410–17 [(2017)]; *Tri Union*, 40 CIT at __, 163 F. Supp. 3d at 1297–1310, *aff'd*, 741 F. App'x 801 (Fed. Cir. 2018) (per curiam).

Stupp I, 43 CIT at __, Slip Op. 19–2 at 17 n.18. A motion for reconsideration is not an opportunity for SeAH to relitigate a previously addressed issue.

that kind of decision, and in reviewing such decisions, this court inquires "whether Commerce's methodological choice in carrying out its directive is reasonable." *Tri Union*, 40 CIT at __, 163 F. Supp. 3d at 1300.

Commerce's differential pricing analysis occurs in two stages. The first stage is bifurcated to address two separate questions posed by 19 U.S.C. § 1677f-1(d)(1)(B), namely, whether (i) there are significant price differences and (ii) there is a pattern to the price differences. *See* Final Decision Memo at 11; Decision Mem. for the Prelim. Determination in the [ADD] Investigation of Welded Line Pipe from [Korea] at 7–8, A-580876, PD 305, bar code 3277027–01 (May 14, 2015) ("Prelim. Decision Memo"). It is these two determinations—whether price differences are significant and whether those differences form a pattern—that SeAH argues are factual findings embedded in Commerce's differential pricing analysis and for which substantial evidence must be proffered on every record. However, what SeAH refers to as factual findings embedded in the differential pricing analysis are actually interpretative choices Commerce made to implement 19 U.S.C. § 1677f-1(d)(1)(B) because the statutory terms "significant" and "pattern" are undefined and are ambiguous.[6] Congress delegates discretion to the agency to make such interpretive choices when the terms of the statute are ambiguous. *See Chevron*, 467 U.S. at 843–45. Here, the agency's choice is that a price difference is significant if it passes what the agency refers to as Cohen's d test and that there is a pattern if the ratio test is satisfied. *See* Final Decision Memo at 7–13, 19–26; Prelim. Decision Memo at 7–8. Commerce must, of course, still explain why these choices are reasonable. *Ceramica*, 10 CIT at 404–05, 636 F. Supp. at 966. The Court of Appeals for the Federal Circuit, per curiam, affirmed *Tri Union*'s holding that Commerce reasonably explained why its Cohen's d test is able to identify significant price differences and why its ratio test is able to evaluate whether the extent of the identified significant price differences constitutes a pattern. *Tri Union*, 741 F. App'x 801, *aff'g*, 40 CIT at __, 163 F. Supp. 3d at 1297–1301, 1308–09. The second stage of the differential pricing analysis interprets 19 U.S.C. § 1677f-1(d)(1)(B)(ii) and is called the meaningful difference test. Although SeAH does not challenge *Stupp I*'s holding sustaining Commerce's application of this test, the Court of Appeals for the Federal Circuit has held that

[6] SeAH mistakenly argues that the individual components of Commerce's differential pricing analysis, e.g., its use of effect size, Cohen's d, and various numerical thresholds, are "factual findings" that must be supported by substantial evidence in every case. A methodology is not a factual finding; it is an approach to finding facts. The words of the relevant statute allow for the approach chosen by Commerce.

Commerce's rationale for applying the test was reasonable. *Apex Frozen Foods Private Limited v. United States*, 862 F.3d 1337, 1346–49 (Fed. Cir. 2017). Accordingly, the Court of Appeals for the Federal Circuit has found that all components of the differential pricing analysis are reasonable mechanisms for Commerce to satisfy the statute.

Finally, the court did not, as SeAH contends, "h[o]ld that the substantial evidence requirement did not apply in this case because the 'Differential Pricing Analysis' is simply an interpretation of a statutory provision, which must be upheld if the Court finds that it is 'reasonable.'" SeAH's Mot. at 5 (citing *Stupp I*, 43 CIT at __, Slip Op. 19–2 at 13–14). SeAH's characterization of the holding reveals its misunderstanding of when this Court applies the substantial evidence standard. The Court reviews whether the outputs of Commerce's methodology are supported by substantial evidence on this record; as it did in *Stupp I*. The Court does not review whether Commerce's methodology, which is an interpretation of a statute, is supported by substantial evidence. Instead, the court evaluates whether the methodology reasonably implements a given statutory directive. SeAH's reading of the court's holding is likely colored by its position, which is based on a false premise, that the differential pricing analysis is merely a general policy statement and as such, "must be reviewed as if the policy had never been adopted." SeAH's Mot. at 2–3 (citing and quoting *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974); *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014)). The differential pricing analysis is not a policy; it is the result of Commerce interpreting 19 U.S.C. § 1677f-1(d)(1)(B) and devising a methodology to effectuate that interpretation. The statute affords Commerce the ability to interpret the statutory terms absent rule making.[7] *Apex*, 40 CIT at __, 144 F. Supp. 3d at 1320–21; *see also Chevron*, 467 U.S. at 843–45. It would be inappropriate to review the methodology itself pursuant to the substantial evidence standard. Accordingly, SeAH failed to demonstrate "manifest error" with the court's reasoning for sustaining Commerce's application of the differential pricing analysis in *Stupp I*.

CONCLUSION

For the foregoing reasons, it is

ORDERED that SeAH's motion for reconsideration is denied.

[7] Further, given that Commerce's methodology continues to be developed, it may not be appropriate for the court to rigidify it in this case. *See SEC v. Chenery*, 332 U.S. 194, 202–03 (1947); *Apex*, 40 CIT at __, 144 F. Supp. 3d at 1320–21.

Dated: March 7, 2019
New York, New York

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

Slip Op. 19–31

JINDAL POLY FILMS LIMITED OF INDIA (a.k.a. JINDAL POLY FILMS, LTD. (INDIA)), Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 18–00038

[Remanding the U.S. Department of Commerce's final results in the administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip from India.]

Dated: March 11, 2019

Stephen W. Brophy, Husch Blackwell, LLP, of Washington, DC, argued for Plaintiff. With him on the brief was *Nithya Nagarajan*.

Sonia Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Kristen E. McCannon*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Barnett, Judge:

Plaintiff Jindal Poly Films Limited of India (a.k.a. Jindal Poly Films Ltd. (India)) ("Plaintiff" or "Jindal") challenges certain aspects of the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip ("PET film") from India. *See Polyethylene Terephthalate Film, Sheet, and Strip from India*, 83 Fed. Reg. 6,162 (Dep't Commerce Feb. 13, 2018) (final results on antidumping duty admin. review; 2015–2016) ("*Final Results*"), ECF No. 18–4, and the accompanying Issues and Decision Mem., A-533–824 (Feb. 6, 2018) ("I&D Mem."), ECF No. 18–5;[1] Compl., ECF No. 6. Plaintiff argues that Commerce's decision to deny

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 18–1, and a Confidential Administrative Record ("CR"), ECF No. 18–2. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public J.A. ("PJA"), ECF No. 30; Public Suppl. J.A., ECF No. 42; Confidential J.A. ("CJA"), ECF No. 29, Confidential Suppl. J.A., ECF No. 41. The court references the confidential versions of the relevant record documents, unless otherwise specified.

Jindal two post-sale price adjustments to its home market sales lacks adequate explanation and analysis, is not supported by substantial evidence, and is contrary to law; Commerce unlawfully failed to issue a supplemental questionnaire to Jindal to seek additional information on the two post-sale price adjustments that Commerce denied; and Commerce violated Jindal's due process rights by depriving it of an opportunity to meaningfully comment on Commerce's preliminary results. *See* Mot. for J. Upon the Agency R. Pursuant to USCIT Rule 56.2 of Pl. Jindal Poly Films Ltd. of India (a.k.a. Jindal Poly Films Ltd. (India)) and Mem. in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Br."), ECF No. 23; Confidential Reply of Pl. Jindal Poly Films Limited of India (a.k.a. Jindal Poly Films Ltd. (India)) ("Pl.'s Reply"), ECF No. 27.

Defendant United States ("Defendant" or "the Government") urges the court to sustain the agency's *Final Results*. *See generally* Confidential Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. ("Def.'s Br.") at 10–14, 17–23, ECF No. 26. Defendant-Intervenors DuPont Teijin Films, Mitsubishi Polyester Film, Inc., and SKC, Inc. did not respond to Plaintiff's arguments. *See* Letter to Court (Sep. 17, 2018), ECF No. 24. The court heard oral argument on February 13, 2019. *See* Docket Entry, ECF No. 43. For the reasons discussed below, the court remands the *Final Results*.

BACKGROUND

Jindal was one of two mandatory respondents in the 2015–2016 administrative review of the antidumping duty order on PET film from India. *See* Selection of Respondents for Individual Examination (Nov. 2, 2016) at 5, CR 3, P.R. 16, CJA Tab 4, PJA Tab 4. In its response to Section B of Commerce's initial questionnaire, Jindal stated that it provides the following post-sale billing adjustments, discounts, and rebates to its customers:

> Short Billing Adjustment (BILLADJ1H)
> Excess Billing Adjustment (BILLADJ2H)
> Early Payments Discount (EARLYPYH)
> Quantity Discount (REBATE1H)
> Financing Charge Discount (REBATE3H)
> VAT/CST Discount (REBATE4H)
> Monthly Rebate & Other Credit Notes (REBATE5H)
> Exclusive Dealer Discount (REBATE6H)

Initial Sec. B and C Questionnaire Resp. of Jindal (Dec. 20, 2016) ("Sec. B Resp.") at 27–38, CR 19–21, PR 43, CJA Tab 5, Suppl. CJA Tab 1, PJA Tab 5, Suppl. PJA Tab 1. Jindal claimed that its post-sale discounts are "within the scope of accepted price adjustments" be-

cause they "are known to its customers at the time the sale is made" and "these adjustments have been granted by [Commerce] in previous administrative reviews with respect to Jindal." *Id.* at 32. Jindal provided a sample copy of its sales policy that included the terms of the claimed adjustments as well as various exhibits purporting to reflect sample calculations of the rebates and copies of credit notes. *See id.*, Exs. B-16—B-26.

Commerce published its preliminary results on August 7, 2017. *Polyethylene Terephthalate Film, Sheet, and Strip from India*, 82 Fed. Reg. 36,735 (Dep.'t Commerce Aug. 7, 2017) (prelim. results and partial rescission of antidumping duty admin. review; 2015–2016) ("*Preliminary Results*"). In the Decision Memorandum accompanying the *Preliminary Results*, Commerce stated that "in accordance with 19 C.F.R. [§] 351.401(c), we made adjustments for discounts and rebates." Decision Mem. for Prelim. Results and Partial Rescission of Antidumping Duty Admin. Review (July 31, 2017) at 12, PR 68, CJA Tab 7, PJA Tab 7; *see also id.* at 7. Commerce did not identify therein which normal value price adjustments it made or provide further discussion or analysis regarding Plaintiff's claimed adjustments. Commerce released the home market Statistical Analysis Software ("SAS") program log in conjunction with its preliminary analysis memorandum, which provided the following information:

> 7809 HMGUPADJ = (BILLADJ1H + BILLADJ2H + . . .); /* Price adjustments to be added to HMGUP */
>
> 7810 HMDISREB = EARLPYH + REBATE5H; /* Discounts, rebates & other price */
>
> 7811 /* adjustments to be subtracted from HMGUP - Post-sale price adjustments are not allowed */

Jindal's Prelim. Home Market SAS Program Log (Aug. 11, 2017) ("Prelim. SAS Log") at 91, CR 126, CJA Tab 9, PJA Tab 9; *see also* Analysis Mem. for the Prelim. Results (July 31, 2017) at 4, CR 63, PR 123, CJA Tab 8, PJA Tab 8.

On August 23, 2014, Plaintiff filed a letter with Commerce asking the agency to either explain why it had denied Plaintiff's reported price adjustments or issue a supplemental questionnaire to Plaintiff to "clarify the record of this case" since Commerce had granted Jindal's reported price adjustments "in all prior reviews." Req. for Clarification of Prelim. Results of Review (Aug. 23, 2017) ("Pl.'s Req. for Clarification") at 2, PR 65, CJA Tab 10, PJA Tab 10. Commerce responded that it had inadvertently omitted a footnote from its preliminary memoranda indicating that Jindal "did not meet the criteria

. . . for post-sale rebates and adjustments" because its responses to the agency's initial questionnaire "did not provide information on any of the [] factors" set forth in *Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings,* 81 Fed. Reg. 15,641 (Dep't Commerce, Mar. 24, 2016) (final rule) ("*Final Modification*"). Letter from Commerce to Jindal Re: 2015–2016 Admin. Review of PET Film from India (Sept. 25, 2017) ("Sept. 25, 2017 Letter") at 1 & nn.1–2, PR 74, CJA Tab 11, PJA Tab 11.

Two days later, Plaintiff submitted its case brief to the agency arguing that (1) Commerce's preliminary decision to deny Jindal's post-sale price adjustments without adequate explanation was arbitrary and capricious and unsupported by substantial evidence; (2) Jindal's Section B responses addressed the *Final Modification* factors; and (3) Commerce was statutorily required to issue a supplemental questionnaire to provide Jindal an opportunity to cure any purported deficiencies in its responses. Admin. Case Br. (Sept. 27, 2017) ("Pl.'s Admin. Case Br.") at ECF pp. 110–11, PR 76, CJA Tab 12, PJA Tab 12. Jindal requested that Commerce either explain the reasons for denying its reported post-sale price adjustments and permit supplemental briefing to address the issue or issue a supplemental questionnaire to Jindal. *Id.* at ECF p. 112–13.

Commerce published its final results on February 13, 2018. *See Final Results*. Commerce explained that it granted the following post-sale price adjustments in accordance with the *Preliminary Results*: Payment Discount (EARLPYH), Short Billing Adjustment (BILLADJ1H), Excess Billing Adjustment (BILLADJH2H) and Monthly/Other Credit Notes Rebate (REBATE5H). Analysis Mem. for the Final Results (Feb. 6, 2018) ("Final Analysis Mem.") at 2–4, CR 144, PR 82, CJA Tab 13, PJA Tab 13. For the final results, Commerce also granted the Quantity Discount (REBATE1H) and VAT/CST Discount (REBATE4H) "because: 1) the terms were set prior to the sales, 2) proper timing of the adjustment, and 3) a showing of legitimate transactions." I&D Mem. at 3; *see also* Final Analysis Mem. at 1, 5. However, Commerce denied two remaining adjustments—Financing Charges Discount (REBATE3H) and Exclusive Dealer Discount (REBATE6H)—stating:

> We continue to determine that the information on the administrative record does not meet the criteria spelled out in the *Final Modification*. The Financing Charges Discount does not meet the criteria (1) where terms and conditions were set prior to sale; (3) the timing of the adjustment; and (5) any other factors tending to reflect on the legitimacy of this claimed adjustment, specifically the business sense of this adjustment. The Exclusive

> Dealer Discount also does not meet the criteria (1) where terms and conditions were set prior to sale; (3) the timing of the adjustment; and (5) any other factors tending to reflect on the legitimacy of this claimed adjustment, specifically the business sense of this adjustment. . . . [T]he burden is on the respondent [to] provide information relevant to support its questionnaire response.

Final Analysis Mem. at 6.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[2] and 28 U.S.C. § 1581(c). The court will uphold Commerce's determination if it is supported by substantial evidence on the record and in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). In reviewing whether substantial evidence supports Commerce's determination, the court asks whether there was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). This standard requires that Commerce "examine the record and articulate a satisfactory explanation for its action." *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013). While the court will uphold a determination of less than ideal clarity, "the path of Commerce's decision must be reasonably discernable to [the] court." *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009); *see also CS Wind Vietnam Co., Ltd. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (the agency's experience and expertise are not a substitute for the required explanation).

DISCUSSION

I. Commerce's Denial of Two Post-Sale Price Adjustments

A. Legal Framework

To determine whether subject merchandise is being sold at less than fair value, Commerce compares the export price or constructed export price of the subject merchandise to its normal value. *See*

[2] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

generally 19 U.S.C. § 1673 *et seq*. The statute directs Commerce to calculate normal value using the "price at which the foreign like product is first sold . . . for consumption in the exporting country." *Id.* § 1677b(a)(1)(B)(i). Commerce's regulations further direct the agency to use a price for normal value that "is net of price adjustments, as defined in § 351.102(b), that are reasonably attributable to the . . . foreign like product." 19 C.F.R. § 351.401(c) (2016).

The regulations define a "price adjustment" as "a change in the price charged for . . . the foreign like product, such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale (*see* § 351.401(c)), that is reflected in the purchaser's net outlay." *Id.* § 351.102(b)(38). Commerce does "not accept a price adjustment that is made after the time of sale unless the interested party demonstrates . . . its entitlement to such an adjustment." *Id.* § 351.401(c).[3] When it adopted this version of the regulations, Commerce also discussed, in the preamble, a non-exhaustive list of factors that it may consider in determining whether an interested party has demonstrated entitlement to a post-sale price adjustment. *Final Modification*, 81 Fed. Reg. at 15,644–45. Those factors are:

> (1) [w]hether the terms and conditions of the adjustment were established and/or known to the customer at the time of sale, and whether this can be demonstrated through documentation; (2) how common such post-sale price adjustments are for the company and/or industry; (3) the timing of the adjustment; (4) the number of such adjustments in the proceeding; and (5) any other factors tending to reflect on the legitimacy of the claimed adjustment.

Id.

B. Parties' Arguments

Plaintiff argues that Commerce failed to articulate its reasons for granting certain adjustments and denying others, and this failure renders Commerce's decision unsupported by substantial evidence and contrary to law.[4] Pl.'s Br. at 9, 11. Plaintiff contends that Commerce's decision with respect to the first factor—whether the terms of

[3] The agency modified 19 C.F.R. § 351.401(c) in 2016 to add this sentence after the court, in *Papierfabrik Aug. Koehler AG v. United States*, 38 CIT ___, 971 F. Supp. 2d 1246, 1251–57 (2014), held that Commerce's decision to reject certain post-sale price adjustments, when the customer was not aware of the adjustment at the time of sale, contravened the plain language of 19 C.F.R. §§ 351.401(c) and 351.102(b)(38). *See Final Modification*, 81 Fed. Reg. at 15,642. Commerce also refined its definition of price adjustment in 19 C.F.R. § 351.102(b)(38) in the *Final Modification*. *Id.*

[4] Plaintiff does not challenge the regulation itself.

the adjustment were set or known to the customer at the time of sale—is internally inconsistent because Plaintiff provided the same sample copy of its sales policy for all the claimed adjustments. *See id.* at 10; Pl.'s Reply at 4. With respect to the third and fifth factors—the timing of the adjustment and any factor "tending to reflect on the legitimacy of the claimed adjustment"—Plaintiff contends that Commerce's decision fails to explain Commerce's path of reasoning and why Plaintiff's questionnaire responses were insufficient to satisfy these criteria. Pl.'s Br. at 10–11; Pl.'s Reply at 4–5.

The Government contends that Jindal, as the party claiming the adjustment, failed to meet its burden of establishing eligibility for the adjustment. Def.'s Br. at 10. According to the Government, Jindal failed to provide evidence regarding the first and third factors and failed to explain whether the discounts "were legitimate adjustments." *Id.* at 11. The Government further contends that "Jindal did not offer any specific arguments with respect to individual post-sale adjustments in its case brief." *Id.* at 11 (quoting I&D Mem. at 2 n.6).

C. Commerce Failed to a Provide Reasoned Explanation for Denying the Post-Sale Price Adjustments

Commerce has not provided the required explanation for its determination to allow the court to apply the standard of review. Commerce's entire analysis for denying the two post-sale price adjustments is comprised of conclusory statements that the adjustments did not satisfy the first, third, and fifth "criteria" listed in the *Final Modification*. *See* I&D Mem. at 3; Final Analysis Mem. at 6. Commerce did not explain why the adjustments do not meet the "criteria" or how Commerce evaluated the factors in the *Final Modification*. Nor did Commerce discuss the evidence which Jindal supplied in support of its claims.[5]

Regarding the first factor, the Government argues that Jindal failed to support its claim that "the terms and conditions of the adjustment[s] were established and/or known to the customer at the time of sale" with supporting "documentation." Def.'s Mem. at 11 (quoting *Final Modification*, 81 Fed. Reg. at 15,645). In its Section B response, however, Jindal stated that all its claimed adjustments "are known to

[5] Defendant's contention that Jindal failed to make any "specific arguments with respect to individual post-sale adjustments in its case brief," Def.'s Br. at 11 (quoting I&D Mem. at 2 n.6), is unpersuasive because Jindal argued in its case brief that its Section B questionnaire responses addressed the *Final Modification* factors, Pl.'s Admin. Case Br. at ECF p. 111. Jindal also urged Commerce on two separate occasions to provide a detailed explanation for denying the adjustments so that it could better tailor its arguments to address Commerce's concerns. *See* Pl.'s Req. for Clarification; Pl.'s Admin. Case Br. at ECF p. 112. Commerce did not.

its customers at the time the sale is made and[,] in many situations, the customers have been availing of the price adjustments for several years." Sec. B Resp. at 32. Jindal also provided the same sample copy of its sales policy for all the claimed adjustments, including the two that Commerce denied. *Id.* at 31–32 & Ex. B-16. Commerce did not explain why that documentation sufficed for some of the claimed adjustments but not others.[6]

Regarding the fifth factor, the Government contends that Jindal failed to establish that the Exclusive Dealer Discount and Financing Charge Rebate Discount "had a legitimate business purpose," like the other six adjustments that Commerce granted. Def.'s Br. at 12 (citing Final Analysis Mem. at 3–6). However, Commerce only addressed this factor for three of the six adjustments that it granted, and even then, it only made a specific finding regarding that factor for *one* of the adjustments. *See* Final Analysis Mem. at 3–5.[7] Before the court, the Government claims that "Jindal explained the business purpose" for all of the adjustments that Commerce did not address, Def.'s Br. at 13 (citing Sec. B Resp. at 27–29); however, Commerce did not cite or rely on the explanations provided in the brief and, more importantly, Commerce did not explain why Jindal's explanations for the two denied adjustments were distinct from the other explanations.[8]

The non-exhaustive list of factors in the *Final Modification* is not a rigid set of criteria; Commerce "may consider any one or a combination of the[] factors in making its determination," and that determination "may be made on a case-by-case basis and in light of the evidence and arguments on each record." *Final Modification*, 81 Fed. Reg. at 15,645. However, Commerce must explain that determination and the determination must be supported by substantial evidence on the record. Based on Commerce's conclusory statements, the court cannot discern the path of Commerce's decision-making nor deter-

[6] Furthermore, Jindal explained the circumstances in which it offers the Financing Charge Discount and the Exclusive Dealer Discount and provided sample rebate calculations and copies of credit notes, as supporting documentation. *See* Sec. B Resp. at 34–38 & Exs. B-19, B-20, B-25, B-26. The documentation that Jindal provided was the same as that provided to support the six other claimed adjustments that Commerce granted. *See id.*, Exs. B-16—B-26. Although Commerce decided to grant some adjustments and deny others, it did not explain sufficiently its reasoning.

[7] Commerce granted the Early Payments Discount, Excess Billing Adjustment, and the Short Billing Adjustment even though it did not make a finding concerning the "business sense" of these adjustments. *See* Final Analysis Mem. at 3–4. Moreover, Commerce granted the Short Billing Adjustment based only on a finding that it met factors (2) and (3). *Id.* at 4.

[8] The Government's attempt to provide *post hoc* explanation for the distinction must fail. *See* Def.'s Br. at 11–13.

mine that it is supported by substantial evidence. *See NMB Singapore Ltd.*, 557 F.3d at 1319 ("[W]hile its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court."); *see also CS Wind*, 832 F.3d at 1377. Therefore, this matter must be remanded for Commerce to reconsider Jindal's claims for post-sale price adjustments for Exclusive Dealer Discounts and Financing Charge Rebate Discounts, taking account of the evidence and arguments on record, and to provide the reasons supporting its redetermination.

II. Commerce's Decision Not to Issue to Jindal a Supplemental Questionnaire

A. Legal Framework

Pursuant to 19 U.S.C. § 1677m(d), if Commerce:

> determines that a response to a request for information . . . does not comply with the request, [Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews.

If the respondent's subsequent submission is also deficient or untimely, Commerce may "disregard all or part of the original and subsequent responses," subject to section 1677m(e). *Id.* § 1677m(d)(1)-(2). Section 1677m(e) provides that Commerce may not "decline to consider information that is . . . necessary to the determination but does not meet all the applicable requirements" when the information is timely submitted; "the information can be verified"; "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination"; the proponent of the information "has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce]"; and "the information can be used without undue difficulties." *Id.* § 1677m(e).

As noted above, in addition to these statutory obligations placed on the agency, Commerce has regulated that it "will not accept a price adjustment that is made after the time of sale unless the interested party demonstrates, to the satisfaction of [the agency], its entitlement to such an adjustment." 19 CFR § 351.401(c).

B. Parties' Arguments

Plaintiff asserts that Commerce was required to issue a supplemental questionnaire if it found Jindal's questionnaire response regard-

ing the two price adjustments to be inadequate. Pl.'s Br. at 15. Plaintiff also complains that Commerce did not provide adequate notice of the specific information required to receive a post-sale price adjustment pursuant to the methodology announced in the *Final Modification*. *Id.* at 15–16. The Government argues that Commerce did not request that Jindal claim eligibility for a post-sale price adjustment and, therefore, Jindal did not submit a deficient response within the meaning of 19 U.S.C. § 1677m(d). Def.'s Br. at 18. The Government also argues that Commerce was not obligated to issue a supplemental questionnaire and did not rely on facts otherwise available to calculate a price adjustment; instead, Commerce merely refused to grant the adjustment. *Id.*

C. Commerce Must Provide Jindal an Opportunity to Clarify or Supplement its Questionnaire Responses

Commerce's failure to articulate its reasoning for denying two of Jindal's post-sale price adjustments limits the court's ability to review whether an alleged deficiency in Jindal's questionnaire response was a factor in Commerce's decision making. Nevertheless, for the reasons discussed below, if Commerce determined that Plaintiff's questionnaire response was deficient in some regard, or that Commerce needed clarification of the response regarding the adjustments, the agency should have issued a supplemental questionnaire to Plaintiff.

Commerce stated that it was denying certain post-sale price adjustments in the *Preliminary Results* because Jindal's questionnaire responses "did not provide information on any of the [] factors" laid out in the *Final Modification*. Sept. 25 Letter at 1. This statement is inaccurate[9] and Plaintiff subsequently made two efforts to obtain clarification as to how Commerce interpreted the *Final Modification* factors and what additional information was necessary to satisfy those factors. *See* Pl.'s Req. for Clarification; Pl.'s Admin. Case Br. at ECF p. 112.

It is undisputed that a respondent seeking a post-sale price adjustment to normal value bears the burden of establishing its entitlement to such adjustment. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1040 (Fed. Cir. 1996). This burden properly rests with the respondent because it is the party in possession of "the necessary information." *Id.* at 1040. However, this placement of the burden comes with an understanding that a respondent has sufficient notice of what information is considered necessary to allow it to meet its

[9] Indeed, Plaintiff attempted to address the *Final Modification* factors through both narrative responses and documentary evidence. *See* Sec. B Resp. at 27–38 & Exs. Exs. B-16—B-26.

burden. Although the preamble to the *Final Modification* contained a list of factors Commerce may consider to determine whether to grant a post-sale price adjustment, Commerce indicated that it would apply these factors on a case-by-case basis in light of the evidence and arguments on the record. *See Final Modification*, 81 Fed. Reg. at 15,644–45. While Commerce may conduct such a case-by-case analysis, it may not fail to engage with a respondent attempting to address the factors in good faith. Under these circumstances, in which Jindal responded to Commerce's questions regarding price adjustments and attempted to address the *Final Modification* factors, Commerce was obligated to inform Jindal of the nature of any deficiency and, to the extent practicable, provide Jindal with an opportunity to remedy or explain the deficiency. *See* 19 U.S.C. § 1677m(d).

The court is unpersuaded by the Government's argument that section 1677m(d) is inapplicable because Commerce did not specifically request Plaintiff to establish entitlement to these post-sale price adjustments and, thus, Plaintiff's response did not fail to comply with a request for information. Def.'s Br. at 18. In Section B of the initial questionnaire, Commerce requested that Jindal "report the unit value of each rebate given," "explain [its] policy and practice for granting rebates," and "describe the terms and conditions of each rebate program and when the terms and conditions are established in the sales process." *See* Sec. B Resp. at 31. Jindal reported the post-sale price adjustments in response to this request.

The Government's reliance on *ABB, Inc. v. United States*, 41 CIT __, 273 F. Supp. 3d 1200 (2017) for its claim that Commerce is not required to issue a supplemental questionnaire to a respondent seeking a favorable adjustment that fully complied with an information request, *see* Def.'s Br. at 19; Oral Arg. at 26:48–27:16, is unavailing.[10] In *ABB*, the respondent mislabeled its data, did not attempt to fix the alleged labeling error prior to Commerce issuing its final determination, and did not identify its own error until it filed ministerial error allegations. 273 F. Supp. 3d at 1211–12. The issue in *ABB* was whether Commerce was required to correct the alleged error, not whether it was obligated to issue a supplemental questionnaire. *ABB*, therefore, is readily distinguished.

The Government might have considered *ABB, Inc. v. United States*, Slip Op. 18156, 2018 WL 6131880 (CIT Nov. 13, 2018) to be slightly more relevant. *See* Oral Arg. at 35:40–36:00 (quoting language from *ABB*, 2018 WL 6131880, at *11). There, the court agreed with the Government that Commerce was not obligated to issue a supplemental questionnaire pursuant to 19 U.S.C. § 1677m(d). That case, how-

[10] Citations to the oral argument reflect time stamps from the recording.

ever, is also distinguishable because the court found that "[i]nherent in the requirement of § 1677m(d) is a finding that Commerce was or should have been aware of the deficiency in the questionnaire response" and the respondent was the only party with the ability to determine that its questionnaire response was deficient. *Id.* at *11. Here, the situation is just the opposite—Commerce was the only party that could have been aware of the deficiency in the questionnaire response because it was the only participant in the review that knew what would satisfy its unarticulated criteria.

Even if Commerce determined that Jindal fully complied with a request for information, but Commerce did not understand the information, Commerce had the opportunity to issue a supplemental questionnaire seeking clarification of any ambiguities in the information. The Government's brief and statements at oral argument indicate that Commerce might have benefitted from a request for clarification of certain information in Jindal's responses and documentation Jindal submitted. *See* Def.'s Br. at 11–12 (selecting several quotes from Jindal's Section B responses and arguing that Jindal "did not explain" what it meant by them); Oral Arg. at 40:15–40:38, 40:50–41:16 (making similar arguments and stating that Jindal's responses were unclear and "not intelligible" to Commerce); *id.* at 23:06–23:14 (arguing that it was not clear whether Jindal had shared its sales policy with anyone).

Commerce is obligated "to carry out its statutory duty of 'determining dumping margins as accurately as possible.'" *Huzhou Muyun Wood Co., Ltd. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1215, 1224 (2017) (quoting *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995)). As stated above, Commerce must calculate normal value using the "price at which the foreign like product is first sold . . . for consumption in the exporting country," 19 U.S.C. § 1677b(a)(1)(B)(i), and which is net of price adjustments, 19 C.F.R. §§ 351.401(c), 351.102(b)(38). By declining to issue a supplemental questionnaire seeking clarification of the information Jindal provided to support its claims for the post-sale price adjustments, Commerce unreasonably declined a downward adjustment to normal value when a simple clarification may have cured Commerce's lack of understanding.

Accordingly, on remand, Commerce must provide Jindal an opportunity to clarify or supplement its responses to address Commerce's application of the *Final Modification* in this case with respect to the Exclusive Dealer Discount and Financing Charges Discount.

III. Jindal's Procedural Due Process Claim

A. Legal Framework

When Commerce makes a preliminary determination in an administrative review, it must "publish the facts and conclusions supporting that determination" and "publish notice of that determination in the Federal Register." 19 U.S.C. § 1677f(i)(1). The notice or determination must include, "to the extent applicable . . . a full explanation of the methodology used in establishing [the weighted average dumping] margins" and "the primary reasons for the determination." 19 U.S.C. § 1677f(i)(2)(A)(iii)(II), (iv). Thereafter, interested parties may submit case briefs setting forth arguments relevant to the agency's final results. *See* 19 C.F.R. § 351.309(c)(1)(ii), (2). The U.S. Court of Appeals for the Federal Circuit has stated that an importer participating in an administrative review has a due process right to "notice and a meaningful opportunity to be heard." *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761–62 (Fed. Cir. 2012) (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)).

B. Parties' Arguments

Plaintiff contends that Commerce's failure to provide an adequate explanation for its decision in the *Preliminary Results* deprived Jindal of its due process rights and an opportunity to comment meaningfully on the preliminary decision. Pl.'s Br. at 13. The Government responds that Commerce identified the adjustments that it granted in the preliminary SAS Log and explained the legal basis for its decision in the September 25, 2017 letter in response to Jindal's request. Def.'s Br. at 15 (citing Prelim. SAS Log. At 91; Sept. 25, 2017 Letter). It further argues that Jindal received and used its opportunity to file a brief pursuant to 19 C.F.R. § 351.309(c)(1)(i). *Id.* At oral argument, Plaintiff conceded that if the court remands the determination for Commerce to reconsider the two price adjustments, Plaintiff's due process claim is moot. Oral Arg. at 17:17–17:37.

C. Jindal's Procedural Due Process Claim is Moot

Jindal's claim that it was deprived of notice and meaningful opportunity to be heard is moot as a result of the court's remand order. Jindal has made its objections to Commerce's determination and Commerce must now reconsider its determination in light of those objections. No further remedy would be available to Jindal if the court were to agree with its due process claim.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Results* are remanded so that Commerce may reconsider or further explain its denial of the Financing Charge Discount and the Exclusive Dealer Discount price adjustments in accordance with Discussion sections I and II above;

ORDERED that Commerce shall file its remand results on or before June 10, 2019; and it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 5,000 words.

Dated: March 11, 2019
New York, New York

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

Slip Op. 19–34

UTTAM GALVA STEELS LIMITED, Plaintiff, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, AK STEEL CORPORATION, STEEL DYNAMICS, INC., CALIFORNIA STEEL INDUSTRIES, INC., UNITED STATES STEEL CORPORATION, and NUCOR CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00162

[Remanding the U.S. Department of Commerce's remand redetermination following an antidumping duty investigation on certain corrosion-resistant steel products from India.]

Dated: March 12, 2019

Diana Dimitriuc-Quaia and *John M. Gurley*, Arent Fox LLP, of Washington, D.C., for Plaintiff Uttam Galva Steels Limited. *Claudia D. Hartleben*, *Matthew M. Nolan*, and *Nancy A. Noonan* also appeared.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Natan P.L. Tubman*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Paul W. Jameson and *Roger B. Schagrin*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenors Steel Dynamics, Inc. and California Steel Industries, Inc. *Christopher T. Cloutier* and *Elizabeth J. Drake* also appeared.

R. Alan Luberda and *Melissa M. Brewer*, Kelley Drye & Warren, LLP, of Washington, D.C., for Defendant-Intervenor ArcelorMittal USA LLC. *David C. Smith, Jr.*, *Kathleen W. Cannon*, and *Paul C. Rosenthal* also appeared.

Stephen A. Jones and *Daniel L. Schneiderman*, King & Spalding, LLP, of Washington, D.C., for Defendant-Intervenor AK Steel Corporation.

Timothy C. Brightbill and *Maureen E. Thorson*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor Nucor Corporation. *Tessa V. Capeloto*, *Alan H. Price*, *Adam M. Teslik*, *Christopher B. Weld*, *Cynthia C. Galvez*, *Derick G. Holt*, *Laura El-Sabaawi*, *Stephanie M. Bell*, and *Usha Neelakantan* also appeared.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

OPINION AND ORDER

Choe-Groves, Judge:

This case concerns Commerce's methodology when calculating a respondent's duty drawback adjustment. Plaintiff Uttam Galva Steels Limited ("Plaintiff" or "Uttam Galva") initiated this action challenging the final determination in an antidumping duty investigation, in which the U.S. Department of Commerce ("Commerce") found that certain corrosion-resistant steel products from India are being, or are likely to be, sold in the United States at less-than-fair value. *See Certain Corrosion-Resistant Steel Products From India*, 81 Fed. Reg. 35,329 (Dep't Commerce June 2, 2016) (final determination of sales at less-than-fair value), *as amended*, 81 Fed. Reg. 48,390 (Dep't Commerce July 25, 2016) (amended final affirmative determination and issuance of antidumping duty orders) (collectively, "*Final Determination*"). Before the court are the Final Results of Redetermination Pursuant to Court Remand, Aug. 16, 2018, ECF No. 81 ("*Remand Results*"), filed by Commerce as directed in the court's prior opinion. *See Uttam Galva Steels Ltd. v. United States*, 42 CIT __, __, 311 F. Supp. 3d 1345, 1357 (2018) ("*Uttam Galva I*"). For the reasons discussed below, the court concludes that Commerce's modified calculation of Uttam Galva's weighted-average dumping margin is unsupported by substantial evidence and not in accordance with the law. The *Remand Results* are remanded for further proceedings consistent with this opinion.

PROCEDURAL HISTORY

The court presumes familiarity with the facts of this case. *See Uttam Galva I*. The one issue in dispute was whether Commerce reasonably calculated Uttam Galva's duty drawback adjustment by allocating import duties rebated and exempted by reason of export of finished product over total cost of production. The court concluded that Commerce's methodology was not permitted under the governing statute, 19 U.S.C. § 1677a(c)(1)(b) (2012), and remanded Commerce's *Final Determination* with directions to recalculate Uttam Galva's duty drawback adjustment using a different methodology.

Commerce filed its *Remand Results* under protest on August 16, 2018. *See Remand Results* at 1. Commerce recalculated Uttam Galva's duty drawback adjustment by allocating import duties rebated and exempted by reason of export of finished product over total exports, as reported by Uttam Galva. *See id.* at 1–2. Because Commerce perceived an imbalance in its comparison between Uttam Galva's export price and normal value, Commerce made an additional circumstance of sale adjustment. *See id.* at 2–4. Pursuant to Commerce's modified calculations, Uttam Galva's weighted-average dumping margin changed from 3.05% in the *Final Determination* to 3.11% in the *Remand Results*. *Id.* at 27.

Uttam Galva filed comments on the *Remand Results*. *See* Pl.'s Comments Remand Redetermination, Sept. 25, 2018, ECF No. 86 ("Pl.'s Comments"). Defendant filed a reply to Uttam Galva's comments. *See* Def.'s Reply Comments Remand Redetermination, Oct. 25, 2018, ECF No. 88 ("Def.'s Reply"). Defendant-Intervenors Steel Dynamics, Inc., California Steel Industries, AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, and United States Steel Corporation also filed a reply to Uttam Galva's comments. *See* Def.-Intervenors' Resp. Uttam Galva's Comments Remand Results, Oct. 25, 2018, ECF No. 87.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The results of a redetermination pursuant to court remand are reviewed also for compliance with the court's remand order. *ABB Inc. v. United States*, Slip Op. 18–156, 2018 WL 6131880, at *2 (CIT Nov. 13, 2018); *SolarWorld Ams., Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1314, 1317 (2017).

ANALYSIS

If Commerce finds that merchandise is being sold at less than fair value, Commerce issues an antidumping duty order imposing antidumping duties equivalent to the amount by which the normal value exceeds the export price for the merchandise. *See* 19 U.S.C. § 1673. Export price, or U.S. price, is the price at which the subject merchandise is first sold in the United States. *See id.* § 1677a(a). A duty drawback adjustment is an adjustment to export price—specifically, an increase by "the amount of any import duties imposed by the

country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." *Id.* § 1677a(c)(1)(B). The purpose of the adjustment is to correct an imbalance and prevent an inaccurately high dumping margin by increasing export price to the level it likely would be absent a duty drawback.

Normal value represents, on the other hand, the price at which the subject merchandise is sold in the exporting country. *See id.* § 1677b(a)(1)(A). When determining the appropriate price for comparison, Commerce may make certain price adjustments, such as a circumstance of sale adjustment. *See id.* § 1677b(a)(6). The price may be

> (C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to—
>
> (iii) other differences in the circumstances of sale.

Id. § 1677b(a)(6)(C)(iii). The purpose of statutory adjustments to normal value is so Commerce can "ensure[] that there is no overlap or double-counting of adjustments." H.R. Rep. No. 103 826, pt. 1, at 84–85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3857–58.

On remand, Commerce continued to grant Uttam Galva a duty drawback adjustment, but calculated the amount based on Uttam Galva's reported duties rebated and exempted by reason of export of finished product over total exports. *See Remand Results* at 1–2. Uttam Galva does not contest this aspect of the recalculation. *See* Pl.'s Comments 5–6. Uttam Galva takes issue with Commerce's subsequent circumstance of sale adjustment. Uttam Galva argues that this increase to normal value "nullifies the duty drawback adjustment." *Id.* at 7.

In the *Remand Results*, Commerce added to Uttam Galva's normal value the difference between the duty drawback amount on U.S. sales and the amount of import duties in Uttam Galva's reported cost of production. *See Remand Results* at 8–9. In substantiating the additional circumstance of sale adjustment, Commerce continued to rely on a reading of *Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335 (Fed. Cir. 2011) ("*Saha Thai*"), that the court disapproved of already in *Uttam Galva I*. *See Remand Results* at 16–19. Both the *Remand Results* and Defendant's comments in support of the *Remand Results* quote language from *Saha Thai* discussing why export price, cost of production, and constructed value "should be increased together, or not at all" in order to achieve a

"duty-neutral" comparison. *See Remand Results* at 18, 22; Def.'s Reply 8. This reference to *Saha Thai* is taken out of context. As explained by the court before, the quoted passage in *Saha Thai* relates "to an adjustment to normal value with respect to the particular facts, exemption program, and recordkeeping practices presented in *Saha Thai*, and should not be expanded to encompass all duty drawback adjustment calculations made by Commerce." *Uttam Galva I*, 42 CIT at __, 311 F. Supp. 3d at 1355. When viewed in this context, *Saha Thai* "does not support Commerce's methodology in the instant matter before this court." *Id.* Commerce's justification for the circumstance of sale adjustment is untenable in light of the court's previous interpretation of *Saha Thai*.

The court reiterates that Commerce's reliance on *Saha Thai* is misplaced. *Saha Thai* concerned Commerce's separate calculations of U.S. price and of cost of production and constructed value. Generally, Commerce makes a duty drawback adjustment to a respondent's U.S. price to account for duties rebated and exempted by reason of exportation of the finished product to the United States. Commerce makes a separate adjustment to a respondent's cost of production and constructed value to reflect import duties incurred when the finished product is sold in the home market. *See, e.g., Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. v. United States*, Slip Op. 19–10, 2019 WL 413800, at *3–4 & n.8 (distinguishing Commerce's duty drawback adjustment to U.S. price, which the opinion refers to as the "sales-side adjustment," and Commerce's adjustment to cost of production and constructed value, which the opinion refers to as the "cost-side adjustment"). *Saha Thai* sustained Commerce's utilization of these two corresponding adjustments but did not hold that the two adjustments should be "equal" or "duty neutral," as Commerce and Defendant continue to espouse here. *Saha Thai* does not support Commerce's *Remand Results*.

Commerce reasoned in the *Remand Results* that the additional circumstance of sale adjustment was necessary to correct a perceived imbalance in the dumping margin calculation. *See Remand Results* at 17–18. Commerce again departs from the legislative purpose of 19 U.S.C. § 1677a(c)(1)(B) in an impermissible way. As stated in the court's previous Opinion and Order:

> The purpose of a duty drawback adjustment is to ensure a fair comparison between normal value ("NV") and export price ("EP"). Under a duty drawback program, producers may receive an exemption or rebate for imported inputs used in exported merchandise. As a result, producers are still required to pay import duties for domestically-sold goods, which leads to an

> increase in normal value. A duty drawback adjustment corrects this imbalance, which could otherwise lead to an inaccurately high dumping margin, by increasing EP to the level it likely would be absent the duty drawback.

Uttam Galva I, 42 CIT at __, 311 F. Supp. 3d at 1351 (internal citations and quotations omitted). The upward adjustment to export price contemplated by 19 U.S.C. § 1677a(c)(1)(B) aids Commerce's statutory duty to make a fair comparison between normal value and export price in antidumping duty investigations. Commerce's action on remand here negates the statutory duty drawback adjustment that Uttam Galva earned by exporting its finished product to the United States and impinges on the agency's ability to make a fair comparison. The court concludes that the *Remand Results* are not in accordance with the law and remands this case again for a second redetermination.

As Plaintiff argues, Commerce's adjustment to Uttam Galva's normal value creates an additional problem within the dumping calculation. *See* Pl.'s Comments 13–15. Commerce accounts for Uttam Galva's import duties incurred when subject merchandise was sold in the home market. Specifically, Commerce makes an upward adjustment to the cost of production and constructed value, which are part of Commerce's overall calculation of Uttam Galva's normal value. Commerce's circumstance of sale adjustment in this case double-counts Uttam Galva's import duties within normal value because Commerce's original calculation incorporated already the import duties incurred for merchandise sold in the home market. *See* Mem. from A. Sepulveda to N. Halper re: Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Uttam Galva Steels Limited at 2, PD 417, bar code 3473140–01 (May 26, 2016). The court concludes that Commerce's remand redetermination is not supported by substantial evidence.

CONCLUSION

The court concludes that Commerce's revised calculation of Uttam Galva's duty drawback adjustment is unsupported by substantial evidence and not in accordance with the law. The court remands the *Remand Results* for a second redetermination consistent with this opinion. Accordingly, it is hereby

ORDERED that the *Remand Results* are remanded to Commerce for further proceedings; and it is further

ORDERED that Commerce shall file the second remand redetermination on April 29, 2019; and it is further

ORDERED that the administrative record on the second remand redetermination shall be filed on May 13, 2019; and it is further

ORDERED that comments in opposition to the second remand redetermination shall be filed on May 29, 2019; and it is further

ORDERED that comments in support to the second remand redetermination shall be filed on June 28, 2019; and it is further

ORDERED that the joint appendix on the second remand redetermination shall be filed on July 12, 2019.

Dated: March 12, 2019
New York, New York

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