# U.S. Customs and Border Protection

Slip Op. 12–117

YAMA RIBBONS AND BOWS CO., LTD, Plaintiff, v. UNITED STATES, Defendant, and BERWICK OFFRAY LLC, Defendant-Intervenor.

Before: Donald C. Pogue, Chief Judge
Court No. 10–00291

[Commerce's final determination is affirmed.]

Dated: September 14, 2012

*John J. Kenkel*, *Gregory S. Menegaz*, and *J. Kevin Horgan*, DeKieffer & Horgan, of Washington, DC, for the Plaintiffs,

*Renee A. Gerber*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for the Defendant. With her on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs were, Daniel J. Calhoun, Office of Chief Counsel for Import Administration, United States Department of Commerce, and

*Gregory C. Dorris*, Pepper Hamilton LLP, of Washington, DC, for the Defendant-Intervenor.

## *OPINION*

**Pogue, Chief Judge:**

In this action, Plaintiff, Yama Ribbons and Bows Co., Ltd. ("Yama"), a producer of ribbons, challenges the final countervailing duty ("CVD") rate determined by the United States Department of Commerce ("Commerce" or "the Department") in an investigation of certain narrow woven ribbons with woven selvedge[1] from the People's Republic of China ("China"). Specifically, Yama asserts that Commerce erred in calculating a CVD subsidy rate for Yama's products by incorrectly using the value of Yama's unconsolidated Chinese sales, rather than Yama's consolidated Hong Kong sales, as the denominator in the CVD subsidy calculation. Yama claims that because the unconsolidated sales were not the first sales at arm's length, they are not the actual "sales value" required by Commerce's regulations for determining a subsidy rate.

[1] Selvedge is the edge of ribbon on either side, woven such that it will not fray or unravel. *Webster's Third New International Dictionary* 2062 (2002).

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006). For the reasons explained below, Commerce's decision to use Yama's unconsolidated Chinese sales to value the denominator for the subsidy calculation is affirmed.

## BACKGROUND

This case arises from Commerce's CVD investigation, initiated on August 16, 2009, to determine whether countervailable subsidies[2] had been granted to certain Chinese manufacturers of narrow woven ribbons with woven selvedge.[3] Yama was a respondent in this investigation. When calculating CVD subsidy rates for a respondent, Commerce divides the value of subsidy benefits by the sales value of the merchandise which received the subsidies.[4] In other words, the denominator in Commerce's calculation is the sales value of the importer or producer's subject merchandise.

To calculate Yama's CVD rate, Commerce preliminarily included sales from Yama's affiliated Hong Kong company, Yama HK,[5] as part of the calculation's denominator. Inclusion of the Hong Kong sales resulted in a preliminary *de minimis* subsidy rate for Yama. *See Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, 74 Fed. Reg. 66,090, 66,096 (Dep't Commerce Dec. 14, 2009) (preliminary affirmative countervailing duty determination and alignment of final countervailing duty determination with final antidumping duty determination) ("*Preliminary Determination*"). Because the subsidy determination was *de minimis*, Yama's imports would not have been subject to countervailing duties. *See id.*

After considering comments from interested parties, Commerce revised its calculations in its final determination to exclude Yama HK's sales. *See Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, 75 Fed. Reg. 41,801 (Dep't Commerce July

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[2] A countervailing duty is imposed on an import when the United States International Trade Commission has found "material injury" to a domestic industry and Commerce determines that "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy . . . ." 19 U.S.C. § 1671. To be countervailable, a subsidy must provide a financial contribution to a specific industry, and the respondent must benefit. *See* 19 U.S.C. § 1677(5)–(5A); *Essar Steel Ltd. v. United States*, 34 CIT__, 721 F. Supp. 2d 1285, 1292 (2010).

[3] The period of investigation is January 1, 2008 to December 31, 2008.

[4] *See* 19 C.F.R. § 351.525(a) ("The Secretary will calculate an ad valorem subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the Secretary attributes the subsidy under paragraph (b) of this section.").

[5] The name of Yama's Hong Kong affiliate is confidential. This opinion will refer to it as "Yama HK".

19, 2010) (final affirmative countervailing duty determination) ("*Final Determination*") and accompanying Issues and Decision Memorandum, (July 12, 2010), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2010–17541–1.pdf (last visited Sept. 12, 2012)("*I&D Memo*"). Rather, Commerce used the sale price of the merchandise from Yama to Yama HK as the denominator. *I&D Memo* at 20. This exclusion resulted in a subsidy rate greater than *de minimis*, and thus in the imposition of countervailing duties.[6] *See id.* at 20, 22. Plaintiff now challenges the final CVD rate.

## STANDARD OF REVIEW

The court will sustain Commerce's determination if it is supported by "substantial evidence on the record," and "otherwise . . . in accordance with law." Section 516A(b)(1)(B)(i) of the Tariff Act of 1930, 19 U.S.C. § 1516a(b)(1)(B)(i).[7] To be in accordance with law, the agency's decision must be authorized by the statute, and consistent with the agency's regulations. *See, e.g.*, *Hontex Enter., Inc. v. United States*, 27 CIT 272, 292–93, 248 F. Supp. 2d 1323, 1340–41(2003).

## DISCUSSION

Yama claims that the use of an intra-company transfer price, instead of the sales price to a U.S. consumer, as the denominator for its subsidy rate calculation, was improper. It also claims that Commerce used an appropriate methodology in an analogous determination, *Coated Free Sheet Papers from the People's Republic of China*, 72 Fed. Reg. 60,645 (Dep't Commerce Oct. 25, 2007) (final affirmative countervailing duty determination) ("*CFS Paper*"), yet unreasonably refuses to follow its own prior practice. These arguments are unavailing.

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[6] The final rate was calculated pursuant to 19 C.F.R.§ 351.525(b)(6)(i), which states that, for companies with cross-ownership, "the Secretary normally will attribute a subsidy to the products produced by the corporation that received the subsidy."

In calculating the CVD subsidy rate, Commerce found that Xiamen Yama Import and Export Co., Ltd. ("Yama Trading"), a Chinese affiliate, supplied inputs to Yama. It therefore consolidated the sales of these two Chinese companies and attributed the Chinese subsidies granted to both those Chinese companies to their consolidated Chinese sales.

While there are exceptions, listed in 19 C.F.R. § 351.525(b)(6)(ii)–(v), which create alternate CVD subsidy rate calculation methods, Commerce determined that the CVD record did not show contain sufficient evidence to support the application of these exceptions. *I&D Memo* at 20. It therefore excluded sales figures from the Hong Kong affiliate in its final calculation of the denominator pursuant to 19 C.F.R.§ 351.525(b)(6)(i). *See id.*

In supplemental briefing requested by the court, Plaintiff made clear that it is not claiming any of the statutory exceptions listed in 19 C.F.R. § 351.525(b)(6)(ii)–(v).

[7] Further citations to the Tariff Act of 1930 are to Title 19 of the United States Code, 2006 edition.

It is Commerce's practice to attribute subsidies to the company that received them. 19 C.F.R. § 351.525(b)(6)(i). While there are exceptions that allow Commerce to attribute the subsidies to foreign cross-owned subsidiaries and affiliates,[8] Commerce must base its decisions on the record before it in each individual investigation. With respect to data within their control, the burden rests on the interested parties "to create an accurate record during Commerce's investigation." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012).

*I. Denominator*

As stated above, Commerce based the denominator of the CVD calculation on the sales price from Yama to Yama HK. Yama argues that this calculation is improper because the transfer of goods from Yama to Yama HK was not a sale at arm's length, but rather an "artificial internal transfer price." Pl.'s Rule 56.2 Mot. for J. upon the Agency R., ECF No. 22 at 32 ("Pl.'s Br."). Yama notes that Commerce's verification report identifies the figures Commerce used as "internal transfer values," Pl.'s Br. at 33 (citing *Commerce Verification Report: Yama Ribbons and Bows Co., Ltd.*, (Mar. 17, 2010) Admin. R. Con. Doc. 148 at 5), and contends that when Commerce acknowledged these were internal transfers, it should have turned to the first arms-length sales, namely, the sales from its Hong Kong affiliate.

Commerce correctly responds that only Chinese companies (Yama and Yama Trading) received Chinese subsidies and therefore, pursuant to 19 C.F.R. § 351.525(b)(6)(i), using sales figures from Yama HK, a Hong Kong company, would be inappropriate. Yama HK did not directly receive any Chinese subsidies. By excluding Yama HK's sales from the denominator, Commerce complied with its own regulation, which calls for it to attribute subsidies to the sales of the companies which receive them. *See* 19 C.F.R. § 351.525(b)(6)(i). Furthermore, Commerce notes that it does not have any information regarding Hong Kong subsidies that may have been received by Yama HK, and therefore including the consolidated Hong Kong sales in the denominator without properly attributing any corresponding Hong Kong subsidies would be inappropriate and contrary to the statute. *See* 19 C.F.R. § 351.525(a).

[8] In antidumping ("AD") and CVD investigations, Commerce treats Hong Kong and the People's Republic of China as two separate countries. *See Application of U.S. Antidumping and Countervailing Duty Laws to Hong Kong*, 62 Fed. Reg. 42,965 (Dep't Commerce Aug. 11, 1997); 22 U.S.C. § 5713(3) ("The United States should continue to treat Hong Kong as a territory which is fully autonomous from the United Kingdom and, after June 30, 1997, should treat Hong Kong as a territory which is fully autonomous from the People's Republic of China with respect to economic and trade matters.").

While Yama appears to have identified its cross-ownership relationship with Yama HK early in the administrative process in one of its questionnaire responses, the evidence supporting its assertion of cross-ownership between the two companies is not on the CVD administrative record, but rather, appears to be proprietary data on the record for the accompanying AD investigation. *See* Pl.'s Br. at 38. Yama contends that Commerce should have requested the necessary information, but it is well established that in AD and CVD investigations, the burden falls on the interested party to place relevant information within its possession on the record. *Statement of Administrative Action Accompanying the Uruguay Round Agreements Act*, H.R. Doc. No. 103–316, vol. 1 (1994) at 829, *reprinted in* 1994 U.S.C.C.A.N. 4040; 19 C.F.R. § 351.401(b)(1) ("The interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of [Commerce] the amount and nature of a particular adjustment."). Therefore, while a cross-ownership relationship between Yama and Yama HK might exist, which potentially could place Yama in one of the exceptions listed under 19 C.F.R. § 351.525(b), Commerce was correct in not considering any of these exceptions because the record before it in the investigation did not contain any evidence to support the existence of such a relationship. *I&D Memo* at 20.

*II. Coated Free Sheet Paper methodology*

Yama next argues that Commerce should have applied the methodology from *CFS Paper*, a case Yama claims is analogous to its own situation. *See* Pl.'s Brief at 30 (citing *CFS Paper*). Yama notes a number of similarities between its situation and *CFS Paper*, namely that: (1) the price on which the alleged subsidy is based differs from the United States invoice price; (2) the exporter and the party who invoices the customer are affiliated; (3) the United States invoice establishes the customs value to which countervailing duties are applied; (4) there is a one-toone correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment; (5) the merchandise is shipped directly to the United States; and (6) the invoices can be tracked as back-to-back invoices that are identical except for price. *Id.*

In response, Commerce makes two arguments: First, Yama mischaracterized Commerce's calculations in *CFS Paper*. Second, even if the methodology used in *CFS Paper* would alter the outcome here, Yama had the burden of providing verifiable documentation sufficient for Commerce to make Yama's requested adjustment, and Yama did

not provide this data. *See* Def.'s Opp'n to Pl.'s Rule 56.2 Mot. For J. upon the Agency R., ECF No. 31 at 38 ("Def.'s Br.").

Commerce clarified that in *CFS Paper* it did not, as Plaintiff claims, simply use the consolidated sales figures reflected in the affiliated reseller's prices as the denominator. Rather, it adjusted the subsidies calculated by the ratio of the sales value of exports from the investigated country and the sales value in the United States. *See id.* Regardless, Commerce continued, it would be unable to apply the *CFS Paper* calculation methodology to a determination of the CVD margin for Yama, because Yama failed to provide the necessary documentation, which, as discussed *supra*, it bore the burden of producing.[9] Commerce states that Yama has cited "*no* record evidence to substantiate as a factual matter its eligibility for a rate adjustment," Def.'s July 3 Letter, ECF No. 44, at 4 (emphasis in original), and therefore it was reasonable to use the ad valorem subsidy rate calculation – without applying any of the exceptions – specified in Commerce's applicable regulation.

Yama argues that it submitted evidence of its eligibility for a rate adjustment in the companion antidumping investigation, and that Commerce should have pulled relevant data from the AD record and placed it on the record in the CVD proceeding. Yama contends that the CVD proceeding "should be seen as one combined proceeding with the simultaneous antidumping investigation," especially because "the petition that initiated the countervailing duty investigation was the same petition that included the request for an antidumping investigation." *See* Pl.'s July 26 Letter, ECF No. 53 at 7–9. However, antidumping duty and countervailing duty investigations operate pursuant to different statutory provisions, are separate administrative proceedings, and as such, each investigation has its own unique and separate administrative record. *See* 19 C.F.R § 351.306. Importantly, the relevant data appears to be proprietary and therefore it would have been inappropriate for Commerce simply to move it from one administrative record to another. *See* 19 C.F.R § 351.306 (authorizing sanctions against any Commerce employee who discloses business proprietary information). While Commerce has discretion to transfer certain non-proprietary information from one proceeding to another, *see, e.g.*, *Melamine Chemicals, Inc. v. United States*, 2 CIT 113, 115–16 (1981), it may not unilaterally transfer proprietary information across administrative proceedings. *See* 19 U.S.C. § 1677f(b)-(c); 19 C.F.R § 351.306.

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[9] Commerce clarified that the particular missing information is any verifiable data regarding the above-mentioned six criteria that Yama claims link its situation to that in *CFS Paper*. *See* Def.'s July 3 Letter, ECF No. 44 at 3.

Even assuming, *arguendo*, that Plaintiff may be correct in its assertions that Yama's merchandise was merely transferred from one company to another and therefore qualifies for the exception used in *CFS Paper*, the result does not change. Absent any evidence on the administrative record supporting these claims, which Plaintiff has the burden of providing, Commerce's decision to use the unconsolidated sales figures as the denominator in its CVD rate calculation is supported by substantial evidence.

## CONCLUSION

For the reasons discussed above, Commerce's calculation of the countervailing duty rate for Plaintiff is AFFIRMED. Judgment will be issued accordingly.

Dated: September 14, 2012
New York, New York

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

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Slip Op. 12–118

CIBA VISION CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00672

[Cross-motions for summary judgment denied]

Dated: September 19, 2012

*John B. Pellegrini*, McGuireWoods LLP, of New York, New York, argued for Plaintiff.

*Saul Davis*, Senior Trial Counsel, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, New York, argued for Defendant. With him on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney In Charge, International Trade Field Office. Of counsel on the brief were *Edward N. Maurer* and *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, of New York, New York.

## OPINION

**RIDGWAY, Judge:**

In this action, Plaintiff CIBA VISION Corporation ("CIBA") challenges the decision of the U.S. Customs Service[1] denying CIBA's

[1] The U.S. Customs Service – formerly part of the U.S. Department of Treasury – is now part of the U.S. Department of Homeland Security, and is commonly known as U.S. Customs and Border Protection. *See Bull v. United States*, 479 F.3d 1365, 1368 n.1 (Fed. Cir. 2007). The agency is referred to as "Customs" herein.

protest of Customs' classification of Nelfilcon polymer solution ("Nelfilcon") – a chemical that CIBA uses in the manufacture of daily disposable soft contact lenses.

CIBA contends that Nelfilcon is classifiable as "Polymers of vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms: Polyvinyl alcohols, whether or not containing unhydrolyzed acetate groups," under subheading 3905.30.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"), and is thus dutiable at the rate of 3.2% *ad valorem*. *See generally* Subheading 3905.30.00, HTSUS;[2] Plaintiff's Memorandum in Support of Its Motion for Summary Judgment ("Pl.'s Brief") at 4, 9–10, 14, 15; Plaintiff's Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment and in Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Pl.'s Reply Brief") at 1, 4–5, 8. In contrast, the Government maintains that Nelfilcon is properly classified under subheading 3905.99.80, which covers "Polymers of vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms: Other: Other: Other," dutiable at the rate of 5.3%. *See generally* Subheading 3905.99.80, HTSUS; Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment ("Def.'s Brief") at 1, 8, 11–12, 18; Defendant's Reply to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment ("Def.'s Reply Brief") at 1, 9.

Jurisdiction lies under 28 U.S.C. § 1581(a) (1994).[3] Cross-motions for summary judgment are pending. As summarized below, however, a genuine dispute of material fact exists as to the meaning of "polyvinyl alcohol" as that term is used in subheading 3905.30.00. The parties' motions for summary judgment therefore must be denied.[4]

## I. *Background*

Nelfilcon Polymer Solution ("Nelfilcon") is an aqueous solution of modified polyvinyl alcohol ("PVA") that is used in the production of CIBA's daily disposable soft contact lenses. *See* Joint Statement of Material Facts Not in Dispute ("Joint Statement of Material Facts")

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[2] All citations to the HTSUS herein are to the 1999 edition. This action covers 94 entries of Nelfilcon made through the Port of Atlanta during the period 1999 to 2001. *See* Pl.'s Brief at 1. There were no relevant changes in the tariff provisions here at issue in 2000 or in 2001. *See* Pl.'s Brief at 2; *see also* Def.'s Brief at 2.

[3] All statutory citations herein (other than citations to the HTSUS) are to the 1994 edition of the United States Code.

[4] Both parties make a number of arguments that do not directly focus on the meaning of "polyvinyl alcohol." As a practical matter, however, the definitional issue overshadows those other arguments.

¶¶ 16, 23. The merchandise at issue here was manufactured in Switzerland and imported into the United States from Germany and Switzerland between 1999 and 2001. *See* Joint Statement of Material Facts ¶¶ 1, 22; *see also* Summons at 3–7 (listing 94 entries). On the commercial invoices and other entry documents, the merchandise was described as "NELFILCON Polymer Solution" (with or without additional words and numbers). *See* Joint Statement of Material Facts ¶¶ 1, 6.

Nelfilcon is created through the process of acetalization – a chemical reaction between PVA and another chemical. *See* Joint Statement of Material Facts ¶¶ 8–10, 21. The molar percentage of PVA in the acetalized PVA, *i.e.*, Nelfilcon, is roughly 95%. *See* Complaint ¶ 5; HQ 964854 (March 18, 2002). After the Nelfilcon is imported, CIBA subjects it to further processing, including thawing and heating (and, in some cases, the addition of pigment), before molding the Nelfilcon into contact lenses. *See* Joint Statement of Material Facts ¶¶ 12, 26–27. CIBA does not trade Nelfilcon, and uses it exclusively in its lens production facilities. *See* Joint Statement of Material Facts ¶ 29.

With one exception,[5] Customs liquidated all of the entries of Nelfilcon at issue under HTSUS subheading 3905.99.80, as "Polymers of vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms: Other: Other: Other," assessing duties at a rate of 5.3% *ad valorem*. *See* Joint Statement of Material Facts ¶ 2; Subheading 3905.99.80, HTSUS. CIBA timely protested, arguing that Nelfilcon is properly classifiable under HTSUS subheading 3905.30.00, as "Polymers of vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms: Polyvinyl alcohols, whether or not containing unhydrolyzed acetate groups," and is thus dutiable at the rate of 3.2%. *See* Joint Statement of Material Facts ¶ 3; Subheading 3905.30.00, HTSUS. Customs denied the protests and, in response to CIBA's Application for Further Review, issued a ruling letter affirming the agency's classification of Nelfilcon in subheading 3905.99.80. *See* Joint Statement of Material Facts ¶¶ 4, 37; *see also* HQ 964854.

This action followed.

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[5] Customs liquidated one entry of Nelfilcon, Entry No. 112–9728133–7, under subheading 3905.12.00 (which covers "Polymers of vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms: Polyvinyl acetate: In aqueous dispersion"). *See* Subheading 3905.12.00, HTSUS; Joint Statement of Material Facts ¶ 2. However, the parties agree that Nelfilcon is not polyvinyl acetate and that liquidation of Entry No. 112–9728133–7 under subheading 3905.12.00 was incorrect. *See* Answer ¶ 6; Counterclaim ¶¶ 13–14; Reply to Counterclaim ¶¶ 13–14. Because the Nelfilcon covered by that entry was identical to the rest of the merchandise at issue in this action, the parties' arguments concerning all entries are the same.

## II. *Standard of Review*

Customs classification decisions are reviewed *de novo*, through a two-step analysis. *See* 28 U.S.C. § 2640; *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009). The first step of the analysis "addresses the proper meaning of the relevant tariff provisions, which is a question of law. The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed." *See id*. (*citing Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).[6]

As a practical matter, summary judgment is often appropriate in customs classification cases, because, in many cases, "there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citation omitted). Indeed, the Court of Appeals has hailed summary judgment as a "salutary procedure . . . to avoid unnecessary expense to the parties and wasteful utilization of the jury process and judicial resources." *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835 (Fed. Cir. 1984).

However, the function of the judge at the summary judgment stage "is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Accordingly, "[t]he question is not whether [a party's] proof will ultimately be found convincing or persuasive. . . . Rather, the question is only whether the parties have proof for their claims . . . such that a trial is needed." 11 Moore's Federal Practice § 56.02[1], p. 56–18 (3d ed. 2012) ("Moore's Federal Practice"). As such, a movant is not entitled to summary judgment "merely because the facts the party offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial. This is true even though both parties move for summary judgment." 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725,

[6] Pursuant to 28 U.S.C. § 2639(a)(1), Customs' classification decisions enjoy a presumption of correctness. However, that presumption attaches only to the agency's factual determinations. The presumption thus has no force or effect at this stage of the proceedings, because summary judgment may be entered only if there is no genuine dispute as to any material fact – and, if there is no such factual dispute, Customs does not need the benefit of any presumption. *See, e.g.*, *Universal Electronics, Inc. v. United States*, 112 F.3d 488, 492–93 (Fed. Cir. 1997) (explaining that statutory presumption of correctness "carries no force as to questions of law"); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997) (stating that presumption of correctness "is irrelevant where there is no factual dispute between the parties"); *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (noting that, absent factual dispute between the parties, "the presumption of correctness is not relevant").

pp. 432–33 (3d ed. 1998) ("Wright & Miller"); *see*, *e.g.*, *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1371–72 (Fed. Cir. 2004) (holding that, where parties filed cross-motions for summary judgment, trial court erred in granting government's motion in light of "genuine issues of material fact" concerning "essential character" of goods at issue). Summary judgment is proper "only when a trial would be superfluous." 11 Moore's Federal Practice § 56.02[1], p. 56–16.

A party moving for summary judgment thus "is held to a stringent standard." 10A Wright & Miller § 2727, p. 457. In evaluating a summary judgment motion, "any doubt as to the existence of a genuine issue of material fact will be resolved against the movant." *Id.* § 2727, pp. 457–58. Further, "[b]ecause the burden is on the movant, the evidence . . . always is construed in favor of the party opposing the motion and the opponent is given the benefit of all favorable inferences that can be drawn from it." *Id.* § 2727, p. 459. Moreover, "facts asserted by the party opposing the motion, if supported by affidavits or other evidentiary material, are regarded as true." *Id.* § 2727, pp. 459–62.

In sum, because the impact of the entry of summary judgment is "rather drastic," summary judgment is to be "cautiously invoked" and used "with a due regard for its purposes." 10A Wright & Miller § 2712, pp. 215–16. Summary judgment thus is not appropriate where there are "[d]oubts as to the credibility of a movant's affiants or witnesses." *Id.* § 2726, p. 440. Similarly, summary judgment is not appropriate where "the evidence presented . . . is subject to conflicting interpretations, or reasonable people might differ as to its significance." *Id.* § 2725, pp. 433–37. Finally, summary judgment is not appropriate "if the existence of material fact issues is uncertain." *Id.* § 2712, p. 210.

As one leading authority sums up the state of the law, summary judgment is reserved exclusively for "clear cases." 10A Wright & Miller § 2725, pp. 428–29. Based on the record as it currently stands, this is not such a case.

### III. *Analysis*

In the case at bar, the parties agree that the merchandise at issue, Nelfilcon, is a polyvinyl alcohol ("PVA") "that has been chemically modified." *See*, *e.g.*, Joint Statement of Material Facts ¶¶ 8, 16. The parties also are in accord as to the appropriate classification at the heading level – specifically, HTSUS heading 3905, which covers "Polymers of vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms." *See* Pl.'s Brief at 8; Def.'s Brief at 11–12; Heading 3905, HTSUS.

Similarly, of the four subheadings at the first level of indentation under heading 3905 (*i.e.*, the so-called "one-dash" or "level one" subheadings), the parties agree that two – specifically, "Polyvinyl acetate" and "Vinyl acetate copolymers" – have no application here. *See* Joint Statement of Material Facts ¶ 20; Pl.'s Brief at 4; Def.'s Brief at 3.[7] The parties' dispute thus focuses solely on the remaining two competing subheadings under heading 3905 – "Polyvinyl alcohols, whether or not containing unhydrolyzed acetate groups" (specifically, subheading 3905.30.00) *versus* the residual (or "basket") subheading, "Other" (specifically, subheading 3905.99.80). *See*, *e.g.*, Pl.'s Brief at 2, 7, 8, 15; Def.'s Brief at 1, 2, 8; Subheading 3905.30.00, HTSUS; Subheading 3905.99.80, HTSUS.[8] Asserting that Nelfilcon is a form of PVA and is commonly referred to as PVA, CIBA claims that the proper classification is under subheading 3905.30.00 (the *eo nomine* provision for PVA),[9] while the Government defends Customs' classification under subheading 3905.99.80 (the residual, or basket, provision). *See*, *e.g.*, Pl.'s Brief at 9–10, 11–13; Pl.'s Reply Brief at 2, 6–7; Def.'s Brief at 5, 20–23; Def.'s Reply Brief at 3–4, 6, 8.

The tariff classification of all merchandise imported into the United States is governed by the General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation ("ARIs"), which provide a framework for classification under the HTSUS, and are to be applied in numerical order. *See BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007); 19 U.S.C. § 1202.[10] Most merchandise

[7] "Polyvinyl acetate" is classified under subheading 3905.12.00 if it is "[i]n aqueous dispersion," and under subheading 3905.19.00 ("Other") if it is not. *See* Subheading 3905.12.00, HTSUS; Subheading 3905.19.00, HTSUS. "Vinyl acetate copolymers" are classified under subheading 3905.21.00 if they are "[i]n aqueous dispersion," and under subheading 3905.29.00 ("Other") if they are not. *See* Subheading 3905.21.00, HTSUS; Subheading 3905.29.00, HTSUS.

[8] As noted above, subheading 3905.30.00 covers "Polymers of vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms: Polyvinyl alcohols, whether or not containing unhydrolyzed acetate groups," and subheading 3905.99.80 covers "Polymers of vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms: Other: Other: Other."

[9] An *eo nomine* tariff provision is one that describes the covered merchandise by name, rather than by use. *See BASF Corp. v. United States*, 482 F.3d 1324, 1326 n.2 (2007).

[10] The HTSUS consists of the General Notes, the General Rules of Interpretation ("GRIs"), the Additional U.S. Rules of Interpretation ("ARIs"), and Sections I to XXII of the HTSUS (including Chapters 1 to 99, together with all section notes and chapter notes, article provisions, and tariff and other treatment accorded thereto), as well as the Chemical Appendix. *See BASF Corp.*, 482 F.3d at 1325–26; *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (noting that the HTSUS "is indeed a statute but is not published physically in the United States Code") (*citing* 19 U.S.C. § 1202). The terms of the HTSUS are "considered 'statutory provisions of law for all purposes.'" *See Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 904 n.5 (Fed. Cir. 1999) (internal citation omitted).

is classified pursuant to GRI 1, which provides for classification "according to the terms of the headings and any relative section or chapter notes." *See* GRI 1, HTSUS.[11] After the proper heading is determined, GRI 6 governs classification at the subheading level, and requires a renewed sequential application of GRIs 1 to 5 to the particular subheadings under consideration. *See* GRI 6, HTSUS ("For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the [GRIs], on the understanding that only subheadings at the same level are comparable.").

Here, because the proper heading is not in dispute, the analysis begins at the subheading level, with GRI 1 (which applies through GRI 6). Thus, the first step is to construe the terms of the two competing subheadings, together with any pertinent section and chapter notes (which are statutory law), to determine whether they require a specific classification. *See Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (explaining that Section Notes and Chapter Notes "are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202") (internal quotation marks omitted); *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (stating that "section and chapter notes are integral parts of the HTSUS, and have the same legal force as the text of the headings").

Tariff terms are construed "according to their common commercial meanings"; and a court may rely both on its own understanding of a term and on lexicographic and scientific authorities. *See Millenium Lumber Distribution Ltd. v. United States*, 558 F.3d 1326, 1328–29 (Fed. Cir. 2009); *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). Also instructive are the Explanatory Notes to the Harmonized Commodity Description and Coding System ("Explanatory Notes"), "which – although not controlling – provide interpretive guidance." *See E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citation omitted); *see generally* World Customs Organization, Harmonized Commodity Description and Coding System (2d ed. 1996).[12]

Because the Government's asserted classification – subheading 3905.99.80 – is a residual, or "basket," provision, Nelfilcon necessar-

[11] Only if the headings and Section and Chapter Notes do not determine classification does a classification analysis proceed beyond GRI 1. *See Mita Copystar America v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998).

[12] As Congress has recognized, the Explanatory Notes "provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system." *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d

ily can be classified thereunder only if it is not properly classifiable under the parallel but more specific provision, subheading 3905.30.00, as PVA. *See*, *e.g.*, *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1047 (Fed. Cir. 2001) (explaining that classification in a residual, or "basket," provision is appropriate only where there is no other tariff provision that more specifically covers the merchandise). Pursuant to GRI 1, the touchstone in analyzing the possibility of classification under subheading 3905.30.00 is the meaning of the term "polyvinyl alcohol" as it is used in the subheading. *See* GRI 1, HTSUS (providing for classification "*according to the terms of the headings* and any relative section or chapter notes" (emphasis added)). However, neither party has identified any lexicographic or scientific or other authorities that define "polyvinyl alcohol" ("PVA") in such a way as to permit a determination as to whether the merchandise at issue falls within the common or commercial meaning of that term.[13]

Both parties point to Subheading Note 1 to Chapter 39, which provides, in relevant part:

> Within any one heading of this chapter [*i.e.*, Chapter 39], polymers (including copolymers) are to be classified according to the following provisions:
>
> (a) Where [– as here – ] there is a subheading named "Other" in the same series:

Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *see also* Guidance for Interpretation of Harmonized System, 54 Fed. Reg. 35,127, 35,128 (Aug. 23, 1989) (noting that the Explanatory Notes provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level).

The Explanatory Notes are the official interpretation of the Harmonized Commodity Description and Coding System (on which the HTSUS is based), as set forth by the World Customs Organization (the same body which drafts the international nomenclature). *See Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1360 (Fed. Cir. 2001) (explaining that Explanatory Notes are "prepared by the World Customs organization to accompany the international harmonized schedule"). Accordingly, although the Explanatory Notes "do not constitute controlling legislative history," they serve a critical function as an interpretative supplement to the HTSUS, and "are intended to clarify the scope of HTSUS [provisions,] and to offer guidance in interpreting [those provisions]." *See Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citation omitted). The Explanatory Notes are thus highly authoritative – "persuasive" and "'generally indicative of the proper interpretation of a tariff provision.'" *See Agfa Corp. v. United States*, 520 F.3d 1326, 1329–30 (Fed. Cir. 2008) (*quoting Degussa Corp.*, 508 F.3d at 1047 (citation omitted)).

All citations to the Explanatory Notes herein are to the 1996 edition.

[13] Although the Government refers to two technical dictionaries, neither definitively includes or excludes Nelfilcon from the definition of "polyvinyl alcohol." *See* Def.'s Brief at 21–23 (*discussing* Hawley's Condensed Chemical Dictionary (14th ed. 2001) and McGraw Hill Dictionary of Scientific and Technical Terms (3d ed. 1984)).

* * * *

(3) Chemically modified polymers are to be classified in the subheading named "Other", provided that the chemically modified polymers are not more specifically covered by another subheading.

Subheading Note 1, Chapter 39, HTSUS (*discussed in* Pl.'s Brief at 7–11; Pl.'s Reply Brief at 2–4; Def.'s Brief at 10, 12–13, 15–20, 24; Def.'s Reply Brief at 2–3, 5). The Government highlights the first part of Subheading Note 1(a)(3), arguing that the effect of the note is to require Nelfilcon's classification under subheading 3905.99.80, the "Other" provision. *See*, *e.g.*, Def.'s Brief at 8, 10; Def.'s Reply Brief at 5. On the other hand, CIBA underscores the second part of the same note – that is, the caveat which exempts from classification under the "Other" provision those chemically modified polymers that are "more specifically covered by another subheading." *See*, *e.g.*, Pl.'s Brief at 8–9; Subheading Note 1, Chapter 39, HTSUS. Asserting that Nelfilcon is "specifically provided for in the subheading for PVA [*i.e.*, subheading 3905.30.00]," CIBA contends that "Subheading Note 1 precludes classification in [subheading 3905.99.80,] the subheading named 'Other.'" *Id.*; *see also* Subheading Note 1, Chapter 39, HTSUS. The text of Subheading Note 1(a)(3) thus contributes little or nothing to the resolution of the parties' dispute.

The relevant Explanatory Note states:

(A) Classification when there is a subheading named "Other" in the same series

* * * *

(3) Subparagraph (a)(3) of Subheading Note 1 deals with the classification of chemically modified polymers. These polymers are to be classified in the subheading named "Other", provided that the chemically modified polymers are not more specifically covered by another subheading. The consequence of this Note is that chemically modified polymers are not classified in the same subheading as unmodified polymer[s], unless the unmodified polymer itself is classifiable in a subheading named "Other".

Thus, for example, chlorinated or chlorosulphonated polyethylene, being chemically modified polyethylene of heading 39.01, should be classified in subheading 3901.90 ("Other").

> On the other hand, polyvinyl alcohol, which is obtained by the hydrolysis of polyvinyl acetate, should be classified in subheading 3905.30 which specifically covers it.

Subheading Explanatory Note, Subheading 1, Chapter 39, HTSUS (*discussed in* Pl.'s Brief at 7–8).[14] To the extent that the Explanatory Note refers to "polyvinyl alcohol, which is obtained by the hydrolysis of polyvinyl acetate," it may be read to suggest some sort of definition of PVA. *See* Subheading Explanatory Note, Subheading 1, Chapter 39, HTSUS. But, on the existing record, it will not suffice to support summary judgment. *See* 10A Wright & Miller § 2712, p. 210 (stating that summary judgment is not appropriate "if the existence of material fact issues is uncertain"); *id.* § 2725, pp. 428–29 (explaining that summary judgment is reserved for "clear cases"). In lieu of defining "polyvinyl alcohol" (as the term is used in subheading 3905.30.00) via one of the more conventional sources, such as a scientific or technical dictionary, CIBA instead invokes "[the] basic rule of tariff interpretation that in the absence of a contrary legislative intent[,] an *eo nomine* provision, one which describes a commodity by a specific name, usually well-known in commerce, includes all forms of the article," and argues broadly that Nelfilcon has a commercial identity as PVA. Pl.'s Brief at 11; *see also id.* at 11–13; Pl.'s Reply Brief at 6 (asserting that "[t]he keystone issue in this proceeding is whether the subject merchandise is commonly known as PVA").[15]

In particular, CIBA contends that Nelfilcon "is commonly referred to as PVA in a variety of reliable sources." Pl.'s Brief at 11.[16] For

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[14] In its briefs, the Government inexplicably relies on the 1987 edition of the Explanatory Notes, rather than those in force at the time of the entries at issue. Moreover, the Government's briefs failed even to identify the edition that it was using. These actions seriously and needlessly complicated the review of the parties' pending motions.

[15] Although the point is not free from doubt, it does not appear that CIBA is claiming that the term "polyvinyl alcohol" as used in subheading 3905.30.00 is a "commercial designation" – a usage that is "'definite, uniform, and general throughout the trade,'" and which deviates from the common or dictionary definition of the term. *See*, *e.g.*, *Russell Stadelman & Co.*, 242 F.3d at 1048–49 (*quoting Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984)).

[16] CIBA amply lards its briefs with not-so-subtle references seeking to equate Nelfilcon and PVA. *See*, *e.g.*, Pl.'s Brief at 4 (stating that subject merchandise "is commonly referred to as PVA" and "is a form of PVA, albeit an improved form"); *id.* at 9 (asserting that subject merchandise "is an improved version of PVA" and "commonly is known as PVA"); *id.* (stating that subject merchandise "is commonly referred to as PVA" and "is a form of PVA"); *id.* at 10 (arguing that subject merchandise is "a version of PVA"); *id.* at 11 (asserting that "the parties in this proceeding agree that the subject merchandise is a form of PVA"); *id.* (stating that subject merchandise "is commonly referred to as PVA in a variety of reliable sources"); *id.* at 12 (arguing that subject merchandise is "within the common meaning of the term PVA"); *id.* at 13 (asserting that subject merchandise "is essentially PVA"); Pl.'s Reply Brief

example, CIBA notes that the company refers to Nelfilcon as PVA in regulatory filings that the company submits to the U.S. Food and Drug Administration. *See id.*; Joint Statement of Material Facts ¶ 34 & Exh. N. Similarly, CIBA notes that Nelfilcon "is described as PVA in various journals." *See* Pl.'s Brief at 11–12; Joint Statement of Material Facts ¶ 33 & Exhs. K, L, M. CIBA emphasizes that, in the HQ ruling letter, Customs itself referred to Nelfilcon as PVA. *See* Pl.'s Brief at 12; Joint Statement of Material Facts ¶ 37; HQ 964854. In addition, CIBA states that "[t]he United States Adopted Name Council of the American Medical Association has accepted the name 'Nelfilcon A,' which it describes as 'polymer of poly(vinyl alcohol) partially acetalized . . . .'" *See* Pl.'s Brief at 12; Joint Statement of Material Facts ¶ 30 & Exh. J. CIBA also relies on the U.S. Department of Commerce's Order in the antidumping proceeding involving PVA from the People's Republic of China. *See* Pl.'s Brief at 1213; Joint Statement of Material Facts ¶ 36 & Exh. P (Antidumping Duty Order: Polyvinyl Alcohol from the People's Republic of China, 68 Fed. Reg. 56,620 (Oct. 1, 2003) ("Antidumping Duty Order")). CIBA notes that the Antidumping Duty Order "lists 15 types or versions of PVA as being excluded" from the scope of the Order, and emphasizes that "[t]he Order also states that the merchandise under investigation is classified under subheading 3905.30.00," the provision that CIBA claims here. *See* Pl.'s Brief at 12; Antidumping Duty Order, 68 Fed. Reg. at 56,620–21. CIBA concedes (as it must) that the Antidumping Duty Order "is not binding as to classification," but nevertheless maintains that the Order "substantiates that there are a wide variety of substances commonly and commercially referred to as PVA." *See* Pl.'s Brief at 12–13.

However, CIBA significantly overstates the case in claiming that the various materials that it lists (outlined above) "establish that [Nelfilcon] is referred to as PVA." Pl.'s Brief at 13. Any agreement to that effect is conspicuously absent from the parties' Joint Statement of Material Facts. *See* Joint Statement of Material Facts, *passim*. Indeed, the Government vigorously protests CIBA's attempts to rely on the parties' Joint Statement of Material Facts and certain exhibits to that document to claim that Nelfilcon is a form of PVA. *See*, *e.g.*,

at 2 (stating that subject merchandise "is a form of poly (vinyl alcohol) ('PVA')"); *id.* (asserting that subject merchandise "is known as a form of PVA"); *id.* at 4 (alleging that parties have "[an] agreement that the subject merchandise is a form of PVA"); *id.* at 6 (stating that "the Government does not dispute plaintiff's assertions [that the subject merchandise is commonly known as PVA] . . . and apparently concedes that Nelfilcon is known as a form of PVA"); *id.* at 7 (asserting that "Nelfilcon is referred to as a form of PVA" and "the Government does not dispute this characterization"); *id.* (stating that subject merchandise "is referred to as a form of PVA").

Def.'s Brief at 20–23 (arguing, *inter alia*, that "Nelfilcon is in fact not PVA or a form of PVA," nor is it "encompassed by the provisions for PVAs"); *id.* at 26 (asserting that "while Nelfilcon is a chemically modified PVA, and a two-stage derivative of PVA, it is not PVA, or any form of PVA"); Def.'s Reply Brief at 7–8 (same). The Government emphasizes, for example, that "[t]he joint statement [of material facts] includes no 'fact' that [Nelfilcon] is 'commonly known as PVA,' and [the Government] do[es] not believe such a conclusion can be drawn from the documents included with the joint statement." *Id.* at 8. So as to leave no room for doubt, the Government concludes its reply brief by expressly, emphatically, and "unequivocally" reiterating its position that "Nelfilcon is *not* PVA nor a form of PVA." *Id.*

CIBA's reliance on the materials listed above and the many references in its briefs seeking to equate Nelfilcon and PVA cannot suffice to establish the point as a statement of undisputed material fact. Under these circumstances, CIBA cannot prevail on its Motion for Summary Judgment. But, at the same time, the failure to define "polyvinyl alcohol" also makes it difficult, if not impossible, to conclude that Nelfilcon cannot be classified under subheading 3905.30.00. And, absent a determination that Nelfilcon *is not* classifiable as polyvinyl alcohol under subheading 3905.30.00, it is not possible to conclude that Nelfilcon *is* properly classifiable under the residual, "basket" provision – specifically, subheading 3905.99.80, "Other" – as the Government claims. The Government's Cross-Motion for Summary Judgment therefore must also fail.

## IV. *Conclusion*

As set forth above, CIBA has not defined "polyvinyl alcohol" as that term is used in subheading 3905.30.00 of the HTSUS, much less established that Nelfilcon falls within the meaning of the term. CIBA's Motion for Summary Judgment must therefore be denied. By the same token, absent a definition of "polyvinyl alcohol," it cannot be concluded on the existing record that Nelfilcon cannot be classified as "polyvinyl alcohol" under subheading 3905.30.00. And because classification as "polyvinyl alcohol" under the more specific provision, subheading 3905.30.00, cannot be ruled out, it is not possible to conclude that classification under the residual, "basket" provision, subheading 3905.99.80, is proper. The Government's Cross-Motion for Summary Judgment therefore must also be denied.

An order will enter accordingly.

Dated: September 19, 2012
New York, New York

*/s/ Delissa A. Ridgway*
Delissa A. Ridgway Judge

Slip Op. 12–119

BAROQUE TIMBER INDUSTRIES (ZHONGSHAN) COMPANY, LIMITED, et. al, Plaintiffs, v. UNITED STATES, Defendant, and ZHEJIANG LAYO WOOD INDUSTRY COMPANY, LIMITED, et al., Defendant-Intervenors.

Before: Donald C. Pogue, Chief Judge
Consol. Court No. 12–00007[1]

[granting Defendant's Motion to Dismiss for lack of subject-matter jurisdiction]

Dated: September 19, 2012

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*Jeffrey S. Neeley*, *Michael S. Holton*, and *Stephen W. Brophy*, Barnes, Richardson & Colburn, Washington, DC, for Defendant-Intervenor Zhejiang Yuhua Timber Co., Ltd.

*Kristin H. Mowry*, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Susan L. Brooks*, *Sarah M. Wyss*, *Keith F. Huffman*, Mowry & Grimson, PLLC, of Washington, DC, for Defendant-Intervenor Fine Furniture (Shanghai) Ltd.; Great Wood (Tonghua) Ltd.; and Fine Furniture Plantation (Shishou) Ltd.

*Kristen S. Smith* and *Mark R. Ludwikowski*, Sandler, Travis & Rosenberg PA, of Washington, DC, for Defendant-Intervenors Lumber Liquidators Services, LLC; Armstrong Wood Products (Kunshan) Co., Ltd.; and Home Legend, LLC.

## *OPINION AND ORDER*

**Pogue, Chief Judge:**

This is a consolidated action seeking review of determinations made by the Department of Commerce ("the Department" or "Commerce") in the antidumping duty investigation of multilayered wood

[1] This action was consolidated with Court Nos. 11–00452, 12–00013, and 12–00020. Order at 1, May 31, 2012, ECF No. 37.

flooring from the People's Republic of China ("China").[2] Currently before the court is Defendant's Motion to Dismiss Plaintiff's Complaint for Lack of Jurisdiction, ECF No. 52 (docketed under Ct. No. 11–00452) ("Motion to Dismiss").

In the Motion to Dismiss, Defendant alleges that Plaintiff Coalition for American Hardwood Parity ("CAHP") Complaint failed to comply with jurisdictional timing requirements established by § 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2),[3] because CAHP filed its Summons, ECF No. 1 (docketed under Ct. No. 11–00452), in advance of Commerce's publication in the Federal Register, of the antidumping duty order. In *Baroque Timber Industries (Zhongshan) Co. v. United States*, 36 CIT __, Slip Op. 12–90 (June 27, 2012) ("*Baroque Timber I*"), the court held that CAHP's Summons was untimely filed pursuant to 19 U.S.C. § 1516a(a)(2). However, the court reserved decision on whether the untimely filing required dismissal of the Complaint on jurisdictional grounds and requested further briefing to determine whether the timing requirements in § 1516a(a)(2) are jurisdictional and, if not, whether they are subject to equitable tolling. *Baroque Timber I*, 36 CIT at __, Slip Op. 12–90 at *19–21.

Having considered the additional briefing submitted by the parties, the court concludes that recent Supreme Court precedent has cast doubt on the jurisdictional nature of § 1516a(a)(2)'s timing requirements; however, because the Court of Appeals for the Federal Circuit has historically treated those timing requirements as jurisdictional requisites, the court is obligated to follow circuit precedent unless it is reversed. Therefore, CAHP's Complaint will be dismissed for lack of jurisdiction.

## BACKGROUND[4]

In *Baroque Timber I*, the court recognized that 19 U.S.C. § 1516a(a)(2) contains two potential time lines for a party to challenge the exclusion of a company from an antidumping duty order: (1) as a negative part of an affirmative determination, pursuant to 19 U.S.C.

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[2] *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 64,318 (Dep't Commerce Oct. 18, 2011) (final determination of sales at less than fair value) ("*Final Determination*") and accompanying Issues & Decision Memorandum, A570–970, POI Apr. 1, 2010 – Sept. 30, 2010 (Oct. 11, 2011) Admin. R. Pt. 2 Pub. Doc. 31, 32, available athttp://ia.ita.doc.gov/frn/summary/PRC/2011–26932–1.pdf ("*I & D Mem.*") (adopted in *Final Determination*, 76 Fed. Reg. at 64,318).

[3] All subsequent citations to the Tariff Act of 1930 will be to Title 19 of the U.S. Code, 2006 edition, unless otherwise noted.

[4] Familiarity with the court's prior opinion is presumed, and only interim developments not included in the prior opinion are provided here by way of background.

§ 1516a(a)(2)(A)(i)(II) (requiring filing within thirty days of publication of the antidumping duty order), or (2) as a negative determination, pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (requiring filing within thirty days of publication of the final determination). *Baroque Timber I*, 36 CIT at __, Slip Op. 12–90 at *10. We held, however, that a challenge to the exclusion of a company must be filed as a negative part of an affirmative determination, i.e., within thirty days after publication of the antidumping duty order, if filed alongside other challenges to an affirmative determination. *Id.* at *13–14. Because CAHP challenged both the exclusion of Zhejiang Yuhua Timber Co., Ltd. ("Yuhua") and other aspects of the affirmative determination, its Summons, filed prior to publication of the antidumping duty order, was untimely. *Id.* However, having reserved decision regarding the jurisdictional nature of § 1516a(a)(2) and the possibility that the filing deadline is subject to equitable tolling, the court directed the parties to submit further briefing addressing the reserved issues. *Id.* at *18–19. We now turn to these issues.

## DISCUSSION

### *I. Jurisdiction*

In *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Supreme Court noted that "[c]ourts, including this Court, it is true, have been less than meticulous . . . ; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court. 'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'" *Kontrick*, 540 U.S. at 454 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)).

Following *Kontrick*, the Court has attempted to bring greater clarity to consideration of what restrictions are properly classed as jurisdictional.[5] The Court has also directed: "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540

[5] *See Gonzalez v. Thaler*, 132 S. Ct. 641 (2012); *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011); *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen*, 130 S. Ct. 584(2009); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010); *Bowles v. Russell*, 551 U.S. 205 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. United States*, 546 U.S. 12(2005); *Scarborough v. Principi*, 541 U.S. 401 (2004).

U.S. at 455; *see also Eberhart*, 546 U.S. at 16; *Scarborough*, 541 U.S. at 413–14.[6]

While further clarity is needed, "'[c]lassify[ing] time prescriptions, even rigid ones, under the heading "subject matter jurisdiction"' can be confounding." *Kontrick*, 540 U.S. at 455 (quoting *Carlisle v. United States*, 517 U.S. 416, 434 (1996)). To provide guidance in this determination, the Supreme Court, in *Arbaugh*, applied a "readily administrable bright line" for distinguishing between jurisdictional requisites and claim-processing rules:

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

546 U.S. at 515–16 (footnote omitted) (citation omitted).[7]

When determining whether Congress has ranked a statutory time limit as jurisdictional, courts are to consider text, context, and historical treatment. *Reed Elsevier*, 130 S. Ct. at 1246 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393–95 (1982)). Textual factors weighing in favor of jurisdiction include explicit jurisdictional terms, implicit references to a court's jurisdiction, and location in the same provision as the court's grant of subject-matter jurisdiction. *See Henderson*, 131 S. Ct. at 1204 (noting that 38 U.S.C. § 7266(a)[8] "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [Veterans Court]" (quoting *Zipes*, 455 U.S. at 394)); *Id.* at 1205 (noting that the timing requirements in 38 U.S.C. § 7266(a) are

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[6] As the Supreme Court has pointed out, proper delineation of jurisdiction is not an academic exercise. *See Henderson*, 131 S. Ct. at 1202 ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term."). "While a mandatory but non-jurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket," that limitation can be altered through equitable means. *Bowles*, 551 U.S. at 216 (Souter, J., dissenting). A jurisdictional limitation, however, cannot be tolled. *Id.* at 214 (majority opinion). Furthermore, a mandatory, but non-jurisdictional, limitation may be waived if not timely raised; however, a jurisdictional limitation may be raised at any time, and the court is obligated to raise jurisdictional limitations *sua sponte*. *Id.* at 216–17 (Souter, J., dissenting) (citing *Arbaugh*, 546 U.S. at 514).

[7] The Supreme Court has endorsed this standard in subsequent cases. *See* Gonzalez, 132 S. Ct. at 648–49; Henderson, 131 S. Ct. at 1203; *Reed Elsevier*, 130 S. Ct. at 1244.

[8]
> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

38 U.S.C. § 7266(a).

in a separate statutory provision from the grant of subject-matter jurisdiction). Context and historical treatment are often considered together. *Reed Elsevier*, 130 S. Ct. at 1248 ("[C]ontext, including this Court's interpretation of similar provisions in many years past, is relevant . . . ."). Therefore, context includes the background and framework of the statutory scheme, *see Henderson*, 131 S. Ct. at 1205 (noting that "what is most telling here are the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims"), as well as prior treatment of a statutory provision by the Supreme Court, *see Union Pac. R.R.*, 130 S. Ct. at 597 (holding the 28 U.S.C. § 2107(a) time limits for filing an appeal jurisdictional based on "a long line of [Supreme Court] decisions left undisturbed by Congress" (citing *Bowles*, 551 U.S. at 209–11)).

Following these instructions, and turning to the case at hand, we initially note that "[f]iling deadlines . . . are quintessential claim-processing rules." *Henderson*, 131 S. Ct. at 1203. Therefore, "[a filing deadline] falls outside the class of limitations on subject-matter jurisdiction unless Congress says otherwise." *Bowles*, 551 U.S. at 218 (Souter, J., dissenting) (footnote omitted); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).

Looking first to the text of the statute for Congressional intent we *see* that 19 U.S.C. § 1516a(a)(2) contains no indication that it is jurisdictional in nature. The statute does not contain express jurisdictional language or language implying that its timing requirements are jurisdictional. Rather, § 1516a(a)(2) states that a summons and complaint are to be filed in accordance with the rules of the Court of International Trade, thereby indicating that Congress did not intend for these timing provisions to be jurisdictional requisites. *Cf. Henderson*, 131 S. Ct. at 1204–05 (examining 38 U.S.C. § 7266(a)); *Reed Elsevier*, 130 S. Ct. at 1245 (examining 17 U.S.C. § 411(a)); *Arbaugh*, 546 U.S. at 515–16. Furthermore, the timing requirement in § 1516a(a)(2) is separate from the Court's grant of subject-matter jurisdiction in 28 U.S.C. § 1581(c), also indicating that the requirement should not be treated as jurisdictional. *See Henderson*, 131 S. Ct. at 1205; *Reed Elsevier*, 130 S. Ct. at 1245–46.

Commerce contends that 28 U.S.C. § 1581(c) incorporates 19 U.S.C. § 1516a when it references § 1516a in making the jurisdictional grant and further argues that this renders § 1516a, including the timing requirements, jurisdictional. Def.'s Br. in Resp. to the Questions Presented in the Court's June 27, 2012 Order at 3–4, ECF No. 48. This argument is not persuasive. Jurisdiction refers to the "classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)

falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455. Section 1581(c) states that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced under [19 U.S.C. § 1516a]." Section 1516a does not grant jurisdiction; rather, it sets out the parameters of the jurisdiction granted in § 1581(c) by defining which determinations may be challenged and the procedures for such challenges under the authority established by § 1581(c). In other words, § 1581(c) defines the Court of International Trade's jurisdiction as the class of cases commenced pursuant to § 1516a. But, defining the scope of subject-matter jurisdiction by reference to § 1516a does not render § 1516a jurisdictional. Rather, § 1516a contains a quintessential example of claim-processing rules that describe for plaintiffs the necessary — but not jurisdictional — requirements for filing a challenge over which the Court of International Trade will have jurisdiction pursuant to § 1581(c).[9]

While consideration of the text of 19 U.S.C. § 1516a(a)(2) weighs in favor of the conclusion that Congress intended its timing requirements not to be jurisdictional, consideration of the context of those requirements creates a more complicated picture because it is partially analogous to both the context that the Supreme Court found jurisdictional in *Bowles* and that it found not jurisdictional in *Hend-*

[9] The Court of International Trade was established by the Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727. Title II of the Customs Courts Act of 1980 is titled "Jurisdiction of the Court of International Trade" and was codified as 28 U.S.C. §§ 1581–85. 94 Stat. at 1728–30. Title III of the Customs Courts Act of 1980 is titled "Court of International Trade Procedures" and was codified as 28 U.S.C. §§ 1876, 2631–47. 94 Stat. 1730–39. Included in "Court of International Trade Procedures" is 28 U.S.C. § 2636, "Time for commencement of action." 94 Stat. at 1734–35. Section 2636(c), which sets forth the timing requirements for commencing an action pursuant to 19 U.S.C. § 1516a, was intended to substantially restate the timing requirements already set forth in § 1516a. *See Bethlehem Steel Corp. v. United States*, 742 F.2d 1405, 1412 (Fed.Cir. 1984).

When the foregoing background is compared to the Supreme Court's discussion of the Veteran's Judicial Review Act ("VJRA") in *Henderson*, it is clear that the statutory structure of the Customs Courts Act does not indicate that the timing requirements in 19 U.S.C. § 1516a are jurisdictional. As the Supreme Court noted in *Henderson*,

> [n]or does § 7266's placement within the VJRA provide such an indication [of jurisdictional attributes]. Congress placed § 7266, numbered § 4066 in the enacting legislation, in a subchapter entitled "Procedure." That placement suggests that Congress regarded the 120-day limit as a claim-processing rule. Congress elected not to place the 120-day limit in the VJRA subchapter entitled "Organization and Jurisdiction."

131 S. Ct. at 1205 (citations omitted). As with the VJRA, the Customs Courts Act of 1980 separated procedure and jurisdiction, placing the timing requirements for filing under procedure. Furthermore, while the jurisdictional provision, 28 U.S.C.§ 1581(c), references 19 U.S.C. § 1516a to establish the class of cases subject to review, the timing requirements laid out in § 1516a were substantially restated in the procedural provision, 28 U.S.C. § 2636(c). *Bethlehem Steel*, 742 F.2d at 1412.

*erson*. In *Bowles*, the Supreme Court interpreted the filing requirements of 28 U.S.C. § 2107(a),[10] governing appeals from federal district courts to federal circuit courts, to be jurisdictional because appeal requirements in civil litigation between Article III courts had been historically treated as jurisdictional. *Bowles*, 551 U.S. at 209–11. By contrast, in *Henderson* the Supreme Court held that the appeal requirements of 38 U.S.C. § 7266(a),[11] governing appeals from the Board of Veterans' Appeals to the Court of Appeals for Veterans Claims, were not jurisdictional. 131 S. Ct. at 1204–06. The Court based its holding in large part on the context of the veterans' benefits review scheme. *Id.* at 1205. First, unlike the timing requirements held jurisdictional in *Bowles*, § 7266(a) does not concern an appeal between Article III courts; rather, it governs appeals from an administrative agency to an Article I court. *Id.* at 1204–05. Furthermore, the process is informal, non-adversarial, and conducted in a context intended to evidence a solicitude for veterans. *Id.* at 1205–06.

As an Article III court reviewing agency determinations, this Court's review of Commerce action pursuant to § 1516a falls between those two examples. Like *Henderson*, § 1516a(a)(2) imposes requirements on the filing of a summons and complaint for the review of determinations by an administrative agency. Unlike *Henderson*, the Court of International Trade is an Article III court, and the process for determining an antidumping duty is adversarial. In that regard, § 1516a review is more akin to ordinary civil litigation than the procedure for review of Board of Veterans' Appeals' decisions. Section 1516a(a)(2) does not, however, impose requirements on reviews between Article III courts; therefore, the *Bowles* context is not fully analogous to the context at issue here.

Though the context of § 1516a(a)(2) cannot be fully analogized to *Bowles*, the *Bowles* decision is additionally relevant when considering the historical treatment of § 1516a(a)(2). Historically, § 1516a(a)(2)'s timing requirements have been treated as jurisdictional by the Court of Appeals and this Court. *See NEC Corp. v. United States*, 806 F.2d 247, 248–49 (Fed. Cir. 1986) (affirming dismissal for lack of subject-matter jurisdiction when a summons was untimely filed outside the thirty day period due to insufficient postage); *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1311–13 (Fed. Cir. 1986) (vacating and ordering dismissal, in part, for lack of subject-matter jurisdiction when a complaint was filed outside the thirty day time period for

[10] "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." 28 U.S.C. § 2107(a).

[11] For the text of 38 U.S.C. § 7266(a), *see supra* note 8.

review); *British Steel Corp. v. United States*, 6 CIT 200, 202–04 (1983) (dismissing for lack of subject-matter jurisdiction when plaintiff commenced a challenge to an affirmative countervailing duty determination within thirty days after publication of the final determination but before publication of the countervailing duty order); *Advanced Tech. & Materials Co. v. United States*, 33 CIT __, Slip Op. 09–115, *4–7 (Oct. 15, 2009) (dismissing for lack of subject-matter jurisdiction a challenge to an affirmative antidumping determination filed prior to publication of the antidumping duty order). The Court of Appeals has held § 1516a(a)(2)'s timing requirements jurisdictional on the grounds that the manner and method for filing a summons and complaint with the Court of International Trade constitute terms and conditions upon which the United States has waived its sovereign immunity. *See NEC Corp.*, 806 F.2d at 248; *Georgetown Steel*, 801 F.2d at 1312.

Considered in light of the Supreme Court's holding in *Bowles*, and in light of our conclusion that the statutory context at issue in this case is not completely in line with that considered in *Henderson*, we conclude that we are obligated to follow the precedential opinions of the Court of Appeals in *NEC Corp* and *Georgetown Steel* and hold that the timing requirements of 19 U.S.C. § 1516a(a)(2) are jurisdictional requisites. *NEC Corp.* and *Georgetown Steel* were both decided prior to the recent developments in Supreme Court jurisprudence focused on delimiting the boundaries of jurisdiction, and, as such, they were not based on a consideration of the *Arbaugh* standard. Nonetheless, we are bound by the precedential opinions of the Court of Appeals, *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1373–74 (Fed. Cir. 2001), especially where, as here, the historical treatment of the statute may be reason to maintain its position as a jurisdictional requisite, *see Bowles*, 551 U.S. at 209–11.[12] While it appears that the timing requirements of 19 U.S.C. §

[12] In her concurring opinion in *Reed Elsevier*, Justice Ginsburg suggested that the *Bowles* decision rested solely on the precedential effect of rulings from the Supreme Court, and that historical rulings from lower courts may not carry the same weight, particularly opinions that have not considered the issue in light of the *Arbaugh* standard. *Reed Elsevier*, 130 S. Ct. at 1250–51 (Ginsburg, J., concurring). However, we find that *Bowles* provides reason to maintain the jurisdictional nature of a statute historically held to be jurisdictional where, as here, we are bound by the precedential opinions of the Court of Appeals. *Cf. Eberhart*, 546 U.S. at 19–20 ("Convinced, therefore, that *Robinson* and *Smith* governed this case, the Seventh Circuit felt bound to apply them, even though it expressed grave doubts in light of *Kontrick*. This was a prudent course. It neither forced the issue by upsetting what the Court of Appeals took to be our settled precedents, nor buried the issue by proceeding in a summary fashion.").

1516a(a)(2) should be reconsidered in light of the *Arbaugh* standard and its progeny, such a reconsideration is not the province of this court where the Supreme Court has not extended further its own analysis.

As we noted in *Baroque Timber I*, we do not find the Complaint severable by the Court, *sua sponte*. 36 CIT at __, Slip Op 12–90 at *14–17. However, CAHP may amend its Complaint to remove the untimely counts.[13] Therefore, unless CAHP amends its Complaint consistent with *Baroque Timber I* by the date specified in the Conclusion to this opinion, the court will enter an order of final judgment dismissing the Complaint in its entirety for lack of jurisdiction.

*II. Equitable Tolling*

In *Baroque Timber I*, we also requested additional briefing from the parties on the question of equitable tolling in light of the Court of Appeals decision in *Former Employees of Sonoco Products Co. v. Chao*, 372 F.3d 1291 (Fed. Cir. 2004) (holding that 19 U.S.C. § 2636(d) is subject to equitable tolling).[14] *Baroque Timber I*, 36 CIT at __, Slip Op. 12–90 at *19–21. Because we have determined that the court lacks jurisdiction due to CAHP's untimely filing, we cannot reach the question of equitable tolling. *See Bowles*, 551 U.S. at 214 (noting that courts cannot create equitable exceptions to jurisdictional requirements). While we will not decide whether the time limits set out at 19 U.S.C. § 1516a(a)(2) would be subject to equitable tolling, we note that the questions raised above regarding the continuing validity of

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[13] CAHP's challenge to the exclusion of Yuhua would have been timely filed pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and 19 U.S.C. § 1516a(a)(2)(B)(ii), if not filed alongside other challenges to the affirmative antidumping duty determination. *See Baroque Timber I*, 36 CIT at __, Slip Op. 12–90 at *13. Therefore, CAHP may amend its complaint, pursuant to USCIT R.15(a)(2), to eliminate all counts of the Complaint that do not pertain to the exclusion of Yuhua and proceed with only that challenge.

In *Baroque Timber I*, the court suggested that CAHP could seek voluntary dismissal of the untimely portions of its Complaint, pursuant to USCIT R. 41(a)(2). 36 CIT at __, Slip Op.12–90 at *17 n.7. While the effect of dismissing the untimely portion of the Complaint is the same as amending the Complaint, the court recognizes the proper procedure in this case would be to amend the Complaint. *Cf. Nilssen v. Motorola, Inc.*, 203 F.3d782, 784 (2000) ("Although we agree with Nilssen that an involuntary dismissal of a claim is technically not an amendment, that distinction is not controlling. The true state of affairs is more critical than mere labels. The fact that a voluntary dismissal of a claim under Rule 41(a) is properly labeled an amendment under Rule 15 is a technical, not a substantive, distinction." (footnote omitted)).

[14] There is a dearth of clarity regarding the applicability of equitable tolling to the various sections of 28 U.S.C. § 2636. *See Former Emps. of Sonoco*, 372 F.3d at 1298 (holding that § 2636(d) is subject to equitable tolling); *but see SKF USA Inc. v. U.S. Customs & Border Protection*, 556 F.3d 1337, 1348 (Fed.Cir. 2009) (assuming, but not deciding, that § 2636(i) was jurisdictional); *Autoalliance Int'l, Inc. v. United States*, 357 F.3d 1290, 1294 (Fed. Cir. 2004) (rejecting the applicability of equitable tolling to § 2636(a)).

holding the § 1516a(a)(2) timing requirements to be jurisdictional requisites could render the equitable tolling question equally imperative.

As with the issue of § 1516a(a)(2)'s jurisdictional character, there is good reason to believe that, in light of recent precedent, § 1516a(a)(2)[15] may be subject to equitable tolling were it found, upon reconsideration, not to be a jurisdictional requisite. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (noting that "[o]nce Congress has made such a waiver [of sovereign immunity] . . . making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver"); *see also Former Emps. of Sonoco*, 372 F.3d at 1296–98 (holding 28 U.S.C. § 2636(d) subject to equitable tolling). Furthermore, the facts of this case present a good case for equitable tolling. CAHP's summons was untimely because it was filed early — not late — due to CAHP's misinterpretation of a complicated statute. Moreover, there was no prior judicial guidance for interpreting the statute in light of the particular facts of CAHP's case. Together these facts suggest that CAHP filed its summons out of time in an attempt to preserve its rights, a basis upon which courts have found it appropriate to toll a statutory timing requirement. *See Irwin*, 498 U.S. at 96 ("We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory time period . . . ."). Nor does it seem that CAHP's early filing would prejudice the interests of the Defendant. However, such a decision is not for this court to make today; it rests either with the Court of Appeals or with this court at some later date.

*III. Certification for Interlocutory Appeal*

Consistent with the prior discussion, we believe that the statutory issues discussed in this opinion are appropriate for interlocutory appeal. This Court may certify an issue for interlocutory appeal to the Court of Appeals for the Federal Circuit when "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate determination of the litigation . . . ." 28 U.S.C. § 1292(d)(1). This case meets the three part test set forth in 28 U.S.C. § 1292(d)(1): (1) it presents controlling questions of law, namely whether the timing requirements of 19 U.S.C. § 1516a(a)(2)

[15] Given that 28 U.S.C. § 2636(c) was intended to substantially restate the timing requirements already set for thin § 1516a, *see Bethlehem Steel*, 742 F.2d at 1412, it stands to reason that if either statutory provision is subject to equitable tolling the other provision would likewise be subject to equitable tolling.

should be interpreted to render CAHP's Complaint untimely and, if so, whether such timing requirements should be interpreted as jurisdictional requisites or claim-processing rules; (2) there is a substantial ground for difference of opinion given the intervening Supreme Court precedent that has not yet been considered in analyzing the nature of the § 1516a(a)(2) timing requirements; and (3) an immediate appeal may materially advance the ultimate termination of the litigation because an incorrect disposition of this issue would require reversal of a final judgment based thereon. *Cf. USEC Inc. v. United States*, 27 CIT 1925, 1928–29 (2003). Therefore, we find, pursuant to 28 U.S.C. § 1292(d)(1), that interlocutory appeal of the court's interpretation of 19 U.S.C. § 1516a(a)(2) and its decision that 19 U.S.C. § 1516a(a)(2) may be a jurisdictional requisite is appropriate.

Upon request by the parties, the court will order certification of the following issues for interlocutory appeal to the Court of Appeals:

(1) Whether, pursuant to 19 U.S.C. § 1516a(a)(2), a challenge to the exclusion of a company must be filed as a negative part of an affirmative determination, i.e., within thirty days after publication of the antidumping duty order, if filed alongside other challenges to an affirmative determination. *Baroque Timber I*, 36 CIT at __, Slip Op. 12–90 at *13–14.

(2) Whether the timing requirements of 19 U.S.C. § 1516a(a)(2) should continue to be considered jurisdictional requisites in light of recent Supreme Court precedent delimiting the boundaries of what is properly considered a jurisdictional requirement.

(3) Whether, if the timing requirements of 19 U.S.C. § 1516a(a)(2) are not jurisdictional requisites, those timing requirements are subject to equitable tolling.

## CONCLUSION

Consistent with this opinion and the court's prior opinion in *Baroque Timber I*, the Defendant's Motion to Dismiss Plaintiff's Complaint for Lack of Jurisdiction is hereby granted. The parties are directed to consult on whether the court should certify the issues discussed above for interlocutory appeal and to inform the court of their decision by October 10, 2012. If the parties do not seek interlocutory appeal, the court will enter final judgment dismissing this case unless CAHP files an amended complaint consistent with this opinion and the court's opinion in *Baroque Timber I* by October 31, 2012.

It is **SO ORDERED**.
Dated: September 19, 2012
New York, NY

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

## Slip Op. 12–120

HOME MERIDIAN INTERNATIONAL, INC. D/B/A SAMUEL LAWRENCE FURNITURE CO. AND IMPORT SERVICES, INC., Plaintiffs, GREAT RICH (HK) ENTERPRISES CO., LTD., DONGGUAN LIAOBUSHANGDUN HUADA FURNITURE FACTORY, NANHAI BAIYI WOODWORK CO., LTD., AND DALIAN HUAFENG FURNITURE GROUP CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE AND VAUGHAN-BASSETT FURNITURE COMPANY, INC., Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 11–00325
Public Version

[In anti-dumping duty matter Plaintiffs' and Consolidated Plaintiffs' motion for judgment on the agency record granted. Nanhai Baiyi Woodwork Co., Ltd.'s motion for judgment on the agency record granted. Dalian Huafeng Furniture Group Co., Ltd.'s motion for judgment on the agency record granted. Intervenor Defendants' motion for judgment on the agency record granted in part and denied in part.]

Dated: September 19, 2012

*Kristin H. Mowry*, Mowry & Grimson, PLLC, of Washington, DC, argued for the plaintiffs and for the consolidated plaintiffs, Great Rich (HK) Enterprises Co., Ltd. and Dongguan Liaobushangdun Huada Furniture Factory. With her on brief were *Jeffrey S. Grimson*, *Jill A. Cramer*, *Keith F. Huffman*, *Sarah M. Wyss*, and *Susan L. Brooks*.

*Ned H. Marshak*, *Bruce M. Mitchell*, and *Mark E. Pardo*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, for the consolidated plaintiff, Nanhai Baiyi Woodwork Co., Ltd.

*Lizbeth R. Levinson* and *Ronald M. Wisla*, Kutak Rock LLP, of Washington, DC, for the consolidated plaintiff Dalian Huafeng Furniture Group Co., Ltd.

*Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Carrie A. Dunsmore*, Trial Attorney. Of counsel on the brief was *Shana Hofstetter*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, of Washington, DC.

*J. Michael Taylor*, King & Spalding, LLP, of Washington, DC, argued for intervenor defendants. With him on the brief were *Daniel L. Schneiderman*, *Joseph W. Dorn*, *Mark T. Wasden*, *Prentiss L. Smith*, and *Sarah K. Davis*.

## *OPINION AND ORDER*

**Restani, Judge:**

This action challenges the Department of Commerce's ("Commerce") final results rendered in the fifth antidumping ("AD") duty review of certain wooden bedroom furniture ("WBF") from the People's Republic of China ("PRC"). *See Wooden Bedroom Furniture from the People's Republic of China: Final Results and Final Rescission in Part*, 76 Fed. Reg. 49,729, 49,729 (Dep't Commerce Aug. 11, 2011) ("*Final Results*"). Plaintiffs Home Meridian International, Inc. and Import Services, Inc. along with consolidated plaintiffs Great Rich (HK) Enterprises Co., Ltd. and Dongguan Liaobushangdun Huada Furniture Factory (collectively "HMI") moved for judgment on the agency record. Mot. for J. Upon the Agency R. Pursuant to Rule 56.2 by Pls. Home Meridian Int'l, Inc. d/b/a Samuel Lawrence Furniture Co. & Pulaski Furniture Co. & Import Svcs., Inc. & Consol. Pl. Great Rich (HK) Enterprises Co., Ltd. & Dongguan Liaobushangdun Huada Furniture Factory ("HMI Br."). Consolidated Plaintiffs Nanhai Baiyi Woodwork Co., Ltd. ("Nanhai Baiyi") and Dalian Huafeng Furniture Group Co., Ltd. ("Huafeng") each moved for judgment on the agency record. Mem. of Points and Auths. in Supp. of Consol. Pl. Dalian Huafeng Furniture Group Co., Ltd.'s 56.2 Mot. for J. on the Agency R. ("Huafeng Br."); Mot. of Pl. Nanhai Baiyi Woodwork, Co. Ltd. for J. on the Agency R. Under USCIT Rule 56.2 ("Nanhai Baiyi Br."). HMI adopted the arguments made by Huafeng. HMI Br. 33. Intervenor Defendants American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. (collectively "AFMC"), which were plaintiffs in one of the consolidated actions, also moved for judgment on the agency record. AFMC's Rule 56.2 Br. in Supp. of its Mot. for J. on the Agency R. ("AFMC Br."). For the reasons stated below, the court remands in part and sustains in part the *Final Results*.

## BACKGROUND

In January 2005, Commerce published an AD duty order on WBF from the PRC. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329, 329 (Dep't Commerce Jan. 4, 2005). In January 2010, AFMC and others requested an administrative review of certain companies exporting WBF to the United States between January 1, 2009 and December 31, 2009, thereby triggering the fifth administrative re-

view of WBF.[1] *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part*, 76 Fed. Reg. 7534, 7535 (Dep't Commerce Feb. 10, 2011) ("*Preliminary Results*"). After publishing a notice of initiation and receiving questionnaire responses and comments, Commerce selected one mandatory respondent: Huafeng.[2] *Id.* at 7535. In November and December 2010, Commerce verified the antidumping questionnaire and supplemental questionnaire responses of Huafeng. *Id.* at 7536.

In the *Final Results*, Commerce assigned Huafeng a separate rate of 41.75%.[3] *Final Results*, 76 Fed. Reg. at 49,733; *see also Issues and*

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[1] The subject merchandise includes the following items:

> (1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-on-chests, highboys, lowboys, chests of drawers, chests, door chests, chiffoniers, hutches, and armoires; (6) desks, computer stands, filing cabinets, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.
>
> The scope of the order excludes the following items: (1) Seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate; (9) jewelry armories; (10) cheval mirrors; (11) certain metal parts; (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser-mirror set; (13) upholstered beds and (14) toy boxes.

*Final Results*, 76 Fed. Reg. at 49,730 31 (footnotes deleted).

[2] Commerce initially decided to review both Huafeng and the Dorbest Group. All review requests for the Dorbest Group were withdrawn. *Preliminary Results*, 76 Fed. Reg. at 7535. Commerce then named Dongguan Sunrise Furniture Co., Taicang Sunrise Wood Industry Co., Ltd., and Huafeng Designs (collectively "Fairmont") as additional mandatory respondents. *Id.* at 7535 36. "[A] number of interested parties withdrew their review requests, including all review requests of the mandatory respondent Fairmont." *Id.* Commerce rescinded the review with respect to 119 entities, including Fairmont. *Id.* at 7536. The court has previously expressed its view that the selection of one respondent does not fit well with the statutory scheme. Obviously, the all others rate does not reflect a broadly based average. Here, no party challenges the selection of one respondent as unsupported by the record or *per se* contrary to law.

[3] Commerce amended the *Final Results*, but did not change the assigned dumping margins. *Wooden Bedroom Furniture From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review*, 76 Fed. Reg. 57,713, 57,713 (Dep't Commerce Sept. 16, 2011).

*Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China*, A-570–890, POR 1/1/09 12/31/09 (Aug. 5, 2011) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/prc/2011–20434–1.pdf (last visited Sept. 17, 2012). All non-mandatory respondents also received Huafeng's separate rate of 41.75%. *Final Results*, 76 Fed. Reg. at 49,733. Commerce assigned the PRC-wide entity a rate of 216.01%. *Id.*

## JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will not uphold Commerce's final determination in an AD review if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Value of Lumber, Veneer and Plywood[4]

Huafeng and HMI argue that Commerce erred when it used Philippine import data contemporaneous with the period of review ("POR") instead of Huafeng's market economy purchases in order to value lumber, veneer, and plywood. HMI Br. 8; Huafeng Br. 8 28. The Government contends that Commerce's determination was proper because Huafeng's market economy purchases were not made during the POR and therefore not the "best available information." Def.'s Resp. to Pls.' Rule 56.2 Mots. ("Def. Resp. Br.") 23. Specifically, the Government argues that Commerce, in exercising its discretion to interpret its regulations, "has developed a practice, whenever possible, of using price data that are contemporaneous with the period of review . . . ." Def. Resp. Br. 23. Huafeng and HMI's claim has merit.

In determining normal value for non-market economies, Commerce must use "the best available information . . . ." 19 U.S.C. §

[4] A dumping margin is the difference between the normal value ("NV") of merchandise and the price for sale in the United States. *See* 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35). For merchandise exported from a non-market economy ("NME"), such as the PRC, Commerce calculates NV "on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). The factors of production include, but are not limited to, labor hours, raw materials, energy and other utilities, and representative capital cost, including depreciation. *Id.* § 1677b(c)(3). Surrogate values from market economy countries are often used as a measure of these costs. *See id.* § 1677b(c)(1),(4); *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337, 1347 (CIT 2010), *aff'd*, 666 F.3d 732 (Fed. Cir. 2011), *reh'g granted*, 678 F.3d 1308 (Fed. Cir. 2012).

1677b(c)(1)(B). When valuing factors purchased from a market economy supplier, Commerce's regulations stipulate that:

> [T]he Secretary normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier.

19 C.F.R. § 351.408(c)(1). Furthermore, Commerce creates:

> . . . a rebuttable presumption that market economy input prices are the best available information for valuing an entire input when the total volume of the input purchased from all market economy sources during the period of investigation or review exceeds 33 percent of the total volume of the input purchased from all sources during the period. In these cases, unless case-specific facts provide adequate grounds to rebut the Department's presumption, the Department will use the weighted-average market economy purchase price to value the entire input.

*Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61,716, 61,717 18 (Dep't Commerce Oct. 19, 2006) ("*Antidumping Methodologies*").[5]

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[5] In the past, Commerce has favored contemporaneous surrogate values over non-contemporaneous market economy purchases, but it has never addressed a situation where such purchases were 100% of the actual inputs of the subject merchandise. *See Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of diamond sawblades and Parts Thereof from the People's Republic of China*, A-570–900 Investigation, at 75 76 (May 15, 2006), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E6–7763–1.pdf (last visited Sept. 17, 2012) (declining to use market economy purchases where such purchases were made prior to the period of investigation); *Issues and Decision Memorandum for the Final Results of Antidumping Investigation of Automotive Replacement Glass ("ARG") Windshield from the People's Republic of China*, A-570–867, Investigation, 7/1/00–12/31/00, at Cmt. 32 (Feb. 12, 2002), *available at* http://ia.ita.doc.gov/frn/summary/prc/02–3383–1.txt (last visited Sept. 17, 2012) (rejecting market economy purchases because they were either insignificant or outside the period of investigation); *Issues and Decision Memorandum for the 2002–03 Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from Romania*, A-485–806, Admin. Rev. 2002/03, at 25 (June 6, 2005), *available at* http://ia.ita.doc.gov/frn/summary/romania/E5–3067–1.pdf (last visited Sept. 17, 2012) (declining to use pre-POR purchases as "a benchmark against which [to] measure the surrogate values in the instant review's POR"). Commerce's determinations in those proceedings were never reviewed by the court with regard to market economy purchases.

Section § 1677b "sets forth procedures in an effort to determine margins 'as accurately as possible.'" *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)) (finding that Commerce may permissibly mix methodologies, using market purchases to value some factors and surrogates to value others). "Where we can determine that a NME producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law." *Lasko*, 43 F.3d at 1446 (quoting *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55,271, 55,275 (Dep't Commerce Oct. 25, 1991)); *see Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1379, 1383 (Fed. Cir. 2001) (agreeing with Commerce that "the actual price paid for the imports constitutes the best available information . . . ."); *Taian Ziyang Food Co. v. United States*, 783 F. Supp. 2d 1292, 1330 (CIT 2011) (finding that "product specificity" takes precedence over contemporaneity). But, Commerce also has an interest in using values that are contemporaneous with the POR because Commerce must establish the value of a factor of production for a specific time period in order to calculate the normal value of imports within that time period as accurately as possible under 19 U.S.C. § 1677b(a)(1)(A). *See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 30 CIT 1173, 1177 (2006).

The parties agree that Huafeng made no market economy purchases of lumber during the POR. Huafeng Br. 7. Huafeng alleges that it purchased 100% of its pine, poplar, birch, elm, and oak lumber as well as its oak veneer from a market economy supplier from December 2007 to December 2008, immediately before the period of review which ran from January 2009 to December 2009. *Resp. of Dalian Huafeng to the Dep't of Commerce Antidumping Request for Information* ("*Huafeng Resp. to Request for Information*") (July 12, 2010), P.R. 338, Mem. of Points and Auths. in Supp. of Rule 56.2 Mot. for J. on the Agency R. by Pls. Home Meridian Int'l, Inc. d/b/a Samuel Lawrence Furniture Co. & Pulaski Furniture Co. and Import Svcs., Inc. & Consol. Pl. Great Rich (HK) Enters. Co., Ltd. & Dongguan Liaobushshangdun Huada Furniture Factory ("HMI App."), Tab 14, at 7, Ex. D-4. For the first time, at oral argument, AFMC and the Government contested Huafeng's allegations that 100% of relevant wood input for the subject merchandise during the POR was from these market economy purchases made during the prior calendar year. In the *Preliminary Results*, Commerce "did not consider market

purchases made by Huafeng prior to the POR . . . .” *Preliminary Analysis Memo. for Dalian Huafeng Furniture Group Co., Ltd.* (Jan. 31, 2011), P.R. 472, App. to AFMC’s Rule 56.2 Br. in Supp. of Its Mot. for J. on the Agency R. (“AFMC App.”), Tab 18, at 3. In lieu of Huafeng’s market economy purchases, Commerce used 2009 Philippine import data. *Id.* In the *Final Results*, Commerce relied upon its “practice of using, whenever possible, price data that are contemporaneous with the period under consideration to value [Factors of Production] . . . .” *Issues and Decision Memorandum* 49. Commerce explained that it treats market economy purchases the same as surrogate values: Adjusted pre-POR market economy purchases or surrogate values are used to construct normal value “only when there are no acceptable contemporaneous [surrogate values] on the record . . . .” *Id.* Commerce pointed to the statutory directive that normal value “shall be the price . . . at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price . . . .” 19 U.S.C. § 1677b(a)(1)(A).

If the only wood inputs into the subject merchandise were market economy inputs, contemporaneity would not outweigh all other factors. *See Lasko*, 43 F.3d at 1446; *Shakeproof*, 268 F.3d at 1382. Commerce must look at the record. If the administrative record does not reveal whether market economy purchases were the only inputs for the relevant wood inputs, this is one factor which Commerce may weigh. Another factor is that the surrogate value data chosen by Commerce have notable flaws: 1) Commerce’s Philippine Harmonized Tariff Schedule (“HTS”) subheadings 4407.10.90, 4407.99.90, and 4408.90.90[6] show a significant and unexplained increase over the market economy purchases made during the immediate prior calendar year,[7] and 2) HTS subheading 4407.90.90 is a basket category that includes lumber other than the poplar, birch, and elm used by Huafeng. Accuracy is important. Using the actual inputs, if available

[6] Philippine HTS 4407.10.90 is “Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm. Coniferous Other[.]” *Letter from King & Spalding to Commerce re: Submission of Publicly Available Information to Value Factors of Production* (Nov. 15, 2010), P.R. 435, Ex. 2, at 234. Philippine HTS 4407.99.90 is “Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm. Other: Other[.]” *Id.* at 236. Philippine HTS 4408.90.90 is “Sheets for veneering (including those obtained by slicing laminated wood), for plywood or for other similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or end-jointed, of a thickness not exceeding 6 mm. Other Other[.]” *Id.* at 237.

[7] The surrogate value applied by Commerce increased the value of Huafeng’s wood input by nearly [[ ]] over Huafeng’s market economy purchases from 2008. HMI Br. 20 21. AFMC has offered possible causes for this increase, but none of these were mentioned by Commerce. The AFMC’s Resp. in Opp. to Pls.’ Rule 56.2 Mots. for J. on the Agency R. (“AFMC Resp. Br.”) 5 n.3.

and where they yield reliable values, would seem to promote accuracy more than does using flawed surrogate values.

Here, Commerce did not examine Huafeng's market economy purchases and therefore made no factual determination as to whether the relevant wood inputs were from market economy purchases. Commerce also did not determine whether or not such purchases were reliable indications of normal value. Commerce did not weigh the merits of using slightly non-contemporaneous market economy purchases of actual inputs versus contemporaneous surrogate values. Instead, Commerce found that accuracy could be determined solely by examining whether or not the values were from the POR. In defense of this position, Commerce stated that "using POR and pre-POR values to calculate NV may introduce distortions." *Issues and Decision Memorandum* 49. Yet Commerce frequently uses non-POR values for a variety of reasons. *See, e.g.*, *infra* § III(A). Where two data sets are equally accurate, Commerce may prefer the contemporaneous data set over the non-contemporaneous data set. *See Shakeproof Assembly*, 30 CIT at 1178 79 (finding that Commerce may prefer one surrogate value over another on the basis of contemporaneity). Commerce, however, never determined whether the two data sets were equally accurate because it explicitly declined to look at Huafeng's non-contemporaneous market economy purchases. Commerce cannot create a blanket rule that prevents it from comparing the merits of contemporaneous and non-contemporaneous data, and thereby prevents Commerce from determining the best available information.[8]

Because Commerce relied upon contemporaneity to the exclusion of all other factors and failed to make necessary factual findings, Commerce's interpretation is not in accordance with law. The court remands this matter to Commerce to determine the wood input factor of production in accordance with the statutory or regulatory framework, as well as to make any necessary factual determinations.[9]

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[8] Huafeng and HMI argue that Commerce's regulations mandate that Commerce use non-contemporaneous market economy purchases where such purchases are the actual input for the subject merchandise even when those purchases are outside the POR. Huafeng Br. 8 11; HMI Br. 16 18. Commerce did not address the probity of Huafeng's market economy purchases. *Issues and Decision Memorandum* 51. Additionally, Commerce's verification of Huafeng's questionnaire responses is insufficient for the court to conclude that Commerce determined that Huafeng's market economy purchases were the actual input for the subject merchandise. *See Verification at Dalian Huafeng Furniture Group Co., Ltd.* ("*Huafeng Verification*"), P.R. 474 (Jan. 31, 2011), HMI App., Tab 16, at 35. On remand, Commerce will have the opportunity to complete its factual determinations. Thus, the court does not resolve HMI and Huafeng's claim that the statute and regulations mandate that Commerce accept their non-contemporaneous market economy purchases.

[9] HMI argues that Commerce erred in failing to correct a ministerial error when Commerce converted the surrogate value of plywood from a volume-based price to a unit-based price. HMI Br. 30 33. Because the court remands the issue of the value of plywood to Commerce

## II. Surrogate Value of Poly Foam

AFMC argues that Commerce's decision to value poly foam as a non-cellular plastic imported under the Philippine HTS heading 3920, rather than as a cellular plastic imported under HTS heading 3921, is unsupported by substantial evidence. AFMC Br. 11. AFMC's argument has merit.

Huafeng describes its poly foam as "packing material to protect goods in the containers." *Huafeng Resp. to Request for Information*, AFMC App., Tab 6, at Ex. D-5.[10] Initially, Huafeng classified its poly foam under HTS subheading 3904.10.00, "Poly(vinyl chloride), not mixed with any other substances[.]"[11] Asean Harmonized Tariff Nomenclature (AHTN) Book, 2010 Nomenclature ("AHTN Book"), Ch. 25 40, at 39.20 39.21, *available at* http://www.tariffcommission.gov.ph/AHTN Chapter39.pdf (last visited Sept. 17, 2012); AFMC Br. 5. In response to Commerce's critique that Huafeng's suggested classification was likely incorrect, Huafeng changed its categorization of poly foam to HTS subheading 3920.30.90, noncellular "polymers of styrene."[12] *Resp. of Dalian Huafeng to the Dep't of Commerce's Sept. 21, 2010 Supplemental Questionnaire* ("*First Supplemental Resp.*") (October 12, 2010), P.R. 391, HMI App., Tab 15, at 4 5; *see also* AHTN Book at 39.20 39.21. Commerce asked Huafeng to explain its selection of HTS subheading 3920.30.90. *Resp. of Dalian Huafeng to Questions 4372 of the Dep't of Commerce's Oct. 25, 2010 Supplemental Questionnaire* ("*Second Supplemental Resp.*") (Nov. 8, 2010), P.R. 429, HMI App., Tab 17, at 2 3. Huafeng responded that the "[p]oly foam reported by Dalian Huafeng consists of polyethylene, the composition of which is shown on

on the aforementioned grounds, the court need not reach the issue of whether this was a ministerial error. Commerce, however, should not perpetuate an error if it exists and if it continues to use the affected data.

HMI also argues that Commerce should consider inflating Huafeng's 2008 market economy purchases to 2009 levels. HMI Br. 14 15. Commerce did not consider this issue because it did not examine Huafeng's market economy purchases. Commerce may address both issues on remand to the extent they are relevant.

[10] The parties have placed the information discussed in this section in their public briefs and appendices, despite their extensive use of the confidential administrative record. No party has objected. The court treats information placed on the public record as public.

[11] Philippine HTS subheading 3904.10.00 does not exist, but HTS subheading 3904.10 fits Huafeng's description. HTS subheading 3904.10 consists of "Polymers of vinyl chloride or of other halogenated olefins, in primary forms Poly(vinyl chloride), not mixed with any other substances[.]" AHTN Book at 3904.10.

[12] Philippine HTS 3920.30.90 reads in full: "Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials Of polymers of stryene Other[.]" AHTN Book at 39.20 39.21.

the [Value Added Tax ("VAT")] invoice issued by the supplier."[13] *Id.* at 3. Confused,[14] Commerce asked a follow up question:

> Philippine HTS 3920.20 contains non-cellular polymers of propylene. Does your poly foam consist primarily of non-cellular polymers of propylene? As stated in the previous response, *Non-cellular* poly vinyl chloride packing materials appear to be classified within HTS 3920.4x.xx. Please suggest an alternate HTS if necessary.

*Id.*[15] In response, Huafeng changed its categorization again and responded that "[p]oly foam reported by Dalian Huafeng consists of polythene, which should be classified under Philippine HTS 3920.10[.]90." *Id.* In the *Final Results*, Commerce classified poly foam as polyethylene, under HTS subheading 3920.10.90. *Issues and Decision Memorandum* 17. Commerce found that Huafeng had twice classified its poly foam as a non-cellular plastic under HTS heading 3920. *Id.* Commerce determined that, "Petitioners have cited to nothing on the record contradicting Huafeng's consistent statements that its poly foam should be classified under HTS categories for products consisting of non-cellular plastic." *Id.*

Commerce's determination relied entirely on Huafeng's "consistency" in classification. Custom and Border Protection ("CBP") Ruling NY J81106, stating that plastic foam is cellular polyethylene and should be classified under HTS subheading 3921.19, calls that clas-

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[13] The VAT invoice submitted by Huafeng showed [[ ]] *Second Supplemental Resp.*, C.R. 157, at Ex. S-96. "Polyethylene" is "a polymer of ethylene," especially "one of a group of partially crystalline lightweight thermoplastics" with particular chemical and physical characteristics. Polyethylene, *Webster's Third New Int'l Dictionary, Unabridged*, Merriam-Webster (2002), *available at* http://unabridged.merriam-webster.com/ (last visited Sept. 17, 2012). "Polythene" is polyethylene used as a plastic. Polythene, *Webster's Third New Int'l Dictionary, Unabridged*, Merriam-Webster (2002), *available at* http://unabridged.merriam-webster.com/ (last visited Sept. 17, 2012).

[14] Commerce seems to have misread Huafeng's first response to mean Huafeng categorized poly foam under HTS subheading 3920.20.90, non-cellular "polymers of propylene." The error derived from Commerce's questionnaires, where inquiries regarding poly foam were alongside questions regarding Huafeng's other packing materials, including packing tape. *See First Supplemental Resp.*, P.R. 391, HMI App., Tab 15, at 4 5; *Second Supplemental Resp.*, P.R. 429, HMI App., Tab 17, at 2 3. Huafeng chose HTS subheading 3920.20.90, polymers of propylene, for its packing tape. *First Supplemental Resp.*, P.R. 391, HMI App., Tab 15, at 5; *see also Second Supplemental Resp.*, P.R. 429, HMI App., Tab 17, at 3.

[15] "HTS 3920.4x.xx" refers to merchandise under HTS heading 3920 "Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials. Of polymers of vinyl chloride[.]" AHTN Book at 39.20 39.21.

sification into question. *AFMC's Post Preliminary Results Surrogate Value Submission* (March 7, 2011), P.R. 489, AFMC App., Tab 20, at Attach. 13. Additionally, the World Customs Organization ("WCO") Explanatory Notes state that cellular plastics include foam plastics. *Id.* at Attach. 14, VII 39 12. These sources support the common definition of foam in the industrial context: Foam is a "material in a lightweight *cellular* spongy or rigid form produced by foaming," such as "expanded plastic." Foam, *Webster's Third New Int'l Dictionary, Unabridged*, Merriam-Webster (2002) (emphasis added), *available at* http://unabridged.merriam-webster.com/ (last visited Sept. 17, 2012).[16] Huafeng has not disputed these characterizations of poly foam in its briefs and did not appear at oral argument to answer any questions on this issue. HMI also did not brief the issue or respond to questions at oral argument on this issue. Given the evidence on the record, Commerce must do more than refer to the inconsistent statements of a respondent to unseat conventional wisdom. Although Huafeng twice chose an HTS subheading which was non-cellular, Huafeng has offered three different classifications in response to Commerce's three requests for information.[17] Huafeng's answers were consistently unresponsive to Commerce's questions and in tension with a CBP Ruling and the WCO Explanatory Notes.

The Government counters that "Huafeng's responses are more specific to their own input than general dictionary definitions . . . ." Def. Resp. Br. 22. Despite Commerce's requests for Huafeng to explain its classification, no record evidence supports the Government's conclusion.[18] Additionally, Commerce's dismissal of the CBP Ruling on the basis that "the poly foam under consideration was cellular and thus [inapplicable] to Huafeng's non-cellular poly foam" fails to address AFMC's core point: Poly foam is necessarily cellular. *Issues and Decision Memorandum* 17. Commerce also did not address the WCO Explanatory Notes. *Id.* Thus, other than Huafeng's inconsistent responses, Commerce has provided no basis to believe that poly foam is ever non-cellular.

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[16] AFMC makes this argument based on an older dictionary definition of foam as "a material in a lightweight cellular form resulting from introduction of gas bubbles during manufacture." AFMC Br. 11 (citing Webster's New Collegiate Dictionary, G. & C. Merriam Co. (1977), *available at* http://www.merriam-webster.com/dictionary/foam).

[17] Commerce's verification required an examination of Huafeng's poly foam. Despite the back-and-forth between Huafeng and Commerce pre-dating verification, that portion of the verification report does not address poly foam. *Huafeng Verification*, P.R. 474, HMI App., Tab 16, at 40 41.

[18] On brief, the Government alternates between stating that Commerce valued poly foam under HTS subheading 3920.30.90 and under 3920.10.90. *See* Def. Resp. Br. 20, 21. The court treats all these references as HTS subheading 3920.10.90 because this was Commerce's final determination. *See* Issues and Decision Memorandum 17.

In the light of overwhelming evidence that poly foam is cellular, Huafeng's word alone does not constitute substantial evidence that its poly foam is non-cellular. Thus, Commerce's determination to value poly foam under HTS heading 3920 is unsupported by substantial evidence. The court remands the issue to Commerce so that it can apply the correct HTS subheading and derive the appropriate value therefrom.[19]

### III. Surrogate Value of Labor

#### A. Contemporaneity of Data & Selection of Bookend Countries

AFMC argues that Commerce erred when it selected the bookend countries using 2008 gross national income ("GNI") data instead of 2009 GNI data. AFMC Br. 22. This claim has merit.

In the methodology applied here Commerce selects bookend countries, two countries with the highest and lowest GNIs of countries which are economically similar to the PRC and produce comparable merchandise, in order to delineate the set of countries for wage rate calculations. *Factor Valuation Memorandum* (Jan. 31, 2011), App. to AFMC's Resp. Br. in Opp'n to Pls.' Mots. for J. on the Agency R. ("AFMC Resp. App."), Tab 16, at Attach. III, 1.[20] Here, Commerce identified the bookend countries from the *Surrogate Country Memorandum* 's list of economically comparable countries.[21] *Id.*; *Issues and Decision Memorandum* 28. At the time the *Surrogate Country Memorandum* was drafted, only 2008 GNI data were available. *Issues and Decision Memorandum* 28 29. In January 2011, when Commerce identified the bookend countries, Commerce chose not to use 2009 GNI data which were also available. Commere explained that "[t]he selection of bookend countries is inextricably linked to the 2008 GNI data that was available to the Department at the time the Surrogate Country Memorandum was issued." *Id.* at 28 29. Commerce added that "[t]o now reselect the bookend countries based on 2009 data . . .

[19] AFMC proposes HTS subheading 3921.19, "Other plates, sheets, film, foil and strip, of plastics Cellular Of other plastics: Plates and sheets forms[.]" AFMC Br. 7. The court expresses no opinion as to the merit of this classification.

[20] The *Factor Valuation Memorandum* was not placed on the administrative record. AFMC has put an excerpted version of the *Factor Valuation Memorandum* in its response appendix. No party has objected to this version.

[21] When determining which countries are economically similar to China, Commerce uses per-capita GNI to identify countries at roughly the same level of economic development as China. Here, those countries were India, the Philippines, Indonesia, Ukraine, Thailand, and Peru. *Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China* ("*Surrogate Country Memorandum*") (Apr. 26, 2010), P.R. 248, at 2.

would result in identifying one set of economically comparable countries as a starting point for purposes of our initial surrogate country selection and a different, inconsistent, set of economically comparable countries as a starting point for purposes of our labor rate calculation." *Id.* at 29.

Commerce has not explained what links the selection of possible surrogate countries to the selection of the bookend countries for the purpose of wage rate calculations. Additionally, Commerce explicitly excluded surrogate wage calculations from its *Surrogate Country Memorandum*, P.R. 248, at 2, and considered the list of surrogate countries "non-exhaustive." *Id.* at 1; *Factor Valuation Memorandum*, AFMC Resp. App. Tab 16, at Attach. III, 1, n.3; *see Dorbest Ltd. v. United States*, 755 F. Supp. 2d 1291, 1298 (CIT 2011) ("*Dorbest V*") (finding that the surrogate country list was not exhaustive as it "allow[ed] for the possibility of introducing a more balanced range of countries from which to draw labor wage rate data").

Commerce did not "reselect" (nor would it have been required to "reselect") the bookend countries, as it claims, Def. Resp. Br. 29, because selection of bookend countries took place after the 2009 GNI data were available. Furthermore, Commerce has identified no impact from selecting bookend countries that differ from those listed in the *Surrogate Valuation Memorandum*. *See Dorbest V*, 755 F. Supp. 2d at 1298 ("[T]here is no indication here that the methodology applied in *Fujian Lianfu Forestry* to select a primary surrogate country is similar to the methodology for determining surrogate wage rates. [*Fujian Lianfu Forestry Co., Ltd. v. United States*, 638 F. Supp. 2d 1325, 1348 49 (CIT 2009).]"). Finally, as the prior wood input discussion indicates, Commerce clearly places a high value on using data within the POR. *See supra* § I; Def. Resp. Br. 23 27; *Issues and Decision Memorandum* 49. Here it has ignored the fact that this is POR data.

Commerce has insufficiently explained the connection between the selection of surrogate countries and the selection of bookend countries. Absent a new and persuasive explanation, on these facts Commerce's decision to reject contemporaneous data in favor of non-contemporaneous data is unreasonable. The court remands the selection of bookend countries for redetermination or further explanation.

**B. Absolute/Relative Differences**

AFMC argues that Commerce erred when it used absolute differences in GNI rather than relative differences when selecting the

range of countries considered to be economically comparable to China. AFMC Br. 27. AFMC concedes that the substantively identical issue was before the court in *Dongguan Sunrise*. *Dongguan Sunrise Furniture Co., Ltd. v. United States*, Slip Op. 2012–79, 2012 WL 2045753, at *12 (CIT June 6, 2012); *see* AFMC Br. 28. In *Dongguan Sunrise*, the court found that "[a]lthough AFMC has pointed out an alternative method for determining which countries are economically comparable that would result in a more preferable rate for AFMC, it has not shown that Commerce's methodology or the use of absolute differences is unreasonable or unsupported." *Dongguan Sunrise*, 2012 WL 2045753, at *12. Here, Commerce used the same methodology and explained itself in essentially the same manner. *See Issues and Decision Memorandum* 29. AFMC's current arguments add nothing. The court agrees with the reasoning of *Dongguan Sunrise* and sustains this aspect of the determination.

**IV. Financial Statements**

AFMC argues that Commerce should rely on the financial statements of Kirsten, Inc. ("Kirsten") and Cancio Associates, Inc. ("Cancio") to establish surrogate financial ratios because Commerce erred in finding that they had significant retail operations. AFMC Br. 18, 20. AFMC also argues that Commerce should not rely on the financial statement of Insular Rattan and Native Products Corp. ("Insular Rattan") because the financial statement does not include a line item for taxes, which is necessary to determine whether the company received tax subsidies. AFMC Br. 7 8. AFMC's argument with regard to Insular Rattan has merit although its arguments with regard to Kirsten and Cancio do not.

**A. Kirsten**

AFMC argues that Commerce erred in excluding Kirsten's financial statements on the basis that Kirsten engaged in "significant retail operations" and the examined respondent did not. AFMC Br. 20 22. Specifically, AFMC argues that the absence of evidence in Kirsten's financial statements and on Kirsten's website regarding significant retail operations casts significant doubt on Commerce's claims that third-party websites demonstrate that Kirstin engaged in significant retail operations. *Id.* at 20 21.

Commerce determined that Kirsten may have significant retail operations based on Kirsten's website, an online business directory entry for Kirsten, and photographs of the outside of one of Kirsten's buildings. *Issues and Decision Memorandum* 39. Commerce found that Kirsten's website indicated that it operated showrooms and served the local market through an entity called "CASA MUEBLES

SM." *Id.*; *AFMC's Post-Preliminary Results Surrogate Value Submission* (May 7, 2011), P.R. 489, AFMC App., Tab 20, at Attach. 1-B. Commerce paired Kirsten's address from an online business directory with an online picture of that address, which appeared to be located in a shopping mall. *Issues and Decision Memorandum* 39; *Home Meridian Rebuttal Surrogate Value Submission* (Mar. 17, 2011), P.R. 500, AFMC App., Tab 21, at Ex. 1. AFMC argues that because Kirsten's financial statements do not reference the existence of retail stores or operations, instead emphasizing manufacturing and exporting, Commerce's determination lacks substantial evidence. AFMC Br. 21. Kirsten's website, however, clearly states that the company has four showrooms.[22] Commerce also noted that there were "multiple useable financial statements" on the record from other companies for which there was no indication of any retail activity. Thus, sufficient data was available to calculate the necessary financial ratios. *Issues and Decision Memorandum* 39. AFMC's contention relies on the principle that the silence of Kirsten's financial statements on the existence of retail operations disproves Commerce's interpretation of various websites. Commerce permissibly interpreted the record as evidence that Kirsten likely possessed significant retail operations. Thus, Commerce's determination that Kirsten's financial statements did not constitute the "best available information" for calculating surrogate financial ratios was supported by substantial evidence.

**B. Cancio**

AFMC argues that Commerce's exclusion of Cancio's financial statements, on the basis that Cancio had retail operations, is unsupported by substantial evidence. AFMC Br. 18. Specifically, AFMC contends that Cancio's financial statement "conclusively contradicts" Commerce's determination that the financial statements include the retail operations of CADI Showrooms. *Id.* at 19.

Commerce determined that expenses for CADI Showrooms were reflected in Cancio's financial statements. *Issues and Decision Memorandum* 43. CADI Showrooms sells Cancio's furniture and accessories

[22] Although, as AFMC notes, the portion of Kirsten's website indicating that they have four showrooms was not put on the record, AFMC itself included significant other portions of the same website on the record. AFMC Br. 20; *AFMC's Post-Preliminary Results Surrogate Value Submission*, P.R. 489, AFMC App., Tab 20, at Ex.1-B. The website in its current form echoes Commerce's factual findings. Kirsten Int'l Inc., http://www.kirsten-intl.com/pages/showrooms.html (last visited Sept. 17, 2012). Additional information on the retail nature of this shopping mall exists. Whether or not the court may take judicial notice of public information readily accessible to all parties, there seems no purpose in sending back this issue for Commerce to find what it has already found. Regardless of further supportive facts external to the record, at this point the determination is sufficiently supported by the record.

to residential clients and is "managed by Cancio Associates." *Id.* CADI Showrooms has four main divisions: Cancio Contract, CADI Office Systems, CADI Showrooms, and Cancio Export. *Id.*; *Home Meridian Rebuttal Surrogate Value Submission*, P.R. 500, AFMC App., Tab 21, at Ex. 5, 1 2. Commerce interpreted this as evidence that the entity CADI Showrooms was a retail division covered by the financial statement. *Issues and Decision Memorandum* 43. Commerce supported this view with evidence of Cancio's outsized administrative rental expense (which comprised 26% of selling, general, and administrative ("SG&A") expenses) and the fact that Cancio and CADI Showrooms shared the same office address. *Id.* at 43 & n.117. Commerce also noted again that "there are multiple usable financial statements on the record from other companies that do not have retail operations . . . ." *Id.* at 43. Accordingly, it found the volume and range of information that it used sufficient to derive the necessary financial ratios, without Cancio's information.

Commerce's decision that Cancio's financial statements did not provide the "best available information" for calculating the financial ratios was reasonable based on the information available on the record. AFMC argues that a note in Cancio's financial statements on revenue contradicts Commerce's determination. AFMC Br. 19. The note states that "[t]his account consists of gross earnings on completed contracts amounting to P28,259,932 and P46,561,119 as of December 31, 2009 and 2008, respectively." *AFMC's Post-Preliminary Results Surrogate Value Submission*, P.R. 489, AFMC App., Tab 20, Attach. 5-A, at 18. AFMC contends that this note indicates that Cancio's entire revenue was attributable to "completed contracts" and therefore CADI Showrooms' revenue and expenses cannot be included in the statements because retail sales cannot be contract sales. AFMC Br. 19. AFMC fails to explain why the phrase "completed contracts" is applicable only to non-retail transactions. Why cannot retail sales also be contract sales? Examples of contractual retail sales include credit card transactions, lay-away purchases, and installment plans. Additionally, "completed contract" typically refers to the completed contract accounting method[23] and has no bearing on the relationship between a subsidiary retail operation and its parent company.[24]

[23] Under the completed contract accounting method, any income/expense from a long-term contract is realized only in the year that the work on the contract is completed. *Spang Indus., Inc. v. United States*, 791 F.2d 906, 907 (Fed. Cir. 1986).

[24] AFMC is correct in noting that Commerce neglected to respond to the "completed contracts" portion of AFMC's argument in its decision. AFMC Br. 19; AFMC Reply Br. in Supp. of Its Rule 56.2 Mot. for J. on the Agency R. ("AFMC Reply Br.") 4. Contrary to AFMC's fears, however, the court does not rely on the Government's post-hoc rationalization in concluding that Commerce could exclude Cancio's financial statements. *See id.* at 4 5.

Thus, Commerce's decision to exclude Cancio's financial statements has not been significantly undermined.

### C. Insular Rattan

AFMC argues that Commerce erred when it used the 2009 financial statements from Insular Rattan when calculating the surrogate financial ratios for factory overhead, SG&A expenses, and profit because Insular Rattan's financial statements fail to disclose the company's tax expense, as required by the Philippine Accounting Standards. AFMC Br. 7 8. The parties agree that the same argument was contested in *Dongguan Sunrise*. AFMC Br. 17. As in the prior administrative review, Commerce defended its use of Insular Rattan's financial statements on the basis that the statements were "affirmed by the auditor to be prepared in accordance with the GAAP of the Philippines," Commerce "does not rely on income taxes in calculating financial ratios" and the record contained no evidence that Insular Rattan had received subsidies. *Issues and Decision Memorandum* 38; *see Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China*, A-570–890, POR 1/1/08 12/31/08, at 88 (Aug. 11, 2010), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2010 20499 1.pdf (last visited Sept. 17, 2012). In *Dongguan Sunrise*, the court found Insular Rattan's financial statements were potentially unreliable, but that "[w]ithout further information, the court cannot determine whether Commerce has decided unreasonably to use a dubious financial statement." *Dongguan Sunrise*, 2012 WL 2045753, at *16. Because the facts and arguments are identical, and the court agrees with *Dongguan Sunrise*, the court remands for reconsideration of the use of this statement or for an explanation as to why Commerce finds that Insular Rattan's financial statement is generally reliable and also unaffected by subsidies.

## V. Combination Rates

AFMC argues that Commerce abused its discretion by refusing to develop the record with necessary information regarding circumvention in order to apply combination rates, and instead by requiring AFMC to supply conclusive proof of circumvention. AFMC Br. 29 32. AFMC relies on CBP data in the form of two sets of entry documents with sequential numbering from two different companies, and data that shows that the vast bulk of the entries were from the company with the lower rate, to argue that Commerce cannot decline to inves-

tigate in light of such prima facia evidence of circumvention.[25] AFMC Br. 33 38.[26] Because AFMC's evidence is not "speculative", as claimed by Commerce, and there also appears to be issue with AD circumvention with respect to WBF largely due to the large number of exporters involved and the widely varying rates applicable to the exporters, Commerce must investigate and decide whether combination rates are appropriate in the context of this subject merchandise.

It is a truism that "[t]he application of combination rates is left to the discretion of Commerce." *Dongguan Sunrise*, 2012 WL 2045753, at *24 (citing 19 C.F.R. § 351.107(b)(1)); *Tung Mung Dev. Co. v. United States*, 354 F.3d 1371, 1381 (Fed. Cir. 2004). As the court has cautioned, however, "[a]n agency's failure to collect pertinent data . . . in some situations may constitute an abuse of discretion." *Dongguan Sunrise*, 2012 WL 2045753, at *24 (citing *U.S. Steel Grp. v. United States*, 18 CIT 1190, 1202, 873 F. Supp. 673, 687 (1994), *aff'd* 96 F.3d 1352 (Fed. Cir. 1996)).

Here, Commerce asserts that "the application of combination rates would be too large of an administrative burden to be practicable,"[27] the facts in the instant case do not match with the facts from a prior instance where Commerce imposed combination rates,[28] and "there is no record evidence concerning specific producer/exporters shifting

[25] AFMC points to two entry numbers, [[

]] *Proprietary Information Relating to the July 11, 2011 Issues and Decision Memorandum* (Aug. 5, 2011), C.R. INT_021493, at 2 3. This type of behavior is not speculative.

[26] AFMC has once again placed an article from Furniture Today on the record as evidence that Commerce should have used combination rates. AFMC Br. 28. The court has repeatedly rejected this article as insufficient proof to require Commerce to apply combination rates. *See Dongguan Sunrise*, 2012 WL 2045753, at *24; *Lifestyle Enter., Inc. v. United States*, 768 F. Supp. 2d 1286, 1313 14 (CIT 2011). Commerce may choose to consider the article as somewhat supportive, even if it is insufficient by itself.

[27] Commerce's argument that applying combination rates would be a large administrative burden is irrelevant if Commerce's inaction permits circumvention of AD law in contravention of the AD statute. *See Lifestyle Enter.*, 768 F. Supp. 2d at 1314. Also, Commerce has not explained precisely why this is such a burden.

[28] Commerce's duty to use combination rates or otherwise prevent circumvention of AD law has nothing to do with whether or not the facts of the instant case correspond with the facts in Pistachios from Iran. *See Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Certain In-Shell Raw Pistachios from Iran*, A-507–502, ADR: 07/01/02–06/30/02 (Feb. 7, 2005) at 16, *available at* http://ia.ita.doc.gov/frn/summary/iran/E5–596–1.pdf (last visited Sept. 17, 2012); *see also Import Administration Policy Bulletin 03.2: Combination Rates in New Shipper Reviews* (Mar. 3, 2004), *available at* http://ia.ita.doc.gov/policy/bull03–2.html (last visited Sept. 17, 2012) (outlining the policies for implementation of combination rates where the system is

their exports from high-margin to low-margin exporters." *Issues and Decision Memorandum* 26.

These reasons are all unsupportive of Commerce's decision either because they are not explained or simply do not agree with the evidence of record. Because Commerce failed to investigate clearly raised allegations as to the circumvention of AD law in this administrative review of WBF, which were supported by apparently reliable record evidence, Commerce abrogated its duty to ensure that exporters and producers do not circumvent AD law. In *Dongugan Sunrise*, the court noted that:

> The broader issue is whether Commerce should in its short form questionnaire, which focuses on whether a respondent is to get a rate other than that of the PRC-entity, ask about shipments of subject merchandise for or by another company. Apparently this type of inquiry was included previously. The court is concerned that Commerce's answer that it cannot act because it has no circumvention data and the fact that it does not ask for the data creates a familiar geometric object. The court declines to order a new investigation here because AFMC's evidence of circumvention is largely based on its own client's general statements to a magazine. This is a troubling area, however, and Commerce should be prepared to alter its investigation techniques or explain its actions carefully in the future. It is also not a satisfactory answer that Commerce does attend to these problems in new shipper reviews.

*Dongguan Sunrise*, 2012 WL 2045753, at *25. Commerce argues that this case is just like *Dongguan Sunrise*, but, in fact, the companies at issue were treated differently. Unlike in *Dongguan Sunrise*, here Commerce did not apply the 216.01% PRC-wide rate to the company accused of routing other companies' sales through its low AD rate.[29] Additionally, in *Dongguan Sunrise*, "Commerce examined and verified the sales of Nanjing Nanmu and determined that the sales were actually from Nanjing Nanmu." *Dongguan Sunrise*, 2012 WL 2045753, at *24. Commerce also found that the increase in Aosen's shipments through lower-rate companies could be attributed to legitimate business reasons. *Id.* Commerce made no such efforts or findings in the instant case except to state in a blanket manner that

being circumvented). Furthermore, Commerce considered four factors in that review and it is unclear if Commerce considered these factors or otherwise investigated AFMC's allegations of circumvention.

[29] [[

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"in instances where companies may be improperly misreporting their entries to CBP, such instances will be reported to CBP for proper action under that agency's fraud provisions." *Issues and Decision Memorandum* 26. It is unclear whether Commerce in fact reported such instances CBP and, if they were reported, what actions were taken.

Accusations and evidence of circumvention date back to the third administrative review of WBF, indicating an issue that seems particular to the subject merchandise at issue in the instant case. Such behavior may be a byproduct of the complex network of hundreds of Chinese exporters and producers, which may necessitate greater investigation and oversight of WBF than other subject merchandise. Because Commerce did not collect data relating to the circumvention of AD law or otherwise explain why such data were unnecessary in this case to prevent circumvention, Commerce likely abused its discretion to apply antidumping duty remedies itself. Thus, the issue of combination rates is remanded to Commerce to investigate and decide whether combination rates are appropriate.

## VI. Zeroing[30]

HMI asks the court to remand the issue of zeroing so that Commerce may comply with the Federal Circuit's holdings in *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1366 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–84 (Fed. Cir. 2011); HMI Br. 23. Because this issue was not raised in the brief at the agency level, the court first addresses administrative exhaustion before reaching the merits.

### A. Administrative Exhaustion

The Government argues that the issue of zeroing should not be remanded because HMI failed to exhaust its administrative remedies. Def. Resp. Br. 38. HMI counters that invoking administrative remedies with respect to zeroing would have been futile and the court therefore should excuse HMI's failure to exhaust administrative remedies. HMI Br. 28 29.

The court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Exhaustion may be waived in certain circumstances, including where unexpected legal developments arise or a challenge to agency action would have ap-

[30] "Zeroing is the practice whereby the values of positive dumping margins are used in calculating the overall margin, but negative dumping margins are included in the sum of margins as zeroes." *JTEKT*, 642 F.3d. at 1383 (citing *Dongbu*, 635 F.3d at 1366).

peared futile. *Gerber Food (Yunnan) Co. v. United States*, 601 F. Supp. 2d 1370, 1377 (CIT 2009) (discussing situations where waiver of the exhaustion requirement is appropriate); *see Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452, n.2, 773 F. Supp. 1549, 1555 n.2 (1991). The futility exception requires a party to demonstrate that it would have been "required to go through obviously useless motions in order to preserve [its] rights." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quoting *Walsh v. United States*, 151 Ct. Cl. 507, 511 (1960)).

The parties agree that HMI did not challenge Commerce's use of zeroing in administrative reviews in its administrative case brief. HMI Br. 23; Def. Resp. Br. 9. Nine days after HMI submitted its administrative case brief, the Federal Circuit announced a decision requiring Commerce to explain or abandon its inconsistent use of zeroing in administrative reviews but not in investigations. *See Dongbu*, 635 F.3d at 1373; HMI Br. 25 26; Def. Resp. Br. 9. Following *Dongbu*, HMI attempted to raise the issue of zeroing on two occasions before Commerce issued its final results. *See infra* n. 30.

"Both *Dongbu* and *JTEKT* came as a surprise to many because a long-line of cases seemed to allow Commerce great discretion in making the [zeroing] calculation at issue." *Union Steel v. United States*, 823 F. Supp. 2d 1346, 1348 (CIT 2012), *appeal docketed*, Appeal No. 2012–1248 (Fed. Cir. 2012). Considering the numerous past decisions affirming Commerce's use of zeroing in administrative reviews, *see id.* at 1350 52, HMI correctly believed that challenging Commerce's use of zeroing would have been futile. Moreover, the same day that *Dongbu* was issued, HMI promptly sent a letter notifying Commerce of the recent decision and indicated its intent to challenge the continued use of zeroing in administrative reviews. [31]Thus, in the instant case, HMI's failure to exhaust administrative remedies with respect to zeroing is excused due to 1) an unexpected legal development, 2) a challenge to Commerce's use of zeroing in administrative reviews as a practical matter appeared futile prior to *Dongbu*, and 3) HMI acted promptly in attempting to rectify its understandable failure to exhaust once *Dongbu* was issued.

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[31] Plaintiffs sent notices of the intervening Federal Circuit decision to Commerce on March 31, 2011 (the same day *Dongbu* was published) and June 6, 2011. *See Letter from Arent Fox to Commerce re: Notice of Intervening CAFC Decision* (June 6, 2011), P.R. 541; *Letter from Commerce to Mowry & Grimson re: Untimely Written Argument in March 31, 2011, Letter* (Apr. 5, 2011), P.R. Doc. 527, HMI App., Tab 12, at 1; *see also* HMI Br. 26. Commerce rejected these submissions as untimely. *Letter from Commerce to Mowry & Grimson re: Untimely Written Argument in March 31, 2011, Letter* (Apr. 5, 2011), P.R. Doc. 527, HMI App., Tab 12, at 1; *Letter from Commerce to Arent Fox re: Untimely Written Argument in June 6, 2011, Letter* (June 6, 2011), P.R. 542, HMI App., Tab 13, at 1; *see also* HMI Br. 25 26.

The Government and AFMC's view that nothing prevented HMI from raising the issue in its administrative case brief is too narrow on these facts. *See* Def. Resp. Br. 41 42; AFMC Resp. Br. 17. Defendants argue that "[t]he mere fact that an adverse decision may have been likely does not excuse a party from satisfying statutory or regulatory requirements to exhaust administrative remedies." *Tianjin Magnesium Int'l Co. v. United States*, 722 F. Supp. 2d 1322, 1330 (CIT 2010) (citations omitted); *see also* Def. Resp. Br. 42. Defendants seem merely to argue that because a subsequent case questioned the validity of Commerce's zeroing, it was not futile for HMI to make its argument to Commerce. That the law seemed to change due to a judicial opinion, however, is at the core of the recognized exceptions to the exhaustion requirement. *Gerber Food*, 601 F. Supp. 2d at 1377. The Federal Circuit's decisions in *Dongbu* and *JTEKT* made a challenge to Commerce's use of zeroing tenable, in so far as those decisions required Commerce to provide an explanation for its differing use of zeroing in ongoing administrative reviews but not in new investigations.[32] Thus, for a variety of reasons HMI's failure to exhaust administrative remedies with respect to zeroing is excused.

**B. Commerce's Explanation**

Having determined that the zeroing issue is properly before the court, HMI argues that the issue should be remanded to Commerce to calculate Huafeng's dumping margin without zeroing. HMI Br. 24 25. *Dongbu*, however, merely requires Commerce to provide a reasonable justification for its inconsistent use of zeroing.[33] *Dongbu*, 635 F.3d at 1373; *see also JTEKT*, 642 F.3d at 1384 85 ("In order to satisfy the

[32] The Government and AFMC also argue that the court has already expressly rejected the futility exception in a similar situation. *Fuwei Films (Shandong) Co. v. United States*, 791 F. Supp. 2d 1381, 1384 85 (CIT 2011); *see also* Def. Resp. Br. 42; AFMC Resp. Br. 16. In *Fuwei Films*, the plaintiff moved to amend its complaint to challenge Commerce's use of zeroing after *Dongbu* was issued. The court held that the futility exception was inapplicable because "[t]here was nothing preventing Fuwei from asserting its rights at the administrative level." *Id.* at 1385. In *Fuwei Films*, the court noted that had plaintiffs asserted its rights with vigor by, for example, submitting a letter to Commerce challenging the use of zeroing as "an unreasonable interpretation of the dumping statute," Fuwei would have "created a record suitable for judicial review." *Id.* In the present case, HMI promptly submitted two letters to Commerce, indicating its intent to challenge Commerce's use of zeroing in the wake of *Dongbu*. HMI Br. 25 26. The facts of the present case suggest waiver of exhaustion is not inappropriate here.

[33] Several challenges to Commerce's continued use of zeroing in administrative reviews have been stayed pending the Federal Circuit's decision in *Union Steel* (Fed. Cir No. 2012–1248). *See JTEKT Corp. v. United States*, Slip Op. 2012–72, 2012 WL 2000993 (CIT June 4, 2012); *JTEKT Corp. v. United States*, Slip Op. 2012–73, 2012 WL 2001379 (CIT June 4, 2012); *NTN Bearing Corp. of Am. v. United States*, Slip Op. 2012–75, 2012 WL 1999645 (CIT June 4, 2012); *SKF USA Inc. v. United States*, Slip Op. 2012–74, 2012 WL 1999685 (CIT June 4, 2012); *NSK Corp. v. United States*, Slip Op. 2012–76, 2012 WL

requirement set out in *Dongbu*, Commerce must explain why . . . [it is] reasonable to continue zeroing in one phase, but not the other.”). Because Commerce’s use of zeroing was not challenged until after the briefing had concluded and Commerce declined to accept “untimely” arguments, Commerce in this administrative review provided no justification. This is very similar to the situation in *Dongbu*. As this matter is remanded on other grounds, this issue is also remanded to Commerce to provide an explanation for its differing use of zeroing in administrative reviews and investigations.

## VII. Separate Rates of Other Respondents

AFMC argues that if Huafeng’s separate-rate dumping margin is increased, Commerce should adjust the weighted-average separate-rate of the other respondents, which were calculated based on Huafeng’s rate. AFMC Br. 38. The Government argues that only those respondents subject to an injunction of liquidation (Nanhai Baiyi,[34] Great Rich (HK) Enterprise Co., Ltd., Dongguan Liaobushangdun, and Huafeng) may have their rates adjusted based on any changes to Huafeng’s rates. Def. Resp. Br. 38; Pls. Home Meridian Int’l, Inc. d/b/a Samuel Lawrence Furniture Co. & Pulaski Furniture Co. & Import Svcs., Inc. & Consol. Pl. Great Rich (HK) Enterprises Co., Ltd. & Dongguan Liaobushangdun Huada Furniture Factory Reply Br. in Supp. of Rule 56.2 Mot. for J. upon the Agency R. 14. The court agrees

1999641 (CIT June 4, 2012); *NSK Bearings Eur., Ltd. v. United States*, Slip Op. 2012–77, 2012 WL 2001745 (CIT June 4, 2012). The court explained its rationale for granting stays on the zeroing issue:

> In summary, the pending litigation in the Court of Appeals is likely to affect the disposition of plaintiffs’ claim challenging [Commerce’s] zeroing practice. While the case at bar concerns a different antidumping duty order and administrative review than are involved in *Union Steel* , both cases raise the same general issue of whether the Department’s application of the zeroing methodology in an administrative review of an antidumping duty order is lawful. A stay, therefore, will serve the interest of judicial economy and conserve the resources of the parties. Moreover, defendant and defendant-intervenor have failed to show, or even allege, that the proposed stay would cause them harm.

*NSK Corp*, Slip Op. 2012–76, 2012 WL 1999641, at *1. No party to this case has requested a stay. Moreover, several unrelated issues within this case are remanded. Thus, the interests of orderliness and judicial efficiency weigh in favor of granting a remand on the zeroing issue as well. In addition, later explanations, not present here, supporting zeroing in reviews have been upheld. *See Union Steel*, 823 F. Supp. 2d at 1346; *Far Eastern New Century Corp v. United States.*, Slip Op. 2012–110, 2012 WL 3715105, at *2 (CIT Aug. 29, 2012); *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, Slip Op. 2012–100, 2012 WL 3104900, at *6 (CIT July 31, 2012).

[34] Nanhai Baiyi argues that should Commerce recalculate Huafeng’s rate, Commerce should also recalculate Nanhai Baiyi’s dumping margin. Nanhai Baiyi Br. 7 8. No party claims otherwise. Because Nanhai Baiyi was subject to suspension of liquidation, Commerce should recalculate Nanhai Baiyi’s rate to reflect any changes to Huafeng’s rate.

with the reasoning in *Dongguan Sunrise* that the Government's argument has merit. *Dongguan Sunrise*, 2012 WL 2045753, at *25. Pursuant to the statutory scheme the way to obtain a change in final assessment rates when a court decision is not in agreement with the Commerce determination is to have liquidation of relevant entries enjoined. *See* 19 U.S.C. § 1673b(c), (e). Domestic parties, just as respondents, may have liquidation of entries enjoined. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 811 12 (Fed. Cir. 1983). Thus, AFMC could have preserved this relief. AFMC has not sought this relief. Accordingly, its request is denied.[35]

## CONCLUSION

For the foregoing reasons, the court remands the matter for Commerce to reconsider or explain whether a surrogate value or market economy purchases constitute the best available information for certain wood inputs, apply the correct HTS sub-heading for poly foam, reconsider or explain its reliance on 2008 GNI data for labor wage rate calculations, reconsider or explain why Insular Rattan's financial statement is generally reliable and usable, obtain the necessary information to decide whether combination rates are appropriate, and provide the required explanation of its zeroing practice. If Commerce calculates a different separate rate for Huafeng, Commerce shall make appropriate adjustment for assessment purposes to the separate rates of the parties before the court in this litigation. Commerce's determination is sustained in all other respects.

As further investigation is ordered, Commerce shall file its remand determination with the court within 120 days of this date. The parties shall have 30 days thereafter to file objections, and the Government will have 15 days thereafter to file its response.

Dated: This 19th day of September, 2012
New York, New York

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

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[35] What action Commerce may take on deposit rates when assessment rates are not changed is not an issue that has been briefed adequately before the court and the court expresses no opinion on it.

Slip Op. 12–121

Legacy Classic Furniture, Inc., Plaintiff, v. United States, Defendant.

Before: Gregory W. Carman, Judge
Court No. 10–00352

[Commerce's *Remand Results* are remanded.]

Dated: September 19, 2012

*Mark E. Pardo, Andrew T. Schutz*, *Max F. Schutzman, and Nikolas E. Takacs,* Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, for Plaintiff.

*Douglas G. Edelschick*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant, and *Nathaniel J. Halvorson*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel. With them on the briefs were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director.

## *OPINION & ORDER*

**CARMAN, JUDGE:**

Plaintiff Legacy Classic Furniture, Inc. ("Plaintiff" or "Legacy") disputes the results of the first court-ordered remand to the United States Department of Commerce ("Commerce") regarding a scope determination in the antidumping duty order covering wooden bedroom furniture from China. *Bedroom Furniture from the People's Republic of China: Scope Ruling on Legacy Classic Furniture, Inc.'s Heritage Court Bench* (Nov. 22, 2010) ("*Final Scope Ruling*"); *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China*, 70 Fed. Reg. 329 (Jan. 4, 2005) ("*WBF Order*"). Pursuant to Plaintiff's motion for judgment on the agency record challenging Commerce's *Final Scope Ruling*, the Court sustained in part and remanded in part this case in Slip Opinion 11–157.[1]

In *Legacy I*, the Court sustained Commerce's determination that the factors set forth in 19 C.F.R. § 351.225(k)(1)[2] are not dispositive but remanded for reconsideration Commerce's determination that the factors set forth in 19 C.F.R. § 351.225(k)(2)[3] are dispositive. Accordingly, the Court set aside Commerce's determination that the Heri-

[1] *Legacy Classic Furniture v. United States*, 35 CIT ___, 807 F. Supp. 2d 1353 (2011) ("*Legacy I*"). The Court presumes familiarity with *Legacy I*.

[2] Referred to as "(k)(1) factors" hereinafter.

[3] Referred to as "(k)(2) factors" hereinafter.

tage Court Bench fell within the scope of the *WBF Order* and instructed Commerce to reconsider each of the factors listed under 19 C.F.R. § 351.225(k)(2) and to take into account in its analysis all of the evidence on the record. Commerce issued its *Final Results of Redetermination Pursuant to Court Order* (Mar. 26, 2012) ("*Remand Results*"), affirming its original determination that the Heritage Court Bench is within the scope of the *WBF Order*.

Upon review of the *Remand Results*, upon further examination of the record, and upon further consideration of the unique circumstances presented in this case, the Court reconsiders its initial decision regarding the (k)(1) factors and remands to Commerce to explain its policy where general language in the scope section of an antidumping duty order can be read to include the product at issue but other language in the scope section specifically excludes the product at issue. The Court also remands the (k)(2) factors because Commerce's conclusion in its *Remand Results* that the Heritage Court Bench is more like a chest than a bench is not supported by evidence on the record.

**BACKGROUND**

The product at issue is Legacy's Heritage Court Bench – a piece of furniture that both sides agree serves simultaneously as a seating bench and a storage unit. It is described as "a backless wooden seating bench measuring 50 inches wide by 19 inches tall by 20 inches deep." *Final Scope Ruling* at 2. The body of the bench is made from "solid hardwood with Okume Mahogany veneers and a cocoa brown wood finish." *Id.* It has a top that consists "entirely of a padded leather surface," is attached by hinges to the base, and has a cedar-lined interior storage area. *Id.* The scope of the *WBF Order* includes only specified chests but explicitly excludes all seating furniture, including benches. *Id.* at 3.

Commerce evaluated whether the Heritage Court Bench was within the scope of the *WBF Order* according to the factors and procedure set out in 19 C.F.R. § 351.225(k). *Final Scope Ruling* at 4. This regulation specifies that when Commerce is "considering whether a particular product is included within the scope of an order," it will "take into account" the following factors: "(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). Commerce determined that the (k)(1) factors were not dispositive. *Final Scope Ruling* at 6. Thus Commerce proceeded to the next subsection of factors: "(i) [t]he physical characteristics of the product; (ii) [t]he

expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2). In its *Remand Results*, Commerce found that "the record is mixed with respect to the criterion under 19 C.F.R. § 351.225(k)(2) (iv) and (v)," but "[did] not find that this mixed record is enough to change the conclusions reached with respect to the criterion under 19 C.F.R. § 351.225(k)(2)(i-iii)." *Remand Results* at 18.

## STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006). For scope determinations, the Court sustains determinations, findings or conclusions of Commerce unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Courts "look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious or an abuse of discretion." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998) ("*Wheatland Tube*").

## DISCUSSION

### I. *Redetermination of the (k)(2) Factors*

This Court reviews Commerce's *Remand Results* and corresponding comments. Commerce conceded that the record is inconclusive for the two factors of (iv) channels of trade and (v) manner displayed and advertised. *Remand Results* at 14–17. Therefore Commerce made its redetermination upon the three factors of (i) physical characteristics, (ii) customer expectations, and (iii) ultimate use. This Court reviews all the factors upon which Commerce based its redetermination. Each factor will be addressed in turn.

#### A. Physical Characteristics of the Product

Regarding the factor of physical characteristics of the product, Commerce determined that "the primary element of the product is its box structure and lid, elements consistent with certain storage chests." *Remand Results* at 7. Plaintiff countered that "[t]he shape and height of the Heritage Court Bench and its other physical characteristics are entirely consistent with those of a bench." Pl.'s Comments in Opp'n to Final Results of Redetermination Pursuant to Court Order ("Pl.'s Opp'n") at 5. Further, Plaintiff advanced that "[t]he fact that the Heritage Court Bench would continue to fulfill its primary function as a bench even without its storage component supports the contrary position that its function as a bench is the

primary element." Pl.'s Opp'n at 7. While it has a rectangular shape and the seat does function as a lid for the storage area, the record clearly indicates that the Heritage Court Bench—case in point, the name of the product—is undisputedly a bench. Commerce conceded that the Heritage Court Bench "has some, albeit limited, attributes of an excluded product" (*e.g.*, a bench) but nevertheless concluded that the product "possesses all of the physical characteristics of a subject chest." *Remand Results* at 7.

Upon review of the numerous definitions of the subject chests in the *WBF Order*, contrary to Commerce's conclusion, the Heritage Court Bench does not possess *all* of the physical characteristics of any of the subject chests. In fact, the Heritage Court Bench only arguably fits into the residual provision of a footnoted definition of a general chest. *See WBF Order* at 332, n.5. In contrast, the Heritage Court Bench not only unambiguously falls under the explicit exclusion for a "bench" but also the basket provision for all "seating furniture" under the list of items that is excluded from the scope. *Id.* ("The scope of the Petition excludes . . . benches . . . and other seating furniture.")

In support of its conclusion, Commerce stated that

> simply because one could sit on the product does not mean it should principally be viewed as seating furniture that is excluded from the scope. If that were the case, the language in the scope covering a large box with a lid would be nullified because many boxes with a flat lid could be used for seating even if they do not come with a padded leather covering.

*Remand Results* at 6. Commerce's speculation is specious. First, the product at issue does indeed have a padded leather covering so speculating that the scope language would be nullified if a product did not have a padded leather covering is fallacious. Determining that the Heritage Court Bench is outside of the scope will not open the floodgate of exclusions to any product that can be sat upon. For example, a milk crate can be sat upon but that does not make it seating furniture. The determinative factor is that the furniture is designed for seating. The Heritage Court Bench is seating furniture precisely and simply because it is designed with padded leather covering for seating. The seating function is not incidental as Commerce insinuated in its conclusion. The record clearly indicates that seating is one of the main functions of the Heritage Court Bench. Furthermore, the record also demonstrates that the padded leather covering is one of the main design features of the product. The Court finds Commerce's reasoning that the seating function is incidental or secondary to the Heritage Court Bench to be arbitrary and capricious. Therefore, Com-

merce's conclusion that the most prominent physical characteristic is the box with the lid must be remanded for further consideration.

### B. Expectations of the Ultimate Purchasers

Regarding the factor of customer expectations of the product, Commerce admitted that there is "no direct evidence on the record regarding the expectations of the ultimate purchasers." *Remand Results* at 8 (quoting *Final Scope Ruling* at 10). Using the same analysis from the *Final Scope Ruling*, Commerce submitted that

> record evidence does not demonstrate that the oblong (rectangular) shape and height of the product under consideration is necessarily atypical of the type of storage chest that might be used at the end of a bed . . . . Moreover, it is reasonable to believe that bedroom storage chests with lids that are used at the end of beds would be wider than tall to be flush with the height and width of typical beds.

*Id.* at 8–9. Plaintiff countered that Commerce ignored its advertisement stating "[t]he Heritage Court Storage Bench offers timeless style and valuable storage for any room. Place at the foot of your bed, in a hallway, or make this bench a part of your living room ensemble." Pl.'s Opp'n at 9 (quoting Scope Request, Ex. 9). Commerce claimed that "consumers can view the product on websites under a tab labeled 'Seating' or a tab labeled 'Bedroom.'" *Remand Results* at 9. Plaintiff countered, however, that under the "Bedroom" tab, there is a "Benches" sub-tab, where the Heritage Court Bench is located. Pl.'s Opp'n at 10. Plaintiff further pointed out that there is a separate tab for "Bedroom Chests" and the Heritage Court Bench is not located there. *Id*. The Court agrees with Plaintiff that Commerce disregarded evidence placed on the record by Plaintiff. From a plain reading of the scope language, the Court recognizes that mere placement of seating furniture in a bedroom does not remove it from the scope exclusion of the *WBF Order*.

Plaintiff contended that the Heritage Court Bench has the dimensions typical of a bench but atypical of a chest. Pl.'s Opp'n at 10. The Court agrees. The dimensions listed in the scope of the *WBF Order* describe the subject chest as "a case piece taller than it is wide," but the Heritage Court Bench is just the opposite: a bench wider (50 inches) than it is tall (19 inches). *WBF Order* at 332, n.5. Thus, Commerce's conclusion that the Heritage Court Bench has the dimensions typical of a subject chest is not supported by the record. Rather there appears to be ample support on the record for Plaintiff's proposition that the Heritage Court Bench's most prominent features are

the "padded leather top, the oblong shape and dimensions that make it suitable for one or more individuals to sit." Pl.'s Opp'n at 12. Therefore, the Court finds that the record evidence does not support Commerce's conclusion that the customer expectations is for storage over seating. Commerce's determination must be remanded for further consideration.

**C. Ultimate Use of the Product**

Regarding the factor of ultimate use of the product, similar to the previous factor, Commerce again admitted that there is "no direct evidence on the record regarding how purchasers are actually using the Heritage Court Bench." *Remand Results* at 10. In lieu of ultimate use, Commerce "examined the record for evidence of the use for which the product was designed." *Id*. Noting that it "is tasked with determining whether the product in question is sufficiently similar to subject merchandise and thus subject to the order—not whether the product has absolutely no features in common with non-subject or excluded merchandise," Commerce concluded that "[w]hile the Heritage Court Bench does have a padded leather lid and could be used for seating, this one ultimate use does not negate the ultimate uses of the Heritage Court Bench that are similar to those of subject chests." *Remand Results* at 12, 13.

As noted in the Court's first decision, Commerce's conclusion is based on an "impression." *Legacy I*, 807 F. Supp. 2d at 1359. It appears that Commerce has not fully considered the record, as instructed, but rather remains mired in its position regarding this factor. Plaintiff asserted that

> Commerce once again ignores substantial record evidence that the Heritage Court Bench is designed to be used *as a bench*, which could be placed at the foot of the bed or elsewhere in the house. Commerce presumes that the storage capability of the Heritage Court Bench it is primary function with no record support.

Pl.'s Opp'n at 14 (emphasis in original). Commerce even admitted that there is a "lack of direct record evidence regarding the ultimate use of the product," yet proceeded to declare that the storage function supersedes the seating function of the product in the absence of record evidence pertinent to this factor. *Remand Results* at 10. In the absence of direct evidence of how customers actually use this product, the only reasonable way to analyze this factor is to infer from the marketing evidence. The product is marketed as a "bench" or "seating

furniture" that can be placed in the bedroom. Pl.'s Opp'n at 14. The fact that seating furniture can, and often is, located in the bedroom does not place it within the scope of the *WBF Order*. It is unreasonable to conclude that customers seeing a product marketed as a "bench" or "seating furniture" would primarily expect to use it as a bedroom chest. Commerce apparently made its conclusion based on conjecture and not on evidence, or even logical inference from the evidence. The Court finds that Commerce's conclusion that the Heritage Court Bench's primary use is as a bedroom chest is not supported by substantial evidence and must be remanded for further consideration.

### D. Channels of Trade in Which the Product Is Sold

Regarding the factor of channels of trade in which the product is sold, Commerce determined that "the evidence regarding this criterion by itself is not dispositive on the issue" because record evidence demonstrates that the Heritage Court Bench and similar products "are sold through different channels of trade from those used for subject merchandise as well as through identical channels of trade as those used for subject merchandise." *Remand Results* at 14–15. Plaintiff claimed that "[w]hile there may be some overlap between this channel of trade and the channel of trade for subject bedroom furniture, the record establishes that the channels are not the same" and that the Heritage Court Bench and similar products are "*never* identified as bedroom chests and [are], instead, always grouped with other seating furniture." Pl.'s Opp'n at 18 (emphasis in original). The Court agrees with Plaintiff that, even if the Heritage Court Bench is sold through overlapping channels of trade for subject wooden bedroom furniture, it is still seating furniture, all of which is excluded. Therefore, the Court remands this factor of the channels of trade to Commerce to consider all of the record evidence.

### E. The Manner in Which the Product Is Displayed and Advertised

Regarding the factor of the manner in which the product is displayed and advertised, Commerce also determined that the record was inconclusive and thus not a dispositive factor. *Remand Results* at 17. Commerce found that "the majority of features advertised about the Heritage Court Bench are the ones of a subject chest" but acknowledged that "the ability to use the chest for seating is also advertised and the product is labeled as a storage bench." *Id.* at 17. Plaintiff advocated that "the Heritage Court Bench is much more prominently advertised as a bench, and not a chest," Pl.'s Opp'n at 11,

and asserted that "the record shows that storage benches are a widely recognized type of bench that must be within the unqualified exclusion for all benches and seating furniture," Pl.'s Opp'n at 18. Further, Plaintiff declared that "Commerce attempts to minimize record evidence showing that the Heritage Court Bench is marketed and advertised as a bench." *Id.* The Court agrees with Plaintiff. The subject chest was never advertised as a chest; it was advertised as seating furniture or a storage bench. Parsing the phrase "storage bench," the Court analyzes that "storage" is merely an adjective that modifies the noun "bench," which is the focus of the phrase. The record evidence supports Plaintiff's assertion that the Heritage Court Bench is indisputably a bench in terms of its marketing. Consequently, the Court remands this factor of the manner in which the product is displayed and advertised for Commerce to fully reconsider.

**F. Remand of the (k)(2) Factors**

In its *Remand Results*, Commerce concluded that the record is inconclusive for the two factors of (iv) channels of trade and (v) manner displayed and advertised and therefore made its redetermination upon the three factors of (i) physical characteristics, (ii) customer expectations, and (iii) ultimate use. *Remand Results* at 17–18. However, Commerce conceded that there was "no direct evidence on the record" for the factors of (ii) customer expectations and (iii) ultimate use. *Remands Results* at 8, 10. The Court finds that Commerce's *Remand Results* regarding the (k)(2) factors are based on conjecture and assumption, not based on evidence in the record. Contrary to its assertion that it "provided a robust explanation concerning how it weighed the conflicting evidence in this case," Def.'s Reply to Pl.'s Comments Concerning Remand Results ("Def.'s Reply") at 6, the Court finds that Commerce merely regurgitated its original conclusions from the *Final Scope Ruling* without the requisite "reasoned analysis or explanation for [its] decision" ordered by the Court in *Legacy I* and required by *Wheatland Tube*, 161 F.3d at 1369.

Accordingly, similar to the results in *Legacy I*, the Court finds that the record evidence does not support Commerce's conclusions that the factors under 19 C.F.R. § 351.225(k)(2)(i-iii) are within the scope of the order. Further, considering the (k)(2) factors—19 C.F.R. § 351.225(k)(2)(vi-v)—that Commerce found to be inconclusive, the Court cannot find that Commerce took into account "the breadth of the record evidence" as instructed in *Legacy* I, 807 F. Supp. 2d at 1358. Therefore, Commerce's redetermination that the Heritage Court Bench is within the scope based on the (k)(2) factors is unsus-

tainable and must be set aside. The case is remanded for a second time for consideration of the (k)(2) factors.

## II. *Reconsideration of the (k)(1) Factors*

Given that the Heritage Court Bench appears to fall both in and out of the scope language, making scope determination a vexed question for Commerce, the Court returns to the basics of a scope determination and reconsiders the first step, the (k)(1) factors, specifically taking another look at the scope language of the antidumping order. The Court's goal is to ensure that the final determination is arrived at through thorough and proper consideration of the record, which did not happen here, by both this Court in its original decision and by Commerce in its previous determinations. The Court may reconsider its decision in an interim order "pursuant to its general authority, which is recognized by USCIT Rule 54, to reconsider a non-final order prior to entering final judgment." *Union Steel v. United States*, 36 CIT ___, 836 F. Supp. 2d 1382, 1394 (2012); USCIT R. 54(b).[4] Upon further consideration, particularly the way the specific exclusion interacts with the general inclusion, the Court is no longer convinced that the (k)(1) factors are non-dispositive.

In a scope determination, the plain language of the order clarifies whether the item at issue is unambiguously included or excluded in the scope. *Novosteel SA v. United States*, 284 F.3d 1261, 1266 (Fed. Cir. 2002). It is well-established that the cornerstone in any scope determination is the language of the order itself. *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010). Commerce may not impermissibly expand the scope of the order. *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001). Issues regarding scope arise because "the descriptions of subject merchandise contained in [Commerce's] determinations must be written in general terms." 19 C.F.R. § 351.225(a). Accordingly, scope inclusions are written in general terms and then specific exclusions are carved out from the general terms. Some exclusions are qualified and some are not.

In *Legacy I*, this Court noted that the *Final Scope Ruling* determined that the "Heritage Court Bench had characteristics of both a chest—which would be included within the scope of the order—and also a bench—which would be excluded from the order." *Legacy I*, 807. F. Supp. 2d at 1356. While arguably falling under a residual defini-

[4] USCIT Rule 54(b), in pertinent part, provides:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and the parties rights and liabilities.

tion of a chest within the general scope language, the Heritage Court Bench is unambiguously a bench or seating furniture as listed in the scope exclusions. *WBF Order* at 332*; see also Remand Results* at 3, Pl.'s Opp'n at 2. Commerce acknowledged that the *WBF Order* defines chests but not benches. *Remand Results* at 3. Analyzing the scope language, only certain specified chests are included in the scope, but all benches—in fact all seating furniture—are unequivocally excluded from the scope. *WBF Order* at 332.

Because the scope language of an order starts with general inclusions and then carves out specific exclusions, when a product is generally included in a residual provision but yet specifically excluded from the scope, the specific should trump the general. The purpose of the explicit exclusions is to narrow the expanse of the general scope. Unequivocal exclusions are not loopholes; they are argued for and intentionally omitted from the scope. *Wheatland Tube*, 161 F.3d at 1371. To "allow Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation" would "frustrate the purpose of the antidumping laws." *Id*. (citing 19 U.S.C. § 1673 (1994) (requiring an injury determination by the ITC before the imposition of antidumping duties).

In the instant case, Plaintiff asserts that the product at issue is a "storage bench" while Commerce avers that it is a "bedroom chest." The scope language includes various types of "chests." Commerce argues the Heritage Court Bench falls under the general category of chest, which is the fifth enumerated item of subject merchandise under the scope language in the *WBF Order* : (5) chests-on-chests, highboys, lowboys, chests of drawers, *chests*, door chests, chiffoniers, hutches and armoires. *WBF Order* at 332 (emphasis added). Every chest listed under number five includes a footnote, which provides a narrative definition of the type of chest that is covered. Commerce determined that the Heritage Court Bench fits under the following definition:

> A chest is typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid.

*Id*. at 332, n.5. Looking at the plain language, the Court notes that the Heritage Court Bench is not "a case piece taller than it is wide featuring a series of drawers." Commerce determined, however, that the Heritage Court Bench fits squarely in the last phrase "designed as a large box incorporating a lid." *Remand Results* at 4. While the Court agrees that the shape of the Heritage Court Bench resembles a large

box, Plaintiff has placed on the record that the Heritage Court Bench is designed as seating furniture in the shape of a large box. Further, the Court notes that the plain reading of footnote 5 requires that a "case piece" be taller than it is wide, which does not encompass the Heritage Court Bench, and then be designed as a large box incorporating a lid, which generally describes the Heritage Court Bench. Moreover, the Court notes that the "lid" is actually a padded leather bench designed as seating furniture.

While it ambiguously fits under the qualified definition of chest found in footnote 5, the Heritage Court Bench unambiguously fits under the unqualified term "benches." The scope specifically excludes benches, listed as the third item under the first exclusion: "(1) Seats, chairs, *benches*, couches, sofas, sofa beds, stools *and other seating furniture*." *WBF Order* at 332 (emphasis added). The third enumerated item under the first exclusion is "benches" and there is even a basket provision for all other kinds of "seating furniture" under the scope exclusions, which highlights the intention that all seating furniture is to be excluded from the scope. *Id.* The exclusion of sofabeds provides insight that the key to the seating furniture exclusion is that an item—whether or not it has a typical bedroom-type function—have a seating function. Plaintiff pointed out that "the exclusion for benches (and other seating furniture) within the scope of the WBF Order is unqualified" and argued that "Commerce cannot seek now to interpret the WBF Order contrary to its plain terms." Pl.'s Opp'n at 6. Plaintiff proffered that "all the physical features of the Heritage Court Bench are consistent with that of a bench, and that the cedar-lined storage area is merely one feature it shares in common with some storage furniture." Pl.'s Opp'n at 5. The Court agrees.

Commerce stated that it "has determined in the past that additional features that do not change the primary nature of an 'in-scope' product do not serve to move that product outside of the scope of the order." *Remand Results* at 5 (quotations omitted) (citing *Color Television Receivers from Taiwan: Notice of Final Scope Ruling Couch Master International Corporation*, 63 Fed. Reg. 805, 806 (Jan. 7, 1998) ("*Color TVs*")). However, *Color TVs* involved a product that was "neither specifically included . . . nor excluded" while the product in the instant case is specifically excluded from the scope. 63 Fed. Reg. at 806. Therefore, *Color TVs* does not support Commerce's position. When a product is "specifically excluded from the antidumping duty order, that order could not be interpreted to cover it." *Nippon Steel Corp. v. United States*, 219 F.3d 1348 (Fed. Cir. 2000) (explaining the holding of *Wheatland Tube*).

While this Court originally sustained Commerce's determination that the (k)(1) factors are not dispositive in *Legacy I*, upon review of the *Remand Results* and upon further consideration, this Court remands this case for Commerce to reconsider the application of both the (k)(1) and (k)(2) factors because Commerce's *Remand Results* that the Heritage Court Bench falls within the scope are not supported by evidence on the record. The Court instructs Commerce to fully and objectively reconsider the record, make redeterminations based on the evidence in the record, and consistent with this opinion, and not merely repeat the original conclusions from the *Final Scope Ruling*.

## CONCLUSION

For the foregoing reasons, it is hereby

**ORDERED** that Commerce's determination that Legacy's Heritage Court Bench falls within the scope of the *WBF Order* is SET ASIDE, and it is further

**ORDERED** that Commerce's determination that the factors set out in 19 C.F.R. § 351.225(k)(1) are not dispositive of this scope determination is reopened for reconsideration, and it is further

**ORDERED** that this case is remanded to Commerce with instructions to make a redetermination that reconsiders scope language under 19 C.F.R. § 351.225(k)(1) in light of the Court's opinion, and it is further

**ORDERED** that this case is remanded to Commerce with instructions to make a redetermination that reconsiders each of the factors set out in 19 C.F.R. § 351.225(k)(2) in light of the Court's opinion, and it is further

**ORDERED** that the results of this redetermination on remand shall be filed no later than **Thursday, November 15, 2012** , and it is further

**ORDERED** that Plaintiff may file comments on such *Remand Results*, not to exceed 20 pages, and that such comments shall be filed no later than **Thursday, December 13, 2012** , and it is further

**ORDERED** that Defendant may file a reply to Plaintiff's comments, not to exceed 15 pages, and that such reply shall be filed no later than **Thursday, January 10, 2013.**

Dated: September 19, 2012
New York, New York

*/s/ Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 12–122

ITOCHU BUILDING PRODUCTS, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 11–00208

[Denying motion for judgment on the agency record in an action contesting final results of a changed circumstances review of an antidumping duty order]

Dated: September 19, 2012

*Ned H. Marshak*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for plaintiff. With him on the brief were *Mark E. Pardo*, *Joseph M. Spraragen*, *Andrew T. Schutz*, and *Bruce M. Mitchell*.

*Carrie A. Dunsmore*, Trial Counsel, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*. Of counsel on the brief was *Nathaniel J. Halvorson*, Attorney-International, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

## *OPINION*

**Stanceu, Judge:**

This litigation concerns an antidumping duty order issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or "the Department") on certain steel nails ("subject merchandise") from the People's Republic of China ("China"). Compl. ¶ 1 (July 21, 2011), ECF No. 8. At the request of the domestic industry, Commerce conducted a review of the order based on changed circumstances and revoked the order as to four types of steel nails.[1] *Certain Steel Nails From the People's Republic of China: Final*

[1] The merchandise now excluded from the order is described as follows:

(1) Non-collated (*i.e.*, hand-driven or bulk), two-piece steel nails having plastic or steel washers (caps) already assembled to the nail, having a bright or galvanized finish, a ring, fluted or spiral shank, an actual length of 0.500" to 8", inclusive; and an actual shank diameter of 0.1015" to 0.166", inclusive; and an actual washer or cap diameter of 0.900" to 1.10", inclusive.

(2) Non-collated (*i.e.*, hand-driven or bulk), steel nails having a bright or galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500" to 4", inclusive; an actual shank diameter of 0.1015" to 0.166", inclusive; and an actual head diameter of 0.3375" to 0.500", inclusive.

(3) Wire collated steel nails, in coils, having a galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500" to 1.75", inclusive; an actual shank diameter of 0.116" to 0.166", inclusive; and an actual head diameter of 0.3375" to 0.500", inclusive.

(4) Non-collated (*i.e.*, hand-driven or bulk), steel nails having a convex head (commonly known as an umbrella head), a smooth or spiral shank, a galvanized finish, an actual length of 1.75" to 3", inclusive; an actual shank diameter of 0.131" to 0.152", inclusive; and an actual head diameter of 0.450" to 0.813", inclusive.

*Results of Antidumping Duty Changed Circumstances Review*, 76 Fed. Reg. 30,101 (May 24, 2011) ("*Final Results of Changed Circumstances Review*"). Commerce made the partial revocation effective as of August 1, 2009 despite all parties to the proceeding having requested an earlier date, January 23, 2008. *Id.* at 30,102; Compl. ¶ 12. Plaintiff Itochu Building Products ("Itochu" or "IBP"), a U.S. importer of subject merchandise, claims that Commerce unlawfully chose the later date and seeks a remand directing that revocation occur as of the earlier date and that plaintiff's entries be liquidated accordingly. Compl. ¶ 3, Prayer for Relief.

Before the court is Itochu's USCIT Rule 56.2 motion for judgment upon the agency record. Pl.'s Rule 56.2 Mot. for J. upon the Agency R. (Dec. 5, 2011), ECF No. 19; Mem. of Law in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. (Dec. 5, 2011), ECF No. 19 ("Pl.'s Mem."). The court denies relief because plaintiff, although having informed the Department of its position in favor of the earlier effective date prior to the publication of the preliminary results of the changed circumstances review, declined to comment in response to the published notice of the preliminary results and thereby waived its previous objection to the later (August 1, 2009) effective date for the partial revocation of the order.

## *I. BACKGROUND*

On July 16, 2007, Commerce initiated an investigation of sales at less than fair value of certain steel nails from China. *Certain Steel Nails from the People's Republic of China & the United Arab Emirates: Initiation of Antidumping Duty Investigations*, 72 Fed. Reg. 38,816 (July 16, 2007). Commerce issued an affirmative preliminary less-than-fair-value determination on January 23, 2008. *Certain Steel Nails From the People's Republic of China: Prelim. Determination of Sales at Less Than Fair Value & Partial Affirmative Determination of Critical Circumstances and Postponement of Final Determination*, 73 Fed. Reg. 3,928 (Jan. 23, 2008). Commerce required, as of January 23, 2008, that all entries of subject merchandise be accompanied by cash deposits in the amount of estimated antidumping duties and instructed U.S. Customs and Border Protection ("Customs") to suspend liquidation of subject entries made on and after that date. *Id.* at 3,942. Commerce issued an affirmative final less-than-fair-value determination on June 16, 2008, *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less than Fair Value & Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (June 16, 2008), and, on August 1, 2008, pub-

*Certain Steel Nails From the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 76 Fed. Reg. 30,101 (May 24, 2011).

lished the antidumping duty order, *Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 44,961 (Aug. 1, 2008).

On September 22, 2009, Commerce initiated the first periodic administrative review of the antidumping duty order on steel nails from China. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Request for Revocation in Part*, 74 Fed. Reg. 48,224, 48,226 (Sept. 22, 2009). The review pertained to entries made from the first date on which liquidation was suspended, January 23, 2008, until July 31, 2009. *Id.*

On February 11, 2011, a domestic producer filed a request, on behalf of itself and the domestic industry, that Commerce revoke the order as to four types of nails through a changed circumstances review. *Certain Steel Nails From the People's Republic of China: Initiation & Prelim. Results of Antidumping Duty Changed Circumstances Review*, 76 Fed. Reg. 22,369 (Apr. 21, 2011) ("*Initiation Notice*"). That domestic producer, Mid Continent Nail Corporation ("Mid Continent"), sought, as an effective date for the proposed partial revocation, January 23, 2008, the date of the beginning of the suspension of liquidation of entries of subject merchandise. *Id.* at 22,371. Itochu requested the same effective date in a February 22, 2011 meeting with Commerce. *Id.* at 22,370. In a March 1, 2011 submission, another domestic producer, National Nail Corp., also requested the January 23, 2008 effective date. *Id.* No other parties participated in the changed circumstances review.

Commerce published the final results of the first administrative review of the order ("Final Results") on March 23, 2011. *Certain Steel Nails From the People's Republic of China: Final Results of the First Antidumping Duty Admin. Review*, 76 Fed. Reg. 16,379 (Mar. 23, 2011). Commerce then issued amended final results ("Amended Final Results") on April 26, 2011, responding to allegations of ministerial errors in the March 23 results. *Certain Steel Nails From the People's Republic of China: Amended Final Results of the First Antidumping Duty Admin. Review*, 76 Fed. Reg. 23,279 (Apr. 26, 2011).

On April 21, 2011, five days prior to the issuance of the amended final results of the administrative review, Commerce issued a combined notice of initiation of a changed circumstances review under Section 751(b) of the Tariff Act, 19 U.S.C. § 1675(b), and notice of the preliminary results of that review. *Initiation Notice*, 76 Fed. Reg. at 22,369. This notice announced that Commerce preliminarily had determined that the order would be revoked as to the four types of nails

identified by Mid Continent. *Id.* at 22,371. The notice acknowledged that Mid Continent requested revocation of the order as of January 23, 2008 but declined to adopt that date, stating that "the Department does not find this to be consistent with its recent practice." *Id.* The Department explained that its practice was "to revoke (in whole or in part) an antidumping duty order so that the effective date of revocation covers entries that have not been subject to a completed administrative review." *Id.* Commerce chose as the revocation date August 1, 2009, which it characterized as "the earliest date for which entries of certain steel nails have not been subject to a completed administrative review." *Id.*

Commerce provided an opportunity for comments on the April 21, 2011 notice, stating that "[i]nterested parties are invited to comment on these preliminary results. Written comments may be submitted no later than 14 days after the date of publication of these preliminary results." *Id.* Commerce then stated that it would "issue the final results of this changed circumstances review . . . no later than 270 days after the date on which this review was initiated, or within 45 days if all parties agree to our preliminary results. *See* 19 CFR 351.216(e)." *Id.*

On May 24, 2011, Commerce issued the final results of the changed circumstances review. Commerce announced that no comments had been received in response to the publication of the combined notice initiating, and announcing preliminary results of, the changed circumstances review, that the order would be revoked as to the four types of nails for which revocation had been requested, and that the partial revocation would take effect as of August 1, 2009. *Final Results of Changed Circumstances Review*, 76 Fed. Reg. at 30,101–02. In the notice announcing the final results of the review, the Department reiterated the reason for its choice of the August 1, 2009 effective date, stating that "[t]he Department's recent practice has been to select the date after the most recent period for which a review was completed or issued assessment instructions [*sic*] as the effective date." *Id.* at 30,102 n.5.

Challenging the decision to select the August 1, 2009 effective date, plaintiff brought this action by filing a summons on June 22, 2011 and a complaint on July 21, 2011. Summons, ECF No. 1; Compl. Itochu filed its motion for judgment on the agency record on December 5, 2011. On September 13, 2012, the court held oral argument on this motion.

## *II. DISCUSSION*

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 of any civil action commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006), including the present action challenging the final results of a review based on changed circumstances issued under section 751 of the Tariff Act, 19 U.S.C. § 1675(b). 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) (2006).

The essence of plaintiff's claims is that the Department acted contrary to law in refusing to adopt the requested effective date of January 23, 2008 and instead making the partial revocation of the order effective as of August 1, 2009. *See* Pl.'s Mem. 3 (claiming that the Department's decision "is contrary to administrative practice, judicial precedent, [and] basic principles of fairness, . . . is inconsistent with the fundamental purpose of the [antidumping duty] law," and lacks a rational basis). As relief, plaintiff seeks an order remanding to Commerce the final results of the changed circumstances review with instructions to issue new final results with an effective date of January 23, 2008 for the partial revocation and to direct Customs to liquidate plaintiff's entries of the excluded nails entered on an after that date without the assessment of antidumping duties. *Id*. at 35–36 and draft order.

Without reaching the question of whether the decision contested in this case was lawful, the court concludes that plaintiff is not entitled to relief on its claims. Itochu waived any objection to the decision Commerce reached on the question of the effective date for the partial revocation, as set forth in the final results of the changed circumstances review, when it declined to file comments in response to the combined notice of initiation and notice of preliminary results of that review.

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). It is appropriate here to require exhaustion because Commerce expressly invited comments in the notice announcing the preliminary results of the changed circumstances review. *Initiation Notice*, 76 Fed. Reg. at 22,371 ("Interested parties are invited to comment on these preliminary results. Written comments may be submitted no later than 14 days after the date of

publication . . . ."). When no party submitted comments, *Final Results*, 76 Fed. Reg. at 30,101, Commerce was justified in presuming that all interested parties now concurred in all aspects of the preliminary results of the changed circumstances review, including the choice of the effective date for the partial revocation, regardless of whether those interested parties earlier had voiced objection. In the absence of any party's taking a position contrary to the preliminary results, the Department adopted the preliminary results as the final results, without change. *Id.*

The exhaustion requirement and the related doctrine of waiver require an interested party to raise all relevant arguments at the time Commerce requests comments, even if the party raised an argument previously. *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). As the Supreme Court has explained, "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should 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." *L.A. Tucker Truck Lines*, 344 U.S. at 37.

In *Mittal Steel Point Lisas*, the Court of Appeals held that Gerdau Ameristeel Corp., a defendant-intervenor in litigation arising out of an antidumping duty order, waived its earlier-expressed argument that Commerce should calculate an exporter's credit expenses based on export date rather than invoice date. 548 F.3d at 1382–83. Gerdau Ameristeel had raised that argument in the proceedings before Commerce and again in litigation before this Court. *Id.* After Commerce on remand decided to calculate credit expenses based on invoice date, Gerdau Ameristeel failed to preserve its position when it did not take the opportunity to comment on the draft remand results. *Id.* Despite having raised its argument earlier, "Gerdau was procedurally required to raise the issue before Commerce at the time Commerce was addressing the issue." *Id.* In a similar manner, Itochu waived its objection to an effective date of August 1, 2009 by not commenting in response to the notice announcing the preliminary results of the changed circumstances review. Due to the failure to exhaust administrative remedies, it is appropriate that the court deny relief on Itochu's claims.

Plaintiff advances several reasons why the court should not apply the exhaustion requirement in this case. First, plaintiff points out that the notice announcing the preliminary results of the changed circumstances review did not solicit case briefs pursuant to 19 U.S.C.

§ 309(b)(1) and did not cite 19 C.F.R. § 351.309(c), a provision in the Department's regulations that, in paragraph (2), instructs parties that "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results." Pl.'s Reply to Def.'s Opp'n to Rule 56.2 Mot. for J. upon the Agency R. 6–8 (Mar. 16, 2012), ECF No. 27. ("Pl.'s Reply"). Plaintiff does not argue that Commerce was *required* by its regulations to take these steps (and the court would *see* no merit in such an argument), instead arguing that had Commerce cited § 351.309(c) and advised all parties of the requirement to file case briefs, "Plaintiff would have been on notice that it arguably would lose its opportunity to challenge the Department's determination in this Court by not filing a post-preliminary Case Brief." *Id.* at 8. This argument is unconvincing. The requirement to exhaust administrative remedies arose from the exhaustion doctrine as codified in 28 U.S.C. § 2637(d), independently of § 351.309(c)(2). The requirement to exhaust administrative remedies therefore applies in this case despite the lack of a reference to § 351.309(c) in the notice announcing the preliminary results of the changed circumstances review.

In this case, Commerce cannot be faulted for the manner in which it requested comments. The regulation provides that "[a]ny interested party . . . may submit a 'case brief'" in response to "publication of the preliminary results" of a changed circumstances review, § 351.309(c)(1)(ii), and Itochu was free to file a case brief, if it so chose, within the 14-day time limit set forth in the Department's notice. Commerce did not exceed its discretion by inviting comments without requiring that such comments be in the form of case briefs. Nor can Commerce's exercising its discretion in this way reasonably be construed as an indication that an interested party need not file comments in order to preserve its position for a future judicial challenge to the final results of the changed circumstances review.

Plaintiff argues, next, that any attempt it might have made to convince the Department to change its mind on the issue of the effective date "would have been an exercise in futility." Pl.'s Reply 8. Futility is a recognized exception to the exhaustion requirement, but it is a narrow one and is not satisfied merely by circumstances indicating that an agency would be unlikely to adopt the position a party failed to assert. *Corus Staal BV v. United States*, 502 F. 3d 1370, 1379 (Fed. Cir. 2007). Here, Commerce specifically requested comments on the preliminary results of the changed circumstances review and did not indicate in its notice that there would be no possibility of a change in position on the effective date issue.

Third, Itochu maintains that its filing comments objecting to the August 1, 2009 effective date "would have resulted in a needless 225 day delay in revocation," Pl.'s Reply 8, and at oral argument asserted that Itochu would have be prejudiced financially by the resulting delay in receiving refunds of duty deposits on its entries. This argument is also unconvincing. The Department's regulations, in 19 C.F.R. § 315.216(e), provide for an expedited issuance of final results, *i.e.*, within 45 days, "if all parties to the proceeding agree to the outcome of the review," and provide otherwise that the final results will issue in 270 days. It was reasonable for Commerce to construe the words "outcome of the review," as it apparently did here, to refer to the preliminary results. Moreover, the delay posited by Itochu rests on speculation. Although it is possible that Commerce would have taken the full 270 days had any party raised any objection, it is also possible that Commerce would not have required the full period. Itochu could have attempted to protect its interests by filing a short comment submission preserving its position on the effective date but also urging that Commerce, in any event, issue its final results as expeditiously as possible.

Plaintiff also asserts the "pure legal question" exception to the exhaustion requirement, arguing that "[i]n the instant case, IBP argued before the Department that as a matter of law the Department was required to revoke the [antidumping duty] order as of the date requested by Petitioner and to apply that decision to all unliquidated entries." Pl.'s Reply 10. Plaintiff argues, further, that "[t]he issue raised by IBP did not require any additional fact finding by the Department and judicial review would not be significantly aided by an additional administrative decision on this issue." *Id.* at 11. This argument fails because Commerce was *not* required by law to revoke the order as of the date requested by the petitioner. *See* 19 U.S.C. § 1675(d)(3). The date of revocation is a matter for the Department's reasonable exercise of discretion, not a pure question of law.

Here, Commerce provided only a cursory explanation of its reason for exercising its discretion in the way that it did (referring only to a recent practice), but the court will not review that reasoning on the merits when plaintiff, like the other interested parties, lodged no formal objection to the August 1, 2009 effective date in response to the published notice. In these circumstances, the court's reviewing the adequacy of the Department's reasoning would be particularly unfair to Commerce, whose dispensing with a better explanation is more understandable than it would have been had plaintiff filed such a formal objection. As the court observed previously, Commerce was justified, at the close of the comment period, in presuming that Itochu

no longer objected to the decision to make the partial revocation effective as of August 1, 2009 rather than January 23, 2008.

## *III. CONCLUSION*

In summary, plaintiff failed to exhaust its administrative remedies prior to bringing its judicial challenge to the final results of the changed circumstances review when it declined to file comments in response to the Department's published notice announcing the preliminary results. In so doing, plaintiff waived any claims pertaining to the Department's choice of effective date for the partial revocation of the order. Considering all relevant circumstances, the court finds on the record before it no justification for making an exception to the exhaustion requirement. Pursuant to USCIT Rule 56.2, the court will enter judgment in favor of defendant.

Dated: September 19, 2012
New York, New York

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