U.S. Court of International Trade

Slip Op. 15–122

MID CONTINENT NAIL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and DUBAI WIRE FZE AND ITOCHU BUILDING PRODUCTS CO., INC., AND PRECISION FASTENERS, LLC, Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Consol. Court No. 12–00133

[Affirming the results of the remand redetermination in Commerce's antidumping duty investigation of certain steel nails from the United Arab Emirates.]

Dated: November 3, 2015

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OPINION AND ORDER

Carman, Judge:

This consolidated case is currently before the Court for resolution of challenges to the *Final Results of Redetermination Pursuant to Court Remand*, ECF Nos. 118 (confidential version) and 119 (public version) (hereinafter "*Remand Results*") issued by the U.S. Department of Commerce ("Commerce" or "the government").

The remand resulted from an order issued by the Court on June 26, 2014. *Mid Continent Nail Corp. v. United States,* 38 CIT ___, 999 F. Supp. 2d 1307 (2014). That order upheld most aspects of *Certain Steel Nails From the United Arab Emirates*, 77 Fed. Reg. 17,029 (Dep't of

Commerce Mar. 23, 2012) (final determination) ("*Final Results*"), *as amended*, 77 Fed. Reg. 27,421 (Dep't of Commerce May 10, 2012) (am. final determination and antidumping duty order), and the unpublished Issues and Decisions Memorandum incorporated by reference, *see* Issues and Decisions Mem. for the Less Than Fair Value Investigation of Certain Steel Nails from the United Arab Emirates, A-520–804 (Mar. 19, 2012), *available at* http://enforcement.trade.gov/frn/summary/uae/2012–7067–1.pdf (last visited October 2, 2015) ("*I&D Memo*"). However, the Court determined that Commerce had failed to apply a regulation that it had improperly withdrawn without notice and comment, and thus remanded the case with instructions for Commerce to apply the former regulation. 999 F. Supp. 2d at 1323. Because that change could result in significant differences in Commerce's targeted dumping analysis, the Court deferred ruling on other challenges to that aspect of the *Final Results*. *Id.* at 1323–24.

Commerce has now issued its *Remand Results,* and each of the parties has submitted its comments. The comments have raised a number of objections to the *Remand Results*, all centered on aspects of the targeted dumping analysis that Commerce conducted. The Court addresses these issues below, and upholds the *Remand Results* in full as supported by substantial evidence and in accordance with law.

BACKGROUND

Plaintiff in this consolidated action is domestic nail producer Mid Continent Nail Corporation ("MCN" or "Plaintiff"). Defendant-Intervenors Dubai Wire FZE and Itochu Building Products Co., Inc. (collectively "Dubai Wire" or "DWE") and Precision Fasteners, LLC ("Precision") are producers of subject merchandise from the UAE.[1]

In the Court's prior opinion, the Court upheld the aspects of the *Final Results* that determined that (a) Precision was not affiliated with a company called Millennium; (b) certain financial statements would be used for surrogate profit values; and (c) a particular interest rate would be imputed to a loan extended to Dubai Wire. *See generally Mid Continent Nail,* 999 F. Supp. 2d 1307.

The Court, however, determined that Commerce had improperly applied the law governing what is commonly called "targeted dumping." Pursuant to 19 U.S.C. §1677f-1(d)(1)(A), Commerce "shall de-

[1] MCN filed this action under Court No. 12–00133, and Dubai Wire and Precision entered Court No. 12–00133 as Defendant-Intervenors as of right. Separately, Dubai Wire and Precision filed their own challenges to the investigation; Dubai Wire is therefore the plaintiff in Court No. 12–00153 and Precision is the plaintiff in Court No. 12–00162. The cases filed by Dubai Wire and Precision are now consolidated with the current case filed by MCN.

termine whether the subject merchandise is being sold in the United States at less than fair value" in one of two ways: by comparing "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise," or by comparing "the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise." These price comparison methods are commonly called average-to-average ("A-A") and transaction-to-transaction ("T-T"). The statute contains an exception to this general rule regarding price comparisons. Commerce "may" make its determination regarding sales at less than fair value "by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise" if two conditions are satisfied:

> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) [Commerce] explains why such differences cannot be taken into account using [average-to-average or transaction-to-transaction price comparisons].

19 U.S.C. §1677f-1(d)(1)(B). Such a pattern of export prices is commonly called targeted dumping, and the comparison method that may be used in this context is termed average-to-transaction ("A-T").

In 1997, Commerce promulgated a regulation interpreting this statutory authority, in relevant part, in the following manner:

(f) Targeted dumping—

> (1) In general. . . . the Secretary may apply the average-to-transaction method . . . in an antidumping investigation if:
>
> (i) As determined through the use of, among other things, standard and appropriate statistical techniques, there is targeted dumping in the form of a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time; and
>
> (ii) The Secretary determines that such differences cannot be taken into account using the average-to-average method or the transaction-to-transaction method and explains the basis for that determination.
>
> (2) Limitation of average-to-transaction method to targeted dumping. Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, the Secretary

> normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.

19 C.F.R. § 351.414(f) (1997). (Subsection (2) of this regulation will be referred to as the "*Limiting Regulation*.") In 2008, Commerce published a Federal Register notice stating that this targeted dumping regulation was being withdrawn. *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930 (Dep't of Commerce Dec. 10, 2008) ("*Withdrawal Notice*"). Although Commerce indicated that it would accept post-publication comments regarding the withdrawal, the withdrawal was given immediate effect. *Id.* It was this purported withdrawal of the *Limiting Regulation* that the Court found to be unlawful in its June 26, 2014 order; the Cout consequently instructed Commerce to apply 19 C.F.R. § 351.414(f) on remand in the manner in which the regulation had been applied prior to the *Withdrawal Notice*. 999 F. Supp. 2d at 1323.

The Court also noted in its June 26, 2014 order that Commerce did not address "whether or not the transaction-to-transaction method would have been able to account for the targeted dumping," and stated that Commerce should "state its rationale . . . in the redetermination." *Id.* at 1324 n.5.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c). When reviewing the results of a remand, the Court examines the decision "for compliance with the court's remand order." *Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008). Factual findings of Commerce in the *Remand Results* will be upheld unless unsupported by substantial evidence on the record, while legal determinations will be upheld unless not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* 8A West's Fed. Forms, National Courts § 3:6 (5th ed. 2015).

Substantial evidence is "more than a mere scintilla," amounting to "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *NSK Corp. v. U.S. Int'l Trade Comm'n*, 716 F.3d 1352, 1364 (Fed. Cir. 2013) (internal citations and quotations omitted). In assessing substantial evidence, the court determines whether the reviewed agency decision is reasonable given the record as a whole, "even if some evidence detracts from the [agency's] conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

In assessing whether Commerce's determination of a legal question is in accordance with law, "[t]he statute is the starting point . . . . The agency's action must be authorized by the statute, and consistent with the agency's regulations." West's Fed. Forms, National Courts, *supra; see Ningbo Dafa Chem. Fiber Co. v. United States,* 580 F.3d 1247, 1253–54 (Fed. Cir. 2009). When Commerce interprets the antidumping statute, the Court's review of Commerce's determination is conducted under the two-step framework of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984); *see Ningbo Dafa,* 580 F.3d at 1253–54. The Court defers to Commerce's interpretation unless there is "unambiguous statutory language to the contrary" or Commerce has reached an "unreasonable interpretation of language that is ambiguous." *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009). Unless Commerce's interpretation of ambiguous language in the statute is "arbitrary, capricious, or manifestly contrary to the statute," the court will not set it aside. *Chevron*, 467 U.S. at 844.

DISCUSSION

I. Remand Results

In the *Remand Results,* Commerce applies (under protest[2]) the *Limiting Regulation* and continues "to find that for both DWE and Precision, there was a pattern of export prices (or constructed export prices) for comparable merchandise that differed significantly among U.S. customers, regions, and time periods during the period of investigation." *Remand Results* at 6.

This finding is based on the results of what Commerce refers to as "the *Nails* test" an analytic framework Commerce applied in targeted dumping investigations during the time period applicable to this case. Def.'s Resp. to Pl.'s and Def.-Intervenor's Comments on the Remand

[2] Commerce cites *Viraj Group, Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003) to explain why it files the *Remand Results* under protest. In *Viraj Group*, the Federal Circuit held that Commerce, despite technically having prevailed below, had standing to appeal after the Court of International Trade upheld its remand redetermination since the remand redetermination was issued only pursuant to court order and under protest. *See id.* at 1374–77. Commerce's filing of the *Remand Results* here "under protest" appears solely intended to preserve its ability to seek appellate review. The Court of International Trade has stated that "[t]he only legitimate purpose of registering a protest in a remand determination is to preserve a particular issue for appeal where the agency has been compelled to take a particular step that results in an outcome not of its choosing." *GPX Int'l Tire Corp. v. United States*, 37 CIT ___, ___, 942 F. Supp. 2d 1343, 1348 n.2 (2013). Commerce has lodged such a legitimate protest here.

Redetermination ("*US Response*"), ECF No. 138, at 3.[3] The *Nails* test is a two-step methodology. Commerce first analyzes the prices of allegedly targeted sales to identify whether more than 33% of the sales were priced more than one standard deviation below the weighted-average price of all sales. *Id.* This is the "standard deviation" test. Where such a price pattern is found, Commerce moves to the second step, known as the "gap test." At this step, Commerce "examines all sales of subject merchandise by the respondent to the allegedly targeted group which passed the first stage of the *Nails* test," "determines the total volume of sales for which the difference between the weighted-average price of sales to the allegedly targeted group and the next higher weighted-average price of sales to a non-targeted group exceeds the average price gap (weighted by sales volume) for the non-targeted groups," and concludes, if "the volume of the sales that meets this test exceeds five percent of the total sales volume of subject merchandise to the allegedly targeted," that the sales pass the *Nails* test. *Id.* at 3–4. This methodology is the means by which Commerce affirmatively finds targeted dumping by Dubai Wire and Precision on remand. *Id.* at 6.

Commerce examines the dumping margins calculated for Dubai Wire and Precision using A-A comparison against the margins calculated using A-T comparison (limited to the allegedly targeted sales in accordance with the *Limiting Regulation*). *Id.* Because the margin for Precision is *de minimis* regardless of which methodology is applied, Commerce determines that the pattern of pricing differences can be taken account of using the standard A-A comparison method, without resorting to A-T comparison. *Id.* A rate of 0.00% is calculated for Precision.[4] *Id.* However, the margin calculated for Dubai Wire is *de minimis* using A-A comparison, but above the *de minimis* threshold using A-T comparison. *Id.* Commerce therefore finds that Dubai Wire's pattern of pricing differences cannot be accounted for using A-A comparison, and applies A-T comparison, resulting in a weighted-average dumping margin for Dubai Wire of 2.68%. *Id.*

Commerce also decides that examining whether to use T-T comparison is unnecessary and that, in any case, T-T comparison is unwar-

[3] The *Nails* test originated with *Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 33,977 (Dep't of Commerce June 16, 2008) (final determination of sales at less than fair value), which was upheld by the Court of International Trade in *Mid Continent Nail v. United States*, 34 CIT ___, 712 F. Supp. 2d 1370 (2010).

[4] Precision urges the Court to uphold the *Remand Results*. *See generally* Pl./Def.-Intervenor Precision Fasteners' Comments on Remand Results, ECF No. 125. Precision correctly notes that because its "dumping margin is *de minimis*, the additional issues raised by Precision are rendered moot and need not be considered by the Court in affirming" the *Remand Results*. *Id.* at 3.

ranted under the facts of the case. *Remand Results* at 3–6. Commerce bases this decision on an interpretation of 19 U.S.C. §1677f-1(d)(1)(B) that sees the statute as mandating only that Commerce explain, before using A-T comparison, why *one* of the statutorily-preferred comparison methods (A-A or T-T) cannot account for the targeted dumping pattern. *Id.* at 3–4. In Commerce's view, "[a]n interpretation of the statute by which the Department would be required to explain why both the [A-A] and the [T-T] methods cannot account for such differences would read into the statute's express terms a requirement that is not present." *Id.* at 4. Commerce bases this on the language of the statute, which requires that before employing A-T comparison, Commerce "explains why such differences [i.e. the targeted dumping differential price patterns] cannot be taken into account using a method described in paragraph (1)(A)(i) [i.e. A-A comparison] or (ii) [i.e. T-T comparison]." 19 U.S.C. § 1677f-1(d)(1)(B)(ii). Commerce sees the use of "a method" and "or" in this clause as giving Commerce the discretion to choose a preferred method from the options given (A-A and T-T), and mandating only that Commerce check whether its preferred method accounts for the targeted dumping pattern when considering whether to use A-T comparison. *Remand Results* at 3–4.

As support for this view of the statute, Commerce references the Statement of Administrative Action ("SAA") issued by Congress in conjunction with the passage of the Uruguay Round Agreements Act, as well as several of Commerce's regulations. In particular, Commerce focuses on statements in the SAA that Commerce will use T-T comparison "far less frequently" than A-A comparison given its "past experience with this methodology" and the "difficulty in selecting appropriate comparison transactions." *Id.* at 5 (citing Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 842–843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4178.) The SAA also indicates that T-T comparison will be appropriate where "there are very few sales and the merchandise sold in each market is identical or very similar or is custom made." SAA at 842–43.

Commerce notes that there are a "substantial number of sales" here. *Remand Results* at 5. Commerce also notes that price volatility, a consideration that may favor use of T-T comparisons, is not "present with respect to DWE's and Precision's sales." *Id.* at 6. As a result, Commerce finds that "use of the [T-T] method is inappropriate[.]" *Id.*

In reviewing the *Remand Results*, the Court must defer to Commerce's interpretation of its statute unless there is "unambiguous statutory language to the contrary" or Commerce has reached an

"unreasonable interpretation of language that is ambiguous." *Eurodif S.A.*, 555 U.S. at 316. The language requiring Commerce to explain why the pattern of price differences "cannot be taken into account using a method described in paragraph (1)(A)(i) [i.e. A-A comparison] or (ii) [i.e. T-T comparison]" seems to the Court to be most naturally read, in context, as requiring Commerce to eliminate both of the statute's standard comparison methods before applying A-T comparison. However, Commerce identified an alternative reading that shows that the language is ambiguous—i.e., open to two different interpretations. The Court cannot say that Commerce's interpretation of this ambiguous language is unreasonable, since Commerce supports its interpretation with the SAA. The Court therefore determines that Commerce's interpretation of 19 U.S.C. § 1677f-1(d)(1)(B) is entitled to *Chevron* deference and is in accordance with law. The Court also determines that substantial evidence supports Commerce's application of the statute here, since Commerce has reasoned that T-T methodology is inappropriate where, as here, there are a large number of sales and no concerns such as price volatility. The Court therefore upholds the *Remand Results* in this respect.

II. The Objections of MCN Are Without Merit

MCN objects to the *Remand Results*. *See generally* Mid Continent Nail Corp.'s Comments on Final Results of Redetermination Pursuant to Court Remand ("*MCN Comments*"), ECF No. 126. MCN argues that the Court's remand order merely required Commerce to apply 19 C.F.R. § 351.414(f) as it existed prior to the *Withdrawal Notice*, but did not require Commerce to interpret that regulation such that A-T comparison would only apply to sales found to be targeted. *Id.* at 1–2, 7–8. MCN contends that Congress intended Commerce to apply A-T to all sales where necessary to deal with masked dumping, so "it would clearly be opposed to the intent of Congress for Commerce to ignore the existence of masked dumping and refuse to apply the A-T methodology" in such a situation. *Id.* at 7. The proper reading of the *Limiting Regulation* according to MCN is that where targeting—a pattern of sales differing in price among customer, time period, or region—exists, *all* sales that comprise that pattern, not solely the low-priced sales. *Id.* at 8–9. MCN contends that Commerce "acted arbitrarily and contrary to the Court's instructions" in failing to apply the *Limiting Regulation* in a manner consistent with this view. *Id.* at 13; *see also id.* at 12. MCN also argues that substantial evidence on the record shows that targeted dumping was so extensive and masked that it was unreasonable to segregate targeted and untargeted sales, so the A-T methodology should have been applied to all sales pursu-

ant to the *Limiting Regulation*. *See id.* at 13–20. The evidence that MCN cites consists of the differences in weighted average dumping margins resulting from application of the A-A and A-T methods to the respondents. *See id.* at 13–16. From this, MCN claims that Commerce should have determined that it was appropriate to apply A-T comparison beyond the limited realm of the sales identified as targeted. Finally, MCN claims that the *Nails* test does not identify the set of targeted sales, but simply identifies whether targeting occurred. *See id.* at 20–22. MCN argues that Commerce improperly failed to evaluate whether targeting was so extensive as to require A-T comparisons for all sales, instead relying on the under-inclusive *Nails* test. *See id.* at 22–23.

Commerce responds that it considered whether the record supported deviation from "normal" application of the *Limiting Regulation*, and determined that it did not. *US Response* at 8, citing *Remand Results* at 6–7. Commerce notes that MCN's extensive discussion of the statute and the regulatory framework around targeted dumping is generally consistent with the current views of Commerce, which are the views that led Commerce to issue the *Withdrawal Notice* invalidated by the Court's remand order. *Id.* at 8–9. However, Commerce was required on remand to apply the *Limiting Regulation* and did so in a manner consistent with both the remand order and the language of the regulation. *Id.* at 9. On remand, Commerce considered the record and determined that no evidence made it appropriate to deviate from the normal application of the *Limiting Regulation*. *Id.,* citing *Remand Results* at 13–18. Commerce also argues that MCN has not provided any rationale to support its argument that a comparison of the results of the various comparison methodologies is an appropriate basis for determining whether the "normal" application of the *Limiting Regulation* should apply. *Id.* at 10–12. Commerce also rejects MCN's argument that targeting was so extensive that targeted sales could not practically be segregated from non-targeted sales, and that the A-T comparison method should therefore have applied more broadly. *Id.* at 12–13. Commerce conducted an analysis of sales data to determine whether the *Nails* test was improperly limiting its determination of how widespread targeting was in the sales. *Id.* at 13–14. The results showed that the volume of sales not tested under the *Nails* test was insignificant. *Id.* at 15.

The Court finds that Commerce has complied with the remand order by applying the *Limiting Regulation* as it would have done had the invalid *Withdrawal Notice* not been issued. To the extent that MCN argues that the government adopted an inappropriately narrow

view of its authority under the *Limiting Regulation*, and inaccurately construed the remand order as a cover for doing so, MCN is mistaken (and Commerce is correct) about the remand order.

Much of MCN's argument must be rejected because it is based on the notion that Commerce was required to exercise its interpretive discretion over the statute and its own *Limiting Regulation* in a particular manner. But the language of the statute and the *Limitation Regulation* explicitly grant Commerce broad discretion in the context of applying a remedy to targeted dumping. The statute says that Commerce "may" employ A-T comparison in the targeted dumping context. 19 U.S.C. § 1677f-1(d)(1)(B). The *Limiting Regulation* also incorporates a certain amount of the flexibility that is characteristic of discretion when it states Commerce "*normally* will limit the application of the average-to-transaction method to those sales that constitute targeted dumping[.]" 19 C.F.R. § 351.414(f)(2) (emphasis added). The statutory use of "may" is an especially strong counterpoint to MCN's contention that Commerce acted illegally in failing to apply A-T comparison more broadly, since the statute leaves to Commerce the choice of whether to apply A-T, even when evidence of targeted dumping permits doing so. To the extent that Commerce's *Remand Results* adopted a different interpretation of the statute than the one MCN preferred, the Court upholds the *Remand Results*.

Finally, MCN's argument that the *Remand Results* are unsupported by substantial evidence fails. Commerce took MCN's contentions seriously and conducted detailed analysis of the record data to ascertain whether or not the *Nails* test was distorting its understanding of how extensive targeting was in this case, but the results of that analysis were negative. Commerce examined the evidence for other indicators that the normal application of the *Limiting Regulation* should be put aside, but found none. These determination were certainly supported by more than a scintilla of evidence, and were reasonable in light of the record as a whole. The Court therefore upholds the *Remand Results* over MCN's challenges.

III. The Objections of Dubai Wire Are Without Merit

A. Dubai Wire's Arguments

Dubai Wire argues that Commerce committed reversible error in finding targeting by time period based on increases in Dubai Wire's prices over the period of investigation ("POI"). Dubai Wire FZE, et al, Comments in Resp. to the Dep't of Commerce's Final Results of Redetermination (*Dubai Wire Comments*) at 4–11, ECF No. 123. Dubai Wire contends that these price increases were directly related

to increased costs, avoided dumping by maintaining prices above cost of production, and that it was therefore improper to use them as a basis for a finding of unfair trade in the form of targeted dumping. *Id.* at 5–6. Contending that Commerce must make its decisions based on the commercial realities surrounding a case, Dubai Wire claims that Commerce has acted unreasonably in applying its mathematical dumping analysis without considering *why* Dubai Wire's pricing fell into the observed patterns. *Id.* at 6–7. Noting that Commerce verified its cost and sale data, Dubai Wire claims that record evidence establishes a correlation between surging costs for wire rod (making up nearly all of Dubai Wire's input) and increasing nail prices. *Id.* at 8–9. Dubai Wire attacks Commerce's claim that its cost increases over the POI were not significant enough to require adjustment to the targeted dumping analysis, which Commerce based on the 25% increase Commerce requires to calculate constructed value costs over a shorter period than the entire POI. *Id.* at 10. Dubai Wire claims there is no reason to link this unrelated test to the targeted dumping analysis, since price increases below 25% can lead to a finding of targeted dumping and the exporter should be allowed to justify its price increases by showing related cost increases. *Id.*

Dubai Wire claims that Commerce erred when it determined that Dubai Wire had engaged in targeting by customer and by region. *Id.* at 11–15. Dubai Wire argues that these findings were based on a miniscule percentage of total sales, which did not constitute a "commercially recognizable" pattern and should, in Dubai Wire's view, be considered *de minimis* (and therefore be ignored) by Commerce. *Id.* at 12. According to Dubai Wire, Commerce's rejection of this proposed *de minimis* standard for the targeting analysis was contrary to several recent Commece decisions, yet Commerce did not justify applying a different standard. *Id.*at 14–15.

Dubai Wire also claims that Commerce erred in treating certain low-priced sales, made to three customers, as targeted despite the fact that two of these customers purchased "second quality, non-prime goods" sold "at a discounted price, on an 'as-is' basis," and the third purchased "nails which had been sitting in inventory" as "old stock" for years. *Id.* at 16–17. Dubai Wire claims that Commerce erred in finding these sales to be commercially interchangeable with the nails in Dubai Wire's sales to other customers.

Challenging Commerce's finding of targeting by geographic region, Dubai Wire claims that it accidentally failed to recover freight costs for a shipment to a particular inland customer, resulting in a small shortfall not contemplated in its agreement with the customer, who later informed Commerce of its intent to conform the sale with the

agreement to cover the shortfall. *Id.* at 19–20. In Dubai Wire's view, Commerce acted unreasonably in basing its finding of targeted dumping by geographic region on this shortfall. *Id.*

Dubai Wire claims that the statute does not permit non-dumped sales to be used to establish a pattern of prices constituting targeted dumping. *Id.* 20–21. Dubai Wire notes that the *SAA* "provides that targeted dumping takes place when 'an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions,'" and argues that this supports a reading of the statute that requires Commerce to find sales to be dumped before they can be analyzed for targeting. *Id.* at 21. Dubai Wire claims that any other construction of the law could "lead to the absurd result of finding that an exporter is guilty of 'targeted dumping' without selling merchandise at dumped prices." *Id.*

Dubai Wire's final challenge to the *Remand Results* claims that Commerce erred when it refused to offset the positive margin from the A-T results with the negative margin from the A-A results. *Id.* at 23–24. Dubai Wire identifies three separate applications of this practice of failing to offset positive margins with negative ones, a practice known as "zeroing": (1) zeroing negative margins in the A-T results from tested sales found not to be targeted; (2) zeroing negative margins in A-A results when combining them with positive margins from A-T results within the same product type (known as a "CONNUM"); and (3) zeroing negative margins in A-A results when combining them with positive margins from A-T results for other CONNUMs. *Id.* at 23. Dubai Wire claims there is no rationale for repeating zeroing in steps two and three under Commerce's own methodology. *Id.* at 23.

B. Commerce's Responses to Dubai Wire

Commerce argues that the statute does not require it to first ascertain that sales were made at less than fair value (i.e. dumped) before considering whether those sales were targeted. *US Response* at 19–20. In Commerce's view, the statute refers solely to analyzing export or constructed export prices when determining if there is a pattern of prices that indicates targeting; it is only after such a pattern is identified that the statute contemplates comparison of normal value to export price or constructed export price, and the comparison method Commerce should use. *Id.* Therefore, in Commerce's view, the statute can only be read as calling for a targeting analysis *prior* to a dumping finding, since the dumping finding can only be reached once a comparison method is identified and applied. *Id.*

Likewise, the government argues that Commerce is only required by the statute to identify a pattern of targeted sales and need not consider whether there is a *de minimis* number of such sales. *See id.* at 20–23. The government contends that the cumulative amount of targeting is the important consideration under the statute, rather than the targeting along each of the three axes (customer, location, and time period) in isolation. *Id.* at 21–22. In any case, the government argues that the cumulative volume of Dubai Wire's sales that were found to be targeted is well above a level that could be considered *de minimis* even were Commerce to impose a *de minimis* test here. *Id.* at 22–23.

The government rejects Dubai Wire's contention that its sales to particular customers were discounted due to being of second quality or from old stock because such a conclusion was not clear from the evidence in the administrative record. *Id.* at 23–24. As for Dubai Wire's purported "mistake" regarding the failure to recover freight costs for a particular sale, Commerce contends that no evidence of this mistake, or the customer's intention to correct it, is reflected in the record, upon which Commerce is required to base its decision. *Id.* at 24.

Commerce disputes Dubai Wire's argument that it should have considered the commercial reasons why Dubai Wire's prices varied over the POI (i.e. due to input cost increases that Dubai Wire sought to recover). *Id.* at 26–28. Commerce states that it is not required by statute to consider the reasons behind patterns of low-priced sales by time period, and cites several recent court decisions as supporting the proposition that Commerce need not consider motive when finding targeting. *Id.* at 26–27.

The United States argues that the statute and *Limiting Regulation* do not specify how Commerce must compare the results of the A-A method with the A-T method in applying the *Limiting Regulation*. *Id.* at 30–31. Commerce contends that it reasonably segregated the results of the two methodologies by applying zeroing in the A-A comparison but not in the A-T comparison, and then by calculating margins separately for each comparison methodology without offsetting the results of one method with the results of the other. *Id.* at 31.

C. Analysis

The Court finds Commerce's construal of the statute reasonable and entitled to deference with regard to the issues raised by Dubai Wire. The statute does not specify whether Commerce may consider non-dumped sales when identifying whether there is a pattern of prices

constituting targeting, as Dubai Wire claims. In the absence of a clear command from Congress via the statute, Commerce has wide latitude under *Chevron* to adopt a reasonable construal. Here, Commerce has adopted the reasonable interpretation of first identifying whether a pricing pattern exists, and only then determining whether that pricing pattern involves dumping. Not only is this a reasonable interpretation of the language of the statute, but it is hard to imagine how the statute could be administered were Commerce to adopt Dubai Wire's preferred approach. This is because no determination can be reached as to whether dumping has occurred without comparing the prices of sales of the subject merchandise in the home market with the prices of sales of the product in the United States. But Commerce cannot make that determination without choosing to compared prices using either the A-A, T-T, or A-T method. It would be putting the cart before the horse to use the outcome of the price comparison methodology to determine which price comparison methodology could be used. Because Commerce has reasonably construed the statute in this regard, the Court upholds this aspect of the *Remand Results*.

On the issue of whether Commerce must adopt a *de minimis* number of sales beneath which those sales will not support a finding of targeting, the Court also rejects Dubai Wire's argument. This is, again, an issue not specified by the statute and thus reviewable only for whether Commerce has come to a reasonable interpretation of the statute that it administers. Commerce's determination that the relevant concern is the total volume of targeted sales across all three of the targeting axes is a reasonable approach not contradicted by the statute. And Commerce is correct that, even if Commerce were to adopt a *de minimis* level of targeting beneath which it would not apply the A-T comparison method, the volume of Dubai Wire's sales found to be targeted would exceed that level based on the record evidence in this case. For these reasons, the Court upholds this aspect of the *Remand Results*.

The Court finds that Commerce's determination of the factual issues raised by Dubai Wire—whether certain sales were of second quality or old stock—was supported by substantial evidence. Dubai Wire's argument rests on a generous interpretation of the information on the record, which Commerce considered but by which it was not persuaded. The Court finds that Commerce's rejection of this argument was proper. Similarly, Commerce is required to make its determinations solely on the basis of evidence in the record. Commerce therefore could not take into account the purported mistake regarding freight costs associated with a shipment of Dubai Wire's nails, about which the record was silent. The Court therefore upholds the

Remand Results on this issues.

The issue of whether Commerce must consider explanations for *why* there exists a pattern of prices that varies (i.e. targeting) was definitively resolved in *JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015). The Court of Appeals held in that case that 19 U.S.C. §1677f-1(d)(1)(B) "does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. . . . we agree with the CIT that requiring Commerce to determine the intent of a targeted dumping respondent 'would create a tremendous burden on Commerce that is not required or suggested by the statute.'" *JBF RAK LLC*, 790 F.3d at 1368 (quoting *JBF RAK LLC v. United States*, 38 CIT ___, ___, 991 F. Supp. 2d 1343, 1355 (2014)). The Court therefore rejects Dubai Wire's argument on this issue and affirms the *Remand Results* in this regard.

Finally, the statute and regulations are silent as to how Commerce should compare the results of the A-A method with the A-T method in applying the *Limiting Regulation*. The matter is therefore squarely within Commerce's purview and the Court defers to Commerce's reasonable decision to reject an offset of the results of A-T method with the results of the A-A method. Therefore the Court upholds this aspect of the *Remand Results* as well.

CONCLUSION

For the reasons given above, the Court determines that the *Remand Results* complied with the Court's remand order, were not contrary to law, and were supported by substantial evidence. The *Remand Results* are therefore affirmed. Judgment shall enter for Defendant.

Dated: November 3, 2015
New York, NY

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

Slip Op. 15–123

BAODING MATONG FINE CHEMISTRY CO., LTD., Plaintiff, v. UNITED STATES Defendant, and GEO SPECIALTY CHEMICALS, INC. Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 12–00362

[Remanding for reconsideration a final determination of the International Trade Administration, U.S. Department of Commerce, concluding an administrative review of an antidumping duty order on glycine from China]

Dated: November 3, 2015

Ronald M. Wisla, Kutak Rock LLP, of Washington, D.C., argued for plaintiff Baoding Mantong Fine Chemistry Co., Ltd. With him on the brief was *Lizbeth R. Levinson*.

Antonia R. Soares, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for defendant United States. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jessica Forton*, Attorney-International, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

David M. Schwartz, Thompson Hine LLP, of Washington D.C., argued for defendant-intervenor GEO Specialty Chemicals Inc.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding") contests the final determination ("Final Results") that the International Trade Administration of the U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude an administrative review of an antidumping duty order on glycine from the People's Republic of China (the "subject merchandise").[1] *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 64,100 (Int'l Trade Admin. Oct. 18, 2012) ("*Final Results*"). In the review, Commerce assigned to Baoding, a Chinese producer and exporter of glycine and a respondent in the administrative review proceeding conducted by Commerce, a weighted average dumping margin of 453.79%. *Id*. at 64,101. Defendant-intervenor GEO, also a party to the administrative proceeding, is a domestic producer of glycine.

[1] Glycine "is a freeflowing crystalline material, like salt or sugar" that "is produced at varying levels of purity and is used as a sweetener/taste enhancer, a buffering agent, reabsorbable amino acid, chemical intermediate, and a metal complexing agent." *Antidumping Duty Order: Glycine From the People's Republic of China*, 60 Fed. Reg. 16,116, 16,116 (Int'l Trade Admin. Mar. 29, 1995).

Before the court is plaintiff's Motion for Judgment on the Agency Record. Pl.'s Mot. for J. on the Agency R. (July 22, 2013), ECF No. 30 ("Pl.'s Mot."); Mem. of P. & A. in Supp. of Pl.'s R. 56.2 Mot. for J. on the Agency R. (July 22, 2013), ECF No. 30–1 ("Pl.'s Br."). Plaintiff contends that the 453.79% dumping margin Commerce calculated for Baoding is impermissible because it defies commercial and economic reality. Pl.'s Br. 10, 13. Plaintiff also challenges certain "surrogate values" that Commerce applied to various factors of production when calculating the normal value of Baoding's subject merchandise. Pl.'s Br. 11–34. Finally, plaintiff challenges the surrogate financial ratios Commerce used to value Baoding's factory overhead, selling, general and administrative (SG&A) expenses, and profit (collectively, the "financial ratios") for the normal value calculation. Pl.'s Br. 34–39.

Also before the court is defendant's Motion for a Partial Voluntary Remand, which seeks a voluntary remand to allow Commerce to reconsider the financial ratios it used in determining the normal value of Baoding's subject merchandise. Def.'s Mot. for a Voluntary Remand 1 (Aug. 6, 2014), ECF No. 64 ("Def.'s Mot. for Voluntary Remand"). Both Baoding and defendant-intervenor GEO Specialty Chemicals, Inc. ("GEO") oppose defendant's motion. *Id.* at 1–2.

The court rules that Commerce failed to fulfill its obligation to determine the most accurate margin possible when it assigned Baoding a weighted average dumping margin of 453.79%, which on the record of this case was not realistic in any commercial or economic sense and punitive in its effect. The court directs Commerce to determine a new margin for Baoding that is the most accurate margin possible, that is grounded in the commercial and economic reality surrounding the production and sale of Baoding's subject merchandise, and that is fair, equitable, and not so large as to be punitive.

I. BACKGROUND

A. The Administrative Review Proceedings before Commerce

Commerce issued the antidumping duty order on glycine from China (the "Order") in 1995. *Antidumping Duty Order: Glycine From the People's Republic of China*, 60 Fed. Reg. 16,116 (Int'l Trade Admin. Mar. 29, 1995). On April 27, 2011, Commerce initiated the administrative review at issue in this case, for which the period of review ("POR") was March 1, 2010 through February 28, 2011, and in which Baoding was the sole respondent.[2] *See Initiation of Antidump-*

[2] The review was only the fifth periodic review of the antidumping duty order conducted by Commerce; periodic reviews were not conducted for certain years following issuance of the order. For the 2010–2011 review, GEO initially requested that Commerce review twenty-

ing and Countervailing Duty Administrative Reviews, 76 Fed. Reg. 23,545 (Int'l Trade Admin. Apr. 27, 2011).

On April 11, 2012, Commerce published the preliminary results of the review ("Preliminary Results"), in which it determined a preliminary dumping margin of zero for Baoding. *Glycine From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 77 Fed. Reg. 21,738, 21,743 (Int'l Trade Admin. Apr. 11, 2012) ("*Prelim. Results*"). In response to an allegation that Commerce made a currency conversion error in the Preliminary Results, Commerce notified the parties that it was revising the Preliminary Results and adjusting Baoding's antidumping margin from zero to 457.74% ("Revised Preliminary Results").[3] *Letter to File Concerning Revision to Certain Surrogate Valuations & the Prelim.-Margin Calculation Program for Baoding* 2 (June 27, 2012) (Admin.R.Doc. No. 84) ("*Revisions to the Prelim. Results*"). Commerce explained that "correction of this error has a significant impact on Baoding Mantong's dumping margin." *Issues & Dec. Mem. for the Final Results in the Admin. Review of Glycine from the People's Republic of China* 29 (Oct. 9, 2012), A-570–836, (Admin.R.Doc. No. 127), *available at* http://enforcement.trade.gov/frn/summary/PRC/201225595–1.pdf (last visited Oct. 29, 2015) ("*Decision Mem.*").

On October 12, 2012, Commerce issued the Final Results and an accompanying Issues & Decision Memorandum, determining a final margin for Baoding of 453.79%.[4] *See Final Results*, 77 Fed. Reg. at

nine other Chinese companies but withdrew its request as to those other companies. *See Glycine From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 77 Fed. Reg. 21,738, 21,739 (Int'l Trade Admin. Apr. 11, 2012) ("*Prelim. Results*").

[3] Following the Department's issuance of the Preliminary Results, GEO submitted a case brief arguing that Commerce made a currency conversion error by extracting Global Trade Atlas ("GTA") import data, which Commerce used in the surrogate value calculations, in Indian rupees rather than Indonesian rupiahs. *See GEO Specialty Chem.'s Case Br.* 13 (May 11, 2012) (Admin.R.Doc. Nos. 75–76) ("*GEO Case Br.*"). In response, Commerce examined its source data and found that the GTA data had been reported in U.S. dollars and that, therefore, no currency conversion was necessary. *Letter re: Revision to Certain Surrogate Valuations & the Prelim.-Margin Calculation Program for Baoding* 2 (June 27, 2012) (Admin.R.Doc. No. 84); *Issues & Dec. Mem. for the Final Results in the Admin. Review of Glycine from the People's Republic of China* 2 (Oct. 9, 2012), A-570–836, (Admin.R.Doc. No. 127), *available at* http://enforcement.trade.gov/frn/summary/PRC/2012–25595–1.pdf (last visited Oct. 29, 2015) ("*Decision Mem.*").

[4] The minor change in calculation from the Revised Preliminary Results to the Final Results concerned Baoding's international freight expenses on Baoding's constructed export sales. *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 64,100, 64,101 (Int'l Trade Admin. Oct. 18, 2012) ("*Final Results*"). After the Preliminary Results, Commerce asked that Baoding provide additional information concerning those expenses, and when the company did not respond

64,100; *Decision Mem.* 1.

B. Proceedings before the Court of International Trade

Baoding filed its summons on November 16, 2012 and its complaint on December 7, 2012. Summons, ECF No. 1; Compl., ECF No. 7. It followed with its Motion for Judgment on the Agency Record on July 22, 2013, and defendant and defendant-intervenor filed oppositions to plaintiff's motion on January 15, 2014. Mot. for J. on the Agency R., ECF No. 30 ("Pl.'s Mot."); Def.'s Resp. to Pl.'s R. 56.2 Mot. for J. upon the Agency R., ECF No. 46 ("Def.'s Opp'n); Def.-Intervenor's Resp. Br. in Opp'n to Pl. Baoding Mantong Fine Chem. Co. Ltd.'s R. 56.2 Mot. for J. upon the Agency Rec., ECF No. 45 ("Def.-intervenor's Opp'n"). Plaintiff filed a reply brief on March 10, 2014. Pl.'s Reply Br., ECF No. 57 ("Pl.'s Reply"). The court held oral argument on July 23, 2014.

Following oral argument, defendant filed a motion for partial voluntary remand of the case, Def.'s Mot. for Voluntary Remand, which both defendant-intervenor and plaintiff opposed, Def.-Intervenor's Resp. in Opp'n to Def.'s Mot. for a Voluntary Remand (Aug. 25, 2014), ECF No. 65 ("GEO Opp'n to Voluntary Remand"); Pl.'s Opp'n to Def.'s Mot. for a Voluntary Remand (Aug. 25, 2014), ECF No. 66. Defendant then filed a motion for leave to file a reply to plaintiff's opposition to a voluntary remand. Def.'s Mot. for Leave to Reply to Pl.'s Resp. to Def.'s Mot. for Voluntary Remand (Aug. 27, 2014), ECF No. 67.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended*, 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping administrative review.[5] In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

within the provided deadline, Commerce applied surrogate freight expenses to construct export price sales for which freight services may have been provided by a nonmarket economy carrier. *Id.* Plaintiff does not challenge the Department's determination as to Baoding's international freight expenses.

[5] All citations to the United States Code herein are to the 2006 edition and all citations to the Code of Federal Regulations are to the 2011 edition.

B. The Court Remands the Final Results for Redetermination of the 453.79% Margin, which Does Not Conform to Baoding's Commercial Reality and Fails to Fulfill the Department's Fundamental Responsibilities under the Statute

In contesting the Final Results, plaintiff makes various specific objections to the way in which Commerce calculated its margin but also argues generally that "[e]ven where Commerce has acted in conformity with its statutory and regulatory obligations, the resulting dumping margin must be examined for its accuracy and fairness." Pl.'s Br. 3 (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995)). Baoding submits that the 453.79% weighted average dumping margin Commerce assigned to it "defies commercial and economic reality." Pl.'s Br. 13. The court agrees.

In conducting a periodic administrative review of an antidumping duty order, Commerce is required to determine "the normal value and export price (or constructed export price) of each entry of the subject merchandise" and "the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A). A "dumping margin" is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," 19 U.S.C. § 1677(35)(A), and a "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer," *id*. § 1677(35)(B).

Antidumping duties are remedial, not punitive, measures. Their purpose is "prevent[ing] foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' *i.e.*, at prices below the prices the foreign manufacturers charge for the same products in their home markets." *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995); *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1027 (Fed. Cir. 2007) ("The purpose of the antidumping statute is to prevent foreign goods from being sold at unfairly low prices in the United States to the injury of existing or potential United States producers.").

The Court of Appeals for the Federal Circuit ("Court of Appeals") has emphasized repeatedly that in administering the antidumping statute, Commerce must determine margins as accurately as possible. *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) ("*Bestpak*") ("An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible."); *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d

1376, 1382 (Fed. Cir. 2001) ("*Shakeproof*"); *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) ("*Lasko*") (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)) ("*Rhone Poulenc*"). Commerce also has an obligation to calculate antidumping duties in a way that is fair and equitable. *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994) ("We begin by noting that one of the purposes of the antidumping laws is to calculate antidumping duties on a fair and equitable basis.").

While normal value ordinarily is based on the price at which merchandise comparable to the subject merchandise (the "foreign like product") is sold in the exporter's home market or another comparison market, *see* 19 U.S.C. § 1677b(a)(1), Commerce uses a different method of determining normal value where the subject merchandise is produced in a country considered to be a nonmarket economy country, such as China.[6] Here, Commerce determined the normal value of Baoding's subject merchandise according to 19 U.S.C. § 1677b(c)(1), which provides for the calculation of the normal value of subject merchandise from a nonmarket economy country "on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." The "factors of production utilized in producing merchandise include, but are not limited to—(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

Where, as here, Commerce is determining the normal value of subject merchandise according to specialized procedures applicable to goods produced in nonmarket economies, Commerce is no less obligated to determine margins as accurately as possible, and it is no less obligated to determine, fairly and equitably, margins that are remedial and not punitive. Congress directed generally that "the valuation of the factors of production shall be based on the *best available information* regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1) (emphasis added). Although calculating normal value "for a producer in a nonmarket economy country is difficult and necessarily imprecise," the method used by Commerce still must fall within "the limits of permissible approxi-

[6] A "nonmarket economy country" is defined in 19 U.S.C. § 1677(18) as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."

mation." *Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997). Here, Commerce fell far short of this obligation: the assignment of so prohibitive a dumping margin as 453.79% as a remedial measure is difficult to comprehend from a commercial or economic standpoint.[7] To take an extremely simplified example of the statutory formula (one that does not require calculation of a weighted average from multiple sales), a foreign exporter assigned a percentage dumping margin of 453.79% on a good with a normal value of $100 would have had to have sold the good at an export price, or constructed export price, of approximately $18.06 (i.e., in rounded numbers, the dumping margin would be $81.94 and the percentage dumping margin would be $81.94 divided by $18.06, or 453.71%.).

Also, Congress expressly allowed for the possibility that adequate surrogate value information might be unavailable for the purpose of constructing normal value according to the specialized procedures involving valuation of factors of production. Congress directed that if Commerce finds that the "available information is inadequate" for that purpose, Commerce "shall determine the normal value on the basis of the price at which merchandise that is—(A) comparable to the subject merchandise, and (B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country, is sold in other countries, including the United States." *Id.* § 1677b(c)(2). In the subject review, Commerce, even though arriving at a margin that defies reality, did not find that the available surrogate value information was inadequate for use in determining the normal value of Baoding's subject merchandise.

Regarding the enormity of the margin assigned to it, Baoding argues that if the 453.79% margin "reflected commercial reality, Baoding would have suffered huge operating losses during the period of review."[8] Pl.'s Br. 13; *see also Baoding Submission of Surrogate Value Information & Comment* 2 (July 16, 2012) (Admin.R.Doc. Nos.

[7] When Commerce has assigned relatively large antidumping duty margins, typically the recipients were uncooperative respondents and the margins were based principally or entirely on "facts otherwise available" and an "adverse inference" pursuant to section 776 of the Tariff Act, 19 U.S.C. § 1677e. That situation did not occur in the review under consideration here. Commerce did not find that Baoding was an uncooperative respondent, and the 453.79% margin is an actual calculated margin, not one Commerce assigned based on an adverse inference.

[8] Plaintiff states that "[i]n the 2007–2008 review, Baoding's gross U.S. sales prices were in the $2,000 - $3,000 per ton range" and that "during the current period of review, Baoding's CEP [constructed export price] sales ranged between $4,100 and $4,500 per metric ton." Pl.'s Br. 12–13. The court is not able to conclude that Baoding's statement regarding its gross U.S. sales prices during the 2007–2008 review is grounded in a reference to the administrative record of the review at issue in this case and therefore has disregarded this statement in reaching the decision to order Commerce to calculate Baoding's margin anew. Baoding also states that after experiencing difficulty selling glycine in the United States

95–121) ("*Baoding's July 16, 2012 Comments*"). Baoding reported during the administrative proceeding that it did not suffer any financial loss on export sales during the POR.[9] Pl.'s Br. 13 (citing *Baoding Section A Resp.* A-9). The normal value Commerce calculated for Baoding's subject merchandise—which based on the margin would have had to have been between five and six times the U.S. price—cannot be described as falling within "the limits of permissible approximation." *Sigma Corp.*, 117 F.3d at 1408. In short, the record lacks substantial evidence to support a finding that the 453.79% margin has any relationship to Baoding's commercial reality, and the record evidence of Baoding's profitability is contrary to any such finding.

Plaintiff also points out that the 453.79% margin is many times larger than any margin it received in previous reviews.[10] Pl.'s Br. 11.

under the 50.20% margin it was assigned in the 2006–2007 review and the 37.18% margin it was assigned in the 2007–2008 review, it did not sell glycine to the United States during the 2009–2010 period of review. *Id.* at 11–12. It further explains that it subsequently "deployed a new strategy for its U.S. sales" under which, instead of making "lower-priced EP [export price] sales directly to U.S. distributors" as it had in the three previous reviews, for the subject review Baoding's U.S. sales were mostly "higher priced CEP sales made by [its] affiliated U.S. importer, who sold directly to U.S. companies." *Id.* at 12. Plaintiff concludes by stating that "[d]ue to the substantial increase in Baoding's U.S. sales prices, Baoding fully expected to receive a zero margin, even taking into account normal variances in the valuation of surrogate prices and financial ratios." *Id.* at 13. Defendant-intervenor disputes Baoding's version of events, arguing that "Baoding had no sales in 2009 because of the global recession, and, as the market improved and customer demand increased, resumed its sales in 2010." Def.-intervenor's Br. 18. The court does not find it necessary to resolve the issues the parties debate as to the circumstances underlying the history of Baoding's pricing in reviews prior to the review at issue, as that history is not relevant to the court's decision in this case.

[9] Record information submitted by Baoding supports a finding that the company was profitable in its export sales. *Baoding's First Supplemental Section A Resp.* 9–10 (Nov 4, 2011), (Admin.R. Part II, Doc. Nos. 20–22) ("*Baoding Supplemental Section A Resp.*"); *see also* App. A-10 to *Baoding Section A Resp.* (2010 audited financial report of Baoding); Ex. S1–16 to *Baoding Supplemental Section A Resp.* (showing profit in calendar year 2010); Ex. S1–17 to *Baoding Supplemental Section A Resp.* (financial report of Baoding for the first three months of 2011).

[10] Baoding cites the 2.75% margin assigned to it in the 2003–2004 review, the 50.20% margin in the 2006–2007 review, and the 37.18% margin assigned to it in the 2007–2008 review. Pl.'s Br. 11. *See Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 41,121 (Int'l Trade Admin. Aug. 14, 2009), *as amended*, 74 Fed. Reg. 48,223 (Int'l Trade Admin. Sept. 22, 2009); *Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 55,814 (Int'l Trade Admin. Sept. 26, 2008). In arguing that the 453.79% margin is not a permissible margin, plaintiff does not concede that the 50.27% and 37.18% margins were correct and gives reasons, grounded in the Department's choices of surrogate values and financial ratios, why it believes they were not. *Id.* at 12. Defendant-intervenor argues that the 2.75% margin in the 2003–2004 review was much lower than the margins in the 2006–2007 and 2007–2008 reviews "because no domestic interested party participated in the 2003–2004 review and GEO vigorously participated in the later reviews." Def.-intervenor's Br. 17. Because the impermissibility of the 453.79% margin is apparent from

Further, Baoding submits that in the review in question, the 453.79% margin is approximately three times higher than the China-wide rate, which Commerce determined according to facts otherwise available and an adverse inference, under section 776 of the Tariff Act, 19 U.S.C. § 1677e, based on the non-cooperation of the China-wide entity.[11] *Id*.

In its response to Baoding's contention that the 453.79% margin defies commercial reality, defendant argues, first, that "Baoding failed to raise this argument in its comments to the agency." Def.'s Br. 18. This argument is contradicted by the administrative record.[12] Baoding did not fail to exhaust its administrative remedies as to this argument. It stated in its comments to the Department on the revised preliminary results that "[t]he absurd results of Commerce's revisions reflect the selection of aberrational surrogate prices to value certain key inputs used to manufacture the subject merchandise," but it also stated therein that "[t]he results of Commerce's revisions are *not commercially credible* and must be revised for the final results."[13] *Baoding's July 16, 2012 Comments* 2 (emphasis added).

Next, defendant argues that Baoding's argument is "without merit because Commerce conducted its surrogate value determinations in

the evidence on the record of this case, the court considers the parties' various characterizations of the circumstances giving rise to the previous margins to be beyond the scope of this judicial proceeding.

[11] *See Glycine from China* at I-2, Inv. No. 731-TA-718, USITC Pub. 4255 (Aug. 2011); *Antidumping Duty Order: Glycine From the People's Republic of China,*60 Fed. Reg. 16,116 (Int'l Trade Admin. Mar. 29, 1995); *Preliminary Determination of Sales at Less than Fair Value: Glycine from the People's Republic of China,* 59 Fed. Reg. 59,211 (Int'l Trade Admin. Nov. 16, 1994). The Final Results state that the PRC-wide rate is 155.89%. *Final Results*, 77 Fed. Reg. at 64,101.

[12] Rather than Baoding, it was Commerce that failed to meet its obligation arising out of Baoding's argument that the 453.79% margin was not commercially credible. Commerce failed to respond to this argument, either in the Final Results or in the incorporated Issues & Decision Memorandum. Commerce "has an 'obligation' to address important factors raised by comments from petitioners and respondents." *SKF USA, Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011) (citing *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1358 (Fed. Cir. 2005), *Nat'l Mining Ass'n v. Mine Safety& Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997)).

[13] Defendant also argues, incorrectly, that Baoding failed to raise before Commerce its argument that the 453.79% margin defies economic reality under the principle of *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378–79 (Fed. Cir. 2013) ("*Bestpak*"). Def.'s Opp'n 44. *Bestpak* was decided in May 2013, well after the subject review was completed in October 2012. Pl.'s Reply 2. In *Bestkpak*, the Court of Appeals found that a 123% dumping margin was not supported by substantial record evidence. *Bestpak*, 716 F.3d at 1372. The case involved a challenge by a separate rate respondent challenging the dumping margin it received when Commerce averaged rates derived for the two mandatory respondents, a *de minimis* rate and a rate derived from facts otherwise available and an adverse inference. The court concluded that "[t]here is no basis in the record to tie this 123.83% rate to Bestpak's commercial activity." *Bestpak*, 716 F.3d at 1380.

accordance with the relevant legal authorities and supported its determinations with substantial evidence," adding that "[a]s long as Commerce satisfies these requirements, the law does not provide for any additional scrutiny of the final resulting rate." Def.'s Br. 18. Defendant misstates the law. As the court has emphasized, it is settled law that in administering the antidumping statute, Commerce must determine margins as accurately as possible. In this case, Commerce has assigned a margin that, on the record facts, has not been demonstrated to be anything other than commercially impossible.

Defendant argues, further, that "[a]lthough Commerce must strive to calculate dumping margins as accurately as possible, Commerce satisfies this standard in non-market economy cases by selecting surrogate values that constitute the best available information." *Id.* at 45. This too is a misstatement of the law. Congress contemplated that information that is the "best available" might still be "inadequate for purposes of determining the normal value of subject merchandise under paragraph (1)" of 19 U.S.C. § 1677b(c), requiring Commerce to determine normal value under paragraph (2) of subsection (c). Moreover, normal value calculations for subject merchandise of nonmarket economy countries cannot be shown to be within the "limits of permissible approximation," *Sigma Corp.*, 117 F.3d at 1408, when they lack any apparent connection to the underlying commercial reality.

In assigning Baoding such a huge margin, Commerce has lost sight of the purpose of the antidumping duty statute, which is remedial, not punitive. The 453.79% margin is undeniably punitive in effect, regardless of the Department's intent, and it violates the Department's obligation to treat every party before it fairly and equitably as well as the obligation to arrive at the most accurate margin possible. Therefore, the court must order a remand.

The margin determined upon remand must: (1) be the most accurate margin possible; (2) reflect the commercial and economic reality surrounding the production and sale of Baoding's subject merchandise; (3) be arrived at fairly and equitably; and (4) not be punitive. Where Commerce must make normal value calculations that are inherently imprecise, the calculations still must lie within the limits of permissible approximation. On remand, Commerce must take whatever steps are necessary to calculate a margin that satisfies these fundamental requirements. If, in the process of determining a new margin for Baoding, Commerce concludes that the record information is insufficient to allow it to determine a margin that satisfies these fundamental requirements, it either must reopen the record to

collect new information that will allow it to meet those requirements in full, or it must follow the statutory directive to determine a margin according to the method of 19 U.S.C. § 1677b(c)(2), reopening the record if it is necessary to do so in order to comply with that statutory provision.

Whatever its method, Commerce must be clear and transparent in setting forth in the remand redetermination its various methods and calculations, and its reasoning, so that plaintiff, defendant-intervenor, and the court may give the Department's new determination adequate and informed consideration.

Because Baoding has claimed that the margin defies commercial and economic reality as well as claiming that specific determinations Commerce made in reaching that margin are unsupported by substantial evidence or otherwise not in accordance with law, the court directs Commerce to reconsider any and all aspects of the Department's calculation of the 453.79% margin as necessary and appropriate in arriving at a margin that complies with the directives of this Opinion and Order. The court declines, at this time, to affirm any of the findings of fact and conclusions of law by which Commerce arrived at that margin. In so doing, the court holds in abeyance any ruling on Baoding's specific challenges to aspects of the calculation of the 453.79% margin, recognizing that those aspects may change in the remand redetermination that Commerce is directed to submit for the court's consideration. While it is likely that at least some of the decisions resulting in the unrealistic margin stemmed from the Department's choices pertaining to the surrogate country, surrogate values, and SG&A ratios, the remand is not limited to these aspects of the Final Results.

Recognizing that Commerce may find it necessary to conduct anew many of the procedures it conducted in arriving at the Final Results and to reopen the record for various purposes, the court is allowing Commerce a period of 120 days in which to submit its remand redetermination. Should Commerce even consider that lengthy a time period inadequate, defendant should make a motion, as soon as practicable, for additional time.

Defendant has moved for a voluntary remand to allow Commerce to reconsider the financial ratios used in determining the normal value of Baoding's subject merchandise. Def.'s Mot. for a Voluntary Remand. Because the court is directing Commerce to reconsider all aspects of its determination of the margin it assigned to Baoding in the Final Results, Commerce may reconsider these ratios. However, the court will not assume that a remand confined to the question of the financial ratios could suffice for correction of the serious, funda-

mental deficiencies affecting the Final Results. Therefore, the court is denying defendant's voluntary remand motion as submitted.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court remands the final decision ("Final Results") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in the administrative review of the antidumping duty order on glycine from the People's Republic of China, published in *Glycine from the People's Republic of China: Final Results of Antidumping Duty Admin. Review*, 77 Fed. Reg. 64,100 (Int'l Trade Admin. Oct. 18, 2012) ("*Final Results*"). Therefore, upon consideration of all papers and proceedings in this case, and upon due deliberation, it is hereby

ORDERED that the Final Results be, and hereby are, set aside as unlawful and remanded for redetermination in accordance with this Opinion and Order; it is further

ORDERED that Defendant's Motion for a Voluntary Remand (Aug. 6, 2014), ECF No. 64, be, and hereby is, denied; it is further

ORDERED that Defendant's Motion for Leave to Reply to Plaintiff's Response to Defendant's Motion for Voluntary Remand (Aug. 27, 2014), ECF No. 67, be, and hereby is, granted and defendant's reply is hereby accepted for filing; it is further

ORDERED that Commerce shall issue, within 120 days of the date of this Opinion and Order, a new determination upon remand ("Remand Redetermination") that complies fully with this Opinion and Order and determines a new dumping margin for Baoding; it is further

ORDERED that plaintiff and defendant-intervenor GEO Specialty Chemicals, Inc. each may file comments on the Remand Redetermination within 30 days from the date on which the Remand Redetermination is filed with the court; and it is further

ORDERED that defendant may file a response to such comments within 15 days from the date on which the last of any such comments is filed with the court.

Dated: November 3, 2015
New York, New York

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

Slip Op. 15–124

GLYCINE & MORE, INC., Plaintiff, v. UNITED STATES Defendant, and GEO SPECIALTY CHEMICALS, INC. Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 13–00167

[Ordering a remand of a decision by the International Trade Administration, U.S. Department of Commerce, on withdrawal of a request for a periodic review of an antidumping duty order]

Dated: November 3, 2015

Ronald M. Wisla, Kutak Rock LLP, of Washington D.C., argued for plaintiff Glycine & More. With him on the brief was *Lizbeth R. Levinson*.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy,* Assistant Director. Of counsel on the brief was *Jessica M. Forton*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

David Michael Schwartz, Thompson Hine LLP, of Washington D.C., argued for defendant-intervenor GEO Specialty Chemicals, Inc.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff Glycine & More, Inc. ("Glycine & More") contests the final determination ("Final Results") issued by the International Trade Administration of the U.S. Department of Commerce ("Commerce" or the "Department") to conclude an administrative review of an antidumping duty order on glycine from the People's Republic of China ("PRC" or "China").[1] *Glycine from the People's Republic of China: Final Results of Antidumping Duty Admin. Review; 2011–2012*, 78 Fed. Reg. 20,891 (Int'l Trade Admin. Apr. 8, 2013) ("*Final Results*"). The administrative review at issue in this action covered the period of review ("POR") of March 1, 2011 to February 29, 2012. *Id.* Glycine & More is an affiliate of Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding"), a Chinese producer and exporter of glycine and the sole respondent in the review. Compl. ¶ 1 (May 20, 2013), ECF No. 6. Glycine & More was the importer of record for some of Baoding's export shipments of glycine during the POR and participated in the underlying administrative proceeding. *Id.* ¶¶ 1, 4.

[1] Glycine "is a freeflowing crystalline material, like salt or sugar" that is "produced at varying levels of purity and is used as a sweetener/taste enhancer, a buffering agent, reabsorbable amino acid, chemical intermediate, and a metal complexing agent." *Antidumping Duty Order: Glycine From the People's Republic of China*, 60 Fed. Reg. 16,116, 16,116 (Int'l Trade Admin. Mar. 29, 1995).

Before the court is plaintiff's motion for judgment on the agency record, filed pursuant to USCIT Rule 56.2. 56.2 Mot. for J. on the Agency R. (Jan. 31, 2014), ECF No. 28 ("Pl.'s Mot."). Plaintiff claims that Commerce: (1) unlawfully refused, on the ground of untimeliness, to allow Baoding to withdraw its request for review and, (2) upon completing the review, unlawfully assigned Baoding a 453.79% antidumping duty margin based entirely on facts otherwise available and an adverse inference. Because the Department's decision as to Baoding's withdrawal of the request for review was based on an unreasonable construction of the applicable regulation, the court issues a remand of that decision and does not reach plaintiff's second claim.

I. BACKGROUND

A. Proceedings before Commerce

Commerce issued the antidumping duty order on glycine from China (the "Order") in 1995. *Antidumping Duty Order: Glycine From the People's Republic of China*, 60 Fed. Reg. 16,116 (Int'l Trade Admin. Mar. 29, 1995). On March 1, 2012, Commerce notified interested parties of the opportunity to request an administrative review of the Order. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 77 Fed. Reg. 12,559, 12,560 (Int'l Trade Admin. Mar. 1, 2012) ("*Opportunity to Request Notice*"). In response to March 30, 2012 requests from Baoding and defendant-intervenor GEO Specialty Chemicals, Inc. ("GEO"), petitioner in the antidumping investigation, Commerce initiated the administrative review at issue in this action.[2] *GEO Request for Admin. Review* (Admin.R.Doc. No. 1) ("*GEO Request for Admin. Review*"); *Baoding Mantong Request for Admin. Review* (Admin.R.Doc. No. 2); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 77 Fed. Reg. 25,401, 25,403 (Int'l Trade Admin. Apr. 30, 2012) ("*Initiation*"). GEO requested that Commerce review sales of subject merchandise by Baoding and twenty-five other producer/exporters. *GEO Request for Admin. Review* 2.

On July 10, 2012, Commerce selected Baoding as one of two mandatory respondents and issued a questionnaire to Baoding. *Respondent Selection Mem.* (July 9, 2012) (Admin.R.Doc. No. 18) ("*Respon-*

[2] Although the relevant antidumping duty order was issued in 1995, periodic reviews were not conducted in every year following issuance of the order; the review at issue was only the sixth periodic review of the order that the International Trade Administration of the U.S. Department of Commerce ("Commerce" or the "Department") conducted. *See* http://enforcement.trade.gov/frn/summary/prc/prc-fr.htm (last visited Oct. 29, 2015).

dent Selection Mem."); *Antidumping Duty Questionnaire* (July 18, 2012) (Admin.R.Doc. No. 19). On July 30, 2012, GEO withdrew its administrative review request as to all twenty-six companies, including Baoding. *Pet'r's Letter Withdrawing All Review Requests* (Admin. R.Doc. No. 37). On August 7, 2012, Baoding requested that Commerce, pursuant to § 351.213(d)(l) of the Department's regulations, extend the ordinary 90-day period for withdrawal of a request for a periodic administrative review and thereby give effect to Baoding's withdrawal of its review request. *Baoding Mantong's Letter Requesting to Withdraw its Admin. Review Request* (Admin.R.Doc. No. 39) ("*Baoding's Withdrawal Request*"). Because Commerce gave effect to GEO's withdrawal of its request for review of all respondents, including Baoding, the Department's also giving effect to Baoding's withdrawal of its review request would have resulted in rescission of the administrative review at issue. *See* 19 C.F.R. § 351.213(d)(l).[3]

On August 22, 2012, Commerce notified Baoding that the agency was considering Baoding's withdrawal of its review request and that Baoding was not required to respond to questionnaires while Commerce considered whether to give effect to the withdrawal. *Commerce's Letter Responding to Baoding's Withdrawal Request* (Admin-.R.Doc. No. 46). On September 27, 2012, Commerce notified Baoding that it had rejected the withdrawal request on the ground that Baoding had not shown an extraordinary circumstance warranting an extension of time. *Rejection of Baoding's Withdrawal of its Admin. Review Request* 1 (Admin. R. Doc. No. 47) ("*Rejection of Baoding's Withdrawal Request*"). Commerce also established a deadline for Baoding's questionnaire responses. *Id.* at 2. On October 18, 2012, Baoding notified Commerce that the company would no longer participate in the administrative review and would not respond to the questionnaire. *Baoding Withdrawal from the Admin. Review* (Admin. R. Doc. No. 48).

Commerce published the preliminary results of the review on December 6, 2012, preliminarily assigning Baoding a 453.79% antidumping duty margin based on facts otherwise available and an adverse inference pursuant to section 776(b) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677e. *Glycine from the People's Republic of China, Preliminary Results of Antidumping Duty Admin. Review and Preliminary Partial Rescission of Antidumping Duty Admin. Review; 2011–2012*, 77 Fed. Reg. 72,817, 72,817 (Int'l Trade Admin. Dec. 6, 2012) ("*Prelim. Results*"). In the accompanying decision memorandum, Commerce explained that because Baoding had failed to coop-

[3] Except where otherwise noted, citations to the United States Code and the Code of Federal Regulations are to the 2012 editions.

erate to the best of its ability by not responding to the Department's questionnaire, Baoding was no longer eligible for a rate that is separate from the rate assigned to companies considered to be part of an entity including the government of China. *Issues & Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review & Prelim. Partial Rescission of Antidumping Duty Admin. Review*, A-570–836, ARP 11–12, at 5–6 (Nov. 29, 2012) (Admin.R.Doc. No. 51), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–29543–1.pdf (last visited Oct. 29, 2015) ("*Prelim. Decision Mem.*").

Plaintiff Glycine & More entered a notice of appearance before Commerce on December 17, 2012. *Glycine & More Entry of Appearance* 1 (Admin.R.Doc. No. 53). Glycine & More subsequently filed a case brief objecting to the Department's rejection of Baoding's request to withdraw the administrative review request and the application of a 453.79% dumping margin to Baoding. *Glycine & More's Comments on the Prelim. Results* 2–3, 6 (Jan. 7, 2013) (Admin.R.Doc. No. 54).

On April 8, 2013, Commerce published the Final Results, which assigned to Baoding a dumping margin of 453.79%. *Final Results*, 78 Fed. Reg. at 20,891. According to the Issues & Decision Memorandum incorporated into the Final Results, Commerce obtained this rate from the rate calculated for Baoding in the immediately preceding administrative review of the Order. *Issues & Decision Mem. for the Final Results of the Antidumping Duty Admin. Review of Glycine from the People's Republic of China*, A-570–836, ARP 11–12, 11–12 (Apr. 1, 2013) (Admin.R.Doc. No. 57), *available at* http://enforcement.trade.gov/frn/summary/PRC/201308108–1.pdf (last visited Oct. 29, 2015) ("*Issues & Decision Mem.*"). Baoding is contesting in this Court the 453.79% rate Commerce assigned to it in that preceding review. *See Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, Court No. 12–00362.

B. Proceedings before the Court of International Trade

Glycine & More initiated this action by filing a summons on April 26, 2013 and a complaint on May 20, 2013. Summons, ECF No. 1; Compl., ECF No. 6. Plaintiff filed its Motion for Judgment on the Agency Record and an accompanying brief on January 31, 2014. Def.'s Mot.; Mem. of P. & A. in Supp. of Pl.'s 56.2 Mot. for J. on the Agency R., ECF No. 28–1 ("Pl.'s Br."). Defendant and defendant-intervenor each opposed the motion, and plaintiff replied. Def.'s Mem. in Opp'n to Pl.'s R. 56.2 Mot. for J. Upon the Agency R. (Apr. 25, 2014), ECF No. 32 ("Def.'s Opp'n"); Def.-Intervenor's Resp. Br. in Opp'n to Pl. Glycine & More, Inc.'s R. 56.2 Mot. for J. upon the Agency R. (Apr. 25, 2014),

ECF No. 33 ("Def.-intervenor's Opp'n"); Reply Br. of Glycine & More (May 23, 2014), ECF No. 38 ("Pl.'s Reply").

The court held oral argument on September 9, 2014. ECF No. 43. Following oral argument, defendant-intervenor filed a Notice of Supplemental Authority notifying the court of a decision by the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343 (Fed. Cir. 2015), which defendant-intervenor submits is a precedent lending support to affirmance of the decision challenged in this case. Def.-Intervenor's Notice of Supplemental Authority (Feb. 4, 2015), ECF No. 44.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c), under which the U.S. Court of International Trade is granted exclusive jurisdiction over actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a. In reviewing the Department's decisions in antidumping reviews, the court will hold unlawful determinations that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. The Contested Decision Must Be Remanded Because It Is Based on an Unreasonable Interpretation of the Department's Regulation

Plaintiff claims that the Department's decision to reject its withdrawal request was unlawful and seeks as a remedy an order directing Commerce to rescind the administrative review. Pl.'s Br. 18. Plaintiff argues, *inter alia*, that in requiring Baoding to demonstrate that an extraordinary circumstance prevented a timely withdrawal of its review request, Commerce applied an unreasonable interpretation of the applicable regulation, 19 C.F.R. § 351.213(d)(1). Pl.'s Br. 16–18. The court finds merit in plaintiff's claim.

The antidumping statute provides for the conducting of a periodic review of an antidumping or countervailing duty order "[a]t least once during each 12-month period beginning on the date of publication" of such order "if a request for such a review has been received." 19 U.S.C. § 1675(a)(1). Speaking only in general terms, the statute, although providing for the conducting of a periodic review upon a "request," does not address the situation in which Commerce decides to proceed with a review that was initiated upon the request of one or

more parties even though those parties have withdrawn their requests. This case presents that situation.[4]

In its regulations governing administrative reviews, Commerce has provided as follows:

> The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

19 C.F.R. § 351.213(d)(l). In August of 2011, Commerce stated as follows in a Federal Register notice:

> Pursuant to section 351.213(d)(1) of the Department's regulations, a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months on or after August 2011, *the Department will not consider extending the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request*. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis. The Department is providing this notice on its Web site, as well as in its "Opportunity to Request Administrative Review" notices, so that interested parties will be aware of the manner in which the Department intends to exercise its discretion in the future.

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 76 Fed. Reg. 45,773, 45,773 (Int'l Trade Admin. Aug. 1, 2011) (emphasis added). In the March 1, 2012, Federal Register notice Commerce issued to invite parties to request the administrative review and in the April 30, 2012, notice initiating the review, Commerce provided a

[4] This situation is not to be confused with a decision by Commerce to rescind a review that Commerce self-initiated. *See* 19 C.F.R. § 351.213(d)(2).

nearly identical notice.[5] *Opportunity to Request Notice,* 77 Fed. Reg. at 12,560; *Initiation,*77 Fed. Reg. at 25,401.

1. Commerce Refused to Give Effect to Baoding's Withdrawal of its Review Request

In an August 7, 2012, letter withdrawing its administrative review request, Baoding claimed that "[e]xtraordinary circumstances exist in this case to extend the 90 day period." *Baoding's Withdrawal Request* 2–3. Baoding elaborated as follows:

> [B]oth GEO and Baoding Mantong had requested administrative reviews as to Baoding Mantong. Consequently, a unilateral withdrawal by only one party would be of no consequence—withdrawal of administrative review requests by both parties must be present to effectuate rescission of the administrative review. Given that Baoding Mantong was not aware of GEO's withdrawal of its administrative review request as to Baoding Mantong until service of the withdrawal request was received by counsel for Baoding Mantong via first class mail ***after*** expiration of the 90 day period, Baoding Mantong had no reason to believe that a unilateral withdrawal of its own administrative review request would have any impact. Only after Baoding Mantong received notice of the GEO withdrawal of the Baoding Mantong review request, was Baoding Mantong able to decide whether to withdraw its own administrative review request or proceed with the review.

Baoding's Withdrawal Request 2–3 (emphasis in original). Baoding also stated that "good reason exists" for Commerce to grant the untimely withdrawal request, explaining that Commerce would be able to preserve its limited administrative resources in this proceeding because Baoding had not yet submitted its response to the Department's questionnaire. *Id.* at 3.

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[5] The full text of that notification in the Department's March 1, 2012, Federal Register notice, which announced the opportunity to request a review, is as follows:

> Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months on or after March 2012, the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

Opportunity to Request Notice, 77 Fed. Reg. at 12,560; *see also Initiation*, 77 Fed. Reg. at 25,401.

In a letter denying Baoding's request to rescind the administrative review, issued on September 27, 2012, Commerce explained that "[w]e do not find the circumstances you describe to be extraordinary and therefore are unable to grant your request to extend the 90-day deadline." *Rejection of Baoding's Withdrawal Request* 1. Commerce elaborated that "[p]ursuant to 19 CFR 351.213(d)(l), because your withdrawal of review request was submitted untimely (*i.e.*, past the 90 days of the date of publication of the notice of initiation for this administrative review), Baoding Mantong is subject to this administrative review." *Rejection of Baoding's Withdrawal Request* 1. Because Baoding did not submit responses to the Department's requests for questionnaires and information, Commerce issued preliminary results that determined, preliminarily, an antidumping duty margin of 453.79% for Baoding that was based on facts otherwise available and an adverse inference, pursuant to section 776(b) of the Tariff Act, 19 U.S.C. § 1677e.[6] *Prelim. Results*, 77 Fed. Reg. at 72,817.

In the Final Results, Commerce made no changes to its preliminary results, assigning Baoding a margin of 453.79%. *Final Results*, 78 Fed. Reg. at 20,891. According to the Issues & Decision Memorandum, Commerce, "[e]xercising its wide discretion" under 19 C.F.R. § 351.213(d)(l) to consider Baoding's withdrawal, "evaluated whether extraordinary circumstances prevented Baoding Mantong from submitting a timely withdrawal request." *Issues & Decision Mem.* 5. In support of this position, Commerce cited "the Department's policy, announced in its *Opportunity to Request Notice* and *Initiation Notice*," which "allows for extensions of time only where an extraordinary circumstance prevented a party from timely withdrawing its request for review." *Id.* at 4. Commerce further explained:

> In the past, extending the 90-day deadline depended on a variety of factors, such as whether the Department had devoted significant time or resources to the review and the stage of the review. To enhance certainty and fairness, the Department determined to apply the 90-day rule except where a requestor could demonstrate that an extraordinary circumstance prevented it from timely submitting a withdrawal of review request.

[6] Commerce based Baoding's rate on the final rate assigned to Baoding in the preceding (fifth) administrative review. In that review, Commerce calculated a 0% margin in the initial preliminary results and then issued amended preliminary results (the "post-preliminary results") calculating a preliminary 457.74% dumping margin for Baoding after correcting a calculation error in the original preliminary results. In the final results of the fifth review, Commerce assigned Baoding a margin of 453.79%. This Court has set aside the final results of the fifth review as unlawful and remanded the matter for redetermination. *Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, Court No. 12–00362, Slip Op. 15–123.

Id. at 7. Responding to various arguments raised by Baoding, Commerce "did not find that extraordinary circumstances existed which prevented Baoding Mantong from filing a timely withdrawal request." *Id.* at 5. Specifically, Commerce found that "Baoding Mantong's assertion that only after it received GEO's withdrawal request was Baoding Mantong 'able to decide whether to withdraw its own administrative review request or proceed with the review,' does not present an extraordinary circumstance." *Id.* at 6 (citation omitted in original). Commerce noted that "GEO withdrew its request for review of all parties with no knowledge of whether Baoding Mantong would also withdraw its own request for review." *Id*. Commerce further reasoned that "[w]hile Baoding Mantong may have known a timely withdrawal of its request for review would not guarantee that the review would be rescinded, it also knew that unless it timely withdrew its request the review would not be rescinded absent extraordinary circumstances." *Id*. Commerce also stated that nothing prevented Baoding from submitting a timely withdrawal request to prepare for the possibility that GEO also submitted a withdrawal request. *Id.* Finally, Commerce claimed that "evidence suggests that it was the final results from the prior administrative review (*i.e.*, the 2010–2011 administrative review) that influenced Baoding Mantong's ultimate decision to withdraw its participation in the instant proceeding." *Id.* at 5–6. Commerce noted that "Baoding Mantong decided to no longer participate in the instant review on October 19, 2012, *i.e.*, the day after the final results of the 2010–2011 administrative review [were] published in the *Federal Register*." *Id.* at 6.

In response to Glycine & More's arguments concerning the early point in the review at which Baoding submitted its withdrawal request, Commerce reiterated its position that the appropriate consideration is whether an extraordinary circumstance prevented Baoding's submission of a timely withdrawal. *Id*. Commerce also cited an opinion of this Court, *ArcelorMittal Dofasco Inc. v. United States,* 602 F. Supp. 2d 1330, 1336 (2009), for the proposition that the resources Commerce expends in conducting an administrative review are not the only consideration that reasonably could affect the Department's decision of whether to extend the 90-day deadline. *Id.* at 6–7. Commerce rejected Glycine & More's argument that the agency had been inconsistent with regard to the language of 19 C.F.R. § 351.213(d)(1), citing the *Opportunity to Request Review Notice* and *Initiation Notice* as evidence of the Department's notice to parties concerning the "extraordinary circumstance" standard for untimely-filed withdrawals. *Id.* at 7. Concerning Glycine & More's allegation of pervasive errors in the 2010–2011 review, Commerce explained that the "pre-

liminary results of the 2010–2011 review, the release of the post-preliminary results, as well as all comments and rebuttal comments on such revised results, were known to all parties involved in the instant administrative review well before the 90-day limit to withdraw review requests." *Id.* at 8.

2. The Department's Interpretation of 19 C.F.R. § 351.213(d)(1), Being Inconsistent with the Intent Expressed at the Time of Promulgation, Does Not Qualify for "Auer" Deference

Commerce denied effect to Baoding's withdrawal of its review request based on its interpretation of 19 C.F.R. § 351.213(d)(1), as first announced in 2011 and reiterated in the *Opportunity to Request Review Notice* and the *Initiation Notice*. Adjudicating plaintiff's claim requires the court to decide whether, as a matter of deference, that interpretation is controlling, and, if not, whether the interpretation is otherwise permissible as applied in this case.

The applicable regulation, 19 C.F.R. § 351.213(d)(1), contains two provisions. It provides, first, that a party's withdrawal of a request for an administrative review will be given effect if that withdrawal occurs within the 90-day period. 19 C.F.R. § 351.213(d)(l) ("The Secretary *will rescind* an administrative review under this section, in whole or in part, if a party that requested a review withdraws that request within 90 days of the date of publication of notice of initiation . . . ." (emphasis added)). Under this provision, withdrawal is effective if received by Commerce within the 90-day period, and rescission of a requested review as to a producer/exporter will occur if all parties requesting such a review withdraw their requests within the 90-day period.

The second provision in § 351.213(d)(1) provides that "[t]he Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." *Id*. Placing no limitations on how the Commerce Secretary will decide whether it is reasonable to extend the 90-day time limit, the plain language of the provision connotes wide discretion.

The general rule is that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989), in turn quoting *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945)). However, "this general rule does not apply in all

cases." *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2166 (2012). Deference is "unwarranted when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Id*. (quoting *Auer*, 519 U.S. at 462 and citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 209 (2011)). "This might occur when the agency's interpretation conflicts with a prior interpretation . . . ." *Id*. (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). Analogously, *Auer* deference may be unwarranted if the agency's interpretation conflicts with the intent the agency expressed at the time of promulgation. *Thomas Jefferson Univ.*, 512 U.S. at 512 ("[W]e must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.'") (quoting *Gardebring v. Jenkins,* 485 U.S. 415, 430 (1988)). Upon reviewing the history and purpose of § 351.213(d)(1), the court concludes that the Department's latest interpretation is inconsistent with that expressed intent.

Commerce promulgated the regulation in essentially its current form in 1989, to implement a 1984 amendment to the Tariff Act providing for periodic reviews of antidumping orders that would occur upon request; under the previous statute reviews invariably were conducted for each twelve-month period. *See* Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 611(a)(2), 98 Stat. 2948, 3031. As promulgated in 1989 (for codification then as 19 C.F.R. § 353.22(a)), the regulation, in pertinent part, contained a provision ("subparagraph (5)") that read as follows:

> (5) The Secretary may permit a party that requests a review under paragraph (a) of this section to withdraw the request not later than 90 days after the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

Antidumping Duties (Final rule), 54 Fed. Reg. 12,742, 12,778 (Int'l Trade Admin. Mar. 28, 1989). The sentence stating that "[t]he Secretary may extend this time limit if the Secretary decides that it is reasonable to do so" has been carried over, in identical form, in the current regulation. *See* 19 C.F.R. § 351.213(d)(1).

As it related to paragraph (5) of § 353.22(a), Commerce disclosed its "intent at the time of promulgation," *Thomas Jefferson Univ.*, 512 U.S. at 512, in the preamble accompanying the final rule. In the preamble, the purpose stated for paragraph (5) was to allow a party

that had requested a periodic review to be informed of the results of the immediately preceding periodic review before having to make a final decision as to whether to withdraw its review request. *Antidumping duties* (Final rule), 54 Fed. Reg. 12,742, 12,755 (Int'l Trade Admin. Mar. 28, 1989). Below, the court summarizes the regulatory history of this provision.

In the form in which Commerce issued it as a proposed regulation in 1986, § 353.22(a) was identical to the regulation as promulgated in 1989, with one exception: the proposed rule did not include paragraph (5). *See Antidumping Duties* (proposed rule and request for comments), 51 Fed. Reg. 29,046, 29,051, 29,064 (Int'l Trade Admin. Aug. 13, 1986). As proposed, therefore, the provision was silent on the question of whether or how a party that had requested a review could withdraw its request. Commerce stated in its preamble to the final rule that "[t]hree parties argue that the proposed regulation will result in interested parties having to request a new administrative review before the final determination has been made in an ongoing review" and that "[o]ne party argues that, as proposed, the regulation will reimpose on the Department the burden of conducting reviews that no party desires." *Antidumping duties* (Final rule), 54 Fed. Reg. at 12,755. Commerce further stated that "[w]e recognize the importance to the party submitting the request for review of knowing the final results of the immediately preceding review, if any," and that "*[t]herefore*, we are modifying paragraph (a) to permit the party that submits a request to withdraw the request under certain conditions." *Id*. (emphasis added). Addressing new subparagraph (5), Commerce further explained:

> If a relevant review has not been completed before the end of the anniversary month during which the new request is submitted, the party that submitted the new request may withdraw it not later than 90 days after the date of publication of notice of initiation of the requested review. The Secretary may extend the time limit if it is reasonable to do so.

Id. Thus, by adding subparagraph (5) to the regulation upon promulgation, Commerce addressed the problem in which a party is faced with the need to decide whether it wants a review before knowing the final results of the immediately preceding review. In the first sentence of the regulation, Commerce allowed the 90-day period on the premise that it would suffice to solve the stated problem in the ordinary instance. Due to the stated rationale of paragraph (5), it is difficult to *see* why granting at least a brief extension according to the second

sentence would *not* presumptively be reasonable where the preceding review is still ongoing at the close of that period.

When making numerous revisions to its regulations in 1997, Commerce placed the regulation into its current form, redesignating it as § 351.213(d)(1) but making no essential changes and retaining verbatim the language of the sentence regarding extension of the 90-day period. *Antidumping Duties; Countervailing Duties* (Notice of proposed rulemaking and request for Public Comments), 61 Fed. Reg. 7,308, 7,365 (Int'l Trade Admin. Feb. 27, 1996) ("*1996 Proposed Regulations*"); *see id.* at 7,317 ("Section 351.213 is based largely on existing §[ ] 353.22 . . . ."). In the proposed regulations, published on February 27, 1996, Commerce provided that "[t]he Secretary may rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request not later than 90 days after the date of publication of notice of initiation of the requested review." *1996 Proposed Regulations*, 61 Fed. Reg. at 7,365. The 1996 proposed regulations, without explanation, omitted the provision that Commerce might extend the deadline where the Secretary determined it reasonable to do so. *See id.* In the final regulations, promulgated on May 19, 1997, Commerce reinserted, verbatim, the previous "reasonable to do so" language. *Antidumping Duties; Countervailing Duties* (Final rule), 62 Fed. Reg. 27,296, 27,393 (Int'l Trade Admin. May 19, 1997) (codified at 19 C.F.R. § 351.213(d)(l)) ("*1997 Regulations*"). The preamble accompanying the final 1997 regulations explained that a commenter had suggested that the regulations allow rescission of an administrative review if "(1) the party that initially requested the review withdraws its request, and (2) no other party objects to the rescission within a reasonable period of time." *1997 Regulations*, 62 Fed. Reg. at 27,317. In response, Commerce explained:

> We agree that the 90-day limitation may be too rigid. However, we believe that the Department must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review. For example, we are concerned with the situation in which a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor.
>
> Therefore, in § 351.213(d)(1), we have retained the 90-day requirement. In addition we have added a new sentence, taken

> from 19 CFR §§ 353.22(a)(5) and 355.22(a)(3),[7] that essentially provides that if a request for rescission is made after the expiration of the 90-day deadline, the decision to rescind a review will be at the Secretary's discretion.

Id.

The regulatory history clarifies that current § 351.213(d)(1) was intended to maintain the regulatory scheme of the previous § 353.22(a)(5). Commerce linked § 351.213(d)(1) to the previous provision, which included paragraph (5), and gave no indication in the 1997 promulgation that the intended purpose of the provision, as Commerce had explained it at the time of the 1989 promulgation, had changed. The only additional discussion, which Commerce provided in response to the aforementioned comment, concerned the Department's desire to prevent "abuse," such as where "the Department devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor." *Id*.

The Department's 2011 interpretation of § 351.213(d)(1) defeats the originally-stated purpose of the regulation. Under the new interpretation, as Commerce stated it each time beginning with the initial announcement in 2011, a party no longer may request an extension, however brief, of the 90-day period in order to ascertain the results of the immediately preceding review before deciding whether or not to withdraw its review request. As a practical matter, the new interpretation leaves open to a party that has requested a review only two choices. It either must withdraw its request for a review outright within the 90-day period—regardless of whether the results of the preceding review are known—or it must forego any realistic opportunity to do so. This is because the "exceptional circumstances" test embodied in the Department's 2011 interpretation of § 351.213(d)(1) looks backwards to the 90-day period, and specifically to whether the requestor could have withdrawn its request then, not forward to the time at which the final results of the preceding review might be issued. Thus, the exceptional circumstances test focuses *only* on whether the party can demonstrate that a circumstance beyond its control prevented it from effecting a withdrawal within the 90-day period, not the requestor's ability to know the results of the preceding review. Being so narrowly focused, the new interpretation pays no heed to the problem that prompted the issuance of the regulation,

[7] The provision at 19 C.F.R. § 355.22(a)(3) promulgated in the 1989 version of the regulations related to the imposition of countervailing duties. *See* Scope, 19 C.F.R. § 355.1 1996).

which was the possibility that the final results of the immediately preceding review are delayed and a party considered it important to know those results before making its decision. *See Antidumping duties* (Final rule), 54 Fed. Reg. at 12,755 ("We recognize the importance to the party submitting the request for review of knowing the final results of the immediately preceding review."). Because the Department's current interpretation of the regulation cannot be reconciled with the purpose for which the regulation was promulgated, and indeed defeats that purpose, the court considers that interpretation not to be controlling of the outcome in this case.

3. The Department's Interpretation of § 351.213(d)(1) Is Unreasonable as Applied in this Case

When viewed absent the degree of deference specified in *Auer*, the interpretation of § 351.213(d)(1), as applied by Commerce in denying effect to Baoding's withdrawal of its review request, cannot be sustained upon judicial review. The record facts of the review demonstrate this point: the 90-day period for withdrawing requests for review ended on July 29, 2012 (the notice of initiation having been published on April 30, 2012). The final results of the preceding (2010–2011) review were still pending as of that date.[8] The Department's interpretation of § 351.213(d)(1) left no means for Baoding to obtain, or even request, an extension of the 90-day period that would have allowed it to know the final results of the immediately preceding review before making a decision to withdraw, despite the purpose for the provision that the Department stated upon promulgation.

Moreover, the Department's refusal to recognize Baoding's withdrawal of its review request, when viewed according to the record facts of this case, is also inconsistent with the statement Commerce offered in 1997 of its reasons for maintaining the 90-day period and retaining discretion over extensions. As discussed previously, Commerce, in responding to a comment, expressed at that time that it wished to prevent "abuse of the procedures for requesting and withdrawing a review," such as where "a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the

[8] Commerce published the final results of the preceding review on October 18, 2012. *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 64,100 (Int'l Trade Admin. Oct. 18, 2012). The statute allows a maximum of 545 days for issuance of the final results of an administrative review, with the time limit beginning on the last day of the anniversary month of the date of publication of the order, which for the fifth review was March 31, 2011. Section 751(a)(3) of the Tariff Act, 19 U.S.C. § 1675(a)(3). Commerce did not adhere to this statutory time limit in conducting the prior review.

results of the review are not likely to be in its favor." *1997 Regulations*, 62 Fed. Reg. at 27,317. Because Baoding sought rescission of the review before submitting its initial questionnaire response, there is no evidentiary basis on this record from which Commerce could have concluded that it had devoted "considerable time and resources to the review." *Id*. Allowing the extension in this case would have required an extension of only nine days, i.e., from July 29 to August 7, 2012.[9] On these facts, Baoding cannot credibly be characterized as having committed an "abuse of the procedures for requesting and withdrawing a review." *Id*.

Glycine & More's statements to Commerce during the administrative proceedings indicate that Baoding considered the developments in the preceding review significant to its decision whether to withdraw its request for the review at issue. *Glycine & More's Comments on the Prelim. Results* 3–4 (Jan. 7, 2013) (Admin.R.Doc. No. 54). Glycine & More told Commerce that "pervasive errors contained in the preliminary results of the 2010–2011 administrative review," including the "extraordinary issuance of revised post-preliminary results, and the Department's consideration of new surrogate value information after the preliminary results" in the that review made it difficult for Baoding "to determine whether it was in its own interest to withdraw its administrative review request in the 2011–2012 review." *Id.* at 5.

In the Issues & Decision Memorandum, Commerce criticized Baoding for deciding not to participate in the review at issue review after becoming aware of the final results of the previous (fifth) review. Commerce stated that "[e]vidence suggests that it was the final results from the prior administrative review (*i.e.*, the 2010–2011 administrative review) that influenced Baoding Mantong's ultimate decision to withdraw its participation in the instant proceeding," *Issues & Decision Mem*. 5–6, adding that "Baoding Mantong decided to no longer participate in the instant review on October 19, 2012, *i.e.*, the day after the final results of the 2010–2011 administrative review [were] published in the *Federal Register*," *id*. at 6. In leveling this criticism, Commerce appears to have lost sight of the purpose for which it promulgated the regulation now codified as 19 C.F.R. § 351.213(d)(1). Commerce also ignored its stated purpose for the regu-

[9] Commerce erroneously determined that GEO's withdrawal of its request for a review of Baoding and other respondents, which was filed on July 30, 2012, was filed on the last day of the 90-day period. *See Issues & Decision Memorandum* 6 (". . . the Department acknowledges that GEO's withdrawal was submitted on the last day of the 90-day deadline . . . ."). As filed, that withdrawal could have been given effect under § 351.213(d)(l) only by means of a one-day extension of the time period, which under the Department's new interpretation would have required that GEO satisfy the "exceptional circumstances" standard.

lation in stating in the Issues & Decision Memorandum that the "preliminary results of the 2010–2011 review, the release of the post-preliminary results, as well as all comments and rebuttal comments on such revised results, were known to all parties involved in the instant administrative review well before the 90-day limit to withdraw review requests." *Id.* at 8. As the court has discussed, the purpose was to allow a party to know the *final* results of the immediately preceding review before having to decide whether to withdraw a review request.

Defendant and defendant-intervenor raise various arguments in support of the Department's decision to refuse to recognize Baoding's withdrawal request. Defendant argues, for example, that under *Auer v. Robbins*, 519 U.S. at 457, the Department's interpretation is controlling because it is neither plainly erroneous nor inconsistent with the governing regulation and because it represented the Department's "fair and considered" judgment on the issue. Def.'s Opp'n 8. Similarly, defendant-intervenor argues that the "reasonable to do so" standard in 19 C.F.R. § 351.213(d)(l) was ambiguous and that Commerce therefore was free to adopt the "extraordinary circumstance" standard. Def.-intervenor's Opp'n 15–16. The court rejects these and the other arguments these parties present, none of which addresses the critical point that the interpretation of § 351.213(d)(l) applied to Baoding cannot be reconciled with the purpose of the regulation, either as Commerce stated it upon promulgation or as Commerce discussed it upon re-promulgation in 1997.[10]

4. On Remand, Commerce Must Reach a New Decision on Baoding's Withdrawal of its Review Request that Is Based on a Reasonable Interpretation of § 351.213(d)(l)

For the reasons discussed *supra*, the Department's decision declining to give effect to Baoding's August 7, 2012 withdrawal of its review request and its concomitant decision not to rescind the review at issue cannot be sustained upon judicial review. On remand, Commerce must reach a new decision that does not apply the interpretation of § 351.213(d)(l) Commerce adopted in 2011, which is unreasonable for the reasons the court has identified, and instead applies an interpretation that *is* reasonable and, in particular, is consistent with the purpose of the regulation, as stated by Commerce upon promulgation

[10] The court rejects defendant-intervenor's argument that *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343 (Fed. Cir. 2015), supports affirmance of the decision not to give effect to Badoing's withdrawal of its review request. *See* Def.-Intervenor's Notice of Supplemental Authority (Feb. 4, 2015), ECF No. 44. The decision, which affirmed the Department's rejection of an untimely request to extend a deadline for filing of a questionnaire response, and which did not involve 19 C.F.R. § 351.213(d)(l), is not on point.

in 1989 and maintained upon re-promulgation in 1997. Commerce also will need to take into consideration the controlling circumstances, as shown by the record of this case, that (1) Baoding's withdrawal of its review request occurred only *nine days* after the close of the 90-day period; (2) the review then was at an early stage, with no questionnaires having been submitted; (3) Baoding could not have known the results of the immediately preceding review during the 90-day period, which Commerce had yet to issue as of the expiration of that period; and (4) at the time Baoding submitted the withdrawal of its review request, all parties who had requested a review had expressed the position that the review not be conducted.

Under the circumstances shown by the record of this proceeding, it appears likely that only a decision allowing a nine-day extension, and a consequent rescission of the relevant review, could fulfill the stated purpose of § 351.213(d)(l). For although this regulation grants the Secretary of Commerce discretion over whether to extend the 90-day period, the compelling circumstances giving rise to this case, when viewed according to the purpose of the regulation, would call into question any decision on remand reinstating the previous, challenged decision to deny the extension.

Nevertheless, out of an abundance of caution, and because the regulation imparts the discretion to decide extension requests to the Commerce Secretary, the court will issue a remand order under which Commerce is to decide anew the question of whether Baoding's request for a nine-day extension should be approved. The court envisions that it could sustain a decision reinstating the previous, negative decision only if the record were to support a finding of a new and compelling circumstance, not previously identified by Commerce in the Issues & Decision Memorandum or elsewhere during the review, that, despite the circumstances the court has identified, could justify disallowing Baoding's withdrawal. At this time, the court is not aware of any such circumstance.

Because the court is remanding the decision to reject Baoding's withdrawal of its request for review, the court does not adjudicate at this time Glycene & More's other claim in this case, which contests the Department's decision to assign Baoding a rate of 453.79%.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court remands the final decision ("Final Results") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in the administrative review of the antidumping duty order on glycine from the People's Republic of China ("PRC" or "China"), pub-

lished in *Glycine from the People's Republic of China*, 78 Fed. Reg. 20,891 (Int'l Trade Admin. Apr. 8, 2013) ("*Final Results*"). Therefore, upon consideration of all papers and proceedings in this case, and upon due deliberation, it is hereby

ORDERED that the Final Results be, and hereby are, set aside as unlawful and remanded for further proceedings consistent with this Opinion and Order; it is further

ORDERED that Commerce, within sixty (60) days of this Opinion and Order, submit for the court's review a Remand Redetermination that complies fully with this Opinion and Order; it is further

ORDERED that plaintiff Glycine & More and defendant-intervenor GEO Specialty Chemicals, Inc. each may file comments on the Remand Redetermination within thirty (30) days from the date on which the Remand Redetermination is filed with the court; and it is further

ORDERED that defendant may file a response within fifteen (15) days from the date on which the last of any such comments is filed with the court.

Dated: November 3, 2015
New York, New York

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

Slip Op. 15–125

AN GIANG FISHERIES IMPORT AND EXPORT JOINT STOCK COMPANY et al., Plaintiffs and Consolidated Plaintiffs, and ANVIFISH JOINT STOCK COMPANY et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00044

[Granting the partial consent motion of Consolidated Plaintiffs/Plaintiff Intervenors for leave to amend their complaint]

Dated: November 3, 2015

Matthew Jon McConkey, Mayer Brown LLP, of Washington, DC, for An Giang Fisheries Import and Export Joint Stock Company et al.

Andrew Brehm Schroth, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC, for Anvifish Joint Stock Company et al. With him on the brief were *Ned Herman Marshak*, *Kavita Mohan*, and *Dharmendra Narain Choudhary*.

Ryan Michael Majerus, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the

brief was *Nanda Srikantaiah*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Nazakhtar Nikakhtar, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Catfish Farmers of America et al. With her on the brief was *Nathaniel James Halvorson*.

MEMORANDUM AND ORDER

Kelly, Judge:

This consolidated action challenges various aspects of the Department of Commerce's ("Department" or "Commerce") final determination in *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 80 Fed. Reg. 2,394 (Dep't Commerce Jan. 16, 2015) (final results of the tenth antidumping duty administrative review; 2012–2013) ("*Final Results*"). Plaintiffs/Consolidated Plaintiff-Intervenors An Giang Fisheries Import and Export Joint Stock Company, Asia Commerce Fisheries Joint Stock Company, Cuu Long Fish Joint Stock Company, Hiep Thanh Seafood Joint Stock Company, International Development and Investment Corporation, NTSF Seafoods Joint Stock Company, Thuan An Production Trading and Services Co., Ltd., Vinh Quang Fisheries Joint Stock Company ("MB Plaintiffs") and Consolidated Plaintiffs/Plaintiff-Intervenors Anvifish Joint Stock Company, Asia Commerce Fisheries Joint Stock Company, Cadovimex II Seafood Import-Export and Processing Joint Stock Company, Can Tho Import-Export Joint Stock Company, Dai Thanh Seafoods Company Limited, East Sea Seafoods Limited Liability Company, Fatifish Company Limited, Hoang Long Seafood Processing Company Limited, Nam Viet Corporation, QVD Food Company Ltd., Saigon-Mekong Fishery Co., Ltd. ("GDLSK Plaintiffs") challenge various aspects of Commerce's final determination, including the calculation of the dumping margin for the mandatory respondent, Hung Vuong Group ("HVG"). *See generally* Compl. ¶¶ 20–45, ECF No. 10, Am. Compl. ¶¶ 14–69, filed in *Anvifish Joint Stock Company et al. v. United States*, Court No. 15–00045, ECF No. 13 ("*Anvifish v. United States*"), Comp. ¶¶ 14–32, filed in *Can Tho Import-Export Joint Stock Company v. United States*, Court No. 1500046, ECF No. 6.

Before the court is a partial consent motion[1] brought by GDLSK Plaintiffs to amend their Amended Complaint filed on March 10, 2015

[1] MB Plaintiffs consent to the motion. *See* Pl.'s Partial Consent Mot. Leave to File Am. Comp. ("Mot. to Amend") 6. Defendant and Defendant-Intervenors oppose the motion. *See generally* Def.'s Resp. Opp'n to Pl.'s Mot. to Amend ("Def.'s Resp."), Def.-Intervenors' Resp. Opp'n. to Consolidated Pl.s' and Pl.-Intervenors' Mot. to Amend ("Def.-Intervenors' Resp.").

("Motion to Amend")[2] to add one additional count, Count Fourteen, which: (1) adds a challenge referencing Commerce's calculation of the dumping rate for HVG as unsupported by substantial evidence and contrary to law, Proposed Am. Compl. ¶ 71, ECF No. 43, Att. 1; (2) asserts that Commerce's calculation of the dumping margin for "exporters found to qualify for separate rate treatment was based upon the weighted average dumping rate found by the Department for the mandatory respondent," *id.*; (3) challenges the dumping rate assigned to HVG as not supported by substantial evidence, *id.* at ¶ 72; and (4) alleges that:

> 73. As the dumping rate for separate rate respondents was based upon the weighted average rate derived from the individual dumping rate found for HVG, the mandatory respondent, and HVG's rate was calculated in a manner which was contrary to law and not supported by substantial evidence, the Department's weighted average dumping rate for exporters entitled to separate rate treatment was likewise contrary to law and not supported by substantial evidence,

id. at ¶ 73; *see also* Mot. to Amend 2–3.

Defendant opposes the Motion to Amend, arguing that the "[c]ourt should deny [GDLSK Plaintiffs'] motion and require them to refile their 56.2 brief without the arguments pertaining to [the calculation of the rate for separate rate respondents]" because "by not raising this distinct issue at the administrative level, [they] failed to exhaust this argument." Def.'s Resp. 6. Defendant argues that it is appropriate for the court to "deny a motion for leave to amend a complaint for several reasons, including 'futility of amendment.'" *Id.* at 3. (*citing Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)). According to Defendant, "[HVG] and other interested parties had the opportunity as of the preliminary determination to raise the issue of the calculation of the rate of separate rate respondents, but none chose to do so." *Id.* at 6. As a consequence, Defendant argues that "because [GDLSK] Plaintiffs failed to exhaust their administrative remedies, any amendment to their complaint would be futile." *Id.* Defendant-

[2] On February 17, 2015, GDLSK Plaintiffs filed their initial Complaint, ECF No. 6, in the member case, *Anvifish v. United States*. On March 10, 2015, pursuant to USCIT Rule 15(a)(1), GDLSK Plaintiffs filed an Amended Complaint, ECF No. 13, in the same case as a matter of course within 21 days of service of their complaint. By order dated May 6, 2015, ECF No. 29, the court later consolidated *Anvifish v. United States* with *An Giang Fisheries Import and Export Stock Company et al. v. United States*, Court No. 15–00044, and *Can Tho Import-Export Joint Stock Company v. United States*, Court No. 15–00046, in this consolidated action under Consolidated Court No. 1500044.

Intervenors join in opposition. *See generally* Def.-Intervenors' Resp. Because granting GDLSK Plaintiffs leave to amend their complaint does not unduly prejudice Defendant or Defendant-Intervenors, and because the exhaustion of administrative remedies arguments are better disposed of upon hearing the parties Rule 56.2 motions for judgment on the agency record, the court grants the Motion to Amend.

DISCUSSION

USCIT Rule 15(a)(2) provides that a party may amend its own pleading after 21 days of serving it "only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." USCIT R. 15(a)(2). The requirement that such leave be freely given must be balanced against several considerations protecting the rights of the opposing party. *See Foman v. Davis*, 371 U.S. at 182. The Supreme Court framed the balancing of interests envisioned by the rule in the following way:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason— such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Id.[3]

Defendant does not argue that the additional count in GDLSK Plaintiffs' Proposed Amended Complaint arises from different transactions, occurrences and events. Defendant also makes no claim that the proposed amendment would cause undue delay to the litigation or that GDLSK Plaintiffs acted with bad faith or dilatory motive. Defendant does not allege any undue prejudice by reason of GDLSK Plaintiffs' requested amendment. Rather, Defendant argues that GDLSK Plaintiffs' failure to raise the issue of the calculation of the rate of separate rate respondents, encompassed in the proposed fourteenth count, at the administrative level constitutes a failure to

[3] Although the court acknowledges that the rules of this Court sometimes differ from those contained in the Federal Rules of Civil Procedure, USCIT Rule 15(a)(2) is identical to Rule 15(a)(2) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 15(a)(2). Reflecting this, the Court has adopted the language of *Foman v. Davis*, 371 U.S. at 182. *See, e.g. Ford Motor Co. v. United States*, 19 CIT 946, 955–956, 896 F. Supp. 1224, 1231 (1995).

exhaust administrative remedies, which Defendant argues necessarily renders GDLSK Plaintiffs' claim here challenging the calculation of the dumping rate for separate rate respondents futile. *See* Def.'s Resp. 6.

GDLSK Plaintiffs argue that their claim would not be futile because they "believe that the additional count is in fact encompassed by the other counts" in the complaints filed in this consolidated action. Mot. to Amend 3. They further argue that, "[s]hould the dumping margin for HVG change as a result of any of the other counts, the Department would, as a matter of course, revise the dumping margin assigned to separate rate companies." *Id.* By implication, GDLSK Plaintiffs argue that their motion is actually unnecessary in order to challenge Commerce's calculation of the rate for separate rate respondents, which they argue is "identical to and related to the counts contained in the original complaint already filed by Plaintiffs HVG and part of this consolidated action." *Id.* GDLSK Plaintiffs have nonetheless filed the Motion to Amend "to put to rest any technical arguments made by Defendant or Defendant-Intervenor that GDLSK Plaintiffs may have waived this issue." *Id.*

The court acknowledges the well-settled principle that litigants must exhaust administrative remedies where appropriate, *see* 28 U.S.C. § 2637(d) (2012), as well as the generally prevailing "'strict view' of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases." *See e.g. Corus Staal BV v. United States*, 502 F. 3d 1370, 1379 (Fed. Cir. 2007). Among the primary policy goals behind the exhaustion of administrative remedies doctrine is to "allow[ ] the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review–advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *See Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (*citing Woodford v. Ngo*, 548 U.S. 81, 88–90, 126 S. Ct. 2378, 2384–85 (2006)). Another policy goal of this doctrine is to incentivize the parties to "voluntarily exhaust all avenues of administrative review before resorting to federal court" challenge. *See Woodford v. Ngo*, 548 U.S. at 89–90.

Nonetheless, granting leave to amend a complaint lies within the sound discretion of the court. *Foman v. Davis*, 371 U.S. at 182. Although futility by virtue of failure to exhaust administrative remedies may serve as a basis for denying a motion to amend a pleading filed beyond 21 days of service, the court retains the discretion to address the exhaustion argument after the pleading stage where it presents no undue prejudice to do so. *See* Id. None of the cases relied

upon by Defendant require otherwise. *See United States v. Ford Motor Co.*, 463 F.3d 1286, 1296 (Fed. Cir. 2006) (trial court had not abused its discretion in denying defendant's motion to amend its answer to add a counterclaim because the claim lacked any statutory basis where defendant voluntarily tendered duties, which precluded review because only a party facing a charge or exaction was entitled to protest); *see also XL Specialty Ins. Co. v. United States*, 28 CIT 858, 871–872, 341 F. Supp. 2d 1251, 1262 (2004) (relying on court's determination that it lacked jurisdiction over the claim under 28 U.S.C. § 1581(a), not exhaustion of administrative remedies, to deny plaintiff leave to amend its pleading because any such amendment could not cure the jurisdictional deficiency in plaintiff's protest).

In this case GDLSK Plaintiffs moved to amend their complaint "to put to rest any technical arguments made by Defendant or Defendant-Intervenor that GDLSK Plaintiffs may have waived this issue." *Mot. to Amend 3*. Defendant opposes this proposed amendment on the grounds that Plaintiffs failed to assert a challenge to the rate assigned to separate rate respondents at the administrative level. The parties disagree as to whether Plaintiffs' challenge to the mandatory respondents' duty rate at the administrative level necessarily includes a challenge to the separate rate respondents' rate. *See* Mot. to Amend 3, Def.'s Resp. 5–6. As a result of this disagreement, a question arises as to whether or not Commerce has a practice of assigning dumping margins to non-individually reviewed companies in non-market economy cases based on the weighted-average of the estimated dumping margins established for exporters individually investigated. If the answer is affirmative, then further questions arise as to whether, in light of that practice, the respondents' challenge below to the mandatory respondent's rate was, by implication, also a challenge to the resulting rate assigned to separate rate respondents. The nature and implications of this disagreement warrant full briefing by the parties as a matter of fundamental fairness.

The court will be in a better position to properly dispose of the question of the scope of Plaintiffs' challenge at the administrative level and its implications as they relate to exhaustion after the motions for judgment on the agency record are submitted by all parties. Defendant does not allege that it will suffer any prejudice from the addition of what it essentially argues is a superfluous count, incapable of gaining Plaintiffs any relief, nor can it. If the court grants the Motion to Amend, nothing constrains Defendant from raising its exhaustion of administrative remedies arguments in its response to Plaintiffs' motions for judgment on the agency record. If the Plaintiffs' challenge to the mandatory respondent's rate below was not a chal-

lenge to the separate rate respondents' rate, then adding such a claim to GDLSK Plaintiffs' complaint here will not cure that deficiency. Conversely, if the court denies the motion, nothing constrains the Plaintiffs from arguing that their original pleading included the claim. By deferring the exhaustion question, the court does not mean to suggest that the challenge below to the mandatory respondents' rate necessarily does or does not include a challenge to the rate assigned to separate rate respondents. Addressing a dispute over the scope of those claims at the pleading stage, without briefing by the parties, is neither necessary nor prudent.

Accordingly, it is hereby

ORDERED that GDLSK Plaintiffs' Motion to Amend is granted; and it is further

ORDERED that GDLSK Plaintiffs' Amended Complaint shall be deemed filed as of this date.

Dated: November 3, 2015
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY. JUDGE

Slip Op. 15–126

DESIGN INTERNATIONAL GROUP, INC., Plaintiff v. UNITED STATES, Defendant.

Before: Nicholas Tsoucalas, Senior Judge
Court No. 14–00119

[Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.]

Dated: November 9, 2015

John N. Politis, Politis & Politis, of Pasadena, CA for Plaintiff.

St. Lutheran Tillman, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, New York, for Defendant. With him on the brief were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Amy M. Rubin, Assistant Director. Of counsel on the action was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of NewYork, NY.

OPINION

Tsoucalas, Senior Judge:

This case is before the court on Defendant's motion to dismiss for lack of subject matter jurisdiction. *See* Def.'s Mem. in Supp. of its Mot.

To Dismiss, ECF No. 9 (July 17, 2015)("Def.'s Br."); *see also* Reply Mem. in Supp. of Def.'s Mot. To Dismiss, ECF No. 13 (Sept. 3, 2015). Plaintiff, Design International Group, Inc. ("Design" or "Plaintiff"), opposes Defendant's motion. *See* Pl.'s Mem. in Opp. Def.'s Mot. To Dismiss, ECF No. 10 (Aug. 10, 2015)("Pl.'s Br.").

BACKGROUND

This action concerns two entries of pencils, Entry Nos. BKC 0138174–9 and BKC 0138213–5, made at the Port of Los Angeles/ Long Beach. Compl. at ¶¶ 14–18. Plaintiff is the importer of record for these entries. *Id.* at ¶ 1. On June 7, 2013, U.S. Customs and Border Protection ("Customs") liquidated both entries. *Id.* at ¶ 2. On July 9, 2013, Design's customs broker filed Protest Nos. 2704–13–101337 and 2704–13–101339, challenging Customs' calculation of the number of pencils included in each entry and the resulting assessment of duties. *Id.* at ¶ 14. On August 15, 2013, Customs denied both protests. *Id.*

On October 10, 2013, Design's counsel filed a third protest, Protest No. 2704–13–102066. *Id.* at ¶ 2. This protest also challenged Customs' calculation of the number of pencils covered by Entry Nos. BKC 0138174–9 and BKC 0138213–5. *See id.* at ¶ 25. On November 19, 2013, Customs denied Plaintiff's protest as untimely. *Id.* at ¶ 4, 5.

After the denial of Design's October 10, 2013 protest, Design insisted that it timely filed its protest, and that Customs should withdraw its denial. *Id.* at ¶ 6. However, denial of the protest was not withdrawn. *Id.* at ¶ 7. Instead, Customs placed Design on the sanction list for failing to pay the increased duties on the subject entries. *Id.* at ¶ 7. Customs required Design to file "live" entries, which delayed release and increased costs of shipments. *Id.* at ¶ 8. Design informed Customs that this situation was a mistake, and Customs responded that they would change the status of Design's protest from "decided" to "open" in order to remove Design from the sanctions list. *Id.* at ¶ 9.

On March 10, 2014, Customs denied Design's October 10, 2013 protest again, changing the reason for denial from "Untimely filed" to "Rejected as non-protestable." *Id.* at ¶ 10. In the denial, Customs explained that "[w]e have no [j]urisdiction over this [p]rotest, since a denial of a protest is not a protestable action." *Id.* at ¶ 10.

On May 16, 2014, Design filed an action in this Court challenging the denial of Protest No. 2704–13–102066. *Id.* at ¶ 4.

STANDARD OF REVIEW

"Plaintiffs carry the burden of demonstrating that jurisdiction exists." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F.

Supp. 428, 432 (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In deciding a Rule 12(b)(1) motion to dismiss that does not challenge the factual basis for the complainant's allegations, the court assumes "all factual allegations to be true and draws all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

DISCUSSION

In order to invoke the Court's jurisdiction under § 1581(a), a civil action must be based on the denial of a valid protest filed in accordance with 19 U.S.C. § 1514 (2012). *See Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908–09 (Fed. Cir. 1999). Customs contends that the Court lacks subject matter jurisdiction under § 1581(a) because Design's third protest filed on October 10, 2013, Protest No. 2704–13–102066, was not a valid protest. *See* Def.'s Br. at 3–5. In response, Plaintiff asserts that the action was "timely commenced within 180 days of denial of protest number 2704–13–102066 in accordance with 28 U.S.C. § 1581(a) and 28 U.S.C. § 2636(a)." *See* Pl.'s Br. at 2.

The issue in the instant action is whether Design's protest is valid in light of the "one entry, one protest" rule outlined in 19 U.S.C. § 1514(c)(1)(D). *See* 19 U.S.C. § 1514(c) ("Only one protest may be filed for each entry of merchandise . . . ."). Section 1514(c)(1) generally prohibits multiple protests from being filed for the same entry of merchandise. Accordingly, "[w]here a plaintiff has invalidly filed a second protest, the court lacks jurisdiction to entertain plaintiff's claims." *Mitel, Inc. v. United States*, 16 CIT 4, 9, 782 F. Supp. 1567, 1571 (1992).

Plaintiff argues that a third protest was permitted because 19 U.S.C. § 1514(c) provides exceptions to the one protest rule, stating that "separate protests filed by different authorized persons with respect to any one category of merchandise . . . that is the subject of a protest are deemed to be part of a single protest." Pl.'s Br. at 3 (citing 19 U.S.C. § 1514). Specifically, Plaintiff asserts that its broker and its counsel are "different authorized persons," and thus, insists that Customs violated the exceptions outlined in § 1514(c) when it failed to consolidate the third protest filed by its counsel (Protest No. 2704–13–102066), with the two previous protests filed by its broker (Protest Nos. 2704–13–101337 and 2704–13–101339). *Id.* at 3–4.

The court disagrees with Plaintiff's assertions. The exception articulated in 19 U.S.C. § 1514(c)(1) does not permit a party to file an additional protest after a previous protest has already been denied,

even when one is filed by a different authorized person: "only the first protest received by Customs for filing may practicably be treated as valid." *Alcan Aluminum Corp. v. United States*, 28 CIT 2067, 2068 n.2, 353 F. Supp. 2d 1374, 1375 n.2 (2004); *see also id.* ("Because 19 U.S.C. § 1514(c)(1) precludes the filing of two protests relating to the same entries and same category of merchandise [. . .] only the first protest received by Customs for filing may practicably be treated as valid." (citing *Russ Togs, Inc. v United States*, 79 Cust. Ct. 119, 122 (1977)(emphasis in original))). Furthermore, allowing an additional protest contesting an entry that was already subject to the denial of a previous protest would "allow [a] plaintiff to file an unending series of protests each protesting the previous protest denial." *Wally Packaging, Inc. v. United States*, 7 CIT 19, 22–23, 578 F. Supp. 1408, 1412 (1984) ("[S]ection 1514 does not permit a party to protest the denial of a protest . . . such a procedure would allow plaintiff to file an unending series of protests each protesting the previous protest denial."). Additionally, § 1514(c)(1) provides that "[n]ew grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration in connection with the review of such protest pursuant to section 1515 of this title *at any time prior to the disposition of the protest* in accordance with that section." 19 U.S.C. § 1514(c)(1) (emphasis added).

Here, Customs denied Protest Nos. 2704–13–101337 and 2704–13–101339 on August 15, 2013. Design's October 10, 2013 protest, Protest No. 2704–13–102066, effectively contested Customs' denial of its first two protests. As a result, Design's October 10, 2013 protest is invalid. *See Alcan Aluminum Corp*, 28 CIT at 2068 n.2, 353 F. Supp. 2d at 1375 n.2 (citing *Russ Togs, Inc.*, 79 Cust. Ct. at 122 (1977)); *see also Wally Packaging, Inc.*, 7 CIT at 22–23, 578 F. Supp. at 1412. The court therefore lacks jurisdiction to entertain Plaintiff's claims. *See Mitel, Inc.*, 16 CIT at 9, 782 F. Supp. at 1571.

CONCLUSION

For the reasons stated, Defendant's motion to dismiss for lack of subject matter jurisdiction is **GRANTED**. Judgment will be entered accordingly.

Dated: November 9, 2015
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 15–127

GANG YAN DIAMOND PRODUCTS, INC., CLIFF INTERNATIONAL LTD., AND BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, Plaintiffs, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS COALITION, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 14–00148

[Remanding third administrative review of antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: November 9, 2015

Jeffrey S. Neeley and *Michael S. Holton*, Hush Blackwell, LLP, of Washington, DC, for the plaintiffs Gang Yan Diamond Products, Inc., Cliff International Ltd., and Beijing Gang Yan Diamond Products Company

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *Aman Kakar*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Daniel B. Pickard and *Maureen E. Thorson*, Wiley, Rein & Fielding, LLP, of Washington, DC, for the defendant-intervenors.

OPINION

Musgrave, Senior Judge: This opinion concerns the third administrative review conducted by the defendant International Trade Administration, U.S. Department of Commerce ("Commerce") of *Diamond Sawblades from the People's Republic of China* ("PRC") ("*Third Review*")[1] covering the 2011–2012 period. As with the two prior administrative reviews, the plaintiffs filed this action to preserve their challenge to the country-wide (or "PRC-wide") rate applied to them as part of the "ATM entity."[2] Jurisdiction here again falls under 28 U.S.C. §1581(c), and administrative determinations that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law" are to be held unlawful. 19 U.S.C. §1516a(b)(1)(B)(i). The matter will remanded due to the following.

[1] *Diamond Sawblades and Parts Thereof From the People's Republic of China*, 79 Fed. Reg. 35723 (Jun. 24, 2014) (final rev. results), PDoc 487, and accompanying issues and decision memorandum ("*IDM*") (July 11, 2014), PDoc 471.

[2] Commerce continued to consider the "collapsed" ATM entity as consisting of Advanced Technology & Materials Co., Ltd., AT&M International Trading Co., Ltd., Beijing Gang Yan Diamond Products Company, Gang Yan Diamond Products, Inc., Cliff (Tianjin) International Limited Company, and HXF Saw Co., Ltd. *See* Memorandum to File, *re* "Affiliation and the ATM Single Entity" (Dec. 3, 2012), PDoc 346.

The plaintiffs recast a number of their arguments previously raised, to the effect that the PRC-wide rate is an adverse facts rate, and that its application to them in this administrative review is unlawful given that the PRC-wide entity, including the "ATM entity" (including the plaintiffs), "fully cooperated" in the proceeding. *See* 19 U.S.C. § 1677e. Most of the plaintiffs' arguments were addressed by the prior decision on the first administrative review. *See Diamond Sawblades Manufacturers' Coalition v. United States*, 39 CIT ___, Slip Op. 15–105 (Sep. 23, 2015). The court will here readdress certain arguments pertinent to resolution of this matter.

As in their comments on the remand results of the first and second administrative reviews, the plaintiffs assume that Commerce's finding of "cooperation" extends to the full PRC-wide entity. *See*, *e.g.*, Pls' R. 56.2 Br. at 3 ("[t]he finding of cooperation by the AT&M Entity responding for the PRC-wide entity, is equally applicable to this review as to the prior two reviews") & 4 ("the full cooperation of the PRC-wide entity, responding through the AT&M Entity, is readily apparent"); Pls' Reply at 4 ("the full cooperation of the PRC-wide entity, responding through the AT&M entity"). That is an inexact interpretation of the *Third Review* final results. It is clear from the *IDM* that Commerce examined the ATM entity from the perspective of the ATM entity's arguments that it was entitled to a separate rate. *See*, *e.g*., *IDM* at cmt. 1. It is also clear that the arguments the ATM entity made before Commerce were advanced on its own behalf, not on behalf of the PRC-wide entity. *See*, *e.g.*, *id*. at cmt. 3. In addition, the record does not indicate that the ATM entity was authorized, by either Commerce or any PRC-wide authority, to speak for the PRC-wide entity, only that the plaintiffs, as part of the ATM entity, were also part of the PRC-wide entity. *See generally id*.

At this point, Commerce's defense of applying to the plaintiffs the country-wide rate from the original investigation (*i.e.*, 164.09%) rests on the concept of the finality of the administrative review process. This *Third Review* is distinct from the first and second administrative reviews in so far as Commerce denied separate rate status to the ATM entity during the administrative process rather than pursuant to voluntary remand. And Commerce has not requested voluntary remand for this review as it did for the first and second reviews. The court is mindful of the fact that the *IDM* was prepared as of and dated June 18, 2014, whereas the results of the redeterminations of the first and second administrative reviews were prepared as of and dated April 10, 2015, and May 18, 2015, respectively. In other words, as

Commerce states, at the time of the *Third Review*'s final results it had no record evidence that would require recalculation of the country wide rate established in the investigation. Nonetheless, the tenor of the plaintiffs' arguments is to the effect that the *Third Review* final results fail to give due consideration to the plaintiffs' cooperation during the proceeding, in particular with respect to the effect of that cooperation upon the PRC-wide rate applied to it. With respect to the first and second administrative review redeterminations, Commerce considered, and successfully defended, that once it was determined that the ATM entity was ineligible for a separate rate, the circumstance triggered a "review" of the PRC-wide rate, apparently in accordance with policy or practice, and that the ATM entity's "cooperation" needed to be taken into account in such "reviews." The *Third Review*'s final results as they currently stand thus appear anachronistic in comparison with those final results of redeterminations. At the very least, this matter requires remand for further clarification of why the determination of the ATM entity's ineligibility for a separate rate did not trigger a similar "review" of the PRC-wide rate, and specifically what Commerce's policy or practice was at the time, if it was not as described in the decision on the results of redetermination of the first administrative review. *See* Slip Op. 15–105 at 11. Of course, Commerce also has discretion to reconsider, if that is appropriate.

So ordered.

Dated: November 9, 2015
New York, New York

/s/ R. Kenton Musgrave

R. KENTON MUSGRAVE, SENIOR JUDGE