U.S. Court of International Trade

Slip Op. 17–105

BEIJING TIANHAI INDUSTRY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and NORRIS CYLINDER COMPANY, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 12–00203

JUDGMENT

Before the court are the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, ECF No. 127–1 ("Third Remand Results"), and the Status Report and Request for Entry of Judgment, ECF No. 128 ("Judgment Request"), filed by plaintiff Beijing Tianhai Industry Co. ("BTIC").

In the Third Remand Results, Commerce reconsidered the calculation of BTIC's margin consistent with 19 C.F.R. § 351.414(f)(2) (2007), which was in effect at the time of Commerce's final determination, in accordance with the court's instructions in *Beijing Tianhai Industry Co. v. United States*, 41 CIT __, Slip Op. 17–79 (July 5, 2017). Commerce applied its average-to-transaction ("A-T") method only to BTIC's U.S. sales that were found to be targeted, and the average-to-average ("A-A") method to all other transactions. It found that there was no meaningful difference in BTIC's antidumping margins using the A-A and A-T methods, *i.e.*, both resulted in a margin of zero. Accordingly, Commerce recalculated BTIC's weighted-average dumping margin to be zero, and having found BTIC's margin to be *de minimis*, indicated its intention to exclude BTIC from the antidumping duty order. *See* Third Remand Results at 7–8 (citing *High Pressure Steel Cylinders From the People's Republic of China*, 77 Fed. Reg. 37,377 (Dep't Commerce June 21, 2012) (order)).

No party disputes the Third Remand Results. In its Judgment Request, BTIC asks the court to sustain the Third Remand Results, noting that "Defendant and Defendant-Intervenor do not object to this request." Judgment Request at 1–2 ("All parties agree that the third remand redetermination complies with the court's remand instructions issued on July 5, 2017 (ECF No. 126). Accordingly, all parties propose to dispense with further briefing . . . .").

In accordance with the forgoing, and upon consideration of the papers and proceedings had herein, it is hereby

ORDERED that Commerce's final determination of sales at less than fair value, published as *High Pressure Steel Cylinders From the People's Republic of China*, 77 Fed. Reg. 26,739 (May 7, 2012), as supplemented and modified on remand, is sustained; and it is further

ORDERED that the subject entries whose liquidation was enjoined in this action, *see* ECF No. 120 (order granting consent motion to amend the preliminary injunction), shall be liquidated in accordance with the court's final decision, as provided for in 19 U.S.C. § 1516a(e) (2012).

Dated: August 17, 2017
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE

Slip Op. 17–106

CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Plaintiff, SOLARWORLD AMERICAS, INC., Consolidated Plaintiff, v. UNITED STATES, Defendant, SOLARWORLD AMERICAS, INC., CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 16–00157
Public Version

OPINION AND ORDER

[Plaintiff's motion for judgment on the agency record in countervailing duty administrative review is denied. Consolidated plaintiff's similar motion is granted in part and denied in part.]

Dated: August 18, 2017

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific PLLC, of Washington, DC, for plaintiff and defendant-intervenor Changzhou Trina Solar Energy Co., Ltd.

Timothy C. Brightbill, Laura El-Sabaawi, and *Usha Neelakantan*, Wiley Rein LLP, of Washington, DC, for consolidated plaintiff and defendant-intervenor SolarWorld Americas, Inc.

Justin R. Miller, Senior Trial Counsel, International Trade Field Office, U.S. Department of Justice, Civil Division, of New York, NY, for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T.* Blades, Jr., Assistant Director. Of counsel on the brief was Lydia C. Pardini, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Restani, Judge:

This action challenges the U.S. Department of Commerce ("Commerce")'s final results rendered in the second administrative review of the countervailing duty ("CVD") order on crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells"), from the People's Republic of China ("PRC"), covering the period of January 1, 2013, through December 31, 2013. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2013*, 81 Fed. Reg. 46,904, 46,904 (Dep't Commerce July 19, 2016) ("*Final Results*"); *see also* Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2013 at 1, PD 247 (July 12, 2016) ("*I&D Memo*"). Consolidated Plaintiff SolarWorld Americas, Inc. ("SolarWorld") seeks re-

mand of the *Final Results*, contending that Commerce erred in finding non-use of a loan program by the respondent's U.S. customers, by averaging data sets for the benchmark price of solar glass, and in choosing not to average data sets for an ocean freight benchmark adjustment. Consol. Pl. SolarWorld Americas, Inc.'s Mem. in Support of Its R. 56.2 Mot. for J. on the Agency R. 10–31, ECF No. 32 ("SolarWorld Br."). Plaintiff Changzhou Trina Solar Energy Co., Ltd. ("Trina") also seeks remand of the *Final Results*, arguing that Commerce erred by including value added tax ("VAT") in its benchmark calculations. Mem. in Support of Mot. of Changzhou Trina Solar Energy Co. Ltd. for J. upon the Agency R. 7–14, ECF No. 30 ("Trina Br."). Defendant United States ("the government") contends that the *Final Results* are based on substantial evidence and are in accordance with law, which contention SolarWorld joins with regards to Commerce's treatment of VAT. Def.'s Resp. in Opp'n to Pls.' Mots. for J. upon the Agency R. 11–35, ECF No. 37 ("Gov't Br."); SolarWorld Americas, Inc.'s Resp. to Pl.'s Mot. for J. on the Agency R. 6–14, ECF No. 35 ("SolarWorld Resp."). For the reasons stated below, the court sustains the *Final Results* in part, but remands for Commerce to reconsider its data selection for solar glass.

BACKGROUND

"In order for Commerce to assess countervailing duties upon investigation of a subsidy, it must find that the subsidy is one in which an authority 1) provides a financial contribution to a person, 2) a benefit is thereby conferred, and 3) the subsidy is specific." *Bethlehem Steel Corp. v. United States*, 26 CIT 1003, 1009, 223 F. Supp. 2d 1372, 1378 (2002); *see* 19 U.S.C. § 1677(5)(A)-(B). A benefit may arise in a variety of ways, including, at issue here, "in the case where goods or services are provided [to a respondent by a foreign government], if such goods or services are provided for *less than adequate remuneration*." 19 U.S.C. § 1677(5)(E)(iv) (emphasis added). The adequacy of remuneration is determined by comparing the price paid by a respondent "to a market-determined price for the good . . . resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i). This latter price is referred to as the "benchmark." If a price from actual transactions, referred to as a tier-one benchmark, is unavailable, Commerce turns to a tier-two benchmark, in which Commerce "compar[es] the government price to a world market price." *Id.* § 351.511(a)(2)(ii). For both tier-one and tier-two benchmarks, "[Commerce] will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product." *Id.* § 351.511(a)(2)(iv).

In this review, Commerce investigated a single mandatory respondent, JA Solar Technology Yangzhou Co., Ltd. and its cross-affiliated companies (collectively "JA Solar"). *Final Results*, 81 Fed. Reg. at 46,904. Commerce determined the net countervailable subsidy rate to be 19.20% ad valorem, which rate Commerce assigned to respondent Trina. *See id.* at 46,905. Relevant here, Commerce found subsidies based on the PRC's provision of several solar cell inputs—including polysilicon, solar glass, and electricity—for less than adequate remuneration ("LTAR"). *I&D Memo* at 6, 8. For electricity, Commerce used a tier-one benchmark, whereas for polysilicon and solar glass Commerce employed a tier-two benchmark. *See id.* at 6, 16, 20, 25–26. In calculating the benchmark price for these inputs, Commerce included ocean freight costs (except for electricity) and an amount for VAT. *Id.* at 22–27. Also relevant here, Commerce determined that alleged subsidies, preferential, low interest rate loans provided by the Export-Import Bank of the PRC ("Ex-Im Bank") to U.S. purchasers of JA Solar's solar cells through the Ex-Im Bank's Export Buyer's Credit program ("the program"), were not actually provided to JA Solar's U.S. customers. *Id.* at 10. Both parties now make challenges to the *Final Results*.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court upholds Commerce's final results in a CVD 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. Export Buyer's Credit Program

A. Specific Facts

In its *Final Results*, Commerce determined that none of JA Solar's U.S. customers used the Ex-Im Bank's Export Buyer's Credit program, and thus, that a countervailing duty for this program was not appropriate. *I&D Memo* at 11. Commerce noted that although the Government of China ("GOC") failed to fully cooperate with Commerce's verification of non use of the program by JA Solar's

customers,[1] JA Solar cooperated with Commerce and submitted declarations of non-use from its U.S. customers. *Id.* at 11. Accordingly, Commerce concluded, in line with its determination in *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 Fed. Reg. 56,560 (Dep't Commerce Sept. 22, 2014) ("*Chlorinated Iso*"), that JA Solar's declarations from its U.S. customers sufficiently established non-use of the program. *I&D Memo* at 9, 11; *see Countervailing Duty Investigation of Chlorinated Isocyanurates from the People's Republic of China: Issues and Decision Memorandum for the Final Determination* at 15, C-570–991 (Dep't Commerce Sept. 8, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/201422501–1.pdf (last visited August 15, 2017). Verification of JA Solar's customers' declarations was unnecessary, Commerce stated, because no record evidence contradicted the declarations' accuracy. *I&D Memo* at 11–12.

SolarWorld argues that substantial evidence does not support Commerce's determination that none of JA Solar's U.S. customers used the program. SolarWorld Br. at 10–20; Reply Br. of Pl. SolarWorld Americas, Inc. 3–11, ECF No. 41 ("SolarWorld Reply"). SolarWorld contends that Commerce wrongly concluded *all* of JA Solar's U.S. customers submitted declarations, given that JA Solar's export customer list shows some customers with addresses in the United States, none of which submitted declarations. Solar World Br. at 15–17; SolarWorld Reply at 3–5. Furthermore, SolarWorld faults Commerce for "deviat[ing] from [its] practice," established in *Chlorinated Iso*, of verifying such declarations. SolarWorld Br. at 10, 17–18; SolarWorld Reply at 5–6. Instead of relying on the customers' declarations, SolarWorld contends, Commerce should have applied adverse facts available ("AFA") and found use of the program by JA Solar's customers. SolarWorld Br. at 14–20; SolarWorld Reply Br. at 6–11. For this argument, SolarWorld points to the GOC's failure to adequately cooperate with verification, Commerce's past practice of applying AFA when the GOC fails to verify non-use of the program by a respondent's customers, and the dangerous precedent set for future proceedings by in effect rewarding the GOC for non-cooperation. SolarWorld Br. at 10, 11–13, 19; SolarWorld Reply at 6–11.

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[1] The GOC "refus[ed] to provide all of the requested information and system access." *I&D Memo* at 11. For example, Ex-Im Bank officials searched the program's inquiry system at verification for the [[ ]] customer names provided by JA Solar to determine if loans were made to these companies. Verification of GOC Questionnaire at 6–7, PD 224 (May 6, 2016). But, the officials did not search for other names or consent to a search of customers with slightly different spellings or punctuation, which search arguably was necessary to conclusively establish that no customers received a loan from the Ex-Im Bank. *See id.*

The government responds that substantial evidence supports Commerce's conclusion that none of JA Solar's U.S. customers used the program, and that Commerce's refusal to apply AFA was proper. Gov't Br. 27–35. The government states that JA Solar provided declarations from all its U.S. customers, and that no record evidence demonstrates any other customer received a loan from the Ex-Im Bank. *Id.* at 28, 31–32. The government contends that the GOC's noncooperation is irrelevant in light of the customers' declarations, and that AFA should not be used simply to punish the GOC when no party received a more favorable result than would have resulted had the GOC fully cooperated. *Id.* at 29–30, 35.

B. Discussion

Commerce "shall . . . use the facts otherwise available" in reaching a determination when "an interested party . . . withholds information that has been requested by [Commerce]." 19 U.S.C. § 1677e(a)(2)(A). "[I]n selecting from among the facts otherwise available," Commerce "may use an inference that is adverse to the interests of that party" when Commerce "finds 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]." *Id.* § 1677e(b)(1)(A). When a foreign government fails to cooperate to the best of its ability, Commerce is permitted to apply AFA even though it "may adversely impact a cooperating party." *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013). Commerce should, however, "seek to avoid such impact if relevant information exists elsewhere on the record." *Id.* Commerce is afforded a significant amount of discretion in choosing not to apply AFA. *See Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1356 (CIT 2015).

Commerce's determination that none of JA Solar's U.S. customers used the program is supported by substantial evidence. Commerce reasonably relied on JA Solar's declarations from [[ ]] of its customers to establish non-use of the program. The fact that [[ ]] of JA Solar's customers that did not submit a declaration also have an address in the United States raises the possibility that some customers may have used the program. *See* JA Solar Suppl. Questionnaire Resp. at Ex. 9, CD 56–63 (Nov. 12, 2015) (listing JA Solar's export customers). But, SolarWorld does not identify any record evidence establishing that any of these customers used the program, or that any of them crossed the two million dollar of sales threshold apparently necessary to receive an Ex-Im Bank loan. *See* SolarWorld Br. at 16 (stating that

"the GOC reported that sales contracts eligible for [the program] must be for $2 million or more"). SolarWorld's citation to its own letter alleging that JA Solar was involved in the downstream construction of large solar farms is unavailing, given that the evidence only reports JA Solar's production of solar farms in the PRC, not the United States, and does not refer to any particular dollar amount. *See* SolarWorld New Subsidy Allegations Letter at 6–8, PD 125 (Oct. 15, 2015). In light of the customer declarations provided by JA Solar certifying non-use of the program and the lack of evidence to the contrary, the mere possibility that one of JA Solar's customers participated in the program is not enough for SolarWorld to prevail. *See Archer Daniels*, 917 F. Supp. 2d at 1331 ("Even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence.").[2]

Similarly, substantial evidence supports Commerce's decision not to apply AFA despite the GOC's failure to fully comply at verification. When "relevant information exists elsewhere on the record," such as JA Solar's customer's declarations here, Commerce should "seek to avoid" adversely impacting a cooperating party. *See Archer Daniels*, 917 F. Supp. 2d at 1342. SolarWorld contends that Commerce has a "prior practice" of applying AFA when the GOC refuses to cooperate in verifying non-use of the program by a respondent's customers. SolarWorld Br. at 18–19. But, although Commerce has at times applied AFA in such contexts, these prior proceedings are distinguishable by the lack of evidence in those records to fill in the void. *See, e.g., Issue and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China* at 93, C-570–011 (Dec. 15, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/2014–30071–1.pdf (last visited August 15, 2017) ("Unlike in [*Chlorinated Iso*], none of the company respondents here provided any probative documents indicating non-use by unaffiliated U.S. customers . . . such as affidavits or certifications indicating

[2] SolarWorld's reliance on *Chlorinated Iso* as establishing a "practice" requiring Commerce to verify the declarations on record also comes up short. A single agency decision does not create an agency "practice." *See Huvis Corp. v. United States*, 525 F. Supp. 2d 1370, 1377 (CIT 2007) ("[T]wo prior determinations [in separate administrative proceeding] are not enough to constitute an agency practice that is binding on Commerce.") (quoting *Shandong Huarong Mach. Co. v. United States*, 435 F. Supp. 2d 1261, 1282 n. 23 (CIT 2006)). Furthermore, Commerce adequately explained its decision not to verify the declarations in this case—no record evidence contradicted them. *See* I&D Memo at 11–12.

non-use of [the program].").[3] Moreover, it would have been inappropriate for Commerce to apply AFA for no reason other than to deter the GOC's noncooperation in future proceedings when relevant evidence existed elsewhere on the record. Accordingly, Commerce's decision to refrain from applying AFA is supported by substantial evidence.

II. Solar Glass Benchmark Data

A. Specific Facts

In its *Final Results*, Commerce calculated the world market price of solar glass, an input of solar cells, by averaging data from IHS Technology ("IHS"), submitted by respondent JA Solar, with data from the Global Trade Atlas ("GTA"), submitted by petitioner SolarWorld. *I&D Memo* at 19; JA Solar Benchmark Submission at Ex. 3A, PD 147–60 (Nov. 2, 2015); SolarWorld Benchmark Submission at Ex. 7, PD 144 (Nov. 2, 2015). Commerce analyzed the data sets' accuracy in terms of four factors: (1) specificity to the input in question, solar glass; (2) contemporaneity with the period of review ("POR"); (3) unit of measure; and (4) exclusivity of taxes and PRC prices. *I&D Memo* at 20–22. As to specificity, the IHS data reported prices for solar glass while the GTA data gave prices for "safety glass, toughened, tempered, or other," which category included solar glass. *Id.* at 21; Preliminary Results Decision Memo. at 16, PD 187 (Dec. 31, 2015). Commerce concluded that the IHS data was more specific than the GTA data to the input in question, but rejected JA Solar's argument "that the tempered glass category is too broad to be reliable." *I&D Memo* at 20–21. As for contemporaneity, Commerce determined that the fact the GTA data reported prices on a monthly basis, whereas the IHS data only gave a single annual price, meant that the GTA data

[3] SolarWorld also notes that Commerce has applied AFA in previous proceedings at times despite the existence of customer declarations. SolarWorld Reply at 9–11. But, in those proceedings there were additional factors not present here. *See, e.g., Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China* at 61–62, C-570–039 (Jan. 17, 2017), *available at* http://enforcement.trade.gov/frn/summary/prc/2017–01635–1.pdf (last visited August 15, 2017) (applying AFA because, inter alia, the GOC "withheld critical information" regarding a possible revision to the program's requirements); *Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Issues and Decision Memorandum for the Final Affirmative Determination* at 20, C-570–037 (Jan. 4, 2017), *available at* http://enforcement.trade.gov/frn/summary/prc/2017–00429–1.pdf (last visited August 15, 2017) (using AFA because, among other reasons, one of two respondents did not provide a declaration, and loans may have been made by banks whose information was not on the record).

was more favorable. *Id.* at 21. Commerce noted that a single annual price could be reporting the price for the beginning of the year or the end of the year, rather than a price representative of the entire POR. *Id.* at 21. Regarding unit of measure, Commerce filtered out GTA data for prices reported in price per square meter to include data reported only in price per metric ton. *Id.* at 21. For the IHS data, all of which was reported in price per square meter, Commerce used record evidence on solar glass's density and thickness to convert the square meter price to price per kilogram ("kg"). *Id.* at 21–22. Finally, Commerce concluded that the GTA data was exclusive of PRC prices and taxes, and that PRC prices could be removed from the IHS data. *Id.* at 22. As to taxes in the IHS data, Commerce noted that "there is no information indicating whether the IHS data is [] tax exclusive," but concluded without discussion that this issue did not render the IHS data unsuitable. *Id.* at 22. Commerce ultimately determined that, because both data sets had strengths and flaws, averaging the two data sets would create the most robust global benchmark for solar glass. *Id.* at 22.

SolarWorld argues that Commerce's decision to average the data sets is not supported by substantial evidence, and that Commerce instead should have used only the GTA data. SolarWorld Br. at 20–24; SolarWorld Reply at 11–14. SolarWorld highlights the fact that the IHS data does not report monthly prices, and notes that Commerce's preference is for monthly prices. SolarWorld Br. at 20–22. In addition, SolarWorld faults the IHS data for being inclusive of PRC prices and for not excluding taxes. *Id.* at 22–23. Lastly, SolarWorld contends that the GTA data was not flawed on specificity because the "tempered glass" category covers the solar glass used in photovoltaic applications. *Id.* at 23.

The government responds that Commerce's decision was supported by substantial evidence because neither data set was so flawed as to be unusable. Gov't Br. at 11–19. The government focuses on product specificity as being a crucial factor in calculating an accurate benchmark, and notes that the IHS data was superior in this regard. *Id.* at 17. On tax and price exclusivity, the government points to the fact that Commerce removed PRC pricing from the IHS data, but the government makes no mention of taxes. *Id.* at 17–18. The government adds no new arguments on the other factors.

B. Discussion

As discussed above, a "subsidy" includes the provision of "goods . . . for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). In a tier-two analysis, as here, "[Commerce] will seek to measure the adequacy of remuneration by comparing the government price to a world market price . . . . Where there is more than one commercially available world market price, [Commerce] will average such prices to the extent practicable, making due allowance for factors affecting comparability." 19 C.F.R. § 351.511(a)(2)(ii).

On this record substantial evidence does not support Commerce's decision to average the IHS and GTA data sets. Commerce correctly determined that the IHS data is slightly more product specific than the GTA data, but also concluded that "[t]empered glass is a relatively limited category," that that category contains solar glass, and that "[t]empered glass" is not so broad a category as to be unreliable. *See I&D Memo* at 20–21. Given this conclusion in this case specificity seems to be a minimal advantage and the GTA data appears superior.

First, the IHS data reports a single annual price, which, as Commerce noted, could be a price either for the beginning or end of the year, or an average for the entire POR. *Id.* at 21. In a market where prices fluctuate a meaningful amount from month to month, as here, a price reflective of a single moment in the year could be significantly different, and less accurate, than the average annual price. *See* SolarWorld Benchmark Submission at Ex. 7 (reporting, for example, Costa Rica monthly solar glass prices ranging from 1,487.83 U.S. Dollars per Metric Ton ("USD/MT") to 2,210.19 USD/MT, and Ecuador prices ranging from 2,818.64 USD/MT to 1,875.07 USD/MT). Second, Commerce itself admitted that the record is ambiguous as to whether the IHS data is tax inclusive or exclusive, *I&D Memo* at 22, yet included no specific justification for its conclusion that the IHS was usable despite this possible distortion—e.g., that even if the IHS data is tax inclusive the GTA's specificity flaw is significant enough to warrant averaging the data sets, or that taxes are removed only if "there is an affirmative indication of their presence," as in the antidumping context. *See Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1504, 460 F. Supp. 2d 1338, 1359 (2006).[4] Nor does the government attempt to explain Commerce's silence on this issue. In

[4] Contrary to SolarWorld's contention, the IHS data used by Commerce does not include PRC prices, given that Commerce adjusted the IHS data to exclude PRC prices. *See I&D Memo* at 22; Final Results Analysis at 3, PD 248 (July 12, 2016) (stating that Commerce "[r]emoved the PRC-related data from Tables G7 and G9 [of the IHS data]."); JA Solar Benchmark Submission at Ex. 3A at 1 (listing separate solar glass prices for China, EMEA [Europe, the Middle East, and Africa], Americas, and "Rest of World").

such an important matter as this,[5] Commerce must reconsider its choice and if it chooses to adhere to it explain why a data set that may include taxes, may not be representative of the entire POR, and is only slightly more product specific, should be averaged with a data set that generally lacks cause for concern.

III. Ocean Freight Data

A. Specific Facts

In its *Final Results*, Commerce determined the ocean freight cost of shipping polysilicon and solar glass by reference to JA Solar's data, rather than SolarWorld's data. *I&D Memo* at 23.[6] The two factors guiding Commerce's selection of data here were contemporaneity and product specificity. First, Commerce reasoned, JA Solar's data was contemporaneous with the POR, whereas SolarWorld's was not. *Id.* at 23–24. Second, according to Commerce, SolarWorld's shipping data was not specific to the inputs in question because it reflected prices for forty-foot tanks, and "information on the record indicates that a tank's capacity is measured in liters rather than a dry weight measure, as used for regular containers." *Id.* at 24. Because solar glass and polysilicon are dry solids, Commerce concluded that SolarWorld's data lacked specificity. *Id.* at 24. Additionally, Commerce rejected SolarWorld's concern that the nine months of shipping data submitted by JA Solar from *Citric Acid* was not specific to the inputs in question. *Id.* at 23. Commerce reasoned that that data was trustworthy because the shipping prices for October–December of 2013 re-

[5] The provision of solar glass for LTAR is central to this subsidy investigation. It is by far the most significant subsidy in this proceeding, accounting for nearly two-thirds of the 19.20% ad valorem subsidy rate. *See* Final Results Analysis at Attach. 1, PD 248 (July 12, 2016). Furthermore, averaging the IHS data with the GTA data significantly lowers the solar glass benchmark price. *See* Final Results Analysis at Attach. 2 at 127 (calculating the price of solar glass derived from the IHS data to be 1.05 USD/kg and, from the GTA data, to be 4.53 USD/kg).

[6] SolarWorld's data reported prices from Maersk Line ("Maersk") for shipping "[g]lass, glassware" and "[m]iscellaneous manufactured articles" in forty-foot tanks during the year 2012. SolarWorld Freight Benchmark Data at Exs. 2–3, PD 137–146 (Nov. 2, 2015). JA Solar's data, meanwhile, was composed of two data sets. First, JA Solar submitted the shipping data used in an administrative review in *Citric Acid and Certain Citrate Salts from the People's Republic of China*, 79 Fed. Reg. 77,318, 77,318 (Dep't Commerce Jan. 2, 2014) ("*Citric Acid*"). *See* JA Solar Freight Benchmark Submission at Ex. 4B, CD 42 (Nov. 2, 2015). This data reported prices from Maersk for shipping various goods in twenty-foot containers, none of which were investigated in the current proceeding, for the entire year of 2013. *Id.* Second, JA Solar placed on the record Maersk prices for shipping "[g]lass, glassware" and "[b]ase metals, base metal articles" in twenty-foot containers for only October, November, and December of 2013. *See id.* at Ex. 4C. In its *Final Results*, Commerce used the *Citric Acid* data for the first nine months of 2013, and JA Solar's second data set for the final three months of the year. *I&D Memo* at 23.

ported in *Citric Acid*, which Commerce did not use, matched the shipping prices for those months provided in JA Solar's second data set, which data *was* specific to the inputs in this proceeding. *Id.* at 23.

SolarWorld argues that substantial evidence does not support Commerce's decision to use only JA Solar's data to calculate ocean freight costs, and that Commerce instead should have averaged SolarWorld's data with JA Solar's data. SolarWorld Br. at 24–31; SolarWorld Reply at 14–18. Regarding contemporaneity, SolarWorld contends that its data was non-contemporaneous but nonetheless accurate because SolarWorld used an inflator to adjust the data to reflect POR-contemporaneous prices, and Commerce regularly allows such data inflation. SolarWorld Br. at 27–28; SolarWorld Reply at 16–17. As to specificity, SolarWorld faults JA Solar's data for including ocean freight costs for calcium carbonate, caustic soda, and steam coal—the shipped goods reported in *Citric Acid*—whereas the inputs in question here are different products. SolarWorld Br. at 30–31; SolarWorld Reply at 16–17. Regarding its own data, SolarWorld argues that the products reported as being shipped in forty-foot tanks were solids, despite the data's use of the word "tank," and that no record evidence shows a typical Chinese producer would use only twenty-foot containers as opposed to forty-foot ones. SolarWorld Br. at 28–29; SolarWorld Reply at 17–18.

The government responds that Commerce's selection of JA Solar's ocean freight data was supported by substantial evidence. Gov't Br. at 19–25. The government states that, critically, JA Solar's data was contemporaneous with the POR while SolarWorld's was not. *Id.* at 20. The government admits that Commerce has used non-contemporaneous data inflated to the proper POR in past proceedings, but states that Commerce has done so only when no contemporaneous data existed on the record, and that inflating data can lead to inaccurate results. *Id.* at 20–23. As to specificity, the government does not argue that the *Citric Acid* shipping data used for the first nine months of the POR is specific to the products in question. But, the government contends, the fact the final three months of the *Citric Acid* data match the overlapping three months from JA Solar's other data sufficiently indicates that the nine months of *Citric Acid* data are reliable. *Id.* at 24–25. In addition, the government contends that SolarWorld's data was not specific to the inputs in question because it reported shipping costs for liquids, as indicated by a tank's capacity being measured in liters rather than kilograms. *Id.* at 23.

B. Discussion

In its benchmark calculations, "[Commerce] will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product," such as by including ocean freight costs. 19 C.F.R. § 351.511(a)(2)(iv); *see also* Preliminary Results Decision Memo. at 31 ("Regarding delivery charges, we included ocean freight . . . ."). Because "Commerce's regulations neither require nor preclude Commerce from averaging freight costs when adjusting the world market benchmark for import costs . . . Commerce has broad discretion in determining how to adjust the world market benchmark price to reflect costs incurred by purchasers so long as it does so reasonably." *TMK IPSCO v. United States*, 179 F. Supp. 3d 1328, 1350 (CIT 2016).

Commerce's selection of JA Solar's ocean freight data and concomitant rejection of SolarWorld's data was supported by substantial evidence. First, JA Solar's data is contemporaneous with the POR while SolarWorld's is not. *See* SolarWorld Freight Benchmark Data at Exs. 2–4 (providing ocean freight data for the year 2012). Although Commerce has in past proceedings used price inflators to adjust data to be contemporaneous with the POR, the government correctly states that Commerce does so only when there is not contemporaneous data on the record, a point SolarWorld does not contest. *See, e.g.*, Prelim. Determination Analysis for JA Solar at 8, PD 200 (Dec. 31, 2015) (using price inflators and deflators to adjust land-use right prices to be contemporaneous with the POR when no party submitted land-use rights benchmarks). Commerce explains this preference for contemporaneous data by stating that "non-contemporaneous freight rate data may have been affected by factors not present during the POR, for example, changes in demand for freight from year-to-year, changing energy costs, or construction of new ports, or inability to use particular ports." Gov't Br. at 22. Second, as to specificity, the overlapping three months in JA Solar's two data sets indicates the accuracy of the *Citric Acid* data, even though it reports shipping costs for materials other than the inputs at issue in this proceeding. *Compare* JA Solar Freight Benchmark Submission at Ex. 4B (providing the underlying shipping data used in *Citric Acid), with id*. at Ex. 4C (providing shipping data for October–December of 2013).[7] Because JA

[7] Indeed, shipping costs do not appear to vary at all based on the particular type of cargo shipped. For instance, the shipping data in *Citric Acid* for October, November, and December of 2013, for shipping "[s]alt, sulphur, earths and stone, plastering materials, lime, cement, marble, granite" from Los Angeles to Shanghai, reported prices of $1,020.34, $1,020.58, and $1,100.63, respectively. JA Solar Freight Benchmark Submission at Ex. 4B at 17–19. The data for the final three months of 2013 submitted by JA Solar for shipping "glass, glassware" from Los Angeles to Shanghai, meanwhile, reported exactly the same

Solar's data is contemporaneous and has no specificity concerns, whereas SolarWorld's data suffers from, at the very least, contemporaneity issues, substantial evidence supports Commerce's selection of only JA Solar's data to calculate ocean freight costs.

IV. Value Added Tax

A. Specific Facts

In its *Final Results*, Commerce increased the tier-two benchmark prices for polysilicon and solar glass to reflect the VAT that a hypothetical PRC firm would pay upon importing these products. In addition, Commerce chose not to exclude any amount for VAT from the electricity tier-one benchmark price. *I&D Memo* at 26. Commerce justified its decision to account for VAT by reference to 19 C.F.R. § 351.511(a)(2)(iv), quoted in full below. *Id.* at 25–26. Commerce reasoned that the regulation "require[s] [Commerce] to consider all adjustments necessary to ensure an accurate comparison . . . not limited to delivery charges and import duties." *Id.* at 26. Commerce clarified this understanding by stating that VAT should be included in benchmark prices "[a]s long as VAT is reflective of what an importer would have paid." *Id.* Commerce rejected JA Solar's contention that VAT should be excluded from the benchmarks because VAT is later recouped by PRC firms by stating that 19 C.F.R. § 351.511(a)(2)(iv) "does not contemplate future reimbursements or refunds of taxes, but instead requires us to evaluate the purchases in the form in which they are made." *Id.* at 26. On the record of this proceeding, Commerce concluded that importers would pay VAT on the tier-two products, and that there was insufficient evidence as to whether the electricity prices included VAT. *Id.* at 26–27.

prices of $1,020.34, $1,020.58, and $1,100.63. *Id.* at Ex. 4C at 55, 57, 59. This is of little surprise, given that both the *Citric Acid* data and JA Solar's second data set report the cost of shipping 28,000 kg of the various goods in twenty-foot containers. *See id.* at Exs. 4B, 4C.

The record is less clear, however, on whether SolarWorld's data suffers from specificity concerns. Commerce correctly notes that SolarWorld's data for "[g]lass, glassware" and "[m]iscellaneous manufactured articles," obtained from Maersk, reports prices for "Type [of container]: Tank," "Size: 40'." *See I&D Memo* at 24; SolarWorld Freight Benchmark Data at Exs. 2–3. But, this data is silent on whether the prices are reported by weight or by volume, unlike JA Solar's data, which specifies that the prices reported are for shipping 28,000 kg of the particular goods listed. *See* SolarWorld Freight Benchmark Data at Exs. 2–3; JA Solar Freight Benchmark Submission at Exs. 4B, 4C. Commerce cites Exhibit 1 of the SolarWorld Freight Benchmark Data as evidence that Maersk forty-foot tanks report prices for liquids. *See I&D Memo* at 24. But, while a description of "[t]ank container[s]" from a *different* website indicates that tanks are for shipping liquids, *see* SolarWorld Freight Benchmark Data at Ex. 1 at 10–12, the Maersk data in Exhibit 1 refers only to forty-foot *containers* for shipping dry freight, *see* SolarWorld Freight Benchmark Data at Ex. 1 at 3, 4–5. Even if SolarWorld's data reports prices for shipping solids, however, Commerce's selection of only JA Solar's data is supported by substantial evidence.

Trina argues that Commerce's decision to factor VAT into the benchmark price of polysilicon and solar glass, and to not exclude it for electricity, is not in accordance with law. Trina Br. at 7–14; Reply Br. of Pl. Changzhou Trina Solar Energy Co., Ltd. 1–9, ECF No. 38 ("Trina Reply"). Trina contends that 19 C.F.R. § 351.511(a)(2)(iv), the regulation Commerce relied on in justifying its treatment of VAT, prevents Commerce from including any adjustment other than delivery charges and import duties, because the regulation lists these and does not explicitly state that other adjustments are allowed. Trina Br. at 9–11; Trina Reply at 2–4. Accordingly, Trina states, because VAT is neither a delivery charge nor an import duty, Commerce cannot add it into the benchmark calculations. Trina Br. at 9–10. Trina argues further that Commerce's interpretation is unreasonable because Chinese firms later recoup VAT when they re-sell or export the product, and because including VAT upwardly distorts benchmark prices. Trina Br. at 11–14; Trina Reply at 8.

The government and SolarWorld argue that Commerce's inclusion of VAT in the calculation of benchmarks prices was in accordance with law. Gov't Br. at 25–27; SolarWorld Resp. at 6–14. Both note that the regulation requires Commerce to include delivery charges and import duties in benchmark calculations, but contend that Commerce is not prevented from also making other adjustments. Gov't Br. at 26–27; SolarWorld Resp. at 8–9. In addition, both posit that the fact a firm may eventually recoup VAT is irrelevant given that the benchmark price is to be calculated "[a]t the time of purchase." Gov't Br. at 27; SolarWorld Resp. at 11–12. Lastly, the government and SolarWorld argue that the relevant inquiry for whether or not to include VAT is whether a hypothetical firm would pay it, not what the respondent actually paid, and that there is evidence Chinese firms pay VAT on the inputs in question. Gov't Br. at 25–26; SolarWorld Br. at 9–11.

B. Discussion

The regulation at issue, 19 C.F.R. § 351.511(a)(2)(iv), states simply that "[i]n measuring adequate remuneration under [tier-one or tier-two analysis], [Commerce] will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties." "When an agency interprets its own regulation, the Court, as a general rule, defers to it 'unless that interpretation is plainly erroneous or inconsistent with the regulation.'" *Decker v. N.W. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013) (quoting *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 209 (2011)). But, "deference is warranted only

when the language of the regulation is ambiguous." *Christensen v. Harris Cty.*, 529 U.S. 576 (2000).

Commerce's interpretation of 19 C.F.R. § 351.511(a)(2)(iv) to permit inclusion of expenses other than delivery charges and import duties in benchmark calculations is not "plainly erroneous or inconsistent with the regulation." *See Decker*, 568 U.S. at 613. The regulation mandates that Commerce "will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product." 19 C.F.R. § 351.511(a)(2)(iv). To interpret the regulation as requiring Commerce to adjust benchmark prices only for delivery charges and import duties would render this mandate meaningless—the regulation, in such case, should instead state simply that "[Commerce] will adjust the comparison price . . . [to] include delivery charges and import duties." This interpretation, however, is to be avoided. *See Mass. Mut. Life Ins. Co. v. United States*, 782 F.3d 1354, 1365 (Fed. Cir. 2015) ("When construing a regulation, the court applies the same interpretive rules it uses when analyzing the language of a statute."); *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1353 (2005) ("[C]ourts should be 'reluctant to treat statutory terms as surplusage in any setting'") (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). At the very least, the regulation is ambiguous as to whether other adjustments are permitted because the final sentence of 19 C.F.R. § 351.511(a)(2)(iv) does not explicitly limit adjustments to, or expand them beyond, the two listed. In light of this ambiguity, Commerce's interpretation was reasonable given the regulation's mandate to "adjust the comparison price" and the lack of language limiting adjustments to the two examples provided.

The fact Commerce reasonably interpreted its regulation to permit the addition of more than just delivery charges and import duties to benchmark prices does not necessarily mean, however, that Commerce reasonably read the regulation as allowing the addition of VAT. 19 C.F.R. § 351.511(a)(2)(iv) requires Commerce to make adjustments "to reflect the price that a firm actually paid or would pay if it imported the product," but does not make clear whether that includes VAT. According to Trina, VAT is not a charge that a firm "actually paid or would pay" because firms later recoup VAT when they re-sell or export the good. *See* Trina Br. at 11–14; Trina Reply at 4. Granted, this view of payment as extending beyond the time of importation is within the realm of what the regulation could mean. But, Commerce's narrower view of payment is not "plainly erroneous or inconsistent with the regulation"—the regulation simply speaks of "the price that a firm actually paid or would pay if it imported the product." *See* 19 C.F.R. § 351.511(a)(2)(iv). VAT fits that bill because importers must

make an initial outlay of funds to pay VAT, a point Trina does not challenge.[8] Because Commerce's view that possible later recoupment of VAT does not prevent VAT from being an appropriate adjustment is well within the language of the regulation, the court defers to Commerce's construction.[9] In this case, given that record evidence indicates a hypothetical Chinese firm would pay VAT on the inputs in question,[10] the court upholds Commerce's inclusion of VAT in the benchmark calculations.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determinations in the *Final Results* regarding the Ex-Im Bank's Buyer's Credit Program, selection of ocean freight data, and inclusion of VAT in the benchmark calculations. The court remands, however, for Commerce to reconsider its decision to average the IHS and GTA data in calculating the solar glass benchmark. Commerce must not fail to take into consideration the possible inclusion of taxes in the IHS data, a factor that Commerce does not contest can affect data accuracy. Commerce must explicitly weigh this possible flaw and the IHS data's other potential inaccuracy of reporting a single annual price, against the GTA data's defect of being slightly less specific than the IHS data. Commerce may consider whether or not to reopen the record for

[8] 19 C.F.R. § 351.511(b) appears to lend further support to Commerce's interpretation:

> Time of receipt of benefit. In the case of the provision of a good or service, [Commerce] normally will consider a benefit as having been received as of the date on which the firm pays or, in the absence of payment, was due to pay for the government-provided good or service.

A "benefit" is calculated by comparing the price a firm pays for goods with the benchmark price. *See* 19 C.F.R. § 351.511. Because "the date on which the firm pays" for a government-provided good will necessarily be prior to any recoupment of VAT, the regulation implies that recoupment of VAT is irrelevant for the calculation of LTAR.

[9] Deference to Commerce is further supported by Commerce's past practice of including VAT for PRC benchmark calculations without factoring in recoupment. *See, e.g., Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China* at 44, C-570–978 (Apr. 30, 2012), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–10954–1.pdf (last visited August 15, 2017) ("[I]n order to ensure an 'apples-to-apples' comparison between these domestic input purchases and the world-market benchmark, our regulations require the use of delivered prices, which include import duties and VAT. To suggest [otherwise] . . . results in a distorted benefit calculation and is inconsistent with the requirements of 19 C.F.R. § 351.511(a)(2)(iv)."). This conclusion is also supported by *Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1372–74 (CIT 2015), where the court, although not addressing the specific recoupment argument made here, upheld Commerce's inclusion of VAT in calculating PRC benchmark prices.

[10] The GOC indicated that it imposes a 17% VAT on solar glass and polysilicon. GOC Initial CVD Questionnaire Resp. at 66, 115, PD 111–14 (Sept. 18, 2015). As for electricity, the GOC did not adequately indicate whether it imposes VAT, thus, Commerce applied an adverse inference and presumed that the electricity prices reported by the GOC are VAT-inclusive. *See I&D Memo* at 26. Trina does not challenge this particular inference, only Commerce's broad policy of using benchmarks that include VAT. *See generally* Trina Br.

further evidence, such as what type of figure, whether an average or just a single day, the IHS data reports.

Commerce shall file its remand determination with the court on or before October 17, 2017. The parties shall have until November 16, 2017 to file objections, and the government will have until November 30, 2017, to file its response.

Dated: August 18, 2017
New York, New York

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

Slip Op. 17–107

TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş., AND TOSYALI DIS TICARET A.Ş., CAYIROVA BORU — SANAYI VE TICARET A.S./YUCEL BORU ITHALAT-IHRACAT VE PAZARLAMA A.S., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 15–00339

[Final determination remanded.]

Dated: August 22, 2017

David L. Simon, Law Offices of David L. Simon of Washington, DC, argued for Plaintiffs Tosçelik Profil ve Sac Endüstrisi A.Ş. and Tosyali Dis Ticaret A.Ş.; and Cayirova Boru Sanayi ve Ticaret A.S./Yucel Boru Ithalat-Ihracat ve Pazarlama A.S. With him on the briefs was *Mark B. Lehnardt*, Law Offices of Mark B. Lehnardt, of Washington, DC.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, U.S. Department of Justice of Washington, DC, for Defendant United States, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director. Of counsel was *Lydia C. Pardini*, on the brief, and *James H. Ahrens II*, Attorneys, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Roger B. Schagrin, Paul W. Jameson, and *Jordan C. Kahn*, Schagrin Associates of Washington, DC, for Defendant-Intervenor's Stupp Corp., TMK IPSCO, and Welspun Tubular LLC USA.

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein, LLP of Washington, DC for Defendant-Intervenor Maverick Tube Corp.

OPINION AND ORDER

Gordon, Judge:

This action involves the U.S. Department of Commerce ("Commerce") antidumping duty investigation covering Welded Line Pipe from the Republic of Korea and the Republic of Turkey. *See Welded Line Pipe From the Republic of Turkey*, 80 Fed. Reg. 61,362 (Dep't of Commerce Oct. 13, 2015) (final determination of sales at less than fair value) (Final Determination); *see also* Issues and Decisions Memorandum for Welded Line Pipe from the Republic of Turkey, A-489–822 (Dep't of Commerce Oct. 13, 2015), available at http://enforcement.trade.gov/frn/summary/turkey/2015–25990–01.pdf (last visited this date) ("Decision Memorandum").

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record filed by Plaintiffs Cayirova Boru Sanayi ve Ticaret A.S./Yucel Boru Ithalat-Ihracat ve Pazarlama A.S. (collectively, "Yucel") and Toscelik Profil ve Sac Endustrisi A.S./Tosyali Dis Ticaret A.S. (collectively, "Toscelik"). Plaintiffs Yucel and Toscelick challenge (1) Commerce's treatment of Plaintiffs' duty drawback claims; and Yucel also challenges (2) Commerce's date of sale determination. For

the reasons that follow, the court remands the duty drawback determination for further consideration, and sustains Commerce's date of sale determination.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2017). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2017).

II. Discussion

A. Duty Drawback

Commerce requests an unopposed remand to address the issue of duty drawback. Def.'s Resp.in Opp'n to Pl.s' Mot. for J. Upon the Agency R., 14–17, ECF No. 43. As it is unopposed, the court will grant the request. *Accord SKF USA Inc. v. United* States, 254 F.3d 1022, 1029–30 (Fed. Cir. 2001) (reviewing contested voluntary remand request) ("Where there is no step one *Chevron* issue, we believe a remand to the agency *is required*, absent the most unusual circumstances verging on bad faith") (emphasis added).

B. Date of Sale

Yucel challenges Commerce's use of its regulatory presumptive invoice date for the date of sale. The date of sale issue is one with which the court is familiar. *See Yieh Phui Enter. Co. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1319, 1322–24 (2011) (describing in detail Commerce's date of sale regulation); *CC Metals and Alloys, LLC v. United States*, 40 CIT ___, ___, 145 F. Supp. 3d 1299, 1305 (2016).

Commerce "normally" uses invoice date as the date of sale. 19 C.F.R. § 351.401(i). Commerce "may," however, "use a date other than the date of invoice if [Commerce] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." *Id.* An interested party proposing something other than invoice date must demonstrate that the material terms of sale were "firmly" and "finally" established on its proposed date of sale. *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27,296, 27,348–49 (Dep't of Commerce May 19, 1997) (*"Preamble"); see generally Yieh Phui Enter. Co. v. United States, 35 C.I.T. ___, ___, 791 F. Supp. 2d 1319, 1322–24 (2011).*

Yucel seems to believe that an interested party need only create some doubt about when material terms are set, or raise the issue of the proper date of sale, which then triggers some sort of burden on Commerce to then independently review each and every sale to determine when material terms are set. *See* Yucel Br. at 12–13 (citing *Nucor Corp. v. United States*, 33 CIT 207, 612 F. Supp. 2d 1264 (2009) ("*Nucor*")).[1] On a practical level, this strikes the court as naïve. One wonders how Commerce could accomplish that across all reviews or even during an individual review covering hundreds or thousands of sales. And date of sale is just one small component in an otherwise complicated proceeding. Here, for example, Commerce penned a 50-page Decision Memorandum addressing 20 issues. Commerce's date of sale regulation has efficiently avoided the impracticality of Yucel's approach for 20 years by squarely placing the burden on interested parties challenging the presumptive invoice date, to remove any doubt about when material terms are firmly and finally set, so that a reasonable mind has one, and only one, date of sale choice. *See Allied Tube & Conduit Corp. v. United States*, 24 CIT 1357, 1371–72, 127 F. Supp. 2d 207, 220 (2000) ("Plaintiff, therefore, must demonstrate that it presented Commerce with evidence of sufficient weight and authority as to justify its [date of sale] as the only reasonable outcome.");

[1] The court notes that Yucel fails to cite or discuss *Nucor*'s subsequent history, which the court in *Yieh Phui* explained leaves *Nucor* with no persuasive weight. *Yieh Phui*, 35 CIT at ___, 791 F. Supp. 2d at 1324–25 (2011).

Yieh Phui Enter. Co. v. United States, 35 CIT ___, ___, 791 F. Supp. 2d 1319, 1322–24 (2011); *CC Metals and Alloys, LLC v. United States*, 40 CIT ___, ___, 145 F. Supp. 3d 1299, 1305 (2016).

Suffice it to say, Yucel did not do that here. During the administrative proceeding Yucel argued that contract date was the date of sale for its two U.S. sales. *Decision Memorandum* at 21–22. Problematically, one of those sales had terms (involving the timing of the letter of credit and delivery date) that varied after contract date. *Id.* at 24. Petitioners highlighted these differences, and using Yucel's own arguments touting the importance of the opening of the letter of credit, explained to Commerce that material terms varied after contract date. *Id.* at 22–23. By emphasizing the opening of the letter of credit as the moment at which both parties are bound to perform, Yucel unwittingly undermined its argument that the earlier contract date was the effective date of sale. Petitioners seized on this narrative, highlighting the variance in the letter of credit opening date specified in the contract with when it actually occurred. Commerce reasonably concurred with petitioners' argument that Yucel had failed to establish contract date as the date on which material terms were firmly and finally fixed. *Id.* at 24–25. Despite the apparent reasonableness of this determination, Yucel nevertheless argues that Commerce erred and should have conducted further analyses as to whether contract date might have been the date of sale, Conf. Br. in Supp. of Mot. for J. on Agency Rec., ECF. No. 33 (May 27, 2016) ("Yucel Br.") at 12–17, or at least determined date of sale *per transaction* and used contract date for one of the sales (an argument Yucel failed to exhaust before Commerce), *id.* at 17–18, or that Commerce should have considered whether the opening of the letter of credit might have been the correct date of sale, *id.* at 16 n.5. Yucel also makes an argument about fluctuating exchange rates that they failed to exhaust before Commerce. *Id.* at 18–21; *see also* Def.'s Resp. in Opp'n to Pls.' Mot. for J. on Agency R., ECF. No. 43 (Sept. 23, 2016) at 11, 13–14; *see also* Scheduling Order at 3, ECF No. 27 (Mar. 10, 2016) ("please make sure you have exhausted your administrative remedies by presenting your arguments to the agency in the first instance.").

Yucel itself is apparently uncertain about when material terms were firmly and finally fixed, arguing to the court that Commerce should have considered whether the opening of the letter of credit was a suitable date of sale (despite no interested party arguing for that date of sale at the administrative level). Yucel Br. at 16 n.5. Conceding that there may be multiple possible dates of sale is a curious stance given a regulatory standard that requires Yucel to have established one, and only one, date of sale. Suggesting multiple possibilities, as

Yucel does, just confirms for the court the abiding wisdom of a date of sale regulation that defaults to invoice date precisely because this sort of uncertainty and complexity is prevalent in most industries. *Preamble*, 62 Fed. Reg. at 27,348–49 ("[I]n most industries, the negotiation of a sale can be a complex process. . . . In fact, it is not uncommon for the buyer and seller themselves to disagree about the exact date on which the terms became final. However, for them, this theoretical date usually has little, if any, relevance. From their perspective, the relevant issue is that the terms be fixed when the seller demands payment. . . .").

Yucel argues that even if Commerce correctly determined that Yucel failed to establish that contract date was the date of sale for the transaction with changing terms, Commerce nevertheless should have used contract date for the other transaction in which all terms remained the same. Problematically for Yucel, during the proceeding Yucel argued that Commerce should apply one date of sale (contract date) to both of its transactions. Yucel did not argue or suggest that Commerce should assign date of sale for its U.S. sales on a per transaction basis. The time to do so was before Commerce, and make whatever arguments supported Yucel's proposed *per transaction* approach. Commerce could then have addressed those arguments. Because Yucel did not raise the issue, Commerce never considered it, and the issue is not in a posture that the court can review. This is Yucel's fault, having failed to exhaust its administrative remedies. *See* 28 U.S.C. 2637(d); *Boomerang Tube LLC v. United States*, Nos. 2016–1554, 2016–1561, ___ F.3d ___ (Fed. Cir. May 8, 2017); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). Yucel also failed to present its arguments about the fluctuating exchange rate to Commerce in the first instance, and failed to exhaust these arguments as well. *Id.*

To prevail before the court, Yucel needed to demonstrate that it presented Commerce with one and only one reasonable choice for date of sale—that the material terms were firmly and finally fixed on its proposed contract date. Yucel failed to do that here, accordingly, the court sustains Commerce's date of sale determination.

III. Conclusion

In accordance with the foregoing, it is hereby

ORDERED that the *Final Determination* is sustained as to Commerce's date of sale determination; it is further

ORDERED that this action is remanded to Commerce to reconsider its treatment of duty drawback; it is further

ORDERED that Commerce shall file its remand results on or before November 6, 2017; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page/word limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: August 22, 2017
New York, New York

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

Slip Op. 17–108

UNITED STATES, Plaintiff, v. DELADIEP, INC. and JOHN DELATORRE, Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00241

[Granting in part Plaintiff's motion for the entry of a default judgment.]

Dated: August 23, 2017

Jason M. Kenner, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Plaintiff the United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Bayleigh J. Pettigrew*, Office of the Associate Chief Counsel, U.S. Customs and Border Protection, of Long Beach, CA.

OPINION

Choe-Groves, Judge:

The United States ("Plaintiff" or "Government") brought this action against Deladiep, Inc. ("Deladiep") and John Delatorre ("Mr. Delatorre") (collectively, "Defendants") to recover unpaid duties and a civil penalty under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2006).[1] *See* Summons, Nov. 4, 2016, ECF No. 1; Compl., Nov. 4, 2016, ECF No. 3. Deladiep is a Delaware corporation with its principal place of business in Sugar Land, Texas, and Mr. Delatorre is the owner, president, and sole corporate officer of Deladiep. *See* Compl. ¶ 4. Plaintiff alleges, *inter alia*, that Defendants made two entries of raw flexible magnets from the People's Republic of China ("China") and provided material false information to U.S. Customs and Border Protection ("Customs") indicating that the entries were not subject to antidumping or countervailing duties. *See id.* ¶¶ 23–30. Plaintiff contends that Defendants are jointly and severally liable for unpaid duties and a civil penalty because they failed to exercise reasonable care to ensure that the statements made in connection with the entries were complete and accurate. *See id.*

Before the court is Plaintiff's Motion for the Entry of a Default Judgment.[2] *See* Pl.'s Mot. Entry Default J., May 5, 2017, ECF No.

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

[2] In support of its motion, Plaintiff has provided the court with declarations and documents from: Robert Theirry, who is a fines, penalties, and forfeitures officer for Customs in Los Angeles, California; Quoc Tran, who is a senior import specialist for Customs in Long Beach, California; Jessica Vandemark, who is a section chief for Customs in the debt management branch; and Paul Sumbi, who is a supervisory import specialist for Customs in the Center of Excellence and Expertise for consumer products and mass merchandise. *See* Pl.'s Mot. Entry Default J., May 5, 2017, ECF Nos. 17–3–17–6.

17. Because Defendants have failed to plead or otherwise defend themselves in this action, the Government requests the court to enter a default judgment against Defendants in the amount of $32,931.53 for unpaid customs duties, plus prejudgment interest, and $87,740.60 as a civil penalty for negligent violations of 19 U.S.C. § 1592(a). *See id.* at 13.

As explained below, the well-pled facts in Plaintiff's complaint and supporting declarations accompanying Plaintiff's motion establish that Defendants are jointly and severally liable for negligent violations of 19 U.S.C. § 1592(a). The court grants in part Plaintiff's motion for default judgment and enters a default judgment against Defendants in the amount of $32,931.53 for unpaid customs duties, together with pre-judgment interest, and $17,548.12 as a civil penalty, which is twenty percent of the maximum penalty allowed by statute.

BACKGROUND

On September 17, 2008, the U.S. Department of Commerce ("Commerce") issued antidumping and countervailing duty orders on imports of raw flexible magnets from the People's Republic of China ("China"). *See Raw Flexible Magnets from the People's Republic of China*, 73 Fed. Reg. 53,847 (Dep't Commerce Sept. 17, 2008) (antidumping duty order) ("*AD Order"); Raw Flexible Magnets from the People's Republic of China,* 73 Fed. Reg. 53,849 (Dep't Commerce Sept. 17, 2008) (countervailing duty order) ("*CVD Order*"). The scope of both orders covers "certain flexible magnets regardless of shape, color, or packaging." *AD Order*, 73 Fed. Reg. at 53,847; *CVD Order*, 73 Fed. Reg. at 53,850. Magnets subject to these orders imported from exporters that have not been assigned an individual rate are subject to an antidumping duty rate of 185.28 percent and a countervailing duty rate of 109.95 percent. *See AD Order*, 73 Fed. Reg. at 53,848; *CVD Order*, 73 Fed. Reg. at 53,850. To assist Customs in determining whether imported merchandise is subject to these antidumping and countervailing duty orders, the scope of both orders provides that products subject to the orders are classifiable principally under subheadings 8505.19.10 and 8505.19.20 of the Harmonized Tariff Schedule of the United Sates ("HTSUS").[3] *See AD Order*, 73 Fed. Reg. at 53,847; *CVD Order*, 73 Fed. Reg. at 53,850.

[3] HTSUS heading 8505 covers "[e]lectromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof." HTSUS subheading 8505.19.1000 covers "[p]ermanent magnets and articles intended to become permanent magnets after magnetization: . . . [o]ther: . . . [f]lexible magnets." HTSUS subheading 8505.19.2000 covers "[p]ermanent magnets and articles intended to become permanent magnets after magnetization: [o]ther: . . . composite good containing flexible magnets."

Plaintiff alleges that Defendants made two entries of flexible magnet sheets from China on November 10, 2011 (Entry No. GL502557066) ("November Entry") and January 3, 2012 (Entry No. GL502608083) ("January Entry") through the ports of Los Angeles and Long Beach, California.[4] *See* Compl. ¶ 5; *see also* Compl. Ex. A (entry summaries). The entry documents for the November Entry classified the imported magnets under HTSUS subheading 8505.19.3000[5] and the commercial invoice described the imported merchandise as five thousand pieces of "Magnetic Rubber Sheet[s]." *See* Compl. Ex. A; Decl. Supervisory Import Specialist Paul Sumbi in Supp. Gov't's Mot. Default J. Ex. 1, May 5, 2017, ECF No. 17–6 ("Sumbi Decl."). The entry documents for the January Entry classified the merchandise under HTSUS subheading 8505.19.1000 and the commercial invoice described the imported merchandise as two thousand pieces of "rubber magnet sheet[s]." *See* Compl. Ex. A; Sumbi Decl. Ex. 4. Defendants declared that both entries were Type 01 entries not subject to antidumping and countervailing duties. *See* Compl. Ex. A; Decl. Robert Theirry in Supp. Gov't's Mot. Default J. ¶ 3, May 5, 2017, ECF No. 17–3 ("Theirry Decl."); Sumbi Decl. ¶¶ 2, 4. Defendants did not deposit antidumping and countervailing duties for either entry.[6] *See* Sumbi Decl. ¶¶ 2, 4.

On May 30, 2012, Customs issued a request for information to Deladiep seeking a sample of the magnetic rubber sheets contained in the November Entry.[7] *See id.* at Ex. 6. Customs did not receive a response and issued a notice of action for the November Entry on July

[4] Deladiep was listed as the importer of record for both entries. *See* Compl. Ex. A.

[5] HTSUS subheading 8505.19.3000 covers "[p]ermanent magnets and articles intended to become permanent magnets after magnetization: . . . [o]ther: . . . [o]ther."

[6] An importer's liability to pay duties accrues upon entry into "Customs territory of the United States." 19 C.F.R. § 141.1(a). The United States employs a retrospective duty assessment system under which an importer's final liability for antidumping and countervailing duties is unknown at the time of entry. *See* 19 C.F.R. § 351.212(a). Upon entry of merchandise subject to an antidumping or countervailing duty order, an importer must post a cash deposit or bond as security in an amount equal to the estimated antidumping or countervailing duties owed until the final duty liability is determined and the entry is liquidated. *See* 19 C.F.R. §§ 141.101, 141.103.

[7] Customs issued the request for information after Defendants' customs broker, Pacific Century Customs Services, filed a post entry amendment form requesting to change an alleged calculation error concerning the declared value of the merchandise in the November Entry. *See* Sumbi Decl. ¶ 6. Customs rejected the post entry amendment because antidumping and countervailing duties were due on the entry and had not been paid. *See id.* at Ex. 9. Customs informed Deladiep that it would need to resubmit the post entry amendment along with payment of the antidumping and countervailing duties. *See id.; see also Post-Entry Amendment (PEA) Processing Test: Modification, Clarification, and Extension,* 76 Fed. Reg. 37,136, 37,136 (Dep't Commerce June 24, 2011) (clarifying that "for any PEA which results in Antidumping/Countervailing Duty (AD/CVD) cash deposits due (or bond, if allowed), such deposits or bond are due with the submission of the PEA"). Deladiep neither resubmitted a post entry amendment nor paid the antidumping and countervailing duties. *See* Sumbi Decl. ¶ 9.

29, 2012, which proposed (1) changing the classification of the merchandise from HTSUS subheading 8505.19.3000 to HTSUS subheading 8505.19.1000, (2) changing the entry type from a Type 01 entry to a Type 03 entry to reflect that the imported magnets were subject to antidumping and countervailing duties pursuant to the orders on raw flexible magnets from China, and (3) rate-advancing the entry.[8] *See id.* at Ex. 7. The notice of action also directed Deladiep to submit antidumping duties at a rate of 185.28 percent, countervailing duties at a rate of 109.95 percent, and a non-reimbursement statement.[9] *See id.* In the event that Deladiep disagreed with the proposed action, Customs advised Deladiep that it must provide a sample of the imported magnetic rubber sheets and provide a reason why the product is outside the scope of the antidumping and countervailing duty orders on raw flexible magnets from China within twenty days. *See id.*

On behalf of Deladiep, Mr. Delatorre sent a letter to Customs dated July 30, 2012 that contained a sample of the magnetic rubber sheets and product information from a website that purportedly sells the merchandise to law enforcement entities. *See id.* at Ex. 8. The letter neither referenced nor disputed the changes proposed by Customs in the notice of action. Mr. Delatorre sent an additional e-mail to Customs on August 14, 2012 stating that the merchandise was imported for a friend's business rather than for his own business endeavors. *See id.* at Ex. 11. The e-mail also requested that Customs refrain from assessing antidumping and countervailing duties on the imported merchandise because Mr. Delatorre's new customs broker had not informed Mr. Delatorre that the imported magnets were subject to the orders. *See id.* The e-mail did not provide any reason regarding why the magnets were outside the scope of the orders. Customs also received a letter on August 30, 2012 from a company called SooHoo, Inc.[10] disagreeing with Customs' decision that the magnet sheets

[8] An entry is rate-advanced when it is "liquidated at a higher rate" than the rate claimed by the importer. *See United States v. Horizon Prods. Int'l, Inc.*, 39 CIT __, 82 F. Supp. 3d 1350, 1354 (2015).

[9] According to Commerce's regulations, an importer must file a statement with Customs certifying that it has not received payment or a refund of antidumping or countervailing duties for the imported merchandise. *See* 19 C.F.R. § 351.402(f)(2). Failure to provide a non-reimbursement statement results in a presumption that the exporter or producer paid or reimbursed the importer for antidumping or countervailing duties, in which case antidumping and countervailing duties are doubled to calculate the potential loss of revenue. *See* 19 C.F.R. § 351.402(f)(3).

[10] SooHoo, Inc. provided Customs with images of magnets that were similar but not identical to the magnets imported by Defendants. *See* Sumbi Decl. ¶ 12, Ex. 13. It is unclear whether SooHoo, Inc. was related to Deladiep or whether SooHoo, Inc. had authority to speak on behalf of Defendants.

imported by Deladiep were within the scope of the antidumping and countervailing duty orders because the merchandise fell within an exception for printed flexible magnets.[11] *See id.* at Ex. 13. Upon examination of the sample submitted by Mr. Delatorre, Customs confirmed that the imported magnets were in fact subject to antidumping and countervailing duties and that the exception for printed flexible magnets did not apply because the printing on the imported magnets consisted of only stripes, lines, a trade name, or trade mark.[12] *See* Theirry Decl. ¶¶ 4, 7; Sumbi Decl. ¶¶ 13–14, Ex. 14.

In the interim, Customs issued a similar notice of action for the January Entry on August 13, 2012. *See* Sumbi Decl. Ex. 10. Customs directed Deladiep to submit the antidumping and countervailing duties along with a non-reimbursement statement. *See id.* Defendants neither paid the duties for the two entries nor submitted a non-reimbursement statement following the issuance of the notices of action. *See* Compl. ¶¶ 11, 12; *see also* Theirry Decl. ¶ 10.

Customs issued an informed compliance notice to Deladiep on September 28, 2012, explaining that the imported merchandise was subject to antidumping and countervailing duties and requesting a deposit for the duties owed. *See* Sumbi Decl. Ex. 15. Customs informed Deladiep again that it could resubmit a post entry amendment after paying the requested duties. *See id.* Customs also provided Deladiep with information regarding how to request a scope ruling from Commerce if Deladiep believed that the imported magnets were outside

[11] The antidumping and countervailing duty orders contain an express exclusion for:

> printed flexible magnets, defined as flexible magnets (including individual magnets) that are laminated or bonded with paper, plastic, or other material if such paper, plastic, or other material bears printed text and/or images, including but not limited to business cards, calendars, poetry, sports event schedules, business promotions, decorative motifs, and the like. This exclusion does not apply to such printed flexible magnets if the printing concerned consists of only the following: a trade mark or trade name; country of origin; border, stripes, or lines; any printing that is removed in the course of cutting and/or printing magnets for retail sale or other disposition from the flexible magnet; manufacturing or use instructions (e.g., "print this side up," "this side up," "laminate here"), printing on adhesive backing (that is, material to be removed in order to expose adhesive for use such as application of laminate) or on any other covering that is removed from the flexible magnet prior or subsequent to final printing and before use; nonpermanent printing (that is, printing in a medium that facilitates easy removal, permitting the flexible magnet to be re-printed); printing on the back (magnetic) side; or any combination of the above.

AD Order, 73 Fed. Reg. at 53,847; *CVD Order*, 73 Fed. Reg. at 53,850.

[12] Customs found that the sample provided by Mr. Delatorre was a raw flexible magnet that did not fall within the exception for printed flexible magnets because it is "laminated with a clear material where the words 'TEMPSHIELD NET' are printed at the bottom of the magnetic piece. In addition, a yellow diagonal line is displayed on this magnet." Sumbi Decl. Ex. 14. Customs took the additional step of consulting Commerce to confirm that the imported magnets were subject to the antidumping and countervailing duty orders on raw flexible magnets on China. *See id.* ¶¶ 13–14.

the scope of the orders. *See id.* Defendants did not respond to the notice, did not deposit the requested duties, and there is no indication that Defendants requested a scope ruling regarding the imported magnets. *See id.* ¶ 15.

Pursuant to liquidation instructions issued by Commerce, Defendants' entries were liquidated at the cash deposit rate in effect at the time of entry. *See* Compl. ¶ 14; *see also* Theirry Decl. ¶ 9; Decl. Jessica Vandemark in Supp. Gov't's Mot. Default J. ¶¶ 3, 5, May 5, 2017, ECF No. 17–5 ("Vandemark Decl."). Customs assessed antidumping duties at a rate of 185.28 percent and countervailing duties at a rate of 109.95 percent. *See* Compl. ¶ 14; Theirry Decl. ¶ 9; Vandemark Decl. ¶¶ 3, 5. Customs issued a bill for the unpaid duties for the November Entry in the amount of $62,731.66 and a bill for the unpaid duties for the January Entry in the amount of $15,145.40.[13] *See* Compl. ¶ 14; Vandemark Decl. ¶¶ 3, 5.

Following nonpayment of the bills, Customs issued a pre-penalty notice on July 23, 2013 notifying Defendants of Customs' intent to issue a claim for a monetary penalty for violations of 19 U.S.C. § 1592(a). *See* Compl. ¶ 16; Theirry Decl. Ex. 1. The notice explained that the two entries should have been presented to Customs as Type 03 entries classified under HTSUS subheading 8505.19.1000. *See* Theirry Decl. Ex. 1. Customs estimated a total potential loss of revenue of $44,116.22 due to Defendants' misclassification of the November Entry and misidentification of both entries as Type 01 entries not subject to antidumping and countervailing duties. *See id.* Customs proposed a monetary penalty for negligent violations of the penalty statute in the amount of $87,740.60, which Customs calculated to be the domestic value of the merchandise.[14] *See id.* Defendants were given thirty days to respond to the pre-penalty notice in order to avoid

[13] Customs calculated the bills based on the declared values for each entry ($12,543.00 and $2,400.00). *See* Theirry Decl. ¶ 9. Because Defendants did not submit a non-reimbursement statement, Customs was authorized to double the antidumping and countervailing duties owed. *See* 19 C.F.R. § 351.402(f)(3). In calculating Defendants' duty liability, Customs doubled only the antidumping duties on the November Entry and doubled both the antidumping and countervailing duties for the January Entry. *See* Compl. ¶ 14. The billed amounts of $62,731.66 and $15,145.40 represent Customs' assessment of antidumping and countervailing duties, plus accrued interest pursuant to 19 U.S.C. § 1677g.

[14] The statutory maximum penalty for a violation under the negligence standard affecting the assessment of duties is the lesser of the domestic value of the merchandise or two times the Government's loss of revenue. *See* 19 U.S.C. § 1592(c)(3)(A). There is no statutory definition for the term "domestic value." Customs has defined the term "domestic value" as "the price at which such or similar property is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade." 19 C.F.R. § 162.43(a). Although the regulatory definition relates to the appraisement of seized property, Customs applied this definition to its calculation of domestic value for purposes of calculating the potential penalty for Defendants' violations of 19 U.S.C. § 1592(a). *See* Declaration of Quoc Tran in Supp. Gov't's Mot. Default J. ¶ 3, May 5, 2017, ECF

the issuance of a notice of penalty. *See id.* Defendants did not respond to the pre-penalty notice and a penalty notice was issued on August 30, 2013 demanding payment of a civil penalty. *See* Compl. ¶ 17; Theirry Decl. ¶¶ 15, 16, Ex. 2. Customs issued demands for payment on November 22, 2013 and January 9, 2014. *See* Theirry Decl. Ex. 3. Defendants did not respond to the penalty notice or the letters demanding payment. *See* Theirry Decl. ¶¶ 15, 17.

The outstanding duties continued to accrue post-liquidation interest. *See* Compl. ¶ 18; Vandemark Decl. ¶¶ 10–11. The Government recovered $50,000 from Defendants' surety, which left a remaining balance of $32,931.53 in unpaid duties.[15] *See* Compl. ¶ 18; Vandemark Decl. ¶¶ 7–11. To date, the Government has not received payment of the balance of the outstanding duties or the demanded monetary penalty. *See* Compl. ¶ 22.

The Government commenced this enforcement action on November 4, 2016 to recover the unpaid antidumping and countervailing duties as well as a civil penalty.[16] *See* Summons; Compl. On March 1, 2017, the Government filed a request for the Clerk of the Court to enter default against Defendants due to their failure to respond to the complaint or otherwise appear in this action.[17] *See* Request for Entry of Default, Mar. 1, 2017, ECF No. 8. In a letter dated March 3, 2017, the Court informed Defendants that the Government had filed a request to enter a default against Defendants, recommended that Defendants obtain counsel, and advised Defendants that, upon re-

No. 17–4 ("Quoc Tran Decl."); *see also United States v. Callanish Ltd.*, 36 CIT __, Slip Op. 12–15, at *7–8 (Feb. 1, 2012) (explaining that the regulatory definition reasonably can be construed to apply to domestic value calculations for purposes of penalty assessment under 19 U.S.C. § 1592(a)). To calculate the domestic value of Defendants' entries, Customs calculated the sum of: freight on board value, ocean freight, marine insurance, broker fees and inland freight, ordinary duties under the HTSUS, antidumping duties, countervailing duties, merchandise processing fees, and harbor maintenance fees. *See* Quoc Tran Decl. ¶ 3. Customs also factored in profit and general expenses at a rate of forty-five percent. *See id.* The calculation resulted in a total domestic value of $87,740.60. *See id.* ¶¶ 3–8. Customs proposed a penalty based on the domestic value of the merchandise because it was less than two times the Government's loss of revenue, $88,232.44 (double the antidumping and countervailing duties owed on each entry). *See* Compl. ¶ 16; Theirry Decl. ¶¶ 10–13.

[15] At the time the surety's bond was applied, the balance of the unpaid duties was $67,215.50 for the November Entry and $15,716.03 for the January Entry. *See* Vandemark Decl. ¶¶ 10–11.

[16] The summons and complaint were served on Defendants in Sugar Land, Texas by United States Marshals Service on November 16, 2016. *See* Marshal's Proof of Service on Mr. Delatorre, Nov. 29, 2016, ECF No. 4; Marshal's Proof of Service on Deladiep, Nov. 29, 2016, ECF No. 5.

[17] Defendants did not file a responsive pleading with the court, but the Government noted that it received a letter from Mr. Delatorre on December 4, 2016. *See* Request for Entry of Default 1 n.1, Mar. 1, 2017, ECF No. 8. In the letter, Mr. Delatorre recounted the events that gave rise to this litigation from his perspective and explained that he could not afford to pay the unpaid duties and civil penalty sought by the Government. *See* Conf. Ex. 1 (December 4, 2016 Letter from Mr. Delatorre), Mar. 1, 2017, ECF No. 13. No document has been filed with the court that can be viewed as a responsive pleading.

quest, the Court may attempt to make arrangements for pro bono legal representation in the event that Defendants are unable to obtain counsel.[18] *See* Letter Filed by the Court Concerning Obtaining Legal Counsel, Mar. 3, 2017, ECF No. 11. The Court requested that Defendants respond to the letter by March 31, 2017 to avoid the entry of default. *See id.* Defendants did not respond to the Court's letter and, pursuant to USCIT Rule 55(a), the Clerk of the Court entered default against Defendants on May 10, 2017. *See* Order, May 10, 2017, ECF No. 18 (order entering default against Defendants). The Government has now filed a motion for the entry of a default judgment against Defendants pursuant to USCIT Rule 55(b).[19] *See* Pl.'s Mot. Entry Default J. Defendants have not filed any papers in response to the motion.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1582(1) and (3) (2006),[20] which grant the court exclusive jurisdiction over any civil action commenced by the United States to recover unpaid customs duties and a civil penalty under 19 U.S.C. § 1592. The court reviews all issues *de novo* in actions under § 1592. *See* 19 U.S.C. § 1592(e)(1). Because Defendants have defaulted by not appearing in this action, the court accepts as true all well-pled facts in the complaint. *See Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981). A party's default acts as an admission of liability for the well-pled facts in the complaint, but the default does not operate as an admission of damages alleged in the complaint. *See United States v. Freight Forwarder Int'l, Inc.*, 39 CIT __, 44 F. Supp. 3d 1359, 1362 (2015) (citing *Cement & Concrete Workers Dist. Council Welfare Fund v. Metro Found. Contractors Inc.*, 669 F.3d 230, 234 (2d Cir. 2012); *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992)). If the well-pled facts of the complaint establish liability for a civil penalty, the court must decide the amount of the civil penalty *de novo*. *See* 19 U.S.C. § 1592(e)(1). The court may look beyond the complaint to "determine the amount of damages or other relief," "establish the truth of an allegation by evidence," or "investigate any other matter." *See* USCIT R. 55(b); *see also United States v. Horizon Prods. Int'l,*

[18] The letter issued by the Court was served on Defendants in Sugar Land, Texas by United States Marshals Service on March 6, 2017. *See* Marshal's Proof of Service on Defendants John Delatorre and Deladiep, Inc., Mar. 7, 2017, ECF No. 12.

[19] The Government served the motion for the entry of a default judgment on Defendants at their last known address via U.S. postal service. *See* Pl.'s Mot. Entry Default J.

[20] Further citations to Title 28 of the U.S. Code are to the 2006 edition.

Inc., 41 CIT __, 229 F. Supp. 3d 1370, 1377–78 (2017) (citing *Entrepreneur Media, Inc. v. JMD Entm't Grp., LLC*, 958 F. Supp. 2d 588, 593 (D. Md. 2013)). The court may conduct an evidentiary hearing to determine the amount of damages, *see* USCIT R. 55(b), but such a hearing is not required. *See Freight Forwarder Int'l, Inc.*, 39 CIT at __, 44 F. Supp. 3d at 1362 (citing *Cement & Concrete Workers Dist. Council Welfare Fund*, 669 F.3d at 234).

DISCUSSION

A. Section 1592(a) and Negligence

Under 19 U.S.C. § 1592(a), it is unlawful for any person, by fraud, gross negligence, or negligence, to "enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false." 19 U.S.C. § 1592(a)(1)(A). When the claim for a civil penalty is based on an alleged negligent violation of 19 U.S.C. § 1592(a), the burden of proof is initially on the United States "to establish the act or omission constituting the violation."[21] 19 U.S.C. § 1592(e)(4). If the United States satisfies its burden of proof, the burden then shifts to the alleged violator to prove that "the act or omission did not occur as a result of negligence." *Id.* The alleged violator satisfies its burden of proof by "affirmatively demonstrat[ing] that it exercised reasonable care under the circumstances."[22] *United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2006).

1. The Government's Burden of Proof to Establish the Act or Omission Constituting the Negligent Violations of 19 U.S.C. § 1592(a)

The court must determine whether the Government has met its burden of establishing by a preponderance of evidence that Defendants committed an act or omission constituting a negligent violation

[21] Importers are required by statute to use reasonable care when providing Customs with the information necessary to allow the agency to properly assess duties on the imported merchandise. *See* 19 U.S.C. § 1484(a). Importers are required to certify that the information provided to Customs is true and correct. *See* 19 U.S.C. §§ 1484(d)(1), 1485(a). An act or omission constitutes a negligent violation of 19 U.S.C. §1592(a) if the alleged violator failed to exercise the degree of reasonable care and competence expected from a person in the same circumstances to ensure that the statements made and information provided in connection with the importation of merchandise were complete and accurate. *See* 19 C.F.R. Part 171, App. B(C)(1).

[22] The general parameters of what constitutes reasonable care are set forth in Customs' regulations. *See* 19 C.F.R. Part 171, App. B(D)(6); *see also* H. Rep. No. 103–361 at 120 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2670 (identifying possible methods by which one may show reasonable care).

of the penalty statute. *See* 19 U.S.C. § 1592(e)(4); *see also St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993) (concluding that plaintiffs in civil cases bear a preponderance of the evidence burden of proof when no statute specifies otherwise); *United States v. Ford Motor Co.*, 29 CIT 827, 847, 395 F. Supp. 2d 1190, 1208 (2005) (explaining that the Government must establish the elements of the alleged violation of the penalty statute by a preponderance of the evidence), *aff'd in part and rev'd in part on other grounds*, 463, F.3d 1267 (Fed. Cir. 2006).

Defendants made two entries of flexible magnet sheets from China on November 10, 2011 and January 3, 2012. *See* Compl. Ex. A. The record shows that Deladiep, through Mr. Delatorre, made statements and provided information that indicated the entries were not subject to antidumping or countervailing duties. *See id.* For the November Entry, Defendants: (1) described the merchandise in the invoice as "Magnetic Rubber Sheet[s]," (2) classified the imported magnets under HTSUS subheading 8505.19.3000, and (3) declared that the import was a Type 01 entry not subject to antidumping or countervailing duties. *See* Compl. Ex. A; Sumbi Decl. Ex. 1; Theirry Decl. ¶ 3. For the January Entry, Defendants: (1) described the merchandise in the invoice as "rubber magnetic sheet[s]" and (2) declared that the import was a Type 01 entry not subject to antidumping or countervailing duties. *See* Compl. Ex. A; Sumbi Decl. Ex. 4; Theirry Decl. ¶ 3.

Based on the entry papers and the sample provided by Mr. Delatorre, Customs determined that Defendants' descriptions of the imported magnets were inaccurate, the imported magnets should have been classified under HTSUS subheading 8505.19.1000, and the imported magnets should have been identified as subject to the antidumping and countervailing duty orders on raw flexible magnets from China. *See* Sumbi Decl. Exs. 7, 10. Customs found that the imported magnets fit within the descriptions of the merchandise covered by the antidumping and countervailing duty orders and that the exception for printed flexible magnets did not apply to Defendants' magnets. *See id.* at Ex. 14; *see also supra* Background n.12. Customs also consulted Commerce to confirm that the imported magnets were subject to the orders. *See* Sumbi Decl. Ex. 14. Defendants did not provide Customs with any reason as to why the imported magnets were outside the scope of the orders. Nor is there any evidence suggesting that the imported magnets were not covered by the scope of the orders and Defendants have not requested a scope ruling from Commerce regarding the imported magnets. Defendants' statements and information representing that the imported magnets were

not covered by the orders constituted false statements and information that were used to enter merchandise into the commerce of the United States.

A document, statement, act, or omission is material if it has "the tendency to influence Customs' decision in assessing duties." *United States v. Matthews*, 31 CIT 2075, 2080, 533 F. Supp. 2d 1307, 1312 (2007) (internal quotations omitted), *aff'd*, 329 Fed. Appx. 282 (Fed. Cir. 2009); *see also* 19 C.F.R. Pt. 171, App. B(B) (2011).[23] The statements at issue here concern the description of the imported merchandise provided within the commercial invoice, the asserted classification of the imported merchandise, and the declaration as to whether the imported merchandise is subject to antidumping or countervailing duties. All of this information is used by Customs to determine an importer's duty liability. That is precisely why the law imposes an affirmative obligation on the importer to exercise reasonable care and provide Customs with true and correct information. *See* 19 U.S.C. §§ 1484(a), 1485; *see also* 19 U.S.C. § 1481(a)(3) (requiring the importer to provide a detailed description of the merchandise in the commercial invoice); 19 U.S.C. § 1484(a)(1)(B) (requiring the importer to provide the classification and rate of duty applicable to the merchandise);[24] 19 C.F.R. § 141.61(c) (requiring the importer to identify whether the imported merchandise is subject to an antidumping or countervailing duty order). The false statements and information provided by Defendants in connection with the two entries affected Customs' ability to determine whether the imported magnets were subject to antidumping and countervailing duties. The false statements and information had the tendency to influence Customs' assessment of duties, and therefore constituted material statements and information under the statute. *See United States v. Horizon Prods. Int'l, Inc.*, 39 CIT __, 82 F. Supp. 3d 1350, 1356 (2015); *United States v. Optrex Am., Inc.*, 32 CIT 620, 631, 560 F. Supp. 2d 1326, 1336 (2008).

The court finds that the well-pled facts of the complaint and supporting declarations prove by a preponderance of the evidence that Defendants made statements and provided information that were material and false in violation of 19 U.S.C. § 1592(a). The Government has met its burden of proof to support the alleged negligent violations of the statute.

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[23] Further citations to Title 19 of the Code of Federal Regulations are to the 2011 edition.

[24] The court notes that the scope of the antidumping and countervailing duty orders provide the HTSUS subheadings under which the subject merchandise is classified to assist Customs in properly assessing importer liability for antidumping and countervailing duties. *AD Order*, 73 Fed. Reg. at 53,847; *CVD Order*, 73 Fed. Reg. at 53,850.

2. The Alleged Violator's Burden of Proof to Affirmatively Demonstrate that it Exercised Reasonable Care Under the Circumstances

Because the Government has met its burden of proof establishing that Defendants have committed acts that constitute negligent violations of 19 U.S.C. § 1592(a), the burden of proof shifts to Defendants to show by a preponderance of the evidence that they exercised reasonable care and "the act or omission did not occur as a result of negligence." 19 U.S.C. § 1592(e)(4); *see also Ford Motor Co.*, 463 F.3d at 1279. Defendants have not responded to Plaintiff's motion for default judgment and have not otherwise appeared in this action. There is no evidence before the court that suggests Defendants exercised reasonable care. Accordingly, Defendants are jointly and severally liable for negligent violations of 19 U.S.C. § 1592(a).[25]

B. Unpaid Duties

The Government seeks to recover $32,931.53 in unpaid duties. *See* Compl. ¶¶ 28–29; Pl.'s Mot. Entry Default J. 13–14. Based on the entry papers and the sample provided by Mr. Delatorre, Customs determined that Defendants' imported magnets were subject to the antidumping and countervailing duty orders on raw flexible magnets from China. Defendants were liable, therefore, to the Government for antidumping duties at a rate of 185.28 percent and countervailing duties at a rate of 109.95 percent. Defendants did not pay the duties. Government recovered $50,000 from Defendants' surety, leaving a remaining balance of $32,931.53 in unpaid duties. *See supra* Background nn.13, 15. Section 1592 provides that Customs shall require the restoration of "lawful duties, taxes, and fees" of which the United States may have been deprived as a result of a violation of § 1592(a), "whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d). The United States has been deprived of lawful antidumping and countervailing duties as a result of Defendants' negligent violations of

[25] Section 1592 provides that no "person" may, by fraud, gross negligence, or negligence, "enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false." 19 U.S.C. § 1592(a)(1)(A). As the importer of record, Deladiep, Inc. is a "person" for purposes of Section 1592. *See* 19 U.S.C. § 1401(d) (defining "[p]erson" as including "partnerships, associations, and corporations"). As the owner, president, and sole corporate officer of Deladiep, Inc., Mr. Delatorre was personally involved in introducing the imported magnets into the commerce of the United States and also subject to liability under Section 1592. *See United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1299 (Fed. Cir. 2014) (finding that an individual defendant's "own acts come within the language of [19 U.S.C. § 1592(a)(1)(A)]" for acting on behalf of the corporate importer of record). Thus, Defendants are jointly and severally liable for negligent violations of Section 1592.

19 U.S.C. § 1592(a). Accordingly, the court enters default judgment against Defendants for $32,931.53 in unpaid duties.

C. Pre-Judgment Interest

The Government seeks additional pre-judgment interest on the unpaid duties.[26] *See* Compl. ¶ 30; Pl.'s Mot. Entry Default J. It is within the court's discretion to award pre-judgment interest in actions brought by the Government to recover unpaid duties. *See United States v. Imperial Food Imports*, 834 F.2d 1013, 1016 (Fed. Cir. 1987). The purpose of awarding prejudgment interest is to "compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987). To determine whether to award the Government pre-judgment interest on unpaid duties, the court considers "'the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness.'" *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1326 (Fed. Cir. 2013) (quoting *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175–76 (1989)). Although Defendants are liable for negligent violations of 19 U.S.C. § 1592(a) (the lowest level of culpability under the statute), pre-judgment interest on the unpaid duties is appropriate here in order to compensate the Government for the loss of revenue and to make the Government whole. *See United States v. Am. Home Assurance Co.*, 789 F.3d 1313, 1329 (Fed. Cir. 2015) (providing that "full compensation should be the court's overriding concern"). Defendants failed to pay the duties owed, despite Customs' numerous requests. There is no evidence that the Government unreasonably delayed bringing this action after the conclusion of the underlying administrative penalty procedures. Therefore, the court awards the government pre-judgment interest on the unpaid duties from the date of Customs' final demand for payment through the date of the judgment issued concurrently with this opinion.[27] The pre-judgment interest shall be computed at the rate provided in 28 U.S.C. § 2644 and in accordance with 26 U.S.C. § 6621. *See United States v. Int'l Trading Servs., LLC*, 41 CIT __, 222 F. Supp. 3d 1325, 1336 (2017) (citing *Horizon Prods. Int'l, Inc.*, 39 CIT at __, 82 F. Supp. 3d at 1356).

[26] The Government initially sought pre- and post-judgment interest on the unpaid duties and the civil penalty, *see* Compl. ¶¶ 27, 30, but has only requested pre-judgment interest on the unpaid duties in its motion for default judgment. *See* Pl.'s Mot. Entry Default J.

[27] Customs issued its final demand for payment on January 9, 2014. *See* Theirry Decl. Ex. 3.

D. Penalty

The remaining issue is whether the Government is entitled to the requested statutory maximum civil penalty. *See* Compl. ¶¶ 23–27; Pl.'s Mot. Entry Default J. 13–14. The statute prescribes maximum civil penalties for violations of 19 U.S.C. § 1592 according to the degree of culpability. *See* 19 U.S.C. § 1592(c); *see also* S. Rep. No. 778, pt. 10, *reprinted in* 1978 U.S.C.C.A.N. 2211 (providing that the monetary penalty due to section 1592 violations varies according to the culpability of the importer). The maximum penalty allowed by statute for negligent violations of 19 U.S.C. § 1592 that affect the assessment of duties is the lesser of either the domestic value of the merchandise,[28] or "two times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(3)(A). The maximum penalty in this case is the domestic value of the imported merchandise, which Customs calculated as $87,740.60. *See supra* Background n.14. The court should not presume, however, that the requested maximum penalty is warranted. *See United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1370 (Fed. Cir. 2008) ("Not only do past cases state that nothing requires the court to grant Customs's request for the maximum penalty, they also explain that the court should not presume that the maximum is warranted."); *United States v. Complex Mach. Works Co.*, 23 CIT 942, 946, 83 F. Supp. 2d 1307, 1312 (1999) ("[T]he law requires the court to begin its reasoning on a clean slate. It does not start from any presumption that the maximum penalty is the most appropriate or that the penalty assessed or sought by the government has any special weight."). It is within the court's discretion to determine the appropriate amount of civil penalty for a violation of 19 U.S.C. § 1592(a). *See* 19 U.S.C. § 1592(e)(1) ("[A]ll issues, including the amount of the penalty, shall be tried *de novo"); Ford Motor Co.,* 463 F.3d at 1285.

The court ordinarily considers fourteen non-exclusive factors to determine the appropriate penalty amount.[29] *See Complex Mach. Works Co.*, 23 CIT at 949, 83 F. Supp. 2d at 1314. Defendants' failure to appear in this action, however, has left the court without a com-

[28] Customs' regulations define "domestic value" as "the price at which such or similar property is freely offered for sale at the time and place of appraisement." 19 C.F.R. § 162.43(a); *see also supra* Background n.14.

[29] The fourteen factors set forth in *Complex Mach. Works Co.* are: (1) the defendant's good faith effort to comply with the statute; (2) the defendant's degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the regulations involved; (5) the nature and circumstances of the violation at issue; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business; (9) that the penalty not otherwise be shocking to the conscious of the court; (10) the economic benefit gained by the defendant

plete record to fully consider the fourteen factors. *See Int'l Trading Servs., LLC*, 41 CIT at __, 222 F. Supp. 3d at 1334 (stating that the court's ability to analyze the fourteen factors is "hindered" by the defendant's failure to respond). When a defendant fails to appear, the court will determine the appropriate penalty amount in light of the totality of the evidence, weighing mitigating circumstances that support a lower penalty and aggravating circumstances that support a higher penalty. *See Horizon Prods. Int'l, Inc.*, 41 CIT at __, 229 F. Supp. 3d at 1378–79 (explaining the court's differing approaches in determining the appropriate amount of penalty); *Int'l Trading Servs., LLC*, 41 CIT at __, 222 F. Supp. 3d at 1334 (considering the *Complex Machine Works Co.* factors to the extent possible with an incomplete record due to the defendant's failure to respond).

The Government seeks the maximum penalty allowed by statute, but fails to explain why the penalty requested is appropriate in the circumstances of this case. *See* Compl. ¶¶ 23–27; Pl.'s Mot. Entry Default J. 13–14. A negligent violation of the statute, without more, does not warrant entering a judgment for the maximum penalty requested by the Government. The low degree of culpability (negligence), the absence of past violations of the statute, and the fact that this case involves only two entries weigh in Defendants' favor and support mitigation of the penalty. Defendants provided Customs with a sample of the imported magnets, *see* Sumbi Decl. Ex. 8, which enabled Customs to properly assess duties on the entries. Defendants had experience in importing merchandise, but were inexperienced in importing the magnets at issue that were subject to antidumping and countervailing duties. *See id.* at Ex. 11. The evidence suggests that Defendants would be unable to pay the antidumping and countervailing duties, let alone a penalty for negligent violations of 19 U.S.C. § 1592. *See id.* Defendants were apologetic and vowed not to import merchandise in the future without first consulting Customs. *See id.* The court does not observe any aggravating circumstances in this case.

At the same time, there is a significant public interest in imposing some penalty due to Defendants' negligence in providing Customs with materially false information and Defendants' failure to provide full and timely payment of duties. *See Complex Mach. Works Co.*, 23

through the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency authority; (13) whether the party sought to be protected by the statute had been adequately compensated for the harm; and (14) such other matters as justice may require. 23 CIT 942, 949–50, 83 F. Supp. 2d 1307, 1315. To summarize, the court considers the defendant's character, the seriousness of the offense, the practical effect of the imposition of the penalty, the benefit gained by the defendant, and public policy concerns. *See Complex Mach. Works Co.*, 23 CIT at 949–50, 83 F. Supp. 2d at 1316.

CIT at 952, 83 F. Supp. 2d at 1317 (citing *United States v. Modes, Inc.*, 17 CIT 627, 638, 826 F. Supp. 504, 514 (1993)). Defendants did not make a good faith effort to comply with the statute,[30] relied on a new customs broker without taking steps to ensure the accuracy of the entry paperwork, provided an untimely response to Customs' request for information, and were unresponsive to Customs' notices of action, pre-penalty notice, and demands for payment. Given the circumstances of the negligent violations of the statute in this case, the court finds it appropriate to assess a penalty in the amount of $17,548.12, which is twenty percent of the maximum penalty allowed by statute. This amount serves to penalize Defendants for their negligent violations of the statute and lack of cooperation at the administrative level, deters future violations, and reflects the magnitude of the wrongdoing.

CONCLUSION

For the foregoing reasons, the Government's motion for default judgment against Deladiep, Inc. and John Delatorre is granted in part. The court will enter a default judgment against Defendants in the amount of $32,931.53 for unpaid customs duties, plus pre-judgment interest, and $17,548.12 as a civil penalty.

Dated: August 23, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

[30] Customs' guidelines suggest that a good faith effort to comply with the statute requires "exhibit[ing] extraordinary cooperation beyond that expected from a person under investigation for a Customs violation" or taking "immediate remedial action." 19 C.F.R. Part 171, App. B(G)(2)–(3).

Slip Op. 17–109

BMW of NORTH AMERICA LLC, Plaintiff, v. UNITED STATES, Defendant, and the TIMKEN COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 15–00052

[Sustaining the U.S. Department of Commerce's remand redetermination in the 2010–2011 administrative review of the antidumping duty order on ball bearings and parts thereof from the United Kingdom.]

Dated: August 32, 2017

Max F. Schutzman, Ned H. Marshak, Kavita Mohan, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY and Washington, DC, for Plaintiff BMW of North America LLC.

Tara Kathleen Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Shelby M. Anderson*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Geert M. De Prest, Terence P. Stewart, Lane S. Hurewitz, Stewart and Stewart, of Washington, DC, for Defendant-Intervenor The Timken Company.

OPINION

Choe-Groves, Judge:

This action was brought by BMW of North America LLC ("BMW" or "Plaintiff") to challenge the final determination in the 2010–2011 administrative review of the antidumping duty order on ball bearings and parts thereof from the United Kingdom. *See Ball Bearings and Parts Thereof From Japan and the United Kingdom*, 80 Fed. Reg. 4,248 (Dep't Commerce Jan. 27, 2015) (final results for administrative review 2010–2011), *as amended*, 80 Fed. Reg. 9,694 (Dep't Commerce Feb. 24, 2015) (amended final results for administrative review 2010–2011) (collectively, "Final Results"). Before the court are the Results of Remand Redetermination, ECF No. 77–1, May 12, 2017 ("Remand Results"), filed by the U.S. Department of Commerce ("Commerce" or "Department") pursuant to the court's remand order in *BMW of North America LLC v. United States*, 41 CIT __, 208 F. Supp. 3d 1388 (2017) ("*BMW").* For the reasons set forth below, the court sustains the Remand Results.

BACKGROUND

Commerce issued the antidumping duty order on ball bearings from the United Kingdom on May 15, 1989. *See Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom*,

54 Fed. Reg. 20,910 (Dep't Commerce May 15, 1989) (antidumping duty orders and amendments to the final determinations of sales at less than fair value) ("Order"). Commerce published the notice of initiation of the 2010–2011 administrative review on June 28, 2011. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 Fed. Reg. 37,781 (Dep't Commerce June 28, 2011). Challenges to the International Trade Commission's determination in the second sunset review of the Order resulted in Commerce revoking the Order and discontinuing all pending administrative reviews, including the 2010–2011 review. *See NSK Corp. v. United States*, 35 C.I.T. __, 774 F. Supp. 2d 1296 (2011); *Ball Bearings and Parts Thereof From Japan and the United Kingdom*, 76 Fed. Reg. 41,761 (Dep't Commerce Jul. 15, 2011) (revocation of antidumping duty orders). The Order was later reinstated following a decision by the Court of Appeals for the Federal Circuit in *NSK Corp v. U.S. Int'l. Trade Comm'n*, 716 F.3d 1352 (Fed. Cir. 2013). *See NSK Corp. v. U.S. Int'l. Trade Comm'n*, 37 CIT __, Slip Op. 13–143 (Nov. 18, 2013); *Ball Bearings and Parts Thereof From Japan and the United Kingdom*, 78 Fed. Reg. 76,104 (Dep't Commerce Dec. 16, 2013) (notice of reinstatement of antidumping duty order, resumption of administrative reviews, and advance notification of sunset reviews) ("Reinstatement Notice"). In reinstating the Order, Commerce stated that it was resuming any previously discontinued administrative reviews, including the 2010–2011 review. *See* Reinstatement Notice at 76,105–06.

Commerce issued the Final Results on January 27, 2015, with amended results issued on February 24, 2015. *See* Final Results at 4,248 *as amended* 80 Fed. Reg. at 9,694. In the Final Results, Commerce determined that BMW had not cooperated to the best of its ability, applied an adverse inference in selecting from facts otherwise available ("AFA"), and assigned BMW a dumping margin of 254.25 percent that was selected from the petition. *See* Final Results at 4,248 *as amended* 80 Fed. Reg. at 9,694; Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Ball Bearings and Parts Thereof from the United Kingdom; 2010–2011, A-412–801, (Jan. 22, 2015), *available at* http://enforcement.trade.gov/frn/summary /multiple/2015–01481–1.pdf (last visited Aug. 15, 2017) ("I&D Memo").

Plaintiff filed the instant action challenging Commerce's determination and asserting that Commerce (1) did not have the authority to resume the administrative review, (2) should not have applied AFA in calculating the dumping margin, and (3) should not have selected the

petition rate of 254.25 percent in applying AFA. *See* Compl., Feb. 27, 2016, ECF No. 7; Pl.'s Rule 56.2 Mot. J. Upon Agency R., Sept. 18, 2015, ECF No. 29. The court sustained Commerce's decisions to resume the administrative review[1] and apply AFA in calculating BMW's dumping margin.[2] *BMW*, 41 CIT at __, 208 F. Supp. 3d at 1393–95. The court remanded the Department's use of the petition rate in its application of AFA. *See id.* at __, 208 F. Supp. 3d at 1395–97. In remanding the issue, the court explained that Commerce did not meet its statutory obligation to corroborate the petition rate because:

> First, Commerce failed to explain how the fact that the petition rate was numerically between . . . transaction-specific rates calculated for the mandatory respondent was sufficient data to adequately corroborate the use of the 254.25 percent rate against Plaintiff. Second, the Department did not adequately explain why the mere fact that [the mandatory respondent] "had transaction-specific dumping margins in excess of 254.25 percent," I&D Memo at 15, was sufficient to corroborate the probative value of the petition rate given that [these rates represented a small number of transactions during the review].

Id. at __, 208 F. Supp. 3d at 1397. The court found that Commerce's determination to assign BMW the rate of 254.25 percent was unsupported by substantial evidence. *See id.* Accordingly, the court instructed Commerce to either provide a new corroboration analysis for the petition rate or select a new rate with AFA applied. *See id.* at __, 208 F. Supp. 3d at 1398.

The Department filed the Remand Results on May 12, 2017, in which it assigned BMW a rate of 126.44 percent based on a transaction-specific margin calculated for the mandatory respondent, NSK Europe Ltd. and NSK Bearings Europe Ltd. (collectively, "NSK"). *See* Remand Results. Plaintiff continues to challenge the rate assigned by Commerce, and Defendant asserts that Commerce's remand results should be sustained. *See* BMW's Comments on Results of Remand Redetermination, June 9, 2017, ECF No. 83 ("BMW Re-

[1] The court found that the Department's resumption of a discontinued administrative review was consistent with its obligations under the statute and regulations. *See BMW*, 41 CIT at __, 208 F. Supp. 3d at 1393–94.

[2] BMW's first substantive filing with Commerce occurred after Commerce issued the preliminary results of the administrative review. *See* BMW's Direct Admin. Case Brief, PD 71 at bar code 3237085–01 (Oct. 23, 2014). In the Final Results, Commerce determined that BMW was uncooperative because BMW missed the deadline to either file a Quantity and Value questionnaire response or withdraw its request for an administrative review. *See* I&D Memo 11–13. The court determined that Commerce's application of AFA against BMW was reasonable because BMW had not acted to the best of its ability in participating in the administrative review. *See BMW*, 41 CIT at __, 208 F. Supp. 3d at 1394–95.

mand Comments"); Def.'s Resp. BMW of North America LLC's Comments on Remand Redetermination, July 7, 2017, ECF 87 ("Def. Resp.").

JURISDICTION

The court has jurisdiction over an action challenging the final determination in an administrative review of an antidumping duty order. *See* 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court will uphold Commerce's determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record or otherwise not in accordance with the law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). When reviewing substantial evidence challenges to Commerce's decisions, the court assesses whether the agency action is "unreasonable" given the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F.Supp.2d 1303, 1306 (2008)).

DISCUSSION

Plaintiff challenges the Remand Results on the grounds that Commerce's determination to use the transaction-specific rate of 126.44 percent in applying AFA was unsupported by substantial evidence. *See* BMW Remand Comments 7–24. Plaintiff claims that the rate is aberrational, unlawfully punitive, and not related to BMW's commercial reality. *See id.* at 7–24. Defendant rejects Plaintiff's challenges and asserts that Commerce has supported its rate selection with sufficient evidence. *See* Def. Resp. 7–19. Defendant argues that even though the transaction-specific rate is high, the assigned rate should not be viewed as aberrational and punitive because it was selected for the purpose of inducing cooperation. *See id.* at 15–19. Defendant asserts further that Commerce was not required to consider commercial reality in analyzing the selected rate and, even if it were required to contemplate this factor, the selected rate relates to BMW's commercial reality. *See id.* at 8–17.

If Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "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). When the Department selects a rate

in applying AFA, it may use information from the petition, a final determination in the investigation, any previous review, or any other information on the record.[3] *See id.* at § 1677e(b)(2).

The court affirmed Commerce's determination to apply AFA against BMW in its earlier opinion, but remanded the issue of Commerce's assignment to BMW of a dumping margin of 254.25 percent. *See BMW*, 41 CIT at __, 208 F. Supp. 3d at 1395. In the Remand Results, Commerce assigned BMW a new rate of 126.44 percent in applying AFA, which was selected from a transaction-specific rate calculated for NSK. *See* Remand Results 6. The Department asserted that it was not required to corroborate this rate because it was based on a transaction-specific margin for NSK in the instant review. *See id.* at 8. Commerce is not required to corroborate the use of information on the record that was obtained during the instant segment of the proceeding (i.e., primary information). *See* 19 U.S.C. § 1677e(c). The newly selected transaction-specific margin of 126.44 percent constitutes primary information that may be utilized in selecting an AFA rate, *see Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1348 (Fed. Cir. 2016), and Commerce correctly noted that it was not required to corroborate the use of primary information.[4] *See* Remand Results 8.

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[3] Commerce's regulations reflect that information from the petition, a final determination in the investigation, or any previous review constitute secondary information. *See* 19 C.F.R. 351.308(c)(1)–(2) & (d) (2013).

[4] The court notes that the Trade Preferences Extension Act ("TPEA") recently amended the corroboration requirement in 19 U.S.C. § 1677e. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). Both the pre-TPEA and post-TPEA versions of the statutory scheme only contemplate the corroboration of secondary information. Prior to the enactment of the TPEA, 19 U.S.C. § 1677e(c) read as follows:

> (c) Corroboration of secondary information. When [Commerce] relies on secondary information rather than on information obtained in the course of an investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal

19 U.S.C. § 1677e(c). The TPEA amended this section to provide the following:

> (c) Corroboration of secondary information
>
> (1) In general. Except as provided in paragraph (2), when [Commerce] relies on secondary information rather than on information obtained in the course of an investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.
>
> (2) Exception. [Commerce] shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding.

19 U.S.C. § 1677e(c). The court need not reach the issue of whether the TPEA applies to Commerce's Remand Results because under either version of the statute, it is evident that Commerce is not required to corroborate the use of primary information when applying AFA.

Plaintiff contends that the remand results are unsupported by substantial evidence because the assigned rate is aberrational and punitive. *See* BMW Remand Comments 7–24. While the Department has discretion to select a rate from information placed on the record of the instant review, a rate assigned pursuant to the Department's application of AFA should not be aberrational or punitive. *See F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). The Department explained that the 126.44 percent rate was selected "because it is the highest transaction-specific dumping margin that forms part of a closely-connected range of transaction-specific margins." Remand Results 6. Commerce noted that the rate was the highest transaction-specific margin that fell outside of the top transaction-specific margins, which the court previously indicated were aberrational. *See id.; BMW,* 41 CIT at __, 208 F. Supp. 3d at 1397. The Department clarified further that: 1) the quantity was not unusual for the model sold in this transaction; 2) the price of this sale was not unusual for the model sold in this transaction; 3) although a rebate was involved in this transaction, the respondent provided rebates in several other transactions of this model for a similar amount; and 4) although there was air freight involved, the respondent had utilized air freight in several other transactions of this model for a similar cost. *See* Remand Results 6–7. The Department's analysis indicates that the 126.44 percent rate, while high, was neither aberrational nor punitive. Commerce exercised its statutory discretion in applying AFA and selected a rate from the highest, non-aberrational, transaction-specific margin. The selected rate strikes a reasonable balance, as it serves the goal of inducing cooperation with Commerce's administrative review procedures and is not based on an aberrational rate. *See De Cecco*, 216 F.3d at 1032–33. The court finds that Commerce complied with its statutory obligations and supported its determination to assign a 126.44 percent margin with substantial evidence.

The court instructed Commerce in its remand order to either corroborate the use of the 254.25 percent petition rate or determine a new AFA rate consistent with the agency's obligations. *See BMW*, 41 CIT at __, 208 F. Supp. 3d at 1398. The Department chose to determine a new rate of 126.44 percent in applying AFA, which is reasonable and consistent with the Department's obligations. *See* Remand Results 1–6.

CONCLUSION

For the reasons set forth above, the court finds that Commerce has complied with the court's previous opinion and remand order in selecting a new AFA rate that was supported by substantial evidence. The court sustains Commerce's remand redetermination.

Judgment will be issued accordingly.

Dated: August 23, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 17–110

MEYER CORPORATION, U.S., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00154

[Cross-motions for partial summary judgment granted in part and denied in part.]

Dated: August 23, 2017

John P. Donohue and *Rachel B. Weil*, Reed Smith, LLP, of Philadelphia, PA, and *Joseph M. Donley* and *Christopher M. Brubaker*, Clark Hill, PLC, of Philadelphia, PA, for the plaintiff.

Beverly A. Farrell, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, of Washington, DC, for the defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director; Of Counsel on the brief was *Paula S. Smith*, Attorney, Office of Assistant Chief Counsel. International Trade litigation, U.S. Customs and Border Protection, of Washington, DC.

OPINION AND ORDER

Musgrave, Senior Judge:

This test case[1] concerns protests to and denial thereof by U.S. Customs and Border Protection ("Customs") with respect to the plaintiff's claims on certain sets of cookware imported into the United States for preferential treatment under the Generalized System of Preferences ("GSP"), 19 U.S.C. §2461, *et sequentes*. Exported from Thailand, a GSP-designated "beneficiary developing country" ("BDC"), the imports were declared on entry to consist of sets of pot(s) and/or pan(s) made in that country that had been packaged together with one or more glass lids imported into Thailand from the non-BDC country of their manufacture, the People's Republic of China ("PRC"). The goods were denied preferential treatment in part due to the presence of the lids among the sets.

Now before the court are the parties' cross-motions for partial summary judgment on two of the three issues raised by the plaintiff's complaint, to wit: (1) whether the sets are disqualified from GSP preferential treatment by reason of the presence of the non-BDC component and (2) whether the sets are properly appraised on the basis of "first sale" transaction value.[2] The defendant also moves to dismiss Entry No. 304–0214721–6 from the case. Jurisdiction here

[1] The plaintiff has suspended some 21 other actions hereunder, all purportedly involving similar issues.

[2] The plaintiff holds the last of its causes of action in reserve. That issue is whether certain raw materials undergo a double (or dual) substantial transformation in Thailand. For exemplar analyses of that requirement, *see. e.g., Azteca Milling Co. v. United States*, 12 CIT 1153, 703 F. Supp. 949 (1988), *aff'd*, 890 F.2d 1150 (Fed. Cir. 1989); *Torrington Co. v. United States*, 8 CIT 150, 596 F. Supp. 1083 (1984), *aff'd*, 764 F.2d 1563 (Fed. Cir. 1985).

being properly invoked *per* 28 U.S.C. §1581(a) and the material facts[3] not being in dispute, summary disposition of the two issues presented via partial cross-motions for judgment, *see* USCIT R. 56, as well as the defendant's further rule 12(b)(1) motion is appropriate. Further, the quality of the parties' able briefing to this point obviates the need for oral argument; therefore, the plaintiff's motion therefor can be, and hereby is, denied as moot.

The following explains denial of the defendant's rule 12(b)(1) motion and rulings on the issues of substance.

Discussion

I

The defendant argues Entry No. 304–0214721–6 should be dismissed because the plaintiff's amended complaint avers that this action covers only entries made at the Port of San Francisco, California, whereas Entry No. 304–0214721–6 was entered at the Port of Los Angeles, California, and is the subject of another action, CIT Court No. 13–00226. The plaintiff opposes, arguing that such a factual discrepancy is inconsequential, that the motion does not argue a jurisdictional challenge (*e.g.*, that the protest was not timely summoned before the court), and that to the extent the discrepancy requires resolution it requests that it be permitted to amend its complaint a second time (with a formal second amended filing, if form is to be exalted over substance)[4] — to which the defendant responds that the plaintiff should be held to its explicit statement that this action "contests the denial of certain protests filed by the Plaintiff with the Port Director of Customs at San Francisco, California." Def's Mem. of Law in Reply to Pl's Opp. to Def's Cross-Motion for Partial Summ. J. ("Def's Reply") at 16, quoting Am. Compl. ¶1.

The arguments on the substance of the case do not concern the particular port(s) through which the plaintiff made its entries, but the defendant's more significant point is that the plaintiff has not justi-

[3] A minor wrinkle is that while some sets are specified as including other non-BDC implements imported into Thailand, the country of origin of certain sets' other cooking implements of has not been so specified, but such uncertainty is immaterial to disposition of the cross motions.

[4] The plaintiff further explains that this case encompasses a very large number of entries, probably in excess of 1,000, made at different ports, and that it sought to ease the burden on the Clerk's office by trying to limit one summons to entries made at a single port to that the Clerk's office would not need to write multiple letters to multiple Port Directors when the process could be more efficiently managed; that the first summons, *i.e.*, this case, was intended to cover entries made at the Port of San Francisco and that the inclusion of Entry No. 304–0214721–6 in this case was an inadvertent oversight and should not be the basis for a motion to dismiss.

fied bringing two actions concerning the same protest and entry. At any rate, jurisdiction over Entry No. 304–0214721–6 commenced with the filing of this case. *E.g., Heraeous-Amersil, Inc. v. United States,* 1 CIT 249, 515 F. Supp. 770 (1981). On that basis, the instant motion to dismiss will be, and hereby is, denied, and the summons and amended complaint of the matter at bar will be, and they hereby are, construed without the need for formal amendment as encompassing Entry No. 304–0214721–6 of protest 2704–12–103427. Whether jurisdiction over that same entry could attach subsequently via Court No. 13–00226 is a question for that case, in which issue has not been joined, and which is not technically *sub judice*. *See* USCIT R. 84(a). Any further comment here with respect thereto would amount to mere *dicta*.

II

A

The parties do not dispute the propriety of classifying the imported cookware under subheading 7323.93.0045 of the Harmonized Tariff Schedule of the United States ("HTSUS"), the tariff provision for "table, kitchen or household articles . . . Of stainless steel." *See, e.g.,* Pl's Rule 56.3 Statement of Undisputed Facts ("Pl's SUF") ¶24. Also undisputed is that the cookware were classifiable as "sets." Some were classified pursuant to Rule 1 of the General Rules of Interpretation ("GRI"), HTSUS, and the remainder apparently classified pursuant to GRI 3(b).[5] But whether classified pursuant to GRI 1 or GRI 3(b), if an import is properly considered to be a "set," then the set obtains a single customs classification for the entirety rather than separate classifications for the set's constituent parts, which is indeed how the parties approached the issue of classification.

Considering the imports to be sets as such, Customs proceeded accordingly. Relying on Treasury Decision ("T.D.") 91–7, 25 Cust. B. & Dec. 7 (Jan 8, 1991), Customs denied the plaintiff's protests on the

[5] GRI 1 provides, *inter alia*, that "classification shall be determined according to the terms of the headings and any relative section or chapter notes" while GRI 3(b) provides in relevant part that "goods put up in sets for retail sale . . . shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable." Explanatory Note ("EN") (X) to the ENs for GRI 3(b) elaborates that "the term 'goods put up in sets for retail sale' shall be taken to mean goods which: (a) consist of at least two different *articles* which are, *prima facie*, classifiable in different headings . . . ; (b) consist of products or *articles* put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking (*e.g.*, in boxes or cases or on boards)." EN (X) to GRI 3(b) (italics added). "Six fondue forks", for example, do not form a "set" pursuant to requirement (a). . *Id Cf. What Every Member of the Trade Community Should Know About: Classification of Sets* at 9 (U.S. Dep't of Homeland Security, Informed Compliance Pub., March 2004).

sets' preferential tariff treatment, due, in part as indicated, to the presence of the non-BDC component glass lid(s) at the time of entry. *Cf.* 19 C.F.R. §102.11 (country of origin). T.D. 91–7 came into being after the "product of" requirement was added to the GSP statute in the wake of *Madison Galleries, Ltd. v. United States*, 12 CIT 485, 688 F. Supp. 1544 (1988), *aff'd*, 870 F.2d 627 (Fed. Cir. 1989).[6] T.D. 91–7 sets forth: (1) that, based on General Note 3(a)(iii), HTSUS, the first step to determining whether GSP may be applicable to an imported article is to identify the proper classification under the HTSUS for it and determine if a special rate is available for that subheading; (2) that if such a rate is available, then the next step is to confirm that the article satisfies all of the requirements for eligibility; (3) that for sets that are classifiable through the use of GRI 3(b) rather than GRI 1, classification of the set as a whole is determined by the item that imparts the essential character of the set[7]; (4) that, in order to be considered the growth, product, or manufacture of a BDC, goods imported into the BDC from a non-BDC country must undergo a "substantial transformation" in the BDC[8]; and (5) that under the GSP, an article must satisfy the 35 percent value/content requirement[9].

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[6] *See* 19 U.S.C. §2463(a)(2). *Madison Galleries* addressed certain imported plates that had first been produced as "blanks" in a non-BDC country and then advanced in value in amounts exceeding 35 percent of their appraised value by application of finishing artwork in a BDC country. Customs took the position that the finished plates were not eligible for GSP treatment because the plate was not a "product of" the BDC country; however, both courts affirmed that the only statutory conditions for the grant of duty-free treatment at the time were that the subject merchandise be "directly shipped" from the BDC country, that 35 percent or more of the appraised value of the subject article originate in the BDC country, and that the"substantial transformation" requirement in the relevant Customs' regulation was therefore inapplicable regardless of that regulation's consistency with the GSP statute; therefore, because the imported plates satisfied the statutory conditions, the merchandise attained GSP treatment. The relevant regulation, 19 C.F.R. §10.177(a), provided, then as now, as follows:

> "*Produced in the beneficiary developing country" defined*. For purposes of §§ 10.171 through 10.178, the words "produced in the beneficiary developing country" refer to the constituent materials of which the eligible article is composed which are either:
>
> (1) Wholly the growth, product, or manufacture of the [BDC]; or
>
> (2) Substantially transformed in the [BDC] into a new and different article of commerce.

19 C.F.R. §10.177(a).

[7] Or, in other words, if the essential character of the set satisfies a subheading that includes a provision for GSP treatment, then the entire set could be eligible for GSP treatment.

[8] Or, in other words, the "product of" requirement would render an entire set ineligible for GSP treatment when it contains an item or component that cannot be regarded as a "product of" the BDC, which was now in contrast to such sets' treatment of GSP eligibility prior to amendment of the GSP statute.

[9] Or, in other words, the cost or value of the materials produced in the BDC and the direct costs of processing operation in the BDC must be equal to or greater than that fraction of the appraised value of the article.

The papers argue over T.D. 91–7, over how to interpret the GSP statute for purposes of sets classification, and also over the applicability of *Uniden Corp. v. United States*, 24 CIT 1191, 120 F. Supp. 2d 1091 (2000), a case that considered a GSP claim on a cordless phone imported as a set with a detachable component (an A/C adapter) of PRC origin. That decision concluded, albeit in a footnote, that the "35 percent" test is used to determine what proportion of "an article" qualifies as the product of a BDC, which means the substantial transformation test is applied to "fractions" of the article rather than to the article as a whole, in order to determine "which components" may be considered for GSP purposes as originating in the BDC, whereas the "product of" test considers the article as a whole to determine if it is "wholly" the product of the BDC or has been substantially transformed therein. "[T]he mere fact that one detachable component is not a BDC product does not automatically disqualify the entire article from GSP eligibility." *Uniden*, 24 CIT at 1196 n.5, 120 F. Supp. 2d at 1096 n.5.

The defendant argues *Uniden* was decided incorrectly and that a significant degree of deference should be afforded to T.D. 91–7, *per* the following: (1) in 19 U.S.C. §2463(a), Congress sought to induce trade from "least-developed beneficiary developing countries" directly to the United States, and Customs, understandably, did not want those countries abused as mere "pass-through" facilities; (2) Congress, for whatever reason, "left a gap" for the agency to "fill" and T.D. 91–7 filled that gap as an interpretative rule of general applicability,[10] and unlike a ruling limited to a particular import transaction it was published in the Customs Bulletin and was issued with a degree of formality greater than the ruling at issue in *Mead*[11] and more proxi-

[10] Elaborating further: Customs is authorized by statute not only "to issue rules and regulations governing the admission of articles under the provisions of the tariff schedule" pertaining to a claim for classification that would provide total or partial relief from duty or other import restrictions "on the basis of facts not determinable from an examination of the article itself in its condition as imported", General Note 8, HTSUS (1991), it is also charged with prescribing rules and regulations, consistent with law, to be used in carrying out the provisions of the law relating to raising revenue from imports or to duties on imports. 19 U.S.C. §66. Among the regulations so prescribed therefrom is 19 C.F.R. §177.8(b), which provides that the agency may issue, in addition to rulings addressing a specific importer's transactions, "other rulings with respect to issues or transactions described or suggested by requests for rulings submitted under the provisions of this part, or with respect to issues or transactions otherwise brought to its attention." The regulation further explains that "[t]hese rulings, which are statements of the official position of the Customs Service [that] are likely to be of widespread interest and application, are published in the Customs Bulletin, as described in §177.10." 19 C.F.R. §177.8(b). The defendant contends Customs issued T.D. 91–7 consistent with such authority.

[11] *United States v. Mead Corp.*, 533 U.S. 218 (2000).

mate to the level of formality expected for *Chevron*[12] deference despite not having been subject to notice-and-comment; (4) the statutory and regulatory scheme surrounding the administration of tariff preference programs, tariff classification and other like issues is highly detailed and complex, and Customs brings the benefit of specialized experience to bear on the subtle questions addressed in T.D. 91–7; (5) T.D. 91–7 creates consistency in treatment of GRI 3(b) goods for GSP, Caribbean Basin Initiative, the Automotive Products Trade Act, the Agreement on Trade in Civil Aircraft, and other similar trade preference programs as well as treating GRI 3(b) goods in the same manner as GRI 1 goods; (6) T.D. 91–7 as a whole establishes consistent treatment of sets and composite goods on three key issues that can intersect, *i.e.*, marking, preferential tariff programs, and American Goods returned; and (7) T.D. 91–7 has been consistently applied by the agency since its issuance, for example in HQ 556451(Jan. 28, 1992), HQ 561454 (Dec. 14, 1999), HQ 556798 (Sep. 23, 1993), HQ 956347 (Aug. 30, 1994), HQ 963453 (Feb. 26, 2001) and HQ 555999 (Nov. 20, 1991).

To which the plaintiff responds that *Chevron* is inapplicable, because the statute's meaning is "plain". Pl's Opp. to Def's X- Mot at 8. The plaintiff criticizes T.D. 91–7 as adding a fourth requirement (that every single one of the components of a set claiming GSP preferential treatment must be the "product of" a BDC including substantial transformation thereof therein) that does not exist in the statute, and the plaintiff stresses that *Uniden* did address the same legal question that is relevant here (*i.e.*, whether a single detached component could be the basis, without more, of a disqualification for GSP treatment) and held that it could not, after reasoning that the GSP statute mandates that the "product of" rule and the 35 percent rule of substantial transformation must be read as applying to "the article" as a whole.

The defendant, curiously, "agree[s] with the *Uniden* court that the 'product of' requirement must be applied not to each detachable component, but to the imported article as a whole", but it then contends "the article as a whole includes all of its detachable components, and in Meyer's case all of those components are not the 'growth, product, or manufacture' of the BDC." Def's Resp. at 27. In any event, the defendant's expressed concern over "finding that only the component which imparts the essential character to the finished article must be substantially transformed would open the door for all kinds of significant non-originating goods to be included with origi-

[12] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

nating goods to receive GSP treatment", *id*., is not unreasonable. On the other hand, this court does not agree with the defendant's statement which follows: "[a]n approach more keeping with the purpose of GSP (and the statutory amendment adding a 'product of' requirement to GSP) is to interpret the statute to require that all integral (*i.e.*, non *de minimis*) component pieces of the finished article must be substantially transformed", *see id*. Indeed, after considering the parties' papers and the law, such as it is, this court is unpersuaded by either party's argument on how the GSP statute applies to this "sets" case.

B

In considering the GSP statute, the court concludes that neither *Uniden* nor T.D. 91–7 is adequate to the context here, and that a fresh approach is necessary. *Cf. Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99 (1991) ("[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law") (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). That approach stems from the parties' disagreement, which actually indicates agreement: that despite amendment, the GSP statute does not specifically address how the additional "product of" requirement and the existing "35 percent of appraised value" requirement are to be applied to the context of sets containing both BDC and non-BDC components that are discreet and detachable for purposes of the GSP trade preference program.

The problem confronting the prospect of GSP eligibility for the Thai-made pots and pans of these cookware sets at entry was the fact that, generally speaking, by classifying the entirety of a set under a single tariff provision pursuant to GRI 3(b), thereby the HTSUS may seem to force the assumption of a single country of origin for the purpose of its components' dutiability as well.[13] *See, e.g.* T.D. 91–7, 25 Cust. B. & Dec. at 14–16. The parties also appear to have proceeded on the assumption that "article" in the GSP statute can be construed to cover a single rate of duty (including duty-free) for a "set" containing both BDC components and non-BDC components, and thus the

[13] Further speaking generally, international trade flows are currently computed by attributing the full commercial value of a product to the origin of the last country where it underwent substantial transformation. *Cf.* 19 U.S.C. §1304 (marking of articles) *and* 19 U.S.C. §1485 (entry declaration) *with* 19 C.F.R. §141.86(a) ("[e]ach invoice of imported merchandise, must set forth . . . [t]he country of origin of the merchandise") *and* 19 C.F.R. §134.1(b)("[c]ountry of origin means the country of manufacture, production, or growth of any article of foreign origin entering the United States" and "[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country the country of origin") (internal quotes omitted).

Thai-made pots and pans were presented on entry as one or more of the component parts of the kinds of sets that obtain a singular tariff classification pursuant GRI 3(b). And it is axiomatic, of course, that merchandise is evaluated in its condition as imported on entry. *E.g., Worthington v. Robbins*, 139 U.S. 337 (1891).

Obviously, the set as a whole was manifested in a single country when the pots/pans were packaged in combination with the lids, cooking implements, *et cetera*. But, 19 U.S.C. §2463(a)(2)(B) denies that "an article" becomes the growth, product or manufacture of a BDC merely by having undergone, *inter alia*, "simple combining or packaging operations". That does not mean, of course, that the presence of the non-BDC component rendered the entered merchandise "not sets" as such, only that, contrary to the plaintiff's assertions in this regard, the defendant is correct in arguing that merely being put up for sale as part of a pot/pan set combination changes nothing about the character, "essential" or otherwise, of the lids. *See also* 19 C.F.R. §10.176(a)(2).

On the other hand, this is not, apparently, a case of a BDC being used as a "pass through" operation for the purpose of combining a non-BDC component with BDC components, which is to say this is not a case of non-BDC lids being exported "in search of" BDC components with which they could combine and thereby avoid customs duties. The tariff provision under which the imports were classified, subheading 7323.93.00, HTSUS, is not in dispute, implying that the "of iron or steel" characteristic of these stainless steel, Thai-made, table, kitchen and other household articles obviously imparted their sets' essential character, and that the glass and/or the lids of non-BDC origin did not.[14] In short, it is the pots and pans, regardless of their country of origin, that informed the classification of these sets under a single tariff provision.[15] But that does not answer the question of the proper dutiability of the sets: that question is informed by the sets' constitution.

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[14] Obviously, and to the extent further discussion of essential character is even necessary here: the essence of pots and pans is to contain and cook, and they can serve those functions with or without lids; and while lids may complete or enhance that purpose, they are merely incidental thereto and serve no purpose otherwise without the pots/pans to which they are intended to be fitted or combined.

[15] Which is consistent with the fact that classification under the HTSUS is driven first and foremost by what the article *is*, not where it comes from. *Cf., e.g.,* 25 Cust. B. & Dec. at 14 ("the first step in determining whether sets or mixed or composite goods are entitled to special duty treatment under one or more of the tariff preference programs is to ascertain the proper classification of the article pursuant to the GRI's"). Only after a determination on what the article is do the other facets of customs duty concerns come into play: *exampli gratia*, country of origin, *et cetera*.

In T.D. 91–7's discussion of subheading 9801.00.10, HTSUS, which provides for duty-free (re)entry of merchandise of U.S. origin that has not been advanced in value or improved in condition while abroad (*i.e.*, not having undergone substantial transformation abroad, which is analogous to the glass lids at issue after importation into Thailand), Customs considered the circumstance of a battery-charger set consisting of both U.S.-origin and foreign-origin component articles. Subscribing to the views expressed in *Superscope, Inc. v. United States*, 13 CIT 997, 727 F. Supp. 629 (1989), Customs first rejected the argument "that if two items in a four-item set are granted subheading 9801.00.10, HTSUS, treatment, the remaining two foreign-origin items may no longer qualify, by themselves, as a set and, therefore, each item should be separately classified." 25 Cust. B. & Dec. at 10:

> In our opinion, a set or mixed or composite goods can exist, within the meaning of GRI 3(b), even though a portion of the collection consists of American goods returned. . . . [T]he presence of American goods returned in a set (also containing foreign-origin items) should not destroy the identity of the set and frustrate the purpose of GRI 3(b), which is to facilitate the classification of sets, mixtures and composite goods by permitting the components or items to be classified under a single HTSUS heading.

Id. Customs then explained that as a practical matter it would classify sets consistent with GRI 3(b) under the tariff provision that covers the item in the set that imparts the set's essential character, and would then determine whether any of the items in the set qualify for duty free treatment under subheading 9801.0010, HTSUS — in other words, the items would be classified as a set in Chapters 1–97, HTSUS, but Customs would apply a "classification allowance" under Chapter 98 for qualifying items within the set. *Id*. at 11–12.

That is indeed practical. And reasonable. However, in T.D. 91–7's discussion of the eligibility of sets for special tariff treatment programs, Customs did not apply similar reasoning but assumed that the addition of the "product of" requirement to the GSP statute meant each component of a set claiming a preferential rate must be the "product of" the BDC, or the set as a whole would not be granted preferential treatment. *See id*. at 14–15.GRI 3(b). This assumption is incorrect.

The plain language of the GSP statute extends trade preference to "articles". It does not extend to countries *per se*, but confers authority on the President to designate any or all of the "articles" of a BDC as "eligible articles." 19 U.S.C. §2463(a)(1). Of "sets," there is no indication. And it is notable that in 19 U.S.C. §2463 the plural form of the

term is used in subsection (a)(1) while the singular form is used in subsections (a)(2)'s and (a)(3)'s description of the three requirements for preferential treatment: (1) the "article" must be "wholly"[16] the growth, product or manufacture of the BDC (*i.e.*, the "product of" requirement), (2) the "article" must be imported directly from the BDC to the United States, and (3) the sum of the cost or value of the materials produced in the BDC and the direct costs of processing operations performed in the BDC must be at least 35 percent of the appraised value of the "article" (*i.e.*, the "35% requirement"). *See* 19 U.S.C. §2463(a)(2).

Congressional use of the plural and the singular ("article") cannot be read as unintentional. Similarly, the references to the plural forms in the statutory provision that is GRI 3(b), HTSUS, which appear therein, are likewise construed intentional, *e.g.*, in the phrase (italics added) "*goods* put up in sets for retail sale . . . shall be classified as if *they* consisted of the material or component which gives them *their* essential character" *et cetera*. EN (X), as already noted, clarifies that "the term 'goods put up in sets for retail sale' [*i.e.*, "sets"] shall be taken to mean goods which: (a) consist of at least two different *articles* which are, *prima facie*, classifiable in different headings . . . ; (b) consist of products or *articles* put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking (*e.g.*, in boxes or cases or on boards)." EN (X) to GRI 3(b) (italics added).[17]

"Article" and "set" are not interchangeable terms. In common parlance, "an article" might be used to refer to a "set", but the reverse is not true. For classification purposes, "set" is shorthand for an aggregate, comprised of at least two different articles intended to a common or complementary purpose, but it is a distinct term with a distinct meaning. *See id*. Further obvious is the fact that there is nothing inherent about a "set" that requires for classification purposes that it be comprised of articles from a single country of origin, as is the logic that simply because two or more articles have different countries of origin does not mean that those articles cannot constitute a set. *See* 25 Cust. B. & Dec. at 10, *supra*. Indeed, T.D. 91–7 itself recognized the reality of that "difficulty" by requiring components of sets to be marked with their respective countries of origin. *See id.* at 17. It is also noteworthy that the distinction between "article" and "set" in

[16] *Cf.* 19 U.S.C. §2463(a)(2) ("growth, product, or manufacture of a" BDC) *with id*. §2463(a)(3)(A) ("*wholly* the growth, product, or manufacture of a" BDC) (italics added).

[17] "The EN provide persuasive guidance and 'are generally indicative of the proper interpretation,' though they do not constitute binding authority." *Schlumberger Technology Corp. v. United States*, 845 F.3d 1158, 1164 (Fed. Cir. 2017), quoting *Kahrs International, Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013).

U.S. customs law has for long predated the GSP, which was established by the 1974 Trade Act, and the HTSUS, which was established by the 1988 Omnibus Trade and Competitiveness Act,[18] and enactment of the HTSUS or GSP did not alter the understanding of these terms in customs law.

In view of the foregoing, the court concludes that by assuming that the GSP statute and its requirements can be construed *as a description of* (and are therefore intended to be directly applicable to the question of preferential treatment for) the singular "set" *taken as a whole (i.e.,* as "an article"), the parties' assumption unreasonably conflates customs classification pursuant to GRI 3(b) with the special preferential treatment of the singular "an article" (*i.e.*, whether or not "an article" is imported as part of a set) that Congress intended the GSP statute to benefit. The defendant urges deference to TD 91–7, but to the extent T.D. 91–7 has the effect of denying preferential treatment to "an article" that is otherwise eligible for the benefit of GSP simply because it has been "put up in sets for retail sale" together with one or more non-BDC component articles that are not *de minimis*, the purpose of the GSP statute is thereby undermined. In turn, the plaintiff argues that its sets when analyzed as a whole satisfy the GSP requirements for eligibility, but allowing a non-*de minimis* non-BDC component article the benefit of preferential tariff treatment simply by virtue of its being a component part of the set would also undermine the purpose of the GSP statute. Either instance contorts the GSP statute into covering a condition that is beyond that which the language adopted by Congress apparently contemplates.

Simply put: classification pursuant to GRI 3(b) of "an article" (*e.g.* a set) is a distinct consideration apart from preferential duty-free treatment of "an article", and the two articles are not at the same level of consideration. Customs classification, *i.e.*, the process of official import recognition, is based on the *contours* of the set, as a whole, while GSP analysis, which is concerned with dutiability, considers whether and to what extent preferential treatment extends to the *content* of the set. The defendant argues Customs' rulings recognize a *de minimis* exception to the general proposition that the "product of" criterion requires that all non-originating components of a set be substantially transformed into the finished product, but allowing the inclusion of "some" non-BDC content in a set as a "carve out" winds up collapsing that rule: if the GSP statute's use of "article" is to be

[18] *See, e.g., United States v. Citroen,* 223 U.S. 407, 413 (1912), (construing certain act of 1897, *inter alia*, on "[a]rticles commonly known as jewelry. . . including precious stones set, pearls set or strung").

interpreted as encompassing a set, then Congress has already spoken to that very issue in the 35 percent cost/value content requirement for "an article", and the parties both agree that it is the "article" (set) taken as a whole (*i.e.,* the component "articles" thereof) that is the appropriate consideration. *See Uniden*, 24 CIT at 1196 n.5, 120 F. Supp. 2d at 1096 n.5.

In the final analysis, at any rate, the court holds that Customs denied preferential tariff treatment to the Thai-made components of the set on the basis of an assumption that is invalid as a matter of law. Whether the Thai-made components of the set are entitled to duty-free treatment under the GSP as a matter of fact remains to be determined, but it is at least clear to the court that the non-BDC components of the set are not entitled to such treatment upon reliquidation.

That leads to the question of what that reliquidation should entail.[19] Do the non-BDC items of the sets obtain the rate of duty applicable to the set as a whole, as classified under subheading 7323.93.0045, HTSUS? Or, applying the inverse here of Customs' rationale with respect to the item of the battery-charger set that obtained the "classification allowance" of a *different* provision of the HTSUS from which the "set as a whole" was classified, is the rate of duty applicable to the non-BDC component(s) that which is applicable to the individual article itself, in this instance the sets' glass lids, which would appear, *prima facie*, to be dutiable pursuant to a provision of heading 7013, HTSUS? Further briefing of this issue before a decision thereon can be reached is desirable, *but see "Conclusion", infra.*

[19] In its letter of August 6, 2010 to Customs Headquarters seeking advice, the plaintiff asked whether (and thereby it would appear to agree that), "under the authority of 19 C.F.R. §141.52, [it could] simply make two entries, or create two tariff lines on a single entry, one for the lids, dutiable, and one for the rest of the set, duty-free under GSP". Customs' response, after acknowledging the requirements of 19 C.F.R. §141.52 (*inter alia*, if a port director is satisfied that there will be no prejudice to "the revenue" then "separate entries may be made for different portions of all merchandise arriving on one vessel or vehicle and consigned to one consignee under" any of the circumstances listed therein with Customs' prior approval), concluded that "[i]n the circumstances of this case, there would be prejudice to the revenue and therefore, we find that 19 CFR 141.52 is inapplicable." Headquarters Ruling ("HQ") H088815 (Sep 28, 2011) at 13. The response is facially conclusory and circular, apparently assuming the validity of 91–7 on the issue, while the papers here do not reasonably support concluding that "the revenue" is entitled to duties from Thai-made pots and pans that would appear, *prima facie*, to be entitled to GSP eligibility, whether imported alone or as part of a set. But for Customs' statement in that regard, the sets might have been entered bearing invoices with individual line items for the sets' BDC and non-BDC components, rather than, as entered, simply bearing declarations of each set as a whole. At any rate, it appears that in order to reliquidate these sets it will be no mean feat for the parties to determine the applicable column, either the "Special" preferential treatment column or the "General" treatment column of column 1 and/or the column 2 rate, HTSUS, for the sets' component articles under whatever subheading(s) is/are appropriate, but that is the only just result here.

III

The foregoing appears to moot the plaintiff's arguments on the impact the appraised value of the merchandise had on the denominator of the formula Customs used for the 35 percent content required for GSP benefits, but there remains the question of the appropriate dutiable value of the imported sets in their own right. Thus the next phase of this opinion addresses the parties' arguments on whether the plaintiff's cookware is viably valued at the price established between the Thai producer and a middleman, both of whom are related to the plaintiff, or, as Customs held, on the basis of the price established between the plaintiff's related-party middleman and the plaintiff itself.

A

The issue here concerns the appraisal of the sets at entry. The preferred method is on the basis of transaction value. *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1366 (Fed. Cir. 2002). *See generally* 19 U.S.C. § 1401a. When the manufacturer and the middleman are related entities, the first sale price is to be used if it is a viable transaction value, and it is viable if the price paid can be determined to have been reached "at arm's length, in the absence of any non-market influences that affect the legitimacy of the sales price." *Nissho Iwai America Corp. v. United States*, 982 F.2d 505, 509 (Fed. Cir. 1992). *See* in particular 19 U.S.C. §1401a(b)(2)(B).

One method Customs uses to evaluate the circumstances of sale is to determine whether the price paid is adequate to ensure recovery of all costs plus a profit that is equivalent to the firm's overall profit realized over a representative period of time in sales of merchandise of the same class or kind. 19 C.F.R. §152.103(*l*)(1)(iii). *See, e.g.,* Def's Resp. at 4. Relying on this "costs plus profit" test, the plaintiff, through its consultant, presented to Customs port officials an analysis of the Thai producer's profit on the sets' sales to the middleman using a "full cost markup method" and also as compared to a benchmarking study of the rate of profit earned by "12 comparable, independent Thai manufacturers of cookware." *See generally* Plaintiff's Rule 56.3 Statement of Undisputed Facts ("Pl's SUF") ¶¶ 44–57. Although Customs initially approved of the plaintiff's proposed first sale valuation, it subsequently rejected such valuation during a 2009 audit,[20] and HQ 088815, dated September 28, 2011, upheld that finding.

[20] Customs Audit Report 811–07-OFO-AU-21434 (Aug. 31, 2009) ("Audit Report").

Here, apart from an apparently material factual dispute over the actual amount (*i.e.*, percent) of profit in question, *cf.* Pl's SUF ¶¶ 48–49 *with* ¶69, the plaintiff claims the legal dispute is over the definition of "firm" in regulation 152.103(*l*)(1)(iii). It argues with respect thereto that the relevant profits are those of the entity that actually manufactures the goods at issue, not those of the parent company which neither produces nor sells any goods, and that Customs' interpretation of "firm" only deserves *Skidmore* deference[21] at best.

The defendant contends that Customs did not make a determination that the plaintiff's parent was the "firm" of section 152.103(*l*)(1)(iii), but that Customs generally interprets the term "firm" in the "costs plus profits" test to mean the parent company anyway, and that the issue here is actually whether Customs erred in denying the protests when the burden was on it, the plaintiff, to demonstrate the acceptability of related-party first-sale valuation treatment for its imports, and when it simply failed to meet that burden. The defendant argues the plaintiff's parent's profits are indeed relevant to that consideration, and specifically to the question of whether the relationship of the parties influenced the price actually paid, and that therefore Customs was justified in seeking financial information pertaining to the plaintiff's parent during the internal audit leading up to the issuance of HQ H088815. *See* Def. Ex. R at 4, 20. The plaintiff did not provide Customs with any financial documents for its parent, *id.*, and it has not provided such documents during this litigation.

B

On a threshold point, the plaintiff responds that the defendant waived the issue of its failure to provide financial documents from its parent company by not moving to compel production. However, given the plaintiff's objection that its parent is a separate legal entity over whose documents the plaintiff has no possession, custody or control, the defendant correctly responds that it could not move to compel the plaintiff to produce these documents unless the defendant were able to establish an alter ego relationship between the parent and subsidiary(s) or there are facts to suggest that the plaintiff is able to obtain documents from its parent in the ordinary course of business. The

[21] *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("[t]he weight [judicially accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); *see also United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore*).

defendant is therefore correct in arguing that it did not waive the issue by not filing a motion for which it did not have grounds.

C

The court's decision here is guided by *Nissho Iwai*, which was clear in articulating that the "first sale"

> rule only applies where there is a legitimate choice between two statutorily viable transaction values. The manufacturer's price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and the middleman deal with each other at arm's length, in the absence of any non-market influences that affect the legitimacy of the sales price.

Nissho Iwai, 982 F.2d at 509 (italics added).

The plaintiff complains that Customs did not seek financial information about its parent in order to assess the "second" sale, *i.e.*, the price paid by the plaintiff as importer to the middleman, Pl's Resp. at 18, but that issue is not before the court, only the claim of "first sale" treatment for which the burden is on the importer to establish that the manufacturer and middleman dealt with one another at "arm's length." All of the entities relevant to that issue are related, and therefore the financial information pertaining to the parent is also relevant to examining whether any non-market influences affect the legitimacy of the sales price. *See id*. Those influences can include, for example, parental support or guidance that has a market-distortive effect on the cost of inputs or of financing, which in turn can translate a "booked" profit on a particular sale into one that, in reality, is unrepresentative of sales of merchandise of the same class or kind that have been made without the distortion of non-market influences. The glass lids in the sets at bar were procured from the PRC, and the court takes judicial notice of the fact that the United States has yet to recognize that the PRC has attained "market economy" status under Article 15(a)(ii) and (d) of the PRC's agreement to the World Trade Organization,[22] and thus it presumptively remains a non-market economy in this and other proceedings. Given that reality, in order to overcome that presumption what is missing from the statements of undisputed facts at bar is any indication of whether the plaintiff-related Thai producer procured the glass lids from an unrelated entity and/or at "arm's length," which goes to the question of "the absence of any non-market influences that affect the legitimacy of the

[22] Protocol on the Accession of the People's Republic of China, WT/L432 (Nov. 23, 2001).

sales price." This matters, because the determination of whether a particular valuation test may be appropriate is based on the record as developed before the court, *see* 28 U.S.C. §2640, and the burden is on the plaintiff to make that showing. In the absence thereof, on the facts as alleged, no reasonable market-based conclusions can be drawn at this point from the profit comparisons the plaintiffs aver with respect to the plaintiff-related Thai producer's profits.

Finally, the plaintiff argues that Customs is trying to "walk a tightrope" because it could choose to have the appraisement of its goods using computed value, one element of which is "an amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation for export to the United States." Pl's Resp. at 19. But, as the defendant points out, the argument appears to conflate one of the elements of computed value with the "all costs plus a profit" test of 10 C.F.R. §152.103(*l*)(1)(iii). The elements used to calculate computed value are not relevant to the issue of whether Customs was justified in seeking relevant financial information in order to examine the relationship of related parties pursuant to a requested to accept first-sale transaction valuation.

The court has considered the other arguments raised in the briefs and concludes that, while most are not without merit, the foregoing disposes of the concerns expressed therein and that explicit discussion of them would not advance the opinion(s) already expressed here.

Conclusion

In view of the foregoing, plaintiff's motion for partial summary judgment can be granted in part as to the GSP eligibility of the BDC-component(s) of its imported cookware sets and also denied in part as to the GSP eligibility of the non-BDC-component(s) of its sets and denied with respect to the issue of whether Customs erred as a matter of law in denying the sets first sale transaction valuation treatment. Defendant's cross-motion for partial summary judgment must therefore be denied in part as to the GSP eligibility of the BDC-component(s) of plaintiffs' imported cookware sets and granted in part as to the GSP eligibility of the non-BDC-component(s) of plaintiffs' sets and also granted with respect to the issue of whether Customs erred as a matter of law in denying the sets first sale transaction valuation treatment on the evidence presented at the administrative level.

Briefing of that issue also reveals disputed material facts. The parties are therefore to confer and propose how to proceed to final disposition of this test case and the matters suspended thereunder by September 22, 2017.

So Ordered.

Dated: August 23, 2017
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 17–111

LA MOLISANA S.P.A, Plaintiff, v. UNITED STATES, Defendant, and NEW WORLD PASTA CO. and DAKATA GROWERS PASTA CO., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 16–00047

[Remanding eighteenth administrative review of certain pasta from Italy.]

Dated: August 23, 2017

David J. Craven and *Saichang Xu*, Sandler, Travis & Rosenberg, of Chicago, IL, for the plaintiff.

Elizabeth Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. On the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel was *Mykhalo Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Paul C. Rosenthal and *David C. Smith*, Kelley Drye & Warren LLP, of Washington, DC, for the defendant-intervenors.

OPINION AND ORDER

Musgrave, Senior Judge:

The plaintiff, La Molisana S.p.A., challenges two determinations from the eighteenth (2013–2014) antidumping duty administrative review of certain dry pasta from Italy[1] : (1) whether the U.S. Department of Commerce, International Trade Administration ("Commerce" or "Department") erred in requiring La Molisana's pasta sales product shapes to be reported without variance from the proceeding's pasta shape classification list; and whether Commerce failed to provide meaningful opportunity for addressing the agency's differential pricing analysis. This being a timely-filed matter described by 19 U.S.C. §1516a(a)(2), subsections (A)(i)(I) and (B)(iii), jurisdiction is proper under 28 U.S.C. §1581(c). The standard of review is substantial evidence on the record. 19 U.S.C. §1516a(b)(1)(B)(i). The case will be remanded *per* the following.

[1] *Certain Pasta From Italy: Final Results of Antidumping Administrative Review; 2013–2014*, 81 Fed. Reg. 8043 (Feb. 17, 2016) ("*Final Results*"); *Certain Pasta From Italy: Amended Final Results of Antidumping Duty Administrative Review; 2013–2104*, 8l Fed. Reg. 12690 (Mar. 10, 2016) ("*Amended Final Results*") and the accompanying issues and decision memorandum ("*IDM*"), PDoc 228. Citations to other specific administrative reviews are herein abbreviated "AR" followed by its numeric sequence.

Discussion

I

A. Background

The pasta shape classification list provides for eight different types of shape categories: (1) long cuts (*e.g.*, linguine, spaghetti), (2) specialty long cuts (*e.g.*, capellini, fioccini), (3) nested/folded/coiled, (4) lasagna, (5) short cuts (*e.g.*, fagiolini, medium shells), (6) specialty short cuts (*e.g.*, mezzanelli, pasta mista), (7) soupettes (*e.g.*, ditali, corallini), and (8) combination of shapes. *E.g.*, Initial Questionnaire ("IQ") (Oct. 3, 2014), PDoc 24, at B-8, C-7. Appendix III of the IQ sent to all respondents lists some 256 different shapes and their corresponding control number category (*i.e.*, CONNUMs) and provided therein in relevant part is as follows:

> SHAPE CLASSIFICATION
>
> *You are required* to classify the pasta types reported in field 3.9 into one of the shape categories specified in field 3.1 in accordance with the questionnaire examples and the attached "Classification of Pasta Shapes." *If you sold pasta in shapes that do not appear on the attached list*, please use the most similar pasta type on this list as a guide for determining the appropriate shape classification. Support any such classification with a description and picture of the pasta type, the production line on which it is produced, the standard production capacity of that line (*e.g.*, pounds per hour), and the line speed (*e.g.*, pounds per hour) for the pasta type in question. Please note that any revisions in shape classification must also be reflected in control numbers and variable manufacturing cost information.

IQ at 151 (or Appx. III at 4; italics added).

Long (and linear) cuts are made on long cut pasta machines and short cuts are made on short cut pasta machines. Once the determination of long or short is made, the question is then whether a cut is a "standard" or "special" cut, which for purposes of this matter is a critical distinction: the "dividing line" is not due to any physical differences in pasta cuts within the long or short shape categories but due to the higher production costs that would be associated with the slower line speeds of the latter. *See, e.g., Certain Pasta From Italy,* 78 Fed. Reg. 9364 (Feb. 8, 2013) (AR15 final) and accompanying issues and decision memorandum (all such memoranda hereinafter "I&D Memo") at cmt 1; *Certain Pasta From Italy*, 64 Fed. Reg. 6615 (Feb. 10, 1999) (*inter alia* AR1 final) and accompanying I&D Memo at cmt 7.

Commerce attempts to frame La Molisana's dispute as a disagreement with methodology, but the parties rather appear in agreement that the methodology is proper and long standing. Onward since the 1996 investigation, Commerce's practice has been to use a 75 percent line-speed benchmark to distinguish "speciality" cuts from "regular" cuts produced on the same long or short production line. *See, e.g., id.* La Molisana's initial Section B and C questionnaire responses included detailed exhibits in which the production speeds of the various shapes which La Molisana believed were improperly categorized in Commerce's shape list and which La Molisana believed should be re-classified. La Molisana also included as part of this exhibit a list of those shapes which it believed did not appear on Commerce list and, using the same methodology, placed these shapes into what it believed to be appropriate categories. *See* LM Response to Sections B and C of the IQ (Dec. 2, 2014), CDocs 38–54, at Exs B-1 and C-1. La Molisana had submitted pictures of these shapes as part of its Section A response. *See* LM Response to Section A of the IQ (Nov. 5, 2015), PDocs 34–39, at Ex A-13(a).

About a month later, Commerce issued a supplemental questionnaire ("SQ") to La Molisana stating:

> 1. In your [Section B Questionnaire Response,] page 2, and at Ex B-2, you state that you classified shapes "by taking the production speed for the cut on one of the lines as compared to the production speed for a shape classified by the Department in a particular category." However, *the Department does not classify products by production characteristics, rather through sales characteristics*. Please assign shape codes to each of your observations in the home market and U.S. market databases according to the shape classifications included in Appendix III of the initial questionnaire. *If you believe a change in the model match is warranted, you must submit a formal request to the Department for a change to the model match methodology*.

SQ (Jan. 6, 2015), PDoc 86, at 2. (bracketing and italics added; footnote omitted).

La Molisana requested clarification of this instruction on January 13, 2015, noting Commerce's extant practice. Commerce's reply three days later to this request was as follows:

> A. Please report your shapes, and the appropriate shape code, *according to the existing list of classifications* as presented in Appendix III of the Initial Questionnaire.

> B. For shapes not listed in Appendix III, please report the characteristics based on the most similar shape listed in Appendix III.

Dep't Resp. to Request for Clarification (Jan. 16, 2015), PDoc 92, at 2 (italics added).

Believing it had already placed on the record the correct classifications, La Molisana explains, in order to avoid confusion resulting from multiple competing databases it sent in a database of the shapes as Commerce apparently wanted them (re)classified, but it did so under protest, noting at the time that it intended to raise this issue in its administrative case brief. In that brief, La Molisana argued Commerce had failed to follow the established methodology for shape classification in this order and further argued against the methodology imposed by Commerce in this review, *i.e.*, Appendix III governs a shape's classification regardless of any information on the record as to production line speed for that shape. *See* LM Case Brief (Oct. 6, 2015), CDoc 240, at 2–4.

In the *IDM*, Commerce refused to allow the reclassification of the shapes but did not directly address whether the methodology had shape-shifted to sales-based from production-based; rather, Commerce indicated that the shape methodology was essentially immutable, that the list had been "refined", and that Commerce need not consider certain proffered facts. Commerce stated:

> Although a 75 percent throughput rate has been used to distinguish pasta shape for specialty long and short pasta cuts, we have never allowed respondents to reclassify pasta shape classifications based on its own reported line speeds without providing the requisite evidence to support such a reclassification. Furthermore, we have not allowed respondents to reclassify pasta shapes that are already included in the pasta shape classification table.

IDM at 6.

B. Argument

La Molisana argues generally that the above statement in the *IDM* is factually inaccurate, both with respect to the review in question and also with respect to categorical statements about what has and has not been allowed in prior reviews of this order. First, it notes that the statement is directly contradicted by Commerce's instructions in Appendix III, in which is stated in relevant part: "Please note that any revisions in shape classification" *et cetera*. *See* IQ at 151, *supra*. Thus, La Molisana argues that the questionnaire instructions them-

selves clearly contemplated revisions to the existing list of shapes, and that if Commerce's subsequent statement that the list of shapes is essentially immutable and that respondents are not allowed to reclassify shapes were true, then any provision providing for the "revision" of shapes would be rendered a nullity.

Second, La Molisana notes that Commerce has, in fact, allowed respondents to reclassify shapes that were included in the pasta shape classification table. In the I&D Memo for the fourth (1999–2000) administrative review,[2] for example, Commerce stated: "For those cuts which PAM believed were specialty cuts yet the Department considered a regular cut (or vice versa), it provided the line speed data. We reviewed this information and accepted the revised shape classification as provided by PAM." AR4 I&D Memo at issue 19. Thus, Commerce has expressly allowed parties in other segments to re-classify shapes on the shape list. Further, La Molisana criticizes the defendant's attempt to dismiss Commerce's own decision in AR15 through claiming that such decision stood for the proposition that Commerce did not reclassify shapes, but La Molisana points out that stance is undercut by the language of AR15 itself:

> In the investigation the Department used a 75 percent throughput rate to distinguish pasta shape for specialty long and short pasta cuts. We do not use the throughput rates to further differentiate between specialty short and super-specialty short or specialty long and super-specialty long. Based on the throughput rates of the pasta at issue, we can classify them as specialty short and specialty long because the line speed or the throughput rates are 75 percent or less than the corresponding line speed or throughput rates of the short and long pasta.

AR15 I&D Memo at cmt 1. As this language makes clear, and as previously noted, Commerce since the investigation has used speed as the dividing point between special and regular cuts, and it is production speed, not sales characteristics, which apparently controls that distinction. And in considering the record of AR5, *Certain Pasta From Italy*, 68 Fed. Reg. 6882 (Feb. 11, 2003), the court previously acknowledged "other evidence on the record that appears to show that line speed is a shorthand for shape." *New World Pasta Co. v. United States*, 28 CIT 290, 309 n.22, 316 F. Supp. 2d 1338, 1355 n.22 (2004). La Molisana contends that if Commerce's standard is that the production speed drives whether or not a cut is standard or special but for the administrative review at bar refused to consider any evidence showing the relative production speeds of certain cuts, then Com-

[2] *See I&D Memo accompanying Certain Pasta From Italy, 67 Fed. Reg. 300 (Jan. 3, 2002) (inter alia, AR4 final).*

merce has not actually abided by its own standard but made an arbitrary decision not based on an actual review of production data, which is not in accordance with *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Insurance Co.*, 463 U.S. 29, 43 (1983) (an agency's determination is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency", *etc*.).

Third, La Molisana argues that Commerce "did not even try" (LM Br. at 13) to explain the departure from its prior practices and rather appears to have misconstrued both prior practice from other reviews and the positions that it had taken in this review. Commerce claimed that it never allowed "reclassifications" of products on Commerce's shape list and that a "formal request" (whatever that means) to modify the shape methodology was not made and that insufficient information was placed on the record. Yet, as discussed above, Commerce not only has considered the reclassification of shapes, it has expressly allowed this and expressly contemplated this in the questionnaire.

Fourth, La Molisana contends it was not asking that Commerce "modify" its shape methodology but rather was simply asking that Commerce apply the existing methodology to the facts of record including the information provided by La Molisana, and La Molisana submits that the information placed on the record in this review would appear to be similar to that placed on the record in AR4 (the 4th review of the antidumping duty order on pasta from Italy); and that if the record were not sufficient without supplementation then Commerce should have asked for more information. In AR4, Commerce did not believe the information to be sufficient to sustain the claim and issued a supplemental questionnaire requesting more information. AR4 I&D Memo at issue 17. La Molisana thus argues that to the extent that Commerce believed the information La Molisana submitted was insufficient, then Commerce should have followed extant precedent and asked for further detail from La Molisana; but rather than requesting this information, Commerce essentially enumerated a "new standard" based on sales (*i.e.*, an "immutable" list of shapes) and not on production; and when confronted with the fact that this was a different standard it wound up further mischaracterizing its own practice.

C. Analysis

The court cannot agree that Commerce enumerated a "new" standard. Rather, for this proceeding Commerce appears to have ossified

in its approach to "considering" the facts before it. The court, thus, can agree with La Molisana that Commerce's practice, as established by both administrative and judicial precedent, is quite clear, and that Commerce must follow its prior decisions unless it is able to provide a reasoned explanation for the departure from such decisions. *See Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988) ("it is . . . a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure"); *Cinsa S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997) ("Commerce . . . cannot arbitrarily abandon a relied[-]upon methodology", it "can reach different determinations in separate administrative reviews but it must employ the same methodology or give reasons for changing its practice"); *RHP Bearings Ltd. v. United States*, 24 CIT 1218, 1226, 120 F. Supp. 2d 1116, 1124 (2000) (application of a "special rule" in only two prior reviews does not form a "long-established practice" but Commerce is still obliged "to explain the apparent inconsistency of its approach in this review and the two preceding reviews"). *See also American Silicon Technologies v. United States*, 22 CIT 776, 777, 19 F. Supp. 2d 1121, 1123 (1998).

La Molisana is correct that an immutable list cannot take into account any changes in technology in the production of a cut nor the specific "shape" of the cut produced by each producer nor the speeds of each producer's machines. However, La Molisana undercuts its own argument to a certain degree in pointing out that each pasta producer uses its own unique dies, and that a shape produced by one producer will not necessarily be identical to that of another producer. The defendant thus correctly implies that the shapes list is not company-specific. *See, e.g.,* Def's Resp. at 17 ("taken to its logical conclusion, permitting classifications based on company-specific line speeds would result in a system in which (1) physically identical pasta could have different classifications, and (2) the pasta would be classified by something other than its physical characteristics") (internal quotes omitted; referencing 19 U.S.C. §1677(16)(A)) On the other hand, the defendant goes too far in attempting to characterize La Molisana's arguments as an "attempt to replace the well-established shape classification in the model match methodology with a system based on company-specific line speeds." *Id*. at 9. The court does not interpret La Molisana's arguments to that extent.

Further, the defendant argues "La Molisana has not demonstrated that the well-established shape classification list, which was proposed by Italian pasta respondents in the original investigation,[ ] and

further refined in subsequent reviews, is unreasonable" *Id*. at 14 (footnote omitted). The argument presumes perfection in Appendix III for this review, *i.e.*, that the listed shapes and their corresponding CONNUM categories are indeed immutable, and yet, as also acknowledged, the list has been subject to at least four revisions over the years. While it appears true, as the defendant also contends, that the list reflects a "shape-based approach [to] match[ ] foreign pasta to domestic pasta based on the 'physical characteristics' of the pasta, which is precisely what 19 U.S.C. §1677(16)(A) requires"[3], it is plain that the list is also divided over those "physical characteristics" by presumed production line speed at the start of each administrative review segment, and it is well-established that each such segment is to be considered a separate proceeding with its own unique facts. *E.g., Shandong Huarong Machinery Co. v. United States,* 29 CIT 484, 491 (2005). The questionnaire itself contemplates the possibility of revisions and, by implication, the right of parties to seek them. La Molisana placed on the record specific information about the line speeds used for the production of its various cuts of pasta and why the cuts that it sought to re-classify were produced at the same line speeds as exemplar cuts. *See* CDocs 38–54, *supra*, at Exs B-1 and C-1. La Molisana argues that this information demonstrated that some of the cuts which Commerce had placed on the list as "special" cuts, were in fact produced at the same speed as that of standard cuts. The record being plain that consideration of this claim is what La Molisana sought, to which the record and argument here reflect no adequate rejoinder, the matter will therefore be remanded therefor.

II

The second issue concerns Commerce's differential pricing analysis. In the preliminary results Commerce determined that the differential pricing analysis did not produce a meaningful difference between the use of average to average ("A-A") when compared to average to transaction ("A-T"). *Certain Pasta From Italy*, 80 Fed. Reg. 47467 (Aug. 7, 2015) (prelim. results) and accompanying preliminary decision memorandum, PDoc 183 (Aug. 3, 2015), at 8. Anticipating that when Commerce corrected any errors it might revisit this issue, La Molisana submitted arguments in its case brief challenging Commerce's differential pricing analysis and the potential use of the A-T methodology. CDoc 240 at 11–12. These included a discussion of the seasonality of the product and other factors that could explain a difference in price.

[3] Def's Resp. at 15, referencing *New World Pasta Co. v. United States*, 28 CIT 290, 306, 316 F. Supp. 2d 1338, 1352 (2004).

In the *Final Results*, as reflected in the *IDM*, Commerce did not consider La Molisana's arguments because they were mooted by the finding in the preliminary results that the difference was not meaningful. However, in the amended final results Commerce determined to apply the differential pricing analysis and to use A-T methodology. Amended Final Calculation Memorandum, PDoc 237, CDoc 264 (Mar. 7, 2016). Commerce did not address any of the arguments La Molisana presented but appears to have simply ruled that since the A-T methodology produced a higher rate than the A-A methodology, it was more accurate and thus should be used. La Molisana complains Commerce neither stated why a "higher" rate is necessarily more accurate nor addressed any of the concerns raised in its case brief.

The defendant voluntarily requests remand in order to place its analysis and determination on the record. The defendant-intervenors oppose remand and argue for sustaining Commerce's determination because when La Molisana alleged clerical error in the *Final Results*, it must have understood that the consequence of that allegation would result in halving its dumping margin, which in turn would trigger a re-calculation that would invoke use of the A-T methodology. But the court has been provided no basis on which to draw such ultimate conclusion, and it is still a fundamental tenet of these matters that an agency must "articulate a[ ] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). *See also SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947) (courts judge the propriety of agency action solely on the ground invoked by the agency and are powerless to substitute "a more adequate or proper basis"). Remand to Commerce to address the record is appropriate. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).

Conclusion

The matter is hereby remanded to the Department of Commerce, International Trade Administration with instruction to reconsider La Molisana's arguments on the application of the speed/shape methodology to the facts of record and also to supplement the record with articulated consideration of La Molisana's administrative case brief comments regarding the differential pricing issue. The results of remand shall be due November 30, 2017, and within five days of such filing the parties shall confer and file with the court either a proposed briefing schedule for commenting on the remand results or other indication of proceeding to final disposition. So Ordered.

Dated: August 23, 2017
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 17–112

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

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

JUDGMENT

Before the court is the mandate of the United States Court of Appeals for the Federal Circuit ("Court of Appeals") in *Boomerang Tube LLC v. United States*, 856 F.3d 908 (Fed. Cir. 2017) (*"Boomerang II"*). CAFC Mandate in Appeal Nos. 2016–1554 and 2016–1561 (June 29, 2017), ECF No. 175. In *Boomerang II*, the Court of Appeals vacated the judgment the court entered in favor of defendant United States in *Boomerang Tube LLC v. United States*, 39 CIT __, 125 F. Supp. 3d 1357 (2015) (*"Boomerang I"*).

In *Boomerang I*, a consolidated action, various plaintiffs contested a final negative less-than-fair-value determination the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), issued following an antidumping duty investigation on certain oil country tubular goods ("OCTG") from Saudi Arabia. In the final determination, Commerce determined a *de minimis* weighted-average dumping margin for the only investigated respondent and, accordingly, terminated the investigation without issuing an antidumping duty order. *Boomerang I*, 39 CIT at __, 125 F. Supp. 3d at 1361. The sole investigated respondent was an entity consisting of Jubail Energy Services Co. ("JESCO"), a Saudi producer, and its affiliated exporter, Duferco SA; Commerce treated these two companies as a single respondent for purposes of the investigation. *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1360.

In *Boomerang I*, this court ruled on two motions for judgment on the agency record, which were submitted under USCIT Rule 56.2 by U.S. producers of steel tube products that participated as petitioners in the antidumping duty investigation. One motion was made by United States Steel Corporation ("U.S. Steel"), the other by Boomerang Tube LLC, TMK IPSCO, Energex Tube, and Welded Tube USA Inc. Both motions were based on claims that Commerce, in calculating the normal value of the merchandise subject to investigation according to the constructed value ("CV") method, failed to determine constructed value profit according to a "reasonable method" as required by 19 U.S.C. § 1677b(e)(2)(B). *Id.*, 39 CIT at __, 125 F. Supp. 3d. at 1361. All plaintiffs argued that Commerce impermissibly based CV profit on the profit realized in certain of the sales transactions

between JESCO and an affiliated distributor in Colombia. *Id.* Defendant and defendant-intervenors argued, *inter alia*, that plaintiffs had failed to exhaust their administrative remedies, having failed to raise certain arguments in their case briefs before Commerce during the investigation. *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1361–63. Defendant and defendant-intervenors maintained that "petitioners were on notice that Commerce might rely on Duferco SA/JESCO's sales to Colombia to calculate CV profit because JESCO proposed in its case brief that Commerce use the Colombia sales to determine CV profit." *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1362. *Boomerang I* rejected the arguments alleging a failure to exhaust, noting that Commerce did not base constructed value profit on the Colombia sales in the preliminary less-than-fair-value determination, that the case and rebuttal briefs were due at Commerce in May 2014, and that it was not until the issuance of the final determination the following July that Commerce first indicated it might use Duferco SA/JESCO's sales to Colombia to calculate CV profit. *Id. Boomerang I* declined to require the petitioners to have predicted that Commerce might accept JESCO's proposal to use the Colombia sales for the profit calculation. *Id. Boomerang I* concluded that "petitioners did not have a full and fair opportunity during the investigation to challenge the Department's method of determining CV profit." *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1362–63. The court then proceeded to consider the plaintiffs' claims on the merits. The court ultimately rejected these claims, denying the motions for judgment on the record and entering judgment in favor of the United States. *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1363–70.

In *Boomerang II*, the Court of Appeals concluded that it was an abuse of discretion for the Court of International Trade to consider petitioners' arguments on the merits rather than to refuse to hear them on the ground of failure to exhaust administrative remedies and provided two reasons in support of its conclusion. *Boomerang II*, 856 F.3d at 913. "First, the decision is legally erroneous to the extent it stands for the proposition that Commerce must expressly notify interested parties any time it intends to change its methodology between its preliminary and final determinations, despite the inclusion of the relevant data in the record and the advancement of arguments related to that data before Commerce." *Id.* The Court of Appeals added that "[t]here is no support for such a requirement." *Id.* As the second reason, the Court of Appeals disagreed with the conclusion of the Court of International Trade that the petitioners did not have a full and fair opportunity to challenge the Department's method of determining CV profit, noting that "the data regarding JESCO's transactions with the affiliated distributor were in the record prior to

Commerce's preliminary determination." *Id.* "At that point, U.S. Steel and Boomerang either knew or should have known that Commerce may consider those data during its calculations, especially given that the basis of CV profit was at issue." *Id.*

The Court of Appeals concluded its opinion in *Boomerang II* by stating that "we vacate the Trade Court's decision and remand for proceedings in accordance with this opinion." *Id.* The vacated judgment in *Boomerang I* had ordered that both of the then-pending motions for judgment on the agency record be denied and that, pursuant to USCIT Rule 56.2(b), judgment be entered for defendant. Judgment (Dec. 17, 2015), ECF No. 155. The court concludes that the appropriate proceedings in accordance with the opinion in *Boomerang II* are that the court again deny the two Rule 56.2 motions and again enter judgment in favor of defendant United States. The vacated judgment, however, had been entered "in accordance with the court's Opinion in this action . . . ." *Id. Boomerang II* held that the opinion the court issued in *Boomerang I* erred in ruling on the merits rather than upon a failure to exhaust administrative remedies. *Boomerang II*, 856 F.3d at 913. Therefore, upon consideration of the opinion of the Court of Appeals in *Boomerang II*, and upon due deliberation, it is hereby

ORDERED that plaintiffs' motions for judgment on the agency record be, and hereby are, denied on the ground that plaintiffs failed to exhaust their administrative remedies; and it is further

ORDERED that, pursuant to USCIT Rule 56.2(b), judgment be, and hereby is, entered for defendant.

Dated: August 23, 2017
New York, New York

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