U.S. Court of International Trade

Slip Op. 19–45

SHANDONG DONGFANG BAYLEY WOOD CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and COALITION for FAIR TRADE of HARDWOOD PLYWOOD, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00020

[Sustaining the U.S. Department of Commerce's final determination in the countervailing duty investigation of certain hardwood plywood products from the People's Republic of China.]

Dated: April 12, 2019

Gregory S. Menegaz, *Alexandra H. Salzman*, *J. Kevin Horgan*, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff Shandong Dongfang Bayley Wood Co., Ltd. *John J. Kenkel* also appeared.

Sonia M. Orfield, Trial Attorney, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Jessica R. DiPietro*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Timothy C. Brightbill, *Elizabeth S. Lee*, *Stephanie M. Bell* and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor Coalition for Fair Trade of Hardwood Plywood. *Adam M. Teslik*, *Cynthia C. Galvez*, *Derick G. Holt*, *Jeffrey O. Frank*, *Laura El-Sabaawi*, *Maureen E. Thorson* and *Tessa V. Capeloto* also appeared.

OPINION

Choe-Groves, Judge:

Before the court is a Rule 56.2 motion for judgment on the agency record filed by Plaintiff Shandong Dongfang Bayley Wood Co., Ltd. ("Plaintiff" or "Bayley"). Bayley contests the U.S. Department of Commerce's ("Commerce" or "Department") final determination in the countervailing duty investigation of certain hardwood plywood products from the People's Republic of China ("China"), in which the Department found that countervailable subsidies are being provided to producers and exporters of the subject merchandise. *See Countervailing Duty Investigation of Certain Hardwood Plywood Products From the People's Republic of China*, 82 Fed. Reg. 53,473 (Dep't Commerce Nov. 16, 2017) (final affirmative determination and final affirmative critical circumstances determination, in part) ("*Final Determination*"); *see also* Dep't Commerce, Issue and Decision Memorandum for the Final CVD Determination, PD 618, bar code

3640091–01 (Nov. 13, 2017) ("Final IDM"). For the foregoing reasons, the court sustains Commerce's final determination in full.

ISSUES PRESENTED

This case presents the following issues:

1. Whether Commerce's determination to apply facts available with an adverse inference ("adverse facts available or AFA") to Bayley is supported by substantial evidence;
2. Whether Commerce's determination not to verify certain submissions is in accordance with the law; and
3. Whether Commerce's determination to disregard Plaintiff's submitted information is in accordance with the law and not arbitrary and capricious.

PROCEDURAL HISTORY

Commerce initiated a countervailing duty investigation on hardwood plywood products from China on December 8, 2016, at the request of Petitioner Coalition for Fair Trade in Hardwood Plywood ("Coalition" or "Petitioner"). *See Certain Hardwood Plywood Products From the People's Republic of China*, 81 Fed. Reg. 91,131 (Dep't Commerce Dec. 16, 2016) (initiation of countervailing duty investigation). The period of investigation was from January 1, 2015 through December 31, 2015. *See id.* at 91,132. Commerce selected Bayley and Linyi Sanfortune Wood Co., Ltd. as mandatory respondents. *See* Dep't Commerce, Decision Memorandum for the Preliminary CVD Determination at 2, PD 404, bar code 3564577–01 (Apr. 19, 2017) ("Prelim. IDM").

Commerce issued initial questionnaires to Bayley and the Government of China on January 17, 2017. *Id.* Bayley filed its affiliation questionnaire response on January 31, 2017. *Id.*; *see* Bayley Affiliation Qre Resp., PD 162, bar code 3540296–01 (Feb. 1, 2017). In this response, Bayley revealed its affiliation with Companies A, B, and C.[1] *See* Prelim. IDM at 2, 4. Bayley also reported that it was partially-owned by Person A and majority-owned by Person B, a husband and wife. *Id.* at 24. Bayley submitted its full response to the initial questionnaire on March 2, 2017. *Id.* at 2–3. Commerce issued a supplemental questionnaire for Companies A, B, and C on March 8, 2017. *Id.* at 3. Bayley submitted a section III response for Companies A, B,

[1] The court notes that Companies A, B, C, and D are distinct from Persons A, B, and C. The names of Companies A, B, C, and D, and Persons A, B, and C are confidential. The court refers to the companies and persons as the Parties do.

and C on March 28, 2017. *Id.* at 4. In this response, Bayley revealed an affiliation with Company D, which was wholly-owned by Person C, the father of Person B and father-in-law of Person A. *Id.* at 4, 24–25. Commerce issued a second supplemental questionnaire for Company D on April 3, 2017. *Id.* at 4. Bayley submitted a section III response for Company D on April 10, 2017. *Id.* Petitioner submitted comments to Bayley's initial questionnaire response on March 20, 2017, asserting that Bayley was affiliated with another company, Shelter Forest International Acquisition, Inc. ("Shelter" or "SFIA"). *Id.* at 27. Bayley responded to Petitioner's comments and denied its affiliation with Shelter on April 3, 2017. *See id.* at 4.

Commerce published its preliminary determination on April 25, 2017. *See Certain Hardwood Plywood Products from the People's Republic of China*, 82 Fed. Reg. 19,022 (Dep't Commerce Apr. 25, 2017) (preliminary affirmative countervailing duty determination, preliminary affirmative critical circumstances determination, in part, and alignment of final determination with final antidumping duty determination) ("*Preliminary Determination*"). Commerce determined preliminarily that application of AFA was warranted based on Bayley's failure to disclose all affiliates, and assigned Bayley a subsidy rate of 111.09%. *See id.* at 19,023; *see also* Prelim. IDM at 24–31.

Commerce published its final determination on November 16, 2017. *See Final Determination*. Commerce continued to apply AFA to Bayley in its final determination and assigned Bayley a subsidy rate of 194.90%. *See id.* at 53,474–75; *see also* Final IDM at 24.

Bayley initiated an action in this court on February 27, 2018. *See* Summons, Feb. 2, 2018, ECF No. 1., Compl., Feb. 27, 2018, ECF No. 8. Bayley filed a Rule 56.2 motion for judgment on the agency record on August 3, 2018. *See* Pl. Shandong Dongfang Bayley Wood Co., Ltd.'s Mot. J. Agency R., Aug. 3, 2018, ECF No. 20; *see also* Pl. Shandong Dongfang Bayley Wood Co., Ltd.'s Rule 56.2 Mem. Supp. Mot. J. Agency R., Aug. 3, 2018, ECF No. 20–1 ("Pl. Br."). Defendant and Petitioner filed response briefs on October 2 and 3, 2018. *See* Def.'s Mem. Opp'n Pl.'s Rule 56.2 Mot. J. Agency R., Oct. 2, 2018, ECF No. 25; Resp. Br. Def. Intervenor Coalition for Fair Trade in Hardwood Plywood, Oct. 3, 2018, ECF No. 27. Bayley filed a reply brief on November 5, 2018. *See* Pl. Shandong Dongfang Bayley Wood Co., Ltd. Reply Br., Nov. 5, 2018, ECF No. 30.

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), 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 court will uphold Commerce's determinations unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(ii). An agency acted in an arbitrary and capricious manner if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Al. Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009).

ANALYSIS

I. Commerce's Application of AFA

Section 776 of the Tariff Act provides that if "necessary information is not available on the record" or if a respondent "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," then the agency shall "use the facts otherwise available in reaching" its determination. 19 U.S.C. § 1677e(a)(1), (a)(2)(B). If the Department finds further that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" from the agency, then the Department "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1)(A). The U.S. Court of Appeals for the Federal Circuit has interpreted these two subsections to have different purposes. *See Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014). Subsection (a) applies "whether or not any party has failed to cooperate fully with the agency in its inquiry." *Id.* (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011)). On the other hand, subsection (b) applies only when the Department makes a separate determination that the respondent failed to cooperate "by not acting to the best of its ability." *Id.* (quoting *Zhejiang DunAn Hetian Metal Co.*, 652 F.3d at 1346).

When determining whether a respondent has complied to the "best of its ability," Commerce "assess[es] whether [a] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). This finding requires

both an objective and subjective showing. *Id.* Commerce must determine objectively "that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." *Id.* (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002)). Next, Commerce must demonstrate subjectively that the respondent's "failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Id.* at 1382–83. Adverse inferences are not warranted "merely from a failure to respond," but rather in instances when the Department reasonably expected that "more forthcoming responses should have been made." *Id.* at 1383. "The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent." *Id.*

Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record when making an adverse inference. *See* 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c). Respondents should be forthcoming with information, regardless of their views on relevancy, in the event the agency finds differently. *See POSCO v. United States*, 42 CIT __, __, 296 F. Supp. 3d 1320, 1340–41 (citing *Essar Steel Ltd. v. United States*, 34 CIT 1057, 1073, 721 F. Supp. 2d 1285, 1299 (2010)).

Commerce found that Bayley "failed to cooperate by not acting to the best of its ability to comply" with the Department's requests for information by not disclosing the full extent of its affiliations as required by the initial questionnaire. Final IDM at 24; *see also* Dep't Commerce, Initial CVD Qre, PD 152, bar code 3537176–01 (Jan. 17, 2017) (instructing the companies to provide affiliation information). Plaintiff contends that the Department's application of AFA to Bayley because of its alleged affiliation with one of its customers, Shelter Forest International Acquisition Inc., is unsupported by substantial evidence. Pl. Br. 14. Bayley contends that Commerce relied on (1) inconclusive information that Petitioner placed on the record from an antidumping investigation on hardwood plywood that took place in 2012 ("Plywood I")[2], (2) discredited information from a cached webpage, and (3) conjecture on the relationship between two U.S. companies. *Id.* at 3–4.

[2] *See Hardwood Plywood from China*, 78 Fed. Reg. 76,857 (Int'l Trade Comm. Dec. 19, 2013) (determinations).

Bayley attempted to rebut the evidence Petitioner placed on the record by arguing that SFIA is not the same company as that operating in 2012. *See* Prelim. IDM at 28; *see also* Bayley Resp. to Petitioners' Allegations re Affiliation at 2, PD 356, bar code 3559719–01 (Apr. 4, 2017). Bayley stated that the Plywood I documents refer to Shelter Forest International, Inc., which is a different company than that at issue in this investigation. *See* Prelim. IDM at 28–29; *see also* Bayley Resp. to Petitioners' Allegations re Affiliation at 4, PD 356, bar code 3559719–01 (Apr. 4, 2017). Bayley placed each company's business registration with the Oregon Secretary of State on the record, arguing that the two companies are different because the registrations show two different companies with two different addresses. *See id.* at 5. Commerce made a "full examination of the business registration documents that are publicly available" and found that Bayley failed to provide available attachments showing that the president of both Shelter companies is the same person, supporting a finding of affiliation. *See* Prelim. IDM at 29–30; *see also* Dep't Commerce, Shelter Corporate Documents, PD 420, bar code 3564868–01 (Apr. 19, 2017).

Commerce reasonably suspected that Bayley failed to provide Commerce with information at the outset of the investigation. After investigating Bayley's rebuttal evidence further, Commerce found substantial evidence that Bayley and Shelter are affiliated. Commerce's decision to apply AFA was reasonable. *See Nippon Steel*, 337 F.3d at 1383 (holding that "intentional conduct, such as deliberate concealment or inaccurate reporting" shows a failure to cooperate); *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (finding that "[p]roviding false information and failing to produce key documents unequivocally" shows that respondent "did not put forth its maximum effort"); *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360 (Fed. Cir. 2017) (concluding that substantial evidence supports Commerce's decision to apply AFA where respondent failed to provide information requested by Commerce and "never claimed that it was unable to provide" the information). The court concludes that Commerce's decision to apply AFA to Bayley for failure to disclose the full extent of its affiliations is supported by substantial evidence.

II. Commerce's Decision Not to Verify

Commerce "shall verify all information relied upon in making a final determination in an investigation." 19 U.S.C. § 1677m(i)(1); *see also* 19 C.F.R. § 351.307(b). At verification, Commerce employees "will request access to all files, records, and personnel which the Secretary

considers relevant to factual information submitted of: (1) producers, exporters, or importers." 19 C.F.R. § 351.307. Commerce need not consider information submitted by an interested party if the information "is so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." 19 U.S.C. § 1677m(e)(3).

Bayley contends that Commerce should have verified its questionnaire responses. Pl. Br. 30. Bayley contends also that Commerce should have verified the evidence Petitioner put on the record, including the documents from Plywood I, the cached website information, and Bayley's alleged affiliations with other Chinese producers, once Bayley denied any affiliation with Shelter. *Id.* at 30–32. This is incorrect. Because Commerce did not rely upon Bayley's questionnaires, it did not need to verify them. The evidence that Petitioner placed on the record was not their own and therefore there were no "files, records, and personnel" that Commerce could request from Petitioner to verify it. Commerce considered the evidence to find it was reasonable to suspect Bayley's responses were "so incomplete" as to not "serve as a reliable basis for reaching the applicable determination." Bayley had to rebut this presumption and it was not able to do. Commerce's decision not to verify both Bayley's questionnaire responses and the evidence the Petitioner put on the record is in accordance with the law.

III. Commerce's Decision Not to Consider Information

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." 19 U.S.C. § 1677m(d). Commerce "satisf[ies] its obligations under section 1677m(d) when it issue[s] a supplemental questionnaire specifically pointing out and requesting clarification of [the party's] deficient responses." *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007). "[N]othing in the [language of the statute] compels Commerce to treat intentionally incomplete data as a 'deficiency' and then to give a party that has intentionally submitted incomplete data an opportunity to 'remedy' as well as to 'explain.'" *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016), *cert. denied*, 138 S. Ct. 555 (2017).

During the investigation, Commerce's initial questionnaire requested that Bayley report all affiliated and cross-owned companies. *See* Dep't Commerce, Initial CVD Qre, PD 152, bar code 3537176–01 (Jan. 17, 2017). Bayley reported that it was partially-owned by Per-

son A and majority-owned by Person B, a husband and wife. *See* Final IDM at 22. Bayley originally did not list Company D as an affiliate. *See id.*; Bayley Affiliation Qre Resp. at 3, PD 162, bar code 3540296–01 (Feb. 1, 2017). Bayley eventually reported that Company D was wholly-owned by Person C, the father-in-law of Person A and father of Person B on March 28, 2017. *See* Prelim. IDM 24–35 (referring to Bayley Company A Sec III Qre Responses, PD 309–310, bar code 3555719–01 (Mar. 28, 2017)). Bayley argued that it did not need to report Company D as an affiliate because Person B was no longer considered part of the same family as her father, Person C, after her marriage per Chinese tradition. *See* Prelim. IDM at 26; Final IDM at 25; Bayley, Second Supplemental Questionnaire Response at 8–9, PD 393, 3562018–01 (Apr. 11, 2017). Commerce requested a response from Company D that replied to the initial questionnaire. *See* Bayley, Second Supplemental Questionnaire Response at 9, PD 393, 3562018–01 (Apr. 11, 2017). Company D submitted this questionnaire on April 10, 2017. Bayley, Company D Sec III Qre Rsp, PD 391, bar code 3561903–01 (Apr. 11, 2017). Commerce "found Bayley Wood's timely filing of the Company D response to be irrelevant given our finding that the company did not cooperate to the best of its ability" by "depriv[ing] the Department of the ability to fully investigate the issues of affiliation and cross-ownership." Final IDM at 26. Despite Bayley's timely filing, Commerce decided to apply AFA for failure to comply after Bayley did not include all affiliation information in response to the initial questionnaire and first supplemental questionnaire.

Bayley contends that Commerce's (1) refusal to consider Company D's questionnaire response; (2) refusal to issue Bayley a supplemental questionnaire; and (3) refusal to consider the information Bayley offered to clarify its lack of affiliations, are not in accordance with the law. *See* Pl. Br. 33. The record evidence establishes that Bayley intentionally submitted incomplete information to Commerce regarding its affiliations because it did not consider Person B to be part of Person C's family (her father). *See* 19 U.S.C.§ 1677(33)(A) (providing that "the following persons shall be considered to be 'affiliated' or 'affiliated persons': [m]embers of a family, including . . . lineal descendants."). The court finds that Commerce's conclusion that Bayley provided incomplete information was reasonable because under United States law, Bayley should have provided information about the affiliated relationship of Person C and Person B who are lineal descendants. Commerce satisfied its burden under section 1677m(d) both to inform Bayley that Bayley's affiliation response was deficient and to allow Bayley to correct its response after Commerce issued the

first supplemental questionnaire. *See NSK Ltd.*, 481 F.3d at 1360 n.1. Bayley contends also that Commerce must provide a party with an opportunity to remedy or explain a deficiency "regardless of whether the Department, the respondent, or any other party first brings such a deficiency to the Department's" attention. Pl. Br. 33; *see also* 19 U.S.C. § 1677m(d). Bayley relies on *China Kingdom Import & Export Co. Ltd v. United States*, 31 CIT 1329, 507 F. Supp. 2d 1337 (2007), as support for this proposition. Commerce applied AFA for failure to comply after Bayley did not include all affiliation information in response to the initial questionnaire and first supplemental questionnaire and it therefore did not need to consider the Company D questionnaire.

Bayley contends further that Commerce's disregard of Bayley's questionnaire response for Company D is arbitrary and capricious. Pl. Br. 38. Commerce did not dispute that this submission was timely. Final IDM at 26. Commerce disregarded the questionnaire because it determined that the response would not change the fact that Bayley "significantly impeded the Department's ability to complete [its] investigation." *See id.* at 27. The court finds that Commerce's decision was not arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the court concludes that: (1) Commerce's application of AFA to Bayley is supported by substantial evidence; (2) Commerce's determination not to verify Petitioner's and Bayley's submissions is in accordance with the law; and (3) Commerce's determination to disregard Bayley's submitted information is in accordance with the law and not arbitrary and capricious.

Judgment will be entered accordingly.

Dated: April 12, 2019
New York, New York

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

Slip Op. 19–46

ABB INC., Plaintiff, v. UNITED STATES, Defendant, and HYOSUNG CORPORATION, HYUNDAI HEAVY INDUSTRIES CO., LTD., and HYUNDAI CORPORATION USA, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00054

[Denying Hyundai Heavy Industries, Co., Ltd. and Hyundai Corporation, USA's motion for reconsideration.]

Dated: April 12, 2019

Melissa M. Brewer and *R. Alan Luberda*, Kelley Drye & Warren LLP, of Washington, DC, for Plaintiff.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

David E. Bond, *William J. Moran*, and *Ron Kendler*, White & Case LLP, of Washington, DC, for Defendant Intervenors Hyundai Heavy Industries, Co., Ltd.[1] and Hyundai Corporation USA.

OPINION AND ORDER

Barnett, Judge:

Before the court is a motion for reconsideration filed by Hyundai Heavy Industries, Co., Ltd. and Hyundai Corporation, USA (collectively "Hyundai") pursuant to Rule 59(e) of the U.S. Court of International Trade ("USCIT"). *See* Confidential Def.-Ints.' Mot. for Recons. ("Mot. for Recons."), ECF No. 133. Hyundai requests that the court reconsider its decision sustaining the U.S. Department of Commerce's ("Commerce" or "the agency") use of facts available in applying the agency's capping methodology to service-related revenue with respect to transactions based on communications between Hyundai and Hyundai's unaffiliated customers. *See ABB Inc. v. United States*, 42 CIT __, __, 355 F. Supp. 3d 1206, 1217–23 (2018). Plaintiff, ABB Inc., and Defendant, United States, oppose the motion on the basis that Hyundai improperly re-litigates issues addressed and rejected by the court. *See* Pl.'s Resp. in Opp'n to Def.-Ints.' Mot. for Recons. at 3, ECF No. 139; Def.'s Resp. to Mot. for Recons. at 4, ECF No. 145. For the reasons that follow, Hyundai's motion is denied.

[1] Hyundai Electric & Energy Systems Co., Ltd. is the successor-in-interest to Hyundai Heavy Industries, Co., Ltd. *See* Letter from David E. Bond, Attorney, White & Case LLP, to the Court (Sept. 12, 2018), ECF No. 120.

BACKGROUND

In *ABB Inc.*, the court addressed challenges to Commerce's remand redetermination in the second administrative review of the antidumping duty order on large power transformers from the Republic of Korea for the period of review August 1, 2013, through July 31, 2014. *ABB Inc.*, 355 F. Supp. 3d at 1210;[2] *see also* Confidential Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 96. Relevant here, the court analyzed whether substantial evidence supports Commerce's finding that Hyundai "refused to provide the necessary information for Commerce to apply its capping methodology" to service-related revenue. *ABB Inc.*, 355 F. Supp. 3d at 1217–18. The court concluded that "substantial evidence supports Commerce's finding that Hyundai failed to provide information necessary for Commerce to apply its capping methodology" with respect to "those transactions for which Commerce identified communications (e.g., purchase orders and invoices) between Hyundai and its unaffiliated customers indicating that the provision of those services may reasonably have been separately negotiable." *Id.* at 1221. Hyundai now contends that the court made a factual error in reaching its conclusion and the court's "conclusion appears to be inconsistent with other aspects of its ruling." Mot. for Recons. at 2–4.

JURISDICTION

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), and 28 U.S.C. § 1581(c).

DISCUSSION

I. Standard of Review

Pursuant to USCIT Rule 59(e), the court may consider "[a] motion to alter or amend a judgment," which is served "no later than 30 days after the entry of the judgment." USCIT Rule 59(e). "'Judgment' . . . includes a decree and any order from which an appeal lies." USCIT Rule 54(a).[3] As a general rule, "[a]n order remanding a matter to an administrative agency for further findings and proceedings is not

[2] *ABB Inc.* contains further background information on this case, familiarity with which is presumed.

[3] A "final decision" of the U.S. Court of International Trade is appealable to the U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(5). A decision is final only when it "ends the litigation on the merits and leaves nothing for the court to do but execute judgment." *Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986) (quoting, *inter alia*, *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 373 (1981)).

final," and therefore, not appealable.[4] *Cabot Corp.*, 788 F.2d at 1542–43 (dismissing an appeal of a USCIT order that "resolve[d] an important legal issue" but remanding the matter to the administrative agency for further findings and proceedings because the order was not final).

In *ABB Inc.*, the court considered Hyundai's claims that Commerce's use of facts available with an adverse inference was unsupported by substantial evidence and contrary to law. *ABB Inc.*, 335 F. Supp. at 1216–23. The court sustained Commerce's use of facts available but remanded Commerce's decision to use an adverse inference in selecting among the facts available. *Id.* at 1223. The decision in *ABB Inc.* is not a final appealable order, *see Cabot Corp.* 788 F.2d at 1542, but instead is an interlocutory order, *see NSK Corp. v. United States*, 32 CIT 1497, 1502, 593 F. Supp. 2d 1355, 1362 (2008) (characterizing a remand order as an interlocutory order).[5] Accordingly, because the court's decision in *ABB Inc.* is not final, USCIT Rule 59(e) does not apply.

USCIT Rule 59(e), however, is not the only provision pursuant to which the court may reconsider an order. Pursuant to USCIT Rule 54(b), "any order or other decision . . . that adjudicates fewer than all the claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of a judgment adjudicating all the claims . . . ." USCIT Rule 54(b); *see also Beijing Tianhai Indus. Co., Ltd. v. United States*, 41 CIT __, __, 234 F. Supp. 3d 1322, 1328 (2017) ("This [c]ourt has held that it may reconsider a prior, non-final decision pursuant to its plenary power, which is recognized by Rule 54(b)."") (citations omitted). The court has the discretion to reconsider a prior decision under USCIT Rule 54(b) "as justice requires, meaning when the court determines that reconsideration is necessary under the relevant circumstances." *Irwin Indus. Tool Co. v. United States*, 41 CIT __, __, 269 F. Supp. 3d 1294, 1301 (2017), *aff'd*, No. 2018–1215, 2019 WL 1523053 (Fed. Cir. Apr. 9, 2019) (internal quotation marks and citation omitted). A motion for reconsideration is not, however, 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). The court will consider Hyundai's motion pursuant to USCIT Rule 54(b).

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[4] Any potential exceptions to this rule are inapplicable.

[5] When numerous claims for relief are presented, the court may direct entry of a final judgment on fewer than all claims "only if the court expressly determines that there is no just reason for delay." USCIT Rule 54(b). The court has not done so in this case.

II. Hyundai's Motion for Reconsideration is Denied

Hyundai claims that the court incorrectly concluded that Hyundai did not provide Commerce with requested information that would have enabled the agency to apply its capping methodology until verification in the underlying review. Mot. for Recons. at 2–3. Hyundai avers that the court overlooked that Hyundai submitted sales documentation for SEQU 11—one of five U.S. sales that Commerce examined at verification—two months before verification, and this documentation demonstrated that Hyundai had a breakout of service-related revenue. *Id.* at 2; *see also ABB Inc.*, 355 F. Supp. 3d at 1215 n.15 (listing the sales that Commerce examined). Hyundai further avers that the SEQU 11 documentation "was indistinguishable from the invoices reviewed at verification with respect to the presentation of separate revenue for services." Mot. for Recons. at 3. While recognizing that the court specifically addressed Hyundai's placement of SEQU 11 documentation on the record before verification, *id.* at 3 (citing *ABB Inc.*, 355 F. Supp. 3d at 1222 n.25), Hyundai next claims that the court failed to give due weight to that documentation and advances several reasons why the court should reconsider its decision, *id.* at 3–7. The court first addresses Hyundai's claim that the court made a factual error in its decision, then addresses the merits of Hyundai's arguments for why reconsideration is necessary.

A. The court did not make a factual error in its decision in *ABB Inc.*

The issue addressed by the court was whether Hyundai failed to provide Commerce information in the form and manner that Commerce requested. *See ABB Inc.*, 355 F. Supp. 3d at 1217–19. Commerce specifically asked Hyundai to report the gross unit price as follows: "If the invoice to your customer includes separate charges for other services directly related to the sale, . . . create a separate field for reporting each additional charge." *Id.* at 1217–18 (quoting Initial Antidumping Duty Questionnaire (Dec. 1, 2014) at C-18,[6] CRJA Tab 4, PRJA Tab 4, PR 25, ECF No. 113 at C-18)). Despite the fact that Hyundai had multiple invoices to U.S. customers that contained separate line items for services, Hyundai failed to create separate fields for the price of those services in its reporting methodology, thereby failing to respond to the agency's questionnaire in the form

[6] The administrative record for this case is divided into a Public Administrative Record, ECF No. 27–3, and a Confidential Administrative Record ("CR"), ECF No. 27–4. Parties submitted joint appendices containing record documents cited in their remand briefs. *See* Confidential Remand Proceeding J.A. ("CRJA"), ECF No. 113; Public Remand Proceeding J.A. ("PRJA"), ECF No. 114.

and manner requested. *Id.* at 1218–19 & n.19.[7] Instead, Hyundai "provided a seemingly complete response to Commerce's initial questionnaire," *id.* at 1222; *see also id.* at 1218 (discussing Hyundai's response), and did not notify Commerce that it had invoices with separate line items for services, which would have alerted the agency to the deficiencies in Hyundai's initial response.

In a supplemental questionnaire, Hyundai explained that "when the purchase order and invoice included separate line items for services," Hyundai "included the separately listed revenue in the gross unit price for the LPT." *Id.* at 1218 n.18. Nowhere in this explanation, however, did Hyundai reference the SEQU 11 documentation or point to any other documentation alerting Commerce to the existence of such invoices. Hyundai had provided the SEQU 11 documentation with its May 13, 2015, supplemental response without any explanation; it "was not until Commerce sorted through Hyundai's sales documentation [at verification] that the agency recognized that Hyundai's documentation was inconsistent with its reporting." *Id.* at 1222.

Moreover, in *ABB Inc.,* the court addressed Hyundai's claims that the sales documentation for SEQU 11 was on the record before verification. *ABB Inc.*, 355 F. Supp. 3d at 1222 n.25. Indeed, Hyundai's renewed claim in this motion that it had documentation that demonstrated a breakout of service-related revenue only confirms the court's conclusion that Hyundai failed to provide a complete response to Commerce's questionnaire in the form and manner requested.

B. Justice does not require reconsideration

Hyundai first claims that the court should reconsider its decision because Commerce "reached the opposite conclusion" to the court's decision in the final results of the review underlying this appeal. *Id.* at 3–4 (quoting Issues and Decision Mem., A–580–867 (Mar. 8, 2016) at 50, ECF No. 27–2, accompanying *Large Power Transformers from the Republic of Korea*, 81 Fed. Reg. 14,087 (Dep't Commerce March 16, 2016) (final determination of sales at less than fair value)). Hyundai's argument lacks merit because Commerce requested and was granted a remand to reconsider the record on this issue and ensure that it was properly applying its revenue-capping methodology. *See ABB Inc.*, 355 F. Supp. 3d at 1210; *ABB, Inc. v. United States*, 41 CIT__, __, 273 F. Supp. 3d 1200, 1205–06 (2017); *see also SKF USA*

[7] Hyundai does not challenge the court's finding that Hyundai failed to create the separate fields in accordance with Commerce's request.

Inc. v. United States, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (it is usually appropriate to grant a remand request when the agency, without confession of error, raises a concern that is substantial and legitimate). Upon reconsideration of the record, Commerce reached a different conclusion with respect to Hyundai's reporting, which it was permitted to do provided it explained its determination and supported its findings with substantial evidence. *See Nakornthai Strip Mill Public Co. Ltd., v. United States,* 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008) (reviewing remand determination for compliance with the court's remand order and applying the standard of review set out in 19 U.S.C. § 1516a(b)(1)(B)).[8]

Hyundai next argues that the court's conclusion that the invoices reviewed at verification were directly responsive to the agency's request for information regarding separately negotiated revenues and demonstrated a failure to provide that requested information "appears to be inconsistent with other aspects of its ruling." Mot. for Recons. at 4. Hyundai does not identify the alleged inconsistency, except it argues that the SEQU 11 documentation that was on the record prior to verification "provided the same information for a different sale." *Id.* As the court explained above, Hyundai did not provide the SEQU 11 documentation in response to Commerce's specific questions concerning service-related revenue and did not reference it when responding to Commerce's supplemental questions on this subject. *Supra* Discussion Section II.A; *see also ABB Inc.*, 355 F. Supp. 3d at 1222 n.25 ("While Hyundai explained its reporting methodology, it did not alert the agency to the existence of the very information—to wit, invoices—that the agency had requested but Hyundai was choosing not to provide in the manner requested by Commerce.").

Hyundai last argues that the court failed to give appropriate weight to the agency's acceptance of Hyundai's reporting in the original investigation that it had no service-related revenues. Mot. for Recons. at 4–6. According to Hyundai, the agency's acceptance of Hyundai's reporting reflected the agency's adoption of a "definition" of service-related revenue, upon which Hyundai was entitled to rely in this review. *Id.* at 5–6. Hyundai's arguments on this point amount to nothing more than disagreement with the court's decision, *see ABB Inc.*, 355 F. Supp. 3d at 1221, which is an insufficient basis for reconsideration, *see Irwin Indus. Tool Co.*, 269 F. Supp. 3d at 1301.

[8] At oral argument, the Government stated that Commerce's decision as articulated in the Issues and Decision Memorandum was incorrect. Oral Arg. Tr. at 28:24–29:5.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Hyundai's motion for reconsideration is **DENIED**.

Dated: April 12, 2019
New York, New York

/*s*/ *Mark A. Barnett*
JUDGE