U.S. Customs and Border Protection

Slip Op. 15–14

BEIJING TIANHAI INDUSTRY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and NORRIS CYLINDER COMPANY, Defendant-Intervenor.

Before: Richard K. Eaton, Senior Judge
Court No. 12–00204
PUBLIC VERSION

[Plaintiff's motion for judgment on the agency record is denied and the Department of Commerce's final determination is sustained.]

Dated: February 6, 2015

Mark E. Pardo and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., argued for plaintiff. With them on the brief was *Francis J. Sailer*.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Matthew D. Walden*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Edward M. Lebow and *Nora L. Whitehead*, Haynes and Boone, LLP, of Washington, D.C., argued for defendant-intervenor.

OPINION

EATON, Senior Judge:

This subsidy case is before the court on Beijing Tianhai Industry Co., Ltd.'s ("BTIC" or "plaintiff") motion for judgment on the agency record challenging the final determination of the United States Department of Commerce ("Commerce" or the "Department") in *High Pressure Steel Cylinders From the People's Republic of China*, 77 Fed. Reg. 26,738 (Dep't of Commerce May 7, 2012) (final affirmative countervailing duty determination), and accompanying Issues and Decision Memorandum ("Issues & Dec. Mem.") (collectively, "Final Determination"), and the subsequent countervailing duty order published as *High Pressure Steel Cylinders From the People's Republic of China*, 77 Fed. Reg. 37,384 (Dep't of Commerce June 21, 2012) (countervailing duty order). For the reasons set forth below, Commerce's Final Determination is sustained.

BACKGROUND

In June 2011, in response to a petition filed by defendant-intervenor Norris Cylinder Company ("defendant-intervenor"), the Department initiated a countervailing duty investigation of high pressure steel cylinders from the People's Republic of China ("PRC"). High Pressure Steel Cylinders From the PRC, 76 Fed. Reg. 33,239 (Dep't of Commerce June 8, 2011) (initiation of countervailing duty investigation) ("Initiation Notice"). Commerce selected BTIC, together with its cross-owned[1] affiliates, which included Tianjin Tianhai High Pressure Container Co., Ltd. ("Tianjin Tianhai"), as the mandatory respondent. Issues & Dec. Mem. at I. The period of investigation ("POI") was January 1, 2010 through December 31, 2010. Issues & Dec. Mem. at II.A. The Department investigated whether BTIC and Tianjin Tianhai received countervailable subsidies[2] by obtaining seamless tube steel ("steel tube"), an input in the manufacture of the valves, for less than adequate remuneration. *See* Initiation Notice, 76 Fed. Reg. at 33,241. As part of its investigation, the Department issued questionnaires to determine if the steel tube inputs purchased by BTIC and Tianjin Tianhai from third-party trading companies—steel tube that those third-party trading companies had purchased from the producers—were provided by "authorities,"[3] as that term is used in 19 U.S.C. § 1677(5)(B), and whether a "benefit"[4] was provided to BTIC and Tianjin Tianhai, as that term is used in 19 U.S.C. § 1677(5)(E)(iv) and 19 C.F.R. § 351.511.[5]

BTIC answered the questionnaires for itself and Tianjin Tianhai, describing their supply chain and indicating that one producer whose

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[1] "Cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets." 19 C.F.R. § 351.525(b)(6)(vi).

[2] Under 19 U.S.C. § 1677(5)(B)(i), a "subsidy" is provided where "an authority . . . provides a financial contribution."

[3] The statute defines an "authority" as "a government of a country or any public entity within the territory of the country." 19 U.S.C. § 1677(5)(B).

[4] The statute directs that

> [a] benefit shall normally be treated as conferred where there is a benefit to the recipient, including—
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> . . . .
>
> (iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration . . . .
>
> For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

19 U.S.C. § 1677(5)(E).

[5] Commerce's regulation states that, "[i]n the case where goods or services are provided, a benefit exists to the extent that such goods or services are provided for less than adequate remuneration." 19 C.F.R. § 351.511(a)(1).

steel tube is at issue[6] was a non-cross-owned affiliate of BTIC (the "Affiliated Producer").[7] The government of the PRC (the "PRC government") provided the Department with ownership information for another steel tube producer (the "Unaffiliated Producer"), with which BTIC had no affiliate relationship.[8]

On October 18, 2011, the Department issued a Preliminary Determination, in which it found that the Affiliated Producer and the Unaffiliated Producer were both authorities under 19 U.S.C. § 1677(5)(B), providing financial contributions pursuant to 19 U.S.C. § 1677(5)(D)(iii), and that BTIC and Tianjin Tianhai received a benefit as described in 19 U.S.C. § 1677(5)(E)(iv). *See* High Pressure Steel Cylinders From the PRC, 76 Fed. Reg. 64,301, 64,305 (Dep't of Commerce Oct. 18, 2011) (preliminary affirmative countervailing duty determination and alignment of final countervailing duty determination with final antidumping duty determination) ("Preliminary Determination"). As a result, the Department preliminarily determined that the transactions through the third-party trading companies were countervailable transactions because the steel tube was provided by producers, which were authorities, and that a benefit was conferred on BTIC to the extent that a good (the steel tube) was provided for less than adequate remuneration. Preliminary Determination, 76 Fed. Reg. at 64,305.

To measure the adequacy of remuneration, Commerce sought to construct a benchmark price,[9] representative of the market price for steel tube, in accordance with 19 C.F.R. § 351.511(a)(2). Commerce's

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[6] [[ ]].

[7] BTIC reported that Tianjin Tianhai, its cross-owned affiliate, had a minority shareholder that was [[ ]] by [[ ]] (the Affiliated Producer). *See* Letter from Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, Counsel for BTIC, to Hon. Rebecca M. Blank, Acting Secretary of Commerce, Import Administration, U.S. Department of Commerce at 4, CD 19 at bar code 3027967–01 (Sept. 2, 2011), ECF Dkt. No. 18.

[8] [[ ]].

[9] The benchmark price is "the price that could have constituted adequate remuneration." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1368 (Fed. Cir. 2014). The Department compares the respondent's reported costs for the input in question (e.g., steel tube) with the calculated benchmark price, which is representative of the market price for the good at issue. *See id.* at 1368, 1370.

"[T]he bases for identifying an appropriate market-based benchmark for measuring the adequacy of the remuneration of a government provided good or service" are set forth in 19 C.F.R. § 351.511(a)(2). Preliminary Determination, 76 Fed. Reg. at 64,304; *see also Essar Steel Ltd. v. United States*, 34 CIT __, __, 721 F. Supp. 2d 1285, 1292 (2010). These potential benchmarks are listed by the Department in order of preference:

> (1) Market prices from actual transactions within the country under investigation for the government-provided good (e.g., actual sales, actual imports, or competitively run government auctions) ("tier one" benchmarks); (2) world market prices that would be available to purchasers in the country under investigation ("tier two" benchmarks); or

hierarchy, contained in its regulation, directs it to "normally" rely on "a market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i); *see also* Countervailing Duties, 63 Fed. Reg. 65,348, 65,377 (Dep't of Commerce Nov. 25, 1998). Where "there is no useable market-determined price with which to make the comparison," however, the regulation directs the Department "to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii).

Using ownership information provided by the PRC government, the Department found that 38 percent of steel tube production in the PRC during the POI was manufactured by companies that had been designated by Commerce as state-owned. Preliminary Determination, 76 Fed. Reg. at 64,305. Finding that this level of government ownership was substantial, the Department determined preliminarily "that domestic prices in the PRC for [steel tube were] distorted such that they [could not] be used as a tier one benchmark." Preliminary Determination, 76 Fed. Reg. at 64,305. Having found domestic prices in the PRC for steel tube to be unusable, the Department instead used world market prices available to purchasers in the PRC (i.e., a tier-two benchmark) as a benchmark for steel tube. *See* Preliminary Determination, 76 Fed. Reg. at 64,305. Thus, Commerce preliminarily relied on free on board ("FOB")[10] and export prices submitted by defendant-intervenor, which were reported in *SteelOrbis*[11] for exports from Italy, when determining the value of the steel tube provided. Preliminary Determination, 76 Fed. Reg. at 64,305. It then added delivery charges to the benchmark price, which included, among other things, inland freight charges. *See* Preliminary Determination, 76 Fed. Reg. at 64,305. Commerce also added the value of the import duties reported

(3) prices consistent with market principles based on an assessment by the Department of the government-set price ("tier three" benchmarks).

Preliminary Determination, 76 Fed. Reg. at 64,304 (citing 19 C.F.R. § 351.511(a)(2)).

[10] FOB (free on board) is a standardized shipping term "mean[ing] that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards." *Cutter & Buck, Inc. v. United States*, 37 CIT __, __ n.1, Slip Op. 13–45, at 2 n.1 (2013) (citations omitted) (internal quotation marks omitted).

[11] "SteelOrbis is a[n] . . . e-marketplace and market intelligence provider that offers up-to-date news on the steel industry and steel trading from one single source." *About Us*, STEELORBIS, https://www.steelorbis.com/support/about-us.htm (last visited Dec. 18, 2014). *SteelOrbis* provides "steel prices [that] are spot prices garnered from real market transactions." *Frequently Asked Questions*, STEELORBIS, https://www.steelorbis.com/support/frequently-asked-questions.htm#11 (last visited Dec. 18, 2014).

by the PRC government and the value-added tax ("VAT")[12] applicable to imports of steel tube into the PRC. Preliminary Determination, 76 Fed. Reg. at 64,305.

Following the Preliminary Determination, in its case brief before Commerce, plaintiff argued that the transactions involving the third-party trading companies could not be countervailed because (1) the Affiliated Producer was an affiliate of BTIC and Tianjin Tianhai, and (2) the Unaffiliated Producer was not an authority. *See* BTIC Group's Administrative Case Br. at 16, 23, CD 92 at bar code 3065133–01 (Mar. 23, 2012), ECF Dkt. No. 18 ("BTIC's Case Br.").

Plaintiff also submitted additional proposed benchmark information in the form of *SteelOrbis* prices of steel tube from Ukraine and Iran. When submitting these prices, plaintiff argued that the value of the benefit, if in fact there was any, should have been calculated using the Ukrainian price data it supplied, because those prices were more specific to the size of steel tube that BTIC and Tianjin Tianhai used. *See* BTIC's Case Br. at 35–37. Alternatively, plaintiff proposed that, in the event that Commerce did not use the Ukraine data, it should instead use the lowest world market price during each month. BTIC's Case Br. at 38. As a third option, plaintiff suggested that the Department average all of the prices on the record to obtain a world market benchmark price. *See* BTIC's Case Br. at 41.

In addition, plaintiff contended that Commerce should not have added the VAT and import duties. BTIC's Case Br. at 41–42. According to plaintiff, neither BTIC nor Tianjin Tianhai was required to pay the VAT or import duties on imported steel tube used for export. *See* BTIC's Case Br. at 41.

In its Final Determination, the Department made one departure from the Preliminary Determination. Rather than rely on the Italian prices as the world market price, as it had done in its Preliminary Determination, Commerce accepted plaintiff's suggestion and averaged the prices available on the record (from Ukraine, Italy, and Iran) to calculate the benchmark price. *See* Issues & Dec. Mem. at cmt. 8. This action followed.

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[12] The VAT, or the value-added tax, is "[a] tax on the estimated market value added to a producer or material at each stage of its manufacture or distribution, ultimately passed on to the consumer." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1900 (4th ed. 2000). The tax is normally a percentage of the estimated market value added.

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).

DISCUSSION

I. LEGAL FRAMEWORK

Under the trade statute, a countervailable subsidy is found to be present where "an authority . . . provides a financial contribution . . . to a person and a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B)(i). The Department, however, is directed to determine "whether a subsidy exists . . . without regard to whether the subsidy is provided directly or indirectly on the manufacture, production, or export of merchandise." *Id.* § 1677(5)(C). When determining the amount of any subsidy under tier two, "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." *Id.* § 1677(5)(E).

II. THE DEPARTMENT'S DETERMINATION TO COUNTERVAIL BTIC'S PURCHASES OF STEEL TUBE

A. The Department Reasonably Determined that the Unaffiliated Producer Was an "Authority"

In the Final Determination, the Department determined that the Unaffiliated Producer was an authority, for purposes of 19 U.S.C. § 1677(5)(B), because it was majority-owned by the PRC government.[13]

[13] The Department adhered to its practice, found in accordance with law by this Court, to treat an input producer, that is found to be majority-owned by the PRC government, as an authority within the meaning of 19 U.S.C. § 1677(5)(B). *See* Issues & Dec. Mem. at V.E. (citing Certain New Pneumatic Off-the-Road Tires From the PRC, 73 Fed. Reg. 40,480 (Dep't of Commerce July 15, 2008) (final affirmative countervailing duty determination and final negative determination of critical circumstances), and accompanying Issues and Decision Memorandum at IV.A.1). Indeed, this Court in *Guangdong Wireking Housewares & Hardware Co. v. United States* found that Commerce's treatment of input suppliers as authorities, within the meaning of the statute, based solely on the PRC government's majority-ownership interest in those suppliers, to be reasonable. *Guangdong Wireking Housewares & Hardware Co. v. United States*, 37 CIT __, __, 900 F. Supp. 2d 1362, 1377 (2013), *aff'd*, 745 F.3d 1194 (Fed. Cir. 2014). The *Guangdong* Court found that the term "public entity" was undefined by the statute and Commerce's regulations, but held that

Mem. from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, for Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration at 1–2, CD 95 at bar code 3073403–01 (Apr. 30, 2012), ECF Dkt. No. 18 ("Unaffiliated Producer Mem."). This conclusion was based on a capital verification report supplied by the PRC government, which showed that the Unaffiliated Producer was more than fifty-percent-owned by companies that were, in turn, owned by the PRC government. *See* Unaffiliated Producer Mem. at 1–2. In addition, however, the PRC government also supplied the Department with the Unaffiliated Producer's articles of association. *See* Letter from Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, Counsel for BTIC, to Hon. Rebecca M. Blank, Acting Secretary of Commerce, Import Administration, U.S. Department of Commerce at 42–43, Ex. 22, CD 26 at bar code 3028411–01 (Sept. 7, 2011), ECF Dkt. No. 18 ("Articles of Association"). Unlike the capital verification report, information in the articles of association indicated that the Unaffiliated Producer would become less than fifty-percent-owned by companies held by the PRC government at a future time beyond the date of the capital verification report. *See* Articles of Association at 42–43, Ex. 22. The Department chose to rely on the capital verification report because, as it was dated eight days later than the articles of association, it was the ownership information on the record most contemporaneous to the POI. *See* Unaffiliated Producer Mem. at 3.

Plaintiff contends that the Department should not have relied upon the ownership percentages found in the capital verification report. Br. in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. 25–27 (ECF Dkt. No. 31) ("Pl.'s Br."). Rather, it insists that Commerce should have used the percentages in the articles of association. Pl.'s Br. 25–27. According to plaintiff, given the close timing of the articles of association and the capital verification report, such a non-capital-affecting share transfer must have occurred. *See* Pl.'s Br. 26–27. That is, for plaintiff, the ownership percentages in the company's articles of association reflected the company's "current" (most contemporaneous to the POI) ownership, and thus, the Unaffiliated Producer was not majority-owned by the PRC government. *See* Pl.'s Br. 26 ("[I]n addition to the [PRC government] indicating that capital verification reports, *in general*, are not required for share transfers that do not involve a change in capital, the articles of association here dated a few

Commerce's construction of the term, under step two of *Chevron* was reasonable. *See id.*; *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).

days prior to the capital verification report *specifically* indicate that just such a share transfer occurred. The only reasonable conclusion from this fact is that the articles of association reflect the company's current ownership.").

Plaintiff also argues that the capital verification report is actually less contemporaneous with the POI than the articles of association. *See* Pl.'s Br. 27. Thus, it maintains that, although the capital verification report post-dates the articles of association, the articles of association make reference to anticipated future changes in ownership, including reference to an anticipated capital increase after the date of the capital verification report. Pl.'s Br. 27 (citing Letter from Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, Counsel for BTIC, to Hon. Rebecca M. Blank, Acting Secretary of Commerce, Import Administration, U.S. Department of Commerce at 527, CD 27 at bar code 3028411–02 (Sept. 7, 2011), ECF Dkt. No. 18) ("The reference to a future date beyond the 'amended' date[,] . . . which is *after* the date of the capital verification report further indicates that the articles of association are more contemporaneous than the capital verification."). For plaintiff, the Department's determination that the Unaffiliated Producer was majority-owned by the PRC government is unsupported by substantial evidence. Pl.'s Br. 24.

Here, the Department's determination to rely upon the capital verification report was supported by substantial evidence. Because the capital verification report is dated after the articles of association, substantial evidence supports the Department's finding that the capital verification report was the most contemporaneous information to the POI on the record.[14] Commerce's decision to give controlling weight to the ownership percentages in the capital verification report was thus reasonable. Although the articles of association contained language indicating that it anticipated events would occur after its date of preparation, there is no record evidence that any change in ownership percentages actually took place. Further, in its initial questionnaire response, plaintiff explicitly identified the Unaffiliated Producer as an "SOE," i.e., a state-owned enterprise. *See* Letter from Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, Counsel for BTIC, to Hon. Rebecca M. Blank, Acting Secretary of Commerce, Import Administration, U.S. Department of Commerce at 531, CD 24 at bar code 3027967–06 (Sept. 2, 2011), ECF Dkt. No. 18. Accordingly, it cannot be said that Commerce's choice to

[14] The capital verification report for the Unaffiliated Producer was marked as for the period "[[ ]]." Unaffiliated Producer Mem. at 3. The articles of association, however, are marked "[[ ]]." Unaffiliated Producer Mem. at 3.

rely upon the capital verification report was unsupported by substantial evidence. Therefore, Commerce's determination that the Unaffiliated Producer was majority-owned by the PRC government, and thus an authority, in accordance with 19 U.S.C. § 1677(5)(B), is sustained.

B. The Department's Determination to Countervail BTIC's Purchases of Steel Tube Was Supported by Substantial Evidence and in Accordance with Law

In the Final Determination, Commerce found that BTIC and Tianjin Tianhai received countervailable subsidies through their purchases of steel tube produced by the Affiliated Producer[15] (a company found by the Department to be an authority[16]), which the Affiliated Producer sold to third-party trading companies. *See* Issues & Dec. Mem. at cmt. 7. The third-party trading companies then resold the steel tube to BTIC and Tianjin Tianhai at, what the Department concluded, was a below-market price. *See* Issues & Dec. Mem. at V.F., cmt. 7.

The Department used the sales prices from the trading companies to determine the value of the benefit provided to BTIC and Tianjin Tianhai in its less-than-adequate-remuneration calculation. *See* Issues & Dec. Mem. at cmt. 7. In other words, Commerce found a countervailable subsidy even though BTIC and Tianjin Tianhai purchased the steel tube from the unaffiliated, third-party trading companies, and not directly from the Affiliated Producer. The Department also determined that any effect on the price that might have resulted from the affiliation between the input producer (i.e., the Affiliated Producer) and BTIC (and Tianjin Tianhai) was not relevant. *See* Issues & Dec. Mem. at cmt. 6. This was because it measured the receipt of the benefit based on the sales made between the unaffiliated, third-party trading companies and BTIC (and Tianjin Tianhai), and not between BTIC (and Tianjin Tianhai) and the affiliated input producer (the Affiliated Producer). *See* Issues & Dec. Mem. at cmt. 6.

The court holds that the Department's determination is supported by substantial evidence and is in accordance with law.

As noted, under the countervailing duty statute, a subsidy is found to be present where "an authority . . . provides a financial contribution . . . to a person and a benefit is thereby conferred. . . . [T]he term 'authority' means a government of a country or any public entity

[15] As noted, the Department's subsidy analysis of the steel tube produced and sold by the Unaffiliated Producer was identical to its evaluation of the transaction chain involving the sales of steel tube produced and sold by the Affiliated Producer.

[16] It is undisputed that the Affiliated Producer is a state-owned entity, and thus an authority pursuant to 19 U.S.C. § 1677(5)(B). *See* Pl.'s Br. 8.

within the territory of the country." 19 U.S.C. § 1677(5)(B). Here, the Department found that a financial contribution was made by the Affiliated Producer (an authority) to the third-party trading companies and that a benefit was conferred on BTIC and Tianjin Tianhai in the form of paying less than adequate remuneration for the steel tube purchased from the third-party trading company suppliers. *See* Issues & Dec. Mem. at cmt. 7 ("Consistent with case precedent, we determine that the [PRC government's] financial contribution (provision of a good) is made to the trading company suppliers that purchase steel inputs, while all or some portion of the benefit is conferred on the . . . cross-owned affiliates [(BTIC and Tianjin Tianhai)] through their purchases of steel inputs from the trading company suppliers. The statute does not require the Department to make a separate finding that the trading companies provided a financial contribution to BTIC." (footnote omitted)).

Under the Department's construction of the statute, "the two necessary elements of a subsidy—financial contribution and benefit—need not necessarily go to the same person." Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R. 16 (ECF Dkt. No. 35) ("Def.'s Br."). Defendant insists that, because the statute is silent as to whether "the 'person' who receives the 'financial contribution' must be the same as the person who receives the 'benefit,'" Commerce's construction of the statute must be afforded *Chevron* deference, and be upheld, because its interpretation is reasonable. Def.'s Br. 16–17 (citing *United States v. Eurodif S. A.*, 555 U.S. 305, 316 (2009); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

"When reviewing Commerce's construction of the trade statute, this Court is directed by the two-step framework set forth by *Chevron*." *Xiping Opeck Food Co. v. United States*, 38 CIT __, __, Slip Op. 14–142, at 16 (2014) (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014)); *see also Chevron*, 467 U.S. at 842–43. The first step requires the court to determine whether Congress's intent under the statute is clear. *Chevron*, 467 U.S. at 842–43. If Congress's intent is found to be clear, the court "must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue," that is, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (footnote omitted). "Further, under *United States v. Mead*, Commerce's construction of a statute need not be found in a formal regulation adopted after notice-and-comment to receive deference."

Xiping, 38 CIT at __, Slip Op. 14–142, at 17 (citing *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001)). Its interpretation, however, must be accompanied by some degree of formality. *See Mead*, 533 U.S. at 227 ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."). Thus, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–27.

Here, the Affiliated Producer, which Commerce found to be an authority, sold its steel tube to independent, third-party trading companies. These companies then subsequently sold the steel tube to BTIC and Tianjin Tianhai. The Department found that, under 19 U.S.C. § 1677(5)(B), "a subsidy is deemed to exist when there is a financial contribution 'to a person' and a 'benefit is thereby conferred.'" Issues & Dec. Mem. at cmt. 7. Commerce determined further, that "the question of whether a subsidy is conferred hinges on whether the producer of the input—not the trading company—is an 'authority.'" Issues & Dec. Mem. at cmt. 7. Based on its past practice, the Department "determine[d] that the [PRC government's] financial contribution (provision of a good) [was] made to the trading company suppliers that purchase[d] steel inputs, while all or some portion of the benefit is conferred on . . . BTIC and its cross-owned affiliates [(i.e., Tianjin Tianhai)] through their purchases of steel inputs from the trading company suppliers." Issues & Dec. Mem. at cmt. 7. The Department reasoned that "[t]he statute d[id] not require [it] to make a separate finding that the trading companies provided a financial contribution to BTIC." Issues & Dec. Mem. at cmt. 7. That is, for Commerce, it was permissible, under the statute, for it to determine that a financial contribution was made by the Affiliated Producer (the "authority") to the third-party trading company suppliers (the "persons") and a benefit was conferred upon BTIC and Tianjin Tianhai by means of their purchases of that steel tube for less than adequate remuneration from the trading companies. In other words, according to the Department, it was not necessary for the person that received the financial contribution to be the same person that received the benefit under the statute. The court finds Commerce's interpretation of the statute found in the Issues and Decision Memorandum, that

the person who receives the financial contribution need not be the same person who receives the benefit, to be a permissible construction of the statute.

As an initial matter, based on the plain language of the statute, Congress's intent is unclear as to whether the benefit must be received by the same person that received the financial contribution in order for a subsidy to be present. Thus, the court must determine, under step two of *Chevron*, whether Commerce's construction of the statute—that the benefit need not be conferred upon the same person that receives the financial contribution—is reasonable. *See Chevron*, 467 U.S. at 843.

First, it is apparent that the unfair trade statute permits Commerce to countervail the transactions at issue here. The statute states that, if the Department "determines that the government of a country or any public entity within the territory of a country is providing, *directly or indirectly*, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported . . . into the United States" and the International Trade Commission determines that those imports "materially injure" or threaten a United States industry with material injury, "then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy." 19 U.S.C. § 1671(a) (emphasis added).

The statute defines a countervailable subsidy as "the case in which an authority . . . provides a financial contribution . . . to a person and a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B). The Statement of Administrative Action[17] accompanying the Uruguay Round Agreements Act, which resulted in Congress passing 19 U.S.C. § 1677(5)(B), clarifies that Congress intended "the term 'person' to identify the commercial entity, such as a firm or industry, to which the government or public body provides a financial contribution." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. DOC.NO. 103–316, at 925 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4239 ("SAA").

Moreover, the statute anticipates that the financial contribution need not be direct. Legislative history demonstrates that Congress understood that the Department intended to prevent the circumvention of the statute through the conferral of indirect subsidies. *See* SAA, H.R. DOC.NO. 103–316, at 926, *reprinted in* 1994 U.S.C.C.A.N. at 4239–40 ("The Administration plans to continue its policy of not

[17] The Statement of Administrative Action is "an authoritative expression by the United States 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." 19 U.S.C. § 3512(d).

permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry. . . . In cases where the government acts through a private party, . . . the Administration intends that the law continue to be administered on a case-by-case basis . . . . It is the Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and [19 U.S.C. § 1677(5)(B)(iii)] encompass indirect subsidy practices like those which Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that Commerce is satisfied that the standard under [19 U.S.C. § 1677(5)(B)(iii)] has been met."); *see also* Countervailing Duties, 63 Fed. Reg. at 65,361 ("When we examine indirect subsidies, we are inquiring into whether a government is entrusting or directing a private entity to provide a reduced-cost input or enhanced revenue to a firm that produces the subject merchandise."). In other words, Congress knew, when enacting the statute, that whether a subsidy is provided directly or indirectly would be irrelevant to the law's implementation. *See* 19 U.S.C. § 1677(5)(C) ("The determination of whether a subsidy exists shall be made without regard to whether the recipient of the subsidy is publicly or privately owned and without regard to whether the subsidy is provided directly or indirectly on the manufacture, production, or export of merchandise.").

Case law, moreover, not only permits the countervailing of the transactions at issue, but has found lawful the methodology Commerce has employed here. This Court, in *Guangdong Wireking Housewares & Hardware Co. v. United States*, upheld Commerce's determination, in which it found purchases of wire rod from privately-owned trading companies that had been produced by state-owned producers (authorities), to be countervailable. *Guangdong Wireking Housewares & Hardware Co. v. United States*, 37 CIT __, __, 900 F. Supp. 2d 1362, 1379–80 (2013), *aff'd*, 745 F.3d 1194 (Fed. Cir. 2014). The *Guangdong* Court explained that Commerce's finding that the respondent "received the benefits of an indirect financial contribution, enabling it to purchase wire rod below the benchmark price," was in accordance with 19 U.S.C. § 1677(5), and, in addition, that "Commerce was not required to undergo an upstream subsidies analysis or determine that the trading companies in question were 'authorities.'" *Id.* at __, 900 F. Supp. 2d at 1380. The *Guangdong* facts are virtually identical to the facts here.

Further, Commerce's determination and the *Guangdong* Court's holding are consistent with the Federal Circuit's opinion in *Delverde, SRL v. United States*, in which a privately-owned producer that had received subsidies from the Italian government, sold assets to an-

other privately-owned producer. *See Delverde, SRL v. United States*, 202 F.3d 1360, 1362 (Fed. Cir. 2000). There, the Department assumed that a pro rata portion of the subsidy received by the seller "passed through" to the purchaser at the time of the sale. *Id.* at 1363. The Federal Circuit, however, found Commerce's methodology for determining whether a company received a countervailing subsidy to be inconsistent with 19 U.S.C. § 1677(5). *Id.* at 1370. The Court held that the statute did "not allow Commerce to presume conclusively that the subsidies granted to the former owner of [the] corporate assets automatically 'passed through' to [the purchaser] following the sale." *Id.* at 1364. Rather, the Court held that the statute "requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether [the purchaser] directly or indirectly received both a financial contribution and benefit from a government." *Id.* Thus, the Court, in *Delverde*, "required Commerce to examine the circumstances of the transaction to determine whether the countervailable subsidy survived the transfer." *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1342 (Fed. Cir. 2004) (citing *Delverde*, 202 F.3d at 1366). Indeed, the Federal Circuit has explained that, "in the case of an indirect subsidy, evidence of a causal nexus between the program and the benefit is also required." *AK Steel Corp. v. United States*, 192 F.3d 1367, 1372 (Fed. Cir. 1999) (citing *British Steel plc v. United States*, 19 CIT 176, 270, 879 F. Supp. 1254, 1328 (1995)).

Here, the facts supply the "causal nexus" that *Delverde* and *AK Steel* demand. It is undisputed that the Affiliated Producer (an authority) sold the steel tube and, as shall be seen, provided a financial contribution[18] to the trading companies. It is also apparent that BTIC and Tianjin Tianhai bought the same steel tube from the third-party trading company suppliers at less than adequate remuneration. In the absence of prices for the sale of the steel tube from the Affiliated Producer to the third-party trading companies, there is no actual evidence of the amount of the financial contribution, i.e., the size of the below-market discount for the steel tube sold by the Affiliated Producer to the trading companies. This lack of evidence, however, is immaterial to the finding of a subsidy because a subsidy may only be found when a benefit is conferred. *See* 19 U.S.C. § 1677(5)(B). Here, the size of the benefit and the fact that it was received are evidenced by the purchases made by BTIC and Tianjin Tianhai of the steel tube at less than adequate remuneration. Under the facts of this case,

[18] The statute defines the term "financial contribution" to mean, among other things, "*providing goods* or services, other than general infrastructure." 19 U.S.C. § 1677(5)(D)(iii) (emphasis added).

therefore, it is evident that there was a nexus between the financial contribution made by the Affiliated Producer, when it sold the steel tube to the trading companies, and the benefit conferred on BTIC and Tianjin Tianhai, when they bought the steel tube for less than adequate remuneration.

That a financial contribution was made by the Affiliated Producer to the trading companies when the steel tube was sold by the Affiliated Producer to the third-party trading companies cannot be doubted. The trading companies are in the business of making money. This being the case, the Department could reasonably presume that the trading companies paid no more for the steel tube than the price for which they sold it to BTIC and Tianjin Tianhai. Thus, the Department was reasonable in finding that the Affiliated Producer made a financial contribution to the trading companies based on the below-world-market sales price for the steel tube paid by BTIC and Tianjin Tianhai to the trading company suppliers. Therefore, the necessary nexus between the financial contribution and the benefit conferred is demonstrated by (1) the same product being the subject of both sales and (2) BTIC and Tianjin Tianhai paying less than adequate remuneration for the steel tube. *See AK Steel*, 192 F.3d at 1372 (citing *British Steel*, 19 CIT at 270, 879 F. Supp. at 1328).

Additionally, the sales price between the Affiliated Producer and the third-party trading companies is not relevant to Commerce's determination. *See* Issues & Dec. Mem. at cmt. 6 ("[R]ecord evidence shows that the transactions for which we are measuring the benefit conferred were not between BTIC and the affiliated producer."). Pursuant to the statute, the fact that a financial contribution was made, not its size, is all that Commerce must find. It is the amount of the benefit that must be determined. Indeed, this is the result demanded by *Delverde* where the Federal Circuit found that the full amount of a subsidy cannot be presumed to be passed from the recipient of the subsidy to the purchaser of the subsidized entity's assets. *See Delverde*, 202 F.3d at 1364.

As to the size of the benefit, as defendant points out, the benefit analysis seeks to determine whether the respondent received something at a price below that available in the marketplace. *See* Def.'s Br. 22 ("A benefit analysis, on the other hand, seeks to determine whether the respondent received something on terms more favorable than those available on the market."). "Commerce measures the adequacy of remuneration by comparing the price paid by a particular respondent to an adjusted benchmark figure representative of the market price for the good at issue." *Essar Steel Ltd. v. United States*, 34 CIT __, __, 721 F. Supp. 2d 1285, 1292 (2010) (citing 19 U.S.C. §

1677(5)(E)). Thus, both the statute and case law require that a financial contribution be made by an authority, but they do not require Commerce to inquire about the amount of the contribution, only that it was made and that a benefit was received thereby. It is the amount of the benefit that must then be determined, not the amount of the contribution. This is precisely what the Department did here, adhering to its ordinary methodology by measuring the price paid by BTIC and Tianjin Tianhai for the steel tube to the constructed benchmark price for the input.

The court further finds plaintiff's contention that Commerce should have analyzed the transactions in question under the "upstream subsidy" provision of 19 C.F.R. § 351.523 or under 19 C.F.R. § 351.525 to be without merit. Pursuant to 19 U.S.C. § 1677–1(a), an "upstream subsidy" is defined, in relevant part, as "any countervailable subsidy . . . that . . . is paid or bestowed by an authority . . . with respect to a product . . . that is used in the same country as the authority in the manufacture or production of merchandise which is the subject of a countervailing duty proceeding." In other words, an upstream subsidy analysis is concerned with a subsidy received from an authority by the producer of an input when that input is used in the production of subject merchandise, rather than a subsidy received by a third-party from an authority that produced the input. *See, e.g.*, Live Swine From Canada, 59 Fed. Reg. 12,243, 12,255 (Dep't of Commerce Mar. 16, 1994) (final results of countervailing duty administrative review) (citing 19 U.S.C. § 1677–1(a)). Because, here, the Affiliated Producer was the authority, the input producer, and the entity conferring the subsidy in question, and was not the recipient of a subsidy from an authority, an upstream subsidy analysis was not required. Rather, the Department lawfully constructed a different methodology to examine the transactions in question. *See Guangdong*, 37 CIT at __, 900 F. Supp. 2d at 1380.

As to plaintiff's argument that Commerce should have analyzed the sales and purchases as "affiliated transactions" under 19 C.F.R. § 351.525,[19] this provision clearly applies only to situations where

[19] Pursuant to the regulation,

> [i]f there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, the Secretary [of Commerce] will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).

19 C.F.R. § 351.525(b)(6)(iv). The regulation further describes cross-ownership to be present between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. *Id.* § 351.525(b)(6)(vi).

there is cross-ownership between an input supplier and a downstream producer. Here, the Department specifically found no cross-ownership between the Affiliated Producer and BTIC (and Tianjin Tianhai). That is, although BTIC and Tianjin Tianhai are affiliated with the Affiliated Producer, they are not cross-owned.[20] Indeed, BTIC reported in its initial questionnaire response that it shared no cross-ownership with the Affiliated Producer. *See* Letter from Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, Counsel for BTIC, to Hon. Rebecca M. Blank, Acting Secretary of Commerce, Import Administration, U.S. Department of Commerce at 9, CD 19 at bar code 3027967–01 (Sept. 2, 2011), ECF Dkt. No. 18 ("BTIC and Tianjin Tianhai purchased [steel tube] during the POI that was produced by [the Affiliated Producer]. However, these products were sold by [a company owned by the Affiliated Producer] to three unaffiliated intermediate, third-party trading companies which then resold the materials to BTIC and Tianjin Tianhai. Based on these facts, the [Affiliated Producer is] not cross-owned with the BTIC companies for two reasons. First, . . . BTIC [and Tianjin Tianhai's] purchases of [steel tube] produced by the [Affiliated Producer] were purchased from an unaffiliated third party. Thus, the [Affiliated Producer is] not the input supplier to BTIC [and Tianjin Tianhai]."). Thus, the transactions are not "affiliated transactions" within the meaning of the regulation.

Accordingly, the court holds that Commerce's construction of the statute—that the financial contribution and benefit need not be conferred on the same person—is in accordance with law. In addition, the court holds that Commerce's determination—that BTIC's and Tianjin

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[20] As is made clear by the statute and Commerce's regulations, entities may share an affiliate relationship absent cross-ownership between them. *Compare* 19 U.S.C. § 1677(33), *with* 19 C.F.R. § 351.525(b)(6)(vi). Specifically, the statute provides, in relevant part, as follows:

> The following persons shall be considered to be "affiliated" or "affiliated persons":
>
> (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
>
> (B) Any officer or director of an organization and such organization.
>
> (C) Partners.
>
> (D) Employer and employee.
>
> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> (G) Any person who controls any other person and such other person.
>
> For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

19 U.S.C. § 1677(33).

Tianhai's purchases of the Affiliated Producer's steel tube from their third-party trading company suppliers were countervailable—is in accordance with law and supported by substantial evidence.

III. SELECTION OF A BENCHMARK PRICE FOR STEEL TUBE

A. The Department's Averaging Methodology Was in Accordance with Law

As previously noted, in the Preliminary Determination, Commerce found, based on information supplied by the PRC government, that 38 percent of steel tube production in the PRC during the POI was manufactured by government-owned entities. Preliminary Determination, 76 Fed. Reg. at 64,305. As a result, it "determine[d] that this level of government ownership [was] substantial. Combining this with the fact that imports as a share of domestic consumption [were] insignificant, [the Department] determine[d] that domestic prices in the PRC for [steel tube were] distorted such that they [could not] be used as a tier one benchmark." Issues & Dec. Mem. at V.F. Thus, it instead relied on world market prices available to purchasers in the PRC (i.e., a tier-two benchmark) to construct a benchmark price for the steel tube. *See* Preliminary Determination, 76 Fed. Reg. at 64,305. Specifically, it selected prices reported in *SteelOrbis* for exports of steel tube in Italy—which were placed on the record by defendant-intervenor—and then averaged them to obtain a benchmark price, to which it added, among other things, inland freight charges, the value of the import duties reported by the PRC government, and the VAT applicable to imports of steel tube into the PRC. *See* Preliminary Determination, 76 Fed. Reg. at 64,305. The Department compared this benchmark to BTIC's and Tianjin Tianhai's actual purchase prices, and determined preliminarily that the steel tube "was provided for [less than adequate remuneration] and that a subsidy exist[ed] in the amount of the difference between the benchmark and what BTIC [and Tianjin Tianhai] paid." *See* Preliminary Determination, 76 Fed. Reg. at 64,305 (citing 19 C.F.R. § 351.511(a)).

Following publication of the Preliminary Determination, BTIC submitted additional prices that it argued should be used to calculate the benchmark, including price data from Iran, and diameter-specific prices of steel tube from Ukraine for ranges of 57–159 millimeters and 168–325 millimeters, which matched the diameters of the steel tube that BTIC claimed to have actually purchased. *See* Letter from Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, Counsel for BTIC, to Hon. John E. Bryson, Secretary of Commerce, Import Administration, U.S. Department of Commerce,

CD 63 at bar code 3043993–01 (Nov. 30, 2011), ECF Dkt. No. 18 ("BTIC Proposed Benchmark Info"). With respect to calculating a benchmark price for steel tube in its Final Determination, Commerce departed from its Preliminary Determination by averaging the prices from all three sources (Italy, Iran, and Ukraine) of price data on the record, and used that average as a benchmark. *See* Issues & Dec. Mem. at cmt. 8.

Plaintiff asserts that the Department committed two errors when it chose to average the available steel tube prices from all three countries, rather than selecting the Ukrainian prices. *See* Pl.'s Br. 30–33. First, it contends that the Ukrainian steel tube prices were the best information on the record and should have been the sole source selected to calculate the benchmark because they were the only record prices that identified the diameter of the steel tube being used, and those prices matched the diameter range of the steel tube actually purchased by BTIC and Tianjin Tianhai. *See* Pl.'s Br. 31–32. BTIC argues that the record demonstrates that there is a significant price variation based on diameter. *See* Pl.'s Br. 33. In doing so, it maintains that the 57–159 millimeters "category from the Ukraine is consistently lower each month during the POI than the 168–325 [millimeter Ukraine] category" and also "consistently lower than the [combined prices] from other countries containing all [steel tube] diameter levels." Pl.'s Br. 33 (citing Mem. from Christopher Siepmann, International Trade Compliance Analyst, AD/CVD Operations, for Susan Kuhbach, Office Director, AD/CVD Operations at Attach. 3, CD 96 at bar code 3073976–01 (Apr. 30, 2012), ECF Dkt. No. 18 ("Final Calculation Mem.")).

Second, plaintiff makes the related argument that the Department was not required to use the average of all record benchmark prices for the entire POI and that instead, it should have selected the lowest record price for each month if it was not going to rely upon the Ukrainian prices exclusively. Pl.'s Br. 35, 37 ("Selecting the lowest market price from any country is the only way to determine whether BTIC and Tianjin Tianhai had purchased [steel tube] at [less than adequate remuneration]. If the Department selected only a single country from the record for all months and there were lower prices in another country for a particular month, then the Department would be unreasonably inflating the benefit BTIC received in that month. Or, more simply, the Department would be calculating a benefit when a lower world market price on the record would result in no benefit at all."). BTIC argues that "the primary goal in determining the most appropriate benchmark is to identify a benchmark that would actu-

ally be available to purchasers in" the PRC. Pl.'s Br. 35. Thus, for BTIC, "when prices from multiple countries are averaged together, across country lines, the resulting *constructed* price is *not* one that BTIC and Tianjin Tianhai could have actually obtained. Instead, this cross-country average represents a purely hypothetical constructed price that is *not* obtainable from any single source." Pl.'s Br. 36 (citations omitted). Thus, BTIC contends that Commerce's employed methodology ran afoul of 19 C.F.R. § 351.511. This is because, for BTIC, the regulation only requires Commerce to average record benchmark prices "to the extent practicable" where each of those prices would be available to a respondent. *See* Pl.'s Br. 35 (quoting 19 C.F.R. § 351.511(a)(2)(ii)) (internal quotation marks omitted).

Having taken plaintiff's arguments into consideration, the court holds that the Department acted lawfully in averaging the prices available on the record from Ukraine, Italy, and Iran to calculate the benchmark price for steel tube.

As previously discussed, under the countervailing duty statute, "[a] benefit shall normally be treated as conferred" by the Department "where goods or services are provided, if such goods or services are provided for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). Further, when using a tier-two benchmark, Commerce's regulations require that, "[w]here there is more than one commercially available world market price, the Secretary [of Commerce] will average such prices to the extent practicable, making due allowance for factors affecting comparability." 19 C.F.R. § 351.511(a)(2)(ii).

In this case, Commerce's selection of a tier-two benchmark is not in dispute. Thus, the issue is whether Commerce erred by averaging the prices available from three countries to calculate a benchmark price for steel tube, rather than relying solely on the Ukrainian data, which was, according to BTIC, specific to the steel tube purchased by it and Tianjin Tianhai. First, Commerce's calculation of an average of the Italian, Ukrainian, and Iranian prices is consistent with its regulation, which states that, when using a tier-two benchmark that involves "more than one commercially available world market price," the Department "*will* average such prices to the extent practicable." 19 C.F.R. § 351.511(a)(2)(ii) (emphasis added). The Department evaluated the Ukraine and Iranian price data offered by BTIC, and, like the Italian price data originally submitted by defendant-intervenor, found these prices "to be FOB export prices and, therefore, sufficiently reliable and representative." Issues & Dec. Mem. at cmt. 8. In addition, Commerce's averaging of multiple data sets, when available, to obtain a world market price is consistent with not only

its regulation but its past practice. *See, e.g.*, Galvanized Steel Wire From the PRC, 77 Fed. Reg. 17,418 (Dep't of Commerce Mar. 26, 2012) (final affirmative countervailing duty determination), and accompanying Issues and Decision Memorandum at comment 8 ("Galvanized Steel Wire Issues & Dec. Mem."); Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the PRC, 75 Fed. Reg. 57,444 (Dep't of Commerce Sept. 21, 2010) (final affirmative countervailing duty determination, final affirmative critical circumstances determination), and accompanying Issues and Decision Memorandum at comment 9.

Next, although Commerce must use benchmark prices for merchandise that is *comparable* to a respondent's purchases to satisfy the regulation, there is nothing that requires that it use prices for merchandise that are *identical* to a respondent's purchases. *See Archer Daniels Midland Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1269, 1278 (2014) ("Commerce . . . is required only to select benchmarks that are comparable, not identical." (citing 19 C.F.R. § 351.511(a)(2)(ii)). Even if the Department were required to use prices for identical merchandise, the record does not support plaintiff's claim that BTIC's and Tianjin Tianhai's purchases of steel tube were limited to the diameter ranges provided for in the Ukrainian data. The Ukrainian data supplied prices for steel tube with diameter ranges of 57–159 millimeters and 168–325 millimeters. Invoices placed on the record of BTIC's and Tianjin Tianhai's steel tube purchases, however, demonstrate that they made purchases outside the diameter ranges listed in the Ukrainian data. *See* BTIC Proposed Benchmark Info at Ex. 2. As a result, the Ukrainian data cannot be said to be more specific than other record prices. Indeed, as plaintiff points out, the Iranian and Italian prices include all steel tube diameter levels. *See* Pl.'s Br. 33. This being the case, these prices cover all of the diameters purchased by plaintiff. Thus, based on the record, not only is the Ukrainian data not specific to BTIC's and Tianjin Tianhai's purchases of steel tube, but because the Italian and Iranian data contain prices for all diameters, these prices are arguably more representative. Plaintiff's arguments are therefore unconvincing.

Moreover, despite plaintiff's claims to the contrary, as the Department has explained previously, "[t]here is no basis in the regulations for selecting . . . the lowest monthly world market price in identifying the monthly benchmark . . ." as plaintiff would have the court hold. Galvanized Steel Wire Issues & Dec. Mem. at cmt. 8. Commerce's regulation unambiguously directs it to average multiple prices available on the record to determine a world market price as the bench-

mark. *See* 19 C.F.R. § 351.511(a)(2)(ii) ("Where there is more than one commercially available world market price, the Secretary [of Commerce] *will average* such prices to the extent practicable, making due allowance for factors affecting comparability." (emphasis added)). Commerce followed its regulation and averaged the three data sets on the record, which it had found to be sufficiently reliable and representative. *See Essar Steel*, 34 CIT at __, 721 F. Supp. 2d at 1293 ("When using a tier two benchmark, Commerce must average all commercially available world market prices to arrive at the benchmark figure." (citing 19 C.F.R. § 351.511(a)(2)(ii))).

Although plaintiff maintains that it would have necessarily obtained the lowest price for steel tube available each month, there is nothing on the record to suggest that this is actually the case. Indeed, that the data from Italy and Iran includes prices for the same diameter of steel tube contained in the Ukraine data, yet the steel tube is being offered for sale, and presumably sold, at different amounts, demonstrates that there are other considerations, in addition to price, that affect the price of steel tube. That is, such factors as quality, delivery time, current availability, reliability of supply, supplier qualification, and product consistency enter into purchasing decisions. *See, e.g.*, *Nippon Steel Corp. v. United States*, 28 CIT 1738, 1761, 350 F. Supp. 2d 1186, 1206 (2004) (citations omitted), *rev'd on other grounds*, 458 F.3d 1345 (Fed. Cir. 2006); *Comm. for Fair Coke Trade v. United States*, 27 CIT 774, 790 n.18 (2003) (citation omitted); *Kern-Liebers USA, Inc. v. United States*, 19 CIT 87, 102 (1995) (citations omitted). Therefore, contrary to plaintiff's assertions, purchasing decisions are based on a number of considerations, and are not limited to a product's price, and plaintiff's argument, that only the lowest prices should be used in constructing the benchmark, is unconvincing.

Finally, plaintiff's claim, that averaging the three data sets was impracticable, is also unconvincing. As the Department noted, there was no difficulty to calculating an average of these three prices, which is precisely why it proceeded as it did in the Final Determination by doing so. *See* Issues & Dec. Mem. at cmt. 8.

Accordingly, the court holds that Commerce's construction of a benchmark price for steel tube was supported by substantial evidence and was in accordance with law.

B. Exhaustion of Administrative Remedies

In addition to its objections to the methodology used by Commerce to select a benchmark price for steel tube as discussed above, plaintiff asserts that, if 19 C.F.R. § 351.511(a)(2)(ii) permits averaging of this

type, the regulation is contrary to its statute. Pl.'s Br. 37. BTIC makes this claim before the court, despite not presenting its argument in its case brief to Commerce. Pursuant to 19 U.S.C. § 1677(5)(E), the adequacy of remuneration must "be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation." For plaintiff, the regulation's averaging goes beyond the statutory grant directing that, "[w]here there is more than one commercially available world market price, the Secretary [of Commerce] will average such prices to the extent practicable . . . ." *See* 19 C.F.R. § 351.511(a)(2)(ii); Pl.'s Br. 39. This averaged price, plaintiff claims, is impermissible for two reasons. First, the price is hypothetical and cannot actually be obtained by a respondent. Pl.'s Br. 40. Second, because the price being selected is to be used to calculate the unfair benefit provided to a respondent, the methodology should use the lowest acceptable market price on the record. *See* Pl.'s Br. 40.

Defendant, however, observes that BTIC failed to exhaust its administrative remedies with respect to this argument, because it never raised the argument before Commerce in its case brief during the investigation. Def.'s Br. 37. Nonetheless, plaintiff urges the court to consider its challenge to the validity of 19 C.F.R. § 351.511(a)(2)(ii), arguing that it would have been futile for it to have presented this claim to the Department and that it is therefore excused from having failed to do so. *See* Pl.'s Reply Br. 16–17 (ECF Dkt. No. 45).

Because the futility exception is inapplicable here, the court will not consider plaintiff's argument regarding the validity of the regulation, which it makes here for the first time. 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). "To exhaust its administrative remedies, a party usually must submit a case brief 'present-[ing] all arguments that continue in [its] view to be relevant to [Commerce's] final determination or final results.'" *Qingdao Taifa Grp. Co. v. United States*, 33 CIT 1090, 1092–93, 637 F. Supp. 2d 1231, 1236 (2009) (alterations in original) (quoting 19 C.F.R. § 351.309(c)(2)) (citing *Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 553, 564, 558 F. Supp. 2d 1319, 1329 (2008)). There are several well-settled exceptions to the requirement of exhaustion, including "[t]he futility exception[, which] applies where a party 'would be required to go through obviously useless motions in order to preserve their rights.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1266 (2014) (quoting *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)). This

"exception, however, is a narrow one." *Corus Staal*, 502 F.3d at 1379. It has been granted, for example, in a "rare" circumstance, such as where "Commerce's position, which [it] was defending in court at the time, was that it had no discretion in that matter because it was constrained by statute to reject [the plaintiff's] position." *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1148 (Fed. Cir. 2013). Case law is clear, though, that "[t]he mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." *Corus Staal*, 502 F.3d at 1379 (citing *Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 432–33 (D.C. Cir. 1994)). Thus, "futility can excuse a party from additional practice before the agency [only] when it has already fully presented its arguments to the Department in some form and had those arguments rejected, but not where it declines to present the arguments at all because it believes the agency will be unlikely to accept them." *Xinjiamei*, 38 CIT at __, 968 F. Supp. 2d at 1266.

This case, however, is not a situation where it would have served no purpose for plaintiff to make its argument before Commerce. Whether the Department was unlikely to accept BTIC's position does not excuse its failure to present the argument to Commerce. *See id.* Doing so would have afforded Commerce the opportunity to respond to plaintiff's arguments and justify its interpretation of its regulation and the underlying statute, which in turn, would have created a record for the court to review on appeal. Because making its argument would not have been a "useless motion," the futility exception is unavailable to plaintiff.[21] *See Xinjiamei*, 38 CIT at __, 968 F. Supp. 2d at 1267.

[21] Plaintiff, in its reply brief, argues only that the futility exception to the exhaustion doctrine is applicable here, and omits any claim that, for instance, the "pure question of law" exception is available. *See* Pl.'s Reply Br. 16–17. Despite plaintiff's failure to raise this claim, the court notes that it is unlikely that it would have succeeded if it had. The pure question of law exception is applicable only "for a clear statutory mandate that does not implicate Commerce's interpretation of the statute under the second step of *Chevron*." *Fuwei Films (Shandong) Co. v. United States*, 35 CIT__, __, 791 F. Supp. 2d 1381, 1384 (2011) (citing *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1032 (Fed. Cir. 2007)). Where, as here, however, the statute does not speak to the precise question of requiring the averaging of prices in all instances, the court must look to Commerce's construction of the statute, which fills the statutory gap, to determine whether its interpretation is reasonable. *See Chevron*, 467 U.S. at 843. As previously explained by this Court, a *Chevron* step-two issue cannot on its own be resolved by the court because "it requires the input of Commerce. To address the problem, the court would first have to remand the issue to Commerce, an inefficiency occasioned solely by [p]laintiff's inaction." *Fuwei Films*, 35 CIT at __, 791 F. Supp. 2d at 1385. Consequently, "[t]he pure question of law exception . . . cannot apply in this instance because its application would undermine the very purposes the exhaustion requirement is designed to promote." *Id.*

C. The Department's Addition of the VAT, Import Duties, and Inland Freight Costs Was in Accordance with Law

In the preliminary and final determinations, Commerce used world market prices available to purchasers in the PRC as a benchmark for steel tube. *See* Preliminary Determination, 76 Fed. Reg. at 64,305; Issues & Dec. Mem. at V.F. The Department adjusted this benchmark price for steel tube to include, among other things, delivery charges, such as inland freight. *See* Final Calculation Mem. at 59, 64. Commerce also added to the benchmark price the VAT applicable to imports of steel tube into the PRC and the value of the import duties reported by the PRC government. Preliminary Determination, 76 Fed. Reg. at 64,305; Issues & Dec. Mem. at V.F.

BTIC objects to the addition of the VAT and import duties to the benchmark prices. *See* Pl.'s Br. 40. According to plaintiff, the record establishes that BTIC and Tianjin Tianhai would not pay the VAT or import duties if they imported steel tube. Pl.'s Br. 43. Plaintiff claims that Tianjin Tianhai provided evidence during verification that it was not required to pay the tax and duties, because of its location in a free-trade zone, so long as the imported steel tube was used for the manufacture of subject merchandise intended for export. Pl.'s Br. 44. In addition, plaintiff argues that "Chinese 'processing' law would permit [BTIC and Tianjin Tianhai] to avoid the payment of VAT and import duties on [raw materials] so long as the final product is for export," and as a result, "the delivered price that BTIC and Tianjin Tianhai *would* pay if they imported [steel tube] would not include VAT or import duties." *See* Pl.'s Br. 41, 43 (citation omitted).

Plaintiff further contends that "[t]he Department's conclusion that BTIC's and Tianjin Tianhai's individual import experience is irrelevant to the benchmark calculation is contrary to the plain language of the regulation and unsupported by substantial evidence." Pl.'s Br. 41. The language of the regulation requires the use of the "delivered" price, and, for plaintiff, this means that the addition of the VAT to the benchmark price for the steel tube is contrary to law. *See* Pl.'s Br. 42 (citing 19 U.S.C. § 1677(5)(E)(iv); 19 CFR § 351.511(a)(2)(iv)). Plaintiff's position is that the regulation and statute direct Commerce to make a case-specific determination as to whether the VAT and import duties would be added and then include, or not include, the value of the VAT and import duties accordingly. *See* Pl.'s Br. 43. Thus, for plaintiff, where a respondent would not pay the VAT or import duties, those costs should not be added by the Department.

Also, plaintiff objects, as inconsistent, Commerce's inclusion of the costs that BTIC and Tianjin Tianhai actually incurred for the delivery

of steel tube in the construction of the benchmark price for each company. BTIC claims that "[t]he Department's use of a company-specific adjustment for one component of the benchmark price [(i.e., inland freight charges)] while refusing to do the same for other components of the benchmark price [(i.e., VAT and import duties)] is arbitrary, capricious and otherwise contrary to law." Pl.'s Letter Br. Regarding Inland Freight 1–2 (ECF Dkt. No. 66). In other words, for plaintiff, it is inconsistent for Commerce to use BTIC's and Tianjin Tianhai's actual experience in constructing one part of the benchmark but ignore it when constructing another part.

The court is unpersuaded by plaintiff's claims. Commerce's regulations direct it to use "delivered prices" when calculating a benchmark price. *See* 19 C.F.R. § 351.511(a)(2)(iv). These delivered prices are calculated differently when a tier-two benchmark is used rather than a tier-one benchmark. A tier-one benchmark uses an actual transaction price[22] for the good in question to measure the adequacy of remuneration. *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1273 (Fed. Cir. 2012) (citing 19 C.F.R. § 351.511(a)(2)(i)). A tier-two benchmark, on the other hand, seeks to construct a world market price. *Id.* (citing 19 C.F.R. § 351.511(a)(2)(ii)). Thus, a tier-one analysis looks at a market-determined price for the good resulting from actual transactions in the country in question, while a tier-two analysis seeks to determine a price that would reasonably be available to purchasers in that country.

The statute requires that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review." 19 U.S.C. § 1677(5)(E). Such "[p]revailing market conditions include price, quality, availability, marketability, *transportation*, and other conditions of purchase or sale." *Id.* (emphasis added).

Pursuant to 19 C.F.R. § 351.511(a)(2)(iv), the Department is directed to adjust the benchmark prices by "includ[ing] delivery charges and import duties." In addition, the regulation directs Commerce to measure "the price that *a firm* actually paid or would pay if it imported the product." 19 C.F.R. § 351.511(a)(2)(iv) (emphasis added). When constructing a tier-two benchmark, the reference to "a firm" does not mean the respondent. Rather, it refers to a hypothetical firm located in the PRC purchasing steel tube during the POI. This is why the Department is directed, when calculating tier-two benchmarks, to determine "price[s that] would be available to purchasers in

[22] While the Department often uses the actual transaction prices for the respondents in an administrative proceeding, this opinion should not be read as finding that it must do so.

the country in question." 19 C.F.R. § 351.511(a)(2)(ii). Thus, that (1) Tianjin Tianhai, specifically, might not pay the VAT or import duties on steel tube because the company was located in a free-trade zone, and that, (2) under PRC law, neither Tianjin Tianhai nor BTIC would pay taxes and duties on their purchases of steel tube that were intended to be used in the manufacture of a final product intended for export, is irrelevant, given that *a firm* located in the PRC that imported steel tube would ordinarily have paid these duties.[23]

Indeed, the Federal Circuit has upheld the Department's practice of ignoring a particular respondent's conditions of purchase when calculating tier-two benchmark prices, and found that adding these charges to a benchmark price, even where the respondent did not incur these costs, "is consistent with the relevant statute and regulation." *Essar Steel*, 678 F.3d at 1274 ("Both the statute and the regulation, however, *require* that these costs [(freight and import costs)] be added to the benchmark prices. Commerce's decision to add these charges to the benchmark prices is consistent with the relevant statute and regulation and is supported by substantial evidence." (citing 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.511(a)(2)(iv))).

Plaintiff does not dispute that other firms would pay these costs. Indeed, "[t]he importation of products necessarily entails payment of certain 'delivery charges and import duties' that would not apply when procured domestically." *Essar Steel*, 34 CIT at __, 721 F. Supp. 2d at 1294 (quoting 19 C.F.R. § 351.511(a)(2)(iv)). The Department properly observed its regulations and adjusted the benchmark price for steel tube to account for the VAT and import duties that firms located in the PRC, which purchased steel tube, would ordinarily have paid.

Further, contrary to plaintiff's assertions, the Department acted consistently when adjusting the benchmark prices to include delivery

[23] As defendant correctly notes, plaintiff's reliance on *Certain New Pneumatic Off-the-Road Tires* is inapposite, because, there, Commerce used tier-one prices (i.e., "market prices from actual transactions within the country under investigation") in its determination to calculate the benchmark, rather than tier-two prices (i.e., "world market prices that would be available to purchasers in the country under investigation") as it did here. *See* Certain New Pneumatic Off-the-Road Tires From the PRC, 73 Fed. Reg. 40,480 (Dep't of Commerce July 15, 2008) (final affirmative countervailing duty determination and final negative determination of critical circumstances), and accompanying Issues and Decision Memorandum at IV.A.1, cmt. D.6 ("Certain New Pneumatic Off-the-Road Tires Issues & Dec. Mem.") (citing 19 C.F.R. § 351.511(a)(2)(i), (ii)). That is, in *Certain New Pneumatic Off-the-Road Tires*, the respondents did not pay the VAT or import duties, and thus, Commerce did not add these amounts to the benchmark price because, rather than seek to determine the world market price that "would be available to purchasers in the country in question," as it did here, it instead used the actual experience of the respondents being reviewed. *See* Certain New Pneumatic Off-the-Road Tires Issues & Dec. Mem. at cmt. D.6; 19 C.F.R. § 351.511(a)(2)(ii).

charges. *See, e.g.*, Aluminum Extrusions From the PRC, 76 Fed. Reg. 18,521 (Dep't of Commerce Apr. 4, 2011) (final affirmative countervailing duty determination), and accompanying Issues and Decision Memorandum at comment 20 (citing 19 C.F.R. § 351.511(a)(2)(iv)).

Although plaintiff claims that Commerce's inclusion of inland freight charges that were specific to BTIC's and Tianjin Tianhai's purchases of steel tube was at odds with the Department's refusal to use company-specific information for other components of the benchmark price (e.g., VAT and import duties), there is no inconsistency. This is the case even though Commerce did, in fact, determine the amount of inland freight costs using numbers based on BTIC's and Tianjin Tianhai's actual experience. *See* Final Calculation Mem. at 59, 64. Here, however, BTIC's and Tianjin Tianhai's numbers were the only sets of inland freight data placed on the administrative record. Thus, despite its practice of ordinarily declining to rely upon delivery charge data that is specific to a particular respondent when using a tier-two benchmark, because, here, there was no other data available on the record, the Department was left with only the actual price data reported by BTIC and Tianjin Tianhai to calculate the benchmark for steel tube. "The burden of building the administrative record lies with the interested parties." *Jacobi Carbons AB v. United States*, 38 CIT__, __, 992 F. Supp. 2d 1360, 1369 (2014) (citing *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Had plaintiff wished to place other evidence of freight costs on the record, it could have done so. Consequently, Commerce's selection of BTIC's and Tianjin Tianhai's inland freight data was reasonable and was not irreconcilable with its decision to decline to make company-specific adjustments for other components of the benchmark price for steel tube.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the Department of Commerce's Final Determination is sustained. Judgment will be entered accordingly.

Dated: February 6, 2015
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 15–17

OVAN INTERNATIONAL, LTD. and BSS AUTOMOTIVE GROUP, INC., d/b/a CARRIAGE HOUSE MOTOR CARS, Plaintiffs, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00390

[Plaintiff Ovan International Ltd. dismissed for lack of standing; action dismissed for lack of subject matter jurisdiction in absence of valid timely protest.]

Dated: February 23, 2015

Julius W. Cohn, Cohn & Spector, of White Plains, NY, for the plaintiffs.

Alexander J. Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. On the brief were *Stuart F. Delery*, Assistant Attorney General and *Amy M. Rubin*, Assistant Director. Of Counsel on the brief was *Yelena Slepak*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington DC.

OPINION

Musgrave, Senior Judge:

This matter is before the court on a motion for summary judgment[1] submitted by the plaintiffs Ovan International Ltd. ("Ovan") and BBS Automotive Group, Inc. ("Carriage House") and a cross-motion for judgment on the pleadings filed by the defendant United States in opposition to the plaintiffs' motion.[2] As discussed below, the plaintiff Ovan lacks standing to commence this action under 28 U.S.C. §2631 and must be dismissed from the case. The remaining plaintiff, Carriage House, failed to file a valid timely protest with U.S. Customs and Border Protection ("Customs") prior to commencing the action and as a result has not satisfied the jurisdictional requirements. Accordingly, the court must grant the defendant's cross-motion and deny the plaintiffs' motion.

I . *Background*

Carriage House is the owner of the merchandise at issue, a 1958 Rolls Royce Silver Cloud motor vehicle ("subject vehicle"). The complaint challenges Customs' determination that a protest filed with respect to duties imposed upon the re-importation of the subject vehicle was not valid.[3] The subject vehicle was first imported into the

[1] *See* Pl's Mot. for Summary Judgment, PDoc 11 (June 5, 2014) ("Pl's Mot.").

[2] *See* Def's Cross-Mot. for Judgment on the Pleadings, PDoc12 (July 10, 2014) ("Def's Mot.").

[3] Complaint, PDoc 4 (Dec. 4, 2013) ("Compl.") ¶¶ 2, 3.

U.S. in the 1970's and was transferred at the then-owner's death to his son.[4] On February 20, 2007, Carriage House purchased the subject vehicle from the son and transferred it to its affiliate, Auto Style Leasing, Ltd. ("Auto Style").[5]

According to the papers, the subject vehicle was exported from the U.S. to the United Kingdom in March 2012 to be sold by auction house RM Auctions at an auction taking place in Monaco on May 12, 2012. Compl. ¶ 4; Def's Mot. at 2. The subject vehicle was "transferred" back to Carriage House on April 3, 2012 prior to shipment.[6] RM Auctions hired Schumacher Cargo Logistics to arrange shipment of the subject vehicle which in turn used Ovan as its customs broker. Schudroff Affidavit ¶ 9; Def's Mot. at 2. The subject vehicle did not sell at auction and was returned to Carriage House in the U.S. by RM Auctions using Ovan as the importer. Compl. ¶¶ 5–6; Schudroff Affidavit ¶¶ 11–12, and at Exhibit E; Def's Mot. at 2.

The subject vehicle was imported under cover of Entry No. EJG-0229816–0 with the relevant customs entry form dated July 11, 2012 listing Ovan as the importer of record and Carriage House as the consignee. Compl. ¶ 6; Answer, PDoc 9 (April 11, 2014) ("Answer") ¶ 6. On the entry form, Ovan entered the subject vehicle under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 9801.00.25, a duty-free provision.[7] On August 14, 2012, Customs issued Ovan a Notice of Action stating that the subject vehicle did not qualify for duty-free treatment and would be classified under HTSUS subheading 8703.23.00 at liquidation.[8]

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[4] *See* Compl. at Exhibit A, Affidavit of Michael Schudroff, President and sole shareholder of Carriage House and Auto Style Leasing, Ltd. and accompanying Exhibits A-F (Apr. 8, 2013) ("Schudroff Affidavit") ¶ 2.

[5] The plaintiff states that Carriage House is a corporation that operates as a licensed automotive dealer and Auto Style is a corporation that operates as a licensed automobile leasing dealer, both of which Michael Schudroff serves as the sole shareholder and President. Schudroff Affidavit ¶¶ 1, 3.

[6] The court notes that the referenced date is inherently contradictory to the date of export cited by the plaintiffs and the defendant but finds it unnecessary to resolve the contradiction for purposes of this case. *See* Compl. ¶ 4, and Def's Mot. at 2; *but see* Schudroff Affidavit ¶ 7, referencing Exhibit C, and at Exhibit D.

[7] *See* Def's Mot. at 1, referencing Entry Papers. HTSUS subheading 9801.00.25 provides for:

> Articles, previously imported, with respect to which the duty was paid upon such previous importation if (1) exported within three years after the date of such previous importation, (2) reimported without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, (3) reimported for the reason that such articles do not conform to sample or specifications, and (4) reimported by or for the account of the person who imported them into, and exported them from, the United States.

[8] *See* Compl. ¶ 7; *see also* Answer ¶ 7; Schudroff Affidavit at Exhibit E "Notice of Action". 8703.23.00, HTSUS, provides, in part, for "Motor cars and other motor vehicles principally

On January 23 and February 11, 2013, plaintiffs' counsel wrote to Customs Entry Specialist and Team Leader Curtis W. Gilbert concerning the subject vehicle. On February 14, 2013, Supervisory Entry Officer Evan Johnson ("Johnson") and Officer Pearlman of Customs called plaintiffs' counsel and requested that he email additional information to Johnson concerning the subject vehicle. Compl. ¶ 8; Answer ¶ 8.

The plaintiffs aver that on February 22, 2013, Customs liquidated the entry ("liquidation date") of the subject vehicle under HTSUS subheading 8703.23.00 with a duty rate of 2.5% *ad valorem.* Compl. ¶ 3. On April 9, 2013, or 46 days after liquidation, plaintiffs' counsel emailed a sworn affidavit of Michael Schudroff, the president and sole shareholder of Carriage House, dated April 8, 2013 and six attached exhibits to Customs. The affidavit requested that Customs "waive and cancel all duty, interest and related charges relative to" the subject vehicle. Compl. ¶ 9; Schudroff Affidavit ¶¶ 1, 16. On June 24, 2013, plaintiffs' counsel emailed Johnson indicating that counsel had not received a response to the April 9, 2013 email containing the Schudroff Affidavit. Compl. ¶ 9; Answer ¶ 9. On August 30, 2013, or 189 days after liquidation, plaintiffs' counsel filed Protest No. 4601–13–101369 with Customs, via facsimile, on standard protest Form 19 against the liquidated entry. Compl. ¶ 12 and at Exhibit C; Answer ¶ 12. On October 11, 2013, Customs informed the plaintiff that protest No. 4601–13–101369 was denied as "untimely filed". Compl. ¶ 13 and at Exhibit D; Answer ¶ 24. On October 28, 2013, Ovan paid Customs $23,641.70 in tariffs and associated fees for the subject vehicle. Compl. ¶¶ 7, 14 and at Exhibit E; Answer ¶ 14. On December 4, 2013, plaintiffs' counsel filed a summons and complaint before this court. Compl.; Summons, PDoc 1 (Dec. 4, 2013).

The plaintiffs now move for summary judgment asking the court to find that the Schudroff Affidavit filed on April 9, 2013 constituted a valid timely protest and to annul the rejection of the purported protest by Customs. Pl's Mot. at 1, 3. The defendant cross-moves for judgment on the pleadings asking the court: (1) to dismiss Ovan as a plaintiff to this action averring that it lacks standing under 28 U.S.C. §2631, and (2) to dismiss the action for lack of subject matter jurisdiction under 28 U.S.C. §1581(a) because a valid timely protest was not filed, or if jurisdiction exists, (3) to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted because the complaint does not explicitly set forth the classification

designed for the transport of persons (other than those of heading 8702) . . . ", dutiable at 2.5% *ad valorem*.

claim and because the subject vehicle fails to qualify for a duty exemption under HTSUS subheading 9801.00. Def's Mot. at 1–2, 4, 12–13.

II. *Discussion*

A. Ovan's Standing

Under 28 U.S.C. §2631(a) "[a] civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade *by the person who filed the protest* pursuant to section 514 of such Act, *or by a surety on the transaction* which is the subject of the protest." (italics added). It was Carriage House, not Ovan, who filed both protest No. 4601–13–101369 and the Schudroff Affidavit. Ovan, further, is not a surety on the transaction.[9] Although the plaintiffs concede these facts, they still bid the court to find that Ovan has standing in this action, because Ovan was the Importer of Record listed on the entry summary, because Ovan was the agent for and was given power of attorney by Carriage House to deal with Customs on its behalf concerning the subject vehicle, and because Ovan provided payment to Customs on behalf of Carriage House for the tariff on the subject vehicle. *See* Compl. ¶ 1; *see also* Pl's Resp. at 1, referencing Schudroff Affidavit ¶ 10. The language of 28 U.S.C. §2631(a), however, is clear that to have standing to appeal a denied protest Ovan must have either filed the protest or have served as a surety on the transaction, neither of which it did. Ovan cites no case law to support its claims that an importer of record, an agent to or a party who is given power of attorney by the protestor, or a party who pays a tariff for the protestor but does not file the protest or is not a surety to the transaction, may be provided standing in an action concerning the denied protest.[10] Ovan, as a result, does not have standing to bring this action and must be dismissed as a plaintiff from the case.

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[9] *See* Compl. ¶¶ 1–2 and at Exhibit C "Protest" (listing Carriage House as the "name ... of importer or other protesting party" for Protest No. 4601–13–101369); *see also* Pl's Response to Defendant's Cross-Motion for Judgment on the Pleadings, PDoc13 (Aug. 15, 2014) ("Pl's Resp.") at 1–2 (referring to the Schudroff Affidavit and stating that "Carriage House filed a timely protest on April 9, 2013 against the duties addressed on the subject entry").

[10] Further, since 28 U.S.C. §2631(j)(1) states that "[a]ny 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 -- (A) no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930", and since the contested denial of a protest is being brought before the court under section 515 of the Tariff Act of 1930, Ovan, accordingly, is also barred from intervening in the action.

B. Timeliness and Validity of a 19 U.S.C. §1514 Protest

Concerning the court's jurisdiction to consider the claim of the remaining plaintiff, Carriage House, the court has jurisdiction over "any civil action commenced to contest the denial of a protest [before customs], in whole or in part". 28 U.S.C. §1581(a). This jurisdiction, however, is limited to appeals of valid and timely protests that have been denied by Customs.[11] Pursuant to 19 U.S.C. §§ 1514(a) and 1514(c)(3), to be timely a protest must be filed within 180 days after the date of liquidation. Although protests are to be construed liberally,[12] "[t]he requirements for a valid protest are contained in section 1514(c)(1) and the implementing regulation [19 C.F.R. § 174.13(a)] . . . [and] are mandatory". *Koike*, *supra*, 165 F.3d at 908–09 (finding that the court does not have jurisdiction "over protests that do not satisfy the requirements of 19 U.S.C. §1514(c)(1) *and* 19 C.F.R. §174.13(a)", even considering that the consequence of failing to comply with the requirements is "harsh") (italics added). 19 U.S.C. §1514 (c)(1) (2006) currently requires that:

> A protest of a decision made under subsection (a) of this section shall be filed in writing, or transmitted electronically pursuant to an electronic data interchange system, in accordance with regulations prescribed by the Secretary. A protest must set forth distinctly and specifically—
>
> (A) each decision described in subsection (a) of this section as to which protest is made;
> (B) each category of merchandise affected by each decision set forth under paragraph (1);
> (C) the nature of each objection and the reasons therefor; and
> (D) any other matter required by the Secretary by regulation.

19 U.S.C. §1514(c)(1). Under authority granted by the statute, Customs has implemented further requirements for a valid protest through its regulations. 19 C.F.R. §174.13(a) addresses the general content of a valid protest and requires as follows:

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[11] *See* 28 U.S.C. §1581(a); *see also* 28 U.S.C. §2636(a); 19 U.S.C. §1514; *Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908 (Fed. Cir. 1999) ("*Koike*") ("By its terms, section 1581(a) limits the jurisdiction of the Court of International Trade to appeals from denials of valid protests."), referencing *Computime, Inc. v. United States*, 772 F.2d 874, 875 (Fed. Cir.1985) ("*Computime Inc.*"), and *Washington Int'l Ins. Co. v. United States,* 16 CIT 599, 601 (1992) ("*Washington Int'l Ins. Co.*") ("A prerequisite, therefore, to jurisdiction by the court over an action of this nature is a denial of a valid protest.").

[12] *See e.g.*, *XL Specialty Ins. Co. v. United States*, 28 CIT 858, 870, 341 F. Supp. 2d 1251, 1259 (2004) ("*XL Specialty Ins. Co.*"), referencing *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, 262, 377 F. Supp. 955, 960 (1974) ("*Mattel*"); *see also Washington Int'l Ins. Co.*, *supra*, 16 CIT 599 at 603–04, referencing *CR Industries v. United States*, 10 CIT 561, 564 (1986).

> A protest shall contain the following information:
> (1) The name and address of the protestant, i.e., the importer of record or consignee, and the name and address of his agent or attorney if signed by one of these;
> (2) The importer number of the protestant. If the protestant is represented by an agent having power of attorney, the importer number of the agent shall also be shown;
> (3) The number and date of the entry;
> (4) The date of liquidation of the entry, or the date of a decision not involving a liquidation or reliquidation;
> (5) A specific description of the merchandise affected by the decision as to which protest is made;
> (6) The nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal;
> (7) The date of receipt and protest number of any protest previously filed that is the subject of a pending application for further review pursuant to subpart C of this part and that is alleged to involve the same merchandise and the same issues, if the protesting party requests disposition in accordance with the action taken on such previously filed protest;
> (8) If another party has not filed a timely protest, the surety's protest shall certify that the protest is not being filed collusively to extend another authorized person's time to protest; and
> (9) A declaration, to the best of the protestant's knowledge, as to whether the entry is the subject of drawback, or whether the entry has been referenced on a certificate of delivery or certificate of manufacture and delivery so as to enable a party to make such entry the subject of drawback (see §§ 181.50(b) and 191.81(b) of this chapter).

19 C.F.R. §174.13(a). 19 C.F.R. §174.12(b) addresses the form and number of copies that must be filed with Customs when protesting a decision and requires as follows:

> A written protest against a decision of [Customs] must be filed in quadruplicate on [Customs] Form 19 or a form of the same size clearly labeled "Protest" and setting forth the same content in its entirety, in the same order, addressed to [Customs]. All schedules or other attachments to a protest (other than samples or similar exhibits) must also be filed in quadruplicate. A protest against a decision of [Customs] may also be transmitted electronically pursuant to any electronic data interchange system

> authorized by [Customs] for that purpose. Electronic submissions are not required to be filed in quadruplicate.

19 C.F.R. §174.12(b).

To be considered valid and timely Carriage House's protest must have been filed on or before August 21, 2013, within 180 days of the February 22, 2013 liquidation date, and met the regulatory and statutory requirements for a protest. Protest No. 4601–13–101369 was received by Customs on August 30, 2013, 189 days after the liquidation date, and was accordingly untimely. Compl. ¶¶ 12, 13, and at Exhibit C; Answer ¶¶ 12, 13, 16. Carriage House maintains that the Schudroff Affidavit, which was emailed to Johnson on April 9, 2013, or 46 days after the liquidation date, constitutes a timely valid protest as it was filed within the required time for a protest and meets all of the statutory and regulatory requirements for validity. *See* Compl. ¶¶ 8–11; *see also* Pl's Mot. at 1–3; Pl's Resp. at 2, 4. While the Schudroff Affidavit was submitted to Customs within the appropriate protest time period and meets most of the statutory and regulatory requirements for a valid protest, even when read collectively and liberally it fails to meet "all" of the requirements. In particular, the purported protest was not submitted to Customs pursuant to "any electronic data interchange system authorized by [Customs] for that purpose" (*i.e.*, for the time being the Customs Automatic Broker Interface ("Customs ABI")) or on Customs standard protest Form 19, it was not clearly labeled "protest", and it did not list the liquidation date of the subject entry.[13]

[13] *See* Def's Mot. at 10–11 ("[t]he only electronic data interchange system authorized by Customs is the [Customs ABI], which is used by brokers to transmit protests to Customs"); *see also* Defendant's Reply to Plaintiffs' Response to the Defendant's Cross-Motion for Judgment on the Pleadings, PDoc 16 (Sept. 9, 2014) at 2–5; Defendant's Supplemental Response, PDoc 19 (Nov. 20, 2014) at 1. The court emphasizes here, however, that the Schudroff Affidavit meets the remaining relevant regulatory and statutory requirements for a valid protest. 19 U.S.C. §1514(c) requirements were "distinctly and specifically" met by listing: (A) the rate advance to which the subject vehicle was subject to, the customs decision as to which the protest was being made, and the relevant provisions of the HTSUS, *see* Schudroff Affidavit at Exhibit E "Notice of Action"; (B) the category of merchandise affected, *see id.* ¶ 1 and Exhibit E "Notice of Action"; and (C) the nature of the objection and reasons for objecting, *see id.* ¶¶ 13, 14, 15 and Exhibit F. Further, the 19 C.F.R. §174.13(a)(1)-(6) requirements, invoked by 19 U.S.C. §1514(c)(1)(D), were met by listing: (1) the name and address of the protestant Carriage House who was the consignee to the transaction, *see id.* ¶ 1 and at Exhibit E "Entry Summary"; (2) consignee number of the protestant and the importer number of the agent with power of attorney of the protestant, *see id.* at Exhibit E "Entry Summary"; (3) the date of entry and the entry number, *see id.* at Exhibit E "Notice of Action"; (5) a description of the merchandise, *see id.* ¶ 1 and at Exhibits A, B at Sec. 1, C at Sec. 1, D at "Description of Commodities", E "Entry Summary", and F; and (6) the nature of, justification for the objection with respect to each category, payment, claim, decision or refusal, *see id.* at ¶¶ 1–16 and Exhibit F.

Carriage House maintains that the Schudroff Affidavit is a "clear protest". Specifically, it argues that unlike protests that were rejected by courts for being insufficient on the ground that "no possible construction of the language" could provide a Customs official sufficient information "such that the official could correct any mistakes in liquidation", the affidavit states the requirements for the relevant HTSUS subheading, the grounds for objecting, and the classification to which objection is raised. *See* Pl's Resp. at 4–5, referencing *XL Speciality Ins. Co.*, *supra*, 28 CIT at 869, 341 F. Supp. 2d at 1260. Carriage House further maintains that courts do not require a special form nor technical precision for protests to be considered valid, only that the protest be "distinct and specific enough to show that the objection taken . . . was at the time of filing the protest in the mind of the importer and sufficient to notify the collector of its true nature and character to the end that he might then ascertain the precise facts and have adequate opportunity to correct mistakes and cure defects." Pl's Mot. at 1–2, referencing, *e.g.*, *United States v. M. Rice & Co.*, 257 U.S. 536, 539–40 (1922) ("*M. Rice & Co.*").

The cases to which Carriage House cites,[14] however, predate revisions to 19 U.S.C. §1514(c)(1) that provide clear authority to Customs to establish additional regulatory requirements for protests. *See* 19 U.S.C. §1514(c)(1)(D) ("any other matter required by the Secretary by regulation"). While protests may have been construed generously in the past,[15] the Federal Circuit more recently affirmed that a court does not have jurisdiction over protests that do not satisfy all of the requirements of 19 U.S.C. §1514(c)(1) and 19 C.F.R. §174.13(a), and has declined to find a protest was valid merely because the court (or even a Customs official) could reasonably deduce, from the surrounding circumstances, that Customs was aware of the substance of the protesting party's claim when the party failed to comply with the

[14] Pl's Mot. at 1–2, referencing *M. Rice & Co., supra*, 257 U.S. at 539–40 (not requiring any particular form for a valid protest), and *Davies v. Arthur,* 96 U.S. 148, 151 (1877) ("*Davies*") (stating that technical precision is not required for a valid protest), and *Schell's Executors v. Fauche*, 138 U.S. 562, 569 (1891) (finding that a briefly stated protest which "indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles" should not be rejected).

[15] *See, e.g., Mattel, Inc.*, *supra*, 72 Cust. Ct. at 258–62, 266, 377 F. Supp. at 957–60, 963 (internal citations omitted) (finding that letters which included an IRS number, entry numbers, dates of entry and liquidation, category of merchandise, claimed tariff classification, tariff provision under which the merchandise was classified, rates of duty for conflicting provisions, and supporting authority, constituted a valid protest because the letters "clearly set forth the claim of the importer and were filed within the time required by section 514" but stating that "no formal rules have been devised for the manner in which such objections should be expressed"); *see also Eaton Mfg. Co. v. Untied States*, 60 C.C.P.A. 23, 30, 469 F.2d 1098, 1104 (1972).

relevant statute and regulations. *See Koike*, *supra*, 165 F.3d at 908–09, referencing *Computime, Inc.*, *supra*, 772 F.2d at 875, and *Washington Int'l Insu. Co.*, *supra*, 16 CIT at 601.

The logic of *Koike* also applies to 19 C.F.R. §174.12, because that regulation also derives authority from 19 U.S.C. §1514(c)(1)(D). The Schudroff Affidavit emailed to a Customs official did not comply with the regulation's requirement that an electronic submission of a protest be filed via the electronic data interchange system authorized by Customs for protest submissions, currently the Customs ABI.[16] The Schudroff Affidavit also fails to satisfy the regulation's alternative filing requirements. While submitting a protest on Customs Form 19 is not mandatory, recent decisions of the court have consistently rejected claims of "protests" not submitted on Customs Form 19 that were missing, among other required regulatory and statutory information, a specific indication that the filing is in fact a protest, which is a further requirement under 19 C.F.R. §174.12(b).[17] Pointing out this requirement in *Ammex*, the court noted therein that "[u]nder existing and longstanding case law, a separate letter *containing the information required in the regulations and clearly labeled as a protest* . . . suffice[s] so long as the letter [is] in conformity with the importer's obligations under the statutory scheme and 'sufficient to notify the [duty] collector of [the objection's] true nature and character.'" *Ammex*, 27 CIT at 1686 n. 11, 288 F. Supp. 2d at 1382 n. 11 (italics added), quoting *Davies*, *supra*, 96 U.S. at 151. Like the letters purported to be protests in *Chrysal USA* and *Puerto Rico Towing* that were rejected for failing to satisfy the requirements of 19 C.F.R.

[16] A 2011 amendment to 19 C.F.R. §174.12(b) stated that "written" protests must be submitted on Form 19 or on a "form of the same size clearly labeled 'protest'" in quadruplicate, but also permitted protests to be submitted "electronically", and required that protests submitted in this manner must be "transmitted pursuant to any electronic data interchange system authorized by [Customs] for that purpose. Electronic submissions are not required to be filed in quadruplicate."

[17] *See, e.g., Puerto Rico Towing & Barge Co. v. United States*, Ct. No. 11–00438, Slip Op. 14–80 (July 10, 2014) ("*Puerto Rico Towing*") at 2–3, 9–10 (finding that the plaintiff's letters attached to an email sent to a Customs official failed to comply with several of the statutory and regulatory provisions including that "[n]either document was labeled as a protest, despite such a requirement in 19 C.F.R. §174.12(b), and the first letter does not even include the term"); *see also Chrysal USA*, *Inc. v. United States*, 36 CIT ___, 853 F. Supp. 2d 1314, 1319–20, 1324, 1326 (2012) ("*Chrysal USA*") (finding a physical letter mailed to Customs which was purported to be a protest failed to satisfy the mandatory statutory and regulatory requirements governing valid protests among them that the letter was "not labeled a 'protest,' nor [uses] that term" and that "[t]he letter thus is not designated as a 'protest'"); *Ammex, Inc. v. United States*, 27 CIT 1677, 1684–85, 288 F. Supp. 2d 1375, 1381–82 (2003) ("*Ammex*") (finding an objection included on entry papers did not constitute a protest because among other deficiencies the papers were not "sufficiently labeled as 'Protest' and addressed to the appropriate Customs official to satisfy the requirements of 19 C.F.R. §174.12(b)").

§174.12(b), the Schudroff Affidavit was not submitted on Customs Form 19, was not labeled "protest", and did not reference the term "protest" at any point. The affidavit further was not submitted via the Customs ABI, and thus it fails to comply with the regulation.

The Schudroff Affidavit also does not contain the date of liquidation of the subject entry as is required by 19 C.F.R. §174.13(a)(4). In its supplemental filing, Carriage House both admits that the Schudroff Affidavit is missing this information and claims it is met by the inclusion of Exhibit E to the affidavit, *i.e.*, the "Notice of Action" Customs Form, at Box 12. Plaintiff's Supplemental Response, PDoc 18 (Nov. 12, 2014) at 2–3. In any event, Carriage House maintains that it is not the liquidation of the subject vehicle that is important but the "sufficiency of the protest itself", and it argues that the cases where courts have found protests to be insufficient "tend to turn on the lack of information of 19 C.F.R. §174.13 (a)(6)", information which the Schudroff Affidavit contains. *Id.*, referencing *Koike, supra*, 165 F.3d at 906, and *Ammex, supra*, 27 CIT at 1685, 288 F. Supp. 2d at 1381–82, and *Chrysal USA, supra*, 36 CIT at ___, 853 F. Supp. 2d at 1314. Carriage House further claims that because there is no dispute over the date of liquidation or the timeliness of filing of the Schudroff Affidavit, and because "all parties were at all times aware of the date and its importance and acted in accordance thereof", the absence of a liquidation date is inconsequential. *Id.* It is true that in each of the cases cited by Carriage House the courts determined that the claimed protest was missing information required by 19 C.F.R. §174.13(a)(6), *i.e.*, "the nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal", but the courts in those cases also determined further pieces of mandatory regulatory and statutory information were missing and held that all statutory and regulatory requirements must be met for a protest to be considered valid.[18] Although the

[18] *See Koike*, *supra*, 165 F.3d at 906, 908–09 (finding that a protest on a standard protest form that failed to include "the nature of each objection and the reasons therefor", the "justification for [each] objection set forth distinctly and specifically", and "does not even specify the tariff classifications that Koike would have Customs adopt in lieu of the classifications at which it was directed" was not a valid protest); *see also Ammex, supra*, 27 CIT 1677 at 1681–82, 1685–86, 288 F. Supp. 2d at 1379, 1381–82 (finding that entry papers with an included objection did not meet the mandatory statutory and regulatory requirements for a valid protest because the "paragraph . . . inserted on the entry papers could solely be viewed as an indication that a protest was about to follow (as opposed to constituting a valid protest in itself)", did not state the reasons or justifications for the objection as required by statute and regulation, and was not labeled "Protest" and addressed to the appropriate Customs official as required by regulation.); *Chrysal USA*, *supra*, 36 CIT at, 853 F. Supp. 2d at 1321–22, 1324–26, 1330 (finding that the subject letter did not qualify as a protest because it did not include any of the "mandatory" elements for a valid protest

parties in the present action do not dispute the date of liquidation or the timeliness of the Schudroff Affidavit, the liquidation date is not, contrary to Carriage Houses's claim, contained within Box 12 of the attached Notice of Action form, or indicated anywhere else in the Schudroff Affidavit for that matter. The absence of this information is not inconsequential, but instead must be held as amounting to a failure to meet a "mandatory" regulatory requirement for a valid protest as mandated by Federal Circuit precedent. *Koike*, *supra*, 165 F.3d at 909.

Carriage House also maintains that Customs was aware that the Schudroff Affidavit constituted a valid protest as a result of conversations Carriage House's counsel had with Customs over emails and phone calls in which the basis of the dispute was set forth, and it claims that it submitted the Schudroff Affidavit in response to specific material Customs requested in those conversations. Pl's Mot. at 2; Compl. ¶¶ 8, 9, 10. Through these allegations Carriage House also appears to raise facts relevant to a claim of detrimental reliance upon advice provided by Customs' officials in those conversations as to what they required a document contain in order to constitute a valid protest.[19] However, in other places in its papers Carriage House states that it is

> not relying on the discussions Plaintiffs and Plaintiffs' counsel engaged in with [Customs], extensive though they may have been, to act as notice of Plaintiffs' protest. Plaintiffs are [here] instead relying on the fact that the Schudroff Affidavit and the exhibits annexed thereto contain far more information than is requested on the [Customs]'s own protest form, that being [Customs] Form 19, and meet the qualifications enunciated by statute with requisite specificity.

Pl's Resp. at 4. In any event, the alleged dialogue with Customs cannot be used to cure the defects of the Schudroff Affidavit to satisfy the statutory and regulatory requirements for a valid protest. The test for determining the validity of a protest is objective and independent of a Customs official's subjective reaction to the purported pro-

required by statute and regulation including "the nature of [Chrysal's] objection and the reasons therefor" and the date of liquidation).

[19] *See* Pl's Mot. at 2, referencing Exhibit C and D, and Compl. at Exhibit A and B ("Here Plaintiffs, through counsel, engaged in considerable dialogue by email and phone with [Customs] representatives in the months following the entry date wherein the basis of the dispute was set forth . . . . Following such conversations, wherein specific material was *requested* by [Customs] representatives, [plaintiffs' attorney] submitted [the Schudroff Affidavit] on April 9, 2013, forty-six days after the liquidation date of February 22, 2013.") (plaintiffs' italics).

test.[20] In *Koike,* the Federal Circuit rejected a similar argument that "a protest is valid if a court can surmise, from the surrounding circumstances, that Customs was aware of the substance of the protesting party's claim" and held that Customs' actual knowledge of the plaintiff's position, both "through prior discussions" and through "pre-protest correspondence," was irrelevant to an analysis of the sufficiency of the protest. *See Koike*, *supra*, 165 F.3d at 908–09.

Nor can the affidavit be considered a protest on the ground that there is nothing in the submission "that would suggest the Plaintiffs are merely putting a collector on notice of filing a protest". *See* Pl's Resp. at 4–5. Courts have rejected as "protests" communications that only put the collector on notice that a protest will follow,[21] but the mere lack of such an indication in the Schudroff Affidavit does not in turn qualify it as a valid protest or indicate to Customs that it is intended as an official protest under 19 U.S.C. §1514. In the past, the court could have readily concluded that the Schudroff Affidavit constituted a valid protest, but at present, in order for it to be a valid protest the Schudroff Affidavit must have met all of the "straightforward" and "not difficult to satisfy" mandatory statutory and regulatory requirements governing the validity of a protest, which it did not. *See Koike*, *supra*, 165 F.3d at 909. Because the affidavit was not filed via the Customs ABI, was not filed on Customs Protest Form 19 or labeled "protest", did not include the liquidation date, and was submitted "at the peril that the collector [would] not consider the [filing] as a protest",[22] even if it was timely it must be held invalid as a "protest" because it fails "to satisfy the regulatory or statutory requirements of validity" as strictly required by our appellate court. *Koike*, *supra*, 165 F.3d at 908.

Because the court has determined that a valid timely protest was not filed under 19 U.S.C. §1514(c)(1) and the applicable regulations, it need not reach the question of whether the plaintiff has stated a valid claim upon which relief can be granted or if the subject vehicle qualifies for duty free treatment under HTSUS subheading 9801.00.

IV. *Conclusion*

Plaintiff Ovan did not file the protest at issue and is not a surety on the transaction and as a result must be dismissed as a plaintiff from

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[20] *See e.g., XL Specialty Ins. Co.*, *supra*, 28 CIT 858 at 870, 341 F. Supp. 2d at 1261, referencing *Sony Elecs., Inc. v. United States*, 26 CIT 286, 287 (2002).

[21] *See Continental Ore Corp. v. United States*, 67 Cust. Ct. 202, 205–06, 331 F. Supp. 1060, 1063–64 (1971) ("*Continental Ore*"); *see also Puerto Rico Towing*, *supra*, Slip Op. 14–80 at 10–11; *Ammex, supra*, 27 CIT at 1682, 1686, 288 F. Supp. 2d at 1383.

[22] *See Continental Ore Corp*, *supra*, 67 Cust. Ct. at 203–05, 331 F.Supp. at 1062–64.

the case. The remaining plaintiff Carriage House failed to meet the jurisdictional requirement of filing a valid timely protest with Customs against the duties assessed on the subject entry, and the court must dismiss the case for lack of subject matter jurisdiction. Judgment will enter accordingly.

Dated: February 23, 2015
New York, New York

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

Slip Op. 15–18

JTEKT CORPORATION, et. al., Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 06–00250

[Resolving the remaining contested issue and ruling on other pending matters in litigation contesting the final results of administrative reviews of an antidumping duty order on ball bearings and parts thereof]

Dated: February 25, 2015

Neil R. Ellis and *Dave M. Wharwood*, Sidley Austin, LLP, of Washington, DC, for plaintiffs JTEKT Corp. and Koyo Corp. of U.S.A.

Diane A. MacDonald, Baker & McKenzie LLP, of Chicago, IL, and *Kevin M. O'Brien*, Baker & McKenzie LLP, of Washington, DC, for plaintiffs and defendant-intervenors, American NTN Bearing Manufacturing Corp., NTN Bearing Corp. of America, NTN-Bower Corp., NTN Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. and for plaintiffs FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd.

Greyson L. Bryan, McAllister Jimbo, and *David Ribner*, O'Melveny & Myers LLP, of Washington, DC, for plaintiffs Nachi Technology, Inc., Nachi-Fujikoshi Corp., and Nachi America, Inc.

Robert A. Lipstein and *Alexander H. Schaefer*, Crowell & Moring LLP, of Washington, DC, for plaintiffs NSK Corp., NSK Ltd., and NSK Precision America, Inc.

Claudia Burke, Assistant Director, *L. Misha Preheim*, Senior Trial Counsel, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for defendant United States. With them on the brief were *Jeanne E. Davidson*, Director, and *Stuart F. Delery*, Assistant Attorney General. Of counsel on the brief was *Shana Hofstetter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Terence P. Stewart, Stewart and Stewart, of Washington, DC, for plaintiff and defendant-intervenor, The Timken Company. With him on the brief were *Geert De Prest* and *Lane S. Hurewitz*.

OPINION

Stanceu, Chief Judge:

The plaintiffs in this consolidated case[1] contested the final determination ("Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the sixteenth periodic administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom ("subject merchandise"). *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews,* 71 Fed. Reg. 40,064 (Int'l Trade Admin. July 14, 2006) ("*Final Results*"). The claims in this action pertain to the review of the antidumping duty order on subject merchandise from Japan (the "Order"). The sixteenth administrative reviews applied to entries of subject merchandise made from May 1, 2004 through April 30, 2005. *Id.* at 40,064.

Only one contested issue remains pending before the court in this case: whether it was permissible for Commerce to apply its "zeroing" methodology in the final results of the sixteenth reviews. Under the zeroing methodology, Commerce assigns to U.S. sales made above normal value a dumping margin of zero, rather than a negative margin, when calculating weighted-average dumping margins. As discussed herein, the court concludes that use of the zeroing methodology was in accordance with law.

Also pending before the court is the Department's second redetermination upon remand ("Second Remand Redetermination") issued in response to the opinion and order in *JTEKT Corp. v. United States*, 38 CIT __, __, Slip Op. 14–13 at 11 (Feb. 10, 2014) ("*JTEKT IV*"). *See Final Second Remand Determination* (May 12, 2014), ECF No. 201 ("*Second Remand Redetermination*"). Because the court concludes that Commerce has complied with the court's order in *JTEKT IV*, and because no party has commented in opposition, the court affirms the Second Remand Redetermination.

Finally, one of the parties to this case has filed an unopposed motion to terminate the injunction against liquidation of the entries of its merchandise, which the court grants.

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[1] Six actions are consolidated under Ct. No. 06–00250: Nippon Pillow Block Co. Ltd. v. United States (Ct. No. 06–00258); Timken US Corp. v. United States (Ct. No. 06–00271); NSK Ltd. v. United States (Ct. No. 06–00272); NTN Corp. v. United States (Ct. No. 06–00274); and Nachi-Fujikoshi Corp. v. United States (Ct. No. 06–00275). Order (Nov. 15, 2006), ECF No. 21.

I. BACKGROUND

The court's prior opinions provide detailed background information on this case, which is supplemented and summarized briefly below. *See JTEKT Corp. v. United States*, 33 CIT 1797, 675 F. Supp. 2d 1206 (2009) ("*JTEKT I*") (first remand order); *JTEKT Corp. v. United States*, 35 CIT __, 780 F. Supp. 2d 1357 (2011) (*JTEKT II*) (second remand order); *JTEKT Corp. v. United States*, 36 CIT __, Slip Op. 12–72 (June 4, 2012) (*JTEKT III*) (staying action); *JTEKT IV*, 38 CIT at __, Slip Op. 14–13 (granting in part motions for reconsideration).

When described together with affiliated parties, there are six plaintiffs in this consolidated action, all of which contested various aspects of the Final Results: (1) JTEKT Corp. and Koyo Corp. of U.S.A. (collectively, "JTEKT"); (2) FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"); (3) NSK Corp., NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK"); (4) Nachi Technology, Inc., Nachi-Fujikoshi Corp., and Nachi America, Inc. (collectively, "Nachi"); (5) American NTN Bearing Manufacturing Corp., NTN Bearing Corp. of America, NTN Bower Corp., NTN Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. (collectively, "NTN"), which is both a plaintiff and a defendant-intervenor;[2] (6) and the Timken Company ("Timken"), which is also both a plaintiff and a defendant-intervenor. *JTEKT IV*, 38 CIT at __, Slip Op. 14–13 at 3.

On July 14, 2006, Commerce issued the Final Results, assigning the following antidumping duty margins to plaintiffs: JTEKT, 19.76%; Nachi, 16.02%; NPB, 25.91%; NSK, 6.93%; and NTN, 9.32%. *Final Results*, 71 Fed. Reg. at 40,066.

1. The Department's Redetermination in Response to the Court's First Remand Order

On December 18, 2009, the court issued *JTEKT I*, affirming in part, and remanding in part, the Final Results. The court sustained, *inter alia*, the Department's decision to apply the zeroing methodology, *JTEKT I*, 33 CIT at 1865, 675 F. Supp. 2d at 1263. The court also affirmed the Department's decision to use a revised "model-match" methodology according to which it identified similar merchandise for the purpose of conducting comparisons between the U.S. price of subject merchandise and the price of comparable merchandise in the

[2] American NTN Bearing Manufacturing Corp., NTN Bearing Corp. of America, NTN Bower Corp., NTN Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. (collectively, "NTN") are defendant-intervenors in Timken US Corp. v. United States (Ct. No. 06–00271), which is consolidated in this action. *See* Order (Oct. 4, 2006), ECF No. 14 (Ct. No. 06–00271).

comparison market.[3] *Id.* at 1805–10, 675 F. Supp. 2d at 1218–22. The court remanded, *inter alia*, the Department's decision to reject NTN's proposal to incorporate into the model-match methodology additional design-type categories for specific types of ball bearings. *Id.* at 1817–20, 675 F. Supp. 2d at 1227–29.

On May 17, 2010, Commerce submitted its first redetermination on remand ("First Remand Redetermination"), addressing five issues the court identified in the remand order in *JTEKT I*. *Final Results of Redetermination* 1 (May 17, 2010), ECF No. 143 ("*First Remand Redetermination*"). On three issues, Commerce did not change its positions from the Final Results but provided additional explanation. *Id.* Those issues arose from NPB's proposal during the review to expand the choice of months for sampled transactions, Timken's claim that Commerce should have used U.S. interest rates, not Japanese interest rates, to calculate a portion of NTN's and Nachi's inventory carrying costs, and NTN's proposal to incorporate additional bearing design types in the Department's model-match methodology. *Id.* On two remaining issues, Commerce made changes to the Final Results. *Id.* Commerce redetermined the weighted-average antidumping duty margin for NTN after recalculating NTN's freight expense based on weight rather than value and the margin for Nachi upon limiting the

[3] To determine an antidumping margin, U.S. Department of Commerce ("Commerce" or the "Department") compares the U.S. price of the subject merchandise with the price of comparable merchandise (the "foreign like product") in the "home" market (i.e., the actual home market or another comparison market). 19 U.S.C. § 1677b. In identifying a foreign like product, Commerce attempts to match U.S. sales of the subject merchandise with home market sales of identical merchandise. *Id.* § 1677(16)(A). Where Commerce is unable to identify home market sales of identical merchandise, Commerce attempts to match a U.S. sale of subject merchandise with a home market sale of "similar merchandise." *Id.* § 1677(16)(B)-(C). Commerce uses a "model-match" methodology to identify similar merchandise. *JTEKT Corp. v. United States*, 33 CIT 1797, 1805–06, 675 F. Supp. 2d, 1206, 1218 (2009) ("*JTEKT I*"). According to the revised model-match methodology used in the sixteenth administrative reviews, Commerce matches a ball bearing model sold in the United States, i.e., a "subject" ball bearing, with one sold in the home market only if the two bearings are identical with respect to the following four physical characteristics: (1) load direction, (2) number of rows of rolling elements, (3) precision rating, and (4) ball bearing "design type." *Id.* at 1806, 675 F. Supp. 2d at 1218–19. The applied model-match methodology recognized the following ball bearing design types: angular contact, self-aligning, deep groove, integral shaft, thrust ball, housed, and insert. *Id.* For bearings that are identical with respect to the first four characteristics, Commerce compares ball bearings according to four quantitative characteristics: (5) load rating, (6) outer diameter, (7) inner diameter, and (8) width. *Id.* In matching bearings according to the second set of characteristics, Commerce excludes any potential matches in which the sum of the deviations for those four quantitative characteristics exceeds 40%. *Id.* Commerce also applies a "difference-inmerchandise adjustment" ("DIFMER" adjustment) for any difference in the variable cost of manufacturing, excluding any potential matches for which the DIFMER adjustment would exceed 20%. *Id.*

Department's previous application of facts otherwise available and adverse inferences to instances of errors in certain of Nachi's reporting during the review. *Id.* Commerce assigned a revised margin of 8.02% to NTN and a revised margin of 13.91% to Nachi but did not revise the margins for any other respondent. *Id.* at 31.

2. The Department's Second Remand Order

NPB and NTN, but no other plaintiff, filed comments challenging the First Remand Redetermination. *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1360. NTN also filed a motion to stay this action pending further administrative action on, or alternatively for leave to submit further briefing on, the issue of whether or not it was lawful for Commerce to apply the zeroing methodology in the sixteenth administrative reviews. *Id*.

In *JTEKT II*, the court considered the First Remand Redetermination and construed NTN's motion for a stay as a motion for reconsideration of the court's decision in *JTEKT I* to uphold the Department's use of zeroing in the Final Results. *Id.* at __, 780 F. Supp. 2d at 1363. The court sustained in part, and remanded in part, the First Remand Redetermination, finding that the redetermination complied in part with the court's order in *JTEKT I* and with the applicable law. *Id.* at __, 780 F. Supp. 2d at 1371–72. The court directed Commerce to reconsider the use of zeroing in determining margins for JTEKT, Nachi, NPB, and NTN in light of two intervening decisions by the Court of Appeals for the Federal Circuit ("Court of Appeals") that called into question the legality of the Department's use of zeroing in administrative reviews. *Id*.

The court also ordered Commerce to reconsider its decision to reject NTN's proposal that Commerce incorporate additional design-type categories into the model-match methodology. *Id.* at __, 780 F. Supp. 2d at 1368–72. In the First Remand Redetermination, Commerce determined, as NTN claimed, that there was some overlap between different design types in the Department's model-match methodology (namely, the "thrust ball" and "angular contact" design types) but concluded that no new design type was necessary because record evidence supported a finding that these overlapping bearings "have different load directions" that would preclude a mismatch of such bearings. *First Remand Redetermination* 17–19. In *JTEKT II*, the court found the Department's explanation adequate to support the decision to reject additional design types proposed by NTN and affirmed the First Remand Redetermination on this issue. *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1369. The court remanded the First Remand Redetermination on another issue, which was the Depart-

ment's decision not to adopt in the final version of the First Remand Redetermination two additional design types that Commerce had proposed in the draft version of the remand redetermination. *Id.* at __, 780 F. Supp. 2d at 1370.

3. The Court's Order Staying these Proceedings

Before Commerce issued a second remand redetermination, the court granted a request by several plaintiffs to stay this action pending the final disposition of *Union Steel v. United States,* CAFC Ct. No. 2012–1248, a case then pending before the Court of Appeals that involved the permissibility of the Department's use of zeroing in an administrative review despite having discontinued the methodology in antidumping investigations. *JTEKT III*, 36 CIT at __, Slip Op. 12–72 at 7–8. The Court of Appeals issued an opinion in *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013) ("*Union Steel*"), on April 16, 2013 and a mandate on June 10, 2013.

4. Timken's and Defendant's Motions for Reconsideration

The court issued *JTEKT IV* on February 10, 2014, responding to requests by Timken and defendant either to reconsider or to grant relief from the court's order in *JTEKT II* pertaining to the zeroing claims. *JTEKT IV*, 38 CIT at __, Slip Op. 14–13 at 5. In *JTEKT IV*, the court maintained the directive from *JTEKT II* concerning NTN's proposal to incorporate additional design types in the Department's model-match methodology. *Id.* at __, Slip Op. 14–13 at 10. The court, however, relieved Commerce of the directive in *JTEKT II* concerning zeroing based on the intervening decision of the Court of Appeals in *Union Steel*. *JTEKT IV*, 38 CIT at __, Slip Op. 14–13 at 8. The court permitted parties to submit voluntary supplemental briefing on the question of whether *Union Steel* is dispositive of the zeroing claims in this case and, if not, what further action the court should take to resolve those claims. *Id.* at __, Slip Op. 14–13 at 9. Defendant and Timken each filed supplemental briefing, but NTN informed the court that it would not file a supplemental brief on this issue. Def.'s Supplemental Br. Concerning *Union Steel* (Mar. 7, 2014), ECF No. 198 ("Def.'s Supplemental Br."); The Timken Co.'s Supplemental Br. Concerning *Union Steel* (Mar. 12, 2014), ECF No. 199 ("Timken's Supplemental Br."); Pls.' Resp. to Ct. Order Dated Feb. 10, 2014 Inviting Supplemental Briefing (Mar. 12, 2014), ECF No. 200 ("NTN's Letter Concerning *Union Steel*"). The court, in *JTEKT IV*, also denied a motion by Timken requesting deconsolidation and dismissal of several of the remaining claims after concluding that there was no just

reason for piecemeal adjudication of this case, in accordance with USCIT Rule 54(b). *JTEKT IV*, 38 CIT at __, Slip Op. 14–13 at 9–10.

5. The Department's Second Remand Redetermination

On May 12, 2014, Commerce issued the Second Remand Redetermination, in which it did not recalculate the margin for any party. *Second Remand Redetermination* 4. Timken, but no other party, filed comments thereon, and defendant filed a reply to these comments on July 9, 2014. The Timken Co.'s Comments on the U.S. Dep't of Commerce's May 12, 2014 Final Second Redetermination Pursuant to Ct. Remand (June 11, 2014), ECF No. 203; Def.'s Resp. to Comments, ECF No. 204.

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a(a)(2)(B)(iii), including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a).[4]

A. The Court Sustains the Department's Use of Zeroing in the Final Results

Plaintiffs JTEKT, NPB, NTN, and Nachi challenged the Department's application of zeroing in the Final Results. *JTEKT I*, 33 CIT at 1801–05, 675 F. Supp. 2d at 1214–18. As noted above, the court in *JTEKT I* sustained the Department's decision to apply the zeroing methodology in the sixteenth administrative reviews. *Id.* at 1865, 675 F. Supp. 2d at 1263. Then, in *JTEKT II*, the court directed Commerce to reconsider the use of zeroing in light of two intervening decisions of the Court of Appeals that called into question the Department's use of zeroing in administrative reviews.[5] *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1362–64. Specifically, the court instructed Commerce on remand to either reconsider the use of zeroing or "set forth an explanation of how the language of 19 U.S.C. § 1677(35) as applied to the zeroing issue permissibly may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews . . . ." *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1371.

[4] All statutory citations herein are to the 2006 edition of the U.S. Code.

[5] The Court of Appeals for the Federal Circuit ("Court of Appeals") held that Commerce had not provided a satisfactory explanation for using different interpretations of 19 U.S.C. § 1677(35) in the antidumping administrative review and investigation contexts. *See Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363, 1371–73 (Fed. Cir. 2011); *JTEKT Corp. v. United States,* 642 F.3d 1378, 1383–85 (Fed. Cir. 2011).

In *JTEKT IV*, the court, in light of the intervening decision by the Court of Appeals in *Union Steel*, relieved Commerce of the directive concerning zeroing contained in *JTEKT II* such that Commerce no longer was required to reconsider or provide an explanation of the use of zeroing in the sixteenth administrative reviews. *JTEKT IV*, 38 CIT at __, Slip Op. 14–13 at 11. Because the court granted relief under USCIT Rule 59(d) for reasons not stated in defendant's and Timken's motions for reconsideration or relief, the court also permitted optional supplemental briefing on the narrow question of whether the holding of *Union Steel* is dispositive of the zeroing claims in this case, and if not, what further action the court should take to resolve those claims. *Id.* at __, Slip Op. 14–13 at 9. In supplemental briefing, both defendant and Timken argued that *Union Steel* supported the conclusion that the continued use of zeroing in administrative reviews is lawful. Def.'s Supplemental Br. 1–2; Timken's Supplemental Br. 1–2. NTN informed the court that it would not file a supplemental brief on this issue. NTN's Letter Concerning *Union Steel* 1. No other party filed supplemental briefing.

As described in *JTEKT IV*, the court preliminarily concluded that the claims challenging zeroing in this case are indistinguishable from those rejected in *Union Steel*, in which the Court of Appeals affirmed the Department's use of zeroing in administrative reviews despite discontinuing the practice in antidumping investigations, *JTEKT IV*, 38 CIT at __, Slip Op. 14–13 at 8, and the court received no supplemental briefing contesting this conclusion.[6]

The court considers *Union Steel* to have affirmed the Department's use of the zeroing methodology in an administrative review of an antidumping duty order in circumstances that the court views as analogous to those presented in this case. The court considers *Union Steel* to be binding precedent that is dispositive of all claims in this consolidated case that challenged the Department's use of the zeroing methodology in the Final Results. The court, therefore, will affirm the use of zeroing in the judgment it will enter to conclude this litigation.

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[6] Defendant argues that *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013) ("*Union Steel*"), does not apply to this case as the final determination challenged here was issued in 2006, when Commerce used zeroing in both investigations and administrative reviews, whereas *Union Steel* dealt with the application of zeroing in an administrative review issued after Commerce discontinued zeroing in investigations. Def.'s Supplemental Br. Concerning *Union Steel* 1–2 (Mar. 7, 2014), ECF No. 198 ("Def.'s Supplemental Br."). Nevertheless, defendant also argues that even if *Union Steel* were to apply to this case, it would support a finding that the application of zeroing in this case was lawful. *Id.* at 2.

B. The Court Sustains the Department's Decision to Reject NTN's Proposal that Commerce Adopt Additional Design-Type Categories in the Model-Match Methodology

In challenging the Final Results, NTN claimed that Commerce erred in refusing to recognize and apply the additional ball bearing design types that NTN proposed for use in the model matching process. *JTEKT I*, 33 CIT at 1817, 675 F. Supp. 2d at 1227. As discussed above, the court in *JTEKT I* remanded this issue to Commerce for reconsideration. *Id.*, 33 CIT at 1817–20, 675 F. Supp. 2d at 1227–29. In *JTEKT II*, the court found adequate an explanation that Commerce provided on remand for not adopting NTN's proposed additional design-type categories. *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1368–72. Nevertheless, the court remanded the Department's decision not to incorporate into the model-match methodology additional design types that Commerce had proposed in the draft version of the First Remand Redetermination. *Id.* The court instructed Commerce to "reconsider NTN's proposal to incorporate into the model-match methodology additional design-type categories to the extent necessary to correct any errors revealed by the Department's review of the record evidence." *Id.* at __, 780 F. Supp. 2d at 1371.

During the second remand proceeding, Commerce issued a supplemental questionnaire to NTN seeking clarification concerning a number of NTN's bearings. *Supplemental Questionnaire to NTN* (Aug. 15, 2011) (Remand Admin.R.Doc. No. 1). Based on NTN's response to this supplemental questionnaire, NTN's Supplemental Questionnaire Resp. (Aug. 22, 2011) (Remand Admin.R.Doc. No. 2), Commerce concluded that no mismatches of NTN's bearings had resulted from the Department's design-type categories and so it was "neither necessary nor appropriate to create any additional design types." *Second Remand Redetermination* 4.

Because the court concludes that the Department's determination complies with the court's directive in *JTEKT II* concerning additional design types, and because NTN filed no comments opposing the Department's determination, the court will sustain the Second Remand Redetermination.

C. The Court Grants JTEKT's Motion to Terminate the Injunction Affecting JTEKT's Entries

On October 23, 2014, after Commerce submitted the Second Remand Redetermination, JTEKT filed a motion requesting that the court terminate the injunction on JTEKT's entries at issue in this case, explaining that "JTEKT no longer seeks to address the dumping margins that were calculated by the U.S. Department of Commerce in

the administrative review that is the subject of this litigation." Mot. to Terminate Prelim. Inj. 1 (Oct. 23, 2014), ECF No. 206–1. According to JTEKT, defendant consents to this motion. *Id.* at 2. Timken filed a reply consenting to JTEKT's motion. The Timken Co.'s Notice of Consent to JTEKT's Oct. 23, 2014 Mot. to Terminate the Prelim. Inj. 1 (Nov. 5, 2014), ECF No. 209. As all affected parties consent, the court grants JTEKT's motion to terminate the injunction on JTEKT's entries. *See* Order (Sept. 11, 2006), ECF No. 8 (enjoining liquidation of JTEKT's entries through all appeals of this litigation). All other orders of injunction entered in this case that affect any other plaintiff remain in effect according to the terms of those orders.[7]

III. CONCLUSION

For the reasons discussed herein, upon consideration of the Second Remand Redetermination, all comments submitted thereon, and upon due deliberation, the court will affirm the Second Remand Redetermination concerning NTN's proposal of additional design types and the Final Results concerning the Department's use of zeroing in the sixteenth administrative reviews. The court will order the termination of the injunction against liquidation of entries of JTEKT's merchandise. The court will enter a judgment in accordance with this Opinion.

Dated: February 25, 2015
New York, NY

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

[7] The court entered orders of injunction in each of the consolidated cases: Order (Aug. 31, 2006), ECF No. 17 (Ct. No. 06–00258) (NPB's entries); Order (Oct. 6, 2006), ECF No. 16 (Ct. No. 06–00271) (NTN's and Nachi's entries); Order (Aug. 29, 2006), ECF No. 9 (Ct. No. 06–00272) (NSK's entries); Order (Aug. 23, 2006), ECF No. 8–2 (Ct. No. 06–00274) (NTN's entries); and Order (Sept. 19, 2006), ECF No. 17 (Ct. No. 06–00275) (Nachi's entries).