

UNITED STATES COURT OF INTERNATIONAL TRADE

JIANGSU ZHONGJI LAMINATION
MATERIALS CO., LTD.; JIANGSU
ZHONGJI LAMINATION MATERIALS
CO., (HK) LTD.; SHANTOU WANSHUN
PACKAGE MATERIAL STOCK CO.,
LTD.; JIANGSU HUAFENG ALUMINIUM
INDUSTRY CO., LTD.; ANHUI
MAXIMUM ALUMINIUM INDUSTRIES
COMPANY LIMITED,

Plaintiffs,

v.

UNITED STATES,

Defendant,

and

ALUMINUM ASSOCIATION TRADE
ENFORCEMENT WORKING GROUP
AND ITS INDIVIDUAL MEMBERS; JW
ALUMINUM COMPANY; NOVELIS
CORPORATION; REYNOLDS
CONSUMER PRODUCTS LLC,

Defendant-Intervenors.

Before: Timothy M. Reif, Judge

Court No. 21-00133
PUBLIC VERSION

OPINION AND ORDER

[Sustaining in part and remanding in part Commerce's Final Results in its first administrative review of the countervailing duty order on certain aluminum foil from the People's Republic of China.]

Dated: March 21, 2023

Sarah M. Wyss and Yixin (Cleo) Li, Mowry & Grimson, PLLC, of Washington, D.C., argued for plaintiffs Jiangsu Zhongji Lamination Materials Co., Ltd.; Jiangsu Zhongji Lamination Materials Co., (HK) Ltd.; Shantou Wanshun Package Material Stock Co., Ltd.; Jiangsu Huafeng Aluminium Industry Co., Ltd.; and Anhui Maximum Aluminium

Industries Company Limited. With them on the briefs were Jeffrey S. Grimson and Bryan P. Cenko.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. On the brief were Brian M. Boynton, Principal Deputy Assistant Attorney General, Patricia M. McCarthy, Director, Reginald T. Blades, Jr., Assistant Director, and Catharine M. Parnell, Trial Attorney. Of counsel were Jesus N. Saenz and Ian A. McInerney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Grace W. Kim, Kelley Drye & Warren LLP, of Washington, D.C., argued for defendant-intervenors Aluminum Association Trade Enforcement Working Group; JW Aluminum Company; Novelis Corporation; and Reynolds Consumer Products LLC. With her on the brief was John M. Herrmann.

* * *

Reif, Judge: Jiangsu Zhongji Lamination Materials Co., Ltd., Jiangsu Zhongji Lamination Materials Co., (HK) Ltd., Shantou Wanshun Package Material Stock Co., Ltd., Jiangsu Huafeng Aluminium Industry Co., Ltd., and Anhui Maximum Aluminium Industries Company Limited (collectively, “plaintiffs” or the “Zhongji Respondents”) challenge the final results of the first administrative review (“AR 1”) by the U.S. Department of Commerce (“Commerce”) of the countervailing duty (“CVD”) order on certain aluminum foil from the People’s Republic of China (“China”). See *Certain Aluminum Foil from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2017-2018* (“AR 1 Final Results”), 86 Fed. Reg. 12,171 (Dep’t of Commerce Mar. 2, 2021) and accompanying Issues and Decision Memorandum (“IDM”) (Dep’t of Commerce Feb. 24, 2021); see also *Certain Aluminum Foil from the People’s Republic of China: Preliminary Results of the Countervailing Duty Administrative Review and Rescission of Review, in Part; 2017-2018* (“AR 1 Preliminary Results”), 85 Fed. Reg. 38,861 (Dep’t of Commerce June 29, 2020) and accompanying

Preliminary Decision Memorandum (“PDM”) (Dep’t of Commerce June 17, 2020); *Certain Aluminum Foil from the People’s Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order* (“Aluminum Foil Order”), 83 Fed. Reg. 17,360 (Dep’t of Commerce Apr. 19, 2018).

Plaintiffs move for judgment on the agency record pursuant to Rule 56.2 of the U.S. Court of International Trade (“USCIT” or the “Court”) and challenge the AR 1 Final Results with respect to four issues: (1) Commerce’s rejection of the benchmark submission of the Zhongji Respondents dated May 18, 2020; (2) Commerce’s calculation of the benchmark for the primary aluminum for less than adequate remuneration (“LTAR”) program (“primary aluminum program”); (3) Commerce’s selection of data to calculate the benchmark for the aluminum plate and/or sheet and strip for LTAR program (“aluminum plate/sheet program”); and (4) Commerce’s selection of data to calculate the benchmark for the land for LTAR program (“land program”). See Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. upon the Agency R. of Pls. (“Pls. Br.”), ECF No. 30; Reply Br. in Supp. of Rule 56.2 Mot. for J. upon the Agency R. on Behalf of Pls. (“Pls. Reply Br.”), ECF No. 40; see *also* Compl., ECF No. 10.

The United States (“defendant”) as well as the Aluminum Association Trade Enforcement Working Group, JW Aluminum Company, Novelis Corporation and Reynolds Consumer Products LLC (collectively, “defendant-intervenors” or the “petitioners”) oppose plaintiffs’ motion. See Def.’s Resp. to Pl.’s Mot. for J. on the Admin. R. (“Def. Br.”), ECF No. 35; Def.-Intervenors’ Resp. in Opp’n to Pls.’ Rule 56.2 Mot. for J. upon the Admin. R. (“Def.-Intervenors Br.”), ECF No. 45.

For the reasons discussed below, the court sustains in part and remands in part the AR 1 Final Results.

BACKGROUND

Jiangsu Zhongji Lamination Materials Co., Ltd. is a foreign producer of the subject merchandise and Jiangsu Zhongji Lamination Materials Co., (HK) Ltd. is a foreign exporter of the subject merchandise. See Compl. ¶ 5. Shantou Wanshun Package Material Stock Co., Ltd., Jiangsu Huafeng Aluminium Industry Co., Ltd., and Anhui Maximum Aluminium Industries Company Limited are “cross-owned companies” of Jiangsu Zhongji Lamination Materials Co., Ltd. *Id.*

On April 19, 2018, Commerce published the Aluminum Foil Order. See *Aluminum Foil Order*, 83 Fed. Reg. 17,360. On June 13, 2019, Commerce initiated an AR 1 of the Aluminum Foil Order. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 27,587, 27,595 (Dep’t of Commerce June 13, 2019). The period of review (“POR”) for this AR 1 was from August 14, 2017, through December 31, 2018. See IDM at 1. On April 1, 2020, the Zhongji Respondents and petitioners filed with Commerce their respective benchmark submissions. See Letter from Mowry & Grimson, PLLC, to Sec’y of Commerce, re: Certain Aluminum Foil from the People’s Republic of China: Benchmark Submission (Apr. 1, 2020) (“Zhongji Benchmark Submission”), PR 311-314, CR 205-209, 215-217; Letter from Kelley Drye & Warren LLP, to Sec’y of Commerce, re: First Administrative Review of the Countervailing Duty Order on Certain Aluminum Foil from the People’s Republic of China — Petitioners’ Submission of Factual Information to Measure Adequacy of Remuneration (Apr. 1, 2020) (“Pet’rs Benchmark Submission”), PR 307-310. On April

13, 2020, the Zhongji Respondents filed their rebuttal benchmark submission. See Letter from Mowry & Grimson, PLLC, to Sec’y of Commerce, re: Certain Aluminum Foil from the People’s Republic of China: Rebuttal Benchmark (Apr. 13, 2020) (“Zhongji Rebuttal Benchmark Submission”), CR 222.

On April 24, 2020, “[i]n response to operational adjustments due to COVID-19,” Commerce “decided to uniformly toll deadlines for all . . . administrative reviews . . . by 50 days.” Letter from U.S. Dep’t of Commerce, re: Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID-19 (Apr. 24, 2020) (“Tolling Mem.”), PR 332. Prior to Commerce’s publication of the Tolling Memorandum, the deadline for Commerce to publish the AR 1 Preliminary Results was April 29, 2020. See PDM at 5. The Tolling Memorandum shifted this deadline to June 18, 2020. See *id.*

On May 18, 2020, the Zhongji Respondents submitted for inclusion in the record additional benchmark information for consideration by Commerce. See Letter from Mowry & Grimson, PLLC, to Sec’y of Commerce, re: Certain Aluminum Foil from the People’s Republic of China: Additional Benchmark Submission (May 18, 2020) (“May 18 Benchmark Submission”), PR 336, CR 223. On May 22, 2020, Commerce rejected the May 18 Benchmark Submission as untimely. See Letter from Sec’y of Commerce, to Mowry & Grimson, PLLC, re: Countervailing Duty Administrative Review of Aluminum Foil from the People’s Republic of China (May 22, 2020) (“May 22 Rejection Letter”), PR 338. On May 26, 2020, the Zhongji Respondents requested that Commerce reconsider its decision to reject the May 18 Benchmark Submission. See Letter from Mowry & Grimson, PLLC, to Sec’y of Commerce, re: Certain Aluminum Foil from the People’s

Republic of China: Objection to Commerce's Rejection of Additional Benchmark Submission and Request for Reconsideration (May 26, 2020), PR 340. On June 2, 2020, however, Commerce stated that it "continue[d] to find that [the May 18 Benchmark Submission] should be rejected because it was untimely filed." Letter from Sec'y of Commerce, to Mowry & Grimson, PLLC, re: Countervailing Duty Administrative Review of Aluminum Foil from the People's Republic of China (June 2, 2020) at 2, PR 341.

On June 17, 2020, Commerce published its PDM and, subsequently, the AR 1 Preliminary Results. See PDM at 1; *AR 1 Preliminary Results*, 85 Fed. Reg. 38,861. On July 2, 2020, the Zhongji Respondents requested clarification as to whether they would be permitted to submit new factual information ("NFI") with respect to the benchmark for the land program. See Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Request for Clarification and Extension to Submit Land Benchmark Information (July 2, 2020) ("Zhongji Req. for Clarification"), PR 353. On July 6, 2020, Commerce notified the Zhongji Respondents that "parties [were] not permitted to submit" NFI with respect to the benchmark for the land program. Letter from Sec'y of Commerce, to Mowry & Grimson, PLLC, re: Land Benchmark Comments (July 6, 2020) ("Commerce Resp. to Zhongji Req. for Clarification"), PR 354; see IDM at 33. Notwithstanding Commerce's response, on July 9, 2020, the Zhongji Respondents submitted for inclusion in the record an additional land benchmark submission, see Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Additional Land Benchmark Information (July 9, 2020) ("July 9 Benchmark

Submission”), PR 357, CR 230, which Commerce rejected as untimely. See Letter from Sec’y of Commerce, to Mowry & Grimson, PLLC, re: Countervailing Duty Administrative Review of Aluminum Foil from the People’s Republic of China (July 17, 2020) (“July 17 Rejection Letter”), PR 358.

On March 2, 2021, Commerce published the AR 1 Final Results. See *AR 1 Final Results*, 86 Fed. Reg. 12,171. On March 24, 2021, plaintiffs commenced the instant action.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c). Plaintiffs bring the instant action pursuant to sections 516A(a)(2)(A)(i)(I) and (a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii) (2018).¹ See Compl. ¶ 2.

The court will sustain a determination by Commerce unless the determination is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” *Id.* § 1516a(b)(1)(B)(i). The “substantial evidence” standard requires “more than a mere scintilla” of evidence, *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)), “but is satisfied by ‘something less than the weight of the evidence.’” *Altix, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has stated that for a reviewing court to “fulfill [its] obligation” to

¹ References to the U.S. Code are to the 2018 edition. Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code.

evaluate whether a determination by Commerce is supported by substantial evidence and in accordance with law, Commerce is required to “examine the record and articulate a *satisfactory explanation* for its action.” *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (emphasis supplied) (quoting *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013)); *cf. Risen Energy Co. v. United States*, 46 CIT __, __, 570 F. Supp. 3d 1369, 1376 (2022); *Habas Sinai v. United States*, 43 CIT __, __, 413 F. Supp. 3d 1347, 1361 (2019).

In addition, “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)). However, the court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)); *see also NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) (“Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce’s decision must be reasonably discernable to a reviewing court.”).

LEGAL FRAMEWORK

Commerce is required to determine that a countervailable subsidy exists in circumstances in which: (1) an authority provides a financial contribution; (2) a benefit is thereby conferred; and (3) the subsidy is specific. *See* 19 U.S.C. § 1677(5)-(5A); *see also Guizhou Tyre Co. v. United States*, 45 CIT __, __, 523 F. Supp. 3d 1312, 1378

(2021). In circumstances in which the financial contributions at issue are goods or services, the statute indicates that a benefit is conferred “if such goods or services are provided for less than adequate remuneration.” 19 U.S.C. § 1677(5)(E)(iv).

Commerce’s regulations provide a methodology to measure the adequacy of remuneration that is based on a three-tiered hierarchy. See *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT ___, ___, 352 F. Supp. 3d 1316, 1332 (2018); see generally *Countervailing Duties*, 63 Fed. Reg. 65,348 (Dep’t of Commerce Nov. 25, 1998). Commerce’s methodology requires the selection of an “appropriate remuneration benchmark” — i.e., a Tier 1, Tier 2 or Tier 3 benchmark — to determine the adequacy of remuneration. *Changzhou Trina*, 42 CIT at ___, 352 F. Supp. 3d at 1332; see 19 C.F.R. § 351.511(a)(2)(i)-(iii).

With a Tier 1 benchmark, Commerce will “seek to measure the adequacy of remuneration by comparing the government price to 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)(i). In the absence of a Tier 1 benchmark, Commerce will turn to a Tier 2 benchmark, with which Commerce “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.” *Id.* § 351.511(a)(2)(ii). In the absence of a Tier 1 or Tier 2 benchmark, Commerce will consider a Tier 3 benchmark, with which Commerce will “measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.” *Id.* § 351.511(a)(2)(iii); see *Canadian Solar Inc. v. United States*, 45 CIT ___, ___, 537 F. Supp. 3d 1380, 1389-92 (2021).

DISCUSSION**I. Commerce's rejection of the May 18 Benchmark Submission****A. Legal framework**

19 C.F.R. § 351.301(c)(3)(ii), which regulates time limits for the submission to Commerce of factual information, provides that “[a]ll submissions of factual information . . . to measure the adequacy of remuneration under § 351.511(a)(2), are due no later than 30 days before the scheduled date of the preliminary results of review.” 19 C.F.R. § 351.301(c)(3)(ii).

B. Positions of the parties

Plaintiffs contend that Commerce acted unreasonably in rejecting as untimely the May 18 Benchmark Submission. See Pls. Br. at 11-18. Plaintiffs argue that “the Tolling Memorandum reset the thirty-day [submission] deadline” for the Zhongji Respondents, *id.* at 13; 19 C.F.R. § 351.301(c)(3)(ii), and that Commerce’s past practice supports this position. See Pls. Br. at 14-15; Pls. Reply Br. at 3-4. Separately, plaintiffs maintain that Commerce abused its discretion in rejecting the May 18 Benchmark Submission. See Pls. Br. at 15-18.

Defendant and defendant-intervenors argue that Commerce rejected reasonably the May 18 Benchmark Submission. See Def. Br. at 26-28; Def.-Intervenors Br. at 2-6. According to defendant, plaintiffs’ position that the Tolling Memorandum “increased the time for benchmark submissions and simultaneously allowed parties a second opportunity for rebuttal benchmark comments . . . is [not] supported by Commerce’s regulations.” Def. Br. at 26; see Def.-Intervenors Br. at 3-4. Further, defendant-intervenors challenge plaintiffs’ argument that Commerce deviated from a past practice

in rejecting the May 18 Benchmark Submission. See Def.-Intervenors Br. at 4-5; see *also* Oral Arg. Tr. at 14:01-16, ECF No. 58. Defendant-intervenors contend also that Commerce did not abuse its discretion in rejecting the May 18 Benchmark Submission. See Def.-Intervenors Br. at 5-6 (citing Pls. Br. at 17-18); Oral Arg. Tr. at 17:02-09.

C. Analysis

The court concludes that Commerce's decision to reject the May 18 Benchmark Submission as untimely was reasonable and is supported by substantial evidence. See IDM at 22-23, 26-27.

Commerce's publication of the Tolling Memorandum did not toll the deadline for the Zhongji Respondents to file a benchmark submission in this review. See Tolling Mem. On April 24, 2020, Commerce published the Tolling Memorandum, in which Commerce stated that "[i]n response to operational adjustments due to COVID-19," Commerce would "uniformly toll deadlines for all . . . administrative reviews . . . by 50 days." *Id.* Specifically, Commerce indicated that the Tolling Memorandum "applie[d] to every AD/CVD administrative review segment before [Commerce] as of" April 24, 2020, as well as "*pending* deadlines for actions by parties to administrative reviews."² *Id.* (emphasis supplied).

² See *Pending*, BLACK'S LAW DICT. (11th ed. 2019) ("Remaining undecided; awaiting decision."); *Pending*, COLLINS ENGLISH DICT. <https://www.collinsdictionary.com/us/dictionary/english/pending> (last visited Mar. 16, 2023) ("If . . . a legal procedure is pending, it is waiting to be dealt with or settled."); *Pending*, AM. HERITAGE DICT., <https://www.ahdictionary.com/word/search.html?q=pending> (last visited Mar. 16, 2023) ("Not yet decided or settled; awaiting conclusion or confirmation . . . [i]mpending; imminent.").

In the instant case, the deadline for the Zhongji Respondents to file a benchmark submission was no longer “pending” on the date that Commerce published the Tolling Memorandum. *Id.* 19 C.F.R. § 351.301(c)(3)(ii) provides that “[a]ll submissions . . . to measure the adequacy of remuneration under § 351.511(a)(2), are due *no later than 30 days before* the scheduled date of the preliminary results of review.” 19 C.F.R. § 351.301(c)(3)(ii) (emphasis supplied). Prior to Commerce’s publication of the Tolling Memorandum, the scheduled date for Commerce to publish the AR 1 Preliminary Results was April 29, 2020. *See* PDM at 5. Accordingly, the deadline for the Zhongji Respondents to submit factual information was “no later than 30 days before” April 29, 2020. 19 C.F.R. § 351.301(c)(3)(ii). The Zhongji Respondents complied with this deadline in filing their benchmark submission.³ *See* Zhongji Benchmark Submission.

On this basis, the submission deadline for the Zhongji Respondents was not “pending” on the date that Commerce published the Tolling Memorandum. Tolling Mem. Consequently, Commerce’s tolling decision as set forth in the Tolling Memorandum did not apply with respect to the submission deadline for the Zhongji Respondents.

Moreover, the Tolling Memorandum did not “reset” the submission deadline for the Zhongji Respondents. *See id.*; IDM at 23, 26-27. Commerce did not indicate in the Tolling Memorandum that it would reset submission deadlines that already had passed;

³ The Zhongji Respondents filed their benchmark submission on April 1, 2020, *see* Zhongji Benchmark Submission, after Commerce provided interested parties with a two day extension to submit benchmark information. *See* Letter from U.S. Dep’t of Commerce, re: Grant Partial Extension for Benchmark Deadline, Message No. 3958816 (C-570-054) (Mar. 27, 2020); 19 C.F.R. § 351.301(c)(3)(ii).

rather, as discussed, Commerce stated that it would “uniformly toll . . . pending deadlines” by 50 days. Tolling Mem. Further, 19 C.F.R. § 351.301(c)(3)(ii) does not provide a legal basis for the reset of a party’s submission deadline should Commerce decide to toll the “scheduled date” for the publication of its preliminary results. 19 C.F.R. § 351.301(c)(3)(ii).

Plaintiffs cite to several administrative determinations to support the contention that the Tolling Memorandum reset the submission deadline for the Zhongji Respondents.⁴ See Pls. Br. at 14-15; Pls. Reply Br. at 3-4. However, these determinations do not demonstrate that Commerce deviated from a “past practice” in concluding that the Tolling Memorandum did not reset the submission deadline and, consequently, in rejecting the May 18 Benchmark Submission. Pls. Br. at 14. Rather, the cited determinations involve circumstances in which Commerce decided specifically

⁴ The administrative determinations to which plaintiffs cite are *Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People’s Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Intent to Rescind the Review, in Part*; 2016, 84 Fed. Reg. 5,051 (Dep’t of Commerce Feb. 20, 2019) and accompanying IDM (Dep’t of Commerce Feb. 12, 2019) at 3-4; *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Preliminary Results of Countervailing Duty Administrative Review and Preliminary Intent to Rescind in Part; Calendar Year 2013*, 80 Fed. Reg. 18,809 (Dep’t of Commerce Apr. 8, 2015) and accompanying IDM (Dep’t of Commerce Mar. 31, 2015) at 3-4, n.16; *Certain Uncoated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 80 Fed. Reg. 36,971 (Dep’t of Commerce June 29, 2015) and accompanying IDM (Dep’t of Commerce June 22, 2015) at 3; *Fine Denier Polyester Staple Fiber from India: Preliminary Results of Countervailing Duty Administrative Review; 2020*, 87 Fed. Reg. 12,936 (Dep’t of Commerce Mar. 8, 2022) and accompanying IDM (Dep’t of Commerce Mar. 1, 2022) at 12 n.56; and *Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 Fed. Reg. 63,788 (Dep’t of Commerce Oct. 17, 2012) and accompanying IDM (Dep’t of Commerce Oct. 9, 2012) at 37.

to extend the deadline to publish a preliminary determination in the respective proceedings pursuant to statutory provisions that were neither invoked nor applicable with respect to Commerce's publication of the Tolling Memorandum — i.e., 19 U.S.C. § 1675(a)(3) in the cited administrative reviews, and 19 U.S.C. § 1671b(c)(1) in the cited CVD investigations. See 19 U.S.C. § 1675(a)(3) (providing for the extension of the deadline to publish a preliminary determination in an administrative review by up to an additional 120 days should Commerce determine that it is “not practicable to complete the review within” 245 days); 19 U.S.C. § 1671b(c)(1) (providing for the extension of the deadline to publish a preliminary determination in a CVD investigation by up to an additional 65 days in “extraordinarily complicated” cases).

By contrast, in this circumstance Commerce did *not* extend the deadline to publish the AR 1 Preliminary Results pursuant to 19 U.S.C. § 1675(a)(3) or 19 U.S.C. § 1671b(c)(1). Rather, Commerce in the Tolling Memorandum invoked Commerce's authority (and discretion) to “respond[] to operational adjustments due to COVID-19 . . . [to] make[] available resources and personnel needed to continue performing [Commerce's] other functions” and to “reduc[e] the overall disruption . . . [and] the burden on interested parties.”⁵ Tolling Mem.; see Oral Arg. Tr. at 14:13-16.

⁵ Commerce previously has exercised its authority (and discretion) to “uniformly toll[]” administrative deadlines in circumstances similar to those presented in the instant action. See, e.g., Letter from U.S. Dep't of Commerce, re: Deadlines Affected by the Partial Shutdown of the Federal Government, Message No. 3788676 (Jan. 28, 2019) (stating that Commerce would “exercis[e] its discretion to toll all deadlines for the effective duration” of the “partial Federal Government shutdown”); Letter from U.S. Dep't of Commerce, re: Tolling of Administrative Deadlines as a Result of the Government Closure During Snowstorm ‘Jonas’, Message No. 3435686 (Jan. 27, 2016) (footnote continued)

Accordingly, the cited determinations are not apposite and do not demonstrate that Commerce deviated from a past practice in concluding that the Tolling Memorandum did not “reset” the submission deadline for the Zhongji Respondents. See IDM at 23, 26-27; *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370-71 (2007).

The court concludes next that Commerce did not abuse its discretion in rejecting the May 18 Benchmark Submission. Commerce has “broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits.” *Yantai Timken*, 31 CIT at 1755, 521 F. Supp. 2d at 1370-71 (quoting *Reiner Brach GmbH & Co. v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002)); see *Gulf States Tube Div. of Quanax Corp. v. United States*, 21 CIT 1013, 1040, 981 F. Supp. 630, 653 (1997). Here, as discussed, Commerce provided a reasonable explanation of its rejection of the May 18 Benchmark Submission as untimely. See IDM at 22-23, 26-27; *Maverick Tube Corp. v. United States*, 39 CIT ___,

(tolling deadlines to minimize the impact of the “Government closure during Snowstorm ‘Jonas’”); Letter from U.S. Dep’t of Commerce, re: Tolling of Administrative Deadlines as a Result of the Government Closure During Hurricane Sandy, Message No. 3104680 (Oct. 31, 2012) (tolling deadlines to minimize the impact of the “Government closure during Hurricane Sandy”).

Further, the Court previously has stated that Commerce has an “interest[] in finality and efficiency” with respect to Commerce’s administration of the statute. *Jinan Yipin Corp. v. United States*, 35 CIT 357, 369, 774 F. Supp. 2d 1238, 1249 (2011). In the instant case, these considerations support further Commerce’s decision that it would respond to the “disruption” that resulted from the onset of the COVID-19 pandemic to “over 200 pending administrative reviews” by tolling only pending deadlines, rather than deadlines that already had passed. Tolling Mem. (“The simple rule we are adopting for all administrative reviews will permit parties to such reviews to know immediately the status of applicable deadlines, thus reducing the overall disruption.”).

___, 107 F. Supp. 3d 1318, 1331 (2015) (“Strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision.” (citing *Dongtai Peak Honey Indus. Co. v. United States*, 38 CIT 334, 340, 971 F. Supp. 2d 1234, 1242 (2014), *aff’d*, 777 F.3d 1343 (Fed. Cir. 2015))).

Moreover, Commerce’s decision to reject the May 18 Benchmark Submission was consistent with 19 U.S.C. § 1677m(d). See Pls. Br. at 16 (“Commerce erred in rejecting the May 18 Benchmark Submission when this submission only attempted to correct certain deficiencies on the record of which Commerce itself failed to notify [the Zhongji Respondents].”). 19 U.S.C. § 1677m(d) provides:

(d) DEFICIENT SUBMISSIONS. If [Commerce] determines that a response to a request for information under this subtitle 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 under this subtitle.

19 U.S.C. § 1677m(d). Commerce previously has stated that a submission by an interested party is “deficient” within the meaning of 19 U.S.C. § 1677m(d) if the submission does not provide Commerce with “sufficient information” to conduct its review or investigation. *Certain Glass Containers from the People’s Republic of China: Final Affirmative Countervailing Duty Determination* (“Glass Containers from China”), 85 Fed. Reg. 31,141 (Dep’t of Commerce May 22, 2020) and accompanying IDM (Dep’t of Commerce May 11, 2020) at cmt. 10; *cf. Certain Steel Nails from the Sultanate of Oman: Final Affirmative Countervailing Duty Determination*, 87 Fed. Reg. 51,335 (Dep’t of Commerce Aug. 22, 2022) and accompanying IDM (Dep’t of Commerce Aug. 15,

2022) at cmt. 4. Further, Commerce has identified the following considerations in evaluating whether a submission is deficient: (1) whether the submission results in “unexplained discrepancies” in the record;⁶ (2) whether the submission is nonresponsive or “unusable” as to Commerce’s request;⁷ and (3) whether the submission contains information that “cannot be verified.”⁸

Commerce acted consistently with 19 U.S.C. § 1677m(d) in the instant case. Contrary to plaintiffs’ argument, see Pls. Br. at 16, Commerce determined neither that the submissions of the Zhongji Respondents failed to provide Commerce with “sufficient information” to conduct its review and benchmark analysis, nor that the submissions suffered from any of the foregoing inadequacies. *Glass Containers from China* IDM at cmt. 10. Rather, Commerce in its questionnaires requested information regarding the purchases of the Zhongji Respondents, to which the Zhongji Respondents provided

⁶ See, e.g., *Aluminum Wire and Cable from the People’s Republic of China: Final Affirmative Determination of Sales at Less than Fair Value*, 84 Fed. Reg. 58,134 (Dep’t of Commerce Oct. 30, 2019) and accompanying IDM (Dep’t of Commerce Oct. 18, 2019) at cmt. 2.

⁷ See, e.g., *Certain Carbon and Alloy Steel Cut-to-Length Plate from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 Fed. Reg. 62,871 (Dep’t of Commerce Sept. 13, 2016) and accompanying IDM (Dep’t of Commerce Sept. 6, 2016) at sec. IX.B.2; *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Determination of Sales at Less than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 Fed. Reg. 35,303 (Dep’t of Commerce June 2, 2016) and accompanying IDM (Dep’t of Commerce May 24, 2016) at sec. VII.A.

⁸ See, e.g., *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Final Results of Antidumping Duty Administrative Review; 2020-2021*, 88 Fed. Reg. 1,184 (Dep’t of Commerce Jan. 9, 2023) and accompanying IDM (Dep’t of Commerce Jan. 3, 2023) at cmt. 2.

“sufficient” responses in their submissions.⁹ *Id.*; see IDM at 23, 26-27. The fact that these submissions did not include certain information that may have resulted in a more favorable benchmark selection from the perspective of the Zhongji Respondents does not demonstrate that the submissions were “deficient” or that Commerce acted unlawfully in failing to provide the Zhongji Respondents with an opportunity to “remedy or explain” the submissions. 19 U.S.C. § 1677m(d); see *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761 (Fed. Cir. 2012); *AA Metals, Inc. v. United States*, 47 CIT ___, Slip Op. 23-29 (Mar. 10, 2023), at 16 (“AA Metals appears to read ‘deficient’ [in 19 U.S.C. § 1677m(d)] to mean ‘in conflict with the desires of the company under investigation.’ Such an understanding would twist the meaning of the statute beyond recognition.”).

In sum, Commerce was not required to accept the May 18 Benchmark Submission, as the Tolling Memorandum neither obligated Commerce to do so nor did the Tolling Memorandum “reset” the submission deadline for the Zhongji Respondents.

⁹ See Letter from Mowry & Grimson, PLLC, to Sec’y of Commerce, re: Certain Aluminum Foil from the People’s Republic of China: Section III Questionnaire Response by Jiangsu Zhongji Lamination Materials Co., Ltd. and Affiliates (Sept. 20, 2019), vol. I at 16-18, Ex. I-12, vol. III at 13-15, Ex. III-11, vol. 5 at 14-15, Ex. V-10, PR 181-182, CR 33-53; Letter from Mowry & Grimson, PLLC, to Sec’y of Commerce, re: Certain Aluminum Foil from the People’s Republic of China: Second Supplemental Section III Questionnaire Response (Nov. 25, 2019) at 13, 26, 42, Exs. SQ2-19, SQ2-35, SQ2-59, PR 231-232, CR 87-127; Letter from Mowry & Grimson, PLLC, to Sec’y of Commerce, re: Certain Aluminum Foil from the People’s Republic of China: New Subsidy Allegation Questionnaire Response (Nov. 25, 2019) at Exs. NSA-1, NSA-2, CR 128-132; Letter from Mowry & Grimson, PLLC, to Sec’y of Commerce, re: Certain Aluminum Foil from the People’s Republic of China: New Subsidy Allegation Supplemental Questionnaire Response (Feb. 6, 2020) (“New Subsidy Allegation Supp. Questionnaire”) at Exs. NSAS-1, NSAS-2, CR 148-149.

See Tolling Mem.; IDM at 22-23, 26-27. Further, Commerce's decision was consistent with 19 U.S.C. § 1677m(d).

II. Commerce's calculation of the benchmark for the primary aluminum program

In the instant case, the Zhongji Respondents presented for inclusion in the record data from the London Metal Exchange ("LME") to calculate the benchmark for the primary aluminum program. See PDM at 18; Zhongji Benchmark Submission at 2-3, Ex. 4. Xiamen Xiashun Aluminum Foil Co., Ltd. ("Xiashun"), another respondent in this AR 1, submitted the Comtrade data source, which covers subheadings 7601.10 ("[a]luminum, not alloyed") and 7601.20 ("[a]luminum alloys") of the Harmonized Tariff Schedule ("HTS"). See Letter from Mayer Brown LLP, to Sec'y of Commerce, re: Aluminum Foil from the People's Republic of China: Final — Benchmark Submission (Apr. 1, 2020) at 2, Ex. 3, PR 315-326, CR 211. Xiashun also submitted a summary table of primary aluminum prices contained in the LME data source. See *id.* at 2, Ex. 4; see also *id.* at 2, Ex. 5; PDM at 18. The petitioners submitted data from the Global Trade Atlas ("GTA"), which covers HTS subheadings 7601.10 and 7601.20. See PDM at 18; Pet'rs Benchmark Submission at 4-6, attach. 1.

In the AR 1 Final Results, Commerce relied upon a "weighted average" of the GTA data source and the Comtrade data source, covering HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program. IDM at 26-27.

A. Positions of the parties

Plaintiffs challenge Commerce's use of a weighted average of the GTA data source and the Comtrade data source, covering HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program. See Pls. Br. at 27-30. Plaintiffs point to information contained in their May 18 Benchmark Submission and argue that Commerce should have but did not select "the LME data, or, alternatively, GTA and Comtrade data under [only] HTS subheading 7601.10" to calculate the benchmark for the primary aluminum program. *Id.* at 28. Defendant and defendant-intervenors challenge plaintiffs' arguments and contend that Commerce's benchmark selection is supported by substantial evidence. See Def. Br. at 28, 31-32; Def.-Intervenors Br. at 14-17.

B. Analysis

The court concludes that Commerce's calculation of the benchmark for the primary aluminum program was reasonable and is supported by substantial evidence. See IDM at 26-27. As discussed, Commerce determined in this AR 1 that it would rely upon a "weighted average" of the GTA data source and the Comtrade data source, covering HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program. *Id.* at 26.

The record in this AR 1 does not include the information to which plaintiffs refer in support of their position on Commerce's calculation of the benchmark for the primary aluminum program. See Pls. Br. at 27-30; *Ass'n of Am. Sch. Paper Suppliers v. United States*, 34 CIT 31, 33, 683 F. Supp. 2d 1317, 1320 (2010) ("[T]his court's review of Commerce's determination is limited to the record before it . . . because the

administrative record contains all information which was presented to, or obtained by, Commerce during the course of the administrative review.” (citing 19 U.S.C. § 1516a(b)(2)(A)) (other citations omitted)). This information — which pertains to the aluminum content of the primary aluminum purchases of the Zhongji Respondents — was contained in the May 18 Benchmark Submission, which Commerce declined reasonably to include in the record. *See supra* Section I.C; May 22 Rejection Letter.

The information that is included in the record demonstrates that Commerce’s calculation of the benchmark for the primary aluminum program was reasonable and is supported by substantial evidence.¹⁰ *See* IDM at 26-27. Based on the record, Commerce rejected reasonably the proposed LME data source of the Zhongji Respondents. *See id.* Commerce explained that it declined to rely upon the LME data on the basis that these data contain only a “cash price” for primary aluminum purchases that have a “minimum aluminum content of 99.7 percent.” *Id.* at 26 (quoting PDM at 18). Commerce stated that the record in this AR 1 did not indicate that the Zhongji Respondents purchased “only primary aluminum with a minimum aluminum content of 99.7 percent.” *Id.*

Further, Commerce decided reasonably to use a weighted average of the GTA and Comtrade data sources, covering both HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program. *See id.* The Zhongji

¹⁰ Plaintiffs stated at oral argument that “factual support” with respect to their position on Commerce’s calculation of the benchmark for the primary aluminum program was contained in the May 18 Benchmark Submission and that they did “not challenge the primary aluminum benchmark calculations in any other respects.” Oral Arg. Tr. at 22:03-06.

Respondents argued in the administrative proceedings that should Commerce decide to use a weighted average of the GTA and Comtrade data sources, Commerce should use *only* those data that correspond to HTS subheading 7601.10, as this subheading is more specific than subheading 7601.20 with respect to the primary aluminum purchases of the Zhongji Respondents. See Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Case Brief (Aug. 10, 2020) ("Zhongji Case Br.") at 35-36, CR 231. However, the data upon which the Zhongji Respondents relied to substantiate this argument were not in the record; those data were contained in the May 18 Benchmark Submission, which Commerce rejected reasonably. See *id.*; *supra* Section I.C; May 22 Rejection Letter. Based on the record, Commerce determined reasonably that "there [was] no evidence demonstrating that the respondents only purchased primary aluminum under HTS subheading 7601.10, and not under HTS subheading 7601.20." IDM at 26. Commerce explained that "the GTA and Comtrade data better reflect the range of inputs the respondents purchased" and, consequently, concluded that it would "weight average the GTA and Comtrade data," covering HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program. *Id.*

The Zhongji Respondents argued also in the administrative proceedings that Commerce should have selected the GTA data, covering *only* HTS subheading 7601.10, to calculate the benchmark for the primary aluminum program, as Commerce did in the underlying investigation. See Zhongji Case Br. at 34-35; see *also* Pls. Br. at 30; *Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 Fed. Reg. 9,274 (Dep't of

Commerce Mar. 5, 2018) and accompanying IDM (Dep't of Commerce Feb. 26, 2018) at cmts. 15-16; IDM at 26 n.134. However, there is no requirement that Commerce follow its decision in the underlying investigation. See *Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1134-35, 724 F. Supp. 2d 1327, 1342-43 (2010). “[E]ach CVD proceeding is based on its own unique record of factual evidence and arguments presented to the agency.” *Changzhou Trina Solar Energy Co. v. United States*, 40 CIT ___, ___, 161 F. Supp. 3d 1343, 1348 (2016)); see *E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19, 32-33 (1998).

Commerce explained specifically that the record before it in the underlying investigation was different from the record before it in this AR 1. See IDM at 26. Commerce noted in particular that in the investigation it had “verified information demonstrating that the respondents’ purchases were limited to unalloyed aluminum ingots” and, consequently, determined that it was appropriate to calculate the benchmark with reference only to HTS subheading 7601.10. *Id.* In contrast, Commerce explained that the record in this AR 1 did *not* include any information to indicate that the Zhongji Respondents “only purchased primary aluminum under HTS subheading 7601.10, and not under HTS subheading 7601.20.” *Id.* Consequently — and notwithstanding Commerce’s benchmark selection in the underlying investigation — Commerce evaluated the record here and determined reasonably that it would “weight-average the GTA and Comtrade data,” covering HTS subheadings 7601.10 and 7601.20. *Id.*

Accordingly, the court concludes that Commerce’s use of a weighted average of the GTA data source and the Comtrade data source, covering HTS subheadings

7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program was reasonable and is supported by substantial evidence. See *id.* at 26-27.

III. Commerce's selection of data to calculate the benchmark for the aluminum plate/sheet program

With respect to the benchmark for the aluminum plate/sheet program, the Zhongji Respondents presented for inclusion in the record the Commodities Research Unit ("CRU") Report, which provides pricing data for aluminum alloy products classified under grade 1050 ("alloy 1050"). See Zhongji Benchmark Submission at 3-5, Ex. 7; see *also* Zhongji Rebuttal Benchmark Submission at 2-3. The Zhongji Respondents also submitted certain GTA data. See Zhongji Benchmark Submission at 3-5, Ex. 6. The petitioners submitted data from the Trade Data Monitor ("TDM"), which covers HTS subheading 7606.12, to calculate the benchmark for the aluminum plate/sheet program. See Pet'r's Benchmark Submission at 5-6, attach. 1; PDM at 19.

In the AR 1 Final Results, Commerce determined that it would select the TDM data source to calculate the benchmark for the aluminum plate/sheet program. See IDM at 21-24.

A. Legal framework

The Federal Circuit previously has stated that Commerce's selected remuneration benchmark is required to be "comparable" to the input used in the production of the subject merchandise. *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1273-74 (Fed. Cir. 2012); see 19 U.S.C. § 1677(5)(E)(iv). Further, it is Commerce's practice to "consider factors affecting comparability, such as product quality and similarity, in determining the appropriate benchmark to measure the

adequacy of remuneration.” *Circular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2018*, 86 Fed. Reg. 6,866 (Dep’t of Commerce Jan. 25, 2021) and accompanying IDM (Dep’t of Commerce Jan. 13, 2021) at cmt. 1.

B. Positions of the parties

Plaintiffs argue that Commerce decided unreasonably to select the TDM data source and to reject the submissions of the Zhongji Respondents to calculate the benchmark for the aluminum plate/sheet program. See Pls. Br. at 18-27. Defendant and defendant-intervenors challenge plaintiffs’ argument and contend that Commerce’s benchmark selection is supported by substantial evidence. See Def. Br. at 28-31; Def.-Intervenors Br. at 7-14.

C. Analysis

The court concludes that Commerce did not explain adequately its decision to select the TDM data source and to reject the submissions of the Zhongji Respondents to calculate the benchmark for the aluminum plate/sheet program. See IDM at 21-24. Accordingly, the court is not able to ascertain whether Commerce’s selection is supported by substantial evidence, and the court remands this selection for further explanation or reconsideration.

Commerce explained in its IDM that the TDM data source was “more representative” than the submissions of the Zhongji Respondents with respect to “all the types of aluminum” that they purchased. *Id.* at 22. Specifically, Commerce stated that there was “wider variation” between the alloy 1050 products referenced in the CRU Report and the purchases of the Zhongji Respondents “with respect to the chemical

composition of other elements included in one or the other product” than there was between the products referenced in the TDM data source and the purchases of the Zhongji Respondents. *Id.* Commerce stated also that it would reject the CRU Report because this data source included alloy 1050 product prices that were “based on LME data.” PDM at 19; see IDM at 22. Commerce explained that “[i]n prior cases, [it] has declined to use” LME data on the basis that these data “contain[] only a cash price for primary aluminum . . . with a minimum aluminum content of 99.7 percent.” IDM at 22 (quoting PDM at 18) (internal quotation marks omitted).

Moreover, Commerce rejected the argument that the Zhongji Respondents raised in the alternative — i.e., that Commerce should “narrow” the TDM data source to use data “only from the countries that produce and export aluminum plate/sheet.” *Id.* at 23-24; see Zhongji Case Br. at 32-34. Commerce stated that it would not narrow the TDM data source because the Zhongji Respondents had submitted only one affidavit — unsubstantiated by any other record evidence — with information on “countries that produce and export aluminum foil stock similar to the type” that the Zhongji Respondents used. IDM at 24; see Zhongji Benchmark Submission at 5-6, Ex. 11.

Commerce did not explain adequately its determination that the TDM data source corresponded more closely to the purchases of the Zhongji Respondents than did their own benchmark submissions. See IDM at 21-24. In particular, Commerce did not explain adequately its conclusion that there was “*wider* variation between” the alloy 1050 products referenced in the CRU Report and the purchases of the Zhongji Respondents than there was between the products referenced in the TDM data source and the purchases of the Zhongji Respondents. *Id.* at 22 (emphasis supplied).

Commerce cited to two exhibits in the record to substantiate its “wider variation” conclusion. *Id.* at 22 n.104 (citing New Subsidy Allegation Supp. Questionnaire at Exs. NSAS-1, NSAS-2). However, Commerce did not explain the relevance of these exhibits to that conclusion. *See id.*; *Wind Tower Trade Coal. v. United States*, 46 CIT __, __, 569 F. Supp. 3d 1221, 1258 (2022).

Notably, defendant-intervenors at oral argument provided an explanation with respect to their chemical analysis of the aluminum plate/sheet purchases of the Zhongji Respondents to support Commerce’s selection of the TDM data source. *See Oral Arg. Tr.* at 35:08-13, 20-23. However, Commerce itself did not offer any such explanation to buttress that selection. *See generally* PDM at 18-19; IDM at 21-24; Letter from U.S. Dep’t of Commerce, re: Final Results Calculations for Jiangsu Zhongji Lamination Materials Co., Ltd., Jiangsu Zhongji Lamination Materials Co., (HK) Ltd., Jiangsu Huafeng Aluminum Industry Co., Ltd, Shantou Wanshun Material Stock Co., Ltd., and Anhui Maximum Aluminum Industries Company Limited (Feb. 24, 2021), PR 392, CR 235. A “post-hoc explanation by [defendant-intervenors] at oral argument cannot cure the lack of explanation by Commerce.” *Cooper (Kunshan) Tire Co. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1316, 1332 (2021); *see State Farm*, 463 U.S. at 50 (“[A]n agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” (citations omitted)).

Further, Commerce did not explain adequately its conclusion regarding the relevance of LME data with respect to Commerce’s rejection of the CRU Report. *See* IDM at 22. Specifically, Commerce did not elucidate whether one or both of its particular findings regarding the LME data — (1) that these data contain only a “cash

price” for primary aluminum or (2) that this cash price pertains only to primary aluminum with a “minimum aluminum content of 99.7 percent” — provided the basis for Commerce’s rejection of the CRU Report. *Id.* (quoting PDM at 18). Without such an explanation, Commerce failed to demonstrate that these findings supported the decision to select the TDM data source and to reject the CRU Report on the basis that the latter did not provide an “appropriate remuneration benchmark” for the aluminum plate/sheet program. *Changzhou Trina*, 42 CIT at ___, 352 F. Supp. 3d at 1332; see IDM at 21-24.

Accordingly, the court is not able to ascertain whether Commerce’s decision is supported by substantial evidence and remands this decision for further explanation or reconsideration. See IDM at 21-24. Should Commerce determine on remand to continue to select the TDM data source to calculate the benchmark for the aluminum plate/sheet program, the court directs Commerce to explain further or reconsider whether Commerce’s evaluation of the affidavit that the Zhongji Respondents provided in support of their alternative argument to “narrow” the TDM data source was consistent with Commerce’s past practice. See *id.* at 23-24; Zhongji Case Br. at 32-34; Zhongji Benchmark Submission at 5-6, Ex. 11.

IV. Commerce’s selection of data to calculate the benchmark for the land program

The Zhongji Respondents presented for inclusion in the record for purposes of a benchmark for the land program Coldwell Banker Richard Ellis (“CBRE”) reports from 2016 through 2018 (“2016 to 2018 CBRE Reports”). See Zhongji Benchmark Submission at 6-7, Ex. 13. The Zhongji Respondents also submitted reports compiled by Nexus Innovative Real Estate Solutions (“Nexus Reports”). See *id.* at 7, Ex. 14.

Commerce placed in the record the CBRE Asian Marketview Reports, which contain data from Thailand for 2010 (“2010 CBRE Report”). See Letter from U.S. Dep’t of Commerce, re: Countervailing Duty Administrative Review of Aluminum Foil from the People’s Republic of China: Asian Marketview Report (July 29, 2019) (“2010 CBRE Report”), PR 57-58; Letter from U.S. Dep’t of Commerce, re: Countervailing Duty Administrative Review of Aluminum Foil from the People’s Republic of China: Land Analysis Memo (July 29, 2019) (“Land Analysis Mem.”), PR 59-72.

In the AR 1 Final Results, Commerce selected the 2010 CBRE Report as a Tier 3 benchmark to value the land program. See IDM at 31-33.

A. Positions of the parties

Plaintiffs contend that Commerce’s selection of data to calculate the benchmark for the land program is not supported by substantial evidence. See Pls. Br. at 30-45. Plaintiffs advance three arguments with respect to this issue. First, plaintiffs argue that Commerce was unreasonable its rejection as untimely NFI of the July 9 Benchmark Submission. See *id.* at 40-45. Second, plaintiffs assert that Commerce determined unreasonably that it would not rely upon a Tier 2 benchmark to value the land program. See *id.* at 31-37. Third, plaintiffs contend that Commerce decided unreasonably to select the 2010 CBRE Report as a Tier 3 benchmark and, consequently, to reject the 2016 to 2018 CBRE Reports and the Nexus Reports. See *id.* at 37-40; see *also* Pls. Reply Br. at 15-21.

Defendant and defendant-intervenors argue that Commerce’s benchmark selection for the land program is supported by substantial evidence and respond in sequence to plaintiffs’ three arguments. See Def. Br. at 18-28; Def.-Intervenors Br. at

18-25. First, defendant-intervenors maintain that Commerce rejected reasonably the July 9 Benchmark Submission. See Def.-Intervenors Br. at 21-25; Zhongji Req. for Clarification; see *also* Oral Arg. Tr. at 59:07-60:04. Second, defendant and defendant-intervenors assert that Commerce determined reasonably that neither a Tier 1 nor a Tier 2 benchmark was appropriate to value the land program. See Def. Br. at 19-21; Def.-Intervenors Br. at 18-19. Third, defendant and defendant-intervenors contend that Commerce decided reasonably to select the 2010 CBRE Report as a Tier 3 benchmark and, consequently, to reject the 2016 to 2018 CBRE Reports and the Nexus Reports. See Def. Br. at 21-26; Def-Intervenors Br. at 19-20.

B. Analysis

The court concludes that Commerce did not explain adequately its selection of data to calculate the benchmark for the land program. See IDM at 31-33. Accordingly, the court is not able to ascertain whether Commerce's selection is supported by substantial evidence, and the court remands this selection for further explanation or reconsideration.

The court addresses first Commerce's rejection of the Zhongji Respondents' July 9 Benchmark Submission as untimely NFI. See *id.* at 33; Commerce Resp. to Zhongji Req. for Clarification; July 17 Rejection Letter. The court then addresses Commerce's determination that neither a Tier 1 nor a Tier 2 benchmark was appropriate to value the land program, before turning to Commerce's selection of data to calculate a Tier 3 benchmark for the land program. See IDM at 31-33.

1. Commerce's rejection of the July 9 Benchmark Submission

The court concludes that Commerce was reasonable in its rejection as untimely NFI of the July 9 Benchmark Submission, which contains information related to the land program. See *id.* at 33.

Following Commerce's publication of the AR 1 Preliminary Results, the Zhongji Respondents requested clarification from Commerce as to whether they would be permitted to submit additional NFI to buttress their earlier benchmark submissions for the land program. See Zhongji Req. for Clarification. The Zhongji Respondents requested this clarification in view of their position that the AR 1 Preliminary Results were "not clear [as to] whether the parties [would be] allowed to provide [NFI] or only submit comments on the record information" subsequent to Commerce's publication of the AR 1 Preliminary Results. *Id.* Addressing this request for clarification, Commerce informed the Zhongji Respondents that they were not permitted to submit additional NFI with respect to the land program, but that they were permitted to "submit land benchmark *comments* to rebut, clarify, or correct information *on the record.*" Commerce Resp. to Zhongji Req. for Clarification (emphasis supplied). Specifically, Commerce explained that the AR 1 Preliminary Results did not provide a basis to permit the Zhongji Respondents to submit additional NFI because Commerce "ha[d] not placed any new land benchmark information on the record . . . in reaching these preliminary results." *Id.* Notwithstanding Commerce's clarification, however, the Zhongji Respondents submitted for inclusion in the record the July 9 Benchmark Submission, which Commerce rejected as untimely NFI. See July 9 Benchmark Submission; July 17 Rejection Letter.

Commerce was reasonable in its rejection of the July 9 Benchmark Submission. See IDM at 33; see also *Gulf States Tube*, 21 CIT at 1040, 981 F. Supp. at 653 (“Commerce’s policy of setting time limits on the submission of factual information is reasonable because Commerce ‘clearly cannot complete its work unless it is able at some point to ‘freeze’ the record and make calculations and findings based on that fixed and certain body of information.’” (quoting *Bowe-Passat v. United States*, 17 CIT 335, 339 (1993))). Commerce notified the Zhongji Respondents that “parties [were] not permitted to submit [NFI] relating to Commerce’s Land Benchmark Memo or land benchmark analysis” subsequent to Commerce’s publication of the AR 1 Preliminary Results. Commerce Resp. to Zhongji Req. for Clarification; see *Gold Star Co. v. United States*, 12 CIT 707, 712, 692 F. Supp. 1382, 1386 (stating that Commerce “adequately corrected” a point of ambiguity in its determination through the issuance of a clarification letter). Contrary to plaintiffs’ assertion, see Pls. Br. at 42, Commerce was not required to amend the AR 1 Preliminary Results to provide the Zhongji Respondents with adequate clarification as to this inquiry. See *Gold Star*, 12 CIT at 712, 692 F. Supp. at 1386.

Further, Commerce also did not abuse its discretion in rejecting the July 9 Benchmark Submission. The Federal Circuit previously has stated that Commerce reasonably exercises its discretion to reject an untimely submission so long as interested parties are “afforded both notice and a meaningful opportunity to be heard.” *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1353 (Fed. Cir. 2015). In the instant case, Commerce provided the Zhongji Respondents with such notice as well as the opportunity to submit information in response to the 2010 CBRE Report and

Commerce's Land Analysis Memorandum, which Commerce placed in the record on July 29, 2019 — nearly 11 months prior to Commerce's publication of the AR 1 Preliminary Results. See 2010 CBRE Report; Land Analysis Mem; see also IDM at 33. The Zhongji Respondents filed their land benchmark submissions on April 1, 2020. See Zhongji Benchmark Submission at 6-7, Exs. 12-14.

Accordingly, in view of the fact that the deadline for the Zhongji Respondents to submit NFI already had passed, see 19 C.F.R. § 351.301(c)(3)(ii), Commerce did not abuse its discretion in rejecting the July 9 Benchmark Submission. See *Maverick Tube*, 39 CIT at ___, 107 F. Supp. 3d at 1331 ("Strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision." (citation omitted)).

2. Commerce's determination that neither a Tier 1 nor a Tier 2 benchmark was appropriate

Commerce determined reasonably that neither a Tier 1 nor a Tier 2 benchmark was appropriate to value the land program. See IDM at 31-32.

Commerce explained adequately its determination that a Tier 1 benchmark was not appropriate in this review.¹¹ See *id.* at 31. Commerce stated that in view of the "significant government role in the [Chinese] market," land prices are "distorted . . . and hence, no usable tier one benchmarks exist." *Id.* (citing PDM at 16; Land Analysis Mem. at attach. 1) (internal quotation marks omitted); see *Laminated Woven Sacks from the People's Republic of China: Preliminary Affirmative Countervailing Duty*

¹¹ Plaintiffs do not challenge Commerce's decision not to select a Tier 1 benchmark in this review. See *generally* Pls. Br. at 30-45; Compl.

Determination; Preliminary Affirmative Determination of Critical Circumstances, in Part; and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 72 Fed. Reg. 67,893, 67,906-08 (Dep't of Commerce Dec. 3, 2007).

Commerce also explained adequately its determination that a Tier 2 benchmark was not appropriate in this review “because ‘land is generally not simultaneously available to an in-country purchaser while located and sold out-of-country on the world market.’” IDM at 31-32 (quoting PDM at 16-17). Hence, Commerce was not able to rely on “world prices” to construct a Tier 2 benchmark for the land program. *Id.*; see *Risen Energy*, 46 CIT at ___, 570 F. Supp. 3d at 1374-75 (sustaining Commerce’s rejection of a Tier 2 benchmark to value land in China on the basis that Commerce had evaluated reasonably “the nature and scope of the market for land and determined that land . . . is generally not simultaneously available to an in-country purchaser while located and sold out-of-country on the world market” (citations omitted)).

3. Commerce’s selection of a Tier 3 benchmark

Commerce did not explain adequately its decision to: (1) select for a Tier 3 benchmark the 2010 CBRE Report and (2) reject the 2016 to 2018 CBRE Reports and the Nexus Reports. See IDM at 31-33; 2010 CBRE Report; 2016 to 2018 CBRE Reports; Nexus Reports.

Commerce based its selection of the 2010 CBRE Report primarily on what Commerce considered to be the “geographic proximity” and “economic comparability” of Thailand to China. IDM at 32; see 2010 CBRE Report; Land Analysis Mem. at attach.

1. Commerce explained that the 2016 to 2018 CBRE Reports, which contain “data for Mexico and Brazil as tier three benchmarks,” were not “superior to the 2010 CBRE

Report . . . [because] unlike Thailand, Mexico and Brazil are oceans apart from, and thus not geographically proximate to, China.” IDM at 32. Commerce stated further that the Zhongji Respondents did not demonstrate that Mexico and Brazil “are more economically comparable to China than [is] Thailand.” *Id.* Finally, Commerce asserted that the Nexus Reports did not provide an “explanation of [their] methodology,” thereby preventing Commerce from being able to “evaluate the scope and quality of the [Nexus Reports’] data.” PDM at 17; see IDM at 32-33.

The Zhongji Respondents argued in the administrative proceedings that: (1) the 2010 CBRE Report was “fatally outdated,” whereas the 2016 to 2018 CBRE Reports and the 2018 Nexus Reports were more “contemporaneous” with the POR (August 14, 2017, through December 31, 2018), Zhongji Case Br. at 6-10; (2) Commerce’s practice is to evaluate the contemporaneity of data sources in the record with reference to the relevant period of review, see *id.* at 6-7; (3) contrary to Commerce’s conclusion, see PDM at 17, the Nexus Reports “clearly set forth that their data consist of price information for ‘ready built factory’ and ‘ready built warehouse’ land prices in different regions in Thailand,” Zhongji Case Br. at 12; (4) the Nexus Reports indicated that “the source of their data [was] Nexus’s own ‘real estate advisory’” and that the “credibility of [these] data” was supported by the provision of “economic indicators concerning the price of industrial land in Thailand,” *id.* at 12 (citing Zhongji Benchmark Submission at Ex. 14); and (5) Commerce’s conclusion that it would not use the Nexus Reports for failure to “expla[in] . . . [their] methodology,” PDM at 17, was inconsistent with Commerce’s selection of the 2010 CBRE Report, which did not provide “context or references to the source of its data.” Zhongji Case Br. at 12 (citing 2010 CBRE Report).

The foregoing points that the Zhongji Respondents raised were not adequately addressed by Commerce. Commerce did not explain its purported practice to select data sources that correspond most closely to the point in time at which land use rights were *purchased*. See IDM at 32 (stating that Commerce's selection of the 2010 CBRE Report was reasonable because this report "correspond[ed] more closely to the years in which [the Zhongji Respondents] *purchased* land-use rights" (emphasis supplied)). Commerce did not address adequately the argument of the Zhongji Respondents that the 2016 to 2018 CBRE Reports and the Nexus Reports were more appropriate data sources because they corresponded more closely to the POR in the instant case. See Zhongji Case Br. at 6-10. And, further, Commerce did not address the arguments of the Zhongji Respondents that the Nexus Reports provided information with respect to the methodology and sourcing of their data as well as "other economic indicators concerning the price of industrial land in Thailand," *id.* at 11-12 (citing Zhongji Benchmark Submission at Ex. 14), and that Commerce's decision not to use the Nexus Reports was inconsistent with Commerce's selection of the 2010 CBRE Report, which did not provide "context or references to the source of its data." *Id.* at 12 (citing 2010 CBRE Report); see *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001), *aff'd*, 332 F.3d 1370 (Fed. Cir. 2003) ("[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)) (internal quotation marks omitted)). "[W]hen a party properly raises an argument before an agency, that agency is required to address the argument in its final decision." *Fine*

Furniture (Shanghai) Ltd. v. United States, 40 CIT __, __, 182 F. Supp. 3d 1350, 1371 (2016) (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011)).

In view of the foregoing, the court directs Commerce on remand to explain further or reconsider its evaluation of the contemporaneity of data sources in the record — particularly Commerce’s purported practice to select data sources that correspond most closely to the point in time at which land use rights were *purchased* — with respect to Commerce’s selection of a Tier 3 benchmark for the land program. See IDM at 32. Based on Commerce’s explanation with respect to any such practice in evaluating the contemporaneity of data sources, the court further directs Commerce to explain the reasons that its selected benchmark on remand is consistent with such a practice. Moreover, should Commerce decide on remand to select more than one data source to calculate the benchmark for the land program, the court directs Commerce to explain the reasons that *each* selected data source is consistent with Commerce’s practice in determining whether a data source provides an “appropriate remuneration benchmark.” *Changzhou Trina*, 42 CIT at __, 352 F. Supp. 3d at 1332. In addition, the court directs Commerce on remand to explain further or reconsider its selection of the 2010 CBRE Report specifically with reference to the adequacy, context and references for the data in that report in comparison to Commerce’s criticism of the adequacy, context and references for the data in the Nexus Reports.

CONCLUSION

“I don’t compare ‘em, I just catch ‘em.”¹² Willie Howard Mays, Jr., is considered by many to be the greatest baseball player who ever lived. Mays played for the Birmingham Black Barons of the Negro American League in 1948, and then for the New York and San Francisco Giants, and the New York Mets, from 1951 to 1973. A guest at the White House or on Air Force One of three U.S. Presidents — Gerald Ford in 1976, George W. Bush in 2006, and Barack Obama in 2009 and 2015, when he bestowed on Mays the Presidential Medal of Freedom — Mays’ records and additional honors are too numerous to list.

* * *

For the reasons discussed, the court sustains in part and remands in part the AR 1 Final Results. Specifically, the court remands the AR 1 Final Results with respect to Commerce’s selection of data to calculate the benchmark for the aluminum plate/sheet program and Commerce’s selection of data to calculate a Tier 3 benchmark for the land program.

Accordingly, it is hereby

ORDERED that the AR 1 Final Results are sustained with respect to Commerce’s decision to reject the May 18 Benchmark Submission; it is further

ORDERED that the AR 1 Final Results are sustained with respect to Commerce’s calculation of the benchmark for the primary aluminum program; it is further

¹² *Say Hey Said*, ESPN CLASSIC (Nov. 19, 2003), <https://www.espn.com/classic/s/000725williemaysquote.html>.

ORDERED that the AR 1 Final Results are remanded to Commerce for further explanation or reconsideration, consistent with this decision, of Commerce's selection of data to calculate the benchmark for the aluminum plate/sheet program; it is further

ORDERED that the AR 1 Final Results are sustained with respect to Commerce's determination that neither a Tier 1 nor a Tier 2 benchmark was appropriate to calculate the benchmark for the land program; it is further

ORDERED that Commerce's selection of a Tier 3 benchmark for the land program is remanded for Commerce to: (1) explain further or reconsider its evaluation of the contemporaneity of data sources in the record — particularly Commerce's purported practice to select data sources that correspond most closely to the point in time at which land use rights were *purchased*; (2) explain the reasons that Commerce's selected benchmark on remand is consistent with such a practice in evaluating the contemporaneity of data sources; (3) explain the reasons that *each* data source that Commerce may decide to select on remand — should Commerce select more than one data source — is consistent with Commerce's practice in determining whether a data source provides an appropriate remuneration benchmark; and (4) explain further or reconsider its selection of the 2010 CBRE Report specifically with reference to the adequacy, context and references for the data in that report in comparison to Commerce's criticism of the adequacy, context and references for the data in the Nexus Reports; it is further

ORDERED that Commerce shall file its remand results within 90 days following the date of this Opinion and Order; it is further

ORDERED that within 14 days of the date of filing of Commerce's remand results, Commerce shall file an index and copies of any new administrative record documents; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

/s/ Timothy M. Reif
Timothy M. Reif, Judge

Dated: March 21, 2023
New York, New York