

U.S. Customs and Border Protection



GENERIC CLEARANCE FOR THE COLLECTION OF QUALITATIVE FEEDBACK ON AGENCY SERVICE DELIVERY

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than March 18, 2021 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (85 FR 75347) on November 25, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Number: 1651-0136.

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours.

Type of Review: Extension (without change).

Affected Public: Individuals and businesses.

Abstract: Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. In order to work continuously to ensure that our programs are effective and meet our customers' needs, U.S. Customs and Border Protection (CBP) (hereafter "the Agency") seeks to obtain OMB approval of a generic clearance to collect qualitative feedback on our service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

This collection of information is necessary to enable CBP to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with CBP's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between CBP and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Type of Information Collection: Comment Cards.

Estimated Number of Respondents: 10,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 10,000.

Estimated Time per Response: 3 minutes.

Estimated Total Annual Burden Hours: 500 hours.

Type of Information Collection: Customer Surveys.

Estimated Number of Respondents: 290,000.

Estimated Numbers of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 290,000.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 24,490.

Dated: February 9, 2021.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, February 16, 2021 (85 FR 9527)]

STAKEHOLDER SCHEDULING APPLICATION

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; new collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than April 19, 2021) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-NEW in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the

proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Stakeholder Scheduling Application.

OMB Number: 1651–NEW.

Current Actions: New.

Type of Review: New.

Affected Public: Individuals and Businesses.

Abstract: The Stakeholder Scheduling capability is a mobile application within the “CBP One™” app that will standardize and automate the manual process of brokers and travelers making and updating appointments with CBP for various services. Currently, Customs and Border Protection Officers (CBPOs) and CBP Agriculture Specialists (CBPAS) spend significant time exchanging phone calls, faxes, and emails from stakeholders to schedule inspection services. This includes inspections of perishable cargo, non-perishable cargo that have been identified as mandatory exams, and commercial vessel and commercial or private air arrivals. Based on security vetting, CBP notifies stakeholders that certain cargo require a scan by CBP Non-Intrusive Inspection technology prior to release. Stakeholders then schedule with CBP a time and location for the scans to be conducted. Pilots and other stakeholders contact CBP to schedule a time and location for the inspections of commercial and private carriers (including occupants) or commercial vessels upon arrival from foreign countries. Additionally, travelers hand carrying sensitive agriculture via air carrier notify CBP that an inspection will be required upon their arrival.

The following CBP legal authorities permit the collection of this information: Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108–458, 118 Stat. 3638; Immigration and Nationality Act, as codified at 8 U.S.C. 1185 and 1354; Aviation and Transportation Security Act of 2001 (ATSA); Enhanced Border Security and Visa Reform Act of 2002; and Tariff Act of 1930, as amended, 19 U.S.C. 66, 1433, 1459, 1485, 1624, and 2071.

Type of Information Collection**Estimated Number of Respondents:** 2,000.**Estimated Number of Annual Responses per Respondent:** 127.**Estimated Number of Total Annual Responses:** 254,000.**Estimated Time per Response:** 2 minutes.**Estimated Total Annual Burden Hours:** 8,467.

Dated: February 12, 2021.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, February 18, 2021 (85 FR 10115)]

U.S. Court of International Trade

Slip Op. 21–10

SHANDONG YONGTAI GROUP CO., LTD., Plaintiff, and QINGDAO SENTURY TIRE CO., LTD., SENTURY TIRE USA INC., SENTURY (HONG KONG) TRADING CO., LIMITED, PIRELLI TYRE CO., LTD., PIRELLI TYRE S.P.A., and PIRELLI TIRE LLC, Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00077
Member cases: Court No. 18–00079
Court No. 18–00080

[The court grants Plaintiff Shandong Yongtai Group Co., Ltd.’s motion to sever, reconsolidate, and enter judgment.]

Dated: January 29, 2021

Jordan C. Kahn and *Ned H. Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y. and Washington, D.C., for Plaintiff Shandong Yongtai Group Co., Ltd.

Ned H. Marshak, *Dharmendra N. Choudhary*, and *Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y. and Washington, D.C., for Consolidated Plaintiffs Qingdao Sentury Tire Co., Ltd., Sentury Tire USA Inc., and Sentury (Hong Kong) Trading Co., Limited.

Daniel L. Porter, *James P. Durling*, and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for Consolidated Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Ayat Mujais*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION

Choe-Groves, Judge:

Before the court is Plaintiff Shandong Yongtai’s Consent Motion to Sever, Reconsolidate, and Enter Judgment (“Shandong Yongtai’s Motion” or “Pl.’s Mot.”), ECF No. 93, filed by Plaintiff Shandong Yongtai Group Co., Ltd. (formerly known as Shandong Yongtai Chemical Co., Ltd) (“Shandong Yongtai”). Shandong Yongtai requests that the court: (1) sever the action *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077 from the consolidated action with *Qingdao Sentury Co., Ltd. v. United States* (“Sentury action”), Court

No. 18–00079 and *Pirelli Tyre Co., Ltd. v. United States* (“Pirelli action”), Court No. 18–00080; (2) reconsolidate the Sentury action and Pirelli action into *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 18–00079; and (3) enter judgment in Shandong Yongtai’s action, *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077. Pl.’s Mot. at 1–2. All other parties consent to this motion. *Id.* at 3.

Shandong Yongtai requests this relief in light of the court’s recent decision in *Shandong Yongtai Grp. Co. v. United States* (“*Shandong Yongtai II*”), 44 CIT __, Slip Op 20–182 (Dec. 21, 2020), ECF 92. Pl.’s Mot. at 2. In *Shandong Yongtai II*, the court sustained in part and remanded in part the Final Results of Redetermination Pursuant to Remand, ECF Nos. 71, 72 (“*Remand Results*”) by the Department of Commerce (“Commerce”). *Shandong Yongtai II*, 44 CIT at __, Slip Op 20–182 at 3, 12, 16, 18, 19–20. The court sustained Commerce’s determination that Shandong Yongtai Group Co., Ltd. was the successor-in-interest to Shandong Yongtai Chemical Co., Ltd. and affirmed the 2.96% separate rate for Shandong Yongtai. *Id.* at __, Slip Op. 20–182 at 19. The court sustained Commerce’s assignment of the China-wide entity rate to Consolidated Plaintiffs Pirelli Tyre Co., Pirelli Tire LLC, and Pirelli Tyre S.p.A. (collectively, “Pirelli”) and Commerce’s determination to make an export subsidy adjustment for the Export Buyer’s Credit Program. *Id.* at __, Slip Op. 20–182 at 12–18. The court remanded Commerce’s export price determination for Consolidated Plaintiffs Qingdao Sentury Co., Sentury Tire U.S.A. Inc., and Sentury (Hong Kong) Trading Co., (collectively, “Sentury”). *Id.* at __, Slip Op. 20–182 at 4–12, 20. The court ordered a second remand for Commerce to recalculate Sentury’s export price and eliminate the adjustments made for Sentury’s irrecoverable value-added tax (“VAT”). *Id.* at __, Slip Op. 20–182 at 20.

Shandong Yongtai seeks to sever, reconsolidate, and have judgment entered in accordance with the Court’s “express intent to provide for ‘the just, speedy, and inexpensive determination’ of all actions.” Pl.’s Mot. at 2; USCIT Rule 1. Shandong Yongtai states that it is satisfied with the court’s final decision to sustain Commerce’s determination that Shandong Yongtai was the successor-in-interest to Shandong Yongtai Chemical Co., Ltd., which would result in Shandong Yongtai’s entries being liquidated at a rate of 2.96%. Pl.’s Mot. at 2. Shandong Yongtai argues that there is “no reason to delay the liquidation of [Shandong Yongtai’s] entries at the 2.96% separate rate pending applicable appeal deadlines” because Shandong Yongtai’s outcome will not be affected by the second remand ordered in *Shandong Yongtai II*. *Id.*

The court has discretion to add or drop a party under USCIT Rule 21 and may consolidate actions involving a common question of law or fact under USCIT Rule 42. The court seeks to apply USCIT rules in order “to secure the just, speedy, and inexpensive determination of every action and proceeding.” USCIT Rule 1. Considering that all of Shandong Yongtai’s claims have been finally adjudicated and the second remand proceedings are scheduled to conclude in late 2021, the court agrees that Shandong Yongtai would be unnecessarily delayed in obtaining final relief if Shandong Yongtai were required to wait until the second remand is completed as a consolidated action. The court concludes that severance is therefore appropriate to promote the “just, speedy, and inexpensive determination” of Shandong Yongtai’s action.

Because *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077 is the lead case of the consolidated action in *Shandong Yongtai Group Co., Ltd. v. United States*, Consol. Court No. 18–00077, the court concludes that it is appropriate to reconsolidate the Sentury action and Pirelli action into a new consolidated case.

Upon consideration of Shandong Yongtai’s Motion, all other papers and proceedings herein, and pursuant to USCIT Rules 1, 21, and 42 it is hereby

ORDERED that Shandong Yongtai’s Motion is GRANTED; and it is further

ORDERED that *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077 is severed from the consolidated action with *Qingdao Sentury Co., Ltd. v. United States*, Court No. 18–00079 and *Pirelli Tyre Co., Ltd. v. United States*, Court No. 18–00080; and it is further

ORDERED that *Qingdao Sentury Co., Ltd. v. United States*, Court No. 18–00079, and *Pirelli Tyre Co., Ltd. v. United States*, Court No. 18–00080 are reconsolidated into *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 18–00079; and it is further

ORDERED that the proceedings in new consolidated action *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 18–00079 should comply with the opinion and order issued by the court in *Shandong Yongtai II* with respect to the second remand; and it is further

ORDERED that Commerce shall afford the parties in *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 18–00079 at least twelve (12) business days to comment on the draft second remand results; and it is further

ORDERED that *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 1800079 shall proceed according to the same schedule ordered in *Shandong Yongtai II*, reiterated below:

1. Commerce shall file the second remand results on or before February 19, 2021;
2. Commerce shall file the administrative record on or before March 5, 2021;
3. Comments in opposition to the second remand results shall be filed on or before April 9, 2021;
4. Comments in support of the second remand results shall be filed on or before May 7, 2021; and
5. The joint appendix shall be filed on or before May 21, 2021; and it is further

ORDERED that *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 1800077, having been severed from the consolidated action and duly submitted for decision, and the court, after due deliberation, having rendered a decision in *Shandong Yongtai II*, 44 CIT __, Slip Op. 20–182; now therefore, in conformity with *Shandong Yongtai II* it is hereby

ORDERED that the U.S. Department of Commerce’s *Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China*, 83 Fed. Reg. 11,690 (Dep’t Commerce Mar. 16, 2018) (final results of antidumping duty administrative review and final determination of no shipments; 2015–2016), as amended by the *Remand Results*, which confirmed the 2.96% separate rate for Shandong Yongtai, is sustained; and it is further

ORDERED that final judgment will be entered in *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077 in favor of Defendant and in accordance with *Shandong Yongtai II*, 44 CIT __, Slip Op. 20–182; and it is further

ORDERED that the subject entries enjoined in *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077 shall be liquidated in accordance with the final court decision, including all appeals, as provided for in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e).

Dated: January 29, 2021

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

Slip Op. 21–14

M S INTERNATIONAL, INC., Plaintiff, and BRUSKIN INTERNATIONAL, LLC, and FOSHAN YIXIN STONE COMPANY LIMITED, Consolidated Plaintiffs, and ARIZONA TILE LLC, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CAMBRIA COMPANY LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 19–00140

Dated: February 12, 2021

Jonathan T. Stoel, Craig A. Lewis, Jared R. Wessel, and Nicholas R. Sparks, Hogan Lovells US LLP, of Washington, DC, for Plaintiff M S International, Inc. and Plaintiff-Intervenor Arizona Tile LLC.

David J. Craven, Craven Trade Law LLC, of Chicago, IL, for Consolidated Plaintiff Bruskin International, LLC.

Matthew T. McGrath, Barnes, Richardson & Colburn, LLP, of Washington, DC, for Consolidated Plaintiff Foshan Yixin Stone Company, Ltd.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Jesus Saenz*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, DC.

Luke A. Meisner, Kelsey M. Rule, and Roger B. Schagrin, Schagrin Associates, of Washington, DC, for Defendant-Intervenor Cambria Company LLC.

OPINION

Gordon, Judge:

Recently the court issued an opinion denying a challenge to the scope modification made by the U.S. Department of Commerce (“Commerce”) in its final determination of the antidumping investigation of certain quartz surface products (“QSPs”) from the People’s Republic of China (“PRC”). *See* Mem. and Order, ECF No. 68; *see also Certain Quartz Surface Products from the People’s Republic of China*, 84 Fed. Reg. 23,767 (Dep’t of Commerce May 23, 2019), and accompanying Issues and Decision Memorandum, A-570–084 (Dep’t of Commerce May 14, 2019), *available at* <https://enforcement.trade.gov/frn/summary/prc/2019–10800–1.pdf> (last visited this date); *Certain QSPs from the PRC*, PD¹ 1118 (Dep’t of Commerce May 14, 2019) (“*Scope Modification*”). The challenge to the *Scope Modification* was raised and briefed primarily by Consolidated Plaintiff Bruskin International, LLC (“Bruskin”), and was joined by M S International, Foshan Yixin, and Arizona Tile. *See* Consol. Pl. Bruskin Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 50 (“Bruskin Br.”); *see also* Pl. M S Int’l & Pl.-Int. Arizona Tile LLC’s Mem. in Supp. of Rule

¹ “PD___” refers to a document contained in the public administrative record.

56.2 Mot. for J. on the Agency R., ECF No. 48, at 24 (“Plaintiffs respectfully join and adopt by incorporation the arguments presented by Bruskin International, LLC in its Memorandum of Points and Authorities in Support of Judgment on the Agency Record regarding Commerce’s unlawful crushed glass scope amendment.”); Pl. Yixin Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 49, at 26. Given that the court has decided this issue, the question is whether the court should enter a partial judgment pursuant to USCIT Rule 54(b), sustaining Commerce’s decision to modify the scope of the underlying investigation. For the reasons set forth below, the court will enter a Rule 54(b) partial judgment.

Rule 54(b) provides in part that:

[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, cross-claim, or third-party claim,—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

USCIT R. 54(b). Rule 54(b) requires finality—“an ultimate disposition of an individual claim entered in the course of a multiple claims action.” *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956). Additionally, in evaluating whether there is no just reason for delay, the court examines whether the concern for avoiding piecemeal litigation is outweighed by considerations favoring immediate entry of judgment. *See Timken v. Regan*, 5 CIT 4, 6 (1983).

Here, Bruskin’s brief solely challenged Commerce’s *Scope Modification*. *See generally* Bruskin Br. What remains for adjudication are the other challenges raised by Plaintiffs to Commerce’s determinations in the underlying investigation. As Bruskin did not raise or join in the briefing of these other issues, the court’s decision provides “an ultimate disposition” as to Bruskin’s challenge to the *Scope Modification*. *See Sears, Roebuck & Co.*, 351 U.S. at 436; *see also* Mem. and Order, ECF No. 68, at 9.

The entry of a Rule 54(b) partial judgment would serve the interests of the parties and the administration of justice by bringing this issue, and Bruskin’s role in this litigation, to a conclusion. Partial judgment would also give Bruskin the opportunity to immediately appeal if it so chooses. Moreover, there is no threat of piecemeal judicial review as the resolution of the remaining issues presented by the other Plaintiffs does not implicate the final disposition of the *Scope Modification* challenge raised by Bruskin. Therefore, the court has no just reason for delay.

Based on the foregoing, the court will enter partial judgment pursuant to USCIT Rule 54(b).

Dated: February 12, 2021
New York, New York

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

Slip Op. 21–15

M S INTERNATIONAL, INC., Plaintiff, and ARIZONA TILE LLC, and BRUSKIN INTERNATIONAL, LLC, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CAMBRIA COMPANY LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Court No. 19–00141

Dated: February 12, 2021

Jonathan T. Stoel, Craig A. Lewis, Jared R. Wessel, and Nicholas R. Sparks, Hogan Lovells US LLP, of Washington, DC, for Plaintiff M S International, Inc. and Plaintiff-Intervenor Arizona Tile LLC.

David J. Craven, Craven Trade Law LLC, of Chicago, IL, for Plaintiff-Intervenor Bruskin International, LLC.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Jesus Saenz*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, DC.

Luke A. Meisner, Kelsey M. Rule, and Roger B. Schagrin, Schagrin Associates, of Washington, DC, for Defendant-Intervenor Cambria Company LLC.

OPINION

Gordon, Judge:

Recently the court issued an opinion denying a challenge to the scope modification made by the U.S. Department of Commerce (“Commerce”) in its final determination of the countervailing duty investigation of certain quartz surface products (“QSPs”) from the People’s Republic of China (“PRC”). See Mem. and Order, ECF No. 65; see also *Certain Quartz Surface Products from the People’s Republic of China*, 84 Fed. Reg. 23,760 (Dep’t of Commerce May 23, 2019), and accompanying Issues and Decision Memorandum, C-570–085 (Dep’t of Commerce May 14, 2019), available at <https://enforcement.trade.gov/frn/summary/prc/2019–10799–1.pdf> (last visited this date); *Certain QSPs from the PRC*, PD¹ 524 (Dep’t of Commerce May 14, 2019) (“*Scope Modification*”). The challenge to the *Scope Modification* was raised and briefed primarily by Plaintiff-Intervenor Bruskin International, LLC (“Bruskin”), and was joined by M S International and Arizona Tile. See Pl.-Int. Bruskin Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 50 (“Bruskin Br.”); see also Pl. M S Int’l & Pl.-Int. Arizona Tile LLC’s Mem. in Supp. of Rule 56.2 Mot. for J. on

¹ “PD___” refers to a document contained in the public administrative record.

the Agency R., ECF No. 52, at 23 (“Plaintiffs respectfully join and adopt by incorporation the arguments presented by Bruskin International, LLC in its Memorandum of Points and Authorities in Support of Judgment on the Agency Record regarding Commerce’s unlawful crushed glass scope amendment.”). Given that the court has decided this issue, the question is whether the court should enter a partial judgment pursuant to USCIT Rule 54(b), sustaining Commerce’s decision to modify the scope of the underlying investigation. For the reasons set forth below, the court will enter a Rule 54(b) partial judgment.

Rule 54(b) provides in part that:

[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, cross-claim, or third-party claim,—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

USCIT R. 54(b). Rule 54(b) requires finality—“an ultimate disposition of an individual claim entered in the course of a multiple claims action.” *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956). Additionally, in evaluating whether there is no just reason for delay, the court examines whether the concern for avoiding piecemeal litigation is outweighed by considerations favoring immediate entry of judgment. *See Timken v. Regan*, 5 CIT 4, 6 (1983).

Here, Bruskin’s brief solely challenged Commerce’s *Scope Modification*. *See generally* Bruskin Br. What remains for adjudication are the other challenges raised by Plaintiffs to Commerce’s determinations in the underlying investigation. As Bruskin did not raise or join in the briefing of these other issues, the court’s decision provides “an ultimate disposition” as to Bruskin’s challenge to the *Scope Modification*. *See Sears, Roebuck & Co.*, 351 U.S. at 436; *see also* Mem. and Order, ECF No. 65, at 9.

The entry of a Rule 54(b) partial judgment would serve the interests of the parties and the administration of justice by bringing this issue, and Bruskin’s role in this litigation, to a conclusion. Partial judgment would also give Bruskin the opportunity to immediately appeal if it so chooses. Moreover, there is no threat of piecemeal judicial review as the resolution of the remaining issues presented by the other Plaintiffs does not implicate the final disposition of the *Scope Modification* challenge raised by Bruskin. Therefore, the court has no just reason for delay.

Based on the foregoing, the court will enter partial judgment pursuant to USCIT Rule 54(b).

Dated: February 12, 2021
New York, New York

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

Slip Op. 21–16

UNITED STATES, Plaintiff, v. GREEN PLANET, INC., and TOKEN GROUP, LLC, Defendant.

Before: Gary S. Katzmman, Judge
Court No. 16–00221

[Plaintiff's motion for the entry of default judgment is granted.]

Dated: February 16, 2021

P. Davis Oliver, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for plaintiff. With him on the brief were *Jeffrey Bossart Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel *Andrew V. Sperry*, Senior Attorney, Office of the Chief Counsel, U.S. Department of Customs and Border Protection.

OPINION**Katzmann, Judge:**

The case before the court involves an importer's excise tax compliance that turns out to be smoke and mirrors. Plaintiff the United States ("Government") brings this action against Defendant Token Group, LLC, an importer of cigarette rolling papers from the People's Republic of China ("China"), to recover unpaid taxes and a civil penalty, as permitted by Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 ("Section 1592"). Compl. ¶ 1, Oct. 18, 2016, ECF No. 1.¹ The Government alleges that Token Group negligently entered merchandise into the commerce of the United States by means of materially false information, in violation of 19 U.S.C. § 1592(a)(1)(A). *Id.* ¶¶ 67–69. Because Token Group failed to timely appear, plead, or otherwise defend, default was entered. Clerk's Entry of Default, Sept. 20, 2017, ECF No. 18. The Government now moves for default judgment pursuant to USCIT Rule 55(b). Pl.'s Mot. for Entry of Default J., Oct. 16, 2020, ECF No. 36 ("Pl.'s Br.").

As further explained below, because the Government's well-pleaded complaint and supporting evidence adequately establish the defaulting Defendant's liability for negligent violations of Section 1592 as a matter of law, the Government's motion for a default judgment is granted. Judgment shall be entered against Token Group for the unpaid duties owed as a result of these violations. In addition, because the Government's adequately documented claim for a civil

¹ The Government originally brought this action against both Green Planet, Inc. and Token Group, LLC. Compl. However, pursuant to a settlement agreement, the Government dismissed the counts against Green Planet on December 18, 2019, leaving Token Group, LLC as the only remaining Defendant. Stipulation of Partial Dismissal, ECF No. 31.

penalty against Token Group is for a sum certain within the statutory limit for such violations, judgment shall also be entered for the Government on its penalty claim.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1582(1). The court reviews all issues de novo in actions under Section 1592. 28 U.S.C. § 1592(e)(1).

DISCUSSION

In a motion for default judgment, the moving party must first demonstrate to the Clerk of the Court by affidavit or otherwise that the opposing party has failed to plead or otherwise defend. USCIT R. 55(a). Upon such a showing, the Clerk must enter default, as has occurred here. *Id.* USCIT Rule 55(b) mandates that “[w]hen the plaintiff’s claim is for a sum certain or for a sum that can be made certain by computation, the court—on the plaintiff’s request with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing.”

A defendant who defaults thereby admits all well-pleaded factual allegations contained in the complaint. *United States v. NYCC 1959, Inc.*, 40 CIT __, __, 182 F. Supp. 3d 1346, 1347 (2016) (citing *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011)); *United States v. Deladiep, Inc.*, 41 CIT __, __, 255 F. Supp. 3d 1326, 1336 (2017) (citing *Au Bon Pain Corp. v. Arctect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981)). The defaulting party’s admission of liability for all well-pleaded facts, however, does not also function as an admission of damages. *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.*, 699 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)); *Deladiep*, 255 F. Supp. 3d at 1336. Thus, when considering a motion for default judgment, the court accepts as true all well-pleaded facts in the complaint, but must reach its own legal conclusions. *United States v. Callanish, Ltd.*, 37 CIT 462, 464 (2013); *United States v. Scotia Pharm. Ltd.*, 33 CIT 638, 642 (2009). This suit was timely initiated within five years of the alleged violations pursuant to 19 U.S.C. § 1621. *See* Compl.; 19 U.S.C. § 1621(1) (“in the case of an alleged violation of section 1592 or 1593a of this title, no suit or action . . . may be instituted unless commenced within 5 years after the date of the alleged violation”).

Accordingly, the court must enter judgment against Token Group if (1) the Government's allegations establish Token Group's liability as a matter of law, and (2) "the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation," USCIT R. 55(b). *See NYCC 1959, Inc.*, 182 F. Supp. 3d at 1347.

The Government, supported by evidence in the form of a declaration from a U.S. Customs and Border Protection ("Customs") Fines, Penalties & Forfeitures Officer and associated Customs documentation, adequately alleges the following: Token Group entered five entries of cigarette rolling papers in booklet form from China through the port of Los Angeles/Long Beach, CA between October 17, 2011 and October 10, 2012 using Buscemi Co., Intl LLC as customs broker for all five entries. Compl. ¶¶ 39, 45, 50, 56, 61; Decl. of Lee M. Baxley ¶ 2, Oct. 16, 2020, ECF No. 36-1 ("Baxley Decl."). The entries were subject to excise taxes pursuant to 26 U.S.C. §§ 5701(c), 5703. Compl. ¶¶ 40; Baxley Decl. ¶ 3. Token Group failed to identify on its entry documents for all five entries that the imported cigarette rolling papers in booklet form were subject to excise taxes under 26 U.S.C. § 5701, and instead stated that it did not owe any amount of tax on the entries. Compl. ¶¶ 42, 47, 52, 58, 63; Baxley Decl., ¶ 3. Token Group did not pay any excise taxes owed under 26 U.S.C. § 5701 for its five entries of cigarette rolling papers upon filing of the imports. Compl. ¶¶ 43, 48, 53, 59, 64; Baxley Decl. ¶ 5, 7, 9, 11, 13. Customs timely liquidated each of Token Group's entries and calculated excise taxes on each. Baxley Decl. ¶¶ 5, 7, 9, 11, 13. Token Group's surety, Great American Alliance Insurance Company, paid the excise tax for the first two entries, paid in part the excise tax for the third entry, and Token Group paid the excise tax for the fourth and fifth entries. Compl. ¶¶ 44, 49, 54, 60, 65; Baxley Decl. ¶¶ 6, 8, 10, 12, 14. Customs issued a formal demand for payment for unpaid excise taxes with respect to the third entry. Compl. ¶ 73; Baxley Decl. ¶ 19. Token Group continues to have an outstanding balance of \$5,296.37 in unpaid excise tax. Compl. ¶ 74; Baxley Decl. ¶ 10. After notifying Token Group and initiating an investigation, Customs issued a pre-penalty notice to Token Group stating that Token Group potentially deprived the Government of \$119,973.20 in excise taxes through its negligence in connection with its five entries of cigarette rolling papers. Compl. ¶ 70; Baxley Decl. ¶¶ 15, 18. Token Group did not respond, and, on February 7, 2014, Customs issued a penalty notice to Token Group in the amount of \$239,946.40 for negligent culpability. Compl. ¶ 71; Baxley Decl. ¶¶ 18, 20. In April and May of 2014, Customs sent Token Group three formal demands for payment for the negligence penalty. Baxley Decl. ¶ 21.

I. Admitted as True, the Government’s Factual Allegations Establish Token Group’s Liability as a Matter of Law.

“In examining a penalty enforcement action, ‘the court must consider both whether the penalty imposed has a sufficient basis in law and fact, and whether Customs accorded the [importer] all the process to which [it] is entitled by statute and regulation.’” *United States v. NYWL Enter.*, 44 CIT __, __, 476 F. Supp. 3d 1394, 1398–99 (2020) (quoting *United States v. Puentes*, 41 CIT __, __, 219 F. Supp. 3d 1352, 1357 (2017)). Section 1592 prohibits the entry of 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,” if the responsible person acted with “fraud, gross negligence, or negligence.” 19 U.S.C. § 1592(a)(1)(A)(i). As necessary in cases of default, the court accepts the Government’s factual allegations as true. *Callanish, Ltd.*, 37 CIT at 464. Furthermore, as a matter of law, the merchandise—cigarette rolling papers—was subject to excise taxes pursuant to 26 U.S.C. §§ 5701(c), 5703. *See also* Compl. ¶ 40. Here, the Government adequately alleges that Token Group entered merchandise into the commerce of the United States using entry documents that falsely indicated to Customs that the merchandise in question was not subject to excise taxes and that Token Group was afforded the proper process. Compl. ¶¶ 42, 47, 52, 58, 63, 70–71; Baxley Decl. ¶ 3, 18, 20.

The false entry information was material to Customs’ evaluation of Token Group’s tax liability for these entries because it affected Customs’ ability to collect lawful excise taxes upon entry. *See* 19 C.F.R. pt. 171, app. B(B); *United States v. Rockwell Int’l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) (“[T]he measurement of the materiality of the false statement is its potential impact upon Customs’ determination of the correct duty for the imported merchandise.”) (citations omitted). *See also* Pl.’s Br. at 10; Baxley Decl. ¶ 17. Therefore, the Government’s factual allegations, deemed admitted by the defaulting Defendant, establish that Token Group entered merchandise into the commerce of the United States by means of information that was both material and false. Accordingly, admitted as true, the Government’s factual allegations establish Token Group’s liability under Section 1592 as a matter of law. *See* 19 U.S.C. § 1592(a)(1)(A)(i). Judgment must therefore be entered against Token Group for the unpaid excise taxes that resulted from these violations. *See* Compl. ¶¶ 93–95 (Count IV).

Moreover, in the absence of any defense by the Defendant, the Government’s uncontested factual allegations are sufficient to establish Token Group’s liability under Section 1592 for a monetary pen-

alty based on negligence. *See* Compl. ¶¶ 88–92 (Count III); 19 U.S.C. § 1592(e)(4) (“Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under [Section 1592] . . . if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.”). Accordingly, the next question before the court is the claimed penalty amount.

II. The Government’s Claim for Unpaid Duties and Penalty Amount Are Certain and Within Statutory Authority.

Section 1592 provides a maximum civil penalty amount for penalties based on negligent violations. 19 U.S.C. § 1592(c)(3). Where, as here, the material misrepresentation that forms the basis of the negligent violation concerned the assessment of taxes, the amount of the penalty may not exceed “the lesser of the domestic value of the merchandise, or two times the lawful duties, taxes, and fees of which the United States is or may be deprived.” *See id.* § 1592(c)(3)(A).

Here the Government alleges, providing supporting evidence, that the total domestic value of the entries in question was \$1,412,456.73. *See* Compl. ¶70; Baxley Decl. ¶ 2; Pl.’s Br. at 11. The Government also provides evidence that the potential excise tax loss was \$119,973.20.² *See* Compl. ¶ 70; Baxley Decl. ¶ 18. Accordingly, Customs calculated the penalty amount for Token Group’s negligent violation of Section 1592 to be \$239,946.40, two times the lawful taxes of which the United States is or may be deprived, \$119,973.20 in potential excise tax lost. Compl. ¶ 70; Baxley Decl. ¶ 18; Pl.’s Br. at 11. This represents the maximum allowable penalty amount for Token Group’s negligent violation of Section 1592, as it the lesser of the domestic value of the merchandise or two times the lawful taxes. *See* 19 U.S.C. § 1592(c)(3)(A).

After taking appropriate preliminary steps, Compl. ¶ 70; Baxley Decl. ¶ 15, Customs ultimately issued to Token Group a formal demand for payment of the \$5,296.37 in unpaid excise tax and a penalty of \$239,946.40, both of which remain unpaid. Compl. ¶¶ 71–73; Bax-

² The potential excise tax loss of \$119,973.20 is the sum of the excise tax owed on each of the five entries at issue—\$20,901.89 plus \$29,308.37 plus \$25,988.00 plus \$28,307.54 plus \$15,467.40. *See* Baxley Decl. ¶¶ 5, 7, 9, 11, 13. Of the excise tax owed, \$70,901.89 of this amount was paid by Token Group’s surety, Baxley Decl. ¶¶ 6, 8, 10, and \$43,774.94 was paid by Token Group, Baxley Decl. ¶¶ 12, 14. Thus, while only \$5,296.37 remains in actual lost revenue, the statute contemplates the full amount of the potential duty loss. *See* 19 U.S.C. § 1592(c)(3)(A)(ii) (“two times the lawful duties, taxes, and fees of which the United States is or may be deprived”) (emphasis added).

ley Decl. ¶¶ 19, 21–22. Because the amount of the claimed penalty falls within the statutory cap set by the lesser of the merchandise's domestic value and two times the potential excise tax loss, the Government's assessed penalty amount in this case is within the scope of authority provided by 19 U.S.C. § 1592(c)(3)(A). Because Defendant has defaulted, it raises no equitable claim, argument, or factual allegations supportive of a lesser penalty amount. Judgment shall therefore be entered for the unpaid excise taxes and the penalty as claimed, plus post-judgment interest, *see* 28 U.S.C. § 1961(a), and costs. *See* USCIT R. 55(b) (requiring the entry of judgment for the plaintiff, plus costs, when the plaintiff's claim is for a sum certain against a competent defendant who has been defaulted for not appearing).

CONCLUSION

For the foregoing reasons, the Government's motion for default judgment against Token Group for a negligent violation of 19 U.S.C. § 1592(a) is granted. Judgment shall be entered in the amount of \$245,242.77 (\$5,296.37 in unpaid excise taxes plus \$239,946.40 in penalty), plus post-judgment interest computed in accordance with 28 U.S.C. § 1961(a)-(b), and costs.

SO ORDERED.

Dated: February 16, 2021
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 21–17

UNITED STATES, Plaintiff, v. E.G. PLASTICS, INC., Defendant.

Before: Gary S. Katzmann, Judge
Court No. 18–00226

[Plaintiff's motion for the entry of default judgment is granted.]

Dated: February 16, 2021

Jason M. Kenner, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for plaintiff. With him on the brief were *Jeffrey Bossart Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge. Of Counsel *Brandon T. Rogers*, Office of the Assistant Chief Counsel, U.S. Department of Customs and Border Protection.

OPINION**Katzmann, Judge:**

Plaintiff the United States (“Government”) brings this action to recover unpaid duties incurred by Defendant E.G. Plastics, Inc., an importer of plastic retail bags from Thailand. Compl. ¶¶ 1, 5, Nov. 13, 2018, ECF No. 2. The Government alleges that E.G. Plastics failed to pay antidumping (“AD”) duties on twenty-five entries of plastic retail bags made during 2008 and 2009. *Id.* ¶¶ 5–6, 15–16. Because E.G. Plastics failed to timely appear, plead, or otherwise defend, default was entered. Clerk’s Entry of Default, Oct. 15, 2019, ECF No. 11. The Government now moves for default judgment pursuant to USCIT Rule 55(b). Pl.’s Mot. for Default J., Oct. 8, 2020, ECF No. 16 (“Pl.’s Br.”). As explained below, because the Government’s well-pleaded complaint and supporting evidence adequately establish E.G. Plastics’ liability for unpaid duties, the Government’s motion for a default judgment is granted. Judgment shall be entered against E.G. Plastics for the unpaid duties and interest owed as a result.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1582(3). A defendant who defaults thereby admits all well-pleaded factual allegations contained in the complaint. *United States v. NYCC 1959, Inc.*, 40 CIT __, __, 182 F. Supp. 3d 1346, 1347 (2016) (citing *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011)); *United States v. Deladiep, Inc.*, 41 CIT __, __, 255 F. Supp. 3d 1326, 1336 (2017) (citing *Au Bon Pain Corp. v. Arctect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981)). The defaulting party’s admission of liability for all well-pleaded facts, however, does not also function as an admission of damages. *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.*, 699 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)); *Deladiep*, 255 F. Supp. 3d at 1336. Thus, when considering a motion for default judgment, the court accepts as true all well-pleaded facts in the complaint, but must reach its own legal conclusions. *United States v. Callanish, Ltd.*, 37 CIT 462, 464 (2013); *United States v. Scotia Pharm. Ltd.*, 33 CIT 638, 642 (2009). No statute of limitations exists for an importer's liability for duties assessed on entered merchandise. *United States v. Ataka America, Inc.*, 17 CIT 598, 599–600, 826 F. Supp. 495, 497–98 (1993).

DISCUSSION

In a motion for default judgment, the moving party must first demonstrate to the Clerk of the Court by affidavit or otherwise that the opposing party has failed to plead or otherwise defend. USCIT R. 55(a). Upon such a showing, the Clerk must enter default, as has occurred here. *Id.* USCIT Rule 55(b) mandates that “[w]hen the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation, the court—on the plaintiff's request with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing.”

Accordingly, the court must enter judgment against E.G. Plastics if (1) the Government's allegations establish E.G. Plastics' liability as a matter of law, and (2) “the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation,” USCIT R. 55(b). *See NYCC 1959, Inc.*, 182 F. Supp. 3d at 1347.

Section 505 of the Tariff Act of 1930, 19 U.S.C. § 1505(b), allows U.S. Customs and Border Protection (“Customs”) to impose and collect final duties upon the liquidation of entries. *See also* 19 U.S.C. § 1514(a)–(b) (defining finality of Customs decisions). The Government, supported by evidence in the form of a declaration from Customs' Director of Revenue Division, Office of Finance and related Customs' documentation, adequately alleges the following: E.G. Plastics made twenty-five entries of polyethylene retail carrier bags from Thailand through the port of Los Angeles/Long Beach, CA between March 7, 2008, and January 8, 2009. Compl. ¶¶ 5, 15. The entries were subject to AD duties, *Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 48,204 (Dep't Commerce Aug 9, 2004). Compl. ¶¶ 6, 16; Decl. of Bruce Ingalls in Supp. of Pls.' Mot. for Default J. ¶ 7, Oct. 8, 2020, ECF No. 16–1 (“Ingalls Decl.”). On October 15, 2009 and January 10, 2010, Commerce instructed Customs to lift the suspension of liqui-

dation and liquidate entries made during the two periods of review during which E.G. Plastics' entries were made. Compl. ¶¶ 9, 18; Ingalls Decl. ¶¶ 9, 13–14. Customs timely liquidated each of E.G. Plastics' entries. Compl. ¶¶ 10, 19; Ingalls Decl. ¶¶ 10, 15. Customs issued to E.G. Plastics two formal demands for payment of the unpaid AD duties which remain unpaid, totaling \$1,171,226.70. Compl. ¶¶ 11, 20; Ingalls Decl. ¶¶ 11; 16. E.G. Plastics did not pay the outstanding duty amounts nor did it protest the liquidations. Compl. ¶¶ 12–13; 22–23; Ingalls Decl. ¶¶ 21–22. However, Customs did receive partial payment of \$50,000.00 towards the unpaid duties for some entries from E.G. Plastics' surety Hartford Fire Insurance Company. Compl. ¶ 21; Pl.'s Br. at 4 n.1 (correcting error in Complaint regarding name of surety); Ingalls Decl. ¶¶ 19–20.

Admitted as true, the Government's factual allegations establish E.G. Plastics' liability as a matter of law. Thus, the Government may recover unpaid AD duties in the amount of \$1,123,178.69, plus pre- and post-judgment interest based on its supporting evidence. *See* Compl. ¶¶ 23; Ingall's Decl. ¶ 23 ("E.G. Plastics owes CBP unpaid duties and pre-liquidation interest for the twenty-five entries totaling 1,123,178.69, plus post-liquidation interest under 19 U.S.C. § 1505(d), which continues to accrue."). Because E.G. Plastics failed to protest the liquidations of the entries at issue and E.G. Plastics failed to appear, plead, or otherwise defend itself in this action, the court grants the Government's motion for default judgment. Judgment shall therefore be entered for the unpaid AD duties, plus pre-judgment interest on the unpaid duties, 19 U.S.C. § 1505(c), post-judgment interest, 28 U.S.C. § 1961(a), and costs. *See* USCIT Rule 55(b) (requiring the entry of judgment for the plaintiff, plus costs, when the plaintiff's claim is for a sum certain against a competent defendant who has been defaulted for not appearing).

CONCLUSION

For the foregoing reasons, the Government's motion for default judgment against E.G. Plastics for unpaid duties is granted. Judgment shall be entered in the amount of \$1,123,178.69 for the unpaid AD duties; plus pre-judgment interest computed pursuant to 19 U.S.C. § 1505, from the dates of the respective liquidations of the entries until the date of judgment; post-judgment interest computed in accordance with 28 U.S.C. § 1961(a)–(b); and costs.

SO ORDERED.

Dated: February 16, 2021
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 21–18

BORUSAN MANNESMANN BORU SANAYI VE TICARET A.Ş. and BORUSAN MANNESMANN PIPE U.S. INC., Plaintiffs, v. UNITED STATES, Defendant, and, WHEATLAND TUBE and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Court No. 20–00015

[Antidumping Duty Determination in Review of Order on Steel Pipe and Tube from the Republic of Turkey Remanded.]

Dated: February 17, 2021

Julie C. Mendoza and *Mary S. Hodgins*, Morris, Manning & Martin LLP, of Washington D.C. argued for Plaintiffs Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. and Borusan Mannesmann Pipe U.S. Inc. With them on the brief were *Donald B. Cameron*, *Brady W. Mills*, *Edward J. Thomas, III*, *Eugene Degnan*, *Jordan L. Fleischer*, *Rudi W. Planert*, *Sabahat Chaudhary* and *William H. Barringer*.

Robert R. Kieपुरa, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington D.C., argued for the Defendant. With him on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Rachel A. Bogdan*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Elizabeth J. Drake, Schagrin Associates, of Washington D.C. argued for Defendant-Intervenors Wheatland Tube Company and Nucor Tubular Products Inc. With her on the brief were *Roger B. Schagrin*, Schagrin Associates, of Washington D.C. for Defendant-Intervenor Wheatland Tube Company and *Alan H. Price*, *Robert E. De-Francesco, III*, *Cynthia C. Galvez*, and *Theodore P. Brackemyre*, Wiley Rein LLP, of Washington D.C. for Defendant-Intervenor Nucor Tubular Products Inc.

OPINION**Restani, Judge:**

Before the court is a motion for judgment on the agency record pursuant to United States Court of International Trade (“USCIT”) Rule 56.2, in an action challenging a final determination of the United States Department of Commerce (“Commerce”). The final determination at issue results from Commerce’s findings during an administrative review of the antidumping (“AD”) order covering circular welded carbon steel standard pipe and tube (“CWP”) products from Turkey. *Issues and Decision Memorandum for the Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Circular Welded Carbon Steel Standard Pipe and Tube from Turkey*, A-489–501, POR 5/1/2017–4/30/2018 (Dep’t Commerce Jan. 14, 2020) (“*I & D Memo*”). Plaintiffs Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. and Borusan Mannesmann Pipe U.S. Inc. (collectively, “Borusan”) challenge the calculation of both sides of the

basic comparison of home market sales with sales in the United States market. *See* 19 U.S.C. §§ 1677a, 1677b.

BACKGROUND

On July 12, 2018, Commerce initiated the May 1, 2017 – April 30, 2018, administrative review of the AD Order covering CWP products from Turkey. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 32,270 (Dep’t Commerce July 12, 2018) (“*Initiation of Investigation*”). On August 8, 2018, Commerce selected Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. and Toscelik Profil ve Sac Endustrisi A.S., as two mandatory respondents to be individually reviewed. *See Commerce’s Respondent Selection Memorandum*, C.R. Doc. 3, P.R. Doc. 12 (Aug. 8, 2018). Commerce issued its Preliminary Results and accompanying Decision Memorandum on July 10, 2019. *Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2017–2018*, A-489–501, POR 5/1/2017–4/30/2018 (Dep’t Commerce July 10, 2019) (“*Prelim I & D Memo*”). The *Preliminary Results* were published in the Federal Register on July 18, 2019. *Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018*, 84 Fed. Reg. 34,345 (Dep’t Commerce July 18, 2019) (“*Preliminary Results*”). Commerce issued the *Final Results* on January 22, 2020, resulting in a 9.99% margin for Borusan. *Circular Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017–2018*, 85 Fed. Reg. 3,616, 3,617 (Dep’t Commerce Jan. 22, 2020) (“*Final Results*”).

a. PMS determination and adjustment

On January 29, 2019, Wheatland Tube (“Wheatland”) filed a particular market situation (“PMS”) allegation arguing that the cost of hot-rolled-coil (“HRC”) is distorted and, because HRC is a component of CWP, the cost of production (“COP”) of CWP in Turkey does not reflect the COP in the ordinary course of trade. *Wheatland’s Particular Market Situation Allegation* at 4–5, P.R. Docs. 77–80 (Jan. 29, 2019). As a result, Wheatland requested that Commerce make an upward adjustment to Borusan’s actual COP for CWP when conducting its sales-below-cost test for calculating normal value of CWP. *Id.* at 1, 9, 18. Normal value is based on home market sales or a substitute. 19 U.S.C. §1677b(a)(B)(i)–(ii). Here, home market sales were used. *Prelim I & D Memo* at 16.

In the Preliminary Results, Commerce determined that a PMS existed in Turkey that distorted the COP of CWP based on the factors alleged in Wheatland's PMS allegation. *Prelim I & D Memo* at 25. Thus, Commerce made an upward adjustment to Borusan's COP for purposes of the sales-below-cost test set forth in 19 U.S.C. § 1677b(b). *Id.* at 19, 25. During the agency briefing and hearing period, Borusan argued that Commerce's adjustment to COP when conducting the sales-below-cost test violates the plain language of the statute and is not in accordance with law. *Re-submission of Case Br. of Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Istikbal Ticaret* at 2–8, C.R. Doc. 302, P.R. Doc. 277, (Sept. 24, 2019) (“*Borusan Re-submission of Case Br.*”); *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Hearings Before Office IV for Antidumping and Countervailing Duty Operations Import Administration, International Trade Administration, Department of Commerce* at 11–15, P.R. 286 (Oct. 23, 2019) (“*Hearing Transcript*”). Borusan also contended that there is no evidence of distortion in the Turkish HRC market and no basis for finding a PMS in Turkey. *Borusan Re-submission of Case Br.* at 8–19; *Hearing Transcript* at 15. In its final determination, Commerce continued to find that a PMS existed in Turkey and made an upward adjustment to Borusan's costs for purposes of the sales-below-cost test. *I & D Memo* at 5–7, 11–18, 22–27.

b. Treatment of Section 232 duties

On March 8, 2018, the President exercised his authority under Section 232 of the Trade Expansion Act of 1967, as amended, and mandated the imposition of a global tariff of 25 percent on imports of steel articles from all countries, except Canada and Mexico. *Proclamation No. 9705 of March 8, 2018*, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018) (“*Proclamation 9705*”). The Section 232 duties went into effect on March 23, 2018. *Id.* at 11,627–28. The President subsequently altered aspects of Proclamation 9705.¹ The later Proclamations did not affect the applicable duty rate in Turkey under Proclamation 9705 during the period of review (“POR”).² See *supra* note 1. Under this Proclamation, imports of CWP produced by Borusan on and after March 23, 2018, were subject to the 25 percent *ad valorem* import duty imposed on imports from Turkey over and above any

¹ See *Proclamation No. 9711 of March 22, 2018*, 83 Fed. Reg. 13,361 (Mar. 28, 2018); *Proclamation No. 9740 of April 30, 2018*, 83 Fed. Reg. 20,683 (May 7, 2018); *Proclamation No. 9759 of May 31, 2018*, 83 Fed. Reg. 25,857 (June 5, 2018); *Proclamation No. 9772 of August 10, 2018*, 83 Fed. Reg. 40,429 (Aug. 15, 2018) (“*Proclamation 9772*”); *Proclamation No. 9886 of May 16, 2019*, 84 Fed. Reg. 23,421 (May 21, 2019).

² After the POR, the duty rate was temporarily doubled. See *Proclamation 9772*, 83 Fed. Reg. at 40,429–30. Temporary doubling is not at issue here.

existing import duties that might be applicable to CWP. *Proclamation 9705* 83 Fed. Reg. at 11,627. According to its terms, *Proclamation 9705* was issued in order to “enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production” and to “ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.” *See id.* at 11,625–26; *see also* 19 U.S.C. § 1862(d).³

In the Preliminary Results, Commerce treated the Section 232 duties paid by Borusan as “United States import duties” under 19 U.S.C. § 1677a(c)(2)(A) and therefore deducted the Section 232 duties on the United States price side of the dumping comparison from Borusan’s export price (“EP”) and constructed export price (“CEP”). *Prelim I & D Memo* at 11–15. Commerce also applied facts available to Borusan’s CEP sales during the POR because Borusan did not maintain records linking CEP sales to specific entries on which Section 232 duties were paid. *Id.* at 15. Borusan argued that Commerce should not deduct Section 232 duties paid by Borusan from EP and CEP because Section 232 duties are special duties, not “United States import duties” within the meaning of the AD statute. *Borusan Re-submission of Case Br.* at 24–38; *Hearing Transcript* at 20–23. As to its CEP sales, in the alternative, Borusan asserted that Commerce’s application of facts available was not justified because Borusan provided sufficient information explaining its inability to link its CEP sales to the U.S. entry dates and proposed an average inventory turnover methodology to determine which CEP sales were subject to Section 232 duties. *Borusan Re-submission of Case Br.* at 39–40;

³ The statute describes the purpose of Section 232 duties as follows:

- (d) Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries

For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(d).

Hearing Transcript at 51–53. In the Final Results, Commerce continued to deduct the Section 232 duties as “United States import duties” pursuant to §1677a(c)(2)(A). *I & D Memo* at 30–33. Commerce determined that Section 232 duties are more akin to normal customs duties than to antidumping or countervailing (“AD/CV”) duties,⁴ codified as 19 U.S.C. §§ 1671, 1673, or Section 201 duties, codified as 19 U.S.C. § 2251, which are not deducted. *Id.* Commerce also determined that Borusan’s proposed average inventory turnover methodology was insufficient for determining which CEP sales prices included Section 232 duties, and thus, the use of facts available was warranted. *Id.* at 37–38. Commerce then deducted from the CEP calculation Section 232 duties that were paid on an entry after March 23, 2018, the effective date of the Section 232 duty imposed by Proclamation 9705. *Id.*

c. Challenge to AD Order

On January 22, 2020, Borusan commenced the instant action against the United States pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii). Compl. ¶ 5, ECF No. 7 (Jan. 22, 2020). Borusan claims the AD Order is unsupported by substantial evidence or is otherwise contrary to law because Commerce incorrectly: (1) adjusted Borusan’s COP for the purposes of the sales-below-cost test based on a finding of a PMS in Turkey, (2) determined that a PMS existed in Turkey that distorts the COP of CWP, (3) applied a flawed regression model when adjusting the COP for the PMS,⁵ (4) treated Section 232 duties as normal U.S. customs duties and deducted them from Borusan’s EP and CEP, and (5) applied facts available to Borusan’s CEP inventory sales to deduct Section 232 duties from the CEP sales price. Compl. ¶¶ 35–42; Br. of Pls. Borusan in Supp. of their Mot. for J. on the Agency R. at 12–40, ECF No. 35–2 (June 4, 2020) (“Borusan Br.”).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). The court sustains Commerce’s results of an administrative review of an AD duty order 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); *Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007).

⁴ CV duties are countervailing duties intended to offset governmental subsidization. 19 U.S.C. § 1671.

⁵ Issues two and three are mooted by the disposition of issue one and will not be addressed.

DISCUSSION

I. **Costs of Production may not be adjusted for a Particular Market Situation under 19 U.S.C. § 1677b(b), Sales at less than Cost of Production.**

a. **Statutory framework**

When Commerce determines that “sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product,” those sales may be disregarded in the determination of normal value if Commerce also determines that those sales were “made within an extended period of time in substantial quantities” and “were not at prices which permit recovery of all costs within a reasonable period of time[.]” 19 U.S.C. § 1677b(b)(1). When such sales are disregarded, “normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade.” *Id.* Congress added the term PMS to the definition of “ordinary course of trade” in the Trade Preferences Extension Act (“TPEA”). *See Trade Preferences Extension Act of 2015*, Pub. L. No. 114–27, 129 Stat. 385 (2015); 19 U.S.C. § 1677(15). Commerce contends that the definition of PMS applies to COP under 19 U.S.C. § 1677b(b)(3). *I & D Memo* at 7; *Def.’s Resp. to Pls.’ Mot. for J. upon the Agency R.* at 14–17, ECF No. 39 (Aug. 28, 2020) (“Gov. Br.”).

b. **Commerce’s decision to adjust Borusan’s COP is contrary to law.**

In recent opinions, the court has explained in detail that no adjustment for PMS is permitted when Commerce is using the sales-below-cost test to eliminate such sales from the pool of home market sales used for comparison to sales in the United States market. *See Saha Thai Steel Pipe Pub. Co. v. United States*, 476 F. Supp. 3d 1378, 1383, 1386 (CIT 2020); *Dong-A Steel Co. v. United States*, 475 F. Supp. 3d 1317, 1337–41 (CIT 2020); *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 426 F. Supp. 3d 1395, 1411–12 (CIT 2020); *Husteel Co. v. United States*, 426 F. Supp. 3d 1376, 1383–89 (CIT 2020); *Saha Thai Steel Pipe Pub. Co. v. United States*, 422 F. Supp. 3d 1363, 1368–71 (CIT 2019). Commerce argues that the TPEA generally expanded the meaning of “ordinary course of trade” to include all situations in which a PMS prevents a proper comparison of normal value with the EP or CEP. *I & D Memo* at 6–7; *Gov. Br.* at 14–15. Thus, it argues the definition carries through to normal value provisions concerning sales below cost under 19 U.S.C. § 1677b(b)(3). *See I & D Memo* at 7; *Gov. Br.* at 16–17.

On numerous occasions, the court has held that the plain language and construction of §1677b authorizes PMS adjustments only when determining normal value using constructed value methodology under §1677b(e), not when determining whether to disregard sales below the cost of production under §1677b(b). *See Saha Thai Steel Pipe Pub. Co.*, 476 F. Supp. 3d at 1383–86; *Dong-A Steel Co.*, 475 F. Supp. 3d at 1337–41; *Borusan*, 426 F. Supp. 3d at 1411–12; *Husteel Co.*, 426 F. Supp. 3d at 1383–89; *Saha Thai Steel Pipe Pub. Co.*, 422 F. Supp. 3d at 1368–71. The TPEA expanded Commerce’s discretion to calculate COP when calculating a constructed value. *See* 19 U.S.C. § 1677b(e). In the TPEA, Congress chose *not* to amend 19 U.S.C. § 1677b to apply such discretion to all subparts. *Compare* 19 U.S.C. § 1677b(e), *with* 19 U.S.C. § 1677b(b). Accordingly, Commerce’s adjustments to Borusan’s COP on account of a PMS for the purpose of the sales-below-cost test do not give effect to the unambiguously expressed intent of Congress and are therefore contrary to law.

Because a PMS adjustment is not permitted for the purposes of the sales-below-cost test, any claims relating to Commerce’s PMS adjustment methodology and Commerce’s determination that a PMS existed are now mooted.

II. Section 232 duties may be treated as “United States import duties” to be deducted from EP and CEP in accordance with 19 U.S.C. § 1677a(c)(2)(A).

a. Statutory framework and administrative history

The adjustments to EP and CEP are set forth in section 772(c) of the Tariff Act of 1930, codified at 19 U.S.C. § 1677a(c). EP and CEP are to be reduced by “the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and *United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . .” 19 U.S.C. § 1677a(c)(2)(A) (emphasis added).

When Congress has directly spoken to the precise question at issue, it ends the matter — “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007). When the statute is silent or ambiguous with respect to the specific issue, then the court must evaluate whether Commerce’s interpretation “is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843. The inquiry is into “the reasonableness of

Commerce's interpretation." *NSK Ltd. v. United States*, 26 CIT 650, 654, 217 F. Supp. 2d 1291, 1296 (2002).

Because the operable statute does not define "United States import duties," in *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19,153 (Dep't Commerce Apr. 12, 2004) ("*SSWR from Korea*"), Commerce previously issued an interpretation of the phrase "United States import duties" with regard to the deductibility of Section 201 safeguard duties, 19 U.S.C. § 2251, utilizing formal notice and comment procedures. *Id.* at 19,157–61. Commerce concluded Section 201 duties should not be deducted as "import duties." *Id.* at 19,159–61. Commerce relied on the legislative history of the Antidumping Act of 1921 to conclude there is a distinction between "*special* dumping duties" and "*normal* customs duties" (also referred to as "United States import duties"). *Id.* at 19,159 (citing S. Rep. No. 67–16, at 4 (1921)) (emphasis added). Commerce cited the 1921 Senate Report to demonstrate that Congress intended that some duties implementing trade remedies, such as AD duties, are special duties to be distinguished from the normal duties that should be deducted from EP and CEP. *Id.*; *I & D Memo* at 30–31.

Whether Section 232 duties, unlike Section 201 duties, may be deducted from EP and CEP in accordance with 19 U.S.C. § 1677a(c)(2)(A) as "United States import duties" is a question of first impression. Commerce's analysis with regard to the deductibility of Section 232 duties is based on its reasoning with regard to Section 201 duties in *SSWR from Korea*. See *I & D Memo* at 30–33. In *SSWR from Korea*, Commerce concluded that safeguard duties imposed under Section 201 are special duties because they are remedial and temporary in nature. *SSWR from Korea*, 69 Fed. Reg. at 19,159, 19,161. Commerce also concluded that to find otherwise and deduct Section 201 duties from EP and CEP would result in an inappropriate double remedy under the statute. *Id.* at 19,160. In upholding as reasonable Commerce's interpretation that Section 201 safeguard duties are not "United States import duties," the Federal Circuit clearly stated that "United States import duties" is an ambiguous phrase in the statute. *Wheatland Tube*, 495 F.3d at 1359–60.

Borusan argues that Commerce's determination to treat Section 232 duties differently—as "United States import duties"—from AD/CV duties and Section 201 duties is unreasonable because Section 232 duties are similarly remedial and, like Section 201 duties, temporary in nature. *Borusan Br.* at 20–25. Borusan contends that just as with AD/CV duties and Section 201 safeguard duties, deduction of Section 232 duties would impose a double remedy on Borusan's ex-

ports and is not permitted by the statutory scheme. *Borusan Br.* at 25–26. In response, the Government asserts that Commerce’s determination that Section 232 duties are significantly different from AD/CV duties and Section 201 duties was reasonable and consistent with its prior statutory interpretation of the phrase “United States import duties” because Section 232 duties are not remedial or temporary in nature and deducting them from CEP and EP would not impose a double remedy in contravention of the statute. *Gov. Br.* at 32–39.

b. Commerce’s treatment of AD/CV duties and Section 201 duties does not preclude a different treatment of Section 232 duties.

To understand how Section 232 duties, which at first glance seem far removed from ordinary customs duties, could be deductible from EP and CEP, the court starts, as is ordinary, with the statute. The statute, 19 U.S.C. § 1677a(c)(2)(A), states price is to be reduced by “United States import duties.” 19 U.S.C. § 1677a(c)(2)(A). It does not use the phrase “normal customs duties.” *See id.*

The Antidumping Act of 1921 created antidumping duties, *see* Emergency Tariff Act of 1921, Pub. L. No. 67–10, §§ 201–202 (codified as amended at 19 U.S.C. § 1673), and as the Senate Report relied on by Commerce noted, such duties were “special duties,” not the import duties that were to be deducted from price in the United States market. *See SSWR from Korea*, 69 Fed. Reg. 19,159 (citing S. Rep. No. 67–16, at 4 (1921)); *see also* Emergency Tariff Act of 1921 § 202. In 1921, Section 201 duties did not exist. They were created in 1974. *See* Trade Act of 1974, Pub. No. L. 93–618, §§ 201–203 (1975) (codified as amended at 19 U.S.C. § 2251). Section 232 duties came into existence in the 1950’s⁶ and achieved essentially their present form in 1962. *See* Trade Expansion Act of 1962, Pub. No. L. 87–794, § 232 (codified as amended at 19 U.S.C. § 1862). So, does the term “import duties” in the 1921 Act mean only the duties that existed in 1921?⁷ Nothing in the 1921 Act or its successors resolves that question, but why would one assume the scope of “import duties” is immutable? The very general

⁶ *See* Trade Agreements Extension Act of 1954, Pub. L. No. 83–464, § 2, 68 Stat. 360; Trade Agreements Extension Act of 1955, Pub. L. No. 84–86, § 7, 69 Stat. 166; Trade Agreements Extension Act of 1958, Pub. L. No. 85–686, § 8, 72 Stat. 678, 678–79.

⁷ There seems to be general agreement that it would make little sense to deduct the “special duties” that were being created by the 1921 Act (i.e. antidumping duties) in the price comparison that establishes them. *See APEX Exports v. United States*, 777 F.3d 1373, 1379–80 (Fed. Cir. 2015); *Hoogovens Staal BV v. United States*, 22 CIT 139, 145–46, 4 F. Supp. 2d 1213, 1220 (1998); *see also* Def-Intervenors’ Mem. in Resp. to Pls.’ Mot. for J. on the Agency R. at 13, ECF No. 38 (Aug. 28, 2020) (“Nucor Br.”). The circularity is obvious.

nature of the term suggests adjustment for whatever “import duties” exist at the time the comparison is made. As the appellate court concluded, the phrase “import duties” is ambiguous. *Wheatland Tube*, 495 F.3d at 1359–60. If the antidumping statute made clear that post-1921 duties are not “import duties,” then presumably the phrase would not be ambiguous.

Next, the threshold question should not be, as the parties seem to propose, whether Section 201 duties and Section 232 duties are so similar that Commerce acts unreasonably if it does not give them identical treatment. *See* *Borusan Br.* at 20; *Gov. Br.* at 30–31; *I & D Memo* at 32–33. Rather, the question should be, what is the purpose of the deduction for “import duties” in the dumping margin calculation, and does reduction of price by Section 232 duties serve that purpose.

In conducting the comparison between home market sales and sales made in the United States market, the price paid on goods sold in the U.S. market is reduced by a number of items, including import duties, in an attempt to get back to an ex-factory price that is comparable to the price of goods in the home market. 19 U.S.C. § 1677a(c); *see also* S. Rep. No. 67–16, at 12 (1921); H.R. Rep. No. 67–1, at 23–24 (1921); H.R. Rep. No. 67–79, at 2–3 (1921). Obviously, there are no import duties on home market sales. Thus, the presumption might be that all import duties are to be deducted, except for antidumping duties that present the unique circularity issue. Nonetheless, Commerce found that Section 201 duties were not to be deducted under the price reduction statute, §1677a(c). *SSWR from Korea*, 69 Fed. Reg. at 19,159, 19,161. Thus, the next question is what is so unique about Section 201 duties that they are not deducted from the price paid even though they are duties on imports.

When called upon to decide whether Section 201 safeguard duties were deductible “import duties,” Commerce considered three factors: (1) whether the duties are remedial, (2) whether they are temporary, and (3) whether deducting them from EP and CEP would result in an impermissible double remedy. The answer to all three factors was “yes.” *SSWR from Korea*, 69 Fed. Reg. at 19,159–61. Commerce conducted a similar analysis for Section 232 duties and concluded to the contrary, that based on the same factors, Section 232 duties should be treated as “United States import duties.” *I & D Memo* at 30–33; *2017–2018 Administrative Review of Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Section 232 Duties*, A-489–501, POR 5/1/2017–4/30/2018 at 7–9 (Dep’t Commerce July 10, 2019) (“*Section 232 Memo*”). We turn to each factor for which Commerce answered “no.”

Commerce states that Section 232 duties are not akin to antidumping or Section 201 duties because Section 232 duties “are not focused on remedying injury to a domestic industry” but on threats to national security. *I & D Memo* at 31. Borusan contends that like Section 201 duties, Section 232 duties are remedial in nature because, despite the stated purpose of ensuring that imports do not threaten national security, the duties are imposed following specific investigations and determinations of the existence of injury or threat of injury to domestic industries. Borusan Br. at 20–23.

Even though there is a broader statutory purpose underlying the imposition of Section 232 duties, the purpose of Section 232 duties is also remedial in a broad sense. Subsection (d) of Section 232 is titled “Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries”—demonstrating that Section 232 duties are not part of normal trade remedies, but rather are enacted in response to trade practices in specific instances in which the welfare of key domestic industries is impacted by foreign trade. 19 U.S.C. § 1862(d). Section 232 duties are to be imposed after special findings that consider “the impact of foreign competition on the economic welfare of individual domestic industries” in the light of “national security” concerns. *Id.*

Accordingly, Section 232 duties are remedial, not in the sense of AD/CV duties but more closely to the sense of remediation reflected in Section 201. Neither 232 nor 201 requires a finding of an unfair trade practice. *See id.* §§ 1862(b), 2251(a). Their focus is on saving a United States industry; of course, there are differences. Section 201, but not Section 232, requires a finding of a particular level of injury or threat of injury. *Compare id.* § 2252(b), *with id.* § 1862(b). Further, Section 232 duties could be used to promote vital nascent industries, not just already established injured industries. In such a case, remediation would not be a primary goal. Accordingly, the court concludes that Commerce’s reasoning based on lack of remedial purpose, while not the strongest, is not completely bereft of logic.

Similarly, and with respect to the second factor, Section 232 duties and Section 201 duties are both temporary in that no Congressional action is needed to end them. That is a clear difference from normal customs duties, which are enacted by Congress. Section 201 has time limits. 19 U.S.C. § 2253(e). Section 232 duties may be terminated any time the President believes their purpose has ended. *See Proclamation 9705*, 83 Fed. Reg. at 11,626; 19 U.S.C. § 1862; *cf. Wheatland Tube*, 495 F.3d at 1362 (“Normal customs duties, however, have no termination provision and are permanent unless modified by Congress.”). The difference in how the duties are time limited does not

make Section 232 significantly more permanent than Section 201. Thus, to the court, lack of permanence is not a viable reason to distinguish Section 201 duties from Section 232 duties.

The third factor cited by Commerce, impermissible double counting, bears greater consideration. There is a clear statutory interplay between Section 201 duties and antidumping duties, while Section 232 does not reveal any such coordination concerns. While it was not emphasized in the *I & D Memo* explaining Commerce's decision here, Commerce did mention the complimentary nature of Section 201 and the antidumping laws; and the absence of such interplay with respect to Section 232. *I & D Memo* at 33. Further, where statutorily mandated coordination existed, i.e., in the context of Section 201, see 19 U.S.C. § 2252(c)(5), Commerce analyzed it, see *SSWR from Korea*, 69 Fed. Reg. at 19,160, and that analysis was cited in the *I & D Memo* applicable to this case, *I & D Memo* at 30–33.

As indicated, the International Trade Commission must make a particular injury determination before Section 201 safeguard duties may be imposed. 19 U.S.C. § 2252(b). Further, the imports must be a substantial cause of serious injury, or threat thereof. *Id.* In the course of making the Section 201 injury determination, if the Commission has reason to believe the surge in imports is attributable to dumping or actionable subsidization, it is to refer the matter to Commerce. 19 U.S.C. § 2252(c)(5); see also *SSWR from Korea*, 69 Fed. Reg. at 19,160. Action under the unfair trade laws rather than under Section 201 is preferred. *SSWR at Korea*, 69 Fed. Reg. at 19160 (citing S. Rep. No. 93–1298, at 123 (1974)); see also Nucor Br. at 18–19. Moreover, in setting the level of surge relief, the President is to consider relief already provided by antidumping and countervailing duty laws. See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, vol. 1, at 964 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4267. Thus, the ordinary internationally accepted remedies for unfair trade practices are to be considered when setting Section 201 duties, implying that Section 201 duties are, in fact, related to and complimentary to antidumping duties. *Id.*; S. Rep. No. 93–1298, at 122–23 (1974); see also Nucor Br. at 18–19. There is no such requirement of complimentary treatment with normal unfair trade laws in Section 232. None of this interplay is discussed in the 232 statute, see 19 U.S.C. § 1862, or its legislative history, as Commerce noted. See *I & D Memo* at 32–33. Instead, antidumping duties are simply to continue after the President imposes Section 232 duties. See *Proclamation 9705*, 83 Fed. Reg. at 11,627 (stating that “all steel articles imports specified . . . shall be subject to an additional 25

percent ad valorem rate of duty . . . in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles”); *see also I & D Memo* at 33. Commerce concluded that anti-dumping duties and Section 232 duties are “separate and distinct,” with no overlap in providing remedies under each. *I & D Memo* at 32.

The AD statute does not expressly differentiate among import duties. While Section 232 duties are “special” in some sense, in that they are temporary, they are still import duties. Given that the statutory term at issue is “import duties” and it appears broad enough to include all import duties except antidumping duties, the court likely would have had little pause in saying that Commerce did not err in treating Section 232 duties as it did here, before the Section 201 decision in *Wheatland Tube*, 495 F.3d at 1365–66. The final question remaining then is whether the reasoning provided by Commerce differentiating its treatment of Section 232 and Section 201 duties is so lacking in merit that the court must say it is arbitrary. The court does not so state. This is a reasonable decision based on crucial differences between Sections 201 and 232, namely that Section 201 duties are more akin to antidumping duties and that there is an interplay between antidumping duties and Section 201 duties, which is not present with Section 232 duties.⁸ Accordingly, the court sustains Commerce’s decision that the CEP and EP may be reduced by Section 232 duties paid.

III. The Section 232 duty reduction to CEP was not properly considered.

The final issue before the court is whether CEP should be calculated without reduction for Section 232 duties based on the facts of record.⁹ Although Borusan, the importer of record during the POR, “did not keep records linking its CEP sales to actual entry dates,” Commerce reasonably concluded that Borusan did not have adequate notice that it must keep records to match Section 232 duties paid on entry to the sales of its affiliate. *I & D Memo* at 37–38. So, Commerce applied what it implies is a neutral facts available approach to calculate the CEP Section 232 duty deduction. *See id.*; 19 U.S.C. § 1677e(a).

Borusan made clear to Commerce that there was one 7 MT shipment on which Section 232 duties were paid when the shipment entered the United States a very few days before the end of the POR.

⁸ The court is not persuaded that the placement of Section 232 duties within the Harmonized Tariff Schedule of the United States has an effect. *See Proclamation 9705* 83 Fed. Reg. at 11,629; Harmonized Tariff Schedule of the United States (“HTSUS”) subheading 9903.80.01 (2020); *see also Borusan Br.* at 28–29.

⁹ There is no dispute that certain EP sales prices included Section 232 duties. *Prelim I & D Memo* at 13.

Borusan Re-submission of Case Br. at 39–40; *Borusan’s Response to Commerce’s Third Supplemental Section C Questionnaire*, at 2–3, Exhibit C-29, C.R. 221, P.R. 188 (May 20, 2019) (“*Questionnaire Response*”). The average inventory period for these types of goods is the better part of a year. *Questionnaire Response* at 3. While Borusan admitted it was theoretically possible that the late shipment could be sold out of inventory in a few days, it was highly unlikely. *Questionnaire Response* at 3. It is quite difficult to see how a sales contract could be negotiated that would have included the duties so recently paid.

It is true as the Government asserts in its brief, *Gov. Br.* at 43–44, that Borusan cannot conclusively demonstrate, at least at this stage of the proceedings, that it made no such sale. *Questionnaire Response* at 3, Exhibit C-29.¹⁰ But applying a standard requiring conclusive proof, *see I & D Memo* at 37–38, is the equivalent of drawing an adverse inference with respect to the facts selected, not the neutral choice required. *See* 19 U.S.C. § 1677m(e). Further, substantial evidence must underlie any choice, even if the evidence is based on facts available. Substantial evidence “must do more than create a suspicion of the existence of the fact to be established.” *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). Commerce has not cited substantial evidence that the CEP sale included Section 232 duties, nor has it explained how it arrived at such a conclusion using neutral facts available.

On remand, Commerce must reweigh all of the evidence, including any relevant sales data, with respect to the reduction of CEP by Section 232 duties paid, applying normal decision-making tools without an adverse inference.

CONCLUSION

This matter is remanded to eliminate any adjustment to COP based on a PMS in the sales-below-cost test and to weigh, in an evenhanded manner, the evidence of record applicable to reduction of CEP by Section 232 duties paid. The remand determination shall be issued within 60 days hereof. Comments may be filed 30 days thereafter and any response 15 days thereafter.

¹⁰ The court accepts that Borusan did not sufficiently raise with Commerce an argument that an examination of sales data would show conclusively that the specific product composing the 7 MT shipment on which Section 232 duties were paid was not actually sold during the POR. Borusan’s counsel conceded lack of exhaustion on this narrow point at oral argument.

Dated: February 17, 2021
New York, New York

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

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Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. and Borusan Mannesmann Pipe U.S. Inc., Plaintiffs, v. United States, Defendant, and, Wheatland Tube and Nucor Tubular Products Inc., Defendant-Intervenors.	21-18	28