U.S. Customs and Border Protection

Slip Op. 14–51

THE TIMKEN COMPANY, Plaintiff, v. UNITED STATES, Defendant, CHANGSHAN PEER BEARING CO., LTD. and PEER BEARING COMPANY, Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 13–00069

[Commerce's amended final results in antidumping duty review sustained regarding Commerce's targeted dumping analysis and remanded for Commerce to reexamine alleged currency conversion error.]

Dated: May 2, 2014

William A. Fennell, *Terence P. Stewart*, and *Stephanie M. Bell*, Stewart and Stewart, of Washington, DC, for plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Justin R. Becker*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Herbert C. Shelley and *Christopher G. Falcone*, Steptoe & Johnson LLP, of Washington, DC, for defendant-intervenors.

OPINION

Restani, Judge:

This matter is before the court on plaintiff The Timken Company's ("Timken") and defendant-intervenors Changshan Peer Bearing Co., Ltd. and Peer Bearing Company's (collectively "CPZ/SKF") motions for judgment on the agency record pursuant to USCIT Rule 56.2. The issues before the court stem from the U.S. Department of Commerce's ("Commerce") amended final determination in the 2010–2011 antidumping duty review of certain tapered roller bearings from the People's Republic of China. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 3396 (Dep't Commerce Jan. 16, 2013) ("*Final*

Results"), as amended by *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 12,035 (Dep't Commerce Feb. 21, 2013) ("*Amended Final Results*"). CPZ/SKF challenges Commerce's failure to correct an alleged ministerial error and convert CPZ/SKF's reported further manufacturing costs from Thai baht to U.S. dollars. Changshan Peer Bearing Co., Ltd.'s & Peer Bearing Co.'s Mem. of Points & Auths. in Supp. of Their Mot. for J. on the Agency R., Ct. No. 13–00095, ECF No. 36, 8–22 ("CPZ/SKF Br. in Supp."). Timken challenges Commerce's targeted dumping analysis in the *Amended Final Results*. Pl. The Timken Co.'s Mem. of Points & Auths. in Supp. of Its Mot. for J. on the Agency R., ECF No. 22, 12–25 ("Timken Br."). Defendant United States ("the government") refutes the challenge to Commerce's targeted dumping analysis in the *Amended Final Results* and requests a partial voluntary remand to Commerce to reexamine CPZ/SKF's further manufacturing costs. Def.'s Resp. to the Rule 56.2 Mots. for J. on the Agency R., ECF No. 39, 11–21 ("Government Br."). For the reasons stated below, Commerce's *Amended Final Results* are sustained in part and remanded in part.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012), which grants the court authority to review actions contesting the final determination in an administrative review of an antidumping order. Such determinations are upheld unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Ministerial Error

A. Background

In 1987, Commerce issued an antidumping duty order on tapered roller bearings and parts thereof from the People's Republic of China. *Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 52 Fed. Reg. 22,667 (Dep't Commerce June 15, 1987). In response to requests from interested parties, Commerce initiated an administrative review of the aforementioned antidumping duty order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocations in Part and Deferral of Administrative Reviews*, 76 Fed. Reg. 45,227, 45,228–29 (Dep't Commerce July 28, 2011). The information in dispute before the court was submitted by

CPZ/SKF to Commerce in its questionnaire response on December 12, 2011, which included information concerning CPZ/SKF's further manufacturing costs incurred in Thailand. SKF's Resp. to Dep't's Section C Supplemental Questionnaire, PD 108 at bar code 3045930–01 (Dec. 12, 2011), Ct. No. 13–00095, ECF No. 29 (Aug. 5, 2013). The file layout prepared by the programmer that was used to calculate the margin listed the field name for further manufacturing costs as "Further Manufacturing Cost (USD/PIECE)." *Id.* The supporting documents submitted by CPZ/SKF that Commerce relied upon in its calculations, however, indicated that the further manufacturing costs were reported in Thai baht. *See id.*

In its preliminary determination, Commerce treated CPZ/SKF's further manufacturing costs as denominated in U.S. currency and calculated a weighted-average dumping margin of 7.74%. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Preliminary Results of the 2010–2011 Antidumping Duty Administrative Review, Rescission in Part, and Intent to Rescind in Part*, 77 Fed. Reg. 40,579, 40,585 (Dep't Commerce July 10, 2012) ("*Preliminary Results*"). CPZ/SKF did not raise the issue of the currency inconsistency following the *Preliminary Results*. *See* CPZ/SKF Br. in Supp. 5–6. Accordingly, Commerce continued to treat CPZ/SKF's further manufacturing costs as denominated in U.S. currency and issued its *Final Results* on January 16, 2013, calculating a weighted-average dumping margin for CPZ/SKF of 15.28%. *Final Results*, 78 Fed. Reg. at 3397.

After Commerce disclosed its calculations for the *Final Results*, CPZ/SKF timely filed its ministerial error allegation concerning CPZ/SKF's reported further manufacturing costs. SKF's Ministerial Error Comments, PD 194 at bar code 3114908–01 (Jan. 15, 2013), Ct. No. 13–00095, ECF No. 29 (Aug. 5, 2013). According to CPZ/SKF, the further manufacturing costs should have been treated as denominated in Thai baht, and Commerce thus should have applied the Thai-baht-to-U.S.-dollar exchange rate to those costs. *Id.* at 2–6. On February 21, 2013, Commerce issued its *Amended Final Results* with a revised weighted-average dumping margin of 14.91%, but Commerce did not recognize the inconsistency concerning CPZ/SKF's further manufacturing costs incurred in Thailand as a ministerial error. *See Amended Final Results*, 78 Fed. Reg. at 12,036. CPZ/SKF challenges Commerce's decision not to address the inconsistency and its subsequent use in calculations. CPZ/SKF Br. in Supp. 8–22.

B. Analysis

A "ministerial error" is defined as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which [Commerce] considers ministerial." 19 C.F.R. § 351.224(f) (2013); *see also* 19 U.S.C. § 1675(h). CPZ/SKF notes that the error in the calculation of its reported further manufacturing costs is due to a typo by the programmer who created the file layout used in Commerce's calculations. CPZ/SKF Br. in Supp. 4. CPZ/SKF asserts that Commerce's failure to convert the further manufacturing costs to U.S. currency from Thai baht constitutes a ministerial error, and Commerce's refusal to correct the error is improper due to interests in accuracy and fairness, even if the error does not constitute a ministerial error. *Id.* at 8–22. The government asserts that the error does not constitute a ministerial error as defined in the statute and for various reasons there is no binding obligation on Commerce to correct the error. Government Br. 19–21. Notwithstanding Commerce's contention that the error does not constitute a ministerial error, the government requests partial remand to Commerce to reconsider the currency discrepancy in CPZ/SKF's reported further manufacturing costs. *Id.*

Generally, a request for a voluntary remand due to substantial and legitimate agency concerns should be granted. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Commerce's concerns are substantial and legitimate when (1) Commerce has a compelling justification for the remand, (2) the justification for remand is not outweighed by the need for finality, and (3) the scope of the remand is appropriate. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 882 F. Supp. 2d 1377, 1381 (CIT 2013). Here, Commerce has substantial and legitimate reasons for its request for voluntary remand. Commerce has a compelling justification because of a likely inaccurate determination. *See* Government Br. 9–10. Here, the interest in protecting the administrative proceeding from material inaccuracy does not appear to be outweighed by a need for finality, in part because Timken seeks remand on another ground, and the other parties to the litigation desire remand to address this alleged inaccuracy. Lastly, the scope of the remand is appropriate since it is limited to Commerce reconsidering the currency conversion of CPZ/SKF's reported further manufacturing costs. Because Commerce has a substantial and legitimate concern, it is likely that an easily correctable error has occurred, and there is no suggestion that the request for partial voluntary remand is frivolous or in bad faith, the

government's request for voluntary remand to Commerce to reexamine the conversion error for CPZ/SKF's reported further manufacturing costs is granted.[1]

II. Targeted Dumping

A. Background

Until 2012, Commerce's default methodology for comparing home market and export prices in administrative reviews of antidumping orders had been the average-totransaction ("A-T") methodology. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101, 8101 (Dep't Commerce Feb. 14, 2012). Commerce, when using the A-T methodology, did not allow transactions with export prices above the home market price to offset transactions with export prices below the home market price. *Id.* Commerce's refusal to offset export prices below the home market price with export prices above the home market price is referred to as "zeroing."[2] In February 2012, Commerce changed its default comparison methodology in administrative reviews to the average-to-average ("A-A") methodology in order to comply with World Trade Organization decisions and international obligations. *See id.* at 8101–02. Although Commerce eliminated the practice of zeroing from its default methodology, Commerce did not rule out the possibility of using zeroing if the circumstances warranted its use, such as instances of so-called "targeted dumping." *See id.* at 8104, 8106–07.

Commerce uses 19 U.S.C. § 1677f-1(d)(1)(B),[3] which by its terms applies to antidumping investigations, as the threshold for determining whether to apply the A-T methodology (likely with zeroing) instead of the default A-A methodology in reviews. *See, e.g.*, Issues and Decision Memorandum for the Final Results of the Antidumping

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[1] As Commerce has exercised its discretion to correct this error, if it exists, it is now immaterial whether the error is "ministerial" or not. Commerce shall correct any error in this regard.

[2] For a detailed explanation of the zeroing practice and its history, *see Union Steel v. United States*, 823 F. Supp. 2d 1346 (CIT 2012), *aff'd*, 713 F.3d 1101 (Fed. Cir. 2013).

[3] 19 U.S.C. § 1677f-1(d)(1)(B) provides:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—

> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
> (ii) the administering authority explains why such differences cannot be taken into account using [the average-to-average methodology or the transaction-to-transaction methodology].

Duty Administrative Review: Circular Welded Carbon Steel Pipes and Tubes from Turkey—May 1, 2010, through April 30, 2011, A-489–501, at 10 (Nov. 30, 2012), *available at* http://enforcement.trade.gov/frn/summary/turkey/2012–29529–1.pdf (last visited Apr. 25, 2014); Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China, A-570–601, at 8 (Jan. 8, 2013) ("*I&D Memo*"), *available at* http://enforcement.trade.gov/frn/summary/PRC/2013–00835–1.pdf (last visited Apr. 25, 2014).[4] Under the targeting statute, before Commerce can use the A-T methodology, Commerce must first find "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f-1(d)(1)(B)(i). This pattern is what is commonly referred to as "targeted dumping." Additionally, Commerce must explain why the A-A methodology (or the rarely used transaction-to-transaction ("T-T") methodology)[5] cannot take such differences into account. *Id.* § 1677f-1(d)(1)(B)(ii). Commerce thus may use the A-T methodology if it finds targeted dumping and explains why the default A-A or T-T methodologies cannot take account of the pattern.

Commerce has used the so-called *Nails* test to determine whether targeted dumping has occurred.[6] *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (Dep't Commerce June 16, 2008); *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less than Fair Value*, 73 Fed. Reg. 33,985 (Dep't

[4] For further background on the statutory and regulatory framework regarding targeted dumping, *see Timken Co. v. United States*, Slip Op. 14–24, 2014 Ct. Int'l Trade LEXIS 25, at *2–8 (CIT Feb. 27, 2014).

[5] Although the T-T methodology is also listed as a preferred methodology, Commerce, for practical reasons, rarely employs this methodology. *See* 19 C.F.R. § 351.414(c)(2) ("The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.").

[6] It appears Commerce has since adopted an entirely different test in later reviews. *See, e.g.*, Certain Activated Carbon from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Fifth Antidumping Duty Administrative Review, A-570–904, at 21–22 (Nov. 20, 2013), *available at* http://enforcement.trade.gov/frn/summary/prc/2013–28359–1.pdf (last visited Apr. 25, 2014); Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2011–2012, A-489–501, at 38–39 (Dec. 23, 2012), *available at* http://enforcement.trade.gov/frn/summary/turkey/2013–31344–1.pdf (last visited Apr. 25, 2014). The court expresses no opinion on a test that was not employed in this case.

Commerce June 16, 2008). The *Nails* test proceeds in two stages, each done on a product-specific basis (by control number or CONNUM). The first stage is referred to as the "standard-deviation" test. *I&D Memo* at 10. If 33% or more of the alleged targeted group's (i.e., customer, region, or time period) sales of subject merchandise are at prices more than one standard deviation below the weighted-average price of all sales under review, those sales pass the standard deviation test and are considered in step two—the "gap" test. *Id.* In performing the gap test, Commerce considers whether the "gap" between the weighted-average sales price to the targeted group and the weighted-average sales price to the next-highest non-targeted group is greater than the average gap between the non-targeted groups. *Id.* at 10–11. If the gap between the targeted group and the next-highest non-targeted group is greater than the average gap, those sales pass the gap test. *Id.* If more than 5% of total sales of the subject merchandise to the alleged target pass both tests, Commerce determines that targeting has occurred. *Id.* at 11. Commerce then compares the sales that have passed the *Nails* test with total U.S. sales in order to determine if the targeted sales are sufficient to warrant consideration of the A-T methodology. *Id.*

Turning to the facts of the case before the court, in anticipation of Commerce's use of the new default methodology (i.e., A-A), Timken alleged that CPZ/SKF engaged in targeted dumping and submitted factual information to Commerce to use in its targeted dumping analysis along with a request for Commerce to use the alternative A-T methodology in its preliminary determination. Timken's Factual Submission, PD 92–93 at bar code 3044403–01 (Dec. 2, 2011), ECF No. 29 (Aug. 12, 2013); Timken's Pre-Preliminary Comments, PD 160 at bar code 3075802–01 (May 16, 2012), ECF No. 29 (Aug. 12, 2013). Commerce used the default A-A methodology and did not engage in a targeted dumping analysis in the preliminary results. *Preliminary Results*, 77 Fed. Reg. at 40,582. Commerce explained that it applied the newly adopted default methodology in order to afford the parties an opportunity to comment on its application in the context of this review and stated that it intended to consider whether an alternative methodology was appropriate under the circumstances of this review. *Id.*

In its post-preliminary analysis, Commerce found that an insufficient number of sales passed the *Nails* test to warrant using the A-T methodology. Post-Preliminary Calculation Memorandum at 2, PD 183 at bar code 3109493–01 (Dec. 7, 2012), ECF No. 29 (Aug. 12, 2013). After the parties submitted their comments, Commerce con-

tinued to find that an insufficient number of sales passed the *Nails* test and thus refused to depart from the default A-A methodology. *I&D Memo* at 10–14. In its justification, Commerce noted that the use of the word "may" in 19 U.S.C. § 1677f-1(d)(1)(B) gave Commerce the discretion not to depart from the default A-A methodology even if both prongs of the *Nails* test were satisfied. *Id.* at 12.

Timken challenges Commerce's determination regarding Timken's targeted dumping allegation, arguing that Commerce deviated from its past practice in its application of the *Nails* test and that Commerce provided no explanation regarding its application of its sufficiency determination.[7] *See* Timken Br. 12–25. The government maintains that Commerce's determination was consistent with its prior applications of the *Nails* test and that Commerce makes its determinations regarding whether to use the A-T methodology on a case-by-case basis rather than employing a specific de minimis threshold. *See* Government Br. 11–18. CPZ/SKF argues that Commerce has not departed from its past practice and has provided a sufficient explanation for its final determination.[8] *See* Resp. Br. of Changshan Peer Bearing Co., Ltd. & Peer Bearing Co. Opp. the Rule 56.2 Mot. of The Timken Co., ECF No. 36, 11–28 ("CPZ/SKF Br. in Opp'n").

B. Analysis

1. Consistency with Past Practice

Timken first argues that Commerce's decision to compare the results of the *Nails* test to total U.S. sales when determining whether a sufficient pattern exists as part of the targeted dumping analysis is inconsistent with Commerce's past practice in applying the *Nails* test. *See* Timken Br. 12–18. According to Timken, Commerce's prior decisions have established a practice of considering any sales that have passed the *Nails* test as constituting a pattern, thereby warranting a comparison between the resulting margins under the A-A

[7] Timken refers to Commerce's sufficiency determination as a de minimis test. *See* Timken Br. 23–24. The government denies that Commerce created a de minimis test. *See* Government Br. 15–18. Because of this disagreement in labeling the step in Commerce's analysis as a de minimis test, the court will refer to Commerce's determination as a sufficiency determination.

[8] CPZ/SKF maintains its position that Commerce lacks the statutory authority to engage in a targeted dumping analysis in an administrative review, but does not appeal Commerce's decision to engage in such an analysis in this case because it concurs with Commerce's final determination. Resp. Br. of Changshan Peer Bearing Co., Ltd. & Peer Bearing Co. Opp. the Rule 56.2 Mot. of The Timken Co., ECF No. 36, 12 n.5. The court rejected this same argument in *Timken Co. v. United States*, 2014 Ct. Int'l Trade LEXIS 25, at *18 n.7, and *CP Kelco Oy v. United States*, Slip Op. 14–42, at 8–13 (CIT Apr. 15, 2014).

methodology and the A-T methodology. *Id.* at 14–18. Timken alleges that Commerce explicitly had declined in four other cases to engage in a de minimis inquiry in determining whether a pattern exists for purposes of 19 U.S.C. § 1677f-1(d)(1)(B). *Id.* (citing Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Multilayered Wood Flooring from the People's Republic of China, A-570–970 (Oct. 11, 2011), *available at* http://enforcement.trade.gov/frn/summary/prc/2011–26932–1.pdf (last visited Apr. 25, 2014); Issues and Decision Memorandum for the Less than Fair Value Investigation of Certain Steel Nails from the United Arab Emirates, A-520–804 (Mar. 19, 2012), *available at* http://enforcement.trade.gov/frn/summary/uae/2012–7067–1.pdf (last visited Apr. 25, 2014); High Pressure Steel Cylinders from the People's Republic of China: Issues and Decision Memorandum for the Final Determination, A-570–977 (Apr. 30, 2012), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–10952–1.pdf (last visited Apr. 25, 2014); Issues and Decision Memorandum for the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea, A-580–868 (Dec. 18, 2012), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2012–31104–1.pdf (last visited Apr. 25, 2014)). Timken argues that remand is necessary due to Commerce's divergence from past practice and its failure to provide a justification for its change in practice. *Id.* at 18–22.

The government argues that Commerce's determination was consistent with its prior decisions and a reasonable exercise of its discretion. Government Br. 12–18. Commerce cited three prior cases in which it engaged in a similar sufficiency analysis, notwithstanding the fact that some sales had passed the *Nails* test. *I&D Memo* at 11–12 (citing *Certain Stilbenic Optical Brightening Agents from Taiwan: Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 76 Fed. Reg. 68,154 (Dep't Commerce Nov. 3, 2011); *Ball Bearings and Parts Thereof from France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010–2011*, 77 Fed. Reg. 73,415 (Dep't Commerce Dec. 10, 2012); *Circular Welded Carbon Steel Pipes and Tubes from Turkey; Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 77 Fed. Reg. 72,818 (Dep't Commerce Dec. 6, 2012)). The government also argues that Commerce's determination was a reasonable exercise of its discretion and otherwise in accordance with law. Government Br. 17–18. Although Commerce stated that a sufficient pattern under the *Nails* test did not exist in this case, Commerce further supported its decision to use the A-A methodology

by relying on its discretionary authority granted by the statute. Commerce noted that 19 U.S.C. § 1677f-1(d)(1)(B) states that Commerce "may" use the A-T methodology if it finds targeted dumping, but it is not required to do so. *I&D Memo* at 12. Commerce also noted it had previously indicated that it would proceed on a case-by-case basis in determining when to use the A-T methodology and explained that its prior cases did not preclude the analysis undertaken here. *Id.*

CPZ/SKF argues that Commerce had no duty to explain any departure from its past practice because the cases cited by Timken do not reflect a well-established practice from which Commerce would be obligated to explain a departure. CPZ/SKF Br. in Opp'n 11–16. CPZ/SKF argues further that Commerce's targeted dumping methodology does not warrant a presumption of continuity because its methodology has been in a state of flux in recent years and Commerce had indicated an intention to proceed on a case-by-case basis. *Id.* at 16–17.

Timken's argument regarding past practice is essentially the same argument that was presented in *Timken Co. v. United States*, Slip Op. 14–24, 2014 Ct. Int'l Trade LEXIS 25 (CIT Feb. 27, 2014). In that case, the court treated Commerce's sufficiency determination as an exercise of its discretionary authority granted by 19 U.S.C. § 1677f-1(d)(1)(B) and found that the cases cited by Timken, which are also cited by Timken in this case, did not create any meaningful inconsistencies. *See id.* at *23–28. As indicated, here, Commerce invoked its discretionary authority granted by 19 U.S.C. § 1677f-1(d)(1)(B) in its decision to not use the A-T methodology. *I&D Memo* at 12. As the court held in *Timken Co.*, there is little, if any, inconsistency with the cases cited by Timken when Commerce's sufficiency determination is understood as an exercise of its discretionary authority. *Timken Co.*, 2014 Ct. Int'l Trade LEXIS 25, at *23. Because Timken's arguments on this issue mirror the arguments that were rejected in *Timken Co.*, the court, for the reasons stated in *Timken Co.*, continues to find that Commerce's prior practice does not preclude it from engaging in a sufficiency determination as part of its exercise of discretionary authority. *See id.* at *13–29.

2. Commerce's Explanation of Its Sufficiency Determination

Timken also argues that Commerce failed to explain the purpose of its additional sufficiency determination and what amount of sales it considers sufficient. Timken Br. 23–25. Because Commerce allegedly

failed to provide such an explanation, Timken argues that remand is necessary. *Id.*[9]

In response to Timken's arguments regarding the purpose of the sufficiency determination, the government explains that it is within Commerce's discretion to continue to employ the A-A methodology, even if targeted dumping is found, and that Commerce uses the additional sufficiency determination in exercising that discretion. Government Br. 13–18. The government explains further that Commerce is proceeding on a case-by-case basis rather than establishing a de minimis threshold, and Commerce uses the additional sufficiency determination in its case-by-case analysis in deciding when to exercise its discretion. *Id.* at 15–17. The government additionally argues that Commerce's experience in conducting the *Nails* test has informed its judgment in determining whether the A-T methodology is appropriate. *Id.* at 18.

Again, the same issue and arguments were presented to the court in *Timken Co.* As explained in *Timken Co.*, the purpose of the sufficiency test is clear. Commerce relies on the word "may" in the statute, and, as a result, the additional sufficiency determination used by Commerce is easily understood as a tool in determining whether Commerce should exercise its discretion to depart from the default A-A methodology. *Timken Co.*, 2014 Ct. Int'l Trade LEXIS 25, at *31–32. Only when a significant number of sales pass the *Nails* test, when compared to total U.S. sales, will Commerce consider invoking its discretion to depart from the default A-A methodology. *Id.*; *I&D Memo* at 11.

To support its argument that remand is necessary because Commerce was required—but failed to—explain what amount of sales would be considered "sufficient," Timken cites *Washington Red Raspberry Commission v. United States*, which held in the then absence of a statute or regulation defining de minimis that Commerce "may find that dumping margins less than 0.50 percent are *de minimis*, but only if [Commerce] explains the basis for its decision." *Wash. Red Raspberry Comm'n v. United States*, 859 F.2d 898, 903 (Fed. Cir. 1988). The government argues that Commerce satisfied its obligation to explain by (1) conducting the *Nails* test, (2) evaluating the volume of sales

[9] The court notes that Timken also suggests that comparing the number of sales that pass the *Nails* test to all U.S. sales is unreasonable because the *Nails* test fails to capture all targeted sales. Timken Co.'s Reply Br., ECF No. 42, 18–20. To the extent that Timken may be relying on this argument to attack directly Commerce's determination, Timken failed to raise this argument in its opening brief and did not present it to the agency. The court therefore will not consider it. *See KYD, Inc. v. United States*, 836 F. Supp. 2d 1410, 1413–14 (CIT 2012).

passing the *Nails* test relative to all U.S. sales, and (3) determining whether the facts justified employing the A-A methodology. Government Br. 18 (citing *I&D Memo* at 11).

Commerce generally has a duty to explain the grounds for its determination. *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009); *see also* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to include an explanation of the basis for its determination). If an agency's explanation is not perfectly presented, a court may find that the agency adequately explained its determination if the agency's line of reasoning is "reasonably discernable." *NMB Singapore Ltd.*, 557 F.3d at 1319. When proceeding on a case-by-case basis in exercising discretionary authority, as Commerce does here, "Commerce is not required to justify its determination in terms of past alternatives," as long as it acts reasonably. *Qingdao Taifa Grp. Co. v. United States*, 780 F. Supp. 2d 1342, 1350 (CIT 2011).

Here, Commerce has explained adequately its analysis in reaching its determination that the sales found to have passed the *Nails* test were insufficient to warrant consideration of the alternative A-T methodology. The default methodology in reviews is the A-A methodology. 19 C.F.R. § 351.414(c)(1). The statutory provision that Commerce uses as guidance in reviews in deciding whether to deviate from the default methodology states that Commerce "may" use the A-T methodology in the context of a targeted dumping analysis if certain conditions are met. 19 U.S.C. § 1677f-1(d)(1)(B). Even when those conditions are satisfied, however, Commerce is not required to abandon the A-A methodology. *Id.* Unlike the situation in *Washington Red Raspberry Commission*, upon which Timken heavily relies, the relevant statutory provision in this case expressly gives Commerce the discretion to ignore a targeted dumping finding and continue to employ the A-A methodology. The court gives substantial deference to Commerce in choosing whether to invoke such discretion. *Cf. AK Steel Corp. v. United States*, 28 CIT 1408, 1417, 346 F. Supp. 2d 1348, 1355 (2004) (declining to require Commerce to prove that respondent cooperated to the best of its abilities when it refuses to use adverse facts available because statute expressly stated that Commerce "may" use adverse facts when respondent fails to cooperate to best of its abilities, not that it must). Commerce found that the results of the *Nails* test were insufficient to warrant consideration of the A-T methodology because the percentage of sales found to be targeted was extremely small.[10] In its briefs submitted to the court, Timken argues

[10] For the exact percentages, *see* Response Brief of Changshan Peer Bearing Co., Ltd. and Peer Bearing Co. Opposing the Rule 56.2 Motion of The Timken Co., ECF No. 35, 25 (confidential version).

that the A-T methodology is warranted if any sales pass the *Nails*, but Timken fails to put forth any detailed and specific argument as to why the amount of sales in this case should otherwise be considered sufficient. Although Commerce did not set an amount of sales it considers sufficient, no reasonable person could find the minuscule percentage of sales found to be targeted in this case to be sufficient to require Commerce to invoke its discretion to abandon the default A-A methodology in favor of the A-T methodology. [11] Commerce explained its analytical steps and considered and rejected Timken's arguments before the agency regarding why the amount of targeted sales should be considered sufficient in this case. *I&D Memo* at 10–13. Under the facts of this case, this was an adequate explanation. [12]

The court does not hold that Commerce is excused from providing an explanation for its sufficiency determinations. The court holds rather that because Commerce relied on the default A-A methodology, the percentage of sales that were targeted was very small, and Timken has failed to present a detailed argument to the court why the small number of targeted sales in this case should be considered sufficient to require use of the A-T methodology, Commerce's explanation was adequate for the court to determine that it acted reasonably.

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[11] This does not mean that Commerce necessarily was precluded from invoking such discretion.

[12] The court recognizes that the court remanded another recent targeted dumping case for Commerce to further explain the application of its de minimis test. *See CP Kelco Oy*, Slip Op. 14–42. In *CP Kelco*, Commerce summarily rejected the respondent's claim that the amount of sales that passed the *Nails* test should be considered de minimis. *Id.* at 19. The court remanded to Commerce for a reasoned explanation for rejecting the respondent's de minimis claim. *Id.* at 20–21.

The case currently before the court is distinguishable in two important and related respects. First, Commerce in this case refused to depart from the default A-A methodology. In contrast to *CP Kelco*, where Commerce "used an exceptional methodology to generate Kelco's margins," here, Commerce chose not to deviate from the default methodology to increase margins. *See id.* at 21 n.14. Second, the court in *CP Kelco* did not decide whether the targeted sales were de minimis, although the percentage there was much greater. *See id.* The court here, in contrast, finds that the amount of sales passing the *Nails* test are so small that no reasonable person could conclude that Commerce would be required to invoke its discretion to apply the "exceptional" A-T methodology and increase margins. In fact, Timken never explained in its briefs to the court why the amount of targeted sales in this case should be considered sufficient, aside from arguing that *any* sales that pass the *Nails* test should be considered sufficient as part of its attack on Commerce's general ability to engage in an additional sufficiency inquiry. To the extent that Timken raised any such arguments before the agency, they appear to have been addressed by Commerce in the *I&D Memo*, and Timken has not challenged directly those explanations. *See I&D Memo* at 13.

CONCLUSION

For the foregoing reasons, the government's request for voluntary remand is granted for Commerce to reexamine the alleged currency conversion error for CPZ/SKF's reported further manufacturing costs. In all other respects, the *Amended Final Results* are sustained. Commerce shall complete and file its remand determination by June 2, 2014. Timken and CPZ/SKF shall have until July 2, 2014 to file objections, and the government shall have until July 18, 2014 to file its response.

Dated: May 2, 2014
New York, New York

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

Slip Op. 14–52

ARTISAN MANUFACTURING CORP. AND SHENZEN KEHUAXING INDUSTRIAL LTD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 13–00169

[Remanding a decision of the U.S Department of Commerce assigning an antidumping duty rate based on an adverse inference]

Dated: May 5, 2014

Daniel L. Porter and *Ross Bidlingmaier*, Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington, D.C., for plaintiffs.

Stuart F. Delery, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Richard P. Schroeder*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, for defendant. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce

OPINION AND ORDER

Stanceu, Judge:

Plaintiffs Artisan Manufacturing Corporation ("Artisan") and Shenzen Kehuaxing Industrial Ltd. ("Kehuaxing") contest a determination that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued upon concluding an antidumping duty investigation of drawn stainless steel sinks from the People's Republic of China ("China" or the "PRC"). Plaintiffs claim that Commerce unreasonably rejected as untimely a submission—specifically, a response to the Department's "quantity and value," or "Q&V," questionnaire—that Kehuaxing and Artisan

filed the day after the due date and accompanied with a request for a one-day extension. Plaintiffs seek reversal of the Department's decision, made in response to the untimely filing, to assign Kehuaxing a margin at the 76.53% rate selected by Commerce for application to producer/exporters that had not shown independence from the government of China. The court holds that Commerce abused its discretion in assigning Kehuaxing this rate as a sanction for missing the filing date for the response to the Q&V questionnaire.

I. BACKGROUND

Plaintiffs contest the decision (the "Final Determination") in *Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination*, 78 Fed. Reg. 13,019 (Int'l Trade Admin. Feb. 26, 2013) ("*Final Determination*"). Based on a period of investigation of July 1, 2011 through December 11, 2011, Commerce found in the Final Determination that drawn stainless steel sinks from China are being, or are likely to be, sold in the United States at less than fair value. *Id.* at 13,019.

Plaintiff Kehuaxing is a Chinese producer and exporter of drawn stainless steel sinks and plaintiff Artisan is a U.S. importer of Kehuaxing's products. Compl. ¶ 3 (May 1, 2013), ECF No. 6. Both plaintiffs participated as parties in the antidumping duty investigation. *Id.*

A. General Background on the Final Determination

Commerce selected for individual investigation as "mandatory respondents" two Chinese producer/exporters, Guangdong Dongyuan Kitchenware Industrial Co., Ltd. ("Dongyuan") and a combined entity Commerce identified as consisting of Zhongshan Superte Kitchenware Co., Ltd. and a related invoicing company, Foshan Zhaoshun Trade Co., Ltd. (collectively referred to as "Superte/Zhaoshun"). *Final Determination*, 78 Fed. Reg. at 13,019 n.2. Commerce assigned weighted average dumping margins of 27.14% to Dongyuan and 39.87% to Superte/Zhaoshun, respectively. *Id.* at 13,023. Following its practice for antidumping duty ("AD") investigations involving nonmarket economy ("NME") countries, Commerce assigned a simple average of those two margins, 33.51%, as an antidumping duty rate to nineteen non-investigated producer/exporters that, like the mandatory respondents, had demonstrated "both *de jure* and *de facto* absence" of Chinese government control and had cooperated in the investigation by responding to the Department's requests for information. *Id.* at 13,021, 13,023. Commerce referred to the nineteen producer/exporters and the mandatory respondents collectively as

the "Separate Rate Companies." *Id*. at 13,020.

In the Final Determination, Commerce stated that "[b]ecause the Department begins with the presumption that all companies within an NME country are subject to government control, and because only the mandatory respondents and certain Separate Rate Applicants have overcome that presumption, the Department is applying a single AD rate to all other exporters of subject merchandise from the PRC." *Id.* at 13,022. In selecting this rate, Commerce invoked its authority to apply "adverse facts available" ("AFA") under section 776(b) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677e(b), according to which Commerce, in selecting from among the "facts otherwise available," may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability in responding to a request for information.[1] *Final Determination*, 78 Fed. Reg. at 13,022. "In determining a rate for AFA, the Department's practice is to select a rate that is sufficiently adverse 'as to effectuate the purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'" *Id.* (citation omitted).

Commerce selected as its AFA rate "the highest petition AD margin," 76.53%, which it designated the "PRC-wide rate" for application to all Chinese producer/exporters Commerce determined not to have established independence from control of the government of China. *Id.* Commerce took this action based on its findings that "the Department has found that these PRC exporters and/or producers are part of the PRC-wide entity," that "the PRC-wide entity did not provide the Department with requested information," and that "the PRC-wide entity has failed to cooperate to the best of its ability." *Id*. Commerce listed Kehuaxing among the companies subject to the 76.53% PRC-wide rate. *Id.*

B. Circumstances of the Department's Assigning the 76.53% PRC-Wide Rate to Kehuaxing

The notice initiating the antidumping duty investigation ("Initiation Notice") announced that "[t]he Department will request quantity and value information from all known exporters and producers identified with complete contact information in the Petition." *Drawn Stainless Steel Sinks from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 77 Fed. Reg. 18,207, 18,210 (Int'l

[1] All statutory citations herein are to the 2006 edition of the United States Code and all citations to regulations are to the 2010 edition of the Code of Federal Regulations.

Trade Admin. Mar. 27, 2012) ("*Initiation Notice*"). Commerce explained in the Initiation Notice that "[t]he quantity and value data received from Chinese exporters/producers will be used as the basis for selecting the mandatory respondents." *Id.* The notice instructed that "[t]he Department requires that the respondents submit a response to both the quantity and value questionnaire and the separate-rate application by the respective deadlines, as discussed below and in the Separate Rate section, in order to receive consideration for separate-rate status," *id.*, and specified that "[t]he quantity and value questionnaire must be submitted by all Chinese exporters/producers no later than April 11, 2012, 21 days after the signature date of this **Federal Register** notice," *id.* (emphasis in original). The Initiation Notice announced that the separate-rate application (to which the notice also referred as a "separate-rate status application") would be available on a Department website as of the date of publication of the Initiation Notice. *Id.*

Commerce sent Kehuaxing a Q&V questionnaire accompanied by a cover letter dated March 22, 2012. *See Excerpts of Q&V Questionnaire & Instructions* ("*Q&V Questionnaire*"), *in* Resp't Pls.' App. to their Mot. for J. on the Agency R., tab 8 (Sept. 18, 2013), ECF No. 18 ("Pls.' App."). Plaintiffs submitted their response to the Q&V questionnaire on April 12, 2012, the day following the due date. *Artisan & Kehuaxing's Q&V Submission* 1 ("*Artisan & Kehuaxing's Q&V Submission*"), *in* Pls.' App., tab 2. In a cover letter accompanying their questionnaire response, Artisan and Kehuaxing acknowledged the April 11, 2012 due date and explained that "[d]ue to an inadvertent error, this response is being filed before 9:00 a.m. on April 12, 2012, the day after the deadline." *Id.* at 2. The letter included the following request:

> We respectfully request that the Department accept the quantity and value questionnaire as filed. While recognizing that it has been filed after the deadline, the response is being filed before business hours on the following day, meaning that no additional burden or undue delay is being imposed on the Department. We regret the inadvertent error and urge the Department to include Artisan Manufacturing Corporation and Shenzen Kehuaxing Industrial Ltd. in the quantity and value analysis.

Id. In a letter dated April 20, 2012, Commerce responded that "[a]fter considering Artisan's and Kehuaxing's explanation, we find that it would not be appropriate to accept this late filing because the

deadline for filing a Q&V with the Department had already passed."[2] *Letter Rejecting Artisan & Kehuaxing's Submission* 1 (Admin.R.Doc. No. 92). The letter further notified Artisan and Kehuaxing that "[n]o copy of the document will remain on the record because, pursuant to 19 CFR 351.104(a)(2)(iii), the official record of the proceeding should not include any document that the Department returns to the submitter as untimely filed." *Id.*

Commerce later notified Kehuaxing that it also was rejecting Kehuaxing's timely-filed separate-rate application. As the reason for this rejection, Commerce explained that "[b]ecause a timely response to the Q&V Questionnaire is necessary to be considered for receipt of a separate rate, we have not accepted Kehuaxing's separate rate questionnaire response," adding that "[w]e have removed it from the record and will not rely upon it in our investigation." *Letter Rejecting Kehuaxing's Separate Rate Appl.* 2 (June 6, 2012) (Admin.R.Doc. No. 186).

In a letter dated June 11, 2012, Kehuaxing requested that Commerce reconsider the decision to reject Kehuaxing's separate-rate application. *Req. to Reconsider Rejection of the Separate Rate Appl. of Kehuaxing* 2 (Admin.R.Doc. No. 191). The letter, which was accompanied by an affidavit by plaintiffs' counsel, provides additional details on the circumstances surrounding the late filing of the Q&V

[2] In a letter to the court dated April 17, 2014, defendant requested that the court "not consider Tab 2 of plaintiffs' public and confidential appendices," *i.e.*, Artisan Manufacturing Corporation and Shenzen Kehuaxing Industrial Ltd.'s quantity and value ("Q&V") submission, on the ground that the U.S. Department of Commerce ("Commerce" or the "Department") rejected the documents of Tab 2 such that the documents of Tab 2 are "not part of the administrative record." *See* Def.'s Notice Regarding the Agency R. Docs. Filed Pursuant to Ct. Req. 2, ECF No. 32. Commerce, however, improperly excluded from the record the cover letter accompanying the Q&V submission, which plaintiffs included under Tab 2 of their appendix to their Motion for Judgment on the Agency Record. This letter was submitted to Commerce to request an extension of time and in this regard appears to be correspondence that Commerce should have placed on the record. *See* 19 C.F.R. § 351.104 ("The Secretary will include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding."). Moreover, the record discloses that Commerce considered the explanation provided in the cover letter when reaching a final determination, *Letter Rejecting Artisan & Kehuaxing's Submission* 1 (Apr. 20, 2012) (Admin.R.Doc. No. 92), and therefore Commerce was required by the rules of this Court to include this letter in the record filed with the court. *See* USCIT R. 73.2(a)(1)-(2) ("[T]he administering authority . . . must file with the clerk of the court . . . [a] copy of all information presented to or obtained by the administering authority . . . during the course of the administrative proceedings . . . [and a] copy of the determination and the facts and conclusions of law on which such determination was based . . . ."). Commerce made no finding that the cover letter was untimely or otherwise properly excluded from the record, finding only that the Q&V questionnaire response was untimely. Because Commerce improperly excluded the letter requesting an extension of time, the court finds it appropriate to consider the letter.

questionnaire. *Id.* at Bidlingmaier Aff. In brief summary, the explanation in the letter is that counsel received by email the final version of Kehuaxing's Q&V response on April 10, 2012, the day prior to the due date, but "[d]ue to an inadvertent lapse, counsel did not file the response by the 5 p.m. deadline on April 11." *Id.* at 3. The letter adds that "[u]pon realizing during the evening of April 11 that Kehuaxing's response had not been filed, counsel arrived to the office at 7:00 a.m. on April 12 to finalize preparation of the response and to ensure filing at the earliest possible time" and "filed the final business proprietary and public versions of the quantity and value response before 9:00 a.m. on April 12." *Id.* An Issues and Decision Memorandum ("Decision Memorandum") incorporated by reference in the Final Determination indicates that Commerce denied this request for reconsideration. *See Issues & Decision Mem.*, A-570–983, at 28–32 (Feb. 19, 2013) (Admin.R.Doc. No. 417), *available at* http://enforcement.trade.gov/frn/summary/PRC/2013–04379–1.pdf (last visited Apr. 29, 2014) ("*Decision Mem.*").

In the Decision Memorandum, Commerce provided details on the decision it had made earlier in the investigation to reject as untimely Kehuaxing's Q&V response. *Id.* Commerce stated that Kehuaxing filed its response to the Q&V questionnaire on April 12, 2012, one day after the due date and that "[o]n April 20, 2012, the Department rejected Kehuaxing's Q&V response, consistent with 19 CFR 351.301(c)(2), because the filing was untimely." *Id.* at 29. Commerce also noted that it had "rejected and removed from the record," Kehuaxing's separate-rate application, "in accordance with 19 CFR 351.302(d) and 19 CFR 351.104(a)(2), because Kehuaxing had not timely filed a Q&V response." *Id.* at 30 n.116. Responding in the Decision Memorandum to a case brief plaintiffs filed during the investigation, Commerce "continue[d] to find Kehuaxing's Q&V response untimely," *id.* at 29, and concluded "that Kehuaxing is not eligible for a separate rate," *id.* at 32.

C. Initiation of this Action

Plaintiffs commenced this action by filing a summons and complaint on May 1, 2013. Summons 1, ECF No. 1; Compl. 1. They filed their Motion for Judgment on the Agency Record on September 16, 2013. Resp't Pls.' R. 56.2 Mot. for J. on the Agency R. 1 (Sept. 16, 2013), ECF No. 15 ("Pls.' Mot."). Defendant filed its response on December 18, 2013, Def.'s Resp. to Pls.' R. 56.2 Mot. for J. on the Agency R. 1, ECF No. 24 ("Def.'s Resp."), and plaintiffs replied on February 14, 2014, Pls.' Reply Br. in Support of their Mot. for J. on the

Agency R. 1, ECF No. 27. The administrative record was filed in part on June 10, 2013, ECF No. 9, and in part on April 9, 2014, ECF No. 31.

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting the final determination Commerce issues to conclude an antidumping duty investigation. In reviewing the Final Determination, 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 law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

Plaintiffs' claim, in essence, is that Commerce abused its discretion in denying Kehuaxing's request to accept the late-filed Q&V questionnaire and in denying separate-rate status to Kehuaxing as a result of that late filing, thereby subjecting Kehuaxing to the 76.53% PRC-wide rate. As plaintiffs argue in their brief, "Commerce's decision to reject Plaintiff's separate rate application and assign Plaintiffs the PRC-wide entity antidumping margin because of Plaintiffs' untimely submission of the quantity and value questionnaire response is an abuse of Commerce's discretion under the law." Resp't Pls.' Br. in Supp. of their Mot. for J. on the Agency R. 13 (Sept. 16, 2013), ECF No. 15 ("Pls.' Mem.").

Plaintiffs raise several arguments in support of their claim. They argue that in denying the one-day filing extension, Commerce unreasonably and unlawfully applied a "bright-line rule" under which no extension may be granted regardless of the circumstances. Pls.' Mem. 8–18. Plaintiffs also argue that applying the PRC-wide rate to Kehauxing was contrary to section 782(d) of the Tariff Act, 19 U.S.C. § 1677m(d). According to plaintiffs, Commerce was not permitted in this circumstance to use an adverse inference under 19 U.S.C. § 1677e(b) without first affording Kehuaxing an opportunity, as required by 19 U.S.C. § 1677m(d), to remedy the deficiency caused by the late filing. *Id.* at 19–22. Further, plaintiffs argue that Commerce exceeded its discretion in applying adverse inferences not only to the respondent selection determination but also to the separate rate determination, even though the separate-rate application was timely filed and not found to be deficient. *Id.* at 22.

Defendant counters that "Commerce reasonably declined to grant Kehuaxing a separate rate because Kehuaxing failed to file a timely quantity and value response, a prerequisite for obtaining a separate

rate," and that Commerce "reasonably exercised its discretion when it declined to grant plaintiffs the requested extension." Def.'s Resp. 6. Defendant added that "[t]his determination reflected a reasonable evaluation of the facts of the case, Commerce's interests in enforcing its regulations and deadlines, and fairness to the other parties to the administrative proceeding." *Id.* at 5. Defendant characterizes as reasonable a Departmental policy of granting all parties an extension to file requested information when only one party requests an extension, explaining that "[w]here a party files for an extension of time after the deadline already has passed, it effectively deprives Commerce of the ability to make the extension meaningfully apply to all parties." *Id.* at 7. Disagreeing with plaintiffs that Commerce applied a "bright-line rule," defendant argues that Commerce reasonably determined that the requested extension was not justified by the particular circumstances, in which "plaintiffs merely cited an inadvertent error (rather than, for example, a technical failure) as the reason for their untimely filing" and did not request the extension prior to the expiration of the time period. *Id.* at 10.

On the issue of whether Commerce acted contrary to 19 U.S.C. § 1677m(d) in applying the PRC-wide rate as an adverse inference, defendant argues that the court should refuse to hear plaintiffs' argument because plaintiffs failed to exhaust their administrative remedies when they failed to raise the argument in the administrative case brief they filed during the investigation. *Id.* at 16–19. Defendant cites, *id.* at 17, the Department's regulation, 19 C.F.R. § 351.309(c)(2), which provides that "the case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination . . . , including any arguments presented before the date of publication of the preliminary determination . . . ."

A. Commerce Abused its Discretion in Assigning Kehuaxing the PRC-Wide Rate in Response to the Late Filing of the Response to the Q&V Questionnaire

According to the Initiation Notice, "[t]he Department requires that the respondents submit a response to both the quantity and value questionnaire and the separate-rate application by the respective deadlines . . . in order to receive consideration for separate-rate status." *Initiation Notice*, 77 Fed. Reg. at 18,210. The requirement to which the Initiation Notice refers is not found in the antidumping duty statute. Nor is it found in the Department's regulations, which do not provide that Commerce may apply to a party the "PRC-wide" rate as a sanction for the late filing of a response to a questionnaire

seeking Q&V information on a party's exports. Therefore, the only authority upon which Commerce could have relied for assigning the PRC-wide rate to Kehuaxing was section 776 of the Tariff Act, 19 U.S.C. § 1677e. Commerce itself acknowledged in the Final Determination that it relied on its authority under section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b), in applying the PRC-wide rate to producer/exporters that had not demonstrated independence from control of the government of China.[3] This case presents the question of whether Commerce properly exercised its authority under 19 U.S.C. § 1677e in deciding to include Kehuaxing among that group of exporters.

According to subsection (b) of 19 U.S.C. § 1677e, where Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority [*i.e.*, Commerce] . . . , the administering authority . . . in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). The words "the facts otherwise available" refer to a term used in the preceding subsection, § 1677e(a). As provided in subsection (a), Commerce, in certain circumstances, "shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle." Among the circumstances is one specified in § 1677e(a)(2)(B), under which "an interested party or any other person . . . fails to provide such information by the deadlines for submission of the information . . . subject to subsections (c)(1) and (e) of section 1677m of this

[3] As stated in the decision contested in this case (the "Final Determination"), "[t]he Department determines that, because the PRC-wide entity did not respond to our request for information, the PRC-wide entity has failed to cooperate to the best of its ability," adding that "[t]herefore, pursuant to section 776(b) of the Act [19 U.S.C. § 1677e(b)], the Department finds that, in selecting from the [facts available], an adverse inference is appropriate for the PRC-wide entity." *Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination*, 78 Fed. Reg. 13,019, 13,022 (Int'l Trade Admin. Feb. 26, 2013) ("*Final Determination*"). The Final Determination further states that "[b]ecause the Department begins with the presumption that all companies within an [nonmarket economy] country are subject to government control, and because only the mandatory respondents and certain Separate Rate Applicants have overcome that presumption, the Department is applying a single [antidumping] rate to all other exporters of subject merchandise from the PRC" and that "[s]uch companies have not demonstrated entitlement to a separate rate." *Id*.

title . . . ." [4] *Id.* § 1677e(a)(2)(B). The term "such information" as used in § 1677e(a)(2)(B) is an apparent reference to a term used in the previous paragraph, "information that has been requested by the administering authority . . . under this subtitle." *Id.* § 1677e(a)(2)(A).

The information in Kehuaxing's response to the Q&V questionnaire was not filed by the deadline for submission and, therefore, was information for which Commerce would use "facts otherwise available" according to 19 U.S.C. § 1677e(a). This is not to say that Commerce lacked the discretion under § 1677e(a) to extend the deadline for submission of the Q&V response, even in a situation in which the extension request was filed after the deadline had passed (in this case, immediately after the deadline had passed). To carry out its responsibilities, Commerce necessarily must exercise discretion in setting, extending, and enforcing deadlines for the submission of requested information. Where Commerce permissibly exercises that discretion, Commerce may find that a party that failed to comply timely with an information request "failed to cooperate by not acting to the best of its ability to comply with a request for information" within the meaning of 19 U.S.C. § 1677e(b). As the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") has stated, "the statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). The Department's discretion to "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" applies when a party fails to meet this standard. 19 U.S.C. § 1677e(b).

Plaintiffs argue before the court that "Commerce never identified any deficiency with the separate rate application itself, yet still applied adverse inferences to the information contained in this submission that Commerce never found to be deficient." [5] Pls.' Mem. 22. Accordingly, plaintiffs argue, "Commerce exceeded its discretion when it applied adverse inferences to the separate rate determina-

[4] "Subsections (c)(1) and (e) of section 1677m" are not applicable here, as 19 U.S.C. § 1677m(c)(1) applies when an interested party notifies Commerce that it is unable to submit requested information in the requested form and manner and 19 U.S.C. § 1677m(e) directs Commerce to consider submitted information necessary to a determination even if the interested party does not submit the information in the form and manner requested, provided certain conditions are met, among which is that "the information is submitted by the deadline established for its submission," *id.* § 1677m(e)(1).

[5] Kehuaxing raised this objection in the case brief it filed with Commerce during the investigation. *Case Br. of Keahuxing* 11 (Dec. 13, 2012) (Admin.R.Doc. No. 399) ("The separate rate application, not the quantity and value response, requires analysis by the Department to determine if an exporter is eligible for a separate rate. The separate rate application is the determinative document.").

tion, rather than the respondent selection determination alone." *Id.* Plaintiffs' argument is at least plausible. Arguably, the information comprising the separate-rate application could not lawfully be excluded from the record as an "adverse inference" under 19 U.S.C. § 1677e(b) because the separate-rate application was not missing from the record, except in the sense that Commerce intentionally excluded it on the ground that the Q&V response was untimely filed. The separate-rate application was not untimely submitted and was not found by Commerce to be otherwise disqualified from consideration according to 19 U.S.C. § 1677e(a). The crux of this argument is that § 1677e does not permit Commerce, under any circumstance, to reject a timely-filed separate-rate application, and substitute "the facts otherwise available" for the information comprising the separate-rate application, where a party was late in satisfying a different request for information. Supporting this argument are the Department's statements that the two sets of information are collected for different purposes. Commerce uses the separate-rate application in identifying the "Separate Rate Companies," which are those companies that have demonstrated "both *de jure* and *de facto* absence of government control with respect to each company's respective exports of the merchandise under investigation." *Final Determination*, 78 Fed. Reg. at 13,021. In comparison, as specified in the Initiation Notice, "[t]he quantity and value data received from Chinese exporters/producers will be used as the basis for selecting the mandatory respondents." *Initiation Notice*, 77 Fed. Reg. at 18,210. As Commerce clarified in the cover letter to the Q&V questionnaire, *Q&V Questionnaire* 1, *in* Pls.' App., tab 8, Commerce selects mandatory respondents under section 777A(c)(2) of the Tarriff Act, 19 U.S.C. § 1677f-1(c)(2), according to which Commerce "may determine the weighted average dumping margins for a reasonable number of exporters or producers" where "it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers involved in the investigation . . . ."

On the other hand, it also could be argued that Commerce must have some means of ensuring that it will receive the Q&V information that it needs to select mandatory respondents. Under such an argument, Commerce must be permitted to attach some adverse consequence to a party's failure to file Q&V information. An extension of the argument would hold that Commerce must be allowed to exercise its discretion to use an adverse inference so that it may conduct an investigation in an orderly way and within time restraints.

Because this case can be decided on a narrower ground, the court finds it unnecessary to decide, at least at this time, the broad question

of the lawfulness of the Department's requirement that a party timely file a response to the Q&V questionnaire to be eligible for a separate rate. The court considers the issue presented by this case to be whether Commerce, *in the particular circumstances of this investigation*, abused its discretion under 19 U.S.C. § 1677e(b) and its concomitant discretion when setting, extending, and enforcing its deadline for the submission of the Q&V response, in rejecting the Q&V response and on that basis assigning Kehuaxing the 76.53% rate as an adverse inference. As the Court of Appeals has opined, "the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose *punitive*, aberrational, or uncorroborated margins." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*") (emphasis added).

In *Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010) ("*Gallant Ocean*"), the Court of Appeals, as it did in *De Cecco*, rejected the adverse-inference-based rate Commerce assigned to a respondent, concluding that any such rate "'must be a *reasonably accurate estimate* of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.'" *Id.* at 1323 (quoting *De Cecco*, 216 F.3d at 1032 and adding emphasis). Like this case, *Gallant Ocean* involved the Department's use of an adverse inference against a respondent exporter stemming from the requirement to submit a response to a Q&V questionnaire.[6] *Gallant Ocean* is distinguishable from this case in that the respondent in *Gallant Ocean* failed to respond to the Department's first request for the Q&V information, after which Commerce sent another request for the information the following month that also was met with no response. *Id.* at 1322.

In this case, Commerce set forth its reasoning in the Decision Memorandum, noting that "[a]ll firms participating in this investigation were on notice that Q&V responses must be submitted no later than April 11, 2012." *Decision Mem.* 29. Commerce gave two reasons for denying the extension. "Adherence to the Department's administrative deadlines is necessary for the Department to provide all interested parties with a reasonable timeframe in which to submit

[6] In *Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010), the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") did not discuss the issue plaintiffs raise in this case as to whether 19 U.S.C. § 1677e allows Commerce to reject a separate-rate application based on a producer/exporter's failure to cooperate in responding to a questionnaire seeking Q&V information. As discussed previously in this Opinion and Order, the court does not consider it necessary to resolve this issue in order to adjudicate the dispute before the court.

information and to complete the investigation within the statutory deadline specified in section 751(a)(3)(A) of the Act, and importantly, to assure impartiality in its procedures."[7] *Id.*

Concerning the question of "impartiality in its procedures," the Decision Memorandum provided the following explanation:

> Further, and importantly, in this case, consideration must be given to the possibility of manipulation of the record and inequity among other interested parties. A party filing an untimely Q&V response has the opportunity to review the timely filed Q&V responses from other interested parties and amend its own Q&V response based on this information; such manipulation would allow it to report just enough quantity to qualify as a mandatory respondent, or just little enough not to qualify. Affording an opportunity for such action would seriously jeopardize the integrity of the record. Indeed, the possibility of manipulation is one reason why the Department regularly makes extensions for information from all parties, applicable to all parties, even when only one party requests the extension.

Id. at 30.

Below, the court considers the various circumstances surrounding the Department's decision to reject the Q&V response and assign Kehuaxing the PRC-wide, 76.53% rate as an adverse inference for the late filing of the Q&V response, including the reasons the Department offered. The circumstances cause the court to conclude that Commerce abused its discretion in reaching its decision.

1. Acceptance of the Late Filing of the Q&V Response Would Have Been Inconsequential to the Department's Conducting of the Investigation

The first reason Commerce gave for its decision was the need to complete the investigation within the statutory deadline. *Decision Mem.* 29. On the record evidence, this was not a valid reason. According to that evidence, Kehuaxing's Q&V information was unavailable to Commerce only between the 5:00 p.m. close of business on the due date, April 11, 2012, and a time at or near the beginning of the next business day. *Req. to Reconsider Rejection of the Separate Rate Appl. of Kehuaxing*, Bidlingmaier Aff. Such a brief period could not have

[7] The Department's citation to section 751(a)(3)(A) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1675(a)(3)(A), was erroneous. That provision establishes statutory time frames for completion of administrative reviews of antidumping duty orders, not antidumping duty investigations. The pertinent cite would have been section 733(b) of the Tariff Act, 19 U.S.C. § 1673b(b)(1) (preliminary determination), and section 735(a) of the Tariff Act, 19 U.S.C. § 1673d(a) (final determination).

delayed the investigation in any meaningful way. Nor is it apparent from the record how acceptance of the filing could have interfered in any other way with the Department's ability to conduct the investigation.

The second rationale Commerce offered, a need "to assure impartiality in its procedures," *id.*, is also unconvincing as a reason for the Department's decision in this case. The record does not contain evidence to support a finding that Kehuaxing would have gained, or could have gained, an unfair advantage were Commerce to accept the late submission. Commerce reasoned that "consideration must be given to the possibility of manipulation of the record," raising a concern that "[a] party filing an untimely Q&V response has the opportunity to review the timely filed Q&V responses from other interested parties and amend its own Q&V response" so as to falsely qualify, or falsely not qualify, as a mandatory respondent based on export volume. *Id.* at 30. Here, Commerce did not explain whether, or why, specific record evidence in this case gave it a reason to conclude that the Q&V data Kehuaxing attempted to submit had been, or even was likely to have been, compromised by "manipulation," by which term Commerce meant deliberate falsification of export data. Commerce nevertheless concluded that "Kehuaxing (or a similarly situated party) could gain an unfair advantage over the other parties if the Department accepted its submission." *Id.* at 31. Absent evidentiary support in the record of the investigation, this conclusion is unfounded.

The record contained evidence, comprised of the certified representations of Kehuaxing's counsel, that the cause of Kehuaxing's failure to meet the 5:00 p.m. filing deadline on April 11, 2012 was counsel's neglect. *Req. to Reconsider Rejection of the Separate Rate Appl. of Kehuaxing*, Bidlingmaier Aff. The administrative record contained no evidence to the contrary and, therefore, lacked evidence by which Commerce could conclude that the representations of counsel were not truthful. Despite the absence of supporting evidence, Commerce impliedly presumed that rejection of the Q&V statement was necessary because Kehuaxing, or an exporter in Kehuaxing's situation, otherwise would be submitting, intentionally and criminally, false information to Commerce for use in the investigation.[8]

Because of the proprietary nature of Q&V information, the Department's premise that acceptance of Kehuaxing's late Q&V submission could allow Kehuaxing to gain an unfair advantage and jeopardize the integrity of the record is also a supposition that counsel for

[8] *See, e.g.*, 18 U.S.C. § 1001 (generally imposing criminal liability for a certified false statement made to a government entity).

plaintiffs could conspire with plaintiffs in the unlawful submission of false information and also violate the administrative protective order that was in effect during the investigation. In this regard, plaintiffs point to record evidence establishing that plaintiffs did not have access to the Q&V responses of the other respondents as of the April 12, 2012 date on which their counsel filed the Q&V response and that counsel in fact did not obtain access, under the administrative protective order, to the business proprietary information of other respondents until May 18, 2012. Pls.' Mem. 18 (citing *Entry of Appearance & APO Appl. for Curtis, Mallet-Prevost, Colt & Mosle LLP* (May 18, 2012) (Admin.R.Doc. No. 128). In its response to plaintiff's Rule 56.2 motion, defendant does not address this record evidence yet still argues that "Commerce's explanation demonstrates why it reasonably determined that it would not extend the deadline for plaintiffs' to file their quantity and value response" and that "Commerce's concern is especially significant in cases such as this, in which a party requests an extension *after* the deadline has expired because, by definition, the other respondents would already have submitted their responses." Def.'s Resp. 11–12 (emphasis in original).

Defendant qualifies its argument by stating that it is not suggesting that plaintiffs intended to, or did, falsify the Q&V response and pointing out that Commerce never made a finding to that effect. *Id*. at 11. "Thus, plaintiffs' entire argument that it did not, in fact, engage in manipulation misses the point." *Id.* at 15. According to defendant, "Commerce's generalized concern about manipulation" provides "a valid basis" to support the Department's decision. *Id.* But defendant also argues, somewhat paradoxically, that "[i]t was not the imposition of a bright-line rule, as plaintiffs suggest," *id.* at 9 (citing Pls.' Mem. 8), adding that "[r]ather, Commerce's decision reflected its reasonable evaluation of the totality of the circumstances of the particular matter under consideration," *id.* Defendant views as critical among the circumstances that "plaintiffs merely cited an inadvertent error (rather than, for example, a technical failure) as the reason for their untimely filing" and "plaintiffs' failure to request an extension of time before the deadline expired." *Id.* at 10. These two circumstances are unrelated to concerns Commerce expressed regarding the need to conduct a timely investigation and the policy goal of avoiding "manipulation" that "would seriously jeopardize the integrity of the record." *Decision Mem.* 30.

Attempting to distinguish this case from the facts of past judicial decisions, the Decision Memorandum also concluded that "fairness to all of the respondents who submitted Q&V responses on time requires

that we reject the late filing of Kehuaxing." *Id.* at 31. In the context of a desire to ensure fairness, the Decision Memorandum concluded that rejecting Kehuaxing's submission was appropriate due to the Department's policy of allowing all submitters to benefit from any extension it grants. *Id.* at 30–31. These conclusions have little relevance in this case, in which the extension sought was approximately sixteen hours long, encompassed mainly non-business hours, and, according to the only record evidence, was sought because of a due date that would have been met but for the inadvertence of counsel. The record does not show that any other exporter/producer requested, or could have benefited from, an extension of so short a duration.

In summary, the Department's decision to reject Kehuaxing's Q&V filing was based on certain conclusions that find no support in the record evidence. Considered as a whole, the record does not support a conclusion or inference that the brief delay in the availability of the Q&V questionnaire response, had that response been accepted for the record, would have had any of the adverse consequences for the investigation that Commerce identified as reasons for its decision. Specifically, the record did not support a finding that acceptance of the submission would result either in a delay of the investigation or the possibility of an intentionally false Q&V response by Kehuaxing, or by any other party, that would "seriously jeopardize the integrity of the record." *Id.* at 30. Because the time extension sought was so short, the record does not support a conclusion that accepting the submission would have been unfair to the other parties to the investigation.

2. The Consequence of an Unexcused Late Filing Was Particularly Severe

Although the delay in the Department's receiving Kehuaxing's Q&V response would have been inconsequential, the same cannot be said for the result Commerce brought about in this case. The consequence Commerce attached to an unexcused late filing was particularly severe: the subjecting of Kehauxing to the PRC-wide rate, which is based on an adverse inference and in this case was more than twice as high as the rate assigned to cooperating, non-investigated exporters. *Final Determination*, 78 Fed. Reg. at 13,023. In the circumstances of this case, Commerce attached a consequence that was grossly disproportionate to the mistake that was made. The record evidence reveals that the mistake was a relatively minor one that resulted in a delay in the availability of the Q&V information that lasted only from the end of one business day to approximately the beginning of the next one. The record evidence also demonstrates that

the mistake was committed innocently and inadvertently by plaintiffs' counsel. As defendant's argument concedes, Commerce made no findings to the contrary. *See* Def.'s Resp. 11.

3. Commerce Was Ambiguous in Communicating its Policy on Time Extensions

The cover letter Commerce attached to the Q&V questionnaire connotes a policy as to extensions that is more lenient than that expressed in the Decision Memorandum. The cover letter informed recipients that the due date for responses was April 11, 2012 and referred to the issue of extensions of the due date in only one underlined sentence, which read as follows: "*Please note that, due to time constraints in this investigation, the Department will be limited in its ability to extend the deadline for the response to the attached Quantity and Value ("Q&V") Questionnaire.*" *Q&V Questionnaire* 1, *in* Pls.' App., tab 8 (emphasis in original). This sentence gives the impression that the Department's policy on extensions of the filing date for the Q&V response is dictated by time constraints in the investigation. There is no mention of a Commerce Department policy or practice to reject any request for an extension, no matter how brief, that is made after the due date.

Concerning the possible use of an adverse inference, the cover letter stated that "[i]f you *fail to respond* or *fail to provide the requested Q&V information*, please be aware that the Department may find that you failed to cooperate by not acting to the best of your ability to comply with the request for information, and may use an inference that is adverse to your interests in selecting from the facts otherwise available, in accordance with section 776(b) of the Act [19 U.S.C. § 1677e(b)]." *Id.* (emphasis added). This sentence is significant for what it does *not* say: it does not inform submitters that an adverse inference will be used, or even may be used, if a response is not received by the due date. Instead, the cover letter discusses the use of an adverse inference only in the context of failures to respond or provide the requested information. The cover letter contains no warning that any failure to meet the strict filing deadline would result, or was likely to result, in the rejection of the separate-rate application and the consequent subjecting of the exporter to the PRC-wide rate.

The Initiation Notice addressed the topic of the filing date for the Q&V response in two sentences. In one sentence, Commerce instructed that "[t]he Department requires that the respondents submit a response to both the quantity and value questionnaire and the separate-rate application by the respective deadlines, as discussed below and in the Separate Rate section, in order to receive consider-

ation for separate-rate status." *Initiation Notice*, 77 Fed. Reg. at 18,210. The other sentence specified that "[t]he quantity and value questionnaire must be submitted by all Chinese exporters/producers no later than April 11, 2012, 21 days after the signature date of this **Federal Register** notice." *Id.* (emphasis in original). Unlike the cover letter, the Initiation Notice makes no mention of extensions and on the whole can be read to take a more stringent position than does the cover letter concerning failures to meet the filing deadline for the Q&V response. In this respect, the Initiation Notice and the cover letter to the Q&V questionnaire do not take consistent approaches and thereby send a mixed message.

4. Contrary to Defendant's Arguments, the Challenged Decision Is Not Justified by Reasonableness or by a Resort to the Department's Regulations

Defendant argues that Commerce, in defendant's words, "reasonably declined to grant Kehuaxing a separate rate because Kehuaxing failed to file a timely quantity and value response" and "reasonably exercised its discretion when it declined to grant plaintiffs the requested extension." Def.'s Resp. 6. As discussed above, the challenged decision is based on findings that are not supported by substantial record evidence and on faulty reasoning. In the circumstances surrounding the compliance failure that gave rise to this case, Commerce abused its discretion in rejecting Kehuaxing's separate-rate application and assigning Kehuaxing the PRC-wide rate based on the use of adverse inferences, a rate designated for the non-cooperating entity comprised of the government of China.

Defendant argues, further, that the decision contested in this case was authorized by the Department's regulations, which, according to defendant, "expressly provide that a party may request an extension of time provided that the party submits a written request *before* the time limit established by Commerce expires." Def.'s Resp. 9 (citing 19 C.F.R. §§ 351.302(c), 351.301) (emphasis in original). This argument is also unconvincing. The regulation in question applies to "any time limit established by this part," *i.e.*, Part 351 of the Code of Federal Regulations. *See* 19 C.F.R. § 351.302(b). The time limit in question in this case is not one set by regulation. Moreover, as the court discussed above, the regulations do not provide that the Secretary may exclude from the record a timely-filed separate-rate application simply because a response to a Q&V questionnaire was filed after the deadline. The regulations do provide, in 19 C.F.R. § 351.104(a)(2)(i), that "[t]he Secretary, in making any determination under this part, will not use factual information . . . that the Secretary rejects" and further pro-

vide, in 19 C.F.R. § 351.104(a)(2)(iii), that "[i]n no case will the official record include any document that the Secretary rejects as untimely filed . . . ." These provisions do not resolve the question of whether the Secretary acted permissibly in excluding the timely-filed separate-rate application, thereby attaching a severe consequence to a relatively minor compliance failure.

B. Commerce Must Act Expeditiously in Complying with the Court's Remand Order

The court is requiring Commerce to file a remand redetermination within thirty days of the date of this Opinion and Order. The court believes it is necessary to require an expedited filing of a remand redetermination because the rate assigned to Kehuaxing affects cash deposits that are now being collected pursuant to the Final Determination and the antidumping duty order.

Finally, the court has considered whether it would be feasible to authorize an additional proceeding under which Kehauxing would become an individually investigated producer/exporter according to 19 U.S.C. § 1673d, in the event Commerce would desire to conduct such a proceeding. The court concludes, preliminarily, that the Department's conducting a proceeding of this type would not be feasible. The court reaches this preliminary conclusion because the antidumping duty order was issued on April 11, 2013, approximately one year ago, because cash deposits are now being collected at an unlawful rate, and because any such proceeding likely would require considerable time. *See Drawn Stainless Steel Sinks from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order*, 78 Fed. Reg. 21,592 (Int'l Trade Admin. Apr. 11, 2013). If Commerce disagrees with the court's preliminary conclusion on this question, it should so inform the court in the remand redetermination and address the concerns the court has expressed. In that event, the court will consider the points Commerce raises, and any comments of plaintiffs, before deciding the question and, accordingly, ordering any additional proceeding that may be appropriate.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the Commerce decision challenged in this case cannot be sustained upon judicial review because it reflected an abuse of the Department's discretion. Therefore, upon consideration of all papers and proceedings in this case, and upon due deliberation, it is hereby

ORDERED that the Final Determination in *Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination*, 78 Fed. Reg. 13,019 (Int'l Trade Admin. Feb. 26, 2013), be, and hereby is, set aside with respect to the decision therein to assign to Kehauxing the PRC-wide rate based on the untimely filing of Kehuaxing's response to the quantity and value questionnaire, which decision resulted from an abuse of discretion and therefore was contrary to law; it is further

ORDERED that Commerce, within thirty days (30) of this Opinion and Order, shall reconsider the challenged decision and file a redetermination upon remand ("Remand Redetermination") that is in accordance with this Opinion and Order; it is further

ORDERED plaintiffs may comment on the Remand Redetermination within thirty (30) days of submission of the Remand Redetermination; it is further

ORDERED that defendant may file a response to plaintiffs' comments within fifteen (15) days of the submission of those comments; and it is further

ORDERED that Plaintiffs' Motion for Oral Argument (Feb. 28, 2014), ECF No. 29, be, and hereby is, denied as moot; and it is further

ORDERED that Commerce, as is necessary to comply with this Opinion and Order, be, and hereby is, authorized to admit to the record any previously rejected submissions.

Dated: May 5, 2014
New York, New York

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