U.S. Court of International Trade

Slip Op. 15–105

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, GANG YAN YAN DIAMOND PRODUCTS, INC., and CLIFF INTERNATIONAL, LTD., Intervenor-defendants.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00078

[Sustaining results of redetermination of first administrative review antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: September 23, 2015

Daniel B. Pickard and *Maureen E. Thorson*, Wiley Rein LLP, of Washington, DC, for the plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *Aman Kakar*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Neeley and *Michael S. Holton*, Husch Blackwell LLP, of Washington, DC, for the defendant-intervenors.

OPINION

Musgrave, Senior Judge:

Diamond Sawblades and Parts Thereof from the People's Republic of China ("PRC"), 78 Fed. Reg. 11143 (Feb. 15, 2013), and accompanying issues and decision memorandum (Feb. 8, 2013) ("*IDM*"), PDoc 353, which concerns the first administrative review of subject merchandise covering the 2009–2010 period, was previously remanded for further proceedings consistent with Slip Op. 14–50 (Apr. 29, 2014), familiarity with which is here presumed. Before the court are the final results of remand ("*Redetermination*" or "RR") and the parties' comments thereon. As a result of remand, the contentions in this case now center on Commerce's reduction of the "PRC-wide" rate of antidumping duty from 194.09% to 82.12%, which appears to be an issue

of first impression. For the following reasons, the court sustains the *Redetermination*.

Background

The matter was voluntary remanded in part, at the request of the defendant International Trade Administration, U.S. Department of Commerce ("Commerce"), in order to reconsider the determination to grant a separate rate to the "ATM entity," a "collapsed" respondent in the underlying administrative review.[1] Also remanded was whether collapse of the ATM entity should have included the China Iron and Steel Research Institute ("CISRI"). Consistent with the redetermination addressed by *Advanced Technology & Materials Co. v. United States*, Court No. 09 00511 ("*Advanced Tech*"), *remand results sustained*, 37 CIT ___, 938 F. Supp. 2d 1342 (2013), *aff'd*, 581 Fed. Appx. 900 (Fed. Cir. 2014), on remand Commerce redetermined that the ATM entity failed to rebut the presumption of state control and demonstrate entitlement to a separate rate. Having thus been redetermined part of the PRC-wide entity, the ATM entity is subject to the PRC-wide antidumping duty rate. That determination is hereby sustained.

Due to finding that the ATM entity is not entitled to a separate rate, Commerce considered the issue of whether CISRI should be included in the ATM entity as moot. *See* RR at 2. The plaintiff, Diamond Sawblades Manufacturers' Coalition ("DSMC") contests that conclusion due to the following.[2] During the less-than-fair-value ("LTFV") investigation, Commerce determined the PRC-wide rate to be 164.09% based on non-cooperation from the entities comprising the PRC-wide entity. On remand of the instant matter, however, Commerce determined that the PRC-wide rate needed to take into account inclusion of the ATM entity in the PRC-entity. Information on the

[1] *See* 19 C.F.R. §351.401(f). For purposes of the administrative review, the "ATM entity" was found to consist of the three companies found to be affiliated in the underlying investigation (Advanced Technology & Materials Co., Ltd., Beijing Gang Yan Diamond Products Co., and Yichang HXF Circular Saw Industrial Co., Ltd.) combined with additional affiliates AT&M International Trading Co., Ltd., and Cliff International Ltd. RR at 1 n.1, referencing Memorandum *re Diamond Sawblades and Parts Thereof from the PRC: Determination to Include Additional Companies in the ATM Single Entity* (Nov. 30, 2011), CDoc 103, PDoc 118; *see also IDM* at 2. The intervenor-defendants who participated in briefing, Beijing Gang Yan Diamond Products Co. and Gang Yan Diamond Products, Inc., are herein referenced "ATM" for the sake of consistency; Cliff International Ltd. did not participate in briefing.

[2] According to the DSMC, the agency's draft results did not reflect any downward adjustment of the PRC-wide rate, or any intent to make such an adjustment. DSMC Cmts. at 6 n.4, referencing *Draft Results of Redetermination Pursuant to Court Remand* (Jan. 12, 2015), RRPDoc 2. Instead, DSMC contends, the draft results indicated that the ATM entity would be subject to the 164.09 percent rate. *Id*. referencing RRPDoc at 5.

record had previously enabled determination of the ATM entity's rate as 0.15%. Commerce found, however, that it did not have the necessary sales and production information to calculate that portion of the margin that represents the remaining but unspecified portion of the PRC-wide entity, but it also determined that no part of the PRC-wide entity had failed to cooperate to the best of its ability. For its *Redetermination*, therefore, Commerce determined to use a simple average of the previously-assigned PRC-wide rate and the calculated margin for the ATM entity. Commerce thus revised the PRC-wide rate to 82.12% to account for the ATM entity's inclusion in among the PRC-wide entity.

The *Redetermination* satisfies neither party.

Argument

ATM argues the results of remand are unlawful because Commerce has found "full cooperation" by the ATM entity and all elements of the PRC-wide entity in this review and because the statute does not allow use of a partial adverse inference if there has been full cooperation. *See, e.g.*, Def-Int's Cmts at 1. ATM further argues the adverse portion of the final margin determined for the PRC-wide entity is based on information not on the record of this review nor has that information been corroborated as required by 19 U.S.C. §1677e(c). ATM contends Commerce was and is aware of the precise rate of 0.15% that is applicable to it, a cooperative respondent, and that Commerce must use this rate as the rate that is applicable to it. Def-Int's Cmts. at 6. ATM thus continues to argue that it is somehow entitled to separate consideration notwithstanding. *See, e.g., id*. at 11 ("[i]ndeed, a fairly obvious approach here would have been to use the actual factual information on the record of this review and apply the 0.15 percent here as the assessment rate for [ATM], but continue to apply a different and higher rate as the rate for those who failed to respond or cooperate"). Admitting the possibility of a "higher rate" for other members of the PRC-wide entity, ATM does not appear go so far, however, as to argue that the PRC-wide rate should be 0.15%.

The DSMC argue that Commerce's adjustment of the PRC-wide rate is contrary to agency practice and policy, and that the ATM entity should receive the PRC-wide rate that was calculated during the investigation. Allowing the conduct of a single member of the PRC-wide entity to affect the PRC-wide entity rate, the DSMC argue, "would allow for the PRC-wide entity to potentially manipulate AD results by selectively providing data on the record and dictating what data can be verified." DSMC Resp. to Def-Int's Cmts. at 3, quoting

issues and decision memorandum accompanying *Galvanized Steel Wire from the PRC*, 77 Fed. Reg. 17430 (Mar. 26, 2012) (final LTFV determ.) at cmt. 1.C ("*Galvanized Steel Wire*").[3] "In other words, this would allow the PRC-wide entity to manipulate the margin by having a single member of the PRC-wide entity cooperate in an investigation or administrative review and thereby obtain a low margin for the entire PRC-wide entity, defeating the purpose of the Department's separate rates practice." *Id*.

The DSMC also argue the agency's downward adjustment of the PRC-wide rate is premised on the fact that no PRC-wide entity member has failed to cooperate. *Id*. at 9. CISRI is a member of the ATM entity, the DSMC contend; therefore the record "may indeed indicate that the [ATM e]ntity as a whole did not cooperate and . . . , thus, there are uncooperative members of the PRC-wide entity." DSMC Cmts at 8 n.6. Although the DSMC do not elaborate further on that proposition, they also contend Commerce's "Solomonesque" determination is speculative, arbitrary, and capricious, that the record does not support finding, in essence, that the ATM entity accounted for half of exports of subject merchandise to the U.S., and that if the PRC-wide rate is to be adjusted at all, which the DSMC do not concede, then a more logical approach would be based on the number of potential respondents comprising the PRC-wide entity, which the DSMC calculate as 22, *i.e.*, a "weighting" of the ATM entity's rate in the PRC-wide rate amounting to 1/22nd. In any case, the DSMC argue, Commerce does not explain whether it is changing its long-standing position or practice regarding non-market economies and the PRC-wide rate and, if so, on what basis:

> For example, is the agency taking the position that application of the PRC-wide rate is necessarily the result of adverse inferences, and thus may not be applied to the extent that the PRC-wide entity is "cooperative"? If so, how does the agency reconcile this view with judicial precedent from the original investigation finding that assignment of the PRC-wide rate is not assignment of an adverse rate? . . . Moreover, how does the agency determine whether the PRC-wide entity as a whole has been cooperative or uncooperative? The agency's remand results do not discuss these questions, or otherwise elucidate the basis, in policy, fact, or past proceedings, for its current actions.

[3] *See also* issues and decision memorandum accompanying *Carbon and Certain Alloy Steel Wire Rod from the PRC*, 79 Fed. Reg. 53169 (Aug. 29, 2014) (*inter alia* prelim. LTFV determ.) at 18, n.91 (determining not to verify mandatory respondents that had been found to be part of the PRC-wide entity) (citing *Galvanized Steel Wire* at cmt. l.C).

Id. at 8.

Addressing the parties' comments, Commerce defends its position as follows:

> Typically, when Commerce determines that an exporter in a non-market economy such as [the PRC] has failed to demonstrate independence from state control, Commerce declines to conduct any further inquiry into the exporter's separate, individual business practices. Instead, Commerce assigns the exporter a single country-wide margin that reflects the aggregate behavior of all the exporters of subject merchandise presumed to be under state control. *See generally* Remand at 7–8; 19 C.F.R. §351.107(d) ("In an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers."); *see also Watanabe Group v. United States*, . . . Slip Op. 10–139 at 8 (Ct. Int'l Trade Dec. 22, 2010) ("Commerce's permissible determination that [a respondent] is part of the PRC-wide entity means that inquiring into [that respondent]'s separate sales behavior ceases to be meaningful."); *Jiangsu Changbao Steel Tube Co., Ltd. v. United States*, 884 F. Supp. 2d 1295, 1312 n.21 (Ct. Int'l Trade 2012) (noting that "losing all entitlement to an individualized inquiry appears to be a necessary consequence of the way in which Commerce applies the presumption of government control").
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> Here, however, Commerce had already conducted such an individualized inquiry of ATM earlier in its proceedings. Indeed, ATM provided information that enabled Commerce to calculate a specific rate for ATM, based on its data and individual circumstances: 0.15 percent. The question before Commerce was therefore what bearing that information should have on its calculations.
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> Contrary to ATM's suggestion, the PRC-wide entity's rate assigned to ATM could not be ATM's prior separate rate of 0.15 percent. That rate was an individual margin that reflected ATM's individual circumstances and individual pricing behaviors. Once Commerce determined that ATM was ineligible for such an individual margin, Commerce grouped ATM together with the other state controlled companies -- as a result, the rate ATM would receive had to reflect the aggregate behavior of the entire PRC-wide entity, not just ATM's own behavior. *See generally* Remand at 7–8 (explaining that ATM had to be subject to

the single PRC-wide rate). Because, during its investigation, Commerce had found the PRC-wide rate to be 164.09 percent, it stands to reason that the rate ATM receives as part of the PRC-wide entity should reflect a portion of that number.

But DSMC is similarly [incorrect] to claim that the 0.15 rate should have no bearing at all on Commerce's calculations. *See generally* DSMC Br. at 6–9. By incorporating ATM into the PRC-wide entity, Commerce changed the group of companies that comprised that entity. Moreover, with ATM included among the group of state-controlled companies, Commerce knew (based upon information in the administrative record) that at least some portion of the PRC-wide entity was dumping at 0.15 percent. Commerce reasonably determined that it should recalculate the PRC-wide rate to account for this new information.

Commerce's ultimate conclusion — finding that the PRC-wide margin should be halfway between the rate previously calculated for ATM and that previously calculated for all of the other state-controlled companies — reflects a reasonable resolution of these considerations. On one hand, Commerce acknowledged that the information ATM provided about its pricing behavior was relevant to the PRC-wide entity because ATM was now a part of that entity; on the other hand, Commerce recognized that there were more components to the PRC-wide entity than just ATM.

And the decision to take a simple average between the known rate for ATM and the prior rate for all the state-controlled companies is reasonable given that Commerce had no information about what proportion of the PRC-wide entity ATM comprised — and therefore could not calculate a more precise weighted average.[4] Indeed, Commerce did not have information to determine with any greater precision what portion of the PRC-wide entity ATM represented.

ATM and DSMC present various theories to challenge Commerce's determination. None of these have merit. For example, ATM claims that averaging its calculated individual rate with

[4] *Cf.* 19 U.S.C. § 1673d(c)(1) ("[i]f the determination of the administering authority under subsection (a) of this section is affirmative, then . . . (B)(i) the administering authority shall — (I) determine the estimated weighted average dumping margin for each exporter and producer individually investigated, and (II) determine . . . the estimated all-others rate for all exporters and producers not individually investigated") *with* 19 C.F.R. §351.107(d) ("in an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers").

that of the PRC-wide entity improperly punished it with an "adverse" rate. But a similar line of argument has already been laid to rest by this Court's decision in *Advanced Tech*, which has been upheld by the Federal Circuit. *See* 938 F. Supp. 2d at 1350–51. There, this Court considered the application of the PRC-wide rate to ATM in the context of the diamond sawblades investigation, and concluded that applying the PRC-wide rate to ATM was not, in itself, an application of adverse inferences. *See id.* Rather, it was merely the consequence of ATM failing to rebut the presumption of state control. *See id.*

Further, as the Court noted, the fact that the PRC-wide rate was itself calculated based on adverse inferences did not make applying that rate to ATM improper. *See id.* As the Court explained, the PRC-wide entity rate must be corroborated to the PRC-wide entity as a whole, and not to the individual members of that entity. *See id.* ; *see also Peer Bearing Co.—Changshan v. United States*, 587 F. Supp. 2d 1319, 1327 (2008) ("[T]here is no requirement that the PRC-wide entity rate based on AFA relate specifically to the individual company. It is not directly analogous to the process used in a market economy, where there is no countrywide rate. Here, the rate must be corroborated according to its reliability and relevance to the countrywide entity as a whole.") (citations omitted). This reasoning defeats all of ATM's claims that the rate it received was not properly corroborated, or that the rate was improperly based on certain companies' failure to cooperate in the investigation when there was no equivalent failure in this review. Simply put, once Commerce established the PRC-wide rate, it was permitted to use that rate in the manner it did in this review.

ATM's complaint that the PRC-wide rate could not be used because it was not part of the record of this review is similarly misguided. The PRC-wide rate from the investigation was public information that was known to Commerce and all interested parties. ATM presented no new evidence to suggest that the country-wide rate was no longer applicable to the PRC-wide entity. Accordingly, the use of that rate was proper.

For its part, DSMC claims that Commerce's decision to recalculate the PRC-wide rate after including ATM in the PRC-wide entity was inconsistent with various precedent finding that an individual company's behavior ceases to be meaningful once it is

included in a country-wide entity.[5] This argument also misses the point. Commerce was not conducting a *de novo* inquiry into ATM's behavior; rather, as a result of its decision to include ATM in the PRC-wide entity, Commerce had new record information about the PRC-wide entity as a whole. It is not improper for Commerce to consider such new information: DSMC certainly cites no law or regulation that precludes Commerce from doing so. *See generally* DSMC Br. at 7–9. And although DSMC is correct that cases from this Court have stated that a company's individual behavior becomes irrelevant once that company is incorporated into the country-wide entity, those cases dealt with whether Commerce was required to inquire into an individual company's individual pricing behavior in the first instance before assigning it a country-wide rate. *See, e.g., Jiangsu*, 884 F. Supp. 2d at 1312 n.21; *Advanced Tech*, 938 F. Supp. 2d at 1350 51. The language of those cases therefore does not — and should not — preclude Commerce from considering what it actually knows about portions of the country-wide entity in assigning that entity a rate. Indeed, it would be strange if Commerce were required to blind itself to information about the circumstances of a portion of the country-wide entity to which Commerce assigns an estimated margin.

DSMC also complains that Commerce should have recalculated the PRC-wide rate not as a simple average of ATM's prior rate and the rate of the other state-controlled companies, but as a weighted average: in DSMC's view, because there were at least 21 other state-controlled companies, ATM's pricing behavior should have accounted for only 1/22 of the total. *See* DSMC Br. at 9–10. But there is no reason to think that the latter approach is any better than the one Commerce used. The record contained

[5] *See* DSMC's Cmts on RR (May 13, 2015) at 7–8; *see also* DMSC's Resp. to Def-Int's Cmts at 4–6, referencing, *inter alia, Brake Rotors from the PRC*, 70 Fed. Reg. 24382, 24389 (May 9, 2005) (*inter alia*, prelim. seventh rev. results; denying respondent a separate rate based on information obtained at verification and not altering the PRC-wide rate based on that respondent's margin calculation), unchanged in final determination, 70 Fed. Reg. 69937 (Nov. 18, 2005) (*inter alia*, final seventh rev. results); *Porcelain-on-Steel Cooking Ware from the PRC*, 70 Fed. Reg. 76027 (Dec. 22, 2005) (prelim. rev. results denying separate rate and not altering PRC-wide rate based on respondent's margin calculation), unchanged in final determination, 71 Fed. Reg. 24641 (Apr. 26, 2006) (final rev. results); *and see also* DSMC's Cmts on RR at 6–8 acknowledging recent *contra, e.g., Certain New Pneumatic Off-the-Road Tires From the PRC*, 80 Fed. Reg. 20197 (Apr. 15, 2015) (final rev. results; 2012–2013) and accompanying issues and decision memorandum at cmt. 1 (finding respondent ineligible for separate rate and calculating final margin for PRC-wide entity, including respondent, using a simple average of previously assigned PRC-wide rate and the calculated final margin for respondent).

> no information about what portion of the PRC-wide entity ATM comprised. Assuming that each known company that made up the entity produced and exported the same volume of goods is no more justified than assuming that ATM comprised one half of that total. But, unlike DSMC's methodology, Commerce's approach is consistent with its practice of performing a simple average where a weighted-average is not available.
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> Finally, DSMC's claim that Commerce did not adequately explain its reasoning on these points is likewise unavailing. In its remand, Commerce explained its decision to recalculate the PRC-wide rate and cited authority for doing so. *See generally* Remand at 2–4, 7–10. If Commerce's explanation does not refute every argument DSMC now presents, that is because Commerce did not previously *see* those arguments: Commerce only made the decision to re-calculate the PRC-wide rate after the draft remand results. Nevertheless, Commerce's remand provides a reasoned explanation for its decision.
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> In the end, Commerce's determination on remand was a proper resolution of the issue facing Commerce. Accordingly, it should be sustained.

Def's Resp. to Remand Cmts at 4–9 (footnotes omitted; court's bracketing in part).

Discussion

The question on remand for Commerce was the ATM entity's eligibility for a separate rate, consistent with *Advanced Tech*. As mentioned, in redetermining the ATM entity to have been part of the PRC-wide entity, Commerce concluded that it had to reconsider what impact that had on the PRC-wide rate.

Commerce's address of the ATM entity's comments, above, is not unreasonable. Commerce has a well-established practice of assigning the PRC-wide entity rate to individually investigated respondents who participated in an investigation or review but do not qualify for a separate rate. *See, e.g., Certain Pneumatic Off-the-Road Tires from the PRC*, 80 Fed. Reg. 20197 (Apr. 15, 2015) (final 2012–2013 rev. results) and accompanying issues and decision memorandum at cmt. 1; *Certain Activated Carbon From the PRC*, 78 Fed. Reg. 26748 (May 8, 2013) (prelim. 2011–2012 rev. results) and PDM at 10–11, unchanged in final results, 78 Fed. Reg. 70533 (Nov. 26, 2013). Research indicates that prior to December 4, 2013, whenever a respondent failed to establish its eligibility for a separate rate Commerce's prac-

tice was to conditionally "review" the PRC-wide entity rate.[6] *See, e.g.*, *Certain Lined Paper Products From the PRC*, 78 Fed. Reg. 34640 (June 10, 2013) (*inter alia* prelim. 2011–2012 rev. results) and accompanying issues and decision memorandum. Given such practice and the circumstances of this case, ATM's arguments regarding a lack of corroboration of the PRC-wide rate and the inapplicability of that rate (as "reviewed") to it are inapposite; further, the DSMC's contention that Commerce omitted explanation of why it considered that the PRC-entity rate had to be reexamined is also without merit.

Commerce's overall response to the DSMC's comments is also reasonable, although further clarification would have been helpful.[7] For example, in response to the DSMC's case references, Commerce distinguishes its reconsideration of the ATM entity's eligibility for a separate rate as "not conducting a *de novo* inquiry into ATM's behavior" on remand. The court is unsure of what Commerce means by this, as that characterization does not accurately encompass what transpired during the proceeding. Commerce has oft-stated that it considers each segment of an antidumping proceeding as separate (essentially a blank slate), *see, e.g., Shandong Huarong Machinery Co. v. United States*, 29 CIT 484, 491 (2005), and thus whether the ATM entity was eligible for a separate rate (a *de novo* question) was part and parcel of this first administrative review proceeding. In other words, the fact that it was judicial process that has led to reconsideration of the question would seem to be irrelevant.

The DSMC also argued the matter at bar resembles the type of situation Commerce confronted during litigation of the original investigation, in which Commerce did not alter the PRC-wide entity rate but rather in the final analysis assigned the existing PRC-wide rate to the ATM entity without regard for the originally-calculated individual margin. *See Advanced Tech*, 938 F. Supp. 2d at 1342. The DSMC's proposition is valid, but only to a certain extent, because the rate established at the investigation is only intended to be an estimate, whereas it is at the administrative review stage that the actual and "precise" assessment and future cash deposit rate is established. *See, e.g., AK Steel Corp. v. United States*, 21 CIT 1204, 1215 (1997). On the other hand, as the DSMC imply, there is no reason to suppose

[6] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 Fed Reg. 65963, 65970 (Nov. 4, 2013) (current administrative practice now requires an explicit request prior to initiating a review of the NME entity).

[7] *See Bowman Transportation, Inc. v. Arkansas-Best Freight System Inc.*, 419 U.S. 281, 285–86 (1974) (a court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned").

that consideration of the impact the ATM entity's inclusion in the PRC-wide entity, as confirmed through litigation, was precluded during the LTFV investigation.

Commerce's response to the DSMC's arguments also elides over what transpired in *Brake Rotors from the PRC*, in which the respondent in question, Huanri General, was first examined in the fifth new shipper review of that subject merchandise and granted a separate rate. *Brake Rotors From the PRC*, 66 Fed. Reg. 29080 (May 29, 2001) (prelim. results and partial rescission of new shipper rev.). During the seventh administrative review of the merchandise, Huanri General, apparently cooperative, was denied a separate rate based on information obtained at verification. 70 Fed. Reg. at 24389. And it is notable that such circumstance did not cause Commerce to consider altering the PRC-wide rate based on Huanri General's margin calculation. *Cf.* 70 Fed. Reg. at 24392 (unchanged in final results, 70 Fed. Reg. 69937) *with Brake Rotors From the PRC*, 69 Fed. Reg. 42039, 42040 (*inter alia* final sixth rev. results). Commerce's expressed position here — that it is not precluded from considering what it actually knows about portions of the country-wide entity when reexamining the country-wide margin — may be legally correct, but the DSMC are also correct that Commerce's position is at odds with *Brake Rotors from the PRC*. Nonetheless, the court cannot conclude Commerce's position unreasonable, as it would indeed be "strange" were Commerce so precluded as a matter of law.

The DSMC also argue *Porcelain-on-Steel Cooking Ware from the PRC, supra*, is analogous. That administrative review, however, does not support the proposition that the conduct of individual members of the PRC-wide entity is meaningless to the determination of the appropriate rate for that PRC-wide entity — in fact, quite the opposite. The only respondent in that proceeding, Watex, had been determined ineligible for a separate rate. 70 Fed. Reg. at 76028–29. "As a result," Commerce determined "that it is necessary to review the single PRC entity, including Watex, in this segment of the proceeding." *Id*. at 76029. The "reviewed" PRC-entity received an adverse inference and adverse facts available because Watex had failed to comply to the best of its ability with repeated requests for information, and Commerce therefore assigned the PRC-entity "the highest rate determined in any previous segment of this proceeding." *Id*.[8]

[8] *Cf. Antidumping Manual*, Ch. 10 §IV.B. ("Occasionally, the NME-wide rate may be changed through an administrative review.[ ] This happens when 1) the Department is reviewing the NME entity because the Department is reviewing an exporter that is part of the NME entity, and 2) one of the calculated margins for a respondent is higher than the current NME-wide rate") (noting that in a new shipper review, there is no change to the

The *status quo* of the matter at bar, by contrast, is a record of the PRC-wide entity that was previously determined uncooperative during the investigation but which now includes the cooperative ATM entity as part of the PRC-wide entity. The particular portion of the *Redetermination* addressing that circumstance provides: "unlike the [LTFV] investigation, no part of the PRC-wide entity failed to cooperate to the best of its ability." RR at 9. As mentioned, the ATM entity characterizes this as a determination of "full" cooperation by the PRC-wide entity. DefInt's Cmts. on RR at 1. That characterization, however, depends on the extent to which the ATM entity's cooperation may reasonably be imputed to the remainder of the PRC entity, and substantial evidence of record does not support imputation to that extent. The record does not reveal "cooperation" of the PRC-wide entity beyond that of the ATM entity; the only other individually examined company in the review at bar, besides the ATM entity, was Weihai Xiangguang Mechanical Industrial Co., Ltd., which was presumed to be part of the PRC-entity until it demonstrated an absence of *de jure* and *de facto* control by the PRC government and entitlement to a separate rate, and because it established that entitlement, its cooperativeness cannot be imputed to the PRC-wide entity. At best, the record can be construed as only a "review" of the PRC-wide rate, within the meaning of 19 U.S.C. §1675(a), but not the PRC-wide entity itself, *i.e.*, as and of the consequence of the ATM entity's ineligibility for a separate rate, since it does not appear that Commerce queried information from the remainder of the PRC-wide entity apart from the ATM entity, to which a response would have been required, and from which "full" cooperation could be inferred. Hence, the court agrees with the DSMC that more is required from the record than, for example, the various (but not all) parties' submissions of requests for administrative review and the various voluntary submissions of comments in order to support the implication of "full" cooperation in the context of a review of a country-wide rate that is based in part on information from the investigation and in part on information obtained during review of an entity that had originally been deemed eligible for a separate rate until that determination was reversed in consequence of appeal.

In short, whatever else its expressed policy or practice may indicate on the general subject, to the extent Commerce reexamined ("reviewed") the PRC-wide rate, it was only, as Commerce explains, for the purpose of incorporating a "cooperative" part of the PRC-wide entity as a consequence of *Advanced Tech*, nothing more. However,

NME-wide rate, as a new shipper review covers only an exporter that is eligible for a separate rate, and referencing *Freshwater Crawfish Tail Meat from the PRC*, 67 Fed. Reg. 19546, 19549 (Apr. 22, 2002) (*inter alia*, final rev. and new shipper results)).

the DSMC also argue that the implication in the *Redetermination* of a "cooperative" PRC-wide entity including the ATM entity was expressed without a determination on whether CISRI should also be collapsed as a part of the ATM entity. Considering the point, the court notes that CISRI was listed in the notice of initiation of this review, but it does not appear, from the administrative list of record documents, that CISRI requested either administrative review or "separate rate" consideration, unlike other PRC companies listed in the notice of initiation. *Cf. Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 Fed. Reg. 81565 (Dec. 28, 2010) *with, e.g.*, PDocs 1–15. In light of the fact that the ATM entity's ineligibility for a separate rate caused Commerce to re-examine the PRC-wide margin and consider "cooperation" in that reexamination, consideration of CISRI's "cooperation" (as a part of whichever entity, ATM or PRC) was not irrelevant, but the DSMC do not elaborate upon the evidence of record that would support determining non-cooperation, or upon what impact that would have on Commerce's "review" of the PRC-wide rate within the meaning of 19 U.S.C. §1675(a), given that at the time in question it was Commerce's apparent policy to undertake such a re-examination once it determined that an entity requesting a separate rate (the ATM entity in this instance) was ineligible for that status.[9]

In the final analysis of the record at bar, the court is not persuaded that Commerce's final results of redetermination and the revised PRC-wide rate, based on a simple average of the PRC-wide rate from the investigation and the information Commerce had with respect to the ATM entity, were unreasonable, unsupported by substantial evidence, or otherwise not in accordance with law. *Cf. Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) (noting that 19 U.S.C. §1673d(c)(5)(B) and the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103 316 (1994), both "explicitly allow Commerce to factor both *de minimis* and AFA rates into its calculation methodology" and there is "no legal error in Commerce's use of a

[9] The DSMC's wider argument — that Commerce's administrative review practice has not ordinarily resulted in decreased PRC-wide rates — expresses a valid point, as there may be sound reasons for treading with caution when it comes to considering a downward adjustment of the PRC-wide rate, not least of which is to avoid, as they argue, conferring upon previously or potentially "uncooperative" elements of the PRC-wide entity (as indicated by the *status quo* of a particular proceeding including the investigation phase) the benefit of categorically distinct "cooperative" elements during a particular segment that "do not meet," in the final analysis, the criteria for a separate rate, and avoiding the potential for manipulation of the NME-margin. Whether such concerns can theoretically be mitigated by random respondent selection does not appear to be the matter before the court, at any rate, and no opinion, therefore, need here be expressed thereon.

simple average rather than a weighted average"). The court can agree that adjustment of a country-wide rate based on a weighted average, for example the number of entities comprising the PRC-wide entity or U.S. market share, would better account for cooperative respondents determined ineligible for a separate rate, however judicial review does not involve displacement of the agency's reasonable resolution of "fairly conflicting views" on this record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Conclusion

In view of the foregoing, Commerce's results of redetermination will be sustained and judgment entered accordingly.

Dated: September 23, 2015
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 15–106

UNITED STATES, Plaintiff, v. INTERNATIONAL TRADING SERVICES, LLC and JULIO LORZA, Defendants.

Before: Mark A. Barnett, Judge
Court No. 12–00135

[The court denies Defense Counsel's Motion to Withdraw as Counsel for Defendant International Trading Services, LLC.]

Dated: September 23, 2015

Joshua Ethan Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., for plaintiff. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Peter Stanwood Herrick, Peter S. Herrick, P.A. of St. Petersburg, FL, for defendant.

OPINION AND ORDER

Barnett, Judge:

Pending before this court is counsel's motion to withdraw as attorney of record for Defendant International Trading Services, LLC ("Withdrawal Motion"), pursuant to Rule 75(d) of the Rules of the Court of International Trade ("CIT"). Mot. to Withdraw as Counsel for Def. Int'l Trading Servs., LLC ("Withdrawal Mot."), ECF No. 24. Plaintiff timely filed a response opposing the Withdrawal Motion ("Plaintiff's Response"). Pl.'s Resp. to Defense Counsel's Mot. to With-

draw ("Pl.'s Resp."), ECF No. 26. For the reasons discussed below, the court denies the Withdrawal Motion.

BACKGROUND AND ARGUMENTS

The current action was filed by Plaintiff United States ("Plaintiff" or "United States") against two defendants, International Trading Services, LLC ("ITS") and Mr. Julio Lorza (Managing Member and President/CEO of ITS, prior to its dissolution). *See* Compl. ¶ 4, ECF No. 2. This case commenced on May 17, 2012 when Plaintiff filed its Complaint in this court. *See*, *generally*, Compl. Defendants Mr. Lorza and ITS filed their Answer through counsel, Mr. Peter S. Herrick ("Defense Counsel") on September 11, 2012. *See*, *generally*, Answer, ECF No. 4. On August 10, 2015, Mr. Herrick filed his Withdrawal Motion as attorney of record for Defendant ITS, citing the non-existence of the corporation as his basis for seeking withdrawal. Withdrawal Mot. ¶¶ 4–5. Mr. Herrick does not seek to withdraw as counsel for Defendant Julio Lorza. Plaintiff filed a response to the Withdrawal Motion on August 21, 2015. *See, generally,* Pl.'s Resp.

ITS is a Florida corporation that was administratively dissolved by the Florida Department of State in December 2009. Compl. ¶ 3. Defendants admitted to this fact in their Answer. Answer ¶ 3. Defendant Julio Lorza retained the services of Mr. Herrick to represent Mr. Lorza as an individual and to represent ITS, the already defunct company. Withdrawal Mot. ¶ 3. Mr. Herrick now seeks to withdraw for the reason that Defendant ITS no longer exists as a corporation and, as such, "there is no entity to represent." *Id*. ¶ 5. Stating that "government counsel admitted that International Trading Services, LLC had ceased to exist long before the commencement of this litigation," counsel notes that ITS "has not only ceased to exist, it has not been resurrected." *Id*. ¶¶ 2, 4. As such, Mr. Herrick argues that withdrawal can be affected "without material adverse effect on the interests of the government." *Id*. ¶ 8.

Plaintiff opposes the Withdrawal Motion, arguing that Mr. Herrick has not shown good cause for withdrawal as "there has been no change in circumstances that would make defense counsel's withdrawal—essentially rendering ITS unable to proceed with litigation—appropriate." Pl.'s Resp. at 1. Plaintiff notes that ITS is amenable to suit even as a dissolved corporation, and as a corporation it cannot participate in this action except through counsel. Pl.'s Resp. at 3. As such, Plaintiff argues that the Withdrawal Motion does not meet the burden of showing either that withdrawal can be accomplished without material adverse effect on the interests of ITS or that other good cause exists to support withdrawal.

LEGAL STANDARD

Pursuant to CIT Rule 75(d), "the appearance of an attorney of record may be withdrawn only by order of the court." USCIT R. 75(d). Further, under Rule 4–1.16(b) of the Rules Regulating the Florida Bar, an attorney's request to withdraw may be granted upon showing, in relevant part, that such "withdrawal can be accomplished without material adverse effect on the interests of the client" or for "other good cause." FLA. ST. BAR R. 4–1.16(b). The "attorney seeking to withdraw has the burden of establishing one of these legitimate bases for withdrawal." *In re Davis*, 258 B.R. 510, 513 (Bankr. M.D. Fla. 2001) (internal citations omitted). In *In re Davis,* the court explains that the rules require an attorney to seek leave of court to withdraw in order to ensure "that the client is protected and not abandoned in the matter" and so that the withdrawal does not have an adverse effect on the "orderly administration of the court" and its calendar. *In re Davis*, 258 B.R. at 513.

Under CIT Rule 75(b)(1), a corporation may only appear before the court through an attorney authorized to practice before the court. USCIT R. 75(b)(1)); *see Lady Kelly, Inc. v. U.S. Sec'y of Agric.,* 30 CIT 82, 83, 414 F. Supp. 2d 1298, 1299 (2006) ("The rule is well established that a corporation *must always* appear through counsel."). Thus, when the party being represented by the attorney seeking to withdraw is a corporation, there is a further interest in ensuring the party's ability to continue with the proceedings. *See Highway 46 Holdings, LLC v. Quantified Mktg. Group, LLC*, No. 608-CV-674-ORL28DAB, 2008 WL 4820070, at *1 (M.D. Fla. Nov. 3, 2008) (Mag. J.). Granting withdrawal in such cases can effectively "[render] Defendant voiceless" in the proceeding, and if this is not "timely remedied" may result in "default for the corporation." *Highway Holdings,* 2008 WL 4820070, at *1–2. As such, "the consequences of withdrawal are severe," and absent "compelling ethical reasons prohibiting representation," the court is within its discretion to deny the motion. *Id.*

Finally, under Florida law, a "dissolved corporation continues its corporate existence" and dissolution "does not . . . [p]revent commencement of a proceeding by or against the corporation in its corporate name." FLA. STAT. § 607.1405(1) and (2)(e).

DISCUSSION

As the moving party, Defense Counsel has the burden to show that withdrawal can be accomplished without material adverse effect on the interests of his client ITS. *See Sands v, Moron,* 339 So. 2d 307, 307 (Fla. 3rd DCA 1976); *see also* FLA. ST. BAR R. 4–1.16(b). This burden has not been met. Mr. Herrick simply states that "withdrawal can be

accomplished without material adverse effects on the interests of the government" and does not address the adverse effects on the interests of his own client, ITS. Withdrawal Mot. ¶ 8. Mr. Herrick claims that because ITS has been dissolved, there is no entity to represent. *Id.* ¶ 5. However, under Florida law, even though ITS has ceased operations as a corporation, it remains amenable to suit. At this time, ITS continues to be part of the ongoing proceedings before this court, and as a corporate entity, ITS can *only* appear before this court through counsel. USCIT R. 75(b)(1). Mr. Herrick's motion does not identify substitute counsel or otherwise show how ITS will continue in the present proceeding if his motion is granted. Thus, allowing Mr. Herrick to withdraw as counsel for ITS will preclude this defendant from further appearances before the court, at least until substitute counsel can be identified, causing material adverse effects to interests of ITC and the orderly administration of this proceeding, which commenced more than three years ago, before the court.

Defense Counsel also failed to demonstrate other "good cause" in support of his motion. *See* FLA. ST. BAR R. 4–1.16(b). Mr. Herrick points to the non-continuing nature of ITS as his only reason for withdrawing representation. Withdrawal Mot. ¶¶ 4–5. However, it is clear from the present proceedings that Mr. Herrick agreed to represent, and entered an appearance on behalf of, ITS well after the administrative dissolution of the corporation. *Id.* ¶ 3. As such, he did so with knowledge of the corporation's non-continuing status and now has a responsibility to *see* the defendant corporation through the proceedings, or at least until substitute counsel is identified. Mr. Herrick does not raise any other arguments supporting his motion to withdraw and therefore has not met his burden in showing there is good cause allowing him to withdraw as counsel.

CONCLUSION AND ORDER

Defense Counsel has not met the burden for showing that his Withdrawal Motion can be granted without adverse material effects on Defendant ITS and has not shown any other good cause in support of his request for withdrawal. Upon consideration of Mr. Herrick's Motion to Withdraw as Counsel for Defendant International Trading Services, LLC (ECF No. 24) and the response thereto (ECF No. 26), and upon due deliberation, it is hereby

ORDERED that Defense Counsel's Motion to Withdraw as Counsel for Defendant International Trading Services, LLC is **DENIED**.

Parties are advised that the Scheduling Order, as amended (ECF No. 19, 21, and 23), and all dates established therein, remain in effect.

Dated: September 23, 2015
New York, New York

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

Slip Op. 15–107

MAVERICK TUBE CORPORATION, Plaintiffs, TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş., and ÇAYIROVA BORU SANAYI VE TICARET A.Ş., Consolidated Plaintiffs, BOOMERANG TUBE LLC, ENERGEX TUBE (A DIVISION OF JMC STEEL GROUP), TEJAS TUBULAR PRODUCTS, TMK IPSCO, VALLOUREC STAR, L.P., WELDED TUBE USA INC., and UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, BORUSAN ISTIKBAL TICARET A.Ş., BORUSAN MANNESMANN BORU SANAYI VE TICARET A.Ş., TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş., and ÇAYIROVA BORU SANAYI VE TICARET A.Ş., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00244

[Commerce's final determination in antidumping duty investigation sustained in part and remanded in part to reconsider constructed value profit margin, and in part, duty drawback.]

Dated: September 24, 2015

Robert E. DeFrancesco, III and *Alan H. Price*, Wiley Rein, LLP, of Washington, DC, for plaintiff.

David L. Simon, Law Office of David L. Simon, of Washington, DC, for consolidated plaintiffs and defendant-intervenors Tosçelik Profil ve Sac Endüstrisi A.Ş. and Çayirova Boru Sanayi Ve Ticaret A.Ş. With him on the brief were *Daniel R. Wilson, Jeffrey S. Grimson, Jill A. Cramer, Kristin H. Mowry*, and *Sarah M. Wyss*, Mowry & Grimson, PLLC, of Washington, DC.

Roger B. Schagrin, John W. Bohn, and *Paul W. Jameson*, Schagrin Associates, of Washington, DC, for plaintiff-intervenors Boomerang Tube LLC, Energex Tube (a Division of JMC Steel Group), Tejas Tubular Products, TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc.

Jeffrey D. Gerrish, Jamieson L. Greer, and *Robert E. Lighthizer*, Skadden Arps Slate Meagher & Flom, LLP, of Washington, DC, for plaintiff-intervenor United States Steel Corporation.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Donald B. Cameron, Brady W. Mills, Julie C. Mendoza, Mary S. Hodgins, R. Will Planert, and *Sarah S. Sprinkle*, Morris, Manning & Martin, LLP, of Washington, DC, for defendant-intervenors Borusan Istikbal Ticaret A.Ş. and Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş.

OPINION

Restani, Judge:

This matter is before the court on plaintiff Maverick Tube Corporation's ("Maverick"), consolidated plaintiffs Çayirova Boru Sanayi ve Ticaret A.Ş., and Tosçelik Profil ve Sac Endüstrisi A.Ş.'s (collectively "Çayirova"), and plaintiff-intervenor United States Steel Corporation's ("U.S. Steel") motions for judgment on the agency record pursuant to USCIT Rule 56.2. These parties contest the U.S. Department of Commerce's ("Commerce") final determination in the antidumping ("AD") investigation of oil country tubular goods ("OCTG")[1] from the Republic of Turkey ("Turkey"). *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances, in Part*, 79 Fed. Reg. 41,971 (Dep't Commerce July 18, 2014) ("*Final Determination*"). The court denies Maverick's and U.S. Steel's motions and grants Çayirova's motion in part and remands the

[1] The OCTG covered by the investigation are "hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (*e.g.*, whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached." *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Determination of Sales at Less than Fair Value and Affirmative Final Determination of Critical Circumstances, in Part*, 79 Fed. Reg. 41,971, 41,971 (Dep't Commerce July 18, 2014) ("*Final Determination*"). Casing is circular pipe that serves as the structural retainer for the walls of oil and gas wells. *See* Issues and Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey at 23, A-489–816, (July 10, 2014), *available at* http://enforcement.trade.gov/frn/summary/turkey/2014–16873–1.pdf (last visited Sept. 15, 2015) ("*I&D Memo*"); Tenaris SA Annual Report at Attach. Ex. P 12, PD 239 (May 12, 2014). It is used to prevent the hole from caving in while drilling is taking place and after the well is completed. Tenaris SA Annual Report at Attach. Ex. P 12. Tubing is usually pipe that is smaller in diameter and installed inside larger-diameter casing to conduct the oil or gas from below ground to the surface. *See id.* OCTG need to withstand harsh working environments and pressures, and thus they are subject to strict quality requirements. *See I&D Memo* at 23.

Also included within the scope of the investigation is OCTG coupling stock. *Final Determination*, 79 Fed. Reg. at 41,971. Excluded from the investigation are casing or tubing containing 10.5% or more by weight of chromium, drill pipe, unattached couplings, and unattached thread protectors. *Id.*

Final Determination to Commerce for reconsideration of the calculation of constructed value profit ("CV profit"). The court also grants, in part, Commerce's request for a remand to reconsider duty drawback.

BACKGROUND

Following a petition by Maverick, U.S. Steel, and others, Commerce initiated an AD investigation into OCTG from Turkey. *Certain Oil Country Tubular Goods from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 78 Fed. Reg. 45,505 (Dep't Commerce July 29, 2013) ("*Initiation Notice*"). The period of investigation ("POI") for the Turkish investigation was July 1, 2012, through June 30, 2013. *Id.* at 45,506. After selecting Borusan Manesmann Boru Sanayi ve Ticaret A.Ş. and Borusan Istikbal Ticaret A.Ş. (collectively, "Borusan"),[2] and Çayirova Bora Sanayi ve Ticaret A.Ş. and its affiliated exporter Yücel Bora Ithalat-Pazarlama A.S. (collectively, "Yücel"), as mandatory respondents, Commerce calculated preliminary margins of 0% and 4.87% for Borusan and Yücel, respectively, and 4.87% for all others. *Certain Oil Country Tubular Goods From the Republic of Turkey: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 79 Fed. Reg. 10,484, 10,486 (Dep't Commerce Feb. 25, 2014) ("*Preliminary Determination*").

In calculating dumping margins, Commerce compares the export price[3] and normal value.[4] *See* 19 U.S.C. § 1677b(a) (2012). Borusan reported home market sales in excess of 5% of its U.S. sales and accordingly, in calculating normal value, Commerce used Borusan's

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[2] Originally both defendant-intervenors Borusan Manesmann Boru Sanayi ve Ticaret A.Ş. and Borusan Istikbal Ticaret were selected as mandatory respondents, however, record evidence established that they were affiliated. *See* Decision Memorandum for the Preliminary Affirmative Determination in the Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey at 9, A-489–816, (Feb. 14, 2014), *available at* http://enforcement.trade.gov/frn/summary/turkey/2014–04108–1.pdf (last visited Sept. 15, 2015) ("*Preliminary I&D Memo*"). Commerce thus treated them as one entity for dumping margin analysis. *Final Determination*, 79 Fed. Reg. at 41,973.

[3] Export price is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a) (2012).

[4] The normal value of the subject merchandise is defined as "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i) (2012). Here, normal value is the price at which OCTG products are sold in Turkey.

home market sales. *See* 19 U.S.C. § 1677b(a)(B)(ii)(II). Yücel, however, did not have any home market or third country sales and thus Commerce calculated normal value using constructed value. *See* 19 U.S.C. § 1677b(a)(4); 19 C.F.R. § 351.405(a) (2014). Constructed value is established by applying a statutory formula, and it includes the sum of the costs of production plus an amount for profit. *See* 19 U.S.C. § 1677b(e); 19 C.F.R. § 351.405(b). In the *Preliminary Determination*, Commerce also granted a duty drawback adjustment to both Borusan and Yücel by increasing the export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B); Decision Memorandum for the Preliminary Affirmative Determination in the Antidumping Duty Investigation of Certain Oil Country Tubular Good from the Republic of Turkey 20, A-489–816, (Feb. 14, 2014), *available at* http://enforcement.trade.gov/frn/summary/turkey/2014–04108–1.pdf (last visited Sept. 15, 2015) ("*Preliminary I&D Memo*").

On July 18, 2014, Commerce issued an affirmative final determination, calculating margins of 0% for Borusan, 35.86% for Yücel, and 35.86% for all others. *Final Determination*, 79 Fed. Reg. at 41,973. The dramatic increase in Yücel's margin from the *Preliminary Determination* to the *Final Determination* was due to Commerce's decision to calculate CV profit using the financial statement of Tenaris S.A., a multinational OCTG company whose financial statements Commerce *sua sponte* placed on the record on May 12, 2014. *See* Issues and Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey at 2, 20–27, A489–816, (July 10, 2014), *available at* http://enforcement.trade.gov/summary/turkey/2014–168731.pdf (last visited Sept. 15, 2015) ("*I&D Memo*"). Yücel's margin was also impacted by Commerce's reduction of its duty drawback adjustment. *Id.* at 16–17.

Maverick and U.S. Steel (collectively "petitioners") challenge Commerce's *Final Determination* on five grounds. First, they argue that Borusan's home market sales were part of an effort to create a "fictitious market" and thus Commerce's reliance on those sales in calculating Borusan's normal value was not supported by substantial evidence. Pl. Maverick Tube Corp.'s Mem. in Supp. of Its Rule 56.2 Mot. for J. on the Agency R. at 10–22, DE 49 ("Maverick Br."); Mot. of Pl. United States Steel Corp. for J. on the Agency R. Under Rule 56.2, DE

46.[5] Second, they argue that Commerce improperly granted Borusan and Yücel (collectively, "respondents") duty drawback adjustments. Maverick Br. at 22–33. Third, they contest Commerce's decision not to treat standard J55 OCTG separately from upgradeable J55 OCTG. *Id.* at 33–36. Fourth, they challenge Commerce's decision to reject factual information showing that Borusan failed to report a potential affiliation. *Id.* at 36–41. Finally, they argue the inclusion of certain Borusan export price sales in its U.S. sales database was improper because Borusan knew those sales would be re-exported to a third country. *Id.* at 41–46.

The government and Borusan respond that Commerce properly used Borusan's home market and export price sales, properly analyzed standard and upgradeable J55 together, and properly rejected undisclosed affiliation allegations as untimely. *See* Def.'s Resp. in Opp'n to Mots. for J. upon the Administrative R. at 8–35, DE 60 ("Gov. Br."); Resp. Br. of Def.-Intvnrs. Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. and Borusan Istikbal Ticaret in Resp. to Pls.' Rule 56.2 Brs. at 12–25, 30–44, DE 63 ("Borusan Resp."). Borusan argues that Commerce properly granted it a duty drawback adjustment. Borusan Resp. at 25–29. The government requests a remand to review the adjustment. Gov. Br. at 52–54.

Çayirova challenges Commerce's *Final Determination* on two grounds. First, Çayirova argues that Commerce improperly denied two-thirds of Yücel's duty drawback adjustment. Br. of Pls. Çayirova Boru Sanayi ve Ticaret A.Ş. and Tosçelik Profil ve Sac Endüstrisi A.Ş. in Supp. of Their Mot. for J. on the Agency R. at 9–18, DE 45 ("Çayirova Br."). Second, Çayirova argues Commerce's calculation of its CV profit based on Tenaris's financial statements was not supported by substantial evidence. *Id.* at 18–40. The government also requests a remand to review Yücel's duty drawback adjustments. Gov. Br. at 52–54. The government and U.S. Steel argue that Commerce properly relied on Tenaris's financial statements in calculating CV profit margin because Yücel's non-OCTG sales in Turkey were not of the same general category of merchandise as OCTG and using Tenaris's financial statements was a reasonable method of calculating CV profit. *See* Gov. Br. at 35–52; U.S. Steel Corp.'s Mem. in Opp'n to the Mot. for J. on the Agency R. Filed By Pls. Çayirova Boru Sanayi ve Ticaret A.Ş. and Tosçelik Profil ve Sac Endüstrisi A.Ş. at 18–23, 27–32, DE 64 ("U.S. Steel Resp.").

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[5] U.S. Steel did not submit its own brief in support of its motion for judgment on the agency record, rather, it adopted the arguments made in Maverick's motion.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's AD investigation determination unless it is "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. Borusan's Home Market Sales

Petitioners challenge Commerce's *Final Determination* by arguing that Commerce improperly relied on Borusan's home market sales in calculating normal value. According to petitioners, they brought timely allegations that Borusan's home market sales were intended to create a "fictitious market." Maverick Br. at 10–14. With respect to their timeliness argument, petitioners claim that to require a specific fictitious market allegation as opposed to a general challenge to the home market would place form over substance. Pl. Maverick Tube Corp.'s Reply Br. at 3, DE 81 ("Maverick Reply"). Petitioners further argue that given the limited nature of oil and gas drilling in Turkey, Borusan had to create a fictitious home market because no legitimate one existed. Maverick Br. at 10. Petitioners argue that the sales were low-volume sales of limited product variety overruns to a longtime purchaser of scrap for use outside of the oil and gas exploration industry which matched with precision certain U.S. sales, making them commercially unreasonable. *Id.* at 11–12; Borusan Home Market Sales Verification at 9, PD 240 (May 14, 2014). These allegations align with petitioners' alternative argument that Borusan's home market sales were not in the ordinary course of trade. Maverick Br. at 14–22.

The government and Borusan respond that petitioners' fictitious market allegations were untimely, unsubstantiated, and that Commerce's decision to rely on Borusan's home market sales in calculating normal value was supported by substantial evidence. Gov. Br. at 8; Borusan Resp. at 12–19. The government notes that decisions about the viability of the home market must be made early as it informs the respondent as to which sales must be reported and because the allegations must be analyzed based on information different from that usually gathered by Commerce. Gov. Br. at 10, 11; Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 821, *reprinted* in 1994 U.S.C.C.A.N. 4040, 4162 ("SAA").[6] Relative to the merits of the fictitious market

[6] Under 19 U.S.C. § 3512(d) "[t]he statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States

allegations, the government cites the fact that Borusan's home market sales represented more than 5% of its U.S. sales as evidence of the viability of the home market. 19 U.S.C. § 1677b(a)(1)(B); 19 C.F.R. § 351.404(b)(1). In response to petitioners' ordinary course of trade arguments, the government and Borusan argue that Commerce verified the home market sales and determined that they were legitimate, arm's-length sales of prime merchandise. Gov. Br. at 18–21; Borusan Resp. at 3, 19–25.

A. *Fictitious Market*

A home market is viable, and thus may be used to calculate normal value, if the aggregate quantity of home market sales of the foreign like product is equal to 5% or more of the aggregate quantity of U.S. sales of subject merchandise. 19 U.S.C. § 1677b(a)(1); 19 C.F.R. § 351.404(b)(2). Borusan had sales to one customer during the POI representing more than 5% of Borusan's U.S. sales. Borusan Home Market Sales Verification at 9–10; Borusan's Suppl. Sections B & C Response at Ex. A-43, CD 120–126 (Jan. 7, 2014). Accordingly, the home market satisfied the viability threshold test based on sales volume. *I&D Memo* at 35.

Under 19 U.S.C. § 1677b(a)(2), "no sale or offer for sale intended to establish a fictitious market, shall be taken into account in determining normal value." The statute gives an example of evidence that may be considered in determining whether sales were intended to create a fictitious market, namely, price movement of different forms of the foreign like product sold in the home market after the issuance of an antidumping duty order, if such price movements appear to reduce the dumping margin. *See* 19 U.S.C. § 1677b(a)(2). The court has determined that this statutory provision is intended to "prevent parties from manipulating dumping margins by either setting up pretend sales, or offering merchandise at a price that does not reflect its actual market price." *PQ Corp. v. United States*, 11 CIT 53, 57, 652 F. Supp. 724, 729 (1987). The statutory example was not intended to be exclusive. Omnibus Trade Act of 1987, S. Rep. No. 100–71, at 126 (1987) ("The purpose of [the amendment including the fictitious market example] is to highlight one particular example of a fictitious market."). Although Commerce has not expanded the fictitious market analysis beyond the situation described in the statutory example, Borusan's argument that the fictitious market analysis is applicable only after the implementation of an AD duty order is without merit as the statute contemplates other possible scenarios in which a fictitious

concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."

market could be created. *See* 19 U.S.C. § 1677b(a)(2) (stating that evidence of price movement after the issuance of an AD order *may* be considered as evidence of a fictitious market).

As a preliminary matter, petitioners' fictitious market allegations were untimely. Petitioners challenged Borusan's home market sales early in the investigation, but they did not make a fictitious market allegation until their case brief. *Compare* Maverick Tube's Pre-Preliminary Comments at 2–6, CD 161 (Jan. 28, 2014) (arguing that Borusan's home market sales were not of prime OCTG or differed from Borusan's U.S. sales products), *with* Maverick Tube Case Brief at 5–14, CD 282 (June 11, 2014) (making express fictitious market allegation). Though there is no statutory deadline for filing fictitious market allegations, the allegations must be made at an early, information-gathering stage of the investigation because they require Commerce to perform an extraordinary analysis. *See, e.g., Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order In Part: Dynamic Random Access Memory Semiconductors of One Megabyte or Above From the Republic of Korea*, 62 Fed. Reg. 39,809, 39,821–22 (Dep't Commerce July 24, 1997) (rejecting fictitious market allegations made in case brief as untimely); Issues and Decision Memorandum for the 2011–2012 Final Results of the Administrative Review on Lightweight Thermal Paper from Germany at 12, A-428–840, (June 18, 2014), *available at* http://enforcement.trade.gov/frn/summary/germany/2014–14243–1.pdf (last visited Sept. 15, 2015) ("*LWTP I&D Memo*") (rejecting a fictitious market allegation as untimely when party failed to use the term fictitious market until after Commerce had completed sales verification). This is in line with the deadlines for other allegations concerning the calculation of normal value. *LWTP I&D Memo* at 12. Accordingly, Commerce's rejection of the fictitious market allegations was reasonable.

Unless there is evidence that a sale was not an arm's-length *bona fide* transaction, there is no need to perform a fictitious market analysis. *Cf. PQ Corp.*, 11 CIT at 58, 652 F. Supp. at 729. Petitioners' allegations were untimely and are insufficient on the merits. Commerce verified Borusan's home market sales and determined them to be legitimate, arm's-length sales of prime merchandise identical to that sold in the United States. Borusan Home Market Sales Verification at 9–10. Additionally, Borusan and the government have provided adequate answers for each of petitioners' arguments concerning the unrepresentative nature of the home market sales. The court credits those arguments as supported by substantial evidence.

First, Borusan's home market sales pattern was adequately explained during verification and petitioners' reliance on rumors of an impending AD investigation as motivation is speculation at best. Borusan Home Market Sales Verification at 8–10. Second, that the sales might have been for use outside of the oil and gas industry is of no moment, as the end use of the product was not specified in the scope of the investigation. *See Initiation Notice*, 78 Fed. Reg. at 45,512. Third, Commerce verified that the home market sales were of prime merchandise made through arm's-length transactions making the fact that the sales were to a longtime customer who typically purchased scrap non-determinative. Borusan Home Market Sales Verification at 8–10. Given Commerce's verification of Borusan's home market sales and Commerce's reasonable interpretation of the circumstances surrounding those sales, Commerce's decision to rely on Borusan's home market sales is supported by substantial evidence and in accordance with law.

B. *Ordinary Course of Trade*

Under 19 U.S.C. § 1677(15), the ordinary course of trade, within which home market sales must be made for normal value calculation purposes, means "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." *See also* 19 U.S.C. § 1677b(a)(1)(b)(i). Commerce has adopted regulations indicating that sales are not made in the ordinary course of trade when they are "extraordinary for the market in question." 19 C.F.R. § 351.102(a)(35). The purpose of requiring sales to be in the ordinary course of trade is to prevent margins from being based on unrepresentative sales. *Monsanto v. United States*, 12 CIT 937, 940, 698 F. Supp. 275, 278 (1988).

Plaintiffs have the burden of proving whether sales used in Commerce's calculations are outside the ordinary course of trade, *Murata Mfg. Co. v. United States*, 17 CIT 259, 263, 820 F. Supp. 603, 606 (1993), and "[a]bsent adequate evidence to the contrary, Commerce will treat sales as within the ordinary course of trade." *NSK Ltd. v. United States*, 30 CIT 142, 151, 416 F. Supp. 2d 1332, 1343 (2006). The court has held that Commerce has some discretion to determine what sales are outside the ordinary course of trade because the statute provides "little assistance in determining what is outside the scope of the definition."[7] *U.S. Steel Corp. v. United States*, 953 F.

[7] The statute provides for two express exclusions, not relevant here, for sales at prices less than the cost of production and transactions between affiliated parties. 19 U.S.C. §§ 1677b(b)(1), 1677b(f)(2).

Supp. 2d 1332, 1341 (2013) (quoting *NSK Ltd. v. United States*, 25 CIT 583, 599, 170 F. Supp. 2d 1280, 1296 (2001)). Commerce's regulations provide examples of sales that could be considered outside the ordinary course of trade: "sales or transactions involving off-quality merchandise or merchandise produced to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm's length price." 19 C.F.R. § 351.102(b)(35). The test is a totality of the circumstances test in which Commerce determines which factors may be more or less significant on a case-by-case basis. *See U.S. Steel Corp.*, 953 F. Supp. 2d at 1342. The SAA "demonstrates a particular concern with extraordinary sales that would lead to irrational or unrepresentative results." *Id.* (internal quotation marks omitted).

Commerce verified that Borusan's home market sales were of prime merchandise made at arm's length and found nothing unusual or unrepresentative in the terms of the sales. Borusan Home Market Sales Verification at 8–10. As discussed with respect to the fictitious market allegations, petitioners' arguments about the unrepresentative nature of the sales are unsupported by the evidence as verified by Commerce. *Id.* The court has determined that sales must have extraordinary characteristics before they can be said to be outside the ordinary course of trade, even if a relatively low percentage of sales will have a large impact on the dumping margin. *See U.S. Steel Corp.*, 953 F. Supp. 2d at 1345–46. Accordingly, petitioners have not carried their burden of showing that the sales were not made within the ordinary course of trade and Commerce's reliance on Borusan's home market sales in calculating the dumping margin is supported by substantial evidence. *See Murata Mfg. Co.*, 17 CIT at 263, 820 F. Supp. at 606.

II. Standard and Upgradeable J55

Petitioners next challenge Commerce's decision not to treat standard and upgradeable J55 grade OCTG separately for dumping margin calculation purposes. Maverick Br. at 33–36. Petitioners argue that the physical, chemical, and mechanical differences, as well as the production techniques, costs, final sales prices and end uses, between standard and upgradeable J55 are significant enough to make Commerce's decision unsupported by substantial evidence. *Id.* at 34–35. Petitioners also argue that Commerce's past practice with respect to standard and upgradeable J55 OCTG is inapposite given the relatively new development of upgradeable J55. Maverick Reply at 15–16. The government and Borusan respond that under API stan-

dards, upgradeable J55 meets all the technical specifications of API 5CT, as does standard J55, and accordingly, Commerce's decision to treat the two as one grade is supported by substantial evidence. Gov. Br. at 22–25; Borusan Resp. at 30–34. Borusan also argues that Commerce has relied upon API grades as a basis for defining identical merchandise in prior OCTG investigations and notes that Maverick did not challenge the product hierarchy in concurrent companion OCTG investigations. Borusan Resp. at 31–32.

To calculate a dumping margin, Commerce first attempts to match U.S. sales of subject merchandise with home market sales of identical merchandise. *See* 19 U.S.C. § 1677(16)(A). Where Commerce cannot identify identical merchandise, it attempts to match U.S. sales to similar merchandise. *See* 19. U.S.C. § 1677(16)(B)–(C). In identifying similar merchandise Commerce uses a model-match methodology based on a hierarchy of product characteristics that are commercially significant to the merchandise at issue. *See JTEKT Corp. v. United States*, 33 CIT 1797, 1805, 675 F. Supp. 2d 1206, 1218 (2009) ("*JTEKT I*"); *Fagersta Stainless AB v. United States*, 32 CIT 889, 893, 577 F. Supp. 2d 1270, 1276 (2008).

Here, Commerce selected ten criteria for matching U.S. sales of subject merchandise with home market sales, namely, "whether or not seamless or welded, type, grade, whether or not coupled, whether or not ends are upset, whether or not ends are threaded, nominal outside diameter, length, heat treatment, and nominal wall thickness." *Preliminary I&D Memo* at 17. Based on these ten criteria, Commerce treated standard and upgradeable J55 as the same grade for the *Final Determination* and did not create a separate upgradeable J55 grade for control number[8] construction purposes. *I&D Memo* at 36. Commerce made this determination because both standard and upgradeable J55 meet all the requirements for API 5CT J55 grade. *Id.*

There is no statutorily mandated method for matching U.S. products with home market products; accordingly, Commerce has discretion in selecting a methodology and the court reviews that choice for reasonableness. *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1379 (Fed. Cir. 2008) (citing *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995)). "Commerce can reasonably rely on industry grading standards to assess commercial significance." *Fagersta*, 32 CIT at 898, 577 F. Supp. 2d at 1280.

[8] A control number means a unique product, defined in terms of the hierarchy of specified physical characteristics, identified as identical merchandise for purposes of price comparison. *See Union Steel v. United States*, 823 F. Supp. 2d 1346, 1349 (CIT 2012).

Preliminarily, petitioners' arguments were not made until after Commerce had issued initial AD questionnaires. The court has upheld Commerce's decision not to revise model-matching criteria when the request was made "at a time that did not allow Commerce to distribute to the various respondents initial questionnaires that would solicit the necessary information to adopt" the model-matching criteria changes. *JTEKT Corp. v. United States*, 37 F. Supp. 3d 1326, 1336 (CIT 2014). Although petitioners argued that the use of steel grade as a product characteristic might be problematic, petitioners initially did not specifically argue for standard and upgradeable J55 to be broken out into separate grades. *See* Petitioners' Comments on Product Characteristics and Model Matching at 3–5, PD 37 (Aug. 5, 2013). Petitioners did not raise this issue until after Commerce had issued its initial AD questionnaires and after respondents had submitted home market and U.S. sales responses in accordance with Commerce's model-matching criteria. *See* Maverick's Comments on Borusan's Response to Initial Sections B&C Questionnaire at 11, PD 95–96 (Nov. 13, 2013). Petitioners' arguments were thus untimely and Commerce's decision not to revise the model-matching method was reasonable.

Commerce's reliance on API standards in evaluating the product characteristic hierarchy was also reasonable. In *Fagersta Stainless AB v. United States*, the court upheld Commerce's decision not to modify the model-matching methodology based on a party's arguments that certain product differences were not fully captured in industry grade designations. 32 CIT at 895–99, 577 F. Supp. 2d at 1279–81. Because the party challenging the model-match methodology did not dispute that the products fell within the same industry grade and "placed no evidence on the record which demonstrates that any relevant industry grading standard reflect a distinction based on [an additional product characteristic]" Commerce did not create a separate product characteristic for model-matching purposes. *Id.* at 898, 577 F. Supp. 2d at 1279. Similarly, here, petitioners argue that the existing industry standards do not capture the physical and chemical differences between standard and upgradeable J55 products. Maverick's Comments on Borusan's Response to Initial Sections B&C Questionnaire at 8–10. Just as in *Fagersta*, however, petitioners have failed to place evidence on the record demonstrating that differences in standard and upgradeable products are reflected in any relevant industry-grading standard.

Further, Petitioners' arguments are based mainly on cost differences between standard and upgradeable J55, but differences in costs

do not constitute differences in products in and of themselves. *Preliminary I&D Memo* at 17; Issues and Decision Memorandum for the Final Results of the Administrative Review of Stainless Steel Wire Rod from Sweden at 11–12, A401–806, (Mar. 5, 2008), *available at* http://enforcement.trade.gov/frn/summary/sweden/E84824–1.pdf (last visited Sept. 16, 2015); Issues and Decision Memorandum for the Antidumping Investigation of Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Turkey; Notice of Final Determination ff [sic] Sales at Less Than Fair Value at Model Match cmt. 1, A-489–808, (Mar. 21, 2000), *available at* http://enforcement.trade.gov/frn/summary/turkey/00–6992–1.txt (last visited Sept. 16, 2015). Petitioners have not put forward evidence establishing that the difference in costs between standard and upgradeable J55 products is due to differences in the products that are not captured by the existing model-matching methodology. Accordingly, it was reasonable for Commerce to rely on API standards in creating its model-matching methodology grades and its decision not to modify the methodology is supported by substantial evidence.

III. Alleged Undisclosed Affiliation

Petitioners next argue that Commerce improperly rejected information regarding an alleged undisclosed Borusan affiliation. Maverick Br. at 36–41. The government and Borusan respond that Commerce properly rejected the information because it was untimely and did not establish an affiliation that should have been reported. Gov. Br. at 25–30; Borusan Resp. at 34–37. The government also argues, and petitioners concede, that petitioners' information failed to comply with Commerce's regulations. Gov. Br. at 25–27; Maverick Br. at 36; Maverick Reply at 16–17.

Commerce has "broad discretion [over] the establishment and enforcement of time limits," *Reiner Brach GmbH v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002), and may "for good cause, extend any time limit." 19 C.F.R. § 351.302(b). In order for an untimely extension request to be considered, however, a party must demonstrate the existence of an "extraordinary circumstance." *See* 19 C.F.R. § 351.302(c). An extraordinary circumstance is an "unexpected event," which cannot be prevented by "reasonable measures," and which "[p]recludes a party . . . from timely filing an extension request." 19 C.F.R. § 351.302(c)(2). Commerce also requires all submissions of factual information to "be accompanied by a written explanation identifying the subsection of § 351.102(b)(21) [defining various types of factual information] under which the information is being

submitted." 19 C.F.R. § 351.301(b). Strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision. *See Dongtai Peak Honey Indus. Co. v. United States*, 971 F. Supp. 2d 1234, 1242 (CIT 2014).

On February 26, 2014, Maverick filed a letter alleging that Borusan had failed to disclose a potential affiliation. *See* Maverick's Letter re: Additional Information on Borusan's Alleged EP Sales at 1–2, CD 191 (Feb. 26, 2014). Maverick concedes that the letter did not comply with Commerce's regulations and was untimely filed. Maverick Br. at 36; Maverick Reply at 16–17. Instead, Maverick argues there was good cause for the delay in filing the information. Maverick Br. at 39–41.

Commerce's decision to reject the information is supported by substantial evidence. The factual information submitted did not identify the type of factual information contained and thus did not comply with Commerce's regulations. Memorandum Regarding Rejection of Documents at 2–3, PD 226 (Mar. 25, 2014). Further, the submission was untimely. *Id.* Finally, it appears that Borusan was under no obligation to disclose the alleged affiliation to Commerce in the first place. The alleged affiliation does not meet the definition of an affiliation as stated in 19 U.S.C. § 1677(33), and referenced in Commerce's questionnaire. *See* Borusan Section A Questionnaire Response at A-13, A-16, CD 17–30 (Sept. 24, 2013). Borusan thus reasonably limited its disclosure to affiliations meeting that definition. Accordingly, Borusan did not fail to provide Commerce with requested information and Maverick has not made a showing of good cause, let alone extraordinary circumstances.[9] Given the broad discretion granted to Commerce in setting and enforcing time limits, as well as the stated legal effect of noncompliance with filing regulations, it was hardly unreasonable for Commerce to reject petitioners' submission.

IV. US Sales

Petitioners next argue that Commerce should have excluded certain Borusan sales from its U.S. sales database in calculating its

[9] Petitioners cite *Certain Welded Carbon Steel Pipes and Tubes from Thailand* in support of their argument. Maverick Br. at 40 (citing *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 17,590, 17,592 (Dep't Commerce, Apr. 10, 1997)). That case is readily distinguishable, however, because at verification Commerce discovered an undisclosed affiliation. *Id.* at 17,593. Here, no such discovery was made.

export price. *See* Maverick Br. at 41. Petitioners contend Commerce should have applied the 'knowledge test'[10] to exclude these sales, as Borusan knew that the merchandise in question was "ultimately destined for a third country." *Id.* at 42. The government and Borusan respond that the disputed sales were properly included as U.S. sales because the merchandise was sold to an unaffiliated purchaser and entered for consumption in the United States. *See* Gov. Br. at 31; Borusan Resp. at 38.

In calculating export price, Commerce uses the "price at which the subject merchandise is first sold . . . to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a). In the case at hand, Commerce interpreted "sales for exportation into the United States" to mean "any sale to an unaffiliated party in which merchandise is to be delivered to a U.S. destination, regardless of whether any underlying paper work may indicate possible subsequent export to a third country." *I&D Memo* at 40. The court in *Hiep Thanh Seafood Joint Stock Co. v. United States* upheld this interpretation. 821 F. Supp. 2d 1335, 1339 (CIT 2012).[11] Just as in that case, here, Commerce verified that the OCTG at issue were delivered to the United States, were entered for consumption, and discovered information that at least some of the OCTG was not subsequently re-exported. *I&D Memo* at 40; Borusan U.S. Sales Verification 10–11, CD 278 (May 16, 2014). Further, as in *Hiep Thanh*, the "bills of lading detail[ed] shipment to a U.S. port," and "title transferred in the United States without any arrangements for further transportation." *Hiep Thanh*, 821 F. Supp. 2d at 1340; *see I&D Memo* at 39–41; Final Determination Analysis Memorandum for Borusan at 2–3, CD 287 (July 10, 2014). Accordingly, though some evidence presented indicates that the buyer was located outside of the United States and that the OCTG were

[10] Where a producer attempts to manipulate its dumping margins by not reporting certain sales that end up being consumed in the U.S., Commerce will include such sales "if the producer knew or had reason to know that the goods were for sale to an unrelated U.S. buyer." *Statement of Administrative Action accompanying the Trade Agreements Act of 1979*, 1979 U.S.C.C.A.N. 381, 682. This is commonly known as the "knowledge test," and is applied in order to "identify[] the first party in a transaction chain with knowledge of U.S. destination where there are multiple entities involved . . . prior to importation." *Hiep Thanh Seafood Joint Stock Co. v. United States*, 821 F. Supp. 2d 1335, 1339 (CIT 2012).

[11] In adopting such an interpretation of sale for "exportation to the United States" in *Hiep Thanh*, Commerce also rejected using the knowledge test based on the circumstances of the case. 821 F. Supp. 2d at 1339–40. The court upheld Commerce's decision not to apply the knowledge test in part because it was inappropriate where "there [were] only two entities involved in the sale of the subject merchandise." *Hiep Thanh*, 821 F. Supp. 2d at 1339. For similar reasons, the knowledge test is equally inapplicable here.

possibly intended for re-exportation, the relevance of such facts is not clear and Commerce's decision is supported by clearly relevant substantial evidence.

V. Duty Drawback Adjustment

Petitioners' last challenge to Commerce's *Final Determination* is that Commerce erred in granting duty drawback adjustments to both Yücel and Borusan. Maverick Br. at 24–33; U.S. Steel Resp. at 10–17. Çayirova also challenges Commerce's duty drawback adjustment on other grounds and argues that Commerce's error was not in granting Yücel a duty drawback adjustment, but in calculating the adjustment. Çayirova Br. at 9–18. The government requests a remand to "reconsider its determination" because it "changed certain aspects of its duty drawback decision between the preliminary and final determinations and did not have the opportunity to consider the impact of those changes or certain arguments now raised before the Court." Gov. Br. at 54. Although Maverick argues the court should grant the government's request, Maverick Reply at 13, Çayirova argues against remand and instead urges the court to address the merits of its duty drawback adjustment arguments. Çayirova Reply at 1–3. Borusan argues that Commerce properly calculated its duty drawback adjustment. Borusan Resp. at 25–29.

In the *Preliminary Determination*, Commerce granted duty drawback adjustments to both Borusan and Yücel. *Preliminary I&D Memo* at 20. In the *Final Determination*, Commerce granted Borusan's duty drawback adjustment as reported, but significantly reduced Yücel's adjustment. *I&D Memo* at 14–18. Commerce denied approximately two-thirds of Yücel's duty drawback adjustment because the Harmonized Tariff Schedule ("HTS") headings under which the products were reported to Turkish customs appear to be non-OCTG headings in the United States. *Id.* at 15–16. Commerce thus determined that because the import duties that were exempted were linked to exports of non-subject merchandise, namely, non-OCTG pipe, Yücel had not properly proved its right to a duty drawback for those exempted import duties. *Id.*

When an agency requests a remand to reconsider voluntarily a determination that is not based on an intervening event, the court has discretion over whether to remand. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Remand is appropriate when the agency's concern is "substantial and legitimate" and inappropriate where the request is "frivolous or in bad faith." *Id.* Here, the government's request is not obviously frivolous and does not appear to be in bad faith, but neither are its reasons for requesting the

unlimited remand as to duty drawback demonstrably substantial and legitimate. The government asks the court to allow Commerce to reconsider its determination because it made changes to the duty drawback adjustments between the preliminary and final determinations. Gov. Br. at 54. Such changes are made in almost every proceeding before Commerce, and substantive changes were made only as to Yücel. None of Commerce's changes to the duty drawback adjustments between the preliminary and final determinations were detrimental to petitioners. Petitioners have raised no new arguments in the current proceeding that were not previously raised before Commerce. *See* Maverick Tube's Resubmitted Case Brief at 35–55, CD 282–283 (June 11, 2014) (arguing that the Turkish system is "lax" and does not properly link exempted imports with exports). Commerce thus had every opportunity to address petitioners' concerns.

To receive the benefit of the duty drawback adjustment, respondents must meet Commerce's two-prong test which determines whether:

> (1) the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, if the exemption is linked to the exportation of the subject merchandise; and (2) the respondent has demonstrated that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise.

Allied Tube & Conduit Corp. v. United States, 29 CIT 502, 506, 374 F. Supp. 2d 1257, 1261 (2005) ("*Allied Tube II*"). The respondent is responsible for proving its entitlement to a favorable adjustment. *Allied Tube & Conduit Corp. v. United States*, 25 CIT 23, 28–29, 132 F. Supp. 2d 1087, 1093 (2001); *see Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1040 (Fed Cir. 1996). The purpose of the adjustment is to "correct for an imbalance resulting from import duties that are factored into home market prices but either rebated or not collected for exported products." *Thai Plastic Bags Indus. Co. v. United States*, 774 F.3d 1366, 1369 (Fed. Cir. 2014).

Relative to Borusan, substantial evidence supported Commerce's decision to grant a duty drawback adjustment and its calculation thereof. Borusan provided detailed evidence of the Turkish inward processing regime for exempting duties on imports and Borusan's measures for linking duty exempted imports to exports of subject merchandise. *See* Borusan's Sections B&C Questionnaire Response at C-41–C-44, CD 33–38 (Oct. 28, 2013); Borusan's Suppl. Sections B&C Questionnaire Response at 32–33. Commerce verified that information and found no discrepancies. Borusan Home Market Sales Veri-

fication at 21–23, CD 275 (May 14, 2014); Borusan Home Market Sales Verification Exs. at Ex. 14, CD 203–221 (Mar. 14, 2014). Commerce's determination was also in accordance with previous cases in which it granted duty drawback adjustments based on the Turkish inward processing regime and for KKDF.[12] *See, e.g., Allied Tube II*, 29 CIT at 506–10, 374 F. Supp. 2d at 1261–64; 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 at 17–18, A-489–501, (Dec. 23, 2013), *available at* http://enforcement.trade.gov/frn/summary/turkey/2013–31344–1.pdf (last visited Sept. 16, 2015). With respect to petitioners' arguments relative to Commerce's exclusion of the exempted import duties from the costs of production, Commerce verified that Borusan's raw materials cost included import duties. *See* Borusan's Cost Verification Report at 26, CD 276 (May 14, 2014); *see also I&D Memo* at 17. Commerce's determination that Borusan had adequately proved its entitlement to a duty drawback adjustment and the calculation of that adjustment accordingly is supported by substantial evidence and in accordance with law. While Commerce may in the future change its views on which circumstances warrant a duty drawback adjustment, no error has been demonstrated here and the government has not said what possible error could exist. The court considered allowing general reconsideration of the drawback issue because another aspect of the issue is remanded, but such action would ignore the tri-party nature of this case and the statutory goal of finality. *See* NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (recognizing the "desirability of finality"); Corus Staal BV v. U. S. Dept. of Commerce*, 27 CIT 388, 391, 259 F. Supp. 2d 1253, 1257 (2003) (holding that in evaluating a request for remand from Commerce, "finality concerns do exist and the agency must state its reasons for requesting remand"). Out of an abundance of caution, however, the court allows the government a brief amount of time to tell the court what error it might have made in this general regard to support its remand request.

For Yücel, the government's remand request is adequately supported. Çayirova argues that even though some of Yücel's products were reported under HTS headings to Turkish customs which would

[12] KKDF, is the Turkish acronym given to an ad valorem tax imposed on raw materials financed using short-term foreign currency loans that is exempted if used to finance imports that will subsequently be exported. Although petitioners argue that this is not an import duty, import duty is not further defined in 19 U.S.C. § 1677a(c)(1)(B). Commerce's interpretation including KKDF as an exempted import duty is reasonable and thus sustained. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844–45 (1984).

appear to be non-OCTG headings in the United States, Commerce should have accepted that the products were OCTG, and because of differences in Turkish HTS provisions, granted Yücel a duty drawback adjustment for exempted import duties linked to exports of those products. It is not clear to the court how Çayirova will support its drawback adjustment claim as a factual matter, but Commerce did make a determination that Çayirova had no opportunity to challenge, and Commerce apparently now wishes to consider additional evidence. Procedural fairness concerns support the government's request. Accordingly, the court denies Çayirova's request to proceed to the merits of its drawback claims and grants this aspect of the government's request for immediate remand.

VI. Constructed Value Profit Margin

Çayirova also argues that Commerce's use of Tenaris's profit to calculate CV profit is unsupported by substantial evidence and unlawful. Çayirova Br. at 18–40. Çayirova contends that Commerce should have used either the profit earned by Yücel on its home market sales of non-OCTG products or a ranged valued based on Borusan's profit on home market sales of OCTG products. Çayirova Br. at 19 n.4, 26–31; Çayirova Reply at 10–11. Çayirova asserts that Commerce's determination that the line pipe and standard pipe sold by Turkish producers and Yücel in the Turkish market were not in the same general category of products as OCTG, is unsupported by substantial evidence and contrary to prior Commerce decisions. Çayirova Br. at 25–31. Çayirova argues that Commerce's methodology was flawed because Commerce failed to compare Yücel's OCTG to its own non-OCTG products and instead relied on a comparison to OCTG generally. *Id.* at 26. Çayirova also highlights certain features of Tenaris's OCTG products and business operations that distinguish it and that render Tenaris's profit rate aberrational and unrepresentative of what Çayirova could expect in selling to the Turkish market. *Id.* at 31–40. Çayirova also argues that any business proprietary information ("BPI") concerns about using Borusan's profit are mitigated by the use of ranged data. *See id.* at 19 n.4. Finally, Çayirova notes Commerce failed to apply a profit cap. *Id.* at 23–25. The court addressed substantially similar arguments in its recent decision in *Husteel Co. v. United States*, Slip Op. 15–100, 2015 WL 5132123 (CIT Sept. 2, 2015), and for analogous reasons holds that these arguments have merit.[13]

[13] The court need not determine whether the parties had an adequate opportunity to respond to Commerce's placement of the Tenaris data on the record, as Commerce's decision otherwise requires remand.

A. *Background*

Constructed value is to include "the actual amounts incurred and realized by the specific exporter or producer being examined . . . for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A). If such data is unavailable, Commerce resorts to one of three statutory alternatives for calculating appropriate amounts for selling, general, and administrative expenses, and profits:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise; [i.e., what is commonly referred to as the "profit cap."]

19 U.S.C. § 1677b(e)(2)(B). The court will refer to these alternatives as "alternative (i)," "alternative (ii)," and "alternative (iii)," respectively. As explained in the SAA, the statute does not create a hierarchy or preference among the alternatives and Commerce has some discretion in choosing among the alternatives. SAA, H.R. Doc. 103–316, vol. 1, at 840, 1994 U.S.C.C.A.N. at 4176. In this case, Commerce determined that the data to calculate a profit figure under § 1677b(e)(2)(A) were unavailable and therefore that it had to rely on one of the alternatives listed in § 1677b(e)(2)(B). *I&D Memo* at 20.

For the *Preliminary Determination*, Commerce relied on alternative (i) and based CV profit on Yücel's sales and cost information for products in the same general category as subject merchandise, namely, non-OCTG products. *Preliminary I&D Memo* at 25. On May 12, 2014, more than two months after the *Preliminary Determination*, Commerce placed on the record the 2012 financial statements of Tenaris. *See I&D Memo* at 2 & n.7. The parties commented on the use of the Tenaris data in their case and rebuttal briefs. *See* Maverick Tube's Case Brief at 33– 35; Çayirova Rebuttal Case Brief at 9–14, CD 284 (June 3, 2014).

For the *Final Determination*, Commerce relied on the profit stated in the 2012 Tenaris financial statements to calculate CV profit pursuant to alternative (iii). *See I&D Memo* at 20. Commerce determined that it could not rely on alternative (i), as it had in the *Preliminary Determination*, because Yücel's non-OCTG pipe products did not fall within the "same general category of products" as required to apply alternative (i). *See id.* at 24. In making that determination, Commerce relied on the fact that OCTG are used in down-hole applications requiring that they withstand extreme conditions and are sold to the oil and gas exploration industry. *Id.* at 22–24. Commerce highlighted the fact that the oil and gas industry had seen an uptick in activity in demand during the POI. *Id.* Non-OCTG pipe, such as line pipe and standard pipe, however, are not used in down-hole applications, and the Turkish producers sold their non-OCTG pipe products to the Turkish construction industry, which is generally unable and unwilling to pay the price premium paid in the oil and gas industry, and which had stagnant activity during the POI. *Id.* Commerce also noted that OCTG require different grades of steel, are subjected to different testing and certification requirements, and are generally connected in ways that are different from non-OCTG products. *See id.* Commerce then determined that it could not use alternative (ii) because of BPI concerns relating to the other respondent, Borusan. *Id.* at 21. Commerce thus resorted to alternative (iii).

In considering the various options for calculating CV profit pursuant to alternative (iii), Commerce determined that the profit reflected in the Tenaris data represented the best information available. *Id.* at 26. Commerce rejected using the profitability of certain Turkish pipe and tube producers because the record evidence contained overall profit figures and Commerce could not analyze the data further to exclude profits from non-OCTG products. *Id.* at 25–26. Commerce also rejected using Borusan's producer level financial statements due to BPI concerns and its public consolidated financials because they

reflected operations for products other than OCTG. *Id.* at 26.[14] Commerce explained that "[a]s OCTG is a very specialized premium product used exclusively in the oil and gas exploration industry with significant quality differences, different end uses, different end customers, and different demand patterns than those of non-OCTG pipe, it is important that we rely on a source that closely reflects such a product." *Id.* Commerce selected Tenaris's financial statements as the best available information because its sales consisted primarily of OCTG and the majority of its OCTG sales were to non-U.S. customers. *Id.* Commerce further reasoned that "[b]ecause Tenaris is an OCTG producer that sells a broad range of OCTG, and in virtually every market in which OCTG is sold, we find that its average profit experience is representative of sales of OCTG across a broad range of different geographic markets." *Id.*

In the *Final Determination*, Commerce also determined it could not calculate and apply a profit cap under alternative (iii), because Commerce did "not have home market data for other exporters and producers in Turkey of the same general category of products." *Id.* This was in part because the information on the record concerning the profitability of certain Turkish producers did not isolate OCTG product data. *Id.* Commerce also rejected using Borusan's information for profit cap purposes based on BPI concerns. *Id.* at 26 n.84.

B. *Analysis*

Commerce's reliance on the Tenaris 2012 profit margin without a profit cap as the best available information for calculating CV profit is unsupported by substantial evidence and not in accordance with law. Tenaris is a massive multinational producer of predominantly premium seamless OCTG that had no production or sales in Turkey during the POI. In the light of the other record evidence Commerce could have used and in the light of the fact that Commerce did not even attempt to calculate a profit cap, the calculation of Yücel's CV profit is remanded to Commerce for reconsideration.

When Commerce used Tenaris's financial statements to calculate CV profit, it relied on alternative (iii), which provides that Commerce may use

> the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other rea-

[14] Commerce also considered and rejected using profit data on the record from several Indian OCTG producers. *See I&D Memo* at 25. No party has suggested that Commerce should have used the profit contained in any of these financial statements to calculate CV profit.

> sonable method, *except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise . . . .*

19 U.S.C. § 1677b(e)(2)(B)(iii) (emphasis added). Commerce determined that it lacked public record evidence regarding "the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." *Id.; see I&D Memo* at 26–27. This determination is not supported by substantial evidence.

The SAA states

> The Administration also recognizes that where, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a "profit cap" under alternative (3), it might have to apply alternative (3) on the basis of "the facts available." This ensures that Commerce can use alternative (3) when it cannot calculate the profit normally realized by other companies on sales of the same general category of products.

SAA, H.R. Doc. No. 103–316, vol. 1, at 841, 1994 U.S.C.C.A.N. at 4177. Even assuming that Commerce reasonably concluded that the record lacked public data regarding the profit normally realized by Turkish producers on Turkish sales of merchandise in the same general category of products, Commerce still was required to attempt to apply a profit cap on the basis of the facts available. In *Geum Poong Corp. v. United States*, the court explained, "[i]f Alternative Three without the profit cap may be used as 'facts available,' it would seem a 'facts available' profit cap may also be used." 25 CIT 1089, 1097, 163 F. Supp. 2d 669, 679 (2001). "Because the statute mandates the application of a profit cap, Commerce cannot sidestep the requirement without giving adequate explanation even in a facts available scenario." *Id.* ; *accord Atar, S.r.l. v. United States*, 34 CIT 465, 470, 703 F. Supp. 2d 1359, 1364 (2010), *rev'd on other grounds*, 730 F.3d 1320 (Fed. Cir. 2013) ("But even the exception for absence of record data does not allow Commerce to ignore the profit cap requirement entirely when determining constructed value profit. Where the record lacks data on profit normally realized by other companies on sales of the same general category of products, Commerce still must attempt

to comply with the profit cap requirement through the use of facts otherwise available.").[15] Thus, even when the record evidence is deficient for the purposes of calculating the profit cap, Commerce must attempt to calculate a profit cap based on the facts otherwise available, and it may dispense with the profit cap entirely only if it provides an adequate explanation as to why the available data would render any cap based on facts available unrepresentative or inaccurate. *See Geum Poong Corp. v. United States*, 26 CIT 322, 324, 193 F. Supp. 2d 1363, 1367 (2002) ("*Geum Poong II*").

Here, Commerce failed to provide an adequate explanation as to why it dispensed with the profit cap requirement. The entirety of Commerce's discussion regarding the profit cap was limited to a single paragraph with the crux of its explanation being that it did "not have home market data for other exporters and producers in Turkey of the same general category of products." *See I&D Memo* at 26–27. This explanation falls short of the standard expressed in the court's prior cases, which the court adopts here. As best the court can determine, Commerce completely failed to consider the possibility of applying a facts available profit cap, based on an erroneous legal conclusion. Commerce certainly did not explain why the use of such a profit cap would render the CV profit unreasonable and unrepresentative for Yücel. It also did not explain why the use of a profit cap based on a range derived from Borusan's confidential profit margin could not be used.

The use of an appropriate profit cap seems especially important in this case. The goal in calculating CV profit is to approximate the home market profit experience of a respondent. *See Geum Poong II*, 26 CIT at 327, 193 F. Supp. 2d at 1370. The profit data imbedded in Tenaris's financial statements do not appear to be based on any sales or production in Turkey. Tenaris's data therefore appear to be relatively poor surrogates for the home market experience. Additionally, record evidence suggests that Tenaris is a massive producer of OCTG with production and associated services around the world. *See, e.g.*, Tenaris SA Annual Report at Attach. Ex. P 12. Record evidence also suggests that Tenaris's profits are among the highest in the world and that this profit figure is due in large part to Tenaris's sales of unique, high-end, seamless OCTG products and global services. *See id.* at 19–20. Çayirova, on the other hand, appears to be rather modest in comparison, both in the size of its operations and in the products and

[15] It appears that in arguing against the use of alternative (iii) before the agency, Çayirova stated that there was no evidence on the record from which to calculate a profit cap and therefore Commerce was not permitted to use alternative (iii). Çayirova Br. at 21–22. As a statutory requirement, however, Commerce still was required to attempt to calculate a profit cap.

services it offers; it also produces exclusively welded OCTG. As Commerce recognized in the preamble to its own regulations, "the sales used as the basis for CV profit should not lead to irrational or unrepresentative results." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,360 (Dep't Commerce May 19, 1997); *see also Thai I-Mei Frozen Foods Co. v. United States*, 32 CIT 865, 883, 572 F. Supp. 2d 1353, 1368 (2008) ("An unreasonably high profit estimate will defeat the fundamental statutory purpose of achieving a fair comparison between normal value and export price."), *rev'd on other grounds*, 616 F.3d 1300 (Fed. Cir. 2010). Dispensing with the profit cap requirement entirely in this case could run the risk that the CV profit rate will be unrepresentative of Çayirova's expected home market experience.

On remand, Commerce is to reconsider the entire issue of CV profit. If Commerce continues to calculate CV profit pursuant to alternative (iii), Commerce must either apply a profit cap or provide an adequate explanation as to why data on the record cannot be used to calculate a facts available profit cap. In particular, Commerce must provide explanation beyond BPI concerns for failing to use a cap based on ranged data from Borusan's home market sales.

C. *Çayirova's Additional Arguments*

Because the court is remanding for Commerce to reconsider its calculation of CV profit, the court deems it premature and inefficient at this point to decide finally the bulk of the other arguments raised by Çayirova about why the various sources of Turkish data should have been used instead of the Tenaris data. These arguments may be rendered moot following remand.

While the court does not specifically resolve Çayirova's claims relative to Commerce's determination that its non-OCTG products are not in the "same general category of products" as OCTG products, Commerce must reexamine its determination on remand. Certain aspects of Commerce's reasoning supporting its determination that Turkish non-OCTG products are not in the "same general category of products" as OCTG indicate that Commerce has impermissibly interpreted that term. Specifically, Commerce's reliance on the specific market conditions in the construction industry and oil and gas industry during the POI is misplaced. Commerce's reasoning suggests that the weak demand in the construction industry coupled with the strong demand in the oil and gas industry was an important factor it considered. *See I&D Memo* at 24. Such logic suggests that if the demand dynamics in the two industries during the POI had been reversed, Commerce's conclusion regarding the same general cat-

egory of products might have been different. This insinuates that products might be within the same general category one year, but outside that category the next because of general market conditions. The court doubts that the general category of products can be defined by such temporary factors.

Further, Commerce's treatment of the testing and certification requirements for OCTG is problematic. *See id.* at 23. If so-called "non-OCTG" pipe products meet those testing and certification requirements, it seems that they would be in the same general category as OCTG. The SAA indicates that the "same general category of products" "encompasses a category of merchandise broader than the 'foreign like product.'" SAA, H.R. Doc. No. 103–316, vol. 1, at 840, 1994 U.S.C.C.A.N. at 4176. Commerce's reasoning suggests that because "non-OCTG" pipe cannot be classified as OCTG, then it cannot be within the same general category of products. If Commerce so concluded, it may have improperly limited the same general category of products to the foreign like product.[16] On remand, Commerce must either omit these considerations from its analysis or provide an adequate explanation as to why these are appropriate factors for it to consider in determining which products fall within the same general category of products as OCTG.

Additionally, the court views as substantial Çayirova's argument that Commerce was required to compare its specific OCTG and non-OCTG products as opposed to OCTG products generally in making a "same general category of products" determination. In choosing between financial statements available in the record, Commerce weighs "1) the similarity of the potential surrogate companies' business operations and products to the respondent's business operations and

[16] The court also notes that in the past, Commerce has relied on sales of non-OCTG pipes to calculate CV profit for OCTG products. *See Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Preliminary Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 51,793, 51,796 (Dep't Commerce Sept. 11, 2007) (using financial statement including sales of non-OCTG products to calculate OCTG CV profit), *unchanged in Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 14,439 (Dep't Commerce Mar. 18, 2008); *Certain Oil Country Tubular Goods from Mexico; Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission*, 71 Fed. Reg. 27,676, 27,679 (Dep't Commerce May 12, 2006) ("[W]e based our profit calculations and indirect selling expenses on the income statement of Hylsa's tubular products division, a general pipe division that produces OCTG and products in the same general category."), *unchanged in Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Oil Country Tubular Goods from Mexico*, 71 Fed. Reg. 54,614 (Dep't Commerce Sept. 18, 2006). Commerce may depart from past practices for good reason, but must provide a reasoned explanation for its departure. *See Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1378 n.5 (Fed. Cir. 2007). Here, Commerce has not provided an adequate explanation based on appropriate considerations for such a departure.

products; 2) the extent to which the financial data of the surrogate company reflect sales in the home market and do not reflect sales to the United States; [] 3) the contemporaneity of the data to the POI . . . [and 4)] the extent to which the customer base of the surrogate and the respondent were similar." *I&D Memo* at 24–25. "In applying this test, Commerce consistently takes the position that the greater the similarity in business operations and products, the more likely that there is a greater correlation in the profit experience of the companies." *Mid Continent Nail Corp. v. United States*, 999 F. Supp. 2d 1307, 1324 (CIT 2014) (internal quotation marks and alteration omitted). Because the object of calculating CV profit appears to be to approximate the experience a respondent would have if it had home market sales of a foreign like product, reference to some standard OCTG and non-OCTG pipe may be insufficient in the light of Commerce's mandate to calculate dumping margins as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). On remand Commerce must evaluate CV profit sources based on their suitability for valuing Çayirova's CV profit, rather than their suitability for any OCTG producer.

Finally, on remand, Commerce must provide further explanation for its decision not to rely on alternative (ii). Although courts have previously upheld Commerce's rejection of alternative (ii) because of BPI concerns, *Geum Poong*, 25 CIT at 1092, 163 F. Supp. 2d at 674, and Commerce's rejection of ranged data because they were imprecise and did not match the segmented operations reported at issue, *Mid Continent Nail*, 999 F. Supp. 2d at 1325–26 (upholding Commerce's decision not to rely on ranged public data of confidential profit margin because public version was untimely submitted), Commerce's summary rejection of alternative (ii) requires reexamination. The government correctly notes that Commerce has discretion in choosing among the alternatives under 19 U.S.C. § 1677b(e)(2)(B), but even when an agency has discretion, "[a]n agency 'must cogently explain why it has exercised its discretion in a given manner.'" *Changzhou Hawd Flooring Co. v. United States*, 44 F. Supp. 3d 1376, 1390 (CIT 2015) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 48 (1983)). Commerce failed to provide adequate reasoning for refusing to consider a ranged profit margin based on Borusan's home market sales as a potential CV profit. Commerce's single sentence stating that it could not rely on alternative (ii) for BPI concerns falls below the standard set forth in the court's prior decisions.

CONCLUSION

For the forgoing reasons, Commerce's *Final Determination* is remanded in part for Commerce to reconsider its calculation of CV profit and its partial denial of Yücel's duty drawback adjustment. Commerce has until October 1, 2015, to advise the court if it requests remand to consider its overall drawback determination and to support such a request with adequate reasoning. In all other respects, Commerce's *Final Determination* is sustained. Commerce shall have until November 25, 2015, to file its remand results. The parties shall have until December 28, 2015, to file objections, and the government shall have until January 27, 2016, to file its response.

Dated: September 24, 2015
New York, New York

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

Slip Op. 15–108

THE FLORIDA TOMATO EXCHANGE, Plaintiff, v. UNITED STATES, Defendant, and CAADES SINALOA, A.C., CONSEJO AGRICOLA DE BAJA CALIFORNIA, A.C., ASOCIACION MEXICANA DE HORTICULTURA PROTEGIDA, A.C., UNION AGRICOLA REGIONAL DE SONORA PRODUCTORES DE HORTALIZAS FRUTAS Y LEGUMBRES, and CONFEDERACION NACIONAL DE PRODUCTORES DE HORTALIZAS, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 13–00148

[Plaintiff's motion for judgment on the agency record is granted, in part, and the case is remanded.]

Dated: September 24, 2015

Terence P. Stewart, Stewart and Stewart, of Washington, DC, argued for plaintiff. With him on the brief were *Geert De Prest*, *Patrick J. McDonough*, and *Nicholas J. Birch*.

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr., Assistant Director. Of counsel on the brief was Rebecca Cantu, Senior Attorney,* Office of Chief Counsel for Import Administration, United States Department of Commerce, of Washington, DC.

Thomas B. Wilner, Shearman & Sterling LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief were *Robert S. LaRussa* and *Bryan Dayton*.

OPINION AND ORDER

EATON, Judge:

This matter is before the court on plaintiff The Florida Tomato Exchange's (the "Tomato Exchange" or "plaintiff") USCIT Rule 56.2 motion for judgment on the agency record. *See* Pl.'s Rule 56.2 Mot. for J. on the Agency R. (ECF Dkt. No. 30) ("Pl.'s Mot."). Plaintiff is a trade association representing growers and first handlers of the domestic like product of the subject merchandise.[1] *See* Summons ¶ 1 (ECF Dkt. No. 1). By its motion, plaintiff challenges the United States Department of Commerce's ("Commerce" or the "Department") agreement with producers and exporters of the subject merchandise, defendant-intervenors CAADES Sinaloa, A.C., Consejo Agrícola de Baja California, A.C., Asociación Mexicana de Horticultura Protegida, A.C., Unión Agrícola Regional de Sonora Productores de Hortalizas Frutas y Legumbres, and Confederación Nacional de Productores de Hortalizas (collectively, "defendant-intervenors"). *See* Pl.'s Mot. 1–2. Defendant-intervenors, each associations of Mexican producers and exporters of the subject merchandise, account for substantially all imports of fresh tomatoes from Mexico. *See* Consent Mot. to Intervene as of Right as Def.-Ints. 1–2 (ECF Dkt. No. 15). The agreement suspends the antidumping duty investigation on fresh tomatoes from Mexico entered into pursuant to 19 U.S.C. § 1673c(c) (2012), published as *Fresh Tomatoes From Mexico*, 78 Fed. Reg. 14,967 (Dep't of Commerce Mar. 8, 2013) (suspension of antidumping investigation) ("2013 Suspension Agreement").

The Tomato Exchange contests five aspects of the 2013 Suspension Agreement: (1) Commerce's determination that the agreement would limit dumping to the extent required by the statute; (2) Commerce's determination that the suspension agreement would prevent price suppression and price undercutting; (3) Commerce's determination that the injurious effects of the dumped imports would be eliminated; (4) Commerce's determination that the suspension agreement would

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[1] The subject merchandise is described in the 2013 Suspension Agreement as follows:

> [A]ll fresh or chilled tomatoes (fresh tomatoes) which have Mexico as their origin, except for those tomatoes which are for processing. . . . [P]rocessing is defined to include preserving by any commercial process, such as canning, dehydrating, drying, or the addition of chemical substances, or converting the tomato product into juices, sauces, or purees. Fresh tomatoes that are imported for cutting up, not further processing . . . are covered by this Agreement.
>
> . . . .
>
> Tomatoes imported from Mexico covered by this investigation are classified under the following subheading of the Harmonized Tariff Schedules of the United States (HTSUS), according to the season of importation: 0702.

Fresh Tomatoes From Mexico, 78 Fed. Reg. 14,967, 14,967 (Dep't of Commerce Mar. 8, 2013) (suspension of antidumping investigation).

be more beneficial to the domestic industry than the continuation of the investigation; and (5) Commerce's failure to comply with the notice, comment, and consultation requirements of the suspension agreement statute before suspending the investigation. *See* Pl.'s Mem. of P. & A. in Supp. of its Mot. for J. on the Agency R. 1–2, 32 & n.14 (ECF Dkt. No. 30) ("Pl.'s Br."). Plaintiff thus urges that the 2013 Suspension Agreement be remanded to Commerce with instructions that it reconsider its determination to suspend the investigation and enter into the 2013 Suspension Agreement. *See* Pl.'s Mot. 3.

Defendant, the United States, opposes plaintiff's motion and asks that the 2013 Suspension Agreement be sustained in full. *See* Def.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R. 2 (ECF Dkt. No. 42). Defendant-intervenors join in opposition to plaintiff's motion. *See* Def.-Ints.' Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. (ECF Dkt. No. 40) ("Def.-Ints.' Br."). Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I), (B)(iv). For the reasons set forth below, Commerce's determination to suspend the investigation and enter into the 2013 Suspension Agreement is remanded with instructions to adhere to the notice, comment, and consultation requirements set forth in the suspension agreement statute. *See* 19 U.S.C. § 1673c(e).

STANDARD OF REVIEW

"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).

LEGAL FRAMEWORK

Pursuant to 19 U.S.C. § 1673c(c), the Department is authorized, under limited circumstances, to suspend an antidumping investigation by entering into a settlement agreement with exporters "who account for substantially all of the imports of [subject] merchandise into the United States." 19 U.S.C. § 1673c(c). Such agreements are thus an atypical remedy in that they are entered into with the foreign industry that a petitioner has asserted is making sales at less than fair value into the United States, but neither the petitioner nor any industry representative is a signatory to the agreement. *See* S. Rep. No. 96–249, at 71 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 457 ("[S]uspension is an unusual action which should not become the normal means for disposing of cases."). Congress, in providing for such agreements, intended that they be used "as a means of achieving the remedial purposes of the [antidumping] law in as short a time as possible and with a minimum expenditure of resources by all parties

involved." H.R. Rep. No. 96–317, at 63 (1979); *see also PPG Indus., Inc. v. United States*, 11 CIT 344, 355, 662 F. Supp. 258, 267 (1987) ("A separate investigation of [the exporter, Fomento Comercio Exterior,] would have impermissibly expanded the scope and duration of the investigation and violated congressional desire that suspension agreements lead to rapid resolution of the issues."), *aff'd*, 928 F.2d 1568 (Fed. Cir. 1991). Nonetheless, as shall be seen, it was not Congress's intent that the domestic industry should be a complete stranger to the proceedings leading up to the execution of a suspension agreement or to efforts to continue or terminate it.

There are three[2] types of suspension agreements, the availability of each of which is circumscribed by statute. *See* 19 U.S.C. § 1673c(b), (c), (*l*). The most common of these is an agreement pursuant to 19 U.S.C. § 1673c(b) ("subsection (b) agreement"), by which all sales made by exporters at less than fair value must be completely eliminated by the suspension agreement.[3] *Id.* § 1673c(b). In this case, however, Commerce entered into a second type of agreement found in 19 U.S.C. § 1673c(c) ("subsection (c) agreement"). Unlike subsection (b) agreements, subsection (c) agreements need not eliminate dumping completely. In order to enter into a subsection (c) agreement, though, extraordinary circumstances must be present. *Id.* § 1673c(c)(1). The statute defines "extraordinary circumstances" as those "in which . . . (i) suspension of an investigation will be more beneficial to the domestic industry than continuation of the investigation, and (ii) the investigation is complex." *Id.* § 1673c(c)(2)(A). An investigation is considered complex when either "(i) there are a large number of transactions to be investigated or adjustments to be considered, (ii) the issues raised are novel, or (iii) the number of firms involved is large." *Id.* § 1673c(c)(2)(B).

Once the Department determines that extraordinary circumstances are present, it may suspend the investigation under a subsection (c) agreement "upon the acceptance of an agreement to revise prices from exporters of the subject merchandise who account for substantially all of the imports of that merchandise into the United States." *Id.* § 1673c(c)(1). Commerce may only enter into a subsection (c) agreement

[2] Because Mexico is a market economy country, the special rule of 19 U.S.C. § 1673c(*l*) governing suspension agreements with nonmarket economy countries is not relevant here. *See Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 27 CIT 1827, 1835 n.17 (2003); *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1510, 460 F. Supp. 2d 1338, 1363 (2006).

[3] Under a subsection (b) agreement, which is not relevant here, exporters must agree to either cease exports of the subject merchandise altogether or completely eliminate sales of the subject merchandise at less than fair value to the United States. *See* 19 U.S.C. § 1673c(b).

if (1) "the agreement will eliminate completely the injurious effect of exports to the United States of that merchandise," (2) "the suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented,"[4] and (3) the agreement ensures that,

> for each entry of each exporter the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or the constructed export price) for all less-than-fair-value entries of the exporter examined during the course of the investigation.

Id. In other words, to enter into a subsection (c) agreement, Commerce must be satisfied that the agreement will eliminate at least 85 percent of dumping by finding that the dumping margin of each entry will not exceed 15 percent of the weighted average dumping margin preliminarily determined (1) for the exporter in the less-than-fair-value investigation that is to be suspended, or (2) the all-others rate in the case of exporters that were not selected for individual examination by the Department. Further, the Department may not enter into a suspension agreement of any kind unless "(1) it is satisfied that suspension of the investigation is in the public interest, and (2) effective monitoring of the agreement by the United States is practicable." *Id.* § 1673c(d).

Importantly, before an investigation may be suspended, the Department must "notify the petitioner [in the investigation] of, and consult with the petitioner concerning, its intention to suspend the investigation, and notify other parties to the investigation and the [International Trade Commission ('ITC' or 'Commission')] not less than 30 days before the date on which it suspends the investigation." *Id.* § 1673c(e)(1). In addition, Commerce must "provide a copy of the proposed agreement to the petitioner at the time of the notification,

[4] Notably, these determinations are usually the province of the International Trade Commission. *See Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 27 CIT 1827, 1839–40 (2003) ("The most convincing evidence that the reference price utilized in the Suspension Agreement was not designed to eliminate the dumping margin, however, is that it was arrived at by using none of the tools used in an antidumping case, i.e., a fair comparison of the normal value and export price. Rather, it was determined by reference to a number representing 92% of 'the weighted-average of the honey unit import values from all other countries.' Subsection (b) agreements, by contrast, normally include provisions relating to the establishment of normal value." (quoting *Honey From the People's Republic of China*, 60 Fed. Reg. 42,521, 42,524 (Dep't of Commerce Aug. 16, 1995) (suspension of investigation))), *rev'd and remanded on other grounds*, 432 F.3d 1363 (Fed. Cir. 2005).

together with an explanation of how the agreement will be carried out and enforced, and of how the agreement will meet the requirements of" the statute. *Id.* § 1673c(e)(2). Moreover, the Department must "permit all interested parties . . . to submit comments and information for the record before the date on which notice of suspension of the investigation is published," i.e., before the suspension agreement goes into effect. *Id.* § 1673c(e)(3).

Even after the suspension of the investigation, Commerce has responsibilities relating to the suspension of an investigation and to the suspension agreement itself. If the Department receives a request for continuation of the investigation "within 20 days after the date of publication of the notice of suspension of an investigation" from "exporters accounting for a significant proportion of exports to the United States of the subject merchandise, or . . . an interested party . . . which is a party to the investigation, then the [Department] and the Commission shall continue the investigation." *Id.* § 1673c(g). Following the suspension of an investigation, parties may request an annual review by Commerce of "the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement." *Id.* § 1675(a)(1)(C).

Last, for subsection (c) agreements, interested parties are afforded an additional tool to secure compliance by the signatories with the terms of the agreement and to ensure that the agreement is achieving its intended goal of eliminating the injurious effects of exports to the United States of subject merchandise: "Within 20 days after the suspension of an investigation[,] . . . an interested party which is a party to the investigation . . . may, by petition filed with the Commission and with notice to the administering authority, ask for a review of the suspension." *Id.* § 1673c(h)(1). Following the receipt of such a petition, the ITC "shall, within 75 days after the date on which the petition is filed with it, determine whether the injurious effect of imports of the subject merchandise is eliminated completely by the agreement." *Id.* § 1673c(h)(2). Should the Commission make a negative determination, Commerce is directed to resume its investigation "on the date of publication of notice of such determination as if the affirmative preliminary determination . . . had been made on that date." *Id.* Thus, the statutory scheme envisions an important and continuing role for the parties to an investigation in the period leading up to the execution of a suspension agreement and thereafter.

BACKGROUND

In April 1996, following the receipt of an antidumping duty petition,[5] Commerce initiated an antidumping investigation to determine whether imports of fresh tomatoes from Mexico were being, or were likely to be, sold in the United States at less than fair value. *See Fresh Tomatoes From Mexico*, 61 Fed. Reg. 18,377, 18,377 (Dep't of Commerce Apr. 25, 1996) (initiation of antidumping duty investigation). Following the ITC's affirmative preliminary injury determination, Commerce published a preliminary determination of its own on November 1, 1996, finding that fresh tomatoes from Mexico were being sold at less than fair value in the United States. *Fresh Tomatoes From Mexico*, 61 Fed. Reg. 56,608, 56,608 (Dep't of Commerce Nov. 1, 1996) (notice of preliminary determination of sales at less than fair value and postponement of final determination). On that same day, Commerce finalized a subsection (c) suspension agreement with Mexican producers and exporters, which accounted for substantially all[6] of the United States imports of fresh tomatoes from Mexico, to suspend the investigation. *See* Fresh Tomatoes From Mexico, 61 Fed. Reg. 56,618, 56,618 (Dep't of Commerce Nov. 1, 1996) (suspension of antidumping investigation) ("1996 Suspension Agreement"). To prevent price suppression and price undercutting, the 1996 Suspension Agreement required each Mexican grower and exporter that was a party to the agreement not to sell its fresh tomatoes below a single-established reference price.[7] *See* 1996 Suspension Agreement, 61 Fed. Reg. at 56,618. The agreement was amended in August 1998 to create two reference prices, distinguishing the price for tomatoes sold during the summer season from the winter season. *See Amendment to the Suspension Agreement on Fresh Tomatoes from Mexico*, 63 Fed. Reg. 43,674, 43,674–75 (Dep't of Commerce Aug. 14, 1998).

Nearly ten years later, and after a second, modified suspension agreement was entered into in 2002 and terminated thereafter, Commerce entered into a new suspension agreement with Mexican grow-

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[5] Plaintiff was one of the six petitioners in these proceedings. *See Fresh Tomatoes From Mexico*, 61 Fed. Reg. 18,377, 18,377 (Dep't of Commerce Apr. 25, 1996) (initiation of antidumping duty investigation).

[6] Pursuant to Commerce's regulations,

> exporters that account for "substantially all" of the merchandise means exporters and producers that have accounted for not less than 85 percent by value or volume of the subject merchandise during the period for which the Secretary [of Commerce] is measuring dumping or countervailable subsidization in the investigation or such other period that the Secretary [of Commerce] considers representative.

19 C.F.R. § 351.208(c) (2012) (recodified from 19 C.F.R. § 353.18(c) (1995)).

[7] A "reference price" is "a minimum price at which the signatories [to a suspension agreement] c[an] sell subject merchandise in the United States." *Fla. Tomato Exch. v. United States*, 38 CIT __, __, 973 F. Supp. 2d 1334, 1336 (2014).

ers and exporters on January 22, 2008. *See Fresh Tomatoes From Mexico*, 73 Fed. Reg. 4,831, 4,831–32 (Dep't of Commerce Jan. 28, 2008) (suspension of antidumping investigation) ("2008 Suspension Agreement"). The agreement maintained the reference prices established in the previous agreement of $0.2169 per pound for the winter season (i.e., October 23 through June 30) and $0.172 per pound for the summer season (i.e., July 1 through October 22). *Id.* at 4,836.

This agreement was in effect for over four years when, on June 22, 2012, domestic producers accounting for more than 90 percent of the domestic industry[8] "filed a request for withdrawal of the petition and termination of the [suspended] investigation and the suspension agreement" based on changed circumstances. *Fresh Tomatoes From Mexico*, 77 Fed. Reg. 60,103, 60,103 (Dep't of Commerce Oct. 2, 2012) (notice of preliminary results of changed circumstances review and intent to terminate the suspended antidumping investigation). In August 2012, the Department determined that a changed circumstances review was warranted and provided notice that it was initiating such a review. *Fresh Tomatoes from Mexico*, 77 Fed. Reg. 50,554 (Dep't of Commerce Aug. 21, 2012) (notice of initiation of changed circumstances review); *Correction: Fresh Tomatoes From Mexico*, 77 Fed. Reg. 50,556 (Dep't of Commerce Aug. 21, 2012) (notice of initiation of changed circumstances review and consideration of termination of suspended investigation). As a result, certain Mexican signatories requested consultations with the Department pursuant to the terms of the 2008 Suspension Agreement, to which the Department agreed. *See* Letter from Bryan Dayton, Shearman & Sterling LLP, Counsel for defendant-intervenors, to Hon. Rebecca M. Blank, Acting Secretary of Commerce, U.S. Department of Commerce, PD 77 at bar code 3092122–01 (Aug. 15, 2012), ECF Dkt. No. 54–77.

Between September 2012 and February 2013, Commerce and the Mexican industry met to discuss the issues of reference prices, signatory coverage, and enforcement of a new suspension agreement. Following these consultations, a new suspension agreement was proposed and initialed by Commerce and the Mexican growers and exporters. *See* 2013 Suspension Agreement, 78 Fed. Reg. at 14,967. The proposed agreement was submitted to interested parties for comment

[8] Those domestic producers included the Tomato Exchange (plaintiff), the Florida Tomato Growers Exchange, the Florida Fruit and Vegetable Association, the Florida Farm Bureau Federation, the Gadsen County Tomato Growers Association, Inc., the South Carolina Tomato Association, Inc., and the Ad Hoc Group of Florida, California, Georgia, Pennsylvania, South Carolina, Tennessee, and Virginia Tomato Growers. *Fresh Tomatoes from Mexico*, 77 Fed. Reg. 50,554, 50,554 (Dep't of Commerce Aug. 21, 2012) (notice of initiation of changed circumstances review).

between February 2, 2013 and February 11, 2013. *See* Letter from Judith Wey Rudman, Director for Bilateral Agreements, Office of Policy, U.S. Department of Commerce, to All Interested Parties at 1, PD 4, at barcode 3117540–01 (Feb. 2, 2013), ECF Dkt. No. 54–1 ("Draft 2013 Suspension Agreement"). At the time it provided a draft of the suspension agreement to interested parties, however, Commerce did not make available its explanatory memoranda, which provided the specific details of how the agreement would be carried out and enforced.

On March 4, 2013, the Department and Mexican growers and exporters signed the new suspension agreement, thereby again suspending the investigation of fresh tomatoes, and on March 8, 2013, the Department announced the execution of the 2013 Suspension Agreement. *See* 2013 Suspension Agreement, 78 Fed. Reg. at 14,967. Unlike the 1996, 2002, and 2008 suspension agreements, the 2013 Suspension Agreement established both a summer season and winter season reference price for four general types of tomatoes: (1) open field and adapted environment, other than specialty (winter: $0.31 per pound; summer: $0.2458 per pound); (2) controlled environment, other than specialty (winter: $0.41 per pound; summer: $0.3251 per pound); (3) specialty—loose[9] (winter: $0.45 per pound; summer: $0.3568 per pound); and (4) specialty—packed (winter: $0.59 per pound; summer: $0.4679 per pound). *See* 2013 Suspension Agreement, 78 Fed. Reg. at 14,972.

On April 19, 2013, plaintiff filed this lawsuit, challenging Commerce's determination to suspend the antidumping investigation on fresh tomatoes from Mexico and enter into the 2013 Suspension Agreement. *See* Compl. ¶ 1 (ECF Dkt. No. 7). On January 31, 2014, the Tomato Exchange moved to strike certain exhibits and related arguments from defendant-intervenors' brief, claiming that they were not presented to the Department in the underlying administrative proceedings, were thus not part of the administrative record, and as a consequence, could not be considered by the court. *See* Pl.'s Mot. to Strike Portions of the Def.-Ints.' Br. 1 (ECF Dkt. No. 47). Specifically, the exhibits and arguments that plaintiff sought to have stricken from defendant-intervenors' brief, related to the Mexican producers and exporters' claim that the Tomato Exchange was making arguments before the court that were contrary to the positions it had taken in prior proceedings before the ITC and Commerce, and as a result, it should be judicially estopped from making these arguments

[9] For purposes of the 2013 Suspension Agreement, "specialty tomatoes include grape, cherry, heirloom and cocktail tomatoes." 2013 Suspension Agreement 78 Fed. Reg. at 14,972.

now before the court. *See Fla. Tomato Exch. v. United States*, 38 CIT __, __, 973 F. Supp. 2d 1334, 1336 (2014). The court denied plaintiff's motion to strike, but did not reach the merits of whether plaintiff should be judicially estopped from presenting certain arguments to the court. *See id.* at __, 973 F. Supp. 2d at 1341.

DISCUSSION

I. The Doctrine of Exhaustion of Administrative Remedies Does Not Apply

In an argument related to that made in its motion to strike, defendant-intervenors assert that plaintiff failed to exhaust its administrative remedies with respect to certain claims that the Tomato Exchange makes in its brief before the court. Defendant-intervenors maintain that the Tomato Exchange failed to present its arguments during the comment period on the draft of the 2013 Suspension Agreement and is consequently barred from presenting these arguments now before the court. *See* Def.-Ints.' Br. 29.

Specifically, the Mexican producers and exporters contend that the Tomato Exchange failed to argue before Commerce that: (1) the 2013 Suspension Agreement was not more beneficial to the domestic industry than the continuation of the investigation; (2) the established reference prices would not prevent price suppression or price undercutting; and (3) the 2013 Suspension Agreement would not eliminate the injurious effects of imports of the subject merchandise into the United States. *See* Def.-Ints.' Br. 28–29, 37–38. Before the court, defendant-intervenors renew their claims, arguing that, with respect to these arguments, plaintiff failed to exhaust its administrative remedies.

A court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013). "Exhaustion can 'serve judicial efficiency . . . by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1265 (2014) (alteration in original) (quoting *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013)). Thus, "[a]s a general matter, '[t]he exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the [c]ourt.'" *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1195 (2004) (alteration in original) (quoting *Timken Co. v. United States*, 26 CIT 434, 459, 201 F. Supp. 2d 1316, 1340 (2002)).

Therefore, where, as here, a party "fail[s] to present [an] issue during the applicable comment period," it is normally "precluded from raising this issue *de novo* before the court." *AIMCOR v. United States*, 141 F.3d 1098, 1111 (Fed. Cir. 1998) (citations omitted). This rule, though, is subject to "[c]ertain exceptions[,] . . . such as where . . . [a] party 'had no opportunity' to raise the issue before the agency." *See Yangzhou*, 716 F.3d at 1381 (quoting *Jiaxing Brother Fastener Co. v. United States*, 34 CIT 1455, 1466, 751 F. Supp. 2d 1345, 1356 (2010)). In other words, a party cannot be said to have failed to exhaust its administrative remedies if it was never given a chance to be heard. Moreover, when Commerce has failed to provide information to a party that it is directed by statute to provide, and that is necessary for that party to make its case, it cannot be said that the party has been afforded a true opportunity to be heard.

Pursuant to 19 U.S.C. § 1673c(e)(1), the Department must "notify the petitioner of, and consult with the petitioner concerning, its intention to suspend the investigation, and notify other parties to the investigation and the Commission not less than 30 days before the date on which it suspends the investigation." 19 U.S.C. § 1673c(e)(1). "[A]t the time of the notification," i.e., "not less than 30 days before the date on which it suspends the investigation," the Department must also "provide a copy of the proposed agreement to the petitioner[,] . . . together with an explanation of how the agreement will be carried out and enforced, and of how the agreement will meet the requirements of" the statute. *Id.*§ 1673c(e)(1), (2). In addition, the Department is required to "permit all interested parties . . . to submit comments and information for the record before the date on which notice of suspension of the investigation is published." *Id.* § 1673c(e)(3).

These requirements, of course, are designed to give both foreign and domestic producers an opportunity to be heard prior to a suspension agreement taking effect. Indeed, the legislative history of the statute emphasizes the importance of the notice, comment, and consultation requirements, and that Commerce's failure to adhere to these directives does not constitute an excusable procedural defect: "[T]he *requirement* that the petitioner be consulted will not be met by pro forma communications. Complete disclosure and discussion is *required*." S. Rep. No. 96–249, at 71, *reprinted in* 1979 U.S.C.C.A.N. at 457 (emphases added). The importance of these requirements is underscored by Congress's concern that suspension "not become the normal means for disposing of cases," and be used "only when [it] serves the interest of the public and the domestic industry affected."

S. Rep. No. 96–249, at 71, *reprinted in* 1979 U.S.C.C.A.N. at 457. It was then clearly the intent of Congress that the Department alert the petitioner and the domestic industry of any proposed suspension agreement so that Commerce might verify whether its determination that suspension of the investigation is in the best interests of the public and domestic industry was correct. Doing so would require Commerce to comply with the notice, comment, and consultation requirements provided for by 19 U.S.C. § 1673c(e) before signing the suspension agreement.

Here, although on February 2, 2013, in accordance with 19 U.S.C. § 1673c(e)(1), Commerce provided petitioners[10] a copy of the proposed 2013 Suspension Agreement thirty days before suspending the investigation, and provided them with an opportunity to comment on the proposed agreement, the Department did not comply with the requirements of § 1673c(e)(2) and (3). *See* Draft 2013 Suspension Agreement at 1. This is because, in addition to making available to the petitioners a draft of the proposed suspension agreement prior to suspending the investigation, § 1673c(e)(2) required Commerce to also provide the petitioners with its explanation of how the agreement would be carried out and enforced, as well as how it satisfied the provisions of the suspension agreement statute. *See* 19 U.S.C. § 1673c(e)(2) ("Before an investigation may be suspended under subsection . . . (c) of this section the administering authority shall . . . provide a copy of the proposed agreement to the petitioner at the time of the notification, *together with an explanation* of how the agreement will be carried out and enforced, and of how the agreement will meet the requirements of subsections . . . (c) and (d) of this section . . . ." (emphasis added)).

Although they were not timely provided to the petitioners, Commerce prepared three primary explanatory memoranda. *See* Mem. from Lynn Fischer Fox, Deputy Assistant Secretary for Policy and Negotiations, U.S. Department of Commerce, to Paul Piquado, Assistant Secretary for Import Administration, U.S. Department of Commerce at 1, PD 26, at bar code 3122199–01 (Mar. 4, 2013), ECF Dkt. No. 54–26 ("Extraordinary Circumstances Mem."); Mem. from Lynn Fischer Fox, Deputy Assistant Secretary for Policy and Negotiations, U.S. Department of Commerce, to Paul Piquado, Assistant Secretary for Import Administration, U.S. Department of Commerce at 1, PD 25, at bar code 3122195–01 (Mar. 4, 2013), ECF Dkt. No. 54-25 ("Public Interest Mem."); Mem. from Lynn Fischer Fox, Deputy As-

[10] Although the statute directs that Commerce need only provide a draft of the proposed suspension agreement to the petitioner, the Department made the proposed agreement available to all interested parties. *See* Draft 2013 Suspension Agreement at 1.

sistant Secretary for Policy and Negotiations, U.S. Department of Commerce, to Paul Piquado, Assistant Secretary for Import Administration, U.S. Department of Commerce at 3, PD 75, at bar code 3130846–01 (Apr. 18, 2013), ECF Dkt. No. 54–75 ("Price Suppression & Undercutting Mem."). These memoranda addressed: (1) Commerce's determination that "extraordinary circumstances" were present (i.e., Commerce's findings that (i) suspension of the investigation would be more beneficial to the domestic industry than continuation of the investigation, and (ii) the investigation was complex); (2) Commerce's determination that suspension of the investigation was in the public interest; (3) the "enforcement elements on the U.S. side of the border," as well as the "enforcement mechanisms on the Mexican side of the border," as provided for by the suspension agreement; and (4) "the prevention of price suppression or undercutting of price levels based on the reference prices contained in the 2013 [Suspension] Agreement," which included, among other things, Commerce's interpretation of the suspension agreement statute (specifically, 19 U.S.C. § 1673c(c)(1)(A)) and Commerce's calculations used to derive the reference prices established in the agreement. *See* Extraordinary Circumstances Mem. 1–2; Public Interest Mem. at 1–2; Price Suppression & Undercutting Mem. at 1–3.

On March 4, 2013, the Department suspended the investigation, and on March 8, 2013, the Department announced the execution of the 2013 Suspension Agreement, which suspended the antidumping investigation. *See* 2013 Suspension Agreement, 78 Fed. Reg. at 14,967. The Department took this action even though two of the three explanatory memoranda detailing Commerce's determinations and explanations for entering into the 2013 Suspension Agreement—Commerce's Extraordinary Circumstances Memorandum and its Public Interest Memorandum—were not made available to the Tomato Exchange and the other petitioners until the day after Commerce suspended the investigation (i.e., March 5, 2013). Hence, these two memoranda were provided to the petitioners thirty-one days after the latest date on which Commerce was required to make its explanations available to them. *See* 19 U.S.C. § 1673c(e)(2). The third memorandum—Commerce's Price Suppression & Undercutting Memorandum—was not finalized until April 18, 2013, forty-five days after the investigation had been suspended and seventy-five days after the latest date on which the Department was required to make the explanatory memoranda available. Thus, it is apparent that Commerce did not comply with the notice provision necessary for it to consider any of plaintiff's and the other petitioners' objections before suspending the investigation, because the explanations of how the

agreement would be carried out, enforced, and satisfy the statutory requirements were not made available by the Department until after the investigation was suspended. *See id.*§ 1673c(e). More specifically, it failed to provide plaintiff and the other petitioners with copies of its memoranda detailing how the agreement would be carried out and enforced at least thirty days before suspending the investigation. *See id.* § 1673c(e)(2).

Congress recognized that suspension agreements were to be used sparingly, and provided for subsection (c) agreements, in particular, to be "accepted only in extraordinary circumstances. That is to say, rarely." *See* S. Rep. No. 96–249, at 71, *reprinted in* 1979 U.S.C.C.A.N. at 457. The notice, comment, and consultation requirements were designed with the purpose in mind of ensuring that the petitioners, although not a party to any signed suspension agreement, be given full disclosure with respect to the specific terms of the agreement, so that they could protect themselves by raising objections with Commerce and building the record with relevant information favoring their interests. In other words, these safeguards were put in place by Congress for the purpose of protecting the affected domestic industry and ensuring that their interests be meaningfully considered by the Department before reaching a determination as to whether to enter into a suspension agreement with a foreign industry. As noted, the notice, comment, and consultation requirements of the suspension agreement statute are mandatory and were intended by Congress to be strictly adhered to. *See* S. Rep. No. 96–249, at 71, *reprinted in* 1979 U.S.C.C.A.N. at 457 ("[T]he *requirement* that the petitioner be consulted will not be met by pro forma communications. Complete disclosure and discussion is *required*." (emphases added)). Thus, it is clear that plaintiff and other interested parties were deprived of the procedural rights afforded to them by the statute.

Because each of the explanatory memoranda containing Commerce's reasons for how the agreement would be carried out, enforced, and satisfy the statutory requirements were not made available to the petitioners (and thus plaintiff) until after Commerce suspended the investigation, and were thus not made available to them within the statutorily-prescribed time limit (i.e., not less than thirty days before the date of the suspension), neither plaintiff nor other interested parties had the opportunity to comment or object to specific aspects of the determinations made therein before Commerce suspended the investigation. Accordingly, because plaintiff did not have a fair opportunity to be heard and challenge these issues at the administrative level, the exhaustion doctrine does not apply.

II. Commerce's Failure to Comply With the Statute's Notice, Comment, and Consultation Requirements Compels Remand

Plaintiff argues that Commerce's failure to adhere to the statutory notice, comment, and consultation requirements set forth in 19 U.S.C. § 1673c(e) "provides an independent ground for remand." *See* Pl.'s Br. 32 n.14. That is, according to plaintiff, because Commerce's explanatory memoranda, which provided the explanations and methodologies underlying its determination to enter into the 2013 Suspension Agreement, were not made available to plaintiff and other petitioners prior to the suspension of the investigation, the Tomato Exchange had no occasion to raise any objections to the proposed agreement, thereby depriving it of procedural rights afforded to it by the suspension agreement statute. *See* Pl.'s Br. 32 n.14. The court agrees and holds that the Department's procedural error warrants a remand of this case to Commerce.

Commerce's failure to comply with the statute compels two related holdings. First, because of Commerce's failure to provide petitioners and thus plaintiff copies of its explanatory memoranda prior to suspending the investigation, the Tomato Exchange had no occasion to challenge any aspect before Commerce. Therefore, it may raise any arguments it might have before the court. Second, it is clear that Commerce's failure to comply with the notice, comment, and consultation requirements of the statute has also deprived plaintiff and other interested parties of essential procedural rights, thereby warranting a remand of this case to Commerce to meaningfully consider the views of the domestic industry. As noted, the notice, comment, and consultation requirements of 19 U.S.C. § 1673c(e) are mandatory, not permissive. Thus, Commerce's failure to "provide . . . the petitioner . . . with an explanation of how the agreement will be carried out and enforced, . . . and of how the agreement will meet the requirements of subsections . . . (c) and (d) of [the statute]" meant that Commerce failed to afford interested parties an opportunity to comment and build the record before notice of suspension of the investigation was published in the Federal Register. *See* 19 U.S.C. § 1673c(e).

This failure deprived interested parties of the ability to comment on each of Commerce's determinations dealing with the suspension agreement and build the record with further relevant evidence supporting their position before notice of suspension of the investigation was published. *See id.*§ 1673c(e)(3) ("Before an investigation may be suspended under subsection . . . (c) of this section the administering authority shall . . . permit all interested parties described in section 1677(9) of this title to submit comments and information for the

record before the date on which notice of suspension of the investigation is published under subsection (f)(1)(A) of this section."). In other words, although interested parties were afforded the opportunity to comment on the proposed agreement, they had no occasion to comment on the explanations of how the suspension agreement would be carried out and enforced, which were detailed only in the explanatory memoranda. As a result, Commerce did not have an opportunity to consider many of the arguments made by plaintiff now before the court for the first time, and to which defendant-intervenors object, and make any resulting corrections to the agreement.

While it might be that the court could hear plaintiff's claims for the first time in this appeal, the better course is for this matter to be remanded to the Department. Indeed, the same principle underlying the exhaustion requirement, which requires parties to first present their arguments to the administrative agency before making them in court, applies to the notice, comment, and consultation requirements of the suspension agreement statute:

> It allows the administrative agency to perform the functions within its area of special competence (to develop the factual record and to apply its expertise), and—at the same time—it promotes judicial efficiency and conserves judicial resources, by affording the agency the opportunity to rectify its own mistakes (and thus to moot controversy and obviate the need for judicial intervention).

Qingdao Sea-line Trading Co. v. United States, 36 CIT __, __, Slip Op. 12–39, at 40 (2012) (citations omitted) (internal quotation marks omitted). Remand will afford plaintiff an opportunity to present its claims to Commerce that: (1) the 2013 Suspension Agreement was not more beneficial to the domestic industry than the continuation of the investigation; (2) the established reference prices would not prevent price suppression or price undercutting; (3) the 2013 Suspension Agreement would not eliminate the injurious effects of imports of the subject merchandise into the United States; and (4) allow them to make any other objections pertaining to Commerce's determinations that (i) extraordinary circumstances were present, (ii) suspension of the investigation was in the public interest and could be monitored effectively, and (iii) the 2013 Suspension Agreement would prevent price suppression and price undercutting of domestic prices by the subject merchandise.

CONCLUSION and ORDER

For the foregoing reasons, it is hereby

ORDERED that the case is remanded; it is further

ORDERED that, on remand, Commerce shall issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that, on remand, Commerce shall comply with the notice, comment, and consultation requirements of 19 U.S.C. § 1673c(e); it is further

ORDERED that, on remand, Commerce shall comply with 19 U.S.C. § 1673c(e)(3) and afford plaintiff an opportunity to comment on the Department's determinations and explanations contained in its Extraordinary Circumstances Memorandum, Public Interest Memorandum, and Price Suppression & Undercutting Memorandum; it is further

ORDERED that, on remand, Commerce shall reopen the record to permit plaintiff to submit information for the record with any comments regarding the three explanatory memoranda; it is further

ORDERED that, on remand, Commerce shall undertake any further consultation with plaintiff that may be appropriate; it is further

ORDERED that, in light of any received comments and consultations, Commerce give meaningful consideration of plaintiff's arguments, make any appropriate revisions to the 2013 Suspension Agreement, provide an explanation for any such revisions, and further document in detail its consideration of any comments received by plaintiff and consultations held with the Tomato Exchange; and it is further

ORDERED that the remand results shall be due on February 24, 2016; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: September 24, 2015
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 15–109

ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Plaintiff, v. UNITED STATES, Defendant.

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

[Plaintiff's motion to re-caption Amended Complaint granted; Defendant and Defendant-Intervenors' cross-motions to dismiss denied.]

Dated: September 24, 2015

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

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

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

OPINION AND ORDER

Gordon, Judge:

This action involves a U.S. Department of Commerce ("Commerce" or "the Government") final determination in the countervailing duty investigation of steel concrete reinforcing bar from the Republic of Turkey. *Steel Concrete Reinforcing Bar from the Republic of Turkey*, 79 Fed. Reg. 54,963 (Dep't of Commerce Sept. 15, 2014) (final affirmative countervailing duty determination, final affirmative critical circumstances determination) ("*Final Determination*"); *see also Steel Concrete Reinforcing Bar from the Republic of Turkey*, 79 Fed. Reg. 65,926 (Dep't of Commerce Nov. 6, 2014) (final countervailing duty order) ("*Order*"). Plaintiff Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. ("Icdas") moves to have the court construe its Amended Complaint as a concurrently filed summons and complaint deemed filed as of November 26, 2014, or in the alternative, to amend the caption of the Amended Complaint to read "Summons and Complaint" and deem the revised document filed as of the same date. *See* Mot. of Pl. Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. to Construe Pl.'s Nov. 26, 2014 Am. Compl. as a Concurrently Filed Summons and Compl. and Deem the Summons and compl. Filed as of Nov. 26, 2014, or, Alternatively, Mot. to Amend Pl.'s Nov. 26, 2014 Am. Compl. to Recaption it as Summons and Compl. and Deem the Recaptioned Summons and Compl. Filed as of Nov. 26, 2014 (Jan. 9, 2015), ECF No. 19 ("Pl.'s Mot.").

The Government and Defendant-Intervenor Rebar Trade Action Coalition ("RTAC") cross-move pursuant to USCIT Rule 12(b)(1) to dismiss Icdas' Amended Complaint for lack of jurisdiction. *See* Def.'s Cross-Mot. to Dismiss Pl.'s Am. Compl. for Lack of Jurisdiction and Def.'s Resp. to Pl.'s Jan. 9, 2015 Motion (Feb. 2, 2015), ECF No. 25

("Def.'s Cross-Mot."); RTAC's Resp. in Opp. to Pl.'s Jan. 9, 2015 Mot.; RATC's Mot. to Dismiss (Feb. 2, 2015), ECF No. 24 ("RTAC's Cross-Mot."); *see also* Resp. of Pl. Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. to Def. and Def.-Intervenor's Cross-Mots. to Dismiss (Mar. 25, 2015), ECF No. 29 ("Pl.'s Resp."); Def.'s Reply in Supp. of its Cross-Mot. to Dismiss (June 17, 2015), ECF No. 38 ("Def.'s Reply"); Rebar Trade Action Coalition's Reply to Pl.'s Mar. 25, 2015 Resp. to the Feb. 4, 2015 Cross-Mots. to Dismiss (June 17, 2015), ECF No. 37 ("RTAC's Reply").

The Government and RTAC argue that the court lacks subject matter jurisdiction under Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a),[1] and 28 U.S.C. § 1581(c) (2012) because Icdas filed its summons before Commerce published the *Order* in the Federal Register. For the reasons set forth below, the court grants Icdas' requested relief and amends the caption of the Amended Complaint to read "Summons and Complaint" and deems the re-captioned document filed as of November 26, 2014. The court also denies the Government and RTAC's cross-motions to dismiss.

I. Standard of Review

"Plaintiffs carry the burden of demonstrating that jurisdiction exists." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F. Supp. 428, 432 (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In deciding a Rule 12(b)(1) motion to dismiss that does not challenge the factual basis for the complainant's allegations, the court assumes "all factual allegations to be true and draws all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

II. Discussion

Under 28 U.S.C. § 2636, an action contesting a final affirmative countervailing duty determination "is barred unless commenced in accordance with" 19 U.S.C. § 1516a. 28 U.S.C. § 2636(c). Section 1516a(a)(2)(A), in turn, outlines a brief window of time for commencing such an action at the U.S. Court of International Trade. A party must file a summons "within thirty days after" the date the countervailing duty order is published in the Federal Register, and within 30 days thereafter, a complaint. 19 U.S.C. § 1516a(a)(2)(A)(i)(II). Though § 1516a(a)(2)(A) provides for a two-step process to commence an action challenging a countervailing duty order, the Court's Rules "encourage[]" commencement of a trade action "by the concurrent

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

filing of a summons and complaint." USCIT R. 3, Prac. Cmt. (concurrent filing encouraged to "expedite" prosecution of action).

A countervailing duty order is based on both a final affirmative subsidy determination by Commerce and a final affirmative injury determination by the U.S. International Trade Commission ("ITC"). 19 U.S.C. § 1671d(c)(2). A party challenging either Commerce's final affirmative determination or the ITC's final affirmative determination may also contest any negative part of those determinations. 19 U.S.C. § 1516a(a)(2)(B)(i). The "negative part" language is limited to only those negative decisions subsumed in a *final affirmative determination* by Commerce or the ITC. *Id.*

Section 1516a differentiates a *negative part* from a *final negative determination*. The latter is (1) a separate type of reviewable determination, 19 U.S.C. § 1516a(a)(2)(B)(ii), and (2) challengeable under § 1516a(a)(2)(A), but a different subdivision, § 1516a(a)(2)(A)(i)(I). A challenge to a final negative determination may include a challenge to any part of a final affirmative subsidy or final injury determination that excludes a particular company or product. 19 U.S.C. § 1516a(a)(2)(B)(ii).

Both a "negative part" of a final affirmative determination and a final negative determination, including a certain affirmative part, are judicially reviewable, albeit under different provisions of § 1516a(a)(2)(A). The statute provides an identical time period, 30 days, for filing a summons to commence the challenge to either type of determination. The difference is the triggering event—the date of publication of the countervailing duty order in the Federal Register for a final affirmative determination (including any "negative part"), 19 U.S.C. § 1516a(a)(2)(A)(i)(II) ("order provision"), as opposed to the date of publication in the Federal Register of the notice of a final negative determination, including any part of a final affirmative determination that excludes a company or product, 19 U.S.C. § 1516a(a)(2)(A)(i)(I) ("final determination provision").

Icdas filed its summons on October 14, 2014, 29 days after Commerce published the *Final Determination*. The countervailing duty order on rebar from Turkey, however, was published on November 6, 2014. Although Icdas filed a complaint on November 10, 2014 and an amended complaint on November 26, 2014, Icdas did not file a new summons.

Icdas requests that the court construe its Amended Complaint as a concurrently filed Summons and Complaint pursuant to USCIT Rule 8(f). Pl.'s Mot. at 4–8. In the alternative, Icdas requests permission to amend the caption on the Amended Complaint to read "Summons and

Complaint" pursuant to USCIT Rule 15. *Id.* at 2. Because Icdas filed the Amended Complaint on November 26, a date within 30 days of the *Order*'s publication in the Federal Register, Icdas argues that either solution would satisfy the time period for filing a summons described in § 1516a(a)(2)(A).

In their briefs the parties argue about the applicability of equitable tolling. The doctrine of equitable tolling, though, does not seem to apply here because no time period needs to be "tolled." This action presents a different sort of problem because Icdas filed its summons early, not late. The question here is more basic and depends on whether the Court's Rules can accommodate Icdas' requested relief. The court believes that they can.

As noted, Icdas seeks relief under USCIT Rules 8 and 15. USCIT Rule 8 governs "General Rules of Pleading" and deals mainly with the sufficiency of statements within a pleading, whereas USCIT Rule 15 governs "Amended and Supplemental Pleadings." Of the two, USCIT Rule 15 seems to better cover Icdas' request to re-caption its Amended Complaint as a "Summons and Complaint." The court and the parties, however, are dealing with an early filed summons, a "notice" document, not a pleading. *See Giorgio Foods, Inc. v. United States*, 31 CIT 1261, 515 F. Supp. 2d 1313, 1319 (2007) (citing *DaimlerChrysler v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("The purpose of a summons is to provide notice to other parties of commencement of an action."). Re-captioning Icdas' Amended Complaint as a concurrently filed "Summons and Complaint" amends *both* the summons and (to a lesser extent) the Amended Complaint. The court therefore believes that USCIT Rule 3(e), which governs "Amending a Summons," is implicated as well.

USCIT Rule 3 provides that "[t]he court may allow a summons to be amended at any time on such terms as it deems just, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed. Likewise, under USCIT Rule 15, "the court should freely give leave [to amend] when justice so requires." USCIT R. 15(a). More specifically, leave to amend should be given freely absent bad faith, prejudice to the opposing party, or futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Here, the court can identify no prejudice to the Government or RTAC by granting Icdas its requested relief. Icdas' summons did no more than provide the Government and other interested parties to the investigation with early notice of this action, something that is hard to characterize as prejudicial. The Government and RTAC iden-

tify no change between Icdas' filing and the publication of the *Order* that might have affected Icdas' cause of action. Additionally, Icdas did not gain any litigation advantage by filing early.

RTAC argues that allowing the action to go forward will prejudice both it and the Government because they will incur litigation costs while defending an action that would otherwise be dismissed. RTAC's Cross-Mot. at 9–10. Dismissal here, though, creates more prejudice than it prevents. Commerce preliminarily made a *negative* determination before assigning a 1.25% countervailing duty rate for Idcas in the *Final Determination*. *See Steel Concrete Reinforcing Bar From the Republic of Turkey*, 79 Fed. Reg. 10771 (Dep't of Commerce Feb. 26, 2014) (prelim. determ.). Icdas served its summons and complaint soon after the *Final Determination*, leaving no question that Icdas intended to challenge that determination.

As Icdas explains, the Amended Complaint contains all of the information that would appear in a summons. While no rule lays out precisely what form a summons must take, this Court's form summons contains five blank fields: identification of the parties, the plaintiff's name and standing, a brief description of the contested determination, the date of the contested determination, and the date of the notice of the contested determination's publication in the Federal Register. USCIT Rs., Form 3. Icdas provides a table outlining where each of these pieces of information can be found in its Amended Complaint. Pl.'s Mot. at 7–8 (citing Am. Compl. at pp. 1–2, 6–8 (Nov. 26, 2014), ECF No. 11). The court therefore cannot identify a substantive difference between Icdas' proposed re-captioned Amended Complaint and a concurrently filed summons and complaint. *Cf. Pollak Imp.-Exp. Corp. v. United States*, 52 F.3d 303, 306–08 (Fed. Cir. 1995) (describing content of summons in an action seeking to challenge a denied customs protest as a correctable, non-jurisdictional error); Fed. R. Civ. P. 83(a)(2) ("A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.").

Icdas also acted diligently and without bad faith. Icdas filed *early*, not late. Icdas did so because it was apparently confused by the mixed affirmative and negative aspects of the *Final Determination*. *See* Pl.'s Resp. at 28–30. Icdas' confusion is somewhat understandable given the complexity of the judicial review provision. Icdas thought the *Final Determination* might be the kind of mixed determination that is challenged by filing a summons within 30 days of the publication of the notice of the final determination, as opposed to publication of the countervailing duty order. *Id.* Icdas was incorrect because the *Final*

Determination is labeled a "final affirmative determination," *Final Determination*, 79 Fed. Reg. at 54,963, meaning that judicial review is triggered by the order provision, and not the final determination provision. Despite its confusion, Icdas did not act in bad faith nor did its early filing prejudice the Government or RTAC. Icdas' actions are consistent with those of a party diligently seeking to advance its claim by filing sooner rather than later. Each of the Rule 3(e) and 15 factors therefore support Icdas' request for relief.

The court though must first address a potential jurisdictional issue because "it is well-settled that this Court cannot, through its rules, enlarge its jurisdiction." *Am. Chain Ass'n v. United States*, 13 CIT 1090, 1093, 746 F. Supp. 112, 114–15 (1989); *see also United States v. Sherwood*, 312 U.S. 584, 589–90 (1941) ("[A]uthority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction . . . ."); USCIT R. 1 ("The rules are not to be construed to extend or limit the jurisdiction of the court."). The Government and RTAC argue that the time period for filing a summons described in 19 U.S.C. § 1516a(a)(2)(A) is jurisdictional. Icdas argues that it is non-jurisdictional. Icdas maintains that it is instead a "claim processing" rule, meaning the court has the discretion to grant its motion. The court agrees with Icdas.

In *Kontrick v. Ryan*, 540 U.S. 443 (2004), a unanimous Supreme Court opined that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id.* at 455. Since *Kontrick*, the Supreme Court has developed a "readily administrable bright line" for distinguishing between "jurisdictional" requirements and "claim-processing" requirements:

> If the legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006) (emphasis added). The Supreme Court has applied this same "clearly stated intent" standard to statutes governing lawsuits against the United States. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630–38 (2015).

In analyzing whether "Congress imbued a procedural bar with jurisdictional consequences," the court turns to "traditional tools of statutory construction." *Id.* at 1632. These tools include consideration of a procedural rule's text, context, and historical treatment. *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824–25 (2013); *see also Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–69 (2010) (holding a pre-commencement registration requirement not jurisdictional because it "is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions," and because the "registration requirement is more analogous to the nonjurisdictional conditions" the Supreme Court had considered in earlier cases).

The two provisions at issue here, 28 U.S.C. § 2636(c) and 19 U.S.C. § 1516a(a)(2)(A), prescribe an exception-free time period for filing a summons in order to commence an action challenging a final affirmative countervailing duty determination. Under 28 U.S.C. § 2636, an action "is barred unless commenced in accordance with the rules of the Court of International Trade within the time specified in such section." 28 U.S.C. § 2636(c). 19 U.S.C. § 1516a(a)(2)(A) specifies that:

> Within thirty days after . . . the date of publication in the Federal Register of . . . an antidumping or countervailing duty order based upon any [final affirmative antidumping or countervailing duty] determination[,] . . . an interested party . . . may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint . . . .

19 U.S.C. § 1516a(a)(2)(A).

The text and context of 28 U.S.C. § 2636(c) and 19 U.S.C. § 1516a(a)(2) indicate that the time period is not jurisdictional. Neither provision mentions the word "jurisdiction" or otherwise speaks in jurisdictional terms. *See* 28 U.S.C. § 2636(c); 19 U.S.C. § 1516a(a)(2); *cf. United States v. Wong*, 135 S. Ct. 1625, 1632–33 (explaining that 28 U.S.C. § 2401, which states that "every civil action commenced against the United States shall be barred unless the complaint is filed" within a certain time period, does not speak in jurisdictional terms). There is simply no "express jurisdictional language or language implying that [§ 1516a(a)(2)'s] timing requirements are jurisdictional." *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1300, 1306 (2012). Contextually, § 2636 is located in Chapter 169 of Title 28, United States Code, which is entitled "Court of International Trade Procedure." Congress separated 28 U.S.C. § 2636(c) and 19 U.S.C. § 1516a(a)(2) from this

Court's jurisdictional grant in 28 U.S.C. § 1581, indicating an intent to distinguish the 30-day time period from this Court's subject matter jurisdiction. *See* 28 U.S.C. §§ 1581, 2636; *Wong*, 135 S. Ct. at 1633 (noting that the Supreme Court "has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional"); *Reed Elsevier*, 559 U.S. at 164–65 (noting the same in the context of other procedural rules located in separate provisions from jurisdictional grants).

Regarding historical treatment, the Supreme Court has clarified that "the relevant question . . . is not . . . whether [a statute] itself has long been labeled jurisdictional, but whether the *type* of limitation that [a statute] imposes is one that is properly ranked as jurisdictional absent an express designation." *Reed Elsevier*, 559 U.S. at 168–69 (emphasis added). When it comes to timing requirements, the Supreme Court has not minced words: "[T]ime prescriptions, however emphatic, are not properly typed jurisdictional." *Arbaugh*, 546 U.S. at 510 (quoting *Scarborough v. Principi*, 541 U.S. 401, 414 (2004)) (internal quotation marks omitted); *accord Henderson ex rel. Henderson v. Shineski*, 562 U.S. 428, 435 (2011) ("Filing deadlines, such as the 120–day filing deadline at issue here, are quintessential claim-processing rules.").

In *Bowles v. Russell*, 551 U.S. 205 (2007), the Supreme Court did hold that a time limit governing the filing of a notice of appeal from a district court to a circuit court was jurisdictional. *Id.* at 209–15. There the Court emphasized that its own repeated interpretation of appeal deadlines as jurisdictional over the course of *more than a century* was determinative. *Id.*; *see Union Pac. R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 82 (2012) (unanimous opinion distinguishing *Bowles* as "relying on a long line of this Court's decisions left undisturbed by Congress"); *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825 (unanimous opinion distinguishing *Bowles* as relying on a "century's worth of precedent and practice in American courts" (quoting *Bowles*, 551 U.S. at 209 n.2 (internal quotation marks omitted))).

Here the court is not faced with historical Supreme Court treatment of the time period in § 1516a(a)(2). In fact, the Supreme Court has never considered whether the time limitation imposed by § 1516a(a)(2) is one "that is properly ranked as jurisdictional." *See Reed Elsevier*, 559 U.S. at 168. Accordingly, the court believes, despite arguments from the Government and RTAC to the contrary, that the circumstances in this action are distinguishable from *Bowles*. Regardless, the Government and RTAC cite two Court of Appeals for the Federal Circuit ("Federal Circuit") decisions from the 1980s that held

that the timing requirements of § 1516a are jurisdictional: *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986); *NEC Corp. v. United States*, 806 F.2d 247 (Fed. Cir. 1988). The Government and RTAC argue that *Georgetown* and *NEC* require dismissal. In each of those cases, the Federal Circuit held that the *late* filing of a summons or complaint deprived this Court of jurisdiction. *Georgetown*, 801 F.2d at 1311–13 (discussing untimely complaint); *NEC*, 806 F.2d at 248–49 (discussing untimely summons). The Federal Circuit stated, "[t]he proper filing of a summons to initiate an action in the Court of International Trade is a *jurisdictional requirement* which appellant has failed to meet." *NEC*, 806 F.2d at 248 (emphasis added); *see also Georgetown*, 801 F.2d at 249.

Georgetown and *NEC*, however, both addressed *late* filings; in neither case did the Federal Circuit consider or address the issue of an *early* filing. *See NEC*, 806 F.2d at 248; *Georgetown*, 801 F.2d at 249. Here, the summons was filed *before* § 1516a(a)(2)(A)'s deadlines expired. Returning to the guidance from the Supreme Court, "Congress must do something special, *beyond setting an exception-free deadline*, to tag a statute of limitations as jurisdictional." *Wong*, 135 S. Ct. at 1632 (emphasis added). *Georgetown* and *NEC* interpreted § 1516a(a) as setting "[c]onditions upon which the government consents to be sued" that "must be strictly observed and are not subject to implied exceptions," like the equitable tolling requested by the late-filing plaintiffs in those cases. *NEC*, 806 F.2d at 249; *see also Georgetown* 801 F.2d at 1312. The Supreme Court in *Wong*, though, explained that "because equitable tolling 'amounts to little, if any, broadening of the congressional waiver [of sovereign immunity],' . . . a rule generally *allowing* tolling is the more 'realistic assessment of legislative intent.'" *Wong*, 135 S. Ct. at 1367 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)). And although *Georgetown* and *NEC* labeled section 1516a's time limits "jurisdictional" in the late 1980s, and the Court of International Trade has followed suit for the last almost 30 years, the court believes that more recent pronouncements from the Supreme Court have undercut the *ratio decidendi* of those decisions.

The hard reality here is that *Wong* has extended *Arbaugh* and its progeny to effectively supplant the Federal Circuit's rationale in *Georgetown* and *NEC*. Wong, unlike *Henderson*, involved statutory time limitations governing the commencement of actions at an Article III court like this Court. *Wong*, 135 S. Ct. at 1632–33 (analyzing the Federal Torts Claims Act). *Wong* rejected the two main lines of reasoning the Federal Circuit used in *Georgetown* and *NEC*: mandatory

language in the statute, and sovereign immunity. *Compare Georgetown* 801 F.2d at 1311–13 (holding § 1516a's time limitations to be jurisdictional because of mandatory language and the presumed limited extent of the Federal Government's waiver of sovereign immunity) *and NEC*, 806 F.2d at 249 (same), *with Wong*, 135 S. Ct. at 1631–38 (explaining that tolling can apply "even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are)" and that *Irwin* "forecloses" the sovereign immunity argument).

As a final note, the court acknowledges that *Baroque Timber* considered a similar issue three years ago and came to a different conclusion. *Baroque Timber* evaluated § 1516a(a)(2)(A)'s text and context and concluded that there is "no indication" that Congress intended the timing requirement to be treated as jurisdictional. *Baroque Timber*, 36 CIT at ___, 865 F. Supp. 2d at 1306. In that court's view, however, the prior Federal Circuit decisions controlled the outcome on this issue because of the Supreme Court's emphasis on the importance of historical treatment in *Bowles*, as well as the idiosyncratic nature of rules governing appeals from the Board of Veterans' Appeals to the Court of Appeals for Veterans Claims described in *Henderson*. *Baroque Timber*, 36 CIT at ___, 865 F. Supp. 2d at 1308 (discussing *Bowles* and *Henderson*). *Baroque Timber*, though, recognized in *dicta* that developments at the Supreme Court might not require a similar outcome in future cases: "While it appears that the timing requirements of 19 U.S.C. § 1516a(a)(2) should be reconsidered in light of the *Arbaugh* standard and its progeny, such a reconsideration is not the province of this court where the Supreme Court has not extended further its own analysis." *Id.* at ___, 865 F. Supp. 2d at 1308–09. With *Wong*, the court's observation in *Baroque Timber* that the applicable time period "falls between" the relevant Supreme Court precedents is no longer accurate. *See Baroque Timber*, 36 CIT at ___, 865 F. Supp. 2d at 1307–08(discussing *Bowles* and *Henderson* and distinguishing both from time period for filing a summons at this Court); *Wong*, 135 S. Ct. at 1631–38 (holding that a mandatory time limitation involving actions against the Federal Government in Article III courts is not jurisdictional).

In sum, Congress did not "clearly state" that it intended for the time period in § 1516a(a)(2)(A) to be treated as jurisdictional. The existing Federal Circuit precedents, which predate that standard by almost two decades, are not controlling and have been supplanted by more recent Supreme Court decisions. Because the time period is not jurisdictional, the court may entertain Icdas' motion. And as explained above, after measuring Icdas' explanation for the early filing of its

summons against the statutory scheme, the underlying administrative determination, the Court's Rules, and the arguments of the parties, the court believes the only sensible outcome here is to grant Icdas' motion.

III. Conclusion

The court grants Icdas' motion to amend the caption of the Amended Complaint to read "Summons and Complaint," and deems the re-captioned document filed as of November 26, 2014. The court also denies the Government and RTAC's cross-motions to dismiss.

Accordingly, it is hereby

ORDERED that Plaintiff's motion to re-caption its Amended Complaint is granted; it is further

ORDERED that Plaintiff's Amended Complaint is re-captioned as Plaintiff's Summons and Complaint; it is further

ORDERED that Plaintiff's re-captioned Summons and Complaint are deemed filed as of November 26, 2014; and it is further

ORDERED that Defendant and Defendant-Intervenor's motions to dismiss are denied.

Dated: September 24, 2015
New York, New York

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

Slip Op. 15–110

COMPOSITE TECHNOLOGY INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Nicholas Tsoucalas,
Senior Judge
Court No. 13–00205

[Plaintiff's motion for summary judgment is denied; Defendant's cross-motion for summary judgment is granted.]

Dated: September 28, 2015

Joseph P. Cox and *Mandy A. Edwards*, Stein Shostak Shostak Pollack & O'Hara, LLP, of Los Angeles, CA, for Plaintiff.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., for Defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the action was *Yelena Slepak*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of New York, NY.

OPINION

Tsoucalas, Senior Judge:

This case is before the court on cross-motions for summary judgment. *See* Pl.'s Mot. For Summ. J., ECF No. 27 ("Pl.'s Br."); Def.'s Cross-Mot. For Summ. J., ECF No. 32 ("Def.'s Br."); Pl.'s Resp. to Def.'s Cross-Mot. For Summ. J., ECF No. 33; Def.'s Reply in Support of its Cross-Mot. For Summ. J., ECF No. 34. Plaintiff Composite Technology International, Inc. ("Composite") challenges the decision of Defendant U.S. Customs and Border Protection ("Customs") denying Plaintiff's protest, which claimed that the imported merchandise is properly classified duty free under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 4412.99.51 (2012), "Plywood, veneered panels and similar laminated wood: Other: Other: With at least one outer ply of nonconiferous wood: Other: Other." For the reasons stated below, the product at issue here is properly classified under HTSUS subheading 4421.90.97, and accordingly, Defendant's cross-motion for summary judgment is granted and Plaintiff's motion for summary judgment is denied.

BACKGROUND

The following facts are not in dispute. Plaintiff is the importer of record. Compl. ¶ 3, June 19, 2013, ECF No. 5. In the instant action Plaintiff imported merchandise under Protest No. 2006–13–100540. Pl.'s Br. Att. 2 at ¶ 1.

Pursuant to 19 U.S.C. § 1514(a)(4) (2012), on March 18, 2013, Plaintiff filed its protest to challenge Customs' decision to assess duty at the rate of 3.3% ad valorem. *Id*. at ¶ 3. Plaintiff claimed that the imported merchandise is properly classified duty free under HTSUS 4412.99.51 as "Plywood, veneered panels and similar laminated wood: Other: Other: With at least one outer ply of nonconiferous wood: Other: Other." *Id*. at ¶ 4. On April 17, 2013, Customs denied the protest, concluding that Composite's merchandise is classifiable under 4421.90.97, as "Other articles of wood: Other: Other: Other." *Id*. at ¶ 5.

The merchandise is wooden door stiles and rails that consist of a 9.5 millimeter-thick pine cap laminated to a base of laminated poplar wood layers, each with a thickness of less than six millimeters. *Id*. at ¶ 7, 8. The merchandise has a surface layer of pine wood that is used as the exposed surface. *Id*. at ¶ 10. Two of the imported items, the "79" MSD Latch Stile with 3/8" cap and the 79 Prem Stile with 3/8" Cap, have a rebate cut at both ends of the wood." *Id*. at ¶ 13. Other than the rebate cuts, the seven imported items are constructed the same,

except that they are imported in various lengths and thicknesses. *Id*. at ¶ 14.

JURISDICITON AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). The court reviews Customs' protest decisions de novo. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact . . . ." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

A classification decision involves two steps. The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law. *See Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which, when disputed, is a question of fact. *Id*.

When there is no factual dispute regarding the merchandise, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). This is such a case, and summary judgment is appropriate. *See Bausch & Lomb*, 148 F.3d at 1365–66.

While the court accords deference to Customs classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v.* United States, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

DISCUSSION

Classification disputes under the HTSUS are resolved by reference to the General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation. *See Carl Zeiss*, 195 F.3d at 1379. The GRIs are applied in numerical order. *Id.* Interpretation of the HTSUS begins with the language of the tariff headings, subheadings, their section and chapter notes, and may also be aided by the Explanatory

Notes published by the World Customs Organization. *Id.* "GRI 1 is paramount . . . The HTSUS is designed so that most classification questions can be answered by GRI 1 . . . ." *Telebrands Corp. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1277, 1280 (2012).

Pursuant to GRI 1, merchandise that is described "in whole by a single classification heading or subheading" is classifiable under that heading. *CamelBak Prods. LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). If that single classification applies, the succeeding GRIs are inoperative. *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998). Here, GRI 1 resolves the classification of Composite's merchandise.

The court construes tariff terms according to their common and commercial meanings, and may rely on both its own understanding of the term as well as upon lexicographic and scientific authorities. *See Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the Explanatory Notes "accompanying a tariff subheading, which— although not controlling—provide interpretive guidance." *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

The issue before the court in the instant action concerns whether Composite's merchandise is properly classified under heading 4412 as "[p]lywood," "veneered panels," or "similar laminated wood," or under heading 4421 as "other articles of wood." Plaintiff argues that Composite's merchandise is classifiable under heading 4412. Pl.'s Br. at 1. Plaintiff insists that the subject merchandise fits squarely within the common meaning of "veneered panels," provided by lexicographical sources and supported by the Explanatory Notes. *Id.* at 2. Plaintiff relies on the litigation in *Boen Hardwood Flooring, Inc. v. United States*, 26 CIT 253 (2002), *reh'g granted*, 27 CIT 40 (2003), *rev'd*, 357 F.3d 1262 (Fed. Cir. 2004) to support its contention that the 9.5 millimeter pine caps on its products must be treated as veneers. *Id.* at 15–18. In the alternative, Plaintiff contends that the subject merchandise constitutes "similar laminated wood" because it is "laminated wood," and it possesses numerous characteristics in common with wood merchandise classified under Heading 4412. *Id.* at 18–20. It does not appear that the Plaintiff asserts that Composite's merchandise can be classified as "plywood" under heading 4412.

As required by GRI 1, the court begins its inquiry with the relative sections and chapter notes to headings 4412. Heading 4412, HTSUS, provides for "Plywood, veneered panels and similar laminated wood." The explanatory notes to heading 4412 defines veneered panels as "panels consisting of a thin veneer of wood affixed to a base." 4412 Explanatory Note. Apart from stating that a veneered panel must be

"thin," heading 4412 does not specify the specific size a wooden product must be in order to be classified as a veneered panel. The HTSUS, though, provides further guidance with regards to the specific size requirements for a wooden product to be considered a veneered panel in heading 4408. Heading 4408 defines sheets for veneering as having "*a thickness not exceeding 6 mm*." HTSUS 4408 (emphasis added).

The pine cap rails and stiles at issue here have a face plies that exceed six millimeters in thickness, and therefore conflicts with the language found in headings 4412, 4408, and their respective explanatory notes discussed above. *See* Def.'s Br. at Attachment B, ECF 32.2. The court therefore agrees with Defendant that Composite's merchandise cannot be classified as veneered panels under heading 4412.

Plaintiff argues that the Federal Circuit's holding in *Boen* supports its contention that Composite's merchandise is classifiable under heading 4412. The court disagrees. In *Boen*, the Federal Circuit held that the subject merchandise in dispute was of a plywood construction. *See Boen*, 357 F.3d at 1265–66. Although heading 4412 covers plywood, veneered panels, and similar laminated wood, the three types of wooden plies are not synonymous. 4412 Explanatory Note (Outlining each wooden plies' specific characteristics). The Federal Circuit in Boen defined plywood, but made no ruling as to what constitutes a veneer panel. *Boen* therefore does not support Plaintiff's position that Composite's merchandise is classifiable as a veneered panel.

Additionally, the court disagrees with Composite that its merchandise is classifiable under heading 4412 as "similar laminated wood." Pl. Br. at 18–20. "Similar laminated wood" is defined in the Explanatory Notes for HTSUS heading 4412 as follows:

> [1] Blockboard, laminboard and battenboard, in which the core is thick and composed of blocks, laths or battens of wood glued together and surfaced with the outer plies. Panels of this kind are very rigid and strong and can be used without framing or backing.
>
> [2] Panels in which the wooden core is replaced by other materials such as a layer or layers of particle board, fibreboard, wood waste glued together, asbestos or cork.

Def.'s Br. at Attachment B at 1. The merchandise's base layers consist of wood of a thickness of less than two millimeters. Plaintiff does not allege that the merchandise contains a core of "blocks, laths, or battens." Moreover, the merchandise here is composed of wood and thus cannot fit within the second category of the "similar laminated wood" definition. Because Composite's merchandise does not meet the

requirements outlined by the HTSUS and its respective explanatory notes with regards to what constitutes "similar laminated wood," the court concludes that Composite's merchandise cannot be classified as being a "similar laminated wood" under heading 4412.

As such, Composite's merchandise is not classifiable under Heading 4412. Plaintiff has not provided the court with a narrative to support its classification under any other heading in Chapter 44 of the HTSUS, thus the only remaining heading under which the subject merchandise may be classified is heading 4421. Heading 4421 covers "other articles of wood" but excludes any that are "specified or included in the preceding headings." 4421 Explanatory Note. Accordingly, since the subject merchandise in the instant case cannot be classified under any other heading in chapter 44, the court concludes that the merchandise is properly classified under heading 4421.

CONCLUSION

For the foregoing reasons, the court denies Plaintiff's motion for summary judgment, grants Defendant's cross-motion for summary judgment, and holds that Composite's merchandise at issue is properly classified under subheading 4421.90.97.

Dated: September 28, 2015
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 15–111

UNITED STATES, Plaintiff, v. JEANETTE PACHECO, Defendant.

Before: Nicholas Tsoucalas,
Senior Judge
Court No.: 14–00289

[Plaintiff's Motion for Entry of Default Judgment is granted.]

Dated: September 28, 2015

Stephen C. Tosini, Senior Trial Counsel, Department of Justice, Civil Division, Commercial Litigation Branch, of Washington, D.C. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Assistant Director.

OPINION

Tsoucalas, Senior Judge:

Before the court is United States' ("Plaintiff") Motion for Default Judgment seeking $2,651,312.18 in civil penalties plus interest, costs, and fees against Defendant Jeanette Pacheco ("Pacheco") for fraud under section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012).[1] Pl.'s Mot. for Entry of Default J. at 6, July 7, 2015, ECF No. 9 ("Pl.'s Br."). For the following reasons, Plaintiff's motion is granted.

From October 29, 2009, to approximately December 23, 2009, Pacheco entered thirty six entries of dried peppers into the United States from Mexico. Pl.'s Br. Decl. of Liza Lopez at ¶ 2, June 22, 2015. Dionicio Bustamante ("Bustamante") was the licensed customs broker for each entry. *Id*. at ¶ 3. Homeland Security Investigations conducted an investigation in which they discovered that Bustamante approached Pacheco in a nightclub and told her that he had a way to make "fast cash." Pl.'s Br. Report of Investigation Ex. B, at 2. Subsequently, Bustamante gave Pacheco $200, and in exchange, she provided him with a power of attorney to allow him to use her name to conduct customs business on his own behalf. *Id.*

The entry documents submitted to Customs and Border Protection ("CBP") declared a transaction value of approximately $0.11 per kilogram of dried peppers. Pl.'s Br. Decl. of Liza Lopez at ¶ 5. The median transaction value for identical or similar shipments of dried peppers is $3.75 per kilogram. *Id*. at ¶ 7. Based on the aforementioned transaction values, CBP was concerned that the dried peppers were undervalued, and consequently it requested documents to verify the claimed transaction value through proof of payment and/or the terms of sale agreement for the entries. *Id.* at ¶ 6. Pacheco failed to provide documentation to corroborate the declared transaction value of $0.11 per kilogram. Id. at ¶ 8. Consequently, CBP appraised the entries using a transaction value for similar merchandise to determine a dutiable value of $2,285,550.00. *Id*. at ¶ 9.

The Food and Drug Administration (FDA) issued a Notice of FDA Action refusing these entries as adulterated under section 402 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342 (2012)[2] and barred them from entering the commerce of the United States under

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

[2] Further citations to the Federal Food, Drug, and Cosmetic Act are to the relevant portions of Title 21 of the U.S. Code, 2012 edition, and all applicable amendments thereto, unless otherwise noted.

21 U.S.C. § 381(a). *Id*. at ¶ 12. The Notice of FDA Action required Pacheco to redeliver the entries for exportation or destruction. *Id.* Pacheco failed to redeliver the goods. *Id.* at ¶ 13.

As a result of Pacheco's failure to redeliver the entries, CBP assessed claims for liquidated damages for the subject entries at the $0.11 per kilogram figure provided by Pacheco for a total of $184,419.00. *Id*. at ¶ 10; Pl.'s Br. Jeanette Pacheco Claims for Liquidated Damages, Ex. D.

CBP issued a Pre-Penalty notice to Pacheco on April 16, 2013, informing her that it sought a monetary penalty in the amount of $2,651,312.18 for fraud under 19 U.S.C. § 1592. Pl.'s Br. Pre-Penalty Notice Ex. F, at 1.

On April 24, 2013, CBP issued a penalty notice to Pacheco seeking $2,651,312.18 for fraud under 19 U.S.C. § 1592. Pl.'s Br. Penalty Notice Ex. G, at 1–2. CBP sent to Pacheco demands for payment of the penalty on May 7, 17, 30, 2013, and June 14, 2013. Pl.'s Br. Decl. of Liza Lopez at ¶ 18. To date, CBP has not received any payments from Pacheco. *Id*. at ¶ 19.

Plaintiff filed the instant action on October 29, 2014. Compl., Oct. 29, 2014, ECF No. 2. Pacheco failed to answer or otherwise respond to the complaint. As a result, the Clerk of Court entered Pacheco's default on May 19, 2015. Entry of Default, May 19, 2015, ECF No. 8. Plaintiff now moves for entry of default judgment. Pl.'s Br. at 1.

JURISDICTION

The court possesses jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1582(1) (2012) over this civil penalty action brought by the United States under 19 U.S.C. § 1592.

DISCUSSION

Pursuant to 19 U.S.C. § 1592(e)(1), the Court determines all issues de novo, including the amount of any penalty. 19 U.S.C. § 1592(e)(1). In evaluating a motion for a default judgment, the Court accepts as true all well-pled facts in the complaint but must reach its own legal conclusions. *United States v. Callanish Ltd*., 37 CIT ____, ____, Slip Op. 13–43 (Mar. 28, 2013) (citing *Nishimatsu Constr. Co., Ltd. v. Hous. Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)). "Although a defendant's default acts as an admission of liability for all well-pled facts in the complaint, it does not admit damages." *United States v. Freight Forwarder Int'l*, 39 CIT ____, ____, 44 F. Supp. 3d 1359, 1362 (2015) (citing *Greyhound Exhibit Grp. Inc. v. E.L.U.L. Realty Corp*., 973 F.2d 155, 158 (2d Cir. 1992)). "An entry of default alone . . . does not suffice to entitle a plaintiff to the relief that it seeks." *United States v. Country Flavor Corp*., 36 CIT ____, ____, 825 F. Supp. 2d

1296, 1301 (2012). "Even after an entry of default, 'it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.'" *Id*. (quoting 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2688, p. 63 (3d ed. 1998)). "Because section 592(e) directs that the court determine 'de novo' the amount of penalty to be recovered, the penalty cannot be considered a 'sum certain' to which plaintiff has established its entitlement as a matter of right. *United States v. Inner Beauty Int'l (USA) Ltd*., 35 CIT ____, ____, Slip Op. 11–148 (Dec. 2, 2011).

In the case at bar, the Clerk of Court has entered the Defendant's Default, and Plaintiff supported the Motion for Default Judgment with an affidavit showing the amount due. Entry of Default; Compl. at ¶27, Ex. B; Pl.'s Br. Decl. of Liza Lopez. Thus, the court must address whether the unchallenged facts constitute a legitimate cause of action and what amount, if any, should be awarded Plaintiff.

1. The Unchallenged Facts Constitute a Legitimate Cause of Action Per § 1592

Under 19 U.S.C. § 1592(a)(1) it is unlawful for a person, by fraud to enter, introduce, attempt, or aid or abet any other person in introducing merchandise into the commerce of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or any omission which is material. 19 U.S.C. § 1592(a)(1). "A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing agency action including, but not limited to a . . . [d]etermination of the classification, appraisement, or admissibility of merchandise . . . ." 19 C.F.R. Part 171, appendix B § (B) (2015) ("*Penalty Guidelines*").

In the instant case, the misrepresented entered value was material, because it influenced CBP's decision regarding the admissibility of the peppers. Restricted merchandise such as dried peppers are subject to inspection, may be conditionally released, or the shipment may be placed on hold and later refused entry. Customs may request redelivery of the refused shipment. A refusal to comply with the redelivery requirement may result in Customs assessing liquidated damages at three times the value of the merchandise. 19 C.F.R. § 141.113(c)(3) (2015). Customs assessed liquidated damages in the amount of $184,419.00 relying on the low values provided by the importer. Pl.'s Br. Jeanette Pacheco Claims for Liquidated Damages Ex. D, at 1–2. Had the importer given the correct value of $3.75 per kilogram, Customs would have assessed liquidated damages at $6,856,650.00 and required that the importer post a bond in the

amount of $6,856,650.00 or refused entry to the merchandise. Pl.'s Br. Decl. of Liza Lopez Ex. A, at ¶ 11. Rather, by misrepresenting the value of the peppers, Pacheco procured a bond at a significantly lower amount, entered the merchandise and sold it for consumption in the U.S. *Id*.

Furthermore, by providing her identity to Bustamante for $200 so that he could conduct customs business on his own behalf, Pacheco aided and abetted his fraud upon Customs. Pl.'s Br. Report of Investigation Ex. B, at 2. Having given Bustamante a power of attorney, Pacheco, as principal, can be held liable for her agent Bustamante's actions whether or not she authorized the specific unlawful conduct which constituted the violation of section 1592. *See United States v. Pan Pac. Textile Grp. Inc*., 29 CIT 1013, 102223, 395 F. Supp. 2d 1244, 1252 (2005) (holding that when determining a principal's liability, it is irrelevant whether or not the principal authorized their agent's conduct which constituted the violation of section 1592).

Thus, the court finds that Plaintiff has demonstrated that the unchallenged facts constitute a legitimate cause of action under 19 U.S.C. § 1592.

2. Amount of Damages

Fraud is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise. 19 U.S.C. § 1592 (c)(1). A "Plaintiff is not necessarily entitled to be awarded a judgment for the maximum penalty available under section 592 as a 'sum certain,' as that term is used in Rule 55 . . . It is appropriate that the court consider the facts and circumstances as shown in plaintiff's submissions." *Inner Beauty*, 35 CIT at ____. The Court examines whether there are aggravating or mitigating factors present in assessing the penalty. *Id.* Although not binding on the Court, the guidelines published by Customs are informative on the general question of what constitutes aggravating and mitigating circumstances. *Id*. Under those guidelines, for a Non-Duty Loss Violation, "[a] penalty disposition greater than 80 percent of the dutiable value may be imposed in a case involving an egregious violation, or a public health and safety violation, or due to the presence of aggravating factors, but the amount may not exceed the domestic value of the merchandise." *Penalty Guidelines* §(F)(2)(a)(ii). Undervaluation of duty-free merchandise such as dried peppers from Mexico constitutes a non-duty loss violation. *Id*. at §(D)(2).

Providing misleading information to Customs concerning the section 1592 violation and failing to comply with a lawful demand for records are aggravating factors that permit a penalty of up to the

domestic value of the merchandise. *Id.* at §(H) (3),(7). In this case, Pacheco initially lied to investigators about whether the peppers were hers, and she failed to comply with Customs' lawful demand for documentation verifying the declared transaction value of $0.11 per kilogram. Pl.'s Br. Report of Investigation Ex. B, at 1–2; Request for Information Ex. C, at 1–2; Decl. of Liza Lopez Ex. A, at ¶ 8. Thus, the court finds that aggravating factors are present in this case.

Additionally, the following factors may be considered in mitigation of the penalty: contributory customs error (where Customs provides Defendant with misleading or erroneous advice in writing); Defendant's cooperation with the investigation; immediate remedial action taken by Defendant; inexperience in importing (only where the violation is not due to fraud); prior good record (excluding fraud violations); inability to pay the Customs penalty; and Customs' failure to notify Defendant of a violation, in non-fraud cases, where Customs had actual knowledge of a violation. *Penalty Guidelines* §(G). The court finds that there are no mitigating factors present on the record before the court.

The court grants Plaintiff's Motion for Default Judgment and awards Plaintiff the domestic value of the merchandise, in the amount of $2,651,312.18 due to the presence of aggravating factors and the absence of mitigating factors, plus post-judgment interest as provided by law. Plaintiff shall bear its own costs and fees.

Dated: September 28, 2015
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 15–112

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN HOME ASSURANCE CO., Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 10–00185

[Plaintiff is awarded $299,441.10 in prejudgment interest under 19 U.S.C. § 580 but denied equitable prejudgment interest.]

Dated: September 30, 2015

Edward F. Kenny, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for plaintiff. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy S. Rubin*, Assistant Director.

Herbert C. Shelley, Steptoe & Johnson LLP, of Washington, DC, for defendant. With him on the brief was *Mark F. Horning*.

OPINION

Goldberg, Senior Judge:

Plaintiff the United States ("the United States or "the government") commenced this action to recover unpaid antidumping duties plus pre- and postjudgment interest from surety Defendant American Home Assurance Company ("AHAC"). Following cross-motions for summary judgment, the court held AHAC liable for the unpaid duties, denied the government statutory prejudgment interest under 19 U.S.C. § 580 (2012), and awarded the government equitable pre- and postjudgment interest. *United States v. Am. Home Assurance Co.* (*AHAC CIT 14–7*), 38 CIT __, 964 F. Supp. 2d 1342 (2014). The Court of Appeals for the Federal Circuit affirmed on the issue of liability but reversed on statutory prejudgment interest, holding that the government was entitled to interest under § 580. *United States v. Am. Home Assurance Co.* (*AHAC CAFC*), 789 F.3d 1313 (Fed. Cir. 2015). This case is now before the court on remand to "calculate the precise amount of [§ 580] interest owed" and to consider whether, in light of the Court of Appeals' § 580 holding, "the government is entitled to equitable prejudgment interest in addition to [§ 580] interest." *Id.* at 1328, 1330.

BACKGROUND

The court offered a detailed exposition of the facts in its preappeal opinion. *AHAC CIT 14–7*, 38 CIT at __, 964 F. Supp. 2d at 1345–46. Facts pertinent to the remaining issues are here recited again.

In 2001, AHAC issued a continuous bond on behalf of New York–based importer JCOF (USA) International, Inc. ("JCOF"). JCOF had arranged to import freshwater crawfish tail meat from Chinese exporter Yangzhou Lakebest Foods Company, Ltd., and the imports were subject to a 1996 antidumping duty order issued by the U.S. Department of Commerce ("Commerce"). JCOF made two entries of Yangzhou's crawfish meat during the period covered by the bond, both in November 2001. For each entry, JCOF declared a 0% *ad valorum* antidumping duty rate.

In 2004, Commerce published the final results of its administrative review of the antidumping duty applicable to entries of crawfish meat made between September 1, 2001 and August 31, 2002. *Freshwater Crawfish Tail Meat from the People's Republic of China*, 69 Fed. Reg. 7193 (Dep't Commerce Feb. 13, 2004) (admin. review). Based on this review, Commerce assigned Yangzhou's crawfish meat exports a

223.01% *ad valorem* antidumping duty rate. Commerce instructed Customs to liquidate JCOF's November 2001 entries at that rate, which Customs did on June 25, 2004. JCOF did not pay, so Commerce demanded payment from AHAC.

Customs was concerned that the June 2004 liquidation violated an injunction that this court had issued in a separate case, *Shanghai Taoen International Trading Co., Ltd v. United States*, 29 CIT 189, 360 F. Supp. 2d 1339 (2005). So, once *Shanghai Taoen* was resolved and the injunction lifted, customs then reliquidated JCOF's entries. Customs demanded payment from AHAC on October 2, 2005. Pl.'s Suppl. Br. Regarding the Amount of Interest Owed by Def. Pursuant to 19 U.S.C. § 580, at 2, ECF No. 66 ("Pl.'s Suppl. Br."). Once again, AHAC refused to pay.

In response, the government filed suit against AHAC in this court pursuant to 28 U.S.C. § 1582(2). Besides claiming that AHAC was liable as JCOF's surety, the government also claimed that it was entitled to statutory prejudgment interest under § 580 and equitable interest both pre- and postjudgment. Section 580 provides that "[u]pon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due." Although the historical context of § 580— including the government's own past representations—suggested that the statute applied only to normal customs duties, not antidumping duties, the government argued that § 580's plain language nonetheless warranted a contrary result.

The court held AHAC liable for JCOF's unpaid duties, but denied the government § 580 interest, finding the statute's historical context to be persuasive. *AHAC CIT 14–7*, 38 CIT __, 964 F. Supp. 2d 1342. The court awarded prejudgment equitable interest at a rate set forth in 26 U.S.C. § 6621 after considering a number of factors. "[F]ull compensation" for the time-value of money was "the court's overriding concern," trumping any delay by the government in bringing suit, good-faith defenses to AHAC's liability, and "Customs' erroneous reliquidations." 38 CIT at __, 964 F. Supp. at 1356–57. Finally, the court awarded postjudgment interest at a rate set forth in 28 U.S.C. § 1961.

The parties cross-appealed to the Federal Circuit, which affirmed this court's liability holding but reversed on § 580 interest. *AHAC CAFC*, 789 F.3d 1313. The Court of Appeals held that the government was entitled to interest under § 580 and remanded for this court to "calculate the precise amount of [§ 580] interest owed." *Id.* at 1328. The Court of Appeals also remanded so that this court could consider

whether, in light of the Court of Appeals' § 580 holding, "the government is entitled to equitable prejudgment interest in addition to [§ 580] interest." *Id.* at 1330.

DISCUSSION

Per the Court of Appeals' opinion above, the court now "calculate[s] the precise amount of [§ 580] interest owed" and considers whether "the government is entitled to equitable prejudgment interest in addition to [§ 580] interest." *AHAC CAFC*, 789 F.3d at 1328, 1330. Section 580 interest runs "at the rate of 6 per centum a year, from the time when said bonds became due" until the date of judgment. AHAC's bonds "bec[a]me due" on October 2, 2005, the date that Customs demanded payment pursuant to its June 2005 reliquidations. Pl.'s Suppl. Br. 2; *see United States v. Am. Home Assurance Co.* (*AHAC CIT 15–88*), Slip Op. 15–88, 2015 WL 4927388, at *6 (CIT Aug. 19, 2015) (citing 19 C.F.R § 113.62(a)(ii) (2014)).[1] And § 580 interest stopped accruing on January 23, 2014, the date of this court's original judgment on liability. Judgment, ECF No. 53.[2] Interest therefore ran on a liability amount of $600,000 for 3036 days at a rate of 6% per annum for a total of $299,441.10.[3]

Having calculated the precise amount of § 580 interest, the court now considers whether the government should also get equitable prejudgment interest. At the outset, the court notes its agreement with *AHAC CIT 15–88* that the applicability of § 580 "would appear to resolve the [availability of equitable prejudgment interest] because equity operates in the absence of a statute." 2015 WL 4927388, at *6.

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[1] Interest does not run from Customs' earlier demand (pursuant to the June 2004 liquidations) because Customs voided that earlier demand through the June 2005 reliquidations. (Moreover, the government takes the position that § 580 interest runs only from the 2005 demand. Pl.'s Suppl. Br. 2.) Nor does interest run, as AHAC argues, from February 9, 2007, the date on which Customs once again demanded payment from AHAC after denying AHAC's protest of the 2005 demand. AHAC never appealed the protest denial to this court, thus rendering AHAC's 2005 demand final and conclusive. *Cf.* 19 U.S.C. § 1514. Finally, the proper date for the 2005 demand is October 2, 2005. Although the Court of Appeals' opinion states that Customs' postreliquidiations demand came in September 2005, the government's supplemental briefing confirms that October 2, 2005 was the actual date. Pl.'s Suppl. Br. 2.

[2] The government argues that § 580 interest will not stop accruing until the court enters judgment after the Court of Appeals remand. But, as noted, the court entered its original liability judgment against AHAC on January 23, 2014. Judgment, ECF No. 53.

[3] Interest = (Principal Amount) × 0.06 × (Number of Days Interest Accrued ÷ 365). Because the court is not usually in the business of calculating interest (as opposed to simply awarding it), the court retrieved this formula from the government's supplemental briefing (and corrected the formula by removing an errant exponent). Pl.'s Suppl. Br. 1. AHAC did not provide an interest formula or address whether the government's formula is correct. *See* Def.'s Suppl. Br. Regarding Amount of Interest, ECF No. 67.

Nonetheless, the Court of Appeals stated that its § 580 holding "altered the landscape of th[is] case" and remanded for consideration of "whether dual sources of interest are proper." *AHAC CAFC*, 789 F.3d at 1330.

"Generally, pre-judgment interest 'compensate[s] for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.'" *AHAC CIT 15–88*, 2015 WL 4927388, at *6 (quoting *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987)). "[F]actors that may be considered in determining an award of equitable prejudgment interest [include] '[1] the degree of personal wrongdoing on the part of the defendant, [2] the availability of alternative investment opportunities to the plaintiff, [3] whether the plaintiff delayed in bringing or prosecuting the action, and [4] other fundamental considerations of fairness." *AHAC CAFC*, 789 F.3d at 1329 (quoting *United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1326 (Fed. Cir. 2013)).

Weighing these equitable factors and remaining cognizant of the compensatory purpose of prejudgment interest, the court holds that an award is inappropriate in this case. On the one hand, the government "did not excessively delay instituting the instant action" insofar as the government filed within the statute of limitations. *AHAC CIT 14–7*, 38 CIT at __, 964 F. Supp. 2d at 1356; *see also AHAC CIT 15–88*, 2015 WL 4927388, at *7. And at least some wrongdoing on the part of AHAC is clear because AHAC was ultimately liable. *See AHAC CIT 14–7*, 38 CIT at __, 964 F. Supp. 2d at 1356.

But on the other hand lies the rationale underlying equitable prejudgment interest: compensating for the time-value of money. Were the government to receive equitable prejudgment interest, the rate would be the Federal short-term funds rate described in 26 U.S.C. § 6621. *See* 28 U.S.C § 2644. Between the relevant dates (Customs' October 2, 2005 demand and the court's January 23, 2014 judgment), the short-term funds rate varied between 0.18% and 5.16%. The average rate was 1.77%. As a result, the 6% rate that the government receives under § 580 "more than fairly compensates the Government for the time value of the unpaid duties. To award equitable prejudgment interest in these circumstances would overcompensate the Government. The court therefore declines to award equitable prejudgment interest to the Government in addition to § 580 interest." *AHAC CIT 15–88*, 2015 WL 4927388, at *8.[4]

[4] Because the court holds an award of equitable interest to be unwarranted, the court does not reach AHAC's argument that any award of equitable prejudgment interest is precluded by the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), 19 U.S.C. § 1675c (2000). And because the court does not reach AHAC's CDSOA argument, the court denies

CONCLUSION

For the foregoing reasons, the court awards the government $299,441.10 in prejudgment interest under 19 U.S.C. § 580 but denies the government equitable prejudgment interest. Judgment will be amended accordingly.

Dated: September 30, 2015
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

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the government's motion to strike that argument as moot. *See* Mot. to Strike, ECF No. 68. Finally, the court sees no reason to "alter its standing award of equitable postjudgment interest," as the Court of Appeals indicated that the court is permitted to do. *AHAC CAFC*, 789 F.3d at 1330 n.12. "Post-judgment interest is not discretionary, but rather is available as a matter of right to prevailing parties. *AHAC CIT 15–88*, 2015 WL 4927388, at *9 (citing *United States v. Servitex, Inc.*, 3 CIT 67, 68 n.5, 535 F. Supp. 695, 696 n.5 (1982); *Great Am. Ins. Co.*, 738 F.3d at 1326)).