U.S. Court of International Trade

Slip Op. 16–74

SHENZHEN XINBODA INDUSTRIAL CO., LTD., Plaintiff, HEBEI GOLDEN BIRD TRADING CO., LTD., JINXIANG RICHFAR FRUITS & VEGETABLES CO., LTD., QINGDAO LIANGHE INTERNATIONAL TRADE CO., LTD., SHANDONG CHENHE INTERNATIONAL TRADING CO., LTD., and WEIFANG HONGQIAO INTERNATIONAL LOGISTICS CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 15–00179

[Commerce's final results in antidumping duty administrative review sustained in part and remanded in part.]

Dated: July 27, 2016

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, argued for plaintiff. With him on the brief were *J. Kevin Horgan*, *Alexandra H. Salzman*, and *Judith L. Holdsworth*.

Robert T. Hume, Hume & Associates, LLC, of El Prado, NM, argued for consolidated plaintiffs.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Khalil N. Gharbieh*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Michael J. Coursey, Kelley Drye & Warren, LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief were *John M. Herrmann, II* and *Joshua R. Morey*.

OPINION

Restani, Judge:

This action challenges the Department of Commerce's ("Commerce") final results of the nineteenth administrative review of the antidumping ("AD") duty order on fresh garlic from the People's Republic of China ("PRC"). *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 19th Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 34,141,

34,141–44 (Dep't Commerce June 15, 2015) ("*Final Results*"). Before the court are the motions for judgment on the agency record pursuant to U.S. Court of International Trade ("CIT") Rule 56.2 by Chinese producers Hebei Golden Bird Trading Co., Ltd. ("Golden Bird"), Jinxiang Richfar Fruits & Vegetables Co., Ltd., Qingdao Lianghe International Trade Co., Ltd., Shandong Chenhe International Trading Co., Ltd., and Weifang Hongqiao International Logistics Co., Ltd. (collectively, "Consolidated Plaintiffs"), *see* Mem. in Supp. of Pls.' Mot. for J. on the Agency R., ECF No. 37 ("Golden Bird Br."), and Shenzhen Xinboda Industrial Co., Ltd., ("Xinboda"), *see* Pl. Shenzhen Xinboda Indus. Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 31 ("Xinboda Br."). For the reasons stated below, Commerce's *Final Results* are sustained in part and remanded in part.

BACKGROUND

On November 16, 1994, Commerce issued an AD duty order covering fresh garlic from the PRC. *Antidumping Duty Order: Fresh Garlic from the People's Republic of China*, 59 Fed. Reg. 59,209, 59,209 (Dep't Commerce Nov. 16, 1994). The nineteenth annual administrative review of that AD duty order was initiated on December 30, 2013, and covers the period of review ("POR") of November 1, 2012, through October 31, 2013.[1] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 79,392, 79,393, 79,395–97 (Dep't Commerce Dec. 30, 2013) ("*Initiation Notice*"). Commerce limited its review to two mandatory respondents, selecting the two largest producers by volume, Golden Bird and Jinxiang Hejia Co., Ltd. ("Hejia").[2] Respondent Selection Mem. at 3–5, PD 61 (Apr. 28, 2014).

The PRC is considered by Commerce to be a non-market economy ("NME"). In calculating a dumping margin for products from an NME country, Commerce compares the goods' normal value,[3] derived from factors of production as valued in a surrogate market economy coun-

[1] Commerce must annually review and determine the amount of an AD duty if it receives a request to do so. *See* 19 U.S.C. § 1675(a) (2012).

[2] Commerce may limit its review to "exporters or producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined" if individual examinations are not practicable "because of a large number of exporters or producers involved in the . . . review[.]" 19 U.S.C. § 1677f-1(c)(2)(B).

[3] Normal value is the price

> at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price . . . at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price[.]

19 U.S.C. § 1677b(a)(1)(A),(B)(i).

try, to the goods' export price.[4] Commerce must use the "best available information" in selecting surrogate data. 19 U.S.C. § 1677b(c)(1)(B) (2012). The surrogate data must "to the extent possible" be from a market economy country that is "at a level of economic development comparable to that of the nonmarket economy country, and" is a "significant producer[] of comparable merchandise."[5] *Id.* at § 1677b(c)(4).

On June 25, 2014, five days prior to Commerce's deadline for questionnaire responses, Petitioners, the Fresh Garlic Producers Association ("FGPA"), placed on the record information that alleged Golden Bird and Hejia's shipment volumes were not accurately reported in their Section A questionnaire responses. Pet'rs' Submission of New Factual Information at 2–6, PD 137 (June 25, 2014) ("Pet'rs' Allegations"). Specifically, FGPA claimed that the mandatory respondents' reported shipment data was different from that reported by the General Administration of Customs of the PRC and that the shipment data included export volumes actually shipped by other Chinese exporters that were subject to the PRC-wide rate. *See id.* at 4–6. Following these allegations, Xinboda wrote to Commerce requesting that it be added as either an additional mandatory respondent or voluntary respondent, citing concerns that Commerce would not have "sufficient margins based on cooperating respondents who earn separate rates based on their actual data to apply to separate rate applicants." Xinboda's Req. for Selection as Respondent at 2, bar code 3212864–01 (July 1, 2014). Xinboda also claimed that the Petitioners' allegations called into question the accuracy of the data that was used to select the mandatory respondents. *Id.* at 3–4. Commerce rejected the request, noting that both mandatory respondents were still actively

[4] Export price is

> the price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States[.]

19 U.S.C. § 1677a(a).

[5] For each administrative review, Commerce typically selects a primary surrogate country from a list of countries that it considers to be at a level of economic development comparable to that of the NME country, based upon per capita gross national income ("GNI"). *See* Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process, (Mar. 1, 2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited July 14, 2016). The list of such countries for the PRC in the nineteenth administrative review included South Africa, Colombia, Bulgaria, Thailand, Ecuador, and Indonesia. List of Surrogate Countries at 2, bar code 318027402 (Jan. 30, 2014). Notably, this list does not include the Philippines, which Commerce selected as the primary surrogate country in the eighteenth administrative review. Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China; 2011–2012 Administrative Review, A-570–831, (June 23, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/2014–15279–1.pdf (last visited July 14, 2016).

participating and that Xinboda had failed to submit in a timely fashion the responses necessary to be considered as a voluntary respondent. Commerce's Resp. to Xinboda Respondent Req. at 2–3, bar code 3220285–01 (Aug. 6, 2014). After being granted extensions, the final set of questionnaire responses for the mandatory respondents were ultimately due on June 27, 2014. *See* Grant of Extension for Golden Bird's Quest. Resps. at 1, bar code 320281801 (May 19, 2014); Grant of Extension for Hejia Quest. Resps. at 1, bar code 3210224–01 (June 19, 2014).

In August 2014, and also in response to FGPA's allegations, Commerce issued supplemental questionnaires to Golden Bird and Hejia, requesting complete Chinese Export Declaration Forms ("export declarations") and certain authenticated inspection certificates ("Phytosanitary certificates") to substantiate the mandatory respondents' declared export volumes. Suppl. Golden Bird Quest. at 1 & Attach. 1, bar code 3222078–01 (Aug. 15, 2014); Suppl. Hejia Quest. at 1 & Attach., PD 169 (Aug. 18, 2014).[6] Golden Bird responded on September 5, 2014, providing a portion of the export declarations and Phytosanitary certificates requested. *See* Commerce's Golden Bird Analysis Mem. at 2, CD 106 (Dec. 1, 2014) ("Golden Bird Analysis Mem."). On September 29, 2014, Commerce issued a Second Supplemental Questionnaire to Golden Bird requesting the remaining export declarations and Phyto-sanitary certificates. Second Suppl. Golden Bird Quest. at 1 & Attach., PD 195 (Sept. 29, 2014). Golden Bird submitted a response to the Second Supplemental Questionnaire on October 14, 2014, again providing only a portion of the total documentation requested. *See* Golden Bird Analysis Mem. at 2.

The preliminary results of the review were published on December 8, 2014. *Fresh Garlic From the People's Republic of China: Preliminary Results of the Nineteenth Antidumping Duty Administrative Review; 2012–2013*, 79 Fed. Reg. 72,625, 72,625–29 (Dep't Commerce Dec. 8, 2014) ("*Preliminary Results*"). Commerce preliminarily determined that both Golden Bird and Hejia had failed to demonstrate their status as separate from the PRC-wide entity,[7] and that the PRC-wide rate of $4.71/kg would be assigned as total adverse facts

[6] Hejia did not submit a response to the initial supplemental questionnaire and on September 12, 2014, withdrew its participation in the review. Hejia's Withdrawal from Review at 1, bar code 3227882–01 (Sept. 12, 2014); Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China; 2012–2013 Administrative Review at 3–4, A-570–831, (June 5, 2015), *available at* http://enforcement.trade.gov/frn/summary/prc/2015–14656–1.pdf (last visited July 15, 2016) ("*I&D Memo*").

[7] In the NME context, Commerce has adopted a rebuttable presumption that all companies within the NME country are subject to government control and, thus, should be assessed a

available ("total AFA").[8] *Id.* at 72,625–27; *see also* Decision Memorandum for the Preliminary Results of the 2012–2013 Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China at 10–20, A-570–831, (Dec. 1, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/ 2014–28688–1.pdf (last visited July 15, 2016) ("*Preliminary I&D Memo*"). Commerce deemed seven companies, including Xinboda, eligible for a separate rate. *Preliminary Results*, 79 Fed. Reg. at 72,626; *see also Preliminary I&D Memo* at 9. Because the margins for all individually examined PRC producers were based solely on total AFA, Commerce assigned the separate rate respondents a rate of $1.82/kg, the dumping margin calculated for the separate rate respondents in the immediately preceding administrative review, the eighteenth. *Preliminary Results*, 79 Fed. Reg. at 72,626–27; *see also Preliminary I&D Memo* at 9. On June 15, 2015, Commerce issued the unchanged final results of the review, in which Commerce continued to assign the $4.71/kg PRC-wide rate to the mandatory respondents and the $1.82/kg rate to exporters and producers eligible for separate rates, including Xinboda. *Final Results*, 80 Fed. Reg. at 34,141–42; *see also* Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China; 2012–2013 Administrative Review at 1, A-570–831, (June 5, 2015), *available at* http://enforcement.trade.gov/frn/summary/prc/201514656–1.pdf (last visited July 15, 2016) ("*I&D Memo*").

Golden Bird challenges[9] two aspects of Commerce's *Final Results*. First, Golden Bird disputes Commerce's finding that it did not cooperate to the best of its ability and the subsequent assignment of total AFA. Golden Bird Br. at 11–18. Second, Golden Bird contests the selection of the PRC-wide rate as its total AFA rate. *Id.* at 19–23.

single AD duty rate. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1353 (Fed. Cir. 2015). Here, because Commerce considers the PRC to be an NME, that rate is referred to as the PRC-wide rate.

[8] Although the phrase "total AFA" is not referenced in either the statute or the agency's regulations, it can be understood, within the context of this case, as referring to Commerce's application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e to arrive at a total replacement margin. If, when applying facts otherwise available to fill gaps in the record, Commerce determines

> that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce, Commerce, in calculating a dumping margin], 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).

[9] Although Consolidated Plaintiffs, which include Golden Bird, filed a joint brief, because all relevant arguments raised relate to Golden Bird, the court refers to all arguments made by Consolidated Plaintiffs as arguments made by "Golden Bird."

Xinboda challenges Commerce's *Final Results* on three grounds. First, Xinboda contests the rejection of its request to become an additional mandatory respondent. Xinboda Br. at 9–13. Second, Xinboda contests the rejection of its request to become a voluntary respondent. *Id.* at 14–16. Third, Xinboda challenges the application of the eighteenth administrative review's $1.82/kg rate as the separate rate for this review. *Id.* at 16–20.

The government and FGPA respond that Commerce's decision to apply total AFA was justified due to Golden Bird's failure to submit complete export declarations and Phyto-sanitary certificates. Def. Resp. to Consol. Pls.' Mots. for J. upon the Agency R. 12–16, ECF No. 44 ("Gov't Resp."); Def.-Intvrs.' Resp. in Opp'n to Pls.' Mots. for J. on the Agency R. 16–23, ECF No. 46 ("FGPA Resp."). They also argue that Commerce properly disregarded Golden Bird's separate rate information due to the "fundamental deficiencies resulting from the respondent's lack of cooperation," and correctly assigned the PRC-wide rate. Gov't Resp. at 16–22; *see also* FGPA Resp. at 23–29. They also contend that Commerce sufficiently corroborated the $4.71/kg PRC-wide rate. Gov't Resp. at 24–28; FGPA Resp. at 29–31.

The government further responds that Xinboda did not exhaust its administrative remedies and therefore is not able to appeal the selection of the mandatory respondents and, alternatively, that Commerce's selection of Golden Bird and Hejia as mandatory respondents was proper. Gov't Resp. at 31–39; *see also* FGPA Resp. at 33–40. The government and FGPA contend that Xinboda's voluntary respondent challenge fails because Xinboda failed to submit questionnaire responses in a timely fashion. Gov't Resp. at 39–41; FGPA Resp. at 31–33. And, they argue that Commerce reasonably exercised its discretion in applying the eighteenth administrative review's separate rate as the separate rate in the present nineteenth administrative review. Gov't Resp. at 42–45; FGPA Resp. at 40–43.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). The court upholds Commerce's determination in an administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Golden Bird

Golden Bird argues that Commerce improperly applied total AFA because Golden Bird provided all export declarations and Phyto-

sanitary certificates that were available to the company and that it had valid reasons for not maintaining complete copies of the certificates. Golden Bird Br. at 11–19. Golden Bird also challenges Commerce's application of the PRC-wide rate to Golden Bird as improperly disregarding Golden Bird's separate rate information. *Id.* at 19–20. Alternatively, Golden Bird argues that the PRC-wide rate of $4.71/kg, which was calculated in an earlier review, does not represent commercial reality and was not properly corroborated. *Id.* at 21–23.

The government and FGPA respond that Commerce properly applied total AFA because Golden Bird failed to provide all export declarations and Phyto-sanitary certificates, and Golden Bird admitted to submitting potentially false pricing information to Chinese customs. Gov't Resp. at 7–16; FGPA Resp. at 16–23. They also argue that Commerce's selection of the PRC-wide rate was lawful because Golden Bird failed to demonstrate that it was eligible for a separate rate as Commerce could not trust the entirety of Golden Bird's questionnaire responses and because Commerce properly corroborated the PRC-wide rate. Gov't Resp. at 16–28; FGPA Resp. at 23–31.

As detailed below, Commerce properly applied total AFA to Golden Bird, but its treatment of Golden Bird as part of a PRC-wide entity was unlawful. Accordingly, Commerce's *Final Results* are remanded to assess, based on relevant evidence, whether Golden Bird should have received a separate rate, and select an appropriate rate.

A. Application of Total Adverse Facts Available

As described by the Federal Circuit, application of AFA is a two-part inquiry. *See Mueller Comercial de Mex., S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1231–32 (Fed. Cir. 2014); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). First, Commerce shall use "facts otherwise available" if a party:

> (A) withholds information that has been requested by [Commerce] . . . ,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . ,
>
> (C) significantly impedes a proceeding . . . , or
>
> (D) provides such information but the information cannot be verified . . . .

19 U.S.C. § 1677e(a)(2). In using facts otherwise available, Commerce must fill gaps in the record if it has received less than the full and

complete facts needed to make a determination because a party has failed to provide requested information within the deadline for submission. *Nippon Steel*, 337 F.3d at 1381 ("The reason for the failure is of no moment.").

Second, Commerce may apply an adverse inference in selecting from the facts otherwise available, or AFA, if the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b); *see also Ta Chen Stainless Steel Pipe Co. v. United States*, 31 CIT 794, 812 (2007) (noting that application of AFA is discretionary). A respondent fails to cooperate to the best of its ability when it fails "to do the maximum it is able to do." *Nippon Steel*, 337 F.3d at 1382. In determining whether a party has failed to do the maximum it is able to do, Commerce first "make[s] an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." *Id.* Commerce also then

> make[s] a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. at 1382–83.

Commerce may select either partial or total AFA, depending on the severity and scope of a party's failure to respond to a request for information and its failure to cooperate to the best of its ability. Generally, the "use of partial facts available is not appropriate when the missing information is core to the antidumping analysis and leaves little room for the substitution of partial facts without undue difficulty." *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1308 (Fed. Cir. 2014). Where there are "pervasive and persistent deficiencies that cut across all aspects of the data," all of the reported information may be unreliable, making total AFA appropriate. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citing *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 487–88, 149 F. Supp. 2d 921, 928–29 (2011)).

Commerce's application of total AFA, which is a substitute adverse rate, to Golden Bird is supported by substantial evidence. First, Commerce lawfully used facts available to fill gaps in the record.

Golden Bird failed to provide all the export declarations and Phytosanitary certificates requested by Commerce, providing instead only a portion of each. *I&D Memo* at 3–4; *Preliminary I&D Memo* at 19. The certificates actually provided to Commerce substantiated only a fraction of the net weight of subject merchandise allegedly entered into the United States by Golden Bird. *See* Golden Bird Analysis Mem. at 2; *see also Preliminary I&D Memo* at 14–15, 19. Golden Bird also admitted that the price information in its export declarations to the PRC were "potentially false." *Preliminary I&D Memo* at 19. Thus, Commerce reasonably determined that Golden Bird both failed to comply with Commerce's request for information, and significantly impeded the proceeding. *See Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1325 (CIT 2015) ("*FGPA I*") (sustaining Commerce's use of facts otherwise available where Golden Bird failed to comply with Commerce's request for export declarations).[10]

Second, Commerce's application of an adverse inference is supported by substantial evidence because Golden Bird failed to cooperate to the best of its ability. Golden Bird's failure to maintain its export declarations, which it is required to do so for a minimum of three years by Chinese customs regulations, provided a sufficient basis for Commerce to determine that it failed to cooperate to the best of its ability. *I&D Memo* at 4; *Preliminary I&D Memo* at 18–19; *see Nippon Steel*, 337 F.3d at 1382 ("The [best of its ability] standard . . . does not condone inattentiveness, carelessness, or inadequate record keeping."). Golden Bird's argument that it no longer had a reason to maintain the export declarations because of a change in Chinese value-added tax ("VAT") tax exemption law is of no moment because the reason Golden Bird should have maintained a record of its export declarations is simple: Chinese regulations required it. *See Preliminary I&D Memo* at 18. Further, Golden Bird is no stranger to these types of proceedings and should know what documents it needs to maintain to demonstrate the accuracy of its sales data, specifically as

[10] Golden Bird has not argued here that Commerce failed to notify Golden Bird and provide it an adequate opportunity to correct its deficient response. *See* 19 U.S.C. § 1677m(d) (requiring Commerce to provide a party with the opportunity to correct deficient responses prior to applying facts available). In any event, Commerce abided by the statute when it provided Golden Bird the opportunity to remedy the deficiencies in its Supplemental Questionnaire Response, in which Golden Bird provided incomplete export declarations and Phyto-sanitary certificates, when Commerce issued the Second Supplemental Questionnaire. *See I&D Memo* at 3. Commerce issued the Second Supplemental Questionnaire on September 29, 2014, thereby notifying Golden Bird of the deficiency, Second Suppl. Golden Bird Quest. at 1, and ultimately provided Golden Bird until October 14, 2014, to file its response, *see* Golden Bird's Second Suppl. Quest. Resp. at 1, PD 199–202 (Oct. 14, 2014). This is about twice as long as Commerce typically provides respondents to prepare for verification. *See Preliminary I&D Memo* at 17. Commerce, therefore, provided Golden Bird an appropriate opportunity to remedy the identified deficiencies.

it has failed this requirement before. *See FGPA I*, 121 F. Supp. 3d at 1325–27. Golden Bird compounded that error by also not providing or attempting to provide Commerce with the Phyto-sanitary certificates,[11] which Golden Bird had indicated it would be able to obtain. *See* Golden Bird's Suppl. Quest. Resp. Part 1 at 3, PD 177–78 (Sept. 5, 2014). And, despite a specific request from Commerce to provide documents substantiating its explanation for its inability to obtain the documents, Golden Bird never provided information on the record, such as letters to its U.S. customers or Customs brokers, showing that it did in fact request the Phyto-sanitary certificates to comply with Commerce's request. *I&D Memo* at 4; *see also* Second Suppl. Golden Bird Quest. at Attach. ¶ 17 ("[P]lease provide the remaining, . . . Phytosanitary certificate[s] . . . . If unable to do so, please explain why and submit any supporting documents that substantiate this explanation.").

Further, Commerce lawfully applied total AFA because Golden Bird failed to substantiate export volume, which is at the core of an AD duty calculation. The court has previously sustained Commerce's application of total AFA in the eighteenth administrative review where Golden Bird failed to furnish its export declarations, recognizing that "Golden Bird's sales volume is fundamental to the AD analysis . . . . It is thus akin to the failure to provide product-specific sales and cost data . . . ." *FGPA I*, 121 F. Supp. 3d at 1326–27 (citing *Mukand*, 767 F.3d at 1307). Indeed, total AFA is appropriate here because the unsubstantiated export volumes concern the entire POR, rather than discrete time periods within the POR. *See id.* at 1327 (distinguishing a case in which the Federal Circuit sustained use of partial AFA because the deficiencies only affected a discrete month within the POR). Even though Golden Bird provided some of the export declarations and Phyto-sanitary certificates, it still has not been able to substantiate more than three-quarters of its total exports by weight made during the POR, as initially reported in its Section A Questionnaire Response. *See* Golden Bird Analysis Memo at 2. And, as discussed, Golden Bird admitted to providing potentially false pricing data to the PRC. As pricing data is necessary to calculate an AD duty margin the question is which pricing data, if any, is correct.

[11] It is unclear from the record whether a company like Golden Bird is required by Chinese law or Chinese customs regulations to maintain Phyto-sanitary certificates, as opposed to export declarations. Golden Bird maintains that it was not required to do so. *I&D Memo* at 4. Regardless, as discussed above, Commerce's decision to apply an adverse inference is supported by substantial evidence because Golden Bird failed to maintain export declarations, which it was required to do, and failed to demonstrate it had taken steps to secure copies of the Phyto-sanitary certificates.

See Papierfabrik August Koehler SE v. United States, 7 F. Supp. 3d 1304, 1314 (CIT 2014) (sustaining application of total AFA where "Commerce could not make the comparisons between the normal value and U.S. prices necessary for calculating the dumping margin" because the respondent failed to provide certain sales data). Thus, Commerce's application of total AFA is appropriate because the record does not contain sales volume and pricing information sufficiently reliable for Commerce's purposes and the deficiencies relate to the entire POR.

B. Rejection of Separate Rate Status

In an AD review involving an NME country, Commerce employs a presumption of state control. *See Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1372 (Fed. Cir. 2003). Commerce, therefore, assigns a responding party a country-wide AD duty rate unless the party rebuts the presumption of state control by establishing de jure and de facto independence from the NME country's government. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1353 (Fed. Cir. 2015) ("*Ad Hoc Shrimp*") (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997)). When a party has demonstrated its independence and been granted a separate rate in one segment of the proceeding, it can continue to demonstrate its eligibility for a separate rate by filing a separate rate certification. *See Initiation Notice*, 78 Fed. Reg. at 79,393.

Relevant here, the court has clarified that the separate rate analysis is separate and distinct from the selection of an AFA rate. *Yantai Xinke Steel Structure Co. v. United States*, Slip Op. 12–95, 2012 WL 2930182, at *14 (CIT July 18, 2012) ("[I]t is unreasonable for Commerce to impute the unreliability of a company's questionnaire responses and [other factor of production and U.S. sales] submissions . . . to its separate rate responses when there is no evidence on the record indicating that the latter were false, incomplete, or otherwise deficient."). Commerce's determination that a party is not entitled to a separate rate because its separate rate information is unreliable must be based on substantial evidence. *See Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 771–72, 387 F. Supp. 2d 1270, 1287 (2005). When Commerce fails to make a finding that a respondent's separate rate responses were inaccurate or deficient, its denial of a separate rate is unsupported by substantial evidence. *See Yantai Xinke*, 2012 WL 2930182 at *14.

Commerce's decision to reject Golden Bird's separate rate information is unsupported by substantial evidence. Golden Bird filed a separate rate certification and provided information relevant to its

eligibility for a separate rate in its Section A Questionnaire Response. Golden Bird's Separate Rate Certification at 1, PD 26–27 (Feb. 4, 2014); Golden Bird's Section A Quest. Resp. at A-2–A-12, PD 105–13 (June 11, 2014). In both the *Preliminary Results* and the *Final Results*, Commerce disregarded Golden Bird's separate rate information because, according to Commerce:

> Golden Bird was unable to substantiate its Section A response and its sales transactions. Because Golden Bird's Section A response and [Supplemental Questionnaire Response] are the very documents in which discrepancies have been revealed (*i.e.*, Golden Bird has not been able to corroborate its volume and the price in [export declarations] differed from those reported to [Commerce]) we cannot rely on Golden Bird's submitted Section A responses. The Section A response includes the separate rate information. Golden Bird's failures in reporting its Section A information taint its reported separate rate information, as well. Because we determine that the entirety of Golden Bird's information is unusable, including its separate rate information, we find that Golden Bird has failed to rebut the presumption that it is part of the PRC-wide entity.

I&D Memo at 5; *see also Preliminary I&D Memo* at 19–20.

Commerce improperly disregarded Golden Bird's separate rate information as "tainted" solely because it identified deficiencies in information related to Golden Bird's sales data. This Commerce cannot do. *See Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, Slip Op. 11–123, 2011 WL 4829947, at *16 (CIT Oct. 12, 1011); *Since Hardware (Guangzhou) Co. v. United States*, 34 CIT 1262, 1270–71 (2010); *Qingdao Taifa Grp. Co. v. United States*, 33 CIT 1090, 1098, 637 F. Supp. 2d 1231, 1240–41 (2009) *aff'd*, 467 F. App'x 887 (Fed. Cir. 2012); *Shandong Huarong Gen. Grp. Corp. v. United States*, 27 CIT 1568, 1595–96 (2003). Commerce failed to make an independent finding regarding Golden Bird's separate rate information, but instead imputed deficiencies related to export quantity in both the Section A Questionnaire Response and the Supplemental Questionnaire Responses to all of Golden Bird's submissions, including information submitted by Golden Bird unrelated to export quantity or actual sales data.

The government's reliance on *Ad Hoc Shrimp*, in which the Federal Circuit held lawful Commerce's decision to apply the PRC-wide rate as a total AFA rate to a respondent, where Commerce rejected the respondent's separate rate information because it deemed "the en-

tirety of [the respondent's] submissions unreliable," is misplaced. *See* 802 F.3d at 1357. In that case, "the necessary information missing from the record was . . . an accurate representation of [the respondent's] corporate structure and indications of government control exercised through the company's Chinese affiliates," and such information was deemed "core, not tangential" to Commerce's separate rate analysis as it went "to the heart of [the respondent's] corporate ownership and control." *Id.* at 1356, 1357. Despite the government's arguments, both in its brief and at oral argument, *Ad Hoc Shrimp* does not govern because the unreliability of Golden Bird's export quantity and sales data, which do not relate to "corporate ownership and control," cannot be imputed to its separate rate information. *See id.* at 1357. Thus, as in *FGPA I*, Commerce's rejection of "Golden Bird's rebuttal evidence on the discrete point of government control is not reasonable."[12] 121 F. Supp. 3d at 1328. Indeed, assignment of separate rate status appears proper given Golden Bird's repeated ability to qualify for a separate rate where Commerce has actually considered Golden Bird's separate rate information.[13] *See, e.g., Fresh Garlic Producers Ass'n v. United States*, Slip Op. 16–68, 2016 WL 3693715, at *2, *4 (CIT July 7, 2016) ("*FGPA II*"); *Fresh Garlic Producers Ass'n v. United States*, 83 F. Supp. 3d 1330, 1332, 1334 (CIT 2015) (noting that Commerce calculated an individual rate for Golden Bird in the seventeenth administrative review). Therefore, Commerce's determination improperly ignores separate rate record evidence, which directly rebuts and detracts from Commerce's presumption of state control, and unless Commerce relies on other evidence directly relevant to state control, Commerce is to assign Golden Bird

[12] Commerce also has not based its determination on a finding of fraud on the proceeding. The court need not decide how such a finding would impact this case, but it does not appear proper for Commerce to have rejected wholesale Golden Bird's submissions as unreliable, where extraordinary findings of bad faith and fraud before Commerce were not made. It is not enough for Commerce to find sales data "unreliable."

[13] And, although FGPA alleged that Golden Bird exported goods produced by entities subjected to the PRC-wide rate, *see* Pet'rs' Allegations at 2–3, Commerce never made an explicit finding that Golden Bird was engaged in such export funneling activities. Absent such a finding based on record evidence, it would be inappropriate for the court to take FGPA's allegations as true. On the other hand, if Commerce did make a finding that Golden Bird was importing goods on behalf of companies subject to the PRC-wide rate in order to allow those companies to benefit from Golden Bird's low rate, such a finding likely could be considered in selecting a total AFA rate for Golden Bird. For instance, because deterrence is a factor in selecting an AFA rate, *see F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000), it may be appropriate in that particular situation for Commerce to select a separate rate incorporating the PRC-wide rate, to deter this type of non-compliance.

a separate rate.[14] *See FGPA I*, 121 F. Supp. 3d at 1328 (citing *Gerber Food*, 29 CIT at 771–72, 387 F. Supp. 2d at 1287).

II. Xinboda

A. Respondent Selection

Xinboda argues that Commerce unreasonably denied Xinboda's requests to be examined as a mandatory respondent and, alternatively, as a voluntary respondent. Xinboda Br. at 9–16. With regard to its mandatory respondent request, Xinboda claims it was not required to exhaust its administrative remedies, due to "changed circumstances" and because Commerce's denial of its requests made any attempt to respond futile. Pl. Shenzhen Xinboda Indus. Co. Reply Br. 1–6, ECF No. 55 ("Xinboda Reply Br."). The government responds that Commerce lawfully denied both requests because Xinboda failed to exhaust its administrative remedies regarding mandatory respondent selection and failed to submit the necessary questionnaire responses to be considered for voluntary respondent status. Gov't Resp. at 31–34, 39–40; *see also* FGPA Resp. at 31–40. The government also refutes the merits of Xinboda's mandatory respondent argument. Gov't Resp. at 34–39.

The court "shall, where appropriate, require the exhaustion of administrative remedies," 28 U.S.C. § 2637(d), and has consistently held that a respondent who wishes to challenge Commerce's mandatory respondent selection must exhaust its administrative remedies by seeking such status itself and pursuing voluntary respondent status in accordance with 19 U.S.C. § 1677m(a). *See DuPont Teijin Films China Ltd. v. United States*, 7 F. Supp. 3d 1338, 1357 (CIT 2014) ("[A] party aggrieved by not being selected as a mandatory respondent must request to be reviewed as voluntary respondent under 19 U.S.C. § 1677m(a) before it can challenge the mandatory respondent selection process in court."); *Union Steel Mfg. Co. v. United States*, 837 F. Supp. 2d 1307, 1331 (CIT 2012) ("[A] respondent, in order to exhaust administrative remedies, must pursue the statutory process for receiving an individually-determined margin before challenging before the court [Commerce's] decision not to as-

[14] As the court has previously held, Commerce on remand shall apply the law in effect at the time that Commerce determined "that Golden Bird failed to cooperate to the best of its ability and selected total AFA." *FGPA I*, 121 F. Supp. 3d at 1332–33. Because President Obama signed the Trade Preferences Extension Act of 2015 ("TPEA") on June 29, 2015, *see* Pub. L. No. 114–27, 129 Stat. 362 (2015), and Commerce published the instant *Preliminary Results*, in which Commerce first made the findings relevant to apply total AFA to Golden Bird, on December 8, 2014, *see* 79 Fed. Reg. at 72,625–26, the TPEA does not apply on remand.

sign an individual margin to it."). Where Commerce has, under 19 U.S.C. § 1677f-1(c)(2), limited the number of exporters or producers it will examine, Commerce must establish margins for any exporters or producers that voluntarily respond and submit the requested information "by the date specified—(i) for exporters and producers that were initially selected for examination," as long as the number of exporters and producers that submit the request "is not so large that . . . individual examination . . . would be unduly burdensome . . . and inhibit the timely completion of the investigation." 19 U.S.C. § 1677m(a)(1)(A), (B).

The court has granted exception to the exhaustion requirement under certain circumstances, including where, relevant to this case, "raising the issue at the administrative level would have been futile." *Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, 193, 601 F. Supp. 2d 1370, 1377 (2009). The exhaustion requirement reflects a "congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies" before appealing to the court. *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

Xinboda failed to exhaust its administrative remedies regarding the selection of mandatory respondents in this review. Xinboda did not submit responses to the questionnaires issued to the mandatory respondents by the deadlines established for the mandatory respondents. *See I&D Memo* at 9. Therefore, Xinboda may not challenge the mandatory respondent selection on appeal. *See DuPont Teijin*, 7 F. Supp. 3d at 1357. Regardless of the timing of FGPA's allegations and the final results of the eighteenth administrative review, Xinboda was still required by statute to submit its responses in a timely fashion. *See* 19 U.S.C. § 1677m(a)(1)(A); *Union Steel*, 837 F. Supp. 2d at 1330–31 (holding that because the party did not take the necessary actions to pursue voluntary respondent status it had failed to exhaust its administrative remedies).[15]

[15] And, to the extent that Xinboda argues that its claim need not be exhausted because, as a matter of law, Commerce was required to individually examine every exporter in this review because the number of exporters was not sufficiently "large" pursuant to 19 U.S.C. § 1677f1(c)(2), Xinboda's argument fails. The statute provides an exception to the general requirement that Commerce "determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise[,]" where "it is not practicable" to make such a determination "because of the large number of exporters or producers involved in the . . . review[.]" 19 U.S.C. § 1677f-1(c). The court adheres to its previous holding that the statute "contemplates the entities for whom review was requested, initiated, and not rescinded, and does not require Commerce to first evaluate whether or to what extend those entities shipped subject merchandise during the POR." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 992 F. Supp. 2d 1302, 1307 (CIT 2014). There, the court did not require Commerce to first consider U.S. Customs and Border Protection ("Customs") data to determine the number of exporters or producers "involved"

Moreover, Xinboda has not demonstrated that any exception to the exhaustion doctrine applies to this case. Xinboda knows the history of the case and should have recognized that one of the mandatory respondents might have received AFA, but Xinboda's requests to be a mandatory or voluntary respondent and Commerce's subsequent denial both occurred after the date the questionnaire responses were due. Thus, such responses cannot be said to have been futile at the time that Xinboda should have filed them. Commerce Resp. to Xinboda Respondent Request at 2–4; *see, e.g.*, *DuPont Teijin*, 7 F. Supp. 3d at 1357–58 (holding that an expectation that Commerce would not grant voluntary respondent status did not render the any such requests futile and the party had failed to exhaust its administrative remedies).[16]

Xinboda's voluntary respondent argument is similarly without merit because, as discussed, Xinboda did not meet the statutory requirements. Per Commerce's established deadlines, the Section A, C, and D questionnaire responses were due on June 27, 2014. *See* Grant of Extension for Golden Bird's Quest. Resps. at 1; Grant of

in the review. *Id.* at 1308. This approach is especially appropriate in this case, where the accuracy of the Customs data is questioned. Here, the number of exporters "for whom review was requested, initiated, and not rescinded," at the time that Commerce conducted respondent selection, was fifty-four exporters or producers. *See* Respondent Selection Mem. at 3; *see also* Pet'rs' Withdrawal of Certain Reqs. for Admin. Review at 2–4, bar code 3192007–01 (Mar. 31, 2014). Moreover, before Commerce selected respondents on April 28, 2014, sixteen additional companies certified that they had no shipments during the POR. *See* Qingshui Vegetable Clarification of No Sales, bar code 3194926–01 (Apr. 10, 2014); Merry Vegetable Clarification of No Sales, bar code 3194925–01 (Apr. 10, 2014); Chengda Certificate of No Sales, bar code 3172946–01 (Jan. 10, 2014); Yuanxin Certificate of No Sales, bar code 317294501 (Jan. 10, 2014); XuZhou and Chengwu No Shipment Certification, bar code 3173132–01 (Jan. 10, 2014); Multiple Parties' No Sales Certifications, bar code 3172714–01 (Jan. 8, 2014). Therefore, there were only thirty-eight potential respondents from which Commerce could have picked. Thirty-eight is "non-controversially" large, and, therefore, Commerce acted reasonably. *See Ad Hoc Shrimp Trade Action Comm.*, 992 F. Supp. 2d at 1309.

[16] Admittedly, Commerce's recent history evidences a questionable tendency not to accept any voluntary respondents. Nevertheless, the statute requires a respondent to place their own company-specific data on the record by filing the applicable questionnaire responses to be considered for either mandatory or voluntary respondent status. In this case, Commerce may have actually accepted Xinboda as a mandatory respondent had it placed its information on the record because nearly three months prior to the *Preliminary Results* being published, Hejia had withdrawn from the review and it was highly likely that Golden Bird would receive an AFA rate. *See Preliminary I&D Memo* at 12, 13–14 (detailing that Hejia withdrew on September 12, 2014, and that in the same month Commerce first identified the deficiencies in Golden Bird's responses). Therefore, although Commerce's tendency not to accept voluntary respondents may have the unfortunate effect of discouraging parties from providing their information, Xinboda, a mandatory respondent in previous reviews and a company intimately familiar with the garlic industry, is at fault for its information not being on the record and therefore not being selected as a mandatory respondent in this review.

Extension for Hejia Quest. Resps. at 1. Xinboda did not submit any questionnaire responses by the deadlines set by Commerce and has still never provided that information to Commerce. *See I&D Memo* at 10–11. In fact, Xinboda's initial letter requesting mandatory or voluntary respondent status was filed on July 1, 2014, after the deadline for the last questionnaire response. *See id.*at 9–10. Furthermore, Xinboda's "change in circumstances" argument, seeking an exception to the statutory timeline due to the timing of FGPA's allegations, is unconvincing because, in the circumstances of this review, Xinboda should have submitted the questionnaire responses in a timely manner or immediately notified Commerce after FGPA's allegations that it needed more time to complete its responses.[17] Xinboda, therefore, had no adequate reason for failing to meet the requirement. Thus, Commerce's decision, in isolation, to reject Xinboda's requests for mandatory respondent status and, alternatively, voluntary respondent status was lawful. This decision did have collateral consequences, as will be explained.

B. Selection of the Separate Rate

Xinboda challenges Commerce's selection of the eighteenth administrative review's $1.82/kg separate rate and its application to this year's separate rate respondents. Xinboda Br. at 16–20. Xinboda argues that Commerce unreasonably applied the eighteenth administrative review's separate rate, which uses the Philippines as the primary surrogate country, because the Philippines is not considered economically comparable in this review and Commerce's previous decision to treat the Philippines as a "significant producer" was recently remanded and is still subject to judicial review. *Id.* at 16–19. Xinboda claims that Commerce instead should have used the rate from the seventeenth administrative review, which relied on surrogate market data from the Ukraine.[18] *Id.* at 19–20. The government responds that Commerce was reasonable in using the eighteenth review rate, given the absence of usable data on the record and the statutory preference for contemporaneity. Gov't Resp. at 41–45. The

[17] Commerce notified all respondents, including Xinboda, that it had selected Golden Bird and Hejia as mandatory respondents on April 28, 2014, and issued the questionnaires on May 7 and 9, 2014, nearly two months prior to the last deadline to respond to questionnaires. *Preliminary I&D Memo* at 3–4.

[18] The Ukraine, though not among the countries identified in Commerce's potential surrogate countries list, had a GNI during this POR that was within the range of economically comparable countries identified on the list. List of Surrogate Countries at 2; The World Bank, World Development Report 2014: Risk and Opportunity 297 (2013), *available at* http://siteresources.worldbank.org/EXTNWDR2013/Resources/8258024135290919386l/8936935–1356011448215/8986901–1380046989056/WDR2014_Complete_Report.pdf (last visited July 18, 2016) (indicating that Ukraine had a per capita GNI of $3,500).

government also claims that the removal of the Philippines from this review's list of economically comparable countries does not affect the applicability of the rate. Gov't Resp. at 43–44.

Because the statute is silent on the method of calculation for a separate rate within the NME context, Commerce's practice is to determine separate rates according to the methodology used to calculate the "all others rate" pursuant to 19 U.S.C. § 1673d(c)(5). *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1374 (Fed. Cir. 2013) ("The separate rate for eligible non-mandatory respondents is generally calculated following the statutory method for determining the 'all others rate' under § 1673d(c)(5)(A)."); *see, e.g.*, *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1372 (Fed. Cir. 2012) (utilizing 19 U.S.C. § 1673d(c)(5) for a separate rate determination for PRC respondents). By statute, the all others duty rate is calculated as the weighted average of the dumping margins established for individually-investigated respondents, excluding any margins that are zero, de minimis, or determined solely under facts available. 19 U.S.C. § 1673d(c)(5)(A). When all individually-investigated respondents are assigned margins that are zero, de minimis, or determined solely under facts available, "[Commerce] may use any reasonable method to establish the estimated all-others rate." 19 U.S.C. § 1673d(c)(5)(B). The Statement of Administrative Action ("SAA"), however, states that the "expected method" in such cases is to weight-average the margins, "provided that volume data is available," unless: (1) it is not feasible to do so, or (2) the resulting average would not be "reasonably reflective" of the dumping margins of other exporters or producers. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 ("SAA").[19]

Commerce reasonably did not apply the "expected method" of averaging the rates of the mandatory respondents in this case because volume data is not available and such a method would not yield a margin reasonably reflective of the separate rate respondents' behavior. First, because of the absence of usable data from the review, Commerce did not have any volume data available and therefore, in accordance with the SAA, could not weight-average the rates of the mandatory respondents. *See* SAA, H.R. Doc. No. 103–316, vol. 1, at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201. Second, the rate resulting from averaging would not be reasonably reflective of Xinboda's

[19] Under 19 U.S.C. § 3512(d) "[t]he statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."

and other separate rate respondents' potential dumping margins because both mandatory respondents received total AFA rates, which are calculated from adverse inferences and, at $4.71/kg, are much higher than the previous rates selected for separate rate respondents. *See Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1355–56 (Fed. Cir. 2016) (holding that the difference between a $0.44/kg prior margin and a $0.11/kg average margin was sufficient to support a conclusion that averaging might not be reasonably reflective); *see also Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 36,721, 36,723 (Dep't Commerce June 30, 2014) ("*AR18 Final Results*") (assigning a $1.82/kg separate rate in the eighteenth administrative review); *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 36,168, 36,169 (Dep't Commerce June 17, 2013) ("*AR17 Final Results*") (assigning a $1.28/kg separate rate in the seventeenth administrative review); *Fresh Garlic from the People's Republic of China: Final Results of the 2009–2010 Administrative Review of the Antidumping Duty Order*, 77 Fed. Reg. 34,346, 34,348 (Dep't Commerce June 11, 2012) ("*AR16 Final Results*") (assigning a $0.41/kg separate rate in the sixteenth administrative review). And, although Commerce may assign adverse inferences where "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," 19 U.S.C. § 1677e(b)(1), neither Xinboda nor any other separate rate respondent failed to cooperate in the review.[20] In fact, after selecting mandatory respondents, Commerce did not request further information from the separate rate respondents. Therefore, Commerce lawfully did not establish the separate rate pursuant to the so-called "expected method."

Commerce's selection of the separate rate from the immediately preceding eighteenth administrative review, however, was unreasonable given the unique circumstances of this case. At first blush, Commerce's methodology to use the separate rate from the previous review, i.e. the most contemporaneous separate rate information available, appears reasonable.[21] Indeed, Commerce must strive for accuracy when it is calculating margins, and utilizing the most con-

[20] In AD duty cases, the court does not accept application of adverse inferences or rates based upon adverse inferences to cooperating separate rate respondents. *See SKF USA Inc. v. United States*, 34 CIT 1866, 1879, 675 F. Supp. 2d 1264, 1277 (2009) ("The court cannot accept a construction of 19 U.S.C. § 1677e(b) under which the party who suffers the effect of the adverse inference is not the party who failed to cooperate.").

[21] The Federal Circuit, in *Albemarle*, held that the application of information, including duty rates, from a prior review may be reasonable under at least two circumstances: (1)

temporaneous information furthers that goal. *See Albemarle*, 821 F.3d at 1356 ("[O]ur analysis is guided by the statute's manifest preference for contemporaneity in periodic administrative reviews."); *Yangzhou Bestpak*, 716 F.3d at 1379 ("An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible."). Although it would typically be preferable for Commerce to use information or apply a rate from an ongoing review, *Albemarle*, 821 F.3d at 1357 ("That the prior rates were near in time cannot in and of itself justify their use in a subsequent review."), such contemporaneous information does not exist on the record of this review.[22]

But, Commerce's methodology as applied here, where it selected a separate rate that has been held unlawful, may not be sustained. In *FGPA I* and *FGPA II*, the court twice remanded the final results of the eighteenth administrative review to Commerce because its selection

"where there is evidence that the overall market and the dumping margins have not changed from period to period," and (2) where Commerce is constructing an AFA rate. 821 F.3d at 1357; *see also Atar S.R.L. v. United States*, 730 F.3d 1320, 1327 (Fed. Cir. 2013) (allowing use of data from a prior review where "the record contains no indication that the relevant market underwent any substantial intervening change that would meaningfully distinguish the period"). In evaluating the former circumstance, the Federal Circuit considered fluctuations in margins, financial ratios, and normal values between the previous year and the year under review. *See Albemarle*, 821 F.3d at 1357.

[22] Although Commerce may not "explain the absence of evidence by invoking procedural difficulties that were at least in part a creature of its own making," *Yangzhou Bestpak*, 716 F.3d at 1378, it does not appear Commerce is entirely at fault in this case. It did create a problem by selecting only two mandatory respondents, but the two mandatory respondents it did select failed to provide usable data from which to calculate a separate rate. Further, Xinboda—as well as the other separate rate respondents—could have put contemporaneous information on the record had it properly sought mandatory or voluntary respondent status. But, as discussed, it failed to do so.

This is not to say that Commerce could not or should not seek to remedy this problem. In the context of separate rates, Commerce has in the past reopened the record and collected information from separate rate respondents to confirm the propriety of its selected separate rate. *See, e.g.*, *Amanda Foods (Viet.) Ltd. v. United States*, 774 F. Supp. 2d 1286, 1291–92 (CIT 2011). Here, Commerce on remand may reopen the administrative record to collect information from separate rate companies, or even to select new mandatory respondents to review, resulting in a usable separate rate calculation. Given Commerce's current course, where it continues to select Golden Bird as a mandatory respondent, even in the twentieth administrative review after twice previously assigning it total AFA, Commerce would be wise to either stop selecting Golden Bird or, if it insists on selecting a party that is highly likely to receive an AFA rate, to select a third mandatory respondent, or even a fourth, that is likely to cooperate *at the outset* of the review. *See* Decision Memorandum for the Preliminary Results of the 2013–2014 Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China at 3, A-570–831, (Nov. 30, 2015), *available at* http://enforcement.trade.gov/frn/summary/prc/201530791–1.pdf (last visited July 15, 2016) (selecting Golden Bird as a mandatory respondent, and eventually selecting a third mandatory respondent only after Golden Bird notified Commerce that it would not respond).

of the Philippines as the primary surrogate country was not supported by substantial evidence as Commerce had not shown that the Philippines was a significant producer of subject merchandise. *See FGPA II*, 2016 WL 3693715, at *5–7; *FGPA I*, 121 F. Supp. 3d at 1340. Xinboda is correct that it would be unreasonable for Commerce to select a separate rate that Commerce improperly calculated and knows to be unlawful. *See* Xinboda Br. at 16, 18–19. Commerce, by relying on a rate calculated using a primary surrogate country that does not appear to be a significant producer of subject merchandise, essentially employed a methodology here that allowed it to select a rate calculated in violation of its own policies. *See, e.g.*, Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process, (Mar. 1, 2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited July 14, 2016). In fact, despite the government's arguments to the contrary, when Commerce first relied on the eighteenth administrative review's separate rate on December 8, 2014, in the *Preliminary Results* of this review, *see* 79 Fed. Reg. at 72,627, it was already on notice that the eighteenth administrative review's final results had been appealed as early as July 1, 2014, and that the validity of the $1.82/kg rate was at issue. *See* Compl. ¶ 1–10, 12, 14, *Shenzen Xinboda Indus. Co. v. United States*, No. 14–00154, ECF No. 7 (consolidated under *FGPA I*, No. 14–00180).[23] Furthermore, because the court is remanding the issue of Golden Bird's rate, interests of finality do not weigh against the court's decision to also remand the separate rate issue in this case so that a usable rate maybe selected or calculated for all of the unreviewed separate rate respondents.[24]

[23] Xinboda's other argument, which claims it was unreasonable for Commerce to apply a rate that had been based on surrogate market data from the Philippines where the Philippines is not included on the list of countries economically comparable to the PRC for this review, is unconvincing. *See* List of Surrogate Countries at 2. In the eighteenth administrative review during which the separate rate at issue was calculated, the Philippines was considered economically comparable to the PRC. *See* Surrogate Countries Selection AR 18, bar code 3133689–01 (May 2, 2013). Thus, at the time the rate was calculated, there was no issue of economic comparability.

[24] Commerce's selection of an unsupported rate has important effects, given that there are a number of other companies directly affected by Commerce's decision or potentially affected in the future. *See Final Results*, 80 Fed. Reg. at 34,142 (listing seven companies in total that received separate rates in this review); *see also Initiation Notice*, 78 Fed. Reg. at 79,395–97 (listing 147 companies for which Commerce originally initiated the nineteenth

CONCLUSION

For the foregoing reasons, the *Final Results* are sustained in part and remanded in part. On remand, Commerce is to evaluate record evidence regarding Golden Bird's independence from government control to determine whether Golden Bird is entitled to a separate rate and may not rely on a finding of unreliable sales data. If Commerce determines upon remand that Golden Bird is entitled to a separate rate, Commerce may select an appropriate total AFA rate, as the determination of AFA applicability has been sustained here. Further, on remand, Commerce shall reconsider the separate rate applied to Xinboda and the other non-examined companies, by either employing a different reasonable method to calculate the separate rate, such as reopening the record to examine new mandatory respondents, reopening the record to collect information from which to calculate a reliable separate rate, or if it results in a non-punitive rate for separate respondents, adjusting the separate rate assigned based on the results of the remand pursuant to *FGPA II*. Commerce shall advise the court by August 15, 2016 as to the appropriate scheduling for filing its remand results after it decides which way it is going to proceed.

Dated: July 27, 2016
New York, New York

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

Slip Op. 16–75

FEDMET RESOURCES CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 14–00297

[Denying plaintiff's motion for judgment on the agency record and entering declaratory judgment on a claim adjudicated earlier in these proceedings]

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administrative review); *Preliminary I&D Memo* at 2; *Albemarle*, 821 F.3d at 1358 ("It was unreasonable in this case for Commerce to choose to limit its review to the two largest volume exporters, refuse to collect additional data from Huahui, and then draw inferences adverse to Huahui based on the lack of data available on the record."); *KYD, Inc. v. United States*, 607 F.3d 760, 767 (Fed. Cir. 2010) ("The antidumping laws 'are remedial not punitive.'" (quoting *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995))).

Dated: August 1, 2016

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OPINION

Stanceu, Chief Judge:

Plaintiff Fedmet Resources Corporation ("Fedmet"), a U.S. importer, challenges an internal directive of U.S. Customs and Border Protection ("Customs" or "CBP") that targeted only Fedmet. Designated by Customs as a "user defined rule," or "UDR," the directive instructed Customs port directors on bonding to secure potential antidumping and countervailing duties on entries of a class of imported merchandise, magnesia carbon bricks ("MCBs"), entered by Fedmet during the period from September 6, 2014 to September 30, 2015. Customs applied the UDR to require Fedmet to post 260.24% *ad valorem* single transaction bonds to obtain release of this merchandise into the commerce of the United States. The 260.24% *ad valorem* duty rate is the sum of the deposit rates Customs applied under an antidumping duty ("AD") order (236%) and a countervailing duty ("CVD") order (24.24%) on imported MCBs from the People's Republic of China ("China" or the "PRC"). Customs based the UDR on an investigation of Fedmet for alleged importation of Chinese-origin magnesia carbon bricks using false declarations of Vietnamese origin.

In its prior opinion, *Fedmet Resources Corp. v. United States*, 39 CIT __, 77 F. Supp. 3d 1336 (2015) ("*Fedmet I*"), this court resolved two of the three claims in Fedmet's complaint. Before the court is Fedmet's Motion for Judgment on the Agency Record on the remaining claim, in which Fedmet seeks a judgment declaring the UDR unlawful. Because the UDR expired according to its own terms soon after the briefing was completed on Fedmet's motion and because there are no remaining entries upon which the UDR can be applied, the court concludes that plaintiff's claim challenging the UDR is moot and denies the motion for judgment on the agency record.

Also before the court are the parties' responses to the court's inquiry concerning a remedy on one of the claims in this case, on which

Fedmet obtained a favorable court ruling. The court will enter a declaratory judgment on this claim.

I. BACKGROUND

The court's opinion in *Fedmet I*, 39 CIT at __, 77 F. Supp. 3d at 1338–39, presents background information on this case, which is summarized briefly and supplemented herein with developments since the issuance of that opinion.

A. Administrative Proceedings before U.S. Customs and Border Protection

Customs issued the UDR, "UDR 1057274," on September 6, 2014, in response to information provided to Customs by an agent of Immigration and Customs Enforcement ("ICE") concerning an ongoing criminal investigation of Fedmet. *See id.*, 39 CIT at __, 77 F. Supp. 3d at 1346.

On October 21, 2014, Fedmet made two consumption entries of MCBs from Vietnam at the port of Cleveland (Entry Nos. 336–3104829–0 and 336–3104919–9). *See* Second Am. Compl. ¶ 17 (Jan 15, 2015), ECF Nos. 45 (conf.), 46 (public); *Entry Documents for Entry No. 336–3104829–0* (Dec. 10, 2014), (Admin.R.Doc. No 3) ECF No. 30–4 (conf.); *Entry Documents for Entry No. 336–3104919–9* (Dec. 10, 2014), (Admin.R.Doc. No. 4) ECF No. 30–5 (conf.).[1] On November 6, 2014, Customs issued to Fedmet an "Entry/Rejection Notice" for the two October 21, 2014 entries, stating that "[t]he country of origin for magnesia carbon brick is believed to be China" and requiring for release the posting of a 260.24% single transaction bond for each entry. *See Entry/Summary Rejection Sheet for Entry No. 336–3104829–0* (Dec. 10, 2014), (Admin.R.Doc. No. 1) ECF No. 30–2 (conf.); *Entry/Summary Rejection Sheet for Entry No. 336–3104919–9* (Dec. 10, 2014), (Admin.R.Doc. No. 2) ECF No. 30–3 (conf.). After Fedmet submitted the required single transaction bonds for these two entries, Customs released the merchandise into commerce. *See* Second Am. Compl. ¶ 20; *Jan. 21, 2015 Decl. of Edward Wachovec, Supervisory Import Specialist at the Port of Cleveland*¶ 2 (Jan. 28, 2015), ECF No. 47–1.

Fedmet made a third consumption entry of MCBs from Vietnam at the port of Cleveland on December 2, 2014 (Entry No. 336–3105573–3). Second Am. Compl. ¶ 21. On December 30, 2014, Customs issued an Entry/Rejection Notice for the December 2, 2014 entry, informing Fedmet that the shipment would not be released unless Fedmet submitted a single transaction bond in an amount

[1] Administrative record citations are to the Cleveland administrative record.

calculated at 260.24% of the entered value. *See id.*¶ 23; *Entry/Summary Rejection Sheet for Entry No. 336–3105573–3* (Jan. 23, 2015), (Admin.R.Doc. No. 15) ECF No. 47–2 (conf.). Fedmet has not submitted a 260.24% single transaction bond on the December 2, 2014 entry, and the merchandise covered by that entry has not been released.

B. Proceedings before the Court of International Trade

Plaintiff commenced this action by filing a summons and a complaint on November 12, 2014, and a second amended complaint on January 9, 2015, which the court deemed filed on January 15, 2015. Summons, ECF No. 1; Compl., ECF No. 5; Second Am. Compl. Plaintiff's second amended complaint pled three claims (referred to herein as Counts I, II, and III). *See* Second Am. Compl.

In Count I, Fedmet claimed that the MCBs on the October 21, 2014 entries were products of Vietnam and that CBP's 260.24% bonding requirement therefore was unlawful. *Id.*¶ 25. In Count II, Fedmet claimed that Customs acted unlawfully in imposing the same bonding requirement upon the merchandise of the December 2, 2014 entry, alleging that this merchandise, too, was a product of Vietnam. *Id.*¶ 27. In Count III, Fedmet claimed that Customs acted unlawfully in applying the UDR to all of its entries of MCBs from Vietnam. *Id.*¶ 29.

Defendant filed a Motion to Dismiss Counts I and III of the second amended complaint on January 23, 2015. Def.'s Mot. to Dismiss Counts I & III of Pl.'s Second Am. Compl., ECF Nos. 49 (conf.), 50 (public). On Count II, plaintiff moved for partial judgment on the agency record pursuant to USCIT Rule 56.1. Mot. of Pl. Fedmet Res. Corp. for Partial J. upon the Agency R. (Feb. 4, 2015), ECF Nos. 55 (conf.), 56 (public).

In its opinion in *Fedmet I*, this court granted defendant's motion to dismiss with respect to Count I and denied it with respect to Count III. *Fedmet I*, 39 CIT at __, 77 F. Supp. 3d at 1340–43. The court granted Fedmet's Motion for Judgment on the Agency Record with regard to Count II of the second amended complaint. *Id.*, 39 CIT at __, 77 F. Supp. 3d at 1343–50. The court also ordered additional briefing regarding the form of remedy to be granted to Fedmet upon the claim stated in Count II. *Id.*, 39 CIT at __, 77 F. Supp. 3d at 1350.

On July 28, 2015, following issuance of the court's opinion in *Fedmet I*, Fedmet moved for judgment on the agency record pursuant to USCIT Rule 56.1 with regard to the remaining count, Count III, of the second amended complaint. Mot. of Pl. Fedmet Res. Corp. for J. upon the Agency R. and Mem. of Law in Supp., ECF Nos. 80 (conf.), 81 (public) ("Pl.'s Br."). Defendant filed a response on August 24, 2015.

Def.'s Resp. in Opp'n to Pl.'s Mot. for J. upon the Admin. R., ECF No. 82 ("Def.'s Opp'n"). Plaintiff filed a reply brief on September 2, 2015. Reply Br. of Pl. Fedmet Res. Corp., ECF No. 83 ("Pl.'s Reply").

II. DISCUSSION

A. Plaintiff's Motion for Judgment on the Agency Record on Count III of Fedmet's Second Amended Complaint

Plaintiff moves for judgment on the agency record on Count III of the second amended complaint, in which Fedmet challenges as unlawful the UDR, which it describes as a "final determination...that all entries of MCBs from Vietnam by Fedmet will be required to be entered with STBs [single transaction bonds] at the 260.24 percent rate applicable to imports of MCBs from China." Second Am. Compl. ¶ 29. Fedmet argues that the UDR is arbitrary and capricious because the administrative record contains no evidence that the magnesia carbon bricks Fedmet seeks to import from Vietnam are in fact of Chinese origin. Pl.'s Br. 13. It argues, further, that it was arbitrary and capricious for Customs to fail to address the record evidence it submitted that the origin of this merchandise actually is Vietnam. *Id.* at 14–16. Finally, Fedmet maintains that the UDR imposes an unreasonable and punitive burden on Fedmet. *Id.* at 16–19.

The parties completed their briefing on Fedmet's motion for judgment on the agency record on September 2, 2015. The UDR contested in Count III and in Fedmet's motion was created on September 6, 2014 and applied to entries by Fedmet that occurred on or before September 30, 2015. *See UDR Report* (Dec. 10, 2014), (Admin.R.Doc. No. 13) ECF No. 30–14 (stating "Start Date 9/6/2014" and "End Date 9/30/2015"). Neither party addressed in its briefing the jurisdictional issue posed by the then-imminent expiration of the UDR at issue in this case. Now that the scheduled expiration has occurred, the issue presented is whether the court is required to dismiss as moot Fedmet's claim contesting the UDR. Even though no party has raised this issue, the court must consider it *sua sponte* because it is jurisdictional in nature. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978).

The jurisdiction of federal courts is limited by the Constitution to those cases involving actual cases or controversies. *See* U.S. CONST. art. III, § 2, cl. 1; *Flast v. Cohen*, 392 U.S. 83, 94 (1968). A cause of action becomes moot, and therefore outside of a court's jurisdiction, "when the issues presented are no longer 'live' or the parties lack a

legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496–97 (1969) (citing E. BORCHARD, DECLARATORY JUDGMENTS 35–37 (2d ed. 1941)).

Plaintiff's judicial challenge to the UDR is moot. Customs created the UDR on September 6, 2014; the UDR expired on September 30, 2015. *See UDR Report*. By its own terms, the UDR is inapplicable to future entries of merchandise. Moreover, no new issues can arise from entries of MCBs by Fedmet that were made prior to the expiration of the UDR. The record indicates that Fedmet made only three consumption entries of MCBs from Vietnam at the port of Cleveland during the time that the UDR was in effect, and the parties' submissions indicate nothing to the contrary. Two of the entries were made on October 21, 2014, and the remaining one was made on December 2, 2014. The court resolved Fedmet's claims regarding these entries in *Fedmet I*. *See Fedmet I*, 39 CIT at __, 77 F. Supp. 3d at 1340–50. Nothing in the pleadings, Fedmet's motion, or the administrative record demonstrates that any other entries occurred that potentially could be subject to the UDR.

While it can be argued that the issues raised by the UDR may occur again should Customs issue or apply a similar rule in the future, a judicial challenge arising out of that future rule could be brought only through a new cause of action. In the instant action, any conclusion the court could reach on the issue of whether Customs lawfully issued the now-expired UDR could be only an advisory opinion. *See Chafin v. Chafin*, 568 U.S. __, __, 133 S.Ct. 1017, 1023 (2013) ("Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'") (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). The court, therefore, must dismiss on mootness grounds Fedmet's claim challenging the UDR and deny the motion for judgment on the agency record.

B. Appropriate Form of Relief Concerning Count II

In *Fedmet I*, the court granted plaintiff's Motion for Judgment on the Agency Record on Count II of the second amended complaint, holding unlawful Customs' decision to impose a bonding requirement on Fedmet's Entry No. 336–3105573–3. *Fedmet I*, 39 CIT at __, 77 F. Supp. 3d at 1350. As relief on the claim in Count II, plaintiff sought "an order that not only holds unlawful the contested decision but also orders Customs 'to admit the entry into the United States without the posting of an STB or other security' for payment of antidumping and

countervailing duties." *Id.* At oral argument, the court inquired of defendant whether, should the court set aside the contested decision to require a 260.24% bond on Entry No. 336–3105573–3, Customs promptly would release the merchandise. *See* Conf. Oral Arg. Tr. 66: 8–14 (May 5, 2015), ECF No. 70 (conf.). Because defendant was unable to provide the court and plaintiff an answer to that question at oral argument, the court could not determine whether the second form of requested relief, an order to admit the entry without the posting of a single transaction bond or other security, was necessary. *See Fedmet I*, 39 CIT at __, 77 F. Supp. 3d at 1350. Accordingly, the court ordered the parties to brief the court "concerning the form of remedy to be granted upon the claim stated in Count II of the second amended complaint." *Id.*

Defendant, in responding to plaintiff's current motion for judgment on the agency record, did not respond to the court's request for additional briefing concerning whether, once the court sets aside the contested decision to require a 260.24% bond on Entry No. 336–3105573–3, Customs would act promptly to release the merchandise at issue. *See* Def.'s Opp'n 25–26. Instead, defendant devotes the entirety of its argument regarding the appropriate form of relief on the claim in Count II to a recitation of the reasons why it believes plaintiff is not entitled to an injunction. *See id.*

Plaintiff also fails to respond in its briefing to the court's request as to the form of remedy that is appropriate on Count II. *See* Pl.'s Br. 19; Pl.'s Reply 10–11. However, plaintiff states in its reply brief that "[a]lthough Fedmet's complaint includes a permanent injunction among the relief requested, Fedmet has not moved for such an injunction at this time." Pl.'s Reply 10. The court interprets this statement to mean that Fedmet is not now seeking permanent injunctive relief.

The court issued in *Fedmet I* an order declaring unlawful CBP's decision to require a 260.24% bond on Entry No. 336–3105573–3. Plaintiff has not made a showing that relief in the form of an affirmative injunction directing Customs to admit the merchandise on the entry without the posting of a single transaction bond or other additional security is necessary or appropriate. Therefore, in accordance with *Fedmet I*, the court grants plaintiff declaratory relief on Count II of the second amended complaint.

III. CONCLUSION

For the reasons discussed above, the court concludes that the claim in Count III of plaintiff's second amended complaint is moot and denies plaintiff's Motion for Judgment on the Agency Record. Plaintiff

is entitled to declaratory relief on its claim set forth as Count II of the second amended complaint. Judgment will enter accordingly.

Dated: August 1, 2016
New York, NY

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

Slip Op. 16–76

HUSTEEL CO., LTD., Plaintiff, NEXTEEL CO., LTD. and HYUNDAI HYSCO, Consolidated Plaintiffs, ILJIN STEEL CORPORATION, AJU BESTEEL CO., LTD., and SEAH STEEL CORP., Plaintiff-Intervenors, v. UNITED STATES, Defendant, UNITED STATES STEEL CORPORATION, BOOMERANG TUBE LLC, ENERGEX TUBE (A DIVISION OF JMC STEEL GROUP), TEJAS TUBULAR PRODUCTS, TMK IPSCO, VALLOUREC STAR, L.P., WELDED TUBE USA INC., and MAVERICK TUBE CORPORATION, Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00215

[Commerce's final results of remand redetermination in antidumping investigation sustained.]

Dated: August 2, 2016

Donald B. Cameron, Morris, Manning & Martin, LLP, of Washington, DC, argued for plaintiff. With him on the brief were *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, and *Sarah S. Sprinkle.*

J. David Park, Arnold & Porter, LLP, of Washington, DC, argued for consolidated plaintiffs. With him on the brief were *Henry D. Almond* and *Yujin K. McNamara*.

Joel D. Kaufman, *Richard O. Cunningham*, and *Henry N. Smith*, Steptoe & Johnson LLP, of Washington, DC, for plaintiff-intervenor ILJIN Steel Corporation.

Neil R. Ellis, *Rajib Pal*, and *Shawn M. Higgins*, Sidley Austin, LLP, of Washington, DC, for plaintiff-intervenor AJU Besteel Co., Ltd.

Jeffrey M. Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, DC, for plaintiff-intervenor SeAH Steel Corp.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. On the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, *L. Misha Preheim*, Senior Trial Counsel, and *Melissa M. Devine*, *Emma E. Bond*, and *Agatha Koprowski*, Trial Attorneys. Of counsel on the brief was *Mykhaylo A. Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Jon D. Corey and *Jonathan G. Cooper*, Quinn Emanuel Urquhart & Sullivan, LLP, of Washington, DC, for defendant-intervenor United States Steel Corporation.

Roger B. Schagrin, *Christopher T. Cloutier*, *John W. Bohn*, *Jordan C. Kahn*, and *Paul W. Jameson*, Schagrin Associates, of Washington, DC, for defendant-intervenors Boomerang Tube LLC, Energex Tube (a Division of JMC Steel Group), Tejas Tubular Products, TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc.

Brett A. Shumate and *Jeffrey O. Frank*, Wiley Rein, LLP, of Washington, DC, argued for defendant-intervenor Maverick Tube Corporation. On the brief were *Robert E. DeFrancesco, III.* and *Alan H. Price*.

OPINION

Restani, Judge:

Currently before the court is the U.S. Department of Commerce's ("Commerce") Final Redetermination Pursuant to Court Remand, ECF No. 240 ("*Remand Results*"). The *Remand Results* concern the final determination in the antidumping ("AD") duty investigation of oil country tubular goods ("OCTG") from the Republic of Korea ("Korea"), covering the period of investigation ("POI") between July 1, 2012, and June 30, 2013. *See Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 Fed. Reg. 41,983, 41,983 (Dep't Commerce July 18, 2014) ("*Final Determination*"). The court remanded this matter to Commerce to reconsider or provide further explanation of its mandatory respondent selection and its calculation of the constructed value profit margin ("CV Profit") used in determining the AD duty margin for the selected mandatory respondents, NEXTEEL Co., Ltd. ("NEXTEEL"), and Hyundai HYSCO[1] ("HYSCO"). *Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1325–32, 1337–49 (CIT 2015). Commerce's *Remand Results* are adequately explained, and its revised calculations are supported by substantial evidence. Accordingly, the *Remand Results* are sustained.

BACKGROUND

The court presumes familiarity with the facts of the case as discussed in *Husteel*, 98 F. Supp. 3d at 1322–23, but facts relevant to the *Remand Results* are briefly summarized here for ease of reference.

[1] On July 1, 2015, Hyundai HYSCO merged into its affiliate, Hyundai Steel Company. *Remand Results* at 2 n.2.

A dumping margin is "the amount by which the normal value[2] exceeds the export price[3] [("EP")] or the constructed export price [("CEP")].[4]" 19 U.S.C. § 1677(35)(A) (2012). Relevant to the calculation on remand, when a respondent, such as NEXTEEL or HYSCO, does not have any home-market or third-country sales, Commerce calculates normal value using constructed value. *See* 19 U.S.C. § 1677b(e). Constructed value is derived by applying a statutory formula, and it includes the sum of the costs of production ("selling expenses") plus an amount for profit (i.e., CV Profit), and other incidental expenses. *See* 19 U.S.C. § 1677b(e); 19 C.F.R. § 351.405(b). In calculating normal value using constructed value, Commerce's preferred method is to include "the actual amounts incurred and realized by the specific exporter or producer being examined . . . for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country[.]" 19 U.S.C. § 1677b(e)(2)(A). If such data are unavailable, Commerce resorts to one of three statutory alternatives for calculating selling expenses and CV Profit.[5] 19 U.S.C. § 1677b(e)(2)(B). The court will refer to these

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[2] Normal value of the subject merchandise is defined as

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price.

19 U.S.C. § 1677b(a)(1)(B)(i) (2012).

[3] Export price is defined as

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.

19 U.S.C. § 1677a(a).

[4] Constructed export price is

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

19 U.S.C. § 1677a(b).

[5] The three statutory alternatives for calculating CV Profit are:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or

alternatives as "alternative (i)," "alternative (ii)," and "alternative (iii)," respectively.

In February 2014, Commerce issued a negative preliminary determination. *Certain Oil Country Tubular Goods from the Republic of Korea: Negative Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination*, 79 Fed. Reg. 10,480, 10,480 (Dep't Commerce Feb. 25, 2014) ("*Preliminary Determination*"). For the *Preliminary Determination,* Commerce limited the number of respondents for individual examination, selecting the two exporters or producers of OCTG accounting for the largest volume of imports from Korea to the United States: NEXTEEL and HYSCO. Respondent Selection Mem. at 6–8, PD 80 (Aug. 27, 2013) ("Respondent Selection Memo"); Decision Memorandum for the Negative Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination in the Less-Than-Fair-Value Investigation of Certain Oil Country Tubular Goods from the Republic of Korea at 3, A-580–870, (Feb. 14, 2014), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2014–041101.pdf (last visited July 27, 2016) ("*Preliminary I&D Memo*"). Because the two mandatory respondents did not have viable home or third-country sales of OCTG, Commerce used constructed value to calculate normal value. *See id.* at 3, 20–21. Commerce determined that the data to calculate CV Profit under 19 U.S.C. § 1677b(e)(2)(A) were unavailable, and accordingly, that it had to rely on one of the alternatives listed in 19 U.S.C. § 1677b(e)(2)(B). *Id.* at 21.

For HYSCO, Commerce calculated CV Profit using alternative (i) and HYSCO's own home-market sales of non-OCTG products. *Id.* at 22. Commerce then compared the resulting normal value to CEP, because "HYSCO reported that it [sold] the subject merchandise to a wholly-owned subsidiary in the United States,. ..which then sold the merchandise to an unaffiliated customer." *Id.* at 15–16, 19. For NEXTEEL, Commerce preliminarily relied on the profit recorded in cer-

(iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in a foreign country, of merchandise that is in the same general category of products as the subject merchandise; [i.e., what is commonly referred to as the "profit cap."]

19 U.S.C. § 1677b(e)(2)(B). The statute "does not establish a hierarchy or preference among these alternative methods." Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1, at 840 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4176 ("SAA").

tain Korean OCTG producers' ("Korean producers") financial statements under alternative (iii), and compared the resulting constructed normal value to export price. *See id.* at 15–16, 20, 22. Commerce calculated preliminary dumping margins of zero for both mandatory respondents. *Preliminary Determination*, 79 Fed. Reg. at 10,481.

After the *Preliminary Determination*, Commerce permitted the United States Steel Corporation ("U.S. Steel") to place the 2012 financial statements of Tenaris, S.A. ("Tenaris"), a multinational producer of OCTG, on the record as rebuttal evidence to NEXTEEL's supplemental questionnaire response filed February 20, 2014. *See* Issues and Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Korea at 28–30, A-580–870, (July 10, 2014), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2014–16874–1.pdf (last visited July 27, 2016) ("*I&D Memo*"). Although Commerce permitted U.S. Steel to place the Tenaris financial statements on the record, Commerce did not allow the other parties to fully respond to the Tenaris data or provide additional CV Profit evidence. *See id.*; *Husteel*, 98 F. Supp. 3d at 1343–44.

In July 2014, Commerce issued an affirmative final determination, and calculated a dumping margin of 9.89% for NEXTEEL and 15.75% for HYSCO. *Final Determination*, 79 Fed. Reg. at 41,984. Korean producers and exporters not individually examined, including Husteel Co., Ltd. ("Husteel"), SeAH Steel Corporation ("SeAH"), AJU Besteel Co., Ltd. ("AJU Besteel"), and ILJIN Steel Corp. ("ILJIN") were assigned a margin of 12.82%, the weighted-average of the mandatory respondents' dumping margins. *Id.* Changes in Commerce's CV Profit calculation caused this significant increase in the dumping margins. For the *Final Determination*, Commerce concluded that it could not rely on the profit from HYSCO's or any of the other Korean producers' non-OCTG sales under alternative (i), i.e., profit for the same general category of products as the subject merchandise, because their home-market sales of predominantly line pipe were not in the same general category as OCTG. *I&D Memo* at 16–20. Commerce then calculated CV Profit for both NEXTEEL and HYSCO using data from the Tenaris financial statements under alternative (iii). *See id.* at 14. Commerce also determined that it was unable to calculate and apply a profit cap under alternative (iii), because Commerce did "not have home market profit data for other exporters and producers in Korea of the same general category of products." *Id.* at 21.

NEXTEEL, HYSCO, Husteel, SeAH, AJU Besteel, and ILJIN (collectively, "Respondents"), challenged Commerce's *Final Determination* on several grounds. Relevant to the remand, ILJIN argued Commerce did not provide sufficient explanation for Commerce's decision not to select ILJIN as a mandatory respondent, as ILJIN produces seamless OCTG and the two mandatory respondents selected produce only welded OCTG. *Husteel*, 98 F. Supp. 3d at 1329. ILJIN claimed this rendered Commerce's respondent selection unrepresentative. *Id.*[6] All Respondents contended that they were prejudiced when Commerce allowed the Tenaris financial statements to be placed on the record. *See id.* at 1340, 1343–44. They argued Commerce allowed the Tenaris financial statements on the record as rebuttal evidence, without providing any of the Respondents a sufficient opportunity to submit evidence that would have either undermined the information contained in U.S. Steel's submission or acted as an alternative CV Profit source. *Id.* at 1340. Respondents maintained, alternatively, that if the Tenaris data were properly on the record, Commerce still erred in its use of Tenaris's financial statements to calculate CV Profit. *Id.* at 1337. Finally, Respondents asserted Commerce erred in failing to apply an appropriate profit cap. *Id.* at 1347.[7]

The court held that Commerce did not sufficiently explain its reasoning for the choice of NEXTEEL and HYSCO as mandatory respondents, or for its rejection of ILJIN as a mandatory respondent. *Id.* at 1330–31. The court therefore remanded the *Final Determination* to Commerce to further explain its mandatory respondent selection. *Id.* at 1332. The court also held that the Tenaris financial statements were improperly placed on the record as rebuttal evidence, and instead, should have been rejected as untimely. *Id.* at 1341–43. The court also determined that Respondents were prejudiced by Commerce's action improperly permitting the untimely filing of the Tenaris data and Respondents' inability to comment on the Tenaris data.

[6] Husteel and SeAH also challenged Commerce's mandatory and voluntary respondent selection. *Husteel*, 98 F. Supp. 3d at 1325.

[7] The parties made several additional challenges to the *Final Determination* not relevant on remand: (1) NEXTEEL and AJU Besteel challenged Commerce's affiliation determination, *Husteel*, 98 F. Supp. 3d at 1349–50; (2) Maverick Tube Corporation ("Maverick") challenged NEXTEEL's hot-rolled steel coil valuation, *id.* at 1358; (3) U.S. Steel challenged Commerce's NEXTEEL General & Administrative expense calculation and HYSCO warranty expense calculation, *id.* at 1356, 1362; (4) U.S. Steel also challenged Commerce's decision not to apply adverse facts applicable under 19 U.S.C. § 1677e(b) with regard to HYSCO's short-term U.S. interest rate, *id.* at 1363–64; and (5) Maverick and U.S. Steel both challenged Commerce's decision not to apply adverse facts available for NEXTEEL's warranty and warehousing expenses and HYSCO's affiliated service providers, *id.* at 1351–52, 1360.

Id. at 1343–46. Accordingly, the court remanded the CV Profit issue and instructed Commerce to either remove the Tenaris financial statements from the record or to otherwise counter the prejudice to Respondents. *Id.* at 1346. The court further instructed Commerce to either calculate a profit cap or explain its refusal to apply an appropriate profit cap. *Id.* at 1349.[8]

Following the court's decision, on September 18, 2015, Commerce reopened the record to permit all interested parties to comment on the Tenaris data and submit new factual information on the issue of CV Profit (including the application of a profit cap). *Remand Results* at 2, 9. Husteel, NEXTEEL and HYSCO together, U.S. Steel, and Maverick Tube Corporation ("Maverick") filed comments and new factual information on October 2, 2015. *Id.* at 2. Husteel's submission included the 2012 financial statements of OAO TMK IPSCO ("TMK"), a large multinational producer of OCTG from Russia. *See id.* at 21 (citing Husteel's Factual Info. Submission and Cmts. on CV Profit at Ex. 3 at 8, Remand PD 5–12 (Oct. 2, 2015)). Those parties filed rebuttal comments on October 9, 2015. *Id.* at 2.

In the *Remand Results*, Commerce provided further explanation of its choice of NEXTEEL and HYSCO as mandatory respondents, explaining that the decision was based on NEXTEEL's and HYSCO's size and was in compliance with the statute. *Id.* at 33. Neither ILJIN, nor any other party, has challenged Commerce's further explanation of the mandatory respondent selection issue.

With respect to CV Profit, Commerce revised its calculations and based the new calculation on an average of the profit rates in the 2012 financial statements of Tenaris and TMK. *Remand Results* at 3. As a result, the CV Profit rate fell from 26.11% to 16.24%. *Id.* Commerce provided further explanation for its conclusion that because non-OCTG pipe is not in the same general category of products as OCTG, there was no home-market profit data for Korean exporters or producers of products in the same general category as OCTG. *Id.* at 22–23. Thus, Commerce continued to conclude that no Korean producer had sales information sufficient to calculate to a profit cap. *Id.* at 22. Commerce, however, asserts that it constructed a "facts available profit cap" from the average of the profits in the global market (including Korea). *Id.* at 23. Because Commerce based this calculation on the average profit rate earned by Tenaris and TMK, Commerce's calculation with the "cap" was the same as the CV Profit rate

[8] The court rejected the other challenges made to the *Final Determination*, holding that Commerce's determinations were supported by substantial evidence. *Husteel*, 98 F. Supp. 3d at 1336–37, 1350–51, 1353, 1354, 1356, 1357, 1359, 1362, 1363, 1365; *see supra*, notes 5, 6.

calculation without the cap. *Id.* As a result of these changes, NEXTEEL's revised weighted-average dumping margin is 3.98% and HYSCO's is 6.49%. *Id.* at 85. The all others rate changed to 5.24%. *Id.*

Husteel, NEXTEEL, and HYSCO argue the *Remand Results* are unsupported by substantial evidence, particularly asserting that OCTG and non-OCTG pipe are in the same general category of products, and that therefore Korean sales of non-OCTG pipe should be used as a source of either CV Profit or profit cap data. Pl. Husteel Co., Ltd.'s Cmts. on the U.S. Dep't of Commerce's Feb. 22, 2016 Final Redetermination Pursuant to Ct. Remand 2–12, ECF No. 249 ("Husteel Cmts."); Cmts. of NEXTEEL & Hyundai Steel on the U.S. Dep't of Commerce's Feb. 22, 2016 Final Redetermination Pursuant to Ct. Remand 15–16, ECF No. 252 ("NEXTEEL & HYSCO Cmts.") (adopting Husteel's comments on this issue).[9] Husteel, NEXTEEL, and HYSCO also assert that Commerce held ex-parte meetings while examining Tenaris's financial statements, and that those meetings prejudiced them. Husteel Cmts. at 1–2 (adopting NEXTEEL and HYSCO's comments on this issue); NEXTEEL & HYSCO Cmts. at 9–14. These parties further argue Commerce failed to calculate a proper profit cap. Husteel Cmts. at 14–23; NEXTEEL & HYSCO Cmts. at 16–25. For these reasons, they ask the court to again remand the *Remand Results* to Commerce to address these issues.

Maverick and U.S. Steel (collectively, "Petitioners") also contest the *Remand Results*. Petitioners argue Commerce should not have reopened the record on remand to permit additional CV Profit data, because Tenaris's financial data was sufficient and its prior calculation under statutory alternative (iii) was supported by substantial evidence. Maverick Tube Corp.'s Cmts. on the U.S. Dep't of Commerce's Feb. 22, 2016 Final Results of Redetermination Pursuant to Ct. Remand 10–11, ECF No. 245 ("Maverick Cmts.").[10] Alternatively, Petitioners argue that if Commerce properly reopened the record, Commerce's calculations on remand are supported by substantial evidence. Maverick Cmts. at 3. Finally, Petitioners argue Commerce reasonably interpreted the "same general category of products" to exclude Korean home-market sales of non-OCTG as a CV Profit or profit cap data source. Maverick Cmts. at 3–7.

The government responds that Commerce's choice of mandatory respondents was appropriate and lawful. Def.'s Revised Resp. to

[9] AJU Besteel and SeAH adopt Husteel's, and NEXTEEL and HYSCO's arguments. *See* AJU Besteel Cmts. on Remand Results 1, ECF No. 247; SeAH Steel Corp.'s Cmts. on Remand Results 1, ECF No. 251.

[10] U.S. Steel adopts Maverick's arguments. United States Steel Corp.'s Cmts. on the U.S. Dep't of Commerce's Feb. 22, 2016 Final Results of Redetermination Pursuant to Ct. Remand 2, ECF No. 248.

Cmts. Regarding the Remand Redetermination 63–64, ECF No. 272 ("Gov't Resp."). The government argues that a further representativeness analysis is unnecessary because it has already selected respondents based on the volume of exports in compliance with the statute. *Id.* With respect to CV Profit, the government argues Commerce complied with the court's remand order, appropriately reopened the record, and has complied with the statute in its calculations. *Id.* at 8–33. The government argues reopening the record negated any prejudice from allowing Tenaris's data on the record because all parties had an opportunity to comment and submit factual data. *Id.* at 8–13. The government further argues that Commerce's explanation of the "same general category of products" is adequate. *Id.* at 44–50. Although the government argues that Commerce's CV Profit rate calculation is correct, it requests a remand to reconsider the treatment of one potential CV Profit data source. *Id.* at 34–36. Finally, the government argues Commerce correctly calculated a CV Profit cap. *Id.* at 36–44.

DISCUSSION

I. Mandatory Respondent Selection

The court previously sustained Commerce's determination in the instant case that it was not "practicable to make individual weighted average dumping margin determinations [for each known exporter or producer of the subject merchandise]" based on the "large number of exporters or producers involved in the investigation." *Husteel*, 98 F. Supp. 3d at 1328 (internal brackets omitted) (quoting 19 U.S.C. § 1677f-1(c)(2)). By statute in such instances, Commerce may limit its examination to "(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to [Commerce] at the time of selection, or (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." 19 U.S.C. § 1677f–1(c)(2). In the *Final Determination*, Commerce selected mandatory respondents based on the largest production volume under § 1677f–1(c)(2)(B). The court remanded to Commerce for further explanation of its decision in the light of ILJIN's arguments concerning differences between seamless and welded OCTG production.

In the *Remand Results*, Commerce further explained its decision not to select ILJIN as a mandatory respondent. *Remand Results* at 24–38. Commerce explained that by statute, it is permitted to choose either a representative sample or the largest producers by volume. *Id.* at 25. Commerce reasoned that when it chooses the largest producers, there is an inherent representative aspect to the choice as those

producers likely make up a significant portion of the market. *Id.* at 29. Further, Commerce explained that although ILJIN produced seamless OCTG, the alleged differences in prices and costs between seamless and welded OCTG were unsubstantiated, and were not on the record at the time Commerce made its mandatory respondent selection decision. *Id.* at 31–32, 37. Finally, Commerce explained that ILJIN was the only Korean producer of seamless OCTG and ILJIN's production was an insignificant portion of the total OCTG imports from Korea during the POI. *Id.* at 27. None of the parties have challenged Commerce's further explanation of its mandatory selection process and on its face the determination is adequately explained and appears reasonable. Accordingly, Commerce's decision not to examine ILJIN as a mandatory respondent is sustained.

II. CV Profit Calculation

A. *Procedural Issues*

In challenging the *Remand Results*, Respondents make two procedural arguments. First, Respondents argue that Commerce's *Remand Results* are unsupported by substantial evidence because Commerce has not complied with the court's order to remedy the prejudice caused by Commerce's improper acceptance of the Tenaris financial statements on the record. NEXTEEL & HYSCO Cmts. at 5–9; Husteel Cmts. at 1–2 (adopting NEXTEEL and HYSCO's comments on this issue). Respondents argue that simply reopening the record and permitting all parties to comment on and submit evidence undermining the Tenaris data and to supply new CV Profit data was insufficient. NEXTEEL & HYSCO Cmts. at 6–8. They argue that only by removing the Tenaris data from the record can the prejudice be remedied. *Id.* at 9. Alternatively, they argue that U.S. Steel should not have been permitted to comment on the Tenaris data as the party who originally submitted the data. *Id.* at 8. Second, Respondents argue Commerce's ex parte meeting with Tenaris and Maverick officials on September 17, 2015, has further prejudiced them in the proceeding. *Id.* at 9–14; Husteel Cmts. at 1–2 (adopting NEXTEEL and HYSCO's comments on this issue).

In remanding the CV Profit issue, the court ordered Commerce to either "remove [the Tenaris] information from the record" or "determine if and how, at this late date, the prejudice caused by accepting the Tenaris financial statement in violation of the regulations can be rectified." *Husteel* 98 F. Supp. 3d at 1346. Commerce's decision to reopen the record and permit all parties to comment on the Tenaris data and submit additional CV Profit data was reasonable. Part of the

prejudice caused by permitting the Tenaris data on the record was that Respondents did not have the opportunity to comment on, respond to, or attempt to undermine the Tenaris data. NEXTEEL & HYSCO Cmts. at 7 ("[T]he fundamental prejudice suffered by Respondents was that 'Commerce allow[ed] the information onto the record' without a meaningful opportunity for rebuttal."). By permitting the parties to comment on the Tenaris data, Commerce has compensated for and adequately ameliorated the prejudice to respondents. It was well within Commerce's discretion to reopen the record on remand, *see Qingdao Sea-Line Trading Co. v. United States*, Slip Op. 13–102, 2013 WL 4038618, at *5 (CIT Aug. 8, 2013) (holding that Commerce may reopen the record "on remand if, in its discretion, it finds that more information is necessary to comply with the remand instructions" or when "doing so clearly advances the purposes of the remand"), and its solution to correct the prejudice, although not perfect, was reasonable in the light of the circumstances of the case.[11]

Additionally, the ex parte meeting was not improper. Commerce complied with the statute and regulations, *see* 19 U.S.C. § 1677f(a)(3), 19 C.F.R. § 351.104(b), and put a summary of the meeting on the record on September 29, 2015. Dep't of Commerce meeting with Outside Parties at 1–2, bar code 3400382–01 (Sept. 29, 2015); *see Remand Results* at 68; Gov't Resp. at 51–60. The summary of the meeting was placed on the record eight business days after the meeting, which accords with the court's precedent for timely filing summaries of ex parte meetings. *See Hyundai Elecs. Indus. Co. v. United States*, 28 CIT 517, 526–27, 342 F. Supp. 2d 1141, 1150–51 (2004) (sustaining Commerce's determination where Commerce waited eleven business days to place the summary of an ex parte meeting on the record because the parties had "a meaningful opportunity to respond"). Despite the close juxtaposition between the meeting and Commerce's announcement that it would not remove the Tenaris data from the record, there is nothing to indicate that anything inappropriate occurred at the meeting or that any new factual information was submitted. It is presumed that Commerce complies with statutes and regulations and in this case, the statute specifies that if new factual information is submitted during an ex parte meeting, it must be indicated in the summary. *See* 19 U.S.C. § 1677f(a)(3); *Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1351 (Fed. Cir. 2006) ("In the

[11] Respondents argue that U.S. Steel, as the party who originally submitted the Tenaris data as factual information, should not have been permitted to comment on, respond to, or rebut that data. Respondents cite 19 C.F.R. § 351.301(c) and explain that typically the party submitting factual information is not given an opportunity to submit information in support of that information. NEXTEEL & HYSCO Cmts. at 8–9. Whatever the wisdom of Commerce's procedural choice, Commerce did not exceed its discretion in soliciting comments from all parties.

absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties" (quoting *Bernklau v. Principi*, 291 F.3d 795, 801 (Fed. Cir. 2002)). Finally, after the meeting, respondents were permitted to fully comment on and submit information rebutting the Tenaris data. Accordingly, Commerce did not act improperly when it permitted the ex parte meeting and refused to remove the Tenaris data from the record.

B. *Same General Category of Products*

Respondents next argue that the court should remand once more the CV Profit calculation based on Commerce's incorrect determination that non-OCTG pipe is not in the same general category of products as OCTG. Husteel Cmts. at 2–12; NEXTEEL & HYSCO Cmts. at 15–16 (adopting Husteel's comments on this issue). Respondents contend that based on this incorrect determination, Commerce has continued to determine improperly that it could not use either HYSCO's or any of the other Korean producers' data to calculate CV Profit. Husteel Cmts. at 2–12. Respondents specifically challenge Commerce's reliance on temporary market conditions in making such determination as unreasonable and irrelevant. Husteel Cmts. at 4–7. They also challenge Commerce's reliance on testing and certification requirements of OCTG and argue that Commerce's definition of products in the same general category as limited to those used in down hole applications is unreasonably narrow. *Id.* at 7–12.

On remand, Commerce further explained its determination that line pipe, standard pipe, and other non-OCTG pipe are not in the same general category of products as OCTG, reasoning that "[p]roducts in the same general category as subject OCTG should be of sufficient quality to be used in 'down hole' applications." *Remand Results* at 13. Commerce also complied with the court's specific instructions to address the relevance of the difference in demand in the oil exploration and construction markets given the mutable nature of such a factor, and the relevance of testing and certification requirements in making the same general category of goods determination. Id. at 12. Commerce reasoned that market conditions themselves were not probative of the same general category of goods, but rather underscored the significant differences between the industries in which the products are used. *Id.* Commerce further indicated that down hole pipe and non-down hole pipe serve different purposes and have different uses, which is reflected in their different physical characteristics. *Id.* at 12–14. Commerce next explained that testing and certification requirements differ for down hole products, such as OCTG, because they are subject to harsher conditions and more

significant external and internal pressure. Commerce reasoned that such differences were relevant to analyzing the physical characteristics of the products. *Id.* Finally, Commerce explained that it had not improperly limited the definition of same general category of products to the foreign like product because items such as drill pipe and stainless OCTG would qualify as part of the same general category of goods, but would not meet the narrower definition of foreign like product. *Id.* at 13.

Neither the statute nor the regulations define the phrase "same general category of products." *See* 19 U.S.C. § 1677b(e)(2)(B)(i), (iii). The Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1, at 840 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4176 ("SAA"), indicates that the phrase "encompasses a category of merchandise broader than the 'foreign like product.'" *Accord Atar S.r.L. v. United States*, 730 F.3d 1320, 1328 (Fed. Cir. 2013). Citing the definition of "general" as "not specialized or restricted . . . not limited; diversified," Respondents argue that the use of the term "general" indicates that the phrase should be interpreted broadly to include pipe products not limited to down hole applications. Husteel Cmts. at 3 (internal brackets omitted). Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), to determine whether Commerce's interpretation of the AD statute is entitled to deference the court conducts a two-part test. Where Congress has spoken directly to the question at issue, the court and Commerce must give effect to the unambiguously expressed intent of Congress. *See id.* If, however, the statute is vague or silent on an issue, as it is here, the court upholds Commerce's interpretation so long as the interpretation is reasonable. *See id.* at 843; *see also DuPont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005).

Commerce's interpretation of same general category of products in this case as excluding non-OCTG products is reasonable. First, Commerce's explanation in the *Remand Results* that different market demand in the oil exploration and construction industries during the POI was not expressly relied upon in making the same general category of products determination, but underscored the dissimilarity in the industries in which OCTG and non-OCTG pipe are used, was reasonable. *Remand Results* at 12. Commerce explained that because differences in such industries are not fleeting, it had not relied upon unreasonable or irrelevant criteria in making its determination. *Id.* Rather, Commerce explained that it was reasonable to expect differences in the industry to reflect differences in the product based on the various applications and uses of the products in each respective

industry. Because of the significant differences in the industries, Commerce's conclusion that non-OCTG pipe is not in the same general category of products as OCTG was not unreasonable or unsupported.

Second, with respect to testing and certification requirements, Commerce reasonably explained that those requirements were not expressly relied upon but helped to analyze the physical characteristics of the products at issue. OCTG is unquestionably a premium product that is used in unique and often harsh environments such that OCTG products must be of sufficiently high quality to withstand significant pressures. *See Remand Results* at 12–14; HYSCO's Suppl. Sec. D Quest. Resp. at SD-13, PD 208 (Jan. 8, 2014); Maverick Cmts. at 5. Standard and line pipe, in part because of the uses to which they are placed, have no such requirements. The unique pressures to which OCTG is subjected, and highly specialized nature of the products at issue support Commerce's determination that the products are too dissimilar to be considered in the same general category. The testing and certification requirements of OCTG again highlighted the fundamental differences between the products themselves. *See* Maverick Cmts. at 5. Accordingly, Commerce did not act unreasonably in excluding non-OCTG pipe from its same general category of products determination.

Contrary to respondents' arguments, limiting the same general category of products in this case to exclude line pipe and other non-OCTG pipe does not lead to absurd results. *See* Husteel Cmts. at 6; *cf. Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938). Because drill pipe and stainless OCTG would qualify under Commerce's definition of the same general category of product, but would not qualify as the foreign like product, Commerce has not impermissibly limited the definition of same general category of products to make it equal to or narrower than the scope of the investigation. *See Remand Results* at 13; Maverick Cmts. at 4. Additionally, although unfinished OCTG are within the scope of the investigation, they also qualify under Commerce's definition of the same general category of products because although they may not be suitable for down hole applications immediately upon sale, they are "of sufficient quality to be used in 'down hole' applications." *Remand Results* at 13, 49–50.

Respondents' reliance on certain rejected pipe's inclusion in the scope of the investigation of OCTG from Ukraine does not suggest a different result. That certain rejected pipe was included in the scope of that investigation does not render Commerce's determination here unreasonable. In that case, the rejected pipe was produced, entered,

and sold, as OCTG. A later determination that pipe was unsuitable for its intended use does not render Commerce's determination in this case unreasonable. *See* Gov't Resp. at 49.

Commerce thus reasonably explained its analysis of market conditions and testing requirements. Based on the differences in function, use, and industry, Commerce's determination that non-OCTG pipe is not in the same general category of products as OCTG is supported by substantial evidence. Accordingly, Commerce's determination that the data to calculate CV Profit under alternatives (i) and (ii) were unavailable and its determination that it could not rely on the Korean producers' data under alternative (iii) are sustained.

C. *Commerce's CV Profit Calculation Under Alternative (iii)*

Respondents next argue that even if Commerce did not improperly exclude non-OCTG pipe from the same general category of products, it still erred in calculating CV Profit based on the available CV Profit sources. NEXTEEL & HYSCO Cmts. at 16–25; Husteel Cmts. at 12–14 (adopting NEXTEEL and HYSCO's comments on this issue). Petitioners also contest Commerce's CV Profit rate calculation in the *Remand Results*; however, they acknowledge that if TMK's data was properly placed on the record, Commerce's CV Profit calculation should be sustained. Maverick Cmts. at 7–8. The government requests a partial remand to reconsider whether it properly rejected calculating CV Profit based on the profit rate in Welspun Corporation Limited's ("Welspun") financial statements. Gov't Resp. at 34–36. Because Commerce reasonably evaluated the CV Profit sources available after it properly reopened the record, Commerce's CV Profit rate calculation under alternative (iii) is sustained.

After reopening the record, Commerce had ten potential CV Profit data sources and reasonably constructed a CV Profit rate by averaging the profits earned by Tenaris and TMK. *See Remand Results* at 14–22. The ten sources were the financial statements of: (1) Tenaris; (2) six Korean pipe companies; (3) four Indian pipe companies; (4) National Oilwell Varco-Grant Prideco ("NOV"); (5) Welspun; (6) Interpipe Limited ("Interpipe"); (7) Grupo Tubos Reunidos ("Tubos Reunidos"); (8) Arabian Pipes Company ("APC"); (9) Borusan Mannesmann Boru Sanayi ve Ticaret; and (10) TMK. *Id.* at 15. Using the criteria laid out in the Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Color Television Receivers from Malaysia at 58, A-577–812, (Apr. 16, 2004), *available at* http://enforcement.trade.gov/frn/summary/malaysia/04–8692–1.pdf (last visited July 27, 2016) ("(1) the similarity of the potential surrogate company's business operations and products to the respondent;

(2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market [not reflecting predominantly U.S. sales]; and (3) the contemporaneity of the data to the POI;[12]" and (4) the extent to which the customer base of the surrogate and the respondent were similar),[13] Commerce correctly determined that the Tenaris and TMK were the best available CV Profit sources. As discussed below, Commerce utilized Tenaris and TMK based on its determination that their data represented the best available CV Profit data because as producers of predominantly OCTG, their business operations and products were most similar to those of NEXTEEL and HYSCO.

At the outset, Commerce rejected using the financial statements of the six Korean pipe companies because they sold OCTG in the United States (the alleged dumped sales) and only non-OCTG products elsewhere, which as discussed above, Commerce had reasonably determined were not sales of products in the same general category as OCTG. *Remand Results* at 15. Because the financial statements thus represented U.S. sales or sales of non-OCTG pipe, Commerce's determination not to rely on them in calculating CV Profit is sustained.

Next, Commerce reasonably did not use the Indian pipe companies' financial statements. Commerce declined to use Oil Country Tubular Ltd.'s statements because Commerce determined that it is a processor rather than manufacturer and did not sell products in Korea. *Remand Results* at 15–16. Commerce rejected using Bhushan Steel Limited's statements because they were incomplete. *Id.* at 16. Commerce did not use Ratnamani Metal and Tubes Ltd.'s ("Ratnamani") or Maharashtra Seamless Limited's ("MSL") financial statements because Commerce was unable to determine the portion of sales representing OCTG. *Id.* at 17–18. Commerce reasonably determined that Tenaris's and TMK's data were preferable based on the clear evidence that Tenaris and TMK produce predominantly OCTG and the lack of evidence as to the percent of OCTG manufactured and whether Ratnamani or MSL were likewise predominantly OCTG producers.

Similarly, Commerce determined that it would not use NOV's data because production of OCTG did "not appear to represent a significant focus or income stream for the company," *id.* at 18, and would not use Borusan's financial statements because it determined that Boru-

[12] The parties agree that the CV Profit sources are all contemporaneous to the POI.

[13] The court has previously cited favorably Commerce's reliance on the first three factors in evaluating CV Profit data sources. *See Geum Poong Corp. v. United States*, 26 CIT 991, 993 (2002).

san did not predominately produce OCTG, *id.* at 21. Based on the availability of data for producers of predominantly OCTG, it was not unreasonable for Commerce to reject using these data sources based on differences in the companies' products and business operations resulting from the different relative significance of OCTG production.

With respect to Welspun's data, Commerce rejected petitioners' arguments that Welspun's data was aberrationally low, however, Commerce did not rely on Welspun's data in calculating CV Profit. *Id.* at 18–19. Commerce determined that because Welspun marketed itself as a producer of line pipe, Welspun was not a producer of OCTG. *Id.* at 19. The government and Respondents (ambiguously) request a remand to reconsider whether Welspun's data should have been used in calculating CV Profit. Because record evidence does not indicate that Welspun produces any significant proportion of OCTG, Commerce's decision not to rely on Welspun's data in its CV Profit calculation is sustained.

Commerce explained in the *Remand Results* that it had relied on Welspun for surrogate value financial data in the corresponding investigation of OCTG from the Socialist Republic of Vietnam ("Vietnam"). *Remand Results* at 19. Commerce further explained that such a determination did not conflict with its determination in this case because of the unique circumstances of the Vietnam investigation involving a non-market economy where Commerce was required to select the best information from a surrogate country which was economically comparable to Vietnam that was also a significant producer of OCTG. *Id.* Based on those limitations, Commerce selected Welspun. Those limitations do not apply here. The relevant inquiry here is whether Commerce acted reasonably in relying on data from TMK and Tenaris over Welspun in calculating the CV Profit rate. Because there is no evidence on the record that Welspun produced significant quantities of OCTG, as there is for Tenaris and TMK, Commerce's determination to rely on just the two companies for which it had adequate data was reasonable. In fact, there is no mention of OCTG production in Welspun's financial statements outside the glossary; instead, Welspun repeatedly refers to itself as a line pipe producer. NEXTEEL & HYSCO Submission of CV Profit Info & Cmts. Attach. 1A at 6, 32, 42, 46, 48, 142, PD 13–27 (Oct. 2, 2015). Thus, if the court were to remand the issue, there is nothing of record to support inclusion of Welspun's profit data. That U.S. Steel referred to Welspun as an OCTG producer and argued for its use as a surrogate financial data source in the Vietnam investigation does not indicate that Welspun produces predominantly OCTG.

Further, the government has not stated that it erred or might have erred or failed to consider some information. Nor does Commerce specifically seek to reopen the record to obtain more data. Thus, there is no substantial concern warranting remand in this case at this late date. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (holding that remand is appropriate when an agency's concern is "substantial and legitimate"). The court thus denies the government's request for remand to harmonize its treatment of the Welspun data in this market economy case with its action in an unrelated non-market economy matter with a different record.[14] Although Respondents also request a remand on this issue, they have not indicated what evidence not included in the 644 recorded pages submitted as a supplemental appendix at the court's request could be submitted that would indicate that Welspun is predominantly a producer of OCTG. Accordingly, Commerce's exclusion of Welspun's data from the CV Profit calculation was reasonable in the light of the record evidence and is sustained.

Commerce next rejected using Interpipe's financial statements because for the fiscal year ending December 31, 2012, the statements show a net loss on operations. *Remand Results* at 19. Commerce similarly rejected APC's statements based on a net loss for part of the POI and because it was not able to determine the portion of sales relating to OCTG. *Id.* at 20. Although the court has in the past sustained Commerce's reliance on CV Profit data reflecting a net loss, *see Floral Trade Council v. United States*, 23 CIT 20, 30–31, 41 F. Supp. 2d 319, 330 (1999), more recently the court has upheld Commerce's rejection of financial statements reflecting a net loss. *See Fuyao Glass Indus. Grp. Co. v. United States*, 27 CIT 1892, 1913–14 (2003); *Rhodia, Inc. v. United States*, 26 CIT 1107, 1114, 240 F. Supp. 2d 1247, 1254 (2002). The court is persuaded by its more recent decisions finding such action permissible and holds that Commerce's rejection of Interpipe and APC's financial statements as CV Profit data based on the net loss is permissible. Finally, Commerce next rejected Tubos Reunidos's financial statements because they were incomplete. *Remand Results* at 20. This was reasonable based on the availability of complete financial statements from other companies.

Not only did Commerce properly reject CV Profit data sources, it also correctly determined that the Tenaris and TMK financial statements satisfied its criteria. Commerce determined that the Tenaris data indicated that it was a significant producer of OCTG, whose

[14] In fact, at oral argument, government counsel could not explain why such an odd request, i.e. to harmonize with another case, was made. Commerce normally maintains that every case is different, as it depends on a particular record.

substantial majority of sales were related to OCTG. *Remand Results* at 16–17. Commerce also determined that over 50% of Tenaris's sales were made outside the United States and that it made sales predominantly to end users. *Id.* at 17. Although Commerce also determined that it was possible, based on the existence of a sales office in Korea, that the Tenaris data might reflect sales in Korea, *id.* at 17, this would seem to add little support. Nonetheless, Commerce's determination that the Tenaris financial statement was a viable CV Profit source was thus reasonable given its stated criteria.

In analyzing TMK's financial statements, Commerce determined that TMK is a producer of a broad range of pipes, including those with premium connections that include both OCTG and drill pipe. *Remand Results* at 21. Commerce also found that TMK's financial statements describe TMK as "one of the world's leading producers of steel pipes for the oil and gas industry" whose "principal activities . . . are the production and distribution of seamless and welded pipes with the entire range of premium connections." *Id.* Further, Commerce determined that more than 75% of TMK's sales were made outside the United States and were predominantly to end users. *Id.* Accordingly, Commerce reasonably determined that TMK's data were a viable CV Profit source.

Commerce correctly noted that the statute indicates a preference in calculating CV Profit for data sources reflecting production and sales in the foreign country of the foreign like product. *Remand Results* at 15. None of the data sources on the record, however, reflected both of these preferences. Commerce was thus forced to choose among imperfect choices and the court will not undermine such decision so long as it is reasonable. *See Lifestyle Enter., Inc. v. United States*, 751 F.3d 1371, 1378, 1380 (Fed. Cir. 2014). Because averaging the data from the two sources which best satisfy Commerce's selected factors is reasonable, Commerce acted permissibly.

D. *CV Profit Cap*

The court instructed Commerce on remand to either calculate a profit cap pursuant to 19 U.S.C. § 1677b(e)(2)(B)(iii) or adequately explain why it was unable to do so. The court further instructed that if Commerce determined it could not calculate a profit cap under 19 U.S.C. § 1677b(e)(2)(B)(iii), Commerce needed to attempt to calculate a profit cap based on facts available. On remand, Commerce has complied with the court's instructions.

Commerce determined that because there was no evidence on the record of "the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country,

of merchandise that is in the same general category of products as the subject merchandise," i.e., sales of pipe suitable for use in down hole applications in Korea, it could not calculate a profit cap pursuant to § 1677b(e)(2)(B)(iii). *Remand Results* at 22–24 (quoting 19 U.S.C. § 1677b(c)(2)(B)(iii)). Because that determination was based on its decision that non-OCTG pipe is not in the same general category of products as OCTG, which the court has already sustained, Commerce's determination that it could only calculate a facts available profit cap is also supported by substantial evidence. The court normally defers to Commerce's selection of the best available information when Commerce is forced to rely on facts available. *See Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993).

Commerce explained that after reviewing the available data, a reasonable facts available profit cap would be the average of the profits in the global market, including Korea. *Remand Results* at 23. Commerce calculated the average of the profits in the global market by averaging the profits earned by Tenaris and TMK. *Id.* Thus, the resulting facts available profit "cap" was the same as Commerce's CV Profit rate without the "cap." *See id.*

Respondents argue that Commerce has once again failed to lawfully apply the statutory profit cap requirement. Husteel Cmts. at 14–23; NEXTEEL & HYSCO's Cmts. at 25 (adopting Husteel's comments on this issue). They argue that a "cap" is "an upper limit; a ceiling" and that by using the same data to calculate the profit cap as the CV Profit rate, Commerce has rendered meaningless the statutory requirement to cap profits under alternative (iii). Husteel Cmts. at 15–16. Respondents argue that Commerce frustrated the purpose of the profit cap requirement, which is to impose a reasonableness check on the CV Profit rate so that it bears some relation to the home market experience of the respondents at issue. *Id.* at 17. They argue this is particularly important in a case such as this where one of the CV Profit data sources includes an extremely high profit rate. *Id.* at 17–19. Respondents further argue that Commerce could have calculated a proper profit cap based on the profit of the six Korean producers whose data was on the record or could have based the cap solely on TMK's data. *Id.* at 17, 19–23. They argue that because Commerce resorted to a facts available profit cap, there was no requirement that the sales be of products in the same general category as OCTG and thus could have reasonably included the Korean producers' data. *Id.* at 21. Alternatively, they argue using only TMK's data would be more appropriate than the profit "cap" Commerce calculated because its profit is more in line with the Korean producers' profits. *Id.* at 22–23.

Maverick argues Commerce did not need to calculate profit cap because there was no information available to do so. Maverick Cmts. at 8–10. Maverick reasons that because there was no information for sales in the same general category of products as OCTG in Korea, there were no facts available from which to calculate a profit cap. *Id.* at 8–9. Alternatively, Maverick argues that if Commerce was required to calculate a facts available profit cap even where no facts were available, Commerce's calculation was reasonable. *Id.* at 9–10.

The court is not persuaded that Commerce has in fact capped the CV Profit rate. Respondents argue that Commerce should have calculated a profit cap based on the rejected Korean data, but Husteel acknowledges that the Federal Circuit appeared to approve Commerce's selection of a "profit cap" that was the CV Profit rate in *Atar*, 730 F.3d at 1328–29. *See* Husteel Cmts. at 16 n.10. That was not the holding of the Federal Circuit. The Federal Circuit did not say that whenever Commerce resorts to alternative (iii) it may dispense with any attempt to consider whether the profit rate was at all possible in the home market and to thereby dispense with a profit cap. The court does not accept Commerce's tautology that selecting as a "cap" the same rate without the "cap" is a reasonable interpretation of the statute and SAA's profit cap requirement; rather a non-cap is not a cap.

Here, Commerce's failure to cap the profit rate, however, was reasonable based on the record. Commerce was faced with a difficult decision as all of the information on the record had imperfections, and the court is not persuaded that any of the "caps" suggested by Respondents fulfill the statute any better than no cap.[15] The parties here focused on construction of a fair CV Profit rate as they should have. That rate may not be correct, but that it is all there is. In essence, Commerce valued the similarity in product over the need for a profit cap, and the court cannot say that Commerce's failure to do more to construct a profit cap was unreasonable on this record. Accordingly, Commerce's CV Profit calculation is sustained.

[15] The court is not convinced that Commerce was required to exclude Tenaris's data from its attempted profit cap calculation. Although the Tenaris profit rate was very high, Respondents' arguments that Commerce should have based the profit cap on TMK's data alone are unpersuasive. That TMK's profit rate is closer to that of the Korean producers and U.S. producers is not sufficient reason to compel Commerce to use only that data, particularly in the light of the deference Commerce is permitted in facts available situations. *See Allied-Signal Aerospace Co.*, 996 F.2d at 1191. The same is true of Respondents' arguments that Commerce was permitted to use the Korean producers' data as a facts available profit cap even though those sales were not of OCTG. Merely because Commerce could have relied on such data in calculating a profit cap does not render Commerce's determination unsupported by substantial evidence. *See id.* All of Commerce's options were problematic and utilizing the CV Profit rate, although not capped, was not unreasonable.

III. Cash Deposit Rates

Finally, Respondents contend that Commerce has failed to rectify the effect of the prejudice they suffered as a result of Commerce's improper actions in permitting Tenaris's financial statements to be placed on the record because Commerce has failed to revise the cash deposit rates based on rates determined using that prejudicial information. *See* NEXTEEL & HYSCO Cmts. at 25–27. The government responds that it would not be proper to revise the cash deposit rates at this time because the rates underlying the cash deposits remain subject to ongoing litigation and Commerce has not filed an amended final determination. Gov't Resp. at 61–62. Although the court now sustains Commerce's revised dumping rates of 6.49% (down from 15.75%) for HYSCO, 3.98% (down from 9.89%) for NEXTEEL, and 5.24% (down from 12.82%) for all others, nothing in the statute nor regulations requires Commerce to revise cash deposit rates before it issues a final amended determination. *See* 19 U.S.C. §§ 1673d(c)(1)(B)(ii), 1673e(a). The statutory injunction in this case prevents Commerce from liquidating entries other than in accordance with the final and conclusive court decision in the litigation, including all appeals and remand proceedings. Once litigation is completed and Commerce issues an amended final determination, the cash deposit rates will be adjusted and any excess deposits will be refunded, with interest.

The proper method for seeking the relief respondents seek likely would be a motion for injunctive relief from the collection of cash deposit rates. Such remedy, however, is extraordinary, and the court is hesitant to grant such relief in the absence of a specific request and it may not do so without a showing of irreparable harm or some extraordinary circumstances. *See Inland Steel Bar Co. v. United States*, 18 CIT 14, 15, 16, 843 F. Supp. 1477, 1478, 1479 (1994) (denying injunctive relief to revise cash deposit rates where dumping rate was reduced from 12.69% to 4.59% after a remand); *but see GPX Int'l Tire Corp. v. United States*, 70 F. Supp. 3d 1266, 1272–78 (CIT 2015) (granting relief from cash deposits where respondents made showing that cash deposit rates did not comply with court's judgment). That Commerce originally erred is not an extraordinary circumstance. Accordingly, Commerce's determination not to revise the cash deposit rates until conclusion of the litigation is sustained. The best result for all parties and the best remedy for prior prejudice, at this juncture, is to proceed to the conclusive decision expeditiously, an end served by denying any further requests for remand.

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are sustained in their entirety.

Dated: August 2, 2016
New York, New York

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

Slip Op. 16–77

RIENZI AND SON, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 07–00056

Peter W. Klestadt, *Robert B. Silverman*, and *Robert F. Seely*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, for plaintiff.

Marcella Powell, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director.

MEMORANDUM ORDER

Barnett, Judge:

Before the Court are Plaintiff's Motion for Leave to File an Amended Complaint ("Motion to Amend"), pursuant to U.S. Court of International Trade ("USCIT") Rule 15(a)(2), and Plaintiff's Motion for Leave to File a Reply to Defendant's Opposition to Plaintiff's Motion for Leave to File an Amended Complaint ("Motion for Reply"). *See* Pl.'s Mot. for Leave to File an Am. Compl. ("Pl.'s Mot. Am. Compl."), ECF No. 54; Pl.'s Mot. for Leave to File a Reply to Def.'s Opp'n to Pl.'s Mot. for Leave to File an Am. Compl. ("Pl.'s Mot. Reply"), ECF No. 58. For the reasons discussed below, the Court denies Plaintiff's Motion to Amend and denies Plaintiff's Motion for Reply.

BACKGROUND

This case arises from entries that occurred in 2005 and were liquidated later that year and in early 2006. *See* Summons, ECF No. 1. Following a denied protest, Plaintiff Rienzi and Son, Inc. ("Plaintiff" or "Rienzi") filed a summons on February 16, 2007, and the case was placed on the Court's Reserve Calendar pursuant to USCIT Rule 83.

See Summons; Order Granting Extension of Time to Remain on the Reserve Calendar, ECF No. 7. More than seven years and 12 extensions later, on July 1, 2014, Rienzi filed its Complaint against Defendant United States ("Defendant" or "United States"). *See* Compl., ECF No. 31. With the filing of the complaint, the case was removed from the Reserve Calendar and, following the filing of an answer, the case was assigned to these chambers. On November 18, 2014, the Court entered a Scheduling Order, which required parties to submit any motions regarding the pleadings or other preliminary matters by December 17, 2014. Scheduling Order ¶ 1, ECF No. 36. Pursuant to an amended scheduling order, parties were required to complete fact discovery by June 10, 2016. *See* Am. Scheduling Order ¶ 1, ECF No. 50–1.

On June 29, 2016, some 18 months after the deadline for motions regarding the pleadings elapsed and almost three weeks after the close of discovery, Rienzi filed this Motion to Amend.[1] *See generally* Pl.'s Mot. Am. Compl. Defendant filed its opposition to this motion on July 15, 2016. *See* Def.'s Opp'n to Pl.'s Mot. for Leave to File an Am. Compl. ("Def.'s Opp'n"), ECF No. 57.

STANDARD OF REVIEW

Motions to amend a pleading are governed by USCIT Rule 15(a), which provides that a party may amend as a matter of course or with the opposing party's written consent, or in all other cases, with the court's leave. *See* USCIT R. 15(a)(1)-(2). The court "should freely give leave when justice so requires." *See* USCIT R. 15(a)(2). However, once a scheduling order is established, a motion to amend a pleading is subject to any deadline established in that scheduling order. *See* USCIT R. 16(b)(3)(A). USCIT Rule 16(b)(4), in conjunction with USCIT Rule 6(b)(1), permits a schedule to be modified for good cause with the court's consent. If a motion to amend a scheduling order is filed seeking to extend a deadline that has already passed, it is properly treated as a motion for an extension of time, out of time, and USCIT Rule 6(b)(1)(B) also applies. *See Horizon Prods.*, 38 CIT __, __, 34 F. Supp. 3d 1365, 1367 (2014). Such a motion must show "excusable neglect or circumstances beyond the control of the party." USCIT R. 6(b)(1) (B).

[1] In contrast, USCIT Rule 16(b)(4) governs modifications to a scheduling order once time periods are established but before the established periods have expired. *See United States v. Horizon Prods. Int'l, Inc*., 38 CIT __, __, 34 F. Supp. 3d 1365, 1367 (2014); *see also Rockwell Automation, Inc. v. United States*, 38 CIT __, __, 7 F. Supp. 3d. 1278, 1283–84 (2014) (distinguishing untimely motions for extensions of time under USCIT Rule 6(b)(1)(B) from timely filed motions under USCIT Rule 6(b)(1)(A)).

The court assesses excusable neglect by considering: "(1) the danger of prejudice to the opposing party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." *Horizon Prods.*, 38 CIT at __, 34 F. Supp. 3d at 1367 (citing *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 392, 395 (1993)). Furthermore, the court may take into account "all relevant circumstances surrounding the party's omission." *Home Prods. Int'l, Inc. v. United States*, 31 CIT 1706, 1709, 521 F. Supp. 2d 1382, 1385 (2007) (citing *Pioneer*, 507 U.S. at 395). "Moreover, even [when] 'excusable neglect' is demonstrated, the judge retains discretion to deny relief." *Rockwell Automation*, 38 CIT at __, 7 F. Supp. 3d. at 1283.

DISCUSSION

Plaintiff's Motion to Amend fails to meet even the basic standard required to amend a complaint according to USCIT Rule 15(a)(2). Pursuant to USCIT Rule 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave." In this case, Defendant did not consent and actively opposes Plaintiff's motion; consequently, the court may deny the motion for leave to amend the complaint "if the court finds that there has been undue delay that would prejudice the nonmoving party, that the moving party has acted in bad faith, or that the amendment would be futile." *Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V.*, 464 F.3d 1339, 1353 (Fed. Cir. 2006) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

In this case, the Court finds that there was undue delay that would prejudice the Defendant if the motion were granted. Plaintiff has failed to demonstrate a lack of undue delay pursuant to USCIT Rule 15(a)(2) or the presence of good cause required by USCIT Rule 16(b)(4). Plaintiff provides no explanation as to why the complaint was not amended earlier; in particular, prior to the scheduling order deadline or even the deadline to complete discovery. Pl.'s Mot. Am. Compl. at 7–10; *see also* Pl.'s Mot. Am. Compl. Ex. 2. ("Affirmation of Michael Rienzi"), ECF No. 54–2. Instead, Plaintiff relies on arguments that its motion should be granted "in the interest of justice," specifically citing "the public interest" in "having the Court determine the correct tariff of the subject merchandise" and asserting that "[t]here is no potential prejudice to defendant in this action because . . . Plaintiff is not seeking additional discovery in this action." Pl.'s Mot. Am. Compl. at 7.

In contrast, Defendant has demonstrated that granting Plaintiff's Motion to Amend would "necessitate the reopening of discovery which would cause additional prejudice to the Government by requiring [Defendant] to engage in duplicative discovery." Def.'s Opp'n at 8. In the absence of a reasonable explanation for the delay, or a showing of diligence on the part of Plaintiff, and with the reasonable showing of prejudice that would be imposed on Defendant if the Motion to Amend were granted, the Court denies Plaintiff's Motion to Amend.

While the Court finds that Plaintiff's Motion to Amend fails to meet the standards found in USCIT Rule 15(a)(2), the Court also considered it pursuant to USCIT Rule 16(b)(4) as a motion to amend the scheduling order because Defendant recognized that the motion was filed after the scheduling order deadlines. Pursuant to USCIT Rule 16(b)(4), "[a] schedule may be modified only for good cause and with the judge's consent." Therefore, "Rule 16(b) requires a party to show good cause before being granted leave to amend." *Kemin Foods,* 464 F. 3d at 1353; *see also Horizon Prods.,*38 CIT at __, 34 F. Supp. 3d at 1367.

In determining whether a party has shown "good cause," "the threshold inquiry is whether the movant has been diligent." *Advanced Software Design Corp. v. Fiserv, Inc.,* 641 F.3d 1368, 1381 (Fed. Cir. 2011) (internal citations omitted). Thus, the movant must show it was unable to meet "the deadlines in the scheduling order despite its diligent efforts." *Paice, LLC v. Hyundai Motor Co.,* Civil No. WDQ–12–0499, 2014 WL 3385300, at *1 (D. Md. 2014) (internal citation omitted). Moreover, a party cannot establish good cause if "the proposed amendment rests on information that the party knew, or should have known" before the deadline. *Perfect Pearl Co., Inc. v. Majestic Pearl & Stone, Inc.*, 889 F. Supp. 2d 453, 457 (S.D.N.Y. 2003) (internal citation omitted). Again, Plaintiff has failed to meet the requisite standard of good cause. The amendments Plaintiff seeks to make all relate to its description of the imported merchandise at issue, the details of which have been available to Plaintiff since the entries occurred more than a decade ago.[2] Consequently, the Court must conclude that the amendments rest on information the Plaintiff knew or should have known well before the deadline and good cause for amending the scheduling order does not exist.

[2] Plaintiff's Motion to Amend proposes making the following changes to the complaint: (1) altering the previously stated size of the imported merchandise from "520 gram (1 lb. 2 oz.) glass jars" to "580 milliliter ('ml') glass jars;" (2) adding "5 kilogram ('kg') containers" as an additional container size in which the merchandise was packaged; (3) clarifying that "the 580 ml glass jar identified the imported merchandise as 'Rienzi™ Sun Dried Tomatoes in Sun Flower Oil';" and (4) revising the stated ingredients of the 580 ml glass jar. Compare Compl. ¶¶ 6–8 with Pl.'s Mot. Am. Compl. Ex. 1 ("Amended Complaint") ¶¶ 6–8, ECF No. 54–1.

The Court further notes that Plaintiff filed its motion on June 29, 2016, more than 18 months after the deadline for "any motions regarding the pleadings" established by the scheduling order in this case. Scheduling Order ¶ 1. Because Plaintiff's Motion to Amend was filed out of time, Plaintiff was also required to demonstrate "excusable neglect or circumstances beyond the control of the party," pursuant to USCIT Rule 6(b)(1)(B). *See also Rockwell Automation,* 38 CIT at __, 7 F. Supp. 3d. at 1284. Plaintiff not only failed to address the standard in USCIT Rule 6(b) (1)(B), but also failed to even recognize the applicability of this rule in its motion. Instead, Plaintiff simply asserts that the "court should grant [the] requested amendment because 'justice so requires.'" Pl.'s Mot. Am. Compl. at 2 (quoting USCIT Rule 15(a)(2)).

Plaintiff has not provided any facts that would suggest excusable neglect or circumstances beyond its control for missing the deadline. Because Plaintiff's Motion to Amend is more than 18 months after the deadline set for motions addressed to the pleadings and Plaintiff has failed to demonstrate excusable neglect or circumstances beyond its control to justify its untimely filing, Plaintiff's Motion to Amend must be denied.[3]

Regarding Plaintiff's Motion for Reply, the motion is denied. *See generally* Pl.'s Mot. Reply. Given the long delay and other shortcomings with Plaintiff's Motion to Amend, the Court exercises its discretion to deny Plaintiff's Motion for Reply in the interest of a "just, speedy, and inexpensive determination of every action and proceeding." USCIT R. 1.

CONCLUSION

For the reasons stated above, Plaintiff's Motion to Amend is denied and Plaintiff's Motion for Reply is denied.

Dated: August 2, 2016
New York, New York

/s/ Mark A. Barnett
JUDGE

[3] While the Court is denying Plaintiff's Motion to Amend for the reasons stated herein, neither party has put before the Court, and this opinion should not be regarded as answering, any question as to the size(s) of sun dried tomato containers in the entries at issue that are covered by this litigation.