U.S. Customs and Border Protection

Slip Op. 14–59

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and MINH PHU SEAFOOD CORP., et al., Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Court No. 12–00314[1]

[affirming final results of administrative review of antidumpingduty order]

Dated: May 29, 2014

Andrew W. Kentz, *Jordan C. Kahn*, and *Nathaniel Maandig Rickard*, Picard Kentz & Rowe LLP, of Washington, DC, for the Plaintiff.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Mykhaylo Gryzlov*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Matthew R. Nicely and *Alexandra B. Hess*, Hughes Hubbard & Reed LLP, of Washington, DC, for the Defendant-Intervenors.

OPINION

Pogue, Chief Judge:

This action arises from the sixth administrative review of the antidumping duty order covering certain frozen warmwater shrimp (the "subject merchandise") from the Socialist Republic of Vietnam ("Vietnam").[2] Plaintiff Ad Hoc Shrimp Trade Action Committee ("AH-

[1] This action was previously consolidated with *Nha Trang Seaproduct Co. v. United States*, Ct. No. 12–00317, and *Minh Phu Seafood Corp. v. United States*, Ct. No. 12–00310, *see* Order Nov. 26, 2012, ECF No. 23, but the latter two actions were subsequently dismissed, *see* ECF No. 28.

[2] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 77 Fed. Reg. 55,800 (Dep't Commerce Sept. 11, 2012) (final results and final partial rescission of antidumping duty administrative review) ("*Final Results* "), as amended by 77 Fed.Reg. 64,102 (Dep't Commerce Oct. 18, 2012) (amended final results and partial final rescission of antidumping duty administrative review) and accompanying Issues & Decision Mem., A-552–802, ARP 10–11 (Sept. 4, 2012) ("*I & D Mem.*").

STAC")[3] challenges the final results of this review, claiming that the United States Department of Commerce ("Commerce") made unreasonable determinations when calculating the home market or "normal" comparison values that the agency used to determine whether and to what extent the subject merchandise was dumped in the U.S. market during the relevant time period.[4] Specifically, AHSTAC contends that 1) Commerce unreasonably based its valuation of respondents' factors of production on surrogate market-economy data from Bangladesh, rather than the Philippines[5]; and 2) Commerce unreasonably valued the relevant labor wage rates using data from a single surrogate market economy.

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[6] and 28 U.S.C. § 1581(c) (2006).

As explained below, because Commerce's well-reasoned selection of Bangladesh as an appropriate market economy surrogate for Vietnam was supported by a reasonable reading of the record evidence, Commerce's reliance on data from Bangladesh to construct normal values in this review is affirmed. Additionally, because Commerce reasonably applied its lawful new policy when calculating surrogate labor rates in this proceeding, Commerce's labor rate valuation is also affirmed.

STANDARD OF REVIEW

The court will sustain Commerce's antidumping determinations if they are supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (defining "substantial evidence")), and the substantial evidence standard of review can be roughly translated to mean "is the determination unreasonable?"

[3] AHSTAC is an association of manufacturers, producers, and wholesalers of a domestic like product in the United States that participated in this review. Compl., ECF No. 2, at ¶ 7.

[4] *See* Mot. of [AHSTAC] for J. on the Agency R. Under USCIT Rule 56.2, Ct. No. 12–00310, ECF No. 35 ("AHSTAC's Br.").

[5] Because Commerce treats Vietnam as a non-market economy country, the agency determines the home market or normal value of merchandise from Vietnam by using surrogate market economy data to calculate production costs and profit. *See infra* Section I.A of this opinion.

[6] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

Nippon Steel Corp. v. United States, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (internal quotation and alteration marks and citation omitted).

DISCUSSION

I. Surrogate Country Selection

First, AHSTAC claims that Commerce's determination to estimate respondents' market-value cost of producing the subject merchandise by relying on data from Bangladesh, rather than the Philippines, is unreasonable. AHSTAC's Br. at 9, 13–18.

A. Background

Because Commerce treats Vietnam as a non-market economy ("NME") country, the agency determines the normal value of merchandise from Vietnam by using surrogate market economy data to calculate production costs and profit. *See* 19 U.S.C. § 1677b(c)(1). In doing so, Commerce's valuation of the factors of production ("FOPs") must be "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [agency]." *Id.* "[T]o the extent possible," Commerce is required to use data from countries that are both economically comparable to the NME and significant producers of comparable merchandise. *Id.* at § 1677b(c)(4).

When choosing appropriate surrogate market economy countries, Commerce first creates a list of potential surrogates whose per capita gross national income ("GNI") falls within a range of comparability to the GNI of the NME country (the "potential surrogates list").[7] Next, Commerce identifies which countries on the potential surrogates list produce merchandise comparable to the merchandise subject to the antidumping duty order.[8] After that, the agency determines "whether any of the countries which produce comparable merchandise are 'significant' producers of that comparable merchandise."[9] Finally, "if

[7] *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1(2004), *available at* http://ia.ita.doc.gov/policy/bull04–1.html (last visited Apr. 30, 2014) ("*Policy 4.1*"). *See also Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1075–76, 638 F. Supp. 2d 1325, 1347–49 (2009) (discussing Commerce's practice for creating the potential surrogates list and noting that "[a]lthough Commerce places primary emphasis on GNI when compiling its list of potential surrogate countries, it apparently does not set a fixed range into which a potential surrogate's per capita GNI must fall") (citation omitted).

[8] *Policy 4.1.* Commerce's policy provides detailed examples of the agency's process for determining whether merchandise that is not identical to the subject merchandise is nevertheless "comparable." *See id.*

[9] *Id.* (referring to 19 U.S.C. § 1677b(c)(4)).

more than one country has survived the selection process to this point, the country with the best [FOP] data is selected as the primary surrogate country."[10]

Because Commerce's policy is to treat all of the countries that were initially placed on the potential surrogates list as "equivalent in terms of economic comparability [to the NME country]," regardless of their relative GNI proximity thereto,[11] a literal application of *Policy 4.1* implies that Commerce will choose from among the potential surrogates that satisfy its selection criteria (i.e., economic comparability, significant production of comparable merchandise, and data availability) based solely on considerations of relative data quality.[12] This means that even very slight differences in data quality between the potential surrogates may become dispositive and automatically outweigh comparatively large differences among the candidates in terms of their economic comparability to the NME country and the magnitude of their production of comparable merchandise.[13]

In prior opinions, this Court has remanded Commerce's surrogate country selections where the agency applies *Policy 4.1* in a way that arbitrarily discounts the value of relative GNI proximity (i.e., relative economic comparability) to the NME country when choosing among potential surrogates for whom quality data is available and who are significant producers of comparable merchandise. *See China Shrimp*

[10] *Id.* (referring to 19 U.S.C. § 1677b(c)(1)).

[11] *Policy 4.1* (noting that this practice "reflects in large partthe fact that the statute does not require [Commerce] to use asurrogate country that is at a level of economic development-*most* comparable to the NME country") (emphasis in original).

[12] *See Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 882 F. Supp. 2d 1366, 1374 (2012) ("*China Shrimp AR5* ") (discussing "Commerce's policy of disregarding relative GNI differences among potential surrogates for whom quality data is available and who are significant producers of comparable merchandise").

[13] In *China Shrimp AR5*, for example, both India and Thailand satisfied all of the selection criteria to serve as potential surrogate market economies for the People's Republic of China ("China"), which Commerce also treats as an NME country. Although Thailand's GNI was nearly identical to China's, whereas India's GNI was just over a third of China's, and although Thailand was arguably a more significant producer of comparable merchandise than India, Commerce selected India as the primary surrogate country based on a very slight difference between the relevant Indian and Thai FOP data. Specifically, although the Indian and Thai data were so similar in quality that Commerce was unable to make a distinction between the two datasets based on the agency's usual data-evaluation standards, Commerce found that the Indian data for shrimp larvae (the critical input for producing the subject merchandise) did not specify the species of shrimp to which they referred, whereas the Thai data for shrimp larvae were specific to a species of shrimp that the mandatory respondent in that proceeding did not produce. On the basis of this distinction – i.e., based essentially on a finding that a subset of the Indian data was more vague than its counterpart within the Thai data – Commerce selected India as the primary surrogate country for China. *See China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 1372, 1375–76.

AR5, __ CIT at __, 882 F. Supp. 2d at 1374–76; *Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT 1407, 1413, 647 F. Supp. 2d 1368, 1376 (2009) ("*Vietnam Shrimp AR2* ").

B. Analysis

Here, AHSTAC challenges Commerce's selection of Bangladesh as the primary surrogate market economy country for Vietnam in this review. AHSTAC's Br. at 13–18. Specifically, AHSTAC contends that Commerce erred by applying *Policy 4.1* in such a way that "the GNI differential between Vietnam and the potential surrogate countries was completely excluded from consideration when Commerce selected Bangladesh [in this review]." *Id*. at 16. Accordingly, AHSTAC argues that Commerce's surrogate country selection should be remanded on the same grounds as those supporting remand in *China Shrimp AR5* and *Vietnam Shrimp AR2*. *Id*. at 16–18.

But AHSTAC mischaracterizes the record in this case. Commerce has not "completely excluded from consideration" the potential surrogates' relative GNI proximity to the GNI of Vietnam when selecting the primary surrogate country from the potential surrogates list. On the contrary, Commerce explicitly acknowledged that "India's [GNI[14]] is closer to that of Vietnam" than "the relatively less similar [GNI] of the Philippines and Bangladesh." *I & D Mem.* cmt. 1 at 4.[15] Commerce then determined that, on the record of this review, the accuracy-enhancing value of Bangladesh's significantly superior FOP data quality outweighed the accuracy-enhancing value of India's relative GNI proximity. *See id*. at 5.[16]

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[14] Although the Issues & Decision Memorandum refers to the potential surrogates' gross domestic product ("GDP") rather than their GNI, Commerce in fact generates the potential surrogates list using GNI figures, rather than GDP. *See Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13,246, 13,246 n.2 (Dep't Commerce Mar. 21, 2007) (noting that Commerce uses GNI, rather than GDP, to construct the potential surrogates list because "while the two measures are very similar, per capita GNI is reported across almost all countries by an authoritative source (the World Bank), and because [Commerce] believes that the per capita GNI represents the single best measure of a country's level of total income and thus level of economic development").

[15] Commerce determined that the Philippines, India, and Bangladesh were each within the range of economic comparability to Vietnam, and were each significant producers and exporters of products comparable to the subject merchandise during the relevant time period. *I & D Mem*. cmt. 1 at 4.

[16] Because Commerce in fact addressed "the GNI differential between Vietnam and the potential surrogate countries," AHSTAC's Br. at 16, in making its primary surrogate country selection, declining to reach the merits of AHSTAC's contention that Commerce improperly failed to do so would not be appropriate in this case. *Cf*. Def.'s Corrected Resp. in Opp'n to Pl.'s Mot. for J. Upon the Agency R., ECF No. 41 ("Def.'s Br.") at 20–23 (arguing that the court should decline to reach the merits of AHSTAC's contention in this regard because AHSTAC failed to make this argument before the agency in the first instance);

Specifically, Commerce determined that the available Philippine data on shrimp (the FOP accounting for the largest portion of normal value) omitted "substantial portions of the range of sizes of shrimp sold by the respondents," while the available Indian data on shrimp was 1) limited to a sole company within India, and thus did not "represent the broad market average [that Commerce] prefers," and 2) provided values that were publicly ranged, and thus values that did not "represent actual, exact prices for shrimp in the Indian market." *I & D Mem.* cmt. 1 at 5. The available Bangladeshi data, on the other hand, represented a broad-market average, were product-specific, contemporaneous with the POR, and represented actual transaction prices. *Id.* Accordingly, Commerce determined that, notwithstanding Bangladesh's lesser GNI proximity to Vietnam than that of the other two potential surrogates, "the superiority of the Bangladeshi surrogate value data compared to the Philippine and Indian surrogate value data" outweighed the benefits of using data from a country with a relatively closer GNI to that of Vietnam.[17] *See id.* at 4–5.

Thus Commerce specifically weighed the relative GNI proximity of each potential surrogate to Vietnam's GNI against the significant differences in the quality of the relevant surrogate value data avail-

28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies.") (emphasis added); *Blue Field (Sichuan) Food Indus.Co. v. United States*, __ CIT __, 949 F. Supp. 2d 1311, 1321 (2013) ("This court has discretion to determine when it will require the exhaustion of administrative remedies.") (citing 28 U.S.C. § 2637(d)); *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (holding that requiring exhaustion of administrative remedies is appropriate where doing so "can protect administrative agency authority and promote judicial efficiency") (citation omitted).

[17] Importantly, Bangladesh's *relatively* less similar GNI to that of Vietnam (when compared with India's GNI) does not affect Commerce's determination that all three potential surrogate countries independently fell within the range of economic comparability to Vietnam, and therefore that data from all three countries would satisfy that threshold statutory requirement. *See I & D Mem.* cmt. 1 at 4. The appropriateness of placing Bangladesh on the initial potential surrogates list (based on Commerce's finding that Bangladesh's GNI fell within the range of economic comparability to Vietnam) is uncontested. Accordingly, *Fujian Lianfu* – which addressed a challenge to the appropriateness of placing India on the potential surrogates list for China, and was therefore not concerned with the *relative* economic comparability of potential surrogates, but rather with whether India should have been considered a potential surrogate at all, 33 CIT at 1075, 638 F. Supp. 2d at 1347 – is inapposite to the case at hand. *Cf.* Def.'s Br. at 13 (relying on *Fujian Lianfu* to argue that "Commerce applied the standard that this Court affirmed in *Fujian* "). It may well be that, in placing Bangladesh on the potential surrogates list for Vietnam, Commerce applied the standard that the court affirmed in *Fujian Lianfu*, but Commerce's initial placement of Bangladesh on the potential surrogates list is not the issue before the court. Here, the challenge is to Commerce's consideration of the merits of each of the potential surrogates on that list relative to each other, which is an issue that was not before the court in *Fujian Lianfu*.

able from each of these countries. *See I & D Mem.* cmt.1 at 4–5. Accordingly, contrary to AHSTAC's contentions, Commerce did in fact consider the differences in GNI among the potential surrogates. For this reason, the grounds supporting the remand orders in *China Shrimp AR5* and *Vietnam Shrimp AR2* are not present in this case.[18]

Moreover, Commerce's explanation for why the agency chose to give more weight to the superiority of the Bangladeshi surrogate value data than to India's relatively closer GNI is reasonable.[19] Specifically, Commerce explained that, although India's GNI was closer to that of Vietnam's – implying a more accurate estimate for the FOP values that tend to be linearly correlated with GNI, such as wage rates[20] – the available Indian surrogate value data for shrimp (the FOP accounting for the largest portion of normal value) was limited to only a single company and did not reflect exact market prices, whereas the available Bangladeshi data represented a broad market average based on actual transaction prices. *I & D Mem.* cmt. 1 at 5. [21]

Accordingly, because Commerce's selection of Bangladesh as the primary surrogate country for Vietnam in this review was supported by a reasoned and reasonable analysis of the record, this determination is sustained as supported by substantial evidence. *See Nippon Steel*, 458 F.3d at 1351.

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[18] *Cf. China Shrimp AR5*, __ CIT __, 882 F. Supp. 2d at 1375 (explaining that, in that case, "Commerce did not decide that the superiority of Indian data quality outweighed the superiority of Thailand's economic comparability to the NME," but rather "Commerce decided that it need not consider relative economic comparability, or weigh one country's strength in economic comparability against another's strength in data quality") (citation omitted); *Vietnam Shrimp AR2*, 33 CIT at 1413, 647 F. Supp. 2d at 1376 (explaining that, in that case, Commerce did not consider or explain "why the difference in economic similarity to Vietnam [among the potential surrogates] is outweighed by the differences in quality of data between Bangladesh and India").

[19] Notably, although AHSTAC argues that Commerce should have selected the Philippines rather than Bangladesh, *see* AHSTAC Br. at 9, the Philippines' GNI is actually *less* similar to that of Vietnam than is Bangladesh's. *See id*. at 7 (quoting record evidence listing the per capita GNIs for Vietnam, Bangladesh, and the Philippines as $1,010, $590, and $1,790, respectively; and thus showing that the GNI differential between Vietnam and Bangladesh ($1,010 - $590 = $420) is in fact nearly half that between Vietnam and the Philippines ($1,010 - $1,790 = -$780)).

[20] *See infra* Section II of this opinion.

[21] Again, these facts distinguish this case from *China Shrimp AR5* and *Vietnam Shrimp AR2*, where Commerce did not consider the potential surrogates' relative GNI proximity to the NME country at all. *See supra* note 18. Moreover, in *China Shrimp AR5*, unlike here, the differences in data quality between the potential surrogates were too minor to reasonably support a conclusion that data superiority outweighed any potential benefits from using data from a surrogate with a GNI that was closer to that of the NME in question. *See China Shrimp AR5*,__ CIT __, 882 F. Supp. 2d at 1375–76.

II. Labor Wage Rate Valuation

AHSTAC also argues that the *Final Results* should be remanded for additional consideration because they "are devoid of any effort to address Commerce's prior labor findings, let alone explain why those findings are no longer persuasive." AHSTAC Br. at 25 (citation omitted). Specifically, AHSTAC faults Commerce for deciding to value the labor FOP in the same way that the agency values all other surrogate FOPs (i.e., by relying on data from a single surrogate country, unless reliable data for a particular FOP are not available from the primary surrogate), without explaining its departure from its prior position that "labor is different." *Id.* (internal quotation marks and citation omitted).

A. Background

In the past, Commerce generally valued the labor FOP for merchandise from NME countries by using "regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries." 19 C.F.R. § 351.408(c)(3) (2010). Regression-based NME wage rates estimated the linear relationship between GNI and wage rates to arrive at the wage for an NME country by using the NME's GNI.[22] During the fourth administrative review of this antidumping duty order, however, 19 C.F.R. § 351.408(c)(3) was invalidated as contrary to the statute because, rather than evaluating the extent to which it was possible to base surrogate FOP calculations on data from countries that are economically comparable to the NME and significant producers of comparable merchandise,[23] the regulation instead formulaically required reliance

[22] *Zhejiang DunAn Hetian Metal Co. v. United States*, __ CIT __, 707 F. Supp. 2d 1355, 1366 (2010) (footnote omitted), *vacated on other grounds*, 652 F.3d 1333 (Fed. Cir. 2011); *see also Dorbest Ltd. v. United States*, 604 F.3d 1363, 1371 (Fed. Cir. 2010) ("Commerce determines a linear trend that best fits the data, providing a way to predict the labor rate for a country with any given gross national income."); *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7345 (Dep't Commerce Feb. 27, 1996) ("[W]hile per capita [gross domestic product] and wages are positively correlated, there is great variation in the wage rates of the market economy countries that [Commerce] typically treats as being economically comparable. As a practical matter, this means that the result of an NME case can vary widely depending on which of the economically comparable countries is selected as the surrogate. . . . [U]se of [regression-based] wage rate[s] will contribute to both the fairness and the predictability of NME proceedings. By avoiding the variability in results depending on which economically comparable country happens to be selected as the surrogate, the results are much fairer to all parties.").

[23] *See* 19 U.S.C. § 1677b(c)(4).

on data from countries that did not satisfy one or both of these statutory requirements.[24]

Subsequently, before the results of the fifth review of this antidumping duty order were finalized but after Commerce had already made its preliminary surrogate country selection for that review, Commerce published its *New Labor Rate Policy*, explaining its change in policy for constructing surrogate labor rates.[25] Specifically, the *New Labor Rate Policy* rejected Commerce's prior preference for using data from multiple market economies to construct surrogate labor rates in favor of a policy of relying on data from a single market economy to calculate all surrogate FOPs, including labor. *Id*. at 36,094. Because the results of the fifth review had not yet been finalized at the time that the *New Labor Rate Policy* went into effect, Commerce applied its new policy in that review, as it has in all subsequent antidumping proceedings involving merchandise from NME countries.

In adjudicating AHSTAC's challenge to Commerce's application of its *New Labor Rate Policy* in the fifth review of this antidumping duty order, this Court sustained the *New Labor Rate Policy* as reasonable on its face, holding that "Commerce reasonably determined that, in general, the administrative costs of engaging in a complex and lengthy analysis of additional surrogate data for the labor FOP may outweigh the accuracy-enhancing benefits of doing so."[26] But because Commerce had initially selected the primary surrogate country in that segment of this antidumping proceeding before the *New Labor Rate Policy* went into effect, when Commerce's policy was still to use multiple countries' data to calculate surrogate labor rates, Commerce's initial surrogate country analysis did not consider the reasonableness of its selection in terms of providing the best available

[24] *See Dorbest*, 604 F.3d 1371–72 (holding that because the statute requires Commerce to use data from economically comparable countries "to the extent possible," Commerce may not employ a methodology that requires using data from both economically comparable and economically dissimilar countries, in the absence of a showing "that using the data Congress has directed Commerce to use is impossible"); *Shandong Rongxin Imp.& Exp. Co. v. United States*, __ CIT __, 774 F. Supp. 2d 1307, 1316 (2011) (holding that because the statute requires Commerce to use, "to the extent possible," data from countries that are "significant" producers of comparable merchandise, Commerce may not employ a methodology that requires using data from "countries which almost certainly have no domestic production – at least not any meaningful production, capable of having influence or effect").

[25] *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep't Commerce, June 21, 2011) ("*New Labor Rate Policy* ").

[26] *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, __ CIT __, 968 F. Supp. 2d 1328, 1336 (2014) ("*Vietnam Shrimp AR5* ") (citing *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, __ CIT __, 880 F. Supp. 2d 1348, 1358 (2012)).

information regarding the surrogate values for *all* FOPs, including labor. And because Commerce did not reevaluate the appropriateness of its surrogate country selection for valuing all of the FOPs, including labor, when applying its *New Labor Rate Policy* in finalizing the results of that review, Commerce's surrogate country selection was remanded for the agency to explicitly weigh the evidence that its chosen surrogate's wage data were likely to understate the surrogate market labor rate for the shrimping industry in Vietnam (given the particular GNI disparity between the surrogate and the NME country and the linear relationship between GNI and wage) against the remaining evidence that the chosen surrogate's FOP data as a whole were nevertheless the best available data on record from which to value all of the surrogate FOPs.[27]

B. Analysis

Here, unlike Vietnam Shrimp AR5, Commerce specifically weighed the considerations that the court ultimately ordered Commerce to weigh in the remand of that prior review. *See* I & D *Mem.* cmt. 1 at 4–5. Commerce explained that, although India's GNI was closer to that of Vietnam's – implying a more accurate estimate for the FOP values that tend to be very closely correlated with GNI, such as wage rates[28] – the available Indian surrogate value data for the FOP accounting for the largest portion of normal value were so inferior to the available Bangladeshi data that any accuracy-enhancing benefit accruing from selecting India – the country with the closest GNI to Vietnam's – was in fact outweighed by the accuracy-loss of inferior data quality. *See id.*[29] Thus, as already discussed,[30] Commerce's primary surrogate country analysis in this review reasonably accounted for the effect of the specific GNI differential between Bangladesh and Vietnam (i.e., the likely underestimation of the surrogate labor rate) by explaining that any accuracy-loss from an underestimated wage rate is outweighed by the accuracy gained from using Bangladeshi data for the remaining FOPs. *See I & D Mem*. cmt. 1 at 4–5.

AHSTAC does not point to any specific record evidence to suggest that Commerce's analysis resulted in an unreasonable choice of surrogate FOP data as a whole – i.e., AHSTAC has not pointed to any

[27] *Id.* at 1336–37.

[28] *See supra* note 22.

[29] As discussed above, Commerce found that the Indian data was limited to only a single company and did not reflect exact market prices, whereas the available Bangladeshi data represented a broad market average based on actual transaction prices. *I & D Mem*. cmt. 1 at 5.

[30] *See supra* Section I of this opinion.

evidence that Commerce has not already considered and weighed when making its primary surrogate country selection and implementing its new policy of sourcing all FOP data from that primary surrogate.[31] And while AHSTAC is correct that, notwithstanding the New Labor Rate Policy, Commerce may not rely on data that are aberrational or distortive,[32] AHSTAC's argument that the Bangladeshi wage data used in this review were aberrational is not persuasive. As Commerce explained, *see I & D Mem*. cmt. 2C at 12, although the Banglandeshi labor data exhibit values lower than other countries on Commerce's initial potential surrogates list, this does not mean that the numbers are aberrational. Rather, just as Bangladesh's GNI is the lowest within the range of GNI values exhibited by the countries on the potential surrogates list (all of which were determined to satisfy the threshold economic comparability requirement, a determination that is not contested), so too Bangladesh's labor data is merely the lowest value within the range of economically comparable countries on that list. *See Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, __ CIT __, 929 F. Supp. 2d 1352, 1356 n.9 (2013) (rejecting a similar argument made by AHSTAC in a challenge to the final results of the fifth review of this antidumping duty order).

Thus AHSTAC's challenge to Commerce's reliance on its *New Labor Rate Policy* to value all relevant FOPs in this review (including the labor rate) using data from the primary surrogate country must be rejected because Commerce's *New Labor Rate Policy* is generally reasonable, and no evidence suggests that it was unreasonably applied on the record of this review.

CONCLUSION

For all of the foregoing reasons, Commerce's Final Results are sustained. Judgment will issue accordingly.

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[31] Indeed, as already noted above, the GNI differential between Vietnam and the Philippines (AHSTAC's preferred surrogate) is *greater* than that between Vietnam and Bangladesh. *See supra* note 17. *Cf. Vietnam Shrimp AR5*, __ CIT at __, 968 F. Supp. 2d at 1336–37 (suggesting that a logical implication of Commerce's *New Labor Rate Policy* is that considerations of the labor-valuation accuracy-enhancing benefits of a potential surrogate's GNI proximity to the GNI of the NME country must now be weighed as part of Commerce's primary surrogate country selection analysis).

[32] The *New Labor Rate Policy* itself explicitly acknowledges this. *See New Labor Rate Policy*, 76 Fed. Reg. at 36,094 ("If there is evidence submitted on the record by interested parties demonstrating that the NME respondent's cost of labor is overstated, the Department will make the appropriate adjustments to the surrogate financial statements subject to the available information on the record."); *I & D Mem*. cmt. 2C at 13 (noting that Commerce will look to data beyond that from the primary surrogate country "when a suitable [FOP] value from the primary surrogate country does not exist on the record").

Dated: May 29, 2014
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 14–60

CHANGZHOU HAWD FLOORING CO., LTD., et al., Plaintiffs, v. United States, Defendant,

Before: Donald C. Pogue,
Chief Judge
Court No. 12–00020[1]

[motion to intervene granted]

Dated: May 29, 2014

Gregory S. Menegaz and *J. Kevin Horgan*, deKieffer & Horgan, PLLC, Washington, DC, for the Plaintiffs.

Kristin H. Mowry, Jeffrey S. Grimson, Jill A. Cramer, Sarah M. Wyss, Rebecca M. Janz, and *Daniel R. Wilson*, Mowry & Grimson, PLLC, of Washington, DC, for the Plaintiff-Intervenor.

Harold Deen Kaplan, Hogan Lovells US LLP, of Washington, DC, for movants Armstrong Wood Products (Kunshan) Co., Ltd., Lumber Liquidators Services, LLC, and Home Legend, LLC. On the brief were *Mark R. Ludwikowski* and *Kristen S. Smith*, and *Lana Nigro*, Sandler, Travis & Rosenberg, PA, of Washington, DC.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for the Defendant. Appearing withhim were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Melissa Brewer*, Attorney, International Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, for the Defendant-Intervenor.

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[1] This action was originally consolidated with Court Numbers 1100452, 12–00007, and 12–00013, under Consolidated Court Number 12–00007. Order May 31, 2012, Consol. Ct. No. 12–00007, ECF No. 37. Court Number 11–00452 was ultimately severed and dismissed. Am. Order Nov. 27, 2012, Consol. Ct. No. 12–00007, ECF No. 75; Judgment, Ct. No. 11–00452, ECF No. 68; *see Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __, 853 F. Supp. 2d 1290 (2012); *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __, 865 F. Supp. 2d 1300 (2012). Following the court's decision in *Baroque Timber Indus. (Zhongshan) Co. v. United States*, __ CIT __, 971 F. Supp. 2d 1333 (2014) ("*Baroque IV*"), Court Numbers 12–00007 and 12–00013 were also severed and final judgment entered. Order Granting Mot. to Sever, Apr. 22, 2014, Consol. Ct. No. 12–00007, ECF No. 162; Judgment, Ct. No. 12–00007, ECF No. 163; Judgment, Ct. No. 12–00013, ECF No. 32.

OPINION AND ORDER

Pogue, Chief Judge:

Armstrong Wood Products (Kunshan) Co., Lumber Liquidators Services, LLC, and Home Legend, LLC (collectively "Armstrong"),[2] move for "party litigant re-designation," from Defendant-Intervenor in (the now severed and dismissed) Court Number 11–00452 to Plaintiff-Intervenor in (the now remaining) Court Number 12–00020. Armstrong's Mot. at 2; *see also supra* note 1. The court construes this motion as a motion to intervene pursuant to USCIT Rule 24 in Court No. 12–00020, out of time, as Plaintiff-Intervenor, and grants the motion, finding good cause for Armstrong's late filing in the context and circumstances present here.

BACKGROUND

I. Four Initial Actions Challenging Commerce's Final Determination of Sales at Less Than Fair Value of Multilayered Wood Flooring from the People's Republic of China

This litigation arises from the Coalition for American Hardwood Parity's ("CAHP") October 21, 2010 petition to the Department of Commerce ("Commerce" or the "Department") alleging that imports of multilayered wood flooring from the People's Republic of China ("PRC" or "China") were being dumped in the United States. In response, Commerce initiated an antidumping duty investigation for the period of April 1, 2010 through September 30, 2010. *Multilayered Wood Flooring from the People's Republic of China*, 75 Fed. Reg. 70,714 (Dep't Commerce Nov. 18, 2010) (initiation of antidumping duty investigation). Armstrong was not individually investigated, but qualified for a separate rate. *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 30,656, 30,661 n.33 (Dep't Commerce May 26, 2011) (preliminary determination of sales at less than fair value) (granting Armstrong separate rate status).

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[2] Armstrong Wood Products (Kunshan) Co., Ltd., is a producer of multilayered wood flooring. Lumber Liquidators Services, LLC and Home Legend, LLC are U.S. importers of Armstrong's products. All three participated in the underlying antidumping investigation, Armstrong as a separate rate respondent, Lumber Liquidators and Home Legend as Respondent interested parties. *See* Intervenor Defs.' Mot. to be Re-Designated as Intervenor Pls. & Req. for Correction to Footnote 6 to Slip Op. 14–35 ("Armstrong's Mot."), Consol. Ct. No. 12–00007, ECF No. 160, at 1–2; *see also* Consent Mot. to Intervene Jan. 13, 2012, Ct. No. 11–00452, ECF No. 28, at 2.

The final determination in the investigation[3] was the subject of four separate challenges before this Court, pursuant to § 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2) (2006) and 28 U.S.C. § 1581(c) (2006)[4]:

(1) *Coalition for American Hardwood Parity v. United States*, Court Number 11–00452, brought by the Petitioner, *see* Compl., Ct. No. 11–00452, ECF No. 7, at ¶4;

(2) *Baroque Timber Industries (Zhongshan) Co., Ltd. v. United States*, Court Number 12–00007, brought by individually-investigated mandatory respondents (collectively the "Samling Group"), *see* Compl., Ct. No. 1200007, ECF No. 9, at ¶3;

(3) *Zhejiang Layo Wood Indus. Co. v. United States*, Court Number 12–00013, brought by another individually-investigated mandatory respondent ("Layo Wood"), *see* Compl., Ct. No. 12–00013, ECF No. 9, at ¶ 1; and

(4) *Changzhou Hawd Flooring Co., Ltd. v. United States*, Court Number 12–00020, brought by the non-individually investigated respondents who qualified for a separate rate ("Separate Rate Respondents"), *see* Compl., Ct.t No. 1200020, ECF No. 9, at ¶1.

Armstrong was not among the plaintiffs in the separate rate respondents' challenge and did not, at any time, formally seek to intervene as Plaintiff-Intervenor in that case. Instead, Armstrong sought and received permission to intervene as Defendant-Intervenor in Court Number 11–00452, defending the results of the investigation against the Petitioner's challenge. Consent Mot. to Intervene [as Def.-Intervenor], Ct. No. 1100452, ECF No. 28; Order Jan. 17, 2012, Ct. No. 11–00452, ECF No. 41 (granting Armstrong's motion to

[3] *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 64,318 (Dep't Commerce Oct. 18, 2011) (final determination of sales at less than fair value); *Multilayered Wood Flooring From the People's Republic of China*, 76 Fed. Reg. 76,690 (Dep't Commerce Dec. 8, 2011) (amended final determination of sales at less than fair value and antidumping duty order) ("*Amended Final Determination* ").

[4] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

intervene as Defendant Intervenor).[5] Armstrong did not move to intervene, on the Plaintiff's or Defendant's side, in any of the other three actions.

II. Consolidation Under Consolidated Court Number 12–00007

The court, after consultation with the parties, consolidated Court Numbers 11–00452, 12–00007, 12–00013, and 1200020 into Consolidated Court No. 12–00007; the respondent plaintiffs were ordered to file a joint opening brief. Order May 31, 2012, Ct. No. 12–00007, ECF No. 37. When the respondent plaintiffs filed their Joint Motion for Judgment on the Agency Record Pursuant to Rule 56.2 in accordance with this order, Armstrong was not listed as a plaintiff respondent or as any party on that brief. *See* Resp'ts' Mot. for J. on the Agency R. Pursuant to Rule 56.2, Ct. No. 12–00007, ECF No. 63.

Thereafter, the court granted Defendant's motion to dismiss Petitioner's challenge (Court Number 11–00452) for lack of subject matter jurisdiction. *Baroque*, __ CIT at __, 865 F. Supp. 2d at 1309. Although the court certified some legal issues in that case for interlocutory appeal,[6] the Petitioner never filed an appeal. Its challenge was accordingly severed from the consolidated action, and final judgment was entered in Court No. 11–00452, dismissing the case, on November 27, 2012. Am. Order Nov. 27, 2012, Consol. Ct. No. 12–00007, ECF No. 75; Judgment, Ct. No. 11–00452, ECF No. 68.

Although Armstrong was never formally made a party to any challenge to the antidumping duty investigation, other than being granted Defendant-Intervenor status in the (subsequently dismissed) Petitioner's challenge (Court No. 11–00452), and although Armstrong was not listed as a party on the respondents' joint opening brief, Armstrong appeared on the respondents' reply brief in the remaining consolidated action, for the first time joining the arguments made by the respondent plaintiffs in challenging (as opposed to defending, as it had done in Court No. 11–00452) the results of the investigation.

[5] When the United States moved to dismiss Petitioner's challenge for lack of jurisdiction, Def.'s Mot. to Dismiss Pl.'s Compl. for Lack of Jurisdiction, Ct. No. 11–00452, ECF No. 52, Armstrong supported the motion. Joint Letter in Lieu of Supplemental Br., Ct. No. 11–00452 ECF No. 55. That is, Armstrong's position in the sole case to which it was formally made a party was that the antidumping investigation results should be sustained as is, and that Petitioner's challenge thereto should be dismissed. *See id*.

[6] *See id.* at 1310; Order Oct. 19, 2012, Consol. Ct. No. 12–00007, ECF No. 70 (certifying issues for interlocutory appeal to the Court of Appeals for the Federal Circuit).

See Resp't Pls.' Reply, Consol. Ct. No. 12–00007, ECF No. 87, at 1, 40. Thereafter, Armstrong has consistently appeared on briefing challenging Commerce's determinations in the investigation at issue.[7]

III. Court-Ordered Remand and Commerce's Subsequent Redetermination

The court remanded the results of the antidumping duty investigation. *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, ___ CIT ___, 925 F. Supp. 2d 1332 (2013). Commerce filed its redetermination on November 14, 2013. *See* Final Results of Redetermination Pursuant to Court Order, Consol. Ct. No. 12–00007, ECF No. 132 ("*Redetermination*"). Commerce's *Redetermination* explicitly addresses Armstrong's challenge, during the remand proceeding, to Commerce's calculation of the separate rate. *Id.* at 38.[8]

Following filing of the *Redetermination*, Armstrong continued to pursue this challenge in its briefing. *See* Armstrong's Comments on Remand Results, Consol. Ct. No. 12-00007, ECF No. 134. The Government grouped Armstrong together with the other separate-rate parties and acknowledged Armstrong's comments as "plaintiffs who submitted comments." Def.'s Resp. to Comments Upon Remand Redetermination, Consol. Ct. No. 12–00007, ECF No. 141 at 1 n.1. Defendant-Intervenor CAHP also acknowledged Armstrong's comments in its reply comments. Def.-Intervenor's Reply Comments Regarding Dep't Commerce Final Results of Redetermination Pursuant to Ct. Remand, Dec. 13, 2013, Consol. Ct. No. 12–00007, ECF No. 140, at 1 n.1.

IV. Second Remand and Severance

The court affirmed in part and remanded in part Commerce's *Redetermination. Baroque IV*, __ CIT at __, 971 F. Supp. 2d at 1346. The court sustained most of Commerce's findings, including the assignment of *de minimis* rates to the mandatory respondents. *Id.* at 1338 n.15. However, the separate rate calculation[9] was remanded for

[7] *See* Letter in Resp. to Ct. Req. for Comments on Targeted Dumping Remedy, Consol. Ct. No. 12–00007, ECF No. 110; Reply Br. of Certain Resp't-Appellants, Consol. Ct. No. 12–00007, ECF No. 121; Comments in Opp'n to Final Results of Redetermination Pursuant to Ct. Order ("Armstrong's Comments on Remand Results"), Consol. Ct. No. 12–00007, ECF No. 134; Resp. of [*inter alia*, Armstrong] to the Question Presented in the Ct.'s Dec. 20, 2013 Order, Consol. Ct. No. 12–00007, ECF No. 148.

[8] Armstrong argued, as did the other separate rate respondents, that the agency should not have used the adverse-inference-based China-wide rate as part of its calculation of the separate rate. *Id.* at 38–39.

[9] Because all three mandatory respondents had received *de minimis de minimis* rates, Commerce calculated the separate rate margin under the 19 U.S.C. § 1673d(c)(5)(B) "any

further consideration, as Commerce's redetermination was unsupported by a reasonable reading of the record. *Id.* at 1342–46.

Plaintiffs Samling Group and Layo Wood then moved to sever their appeals (Court Numbers 12–00007 and 12–00013) from the sole remaining action under Consol. Court No. 12–00007 (the Separate Rate Respondents' appeal, Court No. 12–00020), and to have final judgment entered. Pls.' Samling Grp. & Layo Wood Joint Mot. to Sever and for Entry J., Consol. Ct. No. 12–00007, ECF No. 159. The court granted this motion, severing both Court Numbers 12–00007 and 12–00013 and entering final judgment therein. *See supra* note 1.

Before severance and final judgment was granted in Court Numbers 12–00007 and 12–00013, however, on April 14, 2014, Armstrong moved to amend the court's most recent opinion so as to include Armstrong in the list of separate rate plaintiffs in *Baroque IV* and to be re-designated as Plaintiff-Intervenor in Consol. Court Number 12–00007. Armstrong's Mot., Consol. Ct. No. 12–00007, ECF No. 160. This motion is now at issue before the court.

DISCUSSION

I. Consolidation

This Court may consolidate actions that present common questions of law or fact. USCIT R. 42(a).[10] However, "consolidation 'does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.'" *Dorbest Ltd. v. United States*, 32 CIT 185, 220–21, 547 F. Supp. 2d 1321, 1351 (2008) (quoting *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496–97 (1933)).[11] Consequently, while Armstrong was properly a Defendant-

reasonable method" provision, using a simple average of the three mandatory rates and the PRC-wide adverse inference rate (the highest calculated margin from among the mandatory respondents). Id. at 1339. The court found that in doing so, Commerce had failed to meet the substantial evidence standard because it had not "articulated a rational connection between the record evidence and the rate applied to the separate rate companies," nor did Commerce explain "how its determination [bore] a relationship to [the separate rate respondent's] economic reality." *Id.* at 1336.

[10] The rule provides, in pertinent part: "If actions before the court involve a common question of law or fact, the court may .. . consolidate the actions." USCIT R. 42(a); cf. Fed. R. Civ. P. 42(a)(2) ("If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions . . . .").

[11] *Johnson* addressed consolidation under 28 U.S.C. § 734. 289 U.S. at 496. This statute has since been repealed and replaced by Fed. R. Civ. P. 42(a). However, the primary source of authority for interpreting the consolidation rule remains *Johnson. See, e.g., In re Cmty. Bank of N. Va.*, 418 F.3d 277,298 n.12 (3d Cir. 2005) (affirming that *Johnson* is the "authoritative" statement on the law of consolidation); *Intown Props. Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 168 (4th Cir. 2001) (quoting and applying *Johnson*, 289 U.S. at 496–97); *McKenzie v. United States*, 678 F.2d 571, 574 (5th Cir. 1982) (citing, *inter alia, Johnson*, 289 U.S. at 496–97, for the proposition that "consolidation does not cause one civil action to emerge from two; the actions do not lose their separate identity; the

Intervenor in Court Number 11–00452,[12] when the court consolidated that case with Court Numbers 12–00007, 12–00013, and 12–00020, it did not automatically render Armstrong a Plaintiff-Intervenor in any of those cases.[13]

Accordingly, the court construes Armstrong's Motion as a motion pursuant to USCIT Rule 24 to intervene as Plaintiff-Intervenor in Court Number 12–00020 (the remaining Separate Rate Respondents' challenge).

II. Intervention

Intervention is governed by 28 U.S.C. § 2631(j)[14] and USCIT Rule 24.[15] Where, as here, the court has jurisdiction under 28 U.S.C. §

parties to one action do not become parties to the other"); *Twaddle v. Diem*, 200 F. App'x 435, 438 n.4 (6th Cir. 2006) (citing *Johnson*, 289 U.S. at 496–97, for the proposition that "consolidation does not merge the suits into a single action, change the rights of the parties, or make parties in one suit parties in the other"); *Enter. Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994) (quoting and applying *Johnson*, 289 U.S. at 496–97); *Schnabel v. Lui*, 302 F.3d 1023, 1035 (9th Cir. 2002) (noting that "the primary source" of the consolidation rule followed by the majority of circuits is *Johnson*, 289 U.S. at 496–97); *Chaara v. Intel Corp.*, 245 F. App'x 784, 787, 790 (10th Cir. 2007) ("[C]onsolidation is an artificial link forged by a court for the administrative convenience of the parties; it fails to erase the fact that, underneath consolidation's facade, lie two individual cases.") (quoting the district court's opinion, which was affirmed "for substantially the reasons given by the district court"); *Farese v. Scherer*, 342 F.3d 1223, 1228 (11th Cir. 2003) (relying on *Johnson*, 289 U.S. at 496–97, to conclude that consolidation did not alter the fees-paid status of one of the constituent cases).

[12] *See* Order Granting Mot. to Intervene, Ct. No. 11–00452, ECF No. 41.

[13] *Cf. Dorbest*, 32 CIT at 220–21, 547 F. Supp. 2d at 1350–51 (finding that Art Heritage was "not entitled to a revised all-others rate for claims brought by [plaintiff]" because while Art Heritage was a plaintiff-intervenor in a case consolidated with plaintiff's case, it was not a plaintiff-intervenor in plaintiff's case itself); *Silver Reed Am., Inc. v. United States*, 9 CIT 1, 7–8, 600 F. Supp. 852, 857–58 (1985) (holding that, because consolidation did not merge constituent actions, a defendant-intervenor in one of the actions was not barred from intervening as a plaintiff-intervenor in the other).

[14] *See* 28 U.S.C. § 2631(j)(1)(B) ("Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that . . . in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right . . . .").

[15] *See* USCIT R. 24(a)(3) ("In an action described in 28 U.S.C. §1581(c), a timely motion must be made no later than 30 days after the date of service of the complaint as provided for in Rule 3(f), unless for good cause shown at such later time for the following reasons: (i) mistake, inadvertence, surprise or excusable neglect; or (ii) under circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the 30-day period. Also, in an action described in 28 U.S.C. § 1581(c), at the time a party's motion for intervention is made, attorneys for that party are required to comply with the procedures set forth in Rule 73.2(c) by filing of a Business Proprietary Information Certification where appropriate.").

1581(c), intervention may be sought only as a matter of right. *See* 28 U.S.C. § 2631(j)(1)(B).[16] Armstrong, as a separate rate respondent, is an interested party[17] that was party to the underlying investigation,[18] and therefore may intervene in the Separate Rate Respondent's challenge, Court No. 12–00020, as a matter of right, within 30 days after service of the complaint, or at a later date for good cause shown. USCIT R. 24(a)(3). Armstrong did not timely intervene within 30 days of service of the complaint in Court Number 12–00020,[19] but may still intervene if good cause is shown.

Good cause is "mistake, inadvertence, surprise or excusable neglect."[20] USCIT R. 24(a)(3). Relevant case law is sparse[21] but uniform in its understanding of good cause as, "at bottom," an equitable determination that takes into account "all relevant circumstances

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[16] *See, e.g., Ontario Forest Indus. Ass'n v. United States*, 30 CIT 1117, 1130 n.12, 444 F. Supp. 2d 1309, 1322 n.12 (2006) ("[U]nder 28 U.S.C. § 1581(c), intervention may only be sought as a matter of right.") (citing 28 U.S.C. § 2631(j)(B)); *Dofasco Inc. v. United States*, 31 CIT 1592, 1594–95, 519 F. Supp. 2d1284, 1286 (2007) (same).

[17] *See* 28 U.S.C. § 2631(k)(1) (providing that "'interested party' has the meaning given such term in [19 U.S.C. § 1677(9)]); 19 U.S.C. § 1677(9)(A) (defining "interested party" to include "a foreign manufacturer, producer, or exporter ... of subject merchandise").

[18] Armstrong was a non-individually investigated respondent who qualified for a separate rate. *See Amended Final Determination*, 76 Fed. Reg. at 76,692 (assigning the all-others separate rate to Armstrong).

[19] The complaint in Court Number 12–00020 was filed on February 8, 2012. Comp., Ct. No. 12–00020, ECF No. 9. Armstrong moved to intervene on April 14, 2014. Armstrong's Mot., Consol. Ct. No. 12–00007, ECF No. 160.

[20] Good cause may also be found if the delay is the result of "circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the 30-day period." USCIT R. 24(a)(3)(ii).

[21] *Cf. Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 30 CIT 542, 545, 425 F. Supp. 2d 1374, 1376 (2006) ("The relevant caselaw is not particularly robust."). Mistake, inadvertence, and surprise are as yet undefined. They may, however, be taken to carry their ordinary, contemporary, common meanings. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). A (short) line of cases has developed around excusable neglect. *Siam Food Prods. Pub.Co. v. United States*, 22 CIT 826, 828, 24 F. Supp. 2d 276, 279(1998) (defining Rule 24(a)(3) "excusable neglect" as an analysis of "all relevant circumstances surrounding the party's omission . . . [including] the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith") (quoting *Pioneer*, 507 U.S. at 395, and *E.I. DuPont DeNemours & Co. v. United States*, 22 CIT 601, 603, 15 F. Supp. 2d 859, 861 (1998)) (alteration in the original); *Home Prods. Int'l, Inc. v. United States*, 31 CIT1706, 1709, 521 F. Supp. 2d 1382, 1385 (2007) (relying on *Pioneer*, 507 U.S. at 395, and *Siam Food*, 22 CIT at 828, 24 F.Supp. 2d at 279); *GPX Int'l Tire Corp. v. United States*, 33 CIT 114, 115 (2009) (not reported in the Federal Supplement) (same).

surrounding the party's omission." *See Pioneer*, 507 U.S. at 395 (discussing the excusable neglect analysis).[22] Relevant circumstances include "the danger of prejudice to the [non-movants], length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395.[23]

Here, Armstrong seems to have proceeded under the mistaken belief, without objection and in good faith, that by virtue of its participation as a separate rate respondent in the underlying administrative proceedings, consolidation changed its status from that of Defendant-Intervenor in Court Number 11–00452 to that of a Plaintiff-Intervenor in Consolidated Court Number 12–00007.[24]

Granting Armstrong Plaintiff-Intervenor status in the remaining Court No. 12–00020 now, so that it may continue litigating the separate rate issues the investigation, poses no danger of prejudice to the other parties. Armstrong does not seek to raise any issue not already

[22] *See Home Prods.*, 31 CIT at 1709, 521 F. Supp. 2d at 1385 (using an equitable balancing test to analyze excusable neglect); *GPX*, 33 CIT at 115 (same); *Habas Sinai*, 30 CIT at 545,425 F. Supp. 2d at 1377–80 (declining to define "mistake, inadvertence, surprise, or excusable neglect" and instead considering the prejudice that granting a motion to intervene out of time would cause the non-moving parties); *Siam Food*, 22 CIT at 828, 24 F. Supp. 2d at 279–80 (using an equitable balancing test to analyze excusable neglect); *Co-Steel Raritan. Inc. v. U.S. Int'l Trade Comm'n*, 26 CIT 1131, 1132–34 (2002) (not reported in the Federal Supplement) (denying motion to intervene, finding no "good cause" without specific discussion of "mistake, inadvertence, surprise or excusable neglect"), *vacated and remanded on other grounds*, 357 F.3d 1294 (2004); *Geum Poong Corp. v. United States*, 26 CIT 908, 909, 217 F. Supp.2d 1342, 1344 (2002) (finding that, while "[w]hat circumstances" constitute good cause have "not been made clear," USCIT Rule 24(a) addresses the "questions of balancing court efficiency and the parties' burdens" and "must be applied even-handedly to all concerned").

[23] While the Court in *Pioneer* used this multifactor balancing test for 'excusable neglect' (under Fed. R. Bankr. P.9006(b)(1)), *Pioneer*, 507 U.S. at 395, and this Court has since adopted it for excusable neglect under USCIT Rule 24(a)(3), *Siam Food*, 22 CIT at 828, 24 F. Supp. 2d at 279, the Supreme Court's reasoning suggests that this analysis can and should apply to mistake, surprise, and inadvertence as well. *See Pioneer*, 507 U.S. at 388 ("Hence, by empowering the courts to accept late filings 'where the failure to act was the result of excusable neglect,' Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.").

[24] *See* Armstrong's Mot., Consol. Ct. No. 12–00007, ECF No. 160 at3 (Armstrong requests that it be listed with Plaintiffs and Plaintiff-Intervenors in Consolidated Court Number 12–00007, in *Baroque IV*, __ CIT at __, 971 F. Supp. 2d at 1337 n.6, because of its participation as respondent in the underlying administrative review, believing the omission a "technical oversight or clerical error," on the part of the court, rather than reflective of its status as Defendant-Intervenor in the severed and dismissed Court Number 11–00452. Armstrong also requests "party litigant re-designation" as Plaintiff-Intervenor, rather than filing a motion to intervene, as is required).

brought before the court by the plaintiffs.[25] Armstrong fully participated and was treated by the non-moving parties in Consol. Court No. 12–00007 as if already a Plaintiff-Intervenor.[26] Making Armstrong a Plaintiff-Intervenor, therefore, would in no way "interfere with the progress of the litigation." *Silver Reed*, 9 CIT at 7, 600 F. Supp. at 857. Conversely, denying Armstrong Plaintiff-Intervenor status presents considerable danger of prejudice to Armstrong, especially given its previous participation, and because it would deny Armstrong the benefit of the separate rate resulting from the *Baroque IV* remand.[27] The absence of prejudice to the non-moving parties, combined with Armstrong's good faith, "weigh strongly in favor of permitting [late intervention]." *Pioneer*, 507 U.S. at 398.[28]

Accordingly, given the unique context here, because Armstrong is an interested party that was party to the underlying administrative review and filed out of time for good cause, *see* USCIT R. 24(a)(3), the court grants Armstrong's motion to intervene as Plaintiff-Intervenor in the remaining separate rates case, Court No. 12–00020.[29]

CONCLUSION

Armstrong has moved for "party litigant re-designation." Armstrong's Mot., Consol. Ct. No. 12–00007, ECF No. 160, at 2. The court construes this as a motion to intervene pursuant to USCIT Rule 24 in Court No. 12–00020, out of time, as Plaintiff-Intervenor.

Because Armstrong is an interested party that was party to the underlying administrative proceedings, moving out of time but with good cause, *see* USCIT R. 24(a)(3), the court grants Armstrong's motion to intervene as Plaintiff-Intervenor in Court No. 12–00020. Armstrong's attorneys have until June 10, 2014 to come into procedural

[25] *Cf. Silver Reed*, 9 CIT at 7, 600 F. Supp. at 857; *see also Home Products*, 31 CIT at 1709, 521 F. Supp. 2d at 1385 (finding little prejudice to non-moving parties given restricted, supporting role an intervenor takes).

[26] *See supra* note 7, and accompanying text; Def.'s Resp. to Comments Upon Remand Redetermination, Consol. Ct. No. 12–00007, ECF No. 141 at 1 n.1; Def.-Intervenor's Reply Comments Regarding Dep't Commerce Final Results of Redetermination Pursuant to Ct. Remand, Dec. 13, 2013, Consol. Ct. No. 12–00007, ECF No. 140, at 1 n.1.

[27] *Cf. Siam Food*, 22 CIT at 829, 24 F. Supp. 2d at 279 ("Parties with identified interests in the results of a review have the option to protect those interests by intervening in the proceedings. To not allow them to do so is to prejudice them." (citation omitted)).

[28] *See also id.* ("To be sure, were there any evidence of prejudice to [the non-movant] or to judicial administration in this case, or any indication at all of bad faith, we could not say that the [court] [would have] abused its discretion in declining to find the neglect to be 'excusable.'").

[29] *Cf. Silver Reed*, 9 CIT at 5–8, 600 F. Supp. at 857–58 (granting a party's motion to intervene as Plaintiff-Intervenorin an action consolidated with another to which the same party was Defendant-Intervenor because of lack of prejudice to the non-moving parties).

compliance with Armstrong's new status as Plaintiff-Intervenor in Court No. 12–00020 (e.g., filing Forms 11, 13, and 17).

IT IS SO ORDERED

Dated: May 29, 2014
New York, NY

/*s*/ *Donald C. Pogue*

DONALD C. POGUE, CHIEF JUDGE