# U.S. Customs and Border Protection

Slip Op. 12–135

JIANGSU CHANGBAO STEEL TUBE CO., LTD. and JIANGSU CHANGBAO PRECISION TUBE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and TMK IPSCO et al., Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Court No. 10–00180
**PUBLIC VERSION**

[Final determination of sales at less than fair value sustained.]

Dated: November 14, 2012

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## *OPINION*

**Pogue, Chief Judge:**

In this action, Plaintiffs seek review of certain determinations made by the United States Department of Commerce ("Commerce") during an antidumping investigation of oil country tubular goods ("OCTG" or "subject merchandise") from the People's Republic of China ("China" or "PRC").[1] Currently before the court is Plaintiffs'

[1] *See Certain Oil Country Tubular Goods from the People's Republic of China*, 75 Fed. Reg. 20,335 (Dep't Commerce Apr. 19, 2010) (final determination of sales at less than fair value,

Jiangsu Changbao Steel Tube Co., Ltd. and Jiangsu Changbao Precision Tube Co., Ltd. (collectively "Changbao") motion pursuant to USCIT Rule 56.2 for judgment on the agency record. Specifically, Plaintiffs challenge Commerce's decision to apply to Changbao the antidumping duty cash deposit rate that was calculated for the China-wide entity, rather than assigning to Changbao a separate rate based at least in part on information it submitted. *See* Mem. Supp. Pls.' Mot. for J. on Agency R. under Rule 56.2, ECF No. 63 ("Pls.' Br.").[2] The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2006),[3] and 28 U.S.C. § 1581(c) (2006).

As explained below, Commerce reasonably determined to disregard Changbao's separate rate application as unreliable. Commerce reached this determination based on findings that neither Changbao nor its computer accounting software could be relied upon to furnish truthful and accurate information. These findings reflected Changbao's eleventh-hour revelation that it maintained two contradictory sets of certain records and concealed this fact when Commerce examined Changbao's accounting software. Because these findings are supported by a reasonable reading of the record, the court sustains Commerce's *Final Determination*.

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affirmative final determination of critical circumstances and final determination of targeted dumping), Admin. R. Pub. Doc. 461 ("Final Determination") and accompanying unpublished Issues and Decision Memorandum, A-570–943, POI 10/1/08 – 3/31/09 (Apr. 13, 2010), Admin. R. Pub. Doc. 459, *available at* http://ia.ita.doc.gov/frn/summary/PRC/2010–8994–1.pdf (last visited October 9, 2012) ("*I & D Mem*.") (adopted in the *Final Determination*, 75 Fed. Reg. at 20,336).

[2] Plaintiffs' brief discusses additional matters that are no longer before the court in this action. *See* Order (Aug. 31, 2011) ECF No. 80. This opinion does not address those matters.

Also pending is Defendant-Intervenors' TMK IPSCO, V&M Star L.P., Evraz Rocky Mountain Steel, and the United Steelworkers motion pursuant to USCIT Rule 11, for sanctions against Changbao and its present counsel. *See* Mot. for Sanctions, ECF No. 108. Defendant-Intervenors argue that, because Changbao admitted to deceiving Commerce during verification, it has no colorable argument that Commerce's rejection of Changbao's submissions, when calculating Changbao's dumping margin, was not supported by substantial evidence. *Id.*

Upon due consideration of Defendant-Intervenors' motion, Changbao's response thereto, and the administrative record of this proceeding, the motion for sanctions is denied. In the circumstances presented, Changbao's challenge to Commerce's decision to reject all of Changbao's data is not so frivolous as to warrant sanctions. *See, e.g.*, *Since Hardware (Guangzhou) Co. v. United States*, No. 09–00123, 2010 WL 3982277 (CIT Sept. 27, 2010) (remanding Commerce's decision to reject the totality of a respondent's submissions, notwithstanding the fact that this respondent had intentionally deceived Commerce in some of its submissions).

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

## BACKGROUND

When investigating imports from China, Commerce employs a methodology specific to non-market economies ("Commerce's NME methodology"). *Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002). One aspect of Commerce's NME methodology is that exporters are presumed to operate under government control (the "presumption of government control") and must submit reliable evidence to the contrary in order to receive an antidumping duty rate that is separate from the countrywide entity ("separate rate status"). *Id*. (citing *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997)). Here Plaintiffs are challenging Commerce's decision to disregard as unreliable the totality of Changbao's submissions in this investigation, including in particular submissions in support of Changbao's application for separate rate status. *See* Pls.' Br.; *Final Determination*, 75 Fed. Reg. at 20,339.

Commerce's unreliability determinations with regard to Changbao were based on the discovery that Changbao had willfully deceived Commerce when submitting its factors of production data.[4] Changbao had initially reported using both alloy and non-alloy steel billets to produce the subject merchandise,[5] but subsequently recanted these submissions, contending that, during the period of investigation ("POI"), Changbao used alloy billets exclusively. *Changbao Mem*. at 3 (citing Changbao's Pre-Preliminary Cmts., A-570–943, POI 08–09 (Oct. 28, 2009), Admin. R. Con. Doc. 143 [Pub. Doc. 306], at 2 n.2). Preliminarily accepting Changbao's separate rate application, Commerce responded to Changbao's FOP submission by tentatively valuing Changbao's billets exclusively as alloy billets, but noted that it "intend[ed] to pursue this issue at verification".[6]

During verification, Changbao provided Commerce with certain mill test certificates ("MTCs") to support the chemical composition that Changbao claimed for its billets, and Commerce compared these

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[4] Absent certain exceptions not applicable here, the normal value of NME merchandise is generally determined based on the value of the factors of production ("FOP") utilized in producing such merchandise in a surrogate market economy. *See* 19 U.S.C. § 1677b(c).

[5] Memorandum Re Application of Total Adverse Facts Available for [Changbao] in the Antidumping Duty Investigation of [OCTG] from [China], Admin. R. Con. Doc. 219 [Pub. Doc. 456] (Apr. 8, 2010) ("*Changbao Mem.*") (incorporated by reference in the *Final Determination*, 75 Fed. Reg. at 20,337, and in the *I & D Mem.* Cmt. 30 at n. 416) at 3 (citing Ex. 3 to Changbao's Cmts. re Surrogate Values, A-570–943, POI 08–09 (Sept. 11, 2009), Admin. R. Con. Doc. [Pub. Doc. 262] and Changbao's Resp. to Pet'rs' Cmts. re Surrogate Values (Sept. 18, 2009) at 2).

[6] *Certain Oil Country Tubular Goods From the People's Republic of China*, 74 Fed. Reg. 59,117, 59,129 (Dep't Commerce Nov. 17,2009) (notice of preliminary determination of sales at less than fair value, affirmative preliminary determination of critical circumstances and postponement of final determination) ("*Preliminary Determination*").

hardcopy MTCs to the versions maintained in Changbao's computer accounting system.[7] When questioned regarding apparent discrepancies between the MTCs provided to Commerce during verification and documents accompanying U.S. entries of Changbao's subject merchandise during the POI, Changbao denied having any relevant knowledge beyond the fact that Changbao's customers, not Changbao, generally complete entry documents. *Changbao Mem.* at 4 (citing *Changbao Verif. Rep.* at 29).

After verification, however, Defendant-Intervenors TMK IPSCO, V&M Star L.P., Wheatland Tube Corp., Evraz Rocky Mountain Steel, and the United Steel Workers ("Petitioners") sought "to rebut the authenticity of the MTCs placed on the record by Changbao and statements made by Changbao officials during the verification." *Changbao Mem.* at 4 (citing Rebuttal Cmts. Re Changbao Verif. Rep., A-570–943, POI 08–09 (Feb. 22, 2010), Admin. R. Con. Doc. 183 [Pub. Doc. 390] ("*Pet'rs' Cmts. Re Changbao Verif.*")). Petitioners' submission included an MTC that TMK claimed accompanied OCTG produced by Changbao and imported into the United States. *Id*. This MTC was issued for OCTG imported shortly before the POI and corresponded to a steel grade reviewed at Changbao's verification (grade "K55"), but, unlike the MTCs provided by Changbao to Commerce during verification, this MTC "did not contain the requisite levels of manganese, vanadium, or boron to qualify the OCTG as alloy steel." *Id.* ; *see Pet'rs' Cmts. Re Changbao Verif.* at 2. In addition to this MTC, Petitioners' submission also included an affidavit affirming that the OCTG in question was analyzed and that it was determined that this OCTG was non-alloy steel. *Id.* Petitioners therefore asserted that Changbao's representations to Commerce to the contrary were fraudulent. *Id.*

Changbao responded to Petitioners' allegations of fraud by submitting "all grade K55 OCTG laboratory test reports corresponding to all customers, in all markets for the [POI]," contending that, contrary to the MTC submitted by the Petitioners, all of Changbao's K55 OCTG during this period contained the requisite levels of boron to qualify the OCTG as alloy steel. *Id.* at 4–5 (citing Exs. 1 and 2 to Changbao's Rebuttal to Pet'rs' Feb. 22, 2010 Cmts., A-570–943, POI 08–09 (Mar. 4, 2010), Admin. R. Con. Doc. 192 [Pub. Doc. 414]).

Seeking clarification, Commerce requested from U.S. Customs and Border Protection ("Customs"), and placed on the record, certain data

[7] *Changbao Mem.* at 3–4 (citing Verification Report of the Sales & Factors of Production Responses of [Changbao] in the Antidumping Duty Investigation of [OCTG] from [China], A-570–943, POI 08–09 (Feb. 16, 2010), Admin. R. Con. Doc. 181 [Pub. Doc. 385] ("*Changbao Ver. Rep.*") at 25–26 and Exs. 8, 11, 12, 23, 26, 31 and 41).

pertaining to imports of Changbao's subject merchandise during the POI, including "MTCs for three of Changbao's sales of subject merchandise during the POI." *Changbao Mem.* at 5; *see* Release of [Customs] Information, A-570943, POI 08–09 (Mar. 9, 2010), Admin. R. Con. Doc. 199 [Pub. Doc. 422] ("*Customs Data*"). One of the MTCs that Commerce received from Customs corresponded to a U.S. sale that Commerce had reviewed during Changbao's verification. *Changbao Mem.* at 5. With regard to this sale, a comparison of the MTC received from Customs and the MTC provided by Changbao "demonstrated discrepancies between the two MTCs." *Id*. (citing Ex. 8 to *Changbao Verif. Rep*.); *see also Customs Data*. Specifically, the MTC received from Customs indicated that the imported OCTG was produced from non-alloy steel, not alloy steel as Changbao had reported to Commerce. *Id.*[8] In addition, the remaining two MTCs received from Customs for Changbao's sales of subject merchandise during the POI also indicated use of non-alloy steel. *Id.*

Responding to Commerce's release of this new information from Customs, Changbao admitted that, contrary to its representations during verification, Changbao was in fact aware of material discrepancies between the MTCs submitted to Commerce and those accompanying Changbao's subject entries, and Changbao also knew how these discrepancies were created. *See* Changbao's Cmts. on [Customs] Data, A-570–943, POI 08–09 (Mar. 11, 2010), Admin. R. Con. Doc. 203 [Pub. Doc. 429] ("*Changbao's Mar. 11 Cmts.*").[9] Counsel for Changbao argued that "[t]hough [Changbao's] practice [in this regard] is regrettable, it does not contradict [Commerce]'s verification findings regarding the [composition] of Changbao's billets." Id. at 6. Changbao also suggested that the issue of Changbao's actual billet composition be resolved by Commerce conducting its own independent and party-neutral analysis of Changbao's OCTG. *See id.* at 7.

Commerce disagreed, finding instead that the nature and timing of Changbao's admission implicated the overall credibility of Changbao officials, as well as the reliability of Changbao's computer accounting software, which had corroborated Changbao's material misrepresentations during verification. *See Changbao Mem.* at 11–12. Commerce found Changbao's explanation – referring to a concern for protecting

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[8] In particular, the MTC received from Customs demonstrated [[
]]. *Id*.

[9] Changbao contended that "the discrepancies with the [MTCs obtained from Customs] arise from Changbao having [[

]]." *Id.* at 2; *see also id.* at 6 ¶5 (titled "Manual Adjustment of Mill Certificates Issued to Customers to Protect Trade Secrets").

Changbao's commercially-sensitive trade secrets – unsatisfactory, because Changbao should have known that all business proprietary information would be protected by the investigation's administrative protective order. *See id.* at 9. Finding that no additional verification could reasonably be accomplished within the applicable deadlines for completing the investigation, Commerce invoked its authority under 19 U.S.C. §§ 1677e(a) and 1677m(d) to disregard the totality of Changbao's unreliable and unverifiable submissions. *See id.* at 11–12.

The totality of responses that Commerce disregarded included Changbao's application for an antidumping duty rate separate from the China-wide entity. *Final Determination*, 75 Fed. Reg. at 20,339; *Changbao Mem.* at 13–14. Having disregarded Changbao's separate rate application as unreliable, Commerce found that Changbao had failed to submit credible evidence sufficient to rebut the presumption of government control, and thus determined to treat Changbao as part of the China-wide entity for purposes of this investigation. *Id*. Commerce therefore assigned to Changbao the 99.14 percent antidumping duty rate calculated for the China-wide entity. *Final Determination*, 75 Fed. Reg. at 20,341.[10] Plaintiffs contend that Commerce instead should have assessed a separate rate for Changbao, based at least in part on data submitted by Changbao. Pls.' Br.

## STANDARD OF REVIEW

When reviewing Commerce's antidumping determinations under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), this Court sustains Commerce's determinations, findings, or conclusions 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). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–78 (1951)).

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[10] The China-wide rate was calculated based on an adverse inference that was not specific to Changbao, but rather was based on the China-wide entity's own failure to respond to questionnaires. *Preliminary Determination*, 74 Fed. Reg. at 59,124–25. This rate was corroborated with respect to the China-wide entity as a whole. *Final Determination*, 75 Fed. Reg. at 20,339–40. Plaintiffs do not address the methodology or evidence used in Commerce's calculation of the China-wide rate in this investigation. *See* Pls.' Br.; *cf. Watanabe Gr. v. United States*, No. 09–00520, 2010 WL 5371606, at *4 (CIT Dec. 22, 2010) (addressing a challenge to Commerce's corroboration of the chosen China-wide rate). Accordingly, Commerce's selection of this China-wide rate – as opposed to the application of this rate to Changbao – is not at issue in this proceeding.

## DISCUSSION

Pursuant to the antidumping statute, Commerce is authorized to disregard a respondent's submissions in favor of facts otherwise available ("FA") if Commerce finds that the respondent withheld information; failed to provide information within applicable deadlines and in the form and manner requested; submitted information that could not be verified; or otherwise impeded the investigation; and then failed to adequately explain or remedy the deficiency. 19 U.S.C. §§ 1677e(a)(2) (deficiency), 1677m(d) (remedy). Where the deficiency identified under Section 1677e(a)(2) affects discrete areas of the administrative record, Commerce may use FA to fill these "gaps in the record." Uruguay Round Agreements Act Statement of Administrative Action, H.R. Rep. No. 103–316, at 869–70 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198–99 ("SAA"). On the other hand, where the deficiency affects the reliability of all or most of a respondent's submissions, Commerce may disregard the totality in favor of FA. *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 199 n.13, 360 F. Supp. 2d 1339, 1348 n.13 (2005). Commerce may not, however, decline to consider any submission that, though partially deficient, satisfies all of the criteria listed in Section 1677m(e) – *i.e.*, Commerce must give consideration to submissions which 1) were submitted by the established deadline; 2) can be verified; 3) are not so incomplete that they are unreliable; 4) are submitted by a party who has demonstrated that it acted to the best of its ability in providing the information and meeting the established requirements; and 5) can be used without undue difficulties. 19 U.S.C. § 1677m(e).

Once Commerce determines that the conditions established by subsections 1677e(a), 1677m(d) and 1677m(e) are met and that resort to FA is appropriate, Commerce may employ an adverse inference when selecting among the facts available if it further determines that the respondent failed to cooperate by not acting to the best of its ability to comply with Commerce's Court No. 10–00180 Page 14 requests for information. 19 U.S.C. § 1677e(b) (the "adverse inference" provision).[11]

In this case, Commerce invoked all four of Section 1677e(a)(2)'s alternate prerequisites for authorization to discard Changbao's responses in favor of FA. Commerce found that Changbao withheld

[11] The adverse inference provision, however, may be invoked only when selecting from among the facts available, not when deciding whether resort to FA is necessary. 19 U.S.C. § 1677e(a) and (b); *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011) ("Commerce first must determine that it is proper to use facts otherwise available before it may apply an adverse inference."). When the adverse inference provision is invoked, Commerce selects adverse facts available ("AFA") to make its determination. 19 U.S.C. § 1677e(b).

information; failed to provide information in a timely manner and in the form and manner requested; submitted information that could not be verified; and otherwise impeded the investigation. *Changbao Mem.* at 8–11. These findings were all based on Changbao's late admission that Changbao officials had lied to Commerce during verification and failed to disclose the existence of Changbao's dual record-keeping system. *Id.* ; *see Changbao's Mar. 11 Cmts*. at 6–7. Commerce found that the nature and timing of Changbao's deception impeached the credibility of Changbao officials, as well as the reliability of the accounting software examined during verification. *Changbao Mem.* at 11. Finding Changbao's explanation for the deficiency not credible and Changbao's proposed remedy impractical, Commerce invoked its authority under Sections 1677e(a) and 1677m(d) to disregard the totality of Changbao's submissions in this investigation as unreliable. *See id.* at 9, 11. In addition, finding that none of Changbao's submissions could be verified without undue difficulty, Commerce concluded that Section 1677m(e) was not applicable. *See id.* at 10, 11. Finally, Commerce invoked the adverse inference provision to further support its decision to disregard Changbao's responses. *Id*. at 12–14. The totality of responses disregarded by Commerce included Changbao's application for a rate separate from the countrywide entity. *Id*. at 13–14; *Final Determination*, 75 Fed. Reg. at 20,339.

Prior to invoking the adverse inference provision, Commerce explained that its decision to disregard Changbao's responses was based on its findings that neither Changbao nor its computerized record-keeping system could be relied on to provide truthful and accurate information. *Changbao Mem*. at 11–12. Commerce therefore found that Changbao had failed to submit credible evidence sufficient to rebut the presumption of government control, and thus determined to treat Changbao as part of the China-wide entity for purposes of this investigation. *Id*. at 13–14; *see Transcom*, 294 F.3d at 1373 (explaining that the presumption of government control applies to NME respondents in the absence of reliable rebutting evidence) (citing *Sigma*, 117 F.3d at 1405–06 (upholding application of presumption of government control to NME respondents)).[12]

[12] In its Issues and Decision Memorandum, Commerce stated that it was invoking the adverse inference provision with regard to the China-wide entity based on a finding that Changbao failed to cooperate in this investigation. *See I & D Mem*. cmt. 30 ("[W]e find that Changbao is part of the PRC-wide entity for purposes of this investigation. . . . Accordingly, [Commerce] must now apply adverse facts available to the PRC entity, which includes Changbao."). This statement is incorrect. Rather, as Commerce explained in the *Final Determination*, the China-wide rate had been calculated based on an adverse inference employed in the *Preliminary Determination*, and the *Final Determination* had left this rate

Plaintiffs challenge Commerce's determination to apply to Changbao the antidumping duty cash deposit rate that was calculated for the China-wide entity, contending that the findings on which Commerce based its decision to disregard Changbao's separate rate application were not supported by substantial evidence. *See* Pls.' Br. Specifically, Plaintiffs take issue with Commerce's findings that I) Changbao withheld information, *Changbao Mem*. at 8–9; *see* 19 U.S.C. § 1677e(a)(2)(A); II) the scope of this deficiency, within the meaning of Sections 1677e(a)(2) and 1677m(d), extended to all of Changbao's representations, submissions, and databases examined at verification, including the proffered evidentiary support for Changbao's separate rate application, *Changbao Mem*. at 11, 13; III) Changbao failed to credibly explain and adequately remedy the deficiency, *Changbao Mem*. at 9; *see* 19 U.S.C. § 1677m(d); IV) none of Changbao's submissions could be verified without undue difficulty, *Changbao Mem*. at 11; *see* 19 U.S.C. § 1677m(e); V) Changbao failed to cooperate in this investigation, *Changbao Mem*. at 12–14, *see* 19 U.S.C. § 1677e(b); and VI) a presumption of government control, and with it the China-wide rate, applied to Changbao, *Changbao Mem*. at 14.

For the reasons explained below, the court sustains each challenged finding. Taken together, these findings provide sufficient support for Commerce's decision to disregard Changbao's separate rate application and apply to Changbao the China-wide rate pursuant to the presumption of government control. *See* 19 U.S.C. §§ 1677e(a)(2), 1677m(d), 1677m(e); *Transcom*, 294 F.3d at 1373. The court considers each finding in turn.

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unchanged. *Final Determination*, 75 Fed. Reg. at 20,339. As the *Preliminary Determination* was issued before Commerce determined to disregard all of Changbao's submissions, the China-wide rate was calculated while Changbao still enjoyed tentative separate rate status. *See Preliminary Determination*, 74 Fed. Reg. at 59,124–25 and 59,129–30. Then, after the evidentiary support for Changbao's separate rate status had been invalidated and Commerce determined to treat Changbao as part of the China-wide entity, Commerce simply applied the rate already calculated for that entity to Changbao. *Final Determination*, 75 Fed. Reg. at 20,339–41. Therefore it is confusing to imply, as the Issues and Decision Memorandum does, that Changbao's behavior in this investigation had anything to do with how the China-wide rate was calculated. Nevertheless, this misstatement is not pertinent because the issue is corrected in the *Final Determination*. *Id*. at 20,339. As explained in the *Final Determination*, Commerce did not invoke the adverse inference provision to calculate Changbao's margin. Rather, Commerce determined that, based on the presumption of government control operating in the absence of credible evidence to the contrary, Changbao was not entitled to a separate rate. *Id*. Commerce therefore did not calculate a separate dumping margin for Changbao, but rather assigned to Changbao the rate calculated for the China-wide entity. *Id.*

I. *Commerce's Determination that Changbao Withheld Information Requested of It*

The first issue concerns Commerce's determination that Changbao withheld information requested of it in this investigation. *Final Determination*, 75 Fed. Reg. at 20,339; *see* Pls.' Br. at 14–18. Commerce explained that its determination was based on Changbao's admission that it intentionally deceived Commerce officials during verification and failed to disclose the existence of Changbao's dual record-keeping system. *See Changbao Mem.* 8–10. Commerce emphasized that "[a]t no point during the verification, or in any of its submissions to [Commerce] (until after release of the [Customs] data) did Changbao acknowledge that it maintained two versions of its OCTG-related MTCs," *id.* at 9, even when Commerce specifically asked Changbao to explain why its statements concerning the subject merchandise's chemical properties appeared to diverge from documentation accompanying Changbao's subject merchandise during the POI. *Id*. (citing *Changbao Verif. Rep.* at 29 and Ex. 8).

Although, contrary to Changbao's representations, the certificates that Changbao provided to Commerce at verification did not in fact accompany any subject merchandise during the POI, Changbao argues that no information was withheld because the provided certificates nevertheless accurately reflected the chemical composition of the subject merchandise. Pls.' Br. at 15. But Changbao's argument misses the point. What Changbao withheld from Commerce was its undisclosed maintenance of – and so its willingness and ability to maintain and conceal – at least two materially different sets of the same records.[13] *Changbao Mem.* at 9.

It was reasonable for Commerce to determine that Changbao withheld information requested of it when Commerce discovered that Changbao officials had lied during verification, claiming that the mill test certificates provided to verifying officials were those that accompanied the invoices of sales under investigation, while knowing that this was not true. *Changbao Mem.* at 9; *Changbao Verif. Rep.* at 29. *Cf., e.g.*, *Universal Polybag Co. v. United States*, 32 CIT 904, 913, 577 F. Supp. 2d 1284, 1294 (2008) (holding that Commerce reasonably found that a respondent withheld information requested of it where the respondent represented that a report was unchanged from its prior version while knowing that the report contained undisclosed corrections). Commerce's finding that Changbao withheld information within the meaning of 19 U.S.C. § 1677e(a)(2)(A) is therefore sustained.

[13] Changbao also withheld its willingness and ability to [[ ]]. *See Changbao's Mar. 11 Cmts*.

II. *Commerce's Determination that Deficiency Implicated the Totality of Changbao's Submissions*

Next, Plaintiffs challenge Commerce's determination that the information withheld by Changbao implicated the credibility and reliability of all of Changbao's submissions in this investigation, including the credibility of all Changbao officials questioned and the reliability of all records examined during verification. Pls.' Br. at 20–24.

Commerce found that the extent of Changbao's deception during verification impeached Changbao's overall credibility because "not only did Changbao not divulge the existence of the two . . . contradictory [sets of] MTCs, at verification, it actively substituted one set of MTCs for another and, then, directly misrepresented the nature of the information it was providing to [Commerce]." *Changbao Mem.* at 11. Given these circumstances, Commerce found that Changbao officials were not reliable sources of truthful and accurate information. *Id*. Further, because Commerce's review of Changbao's electronic record-keeping system during verification had also failed to disclose that Changbao maintains two contradictory sets of MTCs, Commerce additionally concluded that "the veracity of the remaining information [that Commerce] viewed at verification [and] that was based on this electronic data system" had also been impeached. *Id*. Thus, Commerce emphasized that Changbao 1) failed to disclose that Changbao maintains two different sets of mill test certificates; 2) substituted one set of certificates for another and intentionally lied to Commerce about the nature of the certificates; 3) failed to disclose that the accounting software examined during verification corroborated Changbao's misrepresentations and did not reveal the existence of a dual record-keeping system; and 4) failed to apprise Commerce of these factual circumstances until Commerce itself placed evidence on the record tending to contradict Changbao's representations during verification. *Id*. Given these circumstances, Commerce determined that the credibility of Changbao officials and the reliability of records examined at verification had been called into question. *Id*.

It is reasonable for Commerce to infer that a respondent who admits to having intentionally deceived Commerce officials, and does so only after Commerce itself supplies contradictory evidence, exhibits behavior suggestive of a general willingness and ability to deceive and cover up the deception until exposure becomes absolutely necessary. Here, Commerce determined that, in the absence of additional reassurance or an explanation sufficient to rehabilitate Changbao's damaged credibility, Commerce had no way of knowing whether or

not Changbao may have been less than straightforward with regard also to its remaining submissions and representations in this investigation. *See Changbao Mem*. at 11. In addition, as with Changbao's written and oral representations, Changbao's evident willingness and ability to engineer an electronic record-keeping system that corroborates its misrepresentations, and to conceal this fact from Commerce until confronted with contradictory evidence, *id*., supports a reasonable inference that the information previously verified using this electronic database was also no longer reliable.

In sum, the inference that a respondent's failure to disclose willful deception until faced with contradictory evidence implicates the reliability of that respondent's remaining representations is reasonable. *See Shanghai Taoen*, 29 CIT at 199 n.13, 360 F. Supp. 2d at 1348 n.13. Given that inference, Commerce's determination that a deficiency in credibility affected the totality of Changbao's submissions was Court No. 10–00180 Page 23 supported by the record. Accordingly, this determination is sustained.

## III. *Commerce's Determination that Changbao's Explanation Was Not Credible and Changbao's Proposed Remedy Was Impractical*

Next, Changbao challenges Commerce's finding that Changbao failed to credibly explain and adequately remedy the deficiency, within the meaning of Section 1677m(d). *See* Pls.' Br. 18–20. Although the circumstances on which Commerce's credibility findings were based did not come to light until months after verification, and only about a month before publication of Commerce's *Final Determination, see Changbao Mem*. at 9, 11; *Changbao's Mar. 11 Cmts*, Commerce provided Changbao with an opportunity to rehabilitate its impeached credibility and/or provide a credible explanation to rehabilitate the impeached credibility of its accounting software, notwithstanding the time constraint. *See Changbao Mem.* at 5.

Changbao's explanation for deceiving Commerce officials and covering up the deception until Commerce itself placed contradictory evidence on the record referred to Changbao's need to protect commercially-sensitive trade secrets.[14] Commerce reasonably found

[14] Changbao's explanation was that the certificates provided to Changbao's customers, which accompanied Changbao's subject merchandise into the United States, [[ ]], whereas the certificates that Changbao provided to Commerce accurately reflected the chemical composition of Changbao's steel billets. *Changbao's Mar. 11 Cmts*. at 6 ¶5 (titled "Manual Adjustment of Mill Certificates Issued to Customers to Protect Trade Secrets") and Ex. 1 (Decl. of Lanyong Zhang). Charitably read, Changbao's explanation for withholding this information and instead lying to Commerce officials during verification was that Changbao did not wish to divulge any trade secrets. *See Changbao Mem*. at 9; *see also* Pls.' Br. at 15 ("[T]he discrepancy was due to [Changbao's] attempt to protect its trade secrets . . . .").

this explanation unsatisfactory, because Changbao did not need to lie to Commerce to protect its trade secrets when all business proprietary information would have been protected under the investigation's administrative protective order. *Changbao Mem*. at 9.

Changbao's attempt to remedy the situation involved the submission of additional laboratory test results and a proposal that Commerce arrange for testing of Changbao's merchandise by a neutral laboratory. *Changbao's Mar. 11 Cmts*. at 7 ¶7; *Changbao Mem*. at 5–6. Given the late hour of these new submissions and the time limits for Commerce's completion of antidumping investigations, however, Commerce reasonably determined that Changbao's proposed remedy was not practicable. *See Changbao Mem*. at 10–11; 19 U.S.C. § 1677m(d); *see also* SAA at 865 ("[Section 1677m(d)] is not intended . . . to allow parties to submit . . . information that cannot be evaluated adequately within the applicable deadlines.").

Commerce articulated a reasonable basis for concluding that Changbao withheld information and then failed to adequately explain and remedy the deficiency. Because these findings are sufficient to satisfy the statutory requirements for using FA, the court need not and does not examine Commerce's alternate grounds for relying on FA with regard to Changbao. *See* 19 U.S.C. §§ 1677e(a)(2) and 1677m(d).

## IV. *Commerce's Determination that None of Changbao's Submissions Could Be Verified or Used Without Undue Difficulties*

Although resort to FA may be justified based on deficiencies identified under subsection 1677e(a)(2), Commerce may not decline to consider submissions that, though deficient, satisfy all five of the criteria listed in subsection 1677m(e). 19 U.S.C. § 1677m(e). The criteria listed in subsection 1677m(e) include the requirements that the submissions at issue be verifiable and can be used without undue difficulties. 19 U.S.C. § 1677m(e)(2) and (5).

Plaintiffs challenge Commerce's finding that none of Changbao's deficient submissions could be verified or used without undue difficulties. *See Changbao Mem.* at 10–11; Pls.' Br. at 15–20. Commerce found that none of Changbao's submissions could be verified or used without undue difficulties because the information withheld by Changbao was not disclosed until additional verification could not reasonably be accomplished within the deadline for completing this investigation. *Changbao Mem.* at 10–11. Because the information withheld by Changbao implicated the credibility of all Changbao's submissions and the reliability of all records examined at verification,

Commerce determined that all of Changbao's submissions required additional verification, but that additional verification was impractical so late in the proceeding. *Id.* As already concluded, *supra* subsection III, this determination was reasonable.

Plaintiffs disclaim any responsibility for delaying the discovery that additional verification was necessary. *See* Pls.' Br. at 18–19. They contend that if Commerce had not accepted Petitioners' submissions challenging the veracity of Changbao's representations at verification, then no additional verification would have been necessary. *Id*. Plaintiffs' argument again misses the point. The reason behind Commerce's determination that none of Changbao's submissions were credible in the absence of additional verification was that Changbao had failed to disclose misrepresentations to Commerce, and had concealed from Commerce the existence of a dual record-keeping system. *Changbao Mem*. at 9–12. Changbao was at all times in possession of this information but chose not to disclose it until confronted with contradictory evidence which Commerce itself obtained and placed on record. *Id*. Thus Changbao cannot claim unfair disadvantage from the late hour of the discovery that additional verification was necessary to support the credibility of its submissions.

Commerce's determinations that 1) the discovery of Changbao's deceptive acts at verification invalidated the results of such verification, and 2) additional verification was impractical once this discovery was made, are supported by a reasonable reading of the record. The conclusion that none of Changbao's submissions could reasonably be verified within the applicable deadline logically follows. Commerce's determination that none of Changbao's submissions meet the verifiability requirement of subsection 1677m(e) is therefore sustained.

### V. *Commerce's Finding that Changbao Failed to Cooperate tothe Best of its Ability*

Commerce next found, invoking 19 U.S.C. § 1677e(b), that Changbao failed to cooperate in this investigation. *Changbao Mem*. at 12. Section 1677e(b) permits the use of "an inference that is adverse to the interests of [a] party in selecting from among the facts otherwise available" if Commerce "finds that [the] interested party has failed to cooperate by not acting to the best of its ability to comply with [Commerce's] request for information." 19 U.S.C. § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether [the] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in

an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Here, a reasonable reading of the record supports Commerce's conclusion that, by deceiving Commerce at verification and using its accounting software to cover up its deception, Changbao failed to "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in [this] investigation." *Nippon Steel*, 337 F.3d at 1382; *see Changbao Mem*. at 11–13; *Changbao Verif. Rep*. at 6–9, 29; *Changbao Mar. 11 Cmts*. Commerce's determination that Changbao failed to cooperate in this investigation is therefore supported by substantial evidence, and is accordingly affirmed.

Based on its findings that 1) resort to FA was warranted with regard to all information necessary to calculate Changbao's dumping margin and 2) that Changbao failed to cooperate in this investigation, Commerce could have chosen to calculate a separate rate for Changbao based entirely on AFA. *See* 19 U.S.C. § 1677e. Defendant-Intervenor Maverick Tube Corporation suggests that, on the record of this investigation, such a separate AFA rate for Changbao may have resulted in an antidumping duty rate that was well above 200 percent. *See* Maverick Br., ECF Nos. 85 (public) and 86 (confidential) at 31–36. The court need not reach this issue, however, because, instead, Commerce chose to apply to Changbao the presumption of government control. *Changbao Mem*. at 13–14. Finding Changbao's separate rate application and its supporting evidence to be unreliable, Commerce determined that Changbao had failed to rebut this presumption and was therefore subject to the China-wide rate. *See id.*

As explained in the following two subsections, Commerce's determination that Changbao's separate rate application was unreliable is sustained because this determination is supported by substantial evidence (*infra* subsection VI), and Commerce's application of the presumption of government control has previously been sustained by the Court of Appeals (*infra* subsection VII).

## VI. *Changbao's Separate Rate Application*

Commerce made two critical findings affecting Changbao's application for a rate separate from that calculated for the China-wide entity in this investigation. First, Commerce found that, by lying during verification, Changbao officials revealed themselves to be not credible. *See Changbao Mem.* at 9–11; *Changbao Verif. Rep.* at 29; *Changbao's Mar. 11 Cmts*. The logical implication of this finding is that record evidence consisting solely of representations made by Changbao is, in the absence of independent supporting evidence, unreliable. Second, Commerce found that Changbao's [[ ]] computer software –

which electronically maintains all of Changbao's accounting records, including those used to verify Changbao's separate rate application[15] – corroborated Changbao's material misrepresentations. *See Changbao Mem.* at 11; *Changbao Verif. Rep.* at 29. The reasonable implication of this second finding is that Changbao's accounting software is not a reliable source of independent supporting evidence.

Thus, to the extent that Changbao's separate rate application contained solely representations made by Changbao, and was supported solely by documentation generated by Changbao's accounting software, Commerce's conclusion that Changbao's separate rate application had been invalidated follows logically from Commerce's unreliability findings with regard to Changbao and its accounting software. As the record of this proceeding supports both unreliability findings, *see Changbao Verif. Rep.* at 9, 29; *Changbao's Mar. 11 Cmts* ; *Changbao Mem.* at 9–11, and as Changbao has not pointed to any independent record evidence other than its representations and its accounting software,[16] Commerce reasonably concluded in its *Final Determination* that Changbao's separate rate application should be denied.

Plaintiffs' reference to this Court's reasoning in *Since Hardware (Guangzhou) Co. v. United States*, No. 09–00123, 2010 WL 3982277 (CIT Sept. 27, 2010) to suggest the contrary is misplaced. *See* Pls.' Br. at 24. *Since Hardware* held that remand was warranted where Commerce "made no specific finding that the responses concerning state control were inaccurate." *Since Hardware*, 2010 WL 3982277, at *5. Here, on the other hand, Commerce made specific findings that Changbao's submissions regarding government control were not credible and that the accounting software which generated the documents examined in verifying those submissions was unreliable. *Changbao Mem*. at 11, 13–14. *Since Hardware* is therefore inapposite.

Any other contrary prior holdings on this subject are also not applicable here. The court has repeatedly held, for example, that an NME respondent's separate rate application may not be disregarded in favor of the presumption of government control in the absence of specific evidentiary findings to support the conclusion that such an application presents no reliable evidence. In *Gerber* and *Shandong Huarong*, for example, unlike the present case, Commerce had first

[15] *See Changbao Verif. Rep.* at 6–9.

[16] *See* Pls.'s Br. at 24–25 (arguing that Changbao's separate rate representations were independently verified by Commerce, but citing to Commerce's verification of databases generated by Changbao's unreliable accounting software); *Changbao Verif. Rep*. at 9 (noting that all Changbao accounting record-keeping is done through the [[ ]] accounting software); id. at 29 (noting that the [[ ]] accounting software fully corroborated information which Changbao later admitted to be materially incorrect).

specifically found that the respondents' misrepresentations did not affect their separate rate status, and then subsequently changed course without any intervening record evidence on which to base a determination to the contrary.[17] The court held that, "[h]aving made such favorable findings concerning the accuracy and suitability of the submitted information needed to calculate [individual] assessment rates, and having failed to support with substantial evidence any later findings to the contrary, Commerce may not refuse to consider that information." *Gerber*, 29 CIT at 766–67, 387 F. Supp. 2d at 1283; *see also Shandong Huarong*, 27 CIT at 1594–95. Here, on the other hand, as discussed above, Commerce made two critical findings, supported by the record, that specifically affected Changbao's separate rate application – the finding that Changbao's representations are unreliable in the absence of independent supporting evidence, and the finding that Changbao's accounting software is not a reliable source of independent evidence. Unlike *Gerber* and *Shandong Huarong*, therefore, Commerce did not fail in this case to make a reasonable determination to disregard Changbao's separate rate application.

This action is also distinguishable from prior holdings that Commerce may not disregard an NME respondent's separate rate application based solely on an adverse inference. E.g., Gerber, 29 CIT at 772–73, 387 F. Supp. 2d at 1288; *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, No. 10–00059, 2011 WL 4829947, at *16–17 (CIT Oct. 12, 2011). These prior holdings emphasize that where Commerce has made no finding that responses concerning government control are deficient, it is contrary to law for Commerce to apply an adverse inference to disregard separate rate applications, because a finding of deficiency is an antecedent requirement to Commerce's application of an adverse inference.[18] Here, on the other hand, Commerce did not base its decision to disregard Changbao's separate rate application solely upon an adverse inference. Rather, having found that Changbao's separate rate application consisted entirely of information derived from unreliable sources,

[17] *Gerber Food (Yunan) Co. v. United States*, 29 CIT 753, 766–67,387 F. Supp. 2d 1270, 1282–83 (2005); *Shandong Huarong Gen. Gr. Corp. v. United States*, 27 CIT 1568, 1594–95 (2003) (not reported in the Federal Supplement).

[18] *Gerber*, 29 CIT at 775, 387 F. Supp. 2d at 1290 ("Neither the 'adverse inferences' provision of 19 U.S.C. § 1677e(b) nor the general authority granted by the antidumping laws empowers Commerce to assign punitive antidumping duty assessment rates that are unsupported by record evidence and contrary to facts Commerce found in its own review proceeding."); *Foshan Shunde*, 2011 WL 4829947 at *17 (quoting *Zhejiang DunAn*, 652 F.3d at 1346 ("Commerce must first determine that it is proper to use factsotherwise available before it may apply an adverse inference.").

Commerce disregarded the unreliable submission. As the record reasonably supports this determination, it is affirmed.

VII. *Commerce's Reliance on a Presumption of Government Control*

Pursuant to its established and judicially-affirmed practice, Commerce determined that, in the absence of reliable rebutting evidence, a presumption of government control applied to Changbao. *Changbao Mem*. at 13–14; *see Transcom*, 294 F.3d at 1373 ("Under the NME presumption, a company that fails to demonstrate independence from the NME entity is subject to the countrywide rate, while a company that demonstrates its independence is entitled to an individual rate as in a market economy.") (citing *Sigma*, 117 F.3d at 1405–06).

As Commerce has consistently applied it, the presumption of government control entails a second presumption that a single countrywide antidumping duty rate is appropriate for all respondents subject to the AD duty order – i.e., that most companies in NME-designated countries like China do not engage in independent pricing behavior at all. *See Transcom*, 294 F.3d at 1373, 1381–82. This is why the court has accepted, as a logical consequence of the presumption, Commerce's application of a countrywide rate to a respondent for whom that rate had not been individually corroborated.[19] Simply put, "Commerce's permissible determination that [a respondent] is part of the PRC-wide entity means that inquiring into [that respondent]'s separate sales behavior ceases to be meaningful." *Watanabe Gr. v. United States*, No. 09–00520, 2010 WL 5371606, at *4 (CIT Dec. 22, 2010).

Commerce began employing a presumption of government control for NME-based respondents (as well as its consequent presumption that respondents from NME-designated countries are generally not entitled to individualized antidumping duty rates) in 1991,[20] when, it may reasonably be said, economic conditions were generally different from those of the 2008–09 POI at issue here. In 1997, the Court of Appeals upheld this practice, explaining that "it [is] within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters

[19] *See Transcom*, 294 F.3d at 1382; *Peer Bearing Co. – Changshan v. United States*, 32 CIT 1307, 1313, 587 F. Supp. 2d 1319, 1327 (2008) ("[T]here is no requirement that the PRC-wide entity rate based on AFA relate specifically to the individual company. It is not directly analogous to the process used in a market economy, where there is no countrywide rate. Here, the rate must be corroborated according to its reliability and relevance to the countrywide entity as a whole.") (citations omitted); *Shandong Mach. Imp. & Exp. Co. v. United States*, No. 07–00355, 2009 WL 2017042, at *8 (CIT June 24, 2009) (holding that Commerce has no obligation to corroborate an NME countrywide rate as to an individual party where that party has failed to rebut the presumption of government control).

[20] *Transcom*, 294 F.3d at 1373 (citing two Federal Registernotices from 1991).

to demonstrate an absence of central government control." *Sigma*, 117 F.3d at 1405–06 (citing *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995); 19 U.S.C. § 1677(18)(B)(iv), (v); *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) ("The burden of production should belong to the party in possession of the necessary information.")).

After *Sigma*, Commerce has continued to apply this set of presumptions to all respondents subject to AD duty orders on merchandise from NME-designated countries, and *Sigma* has continued to be cited as controlling authority for judicial affirmation of Commerce's practice in this regard. *See, e.g., Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1372, 1378 (Fed. Cir. 2003); *Transcom*, 294 F.3d at 1373, 1381–82. Accordingly, it appears that the issue of Commerce's reliance upon a presumption of government control for respondents from NME-designated countries is settled (unless the Court of Appeals chooses to revisit it[21]). *But see Qingdao Taifa Gr. v. United States*, __ CIT __, 760 F. Supp. 2d 1379, 1384–85 (2010) (holding that Commerce's reliance on a presumption of government control, without evidence, is incompatible with the agency's duty to support its decisions with substantial evidence).

Accepting the reasonableness of Commerce's presumption of government control for all Chinese respondents has important implications. Logically, it implies that most Chinese companies are in fact controlled by the Chinese government, such that any inquiry into individual pricing behavior is essentially meaningless absent extraordinary circumstances. It also implies that if the record contains no evidence of such extraordinary circumstances – or, as here, if the credibility of what was previously deemed to be such evidence has been impeached – then it is reasonable to assume, without evidence, that no further inquiry into individual pricing behavior is necessary.

[21] As a practical matter, the reasonableness of presuming, without any affirmative evidence, that all modern Chinese companies are wholly controlled by the Chinese government, such that any inquiry into their individual pricing behavior is completely meaningless, appears open to question. Perhaps for this reason, this Court has at times found it difficult to square the presumption and its logical implications with Commerce's duty to base its decisions on a reasonable reading of record evidence. The court has, for example, suggested that applying a countrywide AFA rate to an NME respondent who has failed to demonstrate freedom from government control but for whom Commerce makes no specific finding of a failure to cooperate may be *ultra vires*. *East Sea Seafoods LLC v. United States*, __ CIT __, 703 F. Supp. 2d 1336, 1354 n.15 (2010); *see also Hubbel Power Sys. v. United States*, No. 11–00474, 2012 WL 4320481, at *9 (CIT Sept. 20, 2012). But as losing all entitlement to an individualized inquiry appears to be a necessary consequence of the way in which Commerce applies the presumption of government control, *see Watanabe*, 2010 WL 5371606, at *4, applying a countrywide AFA rate without individualized findings of failure to cooperate is no different from applying such a countrywide AFA rate without individualized corroboration. *See id.* The core of the unease thus rests with the presumption itself.

That is precisely what transpired here: Changbao submitted proof of its independence from government control in the form of attestations backed by statements traceable to its computer accounting software; revelation of Changbao's willful deceptiveness and apparent ability to manipulate its accounting software resulted in findings of non-credibility for Changbao and unreliability for Changbao's accounting software; Changbao's attestations of freedom from government control therefore became not credible and the documents traceable to Changbao's accounting software became unreliable; and, thus, faced with no reliable evidence to the contrary, Commerce presumed that Changbao was controlled by the Chinese government. *See Changbao Mem*. at 14. As the reasonableness of employing such a presumption in the absence of reliable rebutting evidence has been repeatedly upheld by the Court of Appeals, *e.g.*, *Huaiyin*, 322 F.3d at 1378; *Transcom*, 294 F.3d at 1373, 1381–82, it follows that Commerce acted reasonably here. *But see Qingdao*, __ CIT at __, 760 F. Supp. 2d at 1384–85.

VIII. *China-Wide Rate*

Changbao makes no specific objections to the dumping margin calculated for the China-wide entity in this investigation, arguing only that this rate should not have been applied to Changbao. *See* Pls.' Br. at 24–25. Accordingly, because Commerce reasonably determined to treat Changbao as part of the China-wide entity, as explained above, and because no party challenges the calculation of the China-wide rate, the 99.14 percent margin calculated for this entity and applied to Changbao is sustained.

## CONCLUSION

For all of the foregoing reasons, Commerce's Final Determination, 75 Fed. Reg. 20,335, is sustained. Judgment will be entered accordingly.

Dated: November 14, 2012
New York, New York

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

Slip Op. 12–152

R.T. FOODS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 09–00455

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

Dated: December 14, 2012

*Peter S. Herrick* of Miami, FL, for Plaintiff.

*Beverly A. Farrell*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. On the briefs were *Stuart F. Delery*, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, United States Department of Justice, and *Beth C. Brotman*, Of Counsel, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection.

## OPINION

**CARMAN, JUDGE:**

This matter is before the Court on a Motion for Summary Judgment by Plaintiff R.T. Foods, Inc. ("Plaintiff" or "R.T. Foods") and a Cross-Motion for Summary Judgment by Defendant United States ("Defendant" or "Customs"). The parties dispute the correct tariff classification of the subject merchandise—frozen tempura-battered vegetable mixtures from Thailand—imported by Plaintiff. For the reasons set forth below, Plaintiff's motion is denied, and Defendant's cross-motion is granted.

## FACTUAL BACKGROUND

Plaintiff is an importer of the two products at issue: Tempura Vegetables ("Vegetable Medley") and Vegetable Bird's Nests ("Bird's Nests") from Thailand. Pl.'s Statement of Material Facts as to Which No Genuine Issue Exists ("Pl. Facts") ¶¶ 2–3; Def.'s Statement of Material Facts as to Which No Genuine Issue Exists ("Def. Facts") ¶¶ 2–4. This case involves twenty-four entries into the ports of Long Beach, California and Boston, Massachusetts between October 2007 and August 2008. Summons, ECF No. 1; Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J. ("Def. Cross-Mot.") at 2.

The parties do not dispute the identity of the subject merchandise: frozen tempura-battered vegetable mixtures sold under the names of "Vegetable Bird's Nests" and "Tempura Vegetables." Bird's Nests consist of carrots, onion and kale, which are cut julienned-style, mixed together, dipped in tempura batter, deep fried, flash frozen and pack-

aged eight in a retail tray. The name of the product is eponymous with the appearance of the product. Def. Cross-Mot. at 2, Def. Ex. 2; Pl. Mot. at 2–3.

Vegetable Medley includes eighteen pieces of tempura: three Bird's Nests, three pieces of sweet potato, three pieces of carrot, three pieces of wing bean, three pieces of long or green bean, and three pieces of eggplant. Def. Cross-Mot. at 2. The individual vegetables in the Vegetable Medley are also dusted with tempura batter, deep fried, flash frozen and packaged in a retail box. *Id*.

Plaintiff imported twenty-four entries of subject merchandise in this case, ten into the port of Boston and fourteen in the port of Long Beach. Def. Cross-Mot. at 3. Customs classified the ten Boston entries and three of the Long Beach entries under the Harmonized Tariff Schedule of the United States ("HTSUS") tariff classification of 2004.90.85, which provides for "Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Other, including mixtures," with a duty rate of 11.2%. Def. Cross-Mot. at 3.

Customs notes that eleven[1] of the entries into the port of Long Beach were liquidated under Plaintiff's proposed tariff classification of 2106.90.99, HTSUS, which provides for "Food preparations not elsewhere specified or included: Other: Other: Other: Frozen," with a duty-free preference for products from Thailand. Def. Facts ¶ 13; Def. Cross-Mot. at 2–3. Although the other thirteen entries were liquidated at the duty rate of 11.2%, these eleven entries were in fact, whether accidentally as Customs claims or properly as Plaintiff claims, liquidated with no tariff rate. Pl. Facts ¶ 19; Def. Facts ¶ 13.

On March 24 and 25, 2009, Plaintiff timely protested Customs' classification for all twenty-four entries, asserting that the proper classification of its subject merchandise is subheading 2106.90.99, HTSUS. *See* Summons, ECF No. 1. Customs issued notices of denials in response to Plaintiff's protests on the following dates: Protest

[1] These eleven entries (277–0117421–4, 277–0117498–2, 277–0117803–3, 277–01182639, 277–0118077–3, 277–0118462–7, 277–0118901–4, 277–0119300–8, 277–0119301–6, 2770119997–1 and 277–0116454–6) were liquidated under Plaintiff's proposed classification of subheading 2106.90.99, HTSUS. Customs avers that "this duty-free liquidation was in error and does not reflect Customs' position of the classification/rate of duty of the subject merchandise." Def. Facts ¶¶ 12–13.

Number 2704–09–100924[2] on August 14, 2009; Protest Number 2704–09–100996[3] on September 23, 2009; and Protest Number 0401–09–100048[4] on April 1, 2009. *Id.*; Def.'s Cross-Mot. at 3. Plaintiff commenced this action on October 21, 2009. Summons, ECF No. 1.

## JURISDICTION AND STANDARD OF REVIEW

The Court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930" pursuant to 28 U.S.C. § 1581(a) (2006).[5] Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." USCIT R. 56(c).

Although Customs usually enjoys a statutory presumption of correctness in its classification decisions, this does not apply to pure issues of law in a summary judgment motion before the Court. *Universal Elec. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). The Court "does not defer to Customs' decisions because it has been tasked by Congress to conduct a *de novo* review, and to determine the correct classification based on the record made before it." *Universal Elec.*, 112 F.3d at 493; *see* 28 U.S.C. § 2640(a). Ultimately, the Court's "duty is to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (emphasis in original).

Resolution of a disputed classification entails a two-step process: (1) ascertaining the proper meaning of specific terms in the relevant tariff provisions; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999). When "the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law." *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006) (citations omitted). Correct classification of imported merchandise is ultimately a question of law. *Pillowtex Corp.*, 171 F.3d at 1373.

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[2] Protest Number 2704–09–100924 covers the following three entries into the port of Long Beach: 277–0116601–2, 277–0116682–2 and 277–0119690–2.

[3] Protest Number 2704–09–100996 covers the following eleven entries into the port of Long Beach: 277–0117421–4, 277–0117498–2, 277–0117803–3, 277–0118263–9, 2770118077–3, 277–0118462–7, 277–0118901–4, 277–0119300–8, 277–0119301–6, 277–0119997–1 and 277–0116454–6.

[4] Protest Number 0401–09–100048 covers the following ten entries into the port of Boston: 281–0107098–6, 281–0107614–0, 281–0108049–8, 281–0108452–4, 281–0108451–6, 2810109110–7, 281–0109447–3, 281–0111268–9, 281–0111338–0 and 281–0112080–7.

[5] All references to the United States Code hereinafter refer to the 2006 edition, unless otherwise specified.

## DISCUSSION

The threshold question in any judicial proceeding is whether the court has jurisdiction to hear the case. Defendant raises jurisdictional issues in its cross-motion, and therefore the Court first addresses the question of jurisdiction as to the three protests at issue. The Court then decides the proper classification of the subject merchandise for the entries over which it has jurisdiction.

### A. Jurisdiction

#### 1. Protest Number 0401–09–100048

Defendant raises a statute of limitations defense for Protest Number 0401–09100048. While this court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest" pursuant to 28 U.S.C. § 1581(a), there is a statute of limitations on the commencement of an action pursuant to 28 U.S.C. § 2636(a)(1):

> (a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade—
>
> > (1) within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act.

For jurisdiction to attach, a summons must be filed within 180 days after the notice of a denial of protest is mailed. In the instant case, Plaintiff filed three protests to cover the twenty-four entries and Customs issued denials on the following dates: Protest Number 2704–09–100924 on August 14, 2009; Protest Number 2704–09–100996 on September 23, 2009; and Protest Number 0401–09–100048 on April 1, 2009. *See* Summons, ECF No. 1; *see also* Def.'s Cross-Mot. at 3. The summons commencing this action was filed on October 21, 2009. *See* Summons, ECF No. 1. Accordingly, the protests denied on August 14, 2009 and September 23, 2009 are timely; however, the protest denied on April 1, 2009 falls outside the limitations period by approximately twenty days. Therefore, the Court is barred by 28 U.S.C. § 2636(a)(1) from hearing a challenge to the denial of Protest Number 0401–09–100048.

On April 28, 2009, Plaintiff filed a request to Customs to have its denial of Protest Number 0401–09–100048 set aside pursuant to 19 U.S.C. § 1515(d), and on May 13, 2009, Plaintiff filed a request to have the denial of its application for review set aside pursuant to 19 U.S.C. § 1515(c). Summons, ECF No. 1; Def. Cross-Mot. at 10, n.3.

Dropped in a footnote in its Summons but not expanded upon in its motion, Plaintiff claimed that the completion of the 180-day statute of limitations clock was tolled due to Customs' failure to respond to its requests to set aside the denial of its protest and the denial of its application for review.[6] *Id*. Defendant countered that Plaintiff inserted this claim in its Summons because Plaintiff "[a]pparently recogniz[ed] that jurisdiction would not attach to these entries due to filing the summons after 180 days had passed"; however, Defendant asserted that Plaintiff's claim has "no impact on the 180-day period for filing a summons and section 1515 provides no tolling mechanism." Def. Cross-Mot. at 10, n.3. The Court notes that 19 U.S.C. § 1515(c) explicitly mandates that the 180-day period for commencing an action in the Court of International Trade is triggered by the initial denial of the protest for statute of limitations purposes. Thus, the Court finds that commencement of this action in relation to Protest Number 0401–09–100048 is barred by the statute of limitations and determines that it lacks jurisdiction over the ten entries covered by Protest Number 0401–09–100048.

**2. Protest Number 2704–09–100996**

Defendant raises a Constitutional defense for Protest Number 2704–09–100996. A federal court's jurisdictional reach has Constitutional limitations: an action must present a case or controversy to be heard. U.S. CONST. Art III, § 2. Precedent has established three elements to satisfy the Constitutional requirement of case or controversy: a plaintiff (1) must have suffered an injury in fact (2) that is caused by the conduct complained of and (3) that is "likely" be "redressed by a favorable decision." *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiff, as the party invoking jurisdiction, bears the burden of establishing these factors. *Id*. at 561.

Defendant asserts that the eleven entries covered by Protest Number 2704–09100996 were accidentally and incorrectly liquidated at Plaintiff's proposed classification at a duty free rate. Def. Cross-Mot. at 8–9. Because liquidation occurred at a duty free rate, Customs argues that Plaintiff suffered "no injury in fact" as to these eleven entries as required by the case or controversy doctrine. *Id*. at 8–9. The Court agrees that Plaintiff suffered no injury as to these eleven entries. Thus, the Court finds that there is no case or controversy as to these entries and determines that it lacks jurisdiction over the eleven entries covered by Protest Number 2704–09–100996.

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[6] See the asterisk note on page 2 of the Schedule of Protests included in its Summons, ECF No. 1. *See also* Defendant's Exhibit 3 to its cross-motion.

### 3. Protest Number 2704–09–100924

Defendant does not challenge jurisdiction for Protest Number 2704–09–100924, which was timely commenced. Plaintiff claims injury caused by Customs' improper liquidation at a 11.2% duty rate and seeks redress in the Court. Thus, the Court determines it has jurisdiction over the three entries (277–0116601–2, 277–0116682–2 and 277–0119690–2) covered by Protest Number 2704–09–100924.

## B. Proposed Classifications

Customs classified the subject merchandise under subheading 2004.90.85, HTSUS, which provides for "Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Other, including mixtures," with a duty rate of 11.2%. Def. Cross-Mot. at 3. Defendant explains:

> Neither the inclusion of non-vegetable ingredients nor the process of coating the vegetables in tempura batter and then frying them serves to remove the [subject merchandise] from classification in Heading 2004. . . . long-standing precedent on the subject of prepared or preserved food products indicates that products undergoing various processes (including frying) and containing added ingredients fall squarely within the tariff provision for products that are "prepared or preserved."

Def. Cross-Mot. at 13. While conceding that the vegetables used in the subject merchandise are processed with tempura batter, Defendant asserts that the vegetables "retain[ ] the same nature and the same use for edible consumption as the vegetables prior to processing" (Def. Facts ¶¶ 3, 7), and thus belong under the specific tariff provision for prepared mixed vegetables and not Plaintiff's proposed basket provision for "food preparation" (Def. Cross-Mot. at 5–6).

Plaintiff contends that the manufacturing process does indeed change the nature of the products from a vegetable mixture to food preparation. *See* Pl. Mot. at 6–7. Plaintiff argues that the proper classification of the products is HTSUS subheading 2106.90.99, which provides for "Food preparations not elsewhere specified or included: Other: Other: Other: Frozen," with a duty free preference for products from Thailand. *See* HTSUS, General Notes 3(a)(iii), 3(c)(i), 4(a); *see also* HTSUS Heading 2106. Plaintiff asserts its proposed classification is more specific than Defendant's proposed classification because "food preparations not elsewhere specified or included, provides a more specific description of the imported goods when considering the principle use of the imported goods as food

preparations." Pl. Mot. at 9. Defendant counters that because a more specific heading is applicable, Plaintiff's use provision argument in support of its basket provision classification is rendered moot. *See* Def.'s Reply Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. and in Further Support of Def.'s Cross-Mot. for Summ. J. ("Def. Reply") at 5.

**C. GRI Analysis**

Classification of merchandise is governed by the General Rules of Interpretation ("GRIs"). *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005). The GRIs direct "the proper classification of all merchandise and are applied in numerical order." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The Court may not consult any subsequent GRI unless the proper classification cannot be determined by reference to GRI 1. *Mita Copystar Am. v. United States*, 160 F. 3d 710, 712 (Fed. Cir. 1998). The analysis always starts with GRI 1, which provides "classification shall be determined according to the terms of the headings and any relative section or chapter notes." Tariff terms are construed in accordance with their common or popular meaning. *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (1995).

The Court first considers heading 2004, HTSUS, which provides for "Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, frozen, other than products of heading 2006." This heading is an *eo nomine* classification provision, which "describes a commodity by a specific name." *Clarendon Marketing, Inc. v. United States*, 144 F.3d. 1464, 1467 (Fed. Cir. 1998). Bird's Nests are comprised of julienned carrots, onion and kale, which are mixed together, dipped in tempura batter, deep fried, flash frozen and packaged eight in a retail tray. Def. Cross-Mot. at 2. Vegetable Medley consists of eighteen pieces of tempura vegetables or vegetable mixtures: three Bird's Nests, three pieces of sweet potato, three pieces of carrot, three pieces of wing bean, three pieces of long or green bean, and three pieces of eggplant, which are dusted with flour and salt, dipped in tempura batter, deep fried, flash frozen and packaged in a retail box. *Id*.

To *prima facie* fall under heading 2004, HTSUS five criteria must be met: the products must be (1) vegetables that are (2) prepared or preserved, (3) otherwise than by vinegar or acetic acid, which are (4) frozen, and are (5) other than products of heading 2006, HTSUS. Both the Bird's Nests and the Vegetable Medley satisfy all five criteria: they are (1) vegetables that are (2) prepared (3) in tempura batter, not in vinegar or acetic acid, which are (4) flash frozen, and are (5) not products preserved by sugar as provided for by heading 2006, HT-

SUS. Thus, the Court finds that the subject merchandise *prima facie* falls under heading 2004, HTSUS.

Next, the Court considers heading 2106, HTSUS, which provides for "Food preparations not elsewhere specified or included." To *prima facie* fall under heading 2016, HTSUS, two criteria must be met: the products must be (1) a food preparation, which is (2) not elsewhere specified or included. Both Bird Nests and Vegetable Medley satisfy the first criterion, but not the second: they are (1) a food preparation by common meaning, but they are (2) elsewhere specified or included. Because they are classifiable under heading 2004, HTSUS, Bird's Nests and Vegetable Medley do not satisfy the second criterion of "not elsewhere specified or included." Thus, the Court finds that the products do not *prima facie* fit under heading 2106, HTSUS, which is an expansive basket heading that only applies in the absence of another applicable heading.

In support of its position, Plaintiff referenced two ruling letters as support for its proposed classification: (1) Ruling Letter NY 815439 (Oct. 26, 1995) and (2) Ruling Letter N004522 (Jan. 12, 2007). Pl.'s Mot. at 6–7. Ruling Letter NY 815439 involves classification of fruit and vegetable chips from China and Taiwan while Ruling Letter N004522 involves frozen hors d'oeuvres from Canada. The Court finds both of those Ruling Letters inapposite because the subject merchandise discussed in those ruling letters—chips made from a combination of fruits and vegetables and hors d'oeuvres made from various ingredients including water, cheeses, oils, wheat crumbs and flour, corn starch, batter, spices, salt, flavorings, alcohol, color and sorbic acid—are not substantially similar to the tempura vegetable products at issue.

The Court reviewed ruling letters regarding other tempura-coated products, such as shrimp. For example, Customs classified tempura shrimp products under a provision for prepared shrimp. *See* Ruling Letters N138762 (Jan. 6, 2011), NY L80717 (Dec. 14, 2004). It appears that Customs has consistently classified tempura-coated products by the underlying main food dipped into the tempura batter, not as a food preparation. Therefore, the existing ruling letters lend credence to Customs' proposed classification for frozen prepared vegetables over Plaintiff's proposed basket provision for food preparations.

Defendant mentions another heading to be considered. Defendant raises the point that the sweet potatoes in the Vegetable Medley may belong under a different heading in Chapter 20. Def. Cross-Mot. at 14, n.8. An Explanatory Note to heading 2008 indicates that heading 2008 includes "[s]tems, roots and other edible parts of plants (e.g.,

ginger, angelica, yams, *sweet potatoes* . . . .) conserved in syrup or otherwise prepared or preserved." WCO, Explanatory Note (7) to Heading 2008 (Supp. 9 to 2007 Ed.) (emphasis added). Heading 2008, HTSUS, provides for "fruits, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included."

First, the Court notes that the Explanatory Notes are "not legally binding or dispositive, but they may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *Benq America Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011) (citations omitted). Next, the Court acknowledges that the subject merchandise at issue is not mere sweet potatoes but rather tempura-coated vegetables or vegetable mixtures of which only one of the two products includes three pieces of sweet potato, a mere 16 percent of the vegetable mixture. Contemplating the product as a whole, a reasonable mind could not consider the subject merchandise a sweet potato. It is, rather, a mixed vegetable product in which sweet potatoes do not dominate.

Assuming, *arguendo*, that the sweet potatoes did constitute a significant percentage or value of the Vegetable Medley, the Court analyzes the terms of heading 2008, HTSUS, to comprehensively consider all the possible tariff provisions. To *prima facie* fall under this classification three criteria must be met: the products must be (1) fruits, nuts or other edible parts of plants, (2) otherwise prepared or preserved, which are (3) not elsewhere specified or included. The Vegetable Medley arguably satisfies the first two criteria but not the third: while not a fruit or nut, it could colorably be considered (1) an other edible part of a plant and it is certainly (2) prepared in tempura batter. However, as with Plaintiff's proposed classification, this classification is nixed from consideration by the phrase (3) "not elsewhere specified or included." Because it was found to fit under heading 2004, HTSUS, Vegetable Medley cannot fall under the rubric of a basket provision, which was the same fate that befell heading 2106, HTSUS. Thus, the Court finds that the products do not *prima facie* fall under heading 2008, HTSUS.

The Court finally examines the one applicable heading, 2004, for the proper subheading. Upon review of the possible subheadings under heading 2004, the Court finds that the proper subheading is 2004.90.85, HTSUS, which provides for "Other vegetables and mixtures of vegetables: Other." Therefore, the Court holds the correct tariff classification for the Bird's Nests and Vegetable Medley is subheading 2004.90.85, HTSUS.

## CONCLUSION

Since there is no dispute between the parties as to the nature of the merchandise involved in this case and the only issues to be resolved are legal, the case is ripe for disposal at the summary judgment stage. *See, e.g., Value Vinyls, Inc. v. United States*, 31 CIT 173, 175, 2007 WL 273839 at *2 (2007) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–49 (1986)). The Court affirms Defendant's preferred tariff classification of 2004.90.85, HTSUS, for entries 277–0116601–2, 277–0116682–2 and 277–0119690–2 for which jurisdiction lies. Therefore, Plaintiff's Motion for Summary Judgement is denied and Defendant's Cross-Motion for Summary Judgment is granted. Judgment will enter accordingly.

Dated: December 14, 2012
New York, New York

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

Slip Op. 12–153

UNITED STATES OF AMERICA, Plaintiff, v. MILLENIUM LUMBER DISTRIBUTION CO. LTD. and XL SPECIALTY INSURANCE COMPANY, Defendants.

XL SPECIALTY INSURANCE COMPANY, Cross-Claimant, v. MILLENIUM LUMBER DISTRIBUTION CO. LTD., Cross-Defendant.

Court No. 06–00129

[Defendant Millenium's Motion for Judgment on the Pleadings is denied]

Dated: December 18, 2012

*Aimee Lee*, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, New York, argued for Plaintiff. With her 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 was *Christopher Shaw*, Office of the Assistant Chief Counsel, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, of New York, New York.

*Joel R. Junker*, Joel R. Junker & Associates, of Seattle, Washington, argued for Defendant Millenium Lumber Distribution Co. Ltd. With him on the brief was *William N. Baldwin*.

## OPINION

**RIDGWAY, Judge:**

The Government commenced this action against defendant Millenium Lumber Distribution Co. Ltd. and its surety, defendant XL Specialty Insurance Company, to collect more than $1.8 million in

liquidated damages. *See* Complaint ¶¶ 1, 21, 31, 42, 44. According to the Government, Millenium breached the terms of its customs bonds by not providing required export permits to the Bureau of Customs and Border Protection.[1] *See id*. ¶¶ 17–20, 28–31, 39–42. The Government claims that, as a consequence of this alleged breach, Millenium and XL are jointly and severally liable for liquidated damages. *See id*. ¶¶ 10–11.

Pending before the Court is Millenium's Motion for Judgment on the Pleadings, in which Millenium seeks to dismiss this action for failure to state a claim upon which relief can be granted. *See* USCIT Rule 12(b)(5); Defendant Millenium Lumber Distribution Co., Ltd.'s Motion for Judgment on the Pleadings ("Def.'s Motion to Dismiss") at 2, 13–14; Supplemental Submission of Defendant Millenium Lumber Distribution Co., Ltd.'s Motion for Judgment on the Pleadings ("Def.'s Supp. Brief") at 1. According to Millenium, the Government "failed to exhaust administrative remedies" because it brought this action to collect liquidated damages "prior to the completion of" mitigation proceedings that Millenium maintains were "pending" at the agency level. Def.'s Motion to Dismiss at 2. Millenium contends that this action is therefore "premature," and subject to dismissal. *Id*.; *see also* Defendant Millenium Lumber Distribution Co. Ltd.'s Reply to Plaintiff's Response to Motion to Dismiss ("Def.'s Reply Brief") at 3 (explaining that Millenium "claims that this suit is premature and barred by the doctrine of exhaustion of administrative remedies"); Def.'s Supp. Brief at 1 (stating that "motion requests dismissal . . . for failure to state a cause of action upon which relief can be [granted] based on the grounds that this action was commenced before the conclusion of related administrative proceedings and therefore is in violation of the doctrine of exhaustion of administrative remedies").

The Government, in turn, argues that administrative mitigation proceedings are not a condition precedent to the Government's institution of a civil action to collect liquidated damages – particularly "in a situation such as this, where [tariff] classification is contested and the constraint of [the] statute of limitations would abrogate the Government's legal right to recover liquidated damages" if administrative mitigation proceedings were required. *See* Government's Opposition to Defendant's, Millenium Lumber Distribution Co. Ltd., Motion for Judgment on the Pleadings ("Pl.'s Response Brief") at 2–3, 11; *see also* The Government's Response to Defendant's, Millenium Lumber Dis-

[1] The U.S. Customs Service – formerly part of the U.S. Department of the Treasury – was transferred to the U.S. Department of Homeland Security as part of the Homeland Security Act of 2002. *See Bull v. United States*, 479 F.3d 1365, 1368 n.1 (Fed. Cir. 2007). The agency is now commonly known as U.S. Customs and Border Protection, and is referred to as "Customs" herein.

tribution Co. Ltd., Supplemental Submission ("Pl.'s Supp. Brief") at 2, 4, 16. The Government contends that, in any event, Millenium should not be heard to complain, because – the Government argues – the company at no time took action to institute mitigation proceedings at the agency level. *See* Pl.'s Response Brief at 6, 9–11, 13; Pl.'s Supp. Brief at 14–15.

Jurisdiction lies under 28 U.S.C. § 1582(2) (2000).[2] For the reasons outlined below, Millenium's Motion for Judgment on the Pleadings must be denied.

## I. *Background*

Between late April 2000 and early January 2001, Millenium entered 168 entries of certain softwood lumber products into the United States from Canada. *See* Complaint ¶¶ 9, 14, 25, 36. The entries were secured by three bonds issued by Millenium's surety (XL Specialty Insurance Company, or its predecessor, Intercargo Insurance Company). *See id*. ¶¶ 5, 10–11. As a condition of each bond, Millenium and its surety agreed that they would comply with all customs laws and regulations. *Id*. ¶ 11. They also agreed that they would be jointly and severally liable for liquidated damages in the event of a default. *Id*.

Millenium entered all of the merchandise at issue under heading 4418 of the Harmonized Tariff Schedule of the United States ("HTSUS") (2000).[3] *See* Complaint ¶¶ 15, 26, 37. Following entry, Customs classified the merchandise under HTSUS heading 4407. *See id*. ¶¶ 16, 27, 38.[4] Merchandise falling within heading 4407 is subject to the U.S.-Canada Softwood Lumber Agreement, and requires export permits issued by the government of Canada for entry into the United States. *See id*. ¶¶ 16, 27, 38; 19 C.F.R. § 12.140; 19 C.F.R. § 113.62(k).

Customs issued Notices of Action informing Millenium that the Softwood Lumber Agreement required the company to provide proof of issuance of the requisite export permits and stating that, absent Millenium's submission of the necessary documentation, liquidated damages would be assessed. *See* Complaint ¶¶ 17–18, 28–29, 39–40; *id*., Exhs. 5, 11 (Notices of Action, or "CF-29s").

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[2] Except as otherwise indicated, all citations to federal statutes herein are to the 2000 edition of the United States Code. Similarly, all citations to federal regulations are to the 2000 edition of the Code of Federal Regulations.

[3] Heading 4418 covers "[b]uilders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes." Heading 4418, HTSUS.

All citations to the HTSUS herein are to the 2000 edition, which is identical to the 2001 edition in all relevant respects.

[4] Heading 4407 covers "[w]ood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm." Heading 4407, HTSUS.

Millenium failed to provide Customs with proof of the required permits. Customs therefore issued Liquidated Damages Notices to Millenium covering all 168 entries. *See* 19 C.F.R. § 172.1(a)[5]; Complaint ¶¶ 19–20, 30–31, 41–42; *id*., Exhs. 6, 9, 12 (three Notices of Penalty or Liquidated Damages Incurred and Demand for Payment) ("Liquidated Damages Notices," or "CF5955As"). The Liquidated Damages Notices informed Millenium of the amount of liquidated damages assessed. *See* Complaint, Exhs. 6, 9, 12. In addition, the Liquidated Damages Notices advised Millenium of the company's right to petition Customs for mitigation of the liquidated damages assessments, as well as the procedure for the filing of such petitions. *See id*., Exhs. 6, 9, 12. In particular, the Liquidated Damages Notices specified that Millenium had 60 days to pay the liquidated damages assessments or to file a petition for mitigation with Customs. *See id*., Exhs. 6, 9, 12.

No petition for mitigation proceedings was ever filed; nor did either Millenium or its surety make any payment on the liquidated damages assessments. *See* Complaint ¶¶ 22, 33, 44.

In the meantime, Millenium filed protests with Customs contesting the agency's classification of the company's merchandise under HTSUS heading 4407. *See* Def.'s Motion to Dismiss at 5 n.1. In two letters (dated August 24, 2001 and October 9, 2001), Customs agreed – at Millenium's request – to defer action on the agency's liquidated damages claims against Millenium (which arose out of Customs' classification determination) while the company pursued its challenge to that determination. *See id*. at 5–6; *id*. at Exhs. 1, 3 (Customs letters dated August 24, 2001 and October 9, 2001).

Customs denied Millenium's protests, and Millenium brought suit in this court challenging that denial. *See* Def.'s Motion to Dismiss at 6; *Millenium Lumber Distrib. Ltd. v. United States*, Court No. 02–00595 (filed Sept. 12, 2002). In light of Millenium's litigation challenging Customs' classification determination, Customs continued to defer action on the agency's liquidated damages claims. However, in late May 2005, with the six-year statute of limitations soon to expire, Customs notified Millenium and its surety that – although Customs was aware that the classification issue had not yet been finally resolved, and although the agency would be willing to allow

[5] 19 C.F.R. § 172.1(a) provides:

> Notice of liquidated damages incurred. When there is a failure to meet the conditions of any bond posted with Customs, the principal shall be notified in writing of any liability for liquidated damages incurred by him and a demand shall be made for payment. The sureties on such bond shall also be advised in writing, at the same time as the principal, of the liability for liquidated damages incurred by the principal.

19 C.F.R. § 172.1(a).

the classification litigation to run its course – Customs would need to take appropriate action to preserve the agency's liquidated damages claims, unless Millenium and/or its surety made full payment or the two executed waivers of the statute of limitations within 30 days. *See* Complaint ¶¶ 21, 32, 43; *id*., Exh. 7 (letters to Millenium and surety, dated May 23, 2005).[6]

Both Millenium and its surety declined to execute waivers of the statute of limitations. Similarly, neither made payment of the liquidated damages assessed. *See* Complaint ¶¶ 22, 33, 44; Pl.'s Response Brief at 10. Roughly one year later, the Government commenced this action against Millenium and the surety, to collect the liquidated damages assessed.

In the meantime, Customs' classification determination has been sustained by this court, which, in turn, was affirmed on appeal. *See Millenium Lumber Distrib. Ltd. v. United States*, 31 CIT 575 (2007), *aff'd*, 558 F.3d 1326 (Fed. Cir. 2009) (holding that Millenium's merchandise is properly classified under HTSUS heading 4407). Thus, there is no longer any dispute that Millenium's merchandise is properly classified under heading 4407, and, as such, is subject to the Softwood Lumber Agreement.

## II. *Standard of Review*

In reviewing a motion to dismiss for failure to state a claim, "any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000); *see generally* USCIT Rule 12(b)(5). "Dismissal for failure to state a claim is proper only when it is beyond doubt that the plaintiff can prove no set of facts that would entitle it to relief." *Amoco Oil*, 234 F.3d at 1376. Dismissal under Rule 12(b)(5) is thus proper only if the plaintiff's allegations of fact are not "enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (citations omitted). At the same time, a complaint's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*., 556 U.S. at 679.

[6] A complaint to recover liquidated damages must be filed "within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later." 28 U.S.C. § 2415(a).

## III. *Analysis*

Distilled to its essence, Millenium's argument is that the Government failed to exhaust administrative remedies because the Government filed the instant action to collect liquidated damages "prior to the completion of" mitigation proceedings that Millenium maintains were "pending" at the agency level. Def.'s Motion to Dismiss at 2. Millenium contends that this action is therefore "premature," and must be dismissed. *Id*.

However, the exact same argument has been previously considered – and rejected – by this court in *Canex*, a case strikingly similar to the case at bar. *See United States v. Canex Int'l Lumber Sales Ltd.*, 32 CIT 407 (2008). Millenium's argument also cannot be reconciled with other relevant decisions of this court and the Court of Appeals, which highlight the permissive, voluntary, and discretionary nature of the administrative mitigation proceedings in question. *See United States v. Cocoa Berkau*, 990 F.2d 610, 614–16 (Fed. Cir. 1993); *United States v. Ataka America, Inc.*, 17 CIT 598, 605, 826 F. Supp. 495, 501–03 (1993). Moreover, the two cases on which Millenium principally relies are simply inapposite. *See Warner-Lambert Co. v. United States*, 24 CIT 205 (2000); *United States v. Bavarian Motors, Inc.*, 4 CIT 83, 85–86 (1982). Millenium's motion to dismiss thus has no sound basis in the law. *See* section III.A, *infra*.

Millenium's case is just as weak on the facts. As summarized below, contrary to Millenium's repeated assertions, no mitigation proceedings were ever commenced at the agency level. Simply stated, Millenium never availed itself of the "remedy" that it now claims should have been exhausted. *See* section III.B, *infra*.

Finally, as explained below, the scheme that Millenium advocates is entirely unworkable, and would have the potential to produce dire results in cases such as this. The practical realities of administrative process and litigation thus bear out the correctness of the Government's legal position here. *See* section III.C, *infra*.

### A. *The Legal Merits of Millenium's Argument*

The gravamen of Millenium's motion to dismiss is that the Government's commencement of this action "is in violation of the doctrine of exhaustion of administrative remedies." Def.'s Supp. Brief at 1; *see also* Def.'s Motion to Dismiss at 2. Emphasizing that the Court of International Trade is directed, "where appropriate," to "require the exhaustion of administrative remedies," Millenium argues that the Government's attempt to collect liquidated damages is "premature and untimely," because – Millenium maintains – the company should have been allowed to engage in mitigation proceedings at the agency

level. *See* Def.'s Motion to Dismiss at 2, 7, 13; 28 U.S.C. § 2637(d) (providing for application of doctrine of exhaustion of administrative remedies in "appropriate" cases); 19 U.S.C. § 1623(c); 19 C.F.R. § 172.1(b).[7] According to Millenium, the Government's asserted failure to exhaust administrative remedies warrants dismissing this action for failure to state a claim upon which relief can be granted. *See* Def.'s Motion to Dismiss at 1–2; Def.'s Supp. Brief at 1.

As the Government notes, however, this precise argument was squarely rejected in *Canex* (a case with facts virtually identical to those here), which, in turn, relied heavily on *Cocoa Berkau* and *Ataka*. *See* Pl.'s Supp. Brief at 3–6, 8–9, 13; *Canex*, 32 CIT at 408–09 (discussing, *inter alia*, *Cocoa Berkau*, 990 F.2d at 614–16; *Ataka*, 17 CIT at 605, 826 F. Supp. at 501–03); *see also* Pl.'s Response Brief at 6–11, 13–14 (discussing *Cocoa Berkau* and *Ataka*); Pl.'s Supp. Brief at 5, 8–16 (same).

Like *Cocoa Berkau* and *Ataka* before it, *Canex* underscored that administrative proceedings on a petition for mitigation are not only informal, but also permissive and voluntary, and that relief is granted at the discretion of Customs. *See Cocoa Berkau*, 990 F.2d at 615–16 (emphasizing that mitigation proceedings before Customs are "completely voluntary" and that agency's decision whether to grant relief is "discretionary"; characterizing mitigation proceedings as "discretionary and summary [in] nature," and highlighting "marked contrast" with other "formal and time-consuming administrative proceedings"); *Ataka*, 17 CIT at 605–06, 826 F. Supp. at 502–03 (noting that mitigation proceedings are "voluntary," and that decision whether to grant relief is at agency's "discretion"; describing mitigation proceedings as "discretionary and informal" and "not mandatory"); *Canex*, 32 CIT at 408–09 (explaining that mitigation proceedings are "voluntary and informal, and relief is granted at the discretion of Customs"; characterizing such proceedings as "permissive").

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[7] The regulations provide that a principal or its surety may file an application (a petition) for mitigation seeking relief from the assessment of liquidated damages pursuant to 19 U.S.C. § 1623(c). *See* 19 C.F.R. § 172.1(b).

Under 19 U.S.C. § 1623(c):

> The Secretary of the Treasury may authorize the cancellation of any bond provided for in this section, or of any charge that may have been made against such bond, in the event of a breach of any condition of the bond, upon the payment of such lesser amount or penalty or upon such other terms and conditions as he may deem sufficient.

19 U.S.C. § 1623(c). *See also* 19 C.F.R. § 172.11(b) (stating that a petition for relief may be in any form); 19 C.F.R. § 172.12(b)(1) (stating that petition for relief "shall be filed within 60 days from the date of mailing of the notice of the liability for liquidated damages").

Emphasizing the "discretionary and summary" nature of mitigation proceedings, the Court of Appeals held in *Cocoa Berkau* that the Government is not required to resolve a pending petition for mitigation before filing an action to recover liquidated damages in this court. *See Cocoa Berkau*, 990 F.2d at 614–16 (rejecting Government argument that surety's commencement of voluntary mitigation proceedings precluded Government from filing civil action to collect liquidated damages, and thus tolled statute of limitations). To the same effect, the court in *Ataka* ruled that, because administrative mitigation proceedings are "discretionary and informal," they "need not be resolved in order for the government to recover liquidated damages under a bond through court action." *Ataka*, 17 CIT at 605, 826 F. Supp. at 502 (involving Government action attempting to recover customs duties from importer's successor and surety).

Hewing to *Cocoa Berkau* and *Ataka*, the *Canex* court expressly held that "the Government was not required to postpone its filing of [an action for liquidated damages] until [the importer at issue] exercised its right to request mitigation proceedings." *Canex*, 32 CIT at 409. Millenium has made no showing that a different outcome should obtain here.[8]

Millenium seeks to make much of the fact that the issue presented in *Cocoa Berkau* was whether the Government's action to recover liquidated damages was time-barred. Millenium asserts that this action is thus distinguishable from *Cocoa Berkau* because the pending motion involves the applicability of the doctrine of exhaustion, while *Cocoa Berkau* involved the applicability of a particular statute of limitations. *See* Def.'s Reply Brief at 1–5, 7; Def.'s Supp. Brief at 3–6, 8–9. But Millenium has failed to explain why that distinction should compel a different result. *See generally* Pl.'s Supp. Brief at 4–5, 8–14, 17–19. Indeed, the holding in *Cocoa Berkau* was premised broadly on the Court of Appeals' determination that mitigation proceedings are so voluntary and so discretionary that they play no role in determining *when* the Government may sue for liquidated dam-

[8] The judges of the Court of International Trade are in no way bound by the decisions that their colleagues on the court have rendered in prior cases. *See generally Algoma Steel Corp., Ltd. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989). However, "[w]henever [a judge] considers the holding and reasoning of a previous opinion rendered by a different Judge of the CIT [in a similar case], [he or she] regards such opinions as persuasive." *Nucor Corp. v. United States*, 32 CIT 1380, 1447 n.47, 594 F. Supp. 2d 1320, 1380 n.47 (2008); *see also*, *e.g.*, *D & L Supply Co. v. United States*, 22 CIT 539, 540 (1998) (same); *Buna v. Pacific Far East Line, Inc.*, 441 F. Supp. 1360, 1365 (N.D. Cal. 1977) (explaining that "[j]udges of the same district court customarily follow a previous decision of a brother judge upon the same question except in unusual or exceptional circumstances").

ages. *See Cocoa Berkau*, 990 F.2d at 615–16 (explaining nature of mitigation proceedings and why such proceedings do not bar initiation of civil action by Government to collect liquidated damages). As *Canex* recognized, the linchpin in *Cocoa Berkau* (and *Ataka*) was the permissive, voluntary, and discretionary nature of the administrative mitigation proceedings at issue in those cases – the same administrative proceedings at issue in *Canex* and here. *Canex*, 32 CIT at 408–09; *see also Cocoa Berkau*, 990 F.2d at 614–16; *Ataka*, 17 CIT at 605–06, 826 F. Supp. at 501–03. Contrary to Millenium's assertions, *Cocoa Berkau* cannot be cabined to its facts.

Millenium stakes its motion to dismiss on two cases that it labels "directly on point." Def.'s Reply Brief at 10; *see also* Def.'s Motion to Dismiss at 7–11 (discussing the two cases); Def.'s Reply Brief at 10–13 (same); Def.'s Supp. Brief at 5–8 (same). The first is *Warner-Lambert*, in which the court dismissed an action for failure to exhaust administrative remedies. *See generally Warner-Lambert*, 24 CIT at 208–11. According to Millenium, *Warner-Lambert* stands for the proposition that dismissal of an action such as the instant case "is proper where administrative proceedings involving liquidated damages have not been completed at the time the court action was commenced." Pl.'s Motion to Dismiss at 7. As *Canex* explained, however, *Warner-Lambert* lent no support to the plaintiff in that case; and it is equally unavailing for Millenium here. *See Canex*, 32 CIT at 409.

The plaintiff in *Warner-Lambert* brought an application for a temporary restraining order and preliminary injunction premised on an alleged – and, as of that time, not-yet-realized – threat of possible sanctions, which, it was claimed, would have a "detrimental impact" on the plaintiff's operations. *Warner-Lambert*, 24 CIT at 205–06. The purported threat of sanctions arose out of various liquidated damages assessments made by Customs. *Id*., 24 CIT at 205–06. The Government established that some of the liquidated damages claims at issue were the subject of petitions for mitigation filed by the plaintiff that were still pending before Customs. *Id*., 24 CIT at 206–08. Further, although the administrative process was complete as to some of the liquidated damages claims, none had been referred to the Department of Justice for initiation of a collection action. *Id*., 24 CIT at 207. Moreover, there were no actual sanction proceedings initiated against the plaintiff. *Id*.

The *Warner-Lambert* court granted the Government's motion to dismiss. In so doing, the court discussed the constitutional requirement of ripeness. *Warner-Lambert*, 24 CIT at 209. In that context, the court noted that, "where appropriate," the exhaustion of administrative remedies is required. *Id*. (discussing 28 U.S.C. § 2637(d)). The

*Warner-Lambert* court concluded that, in the case before it, the harm that the plaintiff alleged was merely speculative, because, at the time, there was at most a threat of sanctions, and because the administrative process was not yet complete. *Id*., 24 CIT at 209. The court explained that, under such circumstances, it could not "discern the kind of threat of immediate, irreparable injury necessary to grant or sustain the extraordinary equitable relief" that a temporary restraining order or preliminary injunction represents. *Id*., 24 CIT at 208. Dismissing the plaintiff's action, the *Warner-Lambert* court found that it would be "appropriate" for plaintiff to "exhaust fully its administrative remedies" as to those cases that remained pending in the administrative pipeline. *Id*., 24 CIT at 209.

*Warner-Lambert* bears no resemblance to the case at bar. This is an action brought by the Government to collect unpaid liquidated damages – not an action for a temporary restraining order and preliminary injunction, brought against the Government. The action here is based on a breach of a condition of customs bonds (specifically, Millenium's failure to present proof of the permits required by the Softwood Lumber Agreement); and there is nothing unripe or speculative as to that claim. *See Canex*, 32 CIT at 409 (in case strikingly similar to case at bar, rejecting same argument raised by Millenium here, and ruling that "the . . . case is ripe for action"). In contrast, the *Warner-Lambert* court's decision requiring the plaintiff in that case to complete pending administrative proceedings reflected the court's determination that – unless and until the plaintiff had a better understanding of the practical effects (if any) of its alleged noncompliance with the terms of the bond – the plaintiff's claim was not ripe for judicial review, because there was no way for the court to determine whether the plaintiff faced the type of immediate, irreparable injury required for issuance of a preliminary injunction. *See generally* Pl.'s Response Brief at 11–12; Pl.'s Supp. Brief at 5, 19–21.[9] As ammunition for Millenium's argument, *Warner-Lambert* misses the mark.

The second case on which Millenium relies is *Bavarian Motors*. *See generally* Def.'s Motion to Dismiss at 9–11 (discussing *Bavarian Motors*, 4 CIT at 85–86); Def.'s Reply Brief at 10–13 (same); Def.'s Supp. Brief at 5–8 (same). But, like *Warner-Lambert*, *Bavarian Motors* too fails to advance Millenium's cause, for reasons that are summarized in *Canex*. *See Canex*, 32 CIT at 409.

[9] Moreover, in contrast to *Warner-Lambert*, in this case not only are there no administrative mitigation proceedings pending, but, in fact, no such proceedings were ever initiated. *See* section III.B, *infra*.

In *Bavarian Motors*, the court held that the Government's action to collect liquidated damages from a surety was premature in light of the surety's pending protest of the liquidated damages claims at the administrative level. *See Bavarian Motors*, 4 CIT at 85. In the instant case, however, neither Millenium nor the surety protested the demand for the liquidated damages.[10] Further, as *Canex* observes, *Ataka* emphasized that *Bavarian Motors* was decided prior to the 1984 effective date of 19 U.S.C. § 1505(c), which gave the Government an immediate right to sue for liquidated damages, notwithstanding the pendency of protest proceedings. *See Canex*, 32 CIT at 409 (citing *Ataka*, 17 CIT at 607, 826 F. Supp. at 503 ("[S]ince the effective date of 19 U.S.C. § 1505(c) [now 19 U.S.C. § 1505(b)], completion of protest proceedings has not been a requirement for suit to collect.")). Millenium's reliance on *Bavarian Motors* is thus misplaced.[11]

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[10] The Government states that – to the extent that the court's holding in *Bavarian Motors* was premised on the court's determination that the defendant surety in that case had a right to file a protest concerning the Government's demand for payment against the bond (*see Bavarian Motors*, 4 CIT at 85) – subsequent decisions from both the Court of Appeals and this court have established that the assessment of liquidated damages does not constitute a "charge or exaction" and, thus, that it cannot be the subject of a protest. *See* Pl.'s Response Brief at 13 n.7 (citing 19 U.S.C. § 1514(a)(3); *United States v. Utex Int'l, Inc.*, 857 F.2d 1408, 1413–14 (Fed. Cir. 1988); *United States v. Toshoku America, Inc.*, 879 F.2d 815, 818 (Fed. Cir. 1989); *Pope Prods. v. United States*, 15 CIT 279, 281–83 (1991) (analyzing *Utex* and *Toshoku*, and rejecting argument that a "Notice of Demand for Liquidated Damages is a protestable decision")).

[11] As explained above, the doctrine of exhaustion of administrative remedies does not apply in circumstances such as these; thus, there was no requirement that administrative mitigation proceedings be complete before the Government could bring this civil action to collect liquidated damages. However, even if the doctrine of exhaustion did apply, the Government notes that one or more of the established exceptions might well operate to excuse a failure to exhaust. *See generally* Pl.'s Response Brief at 15–16.

For example, it appears that requiring exhaustion (*i.e.*, requiring the Government to now allow Millenium to file and pursue a petition for mitigation) would have been a "useless formality," because any defenses to liability that Millenium may have could be asserted in this proceeding. Similarly, the potential relief that would have been available to Millenium in a mitigation proceeding was a reduction in the amount of liquidated damages demanded. *See* 19 C.F.R. § 172.21. However, to the extent that Millenium has continued to believe that it has grounds for mitigation and should not be required to pay the full amount of liquidated damages that was assessed, the company has been free to make its case to the Government at any point during the pendency of this action and to make an appropriate offer of settlement, to attempt to resolve the matter amicably. Finally, Millenium has failed to make clear what – if any – additional facts it claims need to be developed at the administrative level. *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1338–39 (D.C. Cir. 1983). The fundamental facts of this case – like those in *Canex*, a nearly identical case – are fully-developed, and relatively straightforward: Millenium imported goods that were subject to the Softwood Lumber Agreement, but failed to provide proof of the permits required under that agreement. Given these circumstances, there would be no apparent point to requiring the Government to allow Millenium to file a petition and pursue administrative mitigation proceedings before the agency.

In sum, there is no substance to Millenium's position that the Government may file a civil action to collect liquidated damages only after mitigation proceedings at the agency level are complete. The settled law is to the contrary.

B. *The Factual Basis for Millenium's Argument*

As detailed above, there is no legal merit to Millenium's claim that the pendency of administrative mitigation proceedings bars the Government from bringing the instant collection action for liquidated damages. But, in any event, contrary to Millenium's assertions, there are no such mitigation proceedings pending here. *Compare*, *e.g.*, Def.'s Motion to Dismiss at 8 (asserting that "administrative liquidated damages cases against Millenium remain under active agency consideration," and that "[t]he administrative cases had not concluded at the time Plaintiff commenced this action, and, for that matter, have not yet concluded") *with* Pl.'s Response Brief at 2, 4–6, 9–11 (summarizing chronology of events before the agency, and explaining that neither Millenium nor its surety ever filed application/petition to institute mitigation proceedings at the administrative level); Pl.'s Supp. Brief at 1–2, 14–15 (same).[12]

[12] In its briefs, Millenium repeatedly waffles back and forth as to whether administrative mitigation proceedings were initiated.

Generally, Millenium argues that administrative mitigation proceedings were initiated in a timely fashion and remained pending at least as of the date the Government commenced this action. In addition to the citations provided above, *see*, *e.g.*, Def.'s Motion to Dismiss at 8 (asserting that "administrative proceedings in this case [have] not been completed"); *id.* (stating that "administrative proceedings remain 'under active agency consideration'"); *id*. at 9 (asserting that Government here "filed suit prior to the conclusion of administrative liquidated damages proceedings" and "prior to the conclusion of the administrative proceedings against Millenium"); *id*. at 13 (criticizing Government for "[t]he commencement of this case prior to the . . . conclusion of any substantive proceedings in the underlying administrative liquidated damages cases"); Def.'s Reply Brief at 1 (asserting that administrative mitigation proceedings "are in a 'holding status'"); *id*. at 11 (referring to "uncompleted administrative proceedings"; *id*. (asserting that "the pending liquidated damages administrative proceedings bar [the instant action]"); *id*. at 13 (contending that allegedly pending "administrative cases have been placed in a 'holding status'"); Def.'s Supp. Brief at 6 (arguing that "there is an administrative proceeding that was commenced and is still pending").

Elsewhere, however, Millenium candidly concedes that mitigation proceedings were never commenced, but seems to suggest that it had some right to do so that was abrogated by the Government's commencement of this action. *See*, *e.g.*, Def.'s Motion to Dismiss at 8 (acknowledging that "Millenium has not . . . exercised its express right to file petitions for relief in the administrative cases"); *id*. at 10 (alleging that Millenium "has not been afforded the opportunity to exercise its right to submit a petition to contest the liquidated damages proceeding"); *id*. at 11 (asserting that "Millenium withheld the filing of a petition for relief from the liquidated damages cases," and complaining that Customs "did not afford

Millenium tries to cast the two letters that the company received from Customs in August and October 2001 as evidence that administrative mitigation proceedings were pending. To the contrary, the two letters reflected nothing more than Customs' agreement to defer action on the agency's liquidated damages claims against Millenium (*i.e.*, to place them in "a holding status"), awaiting "resolution of [Millenium's] filed protest" contesting Customs' tariff classification of Millenium's merchandise. *See* Def.'s Motion to Dismiss at Exhs. 1, 3. Nothing in either letter even hints at the existence of any pending mitigation proceedings initiated by Millenium or its surety. And it is telling that Millenium itself cannot point to any application or petition for mitigation that it filed with Customs. Nor can Millenium point to any such application or petition filed by its surety.

In short, contrary to Millenium's assertions at various points in its briefs, there are no relevant administrative mitigation proceedings pending at Customs – and there never were. As detailed above, however, even if Millenium had commenced administrative mitigation proceedings, the pendency of such proceedings would not have barred the Government from bringing the instant action.[13]

### C. *The Practical Implications of Millenium's Argument*

As explained above, there is no legal merit to Millenium's claim that the doctrine of exhaustion barred the Government from bringing this action to collect liquidated damages. The soundness of that outcome as a matter of law is further reinforced by very practical considerations.

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Millenium opportunity to exercise its right to file a petition for administrative relief before . . . filing this action to collect liquidated damages").

In any event, it is clear beyond cavil that administrative mitigation proceedings could have been initiated only by Millenium or its surety (*not* by Customs), and that mitigation proceedings could have been instituted only by the filing of an appropriate application or petition. *See* 19 C.F.R. § 172.1(b) (providing that principal or surety may file application/petition for mitigation seeking relief from assessment of liquidated damages); 19 C.F.R. § 172.11 (stating that application/petition for mitigation should specify facts relied upon by petitioner as grounds for mitigation). And it is undisputed that neither Millenium nor its surety ever filed any such request for relief, even though such an application/petition for mitigation could have been submitted at any time after Millenium's receipt of the Liquidated Damages Notices in 2001. *See* Pl.'s Response Brief at 9; Pl.'s Supp. Brief at 14 n.8.

[13] As the Government notes, "[e]ven if Millenium had availed itself of the opportunity to submit a petition for mitigation . . . , the Government would have had no obligation to actually resolve that petition prior to filing suit." Pl.'s Supp. Brief at 16 n.10 (citing *Cocoa Berkau*, 990 F.2d at 615–16; *Ataka*, 17 CIT at 605, 826 F. Supp. at 501–02; *Canex*, 32 CIT at 409).

Even if the two letters that Millenium and its surety received from Customs in 2001 were to be read to allow Millenium to delay the filing of a petition for mitigation, Customs' letters of May 23, 2005 made it clear to any reader that Customs could no longer afford to wait. *See* Complaint, Exh. 7 (letters to Millenium and surety, dated May 23, 2005). After allowing Millenium's classification litigation to progress, but cognizant of the statute of limitations on the Government's liquidated damages claims, Customs' May 23, 2005 letters explained that the agency would be willing to continue to defer action on the liquidated damages claims and await the outcome of the classification litigation – provided that Millenium and its surety executed waivers of the statute of limitations, to preserve the Government's right to pursue its liquidated damages claims if Millenium did not prevail in the classification litigation. *See id*. The May 23, 2005 letters put both Millenium and its surety on notice that, without executed waivers, the statute of limitations would leave the Government with little choice but to bring a collection action in this court. *See generally Canex*, 32 CIT at 409–10 (concluding that letter from Customs comparable to May 23, 2005 letters here put the plaintiff company in that case on notice of potential legal action by agency, and afforded the company "ample opportunity to execute the statute of limitations waiver or petition for mitigation proceedings as necessary"; ruling that "[the plaintiff company's] argument that it was deprived of the opportunity [to pursue mitigation] . . . is therefore without merit").[14]

Notwithstanding the May 23, 2005 letters, both Millenium and its surety refused to execute waivers. Without such waivers, the Government effectively had no option but to file this action.

Millenium does not dispute that the Government's liquidated damages claims were subject to a six-year statute of limitations. *See* 28 U.S.C. § 2415. Nor does Millenium seriously dispute that Millenium was in control of whether – and, if so, when – to institute administrative mitigation proceedings. Yet Millenium here insists that the Government is precluded from filing an action to collect liquidated damages whenever mitigation proceedings are pending.

As the Government points out, if it had waited to file suit – as Millenium argues it was required to do – the Government would have

[14] As the Government notes, even "after the issuance of the [May 23, 2005] letter[s], neither Millenium nor its surety took any action to file a petition" seeking mitigation – not even in the nearly one-year window between the May 2005 letter and the commencement of this civil action in mid-April 2006. *See* Pl.'s Response Brief at 10. The Government emphasizes that "[i]f Millenium desired to avail itself of the voluntary, administrative mitigation proceeding, it had the opportunity to do so. It did not." *Id*. Millenium never explains why it did not file a petition seeking mitigation after receiving the May 23, 2005 letter. In fact, Millenium conspicuously avoids addressing the significance of the May 23, 2005 letter in any meaningful sense.

faced the very real possibility that, as in *Cocoa Berkau*, the statute of limitations would have barred the liquidated damages claims that are the subject of this action. *See* Pl.'s Response Brief at 2–3, 11; Pl.'s Supp. Brief at 14–16. The scheme that Millenium envisions thus would be patently unworkable.

### IV. *Conclusion*

For the reasons set forth above, Millenium's Motion for Judgment on the Pleadings must be denied. A separate order will enter accordingly.

Dated: December 18, 2012
New York, New York

/*s*/*Delissa A. Ridgway*
DELISSA A. RIDGWAY JUDGE

Slip Op. 12–154

AMS ASSOCIATES, INC., d/b/a SHAPIRO PACKAGING, Plaintiff, v. UNITED STATES, Defendant, and LAMINATED WOVEN SACKS COMMITTEE, COATING EXCELLENCE INTERNATIONAL, LLC, and POLYTEX FIBERS CORPORATION, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00148

[Holding *ultra vires* the suspension of liquidation of entries of laminated woven sacks from the People's Republic of China.]

Dated: December 18, 2012

*Lizbeth R. Levinson* and *Roland M. Wilsa*, Kutak Rock LLP, Washington, DC, for plaintiff.

*Tara K. Hogan*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Rebecca Cantu*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce.

*Joseph W. Dorn* and *Jeffrey B. Denning*, of *King & Spalding*, Washington, DC, for defendant-intervenors.

### OPINION

**Musgrave, Senior Judge:**

This case involves similar issues to those argued before this court in *AMS Associates, Inc. v. United States*, Ct. No. 11–00101 ("*AMS I*"), see Slip Op. 12–98, dated July 27, 2012, familiarity with which is presumed. Although that case was not decided on the merits of the issues

present herein because the affected entries had all liquidated before the action became ripe, thus removing any harm alleged by plaintiff, the underlying issues are familiar to the court.

During the first administrative review of the relevant antidumping duty order, the U.S. Department of Commerce, International Trade Administration ("Commerce") performed a scope inquiry and issued instructions retroactively suspending liquidation of the Plaintiff's entries made during the second administrative review period involved in the present action. For the reasons explained below, the court finds the suspension instructions *ultra vires* and remands the case to Commerce for actions consistent with this opinion.

## *I. Facts*

Commerce found that laminated woven sacks from the People's Republic of China ("PRC") were being dumped in *Laminated Woven Sacks from the People's Republic of China*. 73 Fed. Reg. 45,941 (Aug. 7, 2008) ("LWS Order"). The scope of the LWS Order was defined in part as "bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or polyethylene" that are "laminated to an exterior ply of plastic film or to an exterior ply of paper that is suitable for high quality print graphics." LWS Order, 73 Fed. Reg. at 45,942.

In September, 2009, Commerce undertook the first administrative review of the LWS Order for the period January 31, 2008 through July 31, 2009 ("AR1"). During that review Commerce investigated how respondent Zibo Aifudi Plastic Packaging Co., Ltd. ("Aifudi") determined whether merchandise was subject to the LWS Order due to concerns that not all of Aifudi's production of LWS was included in the information provided to Commerce. [1] At issue were sacks made in the PRC by Aifudi from fabric that originated elsewhere. Aifudi argued to Commerce that a country-of-origin ruling from U.S. Customs and Border Protection ("CBP") provided an adequate basis for its decision not to include sacks made with non-PRC-origin fabric in its sales information. *See* HQ N08508 (May 27, 2008), Exhibit A to Plaintiff's Memorandum in Support of its 56.2 Motion for Judgment on the Agency Record ("Pl's Memo"). Pursuant to that ruling, Aifudi declared a non-PRC origin for LWS made with non-PRC origin fabric and as a result paid no cash antidumping deposits upon their entry.

[1] *See*, *e.g.*, *Preliminary Decision Regarding the Country of Origin of Laminated Woven Sacks Exported by [Aifudi]*, (May 25, 2010) at 2 (citing additional information requested from Aifudi in January, 2010) ("*Preliminary Decision*"), Exhibit B to Pl's Memo, and Nov. 12, 2010 Memo to File from Catherine Bertrand (Commerce), attached at Tab 4 (P.R. 10) to Appendix to Laminated Woven Sacks Committee's ("LWSC") Response to Shapiro's Rule 56.2 Memo in Support of its Motion for Judgment on the Agency Record ("LWSC Appx.").

In AR1, Commerce concluded pursuant to a substantial transformation analysis that the PRC was the country of origin of the Aifudi LWS.

> We recommend preliminarily finding the country-of-origin of LWS produced in the PRC from imported fabric is of PRC origin. As a result, we also recommend preliminarily finding that the LWS imported by Aifudi into the U.S. are within the scope of the order. Based on these findings, we recommend that Aifudi be required to provide its U.S. sales of LWS produced from third countries[’] woven fabric.

*Preliminary Decision* at 9. Based upon this finding, Commerce issued a "clarification" of its liquidation instructions to CBP. Commerce Message No. 0204301 to CBP (July 23, 2010) ("Clarification"), Exhibit C to Pl's Memo. Commerce instructed CBP to "continue to suspend liquidation of all LWS from the PRC, regardless of the origin of the woven fabric, that is entered, or withdrawn from warehouse, for consumption, on or after January 31, 2008." Clarification at 2. While the text of the Clarification innocuously uses present tense, the effect of the Clarification was to retroactively suspend liquidation of and collect cash deposits of antidumping duties on all entries of Aifudi sacks made with non-PRC origin fabric after January 31, 2008, covering almost all of the affected entries made during the second review period, which ended July 31, 2010.[2]

In March, 2011, Commerce issued the final results of the first LWS administrative review.[3] It determined that it had correctly determined the country of origin issue during the administrative review, and that the Clarification was in accordance with the regulatory scheme. Commerce incorporated the findings of the Preliminary Decision on country of origin into the *AR1 Results*.

Aifudi refused to participate in the second administrative review. *Laminated Woven Sacks from the People's Republic of China: Preliminary Results of the Second Administrative Review*, 75 Fed. Reg. 81,218 (Dec. 27, 2010) ("*AR2 Preliminary Results*"). Commerce preliminarily determined that Aifudi had not demonstrated its eligibility for separate-rate status for the administrative review and failed to

[2] Pl's Memo at 5. At the court's request, the parties have identified entries of LWS made with non-PRC origin fabric filed during the second review period whose liquidation remains suspended. *See* Joint Response to Court's September 13, 2012 Order, dated October 12, 2012.

[3] *Laminated Woven Sacks from China: Final Results of First Antidumping Duty Administrative Review*, 76 Fed. Reg. 14,906 (Mar. 18, 2011) ("*AR1 Results*").

rebut the presumption of PRC government control. *AR2 Preliminary Results*, 75 Fed. Reg. at 81,219. Due to Aifudi's lack of cooperation, Commerce applied adverse facts available and assigned the PRC-wide entity the rate of 91.73%. *AR2 Preliminary Results*, 75 Fed. Reg. at 81,219–20. These conclusions carried over to the final results of the second review. *Laminated Woven Sacks from the People's Republic of China: Final Results of the Second Administrative Review*, 76 Fed. Reg. 21,333, 21,334 (Apr. 15, 2011) ("*AR2 Final Results*").

AMS Associates, Inc., d/b/a Shapiro Packaging ("Shapiro"), Plaintiff in this action, entered an appearance in the second review and filed briefs before Commerce. *See* P.D. 16 & 17, Tabs G & H to Defendant's Appendix ("Def's Appx."). Shapiro contended before Commerce that the country of origin determination in the first review period was procedurally erroneous and that Commerce issued the suspension of liquidation instructions to CBP without statutory or regulatory basis. P.D. 16.

In the *AR2 Final Results*, Commerce concluded that it would continue to follow the decision made during the first administrative review regarding the country of origin of LWS made with non-PRC-origin fabric. Issues and Decision Memorandum for the Second AR Results, April 8, 2011 ("AR2 I&D Memo"), at 2–3, Tab 7 to Plaintiff's Appendix of Record Documents ("Pl's Appx."). Commerce defended its decision to retroactively suspend liquidation of the entries of Aifudi LWS made with non-PRC-origin fabric.

> Early in the first administrative review proceeding, it was apparent that the Department needed to address a scope issue to determine the country of origin of [LWS] produced in the PRC from imported woven fabric and sold to the United States by the respondent during the POR. Such an examination is akin to that made in a separate scope inquiry, which provides a mechanism for interested parties to obtain a scope decision, without having to seek an administrative review. Both proceedings provide interested parties notice and an opportunity to comment. The Department's regulations governing an administrative review, however, do not specifically address the suspension of liquidation with respect to a product whose status is subject to a scope inquiry conducted in the context of an administrative review proceeding. Accordingly, when the Department makes a scope decision within the context of the review, the regulations governing scope inquiries provide relevant guidance. *See* 19 C.F.R. § 351.225. These regulations provide that the Department may order the suspension of liquidation of a product found to be

> included within the scope of an order to continue or to commence, as the case may be, following a preliminary scope determination. *See* 19 C.F.R. § 351.225(*l*)(2). The provision for suspension of liquidation is to preserve the ability to assess appropriate duties on the subject merchandise in the future. Therefore, consistent with the regulations governing scope inquiries, when making a scope decision in the context of an administrative review, the Department has the authority to issue instructions to CBP regarding the suspension of entries, as appropriate, after issuing a preliminary country of origin or scope decision conducted within that segment.
>
> The Department notes that in order to prevent subject merchandise from being liquidated without regard to antidumping or countervailing duties and in order to ensure the collection of appropriate cash deposits on [LWS] manufactured in the PRC, the Department issued an instruction to CBP to resolve the confusion that might arise from differences between the Department and CBP's respective country-of-origin classifications. Although no additional suspension of liquidation would normally be needed, as explained in 19 C.F.R. § 351.225(*l*), in this instance the Department issued an instruction to prevent liquidation of merchandise properly subject to the order and to implement the findings in its preliminary country of origin memorandum.

AR2 I&D Memo at 4–5, Tab 7 to Pl's Appx.

### *II. Arguments Presented*

Plaintiff Shapiro argues that Commerce violated its own regulations in deciding to rule on the scope of the LWS Order during the first administrative review without initiating either a scope or circumvention inquiry under 19 C.F.R. § 351.225. Pl's Memo at 8–18. Shapiro also argues that Commerce exceeded its authority by ordering CBP to retroactively suspend liquidation of LWS entries and collect estimated antidumping duties on shipments entered prior to the initiation of the scope review. Pl's Memo at 19. Notably, Plaintiff admits Commerce has the power to decide scope issues, and does not contest Commerce's finding that the LWS made with non-PRC origin fabric was substantially transformed in the PRC.

> Plaintiff does not contest Commerce's authority to conduct a country of origin scope inquiry or anti-circumvention inquiry to determine whether LWS manufactured in China from non-Chinese fabric is subject to outstanding antidumping and countervailing duty orders. Plaintiff recognizes that Commerce is not

> bound by CBP's country of origin analysis in enforcing the antidumping and countervailing duty laws. Moreover, Plaintiff does not contest the legal or factual findings of Commerce's country of origin determination as contained in the May 25, 2010 preliminary memorandum and subsequently adopted into the final results of the First Administrative Review.

Pl's Memo at 9–10. Rather, Shapiro argues that Commerce's failure to follow its regulations resulted in denial of Plaintiff's fundamental due process rights. Pl's Memo at 18–19. Shapiro points out that in the vast majority of instances where scope is at issue, Commerce uses its formal scope procedures under 19 C.F.R. § 351.225. *See* Pl's Reply at 12, *citing Notice of Scope Rulings*, 76 Fed. Reg. 73,596 (Nov. 29, 2011) (showing 36 active scope and circumvention inquiries pending before Commerce at the end of the first quarter of 2011).

The government argues that Commerce's actions were proper because the agency has the right to determine whether to launch a formal scope inquiry or to investigate scope issues as part of an administrative review. Defendant's Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record ("Def's Memo") at 11. According to Defendant, "Commerce's authority to issue instructions is *inherent* in its authority to examine scope issues within the context of the review, and is *implicitly required* by the statute to effectuate the retrospective system for the assessment of antidumping and countervailing duties." *Id*. at 8–9 (emphasis added). Likewise, suspending liquidation during an administrative review "*is not expressly provided by statute* . . . but rather is *statutorily implied* and required for Commerce to calculate assessment rates for subject merchandise."[4]

Petitioner LWSC argues that Commerce has explicit authority to determine which of Aifudi's entered goods were merchandise subject to the LWS Order. LWSC's Response to Shapiro's Rule 56.2 Memorandum In Support of its Motion for Judgment on the Agency Record ("LWSC's Resp.") at 14–15. Commerce merely "clarified" the existing liquidation instructions when it ordered the retroactive suspension of liquidation of Plaintiff's non-PRC fabric LWS. *Id*.

### *III. Jurisdiction and Standard of Review*

Plaintiff has properly invoked jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold a determination by Commerce unless it is "unsupported by substantial evidence on the record or otherwise

[4] Def's Memo at 22 (emphasis added). Defendant failed to explain how suspension of liquidation aids in the calculation of antidumping rates for subject merchandise.

not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(I); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379 (Fed. Cir. 2007). "In order to effectuate review of the reasonableness of agency action, '[c]ourts 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.'" *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010), quoting *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998). An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represent an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005).

### *IV. Discussion*

Although argued extensively by the parties, it is clear that Commerce has the right to conduct a scope inquiry during an administrative review. Indeed, 19 C.F.R. § 351.225(f)(6) expressly permits Commerce to "conduct [a] scope inquiry in conjunction with [an administrative] review." The court is mindful that "Commerce retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." *Minebea Co. v. United States*, 16 CIT 20, 22, 782 F. Supp. 117, 120 (1992) (upholding as supported by substantial evidence scope clarification made after notice of initiation). This discretion is limited by the requirement that it be exercised reasonably and that any consequent determination be supported by substantial evidence in the administrative record. *See Minebea*, 16 CIT at 22, 782 F. Supp. at 119.

The government and LWSC cite decisions in support of Commerce's power to determine a product's origin within an administrative review, but the cases cited are inapposite because none address the critical circumstance here, *i.e.*, the retroactive suspension of liquidation.[5] The administrative proceedings in which Commerce reviewed

[5] *See e.g.*, *Mukand Intl. v. United States*, 29 CIT 1526, 412 F. Supp. 2d 1312 (2005), *affirmed* 502 F.3d 1366 (Fed. Cir. 2007); *Ugine and Alz Belg. N.V. v. United States*, 31 CIT 1536, 517 F. Supp. 2d 1333 (2007), *affirmed* 551 F.3d 1339 (Fed. Cir. 2009) ; *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished from the People's Republic of China*, 75 Fed. Reg. 844 (Jan. 6, 2010). In *Mukand*, plaintiff asserted Commerce illegally failed to initiate a scope inquiry following Mukand's request, with the result that entries were liquidated when their suspensions were lifted. *Mukand*, 412 F. Supp. 2d at 1317. When Mukand later asked the court for an injunction, the court found it lacked jurisdiction because Mukand failed to protect its own entries from liquidation. *Mukand*, 412 F. Supp. 2d at 1319. The court never reached the issue of whether Commerce correctly interpreted its scope regulations. In the *Ugine* case, plaintiff challenged Commerce's instructions to CBP to liquidate entries of foreign-source product that Commerce had determined were outside the scope of

scope within the context of an administrative review are few and none present the circumstances involved here.

The issue here is that Commerce ignored the corollary to 19 C.F.R. § 351.225(f)(6), *i.e.*, that it must abide by the restrictions imposed on its authority to perform certain actions during a scope inquiry regardless of the formality of the proceeding pursuant to which that is determined. In conducting the scope review within the first administrative review, Commerce paid lip service to the scope regulations but failed to follow their restriction of suspension of liquidation to only those entries made on or after the date of initiation of a formal scope inquiry.[6] "If liquidation [of a product subject to a scope inquiry] has not been suspended, the Secretary will instruct [CBP] to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product entered . . . *on or after the date of initiation of the scope inquiry*." 19 C.F.R. § 351.225(*l*)(2) (emphasis added).

Commerce clearly recognized that its administrative review regulations do not permit retroactive suspension of liquidation. AR2 I&D Memo at 4 ("[the administrative review regulations] do not specifically address the suspension of liquidation with respect to a product whose status is subject to a scope inquiry conducted in the context of an administrative review proceeding"). Commerce referred to the scope regulations for "relevant guidance" in its conduct of the scope investigation during the administrative review. *Id*. But Commerce then avoided § 351.225(*l*)(2)'s restriction on suspension of liquidation of entries by claiming that it could "order the suspension of liquidation of a product found to be included within the scope of an order to continue or to commence, as the case may be, following a preliminary scope determination."[7]

the order. The court found *ultra vires* Commerce's instruction to CBP to liquidate entries with antidumping duties where it had earlier found those entries were not within the scope of the applicable order. *Ugine*, 517 F.Supp. 2d at 1346. Notably, in neither of those cases did Commerce suspend liquidation of entries retroactively.

[6] Plaintiff objects to a number of Commerce actions in this case, and lists several regulations other than 19 C.F.R. § 351.225(*l*) which it believes were violated. Plaintiff's Reply Brief at 5–6. For example, for administrative convenience, Commerce established case numbers and cash deposit rates for goods from countries other than the PRC based upon the LWS Order. *Cf. Ugine*, 517 F.Supp. 2d at 1346 (Commerce instruction to liquidate entries of German product which were outside scope of antidumping order on Belgian product was *ultra vires*). But Plaintiff failed to prove actual harm suffered by it (or others) as a result of those actions. The court does not find Commerce's actions resulted from a reasonable application of the regulations.

[7] *Id*. Commerce stated that the regulations permit suspensions of liquidations "to continue or commence". AR2 I&D Memo at 4. Under Commerce's regulations, however, suspension of liquidation may "continue" only where it is already in place, 19 C.F.R. § 351.225(*l*)(1), and it may "commence" only on or after the date of initiation of a scope investigation. 19 C.F.R.

Even if Commerce decided not to initiate a formal scope proceeding, it was bound by the substantive regulations regarding suspension of liquidation during scope determinations. In bridging the gap between regulations governing administrative reviews (which do not provide for suspensions because those entries are automatically suspended pending the review) and scope reviews (where entries may be suspended prospectively from the initiation of the review), Commerce chose to be bound by neither rule. Commerce paid lip service to the formal scope regulations in the AR2 I&D Memo while ignoring 19 C.F.R. § 351.225(*l*)(2)'s requirement that entries cannot be suspended from liquidation before the initiation of a country of origin scope inquiry. Because Commerce failed to initiate a formal scope inquiry, there was no "date of initiation" from which it could require suspension of Shapiro's entries. 19 C.F.R. § 351.225(*l*).

Commerce suspected that Aifudi had made U.S. sales that were not part of the database submitted pursuant to the first administrative review questionnaire as early as January 14, 2010, when it issued a supplemental questionnaire to Aifudi on the issue.[8] It is clear from the facts in the record that Commerce and Petitioners LWSC wanted to prevent circumvention of the LWS Order by Aifudi's use of the CBP origin ruling to declare LWS made with non-PRC origin fabric to be non-originating from the PRC and thus avoid the antidumping duties. LWSC points out Commerce's clarification of liquidation instructions was necessary "to ensure that Shapiro would stop circumventing the Orders by making false country of origin declarations" on its LWS entries. LWSC Resp. at 12. Yet neither Commerce nor Petitioners used the tools available to them to combat the alleged circumvention of the LWS Order. *See* 19 U.S.C. § 1677j(a)-(d); 19 C.F.R. § 351.225(a)-(j); *see e.g.*, *Small Diameter Graphite Electrodes from the People's Republic of China: Initiation of Anti-Circumvention Inquiry*, 76 Fed. Reg. 14,910 (March 18, 2011).

The AR2 I&D Memo states that Commerce will initiate a formal scope inquiry "if the Secretary finds that an inquiry is warranted." AR2 I&D Memo at 2; 19 C.F.R. § 351.225(b). That same memo states that "it was apparent that *the Department needed to address a scope issue* to determine the country of origin of [LWS] produced in the PRC from imported woven fabric". AR2 I&D Memo at 4 (emphasis added). The court is at a loss to understand why Commerce could find a scope

§ 351.225(*l*)(2). Commerce's citation 19 C.F.R. § 351.225(*l*) to support a retroactive order of suspension of liquidation in the absence of a formal scope inquiry is thus an erroneous interpretation of law.

[8] Preliminary Decision at 2. If Commerce had initiated a formal scope inquiry within the ongoing administrative review at that time of this inquiry to Aifudi it could have legally instructed CBP to suspend liquidation of the affected entries as early as January, 2010.

inquiry was unwarranted when it "needed to address" that very issue. Commerce's circular reasoning in defense of the retroactive liquidation instructions supports the finding that the Clarification instructions were issued based upon an erroneous interpretation of the law.

The government essentially argues that in determining the Aifudi LWS were within the original scope, Commerce was declaring what that original scope applied to, and therefore Commerce was correct to "clarify" the instructions retroactively. But these *post hoc* arguments could be applied in any scope inquiry, because by definition Commerce decides in those proceedings whether the product involved falls within the previously-defined scope. If Commerce's actions here were allowed to stand, Commerce could avoid the restriction on suspension of liquidation in any case by simply declaring an "informal" scope review and issuing retroactive suspension of liquidation instructions to CBP to "clarify" what the original scope definition covers. Commerce's regulations already contemplate the situation that Commerce was trying to address, and provide the protection to importers that entries of merchandise subject to scope inquiries will not be suspended before such inquiries are commenced. 19 C.F.R. § 351.225(*l*)(2).

The court agrees with Shapiro that Commerce violated its regulations by instructing CBP to retroactively suspend liquidation of entries of Aifudi's LWS. Commerce understood which regulations should apply under the circumstances but ignored the scope regulation controlling which entries could be suspended. At the time of the Clarification, liquidation of the earlier entries at bar had not been suspended as a matter of fact or law. By ordering the suspension of liquidation retroactive to the beginning of the period of review, Commerce exceeded its authority under 19 C.F.R. § 351.225(*l*). Commerce's determination that it had appropriate authority to issue retroactive suspension of liquidation instructions was based upon flawed reasoning and ignored applicable regulatory restrictions on suspensions. That determination was thus *ultra vires* and based upon an erroneous interpretation of the law.

### *V. Conclusion*

Based on the foregoing, the court finds *ultra vires* Commerce's action to suspend liquidation of Shapiro entries of LWS with countries of origin other than the PRC made during the period of review. The court hereby remands the action to Commerce with instructions to issue instructions to CBP to lift the suspension of liquidation of the entries listed on the parties' October 12, 2012 submission and to liquidate those entries as entered without regard to antidumping or

countervailing duties that may otherwise have been assessed. Any cash deposits that have been paid by Plaintiff as a consequence shall be refunded with interest.

Judgment will enter accordingly.

Dated: December 18, 2012
New York, New York

*/s/ R. Kenton Musgrave*

R. KENTON MUSGRAVE, SENIOR JUDGE