U.S. Court of International Trade

Slip Op. 15–113

JIANGSU JIASHENG PHOTOVOLTAIC TECHNOLOGY CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Donald C. Pogue, Senior Judge
Consol. Court No. 13–000121 [1]
PUBLIC VERSION

OPINION

[affirming the Department of Commerce's final results of redetermination on remand]

Dated: October 5, 2015

Timothy C. Brightbill and *Laura El-Sabaawi*, Wiley Rein LLP, of Washington, DC, for SolarWorld Americas, Inc.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Rebecca Cantu*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Pogue, Senior Judge:

This consolidated action arises from the United States Department of Commerce's ("Commerce") antidumping investigation of crystalline silicon photovoltaic cells from the People's Republic of China ("China").[2] Before the court is Commerce's redetermination, pursuant to remand, of the antidumping cash deposit rates for four specific producers/exporters of merchandise subject to the investigation.[3] On

[1] This action is consolidated with *SolarWorld Indus. Am., Inc. v. United States*, Ct. No. 13–00006. Order, June 12, 2013, ECF No. 18.

[2] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China,* 77 Fed. Reg. 63,791 (Dep't Commerce Oct. 17, 2012) (final determination of sales at less than fair value, and affirmative final determination of critical circumstances, in part) ("*Final Results*") and accompanying Issues & Decision Mem., A-570–979, Investigation (Oct. 9, 2012) ("*I&D Mem.*").

[3] *See* Final Results of Redetermination Pursuant to Ct. Order, ECF Nos. 97–1 (conf. version) & 98–1 (pub. version) ("*Remand Results*"); *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, __ CIT __, 28 F. Supp. 3d 1317, 1343, 1351 (2014) ("*SolarWorld I*") (granting Commerce's request for voluntary remand with respect to these four specific respondents,

remand, Commerce found that three of these four respondents have not shown that their production and export operations are free from government control, and so determined to assign to those respondents the China-wide rate.[4] This portion of the *Remand Results* is not subject to challenge.[5] With respect to the remaining respondent – Ningbo ETDZ Holdings Limited ("Ningbo ETDZ") – however, Commerce found that this company sufficiently demonstrated its eligibility for a rate separate from the China-wide entity.[6] Defendant-Intervenor SolarWorld Americas, Inc. ("SolarWorld") – a petitioner in the underlying antidumping investigation – now challenges this latter determination.[7]

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[8] and 28 U.S.C. § 1581(c) (2012).

and remanding the *Final Results* solely with regard to "the separate rate eligibility of the four respondents named in Commerce's request"). Although the most relevant background is summarized below, familiarity with the history of this litigation is presumed. The court's prior opinion – referred to here as *SolarWorld I* – affirmed the *Final Results* of this antidumping investigation against all challenges presented in this consolidated action, other than the separate rate eligibility of these four respondents. *SolarWorld I*, __ CIT at __,28 F. Supp. 3d at 1351.

[4] *Remand Results*, ECF Nos. 97–1 & 98–1, at 8–11. *See* Background, *infra*, for relevant context.

[5] None of these three respondents filed comments with this Court regarding the *Remand Results*, *see* ECF Nos. 97 *et seq.*, although one of these companies – Sumec Hardware & Tools Co., Ltd. ("Sumec Hardware") – unsuccessfully sought to intervene in this action, out of time, in order to challenge Commerce's *Remand Results*. *See Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, __ CIT __, 72 F. Supp. 3d 1378 (2015) (denying Sumec Hardware's motion to intervene in this action more than two years past the 30 day time limit provided by USCIT Rule 24(a)(3)). Because Sumec Hardware failed to demonstrate good cause for the significant tardiness of its attempted intervention, the court denied Sumec Hardware's motion, and consequently no opinion is expressed herein with regard to Sumec Hardware's arguments against the *Remand Results*. *See id*. at 1382–83 (explaining the court's reasoning).

[6] *Remand Results*, ECF Nos. 97–1 & 98–1, at 12–13.

[7] Def.-Intervenor SolarWorld Americas, Inc.'s Comments on Final Results of Redetermination Pursuant to Ct. Order, ECF Nos. 104 (conf. version) & 105 (pub. version) ("SolarWorld's Br."). Ningbo ETDZ itself did not file any commentary regarding the *Remand Results*. *See* ECF Nos. 97 *et seq*.

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

Because Commerce's redetermination is based on a reasonable reading of the record evidence, as explained below, the *Remand Results* are sustained.

BACKGROUND

When investigating merchandise from a country that Commerce considers to be a non-market economy ("NME"), including China,[9] Commerce employs a rebuttable presumption that the export-related decision-making of all enterprises operating within the NME is controlled by the government (whether at the central, provincial, or local level).[10] "Consistent with this presumption, it is [Commerce]'s policy to assign all exporters of the merchandise subject to review in an NME country a single [country-wide] rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports,"[11] and thereby demonstrate its eligibility for a "separate rate."[12]

As this Court has previously explained,

> Commerce's essential inquiry with regard to whether a particular respondent's circumstances warrant the grant of separate-rate status focuses on whether, "considering the totality of circumstances," the respondents in question "had sufficient independence in their export pricing decisions from government control to qualify for separate rates." To that end, the relevant *de jure* autonomy "can be demonstrated by reference to legislation and other governmental measures that decentralize control," and the relevant *de facto* autonomy "can be established by evidence that [the] exporter sets its prices independently of the government and of other exporters, and that [the] exporter

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[9] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 76 Fed. Reg. 70,960, 70,962 (Dep't Commerce Nov. 16, 2011) (initiation of antidumping duty investigation) ("The presumption of NME status for [China] has not been revoked by [Commerce] and, therefore, in accordance with [19 U.S.C. § 1677(18)(C)(i)], remains in effect for purposes of the initiation of this investigation.").

[10] *See SolarWorld I*, __ CIT at __, 28 F. Supp. 3d at 1323–24 & nn. 12–13 (providing relevant background and authorities); *Remand Results*, ECF Nos. 97–1 & 98–1, at 2–3, 28.

[11] *Remand Results*, ECF Nos. 97–1 & 98–1, at 3 (citations omitted); *see SolarWorld I*, __ CIT at __, 28 F. Supp. 3d at 1338 & n.103 (providing relevant citations).

[12] *See SolarWorld I*, __ CIT at __, 28 F. Supp. 3d at 1324 & n.13.

keeps the proceeds of its sales." In both its *de jure* and *de facto* determinations, Commerce may make reasonable inferences from the record evidence.[13]

Here, recognizing that "within the NME entity, companies exist which are independent from government control to such an extent that they can independently conduct export activities,"[14] Commerce granted a number of separate-rate applications during its investigation, finding that "the evidence placed on the record of this investigation by [these respondents] demonstrates both *de jure* and *de facto* absence of government control with respect to each company's respective exports of the merchandise under investigation."[15]

In the course of this litigation, however, Commerce requested and was granted a voluntary remand to reevaluate the evidence and reconsider the separate rate eligibility of four separate-rate recipients whose rates had been challenged by SolarWorld.[16] Commerce's basis for the remand request was a concern for consistency with the agency's approach to similar issues in antidumping proceedings involving diamond sawblades from China.[17] Specifically, as a result of litigation challenging Commerce's separate rate determinations in the diamond sawblades proceedings, Commerce has clarified its practice with regard to evaluating NME companies' *de facto* independence from government control.[18] This revised practice, which was sustained by this Court and subsequently affirmed by the Court of Appeals,[19] holds that "where a government entity holds a majority ownership share, either directly or indirectly, in the respondent

[13] *Id*. at 1339 (emphasis omitted) (quoting *Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 Fed. Reg. 61,754, 61,759 (Dep't Commerce Nov. 19, 1997) (notice of final determination of sales at less than fair value) and *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (citation omitted),respectively; and citing *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (explaining that substantial evidence may include "reasonable inferences from the record") (quotation marks and citation omitted)).

[14] *I&D Mem*. cmt. 6 at 26 (citation omitted).

[15] *Final Results*, 77 Fed. Reg. at 63,794.

[16] *See SolarWorld I*, __ CIT at __, 28 F. Supp. 3d at 1340–41.

[17] *See id.* at 1340 n.113; *Remand Results*, ECF Nos. 97–1 & 98–1, at 6–7.

[18] *See Remand Results*, ECF Nos. 97–1 & 98–1, at 7, 17.

[19] *See Advanced Tech. & Materials Co. v. United States*,__ CIT __, 938 F. Supp. 2d 1342 (2013), *aff'd*, 581 F. App'x 900(Fed. Cir. 2014).

exporter [or producer],"[20] such majority ownership holding "in and of itself" precludes a finding of *de facto* autonomy.[21]

Applying this clarified approach on remand, Commerce reconsidered the separate rate eligibility of the four respondents covered by the remand order.[22] As a result, Commerce found that three of these respondents were no longer eligible for a separate rate, but that the remaining respondent – Ningbo ETDZ – continued to so qualify.[23] While none of the affected respondents filed comments with the court in response to Commerce's *Remand Results*,[24] SolarWorld challenges Commerce's determination that Ningbo ETDZ is eligible for a separate rate in this investigation.[25] Accordingly, the sole question before the court is whether Commerce reasonably determined that Ningbo ETDZ operated with sufficient autonomy during the period of investigation to qualify for a rate separate from the countrywide entity, notwithstanding the presumption of government control.[26] After a brief statement of the applicable standard of review, this matter is discussed in detail below.

STANDARD OF REVIEW

The court will sustain Commerce's antidumping determinations on remand if they are supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v.*

[20] *Remand Results*, ECF Nos. 97–1 & 98–1, at 7.

[21] *See id*. at 7–11; *see also id*. at 17 ("[W]here a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, the majority ownership holding, in and of itself, means that the government exercises, or has the potential to exercise, control over the company's operations generally, rendering the company ineligible for a separate rate.") (citing Prelim. Decision Mem., *Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China*, A-570–012, Investigation (Aug. 29, 2014) (adopted in79 Fed. Reg. 53,169 (Dep't Commerce Sept. 8, 2014) (preliminary determination of sales at less than fair value and preliminary affirmative determination of critical circumstances, in part)) ("*Wire Rod from China*") at 5–9 (unchanged in 79 Fed. Reg. 68,860 (Dep't Commerce Nov. 19, 2014) (final determination of sales at less than fair value and final affirmative determination of critical circumstances, in part))).

[22] *See Remand Results*, ECF Nos. 97–1 & 98–1, at 1–2; *SolarWorld I*, __ CIT at __, 28 F. Supp. 3d at 1340–41.

[23] *Remand Results*, ECF Nos. 97–1 & 98–1, at 1–2.

[24] *See* ECF Nos. 97 *et seq.* ; *see also supra* note 5 (discussing Sumec Hardware's unsuccessful attempt to file comments).

[25] SolarWorld's Br., ECF Nos. 104 & 105, at 5–9.

[26] *See Remand Results*, ECF Nos. 97–1 & 98–1, at 12–13 (explaining Commerce's evidentiary findings and consequent conclusions with regard to Ningbo ETDZ); *id*. at 26–27 (addressing SolarWorld's challenges to these determinations); SolarWorld's Br., ECF Nos. 104 & 105, at 5–9.

United States, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Thus the substantial evidence standard of review can be roughly translated to mean "is the determination unreasonable?" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quotation marks, alteration marks, and citation omitted). In this context, substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).[27]

Discussion

SolarWorld's challenge relies on the record evidence concerning the extent to which a wholly state-owned company exercised its ownership stake in Ningbo ETDZ to affect the selection of certain high-level management personnel.[28] Specifically, SolarWorld argues that in light of this evidence, "Commerce has not provided adequate explanation or support" for its determination that Ningbo ETDZ is eligible for a separate rate in this investigation.[29]

First, SolarWorld argues that, on the facts presented here, a twenty percent ownership interest in the respondent company held by a wholly state-owned enterprise should in itself constitute conclusive evidence of *de facto* government control, particularly where (as here) the next largest shareholder owned only twelve percent, and no other shareholder owned more than five percent.[30] SolarWorld argues that "a reasonable understanding of what constitutes 'control' in the corporate context" should be "instruct[ed]" by regulations promulgated by the Securities and Exchange Commission ("SEC") – "a U.S. gov-

[27] See also, e.g., *Technoimportexport, UCF Am. Inc. v. United States*, 16 CIT 13, 18, 783 F. Supp. 1401, 1406 (1992) ("When Commerce is faced with the decision to choose between two reasonable alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly.").

[28] *See* SolarWorld's Br., ECF Nos. 104 & 105, at 5–9.

[29] *Id.* at 9.

[30] *See id*. at 6 (relying on *Remand Results*, ECF Nos. 97–1 & 98–1, at 12 (Commerce's finding that [[ ]], "which is indirectly a wholly state-owned company, owned the largest percentage of shares of Ningbo ETDZ of any shareholder," because it owned twenty percent of Ningbo ETDZ, with the next largest shareholder being "an individual that controls 12 percent of the total shares" and all remaining shareholders being "individual[s] owning [no] more than five percent of Ningbo ETDZ's total shares") (citing [Ningbo ETDZ's] Separate Rate Appl., *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, A570–979, Investigation (Jan. 14, 2012), *reproduced in* Def.'s Suppl. App. of Rec. Docs., ECF Nos. 117 (conf. version) & 118 (pub. version) ("Def.'s Suppl. App.") at Tab 1 ("*Ningbo ETDZSRA*") at 13 & Exs. 5 & 10)).

ernment agency with significant experience in the regulation of corporations" – using twenty percent "as the ownership threshold for the point at which an investor is no longer considered a 'passive investor,' triggering various reporting requirements."[31] But as Commerce points out,[32] and as SolarWorld acknowledges,[33] these SEC regulations do not apply to Commerce's antidumping determinations. On the contrary, Commerce has developed its own, different test for the threshold ownership stake at which the ownership percentage in itself constitutes conclusive evidence of *de facto* control. For Commerce, such conclusive evidence is "where a government entity holds *a majority ownership share*, either directly or indirectly, in the respondent exporter."[34] Here, the state-owned entity did not hold a majority ownership share,[35] and it was not unreasonable for the agency to determine not to rely on regulations promulgated by an unrelated agency in an entirely different context.

Next, SolarWorld also argues that Commerce unreasonably found that Ningbo ETDZ rebutted the presumption of *de facto* government control because the wholly state-owned company holding the twenty percent share was involved in the selection of certain of Ningbo ETDZ's high-level management personnel.[36] Specifically, the state-owned shareholder recommended [[ ]] to serve as the Chairman of the Board of Ningbo ETDZ,[37] who was then elected by the board

[31] SolarWorld's Br., ECF Nos. 104 & 105, at 6 (citing 17 C.F.R.§ 240.13d-1 (triggering reporting requirements at twenty percent ownership and above); *id*. at § 210.3–09 (using twenty percent ownership as the threshold for the agency's "significant subsidiary" test)).

[32] *Remand Results*, ECF Nos. 97–1 & 98–1, at 27 ("[Commerce] does not find Petitioner's argument regarding the SEC regulations to be persuasive[] [because these] are SEC regulations and do not apply to [Commerce]'s administration of the antidumping law or its separate rate practice.").

[33] SolarWorld's Br., ECF Nos. 104 & 105, at 6 (quoting *Remand Results*, ECF Nos. 97–1 & 98–1, at 27).

[34] *Remand Results*, ECF Nos. 97–1 & 98–1, at 28 (emphasis added); see also id. at 7 (citing *Wire Rod from China*, *supra* note 21, at 5–9).

[35] *See supra note* 30 (quoting relevant factual findings).

[36] SolarWorld's Br., ECF Nos. 104 & 105, at 6–9.

[37] *Id*. at 6–7 (relying on *Remand Results*, ECF Nos. 97–1 & 98–1, at 12 ("Ningbo ETDZ's articles of association state that [the state-owned shareholder] selects the chairman of the board of directors of Ningbo ETDZ. [[ ]] serves as both the Chairman of the Board of Ningbo ETDZ and [[ ]].") (citing, respectively, [Ningbo ETDZ's] Separate Rate Appl. – 2d Suppl. Questionnaire Resp., *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, A-570–979, Investigation (May 1, 2012), *reproduced in* Def.'s Suppl. App., ECF Nos. 117–1 & 118–1 at Tab 2 ("*Ningbo ETDZ 2d SRA Resp*.") at Ex. 4 (Articles of Association, Art. 94); and *Ningbo ETDZ SRA*, ECF Nos. 117–1 & 118–1 at Tab 1, at Exs. 4 & 12; *Ningbo ETDZ 2d SRA Resp*. at Ex. 1)). In the *Remand Results*, Commerce incorrectly characterizes the evidence to suggest that "Ningbo ETDZ's

members.[38] In addition, the state-owned shareholder also nominated Ningbo ETDZ's [[ ]].[39]

In response, Commerce emphasizes other record evidence, which indicates that other than the Chairman of the Board and the [[ ]], the remainder of Ningbo ETDZ's management personnel selections – and in particular the selection of personnel with primary control over Ningbo ETDZ's production and business operations – were *not* in any way influenced by the government.[40] Specifically, the record indicates that, with the exception of the chairman,[41] all of Ningbo ETDZ's board members, including the board's first vice director, were recommended by shareholders other than the state-owned entity, and appointed by a vote of all of the shareholders.[42] Moreover, the board's first vice director is also Ningbo ETDZ's general manager, as well as the company's second largest shareholder,[43] and Commerce found that it is this individual, rather than the state-owned shareholder, that "has the primary responsibilities associated with taking charge of Ningbo ETDZ's production and business operations."[44] This first vice director and general manager – who has no apparent relation-

articles of association state that [the state-owned shareholder] *selects* the chairman of the board of directors of Ningbo ETDZ," ECF Nos. 97–1 & 98–1, at 12 (emphasis added) (citing *Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at Ex. 4 (Articles of Association, Art. 94)) – in fact the articles state that "[[ ]]." *Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at Ex. 4 (Articles of Association, Art. 94) (emphasis added); *see also Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at 5 ("The chairman is [[ ]] and*elected* by the board members.") (emphasis added).

[38] *See Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at 5 ("The chairman is . . . elected by the board members.").

[39] *Remand Results*, ECF Nos. 97–1 & 98–1, at 12 *(citing Ningbo ETDZ SRA*, ECF Nos. 117–1 & 118–1 at Tab 1, at Ex. 12).

[40] *Id.* at 12–13, 27.

[41] *See supra* note 37 (referencing relevant factual findings regarding the chairman).

[42] *Remand Results*, ECF Nos. 97–1 & 98–1, at 12 (emphasizing record evidence indicating that [[ ]], the first vice director of Ningbo ETDZ's board, was recommended by shareholders other than the state-owned shareholder and appointed by vote of all the shareholders) (citing *Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at 5); *id*. at 13 ("The record also indicates that the remaining three of Ningbo ETDZ's five board directors [after accounting for the first vice director and the chairman] are recommended by shareholders other than the state-owned company and appointed by vote of all the shareholders.") (citing *Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at 5).

[43] *Id*. at 12–13 ("[T]he record indicates that the second largest shareholder, [[ ]], is the first vice-director of Ningbo ETDZ's board . . . . [[ ]] is also the general manager of Ningbo ETDZ.") (citing *Ningbo ETDZ SRA*, ECF Nos. 117–1 & 118–1 at Tab 1, at Ex. 12; *Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at 5).

[44] *Id*. at 13, 26 (citing *Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1& 118–1 at Tab 2, at Ex. 4 (Articles of Association, Art. 116)); *see also id*. at 13 ("As general manager of Ningbo ETDZ, [[ ]] has significant responsibilities in managing and directing the operations of the company.") (citing *Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at Ex. 4

ship with the government[45] – also nominated [[ ]], as well as Ningbo ETDZ's [[ ]], who also comprise two of Ningbo ETDZ's remaining three board members (appointed by a vote of all the shareholders).[46] Based on this evidence, Commerce concluded that Ningbo ETDZ's non-governmental general manager, "rather than the [state-owned] shareholder, is in a position to control, and does control, the operations of Ningbo ETDZ."[47] Accordingly, the agency determined that, because the evidence indicates that "the Government of China [has] little ability to indirectly exercise control over Ningbo ETDZ's operations, including its export decisions," Ningbo ETDZ has "satisfie[d] the criteria demonstrating an absence of *de facto* government control over export activities."[48]

On the evidence presented, Commerce's conclusion is not unreasonable. It is undisputed that the individual who was Ningbo ETDZ's second largest shareholder, first vice director of the board, and general manager during the period of investigation held no apparent ties to the government, and wielded at least some amount of control over the company's production and export operations.[49] The essence of the dispute here regards the relative weight placed by the agency on this evidence, as well as the additional evidence that (unlike the other three respondents whose separate rate status was revoked on remand[50]) Ningbo ETDZ's state-owned shareholder neither controlled a majority of Ningbo ETDZ's shares nor appointed a majority of its

(Articles of Association, Art. 116)); *id*. at 26 ("The record indicates that the second largest shareholder, [[ ]], rather than the [state-owned] shareholder, is in a position to control, and does control, the operations of Ningbo ETDZ."); *see Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at Ex. 4 (Articles of Association, Art. 116) (providing that [[ ]]).

[45] *See Remand Results*, ECF Nos. 97–1 & 98–1, at 13 ("The record does not include any information indicating that [the general manager and first vice director of Ningbo ETDZ's board] has a relationship with [the state-owned shareholder] other than that they are both shareholders of Ningbo ETDZ and [this individual] is employed by Ningbo ETDZ.").

[46] *Id.* ("[[ ]] nominated [[ ]], and nominated [[ ]]. The record also indicates that the remaining three of Ningbo ETDZ's five board directors are recommended by shareholders other than [[ ]] and appointed by vote of all the shareholders. One of the [[ ]] and [[ ]] are also directors of the board.") (citing *Ningbo ETDZ SRA*, ECF Nos. 117–1 & 118–1 at Tab 1, at Ex. 12; *Ningbo ETDZ 2d SRA Resp*., ECF Nos. 117–1 & 118–1 at Tab 2, at 5).

[47] *Id.* at 26.

[48] *Id.* at 13.

[49] *See Remand Results*, ECF Nos. 97–1 & 98–1, at 12–13, 26–27; *supra* note 44 (quoting relevant record evidence); SolarWorld's Br., ECF Nos. 104 & 105, at 8–9 (citing *Remand Results*, ECF Nos. 97–1 & 98–1, at 12–13, 26–27, and not disputing this evidence, while arguing that Commerce should not have given it as much weight as the agency did).

[50] *See Remand Results*, ECF Nos. 97–1 & 98–1, at 8 ("[T]he record indicates that [[ ]] is a wholly state-owned company, which, through its group companies, owns and controls a majority of the shares of Tianwei New Energy."); *id*. at 9 ("[[ ]] is a wholly state-owned

board directors.[51] While Commerce determined that this evidence of decision-making autonomy outweighs the suggestion of potential for government control evidenced by the state-owned shareholder's recommendation of Ningbo ETDZ's elected Chairman of the Board and [[ ]],[52] SolarWorld argues that the latter evidence should outweigh the former.[53] But "[i]t is not for the courts to reweigh the evidence before the agency,"[54] and a "court may [not] displace the [agency's] choice between two fairly conflicting views," even if a reasonable person could also have justifiably made a different choice.[55]

Here, Commerce's weighing of the evidence to conclude that Ningbo ETDZ's non-governmental general manager, rather than the state-owned shareholder, "is in a position to control, and does control, the operations of Ningbo ETDZ"[56] comports with a reasonable reading of the record,[57] even if a reasonable person could have also concluded otherwise. SolarWorld neither challenges any of Commerce's factual findings nor points to any evidence that Commerce did not consider and weigh in reaching[58] On the record presented, Commerce's

company which owns and controls a majority of the shares of Dongfang Electric.");, *id*. at 27 ("[T]he [state-owned] shareholder of Sumec Hardware and the [[employees of the state-owned shareholder]] own approximately [[ ]] percent of that company's shares, and appoint [[ ]] board directors.").

[51] *See id.* at 27; SolarWorld's Br., ECF Nos. 104 & 105, at 5–9 (arguing that this evidence does not outweigh "the significant evidence of control" provided by the facts that the state-owned shareholder owns 20 percent of Ningbo ETDZ's total shares and that this state-owned shareholder appointed Ningbo ETDZ's Chairman of the Board and [[ ]]).

[52] *See Remand Results*, ECF Nos. 97–1 & 98–1, at 12–13, 26–27.

[53] *See* SolarWorld's Br., ECF Nos. 104 & 105, at 9.

[54] *SolarWorld I*, __ CIT at __, 28 F. Supp. 3d at 1323 (quoting *Henry v. Dep't of the Navy*, 902 F.2d 949, 951 (Fed. Cir. 1990) (alteration marks omitted)).

[55] *Univ. Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[56] *Remand Results*, ECF Nos. 97–1 & 98–1, at 26.

[57] *See supra* note 44 (referencing relevant record evidence).

[58] *See* SolarWorld's Br., ECF Nos. 104 & 105, at 5–9 (arguing that Commerce's findings that the state-owned shareholder owned 20 percent of Ningbo ETDZ's shares and recommended Ningbo ETDZ's Chairman of the Board and [[ ]] should have been given dispositive weight, necessarily leading the agency to conclude that Ningbo ETDZ's operations were controlled by the Chinese government). Although SolarWorld argues that Commerce did not address SolarWorld's argument that the Chairman of the Board "[[ ]]," *id*. at 7, Commerce conceded that the circumstances surrounding the selection of Ningbo ETDZ's Chairman of the Board weighed on the side of state-control, *see Remand Results*, ECF Nos. 97–1 & 98–1, at 12, but ultimately concluded that this evidence was outweighed by other evidence on the record, id. at 12–13. Thus SolarWorld does not point to any evidence that "fairly detracts from [the] weight" of the evidence supporting Commerce's conclusion, *cf. Univ. Camera*, 340 U.S. at 488, but rather invites the court to reweigh conflicting evidence, which is not this Court's function. *See, e.g., Am. Bearing Mfrs. Ass'n v. United States*, 28 CIT 1698,1700, 350 F. Supp. 2d 1100, 1104 (2004) ("[T]he court's function is not to reweigh the evidence but rather to ascertain 'whether there was evidence which could reasonably lead to the [agency]'s

inferences are not unreasonable.[59]

Accordingly, Commerce's determination that "Ningbo ETDZ satisfies the criteria demonstrating an absence of *de facto* government control over export activities" (and is therefore eligible for a separate rate)[60] is supported by substantial evidence, and is therefore sustained.

CONCLUSION

For all of the foregoing reasons, Commerce's *Remand Results* are affirmed. Judgment will issue accordingly.

Dated: October 5, 2015
New York, NY

/*s*/ *Donald C. Pogue*
DONALD C. POGUE,
Senior Judge

Slip Op. 15–136

KYOCERA SOLAR, INC. AND KYOCERA MEXICANA S.A. DE C.V., Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant, and SOLARWORLD AMERICAS, INC., Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Court No. 15–00084
PUBLIC VERSION

OPINION

[Plaintiff's Motion for Judgment Upon the Agency Record is denied. The International Trade Commission's determination and decision are affirmed.]

Dated: December 7, 2015

J. Kevin Horgan and *Alexandra H. Salzman*, DeKieffer & Horgan, PLLC, of Washington, DC, for plaintiff.

conclusion . . . .'") (quoting *Matsushita Elec. Indus. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)).

[59] *See supra* notes 37, 42, and 44 (referencing relevant factual findings and record evidence). SolarWorld attempts to make its own (contrary) inferences. *See, e.g.*, SolarWorld's Br., ECF Nos. 104 & 105, at 9 n.4 (arguing that the [[ ]], who was recommended by Ningbo ETDZ's non-governmental general manager, "would *presumably* be under the direct control of the company's [[ ]],"who was nominated by the state-owned shareholder) (emphasis added). But Commerce may make reasonable inferences from the record evidence, *SolarWorld I*, __ CIT at __, 28 F. Supp. 3d at 1339 (citing *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511,1520 (Fed. Cir. 1993) (explaining that substantial evidence may include "reasonable inferences from the record")), and in the absence of actual evidence to the contrary, SolarWorld's speculation regarding possible contrary interpretations of the existing record evidence does not impugn the reasonableness of Commerce's conclusion.

[60] *Remand Results*, ECF Nos. 97–1 & 98–1, at 13.

Mary Jane Alves, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant. With her on the brief were *Andrea C. Casson*, Assistant General Counsel for Litigation, and *Dominic L. Bianchi*, General Counsel.

Timothy C. Brightbill, *Laura El-Sabaawi*, *Usha Neelakantan*, Wiley Rein, LLP, of Washington DC, for defendant-intervenor.

Tsoucalas, Senior Judge:

This case comes before the Court upon Plaintiff's, Kyocera Solar Inc. ("KSI") and Kyocera Mexicana S.A. DE C.V. ("KMX") (collectively "Kyocera"), Motion for Judgment upon the Agency Record challenging the International Trade Commission's ("ITC" or "Commission") decision in *Certain Crystalline Silicon Photovoltaic Products From China and Taiwan*, 80 Fed. Reg. 7,495 (ITC Feb. 10, 2015) ("*ITC Injury Determination*") and Certain Crystalline Silicon Photovoltaic Products from China and Taiwan, USITC Pub. 4519 Inv. Nos. 701-TA-511 and 731-TA-1246–1247 (Feb. 2015) ("*ITC Decision*"). Defendant ITC and Defendant-Intervenor Solarworld Americas Inc. ("Solarworld") oppose Plaintiff's motion. For the following reasons, the court denies the Plaintiff's motion and affirms the *ITC Injury Determination and ITC Decision*.

BACKGROUND

Kyocera is a producer and supplier of solar energy modules. Mem. in Supp. Of Mot. for J. Upon the Agency R. ("Pl.'s Br.") at 2, July 13, 2015, ECF No. 23. Kyocera International ("KII") was established in 1969 as a holding company for Kyocera Corporation's North American group of companies. *Id*. KSI is KII's North American solar products subsidiary headquartered in Scottsdale, Arizona. *Id*.

KMX is a maquiladora manufacturing plant located in Tijuana, Mexico. *Id*. In 2004, KMX began producing solar modules in Mexico for KSI. *Id*. In 2010, KMX began incorporating solar cells produced in Taiwan into some of the solar modules KMX produced in Mexico. *Id*. The Taiwanese solar cells were connected in Mexico to form solar modules. *Id*.

On December 31, 2013, Solarworld filed a petition alleging that certain crystalline silicon photovoltaic ("CSPV") products[1] imported from Taiwan were being dumped in the United States. Pl.'s Br. at 3. The petition also alleged that CSPV products imported from China were being dumped and unfairly subsidized. *Id*.

The Department of Commerce ("Commerce") initiated an antidumping investigation of CSPV products from Taiwan and China on January 29, 2014. *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China and Taiwan*, 79 Fed. Reg. 4,661

[1] CSPV products include solar cells and modules.

(Dep't Commerce Jan. 29, 2014) (Initiation of Antidumping Duty Investigations). Commerce described the products subject to investigation in the following manner:

> The merchandise covered by these investigations is crystalline silicon photovoltaic cells, and modules, laminates and/or panels consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including building integrated materials. For purposes of these investigations, subject merchandise also includes modules, laminates and/or panels assembled in the subject country consisting of crystalline silicon photovoltaic cells that are completed or partially manufactured within a customs territory other than that subject country, using ingots that are manufactured in the subject country, wafers that are manufactured in the subject country, or cells where the manufacturing process begins in the subject country and is completed in a non-subject country . . . .
>
> Also excluded from the scope of these investigations are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.

Id. at 4,667. The scope description included modules produced in Taiwan using cells produced elsewhere, but it did not include solar modules produced in non-subject countries such as Mexico. *Id*.

On September 15, 2014, Kyocera filed a request asking Commerce to exclude solar modules produced in Mexico. Request for Scope Determination Kyocera Conf. App. Attach. E, Sept. 15, 2014, ECF No. 28. Nevertheless, on December 23, 2014, Commerce decided to include solar modules produced in Mexico using Taiwanese cells within the scope of its investigation: "[m]odules, laminates, and panels produced in a third-country from cells produced in Taiwan are covered by this investigation." *Certain Crystalline Silicon Photovoltaic Products From Taiwan*, 79 Fed. Reg. 76,966, 76,968 (Dep't Commerce Dec. 23, 2014) (Final Determination of Sales at Less Than Fair Value). Using this scope definition provided by Commerce, the ITC determined that an industry in the United States is materially injured by reason of imports of CSPV products from Taiwan. *ITC Injury Determination*, 80 Fed. Reg. at 7,495.

Kyocera subsequently filed this action disputing the ITC's affirmative injury determination. Compl. at ¶¶ 16–25, Mar. 20, 2015, ECF No. 6.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2012), and Sections 516A(a)(2)(A)(i)(II) and 516A(a)(2)(B)(i) of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) (2012),[2] 19 U.S.C. § 1516a(a)(2)(B)(i).

In an action challenging a final injury determination by the ITC, the Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(l)(B)(i).

Substantial evidence means "more than a mere scintilla" of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). To determine if substantial evidence exists, the court reviews the record as a whole. *Id*. at 488. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id*. The mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent the determination from being supported by substantial evidence. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Under the first step of *Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc*., 467 U.S. 837, 842 (1984), when a court reviews an agency's construction of the statute which it administers, the first question is whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id*. at 842–43. "To ascertain . . . Congress['] . . . intention . . . [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9.) "The first and foremost 'tool' . . . is the statute's text, giving it its plain meaning . . . [I]f the text answers the question, that is the end of the matter." *Id*. (citing *VE Holding Corp. v. Johnson Gas Appliance Co*., 917 F.2d 1574, 1579 (Fed. Cir. 1990)). "Beyond the statute's text, those 'tools' include the statute's structure, canons of statutory construction, and legislative history." *Id*. If 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

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

the statute. *Chevron*, 467 U.S. at 843. "'To survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation.'" *Usinor v. United States*, 26 CIT 767, 771 (2002) (not reported in F. Supp.2d) (citing *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994). "Thus, when faced with more than one reasonable statutory interpretation, 'a court must defer to an agency's reasonable interpretation . . . even if the court might have preferred another.'" *U.S. Steel Grp. v. United States*, 225 F.3d 1284, 1287 (Fed. Cir. 2000) (quoting *NSK Ltd. v. United States*, 115 F.3d 965, 973 (Fed. Cir. 1997)).

1. Whether Commerce improperly used its authority to expand the geographic reach of the antidumping order.

Kyocera argues that Commerce improperly used its authority to expand the geographic reach of the antidumping order by defining the scope of merchandise covered to include modules produced in Mexico using Taiwanese cells. Pl.'s Br. at 10. Kyocera maintains that Commerce could have conducted a circumvention inquiry under 19 U.S.C. § 1677j(b) and 19 C.F.R. § 351.225(h) (2015), and consulted with the ITC regarding the impact of a circumvention finding on the injury analysis. *Id*. The court declines to address this argument, because it is not properly before the court. This case concerns the Commission's affirmative material injury determination regarding CSPV from Taiwan. *ITC Injury Determination*, 80 Fed. Reg. at 7,495; *ITC Decision*. Commerce's determinations are the subject of separate litigation. Thus, the Court will not address Commerce's determinations here.

2. The ITC's Negligibility Analysis

Under the statute, if the ITC determines that imports of the subject merchandise are negligible, its investigation into whether there is injury shall be terminated. 19 U.S.C. § 1673d(b)(1). Imports from a country are considered negligible if such imports account for less than 3% of the volume of all such merchandise imported into the U.S. in the most recent twelve month period for which data are available that precedes the filing of the petition or the initiation of the investigation. *Id*. § 1677(24)(A)(i). However, imports are not negligible if the aggregate volume of imports of the merchandise from all countries with respect to which investigations were initiated on the same day exceeds 7% of the volume of all such merchandise imported into the U.S. during the applicable twelve month period. *Id*. § 1677(24)(A)(ii).

Kyocera argues that the ITC's injury determination was neither supported by substantial evidence nor in accordance with law, because imports of CSPV from Mexico were negligible. Pl.'s Br. at 11.

Kyocera appears to acknowledge that the statute centers the negligibility analysis on the imports of the subject merchandise with respect to which Commerce has made an affirmative determination. *Id*. at 15. Kyocera maintains that Commerce made an affirmative determination with respect to solar products from Mexico when it deemed Mexican products to be subject merchandise. *Id*.

Kyocera points out that the definition of negligibility is not limited to countries named in the petition. *Id*. Additionally, Kyocera questions the Commission's deference to Commerce's scope determination:

> [a]llowing the Commission to wash its hands of the matter by deferring to the Commerce Department's unlawful scope determination creates a perfect Catch 22. If the petitioner had filed a dumping petition against solar products from Mexico as it could have done, the petition would have resulted in a negative injury finding . . . Likewise, if the petitioner had requested a circumvention inquiry with respect to KSI's solar products from Mexico, there would not have been a finding of circumvention because KSI had established its Mexican production facilities long before any antidumping cases were filed, and also because the Commission would have been asked to make an assessment of the [sic] whether such products were a cause of injury.

Id. at 15–16. Kyocera's argument is flawed. Kyocera ignores the fact that Commerce's investigation defines the scope of the ITC's analysis. 19 U.S.C. § 1673d (a)(1), (b)(1); *See USEC Inc. v. United States*, 34 Fed. Appx. 725, 730 (Fed. Cir. 2002) ("The merchandise that is subject to the ITC's analysis is the 'subject merchandise' as to which Commerce has initiated an antidumping investigation.") Congress' intent is clear in this regard. *See Chevron*, 467 U.S. at 842–43. Here, Commerce determined that "the solar modules produced by Kyocera in Mexico using Taiwanese cells are considered Taiwanese in origin, and are within the scope of this [Taiwanese] investigation." Certain Crystalline Silicon Photovoltaic Products from Taiwan: Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value, at 23, A-583–853, (Dec. 15, 2014). Thus, the ITC was bound by Commerce's determination and tasked with examining whether imports from Taiwan, including modules from Mexico, were negligible. *See USEC*, 34 Fed. Appx. at 730. Accordingly, the ITC correctly declined to conduct a separate negligibility analysis with Mexico as the country of origin.

According to data available for the most recent twelve month period prior to the filing of the petitions, subject imports of CSPV products from Taiwan were [[ ]]% of total CSPV imports and subject imports

from China were [[ ]]% of total CSPV imports. Def.'s App. Prehearing Br. of Taiwan Photovoltaic Industry Association at Ex. 7, Dec. 1, 2014, ECF No. 41. Ostensibly, these figures exceed the 3% and 7% thresholds. 19 U.S.C. § 1677(24)(A)(i),(ii). Therefore, the Commission reasonably concluded that the imports were not negligible.

3. Conclusion

For the foregoing reasons, the court denies the Plaintiff's motion and affirms the *ITC Injury Determination* and *ITC Decision*. Judgment will enter accordingly.

Dated: December 7, 2015
New York, New York

/*s*/ *Nicholas Tsoucalas*
SENIOR JUDGE

Slip Op. 15–139

JUBAIL ENERGY SERVICES COMPANY AND DUFERCO SA, Plaintiffs, v. UNITED STATES, Defendant, UNITED STATES STEEL CORPORATION, et al., Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Court No. 14–00219

OPINION

[Granting defendant's motion to dismiss an action challenging the final negative antidumping determination issued by the U.S. Department of Commerce]

Dated: December 17, 2015

Nancy A. Noonan, Arent Fox LLP, of Washington, D.C., for plaintiffs. With her on the brief were *John M. Gurley*, and *Diana Dimitriuc Quaia*.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, and *Loren Misha Preheim*, Senior Trial Counsel. Of counsel on the brief was *Shana A. Hofstetter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Jeffery D. Gerrish and *Robert E. Lighthizer*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, D.C., for defendant-intervenor United States Steel Corporation.

Roger B. Schagrin, Schagrin Associates, of Washington, D.C., for defendant-intervenors Boomerang Tube LLC, Energex Tube, TMK IPSCO, and Welded Tube USA.

Stanceu, Chief Judge:

Plaintiffs Jubail Energy Services Company ("JESCO") and Duferco SA ("Duferco") (collectively, "plaintiffs") contest a negative amended final "less-than-fair-value" determination of the International Trade

Administration, U.S. Department of Commerce ("Commerce" or the "Department") that concluded an antidumping duty investigation of oil country tubular goods ("OCTG") from Saudi Arabia. In contesting this determination, plaintiffs, who together were the sole mandatory respondent in the investigation, claim that Commerce erred in concluding that JESCO's home market sales could not be used to determine the normal value of their subject merchandise and specifically challenge as unlawful Commerce's determination that JESCO was affiliated with its primary home market customer. Defendant United States moves to dismiss this action under USCIT Rule 12(b)(1) for lack of jurisdiction. The court grants defendant's motion.

I. BACKGROUND

A. The Contested Determination

The determination contested in this action is *Amended Final Determination and Termination of Investigation of Sales at Less Than Fair Value: Certain Oil Country Tubular Goods From Saudi Arabia*, 79 Fed. Reg. 49,051 (Int'l Trade Admin. Aug. 19, 2014) ("*Amended Final Determination*").

B. The Parties to this Action

Plaintiff JESCO is a producer of OCTG in Saudi Arabia, and plaintiff Duferco SA is an exporter of OCTG from Saudi Arabia. Compl. ¶ 3 (Oct. 14, 2014), ECF No. 9. Defendant-intervenors Boomerang Tube LLC, TMK IPSCO, Energex Tube, and Welded Tube USA Inc. and United States Steel Corporation ("U.S. Steel") are U.S. producers of steel tube products that participated in the investigation as petitioners. U.S. Steel Consent Mot. to Intervene as of Right as Defendant-Intervenor ¶ 2 (Oct. 28, 2014), ECF No. 12; Boomerang Consent Mot. to Intervene as Defendant-Intervenors ¶ 2 (Nov. 12, 2014), ECF No. 17; *Certain Oil Country Tubular Goods from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 78 Fed. Reg. 45,505, 45,506 (Int'l Trade Admin. July 29, 2013) ("*Initiation*").

C. Procedural History of the Less-that-Fair-Value Investigation and this Action

On July 29, 2013, Commerce initiated an investigation of sales at less than fair value of certain OCTG from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of

Vietnam. *Initiation*, 78 Fed. Reg. at 45,506.[1] In investigating OCTG from Saudi Arabia, Commerce selected Duferco SA, the largest known Saudi Arabian exporter of OCTG, as the sole mandatory respondent. *Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Kingdom of Saudi Arabia: Respondent Selection* 3–4 (Aug. 29, 2013) (Admin.R.Doc. No. 51). JESCO, an affiliate of Duferco SA, manufactured the OCTG that Duferco SA exported to the United States from Saudi Arabia. *Id.* at 1–2.

Treating Duferco SA and JESCO as a single entity for purposes of the investigation, Commerce issued a preliminary affirmative less-than-fair-value determination on February 25, 2014, determining a preliminary dumping margin of 2.92% for the combined entity. *Certain Oil Country Tubular Goods From Saudi Arabia: Prelim. Determination of Sales at Less Than Fair Value, and Postponement of Final Determination*, 79 Fed. Reg. 10,489, 10,490 (Int'l Trade Admin. Feb. 25, 2014) ("*Prelim. Determ.*"); *Decision Mem. for the Prelim. Results of Antidumping Duty Investigation of Oil Country Tubular Goods from Saudi Arabia*, A-517–804, at 2, 6–7 (Feb. 14, 2014) (Admin.R.Doc. No. 151), *available at* http://enforcement.trade.gov/frn/summary/saudi-arabia/2014–04102–1.pdf (last visited Dec. 14, 2015) ("*Prelim. Decision Mem.*"). Commerce determined that JESCO was affiliated with its largest home market customer through the common control of the government of Saudi Arabia. *Prelim. Decision Mem.* at 7–8. Commerce also determined that JESCO's sales to its largest home market customer were not at arm's length and could not be used to calculate normal value. *Id.* at 8. Concluding that JESCO's remaining home market sales were made below cost, were therefore outside the ordinary course of trade, and accordingly could not serve as the basis for determining normal value, Commerce determined normal value on the basis of constructed value ("CV"). *See id.* at 8–11.

Commerce published an affirmative final less-than-fair-value determination on July 18, 2014. *Certain Oil Country Tubular Goods From Saudi Arabia: Final Determination of Sales at Less Than Fair Value*, 79 Fed. Reg. 41,986 (Int'l Trade Admin. July 18, 2014). Again calcu-

[1] The "oil country tubular goods" ("OCTG") that were the subject of the investigation "are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (*e.g.*,whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached." *Amended Final Determination and Termination of Investigation of Sales at Less Than Fair Value: Certain Oil Country Tubular Goods From Saudi Arabia*, 79 Fed. Reg. 49,051, 49,052 (Aug. 19, 2014).

lating normal value on a CV basis, and maintaining its decision to treat Duferco SA and JESCO as a single entity, Commerce calculated a final margin of 2.69% for this entity. *See id*. Following a ministerial error allegation submitted by JESCO and Duferco SA, Commerce, on August 19, 2014, determined a *de minimis* antidumping duty margin for Duferco SA/JESCO, issued a negative amended final determination, and terminated the investigation. *Amended Final Determination*, 79 Fed. Reg. at 49,051.

In a separate action before this Court, petitioners in the investigation, the defendant-intervenors in the case at bar, challenged Commerce's amended final determination, claiming that the Department's method of calculating CV profit was not determined according to a reasonable method and therefore unlawful. *See Boomerang, et al. v. United States*, Court No. 14–00196 ("*Boomerang*"). Plaintiffs are defendant-intervenors in *Boomerang*.

Defendant moved under USCIT Rule 12(b)(1) to dismiss this action for lack of jurisdiction. Def.'s Mot. Dismiss 1–2 (Nov. 18, 2014), ECF No. 23. Defendant seeks dismissal on lack of standing, arguing that plaintiffs, having obtained a *de minimis* margin that resulted in termination of the antidumping duty investigation, cannot show injury in fact.

II. DISCUSSION

Plaintiffs assert jurisdiction under section 516A(a)(2)(B)(ii) of the Tariff Act of 1930 ("Tariff Act"), 1516a(a)(2)(B)(ii).[2] Compl. ¶ 2. Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), grants this court jurisdiction over any civil action commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including actions challenging the final negative determination of an antidumping investigation issued by Commerce under section 735 of the Tariff Act, 19 U.S.C. § 1673d.

The jurisdiction of federal courts is constitutionally limited to those cases involving actual cases or controversies. *See* U.S. Const. art. III, § 2, cl. 1; *Flast v. Cohen*, 392 U.S. 83, 94 (1968). "For there to be such a case or controversy" the plaintiff must "have 'standing,' which requires, among other things, that it have suffered a concrete and particularized injury." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). The injury must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[2] Statutory citations herein are to the 2012 edition of the United States Code.

The Court of Appeals for the Federal Circuit and this Court have held that a respondent attempting to contest the results of an administrative antidumping duty proceeding in which it has prevailed in the entirety cannot demonstrate an injury in fact. *See*, *e.g.*, *Freeport Minerals Co. v. United States*, 758 F.2d 629, 634 (Fed. Cir. 1985) ("[T]he prevailing party in [an administrative] proceeding may not appeal the proceeding just because he disagrees with some of its findings or reasoning . . . since the end result of the 1982 notice was favorable to Freeport, there was no point in its challenging the ITA then.") ("*Freeport Minerals*"); *Royal Thai Gov't v. United States*, 38 CIT __, __, 978 F. Supp. 2d 1330, 1334 (2014) ("*Royal Thai*").

Plaintiffs have the burden of establishing that the court has jurisdiction over their claim. *McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 189 (1936). In this case, they are unable to demonstrate that the contested determination is causing them injury. Commerce did not issue an antidumping duty order because the amended final determination of sales at less than fair value was negative. *Amended Final Determination*, 79 Fed. Reg. at 49,052. Commerce concluded the investigation and instructed U.S. Customs and Border Protection to terminate suspension of liquidation on all entries of OCTG from Saudi Arabia and refund any cash deposits previously collected. *Id*. Termination of an antidumping duty investigation without issuance of an antidumping duty order is the most favorable outcome available to a respondent in an antidumping duty investigation.

Speculation that reversal of the negative amended final determination could occur upon judicial review is hypothetical, and a merely hypothetical threat of injury does not suffice. *See Zhanjiang Guolian Aquatic Products Co., Ltd. v. United States*, 38 CIT __, __, 991 F. Supp. 2d 1339, 1342 (2014) (citing *Royal Thai*, 38 CIT at __, 978 F. Supp. 2d at 1333). Should petitioners prevail in their appeal of the Department's determination in *Boomerang*, plaintiffs will have an opportunity to defend their interests. *See Freeport Minerals*, 758 F.2d at 634; *Royal Thai*, 38 CIT at __, 978 F. Supp. 2d at 1334 (citing 19 U.S.C. § 1516a(a)(2)(A)(i)(II)); *Rose Bearings Ltd. v. United States*, 14 CIT 801, 803, 751 F. Supp. 1545, 1547 (1990).

Plaintiffs attempt to avoid the jurisdictional problem by arguing that the issue they raise "is not a subsidiary issue or an offset issue to any potential increase in the rate but rather is the condition precedent to the issues raised by U.S. producers" in *Boomerang*. Pl. Jubail Energy Services Co. & Duferco SA's Resp. to Def.'s Mot. Dismiss 6 (Dec. 23, 2014), ECF No. 26. According to plaintiffs, "[b]ecause the statute directs Commerce to use home market sales to determine

normal value, the Court needs to determine whether Commerce properly rejected JESCO's home market sales for purposes of determining JESCO's margin, and lawfully resorted to constructed value." *Id.* at 6–7. Where, as here, jurisdiction over plaintiffs' claim is lacking, the issue plaintiffs insist must be decided is not properly before the court.

III. CONCLUSION

Having prevailed in the underlying administrative proceeding, plaintiffs are unable to demonstrate that they currently are suffering an injury in fact and thus have not pled facts upon which the court may exercise jurisdiction over this action. The court will enter judgment dismissing this action pursuant to USCIT Rule 12(b)(1). Having prevailed in the underlying administrative proceeding, plaintiffs are unable to demonstrate that they currently are suffering an injury in fact and thus have not pled facts upon which the court may exercise jurisdiction over this action. The court will enter judgment dismissing this action pursuant to USCIT Rule 12(b)(1).

Dated: December 17, 2015
New York, New York

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

Slip Op. 15–140

BOOMERANG TUBE LLC, et al., Plaintiffs, v. UNITED STATES, Defendant and JUBAIL ENERGY SERVICES CO. AND DUFERCO SA, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 14–00196

OPINION

[Denying relief in an action contesting a negative final determination in an anti-dumping duty investigation of certain oil country tubular goods from Saudi Arabia]

Dated: December 17, 2015

Paul W. Jameson, Schagrin Associates, of Washington, DC, argued for plaintiffs Boomerang Tube LLC, TMK IPSCO, Energex Tube, and Welded Tube USA Inc. With him on the brief was *Roger B. Schagrin*.

Jeffrey D. Gerrish, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, argued for plaintiff United States Steel Corporation. With him on the brief were *Robert E. Lighthizer* and *Luke A. Meisner*.

Emma E. Bond, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*,

Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Shana A. Hofstetter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

John M. Gurley, Arent Fox LLP, of Washington, DC, argued for defendant-intervenors Jubail Energy Services Co. and Duferco SA. With him on the brief were *Nancy A. Noonan* and *Diana Dimitriuc Quaia*.

Stanceu, Chief Judge:

In this consolidated action,[1] several plaintiffs contest a negative "less-than-fair-value" ("LTFV") determination the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude an antidumping duty investigation of certain oil country tubular goods ("OCTG") from Saudi Arabia. Commerce reached the negative determination, and terminated the investigation, based upon the *de minimis* dumping margin it calculated for the only investigated respondent, Jubail Energy Services Company ("JESCO"), defendant-intervenor in this action.

Before the court are two motions for judgment on the agency record made under USCIT Rule 56.2. The court denies relief on these motions and affirms the contested determination.

I. BACKGROUND

A. The Contested Determination

The determination contested in this consolidated action is *Amended Final Determination and Termination of the Investigation of Sales at Less Than Fair Value: Certain Oil Country Tubular Goods From Saudi Arabia*, 79 Fed. Reg. 49,051, 49,052 (Aug. 19, 2014) ("*Amended Final LTFV Determination*").[2]

B. The Parties to the Consolidated Action

Plaintiffs Boomerang Tube LLC, TMK IPSCO, Energex Tube, Welded Tube USA Inc. and United States Steel Corporation ("U.S.

[1] Consolidated under Consol. Court No. 14–00196, *Boomerang Tube LLC, et al. v. United States*, is *United States Steel Corporation v. United States*, Court No. 14–00201. Order (Oct. 28, 2014), ECF No. 21.

[2] The "oil country tubular goods" ("OCTG") that were the subject of the investigation "are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (*e.g.*,whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached." *Amended Final Determination and Termination of the Investigation of Sales at Less Than Fair Value: Certain Oil Country Tubular Goods From Saudi Arabia*, 79 Fed. Reg. 49,051, 49,052 (Aug. 19, 2014) ("*Amended Final LTFV Determination*").

Steel") are U.S. producers of steel tube products that participated in the investigation as petitioners. Compl. ¶¶ 3–4 (Aug. 26, 2014), ECF No. 6 (Court No. 14–00201) (U.S. Steel's complaint); Compl. ¶¶ 5–6 (Aug. 22, 2014), ECF No. 6 (remaining plaintiffs' complaint). Defendant-intervenor JESCO is an OCTG producer in Saudi Arabia, and defendant-intervenor Duferco SA is an exporter of OCTG from Saudi Arabia. Consent Mot. to Intervene as of Right 2 (Aug. 28, 2014), ECF No. 9.

C. The Motions for Judgment on the Agency Record

One of the two Rule 56.2 motions before the court is submitted by plaintiffs Boomerang Tube LLC, TMK IPSCO, Energex Tube, and Welded Tube USA Inc. Mot. of Consol. Pls. Boomerang Tube, Energex Tube, a Division of JMC Steel Group, TMK IPSCO, and Welded Tube USA Inc. for J. on the Agency R. under Rule 56.2 and Br. in Support (Jan. 15, 2015), ECF No. 28 ("Pls.' Br."). The second motion is by plaintiff U.S. Steel. Mot. of Pl. United States Steel Corp. for J. on the Agency R. under Rule 56.2 and Mem. in Support (Jan. 15, 2015), ECF No. 30 ("U.S. Steel's Br.").

Opposing the Rule 56.2 motions are defendant United States and defendant-intervenors JESCO and Duferco SA. Def.'s Response to Pls.' Rule 56.2 Mots. for J. on the Agency R. 6–7 (Mar. 30, 2014), ECF No. 38 ("Def.'s Opp'n"); Def.-intervenors' Jubail Energy Services Company and Duferco SA's Response to Pls.' Mot. for J. on the Agency R. 6–8, (Mar. 30, 2015), ECF No. 40 ("Def.-intervenors' Opp'n").

D. Procedural History of the Less-than-Fair-Value Investigation and this Action

On July 29, 2013, Commerce initiated an investigation of sales at less than fair value of certain OCTG from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam. *Certain Oil Country Tubular Goods from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 78 Fed. Reg. 45,505, 45,506 (Int'l Trade Admin. July 29, 2013). In investigating OCTG from Saudi Arabia, Commerce selected Duferco SA, the largest known Saudi Arabian exporter of OCTG, as the sole mandatory respondent. *Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Kingdom of Saudi Arabia: Respondent Selection* 3–4 (Aug. 29, 2013) (Admin.R.Doc. No. 51). JESCO, an

affiliate of Duferco SA, manufactured the OCTG that Duferco SA exported to the United States from Saudi Arabia. *Id.* at 1–2.

Treating Duferco SA and JESCO as a single entity for purposes of the investigation, Commerce issued an affirmative preliminary less-than-fair-value determination on February 25, 2014, determining a preliminary dumping margin of 2.92% for the combined entity. *Certain Oil Country Tubular Goods From Saudi Arabia: Prelim. Determination of Sales at Less Than Fair Value, and Postponement of Final Determination*, 79 Fed. Reg. 10,489, 10,490 (Int'l Trade Admin. Feb. 25, 2014) ("*Prelim. LTFV Determination*"); *Issues & Decision Mem. for the Prelim. Determination in the Antidumping Duty Investigation of Oil Country Tubular Goods from Saudi Arabia*, A-517–804, at 2, 6–7 (Feb. 14, 2014) (Admin.R.Doc. No. 151), *available at* http://enforcement.trade.gov/frn/summary/saudi-arabia/2014–04102–1.pdf (last visited Dec. 14, 2015) ("*Prelim. Decision Mem.*"). Commerce also determined that Duferco SA/JESCO's home market sales made to an affiliate were not at arm's length and should not be used to calculate normal value. *Prelim. Decision Mem.* at 7–8. Determining that Duferco SA/JESCO's remaining home market sales were made below cost, were therefore outside the ordinary course of trade, and accordingly could not serve as the basis for determining normal value, Commerce decided to determine normal value on the basis of constructed value ("CV"). *See id.* at 7–11.

Commerce published a final less-than-fair-value determination on July 18, 2014. *Certain Oil Country Tubular Goods From Saudi Arabia: Final Determination of Sales at Less Than Fair Value*, 79 Fed. Reg. 41,986, 41,986 (Int'l Trade Admin. July 18, 2014) ("*Final LTFV Determination*"). Commerce again calculated normal value on a CV basis and maintained its decision to treat Duferco SA and JESCO as a single entity. *See id*. Commerce determined constructed value profit according to profits realized by the Duferco SA/JESCO entity on certain of the sales that this combined entity made to Colombia. *See Issues & Decision Mem. for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from Saudi Arabia*, A-517–804, at 22–23 (July 10, 2014) (Admin.R.Doc. No. 206), *available at* http://enforcement.trade.gov/frn/summary/saudi-arabia/2014–16867–1.pdf (last visited Dec. 14, 2015) ("*Final Decision Mem.*"). Commerce determined a final margin of 2.69% for this entity. *Final LTFV Determination*, 79 Fed. Reg. at 41,986. Recalculating in response to a ministerial error allegation submitted by JESCO and Duferco SA, Commerce determined the *de minimis* margin, issued the negative amended final determination,

and terminated the investigation. *Amended Final LTFV Determination*, 79 Fed. Reg. at 49,052. These actions, now consolidated, followed.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), which grants this court jurisdiction over any civil action commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a(a)(2)(B)(ii),[3] including an action challenging the negative final determination of an antidumping investigation issued by Commerce under section 735 of the Tariff Act, 19 U.S.C. § 1673d. The court must "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). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

A. Plaintiffs' Claims and Responses of Defendant and Defendant-Intervenor

All plaintiffs claim that Commerce, in calculating normal value according to the CV method, failed to determine constructed value profit according to a "reasonable method" as required by 19 U.S.C. § 1677b(e)(2)(B)(iii). *See* Pls.' Br. 7, 16; U.S. Steel's Br. 7–8. They argue that Commerce acted contrary to law in basing constructed value profit on the profit realized in certain of the sales transactions between the combined Duferco SA/JESCO entity and an affiliated distributor in Colombia. In their view, Commerce erred in treating as actual "sales" transactions occurring between the combined entity and the Colombian affiliate, which plaintiffs argue should have been considered part of that combined entity. Plaintiff U.S. Steel contends, in addition, that the transactions in Colombia were made according to unusual circumstances and that Commerce therefore erred in finding that they were made in the ordinary course of trade.

B. Plaintiffs Did Not Fail to Exhaust their Administrative Remedies

Defendant argues that plaintiffs are not entitled to relief on their claims because they failed to exhaust their administrative remedies.

[3] All statutory citations are to the 2012 edition of the United States Code. All citations to regulations are to the 2012 edition of the Code of Federal Regulations.

See Def.'s Opp'n 6, 15–18, 22–25 ("Plaintiffs never argued to Commerce that that [*sic*] the Colombia sales were made outside of the ordinary course of trade . . . . Plaintiffs also failed to exhaust their current argument that JESCO's Colombia sales are intra-company sales that cannot be used as the basis for the constructed value profit."). Defendant-intervenor argues, similarly, that "[a]s an initial matter, it is clear from the record that Plaintiffs failed to exhaust their administrative remedies" with respect to the argument that "JESCO's sales to its affiliated customer in Colombia through its affiliate, Duferco S.A., qualify as intra-company transfers and cannot be used to calculate CV profit." Def.-intervenors' Opp'n 20.

Section 301 of the Customs Courts Act of 1980 provides that, in actions such as this one, "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006). The exhaustion requirement holds that an interested party must raise all relevant arguments at the appropriate time in the proceeding. *See Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts not topple over administrative decisions unless the administrative body not only has erred but has erred *against objection made at the time appropriate under its practice*.") (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (emphasis in original)).

Courts have declined to apply the exhaustion requirement in situations where "the agency change[s] its position . . . after [a] party's case brief [has been filed]." *Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) ("*Corus Staal*"); *see also Qingdao Taifa Group Co. v. United States,* 33 CIT 1090, 1092–93, 637 F. Supp. 2d 1231, 1236–37 (2009) ("A party . . . may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level." (citing *LTV Steel Co. v. United States*, 985 F. Supp. 95, 120 (CIT 1997))). The court has discretion in deciding whether or not to apply the exhaustion doctrine. *See* 28 U.S.C. § 2637(d); *Corus Staal*, 502 F.3d at 1381 ("[A]pplying exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade.").

In the Preliminary Determination, Commerce relied on the financial statements of a Saudi Arabian producer, Saudi Steel Pipe Company, in calculating CV profit. *See Prelim. Decision Mem.* at 11. Case briefs were due May 23, 2014, and rebuttal briefs were due May 30,

2014. *See Prelim. LTFV Determination*, 79 Fed. Reg. at 10,490. It was not until the following July that Commerce first indicated it might use Duferco SA/JESCO's sales to Colombia to calculate CV profit, and this indication came when Commerce issued its final decision. *See Final Decision Mem.* at 16–23; *Duferco SA – Final LTFV Determination Analysis Mem.* 6–7 (July 10, 2014) (Admin.R.Doc. No. 209). Defendant and defendant-intervenors argue, nevertheless, that petitioners were on notice that Commerce might rely on Duferco SA/JESCO's sales to Colombia to calculate CV profit because JESCO proposed in its case brief that Commerce use the Colombia sales to determine CV profit. Def.'s Opp'n 17, 23–24; Def.-intervenors' Opp'n 20–21.

Denying relief on exhaustion grounds would require the court to conclude that plaintiffs should have predicted that Commerce might accept JESCO's proposal to use sales by Duferco SA/JESCO to Colombia to calculate CV profit and should have raised, in their case briefs, potential arguments against that possibility. The court declines to require such speculation. The court concludes, instead, that petitioners did not have a full and fair opportunity during the investigation to challenge the Department's method of determining CV profit. Therefore, the court adjudicates on the merits the claims of all plaintiffs in this litigation.

C. The Court Rejects Plaintiffs' Challenges to the Department's CV Profit Determination

Constructed value is calculated based on the sum of the cost of materials and fabrication employed in producing the subject merchandise, plus amounts for selling, general, and administrative expenses and for profit and U.S. packing costs. Section 773(e) of the Tariff Act, 19 U.S.C. § 1677b(e). In this litigation, plaintiffs challenge the method Commerce used to calculate an amount for CV profit when determining the normal value of the subject merchandise sold in the United States by Duferco SA/JESCO.

Because Commerce determined that the exporter made no home market sales in the ordinary course of trade, Commerce could not use what it terms the "preferred method" of calculating CV profit, which is provided in section 773(e)(2)(A) of the Tariff Act,[4] and instead turned to the three alternatives set forth in section 773(e)(2)(B) of the

[4] Section 773(e)(2)(A) of the Tariff Act provides that constructed value profit is calculated using actual amounts "realized by the specific exporter or producer being examined in the investigation . . . for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country . . ." 19 U.S.C. § 1677b(e)(2)(A).

Tariff Act, 19 U.S.C. §1677b(e)(2)(B)(i)-(iii).[5] *See Prelim. Decision Mem*. at 10. Commerce rejected the firstalternative, that of § 1677b(e)(2)(B)(i), because it found no record information permitting calculation of profit realized by Duferco SA/JESCO on products in the "same general category" as OCTG. *Id*. at 11. The second alternative, under § 1677b(e)(2)(B)(ii), was unavailable because the combined Duferco SA/JESCO entity was the only respondent in the investigation. *Id*. Commerce proceeded to the method of § 1677b(e)(2)(B)(iii), under which Commerce may determine CV profit based on "any other reasonable method," subject to an express limitation.[6] *Id*. In the preliminary determination, Commerce chose to use financial data of another Saudi pipe producer, Saudi Steel Pipe Company, to calculate CV profit. *Id*.

The record contained six potential sources of data from which to determine CV profit under 19 U.S.C. § 1677b(e)(2)(B)(iii). JESCO argued that Commerce should continue to use the financial data of Saudi Steel Pipe Company, as Commerce had done in the *Preliminary LTFV Determination*, or use the financial data of a different Saudi pipe producer known as "Arabian Pipes." *See Case Brief of Jubail Energy Services Company (JESCO) and Duferco SA* 50–68 (May 23,

[5] Section 773(e)(2)(B) of the Tariff Act provides:

> [I]f actual data are not available with respect to the amounts described in subparagraph (A), then [constructed value shall be an amount equal to] –
>
> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise [the "profit cap" limitation] . . .

19 U.S.C. § 1677b(e)(2)(B).

[6] Constructed value profit determined under section 773(e)(2)(A)(iii) of the Tariff Act, §1677b(e)(2)(B), is subject to the "profit cap" limitation of that provision. In the investigation,Commerce concluded it lacked record information sufficient for calculation of a profit cap. *Issues & Decision Mem. for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from Saudi Arabia,* A-517–804, at 23 (July 10, 2014) (Admin.R.Doc. No. 206), available at http://enforcement.trade.gov/frn/summary/saudi-arabia/2014–16867–1.pdf (last visited Dec. 14, 2015) ("*Final Decision Mem.*").

2014) (Admin.R.Doc. No. 196); *Rebuttal Brief of Jubail Energy Services Company (JESCO) and Duferco SA* 2–14 (May 30, 2014) (Admin.R.Doc. No. 199). In the alternative, JESCO argued that Commerce could use Duferco SA/JESCO's own sales or the subset of its sales to Colombia. *See JESCO Case Br.* 65–67. Petitioners argued that Commerce should use the financial data of either of two multinational pipe producers, Tenaris SA and Vallourec S.A., or the financial data of the U.S. OCTG industry as a whole. *See Oil Country Tubular Goods from Saudi Arabia: Petitioners' Case Brief* 1–4 (May 23, 2014) (Admin.R.Doc. No. 195); *Oil Country Tubular Goods from Saudi Arabia: Petitioners' Rebuttal Brief* (May 30, 2014) (Admin.R.Doc. No. 200).

Choosing from among the various options, Commerce determined CV profit according to the profit realized on certain sales that Duferco SA/JESCO made to a third-country market, Colombia. In choosing these sales as the basis for CV profit, Commerce reasoned that "[t]he Colombian sales of JESCO are sales of OCTG products, a significant portion of which are identical to the products sold by JESCO in the home market and the United States, and the related costs have been verified by the Department." *Final Decision Mem.* 22. Commerce further reasoned that "[t]hese sales meet all the requirements for CV profit set out under the preferred method except for the fact that they were not sold in the foreign country," pointing out that "[t]hey are sales of the foreign like product and were produced by the respondent in the foreign country." *Id*.

As discussed previously, the Amended Final Determination reached a revised final weighted-average dumping margin that was *de minimis*. *See Amended Final LTFV Determination*, 79 Fed. Reg. at 49,052; 19 U.S.C. §§ 1673d(a)(4), 1673b(b)(3) (requiring Commerce to disregard as *de minimis* a weighted average dumping margin of less than 2 percent ad valorem or the equivalent specific rate). In calculating CV profit for the amended final results, as it had when issuing the final results, Commerce narrowed its use of the Colombian sales to those that were not made below cost. *See Duferco SA – Amended Final LTVF Determination Analysis Mem.* 3 (Aug. 11, 2014) (Admin.R.Doc. No. 235).

Plaintiffs assert two grounds upon which they claim that the Department's use of JESCO's Colombia sales to calculate CV profit was not a "reasonable method" as required by 19 U.S.C. § 1677b(e)(2)(B)(iii). The first argument, made by all plaintiffs, is based on an assertion that all of the sales Commerce used in the amended final results to determine CV profit were to the same buyer in Colombia, a distributor affiliated with Duferco SA/JESCO. This asser-

tion is shown by the record to be correct. *See Duferco SA – Amended Final LTVF Determination Analysis Mem.* 3, Attachments 1–4, (Aug. 11, 2014) (Admin.R.Doc. No. 217) (Non-Public); *Duferco SA – Final LTFV Determination Analysis Mem.* 7, Attachments 1–2 (July 10, 2014) (Admin.R.Doc. No. 207) (Non-Public). All plaintiffs argue that these transactions were not actual sales but instead were merely intra-company transfers, on the premise that Commerce erred in failing to conclude that the affiliated distributor was part of the Duferco SA/JESCO combined entity. Pls.' Br. 16; U.S. Steel's Br. 9–11. According to their argument, the Department's erroneous assumption that these transactions are actual "sales" resulted in a CV profit calculation that was not made according to a "reasonable method" as required by the statute. U.S. Steel adds that "Commerce's calculation of CV profit based on JESCO's sales of OCTG to Colombia should also be overturned because it violated the statute's general preference to avoid basing CV profit on sales that are made outside the ordinary course of trade," providing various reasons why it believes these sales were made according to unusual circumstances. U.S. Steel's Br. 13.

1. Commerce Was Not Required to Find that the Distributor in Colombia Was Part of the Duferco SA/JESCO "Combined Entity"

In its regulations, Commerce has provided itself authority to "collapse," i.e., treat as a single entity, affiliated producers where two conditions are met. The conditions are (1) "where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and" (2) "the Secretary concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1). The regulation lists several factors the Secretary "may consider." *Id.* § 351.401(f)(2).[7]

After determining that JESCO and Duferco SA were "affiliated" within the meaning of section 771(33)(E) of the Tariff Act, 19 U.S.C. § 1677(33)(E), Commerce applied § 351.401(f) in treating these two companies as a single entity. *Prelim. Decision Mem.* at 6–7. Commerce did not find that Duferco SA was a producer. Instead, Com-

[7] The regulation provides that:

> In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include: (i) [t]he level of common ownership; (ii) [t]he extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (iii) [w]hether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

19 C.F.R. § 351.401(f)(2).

merce explained that "[w]hile 19 CFR 351.401(f) uses the term 'producers,' the Department's practice is to apply this regulation to resellers and other affiliated companies as well." *Id*. at 6 n.26.

Along with Duferco SA and JESCO, Commerce also "collapsed," into the entity to which it referred as "the Duferco single entity," three other affiliated companies: Duferco Shipping, Duferco Steel Inc., and Duferco Saudi Arabia. *Id*. at 6–7. Upon a finding that that these five companies coordinated orders from customers, coordinated shipping and other logistics, and supplied JESCO with inputs for the production of OCTG, Commerce further found, as to these five companies, that "[e]ach Duferco company, therefore, is part of a chain of transactions requiring extensive coordination of sales and production decisions (*e.g.*, price negotiations, production planning, and shipping) and the sharing of sales information." *Id*. at 7. Commerce did not conclude that the distributor in Colombia was within "the Duferco single entity."

To qualify for a remedy under the applicable standard of review, plaintiffs must show that Commerce reached a determination that either was unsupported by substantial evidence on the record or otherwise was not in accordance with law. On the former, plaintiffs do not challenge any specific factual finding associated with the challenged determination as unsupported by record evidence. Their claim, instead, is essentially that Commerce acted contrary to law in *not* finding that the Colombian distributor was part of the "Duferco single entity" for purposes of 19 C.F.R. § 351.401(f) and accordingly in regarding the transactions between Duferco SA/JESCO and the distributor as actual sales rather than intra-company transfers. Stated another way, their argument is that the record does not contain substantial evidence to support the Department's *implicit* finding that the Colombian distributor was *not* part of the single entity. In reviewing this argument, the court must be guided by the statutory standard of 19 U.S.C. § 1677b(e)(2)(B)(iii), i.e., the "reasonable method" standard. Because Congress has stated the standard in such a broad way, the court must accord Commerce a significant degree of discretion. The court also is guided by 19 C.F.R. § 351.401(f), the regulation Commerce applied in "collapsing" some Duferco-affiliated entities but not the Colombian distributor.

Under § 351.401(f)(1), Commerce is to decide whether "producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production." Here, there is no possibility of manipulation of "production" because

the entity at issue is a distributor, not a producer. As noted previously, Commerce interprets § 351.401(f)(1) to apply not only to producers but also to affiliates that are not producers, an interpretation plaintiffs do not challenge here. According to the regulation, therefore, the relevant question is whether the Secretary was compelled by the record evidence to find a "significant potential for the manipulation of price." Plaintiffs do not direct the court to evidence that would have compelled such a finding, and the court does not find such evidence within the record.

Plaintiffs point to the fact that the Colombian distributor is an indirect subsidiary of Duferco SA's parent company. *See* Pls.' Br. 11–12; U.S. Steel's Br. 9–11. But this affiliation does not compel the conclusion that there was a significant potential for the manipulation of price. Plaintiffs also cite evidence that the Colombian entity purchases and distributes OCTG that JESCO transferred to Duferco SA. *See* Pls.' Br. 11–13; U.S. Steel's Br. 10–11. From this evidence, U.S. Steel argues that the Colombian entity "is involved in the production and sale of OCTG." U.S. Steel's Br. 11. However, plaintiffs point to no actual evidence demonstrating a significant risk of manipulation of price. Significantly, plaintiffs point to no evidence of common managerial employees or board members or intertwined operations, such as the sharing of sales information or other involvement in production and pricing decisions. Plaintiffs have failed to meet their burden of demonstrating that Commerce was compelled to treat the JESCO/Duferco SA entity and its Colombian affiliate as a single entity under the regulation.

Moreover, other record evidence is contrary to a finding of a significant risk of price manipulation. Commerce found that the transactions it used to calculate CV profit, i.e., the not-below-cost sales that were made to the Colombian distributor, were made at arm's length. *Final Decision Mem.* 22–23. For this finding, Commerce relied upon record evidence, consisting of prices at which Duferco SA/JESCO sold OCTG to one or more unaffiliated customers in Colombia, showing that the sales it used to calculate CV profit were made at prices comparable to the market price of OCTG in Colombia. *See Duferco SA – Final LTFV Determination Analysis Mem.* 6–7. A finding that a sale was made at arm's length may be supported by record evidence that the sale price is comparable to the price at which the exporter or producer sold the foreign like product to a party who is not affiliated with the seller. *See* 19 C.F.R. § 351.403(c).

U.S. Steel cites record evidence showing common ownership between JESCO and the Colombian distributor and the similarity of the Colombia transactions to U.S. transactions between JESCO and the

single Duferco entity. U.S. Steel's Br. 10–11. This evidence does not establish a significant risk of price manipulation. U.S. Steel also argues that "it is of no moment" that the sales in Colombia used to determine CV profit "passed the arm's length test," on the ground that "Commerce's well-established practice is to disregard intra-company transfers between companies that are part of the same collapsed entity regardless of whether they pass any of Commerce's tests for transactions between affiliated companies, including the arm's length test." *Id*. at 11 (citation omitted). The court disagrees. This argument *presumes* a Commerce decision to collapse the entities in question, which did not occur here. In any event, it is illogical to consider a company's selling to an affiliate at arm's length prices to be irrelevant to a "collapsing" analysis conducted under 19 U.S.C. § 351.401(f) that is directed to the question of a significant risk of manipulation of price.

2. The Department's Finding that JESCO's Sales to Colombia Were Made in the Ordinary Course of Trade Is Supported by Substantial Record Evidence

U.S. Steel contends that "Commerce's calculation of CV profit based on JESCO's sales of OCTG to Colombia should also be overturned because it violated the statute's general preference to avoid basing CV profit on sales that are made outside the ordinary course of trade." U.S. Steel's Br. 13. According to U.S. Steel, "[a]s the Federal Circuit has recognized, where, as here, home market sales are not available for use and CV profit must be calculated pursuant to 19 U.S.C. § 1677b(e)(2)(B), the statute continues to express 'a general preference' not to use sales made outside the ordinary course of trade." *Id*. (citing *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 616 F.3d 1300, 1307 (Fed. Cir. 2010) ("*Thai I-Mei*")). In making its argument, U.S. Steel cites the statutory definition of "ordinary course of trade" provided in 19 U.S.C. §1677(15)[8] and *CEMEX, S.A. v. United States*, 133 F.3d 897, 900 (Fed. Cir. 1998) ("CEMEX"), for the proposition that

[8] The statute defines "ordinary course of trade" as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." 19 U.S.C. §1677(15). The provision directs Commerce to consider to be outside the ordinary course of trade sales made below the cost of production and sales between affiliated persons "if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." 19 U.S.C. § 1677b(f)(2); *see also* 19 U.S.C. § 1677(15) (citing 19 U.S.C. § 1677b(b)(1) and § 1677b(f)(2)); *see also* 19 C.F.R. § 351.102(b)(35) ("The Secretary may consider sales . . . to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question.").

Commerce must consider factors in addition to whether sales are below cost in determining whether sales are in the ordinary course. U.S. Steel's Br. 13.

U.S. Steel's argument is unpersuasive. Section 773(e)(2)(B)(iii) of the Tariff Act, 19 U.S.C. § 1677b(e)(2)(B)(iii), does not limit Commerce to the use of sales made in the ordinary course of trade when determining CV profit. To the contrary, the provision makes no mention of sales in the ordinary course of trade and imparts significant discretion in allowing the use of a "reasonable method." U.S. Steel's citation to *Thai I-Mei* is unavailing, as the case does not hold that Commerce's discretion is confined in the way U.S. Steel suggests. Nor is the court persuaded by U.S. Steel's citation of the statutory definition for "ordinary course of trade," which applies where the term is used in a statutory provision. The reliance upon *CEMEX, S.A. v. United States* is also misplaced. That case arose from a claim by the foreign exporter that Commerce had erred in ruling that home market sales of two of the three types of cement sold in the home market were outside the ordinary course of trade within the meaning of 19 U.S.C. § 1677b(a)(1)(B)(i) and therefore not permitted to be used in determining the normal value of subject merchandise sold in the United States. *See CEMEX*, 133 F.3d at 899–900.

Commerce mentioned "ordinary course of trade" in reaching its decision to use the Colombia sales, but the reference is only in the context of determining whether the sales were below cost: "[i]n using these third country sales we consider it appropriate to perform a sales-below cost test to ensure that they were made in the ordinary course of trade, consistent with the preferred method." *Final Decision Mem.* 22–23 (footnote omitted)). Commerce acted within its discretion in deciding to exclude below-cost sales from its CV profit calculation. Merely by using the term "ordinary course of trade" in explaining its decision to do so, Commerce did not narrow its own discretion on the question of whether those sales otherwise were suitable for use in determining constructed value profit. The question presented, therefore, is not whether the sales Commerce used to determine CV profit were, in respects other than cost recovery, outside the ordinary course of trade for purposes of the statutory definition, which does not apply to 19 U.S.C. § 1677b(e)(2)(B)(iii). Instead, the question is whether the characteristics of those sales otherwise made the sales unsuitable for use in determining CV profit according to the "reasonable method" standard of 19 U.S.C. § 1677b(e)(2)(B)(iii).

U.S. Steel alleges that the Colombia sales Commerce used were made under "unusual circumstances," pointing to record evidence concerning the circumstances under which the merchandise on the

sales was shipped to Colombia and reiterating its argument that the sales were in fact intra-company transfers. U.S. Steel's Br. 14. U.S. Steel also contends that the sales constituted an unrepresentative quantity of goods. *Id*. at 15. Third, U.S. Steel alleges that a remand is required because Commerce erred in finding that a significant portion of the products sold by JESCO in Colombia are identical to the products sold in the home market and the United States, a finding U.S. Steel contends to be contradicted by record evidence. *Id*. at 15–16. Finally, U.S. Steel maintains that the profit rate of the sales is "inconsistent with other record evidence showing that OCTG is one of the most profitable steel pipe products." *Id*. at 16. U.S. Steel directs the court's attention to record evidence consisting of the financial statements of Tenaris, a large multinational corporation that earned a profit of approximately 25% during the POI, and "the weighted-average operating profit for the U.S. OCTG industry," which U.S. Steel contends was 12.6% from 2010–2012. *Id.* at 17.

The record evidence U.S. Steel cites is not sufficient to support a conclusion that Commerce acted contrary to law in using the Colombia sales to determine CV profit. The circumstances of shipping, the sales quantities, and the profit rate on the sales do not establish that it was unreasonable for Commerce to use these sales for the limited purpose of determining profit for the constructed value calculation. In deciding to use these sales to determine CV profit, Commerce compared the suitability of the data from these sales with other record information that it might have used instead, acknowledging that it was "faced with several imperfect options." *Final Decision Mem.* 17. Mentioning that the Colombia sales meet two of the three requirements of the "preferred method," i.e., 19 U.S.C. § 1677b(e)(2)(A), Commerce placed weight on the fact that these sales "are sales of the foreign like product and were produced by the respondent in the foreign country," albeit products that were not sold *in* the foreign country. *Id*. at 22. Moreover, Commerce found that the sales were at arm's length based on record data from other sales of OCTG in the Colombian market, whereas U.S. Steel's objections are grounded, in large part, on comparisons with markets other than Colombia.

The court also rejects U.S. Steel's argument that a remand is required because of the aforementioned finding as to identical merchandise. The actual finding is stated in the Final Decision Memorandum as follows: "[t]he Colombian sales of JESCO are sales of OCTG products, a significant portion of which are identical to the products sold by JESCO in the home market and the United States . . . ." *Final Decision Mem.* 22. The Final Decision Memorandum pertained to the Final Results, not the Amended Final Results, the

analysis memorandum for which set forth the final choice of Colombian sales for the CV profit calculation, i.e., the sales that were not made below cost. *Duferco SA – Amended Final LTFV Determination Analysis Mem.* 3. As defendant points out, Commerce did not reach a finding that the specific sales Commerce used to calculate CV profit were identical to the products JESCO sold in the home market or the United States. Def.'s Opp'n 12. U.S. Steel does not contest that the sales in question were of OCTG.

III. CONCLUSION

For the reasons discussed above, plaintiffs are not entitled to relief on their claims. The Department's finding that JESCO's sales to Colombia were actual sales rather than intra-company transfers was supported by substantial evidence on the record. Plaintiffs' various arguments to the contrary, including U.S. Steel's arguments directed to the question of whether the sales used to determine CV profit were in the ordinary course of trade, do not demonstrate that Commerce failed to determine constructed value profit according to a "reasonable method" as required by law. Pursuant to USCIT Rule 56.2, the court will enter judgment in favor of defendant United States.

Dated: December 17, 2015
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
Chief Judge

Slip Op. 15–141

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

Before Richard K. Eaton, Judge
Consol. Court No. 09–00401

OPINION

[Plaintiff's motion for summary judgment is granted, in part, and defendant's cross-motion for summary judgment is granted, in part.]

Dated: December 17, 2015

Edward F. Kenny and *Beverly A. Farrell*, Trial Attorneys, Commercial Litigation Branch, Civil Division, United States Department of Justice, of New York, NY, argued for plaintiff. With them on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Amy M. Rubin*, Senior Trial Counsel, and *Justin R. Miller*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of

Justice. Of counsel on the briefs were *Melissa Erny*, *Brandon T. Rogers*, and *Kyle Gormon*, Office of Assistant Chief Counsel, United States Customs and Border Protection, of Indianapolis, IN.

Herbert C. Shelley, *Michael T. Gershberg*, and *Mark F. Horning*, Steptoe & Johnson LLP, of Washington DC, argued for the defendant.

Eaton, Judge:

This matter is before the court on the cross-motions for summary judgment of plaintiff United States ("plaintiff" or "the Government"), on behalf of the United States Customs and Border Protection Agency ("Customs"), and defendant American Home Assurance Company ("defendant" or "AHAC"). *See* Pl.'s Mot. for Summ. J. (ECF Dkt. No. 76); Def's Mot. for Summ. J. (ECF Dkt. No. 78). Jurisdiction lies pursuant to 25 U.S.C. § 1582(2) (2012) ("The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury.").

In this consolidated action,[1] the United States seeks to recover on bonds issued by AHAC securing unpaid duties on garlic, mushrooms, and potassium permanganate imported into the United States from the People's Republic of China ("PRC"). Specifically, the Government claims that AHAC is liable for duties up to the amounts of the bonds,[2] and for (1) pre-liquidation interest pursuant to 19 U.S.C. § 1677g (2006);[3] (2) prejudgment statutory interest pursuant to § 580; (3) post-liquidation interest under § 1505(d) for non-payment of the duties; (4) equitable prejudgment interest; and (5) post-judgment interest under 28 U.S.C. § 1961. *See* Mem. in Supp. of Pl.'s Mot. for Summ. J. 6 (ECF Dkt. No. 76) ("Pl.'s Br."). By its cross-motion, with the exception of post-judgment interest, defendant disputes these claims. *See* Mem. of Law in Supp. of Def.'s Mot. for Summ. J. (ECF Dkt. No. 78) ("Def.'s Br.").

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[1] This consolidated action also covers court numbers 09–442, 09–491, 10–002, 10003, 10–311, and 11–206.

[2] In addition to interest, the United States seeks to recover $27,406,336.90 in antidumping duties secured by customs bonds issued by AHAC. *See* Def.'s Statement of Material Facts as to Which There Is No Genuine Issue to Be Tried ¶¶ 12, 34, 52, 69, 86, 107, 121, 225, 232 (ECF Dkt. No. 78) ("Def.'s Statement").

[3] As shall be seen, the United States seeks recovery of pre-liquidation interest pursuant to 19 U.S.C. § 1677g only in case 09–491. *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. 39 n.42 (ECF Dkt. No. 92) ("Pl.'s Resp. Br.") ("But for the 'final and conclusive' nature of the 19 U.S.C. § 1677g interest charge in case 09–491, the Government would not be entitled to interest under 19 U.S.C. § 1677g under these facts. The Government concedes that AHAC does not owe 19 U.S.C. § 1677g interest in cases 09–401, 09–442, 10–002, 10–003, 10–311, and 11206.").

For the reasons set forth below, plaintiffs motion for summary judgment is granted, in part, and defendant 's cross-motion for summary judgment is granted, in part.

STANDARD OF REVIEW

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a); *see Anderson v. Liberty Lobby, Inc*., 477 U.S . 242, 247–48 (1986). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am., Div. of USJVC Corp. v. United States,* 234 F.3d 1348, 1351 (Fed. Cir. 2000). To defeat summary judgment "all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249 (internal quotation marks and citation omitted).

BACKGROUND

The facts described below have been taken from the parties' statements of undisputed material facts. *See* Def.'s Statement of Material Facts as to Which There Is No Genuine Issue to Be Tried (ECF Dkt. No. 78) ("Def.'s Statement"). Citation to the record is provided where a fact, although not admitted in the parties' papers, is uncontroverted by record evidence.

In each of these seven cases, the bonds under which the Government seeks recovery[4] were issued by AHAC—a company authorized to issue surety bonds—to secure the duties due on entries for four different importers between February 2001 and March 2002 . *See* Def.'s Statement ¶¶ 7, 9. Each importer defaulted on payment of antidumping duties owed to Customs and has since disappeared. According to AHAC, the defaults were intentional and part of "a massive scheme of fraud by the exporters of the Chinese products and their importers" to avoid antidumping duties by obtaining surety bonds for entries made by new shippers[5] and importers, which had no intention of remaining in business long enough to pay the assessed duties. *See* Def.'s Br. 2.

Until 1999, AHAC issued customs bonds through an underwriting

[4] These seven consolidated cases comprise a total of 336 entries. *See* Pl.'s Br. Addendum: Pl.'s Statement of Undisputed Material Facts ¶ 1 ("Pl.'s Statement").

[5] "Upon request, [the United States Department of] Commerce is required by statute to perform administrative reviews 'for new exporters and producers' whose sales have not previously been examined." *Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 39 CIT ___, ___ , Slip Op. 15–22, at 8 (2015) (quoting 19 U.S.C. § 1675(a)(2)(B)).

agent, C.A. Shea & Company, Inc. ("Shea"). *See* Def.'s Statement ¶ 1. Beginning in 1999, AHAC engaged a different underwriting agent, Global Solutions Insurance Services, Inc. ("GSIS"), to "underwrite bonds covering regular customs duties and antidumping duties for AHAC." Def.'s Statement ¶ 2. GSIS underwrote all of the bonds for AHAC at issue in this case. *See* Def.'s Statement ¶ 2.

An important statutory provision in this case pertains to notice that liquidation of imported merchandise[6] has been suspended. *See*19 U.S.C. § 1504(c). The subsection states, "[i]f the liquidation of any entry is suspended, the Secretary[7] shall by regulation require that notice of the suspension be provided, in such manner as the Secretary considers appropriate, to the importer of record or drawback claimant, as the case may be, *and* to any authorized agent and surety of such importer of record or drawback claimant." *Id*. (emphasis added). The significance of such notice is that it would have alerted AHAC to the potential for increased antidumping duty liability following the completion of the administrative reviews.[8]

According to Customs, its automated commercial system was, and continues to be, programmed to generate notices of suspension of liquidation to sureties. Def.'s Statement ¶ 24. Prior to May 11, 2005, however, the system was not programmed to issue Customs Form 4333-A notices of suspension of liquidation to sureties other than to those sureties issuing continuous bonds[9] unless the sole bond in the

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[6] "*Liquidation* means the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1 (2015); *see also Shinyei Corp. of Am.*

[7] By regulation Customs has the duty to provide the requisite notice. *United States v. Great Am. Ins. Co. of N.Y.* (*Great Am. II*), 738 F.3d 1320, 1329 (Fed. Cir. 2013); 19 C.F.R. § 159.12(2)(c) (2009) ("If the liquidation of an entry is suspended as required by statute or court order, as provided in paragraph (a)(2) of this section, the port director promptly shall notify the importer or the consignee and his *agent and surety* on Customs Form 4333-A, appropriately modified, of the suspension." (emphasis added)).

[8] Liquidation of the entries was suspended because the entries at issue were the subject of administrative reviews. *See United States v. Am. Home Assurance Co*. (*AHAC I*), 35 CIT ___, ___, Slip Op. 11–57, at 3 (2011) ("Upon the request for an administrative review for each [period of review], liquidation of the entries subject to each review . . . [is] suspended."). The reason "[l]iquidation is suspended upon a request for administrative review [is] to 'enable . . . Commerce to calculate assessment rates for the subject entries . . . , which are then applied by Customs pursuant to liquidation instructions received from Commerce' after it publishes the final results of the review." *Id*. at __, Slip Op. 11–57, at 9 (quoting *SSAB N. Am. Div. v. U.S. Bureau of Customs & Border Prot.*, 32 CIT 795, 798, 571 F. Supp. 2d 1347, 1351 (2008)).

[9] "A 'continuous bond,' as compared to a 'single transaction bond,' covers 'liabilities resulting from multiple import transactions over a period of time, such as one year.'" *United States v. Am. Home Assurance Co*. (*AHAC II*), 789 F.3d 1313, 1316 n.2 (Fed. Cir. 2015) (quoting *Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot*., 30 CIT 1838, 1839, 465 F. Supp. 2d 1300, 1302 (2006)).

system was a single transaction bond.[10] *See* Def.'s Statement ¶ 24. In other words, in those situations where multiple sureties insured individual entries, only the surety that issued a continuous bond would receive a notice of suspension. Thus, under circumstances where there were multiple entries each secured by a single transaction bond and a continuous bond, the sureties that issued single transaction bonds would not have been given the statutorily-required notice.

In five of the seven consolidated cases (court numbers 09–401, 09–442, 09–491, 10–002, and 10–311), AHAC issued only single transaction bonds, while another surety issued the continuous bonds. *See* Def.'s Statement 8. Thus, no notice of suspension of liquidation was provided to AHAC by Customs' automated system in these five cases. *See* Def.'s Statement 25–26, 44–45, 62–63, 80–81, 99–100. In the two remaining cases (court numbers 10–003 and 11–206), AHAC issued both single transaction bonds and continuous bonds to secure the entries at issue. Def.'s Statement ¶ 8. In these cases, Customs' automated system generated notices to AHAC because it had issued a continuous bond. Neither AHAC nor GSIS, its underwriting agent for the applicable bonds, however, directly received such notice. *See* Def.'s Statement 114, 128. Rather, in these two cases, notice was sent to Shea, AHAC's previous underwriter for unrelated bonds, who had no relationship to the bonds at issue in this case. Def.'s Statement 114, 128.

All of the bonds issued by AHAC seemed the duties eventually owed on imported merchandise that was subject to antidumping duty orders issued by the United States Department of Commerce ("Commerce" or "the Department").[11] *See* Def. 's Statement 6. In 2004 and 2005, after the importers defaulted on the antidumping duties owed on all of the entries in this action, Customs demanded payment from AHAC, which AHAC timely protested.[12] *See* Def.'s Statement 10. AHAC filed Freedom of Information Act ("FOIA") requests for "all the documentation relevant" to the demands for payment, to which, ac-

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[10] A "'single [transaction]' bond . . . cover[s] the obligations arising from one entry." *Nat'l Fisheries*, 30 CIT at 1839, 465 F. Supp. 2d at 1302. These seven consolidated actions involve a total of 336 single transaction bonds. Pl.'s Statement ¶ 7.

[11] It is undisputed that AHAC's agents knew the bonds seemed entries subject to both regular and antidumping duties. *See* Def.'s Statement ¶ 2.

[12] AHAC filed protests in all of the consolidated cases (i.e., court numbers 09–401, 09–442, 09–491, 10–002, 10–003, 10–311, 11–206). Decl. of Herbert C. Shelley in Supp. Of Mot. for Summ. J. ¶¶ 19, 41, 46, 52, 56, 60, 65 (ECF Dkt. 78–42) ("Shelley Decl.").

cording to AHAC, Customs was slow in responding.[13] *See* Def.'s Br. 8. Once AHAC supplemented its protests with the information received in response to its FOIA requests, and after additional delays, Customs denied the protests in all but two cases.[14] *See* Def.'s Statement ¶ 11. AHAC did not appeal any of these protest denials to this Court. Customs commenced these collection actions in this Court between September 2009 and October 2010, close to the six-year statute of limitations for filing collections action. *See* 28 U.S.C. § 2415(a). Shortly after the Government brought these collection actions to recover the unpaid duties on the bonds, AHAC executed time-limited waivers of the statute of limitations for the entries covered by court numbers 09–491 and 10- 311.[15] Def.'s Statement ¶¶ 160, 162.

Earlier in these proceedings, AHAC sought dismissal of the Government's action, arguing the case should be dismissed because the company did not receive notice of the suspension of liquidation of some entries. *See United States v. Am. Home Assurance Co.* (*AHAC I*), 35 CIT ___, ___, Slip Op. 11–57, at 5 (2011). Specifically, AHAC argued that, because it failed to receive notice of suspension as required by 19 U.S.C. § 1504(c), liquidation of the entries was not actually suspended. Mem. in Supp. of Def.'s Mot. to Stay Discovery and in Opp'n to Pl.'s Mot. for Stay 2–3 (ECF Dkt. No. 28) ("Def.'s Mot. to Stay"). Because, according to AHAC, there was no suspension of liquidation, the entries were deemed liquidated by operation of law one year after entry pursuant to § 1504(a)(l)(A). Def.'s Mot. to Stay 3. Consequently, AHAC insisted the Government's claims were barred by the six-year statute of limitations that started to run when the entries were deemed liquidated. Def.'s Mot. to Stay 3.

The court disagreed, holding that a failure of Customs to provide a surety notice of suspension of liquidation does not vitiate a valid suspension. *See AHAC I*, 35 CIT at __, Slip Op. 11–57, at 11 ("Because it is clear that the giving of notice is not a condition precedent to a suspension of liquidation, the failure to give notice does not prevent an otherwise valid suspension."). The court further held, however, that failure to provide notice could give a surety an affirmative defense to liability on the bonds if the surety could demonstrate it was

[13] AHAC filed FOIA requests for all of the consolidated cases (i.e., court numbers 09–401, 09–442, 09–491, 10–002, 10–003, 10–311, 11–206). Shelley Decl. ¶¶ 18, 40, 45, 51, 55, 59, 64. Customs failed promptly to provide the requested documentation in response to AHAC's FOIA request related to Protest No. 2704–04–102014 for eighty-four entries in court number 09- 401. Def.'s Statement ¶ 190.

[14] AHAC's protests remain suspended in court numbers 10–002 and 10–311. *See* Pl.'s Resp. Br. 23 n.28.

[15] As shall be discussed in greater detail below, AHAC now argues its waivers of the statute of limitations of 28 U.S.C. § 2415(a) were ineffective because the statute of limitations is jurisdictional in nature and thus cannot be waived. *See* Def.'s Br. 25.

prejudiced by the lack of notice. *See id*. at ___, Slip Op. 11–57, at 13–14.

DISCUSSION

I. Certain Of The Government'S Claims Are Barred

A. Lack of Notice Does Not Invalidate a Suspension of Liquidation

Notwithstanding the court's prior ruling that a lack of statutory notice does not vitiate a suspension of liquidation, AHAC renews its argument here, asking the court to reconsider its holding. *See id*. at ___, Slip Op. 11–57, at 8. For AHAC, the lack of notice rendered all of the entries in this action "deemed liquidated by operation of law one year from the dates of entry, and Customs' causes of action accrued on those dates." Def.'s Br. 19. According to AHAC, because "Customs failed to file any of its complaints within the six-year statute of limitations running from those deemed liquidation dates[,] . . . the [G]overnment's claims are time-barred." Def.'s Br. 19–20.

The court declines AHAC's invitation to reconsider its prior ruling, and reaffirms its holding in *AHAC I*. *See AHAC I*, 35 CIT at ___, Slip Op. 11–57, at 13–14. The proper vehicle by which to raise these arguments was a motion for reconsideration pursuant to USCIT R. 59(e) within "30 days after the entry of the judgment" in *AHAC I*, not at the summary judgment phase. *See* USCIT R. 59(e). Further, it should be noted that in its papers, AHAC makes no new arguments for the court to consider. Accordingly, the court continues to find its ruling in *AHAC I* to be correct and will not disturb it now. *See AHAC I*, at ___, Slip Op. 11–57, at 9–10; *see also United States v. Great Am. Ins. Co. of N.Y.* (*Great Am. II*), 738 F.3d 1320 (Fed. Cir. 2013).

B. Because the Entries Subject to the Department's Notices of Rescission Were Deemed Liquidated Following Publication of the Notices, the Government's Suit Is Untimely As to Those Entries

AHAC argues the Government's claims in court numbers 10–002 and 10–003 and as to certain entries in 10–311 are untimely. *See* Def.'s Br. 20. In these three cases, Commerce partially rescinded its administrative reviews of the antidumping duty orders covering preserved mushrooms from the PRC exported by Raoping Xingyu Foods

Co., Ltd. and fresh garlic from the PRC[16] exported by Clipper Manufacturing Ltd. *See; Certain Preserved Mushrooms from the PRC*, 67 Fed. Reg. 53,914 (Dep't of Commerce Aug. 20, 2002) (notice of partial rescission of antidumping duty administrative review); *Fresh Garlic from the PRC*, 68 Fed. Reg. 4,758 (Dep't of Commerce Jan. 30, 2003) (final results of antidumping duty administrative review and rescission of administrative review in part).

AHAC claims that publication of the notices of the partial rescissions of these administrative reviews triggered the beginning of the six-month period in which Customs must liquidate entries. *See* Def.'s Br. 23. According to AHAC, because Customs did not liquidate the entries within this six-month period, they were deemed liquidated, which, in turn, commenced the six-year statute of limitations for pursuing collection of duties on the entries. *See* Def.'s Br. 23 (citing *United States v. Great Am. Ins. Co. of N.Y.* (*Great Am. I*), 35 CIT ___, ___, 791 F. Supp. 2d 1337, 1367–68 (2011), *rev'd in part*, 738 F.3d 1320 (Fed. Cir. 2013)). For AHAC, because Customs failed to file its collection actions in court numbers 10–002, 10–003, and 10–311 within the six-year limitations period from the dates of deemed liquidation, "Customs is time-barred from collecting any monies pertaining to the respective entries." Def.'s Br. 23 (citing *Great Am. I*, 35 CIT at ___, 791 F. Supp. 2d at 1368).

The Government maintains, however, "the notices of partial rescission did not lift the statutory suspension, nor did they notify Customs that the statutory suspension was lifted." Pl.'s Resp. to Def.'s Mot. for Summ. J. 13–14 (ECF Dkt. No. 92) ("Pl.'s Resp. Br."). Rather, for plaintiff, the notice that lifted the suspension and notified Customs "came later in the form of notice of the final results of the administrative review." Pl.'s Resp. Br. 14.

The court finds plaintiff's arguments to be meritless and thus holds that the publication of the notices of partial rescission in the Federal Register lifted the suspension of liquidation as to the relevant entries for purposes of 19 U.S.C. § 1504(d). This being the case, the statute of limitations began to run at the time the entries were deemed liquidated.

The statute "requires Customs to liquidate entries within six months of receiving 'notice' that a suspension of liquidation of such

[16] The rescission as to Clipper Manufacturing Ltd. covered thirty of the seventy-nine entries of fresh garlic at issue in court number 10–311. *See* Def.'s Statement ¶¶ 102–03. For these entries, it is undisputed that the Government did not file its case within the six-year limitations period, regardless of the date of liquidation. As shall be seen, however, AHAC executed a waiver of the statute of limitations permitting plaintiff to file its claim beyond the six- year limit, which AHAC now insists was ineffective.

entries has been removed." *NEC Solutions (Am.), Inc. v. United States (NEC II)*, 411 F.3d 1340, 1344 (Fed. Cir. 2005) (citing 19 U.S.C. § 1504(d)). "If Customs fails to timely liquidate the entries under the statute, the entries are deemed liquidated at the rate asserted at the time of entry." *Id*. (citing *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)). "Thus, in order for a deemed liquidation to occur, (1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *Fujitsu*, 283 F.3d at 1376. The Federal Circuit has explained, "[t]o be sufficient for purposes of § 1504(d), the 'notice' must be 'unambiguous' that the suspension of liquidation has been lifted, but does not need to include specific liquidation instructions from Commerce to Customs." *NEC II*, 411 F.3d at 1344 (citing *Fujitsu*, 283 F.3d at 1364; *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1276 (Fed. Cir. 2002)). The proper inquiry is therefore whether "a reasonable Customs official would have read the [notice] to provide notification that any suspension of liquidation on the [subject] entries had been removed." *See id*. at 1346.

Moreover, in *Great American I*, this Court held that a suspension[17] is actually removed when a notice of partial rescission is published in the Federal Register. *See Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1364–65. The *Great American I* Court adopted its rule based on the Federal Circuit's rationale that "the suspension of liquidation was removed when the mechanism by which the suspension was initiated was no longer in effect." *Id*. at 1363.

The notice of partial rescission that AHAC contends provided unambiguous notice to Customs that the suspension of liquidation had been lifted on the entries of preserved mushrooms states:

> Accordingly, we are rescinding in part this review of the antidumping duty order on certain preserved mushrooms from the [PRC] as to Compania Envasadora, China Processed and Raoping Xingyu. This review will continue with respect to Gerber, Green Fresh, Shantou Hongda and Shenxian Dongxing.

Certain Preserved Mushrooms, 67 Fed. Reg. at 53,914. Similarly, the notice of partial rescission of the review of the antidumping duty order on fresh garlic from the PRC reads:

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[17] Unlike this Court's recent decision in *United States v. Am. Home Assurance Co*. (*AHAC V*), 39 CIT __, __, Slip Op. 15–120 (2015), this is not a case where an injunction against liquidation was entered as the result of a challenge to a final determination by Commerce being filed in this Court.

> [W]e are rescinding this administrative review as it applies to Clipper. With this rescission, we will instruct the Customs Service to liquidate the entries during the period of review of subject merchandise from Clipper in accordance with [19 C.F.R. § 351.213(d) (2003).[18]]

Fresh Garlic, 68 Fed. Reg. at 4,759. The notice of partial rescission of the review of the antidumping duty order on potassium permanganate from the PRC, affecting only court number 09–442, provides:

> The Department is rescinding its review of the companies named in Carus' request for review because Carus has withdrawn its request. . . . Because Groupstars Chemicals, LLC is not a PRC exporter of the subject merchandise, and failed to identify any PRC exporter(s) of the subject merchandise in its review request, and with Carus' withdrawal of its review requests, the Department is rescinding this review with respect to Groupstars Chemicals, LLC.

Potassium Permanganate From the PRC, 68 Fed. Reg. 58,307 (Dep't of Commerce Oct. 9, 2003) (rescission of antidumping duty administrative review). For AHAC, these notices had the effect of both removing the suspension and giving Customs notice of the removal. *See* Def.'s Br. 14–15, 23–24.

The Government disputes AHAC's claim that the publication of the rescissions in the Federal Register served as unambiguous notice. Rather, plaintiff argues "[t]he notice that actually lifted the suspension and served to notify Customs came later in the form of notice of the final results of the administrative review as to cases 10–002 and 10–003, and in the form of liquidation instructions from Commerce as to the 30 entries in 10–311." *See* Pl.'s Resp. Br. 14. The Government concedes that "a notice of partial rescission[ ] can lift the suspension of liquidation and give notice to Customs, similar to Commerce's notice of the final results of the administrative review," and points to *Great American I* as one of the "rare cases" where this is true. *See* Pl.'s Resp. Br. 14; *see Great Am. I*, 35 CIT __, 791 F. Supp. 2d 1337. Specifically, plaintiff claims that, in order to satisfy the statute, the notice must explicitly state the suspension has been lifted.

The courts, however, have clarified that explicit language stating that a suspension has been lifted is not required to remove a suspen-

[18] "If the Secretary rescinds an administrative review (in whole or in part), the Secretary will publish in the Federal Register notice of 'Rescission of Antidumping (Countervailing Duty) Administrative Review' or, if appropriate, 'Partial Rescission of Antidumping' (Countervailing Duty) Administrative Review." 19 C.F.R. § 351.213(d)(4).

sion of liquidation so long as "a reasonable Customs official, with knowledge in these matters, would have read the message to provide unambiguously that any suspension of liquidation on [the importer's] entries had been removed." *NEC Solutions (Am.), Inc. v. United States (NEC I)*, 27 CIT 968, 977, 277 F. Supp. 2d 1340, 1348 (2003); *see also Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1364 ("Language explicitly stating that a suspension is removed is not required to remove a suspension of liquidation.").

In addition, the Government argues that, unlike here, in *Great American I*, "the notice of partial rescission contained language indicating that liquidation instructions should follow," which served as an indication that the suspension of liquidation had been lifted. Pl.'s Resp. Br. 17 (citing *Freshwater Crawfish Tail Meat From the PRC*, 67 Fed. Reg. 50,860, 50,861 (Dep't of Commerce Aug. 6, 2002) (notice of rescission, in part, of antidumping duty administrative review for the period September 1, 2000, through August 31, 2001)). The Government, however, has pointed to no case, and the court can find none, to support its claim that to end the suspension of liquidation, proper notice must "contain[ ] indicia that liquidation should follow." *See* Pl.'s Resp. Br. 17. Moreover, it can hardly be the case that the omission of a statement that liquidation instructions would follow the lifting of the suspension would have any real meaning because the intent to issue such instructions could be presumed. Therefore, despite the Government's claims to the contrary, it is apparent that to be effective, the notice need not contain language directing Customs that liquidation instructions are forthcoming.

Next, the Government contends it is significant that the partial notice of rescission in *Great American I* "provided Customs with the appropriate duty rate to apply to the relevant entries." Pl.'s Resp. Br. 17. According to the Government, "[b]y contrast, the notices of partial rescission in cases 10–002, 10–003, and the 30 entries in 10–311, contained no such information and, thus, could not and did not lift the suspension." Pl.'s Resp. Br. 17. The Federal Circuit, however, has rejected this argument, holding that the duty rate need not be included in the notice for purposes of 19 U.S.C. § 1504(d). *See NEC II*, 411 F.3d at 1345 ("[N]either the statute nor our precedent requires that the duty rate be included in the notice in order to satisfy the requirements of 19 U.S.C. § 1504(d)."). Moreover, this argument is inconsistent with the Government's assertion that, to be sufficient to lift the suspension of liquidation, the notice must contain language that liquidation instructions (and hence the rate) will be forthcoming.

Further, the Government makes a related argument that, "unlike a notice of final results or a notice of total rescission, which conclude an

administrative review as to all parties, a notice of partial rescission suffers from a contextual ambiguity—the administrative review will continue as to some exporters." Pl.'s Resp. Br. 14. Thus, for plaintiff, without clear direction to Customs that liquidation should follow, "Customs has no way of knowing whether the exporters named in the notice of partial rescission remain subject to a country-wide antidumping rate," and therefore "must await the results of the administrative review." *See* Pl.'s Resp. Br. 15. Why alerting Customs to the rate to which the merchandise is subject should be a prerequisite to starting the deemed liquidation clock, however, is unclear. As noted, explicit language directing Customs that liquidation will follow is unnecessary, as is the specific duty rate at which the entries will be assessed. All the law requires is that Customs be given notice that the suspension has been lifted. Thus, while the context may be ambiguous, the effect of these notices of partial rescission is not. *See NEC II*, 411 F.3d at 1345, *Fujitsu*, 283 F.3d at 1381–83; *Int'l Trading*, 281 F.3d at 1275–76; *Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1364.

Accordingly, the court holds that Commerce's publication of the notices of partial rescission in the Federal Register was sufficient, for purposes of 19 U.S.C. § 1504(d), to remove the suspension of liquidation of the entries in court numbers 10–002 and 10–003 and certain entries in 10–311. In addition, the publication of the notices in the Federal Register constituted notice to Customs that the suspensions of liquidation had been lifted as to those entries. Thus, the first two requirements of § 1504(d) were satisfied. Because Customs failed to liquidate within six months of the date of publication of the notices of rescission in the Federal Register, these entries were liquidated by operation of law at the entered rates, at which time the Government's cause of action on the bonds began to accrue. Having failed to bring its collection actions within six years of the dates these entries were deemed liquidated, the Government's right to collect any duties from AHAC on the entries in court numbers 10–002, 10–003, and thirty of the seventy-nine entries of fresh garlic in court number 10–311 is time-barred. *See* 28 U.S.C. § 2415(a).

C. Waivers of the Statute of Limitations

As noted, AHAC executed time-limited waivers of the statute of limitations in court numbers 09–491 and 10–311, covering a total of 190 entries. In accordance with the waivers' terms, the Government was permitted to file its collection actions on the bonds covering these 190 entries within an extended period beyond the six-year statute of limitations. The statute providing the six-year limitations period on a collection action reads, in relevant part:

> [E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

28 U.S.C. § 2415(a). AHAC now claims its waivers were ineffective because the statute of limitations set forth in § 2415(a) is jurisdictional in nature, and therefore cannot be waived. Def.'s Br. 25. As a result, for AHAC, the Government's suit seeking recovery on the bonds is untimely.

The court finds AHAC's argument unconvincing and holds the limitations period in § 2415(a) is non-jurisdictional, and therefore waivable. Accordingly, the Government's suits in court numbers 09–491 and 10–311 were timely brought.

The primary purpose of most statutes of limitations is "to protect defendants against stale or unduly delayed claims. Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). On the other hand, if a statute of limitations is jurisdictional, it is not waivable because the court is divested of subject matter jurisdiction at the expiration of the limitations period.

A statute of limitations is not jurisdictional "unless Congress provides a 'clear statement' to that effect." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (describing the court's adoption of "a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has 'clearly state[d]' that the rule is jurisdictional." (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)) (alteration in original))). "[I]n case after case, we have emphasized . . . that jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *Kwai Fun Wong*, 135 S. Ct. at 1633 n.4. In other words, for a statute of limitations to be jurisdictional, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional." *Id.* at 1632.

In *Kwai Fun Wong*, in evaluating the statute of limitations governing claims under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), the Supreme Court found "no clear statement" that the statute was jurisdictional. *Id*. In analyzing the text of the statute, the Court explained that the language of the provision "does not define a federal court's jurisdiction . . . [or] address its authority to hear untimely suits." *Id*. at 1633. The Supreme Court held the statute of limitations at issue contained "run-of-the-mill" language, a jurisdictional provision was not included in the text of the statute's limitations provision, and the legislative history equally failed to provide a "clear statement" specifying the statute's jurisdictional nature. *Id*. (internal quotation marks and citation omitted). Accordingly, the Court concluded § 2401(b) is non- jurisdictional. *Id*.

In like manner, the court finds that § 2415(a) is non-jurisdictional and thus subject to waiver. AHAC argues the statutory text demonstrates the subsection's provisions are mandatory, requiring the sanction of dismissal. Def.'s Br. 25–26. But, as the Government points out, statutes of limitations are by their nature characterized by language that mandates the dismissal of a claim if the time limits are not adhered to. *See* Pl.'s Resp. Br. 22. AHAC insists that the language in the statute "shall be barred unless" mandates dismissal. Def.'s Br. 25–26. This same argument, however, was found unconvincing in *Kwai Fun Wong*. *Kwai Fun Wong*, 135 S. Ct. at 1632. The Supreme Court explained that statutes including "shall be forever barred" language have been found to be both jurisdictional and non-jurisdictional statutes of limitations; the inquiry is not based on words alone.[19] *Id*. at 1634; *see also Henderson v. Shinseki*, 562 U.S. 428, 439 (2011) (finding that even though the statute at issue was cast in mandatory language, it provided "no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes"); *Scarborough v. Principi*, 541 U.S. 401, 413 (2004).

Next, AHAC claims the jurisdictional nature of the subsection is demonstrated by the intents and purposes behind its enactment outlined in the statute's legislative history. Def.'s Br. 26–27. The Supreme Court indicated in *Kwai Fun Wong*, however, that legislative history may only rebut the non-jurisdictional presumption when it evidences a "clear statement" of jurisdiction. *Kwai Fun Wong*, 135 S. Ct at 1631–33 ("Finally, even assuming legislative history alone could provide a clear statement (which we doubt), none does so here.").

[19] As mentioned, § 2401(b), the statute of limitations at issue in *Kwai Fun Wong*, contained the language "shall be forever barred" and was nonetheless held to be non- jurisdictional. *Kwai Fun Wong*, 135 S. Ct at 1634–35. Furthermore, another statute of limitations, 15 U.S.C. § 15b, includes this language and has also been found to be non- jurisdictional and therefore subject to equitable tolling. *Id*. at 1634.

AHAC has failed to point to anything in the statute or its legislative history that constitutes a "clear statement" that Congress intended to divest the court of jurisdiction through this limitations period.

Defendant next contends the legislative history for the subsection demonstrates that the provision sought to achieve equality of treatment between the contract claims of private individuals and those of the United States Government. *See* Def.'s Br. 27 (quoting S. Rep. No. 89–1328, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2503 ("'At that hearing it was noted that the Government litigation covered by the bill arises out of activity which is very similar to commercial activity. Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. Therefore it is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity.'" (quoting H.R. Rep. No. 89–1534, at 4 (1966))).

The Supreme Court, however, has found that a statutory provision with similar intents and purposes was not jurisdictional, and the same is true here. *See Kwai Fun Wong*, 135 S. Ct. at 1636–37. That is, just as the Supreme Court in *Kwai Fun Wong* found the Federal Tort Claims Act "treats the United States more like a commoner than like the Crown," the legislative history AHAC cites to defeats its own argument. *See id*. at 1637. "[I]n stressing the Government's equivalence to a private party, the [statute] goes further than the typical statute waiving sovereign immunity to indicate that its time bar allows a court to hear late claims." *Kwai Fun Wong*, 135 S. Ct. at 1638. That a statute of limitations constitutes a waiver of sovereign immunity is a common justification for finding a statute to be jurisdictional in nature. The Supreme Court has held, however, that where a statute is intended to put the United States on equal footing with private parties, the purpose of the statute is to treat the Government as a regular litigant. In other words, when enacting a statute of limitations, if Congress's intent is to treat the United States as any party engaged in commercial activity, the argument that the statute creates a limited waiver of sovereign immunity, and thus is jurisdictional, loses its persuasiveness. Indeed, it cuts against the idea that the statute is jurisdictional by expressing an intent to treat the Government like any other party.

Further, AHAC contends that, where statutes of limitations have the purpose of achieving a broader system-related goal, as distinct

from the ordinary purpose of protecting defendants against aged claims, the Supreme Court has found those statutes to be jurisdictional in nature. *See* Def.'s Br. 26 (citing *John R. Sand & Gravel,* 552 U.S. at 133–34). Goals articulated for jurisdictional statutes of limitations thus encourage "facilitating the administration of claims" against the Government and "limiting the scope of a governmental waiver of sovereign immunity." *John R. Sand & Gravel Co*., 552 U.S. at 133; *see also United States v. Brockamp*, 519 U.S. 347, 352 (1997) (holding a statute of limitations was jurisdictional because, among other reasons, "read[ing] an 'equitable tolling' exception into [the statute] could create serious administrative problems by forcing the [Internal Revenue Service] to respond to, and perhaps litigate, large numbers of late claims"). These considerations, however, are not of particular concern where, as here, the Government is bringing suit against a private entity, not the other way around.

Finally, this Court has previously suggested that the limitations period set forth in 28 U.S.C. § 2415(a) is waivable and thus non-jurisdictional. *See United States v. Canex Int'l Lumber Sales Ltd*., 32 CIT 407, 410 (2008) ("[The defendant] was therefore notified of the possibility of further proceedings with regard to liquidated damages and had ample opportunity *to execute the statute of limitations waiver* or petition for mitigation proceedings as necessary." (emphasis added)).

Based on the forgoing, the court holds the six-year statute of limitations period in 28 U.S.C. § 2415(a) is non-jurisdictional and therefore subject to waiver. Accordingly, the time- limited waivers executed by AHAC in court numbers 09–491 and 10–311 were effective and the Government's collection actions with respect to the 190 entries covered by these two cases were therefore timely brought.

II. AHAC MAY RAISE ITS DEFENSES

The Government contends that AHAC may not interpose its contractual defenses to liability on the bonds because the surety failed to appeal Customs' denials of its protests to this Court. For plaintiff, the matters raised by AHAC in this suit were decided by the unappealed protest denials, and therefore "became 'final and conclusive' under 19

U.S.C. § 1514(a)[20] when AHAC failed to . . . contest the denial of its protests." *See* Pl.'s Resp. Br. 23. Specifically, the Government argues:

> AHAC is precluded from defending the Government's claims on the basis of Customs' failure to issue personal notices of suspension of liquidation pursuant to 19 U.S.C. § 1504(c) and from challenging Customs' interest charges under 19 U.S.C. §§ 1505(d) and 1677g. These Customs decisions became "final and conclusive" under 19 U.S.C. § 1514(a) when AHAC failed to protest these issues or contest the denial of its protests in this Court.

Pl.'s Resp. Br. 23. Thus, the Government maintains that AHAC's failure to bring suit challenging Customs' denial of its protests prevents the surety from raising prejudicial lack of notice as a defense in this action, and further prevents AHAC from objecting to certain interest amounts charged to its bonds. *See* Pl.'s Resp. Br. 23–24.

The court finds AHAC is not foreclosed from arguing as defenses in this collection action that: (1) it was prejudiced by failing to receive § 1504(c) notice; (2) § 1677g interest does not accrue on outstanding duties secured by the bonds; (3) § 1505(d) interest does not apply to antidumping duties; and (4) the Government is not entitled to § 580 and equitable prejudgment interest.

A surety, of course, may protest Customs' liquidation determinations on the merchandise for which it undertakes to secure the pay-

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[20] 19 Section 1514(a) specifies that:

> [A]ny clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title;
>
> *shall be final and conclusive upon all persons* (including the United States and any officer thereof) *unless a protest is filed* in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title.

19 U.S.C. § 1514(a) (emphases added).

ment of duties. *See* 19 U.S.C. § 1514(a). In doing so, however, it largely stands in the shoes of the importer, making arguments the importer could make, such as the correct amount the importer owes on the entries secured by its bond. *See id*. If the protest is denied with respect to these protestable matters, the surety must appeal to this Court or be bound, along with the importer, by the rule of finality as to the liquidation itself (i.e., the amount owed by the importer). *See United States v. Utex Int'l Inc*., 857 F.2d 1408, 1414 (Fed. Cir. 1988).

As to defenses related to its contractual obligations under a bond, however, a surety is not precluded from raising them in a collection action brought by the Government. This is the case even if the defenses replicate claims it made, or could have made, in a protest brought to determine an importer's liability on liquidation. *See id*. ("Once the administrative decision represented by a liquidation is made, the importer must file such a protest in order to secure further administrative review, as well as to preserve his right to judicial review. However, the issue at bar does not relate to administrative review of liquidation, brought by the importer or surety, for the time for such review is long past." (internal quotation marks and citation omitted)).

AHAC may raise its defenses because a cause of action of the kind presented here is on the contract of insurance, not on the entry of goods into the United States. That is, the subject of a protest brought by or in the shoes of an importer covers matters contained in the Tariff Act of 1930. *See* 19 U.S.C. ch. 4. The cause of action in a collection action on a bond, on the other hand, does not arise under the Tariff Act of 1930; rather, its jurisdiction is separately provided for in 28 U.S.C. § 1582(2) ("The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury.").

Although expressed differently at times, courts have long recognized that appeals following protest denials, and collection actions brought by the Government, travel on different tracks and have separate jurisdictional bases. *See United States v. Sherman & Sons Co*., 237 U.S. 146 (1915). "[W]e hold that the importer is not concluded by the reliquidation order, and when suit is brought for the amount claimed to be due he may file his plea and be heard in his defense as in other cases, even though he did not file a protest and make the payment required in the case of the original liquidation." *Id*. at 158.

Customs' power to liquidate

> is an incident of the fact that the assessment and collection of duties is an administrative matter,—no notice or hearing being necessary, since the assessment is *in rem* and against the foreign goods which are sought to be entered. . . . [I]f . . . it should be discovered that . . . the United States has been deprived of its just dues, and if the goods themselves cannot be found, so as to be forfeited, the inability to proceed *in rem* would not prevent the [G]overnment from bringing a suit *in personam* to enforce the importer's personal liability for the debt which accrued and which rightfully should have been paid when the foreign merchandise was entered at the domestic port.

Id. at 153.

The concept that an importer's liability is fixed (i.e., "subsumed") by liquidation, but that a surety's defenses to liability on its bond are preserved, was affirmed by the Federal Circuit's holding that, under contracts of insurance, defenses necessarily "are personal to [the surety] and are separate and distinct from [an importer's] protest." *See St. Paul Fire & Marine Ins. Co. v. United States (St. Paul I)*, 959 F.2d 960, 964 (Fed. Cir. 1992).

> [T]he [G]overnment argues that St. Paul's claims are barred because it failed to file a timely protest. However, the [G]overnment admits that if St. Paul had not filed a protest and had refused to comply with the [G]overnment's demand for payment, and the [G]overnment had proceeded to sue St. Paul, no protest would have been required to assert contractual defenses against the [G]overnment's claim. . . . The justiciability of St. Paul's claims is not dependent on [the importer's] protest, nor is it prejudiced by not being part of that protest. One way to clear away the fog is simply to look at the contract claim only—that is, apart from the appeal of [the importer's] protest.

Id. (citing *Utex*, 857 F.2d at 1413–14).

More recently, in *United States v. Cherry Hill Textiles, Inc.*, the Court recognized that, although Customs has the authority to make decisions impacting liquidation directly, it does not have authority to make determinations other than those authorized by § 1514. *United States v. Cherry Hill Textiles, Inc*., 112 F.3d 1550, 1554 (Fed. Cir. 1997) ("Congress did not 'authorize the Collector to make findings of fraud' and compel the importer to defend against the fraud determination through the protest mechanism." (quoting *Sherman*, 237 U.S. at 155)).

In *Utex*, moreover, the Court held that a surety need not file a protest and deposit the demanded duties before its claims (or defenses) could be heard in a collection action. *See Utex*, 857 F.2d at 1414 ("Sentry states, without contravention, that protest and advance payment of liquidated damages were not required of defendants in a district court action for damages, prior to enactment of the Customs Courts Act of 1980, which transferred jurisdiction of actions on a surety bond from the district courts to the Court of International Trade, 28 U.S.C. § 1582. There is no suggestion in the legislative history that Congress intended to change the status of the surety in such suits. Indeed, Sentry points out that the Customs Courts Act of 1980 contained a new provision, 28 U.S.C. § 1583, that authorized sureties to implead third parties or file cross- claims in actions on a bond brought under 28 U.S.C. § 1582, an opportunity that is not readily harmonized with the [G]overnment's position that the surety must pay all claimed damages in full before raising any defense."); *see also id*. ("It is not characteristic of either the law of surety or the law of contracts that a defendant must routinely pay," as it must do in order to file a protest, "the amount demanded prior to judicial determination of contractual liability. Absent statutory directive or clear Congressional intent to the contrary, we do not impose it. The cases cited by the [G]overnment referring to finality of assessment absent a timely protest all refer to duties and related exactions subsumed in final liquidation. We entirely agree that both sides to this action are now barred from challenging the liquidation. But in a suit for damages brought by the [G]overnment, it appears clear that *historically the surety was not required to file a protest and pay the full demanded damages in advance, in order to preserve its right to defend on the issue of liability*. We conclude that the 1980 legislative enactments did not change the right of the surety to defend against a claim for liquidated damages. Under the circumstances that here prevail the surety was not required *to file an administrative protest and pay the damages assessed*, as prerequisites to defending against the charge." (emphases added)); *United States v. Toshoku Am., Inc*., 879 F.2d 815, 818 (Fed. Cir. 1989) (explaining that, even following liquidation, "[p]roof that the importer has complied with the conditions of the bond has traditionally been and still remains a complete defense to a collection suit brought on the bond").

Thus, the rule found in both law and custom remains that, in a case brought by the Government to collect under a contract of insurance, the surety is not prevented from raising defenses to defeat the Gov-

ernment's claims, even those that would be protestable matters if raised by or on behalf of an importer.[21]

It is also worth noting that the rule found in *Utex* and other cases is a sensible one. First, there are thousands of protests every year and the great majority are resolved at the administrative level using Customs' administrative procedures. By way of contrast, there are only a handful of collection actions brought by the Government to recover on bonds securing the payment of duties. These suits proceed without any prior administrative proceedings and, like the one now before the court, may involve a great deal of money and are subject to the usual discovery and motion practice typical of lawsuits. Moreover, these cases will normally result in a reasoned decision at summary judgment and, in some cases, a subsequent decision with findings of fact and conclusions of law following trial. It would be a peculiar situation indeed if the unreasoned determination[22] of an administrative agency could preclude a party in an action before this Court from interposing its defenses to insurance coverage and thereby circumvent normal court procedures. Nor would it make much practical

[21] Citation to *Hartford Fire Ins. Co. v. United States (Hartford II)*, 544 F.3d 1289 (Fed. Cir. 2008), does not aid the Government's case. *See* Pl.'s Resp. Br. 24. The *Hartford* case involved a unique set of procedural facts. *See Hartford II*, 544 F.3d at 1290–91. It is common for insurance companies to bring declaratory judgment actions to determine their duties and obligations under insurance contracts prior to having a claim lodged by an insured. This is what the plaintiff sought to achieve in *Hartford*. *See Hartford Fire Ins. Co. v. United States (Hartford I)*, 31 CIT 1281, 1281, 507 F. Supp. 2d 1331, 1332 (2007), *aff'd*, 544 F.3d 1289 (Fed. Cir. 2008). At the time Hartford brought its case, Customs had sent the company a statement of charges for duties owed by its defaulting importer, but the Government had not yet filed a collection action. Acting as many insurance companies would, Hartford brought a declaratory judgment action to have its duties and obligations determined by a Court prior to the Government bringing suit. *See Hartford II*, 544 F.3d at 1291. Because the Court of International Trade (like all federal courts) is a court of limited jurisdiction, Hartford sought to bring its declaratory judgment action under 19 U.S.C. § 1581(i), the Court's "catch-all" jurisdictional provision. *See Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992). The Federal Circuit held, however, that § 1581(i) jurisdiction was not available to Hartford because it could have sought relief by protesting the bill from Customs for the duties left unpaid by the insured importer. *Hartford II*, 544 F.3d at 1290. The new rule expressed in *Hartford*, however, did not address an action brought by the Government seeking to enforce a contract of insurance against a surety; a case that has an entirely different jurisdictional basis. *See* 28 U.S.C. 1582(2). Accordingly, *Hartford* did not overrule *Utex* or *Toshoku*, or indeed even mention them.

[22] Typically, Customs gives no reasons when it denies a protest, but merely circles the word "[d]enied for the reason checked." U.S. Customs & Border Prot. Form 19 (05/10), *available at* http://www.cbp.gov/sites/default/files/documents/CBP_Form_19.pdf. As a result, these protest demands are accorded no deference. *See United States v. Mead Corp*., 533 U.S. 215, 228 (2001) ("The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." (alteration in original) (internal quotation marks omitted) (quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944))).

sense in these commercial cases to require a surety to establish certain of its contractual rights in one forum, and then require the surety to establish other rights under the same contract of insurance as defenses elsewhere. Therefore, it is apparent that, despite AHAC's failure to appeal the protest denials, it is not bound by the rule of finality and may interpose its defenses here.

III. AHAC'S CLAIMS OF PREJUDICE

A. Legal Framework

As noted in *AHAC I*, "although Customs' failure to provide notice does not invalidate the suspensions, if AHAC was actually harmed as a result of Customs' omission, it would be entitled to appropriate relief." *AHAC I*, 35 CIT at __, Slip Op. 11–57, at 13. Generally, under insurance law, if a surety is prejudiced by the actions of the insured,[23] then the contract of insurance may be voided in whole or in part. *See generally Chapman v. Hoage*, 296 U.S. 526, 531 (1936); Restatement (First) of Security § 128 (Am. Law Inst. 1941).

AHAC argues it was prejudiced by Customs' failure to provide the statutorily-required notice of suspension of liquidation and, had it known of the suspensions, it would have taken measures to mitigate its liability under the bonds. Def.'s Br. 32–35. Because this claim is raised as a defense in a collection action, the burden is on AHAC to both plead and demonstrate it was prejudiced. *See Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1355. "Whether an error is prejudicial or harmless depends on the facts of a given case." *AHAC I*, 35 CIT at __, Slip Op. 11–57, at 14.

With respect to the claims of prejudice, the Government contends AHAC has not provided *any evidence* that, if the company received notice, it would have, or for that matter could have, taken any action to decrease its risks under the bonds. Pl.'s Br. 16–20. AHAC, however, maintains it has produced ample evidence that it could and would have acted, and urges the court to dismiss the Government's claims on account of the prejudice caused by the lack of notice. *See* Def.'s Br. 30–35. In other words, AHAC seeks to have its duties and obligations under both the single transaction and continuous bonds discharged as a result of the prejudice suffered by the Government's failure to

[23] The text on the bonds indicates that the United States is the insured. *See, e.g.*, Def.'s Resp. to Ct.'s Order, Ex. 1, at 1 (ECF Dkt. No. 138) (Continuous Bond No. 270712146 issued by AHAC) ("In order to secure payment of any duty, tax or charge and compliance with law or regulation as a result of activity covered by any condition referenced below, we, the below named principal(s) and surety(ies), bind ourselves to the United States in the amount or amounts, as set forth below.").

provide the statutorily-required notice that liquidation had been suspended. *See* 19 U.S.C. § 1504(c).

Importantly, if a claim of prejudice is based on the failure of a government entity to perform an act, the resulting harm must be of the sort the required action was designed to prevent. *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996) ("Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect."). The Federal Circuit recently indicated that the party seeking relief from its obligations under a bond must demonstrate concrete, cognizable, "substantial prejudice." *Great Am. II*, 738 F.3d at 1330. This standard is in line with much of the law of insurance. Notably, "[t]he theory of discharge began as a state law *defense* that a surety could assert to avoid enforcement of its bond obligation on the grounds that the obligee (the beneficiary of the bond) had taken improper actions which prejudiced the surety by increasing its financial risk." *Lumbermens Mut. Cas. Co. v. United States*, 654 F.3d 1305, 1313 (Fed. Cir. 2011); *see also Hartford Fire Ins. Co. v. United States*, 772 F.3d 1281, 1288 (Fed. Cir. 2014) (quoting *Great Am. II*, 738 F.3d at 1332). In such cases, prejudice must be established by a preponderance of the evidence at trial. *Fabil Mfg. Co. v. United States*, 237 F.3d 1335, 1340–41 (Fed. Cir. 2001).

Courts have generally found that the burden placed on an insurer to prove it suffered prejudice by reason of a breach of a notice provision is a substantial one. *Intercargo*, 83 F.3d at 396 ("A party is not 'prejudiced' by a technical defect simply because that party will lose its case if the defect is disregarded. Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect."); *Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1359 ("Without a fact-specific demonstration of injury to an interest that the notice provisions were designed to protect, the court cannot conclude that [the surety] has pled *with particularity* the prejudice suffered by the lack of notice."). For example, courts have required that, to create a triable issue of fact with respect to the issue of prejudice due to late notice, an insurer must demonstrate with competent evidence that it suffered a change in position adverse to its interests. That is, the insurer must show a substantial likelihood that it could have defeated the underlying claim against the insured, settled the case for a smaller sum than that for which it was ultimately settled, suffered tangible economic injury, or irretrievably lost a substantial right or the ability to mount a defense. *See Goodstein v. Cont'l Cas. Co*., 509 F.3d 1042, 1058 (9th Cir. 2007); *British Ins. Co. of*

Cayman v. Safety Nat'l Cas., 335 F.3d 205, 212 (3d Cir. 2003); *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig*., 15 F. 3d 1249, 1253–54 (3d Cir. 1994); *Ins. Co. of Pa. v. Associated Int'l Ins. Co*., 922 F.2d 516, 524 (9th Cir. 1991); *Unigard Sec. Ins. Co. v. N. River Ins. Co.*, 4 F.3d 1049, 1068–69 (2d Cir. 1993); *Granite State Ins. Co. v. Clearwater Ins. Co*., No. 09 Civ. 10607, 2014 WL 1285507, at *20–21 (S.D.N.Y. Mar. 31, 2014) ("[O]ne method to defeat liability under contracts for reinsurance is for the reinsurer to prove that the delay was 'material or demonstrably prejudicial.'" (citation omitted)). Finally, the claimed prejudice must relate to particular bonds, not to a surety's business in general. *See Great Am. II*, 738 F.3d at 1330.

Therefore, in order to be released from its contractual obligations by reason of having suffered prejudice, AHAC must demonstrate: (1) Customs failed to provide the required statutory notice that liquidation had been suspended; (2) the purpose of the notice provision is to protect AHAC from injury to its interest with respect to being liable on the bonds; and (3) AHAC suffered actual prejudice with respect to its obligations on the bond due to Commerce's failure to provide the required notice of suspension. Moreover, to establish prejudice, "courts 'reject speculation, and require evidence of concrete detriment resulting from delay, together with some specific harm to the insurer caused thereby.'" *Goodstein*, 509 F.3d at 1058 (quoting *Canron, Inc. v. Fed. Ins. Co*., 918 P.2d 937, 941 (Wash. Ct. App. 1996)).

First, as to the notice provision, it is evident that Customs failed to provide the notice required by § 1504(c). Def.'s Statement ¶¶ 114–17. The Government asserts it provided AHAC with actual notice because Customs sent notice to AHAC's former agent, Shea. Pl.'s Br. 16–18; Pl.'s Resp. Br. 4. The Government also appears to claim that AHAC had actual notice, or at least knowledge, that its bonds secured entries subject to antidumping duties. Pl.'s Br. 19. These arguments, however, simply do not take the place of the notice Congress directed Customs to give, the purpose of which was to protect sureties. The Government's assertion that notice to a stranger to the contracts of insurance, an agent that had been fired by AHAC and which never informed AHAC of the notice, could be said to constitute actual notice is too much of a stretch to be seriously considered. In addition, the Government has produced no evidence that any AHAC employee ever saw any of the publications in the Federal Register, that the company was under any statutory duty to monitor such publications, or that notice to a surety by publication was authorized.

Accordingly, the court finds the alleged service on AHAC's previous agent, Shea, instead of GSIS, the actual agent and underwriter of the

bonds, does not satisfy the notice requirements of § 1504(c). *See* 19 U.S.C. § 1504(c) ("If the liquidation of any entry is suspended, the Secretary shall by regulation require that notice of the suspension be provided, in such manner as the Secretary considers appropriate, to the importer of record or drawback claimant, as the case may be, and to *any authorized agent and surety of such importer of record or drawback claimant*." (emphasis added)). Moreover, the statute requires that both the authorized agent and the surety itself be given notice. Even if there could be some argument that service on Shea was sufficient, there is no factual dispute as to whether AHAC received notice. The Government has not submitted evidence sufficient to meet its burden on summary judgment as to whether it sent the required statutory notice to AHAC. That is, the Government's claim that it served Shea, and its proffer of a "screen shot" dated in 2010, without more, is insufficient for a reasonable jury to conclude AHAC received actual or constructive notice.

Second, the legislative history of § 1504(c) demonstrates an intent to protect sureties from greater risk under bonds. H.R. Rep. No. 95–621, at 25 (1977) ("The addition of this subsection gives notice to the sure[t]y companies and other third parties that there is a potential for loss. Thus, the sureties can take appropriate measures upon receiving this notice to make sure that at least as to continuing activities, the risk of loss will be minimized."). Also, it is clear that Congress, by enacting the amendments surrounding § 1504(c), endeavored to protect "[s]urety companies, which are jointly liable with importers for additional duties, [so they] would be better able to control their liabilities. Sureties would also be better protected against losses resulting from the dissolution of their principals in instances where there has been undue delay in liquidating entries." *Id*. at 4.

In support of AHAC's argument that it suffered injury as a result of Customs' failure to provide notice, the company insists that the required notice "would have alerted AHAC to increased risk of loss on its bonds, which could have led AHAC to take remedial measures." Def.'s Br. 31. AHAC maintains, moreover, that its financial risks were increased by Commerce's failure to provide notice of the suspended liquidation, principally because, had it received notice, it could have (1) demanded more collateral, (2) terminated the bonds, or (3) taken other actions to protect its import duty bond business generally. *See* Def.'s Br. 32–35; Def.'s Resp. Br. 7–8.

The court's inquiry now turns to the question of whether AHAC has presented sufficient evidence of prejudice to be entitled to summary judgment on its defense or to create a triable issue of fact regarding

its liability on the bonds. *See AHAC I*, 35 CIT at __, Slip Op. 11–57, at 13–14. Here, there are two types of bonds at issue, and the court will discuss AHAC's claims with respect to each separately.

B. Single Transaction Bonds

As to the single transaction bonds, the court finds AHAC has not shown prejudicial harm from Commerce's failure to provide it with notice of suspension as required by 19 U.S.C. § 1504(c) to prevail on summary judgment.

First, AHAC claims it could have demanded additional collateral from the importers if it was aware that liquidation had been suspended. Def.'s Br. 34. Defendant, however, has not established any basis on which it could have demanded more collateral after the single transaction bonds were executed. As a surety, AHAC's duties and obligations under the single transaction bonds attached when each bond was executed and each individual entry was made. *See Great Am. II*, 738 F.3d at 1330. AHAC has failed to provide any contractual basis by which a post-execution demand for additional collateral from the importer would have amounted to more than a unilateral attempt to modify its preexisting contract without offering any consideration in return. In addition, AHAC has provided no practical reason why any of its importers would have felt compelled to provide additional collateral. That is, because the agreement to act as a surety for the importer was complete once the single transaction bonds were executed, the importers had no reason to put up more collateral. This holding is consistent with the Federal Circuit's ruling in *Great American II*, where the Court rejected similar arguments, noting that, under a single transaction bond, a surety's obligations have already attached and it would therefore be unable to alter its liability on the bond. *Id*.

AHAC's argument that it could have obtained, at an earlier date, experienced counsel to investigate its liability exposure and alter future business policies accordingly, are equally unavailing because this is irrelevant to the single transaction bonds. *See id*. ("Great American argues that the [G]overnment's failure to send it a separate notice of suspension injured it because, had it gotten such a notice, it could have sought reinsurance, ceased doing business with the importer to limit its future risk, or attempted to minimize its loss on these bonds by participating in the administrative review of the duties at issue and arguing for a lower rate for the entries covered by the bonds. But the trial court correctly recognized that certain of the identified possible actions are irrelevant to the single-transaction bonds at issue here, because altering future business policies could

not limit the risk Great American had already incurred under the bonds in question."). Thus, obtaining experienced counsel would not have helped AHAC to mitigate its losses; nor would termination of any of the single transaction bonds have been possible for AHAC. *See Great Am. I*, 35 CIT at __,791 F. Supp. 2d at 1356 ("Termination is not a legal option for [a single transaction bond] surety.").

Further, the court rejects AHAC's contention that it suffered prejudice with respect to the single transaction bonds because it could have instructed GSIS, its underwriter, to stop issuing additional bonds securing entries of merchandise subject to antidumping duty orders. While it is true that if AHAC had received notice it may not have issued additional single transaction bonds, this is just a reiteration of AHAC's argument regarding future business practices. As this Court previously found in *Great American I*, "any limitations on future bond issuance by an agent do not affect the surety's liability on the [single transaction bonds] already executed on the surety's behalf." *Id*. at __, 791 F. Supp. 2d at 1357. Put another way, had it received notice, there is nothing that either AHAC or GSIS could have done to limit AHAC's risk under the single transaction bonds that had already been issued.

In sum, to prevail on its prejudice defense at summary judgment, AHAC must show it suffered cognizable prejudice with respect to its liability as to particular single transaction bonds (i.e., specific contracts of insurance) on account of Commerce's failure to provide notice that liquidation of the entries secured by those particular bonds had been suspended. It has not done so. *See Great Am. II*, 738 F.3d at 1330.

C. Continuous Bonds

As to the continuous bond, however, the facts are different because the bonds are different. The *Great American I* Court

> acknowledge[d] that the situation could be quite different for [continuous bonds] because, on a [continuous bond], the surety can terminate the bond as to future entries. In [*Hanover Ins. Co. v. United States*], the court mentions the legislative history of the notice provisions of section 1504: "[T]he House committee explained, thus, the sureties can take appropriate measures upon receiving this notice to make sure that at least as to continuing activities, the risk of loss will be minimized." A [continuous bond] covers entries over a period of time. For a [continuous bond] surety, notice of a suspension, in effect, puts the surety on notice of activity by its principal that involves increased risk. Therefore, a [continuous bond] surety has the ability to terminate the bond and prevent future liability. In con-

> trast, the [single transaction bonds] at issue each covered a discrete activity pursuant to a single entry. Termination is not a legal option for a [single transaction bond] surety.

Id. at __, 791 F. Supp. 2d at 1356 (quoting *Hanover Ins. Co. v. United States*, 25 CIT 447, 455 (2001)) (citing 19 C.F.R. §§ 113.27, 113.61). As noted, unlike a single transaction bond, a continuous bond can be terminated by the surety. 19 C.F.R. § 113.27(b) ("A surety may, with or without the consent of the principal, terminate a Customs bond on which it is obligated. The surety shall provide reasonable written notice to . . . the director of the port where the bond was approved. . . ."). It is clear that the purpose of the notice provisions—to alert AHAC of the potential for increased risk of loss and to afford it an opportunity to mitigate the loss—has more meaning with respect to continuous bonds.[24] Because of the possibility of termination of the continuous bond after it received notice of the suspension of liquidation, AHAC's arguments that it would have demanded additional collateral or terminated its continuous bond business (and hence its existing continuous bond) have more traction.

First, a demand for more collateral is dramatically different when a continuous bond is involved, as distinct from when a surety has issued a single transaction bond. As noted, for the single transaction bonds, AHAC produced no evidence of a contractual or practical reason why its importer would have complied with demands for increased collateral. As to the continuous bond, however, because it could have been terminated at any time by AHAC, its importers would have been faced with complying with a demand for additional collateral or prevented from entering their goods in the future. In other words, because the importers needed a surety to guarantee the payment of duties, if they wanted AHAC to continue as their surety, they would have had to put up more collateral or face having AHAC refuse to continue acting as a surety by terminating the continuous bond.

The situation is put into even more relief when comparing AHAC's contractual obligations on single transaction and continuous bonds. With respect to a single transaction bond, even if the statutorily-prescribed notice had been given, AHAC would have been unable to terminate the bond or alter its contractual obligations. By way of

[24] It is worth noting the language of the regulations does not indicate that termination is available exclusively on continuous bonds. From the text, the only indication that the regulations are intended to encompass the termination of continuous bonds is subsection c, which states: "If a bond is terminated no new customs transactions shall be charged against the bond." 19 C.F.R. § 113.27(c). Subsection c's language could not, of course, apply to anything other than continuous bonds. *See id*.

contrast, under a continuous bond, had notice been provided, AHAC could have terminated the bond and avoided liability with respect to subsequent entries. Put another way, had AHAC received the statutorily-required notice, it could have terminated the continuous bond and ceased acting as surety on the multiple entries it guaranteed after receiving notice. Thus, it is apparent that if Customs complied with its statutorily-prescribed obligations, AHAC could have taken action to protect itself from assuming greater liability under the continuous bond.

Speculation as to what AHAC might have done, however, is insufficient for the company to be relieved of its duties and obligations. Rather, AHAC must cite to record evidence demonstrating it would have acted to reduce its liability. AHAC claims it could have terminated its bonds business if it had received notice that liquidation was suspended. The court interprets this argument to mean that, together with other actions, AHAC could have terminated its continuous bond. Here, additional entries seemed by the continuous bond continued to enter the United States after AHAC should have received notice.[25] Pursuant to the terms of the bond, the antidumping duties owed on these subsequent entries were secured by the bond. Under the applicable regulations, this continuous bond could have been terminated at any time. *Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1356. Moreover, AHAC could have demanded additional collateral from the importers as a condition for not terminating the continuous bond. Thus, AHAC could demonstrate it suffered prejudice by Commerce's failure to provide notice by showing that, had it received notice, it would have (1) demanded additional collateral as a condition for not terminating the continuous bond, or (2) terminated its continuous bond and thereby ceasing to insure the duties due on future entries.

[25] When Commerce receives a request for an administrative review, liquidation of entries subject to the review are suspended. *See* 19 U.S.C. § 1675(a)(2)(C); *Canadian Wheat Bd. v. United States*, 33 CIT 1204, 1208, 637 F. Supp. 2d 1329, 1334 n.6 (2009), aff'd, No. 2010-1083, Slip Op. (Fed. Cir. Apr. 19, 2011) (noting that a request for administrative review suspends liquidation pending the outcome of the review); 19 C.F.R. § 351.212(c)(1). Here, a number of entries secured by AHAC's continuous bond entered the United States after administrative reviews were initiated and liquidation was suspended. *See* Def.'s Resp. to Ct.'s Order, Ex. 1, at 1 (ECF Dkt. No. 138) (Continuous Bond No. 270712146 issued by AHAC); Def.'s Resp. to Ct.'s Order, Ex. 2, at 1 (ECF Dkt. No. 138) (listing entries made in 2001 and 2002 covered by Continuous Bond No. 270712146); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 68 Fed. Reg. 14394, 14399 (Dep't of Commerce Mar. 25, 2003) (initiation of administrative review for entries of subject merchandise made between February 1, 2002 through January 31, 2003); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 67 Fed. Reg. 14696, 14697 (Dep't of Commerce Mar. 27, 2002) (initiation of administrative review for entries of subject merchandise made between February 1, 2001 through January 31, 2002).

With respect to the entries secured by the continuous bond, there were entries made subsequent to when AHAC should have received notice. AHAC, though, must do more than claim that it would have taken action to limit its liability on the bonds had it received notice; it must provide evidence it would have. *See Great Am. II*, 738 F.3d at 1330–32.

The Government asserts that AHAC cannot demonstrate it would have taken any action had it received notice, let alone demand more collateral or terminate the bonds. AHAC's former underwriting agent, Shea, testified that AHAC never requested any notices of suspension of liquidation, that AHAC was unconcerned with such notices, and at times, Shea even discarded the notices altogether. *See* Decl. of Lee Barther, Pl.'s Mot. Ex. 7, at 52:15–52:20 (ECF 76–7) ("Barther Decl."). It is worth noting, however, this evidence was taken from AHAC's underwriting agent that had been discharged before the bonds at issue were executed. In addition, the Government has produced some evidence that GSIS, the actual underwriting agent on the bonds at issue, had no procedures in place even if they received notice that liquidation was suspended. Pl.'s Br. 17. Thus, while there is some evidence of how AHAC might have behaved if it had received notice, it is hardly dispositive. *See Great Am. II*, 738 F.3d at 1330 ("While those admissions would not themselves automatically preclude Great American from showing that it would have acted in this case, it was incumbent upon Great American to come forward with evidence that in this case—unlike prior cases—notification would likely have led it to take action, with some relevant probability of averting the alleged harm.").

To demonstrate it would have taken such steps, AHAC points out that it conducted an investigation in 2004 after Customs sought to collect on the bonds. Def.'s Br. 33. Specifically,

> [i]n early 2004, AHAC began to receive demands by Customs for payment under the bonds covering the Chinese imports. Shortly after the first receipt of these demands, AHAC replaced its usual claims handling agent with experienced bond claims counsel to investigate the demands and determine the company's exposure. If AHAC had received timely notice of suspension of liquidation years before, it could have conducted this investigation much earlier than it actually did.

Def.'s Br. 33. According to AHAC, the initiation of an investigation once it knew of its increased exposure is evidence that it would have taken action had it received the statutorily- required notice.

In addition, the primary evidence AHAC claims demonstrates it would have taken action to mitigate its losses had it received notice is the testimony of Mark Pessolano, the Vice President in the Surety Bond Claims Department of Chartis Claims, Inc., the authorized surety claims representative for the company. "I am responsible for managing claims against surety bonds issued by AHAC, including the bonds covering antidumping duties at issue in this litigation." Decl. of Mark Pessolano in Supp. of Def.'s Mot. for Summ. J. ¶ 2 (ECF Dkt. 78–1) ("Pessolano Decl."). Mr. Pessolano testified: (1) had AHAC received notice that liquidation was suspended, the company would have acted quickly to protect itself: "In my 39 years of handling surety bond claims, delay—particularly substantial delay—corresponds directly with increased likelihood of loss," Pessolano Decl. ¶ 96; (2) with adequate notice, AHAC would have conducted an investigation:

> If AHAC were timely notified of this increased risk, it would then have conducted an investigation of the importers of the Chinese products and the main customs house broker, East-West Associates, which had sought bonds on the importers' behalf from GSIS. Those investigations could well have uncovered facts that would have prompted AHAC to take measures to prevent or mitigate its losses,

Pessolano ¶ 97; and (3) AHAC could have demanded more collateral:

> If AHAC had received timely notice of suspension of liquidation, it could have sought substantial collateral from the importer to protect it against risk of loss. . . .
>
> Indeed, obtaining collateral from the principal is a frequent practice by AHAC and other sureties. The required collateral often takes the form of an irrevocable letter of credit from a highly-rated financial institution, but can also take other forms such as the posting of cash or security interests in other assets. I have had personal involvement in several instances where AHAC obtained collateral from a bond principal in order to protect AHAC against loss and effectuate the principal's duty to perform its obligation to the obligee.
>
> AHAC's underwriting agreement with GSIS explicitly permitted it to seek collateral from importers. AHAC and GSIS had no occasion to seek such collateral for bonds covering antidumping duties prior to the issuance of the bonds covering Chinese imports because there was no history of losses of sufficient magnitude to make AHAC aware it needed security. Because any notice of suspension of liquidation would have been issued well

> before the importer's refusal to pay antidumping duties, those notices could have given AHAC sufficient advance warning to seek collateral before the importers reneged on their obligations.

Pessolano ¶¶ 103–05 (citing Pessolano Decl. Ex. 29, at 11–13 (ECF Dkt. No. 78–29). In addition, Mr. Pessolano testified that "[i]f the importers of the Chinese products had refused to provide collateral or could not be found, AHAC could have cancelled the bonds." Pessolano Decl. ¶ 106.

Importantly, Mr. Pessolano testified as to what AHAC actually did after it finally received notice when Customs filed suit against the company. Pessolano Decl. ¶ 94 ("AHAC did not receive information from which it might have learned of this pattern of fraudulent conduct until early 2004, when it first began receiving Customs' demands for payment under the bonds covering the Chinese imports that are the subject of these actions. Soon thereafter AHAC retained experienced Customs bond counsel to conduct an investigation of the [G]overnment claims and the failure by importers to pay antidumping duties that had given rise to those claims."). Mr. Pessolano also testified to actions AHAC had taken in the past when the company learned of increased risk. Pessolano Decl. ¶ 98 ("The possibility that AHAC would have conducted such investigations is not speculative. In mid-2001, AHAC became aware of information not related to antidumping duties which caused concern that GSIS was exceeding its underwriting authority and engaged in other practices of concern. AHAC promptly took corrective action in August 2001 by terminating GSIS' underwriting authority effective October 2, 2001."); *see also* Dep. of Mark Pessolano ¶¶ 72:7–73:6 (ECF Dkt. No. 78–40) ("Pessolano Dep.") (Q: Mr. Pessolano, can you take a look at what's been marked as Pessolano Exhibit 5, please. A. Okay. Q. Can you tell me what this is? A. It's a letter from Mark Mallonee, President of Surety Division, to [FIA Excess and Surplus Agency ("FIA")] and Global Solutions, dated 8/3/2001, providing Notice of Termination of the agencies and Management Agreement between FIA Global Solutions and AIG. . . . Q. Is this informing FIA and GSIS that their agreement, Customs Bonds Agreement, is terminating? A. That's correct."). Thus, the essence of Mr. Pessolano's testimony is that, as an insurance company, AHAC knew how to protect itself from increased risk of loss and when it finally learned that it faced increased liability, it took action to reduce it.

The Government argues that conducting an investigation would unlikely have helped AHAC because two previous[26] investigations

[26] The 2001 investigation was prompted by AHAC's concern that its then-agent, GSIS, was

did not result in AHAC terminating the bonds: "We question whether additional investigations would have actually aided AHAC since, as AHAC admits, it had already conducted two investigations and apparently not discovered any actionable fraudulent behavior." Pl.'s Resp. Br. 34 n.38. The Government is correct that in 2001, AHAC conducted an investigation when it received information relating to GSIS potentially acting outside the scope of its underwriting authority. Def.'s Br. 32–33. In this instance, however, AHAC took action by terminating its relationship with GSIS, its agent at the time. Def.'s Br. 32. Moreover, the result of an investigation failing to lead to the termination of the bond in one case does not necessarily mean that for the transactions at issue here, if given proper notice, AHAC would not have terminated the bonds.

"In evaluating a motion for summary judgment, the evidence of the non-movant is to be believed and all justifiable inferences are drawn in favor of the non-movant. This standard is not changed when the parties bring cross-motions for summary judgment, each nonmovant receiving the benefit of favorable inferences." *Chevron U.S.A. Inc. v. Mobil Producing Tex. & N.M.*, 281 F.3d 1249, 1252–53 (Fed. Cir. 2002) (citing *Anderson*, 477 U.S. at 255). Here, AHAC has failed to produce sufficient evidence to prevail on summary judgment. That is, when viewed in the light most favorable to the Government, AHAC has not shown it was prejudiced by Customs' failure to give notice of the suspension such that it should be relieved of its duties and obligations under the continuous bond. In other words, AHAC has not "show[n] that there is no genuine dispute as to any material fact." USCIT R. 56(a); *c.f. Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) ("'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986))). Here, although AHAC has produced evidence that, as an insurance company, it had experience with risk mitigation and took some steps following receipt of actual notice that its liabilities had grown, it has not produced sufficient evidence entitling the company to summary judgment on its prejudice defense.

Similarly, viewing the evidence in the light most favorable to AHAC, the Government has failed to meet its burden on its cross-motion, and is therefore not entitled to summary judgment on AHAC's prejudice claims. *See Ricci*, 557 U.S. at 586. In other words, because Customs failed to given the statutorily-prescribed notice that liquidation was suspended, there is no actual evidence of actions AHAC took, or did not take, to limit its liability. Rather, all of the

exceeding its authority. Pessolano Decl. ¶ 98. The 2004 investigation was commenced after AHAC began receiving demands from Customs to pay on the bonds. Pessolano ¶ 94.

Government's arguments relating to AHAC's claimed prejudice are necessarily speculative based on AHAC's actions once it received actual notice that its liability had increased; notice it received when Customs sent the bills. By this time, of course, it was too late for AHAC to either demand more collateral or cancel the continuous bond.

Thus, a factual dispute remains at to what actions, if any, AHAC would have taken to mitigate its losses had it been given the notice directed by Congress. Accordingly, the court finds the parties' proffered evidence is insufficient for either party to prevail at summary judgment, and AHAC's defenses must be resolved at trial. *See Briscoe v. LaHue*, 460 U.S. 322, 343 n.29 (1983) ("If summary judgment is denied, the case must proceed to trial.").

IV. DEFENDANT'S LIABILITY

A. The Government Is Not Entitled to § 1677g Interest

The Government argues it is entitled to pre-liquidation interest pursuant to 19 U.S.C. § 1677g[27] on the entries at issue in court number 09–491. *See* Pl.'s Resp. Br. 23–24. The Government maintains it is entitled to this interest solely "because this charge became 'final and conclusive' by operation of 19 U.S.C. § 1514." Pl.'s Resp. Br. 39. As a defense[28] to these claims, AHAC asserts that pre-liquidation interest under § 1677g is unavailable to the Government because such interest is only assessed on cash deposits made by an importer, and not on bonds posted by a surety.

Here, the Government seeks pre-liquidation interest pursuant to § 1677g only on the entries in court number 09–491. Pl.'s Resp. Br. 39.

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[27] Section 1677g provides:

> Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—(1) the date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title, or (2) the date of a finding under the Antidumping Act, 1921.

19 U.S.C. § 1677g(a)(1)–(2).

[28] This defense presents a particularly good example of why the *Utex* rule represents good commercial sense. Were the Government's finality claim to be credited, in order to dispute the relatively small amount represented by the amount of § 1677g interest Customs mistakenly charged the importer, AHAC would have been required to pay the full amount of the regular duties and antidumping duties charged at liquidation. As the *Utex* court explained

> Sentry states, without contravention, that protest and advance payment of liquidated damages were not required of defendants in a district court action for damages, prior to enactment of the Customs Courts Act of 1980, which transferred jurisdiction of actions on a surety bond from the district courts to the Court of International Trade, 28 U.S.C. § 1582. There is no suggestion in the legislative history that Congress intended to change the status of the surety in such suits.

Utex, 857 F.2d at 1414.

According to the Government, it is entitled to such interest on the underpayment of the deposit made by the importers when their merchandise entered the United States solely because: (1) the interest charge was included in the bill sent to AHAC; (2) the amounts contained in this bill were the subject of a protest, and (3) the protest denial was not appealed to this Court. Thus, according to the Government, the interest charge became "final and conclusive" by operation of § 1514(a).

Before the court, the Government concedes that, in fact, it is not owed the money and that the charge was erroneously included in the bill. *See* Pl.'s Resp. Br. 39 n.42 ("But for the 'final and conclusive' nature of the 19 U.S.C. § 1677g interest charge in case 09–491, the Government would not be entitled to interest under 19 U.S.C. § 1677g under these facts. The Government concedes that AHAC does not owe 19 U.S.C. § 1677g interest in cases 09–401, 09–442, 10–002, 10–003, 10–311, and 11–206."). In other words, the Government concedes that, were the court to reject its "final and conclusive" argument and find that AHAC can argue that plaintiff is not owed this interest, no claim for § 1677g interest in this action would lie.

The court has found that AHAC is not precluded from raising its affirmative defenses in this contract action before the court. Thus, the interest charges, including the § 1677g interest, are not final and conclusive by reason of AHAC's decision not to file suit following Customs' protest denials. Further, the Government is not entitled to pre-liquidation interest under § 1677g for the entries at issue in court number 09–491. Accordingly, plaintiff's claim for interest under § 1677g in this action is dismissed.

B. Plaintiff Is Entitled to Statutory Interest Pursuant to § 1505(d)

The Government argues it is entitled to post-liquidation interest in accordance with the provisions of § 1505(d)[29] on all of the entries at issue in this action. *See* Pl.'s Resp. Br. 39–40. Plaintiff maintains it is entitled to § 1505(d) interest because "an unpaid balance remain[ed] on [the] entr[ies] 30 days after liquidation." Pl.'s Br. 40.

As to this claim, AHAC contends: (1) the Government has waived statutory interest under § 1505(d) below the bond limits because plaintiff made no reference to interest under this provision in its

[29] Section 1505(d) reads:
If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) of this section, any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.
19 U.S.C. § 1505(d)

motion for summary judgment, despite its reference to such interest in its complaint; and (2) § 1505(d) applies only to post-liquidation interest on customs duties and is therefore "inapplicable to prejudgment interest relating to antidumping duties." *See* Def.'s Br. 11; Def.'s Resp. Br. 13.

The court finds AHAC's arguments unavailing and holds that the Government is entitled to statutory post-liquidation interest pursuant to § 1505(d).

As an initial matter, AHAC's argument that the Government waived its recovery of post-liquidation statutory interest under § 1505(d) on all of the bonds is unconvincing. "A waiver is [ordinarily evidenced by] an intentional relinquishment or abandonment of a known right or privilege." *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT __, __, Slip Op. 14–38, at 18 (2014) (alteration in original) (internal quotation marks omitted) (quoting *NSK Ltd. v. United States*, 28 CIT 1535, 1555, 346 F. Supp. 2d 1312, 1330 (2004)). "[A] trial court's decision whether or not to find waiver [, however,] is discretionary . . . ." *Woods v. DeAngelo Marine Exhaust, Inc*., 692 F.3d 1272, 1279 (Fed. Cir. 2012).

The Government clearly did not intend to abandon its claimed right to post-liquidation interest under 19 U.S.C. § 1505(d). Although it does not cite to § 1505(d) in its summary judgment papers, it seeks recovery from AHAC on the bonds as a result of the importers' failure to pay interest. Indeed, in its summary judgment brief, as part of its requested relief, it seeks to recover post-liquidation interest on the bonds. *See* Pl.'s Br. 6 ("Because the importers failed to pay, pursuant to the terms of the bonds, AHAC is liable up to the amounts of the bonds for the importers' defaults. In addition, *AHAC is liable for pre-judgment interest*, post-judgment interest, equitable interest and interest pursuant to 19 U.S.C. § 580." (emphasis added)). Further, the Government specifically sought interest pursuant to § 1505(d) in its Complaint in court number 09–401. Moreover, in plaintiff's response brief, the Government argues it "is entitled to section 1505(d) post-liquidation on all entries, up to AHAC's bond amounts." Pl.'s Resp. Br. 39. AHAC does not claim, nor could it, that it did not receive notice that the Government sought to recover such interest on the bonds, or that it suffered any prejudice as a result of the omission of any explicit reference in plaintiff's summary judgment brief that the Government sought to recover post-liquidation interest under § 1505(d). Thus, the court will consider the Government's request for § 1505(d) post-liquidation interest.

As to the applicability of the statute itself to the facts of this case, "§ 1505 governs the payment of duties and fees on entries of imported

merchandise. Once Customs liquidates or reliquidates an entry, any duties and fees . . . due and owing are payable 30 days after Customs issues a bill." *United States v. Am. Home Assurance Co. (AHAC III)*, 39 CIT __, __, Slip Op. 15–88, at 7 (Aug. 19, 2015). Where, as here, "a bill is not paid in full within the 30-day grace period, the unpaid balance is considered delinquent and subject to 'post-liquidation interest,'" which "accrues in 30-day periods from the date of liquidation or reliquidation until the balance is paid in full, excluding the 30-day period in which the bill is paid." *Id*.. Subsection (d) provides:

> If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) of this section, any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.

19 U.S.C. § 1505(d).

Recently, in *AHAC II*, the Federal Circuit construed a different interest provision, 19 U.S.C. § 580, which provides "[u]pon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due," and found this provision encompassed antidumping duties. *See* 19 U.S.C. § 580; *United States v. American Home Assurance Co. (AHAC II)*, 789 F.3d 1313, 1324 (Fed. Cir. 2015). "Thus, by the statute's plain terms, it covers, among other things, bonds securing the payment of antidumping duties when the [G]overnment sues for payment under those bonds." *Id*. (citing *Camargo Correa Metais, S.A. v. United States*, 200 F.3d 771, 773 (Fed. Cir. 1999) ("If the words are unambiguous, no further inquiry is usually required.")). The *AHAC II* Court examined the plain language of the provision and found it was "a short, free-standing statute," "d[id] not cross-reference other statutory provisions," and "[t]he language—'all bonds' on which the [G]overnment sues for the recovery of duties'—is clear and unqualified." *Id*.

Similar to § 580, the word "duties" in § 1505(d) is clear and unqualified. Further, there is nothing in the statute or its legislative history suggesting Congress intended the meaning of the term "duties" to "'bear some different import.'" *See id*. (quoting *Indian Harbor Ins. Co. v. United States*, 704 F.3d 949, 954 (Fed. Cir. 2013) ("In reviewing the statute's text, we give the words their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." (internal quotation

marks and citation omitted))). The statute plainly provides for post-liquidation interest on all unpaid duties, including special duties such as antidumping duties.

Thus, the court holds that AHAC is liable for § 1505(d) post-liquidation interest in this consolidated action.

C. Plaintiff Is Entitled to Statutory Interest Pursuant to § 580

In addition to the principal owed on the bonds, the Government seeks an award of statutory prejudgment interest pursuant to 19 U.S.C. § 580. *See* Pl.'s Br. 13–16. Section 580 provides "[u]pon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due." 19 U.S.C. § 580. For plaintiff, as part of its recovery for "unpaid antidumping duties under surety bonds issued by AHAC, [it] is entitled to collect interest at the rate of 6 percent per year from the date on which the Government first made formal demand upon the surety." *See* Pl.'s Br. 13.

AHAC disputes liability under § 580, claiming such interest is unavailable to the Government because "Congress did not intend [for] the 1799 statute now codified at 19 U.S.C. § 580 to apply to antidumping duty bonds, as antidumping duties did not exist for over a century after the statute's enactment." Def.'s Resp. Br. 3.

As noted, however, this question was settled by the Federal Circuit in *AHAC II*, 789 F.3d at 1313. There, the Court held "§ 580 provides for interest on bonds securing both traditional customs duties and antidumping duties," and thus "the [G]overnment is entitled to statutory prejudgment interest under § 580." *See id*. at 1324, 1328. In reaching its holding, the Federal Circuit examined the plain language of § 580 and found the statute to be "short, free-standing . . .within the Administrative Provisions section of Chapter 3 in Title 19," and that "[i]t d[id] not cross-reference other statutory provisions." *See id*. at 1325. The Court further found the language of the statute "'all bonds' on which the [G]overnment sues for 'the recovery of duties'" to be "clear and unqualified." *Id*. Because, "[a]s written, the term 'duties' d[id] not modify the type of 'bonds' on which interest shall be allowed," but rather, "the statute call[ed] for interest on 'all bonds,'" the Court found "by the statute's plain terms, it cover[ed], among other things, bonds securing the payment of antidumping duties when the [G]overnment sues for payment under those bonds." *Id*. (quoting 19 U.S.C. § 580).

In accordance with the Federal Circuit's construction of 19 U.S.C. § 580, the court finds § 580 applies to antidumping duties. Thus, AHAC

is liable for such interest on the delayed payment of the antidumping duties owed under the bonds at issue.

D. The Government Is Not Entitled to Equitable Prejudgment Interest

Next, the court turns to the question of whether the Government is entitled to equitable prejudgment interest, taking into account the holding that plaintiff is entitled to prejudgment statutory interest under 19 U.S.C. § 580. The decision to award equitable prejudgment interest is "'governed by traditional judge-made principles'" and is "to be exercised at the discretion of the trial judge." *Id*. at 1328 (quoting *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1367 (Fed. Cir. 2005)). The Government argues it is entitled to equitable prejudgment interest in excess of the face value of the bonds as compensation for the loss of its ability to use the amounts owed under the bonds. Pl.'s Br. 8–12. AHAC disputes liability for equitable prejudgment interest on several grounds.

First, AHAC maintains that, because the antidumping duties were subject to the Continued Dumping and Subsidy Offset Act ("Byrd Amendment" or "CDSOA"),[30] "the funds . . . [were] deposited into non-interest bearing accounts and then distributed to domestic producers of products that compete with the applicable imports," and therefore the Government "had no right or ability to earn a return on the bond amounts that were withheld during the pendency of this litigation." Def.'s Suppl. Br. in Supp. of its Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. 1 (ECF Dkt. No. 126) ("Def.'s Suppl. Br."). Therefore, according to AHAC, "the Government did not lose any use of the money and is [therefore] not entitled to compensation" as it would otherwise receive "a windfall that it never would have obtained had the bond been paid upon demand." Def.'s Suppl. Br. 1.

The court finds this argument meritless. As this Court recently held, "[t]he antidumping duties on the bonds in this case, like any other case not subject to the Byrd Amendment, are owed to the United States, not to a fund established by the United States." *United States v. Am. Home Assurance Co. (AHAC V)*, 39 CIT __, __, Slip Op.

[30] Pursuant to the Byrd Amendment, codified at 19 U.S.C. § 1675c (2000), antidumping duties collected by the United States were paid to "affected domestic producers" of goods that were subject to antidumping duty orders. *See Pat Huval Rest. & Oyster Bar, Inc. v. Int'l Trade Comm'n*, 785 F.3d 638, 640 (Fed. Cir. 2015). "The statute defined an 'affected domestic producer' as a party that either petitioned for an antidumping duty order or was an 'interested party in support of the petition.'" *Id*. (quoting 19 U.S.C. § 1675c(b)(1)(A)). Although "[t]he Byrd Amendment was repealed in 2006, . . . the repealing statute provided that any duties paid on goods that entered the United States prior to the date of repeal would continue to be distributed in accordance with the pre-repeal statutory scheme." *Id*. (citing Pub. L. 109– 171, § 7601(a), 120 Stat. 4, 154 (2006)).

15–120, at 25 (Oct. 28, 2015). In other words, "although the funds, once collected, may be placed in accounts for distribution to domestic producers in accordance with the Byrd Amendment, this does not change the fact that the money is owed to the United States and, once paid, will be paid to the United States." *Id*.; *see also* Pl.'s Resp. to Def.'s Suppl. Br. 5 (ECF Dkt. No. 135) ("[C]hecks issued for antidumping or countervailing duty bills are made payable to the Government, and these checks are not simply forwarded to [affected domestic producers] for them to deposit. Rather, after receiving the funds, the Government computes and distributes the 'continued dumping and subsidy offset.'"). Hence, because the funds are owed to the United States itself, and not to a particular account, the Byrd Amendment is not a bar to the Government's entitlement to equitable interest.

The only remaining question is whether, as a consequence of AHAC's default, the balance of the equities weighs in favor of the Government's entitlement to equitable prejudgment interest in excess of the bond limits in this case. In determining whether to grant an award of equitable prejudgment interest, full compensation, including the time value of money, should be the court's primary concern. *See AHAC II*, 789 F.3d at 1329; *see also West Virginia v. United States*, 479 U.S. 304, 310 n.2 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress."). In other words, as this Court has recently held, "if the United States has been compensated for the time value of money by another provision, it is difficult to *see* why it should collect an amount for this purpose again." *See AHAC V*, 39 CIT at __, Slip Op. 15–120, at 27; *see also United States v. Am. Home Assurance Co.* (*AHAC IV*), 39 CIT __, __, Slip Op. 15–112, at 6 (Sept. 30, 2015); *AHAC III*, 39 CIT at __, Slip Op. 15–88, at 17. In addition, when awarding the Government prejudgment statutory interest under 19 U.S.C. § 580, the Federal Circuit noted that, where, as here, a statute governs the award of prejudgment interest, "the award of prejudgment interest [is] an equitable determination to be exercised at the discretion of the trial judge." *AHAC II*, 789 F.3d at 1328.

Because, due to § 580, this case does not involve the absence of a statute, the court holds that the Government is not entitled to an award of equitable prejudgment interest. The law is clear that the purpose of equitable interest is to ensure that a party is fully compensated for the time period during which it is deprived of the use of its funds. *See United States v. Imperial Food Imps*., 834 F.2d 1013, 1016 (Fed. Cir. 1987). Because the Government will be fully compen-

sated by the statutory prejudgment interest it will receive by means of § 580, the balance of the equities here tips in favor of AHAC, and against an award of equitable prejudgment interest. "In other words, it would be inequitable to award the United States both statutory prejudgment interest under 19 U.S.C. § 580 and equitable prejudgment interest under the principles of equity." *AHAC V*, 39 CIT at __, Slip Op. 15–120, at 27. Indeed, this Court has observed that the statutory equitable prejudgment interest plaintiff will receive under § 580 exceeds any discretionary equitable prejudgment interest award the United States would otherwise receive:

> Between the relevant dates (Customs' October 2, 2005 demand and the court's January 23, 2014 judgment), the short-term funds rate varied between 0.18% and 5.16%. The average rate was 1.77%. As a result, the 6% rate that the Government received under § 580 "more than fairly compensates the [United States] for the time value of the unpaid duties. To award prejudgment equitable interest in these circumstances would overcompensate the Government."

AHAC IV, 39 CIT at __, Slip Op. 15–112, at 6 (quoting *AHAC III*, 39 CIT at __, Slip Op. 15–88, at 17); *see also AHAC V*, 39 CIT at __, Slip Op. 15–120, at 24–28.

Accordingly, in view of the court's holding that the Government is entitled to prejudgment statutory interest under 19 U.S.C. § 580, plaintiff may not also recover equitable prejudgment interest in this case.

E. Plaintiff Is Entitled to Post-Judgment Interest

Last, the Government maintains it is entitled to post-judgment interest pursuant to 28 U.S.C. § 1961(a), which provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." *See* Pl.'s Br. 16; 28 U.S.C. § 1961(a). Although § 1961 does not apply directly to the Court of International Trade, the Federal Circuit has confirmed this Court's ability to award post-judgment interest at the rate set forth in § 1961 based on 28 U.S.C. § 1585, which provides that "[t]he Court of International Trade . . . posses[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." *See Great Am. II*, 738 F.3d at 1325–26; 28 U.S.C. § 1585.

AHAC does not object to an award of post-judgment interest, nor could it. "Post- judgment interest is not discretionary, but rather is available as a matter of right to prevailing parties." *AHAC III*, 39 CIT at __, Slip Op. 15–88, at 19. Thus, to the extent the Government has

prevailed in this matter by means of an award of a money judgment against AHAC, plaintiff is entitled to post-judgment interest at the rate set forth in § 1961, calculated from the date of entry of the judgment. *See* 28 U.S.C. § 1961; *AHAC III*, 39 CIT at __, Slip Op. 15–88, at 19–20.

CONCLUSION

Based on the foregoing, the court grants, in part, plaintiff's motion for summary judgment, and grants, in part, defendant's cross-motion for summary judgment. Regarding the Government's interest claims for recovery on the bonds, the court grants its requests for (1) pre-judgment statutory interest under 19 U.S.C. § 580, (2) 19 U.S.C. § 1505(d) post-liquidation interest, and (3) post-judgment interest at the rate set forth in 28 U.S.C. § 1961. The Government's requests, however, for (1) pre-liquidation interest under 19 U.S.C. § 1677g on the entries at issue in court number 09–491, and (2) equitable pre-judgment interest are denied. In addition, plaintiff may not collect any antidumping duties on thirty of the seventy-nine entries of fresh garlic at issue in court number 10–311 that were subject to the notices of rescission. Finally, because both parties' motions for summary judgment are denied with respect to AHAC's defense of prejudice, this issue will be decided at trial.

Dated: December 17, 2015
New York, New York

s\ Richard K. Eaton
RICHARD K. EATON

Slip Op. 15–142

PEER BEARING COMPANY–CHANGSHAN, Plaintiff, v. UNITED STATES, Defendant, and The Timken Company, Defendant-intervenor.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 10–00013

OPINION

[Affirming a remand redetermination issued by the International Trade Administration, U.S. Department of Commerce, in litigation arising from an administrative review of an antidumping duty order on tapered roller bearings and parts thereof from China]

Dated: December 21, 2015

John M. Gurley and *Diana Dimitriuc Quaia*, Arent Fox LLP, of Washington, DC, argued for plaintiff.

L. Misha Preheim, Senior Trial Counsel, and Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With them on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Joanna V. Theiss*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

William A. Fennell and *Terence P. Stewart*, Stewart and Stewart, of Washington, DC, argued for defendant-intervenor. With them on the brief was *Stephanie M. Bell*.

Stanceu, Chief Judge:

This consolidated action concerns challenges to a final determination ("Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the twenty-first review of an antidumping duty order (the "Order") on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, from the People's Republic of China ("China" or the "PRC"). *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2007–2008 Admin. Review of the Antidumping Duty Order*, 75 Fed. Reg. 844 (Int'l Trade Admin. Jan. 6, 2010) ("*Final Results*").[1] The twenty-first review pertained to entries of subject merchandise made during the period of June 1, 2007 through May 31, 2008 ("period of review" or "POR"). *Final Results*, 75 Fed. Reg. at 844.

Before the court is the second redetermination upon remand ("Second Remand Redetermination") Commerce submitted in response to the court's opinion and order in *Peer Bearing Company-Changshan v. United States*, 37 CIT __, 914 F. Supp. 2d 1343 (2013) ("*Peer Bearing II*"). *Final Results of Redetermination Pursuant to Court Remand* (Apr. 30, 2014), ECF No. 139 ("*Second Remand Redetermination*"). The Second Remand Redetermination addresses the only issue re-

[1] The scope language of the relevant order reads: "tapered roller bearings and parts thereof, finished and unfinished, from the PRC; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use." *Tapered Roller Bearings and Parts Thereof, Finished & Unfinished, from the People's Republic of China: Final Results of the 2007–2008 Admin. Review of the Antidumping Duty Order*, 75 Fed. Reg. 844, 845 (Int'l Trade Admin. Jan. 6, 2010).

maining in this litigation, which pertains to the issue of whether certain TRBs produced in Thailand from Chinese-origin parts are subject to the Order. For the reasons presented herein, the court affirms the Department's Second Remand Redetermination.

I. BACKGROUND

The detailed background of this case is provided in the court's prior opinions in this action and is supplemented herein. *See Peer Bearing Company-Changshan v. United States 35 CIT __, __, 804 F. Supp. 2d 1337, 1340–41 (2011) ("Peer Bearing I")* (first remand order); *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1346–47 (second remand order); *Peer Bearing Company-Changshan v. United States*, 37 CIT __, __, Slip Op. 14–15 at 1 (Feb. 13, 2014), ("*Peer Bearing III*") (responding to defendant's motion to clarify the second remand order).

Plaintiff Peer Bearing Company-Changshan ("CPZ"), a Chinese producer and exporter of TRBs and a respondent in the twenty-first review, initiated this action to contest, *inter alia*, the Department's determination in the Final Results that certain TRBs that were produced in, and exported from, Thailand were of Chinese origin for antidumping purposes and therefore were merchandise subject to the Order. Compl. (Jan. 20, 2010), ECF No. 2. Defendant-intervenor The Timken Company ("Timken"), a domestic TRB producer and petitioner in the twenty-first review, initiated a separate action contesting the Final Results that is now consolidated into the above-captioned matter.[2] *See* Compl. (Mar. 5, 2010), ECF No. 11 (Court No. 10–00045); Order (May 24, 2010), ECF No. 27 (consolidating cases).

In *Peer Bearing II*, the court affirmed in part, and remanded in part, the remand redetermination Commerce submitted in response to *Peer Bearing I*, which again determined that the TRBs at issue were subject merchandise.[3] *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1357. On June 13, 2013, defendant moved for clarification of the

[2] Consolidated under Consolidated Court Number 10–00013 is *The Timken Co. v. United States* (Court No. 10–00045). Order (May 24, 2010), ECF No. 25 (consolidating cases). The plaintiff in that action, The Timken Company ("Timken") challenged only one aspect of the final determination, which is no longer in dispute. *See Peer Bearing Company-Changshan v. United States*, 37 CIT __, __, 914 F. Supp. 2d 1343, 1357 (2013) ("*Peer Bearing II*").

[3] In *Peer Bearing Company-Changshan v. United States*, 35 CIT __, 804 F. Supp. 2d 1337 (2011) ("*Peer Bearing I*"), the court issued a remand on three issues, including the country-of-origin issue. In *Peer Bearing II*, the court affirmed the Department's remand redetermination as to all remaining issues except the country-of-origin issue. *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1357.

court's order in *Peer Bearing II*. Def.'s Mot. for Clarification, ECF No. 131 ("Def.'s Mot."). The court responded to defendant's motion on February 13, 2014, the substance of which is addressed later in this Opinion.*Peer Bearing III*, 37 CIT __, Slip Op. 14–15.

Commerce filed its Second Remand Redetermination with the court on April 29, 2014. *Second Remand Redetermination* 1, determining under protest that the TRBs in question were not subject merchandise. CPZ and Timken filed comments on the Second Remand Redetermination on May 30, 2014, and June 9, 2014, respectively. Pl.'s Comments on the Second Remand Redetermination, ECF No. 141 ("CPZ's Comments"); The Timken Co.'s Comments on the Dept. of Commerce's Second Remand Redetermination, ECF No. 151 ("Timken's Comments"). Timken opposes the Department's revised country-of-origin determination on various grounds. *See* Timken's Comments 2–15. CPZ supports the Department's determination on second remand. CPZ's Comments 1–2. Defendant replied to Timken's opposition on July 16, 2014. Def.'s Response to Def.-intervenor's Comments Regarding the Remand Redetermination, ECF No. 158 ("Def.'s Reply").

II. DISCUSSION

A. Jurisdiction and Standard of Review

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, 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] The court will sustain the Department's redetermination if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law. *See* Tariff Act, § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i).

B. The Court Affirms the Second Remand Redetermination

This issue arose from the Department's application of what it termed a "substantial transformation" test to determine whether the Order included TRBs resulting from manufacturing processes conducted in a "third country," i.e., a country other than the United States or the country named in the antidumping duty order. In the twenty-first administrative review, Commerce determined that the

[4] All statutory citations to the Tariff Act of 1930 are to the 2006 edition of the United States Code and all regulatory citations are to the 2010 edition of the Code of Federal Regulations.

TRBs remaining at issue in this case were subject to the Order as products of China. Before the agency, and again before the court, CPZ claimed that Commerce erred in subjecting these TRBs to the Order.

1. The Merchandise Remaining at Issue

Before Commerce, CPZ submitted information on the manufacturing processes performed on its TRBs during the POR. CPZ reported that in its Chinese facilities it produced finished TRBs, finished TRB components (cages and rollers), and unfinished TRB components (cups and cones). *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1350. The TRBs that are the subject of CPZ's claim underwent manufacturing operations conducted in Thailand by a CPZ affiliate. In China, CPZ forged, turned (i.e., machined), and heat-treated cups and cones but did not process these components into a finished form. In Thailand, CPZ's affiliate completed the processing of the cups and cones by performing additional machining, i.e., grinding and honing to achieve the required final dimensions and polished surface. *Id*. The Thai affiliate then assembled the finished cups and cones, together with finished rollers and cages that CPZ had manufactured in China and exported to Thailand, to produce completed TRBs that were exported to the United States. *Id*.

2. The Department's Method of Determining that the TRBs Were Subject to the Order in the Final Results

Commerce discussed its application of its "substantial transformation" test in the Issues and Decisions Memorandum ("Decision Memorandum") accompanying the Final Results. Issues & Decision Mem., A-570–601, ARP 07–08, at 6–11 (Dec. 28, 2009) (Admin.R.Doc. No. 5701) *available at* http://enforcement.trade.gov/frn/summary/PRC/E9–31417–1.pdf (last visited Dec. 16, 2015) ("*Decision Mem.*"). For the first part of its test, Commerce considered the record evidence according to six criteria, drawing a conclusion under each as to whether the record supports or detracts from a finding that a substantial transformation had occurred in Thailand. *Id.* The Department's six criteria were: (1) whether the processed downstream product is of a different class or kind than the upstream product; (2) the extent to which the physical and chemical properties, and the essential character of the TRBs, were imparted in the third country, i.e., Thailand; (3) the nature and sophistication of the Thai processing operations; (4) the level of investment in the Thai operations; (5) ultimate use; and (6) the third country cost of manufacturing ("COM")

as a percentage of the total COM. *Id.* For the second part of its test, Commerce evaluated these criterion-specific determinations collectively and made an ultimate finding on substantial transformation according to the "totality of the circumstances." *Id.*

For the Final Results, Commerce concluded that the record evidence did not support a finding that a substantial transformation occurred in Thailand under any of its six criteria and that, based on the totality of the circumstances, the TRBs were subject to the Order. *Id.* Consequently, Commerce included the TRBs in CPZ's U.S. sales, which Commerce compared with matching normal value transactions to calculate CPZ's weighted-average dumping margin in the Final Results. *Id.*

3. The Court's Decision in Peer Bearing I and the First Remand Redetermination

Upon judicial review of CPZ's claim, the court concluded in *Peer Bearing I* that a remand was appropriate because "Commerce based its country-of-origin determination in part on [a] . . . finding [that] is not supported by substantial evidence on the record," specifically, the "finding that 'the third country processor's costs as compared to each product's COM are not significant.'" *Peer Bearing I*, 35 CIT at __, 804 F. Supp. 2d at 1342 (citation and footnote omitted). In support of its determination, the court cited evidence on the record that "the processing costs in Thailand accounted for 42% of the total cost of manufacturing." *Id.* (citations omitted). Considering the Department's invalid factual finding sufficient to require a remand, the court ordered Commerce to "reconsider on the whole its determination of the country of origin of the bearings that underwent further processing in Thailand," instructing Commerce "to ensure that its redetermination . . . is based on findings supported by substantial evidence on the record of this case." *Id*.

In the First Remand Redetermination, Commerce again concluded that the TRBs at issue were subject to the Order, applying its substantial transformation test according to the same six criteria it had used in the Final Results. *Final Results of Redetermination Pursuant to Court Remand* 8–17 (Apr. 10, 2012), ECF No. 107 ("*First Remand Redetermination*"). Commerce modified the finding it had made in the Decision Memorandum under its sixth criterion (third-country COM as a percentage of total COM). First, it performed its own calculation of the total COM incurred in both China and Thailand, incorporating its revised surrogate values for production operations conducted in China. *Id*. at 27. Based on this figure, Commerce calculated that the COM incurred in Thailand accounted for 38% of the total COM. *Id.* ;

see Def.'s Resp. to the Court's Order (Aug. 19, 2015), ECF No. 168 (withdrawing claim to confidentiality regarding the revised Chinese and Thai cost of manufacturing percentages calculated in the First Remand Redetermination). Commerce described this as a "meaningful figure" that "could be one part of an analysis that finds substantial transformation when considered in the context of other factors that also support a finding that substantial transformation occurs in the third country." *Id*. at 27–28. However, Commerce qualified this conclusion by stating that under its substantial transformation test "no single factor is dispositive" and that the COM in Thailand was "not so significant as to outweigh the other factors which the Department must take into account." *Id*. at 16. As to those "other factors," Commerce concluded that its analysis of record evidence under its other five criteria did not support a finding that a substantial transformation occurred in Thailand. *Id*. at 8–17. Consequently, Commerce again determined that the record evidence did not support an ultimate finding that the TRBs were substantially transformed in Thailand and again placed the TRBs at issue within the scope of the Order. *Id.* at 23.

4. The Court's Decision in Peer Bearing II and the Second Remand Redetermination

In *Peer Bearing II*, the court again remanded the Department's decision for reconsideration. The court held that "[o]n remand, Commerce must reach a new country of origin determination because the record in this case lacks substantial evidence to support the Department's current determination that the TRBs processed in Thailand were products of China for purposes of the antidumping duty order." *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1356. Pointing to the record and to statements Commerce made in the First Remand Redetermination, the court continued:

> [Commerce] acknowledges, and the record confirms, that the cups and cones (which, irrefutably, are the two major components of each TRB) were exported to Thailand in unfinished form, . . . that the grinding and honing operations performed on the cups and cones in Thailand, in the Department's own words, "serve an important role in the production of a bearing," . . . that all assembly operations took place in Thailand, . . . and that the percentage of the cost of manufacturing that was incurred in Thailand, in the Department's words, was "meaningful" and "could be part of an analysis that finds in favor of substantial transformation . . . ."

Id. (citations omitted). The court concluded that, "[i]n reaching its determination, Commerce impermissibly relied on certain critical findings of fact that . . . were not supported by substantial evidence on the record and that, in some cases, were reached without consideration of probative evidence to the contrary." *Id*. Defendant subsequently moved for clarification, asking whether the court's order in *Peer Bearing II* "requires Commerce to find that the TRBs were substantially transformed in Thailand and are thus of Thai origin, or whether the order permits Commerce to make new findings under each of the six criteria and make a determination based on these new findings." Def's Mot. for Clarification 2 (June 13, 2013), ECF No. 131 (emphasis omitted). The court declined to modify the substance of its previous ruling. *Peer Bearing III*, 37 CIT at __, Slip Op. 14–15 at 2. The court explained that the opinion in *Peer Bearing II* "did not reach the question of whether Commerce, in the second remand redetermination, is required to arrive at an ultimate finding that the TRBs in question are of Thai origin" and instead "left it to Commerce to decide, in the first instance, whether it is possible to reach an ultimate finding of Chinese origin in the second remand redetermination." *Id*. at __, Slip Op. 14–15 at 4. The court added, however, that "[s]uch an ultimate finding . . . would have to contend with record evidence to the contrary and recognize the significance of the court's having disallowed" as unsupported by substantial evidence "a number of findings that were critical to the country of origin determination." *Id*. The court also stated in *Peer Bearing III* that, contrary to certain assumptions underlying defendant's motion for clarification, *Peer Bearing II* had not actually affirmed all of the criteria in the Department's substantial transformation analysis. *Id.* at __, Slip Op. 14–15 at 5.

In the Second Remand Redetermination, Commerce excluded from the Order the TRBs at issue in this case and, as a result, reduced CPZ's weighted-average dumping margin from 7.37% to 6.24%. *Second Remand Redetermination*2. Commerce stated that "we now determine the TRBs to be of Thai-origin" because the second redetermination "must necessarily be in accordance with the Court's directives" in *Peer Bearing II*, in which the court "disallowed a number of findings that were critical to our previous finding that the merchandise in question is of Chinese origin." *Id*. at 1–2. Commerce stated in the Second Remand Redetermination that it "is respectfully conducting this remand under protest." *Id*. at 2 (footnote omitted). In the Second Remand Redetermination, Commerce again applied its "substantial transformation" criteria but modified them in light of the court's decision in *Peer Bearing II* and, in particular, the findings the court found to be unsupported by substantial evidence on the record.

Commerce did not apply its first criterion, "class or kind/scope," in the Second Remand Redetermination, stating that "[i]n compliance with the Court's holding that it did not affirm the use of this criterion and found that it has no apparent relevance, we have not applied, nor given weight to, this criterion." *Second Remand Redetermination* 7. In *Peer Bearing II*, the court questioned the relevance of the class or kind/scope criterion and the Department's conclusion thereunder in the First Remand Redetermination that the presence within the scope of parts of TRBs suggested that a substantial transformation did not occur in Thailand. *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1352. The court concluded that Commerce had failed to provide reasons why this criterion was relevant to the issue before Commerce. *Id.* at __, 914 F. Supp. 2d at 1351–52. The court reasoned, further, that "[t]o resolve that issue according to a 'substantial transformation' analysis, Commerce must decide whether the Chinese-origin parts, finished and unfinished, were substantially transformed by the processing in Thailand that converted these parts into finished TRBs." *Id.* at __, 914 F. Supp. 2d at 1352. The court further reasoned that "[t]he Remand Redetermination not only reaches a conclusion unsupported by reasoning but also errs in misstating the issue, framing it as one of whether *TRBs*, as opposed to the finished and unfinished parts, are 'substantially transformed in Thailand.'" *Id.* (citing *First Remand Redetermination* 8).

It appears that Commerce considered itself bound by *Peer Bearing II* to dispense with its first criterion entirely. *Peer Bearing II*, however, did not prohibit Commerce from applying its class or kind/scope criterion, although it held that Commerce had failed to explain the relevance this criterion could have for the inquiry at issue and saw error in the way Commerce applied that criterion in the First Remand Redetermination. In the current remand redetermination, Commerce chose not to apply the criterion rather than give reasons why it considered it relevant. That was the Department's choice, and Commerce errs to the extent that it implies that the court disallowed any application of the first criterion. Commerce noted that in response to its motion for clarification, in which Commerce asked whether on remand it should reapply its six criteria, the court responded that it had not actually approved the criteria. But the court did not disapprove the criteria or any criterion *per se*; instead it rejected, in some instances, the ways in which certain of the criteria had been applied.

Peer Bearing II affirmed some, and rejected some, of the factual findings Commerce reached under its second criterion, "physical/chemical properties and essential character." The court rejected as unsupported by substantial record evidence the Department's ulti-

mate findings that the processes performed in Thailand on the cups and cones imparted no substantial changes to the physical or mechanical properties or the essential character of the merchandise that would constitute a substantial transformation of the merchandise. *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1353. The court reasoned that the "merchandise" consisted of finished TRBs and that as shown by record evidence, a TRB is designed and built to perform load-bearing and friction-reducing functions in the machine to which it is fitted. *Id.* at __, 914 F. Supp. 2d at 1352. The court further reasoned that the evidence did not demonstrate (and Commerce did not actually find) that any single part exported from China to Thailand possessed the physical properties, mechanical properties, or essential character of a complete TRB. *Id*. The court noted that "[t]he record evidence will not permit a finding that any part produced in China had the mechanical or physical properties characterizing a finished TRB, which were acquired only following the finishing and assembly processes." *Id.* at __, 914 F. Supp. 2d at 1353. As stated in *Peer Bearing II*, "because no single part made in China possessed the essential character of a TRB, the Department's finding that the essential character of the finished TRBs was imparted in China, as opposed to Thailand, is a logical impossibility." *Id.* at __, 914 F. Supp. 2d at 1352–53.

In the Second Remand Redetermination, Commerce stated that "because the Court held that 'no single part made in China possessed the essential character of a TRB,' we conclude that we have no alternative but to find that the physical properties and essential character criterion supports a finding that the TRBs are substantially transformed in Thailand." *Second Remand Redetermination* 9 (citing *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1352).

Peer Bearing II found unsupported by substantial record evidence a finding Commerce made in the First Remand Redetermination under its third criterion, "nature/sophistication of processing," which was that "the nature, extent and sophistication of the Thai processing were . . . not significant." *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1353 (citing *First Remand Redetermination* 24). The court observed that Commerce itself had described the machine processes conducted in Thailand as serving an important role in the production of a bearing and were comprised of "a series of steps wherein the width, the outside diameter, and bore of the rings (cup and cone) are ground and the inside diameter of the outer ring and the outside diameter of the inner ring are polished." *Id*. (citing *First Remand Redetermination* 11 (footnote omitted)). The court noted, further, that the Thai processing included multiple stages of assembly operations.

Id. In the Second Remand Redetermination, Commerce decided, due to the court's having rejected its finding, that "we find that we are left with no option but to conclude that the nature and sophistication of Thai processing is significant (or, at least, not insignificant) and, as such, that this criterion supports a finding that the TRBs are substantially transformed in Thailand." *Second Remand Redetermination* 11.

In the Second Remand Redetermination, Commerce explained that in the Final Results it had determined that it had insufficient information on the record to reach a conclusion under its fourth criterion, "level of investment." *Id*. Although Commerce never reopened the record to obtain additional information, it reversed this determination in the First Remand Redetermination and concluded that this criterion "does not weigh in favor of finding substantial transformation." *First Remand Redetermination* 27. Acknowledging that it lacked quantitative data on levels of investment in China and Thailand, Commerce nevertheless proceeded to apply its criterion according to what it termed "qualitative" information on the types of production equipment used in each country. *Id*. at 24. Commerce concluded that "the level of investment in Thailand is not significant in comparison to the level of investment in the PRC because the Thai production stages require significantly less machinery, and less sophisticated machinery[,] than the PRC production stages." *Id*. at 27 (footnote omitted). In *Peer Bearing II*, the court stated that "[w]hether or not supporting the Department's general characterization regarding how 'sophisticated' the machinery was, the record does not support the finding of 'significantly less machinery' in Thailand for a reason Commerce admits: the record lacked quantitative data." *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1354. The court added that, by the Department's own admission, Commerce had no quantitative threshold for what qualifies as a "significant" level of investment. *Id*. That Commerce was able to show from record evidence that the processing in China required relatively more types of production equipment than the processing in Thailand did not, in the court's view, support a finding that the investment in Thailand was not "significant." Pointing to record evidence that the machining in Thailand required multiple stages and that all assembly operations occurred in Thailand, *Peer Bearing II* held that with such evidence present on the record, "the record as a whole cannot support the finding that the investment in production equipment in Thailand was not 'significant,' either by itself or in comparison with the investment in China." *Id*.

Because the court had disallowed the finding on which Commerce had concluded that the "level of investment" criterion supported its decision to place the TRBs at issue within the scope of the Order, Commerce concluded in the Second Remand Redetermination that "we are left with no alternative but to conclude that the level of investment in Thailand is significant (or, at least, not insignificant) and that this criterion supports a finding that the TRBs are substantially transformed in Thailand." *Second Remand Redetermination* 14.

Under its fifth criterion, "ultimate use," Commerce found in the First Remand Redetermination that "[t]he fact that the scope of the *Order* includes TRBs and parts thereof (cups, cones, rollers, cages, *etc*.), finished and unfinished, indicates that both finished and unfinished TRBs are intended for the same ultimate end-use, that is, a finished TRB that can ultimately be used in a downstream product." *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1355 (quoting *First Remand Redetermination* 14 (emphasis in original)). *Peer Bearing II* identified an obvious flaw in this analysis: the issue presented by the case did not involve "unfinished TRBs" and instead was whether TRBs produced in Thailand from unfinished and finished, Chinese-origin parts should be considered merchandise subject to the Order.[5] The court also held erroneous the Department's stated finding that "the expected use of the unfinished TRB components is the same use as that of finished TRBs." *Id*. (quoting *First Remand Redetermination* 14). The court concluded that the finding, as stated by Commerce, was contradicted by the record evidence, which demonstrated that the only "expected" use of the unfinished cups and cones could have been the production of finished cups and cones, which in turn could be used only in the assembly of finished TRBs in Thailand. *Id*. Finally, the court in *dicta* noted the narrowness of the "ultimate use" criterion, in the application of which "Commerce appears to give little or no consideration to the record fact that the two major TRB components, the cups and cones, were not suitable for use in the assembly process in the form in which they were exported to Thailand." *Id*. (citing *First Remand Redetermination* 6–7, 41).

The Second Remand Redetermination states that "[t]hus, the court found that it did not sustain the Department's use of this criterion, and held that the intended use of a TRB part is for use in a finished TRB, which is not the same end use as a TRB." *Second Remand Redetermination*15. This formulation misinterprets the court's holding by attributing to the court a finding the court did not make. As

[5] The court also identified an error of logic, pointing out that the issue of the end use of a good is an issue of fact, not a question dependent on whether parts are included in an antidumping duty order. *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1355.

discussed in *Peer Bearing II* and summarized in this opinion, the court found fault with the Department's basing its ultimate use analysis on "unfinished TRBs," which are not at issue in this case, and pointed out errors in the findings upon which Commerce relied, exactly as those findings were stated in the First Remand Redetermination. Commerce responded to the court's decision on the application of the "ultimate use" criterion by dispensing with the criterion altogether. Commerce added that "[t]hus, in compliance with the Court's holding, we have not relied upon this criterion in our analysis and do not find that it supports a finding that the TRBs are not substantially transformed in Thailand." *Id.* This characterization also misinterprets the court's holding. The court did not hold that Commerce was precluded from applying its "ultimate use" criterion and instead pointed out the errors that occurred in the way Commerce applied it in the First Remand Redetermination. In developing the Second Remand Redetermination, Commerce was free to consider the fact that the merchandise exported from China to Thailand consisted entirely of parts of TRBs, finished and unfinished, rather than materials that could have had multiple uses. Indeed, the fact that all of the exported parts had no "ultimate use" other than in the manufacturing of a finished TRB is undisputed in this case and obvious from the record evidence.

In applying its final criterion, third country COM (i.e., cost of manufacturing) as a percentage of total COM in the Second Remand Redetermination, Commerce again relied on its calculation that 38% of the total COM had been incurred in Thailand. Commerce stated therein that "we continue to find that the COM of Thai processing is meaningful on its own, although not more significant than the COM of PRC processing," and that "[h]owever, as a result of our revised findings on the other five criteria, we find that this criterion supports a finding that the TRBs are substantially transformed in Thailand in conjunction with the findings on the other prongs of the analysis." *Second Remand Redetermination* 17.

Commerce stated its ultimate conclusion that "the totality of the circumstances demonstrates that the TRBs which are further processed in Thailand are substantially transformed in Thailand and are thus of Thai origin." *Id*. Commerce explained that it had reached this conclusion based on the relative COM of Thai processing and its analysis under the other three criteria which it had applied, having excluded two criteria (i.e., class or kind/scope *Id*. As the court has discussed, the decision to exclude those two criteria (as opposed to correcting the analyses thereunder) was made by Commerce, not by the court.

5. The Court Affirms the Department's Determination that the TRBs at Issue are Outside the Scope of the Antidumping Duty Order

The court affirms the Second Remand Redetermination because it is based on a reasonable, rather than expansive, construction of the scope of the Order and because the ultimate finding that the bearings at issue are not within the scope of the Order is supported by substantial evidence on the administrative record.

The application of the Department's substantial transformation analysis to a product that emerged from manufacturing operations conducted in a third country has been the subject of other recent litigation before this Court. *See Peer Bearing Co.-Changshan v. United States*, 38 CIT __, 986 F. Supp. 2d 1389 (2014) ("*Peer Bearing 11–22*"); *Bell Supply Company, LLC v. United States*, 39 CIT __, Slip Op. 15–73 (July 9, 2015) ("*Bell Supply*").[6]

Peer Bearing 11–22, which involved the subsequent (twenty-second) administrative review of the Order, addressed the issue of whether Commerce acted lawfully in determining that TRBs produced in substantially the same way as those at issue in the twenty-first review were merchandise subject to the Order. Like the TRBs at issue in the twenty-first review, the TRBs at issue in *Peer Bearing 11–22* resulted from machining in Thailand that converted unfinished cups and cones to finished, ready-for-assembly cups and cones and from assembly in Thailand using finished, Chinese-origin cages and rollers. In *Peer Bearing 11–22*, this Court rejected the Department's determination on remand that these TRBs were subject merchandise.

Peer Bearing 11–22 began its analysis by examining the scope language of the Order. The opinion stated that "[t]he imported bearings at issue were not, in any literal or ordinary sense, 'imports of tapered roller bearings from the PRC' as described in the scope language of the Order" because "[i]t was in Thailand, not China, that the imported merchandise became 'tapered roller bearings.'" *Peer Bearing 11–22*, 38 CIT at __, 986 F. Supp. 2d at 1400 (citation omitted).

[6] Challenged in *Bell Supply* was a final scope ruling in which Commerce concluded that an antidumping duty order on finished and unfinished oil country tubular goods ("OCTGs") from China included OCTGs resulting from heat treatment and processing in Indonesia that were performed on unfinished OCTGs (including "green tubes") exported to Indonesia from China. *Bell Supply Co. LLC v. United States*, 39 CIT __, __, Slip Op. 15–73 at 2–3 (July 9, 2015) ("*Bell Supply*"). The Court of International Trade concluded in *Bell Supply* that Commerce erred in resolving its scope inquiry because it failed to interpret the scope language of the antidumping and countervailing duty orders, did not address the effect of 19 U.S.C. § 1677j(b), and did not apply its regulation, 19 C.F.R. § 351.225(k), having first cited the regulation only to abandon an application of the regulation in favor of a substantial transformation analysis. *Id.*

The opinion then noted the general principle that Commerce may construe, but may not modify, the scope of an existing antidumping duty order. *See Peer Bearing 11–22*, 38 CIT at __, 986 F. Supp. 2d at 1397. Citing appellate decisions, the opinion viewed the Department's authority under 19 U.S.C. § 1677j(a)-(d) as an exception to this general principle, under which Commerce, in certain circumstances, is empowered to enlarge the scope of an order to reach products not covered by the existing scope. *Id.* at __, 986 F. Supp. 2d at 1398 (citing *AMS Assoc. v. United States*, 737 F.3d 1338, 1343 (Fed. Cir. 2013) ("*AMS Assoc.*"); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1098 (Fed. Cir. 2002) ("*Duferco*")). *Peer Bearing 11–22* concluded that the statute, in 19 U.S.C. § 1677j(b)(1)(A) and (B), "specifically addresses the situation in which a good imported into the United States is completed or assembled in a 'third country,' i.e., a country other than the country named in the order." *Id*. The *Peer Bearing 11–22* opinion stated that the scope language of the Order, which Commerce must construe reasonably, not expansively, and the statutory language of 19 U.S.C. § 1677j(b)(1)(A) and (B) "cast doubt on the Department's decision." *Id.* at __, 986 F. Supp. 2d at 1400.

Peer Bearing 11–22 acknowledged that legislative histories of the versions of § 1677j(b) enacted in 1988 and 1994 "do not state explicitly that Congress intended by enacting these provisions to limit the authority of Commerce in construing the scope of an existing order in any situation in which third country completion or assembly is at issue." *Id.* at __, 986 F. Supp. 2d at 1402. The opinion reasoned, nevertheless, that the statutory language and legislative histories show that "Congress considered it necessary to grant Commerce additional authority so that Commerce could address these situations by expanding, rather than merely interpreting, the scope of an existing antidumping or countervailing duty order" and that "Congress could not have done so without possessing a general understanding that a good emerging from a third country completion or assembly operation such as that described in 19 U.S.C. § 1677j(b)(1)(A) and (B) ordinarily would not be considered to be within the scope of the order in question, at least where, as here, the commercial identity of the finished good was acquired in the third country." *Id*. (footnote omitted). Identifying specific limitations that Congress placed on the anticircumvention authority of 19 U.S.C. § 1677j(b)(1)(A) and (B), *Peer Bearing 11–22* concluded that "the way in which Congress provided anticircumvention authority in 19 U.S.C. § 1677j(b) is an indication that Commerce exceeded the limitations on its authority to interpret, without enlarging, the scope of the Order when it placed within that

scope the TRBs exported from Thailand." *Id.* The court added that "[h]ere, Commerce placed within the Order a product of a type Congress contemplated would be the subject of an anticircumvention inquiry, without actually conducting such an inquiry." *Id*. at __, 986 F. Supp. 2d at 1402–03. *Peer Bearing 11–22* further reasoned as follows:

> Had Commerce chosen to conduct an anticircumvention inquiry under 19 U.S.C. § 1677j(b), it could not have placed the TRBs in question within the order without meeting all three of the criteria Congress set forth in 19 U.S.C. § 1677j(b)(1)(C)(E). The criterion in paragraph (C) is that "the process of assembly or completion in the foreign country . . . is *minor* or *insignificant* . . ." On the record of the twenty-second review, it is far from certain that this criterion could have been met.
>
> One obstacle to satisfying the paragraph (C) criterion is that the "process of assembly or completion" conducted in Thailand was more than mere assembly or completion. As Commerce itself found, the cup and cone machining process in Thailand involved "a series of steps wherein the width, the outside diameter, and bore of the rings (cup and cone) are ground and the inside diameter of the outer ring and the outside diameter of the inner ring are polished."

Peer Bearing 11–22, 38 CIT at __, 986 F. Supp. 2d at 1403 (citations omitted). Opining that the result of any anticircumvention inquiry Commerce could have conducted under § 1677j(b) "would have been far from certain," *Peer Bearing 11–22* summarized its reasoning by stating that "[o]n this administrative record, the court cannot at the same time conclude that Commerce had the discretion to place these TRBs under the Order by relying solely on its interpretive authority, which necessarily is narrower than the anticircumvention authority provided by § 1677j(b)." *Id.* at __, 986 F. Supp. 2d at 1405 (citing *Duferco*, 296 F.3d at 1098).

The court did not apply in *Peer Bearing II* the same analysis it later applied to the results of the twenty-second review in *Peer Bearing 11–22*. In *Peer Bearing II*, a remand was required because certain findings of fact were not supported by substantial record evidence and because these findings were critical to the Department's ultimate finding that the TRBs exported from Thailand that were at issue in the twenty-first review were subject to the Order. Nevertheless, certain principles discussed in *Peer Bearing 11–22* are also applicable to this case and support the conclusion that the Second Remand Redetermination must be affirmed. In this case as well as in *Peer Bearing 11–22*, Commerce has not invoked the anticircumvention authority

provided by 19 U.S.C. § 1677j(b), and had it attempted to do so, it would have had to address the fact that the manufacturing operations in Thailand involved both completion of the cups and cones *and* assembly. *See* 19 U.S.C. § 1677j(b) (providing for invocation of the anticircumvention authority where "the process of assembly *or* completion in the foreign country . . . is *minor or insignificant*" (emphasis added)). Absent reliance on the anticircumvention authority, Commerce unquestionably must construe reasonably, rather than expansively, the scope language of the Order. *See AMS Assoc.*, 737 F.3d at 1343; *Duferco*, 296 F.3d at 1098.

The class or kind of merchandise identified as subject merchandise by the scope language falls into four distinct categories: finished TRBs from the PRC, unfinished TRBs from the PRC, finished parts of TRBs from the PRC, and unfinished parts of TRBs from the PRC. *See Final Results*, 75 Fed. Reg. at 845. The scope language does not identify a fifth category consisting of TRBs that are produced in a third country from unfinished and finished parts from the PRC. Here, the TRBs at issue did not *become* TRBs in China: what was produced and exported from China to Thailand consisted solely of parts of TRBs, finished and unfinished, and no such part plausibly could be described as an unfinished TRB. Considered on the whole, the record evidence supports the ultimate finding that TRBs produced in this way are not within the scope of the Order when the scope language is construed reasonably and not expansively.

For example, a critical finding by Commerce in the Second Remand Redetermination is that "[t]he production in Thailand consists of grinding and polishing, which refine the finished measurements and smoothness of the cup and cone components in line with tolerance levels, and assembly." *Second Remand Redetermination* 8. Further, Commerce reiterated its earlier findings that the grinding and polishing of the cups and cones in Thailand served an important role in the production of a bearing. *Id*. As this finding indicates, it is undisputed that CPZ exported to Thailand unfinished cups and cones and finished cages and rollers. Commerce did not find, and on this record could not permissibly have found, that what was exported from China to Thailand were unfinished TRBs. Moreover, because the cups and cones were not exported to Thailand in a form ready for assembly, Commerce could not permissibly have found (and did not find) that what was exported to Thailand constituted unassembled TRBs. Because the ultimate finding that the TRBs exported from Thailand are not within the scope of the Order is supported by substantial evidence

and conforms to a reasonable, rather than expansive, interpretation of the scope language of the Order, the Second Remand Redetermination qualifies for affirmance.

In opposing the Second Remand Redetermination, Timken takes issue with a conclusion the court reached in *Peer Bearing II*: that Commerce erred in finding that the finishing processes performed in Thailand on the cups and cones imparted no substantial changes to the physical and mechanical properties or the essential character of the merchandise that would constitute a substantial transformation of the merchandise. Timken's Comments 4–5 (citing *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1352). Timken submits that "[u]nder the Court's logic, an automobile imported without its wheels could not be characterized as having the essential characteristics of an automobile because it is incapable of movement." *Id*. at 5.

The flaw in Timken's argument is apparent from the analogy Timken offers. An automobile imported without its wheels necessarily would have the "essential character" of an automobile (and would be recognized as such for tariff purposes) because it is in fact an unfinished automobile, not an automobile part. But in this case, Commerce was not faced with a factual record under which unfinished TRBs were exported from China to Thailand. It cannot seriously be contended that an unfinished cup or cone, or a cage or a roller, has the functional or mechanical characteristics of a tapered roller bearing.

Timken next argues that "[e]ven if the Court does not accept Timken's argument, it should reject the Department's conclusion" that "because the Court ruled that no single imported part has the character of a finished TRB, its consideration of these characteristics require [*sic*] a conclusion that TRBs are substantially transformed in Thailand." *Id*. Timken adds that "[i]t is not possible to discern, as a Court must, the logical connection between facts found and a conclusion drawn." *Id*. (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The court finds no merit in this argument. As discussed above, the court can discern from the Second Remand Redetermination factual findings, supported by substantial evidence, that are sufficient to support the ultimate finding that the TRBs at issue are not "imports of tapered roller bearings from the PRC" within the meaning of the Order. Timken's argument is further flawed in misconstruing the question Commerce was required to decide. That question was not, as Timken's argument posits, whether "TRBs are substantially transformed in Thailand." According to the Department's own findings, Thailand was the *only* country in which the TRBs at issue—as opposed to the unfinished cups, unfinished cones, and finished cages and rollers—can be said to have been produced. If

the question were required to be stated in terms of "substantial transformation," that question could only be whether the Chinese-origin parts, i.e., the unfinished cups, the unfinished cones, and the finished cages and rollers, underwent a substantial transformation during the manufacturing operations in Thailand by which they were converted into finished TRBs.

Timken directs its next argument to the Department's application of its "nature/sophistication of processing" criterion and, specifically, to the Department's reversing in the Second Remand Redetermination its finding in the First Remand Redetermination that the nature, extent, and sophistication of the Thai processing were not significant. Commerce reversed this finding in response to *Peer Bearing II*, which concluded that the finding was not supported by substantial evidence on the record. *Second Remand Redetermination* 11; *see Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1353. Noting in the Second Remand Redetermination that the court had mentioned its reversal of the finding in the response to defendant's motion for clarification, Commerce stated as follows:

> . . . [B]ecause the Court held that the record does not support a finding that the nature and sophistication of Thai processing is not significant, we find that we are left with no option but to conclude that the nature and sophistication of Thai processing is significant (or, at least, not insignificant) and, as such, that this criterion supports a finding that the TRBs are substantially transformed in Thailand.

Second Remand Redetermination 11. Timken argues that the above-quoted conclusion was "illogical and unsupported by the record." Timken's Comments 7. Timken acknowledges in its comment submission that the finding rejected by the court "may not, as this Court found, be supported by the record" but argues that the Department's original finding was different, was supported by substantial evidence, and was not rejected by the court. *Id*. at 8. Regarding the original finding, Timken notes that Commerce found in the Final Results that:

> . . . [T]he finishing processing in and of itself is not significant enough to be considered a process that substantially transforms the subject merchandise for antidumping purposes, because there is no substantial change to the primary properties of the merchandise other than slight alterations to the shape of the TRB through the finish grinding process and a smoothing of the TRB's cup and cone raceways through the honing process.

Id. (quoting *Decision Mem.* 8). According to Timken, Commerce acted illogically and contrary to the record evidence because "[a] broad finding that there is not sufficient evidence for the Department to affirmatively conclude that processing was not significant does not lead to the conclusion that therefore it must have been significant and so support a finding of substantial transformation." *Id*. at 7. Adding that "[t]he Court's negative does not prove the Department's positive" and that "the Department has in this analysis again failed to meet its obligation to investigate and to draw logical conclusions from the facts it has found," Timken asks the court "to reject the Department's remand conclusion as unsupported by substantial evidence." *Id*. at 7–9.

Timken's argument is unpersuasive because the Second Remand Redetermination clearly is supported by substantial evidence. The manufacturing operations conducted in Thailand, although not as extensive as those conducted in China, cannot be characterized truthfully as "not significant." These operations involved more than assembly of finished cups and cones made to the precise tolerances that were required for use in TRBs. As the Department's own discussion impliedly recognized, these operations were essential to the conversion of the Chinese-origin parts, unfinished and finished, into TRBs.

Timken makes a similar argument pertaining to the Department's "level of investment" criterion. In *Peer Bearing II*, the court rejected the Department's finding that "based on the types of equipment required for the production stages in the PRC versus the type of equipment required for the finishing and assembly processing occurring in Thailand, the investment in the Thai equipment is *not significant* in comparison to the investment in the PRC equipment." *Peer Bearing II*, 37 CIT at __, 914 F. Supp. 2d at 1354 (quoting *First Remand Redetermination* 14 (emphasis added)). The court noted that "[a]s the [First] Remand Redetermination acknowledges, the record not only lacked quantitative data but included evidence that the cups and cones underwent multiple stages of processing in Thailand requiring 'an investment for machinery' and evidence that all assembly operations for the TRBs at issue took place in Thailand." *Id*. (citing *First Remand Redetermination* 12–14, 25–27). The court concluded that "[b]ecause such evidence is present, the record as a whole cannot support the finding that the investment in production equipment in Thailand was not 'significant,' either by itself or in comparison with the investment in China." *Id*. In the Second Remand Redetermination, Commerce reasoned as follows:

> As discussed above, in *[Peer Bearing] II*, the Court held that, because there is record evidence that the multiple stages of

> grinding and subsequent assembly that occur in Thailand required an "investment for machinery," the record cannot support a finding that the Thai level of investment is insignificant. Thus, we find that we are left with no alternative but to conclude that the level of investment in Thailand is significant (or at least, not insignificant) and that this criterion supports a finding that the TRBs are substantially transformed in Thailand.

Second Remand Redetermination 13–14. Timken argues, here as well, that "the Court's negative does not prove the Department's positive," adding that "[t]he Department's transformation of missing information into an affirmative finding of substantial transformation does not establish a logical connection between the facts found and the conclusions drawn, nor can it reasonably be characterized as 'a judgment anchored in the language and spirit of the relevant statutes and regulations.'" Timken's Comments 10 (quoting *Freeport Minerals Co. v. United States*, 776 F.2d 1029, 1032 (Fed. Cir. 1985) and citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Contrary to this argument, the court is able to discern the Department's reasoning. The court has no valid basis to conclude that the finding that the TRBs at issue are outside of the scope of the Order is contrary to statute or regulations.

Timken's final argument is that Commerce's calculation of the relative COM in Thailand, 38%, is overstated. Timken submits that Commerce improperly included factory overhead associated with the raw materials received from China in its calculation of Thai manufacturing costs. Timken's Comments 12–15. Timken argues that "[b]y including Thai overhead attributable to Chinese inputs in its build-up of Thai costs, Commerce has added a second factory overhead amount to the same inputs," so that, "in effect, there is double-counting." Timken's Comments 14.

Before the court, Timken presents an alternative COM calculation that it proposed during the second remand proceeding and that Commerce rejected in the Second Remand Redetermination. Timken's Comments 4, 13, *see also Second Remand Redetermination* 18–31. Timken questions the Department's use of certain factory overhead data supplied by CPZ and accuses Commerce of incorrectly including in the calculation of the Thai COM "factory overhead attributable to Chinese inputs." Timken's Comments 13. Timken argues that the Department's calculation of 38% for the relative COM in Thailand is overstated because it "attribute[s] Thai overhead to products [i.e.,

parts] created in China so that, in effect, there is double-counting.*" Id*. at 14. Timken's proposed recalculation modifies the Department's calculation by using a substitute Thai COM that is based on "the labor amount plus the factory overhead attributable to that labor." *Id*. at 13. Timken's proposed recalculation would reduce the calculated Thai COM percentage by more than half. *Id*.

During the second remand proceeding, Commerce disagreed with Timken's recalculation on various grounds, including the ground that "Timken fails to provide any analysis or cite to any record evidence to demonstrate that CPZ improperly reported or allocated its overhead costs." *Second Remand Redetermination* 24. According to Commerce, "the allocated overhead costs reconcile to the Thai facility's financial reporting, and Timken provides no evidence to the contrary." *Id*. at 25.

Commerce also informed the court in the Second Remand Redetermination that even if it were to accept Timken's reduced calculation of the Thai COM (which, for various stated reasons, it did not), it still would reach the same ultimate decision. *Second Remand Redetermination* 31 (" . . . we do not find that the considerably less 'substantial' . . . percent value-added cited by Timken to be a compellingly insignificant percentage of COM to overcome our revised findings on the remaining criteria.").

The court agrees with Commerce that Timken has failed to demonstrate with record evidence that the Department's calculation of the relative percentage COM for the Thai operations was erroneously calculated or otherwise invalid. As Commerce points out, "there is nothing on record to demonstrate that relatively high overhead costs (compared to labor costs) are anything but a normal reflection of the Thai facility's financial reality in its first months of operation." *Second Remand Redetermination* 25. Moreover, even if this 38% value-added calculation were disregarded, the record still would contain substantial evidence to support the ultimate determination that the TRBs at issue are not "imports of TRBs from the PRC." As the court has discussed, and Commerce has found, the machining in Thailand conducted upon the two major components, the cups and the cones, required stages of processing to achieve the required dimensional tolerances and finish. It is undisputed that the assembly operations required to produce the actual TRBs also took place in Thailand. Commerce did not find, and on this record could not validly have found, that CPZ's operations in Thailand were limited to completion of unfinished or unassembled bearings. Even were the court to accept, *arguendo*, Timken's COM analysis, the record evidence still would be sufficient to demonstrate that the manufacturing operations con-

ducted in Thailand, during which the merchandise acquired its commercial identity as TRBs, were not of a sort that fairly could be characterized as insignificant.

Because this case involves interpretation of scope language in an antidumping duty order, the court next considers whether Commerce was required by its own regulation, 19 C.F.R. § 351.225(k), to consider the factors set forth in paragraph (k)(1) and, if those factors are not dispositive, the factors in paragraph (k)(2). An argument can be made that before excluding the merchandise at issue from the scope of the Order, Commerce first should have followed the sequence of factors set forth in paragraphs (k)(1) and (k)(2). Under such an argument, the court should order a remand so that Commerce, with the comment of the parties, may consider this issue. The court is aware of uncertainty over whether Commerce currently interprets this regulation to apply to scope issues involving the country of origin. *See Bell Supply*, 39 CIT at __, Slip Op. 15–73 at 11 (explaining that in a scope ruling Commerce invoked § 351.225(k) but then "shifted its inquiry to a substantial transformation analysis."). On its face, the regulation does not contain an exception or exclusion for scope questions involving country of origin. On the other hand, Commerce addressed the scope issue in this case in the context of an administrative review, not a separate scope inquiry, which raises another interpretive question as to the regulation. As discussed below, the court need not decide the question of whether the regulation applied in the circumstance presented by this case.

Under the analysis set forth by the Court of Appeals in *Duferco*, 296 F.3d at 1098, Commerce may include merchandise within an order only if the language of the order expressly includes that merchandise or can reasonably be interpreted to include it. The court concludes that in the Second Remand Redetermination, Commerce would not have been required to consider the factors in subsection (k) even were it presumed that the regulation applied in the circumstance presented. Here, as the court has emphasized, Commerce must apply a reasonable, and not an expansive, interpretation of the scope. In the Final Results and the First Remand Redetermination, Commerce reached out to place within the scope TRBs that emerged from, and acquired their commercial identity as "TRBs" from, manufacturing operations conducted in a third country rather than the country named in the Order. The Order makes no mention of inclusion of TRBs produced in this way, and a commonsense interpretation of the term "imports of tapered roller bearings from the PRC" does not suggest that the Order was intended to apply to such goods. Therefore, the court concludes that the scope language does not expressly

include the goods at issue in this case. Because Commerce is required to interpret that language reasonably and not expansively, and because of the Department's own findings as to the nature of the merchandise, as supported by substantial record evidence in this case, placing that merchandise under the Order could not have been accomplished according to a reasonable construction of the scope language. Therefore, even were 19 U.S.C. § 351.225 presumed to apply in this situation, the court would find no error in the Department's reaching its decision in the Second Remand Redetermination without performing an analysis of the factors in subsection (k) thereof.

The final issue in this case is whether a third remand is required because Commerce misinterpreted certain aspects of the court's opinion in *Peer Bearing II*. As discussed above, Commerce erroneously concluded that the court had precluded any application of the Department's first criterion (class or kind/scope) and fifth criterion (end use). Nevertheless, the court determines that another remand is unnecessary and would serve no valid purpose. Commerce could have, but did not, attempted to demonstrate the relevance of its first criterion. And even if this criterion is accorded "relevance," any analysis thereunder must confront the plain, uncontested fact that the merchandise at issue, as imported into the United States from Thailand, consisted of finished TRBs, not finished or unfinished TRB parts. Expressed in terms of "substantial transformation," the issue is whether the manufacturing operations performed in Thailand resulted in a substantial transformation of the finished and unfinished parts that were exported to Thailand from China, and not whether "TRBs" (finished or unfinished) were substantially transformed. Similarly, the result of the Department's "end use" criterion is not irrelevant, and the court did not so hold in *Peer Bearing II*. As discussed previously in this opinion, Commerce was not precluded from taking into consideration the uncontested fact that the TRB production in Thailand was conducted upon parts, finished and unfinished, that ultimately were destined to become TRBs. In short, the errors Commerce made in construing the court's opinion in *Peer Bearing II* do not prevent the court from affirming the Second Remand Redetermination by applying the standard of review, under which the court subjects the Department's findings to a substantial evidence standard and considers, further, whether the Second Remand Redetermination is otherwise in accordance with law. In performing this review, the court concludes that Commerce reached an ultimate determination that is supported by substantial evidence on that record and that accords with a reasonable, rather than expansive, interpretation of the scope of the Order.

III. CONCLUSION

For the reasons discussed in the foregoing, the court concludes that the Second Remand Redetermination qualifies for affirmance upon judicial review. Judgment will enter accordingly.

Dated: December 21, 2015
New York, New York

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

Slip Op. 15–143

PEER BEARING COMPANY – CHANGSHAN, Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 11–0002

OPINION

[Affirming a remand redetermination issued by the International Trade Administration, U.S. Department of Commerce, in litigation arising from an administrative review of an antidumping duty order on tapered roller bearings and parts thereof from China]

Dated: December 21, 2015

John M. Gurley and *Diana Dimitriuc Quaia*, Arent Fox LLP, of Washington, DC, for plaintiff and defendant-intervenor Peer Bearing Company–Changshan.

L. Misha Preheim, Senior Trial Counsel, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With them on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Justin Ross Becker*, Office of the Chief Counsel for Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

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

William A. Fennell, *Terence P. Stewart*, and *Stephanie M. Bell*, Stewart and Stewart, of Washington, DC, for plaintiff and defendant-intervenor The Timken Company.

Stanceu, Chief Judge:

This consolidated action arose from challenges to a final determination ("Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the twenty-second review of an antidumping duty order on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, from the People's Republic of China ("China" or the

"PRC"). *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Admin. Review*, 76 Fed. Reg. 3,086 (Int'l Trade Admin. Jan. 19, 2011) ("*Final Results*"). The twenty-second review pertained to entries of subject merchandise made during the period of June 1, 2008, through May 31, 2009 ("period of review" or "POR"). *Final Results*, 76 Fed. Reg. at 3,086.

Before the court is the second redetermination upon remand ("Second Remand Redetermination") Commerce submitted in response to the court's opinion and order in *Peer Bearing Co.–Changshan v. United States*, 38 CIT __, 986 F. Supp. 2d 1389 (2014) ("*Peer Bearing II*"). *Final Results of Redetermination Pursuant to Court Remand* (Aug. 8, 2014), ECF No. 126–1 ("*Second Remand Redetermination*"). The court affirms the Second Remand Redetermination.

I. BACKGROUND

The background of this case is provided in the court's prior opinions and is supplemented herein. *Peer Bearing Co.–Changshan v. United States*, 36 CIT __, __, 884 F. Supp. 2d 1313, 1317–18 (2012) ("*Peer Bearing I*") (first remand order); *Peer Bearing Co.-Changshan v. United States*, 35 CIT __, __, Slip Op. 11–125 at 1–2 (Oct. 13, 2011) (denying a motion to dismiss one of the claims brought in this consolidated action); *Peer Bearing II*, 38 CIT at __, 986 F. Supp. 2d at 1392–93 (second remand order).

A. The Order and the Scope

Commerce issued the antidumping duty order on "imports of tapered roller bearings from the PRC" (the "Order") in 1987. *Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China*, 52 Fed. Reg. 22,667, 22,667 (Int'l Trade Admin. June 15, 1987) ("*Antidumping Duty Order*"). The scope of the Order, as stated in the Final Results, is "shipments of tapered roller bearings and parts thereof, finished and unfinished, from the PRC; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use." *Final Results*, 76 Fed. Reg. at 3,087.

B. The Parties to this Consolidated Action

One of the plaintiffs in this action is PBCD, LLC, which in this litigation is representing the interests of two previously-existing companies, Peer Bearing Company–Changshan, a Chinese company that

produced and exported subject merchandise during the first few months of the POR, and its affiliated U.S. importer, Peer Bearing Company.

On September 11, 2008, approximately two and a half months into the POR, Peer Bearing Company–Changshan, the sole respondent in the prior (twenty-first) administrative review, and its affiliate Peer Bearing Company were acquired by AB SKF, of Sweden, and subsequently ceased to exist as legal entities. Both of these previously-existing companies transferred their legal responsibilities relating to the twenty-second administrative review to PBCD, LLC. In this Opinion, the court refers to the entity litigating claims on behalf of the pre-acquisition companies as "PBCD" and to the pre-acquisition producer Peer Bearing Company–Changshan as "CPZ."

Upon the acquisitions by AB SKF, the production facilities in China were organized as a new company, Changshan Peer Bearing Co. Ltd., and the affiliated U.S. importer also became a new company, again named "Peer Bearing Company." *Second Remand Redetermination* 1 n.1. During the administrative proceedings, Commerce found that the post-acquisition companies were not successors-in-interest to their pre-acquisition counterparts and, accordingly, treated the pre-acquisition and post-acquisition companies as distinct legal entities for purposes of the twenty-second review. *Id*. On the basis of this finding, Commerce split the POR into two segments based on the September 11, 2008 date of the acquisition, after which date Commerce considered SKF to have made both the sales and the entries. *Peer Bearing I*, 36 CIT at __, 884 F. Supp. 2d at 1327. Both of the new companies, i.e., the two SKF affiliates, are defendant-intervenors in this action. In this Opinion, the court refers to the post-acquisition producer and respondent Changshan Peer Bearing Co. Ltd. as "SKF."

The other plaintiff in this action is domestic TRB producer The Timken Company ("Timken"), which sued separately to contest the Final Results and also was a defendant-intervenor in the action commenced by PBCD. *See* Compl., *Timken Co. v. United States*, Court No. 11–00039 (Mar. 10, 2010), ECF No. 9. The court consolidated the two cases. Order (June 13, 2011), ECF No. 27 (consolidating *Timken Co. v. United States*, (Court No. 11–00039), into the above-captioned matter).

C. Procedural History

In *Peer Bearing II*, the court affirmed in part, and remanded in part, the remand redetermination Commerce issued in response to the court's order in *Peer Bearing I*, directing Commerce to reconsider two

issues. *Peer Bearing II*, 38 CIT at __, 986 F. Supp. 2d at 1414–15. The Second Remand Redetermination, submitted August 8, 2014, reduced PBCD's margin from 22.82% to 21.65% and SKF's margin from 22.12% to 19.45%. *Second Remand Redetermination* 17.

Only Timken and PBCD have commented on the Second Remand Redetermination. Timken objects to only one aspect of the Second Remand Redetermination. Timken Co.'s Comments on Dep't Com.'s Second Redetermination Pursuant to Ct. Remand (Sept. 10, 2014), ECF No. 130 ("Timken's Comments"). PBCD makes no objection to either of the Department's determinations on second remand. Peer Bearing Co.–Changshan's Comments on the Second Remand Redetermination (Sept. 10, 2014), ECF No. 129 ("PBCD's Comments").

Defendant filed its reply with the court on September 25, 2014. Def.'s Resp. to Def.-intervenor's Comments Regarding the Remand Redetermination, ECF No. 131.

II. DISCUSSION

A. Jurisdiction and Standard of Review

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, 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).[1] The court will sustain the Department's redetermination if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

B. The Court Sustains the Department's Choice of Factor-of-Production Data to Calculate Normal Value for Certain Pre-Acquisition Inventory Sold by SKF During the POR

In *Peer Bearing II*, the court remanded for explanation the Department's choice of factor-of-production ("FOP") data to calculate the normal value of TRBs manufactured by the former producer, CPZ, but sold from SKF's acquired inventory during the POR by the newly-formed Peer Bearing Company. *Peer Bearing II*, 38 CIT at __, 986 F. Supp. 2d at 1412–14. In the First Remand Redetermination, Commerce had calculated normal value for these TRBs using data per-

[1] All statutory citations to the Tariff Act of 1930 are to the 2006 edition of the United States Code and all regulatory citations are to the 2011 edition of the Code of Federal Regulations.

taining to CPZ's production of subject merchandise in the brief period between the beginning of the POR and the acquisition (i.e., the data that PBCD had submitted to the record).[2] *Peer Bearing II*, 38 CIT at __, 986 F. Supp. 2d at 1412 (citing *Final Results of Redetermination Pursuant to Court Remand* 39 (May 13, 2013), ECF No. 100 (public version), ECF No. 101 (confidential version) ("*First Remand Redetermination*")).[3] In *Peer Bearing II*, the court found that Commerce had not explained why it chose these data over certain other data, submitted for the record by Timken, pertaining to CPZ's production of subject merchandise during the *prior* POR. *Id.* at __, 986 F. Supp. 2d at 1413. The court directed Commerce to "reconsider its selection of the data submitted by PBCD over the data submitted by Timken and provide a rationale grounded in the requirements of the statute for the data set it chooses." *Id*.

In the Second Remand Redetermination, Commerce continued to value the TRBs at issue using the FOP data submitted by PBCD relating to the first three months of the POR. *Second Remand Redetermination* 13. Commerce provided an explanation for its decision, reasoning, *inter alia*, that its decision is compatible with 19 U.S.C. § 1677b(c)(l) "because the record does not reveal that the merchandise sold by SKF was produced in the prior POR." *Id.* Commerce concluded that without this information "it does not follow that PBCD's FOP data from the prior POR is a more accurate reflection of PBCD's production of merchandise sold by SKF during the POR." *Id.* at 12–13. Because Commerce provided an explanation as directed by the court and because no party contests the Department's resolution of this issue, the court sustains this aspect of the Second Remand Redetermination.

C. The Court Sustains the Department's Determination that Certain Bearings Exported from Thailand are Not Within the Scope of the Order

PBCD claims that Commerce unlawfully determined in the Final Results that certain TRBs exported from Thailand and sold during the POR are subject to the Order. Upon a second remand, Commerce

[2] The record contained three individual sets of FOP data from which Commerce could discern normal value: (1) production data pertaining to the post-acquisition months of the POR (submitted by SKF on behalf of the post-acquisition producer); (2) production data pertaining to the pre-acquisition months of the POR (submitted by PBCD on behalf of pre-acquisition CPZ); and (3) data pertaining to CPZ's production during the prior (twenty-first) POR (submitted by petitioner Timken). *Peer Bearing Co.–Changshan v. United States*, 36 CIT __, __, 884 F. Supp. 2d 1313, 1337–38 (2012) ("*Peer Bearing I*").

[3] Unless otherwise specified, all citations to Final Results of Redetermination Pursuant to Court Remand ("Remand Redetermination") filed on May 13, 2013 are to the public version, ECF No. 100 ("*First Remand Redetermination*").

now has determined, under protest, that these TRBs are products of Thailand and therefore outside the scope of the Order.

1. The Merchandise at Issue

The operations performed in Thailand to produce the finished TRBs that are the subject of PBCD's claim are described in the court's previous opinions and are summarized briefly herein. The TRBs at issue emerged from manufacturing operations conducted by a CPZ affiliate in Thailand using finished and unfinished TRB parts that CPZ had produced in its Chinese facilities. The parts imported from China were (1) unfinished races, i.e., "cups" and "cones," that had been forged, turned (i.e., machined), and heat-treated, and (2) finished rollers and cages. The Thai affiliate performed additional grinding and honing on the unfinished TRB cups and cones to achieve the dimensions and polished finish that are required for the final product. The Thai affiliate then assembled the newly-finished cups and cones together with the finished rollers and cages to produce the TRBs that were exported from Thailand to the United States.

2. The Methodology Commerce Applied in the Final Results to Determine Whether the TRBs Were Subject to the Order

In the Final Results, Commerce applied what it termed a "substantial transformation" test to conclude that the TRBs at issue were of Chinese origin and therefore within the scope of the Order. For the first part of this test, Commerce considered the record evidence according to six criteria, drawing a conclusion under each as to whether the record supported or detracted from a finding that the TRBs were "substantially transformed" in Thailand and therefore outside the scope of the Order. *Issues & Decision Mem. for the Final Results of the 2008–2009 Admin. Review*, A-570–601, AR 08–09, at 11–12 (Jan. 11, 2011) (Admin.R.Doc. No. 6041), *available at* http://enforcement.trade.gov/frn/summary/PRC/2011–1026–1.pdf (last visited Dec. 16, 2015) ("*Decision Mem.*").

The Department's six criteria were: (1) the class or kind of merchandise within the scope of the Order, *Decision Mem.* at 12; (2) the nature and sophistication of the upstream processing (i.e., the processing conducted in China) and the third-country processing (i.e., the processing conducted in Thailand), *id.* at 13–14; (3) the identification of the processing that imparts the essential physical or chemical properties of a TRB, *id*. at 14–15; (4) the cost of production and value added by the third-country processing, *id*. at 15–16; (5) the level of investment in the third country and the potential for circumvention, *id*. at 16–17; and (6) whether "unfinished and finished bearings

are both intended for the same ultimate end-use," *id.* at 17. For the second part of its test, Commerce evaluated its criterion-specific determinations collectively to make an ultimate finding on whether the TRBs were within the scope of the Order according to the "totality of the circumstances." *Id.*

For the Final Results, Commerce concluded that, based on the totality of the circumstances, the TRBs in question were products of China and therefore subject to the Order. In reaching this conclusion, Commerce acknowledged that the grinding and assembly processes performed in Thailand "are important and necessary processes for the products in question to becoming finished TRBs" and stated that it "does not dispute the fact that a considerable investment was made in the third country." *Id.* at 17. Commerce reasoned, however, that these findings were outweighed by its findings that "the investment (even though considerable)" and the "process (even though important)" did "not change the class or kind of merchandise," did "not confer the essential characteristics," did "not represent a significant value added to the final product," and did "not change the ultimate end-use to be sufficient to constitute substantial transformation." *Id*. Commerce found that the TRBs were within the scope of the Order and treated the sales of these products as sales of subject merchandise for purposes of the twenty-second review.

3. The Court's Decision in Peer Bearing I

In *Peer Bearing I*, the court did not sustain, in any respect, the Department's determination that the TRBs at issue were subject to the Order. Instead, the court directed Commerce to reconsider the country of origin determination in the entirety and to ensure that its determination on remand is "based on findings supported by substantial record evidence" and "supported by an adequate explanation of the Department's reasoning." *Peer Bearing I*, 36 CIT at __, 884 F. Supp. 2d at 1325. Alluding to the record evidence, the court opined that "[a]ny valid resolution of the origin question posed by this case must consider the assembly process and the fact that the two major components of TRBs, the cups and cones, underwent not only assembly in Thailand but *also* grinding and finishing, which Commerce found to be important and necessary to the functioning of a TRB." *Id*. (emphasis in original). In addition to its general objection, the court identified specific flaws in the Department's analysis.

The court concluded, first, that "in applying its totality of the circumstances test, Commerce gave weight to its first criterion, the inclusion of finished and unfinished parts of TRBs within the class or kind of merchandise defined by the scope of the Order, but it failed to

supply a reason why this criterion was relevant, on the record of this case, to the country of origin determination Commerce was making." *Id*. at __, 884 F. Supp. 2d at 1320. The court considered it insufficient that Commerce justified its use of this criterion solely on the basis that it had applied it in country of origin determinations in the past. *Id*. at __, 884 F. Supp. 2d at 1322. In discussing the failure to show the relevance of the first criterion, the court observed that Commerce did not "reach a finding that the 'important and necessary' operations performed in Thailand posed any circumvention potential" even though "Congress expressly addressed the exact circumstance posed by this case in the 'prevention of circumvention' provision set forth in 19 U.S.C. § 1677j(b)." *Id*. at __, 884 F. Supp. 2d at 1321.

The court concluded that "with respect to the fourth criterion, the Department made a finding that the processing performed in Thailand did not represent a significant value added to the finished product, a finding that is not supported by substantial evidence on the record." *Id*. at 1320. Also, referring to certain qualitative record evidence on the multiple machining processes performed in Thailand on the cups and cones, the court opined that "Commerce appears to have given little if any probative weight to this qualitative evidence, which detracts from the Department's country of origin determination." *Id*. at __, 884 F. Supp. 2d at 1323.

Finally, the court found fault with the Department's according significance to "its finding that an unfinished TRB is intended for the same ultimate end use as a finished TRB." *Id*. at __, 884 F. Supp. 2d at 1320. The court stated that "[n]o individual part exported from China to Thailand plausibly could have been found to be an unfinished bearing, and Commerce made no finding to that effect." *Id*. at __, 884 F. Supp. 2d at 1324.

Peer Bearing I did not affirm, in whole or in part, the Department's "substantial transformation" criteria or methodology. The court specifically found flaws in the Department's application of two of the criteria and the Department's reasoning. The court considered Commerce to have failed to show the relevance of its first criterion, under which Commerce observed that parts of TRBs, finished and unfinished, are included in the class or kind of subject merchandise. *Id*. at __, 884 F. Supp. 2d at 1321–22. The court regarded the Department's use of the sixth criterion, under which Commerce had found that an unfinished TRB is intended for the same ultimate end use as a finished TRB, to be irrelevant to the inquiry Commerce was required to make. *Id*. at __, 884 F. Supp. 2d at 1324. Because the factual situation presented was one in which TRB parts (finished and unfinished), not unfinished TRBs, were used in the processing in Thailand,

the court reasoned as to "substantial transformation" that the question presented was whether the Chinese-origin parts "were substantially transformed by the third country processing, which included grinding, finishing, and assembly, not whether unfinished bearings were substantially transformed by that processing." *Id*. at __, 884 F. Supp. 2d at 1324. The court instructed, therefore, that "[a]ny determination Commerce reaches on remand must rely solely on criteria relevant to whether the parts exported to Thailand were substantially transformed . . . ." *Id*. at __, 884 F. Supp. 2d at 1325.

4. The Department's First Remand Redetermination

In the First Remand Redetermination, Commerce applied its substantial transformation test according to the same six criteria it had applied in the Final Results. Although changing its analysis in minor ways, Commerce did not alter its ultimate determination that the TRBs in question were within the scope of the Order. *First Remand Redetermination* 10–36. Under its "value added" criterion, Commerce replaced the finding the court found unsupported by the record with a new finding that it based on calculated ratios of value added in China and Thailand, concluding from these calculations that the ratios were not representative of a significant value added by the Thai processing. *Id.* at 23. Under its other five criteria, Commerce also continued to find that the record "suggested against a finding" that the TRBs had been substantially transformed. *Id.* at 45. Commerce again reached the ultimate finding that, based on the totality of the circumstances, the TRBs at issue were subject to the Order.

5. The Court's Decision in Peer Bearing II

In *Peer Bearing II*, the court again remanded the Department's determination, concluding that "[c]onsidered on the whole, the record lacked substantial evidence to support the ultimate finding Commerce reached in the Remand Redetermination." *Peer Bearing II*, 38 CIT at __, 986 F. Supp. 2d at 1406. The court cited uncontradicted record evidence that no part exported to Thailand from China was an unfinished or incomplete TRB, that the goods at issue became tapered roller bearings in Thailand, not China, and that the processing in Thailand, which was more extensive that a mere process of assembly or completion, included grinding and honing necessary to produce cups and cones that were ready for assembly. *Id*. at __, 986 F. Supp. 2d at 1405–06. The court noted that Commerce itself had concluded "that the machining conducted in Thailand was a 'critical step,'" *id*. at __, 986 F. Supp. 2d at 1405 (citing *First Remand Redetermination* 17) and "that the processes performed in Thailand 'play[ed] [an] impor-

tant role in the production of a bearing,'" *id*. (citing *First Remand Redetermination* 18).

Citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) ("*Duferco*"), the court in *Peer Bearing II* observed the general rule that Commerce may interpret, but may not modify, the scope language of an existing antidumping duty order. *Peer Bearing II*, 38 CIT at __, 986 F. Supp. 2d at 1397. As the court stated, "[u]nder this general rule, Commerce may not place merchandise within the scope of an order if the scope language may not reasonably be interpreted to include that merchandise." *Id*. (citing *Duferco*, 296 F.3d at 1089).

Furthermore, as it had in *Peer Bearing I*, the court cited 19 U.S.C. § 1677j(b) in its analysis. In *Peer Bearing II*, the court noted that the statute, although silent on how Commerce is to interpret scope language when the question is whether a good should be considered to have originated in the country named in the order, specifically addresses in 19 U.S.C. § 1677j(b), an "anticircumvention" provision, the situation in which a good imported into the United States is completed or assembled in a third country. *Id.* at __, 986 F. Supp. 2d at 1398 (citing 19 U.S.C. § 1677j(b)(1)(A) and (B)). The court described the anticircumvention authority provided by 19 U.S.C. § 1677j(a)-(d), which empowers Commerce, in certain circumstances, to enlarge the scope of an order to reach products not covered by the existing scope, as an exception to the general rule that Commerce may interpret the scope language of an existing order but may not modify it. *Id.* at __, 986 F. Supp. 2d at 1398 (citing *AMS Assoc. v. United States*, 737 F.3d 1338, 1343 (Fed. Cir. 2013); *Duferco*, 296 F.3d at 1098). The court viewed the Department's authority to place within the scope of an order merchandise that acquired its commercial identity in a third country as necessarily narrower than it would be were Commerce to rely upon the § 1677j(b) authority. Because Commerce had declined to invoke that authority in the Remand Redetermination, the court concluded that Commerce was required to interpret the scope language of the Order, which identified imports of tapered roller bearings from the PRC, "reasonably and not expansively." *Id*. at __, 986 F. Supp. 2d at 1400. The court reasoned that "[t]he imported bearings at issue were not, in any literal or ordinary sense, 'imports of tapered roller bearings from the PRC' as described in the scope language of the Order" because "[i]t was in Thailand, not China, that the imported merchandise became 'tapered roller bearings.'"[4] *Id.* (citation omitted). In light of the record evidence concerning the production of

[4] Referring to "imports of tapered roller bearings from the PRC," i.e., the People's Republic of China, the order in its original form contains the following scope language:

the TRBs at issue in this case, *Peer Bearing II* held that "Commerce, when placing the TRBs in question within the scope of the Order, exceeded its authority to interpret, without expanding, the scope language contained in that Order." *Id.* at __, 986 F. Supp. 2d at 1406. The court ordered Commerce to "submit to the court a second Remand Redetermination in which it redetermines, in accordance with the requirements of this Opinion and Order, the country of origin of certain tapered roller bearings that underwent further processing in Thailand . . . ." *Id.* at __, 986 F. Supp. 2d at 1414.

6. The Department's Second Remand Redetermination

In the Second Remand Redetermination, Commerce determined that the TRBs at issue were not within the scope of the Order and revised both SKF's and PBCD's dumping margins to exclude the relevant sales. *Second Remand Redetermination* 16–17.

Timken opposes the Department's country-of-origin determination in the Second Remand Redetermination on various grounds. Timken's Comments 4–15. PBCD supports the Department's redetermination but offers no specific comments on the issue. PBCD's Comments 1–2.

7. The Court Sustains the Department's Determination that Certain TRBs Processed and Assembled in Thailand are Outside the Scope of the Antidumping Duty Order

The court sustains the Department's determination that the TRBs at issue are not within the scope of the Order. The court concludes that the determination implicitly rests upon a reasonable, and not an impermissibly expansive, interpretation of the scope language of the Order and that there is substantial evidence of record to support the Department's ultimate finding that the TRBs are not within that scope, as so interpreted.

Peer Bearing II held that Commerce, in the absence of an anticircumvention inquiry conducted under 19 U.S.C. § 1677j(b), must adhere to a reasonable and not an expansive interpretation of the scope

> The products covered by this investigation are tapered roller bearings and parts thereof, currently classified in Tariff Schedules of the United States (TSUS) item numbers 680.30 and 680.39; flange, take up cartridge, and hanger units incorporating tapered roller bearings, currently classified in TSUS item 681.10; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not automotive use, currently classified in TSUS item number 692.32 or elsewhere in the TSUS.

Antidumping Duty Order: Tapered Roller Bearings and Parts Thereof, Finished or Unfinished , From the People's Republic of China, 52 Fed. Reg. 22,667, 22,667 (Int'l Trade Admin. June 15, 1987). The text of the original order mentions "unfinished" tapered roller bearings and parts only in the title. *Id*

language of the Order. For the reasons discussed in *Peer Bearing II*, the court views the scope language as giving no indication that it was intended to include tapered roller bearings produced in a third country from Chinese-origin parts, finished or unfinished. The record evidence in this case must be considered in light of the scope language, reasonably construed.

In brief summary, the uncontested record evidence—as recounted in the Department's own findings as set forth in previous determinations—is that the processing in Thailand involved not only necessary machining operations conducted on the cups and cones but also included all assembly operations. As the court discussed in its previous opinions, the record demonstrates that no part exported from China to Thailand was an unfinished TRB, and Commerce made no finding to the contrary. In short, there can be no dispute that the merchandise at issue acquired its commercial identity as tapered roller bearings in Thailand, not China.

Although the First Remand Redetermination altered the quantitative findings on the relative value added in China and Thailand, it did not state that Commerce was abandoning the previous factual findings on the nature of the processes performed in Thailand. Commerce found that the cup and cone machining process in Thailand involved "a series of steps wherein the width, the outside diameter, and bore of the rings (cup and cone) are ground and the inside diameter of the outer ring and the outside diameter of the inner ring are polished, *First Remand Redetermination* 14 (footnote omitted), that "this small change to the shape and surface of the cups and cones (and assembly thereof) is a *critical step* in imparting the very physical properties of each TRB that allow for the product to function as a TRB," *id*. at 17 (emphasis added), and that the processes performed in Thailand "play[ed] [an] important role in the production of a bearing," *id*. at 18.

The court also concludes that the Department's presentation of its reasoning in the Second Remand Redetermination, although sparse and, in some respects, incorrect in its interpretation of the holding in *Peer Bearing II*, nevertheless is sufficient to support the ultimate determination that the TRBs are not within the scope of the Order. Despite the brevity of the explanation, the court can discern from it a path under which it may sustain the determination. Commerce presents what it labeled as its "Analysis" in a single paragraph, as follows:

> As discussed above, the Court found that the merchandise which "became" subject merchandise in a third country "ordinarily would be considered to be products of the third country . . . absent an expansion of an order using the authority of {section

> 781(b) of the Act.}" However, we did not conduct a circumvention analysis pursuant to section 781(b) of the Act. Thus, in order to comply with [*Peer Bearing II*], in the absence of an analysis under section 781(b) of the Act, we cannot find that the TRBs in question are of Chinese origin such that they are subject to the *Order*. Further, there is no evidence on the record that U.S. Customs and Border Protection ("CBP" or "Customs") has conducted a country of origin analysis and found the TRBs in question to be of Chinese origin. Accordingly, we revised the dumping margin calculations to exclude sales of merchandise further processed in Thailand. However, because we do not agree with the Court that a circumvention analysis, pursuant to section 781(b) of the Act, is required before the Department may determine whether merchandise which is further processed in a third country is subject to an AD or countervailing duty order, we are conducting this remand respectfully under protest.

Second Remand Redetermination 8–9 (footnotes omitted). The paragraph confirms the Department's decision not to conduct an analysis using its authority of section 781(b) of the Tariff Act (19 U.S.C. § 1677j(b)). Having rejected the idea of conducting such an analysis, Commerce, in order to comply with the court's remand order in *Peer Bearing II*, was under an obligation to interpret the scope language reasonably and not expansively and reach an ultimate determination accordingly. The court concludes that the Second Remand Redetermination should be interpreted as an implicit indication that the Department has done so. The court reaches this conclusion by presuming Commerce, in formulating the Second Remand Redetermination, to have acted in good faith, rather than out of a desire to defy the court's order.[5] Significantly, Commerce concluded that, in the absence of such an analysis, "we cannot find that the TRBs in question are of Chinese origin such that they are subject to the *Order*." *Id*. at 8. That Commerce prefaced this conclusion with the qualifier that it did so in order to comply with *Peer Bearing II* does not change the court's conclusion: Commerce endeavored to preserve its right to appeal by adding that it was doing so respectfully under protest.[6]

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[5] The Second Remand Redetermination should be read to indicate that Commerce understood its obligation under the court's remand order in *Peer Bearing II* : "The Court ordered the Department to submit a 'second Remand Redetermination' in which it redetermines, in accordance with the requirements of this Opinion and Order, the country of origin of certain tapered roller bearings . . . ." *Final Results of Redetermination Pursuant to Court Remand* 8 (Aug. 8, 2014), ECF No. 126–1("*Second Remand Redetermination*").

[6] The Second Remand Redetermination, in quoting in the first sentence of the "Analysis" a statement from *Peer Bearing II*, appears to have taken the court's statement out of context.

The final sentence in the "Analysis" paragraph provides the Department's reason for making its redetermination under protest, adding that Commerce does "not agree with the Court that a circumvention analysis, pursuant to section 781(b) of the Act, is required before the Department may determine whether merchandise which is further processed in a third country is subject to an AD or countervailing duty order." *Id*. at 8–9 (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003)). This sentence is overly broad in its implied conclusion. The court did not hold that Commerce always must conduct a circumvention analysis before it may determine that merchandise further processed in a third country is subject to an order, and this case did not require the court to decide this broad question of law.[7] Instead, the court concluded, based on binding precedent, that in the absence of such an analysis Commerce must interpret scope language reasonably and may not expand it. The court held that on the record of this individual case, the evidence of record was not sufficient to support the determination that the TRBs in question are within the scope when the scope language is reasonably, and not expansively, interpreted. Had Commerce believed the court to have erred in concluding that the record did not contain substantial evidence to support an ultimate determination that the TRBs at issue were within the scope of the Order, its "protest" presumably would have been on that basis instead.

In summary, the "Analysis" presented in the Second Remand Redetermination, although suffering from some flaws in the interpretation of the court's holding in *Peer Bearing II*, is sufficient to allow the court to sustain the Department's ultimate determination under the

The quoted statement occurred in a discussion of legislative history, *Peer Bearing Co.-Changshan v. United States*, 38 CIT __, __, 986 F. Supp. 2d 1389, 1402 (2014) ("*Peer Bearing II*"), not in a directive to the Department, and also appears to have ignored the effect of the court's qualifier, "ordinarily." Moreover, the court did not reach a "finding" to the effect recounted in the Department's opening sentence. The Second Remand Redetermination also presents a correct interpretation of the court's statement. *See Second Remand Redetermination* 7. It also incorrectly interprets the holding of *Peer Bearing II* in rejecting the comments Timken submitted on a draft version of the redetermination, wrongly stating that "underlying the Court's order is an incorrect understanding that the *Order* specifically mentions only 'imports of TRBs from the PRC' and because the TRBs in question are imported from Thailand, the merchandise in question must be considered out-of-scope until lawfully determined to be found within the scope of the *Order*." *Id*. at 15. The mere fact that the TRBs at issue were imported from Thailand was not a basis of the court's decision in *Peer Bearing I* or its decision in *Peer Bearing II*.

[7] In its background section, the Second Remand Redetermination also misinterprets *Peer Bearing II* in stating that "the Court found that the plain meaning of the scope of the TRBs *Order* does not support the Department's decision to dismiss the statutory circumvention criteria." *Second Remand Redetermination* 6. The court did not hold that Commerce erred in dismissing the statutory circumvention criteria.

standard of review that the court is required to apply.[8]

[8] The court notes that defendant, in its comments in support of the Second Remand Redetermination, misconstrues the court's opinion in *Peer Bearing II* by arguing that "[a]s Commerce stated in the Second Remand, which it conducted under protest, without the authority to conclude that the merchandise at issue is included in the Order though a substantial transformation analysis, there is insufficient evidence on the record to demonstrate that the TRBs at issue were of Chinese origin." Def.'s Resp. to Def.-intervenor's Comments Regarding the Remand Redetermination 5 (Sept. 25, 2014), ECF No. 131. This is incorrect. In neither *Peer Bearing I*nor *Peer Bearing II* did the court deny Commerce the authority to conduct a "substantial transformation analysis," although the court concluded in *Peer Bearing I* that Commerce had not shown the relevance of certain of its criteria and concluded in *Peer Bearing II* that the Department's method and criteria caused Commerce to ignore critical record evidence. However, the holding of *Peer Bearing II* was that in the absence of reliance on anticircumvention authority, Commerce is required to interpret the

8. The Court Is Not Persuaded by Defendant-Intervenor's Objections to the Department's Determination that the TRBs at Issue Are Not Within the Scope of the Order

Timken raises various objections to the Department's determination that the TRBs resulting from the processing conducted in Thailand are not within the scope of the Order. For the reasons discussed below, the court reject's Timken's argument that, based on these objections, the court must order another remand of the Department's determination.

Timken contends, first, that Commerce was not required to conduct an anticircumvention inquiry to determine whether the TRBs at issue are within the scope of the Order. Timken's Comments 5. *Peer Bearing II* did not hold that an anticircumvention inquiry under 19 U.S.C. § 1677j(b) was a prerequisite to *determining* whether the TRBs at issue are within the scope. Instead, as discussed above, the court held that this particular record did not provide substantial evidence to support an ultimate determination that the TRBs at issue *are* within the scope when the scope language is reasonably interpreted, as it must be when it is considered without the benefit of an expansion effected by an application of § 1677j(b). The Department's analysis, presented in the single paragraph the court addressed previously, indicates that Commerce did not consider itself able to find that the TRBs at issue are within the scope in the absence of an anticircumvention analysis. On the particular record in this case, that conclusion is correct; as also discussed above, Commerce misinterpreted the court's holding to require such an analysis *whenever* the Department determines whether merchandise which is further processed in a third country is subject to an AD or countervailing duty order. Commerce, however, offered that misinterpretation as its reason for its issuing the Second Remand Redetermination under protest. As the court noted above, it is significant that Commerce did not ground its protest in a claim that there is substantial record evidence for an ultimate determination placing the TRBs at issue within the scope of the Orders when the scope language is reasonably and not expansively interpreted. Had Commerce chosen to do so, logically Commerce would have included in the Second Remand Redetermina-

scope language reasonably, and not expansively and that when the scope language is so interpreted, there is insufficient record evidence to support an ultimate determination that the TRBs in question are within the scope of the Order. It is a matter of speculation whether the particular criteria Commerce chose to apply in the analysis it described as a substantial transformation analysis, considered on the whole (at least as applied), were a cause of the Department's interpreting the scope language in an impermissibly expansive way in the First Remand Redetermination, but it was not necessary for the court to reach that question.

tion a statement of what that evidence is, why the court erred in concluding otherwise, and why such evidence is sufficient under the "reasonable interpretation" standard required by *Duferco* and its progeny.

Timken next argues that the legislative history shows that the provision to prevent circumvention "was intended to provide Commerce with more tools in its arsenal for enforcing the trade remedy laws and not to restrict its ability to do so." *Id*. at 6. The court does not disagree with Timken's argument that Congress did not intend to narrow the Department's authority and intended instead to provide another tool in the Department's "arsenal." But that argument does not address the problem that, in this case, Commerce declined to use the additional tool in its arsenal and therefore was obligated to interpret the scope language reasonably, not expansively. The court's discussion of the legislative history in *Peer Bearing II* was to the effect that Commerce considered it necessary to provide the additional tool. *Peer Bearing II*, 38 CIT at __, 986 F. Supp. 2d at 1402. As the court reasoned, Congress could not have concluded that Commerce needed this tool "without possessing a general understanding that a good emerging from a third country completion or assembly operation such as that described in 19 U.S.C. § 1677j(b)(1)(A) and (B) ordinarily would not be considered to be within the scope of the order in question, at least where, as here, the commercial identity of the finished good was acquired in the third country." *Id*. (footnote omitted). In this regard, Commerce in the Second Remand Redetermination based its ultimate determination, in part, on its conclusion "that there is no evidence that U.S. Customs and Border Protection ('CBP' or 'Customs') has conducted a country of origin analysis and found the TRBs in question to be of Chinese origin." *Second Remand Redetermination* 8. Although Commerce does not consider itself bound by country of origin determinations of other agencies (including Customs), *see Peer Bearing II*, 38 CIT at __, 986 F. Supp. 2d at 1402 n.9, nothing precluded Commerce from considering how a country of origin issue might be approached according to general country of origin principles developed under the customs laws. On this general issue, Timken notes the Department's mention in the Second Remand Redetermination of the lack of an analysis by Customs placing the TRBs in question within the scope of the Order in arguing that, as recognized in decisions of this Court, "the Department is not bound by Customs decisions." Timken's Comments 12. In the Second Remand Redetermination, Commerce gave no indication that it considered itself *bound* by a Customs ruling or lack thereof.

Timken also argues that "[t]he anticircumvention provision is not intended to address all situations in which merchandise is further manufactured in a third country." *Id*. at 7. Citing *AMS Assoc. Inc. v. United States*, 737 F.3d 1338, 1343 (Fed. Cir. 2013) and certain language in the legislative history of the anticircumvention provision, Timken submits that "the anticircumvention provision was tailored to address situations where, when the goods subject to the order either leave the subject country or enter the United States, they could reasonably be found not to match the product description of the scope." *Id*. at 8 (footnote omitted). Neither situation, according to Timken, is present in this case because "[a]s the subject order covers TRBs, finished and unfinished, and TRB parts, finished an [*sic*] unfinished, both the goods that leave China and the goods that enter the United States fit within the product description of the scope." *Id*. at 8 n.6 (citations omitted).

This argument ignores the point that the plain language Congress chose to use in 19 U.S.C. § 1677j(b) describes the situation posed by this case.[9] Timken's argument does not convince the court that the legislative history establishes a narrower scope to the anticircumvention provision of § 1677j(b) that is inapplicable to this situation. Moreover, this argument does not confront the limitations inherent in the scope language, which identifies "shipments of tapered roller bearings and parts thereof, finished and unfinished, from the PRC." *Final Results*, 76 Fed. Reg. at 3,087. As revealed in this language, the class or kind of merchandise identified as subject merchandise by the scope language falls into four separate categories: finished TRBs from the PRC, unfinished TRBs from the PRC, finished parts of TRBs from the PRC, and unfinished parts of TRBs from the PRC. There is no mention in the scope language of a fifth category applying to TRBs that are produced in a third country from unfinished and finished parts from the PRC. The TRBs at issue did not *become* TRBs in China: what was produced and exported from China to Thailand consisted solely of TRB parts, finished and unfinished, and no such part reasonably could be described as an unfinished TRB. Finally, the holding of *AMS Associates, Inc*., which pertains to suspension of liquidation, does not address the issue this case presents.

[9] Timken attempts to distinguish the facts of this case from situations in which, in Timken's view, Congress intended for 19 U.S.C. § 1677j to apply. Timken argues both that "Congress *chose not to specify* the exact circumstances that would be covered by [19 U.S.C. § 1677j]," Timken Co.'s Comments on Dep't Com.'s Second Redetermination Pursuant to Ct. Remand 6 (Sept. 10, 2014), ECF No. 130 (emphasis added), and also argues that the "[l]egislative history of the anticircumvention provision also indicates that it was intended to address *two situations in particular*" and "neither of these situations is present here." *Id.* at 8 & n.6 (emphasis added).

Timken further relies on *AMS Associates, Inc.* for the point that "country of origin determinations may be undertaken in scope inquiries"[10] and also relies on *Smith Corona Corp. v. United States*, 17 CIT 47, 49–50, 811 F. Supp. 692, 695 (1993) to make the point that "further manufacturing in a third country does not automatically change the country of origin of a good." Timken's Comments 9–10. Similarly, Timken cites the Statement of Administrative Action for the Uruguay Round Agreements Act ("SAA") for the principle that "not all goods manufactured in a third country fall within the purview of circumvention," Timken's Comments 10 (quoting *Statement of Administrative Action Accompanying the Uruguay Round Agreements Act*, H.R. Rep. No. 103–316, at 174 (1994) ("[o]utside of a situation involving circumvention of an antidumping duty order, a substantial transformation of a good in an intermediate country would render the resulting merchandise a product of the intermediate country rather than the original country of production.")). These arguments do not address the narrow question presented here, which is whether the court must reject, and remand again, the Department's determination upon remand that the TRBs at issue are outside the scope of the Order. The language Timken quotes from the SAA does not support a contention that the court must do so.[11] The question posed by this case is whether the record contains substantial evidence to support an ultimate determination that the tapered roller bearings resulting from the processing in Thailand constituted "imports" [or, as stated in the Final Results, "shipments"] "of tapered roller bearings from the PRC" when that scope term is construed reasonably, and not expansively. The SAA uses the term "substantial transformation." Expressed in a way that uses that term, the question in this case is not whether any TRBs are substantially transformed but whether unfinished cups and cones and finished cages and rollers undergo a substantial transformation in *becoming* TRBs as a result of the manufacturing operations performed in Thailand.

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[10] Timken cites language from *AMS Associates Inc. v. United States*, 737 F.3d 1338, 1343 (Fed. Cir. 2013), explaining that "Commerce may conduct formal circumvention inquiries pursuant to 19 C.F.R. §§ 351.225(g)-(j) and may conduct formal scope inquires pursuant to 19 C.F.R. § 351.225(k), which may include country of origin determinations." Timken's Comments 9–10. With respect to the latter provision, no party in this case argued that Commerce was required to address the factors identified in § 351.225(k)(1) or (2) in making the country of origin determination it made in the Final Results, in which Commerce instead applied the aforementioned criteria. In this litigation, the court neither affirmed the application of those criteria nor prohibited Commerce, on remand, from considering the factors identified in § 351.225(k).

[11] Additionally, the language Timken quotes from the SAA is part of a discussion of section 773(a)(3) of the Act, which pertains to the Department's use of intermediate sales as a basis for normal value, which is not at issue here.

Timken argues, further, that "[t]he sole fact that a good has been further manufactured in a third country does not mandate that the Department undertake an anticircumvention inquiry to determine that the good remains within the scope of an order." Timken's Comments 11 (footnote omitted). The court did not reach a holding to the contrary. Moreover, the ultimate question presented here does not involve "a good that has been further manufactured in a third country." In this case, only the cups and cones, and not TRBs, were goods that were further manufactured in a third country. And although Commerce reasoned in the First Remand Redetermination that the unfinished and finished parts that left China for Thailand would have been within the scope of the Order had they been exported to the United States, they were not so exported and, in the form in which they entered Thailand, were not finished or unfinished TRBs.

Timken next cites three decisions of this Court in arguing that this Court in the past has affirmed the use of the Department's country of origin criteria. These decisions are neither precedential nor supportive of the argument Timken puts forth.

Timken relies on *E. I. DuPont de Nemours & Co. v. United States*, 22 CIT 370, 373, 8 F. Supp. 2d 854, 858 (1998) ("*DuPont*"), for the proposition that "the Court must defer to the Department's reasonable interpretation of the statute when the statue is silent or ambiguous, and, on this basis, the Court has determined that the Department's substantial transformation test is a permissible application of the statute." Timken's Comments 11–12. This reliance is misplaced. In *DuPont*, this Court remanded for reconsideration and further explanation a final scope ruling in which Commerce concluded that the scope of an antidumping duty order on polyvinyl alcohol from Taiwan included polyvinyl alcohol produced in Taiwan from U.S.-origin vinyl acetate monomer. *DuPont*, 22 CIT at 376, 8 F. Supp. 2d at 860. Although remanding, the Court accorded deference to the "'substantial transformation' rule" Commerce applied in the case, concluding that this rule is "a reasonable application of 19 U.S.C. 1673(1) [referring to "class or kind of foreign merchandise"] because it comports with the plain meaning of the statute." *Id*. at 374, 8 F. Supp. 2d at 858. As stated in the opinion, the country of origin rule Commerce applied was as follows: "[s]ubstantial transformation generally refers to a degree of processing or manufacturing resulting in a new and different article," citing as examples Commerce rulings recognizing as substantial transformations the galvanizing of sheet steel and the conversion of a base vehicle into a limousine. *Id*. at 372, 8 F. Supp. 2d at 857. This statement of the substantial transformation rule accords with the substantial transformation rule established under the cus-

toms laws. *See United States v. Gibson-Thompsen Co., Inc.*, 27 C.C.P.A. 267 (1940). It is not the substantial transformation criteria upon which Commerce concluded, in the Final Results and the First Remand Redetermination, that no substantial transformation occurred in Thailand. Among the cases this Court cited in *DuPont* was *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 664 F. Supp. 535 (1987), which held for purposes of a voluntary restraint agreement that sheet steel is substantially transformed by galvanizing and annealing according to customs law principles of substantial transformation. Because TRBs are a new and different article when compared to unfinished cups and cones and finished rollers and cages, the standard Commerce applied in *DuPont* would lead to the conclusion that the country of origin of the TRBs at issue in this case is Thailand and thereby produce the opposite result from the one Timken is advocating.

Timken argues, further, that this Court "has also affirmed country of origin determinations based on a substantial transformation analysis," citing *Appleton Papers Inc. v. United States* , 37 CIT __, __, 929 F. Supp. 2d 1329, 1335–36 (2013) ("*Appleton Papers*") and *Advanced Tech. & Materials Co. v. United States*, 35 CIT __, __, Slip Op. 11–122 at 8 (Oct. 12, 2011). Timken's Comments 12. As Timken acknowledges, *Appleton Papers* cites *DuPont* in stating that "[t]his Court has upheld Commerce's use of the substantial transformation analysis as a means of determining the country of origin of merchandise produced in multiple countries." *Appleton Papers*, 37 CIT at __, 929 F. Supp. 2d at 1336. *Appleton Papers* upheld a Commerce decision interpreting the scope of antidumping and countervailing duty orders on lightweight thermal paper from China, in which Commerce concluded that lightweight thermal paper in unfinished "jumbo roll" form that had been produced outside of China was not within the scope of those orders because it had not been substantially transformed in China when it underwent a "conversion" process consisting of slitting and repackaging. *Id.* at __, 929 F. Supp. 2d at 1335–36. Citing various decisions of the Court of Appeals that relied upon the principle established in *Duferco*, this Court reasoned that Commerce could neither interpret an order so as to change the scope nor interpret an order contrary to its terms. *Id.* at __, 929 F. Supp. 2d at 1334–35 (citing *King Supply Co. v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012), in turn quoting *Walgreen Co. v. United States*, 620 F.3d 1350, 1354 (Fed. Cir. 2010)). Moreover, this Court concluded in *Appleton Papers* that Commerce had correctly interpreted the scope in applying the substantial transformation test previously applied in *DuPont*, *id*.; this test did not apply the criteria Commerce applied in

the Final Results and the First Remand Redetermination. *Appleton Papers* does not support the position *Timken* has taken in this litigation.

Like *Appleton Papers*, *Advanced Technologies* relies on *DuPont* for the principle that the Department's "'substantial transformation' rule provides a yardstick for determining whether the processes performed on merchandise in a country are of such significance as to require that the resulting merchandise be considered the product of the country in which the substantial transformation occurred." *Advanced Tech.*, 35 CIT __, __, Slip Op. 11–122 at 8 (quoting *DuPont*, 22 CIT at 373–74, 8 F. Supp. 2d at 858). Nevertheless, this Court identified three factors as part of the substantial test that are not part of the test as articulated in *DuPont*, namely, "(1) whether the processed downstream product falls into a different class or kind of merchandise from the upstream product; (2) whether the essential component of the merchandise is substantially transformed in the exporting country; and (3) the extent of processing in the exporting country." *Id*. Therefore, the case involved the application of two criteria that Commerce applied in this case. This aspect of *Advanced Technology* supports Timken's argument, but the decision this Court reached on the merits does not. This Court affirmed, over the objections of the domestic interested party, Diamond Sawblades Manufacturers Coalition, the Department's conclusion that "the country of origin for diamond sawblades was the country in which the diamond segments were joined to the core," *id*. at __, Slip Op. 11–122 at 7, even though the subject merchandise was defined to include both the finished product and components thereof.

Timken's final objection is that Commerce impermissibly grounded its conclusion that the TRBs in question are not within the scope on only two factors: its "determination to not undertake an anticircumvention inquiry and the lack of a Customs ruling finding that the TRBs at issue are of Chinese origin." Timken's Comments 14. According to Timken, "[a]s these are the only bases for Commerce's determination, the Department's conclusion is not supported by substantial evidence." *Id*. Timken asserts that this determination fails to comply with the court's order, which required Commerce to "redetermine the country of origin," and that "[w]hile Commerce stated that it could not find the TRBs to be of Chinese origin, it did not determine that the TRBs are of Thai (or any other) origin." *Id.* This argument does not convince the court that a third remand is necessary in this case. The court has acknowledged that the Department's rationale for its decision in the Second Remand Redetermination is only sparsely presented and not correct in all respects. However, the Second Re-

mand Redetermination reaches an ultimate determination—that the TRBs at issue are not within the scope of the Order—that is supported by substantial evidence, for the reasons the court has discussed in this Opinion. In its comments, Timken does not attempt to show that the record evidence, considered on the whole, did not allow Commerce to reach this determination. That, upon a second remand, Commerce considered the country of origin of the TRBs at issue to be Thailand is implicit from the posture of this case.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court affirms the Final Results of Redetermination Pursuant to Court Remand ("Second Remand Redetermination") and will enter judgment accordingly.
Dated: December 21, 2015
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
Chief Judge

Slip Op. 15–144

TOSCELIK PROFIL VE SAC ENDUSTRISI A.S., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 14–00211

OPINION AND ORDER

[Remanding administrative review of respondent's countervailing duty rate.]

Dated: December 21, 2015

David L. Simon, Law Offices of David L. Simon, of Washington DC, for the plaintiff.
Melissa M. Devine, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *David P. Lyons*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Musgrave, Senior Judge:

The plaintiff, Toscelik Profil ve Sac Endustrisi A.S. ("Toscelik"), a producer of subject merchandise for the Turkish domestic and export markets, filed this action to contest *Circular Welded Carbon Steel Pipes And Tubes From Turkey: Final Results of Countervailing Duty*

Administrative Review; Calendar Year 2012 and Rescission of Countervailing Duty Administrative Review, in Part, 79 Fed. Reg. 51140 (Aug. 27, 2014) ("*2012 CVD Review*"). The matter concerns Toscelik's net subsidy rate, which was incorporated into the *2012 CVD Review* results by reference to the prior *2011 CVD Review* segment of the CVD proceeding.[1] The plaintiff challenges the posture of the *2012 CVD Review* due to its successful litigation of the *2011 CVD Review. See Toscelik Profil ve Sac Endustrisi A.S. v. United States,* 38 CIT ___, Slip Op. 14–126 (Oct. 29, 2014) ("*Toscelik I*"), remand results sustained, 39 CIT ___, Slip Op. 15–28 (Apr. 1, 2015) ("*Toscelik II*"). The defendant, International Trade Administration, U.S. Department of Commerce ("ITA" or "Commerce"), argues Toscelik failed to exhaust its administrative remedies.

I. Background

Prior to publication of the review for year 2011, Commerce initiated the year 2012 review and selected Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (Borusan) as the sole mandatory respondent. Respondent Selection Memorandum at 4–5 (May 17, 2013), PDoc 17. Toscelik participated in the proceeding by filing comments concerning respondent selection matters. *See* Toscelik Respondent Selection Comments (May 13, 2013), PDoc 13.

Commerce published the *2011 CVD Review* on October 30, 2013, assigning Toscelik a subsidy rate of 0.83 percent. 78 Fed. Reg. 64917. On November 5, 2013, Toscelik appealed that proceeding here. In its opening brief, Toscelik argued that certain deficiencies in the calculation of a land benchmark rendered the 2011 subsidy rate invalid. *See* Pl. Mot. for Judgment Upon the Admin. Record, *Toscelik Profil ve Sac Endustrisi A.S. v. United States*, No. 13–00371 (CIT Mar. 21, 2014), ECF No. 28.

On April 23, 2014, Commerce published its preliminary results of the 2012 review. *Circular Welded Carbon Steel Pipe and Tube Products from Turkey*, 79 Fed. Reg. 22625 (Apr. 23, 2014) (prelim. determ.) (2012 Preliminary Results), and accompanying preliminary decision memorandum (Apr. 17, 2014) ("*PDM*"), PDoc 109. Commerce calculated a *de minimis* rate for Borusan. *PDM* at 1. However, in accordance with its practice, Commerce did not assign Toscelik a *de minimis* rate as well; rather, Commerce assigned Toscelik the subsidy rate of 0.83 percent that Toscelik had received in the *2011 CVD Review* results. *Id*. at 7.

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[1] *Circular Welded Carbon Steel Pipes And Tubes From Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2011*, 78 Fed. Reg. 64916 (Oct. 30, 2013) and accompanying issues and decision memorandum ("*2011 CVD Review*").

Pursuant to its regulations, Commerce provided 30 days for interested parties to submit case briefs and five days thereafter to submit rebuttal briefs on the 2012 Preliminary Results. 79 Fed. Reg. at 22627. The government emphasizes that Toscelik did not file case or rebuttal briefs, nor did Toscelik comment upon the 2012 Preliminary Results in some other form or request an extension to submit arguments. *See* Admin. Record at 15–35, ECF No. 16.

In the *2012 CVD Review*, published in August 2014, Commerce continued to apply the 0.83 percent subsidy rate to Toscelik as in the 2012 Preliminary Results. 79 Fed. Reg. at 51141. Commerce did not evaluate or address arguments regarding the subsidy rate Toscelik received because the record contained no challenges to that rate. *See id.* ; *see also IDM* at 3–4.

Thereafter, on February 13, 2015, in its final remand results concerning the *2011 CVD Review*, Commerce revised the land benchmark used to calculate Toscelik's 2011 subsidy rate, lowering Toscelik's subsidy rate for the 2011 period of review from 0.83 percent to 0.44 percent. *Final Results of Redetermination Pursuant to Court Remand, Toscelik Profil ve Sac Endustrisi AS v. United States*, No. 13–00371 (Feb. 13, 2015). Those results were sustained on April 1, 2015. *Toscelik II*, Slip Op. 15–28.

II. Jurisdiction and Standard of Review

Toscelik has standing under 19 U.S.C. §1516a(d) and 28 U.S.C. §2631(c), and judicial review concerns whether Commerce's countervailing duty determinations are unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). *See Royal Thai Government v. United States*, 436 F.3d 1330, 1335 (Fed. Cir. 2006). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

Pursuant to 28 U.S.C. § 2637(d), the court "shall, where appropriate, require the exhaustion of administrative remedies." The court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (citations omitted).[2]

[2] "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946). Commerce's regulations also require that a party's administrative review case brief "present all arguments that continue in the submitter's view to be relevant to [Commerce's] final determination or final results, including any arguments presented before the date of publication of

III. Discussion

Because Commerce recalculated via remand the subsidy rate underlying Toscelik's 2011 rate, Toscelik's opening brief argues that those results should extend to this 2012 review. *See* Pl's Br. at 4–6; Compl. ¶21. The government's sole objection is that Toscelik failed to exhaust that argument before Commerce in the first instance. *See generally* Def's Resp.

The government posits that Toscelik "chose" not to exhaust even though the issue of the 0.84 percent subsidy rate was "squarely in play" in the 2012 Preliminary Results. Def's Resp. at 6, referencing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1380–81 (Fed. Cir. 2013) ("*Bestpak*"); *QVD Food Co. v. United States*, 34 CIT 1166, 1176, 721 F. Supp. 2d 1311, 1320 (2010), *aff'd*, 658 F.3d 1318 (Fed. Cir. 2011); *Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, 197–98, 601 F. Supp. 2d 1370, 1381–82 (2009). The government contends that the "same procedural posture existed administratively", requiring exhaustion, as what Toscelik is attempting to accomplish here judicially,[3] *see id*. at 7–8, and that the *2012 CVD Review* is an entirely separate proceeding, *id*. at 8–9 (citation omitted). "Commerce is not required to consider information beyond the administrative record in question", *id.* at 9, referencing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012),[4] and "[t]he court may not force Commerce to reach outside the administrative record in question even if a particular document or argument would, if raised at the administrative level, be relevant to Commerce's de-

the preliminary determination or preliminary results." 19 C.F.R. § 351.309(c)(2); *see also Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010); *Mid Continent Nail Corp. v. United States*, 37 CIT ___, ___, 949 F. Supp. 2d 1247, 1260–61 (2013); *Pakfood Public Co. v. United States*, 34 CIT 1122, 1143–44, 724 F. Supp. 2d 1327, 1350 (2010). "The exhaustion requirement in this context is therefore . . . a requirement explicitly imposed by the agency as a prerequisite to judicial review." *Corus Staal*, 502 F.3d at 1379. "Issues that are not addressed in an administrative case brief filed with the agency are generally deemed abandoned." *Mid Continent Nail*, 37 CIT at ___ n.10, 949 F. Supp. 2d at 1261 n.10. "A violation of Commerce's regulation, therefore, supplies an independent ground for determining that an argument has not been exhausted." *Samsung Electronics Co. v. United States*, 72 F. Supp. 3d 1359, 1370 (2015).

[3] *See*, *e.g.*, Pl. Br. at 4 ("Toscelik ha[s] preserved the issue by appealing from the 2012 final results."); Compl. ¶21 ("[i]nsofar as Commerce has expressly linked the final result of the 2012 review to the final result of the 2011 review, which is currently upon appeal, therefore, the final results of the 2012 review should be determined in accordance with the outcome of Case. No. 13–00371").

[4] "If, upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." 678 F.3d at 1277 (citation omitted).

termination", *id*. (citation omitted). The government therefore argues "[i]t is . . . of no moment that the arguments Toscelik made in the 2011 review and ensuing litigation ultimately earned it a redetermined subsidy rate for 2011." *Id*.

Distinguishing Toscelik's reliance upon *Maverick Tube Corp. v. United States*, *see* 39 CIT ___, Slip Op. 15–59 (June 15, 2015) at 12, on that ground that Toscelik in fact pursued and exhausted administrative remedies on the issue in that case,[5] and distinguishing the remand order relating to the *2011 CVD Review* from *Toscelik I* on the bases that not only did Commerce's request for voluntary remand moot the exhaustion argument raised by one of the domestic industry petitioners, *see Toscelik I*, Slip Op. 14–126 at 11 n.11, but also that in the original administrative proceeding Toscelik had in fact advocated for the revised benchmark in its rebuttal brief in response to petitioners' case brief,[6] the government in the end contends that Toscelik fails to support its contention that any argument regarding the use of its 2011 rate would have been fruitless or that Commerce would not have considered and addressed such arguments; that even given a substantial likelihood that Commerce would have rejected them, "it still would have been preferable, for purposes of administrative regularity and judicial efficiency" for parties "to make arguments in case brief[s] and for Commerce to give its full and final administrative response in the final results." *See* Def's Resp. at 12, quoting *Corus Staal BV v. United States*, 502 F.3d 1370, 1380 (Fed. Cir. 2007). The government argues Toscelik has neither satisfied this "standard" nor explained how Commerce would have been unwilling or unable to consider its arguments during the 2012 administrative review; specifically with respect to Toscelik's assertion that filing a case brief would not have prompted Commerce to do "anything other than what was done at the preliminary phase", Pl. Br. at 5, the government contends that this is "unsupported speculation" and that Toscelik provides no other reason to presume that Commerce "would have overlooked" arguments on the 2012 rate.

Here, the government again emphasizes that during the 2011 review Toscelik took administrative steps to oppose the 2011 subsidy rate and that the final results for the *2011 CVD Review* preceded the 2012 Preliminary Results by more than six months; however, Toscelik "declined" to submit arguments on the 2012 Preliminary Results and

[5] *See Oil Country Tubular Goods from Turkey*, 79 Fed. Reg. 41964 (July 18, 2014) (final determ.) and attached issues and decision memorandum at cmt. 11 (addressing Toscelik's arguments concerning the land benchmark calculated in the 2011 review of circular welded pipe from Turkey).

[6] *See Circular Welded Carbon Steel Pipes And Tubes From Turkey*, 78 Fed. Reg. 64916 (Oct. 30, 2013) (final determ.), and accompanying IDM at cmt. 4.

therefore Toscelik "denied Commerce the opportunity to consider its arguments concerning the 2012 Preliminary Results and the petitioners the opportunity to comment upon Toscelik's arguments", *i.e.*, Toscelik "failed to alert Commerce during the review that it was at risk of applying a rate that could be changed following a remand in Court. No. 13–00371." Def's Resp. at 13, quoting *Indep. Radionic Workers of America v. United States , 18 CIT 851, 863, 862 F. Supp. 422, 434 (1994) ("an administrative agency 'is obliged to deal with a large number of like cases'. . . . [and o]bjecting to [ITA's] action in the second administrative review at least would have put ITA 'on notice of the accumulating risk of . . . reversals' in these multi-issue serial reviews") (quoting United States v. L.A. Tucker Lines, Inc ., 344* U.S. 33, 37 (1952)). Restating its position, the government argues the futility exception should not apply here "[i]n the interests of fairness to the agency[.]" *Id*. quoting *id*.

Toscelik raises several points in reply. First, Toscelik contends the government does not dispute that the 0.83 percent rate that Commerce applied to Toscelik (namely, the *2011 CVD Review* results as they concerned Toscelik's rate) was ultimately deemed unlawful and was corrected, on remand, to *de minimis* 0.44 percent,[7] *i.e.*, the government does not dispute that the 0.83 percent applied to Toscelik in the *2012 CVD Review* is an incorrect rate, and that the government's sole argument is that Toscelik failed to exhaust its administrative remedies in the *2012 CVD Review*.

Second, Toscelik argues it was under no obligation to file a case brief in this proceeding because there was no administrative record created during the 2012 review concerning Toscelik's CVD rate, Commerce simply reached back and "plucked" its result from the final results of the 2011 review without incorporating any substantive record concerning the underlying calculation. There was therefore, Toscelik argues, no record on the basis of which it could frame arguments in a case brief.

Third, Toscelik emphasizes it did not, and does not, argue that it was unlawful or incorrect for Commerce to reach back to the previous review for its result, it argues that Commerce reached back to a defective result, and that the defect could only be litigated, as it was, in an appeal from the eleventh review, which would then become applicable to the twelfth review *ipso facto*.

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[7] *See Toscelik II*, Slip Op. 15–28; *see also Circular Welded Carbon Steel Pipes and Tubes from Turkey: Notice of Court Decision Not In Harmony With Final Results of Countervailing Duty Administrative Review and Notice of Amended Final Results of Countervailing Duty Administrative Review; 2011*, 80 Fed. Reg. 43709 (July 23, 2015).

Expanding on these points, Toscelik argues the present case is distinguished from all those cited in the government's response brief by the fact that there was no administrative record in the present case against which Toscelik could raise arguments in a case brief. For example, if Commerce had incorporated the calculations of the eleventh review into this twelfth, then Toscelik could have argued that specific aspects of the calculation were in error, but Commerce simply took the ultimate number from the final results of the eleventh review as the final result for Toscelik in the twelfth review. Again: Toscelik does not claim that Commerce acted unlawfully in reaching back to the eleventh review for its result in the twelfth or was required to incorporate any part of the record of the eleventh review into the twelfth, nor does Toscelik take issue with Commerce's policy of applying to a non-mandatory respondent the result of the most recently completed review of that company when such a result exists; Toscelik emphasizes its belief, generally speaking, that this is a reasonable exercise of Commerce's discretion and therefore unobjectionable.

Based on the foregoing, it is therefore difficult to discern what argument Toscelik might have made in an administrative case brief to espouse a different outcome. Toscelik could not argue against the "reach-back" policy, nor could it plausibly argue that Commerce should place the twelfth review on hold until the flaws of the eleventh review were litigated, since Commerce is on a statutory schedule that permits no such suspension. 19 U.S.C. §1675(a)(3). Nor could Toscelik argue that the "facts" did not support the use of the 0.83 percent rate, since there were no facts relevant to Toscelik that were actually determined in the twelfth review: the record in that respect is a void. Nor could Toscelik argue that the results of the eleventh review were erroneous, because such an argument is properly presented only in the eleventh review, where there was a record on which to base such an argument. The flaw in the final result of the *2012 CVD Review* is not a flaw *of* the twelfth review but rather a flaw of the eleventh, and there is no argument Toscelik could have made during the twelfth review that could possibly have resulted in redress of the error of the eleventh review. As such, the court agrees with Toscelik that the fact that there was no record on which to base any argument translates into a "useless formality" defense against an exhaustion argument; *see Jiaxing Brother Fastener Co. v. United States*, 34 CIT ___, ___, 751 F. Supp. 2d 1345, 1355–56 (2010). That is, it would have been useless for Toscelik to argue in the twelfth review that Commerce could correct the error of the eleventh review, particularly when the elev-

enth review was *sub judice*. It would also have been useless for Toscelik to assert that Commerce's "reach-back" policy was an abuse of discretion, when Toscelik agrees that the reach-back policy is lawful.[8]

The government asserts that "[i]n the review at issue in this case, Toscelik at a minimum could have challenged Commerce's application of the 0.83 subsidy rate, and the methodology through which it was calculated, because that rate was being challenged in Court No. 13–00371." Def's Resp. at 6. However, the defending position is contrary to fact, as there was no record in the twelfth review on which to predicate an attack on the facts or methodology underlying the 0.83 percent rate of the eleventh review.

Similarly, the government asserts that "the issue Toscelik now presents to this Court was 'squarely in play[,]' yet Toscelik chose not to file a case brief at all." To the contrary, the lawfulness of the eleventh review result was not squarely in play in the twelfth review; Commerce selected the ultimate number, 0.83 percent, from the final results of the *2011 CVD Review*, but there was no record underlying that number against which to argue. The twelfth review is a purely derivative action; it turns wholly on the lawfulness *vel non* of the eleventh review, and has no independent authority or correctness. In other words, there was nothing in the twelfth review about which to write a case brief.

The government also claims that *Bestpak*, *supra*, compels the conclusion that Toscelik's useless-formality defense is unavailing. However, the core issue in *Bestpak* concerning exhaustion was whether that plaintiff's failure to raise an argument concerning a particular invoice that was part of the record under review constituted a failure to exhaust. That is distinct from the present case in that the plaintiff in *Bestpak* had the administrative ability to argue that the invoice of record supported its position and failed to take advantage of that, whereas in the case at bar there is no factual record from which Toscelik could argue that the result was wrong. Indeed, in all the cases cited by the government, there was a record on which the plaintiffs could have based the arguments that were deemed to have been waived.

The remaining arguments of the government are unpersuasive. For example, the government asserts that Toscelik's "subsidy rate 'had

[8] *Cf. Diamond Sawblades Manufacturers' Coalition v. United States*, 35 CIT ___, Slip Op. 11–137 (Nov. 3, 2011) (noting the domestic industry coalition's acknowledgment that it would be "improper to preserve [the coalition's] challenge to the LTFV determination by 'challenging' the section 129 determination (with which [the coalition] avers it has no substantive contention), simply in order to bring . . . revocation [of the antidumping duty order] under the ambit of [the coalition's] challenge to the LTFV determination").

been squarely in play' during the 2012 administrative review and was the reason for its court challenge of the 2011 Final Results", Def's Resp. at 7, but it is difficult to discern the extent of what is meant by this. As Toscelik points out, its subsidy rate was not literally "in play" during the 2012 review because Commerce selected only Borusan as a mandatory respondent, and only Borusan's rate was "in play" in the 2012 review. Insofar as the 2012 review was concerned, Toscelik's rate was entirely derivative: if Borusan had an affirmative rate, it would have applied to Toscelik; and if Borusan had a zero or *de minimis* rate, then Toscelik's eleventh-review results would apply. In neither case could it be said that Toscelik's subsidy rate was "in play" in the 2012 review, at least in the sense advanced by the government.

And it is also difficult to discern what is meant by "Toscelik's rate . . . was the reason for the [judicial] challenge of the 2011 Final Results." That is true, of course, but the statement does not appear relevant to the 2012 review. The statement seems to link the 2011 appeal to the 2012 review, but there was nothing Toscelik could possibly have argued in the 2012 review while the 2011 case was *sub judice* that could conceivably have affected the outcome of the 2012 review.

The government also notes, properly, that "Commerce is not required to consider information beyond the administrative record in question", Def's Resp. at 9, but it is difficult to discern how this truism furthers the argument here. Toscelik is not arguing that Commerce should have reconsidered the 2011 calculations in (and that were not made part of the record of) the 2012 review, Toscelik is simply arguing that, when the 2011 result was found to be inaccurate, Toscelik was entitled to the same accuracy in the twelfth review as it received in the eleventh. There was no available argument at the administrative level on this point, as it could only be made on appeal.

Finally, the government argues that Toscelik "does not explain how Commerce would have been unwilling or unable to consider its arguments during the 2012 review." Def's Resp. at 12. However, it is fairly clear from the briefing that Toscelik has made its precise explanation repeatedly: Toscelik could not argue that Commerce's 2012 result was not supported by the record because there was no record. Toscelik could not argue that Commerce's 2012 result was not in accordance with law because Commerce's "reach-back" policy is reasonable and, in any event, is not the gravamen of this appeal. Similarly, it would have been, as Toscelik contends, "risible" for it to argue in a case brief that Commerce should set aside its selection of the eleventh-review final result and instead select the rate that was in Toscelik's brief as plaintiff in its appeal of the eleventh review. Not only is such an

argument without a legal basis, but it is further hampered by the fact that Toscelik's brief to the court in the appeal from the eleventh review was not on the record in the twelfth review and therefore could not have been considered by Commerce in the twelfth review even if Commerce may have been otherwise inclined to do so. In fact, there was nothing Toscelik could have argued before the agency that could possibly have changed the outcome of the review.

This is the essence of the futility exception to exhaustion. Any argument Toscelik might have made would have had no impact on the final results. Other than providing repetitive "notice" to Commerce that Toscelik disagreed with the final results of the *2011 CVD Review* (a fact of which Commerce was already well aware), any case brief would have been a useless formality, without substance.

IV. Conclusion

The government apparently agrees that the amended final results of the 2011 review, *i.e.*, the *de minimis* 0.44 percent, are the most accurate measure of the result for Toscelik in the 2012 review. As discussed above, the government's sole opposition to this result is that Toscelik did not file a case brief in the 2012 review; however, Toscelik persuades that any such case brief would have been a useless formality and an exercise in futility, and that the law does not require it to file such a brief merely in order to preserve its right to appeal. In view of the foregoing, the matter must therefore be remanded for consideration of the application of the amended 2011 final result to this 2012 review.

The results of remand shall be due March 21, 2016. After filing thereof with the court, the parties shall confer and report on proceeding further on the case, including a proposed scheduling of further comments, if necessary. **So ordered.**

Dated: December 21, 2015
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE,
Senior Judge