U.S. Customs and Border Protection

Slip Op. 13–116

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

Before: Timothy C. Stanceu, Judge
Court No. 09–00052

[Sustaining a redetermination the U.S. Department of Commerce issued in response to the court's remand order in litigation contesting the final results of a periodic administrative review of an antidumping duty order on tapered roller bearings and parts thereof from the People's Republic of China]

Dated: August 30, 2013

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

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Joanna V. Theiss*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Washington, DC.

William A. Fennell, *Terence P. Stewart*, and *Stephanie R. Manaker*, Stewart and Stewart, of Washington, DC, for defendant-intervenor.

OPINION

Stanceu, Judge:

Plaintiff Peer Bearing Company-Changshan ("CPZ") brought this action to contest a final determination ("Final Results") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), in the twentieth periodic administrative review of an antidumping duty order on tapered roller bearings and parts thereof ("subject merchandise") from the People's Republic of China ("PRC" or "China"). Compl. ¶ 1 (Feb. 4, 2009), ECF No. 2; *see Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Admin. Review*, 74 Fed. Reg. 3,987 (Jan. 22, 2009)

("*Final Results*").[1] The twentieth administrative review pertained to entries of subject merchandise made from June 1, 2006 through May 31, 2007 ("period of review" or "POR"). *Final Results*, 74 Fed. Reg. at 3,988.

Before the court is the second of two remand redeterminations that Commerce has issued in this case ("Second Remand Redetermination"). The Second Remand Redetermination responds to the court's order in *Peer Bearing Co.-Changshan v. United States*, 36 CIT __, 853 F. Supp. 2d 1365 (2012) ("*Peer Bearing II*"). *Final Results of Redetermination Pursuant to Ct. Remand* (Oct. 2, 2012), ECF No. 124 ("*Second Remand Redetermination*"). For the reasons discussed in this Opinion and Order, the court sustains the Second Remand Redetermination.

I. BACKGROUND

Background information on this litigation is presented in the court's previous opinions and is supplemented briefly herein. *See Peer Bearing II*, 36 CIT at __, 853 F. Supp. 2d at 1367–69; *Peer Bearing Co.-Changshan v. United States*, 35 CIT __, __, 752 F. Supp. 2d 1353, 1358–60 (2011) ("*Peer Bearing I*").

The Final Results assigned to CPZ an antidumping duty margin of 92.84%. *Final Results*, 74 Fed. Reg. at 3,989. In *Peer Bearing I*, the court held that Commerce, in attempting to determine the U.S. prices of CPZ's subject merchandise on an export price ("EP") basis according to its selection of "facts otherwise available" under section 776(a) of the Tariff Act of 1930 ("Tariff Act" or the "Act"), 19 U.S.C. § 1677e(a)[2], had not determined these U.S. prices according to a lawful method. *Peer Bearing I*, 35 CIT at __, 752 F. Supp. 2d at 1362–63. The court ordered Commerce, on remand, to "determine the U.S. prices on a constructed export price ["CEP"] basis, whether or not it relies on its authority to use facts otherwise available," unless Commerce decided to reopen the record to obtain additional price information "qualifying for use as starting prices for a determination of export prices according to 19 U.S.C. § 1677a(a)." *Id.* at __, 752 F. Supp. 2d at 1376. The court also ordered Commerce to "review, reconsider, and redetermine

[1] The scope of the order is "tapered roller bearings and parts thereof, finished and unfinished, from the [People's Republic of China]; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use." *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Admin. Review*, 74 Fed. Reg. 3,987, 3,988 (Jan. 22, 2009).

[2] Unless otherwise indicated, all statutory citations herein are to the 2006 edition of the U.S. Code.

the surrogate values" for three of CPZ's factors of production, "alloy steel wire rod, alloy steel bar, and scrap from the production of cages." *Id.* at __, 752 F. Supp. 2d at 1377.

In preparing the first remand determination in response to the court's order in *Peer Bearing I*, Commerce reopened the record by issuing a series of remand questionnaires to CPZ in an effort to obtain price information from which it could determine U.S. prices on an EP basis. *Peer Bearing II*, 36 CIT at__, 853 F. Supp. 2d at 1369. Concluding that CPZ had not provided the necessary export price information and had not acted to the best of its ability to respond to the Department's remand questionnaires, Commerce relied on the authority provided by section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b), to "use an inference that is adverse to the interests" of a party who "failed to cooperate by not acting to the best of its ability" in responding to a request for information. *Id.* (citations omitted). Commerce resorted to a method it termed "total adverse facts available" to determine a new margin for CPZ. *Id.* That margin, as set forth in the first remand redetermination, was 60.95%. *Id.* Commerce reasoned that its use of this method obviated the need for it to redetermine any of the three surrogate values at issue in this litigation. *Id.*, 36 CIT at __, 853 F. Supp. 2d at 1370.

Rejecting the first remand results, the court held that Commerce erred in failing to redetermine the surrogate values in response to the court's remand order. *Id.*, 36 CIT at __, 853 F. Supp. 2d at 1370–78. The court also held that Commerce erred in finding that CPZ had not acted to the best of its ability in responding to the Department's questionnaires and therefore also erred in resorting to an adverse inference. *Id.* The court ordered Commerce, *inter alia*, to redetermine the three surrogate values at issue and to "redetermine the U.S. prices for CPZ's subject merchandise according to a lawful method." *Id.*, 36 CIT at __, 853 F. Supp. 2d at 1378–79. In response, Commerce filed the Second Remand Redetermination on October 2, 2012, in which it determined a recalculated margin of 6.52% for CPZ. *Second Remand Redetermination* 17. CPZ commented in favor of the Second Remand Redetermination. Pl. Peer Bearing Co.-Changshan's Comments on Def.'s Second Redetermination on Remand (Nov. 1, 2012), ECF No. 127 ("CPZ's Comments"). Timken filed a comment submission in opposition. Comments on Final Results of Second Redetermination Pursuant to Ct. Remand (Nov. 5, 2012), ECF No. 128 ("Timken's Comments").

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c). The court must hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. Tariff Act, § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i).

B. Redetermination of U.S. Prices for CPZ's Subject Merchandise

In the Second Remand Redetermination, Commerce stated that "[f]or the reasons discussed in the [*first*] *Remand Redetermination*, the Department continues to find that EP is the appropriate basis to determine CPZ's U.S. price." *Second Remand Redetermination* 10 (citation omitted). Commerce also found, as it had in the first remand redetermination, that "the record lacks the price data necessary to calculate CPZ's U.S. price on an EP basis and, thus, we are unable to calculate CPZ's EP margin in accordance with section 772(a) of the Act," 19 U.S.C. § 1673a(a). *Id.* The Second Remand Redetermination further concluded that "the record contains all transaction and expense information necessary to calculate CPZ's U.S. price on a CEP basis" and that "[t]hese are the only data on the record sufficient for calculating U.S. price in accordance with the Act and the Court's orders" in *Peer Bearing I* and *Peer Bearing II*. *Id.* (citation omitted). Commerce concluded by stating that "because necessary information is not on the record, as non-adverse facts available, we have recalculated CPZ's dumping margin using a U.S. price based on the CEP information."[3] *Id.* (citations omitted).

Commenting that the Department should use the CEP data to determine U.S. price, CPZ did not oppose the method Commerce used in the Second Remand Redetermination to redetermine the U.S. prices of its subject merchandise. CPZ's Comments 2. Defendant-intervenor Timken objected to the method, arguing that, in the circumstances of the review and the remand proceeding, it would have been preferable for Commerce to use adjusted entered values instead of the CEP information as the best available information from which to determine U.S. price. Timken's Comments 5–6. According to

[3] In using the term "non-adverse facts available," the International Trade Administration, U.S. Department of Commerce was referring to the use of "facts otherwise available" according to subsection (a) of section 776 of the Tariff Act of 1930, 19 U.S.C. § 1677e without the use of an adverse inference pursuant to subsection (b) of that section. *Final Results of Redetermination Pursuant to Ct. Remand* 10 (Oct. 2, 2012), ECF No. 124.

Timken, the entered values would have provided "a better measure of prices between CPZ and its importer." *Id*. at 5.

Timken advocated the use of adjusted entered values as facts otherwise available in comments it submitted to Commerce on a draft version of the Second Remand Redetermination. *See Second Remand Redetermination* 14 (citation omitted). In the final version, Commerce rejected Timken's comment on the grounds that (1) the court's prior rulings did not permit the method Timken advocated and (2) unlike the use of the constructed export price method, the use of entered values is not a method of determining U.S. price recognized by the statute. *Id.* at 15. The court is not convinced by the Department's answer that use of entered values would violate the court's earlier rulings; the question of using entered values was not before the court, and therefore not considered, in *Peer Bearing II*. However, the court agrees with the rationale that the use of CEP data would result in the determination of U.S. price by a method expressly recognized by the statute, whereas nothing in the statute contemplates that Commerce would determine U.S. price according to entered values. Entered value under section 402 of the Tariff Act, 19 U.S.C. § 1401a, although in most cases determined according to the transaction value method of appraisement, is not the same as export price as determined according to section 772(a) of the Tariff Act, 19 U.S.C. § 1673a(a). For these reasons, the court does not find error in the Department's decision to use the record CEP data instead of entered value data to determine the U.S. prices of CPZ's subject merchandise.

C. Redetermined Surrogate Values

In the Second Remand Redetermination, Commerce chose new surrogate values for the factors of production corresponding to CPZ's use of bearing-quality alloy steel wire rod, bearing-quality alloy steel bar, and scrap by-product from the production of cages. In the comments it submitted to the court on the Second Remand Redetermination, Timken did not address these new surrogate values, which the court, therefore, considers to be unopposed. The court has reviewed the new surrogate values and the supporting reasoning as set forth in the Remand Redetermination and concludes that these redetermined surrogate values comply with the remand order issued in *Peer Bearing I*. The Department's decisions and reasoning are summarized briefly below.

1. Surrogate Value for Bearing-Quality Alloy Steel Wire Rod

The court concluded in *Peer Bearing I* that substantial evidence did not support the Department's determination that certain Indian im-

port data were, for purposes of section 773(c)(1) of the Tariff Act, 19 U.S.C. § 1677b(c)(1), the "best available information" with which to value CPZ's use of bearing-quality alloy steel wire rod. *Peer Bearing I*, 35 CIT at __, 752 F. Supp. 2d at 1371. The court noted that the average unit value ("AUV") of $3,877 per metric ton shown by the Indian import data varied greatly from the AUVs shown by import data from Indonesia ($1,184 per metric ton) and the Philippines ($1,327 per metric ton). *Id*. at __, 752 F. Supp. 2d at 1370–71.

In the Second Remand Redetermination, Commerce valued the steel wire rod input using the import data for Indonesian HTS subheading 7228.50, which showed an AUV of $1,212.07 per metric ton. *Second Remand Redetermination* 11–12. Commerce reasoned that the Indonesian and Philippine import data, like the Indian import data, satisfy the Department's preference for information that is publicly available, contemporaneous with the POR, tax-exclusive, and representative of significant quantities of imports. *Id.* at 12. Commerce also concluded that, unlike the AUV derived from the Indian import data, the AUVs from the Indonesian and Philippine import data corroborate one another and, when compared to the Indian data, are considerably closer in value to the benchmark value established by U.S. import data, which was $1,391 per metric ton. *Id.* at 11. Commerce chose the Indonesian import data over the Philippine import data because the former were based on larger quantities and values and, accordingly, were "more robust and representative of broader market averages." *Id.* at 12.

2. Surrogate Value for Bearing-Quality Alloy Steel Bar

In *Peer Bearing I*, the court rejected the Department's choice of data for determining a surrogate value for CPZ's inputs of bearing-quality alloy steel bar, concluding that Commerce did not explain why these data, which were import data for Indian HTS subheading 7228.50.90 with an AUV of $1,607 per metric ton, were the "best available information" for valuing the factor of production as required by section 773(c)(1) of the Tariff Act, 19 U.S.C. § 1677b(c)(1). *Peer Bearing I*, 35 CIT at __, 752 F. Supp. 2d at 1372–74. The court observed that Commerce gave no indication of having compared the Indian import data with the record import data pertaining to Indonesia and the Philippines. *Id*. at __, 752 F. Supp. 2d at 1373.

In the Second Remand Redetermination, Commerce valued the steel bar input using the import data for Indonesian HTS subheading 7228.30, which showed an AUV of $970.04 per metric ton. *Second Remand Redetermination* 11–12. Commerce gave reasons analogous to those it gave for its choice of the steel wire rod surrogate value,

including the rationale that the AUVs obtained from the Indonesian and Philippine import data corroborated each other and were far closer to the benchmark value obtained from U.S. import data ($1,040 per metric ton) than was the AUV from the Indian import data. *Id.* at 11. Commerce again chose the Indonesian import data over the Philippine import data because the former were based on larger quantities and values and therefore "more robust and representative of broader market averages." *Id.* at 12.

3. Surrogate Value for Scrap from the Production of Cages

In *Peer Bearing I*, the court rejected the Department's surrogate value for scrap by-product from cage production, which value was based on import data under an Indian HTS subheading that differed from the Indian HTS subheading upon which the Department had based the surrogate value in the preliminary results of the review and that did not appear to be the correct subheading for the scrap under consideration. *Peer Bearing I*, 35 CIT at __, 752 F. Supp. 2d at 1375–76. In the Second Remand Redetermination, Commerce, upon re-evaluating the record information, concluded that the subheading relied upon in the preliminary results (Indian HTS subheading 7204.41) "is more specific to the by-product in question" and therefore "the best available information pursuant to section 773(c)(1) of the Act," 19 U.S.C. § 1677b(c)(1). *Second Remand Redetermination* 12–13.

III. CONCLUSION

For the reasons set forth above, the court concludes that the Second Remand Redetermination should be sustained. Judgment will enter accordingly.

Dated: August 30, 2013
New York, New York

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

Slip Op. 13–117

STEVEN M. CARL, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00271

JUDGMENT

Upon consideration of Defendant's Reconsideration Upon Remand of the Application of Steven M. Carl, ECF No. 33 (Aug. 20, 2013)

("*Redetermination*"), consultation with the parties, and all other papers and proceedings had in this action; and upon due deliberation, it is hereby

ORDERED that the *Redetermination* is sustained.

Dated: August 30, 2013
New York, New York

/*s*/ *Leo M. Gordon Judge*
LEO M. GORDON

Slip Op. 13–119

DONGGUAN SUNRISE FURNITURE CO., LTD., TAICANG SUNRISE WOOD INDUSTRY CO., LTD., TAICANG FAIRMONT DESIGNS FURNITURE CO., LTD., AND MEIZHOU SUNRISE FURNITURE CO., LTD., Plaintiffs, LONGRANGE FURNITURE CO., LTD., Consolidated Plaintiff, COASTER COMPANY OF AMERICA, COE LTD., LANGFANG TIANCHENG FURNITURE CO., LTD., AND TRADE MASTERS OF TEXAS, INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, AND VAUGHAN-BASSETT FURNITURE COMPANY, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 10–00254
Public Version

[Antidumping Remand Results Remanded to Commerce.]

Dated: September 4, 2013

Peter J. Koenig and *Christine J. Sohar Henter*, Squire Sanders (US) LLP, of Washington, DC, for plaintiffs.

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP, of Washington, DC, for consolidated plaintiff.

Kristin H. Mowry, *Jeffrey S. Grimson*, *Susan L. Brooks*, *Jill A. Cramer*, *Rebecca M. Janz*, and *Sarah M. Wyss*, Mowry & Grimson, PLLC, of Washington, DC, for plaintiff-intervenors Coaster Company of America and Langfang Tiancheng Furniture Co., Ltd.[1]

Stuart F. Delery, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Stephen C. Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Of counsel on the brief was *Rebecca Cantu*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Joseph W. Dorn, *Daniel L. Schneiderman*, *J. Michael Taylor*, and *Mark T. Wasden*, King & Spalding, LLP, of Washington, DC, for defendant-intervenors.

[1] On July 31, 2013, the court entered an order granting Mowry & Grimson, PLLC's motion to withdraw as counsel for COE, Ltd. and Trade Masters of Texas, Inc. Dkt. Entry No. 169. The court provided COE, Ltd. and Trade Masters of Texas, Inc. thirty days to obtain counsel or be dismissed from the case. *Id.* They have failed to do so as of the date of this opinion. Accordingly, they will be dismissed from the action.

OPINION AND ORDER

Restani, Judge:

This matter comes before the court following the court's decision in *Dongguan Sunrise Furniture Co. v. United States*, 865 F. Supp. 2d 1216 (CIT 2012) ("*Dongguan I*"), and *Dongguan Sunrise Furniture Co. v. United States*, 904 F. Supp. 2d 1359 (CIT 2013) ("*Dongguan II*"), in which the court remanded *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 75 Fed. Reg. 50,992, 50,992 (Dep't Commerce Aug. 18, 2010) ("*Final Results*") to the U.S. Department of Commerce ("Commerce"). For the reasons stated below, the court finds that Commerce has complied with the court's instructions regarding the exclusion of Insular Rattan and Native Products' ("Insular Rattan") financial statement from use in the calculation of surrogate financial ratios, but that Commerce has not provided substantial evidence for its four partial adverse facts available ("AFA") rates assigned to Fairmont's unreported sales of dressers, armoires, chests, and nightstands. Thus, Commerce's second remand results are sustained in part and remanded in part.

BACKGROUND

The facts of this case have been documented in the court's previous opinions. *See Dongguan I*, 865 F. Supp. 2d at 1224–25; *Dongguan II*, 904 F. Supp. 2d at 1361–62. The court presumes familiarity with those decisions but briefly summarizes the facts relevant to this opinion. In the *Final Results*, Plaintiffs Dongguan Sunrise Furniture Co., Ltd., Taicang Sunrise Wood Industry Co., Ltd., Taicang Fairmont Designs Furniture Co., Ltd., and Meizhou Sunrise Furniture Co., Ltd. (collectively "Fairmont" or "Plaintiff") received a rate of 43.23%, which was calculated based on a rate of approximately 34% for reported sales and a partial adverse facts available ("AFA") rate of 216.01% for unreported sales. *Final Results*, 75 Fed. Reg. at 50,998; *Dongguan I*, 865 F. Supp. 2d at 1234. In *Dongguan I*, the court sustained Commerce's application of a partial AFA rate when calculating Fairmont's overall dumping rate. *Dongguan I*, 865 F. Supp. 2d at 1223–32. The court concluded, however, that Commerce's selected AFA rate of 216.01% was not supported by substantial evidence. *Id.* at 1233–34. The court stated that Commerce failed to demonstrate that the 216.01% rate, which was calculated in a new shipper review for a different entity during a different period of review ("POR"), was relevant and reliable for Fairmont. *Id.* at 1233–34.

On remand, Commerce determined four separate partial AFA rates, one for each of the four types of unreported products, by selecting the single highest CONNUM-specific margin below 216.01% for the corresponding reported product type. *Dongguan II*, 904 F. Supp. 2d at 1362. Fairmont received a rate of 39.41%, which included partial AFA rates of 182.15% for armoires, 215.51% for chests, 134.42% for nightstands, and 183.52% for dressers, which resulted in an weighted-average rate of 39.41%. *Id.*

In *Dongguan II*, the court found that Commerce's selected AFA rates were not supported by substantial evidence. *Id.* at 1363–64. The court stated that Commerce had failed to demonstrate a "relationship between the AFA rates chosen and a reasonably accurate estimate of Fairmont's actual rate" because the rates were based on a minuscule percentage of Fairmont's actual sales. *Id.* at 1363–64. Additionally, the court noted that the weighted-average margin for the reported sales, which constituted the vast majority of Fairmont's POR sales, indicated that Fairmont's actual rate would be much lower than the AFA rates selected. *Id.* at 1364.

In its second redetermination, Commerce selected the single-highest CONNUM-specific margin below 216% where at least 0.04% of the total reported sales for that product type were dumped at or above the selected margin. *Final Results of Second Redetermination Pursuant to Court Order* (July 3, 2013) (Dkt. Entry No. 160) ("*Second Remand Results*") at 11. This approach yielded an overall rate of 41.75%, which included partial AFA rates of 189% for armoires, 161% for chests, 140% for nightstands, and 161% for dressers.[2] *Id.* ; *Analysis Memorandum for the Final Results of Redetermination Pursuant to Second Court Remand in the 2008 Antidumping Duty Review of Wooden Bedroom Furniture from the People's Republic of China*, at 27 (July 3, 2012) (Dkt. Entry 165–2) ("*Analysis Memorandum*"). Plaintiff argues the partial AFA rates are unsupported by substantial evidence and that Commerce erred in excluding Insular Rattan's financial statements from consideration.[3] Pl. Fairmont's Cmts. on Commerce's

[2] The selected AFA rates are in some cases higher than the AFA rates selected in the first remand results because the exclusion of Insular Rattan's financial statements from the financial ratio calculations increased all of Fairmont's margins. *Second Remand Results* at 12, n.35.

[3] There is no merit to Plaintiff's argument that Commerce was required to rely on Insular Rattan's financial statement in part. *See* Pl.'s Cmts. at 6–8. The court previously rejected the same arguments Fairmont raises here. *Dongguan I*, 865 F. Supp. 2d at 1242–43; *Dongguan II*, 904 F. Supp. 2d at 1365–67. The court's decisions refer to the overall unreliability of the statement, and thus, Fairmont's suggestion that Commerce should exclude the profit ratio only and consider other aspects of the financial statement is without merit. *See Dongguan II*, 904 F. Supp. 2d at 1367 (noting Commerce lacked substantial evidence for its conclusion that Insular Rattan's statement could be considered "complete and reliable").

Second Remand Decision ("Pl.'s Cmts.") at 1, 6. Intervenor Defendants continue to argue that 216.01% was the appropriate AFA rate to apply to all of Fairmont's unreported sales. AFMC's Cmts. Concerning Commerce's Final Results of Second Redetermination Pursuant to Court Order at 1. Defendant argues that the selected partial AFA rates and the exclusion of Insular Rattan's financial statement comply with the court's remand order. Def.'s Resp. to Fairmont's Remand Cmts. ("Def.'s Cmts.") at 3, 9.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006). The court will not uphold Commerce's final determination in an antidumping duty review if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Plaintiffs argue that Commerce's selected partial AFA rates are not supported by substantial evidence and are not in accordance with law because the rates are not reasonably accurate estimates of Fairmont's actual rate for the unreported sales. Pl.'s Cmts. at 1. Fairmont argues the court should remand the AFA rates for the same reasons cited in *Dongguan I* and *Dongguan II*, namely, the "huge divergence" between the rate calculated for the reported sales and the AFA rates, and the use of an insufficiently small percentage of sales to determine the AFA rates. *Id.* Additionally, Fairmont argues Commerce's stated rationale, that Fairmont made sales of the unreported product types "at prices that could have resulted in margins similar to the selected partial AFA rates," fails because the gross prices corresponding to the sales tied to the specific CONNUM-margins selected are significantly smaller than the average gross price of the unreported sales. *Id.* at 2–6. Plaintiffs argue, therefore, that there is no evidence that the unreported sales were made *at prices* that could have resulted in the rates selected. *Id.*

When a party has failed to act to the best of its ability, Commerce, "in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). The statute permits Commerce to rely on an adverse inference, but the adverse inference does not replace Commerce's obligation to base its determinations on substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Accordingly, even an AFA rate must be supported

by substantial evidence. *See Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1325 (Fed. Cir. 2010). "Substantial evidence requires Commerce to show some relationship between the AFA rate and the actual dumping margin." *Id.* In other words, Commerce must demonstrate that its selected AFA rate is "a *reasonably accurate estimate* of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *Id.* at 1323 (citing *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

Even when a higher AFA rate is available, and can provide a stronger deterrent to non-compliance, "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Id.* (noting the purpose of an AFA rate is to provide an incentive to cooperate, not to impose "punitive, aberrational, or uncorroborated margins" (quoting *De Cecco*, 216 F.3d at 1032)); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379–80 (Fed. Cir. 2013) ("An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible."). Although Commerce may include a built-in increase for deterrence, Commerce cannot impose a deterrence factor far beyond the amount sufficient to deter respondents from future non-compliance. *Gallant Ocean*, 602 F.3d at 1324.

Here, Commerce relied on the same methodology as in the first *Remand Results*, with one modification:[4] Commerce increased the percentage of sales relied on to at least 0.04% by quantity of the reported sales by product type, to align with the percentage relied upon in *Ta Chen*. *Second Remand Results* at 11 (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330 (Fed. Cir. 2002)). Commerce did not, however, make a material increase in the percentage of sales relied on to determine the rate for armoires and nightstands, because the AFA rates for these products were based on

[4] In order to determine the AFA rates, Commerce relied on Fairmont's reported sales database. *Second Remand Results* at 11. First, Commerce considered the reported sales of each of the four unreported product types. *Id.* at 10. Commerce then considered CONNUM-specific margins for each product type that were not "atypical sales of unusual products or subject to unusual terms of sale." *Id.* at 12. Finally, Commerce selected a single CONNUM-specific margin that represented a "sizable portion" of reported sales. *Id.* at 14. Although Commerce is not required to adopt Plaintiff's alterative methodology based on gross prices, Commerce is required to apply its selected methodology in a reasonable manner. As explained below and in *Dongguan II*, 905 F. Supp 2d at 1363–64, Commerce's determination that between 0.14% and 0.38% of sales by quantity represent a "sizable portion" of reported sales sufficient to act as a reasonably accurate estimate of Fairmont's actual rate is not reasonable or supported by substantial evidence.

more than 0.04% of sales in Commerce's first redetermination. *See Dongguan II*, 904 F. Supp. 2d at 1363 n.3.[5] Accordingly, Commerce again selected the single highest CONNUM-specific margin below 216% for these two products. *See Analysis Memorandum* at Attach. 3. The increase in percentages for dressers and chests were marginal and resulted in the selection of the second highest margin below 216% for dressers and the third highest for chests. *See id.* Commerce, therefore, has not attempted to significantly change the selected rates or its methodology and instead attempts to support its original determinations with what it suggests are new explanations. *Second Remand Results* at 9 (noting the methodology applied was also used in the first redetermination).

Commerce argues the selected rates are supported by substantial evidence for three reasons: (1) the rates reflect Fairmont's commercial reality because they are based on Fairmont's own POR data and Fairmont experienced transaction-specific dumping margins at or above the selected margins; (2) the percentage of sales relied on are consistent with the percentage relied on in *Ta Chen*; and (3) any broader base or average of sales would eviscerate the adverse inference. *Second Remand Results* at 6–15, 20–24. The court notes that it has previously rejected the first two reasons. *Dongguan I*, 865 F. Supp. 2d at 1234; *Dongguan II*, 904 F. Supp. 2d at 1363–65. Commerce, however, articulates some new reasoning, which the court addresses.[6]

1. *Commercial Reality*

Commerce argues it need not rely on a larger percentage of sales to justify its selected rates because an AFA rate must reflect only a company's "commercial reality" and does not have to be an estimate of

[5] The percentage of sales relied on for nightstands increased from 0.379% to 0.38%; the percentage for armoires increased from 0.208% to 0.33%; dressers increased from 0.007% to 0.22%; and chests increased from 0.015% to 0.14%. *Compare Dongguan II*, 904 F. Supp. 2d at 1363 n.3 *with Analysis Memorandum* at Attach. 11.

[6] Commerce does not articulate any new reasoning related to *Ta Chen*. It is sufficient to note that by relying exclusively on *Ta Chen* to determine which AFA rate to select, Commerce assumes that a dumping margin corresponding to 0.04% of sales will always result in a rate that is both a reasonably accurate estimate of the respondent's actual rate for the particular respondent and product at issue and includes a necessary, but not excessive, deterrent factor, given the other rates imposed on similar respondents in the particular segment. There is no justification for making such an assumption. *Ta Chen* has little significance outside the unique facts of that case. Further, whatever significance 0.04% had in *Ta Chen*, that factual determination cannot be applied wholesale here or anywhere else. Trade cases involve different products and different sales contexts. Some products are very price sensitive, others are not. There is no percentage of individual sales transactions that is automatically a reasonable percentage to rely upon.

Fairmont's "average" experience. *Second Remand Results* at 21. Commerce defines "commercial reality" as any dumping margin, including individual transaction-specific margins, that occurred during the POR. *Id.* at 9 ("Each transaction . . . is properly considered part of the company's commercial reality."); *id.* at 14 (defining commercial reality to refer to any transaction that was commercially viable). Because Commerce defines commercial reality to refer to any margin experienced by Fairmont, the term "commercial reality" adds nothing to Commerce's analysis, and Commerce's position is that an AFA rate is supported by substantial evidence as long as it is calculated from the respondent's own POR data. *Second Remand Results* at 11 (arguing an AFA rate is reasonable if it is tied to the respondent's actual sales and the rates here are inherently so because they are derived from actual sales).

Commerce's position is inconsistent with the Federal Circuit's directives in *Gallant Ocean*, which require Commerce to provide substantial evidence demonstrating a rational relationship between the AFA rate selected and a reasonably accurate estimate of the respondent's actual rate. 602 F.3d at 1325. Reliance on a single CONNUM-specific margin based on less than 0.38% of the relevant and verified record evidence, without more, does not demonstrate a reasonably accurate estimate of Fairmont's actual rate, regardless of whether the margin was calculated during the POR. This is because a single sale or CONNUM-specific margin is not generally representative of a respondent's actual rate. *See Gallant Ocean*, 602 F.3d at 1324 (noting that "one sale by itself does not always rise to the level of substantial evidence"). In administrative reviews, Commerce determines a respondent's rate by calculating the weighted-average of the respondent's dumping margins, *see, e.g.*, 19 C.F.R. § 351.212(b)(1) (noting that Commerce generally determines assessment rates after a review by calculating a weighted-average of the respondent's dumping margins), and thus, a single dumping margin calculated during a review is not indicative of a respondent's overall rate, especially when that dumping margin is based on extremely small percentages (in terms of value and quantity) of reported sales. Commerce's methodology, in which the analysis stops once Commerce identifies an individual dumping margin that occurred during the POR, is not a reasonable attempt to estimate Fairmont's actual rate. *See Second Remand Results* at 21 (rejecting Fairmont's proposal that Commerce rely on a larger percentage of reported sales because "commercial reality" is not defined by a company's average or typical experience).

Commerce argues *Gallant Ocean*'s directives are not applicable here because *Gallant Ocean* was a corroboration case based on secondary information, whereas Commerce has relied on Fairmont's own POR data here.[7] *Id.* at 23 ("We . . find that *Gallant Ocean* does not apply to the facts present here."). The statutorily imposed corroboration requirement for secondary information in 19 U.S.C. § 1677e(c) did not grant Commerce a carte blanche to use primary information[8] to impose unreasonable AFA rates having no relationship to the respondent's actual rate. Congress imposed the corroboration requirement for secondary information because it recognized that the "temptation by Commerce to overreach reality in seeking to maximize

[7] Despite disavowing *Gallant Ocean*'s applicability, Commerce relies extensively on the term "commercial reality," which originated in *Gallant Ocean*. *Second Remand Results* at 11, 22. In *Gallant Ocean*, the Federal Circuit stated that an AFA rate must be a "*reasonably accurate* estimate of the respondent's actual rate" and, when based on secondary information, must be tied to the respondent's "commercial reality." 602 F.3d at 1323 (emphasis in original). The Federal Circuit concluded Commerce did not demonstrate that the AFA rate in Gallant Ocean was representative of the respondent's commercial reality and thus, the AFA rate was not a reasonably accurate estimate of the actual rate. *Id.* at 1324. Since *Gallant Ocean*, the Federal Circuit and the court have used the term "commercial reality" and other similar terms to encapsulate Commerce's obligation to demonstrate that a particular AFA rate is a reasonable estimate of the respondent's actual rate. *See, e.g.*, *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1379 (Fed. Cir. 2012) (noting AFA rates generally bear a relationship to the party's "actual business practices"); *Lifestyle Enter. v. United States*, 865 F. Supp. 2d 1284, 1290 (CIT 2012) (finding an AFA rate was not corroborated when the product-specific margins used to corroborate the rate were "outside the mainstream" of the cooperating respondent's normal transactions); *PSC VSMPO-Avisma v. United States*, 755 F. Supp. 2d 1330, 1336–37 (CIT 2011) (finding transaction-specific margin not corroborated when Commerce failed to demonstrate a relationship to the respondent's "commercial reality" or "market realities"). Thus, it is in error for Commerce to define the term "commercial reality" as completely distinct from the requirements of *Gallant Ocean*.

[8] Primary information is not defined in the statute or regulations but is generally understood to refer to "information obtained in the course of an investigation or review." *See* 19 U.S.C. § 1677e(c) (stating that when Commerce "relies on secondary information *rather* than on information obtained in the course of an investigation or review" the corroboration requirement applies (emphasis added)). Commerce suggests that in order to corroborate a rate, Commerce must examine the "reliability and relevance" of the information on which it relies, but that this is not required under the substantial evidence requirement. *Second Remand Results* at 7. Thus, according to Commerce, if it relies on information obtained during the course of a review to determine an AFA rate, that primary information need not be "reliable or relevant" to the respondent's actual rate. This is obviously incorrect as substantial evidence also requires, at a minimum, that the information relied on by Commerce to make the determination be both reliable and relevant to the determination at issue. This does not mean, however, that the substantial evidence requirement and the corroboration requirement are equivalent. Corroboration requires Commerce to establish a specific connection between the secondary information used and the particular respondent beyond that which would be required to demonstrate a reasonable explanation and reading of the record evidence.

deterrence" would be at its highest. *Gallant Ocean*, 602 F.3d at 1323. Thus, the corroboration requirement was necessary to ensure Commerce would not "overreach reality" and apply "unreasonable" rates. *Id.* (requiring Commerce to determine AFA rates consistent with the statutory goals of accuracy and fairness, and not distinguishing between secondary and primary information). The corroboration requirement for secondary information did not eliminate Commerce's general obligation to determine AFA rates that are supported by substantial evidence, nor does it permit Commerce to overreach reality and impose unreasonable rates as long as primary information is used. Thus, even when Commerce determines an AFA rate from information obtained during the current review, Commerce's determination must be supported by substantial evidence on the record, meaning that the record as a whole demonstrates the rate is a reasonably accurate estimate of respondent's actual rate, albeit with a built-in increase for deterrence. *See id.* at 1325 (noting that Commerce did not support its determination with substantial evidence when "a large body of reliable information" suggested the application of a much lower rate). Commerce's reliance on individual CONNUM-specific margins, therefore, is insufficient until Commerce provides substantial evidence to demonstrate that these particular margins represent a reasonably accurate estimate of Fairmont's actual rate, albeit with the built-in increase for non-compliance.

Commerce attempts to support its selected rates by noting that Fairmont experienced transaction-specific margins at or above the selected margins. *Second Remand Results* at 12, 22.[9] Margins calculated from individual transactions of all products, however, are even less relevant to a reasonably accurate estimate of respondent's actual rate for each product type than CONNUM-specific margins. The dumping margin of one sale is not probative of a respondent's actual rate, especially when the quantity or value of that sale, relative to the total amount of sales, is minimal. Instead of increasing the percentage of sales relied on to determine the AFA margins, Commerce uses a smaller denominator (the Hospitality Division sales) to achieve a higher percentage and argue that 0.14% to 0.33% of sales can be

[9] Commerce notes that the simple average of the selected partial AFA rates is less than the weighted-average margin of: (1) more than [[ ]] percent of Fairmont's Hospitality Division's sales for the four unreported product types; (2) [[ ]] percent of all of Fairmont's reported transaction-specific margins for the four unreported product types, and (3) [[ ]] percent of Fairmont's sales of all product types. *Second Remand Results* at 22. Commerce concluded that more accurate rates are reached when it determines the four rates, one for each product type *See Amended Final Results of Redetermination Pursuant to Court Remand* (Oct. 26, 2012) (Dkt. Entry 119) at 5. Thus, the reliability of statistics based on the average of all four product types is unclear. If Commerce determines four separate AFA rates, it must support each rate with substantial evidence related to each selected rate.

considered indicative of the unreported sales. Commerce's methodology purports to rely on sales that are not "atypical" or "subject to unusual terms of sale." *Second Remand Results* at 12. Commerce, however, attempts to justify the selected AFA rates by comparing them to transaction-specific margins over 216%, including margins exceeding 1,500%. *Id.* at 22; *see Analysis Memorandum* at Attach. 13. Although Commerce notes there is no evidence to suggest these extremely high margins are aberrant, the absence of such evidence is not substantial evidence that these transactions are relevant to Fairmont's actual rate, and margins this high have not been shown to be within the mainstream of Fairmont's reported sales.

Moreover, it appears that under Commerce's methodology, any CONNUM-specific margin would be supported by substantial evidence because all CONNUM-specific margins are based on Fairmont's own POR data and correspond to at least some transaction-specific margins. For example, under Commerce's reasoning Commerce could select a CONNUM-specific margin for armoires of 336.72%, 189.33%, 2.04% or -157.22% because all of these margins were commercially viable during the POR and are indicative of at least some of Fairmont's individual transaction. *See Analysis Memorandum* at Attach. 10. There must be some rational explanation, however, as to why Commerce selected 189.33% as the margin to represent a reasonable estimate of Fairmont's actual rate for armoires. Commerce avoids this rational explanation and instead relies exclusively on its ability to draw an adverse inference to select the highest rate possible.[10] Without a rational explanation linking the chosen AFA rates to Fairmont's actual rate, as opposed to merely linking the rate to individual POR dumping margins, Commerce selected an "unreasonably high rate[] having no relationship to [Fairmont's] actual dumping margin," contrary to the Federal Circuit's directives. *See Gallant Ocean*, 602 F.3d at 1323; *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (noting that although "the possibility of a high AFA margin creates a powerful incentive to avoid dumping and to cooperate in investigations, there is a limit to Commerce's discretion.").

2. *Adverse Inference*

Commerce states it cannot rely on a larger percentage of sales because this would eliminate the application of an adverse inference.

[10] Commerce states that it did not select margins over 216% to satisfy the court's concern. *Second Remand Results* at 13. Avoiding an outright conflict with the court's remand directions and making a reasonable effort to apply the principles embodied therein are not the same thing.

Second Remand Results at 8–9, 14, 21 (rejecting the options of relying on 34%, the rate for the reported sales, relying on a larger percentage of reported sales, or relying on an average of a larger percentage of the reported sales by product type because all of these options would eviscerate the adverse inference). Commerce creates a false choice between determining rates based on less than 0.5% of reported sales by product type and rates based on 100% of all reported sales.[11] This range obviously provides Commerce with a number of options to determine a reasonable estimate of Fairmont's actual rate based on a larger percentage of reported sales. Instead, Commerce has cherry-picked from the available data in order to achieve the highest-rate possible, which is both results-oriented and unreasonable. Additionally, although Commerce notes that the selected AFA rates are large enough to deter future non-compliance, Commerce provides no explanation or evidence to suggest that a lower rate would not also be sufficient. Such an explanation is particularly warranted here because the selected AFA margins are many times higher than the weighted-average margin for the reported sales, which indicates that the deterrence factor applied is far beyond the amount necessary to defer future non-compliance. *See Gallant Ocean*, 602 F.3d at 1324 (noting a rate over five times the highest rate imposed on similar products is far beyond an amount sufficient to deter future non-compliance). Even if Commerce relied on a larger percentage of sales and discovered the resulting rates were insufficient to deter future noncompliance, it could add an additional amount to the rate to achieve the desired deterrence factor. Commerce provides no explanation as to what the deterrence factor is in this case and why the particular amount applied is necessary, and thus, Commerce has no support for its position that there is absolutely no alternative margin or increased percentage of sales that could impose a sufficient deterrence factor.

3. *Substantial Evidence*

None of Commerce's new explanations justify its reliance on the minuscule percentages of sales, and the court concludes that the selected AFA rates are not supported by substantial evidence for the

[11] Commerce also argues that it cannot rely on a broader base of sales to determine the margins because this inevitably would have included products other than the four unreported product types and thus, would be less representative of Fairmont's dumping practices of the four unreported product types. *Second Remand Results* at 10. The court's directive to rely on a broader base of sales does not necessarily require consideration of all product types. Commerce ignores the possibility of relying on a larger percentage of sales of each product type, that is, more than 0.38% of any particular product type.

reasons above and for the same reasons explained in *Dongguan II*. 904 F. Supp. 2d at 1363–65. The court finds it necessary, however, to clarify what it means by substantial evidence on the record because Commerce appears to have not understood the previous two orders. *See, e.g.*, *Second Remand Results* at 8 (stating that Commerce understands the court to mean that only the weighted-average margin for all of the reported sales, regardless of product type, can reflect the "commercial reality" of Fairmont).

Generally, Commerce's ability to determine a reasonably accurate estimate of a respondent's actual rate is hampered by the lack of record data, hence the need for an AFA rate. Because of this difficulty, which arises from the respondent's own failure to cooperate, Commerce's discretion in determining an AFA rate is particularly great, and Commerce need only act reasonably in light of the record evidence, or lack thereof. *See De Cecco*, 216 F.3d at 1032 (noting Commerce's discretion is particularly great when determining AFA rates). Commerce's discretion, however, is not unbounded. *Id.* Here, Commerce abused its discretion when it decided that the reported sales by product type represent the most reliable and probative evidence as to Fairmont's unreported sales and then chose to ignore 99% of this record evidence. Unlike other AFA cases, which generally lack record evidence relating to the particular company, or of sales of a particular product or customer, the record here contains verified sales data relating to the same type of products, from the same producer, and during the same period of time as the unreported sales. *See Second Remand Results* at 8–10 (noting that Fairmont's experience with reported sales of the four product types are more relevant to the unreported sales than other sales data on the record).

Despite its recognition that the reported and verified sales data for armoires, chests, dressers, and nightstands are the most appropriate data from which to determine the partial AFA rates for each unreported product type, *id.* at 10, and its recognition that the more sales relied on, the more support for a selected rate, *id.* at 14, Commerce ignored the majority of the reported and verified information and instead relied on an extremely small percentage of these sales. For example, for reported sales of armoires, the record contains 66 CONNUM-specific margins under 216%, ranging from 189.33% to -157.22%. *Analysis Memorandum* at Attach. 3. Commerce, however, based the armoire AFA rate on a single CONNUM-specific margin, which was based on 13 out of 3,885 armoire sales, or 0.33% of total armoire sales by quantity with margins under 216%. *Id.* at Attach. 3, 11. As explained above, reliance on such a minuscule amount of sales

provides very little insight into Fairmont's "actual rate" for the unreported armoires and ignores a large amount record evidence suggesting a much lower rate. *See id.* at Attach. 3 (approximately a third, by quantity, of reported armoire sales with margins under 216% are dumped at margins below 40%). Such a small percentage is particularly unhelpful here because the record evidence demonstrates that Fairmont experienced a wide range in prices, products, and dumping margins, even within each of the four product types. *See, e.g.*, *id.* at Attach. 3 (the U.S. net price for reported sales of armoires range from $85 to $2174, normal value ranges from $218 to $1410, and the dumping margins range from 189.33% to -157.22%). Given that Commerce declined to consider the very evidence it identified as most indicative of Fairmont's actual rate for the unreported sales, and given that the disregarded record evidence suggests a reasonably accurate estimate of Fairmont's actual rate would be much lower, Commerce's determinations are not supported by substantial evidence.

CONCLUSION

The court has twice informed Commerce that without a rational explanation as to why a small percentage of sales can be considered representative of Fairmont's actual rate, especially given the large amount of record evidence available and the diversity in Fairmont's products and sales, Commerce's reliance on minuscule percentages of sales to determine the partial AFA rates does not constitute substantial evidence. Commerce failed to provide a rational explanation in two attempts, and a third attempt is unnecessary. On remand, Commerce is directed to rely on a significant portion of the available evidence, already identified by Commerce as relevant and reliable, to determine the partial AFA rates. Commerce cannot substitute the adverse inference for substantial evidence demonstrating that the selected rates are related to Fairmont's actual rate. Commerce may impose an increase to deter future noncompliance, but it must demonstrate that the amount does not go substantially beyond what is necessary to deter non-compliance.

In all other respects, the *Second Remand Results* are sustained. Commerce shall file its remand determination with the court within 60 days of this date (November 4, 2013). The parties shall have 30 days thereafter to file objections (December 4, 2013) , and the Government will have 15 days thereafter to file its response (December 19, 2013).

Dated: September 4, 2013
New York, New York

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

Slip Op. 13–120

INTERNATIONAL CUSTOM PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 08–00189

[*Defendant's motion to dismiss is granted.*]

Dated: September 4, 2013

Gregory H. Teufel and *Jeremy L. S. Samek*, Eckert Seamans Cherin & Mellott, LLC of Pittsburgh, PA for Plaintiff. With them on the briefs were *Simeon M. Kriesberg*, *Andrew A. Nicely*, and *Jeffrey C. Lowe*, Mayer Brown LLP, of Washington, DC.

Edward F. Kenny, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, of New York, NY, for Defendant. With him on the briefs were *Gregory G. Katsas*, Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, and *John J. Todor*, Trial Attorney. Of counsel on the briefs was *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection.

OPINION & ORDER

CARMAN, JUDGE:

The matter before this Court is a Motion to Dismiss Plaintiff's Complaint filed by Defendant United States ("Defendant" or "the government"). The government moves to dismiss Counts 1–8 pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction; and to dismiss Count 8 (in the alternative) and Count 9 pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. For the reasons set forth below, the Court grants Defendant's motion.

BACKGROUND

International Custom Products ("ICP" or "Plaintiff") seeks relief from an action taken by U.S. Customs and Border Protection ("Customs" or "Defendant") reclassifying and liquidating 13 entries of Plaintiff's imported product known as "white sauce." Compl. ¶ 2. In 1999, Plaintiff obtained a ruling letter from Customs, NYRL D86228,

classifying "white sauce" under HTSUS 2103.90.90 as "sauces and preparations therefor . . . other . . . other . . . other . . . other," with a duty rate of 6.4% *ad valorem*. *Id.* ¶ 12. In April 2005, Customs issued a "Notice of Action" that 99 entries of "white sauce" were being reclassified and liquidated under HTSUS 0405.20.3000 as "dairy spread," at the rate of $1.996 per kilogram. *Id.* ¶ 14. This reclassification had the effect of increasing the duties owed on Plaintiff's entries of "white sauce" by approximately 2400%. *Id.* ¶ 8. Plaintiff asserts that in issuing the Notice of Action, Customs did not follow various statutory and regulatory requirements, and thereby infringed upon several of Plaintiff's rights. *See generally* Compl. This case is the sixth lawsuit brought by Plaintiff with respect to the classification and liquidation of some or all of 99 entries of "white sauce." *Id.* ¶ 6.

A brief time line is illuminating. In July of 2007, Plaintiff protested the reclassification and liquidation of a single entry of "white sauce" with request for accelerated disposition. Pl.'s Opp. to Def.'s Mot. to Dismiss ("Pl.'s Mot.") at 6. Thirty days later, after the protest was deemed denied, Plaintiff paid the duties owing on that single entry and commenced *Int'l Custom Prods. v. United States*, Court No. 07–318 ("*ICP IV*"), on August 28, 2007. *Id.* Immediately after commencing that case, Plaintiff filed protest number 1101–07–100220 covering 13 entries of "white sauce" entered between October 2003 and October 2004. Compl ¶¶ 16–17. This second protest was denied on November 26, 2007. *Id.* ¶ 17. Over the course of the following month, ICP filed eight additional protests covering the balance of its entries of "white sauce" affected by the 2005 Notice of Action. Pl.'s Mot. Ex. 2. Rather than ruling on these eight protests, however, by the end of December 2007, Customs voluntarily placed them all into a "suspended protest status" pending the outcome of ICP IV. *Id.*; Compl. ¶ 17. Because the protest with respect to the 13 entries had been denied and not suspended, ICP now owes the government approximately $28,000,000.00 in duties on these 13 entries alone. Compl. at 16; Mem. in Support of Def.'s Mot. to Dismiss ("Def.'s Mot.") at 6. The treatment of these 13 entries is contested in this litigation. Compl. ¶ 1.

Plaintiff's Complaint includes nine counts. In Count 1, Plaintiff asserts that Customs violated the law by effectively revoking NYRL D86228 without first complying with the notice and comment requirements of 19 U.S.C. § 1625(c)(1). Compl. ¶¶ 30–36. In Count 2, Plaintiff asserts that Customs violated its longstanding treatment of "white sauce" without first complying with the requirements of 19

U.S.C. § 1625(c)(2). *Id.* ¶¶ 37–44. In Count 3, Plaintiff asserts that Customs violated 19 C.F.R. § 177.9 by classifying the 13 entries of "white sauce" in a manner inconsistent with the advance ruling letter. *Id.* ¶¶ 45–50. In Count 4, Plaintiff asserts that Customs failed to demonstrate a "compelling reason" for revoking the advance ruling letter. *Id.* ¶¶ 51–54. In Count 5, Plaintiff asserts that in issuing the Notice of Action in 2005, Customs violated the notice and comment requirements of the Administrative Procedure Act ("APA"). *Id.* ¶¶ 55–58.

In Count 6, Plaintiff asserts that by failing to properly revoke the advance ruling letter, Customs violated ICP's rights under the Due Process Clause of the Fifth Amendment to the Constitution. *Id.* ¶¶ 59–65. In Count 7, Plaintiff asserts that Customs' unlawful reclassification of "white sauce" deprived ICP of its business in violation of ICP's constitutional right to due process of law. *Id.* ¶¶ 66–70. In Count 8, Plaintiff asserts that Customs knew that by denying Plaintiff's protest covering the 13 entries, and by failing to place the entries into "suspended liquidation or suspended protest status" pending the resolution of related litigation, that ICP could not pay the $28 million required to commence this lawsuit, and thereby acted to "unconstitutionally deprive[] ICP of its right of access to the courts." *Id.* ¶ 78; *see generally id.* ¶¶ 71–78. In Count 9, Plaintiff asserts that the jurisdictional prerequisite of 28 U.S.C. § 2637(a) is unconstitutional as applied to ICP in this case, violating ICP's First and Fifth Amendment rights. *Id.* ¶¶ 79–85.

Defendant moves to dismiss Counts 1 through 8 pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction. Alternatively and additionally, Defendant moves to dismiss Counts 8 and 9 pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted.[1]

JURISDICTION

Plaintiff asserts the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a), or alternatively pursuant to 28 U.S.C. § 1581(i)(4). Compl. ¶¶ 20–21. Defendant asserts that because ICP has

[1] Before the Court is also a motion for leave to file a surreply in support of its opposition to the motion to dismiss. Pl.'s Mot. for Leave to File Sur-Reply, ECF No. 64. In brief, Plaintiff requests an opportunity to respond to "factual and legal issues" it claims were raised by the government's reply, and to address the impact of the decision of a related case, Court No. 07–00318. *Id.* at 3–4. The government opposes. Def.'s Letter of Opp'n, ECF No. 65. The government states that the factual issues Plaintiff seeks to brief are "irrelevant" and "in no way relate to the merits" of the motion to dismiss. *Id.* at 2. As to the legal issues Plaintiff seeks to raise, the government contends that they "have already been rejected years ago" or do not bear on this case. *Id.* at 3. The Court agrees with Defendant that further briefing is neither merited nor appropriate; Plaintiff's motion will therefore be denied.

not complied with the requirements of 28 U.S.C. § 2637(a), this Court does not have jurisdiction under Section 1581(a) to hear Counts 1 through 8. Def.'s Mot. 8. Defendant also asserts that this Court does not have jurisdiction under Section 1581(i)(4) to hear Counts 1 through 8. *Id.* 11–15. Defendant does not contest the Court's jurisdiction over Count 9 of Plaintiff's Complaint. *See generally* Def.'s Mot.

1. *Counts 1 through 8 are Dismissed for Lack of Subject Matter Jurisdiction*

An importer may bring a civil action in the Court of International Trade "contesting the denial of a protest under section 515 of the Tariff Act of 1930 . . . *only if* all liquidated duties, charges, or exactions have been paid at the time the action is commenced . . . ." 28 U.S.C. § 2637(a) (emphasis added). Plaintiff candidly acknowledges that it has not paid the duties on the 13 entries as required by Section 2637(a), but bids the Court to take jurisdiction over this case nonetheless. Compl. ¶¶ 2122, 29. The Court cannot oblige. The Court of Appeals for the Federal Circuit ("CAFC") has held that the "conditions upon which the government consents to be sued must be strictly observed and are not subject to implied exceptions." *NEC Corp. v. United States*, 806 F. 2d 247, 249 (Fed. Cir. 1986). Because 28 U.S.C. § 2637(a) operates as just such a condition upon the waiver of sovereign immunity, it must be strictly construed in favor of the government. *Cf. AutoAlliance Int'l, Inc. v. United States*, 357 F.3d 1290, 1293 (Fed. Cir. 2004) (finding that a related provision, 28 U.S.C. § 2636(a)(1), which requires litigation contesting denied protests to be commenced within 180 days of denial, "operates as a waiver of sovereign immunity [that] this court must strictly construe . . . in favor of the sovereign") (internal quotation and brackets omitted). Plaintiff's failure to pay "all liquidated duties, charges, or exactions . . . related to each entry included in the denied protest" prior to commencing this action means that this Court does not have jurisdiction under 28 U.S.C. § 1581(a) to hear any of Plaintiff's claims. *See* 28 U.S.C. § 2637(a); *see also Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986) ("If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no jurisdiction to entertain the suit.") (internal quotation omitted).

Apparently anticipating this result, Plaintiff urges that "[i]f the Court concludes that jurisdiction is lacking under Section 1581(a) because ICP did not prepay the $28 million in duties at the higher rate, then this Court has jurisdiction under 28 U.S.C. § 1581(i)(4) because ICP does not have a remedy under Section 1581(a)." Compl. ¶ 21. The law does not permit the outcome Plaintiff seeks; the Plain-

tiff may not do indirectly what it is prohibited to do directly. The CAFC has previously invalidated attempts to avoid complying with the prerequisites for jurisdiction under Section 1581(a)–-such as the prepayment requirement of Section 2637(a)—by invoking jurisdiction under Section 1581(i).

> It is judicially apparent that where a litigant has access to this court under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i).

Am. Air Parcel Forwarding Co., Ltd. v. United States, 718 F.2d 1546, 1549 (1983) (citation omitted); *see also Int'l Custom Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) ("Where a litigant has access to the Court of International Trade under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach by complying with *all* the relevant prerequisites thereto") (internal quotation marks and brackets omitted) (emphasis added). Therefore, Plaintiff's failure to comply with the requirements of 28 U.S.C. § 2637(a) is fatal; Counts 1 through 8 of Plaintiffs Complaint are dismissed pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction.

2. *The Court has Jurisdiction to hear Plaintiff's Claim in Count 9*

Plaintiff asserts no new claim to jurisdiction for Court 9, simply claiming that the Court has jurisdiction to hear Count 9 either pursuant to 28 U.S.C. § 1581(a) or pursuant to 28 U.S.C. § 1581(i)(4). Compl. ¶¶ 20–21. The government does not contest the Court's jurisdiction to hear this claim, but moves to dismiss Count 9 pursuant to USCIT Rule 12(b)(5), arguing that the validity and constitutionality of 28 U.S.C. § 2637(a) is well-established. *See* Def.'s Mot. 15–28. It is axiomatic that courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (*quoting Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). Upon careful consideration, this Court determines that it has subject matter jurisdiction to hear Plaintiff's claim in Count 9.

In the Court's view, Count 9 alleges that the requirement under 28 U.S.C. § 2637(a) that Plaintiff pay duties prior to filing suit has the effect of depriving Plaintiff of its First Amendment right to petition the government via access to the courts, with the consequent effect of depriving Plaintiff of property without due process of law in violation

of the Fifth Amendment. Compl. ¶¶ 79–85. For relief, Plaintiff requests that Section 2637(a) "be struck down or dispensed with in this case," permitting the Court to take jurisdiction over the substance of Plaintiff's challenge in Counts 1 through 8. *Id.* ¶ 85, Request for Judgment and Relief.

Jurisdiction is available under 28 U.S.C. § 1581(a) only to hear civil actions that "contest the denial of a protest . . . under Section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a). Under Section 1581(a), this Court may only hear "appeals from denials of valid protests." *Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908 (Fed. Cir. 1999). Because the Plaintiff does not appeal the denial of a valid protest in Count 9, Section 1581(a) is not an appropriate jurisdictional vehicle for this claim.

Section 1581(i), on the other hand, authorizes the Court of International Trade to hear a civil action brought against the United States that "arises out of any law of the United States providing for—(1) revenue from imports . . . ," or the "administration and enforcement with respect to [revenue from imports]." 28 U.S.C. § 1581(i). As this court has previously stated, "[w]hen seeking to challenge a provision over which Customs has no authority or discretion, a plaintiff need not file a protest and then invoke jurisdiction under section 1581(a); such a plaintiff may instead rely upon section 1581(i)." *Totes-Isotoner Corp. v. United States*, 32 CIT 1172, 1175, 580 F. Supp. 2d 1371, 1375 (2008) (*citing Orleans Int'l, Inc. v. United States*, 334 F.3d 1375, 1380 (Fed. Cir. 2003) (holding that the Court of International Trade had section 1581(i) jurisdiction over Orleans' constitutional challenge of import assessments mandated by the Beef Promotion and Research Act) and *Pat Huval Rest. & Oyster Bar, Inc. v. United States*, 32 CIT 232, 243, 547 F. Supp. 2d 1352, 1362–63 (2008) (constitutional challenge allowed under 1581(i)). In Count 9, Plaintiff brings a constitutional challenge to a statute, 28 U.S.C. § 2637(a), over which Customs has no authority or discretion. For that reason, and because Count 9 advances a claim against the United States arising out of a law of the United States providing for revenue from imports or providing for the administration and enforcement of such revenue, this Court has jurisdiction under 28 U.S.C. § 1581(i) to hear Count 9.

DISCUSSION

Plaintiff requests unprecedented and startling relief in Count 9. The requirement to pay all outstanding duties prior to commencing litigation on an import transaction has been a fixture of the customs

laws since the Act of February 26, 1845. *See* PATRICK REED, *The Role of Federal Courts in U.S. Customs & International Trade Law* 59 (1997). Prior to the implementation of that statute, the same principle of prepayment as the basis for suit against a collector of customs duties was a fixture of common law since at least 1774. *Id.* at 53. Plaintiff has presented no case from the last two and a quarter centuries where any court has found that the requirement to pay customs duties prior to litigating some aspect of an import transaction contravened the Constitution. The Court, likewise, has uncovered no such holding, and is persuaded that none exists.

Defendant is correct that the requirement to pay duties imposed by 28 U.S.C. § 2637(a) has consistently been upheld as a valid condition attached to the government's waiver of sovereign immunity in 28 U.S.C. § 1581(a). Def.'s Mot. 20–22 (*citing Am. Air Parcel*, 718 F.2d 1546; *Peking Herbs Trading Co. v. Dep't of the Treasury*, 17 CIT 1182 (1985). Plaintiff appears to be correct, though, in pointing out the novelty of the facts of this case. The parties have not informed the Court, and the Court is not aware, of any other case in which the allegedly unlawful reclassification and liquidation of an importer's goods has resulted in an increase in duty liability approaching the magnitude alleged in this case, either in relative (2400%) or absolute ($28 million) terms. Plaintiff's concerns are well founded.

If the prepayment requirement of Section 2637(a) does not violate Plaintiff's constitutional rights in this case, Customs would seem to have an effective license to insulate its future actions from judicial review. There would appear to be no meaningful check on Customs' power to arbitrarily and retroactively reclassify goods of a disfavored importer, with total disregard to any binding ruling letter, under a tariff subheading that would impose a duty liability too great for the importer to pay. As long as Customs' reclassification created an insurmountable financial barrier to the Plaintiff, this court would not have jurisdiction under Section 1581(a) to review even the most egregious agency action. If Plaintiff's allegations are true, the requirement to prepay $28 million in duties, as a rate advance of 2400% above the rate Plaintiff was promised in a valid ruling letter prior to importation, seems both harsh and unfair.

The Court is not persuaded, however, that the harshness and unfairness of this result rises to the level of unconstitutionality. Defendant argues for the validity of Section 2637(a), pointing out by analogy that "[f]ederal courts also have consistently required payment as a prerequisite to filing suit in tax cases." Def.'s Mot. at 22 n.9 (*citing United States v. Clintwood-Elkhorn Mining Co.*, 553 U.S. 1, 11–12 (2008). While it is true that the Supreme Court has held that 28

U.S.C. § 1346(a)(1) requires "full payment of [any tax] assessment before an income tax refund suit can be maintained in a Federal District Court," this is not the only available method for contesting an income tax assessment. *Flora v. United States*, 362 U.S. 145, 177 (1960). An aggrieved party may also file suit in United States Tax Court without paying the assessed tax in advance.

When Congress passed the legislation establishing the Tax Court's predecessor, the Board of Tax Appeals, it "thought full payment of the tax assessed was a condition for bringing suit in a District Court; that . . . sometimes caused hardship," and that providing review through the Board would help to "alleviate that hardship." *Flora*, 362 U.S. at 158. In other words, the Board was created not because taxpayers were constitutionally entitled to judicial review of tax assessments without prepayment, but rather as a matter of legislative grace in response to hardship. The result—permitting appeal from tax assessments in both U.S. District Court and the Tax Court—is "a system in which there is one tribunal for prepayment litigation and another for post-payment litigation." *Flora*, 362 U.S. at 163. Certainly a similar measure in the customs context might have the salutary effect of extending legislative grace and easing hardship in this area.

Prior to 1924, the controlling case on prepayment in challenges to both customs duties and taxes was *Cheatham v. United States*, 92 U.S. 85 (1875). The Court in *Cheatham* explained that the United States has,

> enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the government, the law permits the party, **on paying the money required**, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and test in the courts the validity of the tax.
>
> So also, in the internal-revenue department, the statute . . . allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, **on paying the tax** the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.

> It will be readily conceded, from what we have here stated, that **the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues**.
>
> ...
>
> While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, **the general government has wisely made payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed**. . . . We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it. . . . It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid . . . and the rule prescribed in this class of cases is neither arbitrary nor unreasonable.

Cheatham, 92 U.S. at 88–89 (emphasis added). Although the statutory schemes for income tax and customs duties have evolved considerably since then, this analysis continues to be cited for its explanation of the role of sovereign immunity in revenue collection. *See*, *e.g.*, *Flora*, 362 U.S. at 153–56; *see also Johnston v. Comm'r of Internal Revenue*, 429 F.2d 804, 806 (6th Cir. 1970) ("While we appreciate that the payment of taxes as a precondition to sue for their return places a burden on the taxpayer, we do not believe that it is such as to deny him the fundamental processes of fairness required by the Fifth Amendment of the United States Constitution.").

In the absence of legislative grace, the state of the law remains so today. The Court cannot say that 28 U.S.C. § 2637(a) denies Plaintiff "the fundamental process of fairness required by the Fifth Amendment." *Johnston*, 429 F.2d at 806. Finding no constitutional defect with regard to the application of 28 U.S.C. § 2637(a) in this case, the Court will dismiss Count 9 pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Judgment will enter accordingly.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's motion for leave to file a sur-reply is denied; and it is further

ORDERED that Defendant's motion to dismiss Counts 1–8 for lack of jurisdiction is granted; and it is further

ORDERED that Defendant's motion to dismiss Count 9 for failure to state a claim upon which relief may be granted is granted.

Dated: September 4, 2013
New York, NY

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