U.S. Customs and Border Protection

Slip Op. 12–83

TIANJIN MACHINERY IMPORT & EXPORT CORP. and SHANDONG HUARONG MACHINERY CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and AMES TRUE TEMPER, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 05–00522
Public Version

[The Final Results are sustained.]

Dated: June 14, 2012

Hume & Associates LLC (*Stephen M. De Luca and Robert T. Hume*), for plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Michael D. Panzera*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Shana Hofstetter*), of counsel, for defendant.

OPINION

Eaton, Judge:

INTRODUCTION

At issue in this case are the Final Results of Redetermination following a second remand of the Department of Commerce's ("Commerce" or the "Department") Final Results of the Thirteenth Administrative Review of four antidumping duty orders applicable to imports into the United States of heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC"). *See* Final Results of Redetermination Pursuant to Court Order (Dep't of Commerce May 4, 2011) (ECF Docket No. 146) ("Second Remand Results"); *see also Tianjin Mach. Imp. & Exp. Corp. v. United States*, 35 CIT __, 752 F. Supp. 2d 1336 (2011) (*Tianjin III*); Final Results of Redetermination Pursuant to Court Order (Dep't of Commerce Sept. 16, 2009) (ECF Docket No. 116) ("First Remand Results"); *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 31 CIT 1416 (2007) (not reported in the Federal Supplement) (*Tianjin I*); HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 54,897 (Dep't of Commerce Sept. 19, 2005) (final results of antidumping duty administrative reviews) ("Final Results"); HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 56 Fed. Reg. 6622 (Dep't of Commerce Feb. 19, 1991) (notice of antidumping duty orders). The period of review ("POR") covers February 1, 2003 through January 30, 2004.

In *Tianjin III*, the court remanded the First Remand Results, directing Commerce to: (1) redetermine the Adverse Facts Available ("AFA") rate applied to Shandong Huarong Machinery Co.'s ("Huarong") sales of bars/wedges because Commerce had not sufficiently corroborated the rate of 139.31%; and (2) redetermine the AFA rate of 98.77% applied to Tianjin Machinery Import & Export Co.'s ("TMC") sales of picks/mattocks, which likewise was not sufficiently corroborated by Commerce. *Tianjin III*, 35 CIT at __, __, 752 F. Supp. 2d at 1350, 1353.

In these Second Remand Results, Commerce has determined a revised AFA rate of 47.88% for Huarong's sales of bars/wedges and 32.15% for TMC's sales of picks/mattocks.[1] Second Remand Results 3. The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B) (iii) (2006) and 28 U.S.C. § 1581(c) (2006).

For the following reasons, the Second Remand Results are sustained.

STANDARD OF REVIEW

"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).

DISCUSSION

I. Second Remand Results

On September 19, 2005, Commerce issued the Final Results of the Thirteenth Administrative Review of antidumping orders on HFHTs from the PRC. *See* Final Results, 70 Fed. Reg. at 54,897. Thereafter, the court sustained Commerce's determination to apply AFA to plaintiffs' merchandise because of an agent sales scheme,[2] but remanded

[1] Commerce "conduct[ed] this remand under protest." *See* Second Remand Results 3 n.2; *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003).

[2] In *Tianjin I*, the Court found that "Commerce provided specific reasons for using facts available in determining plaintiffs' margins for their claimed agent sales." *Tianjin I*, 31 CIT at 1421. In addition, the Court found "reasonable Commerce's decision to determine plaintiffs' dumping margins for their claimed 'agent' sales based on AFA." *Id.* at 1422. Specifically, the Department found that (1) "plaintiffs misrepresented the nature of their business relationship throughout the administrative review . . . [and] made it appear in their initial

the case to Commerce to reconsider: (1) the AFA rate of 139.31% for bars/wedges applied to Huarong and TMC; and (2) the AFA rate of 98.77% for picks/mattocks applied to TMC. *See Tianjin I*, 31 CIT at 1417.[3]

Following this first remand, the court upheld Commerce's application of the AFA rate of 139.31% to TMC's sales of bars/wedges, but found that Commerce had not sufficiently corroborated this rate as applied to Huarong. Therefore, the matter was again remanded, and Commerce was directed to

> choose and support, with substantial evidence, one of the following: (1) a calculated rate from a previous review, that reflects [Huarong's] actual rate during the POR, with a built-in increase to deter non-compliance; or (2) reopen the record and calculate a rate that accurately reflects what the rate would have been had Huarong cooperated, with a built-in increase as a deterrent to non-compliance.

Tianjin III, 35 CIT at __, 752 F. Supp. 2d at 1350. The court likewise found that the AFA rate of 98.77% as applied to TMC's sales of picks/mattocks was not sufficiently corroborated, and gave Commerce instructions similar to those it had provided for Huarong's sales of bars/wedges. *See Tianjin III*, 35 CIT at __, 752 F. Supp. 2d at 1353.

II. Legal Framework

"Commerce periodically reviews and reassesses antidumping duties" that it imposes on "imported merchandise that is sold in the United States below its fair value and materially injures or threatens

. . . responses that their agent sales were made pursuant to a legitimate agency relationship"; and (2) both respondents "failed to cooperate by not acting to the best of their ability to comply with [Commerce's] requests for information." *Id.* at 1421–22 (internal quotation marks and citations omitted). Consequently, the court found that "plaintiffs' 'failure initially to provide the relevant information with respect to their invoicing arrangement, information that was fully within their command, justified Commerce's application of AFA' to plaintiffs' claimed 'agent' sales." *Id.* at 1424 (quoting *Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 1278, 435 F. Supp. 2d 1261, 1270 (2006)).

[3] The court later ordered Commerce to reopen the record to consider new information provided by plaintiffs on changes in steel surrogate values during different periods of review, and the impact of these changes on antidumping margins. *See* Court Order at 4, *Tianjin Mach. Imp. & Exp. Corp. v. United States*, No. 05–00522 (June 8, 2009) (ECF Docket No. 112) (*Tianjin II*) (directing Commerce to place plaintiffs' additional information on the record and to offer a response to it). On January 4, 2011, the court sustained Commerce's decision not to use plaintiffs' new data. *Tianjin III*, 35 CIT at __, 752 F. Supp. 2d at 1343. Specifically, in *Tianjin III*, the court stated, "[w]ith respect to the [new data] plaintiffs have now placed on the record, . . . the Department believes, based on the companies' participation in the fraudulent [agent] scheme that the new data, like all of the companies' questionnaire responses, is not reliable." *Id.* at __, 752 F. Supp. 2d at 1342.

to injure a domestic industry." *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1321 (Fed. Cir. 2010) (citing 19 U.S.C. §§ 1673, 1675(a)). During such periodic reviews, "Commerce requests information from the interested parties," *id.*, and if a respondent in a review "significantly impedes a proceeding," Commerce is permitted to use "facts otherwise available" to determine the rate, 19 U.S.C. § 1677e(a)(2)(C). If Commerce further finds that a respondent has "failed to cooperate by not acting to the best of its ability to comply with a request for information," then the Department "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). As noted, the court has sustained Commerce's use of AFA based on an agent sales scheme. *Tianjin I*, 31 CIT at 1422.

When, as here, the record does not contain reliable information from which to calculate a rate,[4] Commerce may determine one. "[I]n the case of uncooperative respondents," Commerce has discretion to "select from a list of secondary sources as a basis for its adverse inferences." *Gallant Ocean*, 602 F.3d at 1323; *see also F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); 19 U.S.C. § 1677e(b). "'Commerce's discretion in these matters, however, is not unbounded.'" *Gallant Ocean*, 602 F.3d at 1323 (quoting *De Cecco*, 216 F.3d at 1032). Commerce's discretion is restrained because the purpose of the AFA statute "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *De Cecco*, 216 F.3d at 1032. Therefore, "Congress tempered the deterrent purpose with the corroboration requirement," *Gallant Ocean*, 602 F.3d at 1323, which requires that "[w]hen [Commerce] relies on secondary information[[5]] rather than on information obtained in the course of an investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal,"[6] 19 U.S.C. § 1677e(c).

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[4] Here, there was no reliable information on the record for Commerce to use to calculate a rate because the Department lawfully rejected the financial information plaintiffs put on the record. Specifically, in *Tianjin I*, this court found "reasonable Commerce's decision to determine plaintiffs' dumping margins for their claimed 'agent' sales based on AFA." *Tianjin I*, 31 CIT at 1422.

[5] "Secondary information" is defined as "information derived from—(1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under [19 U.S.C. § 1675] or determination under [19 U.S.C. § 1675b], or (4) any other information placed on the record." 19 U.S.C. § 1677e(b)(1)–(4).

[6] "The Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994), changed United States law to conform to the provisions agreed upon at the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade," which resulted in the corroboration requirement. *Tianjin III*, 35 CIT at __, 752 F. Supp. 2d at 1347 n.9.

"Corroborate means that [Commerce] will examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d) (2011). To corroborate its selection of an AFA rate, Commerce must therefore demonstrate that the rate is reliable and relevant to the particular respondent. *Gallant Ocean*, 602 F.3d at 1325 ("Substantial evidence requires Commerce to show some relationship between the AFA rate and the [respondent's] actual dumping margin."); *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007) ("Commerce assesses the probative value of secondary information by examining the reliability and relevance of the information to be used."). Furthermore, "[i]n order to corroborate an AFA rate, Commerce must show that it used 'reliable facts' that had 'some grounding in commercial reality.'" *Qingdao Taifa Grp. Co. v. United States*, 35 CIT __, __, 780 F. Supp. 2d 1342, 1348 (2011) (quoting *Gallant Ocean*, 602 F.3d at 1324) (A "'reasonably accurate estimate'" of a respondent's antidumping margin is one that is related to a respondent's "commercial reality.")). Hence, the corroboration requirement is designed to ensure that an AFA rate is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *De Cecco*, 216 F.3d at 1032; *id.* at 1034 ("By requiring corroboration of adverse inference rates, Congress clearly intended that such rates should be reasonable and have some basis in reality.").

III. Corroboration of the AFA Rate for Huarong's Sales of Bars/Wedges

Pursuant to the court's instructions, on remand, Commerce reassessed its original 139.31% AFA rate and assigned an AFA rate of 47.88%[7] for Huarong's sales of bars/wedges. In doing so, the Department selected the rate that was applied as an AFA rate to Huarong's sales of bars/wedges after remand during the Ninth Administrative Review. *Shandong Huarong Gen. Grp. Corp. & Liaoning Mach. Imp. & Exp. Corp. v. United States*, 31 CIT 42, 49 (2007) (not reported in the Federal Supplement).

Plaintiffs argue that the AFA rate for Huarong was not properly corroborated because it does not reflect Huarong's commercial reality. Pls.' Cmts. on Final Results of Redetermination 9 (ECF Docket No.

[7] The final AFA rate of 47.88% had been calculated for Fujian Machinery & Equipment Import & Export Corp.'s sales of bars/wedges in the 1992–1993 review. Thereafter, it was the country-wide rate in the Ninth Administrative Review (post-litigation), and was upheld by this court as a lawful AFA rate for Huarong's sales of bars/wedges during that review. Second Remand Results 5–6; *Shandong Huarong Gen. Grp. Corp. & Liaoning Mach. Imp. & Exp. Corp. v. United States*, 31 CIT 42, 44 (2007) (not reported in the Federal Supplement).

147) ("Pls.' Cmts."). The Department, however, insists that the AFA rate of 47.88% properly reflects Huarong's "commercial reality," and was therefore relevant to the company. Second Remand Results 6 ("The Department has . . . sought to employ an AFA rate that reflects 'commercial reality' as discussed in *Gallant Ocean* and *KYD*."). Defendant-intervenor Ames True Temper ("Ames") agrees "that the Department adequately corroborated this rate." Def.-Int.'s Cmts. on Final Results of Redetermination 6 (ECF Docket No. 148) ("Def.-Int.'s Cmts.") 6.

It is apparent that Commerce has sufficiently corroborated the 47.88% rate. As an initial matter, the rate is reliable because it was calculated from verified information for the respondent Fujian Machinery & Equipment Import & Export Corp.'s sales of bars/wedges in the 1992–1993 review. *See* Second Remand Results 5–6; Def.'s Resp. to Cmts. on Final Results of Redetermination 3 (ECF Docket No. 152) ("Def.'s Resp.").

Next, "[t]o demonstrate how the 47.88 percent AFA rate is commercially relevant to Huarong for the thirteenth administrative review, the Department examined the entire U.S. sales database [of Huarong's sales of bars/wedges] from the eleventh review[[8]] consisting of 447 transactions, the most recent period in which Huarong received a calculated rate."[9] Second Remand Results 6. In other words, Commerce analyzed the 447 individual transaction margins calculated for Huarong's sales of bars/wedges, in the most recent review in which Huarong received a calculated rate, in order to determine whether 47.88% was within the range of these calculated transaction margins. *See* Def.'s Resp. 6 ("Commerce . . . us[ed] Huarong's transaction-specific margins from the eleventh administrative review to corroborate the AFA rate.").

Based on its analysis of the 447 transactions, Commerce found that 47.88% was "well within the range of the individual transaction margins observed for Huarong's sales of bars/wedges during the eleventh administrative review." Second Remand Results 6–7; Def.'s Resp. 7 ("Commerce found that the 47.88 percent margin was probative and within the range of the 447 individual transaction margins observed for Huarong's sales of bars/wedges. Given this range, Com-

[8] The Eleventh Administrative Review covered the POR from February 1, 2001 through January 31, 2002. *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 68 Fed. Reg. 53,347 (Dep't of Commerce Sept. 10, 2003) (final results of antidumping duty administrative review of the order on bars and wedges). The Thirteen Administrative Review, at issue here, covers the POR from February 1, 2003 through January 30, 2004. *See* Final Results, 70 Fed. Reg. at 54,897.

[9] As noted, Commerce did not use transactions from this POR because of the agent sales scheme.

merce determined that Huarong's transaction-specific rates from an administrative review two years prior to the one at issue demonstrated that the 47.88 percent rate was grounded in the company's 'commercial reality.'" (internal citation omitted)). Although the rate falls toward the high end of the range, when considering the volume of transactions, it is dramatically lower than the highest calculated rates for some individual transactions.[10]

In addition, the Department further corroborated the 47.88% AFA rate using a two-step process whereby it (1) determined a baseline rate, and (2) added a deterrence factor to encourage future compliance. Using this method, the Department's first step was to determine a reasonable approximation of the rate Huarong would have received, had it cooperated, to use as the baseline. In doing so, Commerce considered the rationale, previously taken into account by this Court, that "a conservative estimate of what a non-cooperative respondent's margin would have been had it cooperated is the highest weighted-average margin calculated for that respondent in a prior review."[11] Def.'s Resp. 6 (citing Second Remand Results 6; *Shandong Huarong*, 31 CIT at 47). Accordingly, Commerce used Huarong's highest previously-calculated rate of 34.00% from the Sixth Administrative Review as a starting point.

[10] Specifically, relying on Huarong's own calculated transaction-specific rates from the Eleventh Administrative Review, the most recent review in which Huarong received such rates, Commerce found that these transactions spanned from -29.89% to 137.44%. Mem. to File from Matthew Renkey regarding Business Proprietary Information Referenced in the Draft Results of Redetermination, A-570–803 (Mar. 31, 2011) (C.R. Doc. 4295). Furthermore, "[o]ut of the 447 individual transactions, the 47.88 percent rate is lower than 112 (or 25.06 percent) of the margins, and higher than 335 (or 74.94 percent)." *Id.*

[11] Commerce further explains that

> [f]ollowing the rationale upheld by the Court . . . , the Department finds that for non-cooperative respondents, a conservative estimate of what the respondent's margin would have been had it cooperated is the highest weighted-average margin calculated for that respondent in a prior review. In this case, following that rationale, the Department expects that, at a minimum, Huarong would have received a dumping margin of 34.00 percent (its calculated rate from the sixth administrative review, 1996–1997), had it cooperated. Given that its previous highest calculated rate was 34.00 percent, and following Congressional intent that a respondent should not benefit from an AFA rate *vis-à-vis* its previous calculated margins, Huarong's AFA margin for the thirteenth review would necessarily be higher than 34.00 percent.

Second Remand Results 6. Commerce finds the referenced "Congressional intent" in the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, which states

> [w]here a party has not cooperated, Commerce and the Commission may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation.

H.R. Doc. No. 103–316 at 870, *reprinted* in 1994 U.S.C.C.A.N. 4040, 4199 (1994).

Next, Commerce examined the effect of adding 13.88 percentage points to the baseline in order to reach its selected AFA rate of 47.88%. In doing so, Commerce concluded that this amount would be reasonable knowing that (1) 34.00% was a reasonable approximation of what Huarong's rate would have been had it cooperated; and (2) that the 47.88% AFA rate had been approved for Huarong by this Court after remand in the Ninth Administrative Review. *See Shandong Huarong*, 31 CIT at 48.

The court finds that Commerce has used facts and methodologies that sufficiently corroborate the 47.88% rate. First, Commerce demonstrated that the AFA rate was within the bounds of observed values from the Eleventh Administrative Review. In *KYD*, the Federal Circuit noted that the "cases make clear that the dumping margin must be corroborated by 'secondary information that has some grounding in commercial reality.'" *KYD, Inc. v. United States*, 607 F.3d 760, 770 (Fed. Cir. 2010) (quoting *Gallant Ocean*, 602 F.3d at 1324). Here, an examination of the sales listed in Huarong's United States sales database confirms that the 47.88% rate is "within the range of the individual transaction margins observed for Huarong's sales of bars/wedges during [this POR]." Second Remand Results 6–7. As such, it is evident that the rate is within the bounds of sales that actually took place two years prior to the POR. Although the selected rate was higher than most individual transaction margins, it is well below others. Here, it is certainly the case that Commerce was justified in choosing a rate on the higher end in order to encourage future compliance. Further, Commerce's methodology confirms that the originally-assigned 139.31% rate was aberrant. *See De Cecco*, 216 F.3d at 1032 ("[T]he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.").

Second, Commerce's use of a two-step methodology, whereby it started with a 34.00% baseline rate and applied a 13.88 percentage point deterrence factor, tends to further corroborate the 47.88% AFA rate. The Department determined the baseline rate in accordance with a methodology reviewed by this Court in *Shandong Huarong*, wherein the Court approved an AFA rate founded on a baseline that was the respondent's highest previously-calculated rate. *Shandong Huarong*, 31 CIT at 45 ("[T]he court finds that Commerce has explained adequately the reliability and relevance of the [final] AFA rate . . . , and finds the method employed by Commerce in reaching its conclusion [(i.e., using the respondent's highest previously-calculated rate as a baseline)] reasonable."). Thus, the court finds that Commerce's selection of the baseline was reasonable.

As to Commerce's decision to add 13.88 percentage points to the baseline rate, the court also finds this reasonable. As noted, the Federal Circuit has found that an AFA rate should be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *De Cecco*, 216 F.3d at 1032. Here, the addition of the 13.88 points "as a deterrent to non-compliance" is reasonable for two reasons. First, in the Ninth Administrative Review, this increase was found to be a reasonable addition to the base rate, and amounted to an AFA rate of 47.88% for Huarong's sales of bars/wedges. *See Shandong Huarong*, 31 CIT at 48 ("[I]t is not unreasonable for Commerce to allot to Huarong an approximate thirteen-percentage-point increase from its highest calculated rate of 34.00 percent as a deterrent."). Second, when added to the baseline of 34.00%, it yields the 47.88% rate, which, as has been seen, is within the range of Huarong's actual transaction-specific rates in the Eleventh Administrative Review, and was also the rate assigned to Huarong's sales of bars/wedges during the Ninth Administrative Review.

As a result, Commerce's methodology in this case resulted in an AFA rate that is "both reliable and bear[s] a rational relationship to the respondent." *Shandong Huarong*, 31 CIT at 46. Therefore, the court finds that Commerce employed a method that was reasonable and not contrary to law, in this case, because "[h]ere, the reasoning of Commerce's methodology is clear and simple." *Qingdao Taifa*, 35 CIT at __, 780 F. Supp. 2d at 1350 ("When making a discretionary determination [such as determining an AFA rate], . . . Commerce can use a case-by-case analysis, so long as it is 'consistent with its statutory authority.' Under such circumstances, Commerce is not required to justify its determinations in terms of past alternatives. Of course, Commerce must always act reasonably." (quoting *Allied-Signal Aerospace Co. v. United States*, 28 F.3d 1188, 1191 (Fed. Cir. 1994) (internal citations omitted))). In addition, as has been seen, the rate is supported by substantial evidence.

For these reasons, the court sustains Commerce's selection of the AFA rate of 47.88% for Huarong's sales of bars/wedges.

IV. Corroboration of the AFA Rate for TMC's Sales of Picks/Mattocks

The court now turns to the AFA rate determined for TMC's sales of picks/mattocks. Pursuant to the court's instructions, on remand, Commerce reassessed its original 98.77% AFA rate and assigned an AFA rate of 32.15% for TMC's sales of picks/mattocks.

Plaintiffs argue that TMC's AFA rate was not corroborated by Commerce because it does not reflect TMC's commercial reality. Pls.'

Cmts. 9. Despite plaintiffs' arguments, the court finds that Commerce has sufficiently corroborated the selected rate. First, the AFA rate of 32.15% was reliable because it was based on TMC's own data. Def.'s Resp. 12 ("[T]he 32.15 percent rate was calculated using TMC's most recent experience and data because the eight sales observations used in the calculation were from TMC's sales from the most recent prior review.").

In addition, Commerce has sufficiently corroborated the rate and adequately demonstrated that it reflected TMC's commercial reality during the POR. In doing so, the Department looked at TMC's transactions during the immediately-preceding Twelfth Administrative Review and found that "there were a total of 74 TMC U.S. sales transactions . . . . Of those 74 TMC transactions, eight had margins above *de minimis* (greater than 0.5 percent)." Second Remand Results 7 n.3. The rate of 32.15% was derived from a weighted-average margin calculated from these eight dumped transactions. *See* Second Remand Results 8; *see also* Def.-Int.'s Reply to Cmts. on Final Results of Redetermination 10 (ECF Docket No. 151) ("The respondent's own data, adjusted to remove a favorable factor, such as the existence of non-dumped sales, provides [a] deterrent, without sacrificing relevance to the respondent or departing from commercial reality."). This calculation resulted in the AFA rate of 32.15%.

While basing the deterrence increase on eight out of seventy-four transactions may not appear to be representative of TMC's total sales, and thus its commercial reality, Commerce found that "[t]hese eight transactions represent a significant percentage of the volume and value sold by TMC during the previous administrative review." Second Remand Results 8. The Department demonstrated its volume contention with "a precise explanation of the number of CONNUMS[[12]] covered by these eight transactions, as well as their volume and value." Second Remand Results 8; *id.* at 12 ("This [32.15%] rate is corroborated because it is based on a significant quantity and value of sales from the twelfth administrative review, covering half of all CONNUMS sold during that period."). Specifically, Commerce examined the number of CONNUMS that were covered by the eight dumped transactions used to calculate the 32.15% rate, and found that these eight transactions included half of the CONNUMS (or

[12] A CONNUM

> "is a contraction of the term 'control number,' and is simply Commerce jargon for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding). All products whose product hierarchy characteristics are identical are deemed to be part of the same CONNUM and are regarded as 'identical' merchandise for purposes of the price comparison."

Union Steel & Dongbu Steel v. United States, 36 CIT __, __, 823 F. Supp. 2d 1346, 1349 (2012) (citation omitted).

unique products) sold during that POR. In other words, of all the merchandise involved in TMC's transactions during the Twelfth Administrative Review, as classified in Commerce's product-type hierarchy, more than half of the products were part of these eight transactions. Thus, because the eight transactions comprised a significant percentage of TMC's sales activity, and because the increase was based on the weighted average of these transactions, Commerce has demonstrated that the AFA rate reflects TMC's commercial reality.

Next, Commerce further corroborated the AFA rate of 32.15%, derived from TMC's eight dumped transactions in the most recent review, by comparing the rate to those assigned to other participants in the same review. In doing so, "Commerce determined that the 32.15[%] AFA rate fell within the range of margins determined for other market players, which ranged from zero to 98.77."[13] Def.'s Resp. 13. In other words, Commerce established that the rate it calculated was relevant because it was within the spectrum of margins determined for other market participants in the same review. *See* Second Remand Results 8.

Finally, the Department corroborated the 32.15% AFA rate using the same two-step process it used for Huarong's sales of bars/wedges, whereby it (1) determined a baseline rate, and (2) added an amount to encourage future compliance. *See De Cecco*, 216 F.3d at 1032 (An AFA rate is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance."). For TMC, Commerce used the calculated rate of 4.61% from a prior review as a baseline,[14] which was increased by 27.54 percentage points to arrive at 32.15%. The baseline rate of 4.61% was TMC's highest previously-calculated rate, and was from the Twelfth Administrative Review, the review directly preceding the one at issue. Although the increase of 27.54 percentage points might appear large when compared to the baseline rate, Commerce has demonstrated that it is reasonable.

"By requiring corroboration of adverse inference rates, Congress clearly intended that such rates should be reasonable and have some basis in reality." *De Cecco*, 216 F.3d at 1034. Here, as discussed, the deterrence increase was derived from TMC's own complete dataset

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[13] Commerce's review included 194 PRC companies during the Thirteenth Administrative Review of the four antidumping duty orders covering HFHTs, not all of which sold HFHTs that fell within the scope of the "pick/mattocks" order. The highest rate calculated for any respondent for sales of picks/mattocks during this review was 98.77%, which was then used as the PRC-wide rate for picks/mattocks. *See* Final Results, 70 Fed. Reg. at 54,899.

[14] Plaintiffs do not challenge the selection of the previously-calculated rate of 4.61% from the Twelfth Administrative Review as TMC's baseline rate. Pls.' Cmts. 9 ("We do not challenge Commerce's selection of the 4.61 percent calculated rate for TMC."). Therefore, the court need not evaluate this baseline rate.

from the same review that produced the 4.61% rate. Specifically, Commerce recalculated the rate with a weighted-average margin using only the eight data points from the Twelfth Administrative Review that reflected dumped transactions, which resulted in the final 32.15% AFA rate. Being based on TMC's own data from the most recent review, the AFA rate is both reliable and relevant to TMC. *See* Second Remand Results 12 ("[T]he 32.15 percent rate bears a clear relationship to TMC."). Therefore, Commerce's two-step methodology in this case resulted in an AFA rate that is "both reliable and bear[s] a rational relationship to the respondent." *Shandong Huarong*, 31 CIT at 46.

Thus, the court finds that Commerce has adequately explained the reliability and relevance of the AFA rate with respect to TMC's sales of picks/mattocks, as well as its relationship to TMC's commercial reality, therefore meeting the corroboration requirement. Specifically, Commerce corroborated the AFA rate of 32.15% by (1) relying upon TMC's own data; (2) explaining how the AFA rate reflected TMC's commercial reality because the eight transactions it relied upon to calculate the AFA rate comprised a significant percentage of TMC's sales activity; and (3) comparing this rate to those assigned to other participants in the same review, and finding that it fell within the range of margins determined for other market players. This corroboration also demonstrates that the rate was not aberrational because it was aligned with the margins determined for other market participants in the same review. This methodology also further demonstrates that the originally-assigned rate of 98.77% was aberrant. *See De Cecco*, 216 F.3d at 1032 ("[T]he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.").

For these reasons, the court sustains Commerce's selection of the AFA rate of 32.15% for TMC's sales of bars/wedges as being in accordance with law and supported by substantial evidence.

V. Plaintiffs' Zeroing Methodology Argument

Plaintiffs further assert that the calculated rates used as the baselines for Huarong and TMC were calculated using Commerce's zeroing methodology, an approach plaintiffs claim was called into question by *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011). Plaintiffs argue that "[a]ny calculated rate [from a previous review] that incorporates Commerce's zeroing methodology already includes a 'built-in increase to deter non-compliance' since by zeroing sales with negative margins, Commerce is adding a deterrent factor." Pls.' Cmts. 11. For this reason, plaintiffs argue for the use of the highest previously-calculated rates, 34.00% for Huarong and 4.61% for TMC, without any increase because these previous rates, having been calculated with the zeroing methodology, already include a "built-in deterrence factor." Pls.' Cmts. 12.

The court finds plaintiffs' arguments unpersuasive. First, Commerce's decision to depart from its use of zeroing in antidumping investigations was the result of an effort to comply with the Recommendations of the World Trade Organization Dispute Settlement Body. *See* Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006) ("Final Modification"). Thus, the change was not directed by any U.S. court as being required by U.S. law, but rather was an effort by Commerce to comply with this country's treaty obligations. *See Dongbu Steel*, 635 F.3d at 1365 ("Commerce . . . decided to stop using zeroing in investigations to comply with international treaty obligations while continuing to use it in administrative reviews."). Indeed, prior to Commerce's decision to change its methodologies, the use of zeroing had been approved by courts many times. *See, e.g., Corus Stall BV v. Dep't of Commerce*, 395 F.3d 1343, 1347, 1349 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (The statute "allow[s] for Commerce's construction . . . [and zeroing] makes practical sense."). In addition, Commerce announced this change in December 2006. *See* Final Modification, 71 Fed. Reg. at 77,722. Therefore, the decision to cease using zeroing in investigations occurred after the review at issue in this case, which covers the POR from 2003 through 2004.

Next, while Commerce ended its use of zeroing in the context of investigations, neither the Federal Circuit nor this Court have found zeroing to be unlawful in the context of antidumping reviews, such as the one at issue in this case. To the contrary, both the Federal Circuit and this Court have approved the use of zeroing in antidumping reviews. *See, e.g., SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011) ("Commerce changed its practice for original investigations and no longer uses zeroing for calculation of weighted average dumping margins, but it continues to use zeroing during administrative reviews. . . . Commerce's application of zeroing to administrative reviews is not inconsistent with the statute." (citations omitted)); *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1361 (Fed. Cir. 2010) (The antidumping duty statute "does not unambiguously preclude—or require—Commerce to use zeroing methodology."); *Union Steel & Dongbu Steel v. United States*, 36 CIT __, __, 823 F. Supp. 2d 1346, 1350–52 (2012) (citation omitted) (providing a complete background to the use of zeroing in administrative reviews and listing judicial precedents approving of such use).

Furthermore, any dispute in U.S. courts over Commerce's zeroing methodology has extended only to the issue of the reasonableness of Commerce's use of zeroing in one situation (i.e., antidumping reviews) and not in the other (i.e., antidumping investigations). *See JTEKT Corp. v. United States*, 642 F.3d 1378, 1385 (Fed. Cir. 2011) ("Commerce must explain why these (or other) differences between the two phases make it reasonable to continue zeroing in one phase, but not the other."); *Dongbu Steel*, 635 F.3d 1363; *Union Steel*, 36 CIT __, __, 823 F. Supp. 2d at 1360 ("Commerce acted reasonably in applying the antidumping statute to conform to the different purposes of investigations and reviews.").

Finally, before and after the POR, both this Court and the Federal Circuit have approved antidumping margins calculated in reviews where zeroing was employed. *See, e.g.*, *NSK Ltd. v. United States*, 510 F.3d 1375, 1378 (Fed. Cir. 2007) (upholding antidumping margins calculated using zeroing); *Timken*, 354 F.3d 1334, 1342 (upholding antidumping margins calculated using zeroing). Indeed, had Huarong chosen to fully cooperate in this review, it would also have received a rate calculated in accordance with the zeroing methodology.

Hence, because (1) the POR was prior to Commerce's change in its use of the zeroing methodology for investigations, (2) no Court has invalidated the use of zeroing in administrative reviews, and (3) the Court has regularly approved antidumping margins calculated using zeroing, plaintiffs' arguments based upon the zeroing methodology are rejected.

CONCLUSION AND ORDER

For the foregoing reasons, the court concludes that Commerce's determination of AFA rates for Huarong and TMC is supported by substantial evidence and otherwise in accordance with law. Thus, it is hereby

ORDERED that the Final Results of Redetermination are SUSTAINED.

Dated: June 14, 2012
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 12–86

THAI PLASTIC BAGS INDUSTRIES CO., LTD., POLYETHYLENE RETAIL CARRIERBAG COMMITTEE, HILEX POLY CO., LLC, and SUPERBAG CORPORATION, Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Chief Judge
Consol.[1] Court No. 11–00086
Public Version

[Plaintiffs' motion for judgment on the agency record GRANTED inpart and DENIED in part].

Dated: June 18, 2012

Irene H. Chen, Cen Law Group LLC, of Rockville, MD, and *Mark B. Lehnardt*, Lehnardt & Lehnardt LLC, of Liberty, MO, for Plaintiff.

Joseph W. Dorn, *Stephen A. Jones*, and *Daniel L. Schneiderman*, King & Spalding, of Washington, DC, for Consolidated Plaintiffs.

Vincent D. Phillips, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

OPINION

Pogue, Chief Judge:

INTRODUCTION

In this action, Plaintiff Thai Plastic Bags Industries Co., Ltd. ("TPBI"), a producer of polyethylene retail carrier bags ("PRCBs") from Thailand, the subject merchandise, and Plaintiffs Polyethylene Retail Carrier Bag Committee, Hilex Poly Co., LLC, and Superbag Corporation (collectively "PRCBC"), producers of a domestic like product, each challenge determinations made by the United States Department of Commerce ("Commerce" or "the Department") in the fifth administrative review of the antidumping ("AD") order on PRCBs.[2]

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[1] This action is consolidated with Court Nos. 11–00086 and 11–00090.

[2] *See Polyethylene Retail Carrier Bags From Thailand*, 76 Fed. Reg. 12,700 (Dep't Commerce Mar. 8, 2011) (final results of antidumping duty administrative review) ("*Final Results*"), and accompanying Issues & Decision Memorandum, A-549–821, ARP 08–09 (Mar. 1, 2011) Admin. R. Pub. Doc. 136, *available at* http://ia.ita.doc.gov/frn/summary/THAILAND/2011–5267–1.pdf (last visited June 15, 2012) ("*I & D Mem.*") (adopted in *Final Results*,76 Fed. Reg. at 12,701). The period of review ("POR") was August 1, 2008 through July 31, 2009.

Specifically, Plaintiffs challenge: 1) Commerce's adjustments to TPBI's reported cost allocation methodology; 2) Commerce's use of zeroing; 3) Commerce's cost adjustment, under the transactions disregarded rule, for linear low density resin ("LLD") obtained by TPBI; and 4) Commerce's determination that TPBI's 2009 inventory valuation losses were attributable to finished goods inventory and were therefore excluded from the calculation of TPBI's general and administrative expenses for producing its goods.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

For the reasons discussed below, issues two and three are remanded to Commerce for reconsideration and further explanation; Commerce's determinations on issues one and four are affirmed.

STANDARD OF REVIEW

Under its familiar standard of review, the court will sustain Commerce's determinations if they are "supported by substantial evidence on the record," and "otherwise . . . in accordance with law." *See* Section 516A(b)(1)(B)(I) of the Tariff Act of 1930, 19 U.S.C. § 1516a(b)(1)(B)(I) (2006).[3] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938), "taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Thus, the substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quoting *SSIH Equip. SA v. U.S. ITC*, 718 F.2d 365, 381 (Fed. Cir. 1983)).

DISCUSSION

I. TPBI Issue 1: Reallocation of TPBI's Reported Costs

Commerce, during an administrative review, determines whether subject merchandise has been sold at less than fair value, or "dumped," in the United States. To do so, the Department endeavors to make a fair comparison between the export price or constructed export price of a foreign producer's sales and its "normal" or home market sale value. *See* 19 U.S.C. § 1677b(a); 19 U.S.C. § 1677(35)(A).[4] This determination requires that Commerce compare products sold in the United States to matching "like" products sold in the home mar-

[3] Further citations to the Tariff Act of 1930 are to Title 19 of the United States Code, 2006.

[4] "Normal value" is "the price at which the foreign like product is first sold . . . for consumption in the exporting country . . . ." 19 U.S.C. § 1677b(a)(1)(B)(I).

ket. *See* 19 U.S.C. § 1677b(a)(1)(B). *See also* 19 U.S.C. § 1677(16); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 820 (1994) ("SAA"), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4161 ("[T]he preferred method for identifying and measuring dumping is to compare home market sales of the foreign like product to export sales to the United States.") In its comparison, Commerce may, under certain conditions, disregard sales below the producer's cost of production ("COP").[5] 19 U.S.C. § 1677b(b).

To the extent that not all products have an identical match, Commerce, in accordance with the statute, may calculate a constructed value ("CV") of the merchandise. Commerce uses the same method to calculate "costs" for both COP and CV. *Compare* 19 U.S.C. § 1677b(b)(3), *with* 19 U.S.C. § 1677b(e). *See also* 19 U.S.C. § 1677b(f). To make its CV and COP determinations, Commerce must consider all available evidence regarding proper cost allocation, 19 U.S.C. § 1677b(f)(1)(A), including costs as reported by the foreign producer. Such costs will, normally, be calculated based on the producer's records, if the records are kept in accordance with the generally accepted accounting principles ("GAAP") of the exporting country and if such records reasonably reflect the costs associated with the production and sale of the merchandise. 19 U.S.C. § 1677b(f)(1)(A); *I & D Mem.* Cmt. 1 at 9.

In addition, in calculating the normal value, Commerce may make reasonable allowances for differences in physical characteristics of the merchandise (its "DIFMER" adjustment).[6]

As Commerce must calculate the COP and CV with as much accuracy as possible, if the company's reported cost allocation methodology shifts costs away from the subject merchandise or the foreign like product, Commerce has the authority to adjust costs to ensure that they are not artificially reduced. *Thai Plastic Bags Indus. Co. v.*

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[5] 3) Calculation of cost of production

For purposes of this part, the cost of production shall be an amount equal to the sum of—

(A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;

(B) an amount for selling, general, and administrative ["SG&A"] expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and

(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

19 U.S.C. § 1677b(b)(3).

[6] Reasonable allowance. In deciding what is a reasonable allowance for differences in physical characteristics, the Secretary will consider only differences in variable costs associated with the physical differences. Where appropriate, the Secretary may also consider differences in the market value. The Secretary will not consider differences in cost of production when compared merchandise has identical physical characteristics.

19 C.F.R. § 351.411(b).

United States, 34 CIT __, 752 F. Supp. 2d 1316, 1324 (2010)("*Thai Plastic Bags I*"); *See* SAA at 834–35, 1994 U.S.C.C.A.N. at 4171–72; 19 C.F.R. 351.407(c).[7]

Specifically, in the fifth administrative review of this order, just as in the fourth administrative review, Commerce concluded that TPBI's reported cost allocation "resulted in product-specific cost differences which were unrelated to differences in physical characteristics." *Thai Plastic Bags I*, 34 CIT __, 752 F. Supp. 2d at 1329; Resp. Br. of PRCBC in Opp'n to TPBI's Mot. for J. on Agency R. at 7, ECF No. 74 ("PRCBC's Resp. Br."). These differences were the result of TPBI's adjustment of its reported "conversion costs." TPBI alleges that these adjustments were to reflect the additional time needed to process different products. Pl.'s Rule 56.2 Mem. of Law in Supp. Of Mot. for J. on Agency R., ECF No. 50–1, at 15 ("TPBI's Br.). But Commerce determined that TPBI's submitted evidence showed that TPBI's reported cost allocation methodology did not reasonably reflect the actual costs for producing the merchandise, Def.'s Resp. in Opp. to Pls.' Rule 56.2 Mot. for J. upon the Agency R., ECF No. 67, at 14 ("Def.'s Br."), and that TPBI's reporting methodology unreasonably distorted the cost of manufacture ("COM").[8] *Polyethylene Retail Carrier Bags From Thailand*, 75 Fed. Reg. 53,953, 53,955 (Dep't Commerce Sept. 2, 2010) (preliminary results of antidumping duty administrative review) ("*Prelim. Results*").

In particular, Commerce found that TPBI's reporting methodology was inconsistent with its normal cost-accounting practice and the reported cost differences were unrelated to physical differences. *Id.* Commerce found that TPBI did not actually use its reported cost allocation methodologies in its normal books and records, but rather created a methodology outside of its normal business practices to report labor and overhead costs to Commerce. Def.'s Br. at 14–15; *I & D Mem.* Cmt. 1 at 10. Accordingly, Commerce reallocated TPBI's reported conversion costs.[9]

[7] Allocation of costs. In determining the appropriate method for allocating costs among products, the Secretary may take into account production quantities, relative sales values, and other quantitative and qualitative factors associated with the manufacture and sale of the subject merchandise and the foreign like product.

19 C.F.R. § 351.407(c).

[8] Cost of Manufacturing ("COM") includes the direct materials, direct labor, variable manufacturing overhead, and fixed manufacturing overhead costs incurred in the production of the merchandise. *See* Antidumping Manual, Chapter 9 at 5 ("AD Manual"), *available at* http://ia.ita.doc.gov/admanual/index.html (last visited June 15, 2012).

[9] In doing so, Commerce calculated the sum of direct labor, variable overhead, and fixed overhead, and applied a weighted average of these amounts. *See Final Results*, 76 Fed. Reg. at 12,701; I & D Mem. Cmt. 1 at 12.

TPBI argued that its cost allocation method reflected cost differences attributable to physical characteristics; but Commerce found that TPBI's method resulted in "great variability" in costs for similar items having nothing to do with physical characteristics. Def.'s Br. at 15; *Prelim. Results* 75 Fed. Reg. at 53,955. Specifically, Commerce looked at nine pairs of CONNUMs[10] that were very similar physically and found that under TPBI's allocations, these items had very different costs. *I & D Mem.* Cmt. 1 at 8.

Even though TPBI explained that many variables other than physical characteristics affected costs, Commerce found that most of the CONNUM pairs were produced in the same facility and had very slight physical differences, yet there were extreme differences in production times reported. *I & D Mem.* Cmt. 1 at 8; Def.'s Br. at 16. Commerce then determined that the record showed that TPBI's cost allocation methods did not reasonably reflect actual costs because such cost disparities were not explained by physical differences in the specific products. Def.'s Br. at 16. Commerce thus relied on actual data reported by TPBI and weight-averaged the costs across all production lines. Def.'s Br. at 17; *I & D Mem.* Cmt. 1 at 12.

TPBI now challenges Commerce's decision to replace TPBI's reported costs with Commerce's average cost calculation. TPBI's Br. at 13. TPBI states that Commerce should have accepted TPBI's reported costs as in accordance with GAAP principles, that Commerce incorrectly relied on the DIFMER standard in reallocating TPBI's costs and that Commerce should have used TPBI's cost information in its calculations. *See id.* at 14. However, as explained below, Commerce reasonably decided A) not to use TPBI's cost methodology; B) to utilize the DIFMER standard; and C) to reject TPBI's alternate cost methodologies.

A. Costs

TPBI first argues that Commerce's decision to replace TPBI's reported costs with averaged costs is not supported by substantial evidence. TPBI's Br. at 13. But in its normal accounting system, TPBI calculates a single monthly per-kilogram average conversion cost for all products based on the costs and quantities from the previous three months. *See* TPBI's Section D Resp., A-549–821, ARP 08–09 (Dec. 16, 2009), Admin. R. Con. Doc. 7 [Pub. Doc. 40] at D-14. Contrary to this normal practice, in reporting its costs for this administrative review, TPBI used a different reporting methodology. *See id.* at D-15. TPBI allocated conversion costs to individual models based on production

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[10] A CONNUM is a control number variable Commerce uses in matching transactions. *I & D Mem.* at 2.

hours. *Id.* at D-26 to D-28. Commerce rejected TPBI's allocation as distortive because it shifted costs away from the subject merchandise. Def.'s Br. at 16. *See I & D. Mem.* Cmt. 1 at 9.

Disputing Commerce's conclusion, TPBI maintains that its cost allocation is a reasonable reflection of production and sale costs of the subject merchandise. TPBI's Br. at 15. TPBI claims that although its costs were based on actual costs, that other variables besides physical characteristics affected the costs. Def.'s Br. Ex. G at S5D-20 to S5D-22; Def.'s Br. at 15; TPBI's Br. at 7; TPBI Case Br., A-549–821, ARP 08–09 (Dec. 10, 2010), Admin. R. Con. Doc. 42 [Pub. Doc. 128] at 13. TPBI states that Commerce should have reviewed those cost driving factors (such as material inputs, order sizes, complexity of bags) instead of relying on a sampling of nine CONNUM pairs to conclude that there are factors other than physical characteristics that drove cost differences. *See* TPBI's Br. at 18.

But it was not unreasonable for Commerce to conclude that TPBI's methodology produces "great variability" in the costs of similar items having nothing to do with the physical aspects of the specific product. Def.'s Br. at 15; *Prelim. Results*, 75 Fed. Reg. at 53,955. Specifically, in considering the nine pairs of CONNUMs that were very similar physically, Commerce found that under TPBI's reported cost allocations these items had very different costs. *I & D Mem.* Cmt. 1 at 8; Def.'s Br. at 15.

Commerce correctly notes that most of the CONNUM pairs were made at the same facility and that the evidence illustrated that slight physical differences could not account for actual cost differences because the disparities could not be explained by these physical differences in the products. Def.'s Br. at 16; *I & D Mem.* Cmt. 1 at 8. Moreover, TPBI was unable to provide Commerce with its actual labor and overhead costs because its financial accounting system does not maintain such costs at a CONNUM specific level. Def.'s Br. at 5, 14.

As TPBI's reporting methodology deviated from its normal accounting practice, Commerce adjusted the reported costs to ensure that they were not artificially reduced and distortive of true costs. *I & D Mem.* Cmt. 1 at 9; Def.'s Br. at 16. *See also* SAA at 835; *Thai Pineapple Pub. Co. v. United States,* 187 F.3d 1362, 1366 (Fed. Cir. 1999); *Hynix Semiconductor, Inc. v. United States*, 424 F.3d 1363, 1369 (Fed. Cir. 2005) (quoting *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1377 (Fed. Cir. 2001)). Plaintiff's reported per-unit costs shifted costs away from the subject merchandise, and thus Commerce reasonably recalculated Plaintiff's costs by averaging them in order to prevent large discrepancies in costs between merchandise that was physically similar. Def.'s Br. at 17; *I & D Mem.* Cmt. 1 at 12.

B. DIFMER

In calculating normal value, Commerce utilizes a DIFMER standard – i.e., a "difference in physical characteristics" or "difference-in-merchandise" adjustment – in its review of what constitutes a reasonable allowance for differences in the physical characteristics of products sold in the U.S. and in foreign markets. *See* 19 C.F.R. § 351.411(b). Commerce also has a practice of comparing cost allocations using physical characteristics of the product in its determination of whether a company's cost allocation strategy reasonably reflects actual costs. Def.'s Br. at 18.

In the *Final Results* Commerce stated that it considered physical differences in its cost analysis because these differences ultimately affect price. Def.'s Br. at 20. Commerce argues that it analyzes subject merchandise costs by using physical characteristics because this is a dependable way to compare the different products, and that cost comparisons utilizing physical characteristics are "key" to Commerce's analysis. Def.'s Br. at 18; Prelim. Cost Mem. For TPBI, A-549821, ARP 08–09 (Aug. 26, 2010), Admin. R. Con. Doc. 36 [Pub. Doc. 105] at 2 ("*Prelim. Cost Mem.*"); Def.'s Br. Ex. I at 2.

TPBI challenges Commerce's reliance on its physical differences, or DIFMER, analysis. TPBI's Br. at 23–24. TPBI argues that the DIFMER standard is not appropriate here, as it was intended for use in the context of price adjustments to normal value when there are variable cost differences between non-identical foreign like products and the subject merchandise. TPBI's Br. at 24.

TPBI argues that Commerce misapplied the DIFMER standard both in improperly weight-averaging conversion cost differences across all products and by calculating the DIFMER adjustment to normal value based solely on cost differences in materials (because the DIFMER standard is not to be used for cost differences unrelated to physical differences). TPBI's Br. at 26–27.

However TPBI did not offer any meaningful evidence to explain why physical differences in the CONNUM pairs resulted in such large differences in conversion costs. As cost allocation based on physical characteristics is a primary factor in Commerce's analysis, Commerce may adjust a company's allocation method to more reasonably reflect costs. *I & D Mem.* Cmt. 1 at 10; Def.'s Br. at 19; *See also* 19 U.S.C.§ 1677b(b)(1)-(b)(2)(c).

PRCBC adds that it would be distortive to use different costs for the COP, CV and DIFMER contexts; PRCBC's Resp. Br. at 15–17. *See also*

I & D Mem. Cmt. 1 at 10 n.3; *NTN Bearing Corp. of America v. United States*, 368 F.3d 1369, 1374 (Fed. Cir. 2004).

To the contrary, as *Thai Plastic Bags I* explained:

> In its determination, Commerce decided to revise TPBG's cost allocations (regarding direct labor, variable overhead and fixed overhead costs) to eliminate a "distortion" based on factors not attributable to physical characteristics. 74 Fed. Reg. 39, 931 . . . . Commerce reallocated TPBG's costs for the sales-below-cost test, the constructed-value calculations and the difference-in-merchandise adjustment. *Id.* The governments' [sic] legal determination to apply its adjustment for all three purposes was reasonable because the calculation of costs "reasonably reflect[ed]" the associated costs of production and sales. *See* 19 U.S.C. § 1677b (f)(1)(A). As the SAA explains, Commerce must use a methodology that reasonably captures all of the costs incurred in manufacturing and selling the product at issue. SAA at 835. Further, "if Commerce determines that costs, including financing costs, have been shifted away from the production of the subject merchandise, or the foreign like product, it will adjust costs appropriately, to ensure they are not artificially reduced". *Id. See NTN Bearing Corp. of America v. U.S.,* 368 F.3d 1369, 1374 (Fed.Cir., 2004) ("Commerce noted that it 'does not rely on a respondent's reported costs solely for the calculation of COP and CV,' Final Results, 63 Fed. Reg. at 2574, and concluded that it would be distortive to adjust those costs only for those calculations, but not for others in which they were used. *Id.* ('[I]f we determine a component of a respondent's COP and CV is distortive for one aspect of our analysis, it is reasonable to make the same determination with respect to those other aspects of our margin calculations where we relied on the identical cost data.'). We concur with Commerce's analysis and hold that it did not err in interpreting these provisions to permit it to employ affiliated supplier cost data to calculate cost deviations to limit the definition of similar merchandise, the difmer adjustment, and inventory carrying costs.").

Thai Plastic Bags I, 34 CIT __, 752 F. Supp. 2d at 1328 n.28.

TPBI also asserts that Commerce's determination was arbitrary because Commerce failed to cite a benchmark and did not address all of the factors that might influence cost differences between similar products. TPBI's Br. at 18–20. In addition, TPBI contends that Commerce's regulations did not require that cost differences unrelated to physical characteristics must be reallocated or that the DIFMER standard be applied. *Id.* at 27–28.

However, Commerce correctly notes that it may, but is not under an obligation to cite benchmarks or address all potential cost factors, and Plaintiff did not provide the record evidence necessary to do so. Def.'s Br. at 20–21; *See* 19 C.F.R. § 351.407(c).[11] Commerce differentiates TPBI's cited authority from the present matter, stating that Commerce is not required to conduct a factor by factor analysis in this case, as there is only one product at issue. Def.'s Br. at 22–24. Commerce also relies on its past decisions in support of its practice. *I & D Mem.* Cmt. 1 at 11–12.[12]

Despite TPBI's argument that each of the cited cases is distinguishable, Commerce analyzed TPBI's costs in line with the agency practice of considering whether costs are allocated according to physical characteristics of the product as a primary factor. Def.'s Br. at 17. Recognizing that the DIFMER adjustment is a price adjustment, Commerce still found that using physical characteristics was necessary for its analysis as the physical differences influence the price of products. *I & D Mem.* Cmt. 1 at 10 n.2; Def.'s Br. at 19–20. *See also* 19 C.F.R. 351.411(a)-(b). Commerce notes that its regulations do not prohibit Commerce from adjusting reported costs to ensure that there would not be a DIFMER adjustment for conversion cost differences. *I & D Mem.* Cmt. 1 at 13; PRCBC's Resp. Br. at 14.

Commerce also counters TPBI's argument that Commerce's costs reallocation was inappropriate because there was no evidence of under-reporting. *See* TPBI's Br. at 22. Commerce notes that it is not required to wait for under-reporting before determining that those costs did not reasonably reflect actual costs. Def.'s Br. at 24. Commerce found a distortion in that the reported conversion costs were understated for some models and overstated for others; resulting in the need to adjust the costs. *I & D Mem.* Cmt. 1 at 13; Def.'s Br. at 25.

[11] Commerce notes that in *Certain Preserved Mushrooms from India*, 63 Fed. Reg. 72, 246 (Dep't Commerce Dec. 31, 1998) (notice of final determination of sales at less than fair value), Commerce rejected the reported methodology because it may consider other factors in analyzing the costs of production, but that it is not obligated to do so. Def.'s Br. at 22–23.

[12] Commerce states that the common thread in the three cited cases is Commerce's consistent actions in reallocating costs to address distortions on the record. *See Stainless Steel Bar from the United Kingdom*, 72 Fed. Reg. 43,598 (Dep't Commerce Aug. 6, 2007) (final results of antidumping duty administrative review); *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 Fed. Reg. 24,329 (Dep't Commerce May 6, 1999) (notice of final determination of sales at less than fair value); *Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe from Brazil*, 60 Fed. Reg. 31,960 (Dep't Commerce June 19, 1995) (notice of final determination of sales at less than fair value).

Thus, Commerce's cost analysis in this fifth administrative review is consistent with Commerce's determination in the fourth review, in which Commerce reasonably adjusted reported costs to reasonably reflect actual costs. *Thai Plastic Bags I*, 34 CIT at __, 752 F. Supp. 2d at 1328 n.28; Def.'s Br. at 26.

C. Alternate Cost Methodology

In responding to Commerce's request for cost data, TPBI submitted two alternate sets of costs for its margin calculation, both of which Commerce rejected, finding that they distorted TPBI's actual conversion costs. TPBI Pl.'s Br. at 15–16; Def.'s Br. at 29. While Commerce may consider alternative methods, Commerce should only choose such a method if it minimizes distortions. Def.'s Br. at 29–30; *See also U.S. Steel Group v. United States*, 24 CIT 757 (2000); 19 C.F.R. § 351.407(c).

TPBI argues that Commerce should have used one of TPBI's two proposed cost allocation methodologies, as they were both reasonable alternatives. TPBI's Br. at 15–16. TPBI also claims – without proof – that by using weight-averaging for all of its labor and fixed and variable overhead costs, Commerce added more distortions, not fewer. TPBI's Br. at 31.

TPBI further argues that Commerce should have accorded it a chance to correct any deficiency in its cost allocations and that Commerce should not have applied "facts otherwise available." TPBI's Br. at 32–33. *See also* 19 U.S.C. § 1677m(d)-(e)[13]; 19 U.S.C. § 1677e(a). TPBI also asserts that its cost information can be used without undue difficulty because Commerce's analysis is flawed and TPBI's information is more reasonable. TPBI's Br. at 32.

Commerce's conclusion, however — "that it was more important to use a cost allocation methodology that diminished the possibility of extreme undervaluation or overvaluation, even if that meant that a

[13] (e) Use of certain information

In reaching a determination under section 1671b, 1671d, 1673b, 1673d, 1675, or 1675b of this title the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—

(1) the information is submitted by the deadline established for its submission,

(2) the information can be verified,

(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and

(5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

DIFMER adjustment could not be made[,]" Def.'s Br. at 31; *I & D Mem.* Cmt. 1 at 12 – was not unreasonable. Commerce correctly states that after finding TPBI's methodologies to be distortive, Commerce was under no obligation to utilize them. Def.'s Br. at 29; *I & D Mem.* Cmt. 1 at 13 - 14. In addition, Commerce reasonably found that there was an undue difficulty as well as a distortion in Plaintiff's cost allocations. *I & D Mem.* at 14.

Moreover, despite TPBI's contention that it was not notified, TPBI's Br. at 33, Commerce did notify Plaintiff when it rejected its method in the fourth review and issued supplemental questionnaires. Def.'s Br. at 6–7, 32; *Id.* Ex. E at SID-2.

Based on the record here, Commerce reasonably found Plaintiff's methodologies to be distortive. Commerce's determination on this issue is therefore affirmed.

II. TPBI Issue 2: Zeroing

Where imported goods are being sold in the United States at less than fair value and to the detriment of domestic industry, the statute directs Commerce to impose an antidumping duty on those imported goods "equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673.[14]

Here Commerce applied its "zeroing" methodology in arriving at Plaintiff's weighted-average dumping margins.[15] In the administrative review, TPBI argued that zeroing in this context was incorrect, because the World Trade Organization ("WTO") has ruled against this practice. TPBI Case Br. at 59.

Before the court, TPBI contends, based on current law, that "Commerce failed to explain why its inconsistent statutory interpretation [i.e., differing in administrative reviews from the interpretation applied in investigations] with regard to zeroing is reasonable., TPBI

[14] "Dumping margin" is defined as "the amount by which the normal value exceeds the export price or constructed export price." 19 U.S.C. § 1677(35)(A). Weighted average dumping margin is defined as "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." 19 U.S.C. § 1677(35)(B).

[15] Zeroing refers to the method used by Commerce to aggregate positive margins (margins for sales of merchandise sold at dumped prices) and give a value of zero for negative margins (margins for sales of merchandise sold at non-dumped prices).*Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1366 (Fed. Cir. 2010).

When calculating weighted average dumping margins, Commerce may employ either of two methodologies: zeroing or offsetting. *Timken Co. v. United States*, 354 F.3d 1334, 1341–45 (Fed. Cir. 2004) (holding that 19 U.S.C. § 1677(35) is ambiguous and that zeroing is a reasonable interpretation); *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1360–63 (Fed. Cir. 2010) (holding that 19 U.S.C. § 1677(35) is ambiguous and that offsetting is also a reasonable interpretation).

Pl.'s Br. at 36, and that the court should remand because Commerce must either explain its inconsistent interpretation of 19 U.S.C. § 1677(35) or adopt a consistent interpretation for both investigations and reviews. TPBI Pl.'s Br. 36–37.

Commerce argues that denying offsets and applying zeroing serves the policy rationale of combating masked dumping. *I & D Mem.* Cmt. 4 at 22. In addition, Commerce contends that Plaintiff has failed to exhaust its administrative remedies because Plaintiff did not rely in its briefing on Commerce's differing interpretations of 19 U.S.C. § 1677(35) in the context of administrative reviews as opposed to investigations, or regarding average to transaction and average to average comparison methods, respectively. Def.'s Br. at 34.

Despite arguing that Plaintiff has not exhausted its administrative remedies here, that the Federal Circuit has already rejected TPBI's argument regarding WTO related activities, and that exhausting remedies would not have been futile, in the alternative, Commerce requests a remand. Def.'s Br. at 34, 37.[16] The court will grant this request.[17] Here, the briefing in the administrative review occurred before the parties had sufficient time to consider the Federal Circuit's decision in *Dongbu*. Commerce will now have the opportunity to fully explain its reasoning regarding the zeroing issue.[18] *See also Union Steel v. United States*, 35 CIT __, 804 F. Supp. 2d 1356, 1367–68 (2011) ("The court concludes, upon reconsidering its decision in *Union II*, that it is appropriate to set aside its affirmance of the use of zeroing and to direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu* and *JTEKT Corp.*").

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[16] *See Grobest & I-Mei Indus. (Vietnam) Co., Ltd. v. United States*, 36 CIT __, 815 F. Supp. 2d 1342, 1348–50. (2012).

[17] Two recent decisions from the Court of Appeals for the Federal Circuit guide this court's decision of this issue: *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011), which addressed Commerce's inconsistent interpretations of 19 U.S.C. § 1677(35). *Dongbu* held that "[i]n the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce's action is arbitrary." 635 F.3d at 1372–73.

Subsequently, *JTEKT* concluded that "[w]hile Commerce did point to differences between investigations and administrative reviews, it failed to address the relevant question — why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?" 642 F.3d at 1384.

[18] As the decision in *Dongbu* was not available prior to the Final Results in this administrative review, the court does not credit Commerce's exhaustion argument. *See JTEKT*, 642 F.3d at 1384 ("[Appellant] did not have the benefit of the *Dongbu* opinion before filing its briefs and thus could not have argued that the case requires us to vacate, but it nonetheless preserved the issue on appeal by arguing that Commerce's continuing practice of zeroing in administrative reviews, but not in investigations, is unreasonable.").

III. PRCBC Issue 3: Transactions-Disregarded Rule

During the POR, TPBI purchased three types of resin[19] from suppliers (both affiliated and unaffiliated). TPBI's Supp. Section D Resp., A-549–821, ARP 08–09 (Mar. 22, 2010), Admin. R. Con. Doc. 14 [Pub. Doc. 55] at Ex. S1D-3 ("Supp. Resp. 1"). In its *Preliminary Results*, Commerce determined that TPBI purchased resin from an affiliated supplier. *Prelim. Results*, 75 Fed. Reg. at 53,955; Def.'s Br. at 42. Commerce then applied the major input rule[20] and adjusted the COM to reflect the market value of the resin. *Id.* Commerce then compared only the transfer prices and purchases of LLD resin from the affiliated Supplier. *See I & D Mem.* Cmt. 2 at 18–19; Def.'s Br. at 42.

More specifically, in adjusting the COM, Commerce compared the transfer price of LLD resin with the arm's-length transaction price of LLD resin. *See Prelim. Cost Mem.* at 4. Commerce thus compared purchases separately for a specific resin type. *Id.*; Br. of PRCBC in Support of Mot. for J. on Agency R. at 11–12, ECF No. 49 ("PRCBC's Br.").

However, in the *Final Results*, Commerce changed its methodology and used the transactions-disregarded rule,[21] comparing average transfer and market prices across all types of resin; even though the parties did not argue for revising the level of specificity at which to apply the transactions disregarded rule. PRCBC's Br. at 11–12; *I & D Mem.* at 19.[22]

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[19] [[ ]]

[20] The AD Statute defines the major input rule as follows:

> If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. § 1677b(f)(3).

[21]
> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

19 U.S.C. § 1677b(f)(2).

[22] For the *Final Results*, Commerce revised its preliminary results and changed the analysis for TPBI's affiliated resin input purchases to "include all purchases of resin that TPBI made during the POR." Final Cost Mem., A-549–821, ARP 08–09 (Mar. 1,2011), Admin. R Con. Doc. 47 [Pub. Doc. 137] at 1–2, Pub. Doc. 47 (March 1, 2011). PRCBC notes that because Commerce ultimately decided to apply only the transactions disregarded rule, which does not depend upon whether a raw material is a "major output," that TPBI's

TPBI, as a respondent, argued that Commerce should not have applied the major input rule because the affiliated supplier was not a resin manufacturer. *See* TPBI's Case Br. at 50–51, 59.

PRCBC argues that the court should remand this issue, stating that Commerce changed its analysis for the *Final Results* without providing an avenue for comments by the interested parties or a chance for Commerce to consider those comments. PRCBC's Br. at 11–15. Commerce now agrees. Def.'s Br. at 41.

As an agency may request a remand to reconsider its position, *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001), the court will remand this issue so that Commerce can give the parties the proper opportunity to comment.[23]

IV. PRCBC Issue 4: Inventory-Valuation Losses

Under the statute, the calculation of COP includes an amount for general and administrative ("G&A") expenses.[24] Commerce's practice is to include inventory valuation losses in G&A expenses except for those losses relating to finished good's inventories. Def.'s Br. at 38; *Stainless Steel Wire Rod from the Republic of Korea*, 69 Fed. Reg. 19,153, 19,161 (Dep't Commerce Apr. 12, 2004) (final results of antidumping duty administrative review) and accompanying Issues and Decision Memorandum, A-580–829, ARP 01–02 (Apr. 5, 2004) Cmt. 7; PRCBC's Br. at 15.

Here, Commerce did not include inventory-valuation losses in TPBI's G&A expenses. *See* Pet'rs' Case Br., A-549–821, ARP 08–09 (Dec. 10, 2010), Admin. R. Con. Doc. 41 [Pub. Doc. 126] at 4. PRCBC contends that Commerce's finding that TPBI's inventory valuation losses were attributable to finished goods inventory, and thus excluded from G&A expenses, was unreasonable. PRCBC's Br. at 16.

argument regarding whether resin was a major input is moot. PRCBC's Br. at 12 n.5; *see also* I & D Mem. at 18–19.

[23] The court notes that Commerce must require a cost adjustment for materials purchased from an affiliated supplier at below market price, *see* 19 U.S.C. § 1677b(f)(2), but this regulation is silent on what price data Commerce should use in applying the transactions-disregarded rule.

While no regulation directly addresses this issue, Commerce's adjustment in the *Final Results* appears contrary to its past practice. In *Certain Pasta from Italy*, Commerce limited its cost adjustment analysis to a comparison of the weighted-average transfer price for semolina from affiliated suppliers to the arms-length price for this input. 69 Fed. Reg. 6,255, 6,257 (Dep't Commerce Feb. 10, 2004) (notice of final results of the sixth administrative review of the antidumping order) and accompanying Issues and Decision Memorandum, A-475–818, ARP 01–02 (Feb. 3, 2004) Cmt. 32. In applying the transactions-disregarded rule, Commerce did not include all purchases from the affiliated supplier but only took into account the input at issue. *Id.*

[24] G&A expenses are expenses incurred in running a business, as distinguished from expenses incurred in manufacturing or selling. *Black's Law Dictionary* 618 (8th ed. 2004).

PRCBC argues that instead these losses should have been part of the cost of production. PRCBC's Br. at 18.

However, because Commerce may exercise its authority to draw reasonable inferences from the record, *Daewoo Elecs. Co. v. Int'l Union of Electronic Elec., Technical, Salaried and Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993); *Grobest*, 36 CIT at __, 815 F. Supp. 2d at 1356 (2012), Commerce's determination that Plaintiff's inventory-valuation losses should be excluded from the cost calculations was supported by the record.

In its determination, Commerce concluded that TPBI's 2009 inventory losses should be excluded because the evidence suggested that these reported losses were related to finished goods. Def.'s Br. at 38; *I & D Mem.* Cmt. 6 at 26. PRCBC claims that Commerce relied upon evidence that cannot support its determination. PRCBC's Br. at 16–17.[25] Specifically, PRCBC argues that, as no amount for inventory valuation losses was explicitly listed in the statement of administrative expenses, Commerce's determination was not reasonable. PRCBC's Br. at 18–19.

However, in the *Final Results*, Commerce reasonably articulated its basis for excluding TPBI's inventory-valuation losses from the G&A expenses. *See I & D Mem*. Cmt. 6 at 26. Commerce explained that TPBI provided documentary support to show that its 2008 inventory-losses related to finished goods.[26] *Id.* TPBI also reconciled the 2009 data with the 2008 data. *See* Submission of 2009 Financial Statements, A-549–821, ARP 08–09 (July 7, 2010) Admin. R. Con. Doc. 25 [Pub. Doc. 84], Ex. Supp-1 at 17, 25. Thus, while PRCBC is correct that there was no express listing for finished goods in the 2009 data, this does not topple the totality of Commerce's reasoning, including the record evidence that the 2008 inventory valuation losses were related to finished goods.

Commerce cites to record evidence to bolster its claim that TPBI's reported inventory valuation losses were related to finished goods. In particular, in its responses to Commerce, TPBI stated that during the POR it had raw materials, work-in-progress and finished goods in inventory and that raw materials and work-inprogress were valued at actual cost, whereas finished goods were valued at actual cost or net realizable value at year's end, depending on which was lower. Def.'s Br. Ex. B at D-11; Def.'s Ex. F at S4D-2 to S4D-3; Def.'s Br. at 39–40.

[25] TPBI had changed its inventory losses accounting between 2008–2009 and submitted comparative 2009 schedules showing that the 2008 inventory valuation losses related to finished goods.Def.'s Br. at 38–39.

[26] In its response to Supplemental D Questionnaire, TPBI stated that there were write-downs for finished goods but not raw materials or WIPs. *See* Supp. Resp. 1 at 10.

TPBI provided documentation showing that an inventory valuation loss from 2008[27] was attributable to finished goods. Supp. Resp. 1 at Ex. S1D-10; PRCBC's Br. at 16. This same loss appears in the comparative schedule in the 2009 financial statements. TPBI's Supp. Section D Resp., A-549–821, ARP 08–09 (July 26, 2010), Admin. R. Con. Doc. 27 [Pub. Doc. 90] Ex. S4D2–1, at 17 ("Supp. Resp. 2"); PRCBC's Br. at 16. PRCBC argues that this is not evidence that TPBI's 2009 inventory valuation losses[28] are also related to finished goods, as they may also be attributable to raw materials and works-in-progress. PRCBC's Br. at 16–17; Supp. Resp. 2 Ex. S4D2–1 at 11 n.3.

PRCBC also states that even though the 2008 to 2009 change in inventory valuation losses was identified,[29] and that this same amount appears in the cost reconciliation,[30] that this does not provide enough information to conclude whether the loss is attributable to finished goods, WIP or RM. PRCBC's Br. at 17; Supp. Resp. 2 Ex. S4D2–1 at 17; TPBI's Supp. Section D Resp., A-549–821, ARP 08–09 (Aug. 18, 2010), Admin. R. Con. Doc. 32 [Pub. Doc. 99] Ex. S5D1 worksheet D at 2. PRCBC claims that it is Commerce's obligation to deny the adjustment instead of assuming that the 2009 losses should be excluded from normal value. PRCBC's Br. at 18; 19 C.F.R. § 351.401(b)(1).[31]

Commerce counters that in analyzing the inventory valuation loss for 2009, it looked to the statement of administrative expenses, which showed TPBI's report of a loss from a cost higher than net realizable value for finished goods as a 2008 administrative expense, but that no amount for 2009 was reported. Def.'s Br. at 40; Def's Br. Ex. F; *I & D Mem.* at 26.

In addition, in responding to a questionnaire on the issue, TPBI explained that there was a "roll-up into COGS (costs of goods sold) of all the relevant cost elements[.]" Def.'s Br. Ex. F at S4D-5.[32] TPBI also later submitted a cost reconciliation. Def.'s Br. Ex. G at S5D-1.

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[27] [[ ]] baht.

[28] [[ ]] baht.

[29] [[ ]] baht.

[30] Under the item [[ ]].

[31] PRCBC notes that TPBI did not address and Commerce ignored the fact that the line item entitled [[ ]] shows a [[ ]] value for 2009. Supp. Resp. 2 at Ex. S4D2–1 (CR 17); PRCBC's Br. at 18.The court notes that this line is [[ ]].

[32] While the 2008 chart reported no amount for "loss fromcost higher than net realizable value," Def.'s Br. Ex. F, the 2009 chart reported an amount under the same heading. Def.'s Br.Ex. G. at SD5–6; Def.'s Br. at 41.

As Commerce may make reasonable inferences based on the record, "[t]he specific determination [the court] make[s] is 'whether the evidence and reasonable inferences from the record support the [Commerce's] finding.'. The question is whether the record adequately supports the decision of the [Department], not whether some other inference could reasonably have been drawn." *Daewoo Elecs.*, 6 F.3d at 1520 (citation omitted) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)).

Even if PRCBC posits evidence that may detract from Commerce's determination, PRCBC's Br. at 18, just because there are alternative inferences that could be drawn does not mean that Commerce was unreasonable. *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006) ("The Court's role in the case at bar is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.")

Based on the foregoing record evidence, including TPBI's past treatment of such losses and its responses to Commerce, it is reasonable for Commerce, to infer that the 2009 inventory-valuation losses related to finished goods. Commerce's decision to exclude inventory-valuation losses is therefore supported by substantial evidence and will be affirmed.

CONCLUSION

For the reasons discussed above, the court grants Plaintiffs' motions regarding issues two and three. The *Final Results* are otherwise affirmed in all respects.

Commerce shall have until August 17, 2012 to complete and file its remand redetermination. Both Plaintiffs shall have until August 31, 2012 to file comments. Defendant shall have until September 14, 2012 to file any reply. Plaintiffs, also by September 14, 2012, may each reply to the other's comments.

It is **SO ORDERED**.

Dated: June 18, 2012
New York, N.Y.

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 12–88

SALEM MINERALS INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 07–00227

[Upon cross-motions as to classification of "goldleaf vials", summary judgment for the plaintiff.]

Dated: Decided: June 26, 2012

Charles H. Bayar for the plaintiff.

Stuart F. Delery, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Saul Davis*); and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Chi S. Choy*), of counsel, for the defendant.

OPINION & ORDER

AQUILINO, Senior Judge:

This case contests classification by U.S. Customs and Border Protection ("CBP") of merchandise imported for the plaintiff from the People's Republic of China under heading 7114 of the Harmonized Tariff Schedule of the United States ("HTSUS") (2005), in particular subheading 7114.90.00 ("Articles of goldsmiths' . . . wares . . .: Of other precious metal whether or not plated or clad with precious metal"), at a rate of duty of 7.9% *ad valorem*. The importer protested that the goods should have been classified under subheading 7115.90.30 ("Other articles of precious metal . . . : Other . . . Other: Of gold, including metal clad with gold . . . 3.9%).

Upon CBP denial of the protest and liquidation of duties at the higher rate, the plaintiff filed its summons and complaint. The court's jurisdiction is predicated upon 28 U.S.C. §§ 1581(a), 2631(a).

I

Each side has filed a motion for summary judgment. The court has now perused the plethora of papers[1] each has filed in support thereof

[1] Among those docketed on behalf of the plaintiff are its Motion for Summary Judgment, Opposition to Defendant's Cross-Motion for Summary Judgment, Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment, Motion for Oral Argument on Cross-Motion for Summary Judgment, Motion for Leave to File Sur-Reply Brief, and its Motion for Leave to File Supplement to Sur-Reply Brief.

As indicated, the defendant has responded with a Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, a Reply to Plaintiff's Opposition to Defendant's [Cross-]Motion for Summary Judgment, a Response to Motion for Oral Argument By Plaintiff, a Response to Plaintiff's Motion for Leave to File Sur-Reply Brief and to Plaintiff's Sur-Reply, and a Response to Plaintiff's Motion for Leave to Supplement Plaintiff's Sur-Reply.

and come to conclude that summary judgment is indeed dispositive. That is, there is no genuine issue of material fact that requires trial within the meaning of USCIT Rule 56 and teaching of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and their progeny. The dispute is simply a matter of law, to wit, interpretation of provisions of the HTSUS.

A

USCIT Rule 56(h)(1) states that, on any motion for summary judgment, there must be annexed a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. The convoluted statement the plaintiff has submitted herein hardly satisfies this requirement. To attempt to extract from its matrix facts that obviously are apposite:

> . . . 5. The . . . merchandise . . . imported by Salem Minerals from the People's Republic of China[] is described on the Entry's commercial invoice as "gold leaf vials," and consists of a small glass vial filled with clear liquid and a small quantity of gold leaf fragments, topped with a "theme" cap featuring a small figurine, and affixed with a label. . . .
>
> a. The imported merchandise:
>
> (1) is marketed and sold in the United States as a "gold vial";
>
> (2) measures 2½″-2¾″ high and 1½″ wide;
>
> * * *
>
> b. The constituent of the imported merchandise being the gold leaf fragments:
>
> * * *
>
> (2) are derived from gold leaf;
>
> (3) are procured from a gold leaf manufacturer;
>
> (4) are very small in weight per vial . . .; and
>
> (5) are not worked or formed during production of the imported merchandise.
>
> c. The constituent of the imported merchandise being the glass vial:
>
> (1) is clear glass;

Upon due deliberation, plaintiff's aforesaid motions for leave to file a sur-reply and to supplement it can be, and each hereby is, granted.

Given the content of the foregoing written submissions, plaintiff's motion for oral argument can be, and it hereby is, denied.

(2) is spherical in shape (approximately 1½″ in diameter), with a flat base and a short threaded neck at the top;
(3) nominally holds 15 milliliters of liquid; and
(4) is of a type commonly used to package nail polish.

d. The constituent of the imported merchandise being the clear liquid:
(1) is an anionic solution . . .; and
(2) serves to magnify the appearance of the gold leaf fragments and allow them to float freely and prevent them from clumping.

e. The constituent of the imported merchandise being the "theme" cap:
(1) has a cylindrical lower section designed to fit over the threaded neck of the glass vial;
(2) has an upper, figurine section in the shape of a theme object, varying in size from up to ½″ wide and up to ¾″ high;
(3) is cast from high-tin alloy; and
(4) except for the "Mt. Rushmore" theme cap, is electroplated with 18k gold.

In further detail[,. . .t]he imported merchandise featured 19 different gold-plated theme caps (and the unplated Mt. Rushmore theme cap), evoking western, wildlife, San Francisco, and other themes.

* * *

f. The constituent of the imported merchandise being the label:
(1) is crescent-shaped, approximately 1¼″ long, and made from paper with a gold-colored foil overlay (without any gold content);
(2) has a top printed line that refers to the gold vial's gold content; and
(3) has a second printed line that varies depending upon the intended market for the gold vial (and, to some degree, the theme top that it bears).

6. Regarding the production process for the imported merchandise:

a. Production of the unplated theme caps requires metalworking facilities (for casting) and appropriately skilled workers.

b. Electroplating the theme caps require select roplating facilities and appropriately skilled workers.

c. Assembling the gold vials does not require specialized equipment, tools, machinery, or workers.

7. Regarding the production costs for the imported merchandise:

   a. The gold leaf fragments are the single largest cost element, constituting approximately 38% of production costs; and

   b. The theme caps (if gold-plated) also constitute approximately 38% of production costs, divided approximately evenly between: (i) the high-tin allow and its casting, and (ii) the gold plate and its electroplating.

8. Regarding the marketing and sale of the imported merchandise in the United States:

   a. The entities that purchase the imported merchandise at wholesale:
      (1) cater to the tourist/transient trade; and
      (2) do not include fine jewelry stores, interior decorators, or other high-end outlets.

   b. The imported merchandise:
      (1) sells at retail for approximately $6.00 per piece;
      (2) is purchased at retail:
      (a) primarily by tourists/transients on impulse;
      (b) as a souvenir or small gift; and
      (c) for its visible gold content embodied by the gold leaf fragments.

In the interest of contraction of the foregoing, the court has deleted plaintiff's citations to evidence proffered in support of the individual averments, but the court has looked at it and found backing.

Defendant's Response to Plaintiff's Statement of Material Facts as to Which There is No Genuine Dispute admits paragraphs 5(a)(2), 5(c), 5(d), 5(e)(1,2,3), 5(f), 6, 7 and 8(a) and 8(b)(1), *supra*. It admits in part paragraphs 5, 5(a)(1) and 5(e)(4) but denies 5(b) and 8(b)(2), either for lack of sufficient information or due to plaintiff's peculiar presentment.

Defendant's Rule 56(h)(1) statement in support of its cross-motion for summary judgment, in sum and substance, is counsel's attempt to digest the transcript of his pretrial deposition examination of plaintiff's founder and president. The court has reviewed that transcript and does not find either it or its attempted digest of sufficient moment to warrant its recitation *in haec verba* herein.

That is, the salient facts of this case are essentially as presented by the plaintiff above, and which underlie its resolution as a matter of law.

B

Plaintiff's complaint avers that CBP's denial of its protest 3307–06–100042, which underlies this case, was predicated upon earlier HQ 966983 (Oct. 24, 2004). Defendant's answer admits this averment, contending that the ruling "speaks for itself and is the best evidence of its contents." A copy has been produced that states, in controlling part:

> 10. For the purposes of heading 7114, the expression "articles of goldsmiths' or silversmiths' wares" includes such articles as ornaments, tableware, toilet-ware, smokers' articles and other articles of household, office or religious use.
>
> * * *
>
> The importer protests that heading 7114, HTSUS, does not describe the article because "goldsmith's [*sic*]wares" are those items made by a craftsman of the decorative or industrial arts. We do not take such a narrow view of the term "goldsmith's [*sic*] wares." Rather, the article consists of a semi manufactured form of gold, namely gold leaf. The gold has been worked and fashioned into part of an ornamental souvenir. Under Chapter 71, note 10, ornaments are specifically covered in heading 7114. Since we find that heading 7114, HTSUS, describes the article at issue, it cannot be more specifically described by heading 7115, HTSUS, as an "other article of precious metal.[")

Plaintiff's Exhibit I, third page.

This analysis is thus the focus of this case, as discussed and developed by the parties' thorough memoranda of law in support of their cross-motions. In fact, Note 10, as published in HTSUS Chapter 71 (and recited by CBP in its HQ 966983 above), emphasizes via underscoring the wording "*articles of goldsmiths' or silversmiths' wares* ". Explanatory Note ("EN") 71.14 attempts to elucidate the scope of number 10, stating that, in general, goods covered are larger than articles of jewellery within the purview of Heading 71.13 and include (A) articles of tableware, (B) toilet articles, (C) office or desk equipment, (D) smokers' requisites (other than cigarette and other lighters, smoking pipes, cigarette holders, etc.), (F) articles for religious use, and

> (E) Other articles for domestic or similar use, for example, busts, statuettes and other figures for interior decoration; jewel cases; table centre-pieces, vases, jardinières; picture frames; lamps, candelabra, candlesticks, chandeliers; mantlepiece ornaments, decorative dishes and plates, medals

> and medallions (other than those for personal adornment); sporting trophies; perfume burners, etc.

On its face, this explication does not encompass plaintiff's pieces à la its Exhibit A, although the Explanatory Note concludes that heading 7114

> also covers unfinished or incomplete articles of goldsmiths' or silversmiths' wares and identifiable parts of goldsmiths' or silversmiths' wares, for example, silver handles for tableware, silver backs for toilet brushes, etc.

(1)

Plaintiff's memoranda press for a "common meaning" of goldsmiths' wares *viz*. "articles of household, office or religious use" containing gold that has been genuinely smithed or "formed into a useful shape." Volume VI, page 659, of The Oxford English Dictionary (2d ed. 1989) defines goldsmith as a "worker in gold, one who fashions gold into jewels, ornaments, articles of plate, etc." Page 795 thereof defines smith as one who works in iron or other metals, often compounded with prefixes like black-, copper-, gold-, gun-, iron-, lock-, silver-, tin-. *See also* Webster's Third New International Dictionary Of The English Language, Unabridged, p. 976 (3d ed. 1981):

> goldsmith 1: an artisan who makes vessels, jewelry, and other articles of gold 2: a manufacturer of and dealer in articles of gold.

Id. at 2151:

> smith: 1a: a worker in metals - often used in combination <gold*smith* > <iron*smith* > <platinum*smith* >

Id. at 2576:

> ware 1a: manufactured articles, products of art or craft . . .: articles of merchandise . . . 2: goods, commodities, manufactures, or produce of a specific class or kind . . .

Cf. The Random House Dictionary of the English Language, Unabridged, p. 1608 (1st ed. 1969):

> ware 1. Usually, wares. a. articles of merchandise or manufacture; goods. . . . 2. a specialized kind or class of merchandise or of manufactured article (usually used in combination). . .

Plaintiff's Exhibit O contains copies of pages 864–70 from volume 12 of The Dictionary of Art (J. Turner ed. 1996) that focus on gold, the yellow metallic element, with an atomic weight of 197.2 and a specific gravity of 19.32. It is stated therein that the

> long history of goldworking has led to the evolution of a large range of manipulative techniques. These can be classified under three main headings: forming, cutting and joining, and decorating.

Ibid. at 865. Plaintiff's Memorandum of Law, page 16 digests the discussion therein of those techniques as follows:

> Gold forming . . . principally include[s] casting to produce solid objects, and hammering/rolling/drawing to produce sheet, rod or wire. Gold sheet can be further processed into hollowware by such techniques as blocking, raising, and spinning.
>
> Gold cutting . . . principally include[s] shearing, piercing, and sawing. Gold joining techniques principally include riveting (perhaps the oldest technique) and soldering (the most common modern technique).
>
> A wide range of decorative techniques is available to the goldsmith, the majority of them adaptations of constructional techniques. These techniques include granulation (tiny gold spheres arranged and soldered onto a gold surface), filigree (fine wirework, which can be backed or open), repoussé and chasing (high-relief and low-relief designs, respectively, using hammer-and-punch or rubbing/pushing tools), engraving (using small chisels to remove metal), and carving (related to engraving but with more metal removed).

Compare United States v. Olivetti & Co., 7 U.S. Cust. App. 46, 49, T.D. 36309 (1916) ("The potter, the glassmaker, the goldsmith, the weaver, the needlewoman, the lace maker, the woodworker, the jeweler, all produce things which are both artistic and beautiful"); *Reardon v. United States*, 11 Cust.Ct. 233, 238 (1922) (goldsmithing is among the "dependent" fine arts "whose object is to create form that shall minister to some utility"); *Tutton v. Viti*, 108 U.S. 312, 313 (1883) ("The evident intent of Congress, in putting a much lower duty on statues which are 'professional productions of a statuary or of a sculptor' than on other 'manufactures of marble,' is to encourage the importation of works of art, by distinguishing between the productions of an artist and those of an artisan or mechanic"); *United States v. Baumgarten & Co*., 2 U.S. Cust. App. 321, T.D. 32052 (1911) (carved marble vase, made by a sculptor as a copy of an original in the Borghese collection, artistic skill having been employed in its production, is dutiable as a "sculpture" and not as a "manufactured" article); Plaintiff's Exhibit ZB (McGraw-Hill Dictionary of Art, p. 539 (B. Myers ed. 1969) (goldsmith's work is "[t]he artistic production of objects of precious metals . . . in the form of vessels, utensils and jewelry")).

(2)

Defendant's position is that the flakes of gold in plaintiff's goods are substantial and of paramount importance to them, such leaf is a semi-manufactured form that has been worked into ornamental souvenirs, "ornaments" are specifically covered in HTSUS heading 7114, and they are not more specifically described by heading 7115.

Congress is presumed not to have used superfluous words in a statute. *Ameliotex, Inc., v. United States*, 65 CCPA 22, 25, 565 F.2d 674, 677 (1977). Emphasizing that the language of the statute is "articles of goldsmiths' wares", and not simply "goldsmiths' wares", and that the "plain terms" of Note 10 and certain exemplars in the explanatory notes show that heading 7114 covers articles for display or ornamentation such as souvenirs, the defendant argues the statute could not have been intended to be limited to "utilitarian" goods "fashioned by" goldsmiths but rather "clearly" encompasses all articles "displayed in the home" that are composed wholly or partly of gold by virtue of Note 10 to Chapter 71. *See* Defendant's Memorandum, pp. 16–18, citing *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 788–89 (Fed.Cir.) (if terms are plain, the scope of a classification provision is clear), *cert. denied*, 488 U.S. 943 (1988).

The defendant concedes that the electroplated gold caps are not themselves classifiable in heading 7114 due to Note 6 to Chapter 71[2]. The defendant maintains, nonetheless, that the entirety of the imported articles (including their caps and the gold flakes) still satisfy even the lexicographic definitions of "goldsmiths' wares" propounded by the plaintiff as well as Note 10 to Chapter 71 and that the articles in their entirety are theme "ornaments" consisting "of precious metals" that are indistinguishable from ornamental bottle stoppers or automobile hood ornaments. *See* Defendant's Memorandum, pp. 21–22, referencing, *inter alia*, Vol. 1, Funk & Wagnalls New International Dictionary of the English Language (Comp. ed. 1987), p. 543 (defining goldsmith as "A worker in gold", which "would obviously

[2] It provides:

> Except where the context otherwise requires, any reference in the tariff schedule to precious metal or to any particular precious metal includes a reference to alloys treated as alloys of precious metal or of the particular metal . . . but not to metal clad with precious metal or to base metal or non-metals plated with precious metal.

include the solid gold flakes portion of the vials and also the gold plated ornamental themed stoppers”). According to the defendant,

> the undisputed record shows that the gold vials are sold as souvenirs for display on a desk, mantle or window. Thus, they are no different than the gold ornaments described by Note 10 and the Explanatory Notes for Heading 7114, precisely because they are sold as ornaments for display in the house - basically, in the same fashion as the articles specifically enumerated inNote 10 to Chapter 71 and in the *Explanatory Notes*

Id. at 20 (underscoring in the original).

(3)

The plaintiff argues that there is no evidence of record to support such a characterization and that any use of the imported merchandise is immaterial because the physical characteristics alone preclude classification under heading 7114. It argues the imported gold-leaf vials exist to attract purchasers, not to decorate or embellish anything. By contrast, the plaintiff points out, in none of the exemplars of Note 10 to Chapter 71 has gold merely been packaged or contained; all feature gold that has been formed into a useful shape beyond random pieces of gold leaf and electroplated base metal.

It is rather defendant’s interpretation, the plaintiff argues, that would render parts of heading 7114 redundant. Defendant’s construction of goldsmiths’ wares is either “articles or goods made by a manufacturer of and dealer in articles of gold” or “goods made by a worker in gold”, each of which would include both the gold leaf pieces contained in the imported merchandise and its gold-plated theme-figurine cap. But, as the plaintiff points out, the first formulation is a tautology: “articles of goldsmiths’ wares” are “articles made by someone who makes and sells articles of gold”, and the second formulation tends to support construing “goldsmiths’ wares” as gold formed into a useful shape because, in the context of metals, “work” means more than simply “make”.

II

This court cannot conclude that plaintiff’s goods as an entirety landed within HTSUS heading 7114. Note 10 to Chapter 71 limits articles of goldsmiths’ wares to finished goods for consumption, *i.e.*, articles of household, office or religious use (and, of course, goldsmiths also create gold jewelry). *See, e.g.*, McGraw-Hill Dictionary of Art, *supra*. In this regard, defendant’s “hairbrush with a gold handle” example is telling:

> . . . The essential character of the brush is provided by the bristles, but the brush is classifiable in Heading 7114 because the gold handle is not a minor constituent of the brush.

Defendant's Memorandum, p. 12. Precisely.

A hairbrush's bristles-and-base is not a goldsmith's ware, but its gold handle is because that metal has been formed into a "useful" shape. Reference to goods "of" a given material or substance means goods consisting wholly or partly thereof. *See* HTSUS GRI 2(b). The gold hairbrush handle alone is classifiable in heading 7114 as an "incomplete" article wholly "of goldsmiths' wares", *see* EN 71.14, *supra*, and the gold-handled hairbrush, as an entirety, is likewise classifiable under that heading because it is an article partly of "goldsmiths' wares" that is not a minor component. Thus, contrary to defendant's implication, "articles of" in heading 7114 does not mean that the gold component of the article need not come within the common meaning of "goldsmiths' wares", rather it means that heading includes not just goldsmiths' wares *per se* but also articles that incorporate them as component parts, *e.g.*, the gold-handled hairbrush.

Gold leaf itself is a semi-manufactured form of gold. It is created by "goldbeaters"[3], not goldsmiths, and would find classification in HTSUS subheading 7108.13.10 *eo nomine*[4]. The defendant argues the gold in plaintiff's vials is actually gold flake, which is a commodity marketed for a variety of uses including sale in vials and globes as "gold flake vials" or "gold flake" globes and sale for food or beverage decoration. Be that as it may, whether the gold in the vials can be

[3] The beating of gold into leaf developed as a distinguishable craft, with its own guild distinct from that of the goldsmiths. *See* Plaintiff's Exhibit P (Cullity, "The Art of the Gold Beater", Vol. 47–2 The Decorator, pp. 4–7 (1993)) and Plaintiff's Exhibit Q ("The History of Gold Beating: 5000 Years of Craftsmanship" reproduced in The Regilded Age: An Exhibition of Contemporary Gilded Art and Historic Gilded Objects, pp. 9–12 (1991)).
And "goldsmiths' wares" does not encompass the gold leaf produced by goldbeaters.

[4] The defendant asserts that such gold would not be so classified because superior subheading 7108.13 limits gold leaf to "semi-manufactured forms". HTSUS Chapter 71, Additional U.S. Note 1(b), allows classification thereunder only for gold leaf in "sheets", and it is clear that the gold-leaf fragments contained in plaintiff's merchandise are not sheets. Defendant's Memorandum, p. 24.

While the Notes and Additional U.S. Notes to Chapter 71 do not define "sheets" of precious metals for purposes of that chapter, the HTSUS chapters for the principal nonferrous base metals and articles thereof uniformly define "sheets" to include "[f]latsurfaced products . . . coiled or not, of solid rectangular (other than square) cross section . . . of a uniform thickness, which are:. . . of a shape other than rectangular or square, or any size, provided that they do not assume the character of articles or products of other headings". *See* Ch. 74, Note 1(g) (copper); Ch.75, Note 1(d) (nickel); Ch. 76, Note 1(d) (aluminum); Ch. 78, Note 1(d) (lead); Ch. 79, Note 1(d) (zinc); Ch. 80, Note 1(d) (tin). These definitions of "sheets" encompass irregularly-shaped metal pieces -- even small ones -- that have been rendered flat.

characterized as fragments, pieces, flakes, flecks, nuggets or powder, if imported on their own they would not find classification in heading 7114. *Cf*. NY N024842 (April 2008) (imported gold powder classifiable in HTSUS 7108.11.0000, imported gold flakes and nuggets classifiable under subheading 7108.12.5050). Moreover, as the defendant agrees, "goldsmiths' . . . wares" excludes gold-plated articles in the light of Note 6 to Chapter 71, *supra* footnote 2. Thus, if the goods at bar consisted solely of the gold-plated caps for the glass vials, they would be classifiable under HTSUS subheading 8309.90.00 ("Stoppers, caps and lids (including . . . screw caps . . .) . . . of base metal: . . . Other").

Plaintiff's goods herein lack any constituent component that a goldsmith would make and cannot be concluded to be "more than" the sum of their constituent parts. *See*, *e.g.*, *Montgomery Ward & Co. v. United States*, 73 Cust.Ct. 187, 189 (1974); *F.B. Vandergrift & Co. v. United States*, 43 Cust.Ct. 22, 25 (1959). Taken as a whole, those "gold leaf vials" do not reach to the level of the work, or the ware, of a goldsmith within the purview of HTSUS heading 7114. The gold floating within the vials has not been "worked" by a goldsmith beyond its obvious, simple, beaten state (and regardless of "tweezing" and "blooming" within the anionic solution after immersion therein and also of defendant's arguments on lack of proof on complete production of the gold leaf pieces and/or whether they are "worked" upon insertion as well as whether the gold leaf pieces can be considered "waste or scrap").

The finished product results from simple assembly that ends up short of any goldsmithing. It is but a *tchotchke*, not something like creative exemplars of Explanatory Note 71.14.

III

In view of the foregoing, the court concludes that plaintiff's merchandise is properly classifiable under HTSUS subheading 7115.90.30 (2005). Judgment will enter accordingly.

So ordered.

Dated: New York, New York
June 26, 2012

/s/ Thomas J. Aquilino, Jr.
SENIOR JUDGE

Slip Op. 12–89

OTR WHEEL ENGINEERING, INC., Plaintiff, v. UNITED STATES, Defendant, BRIDGESTONE AMERICAS, INC., and BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC, Intervenor Defendants.

Before: Jane A. Restani, Judge
Court No. 11–00166

[Commerce scope inquiry determination remanded.]

Dated: June 27, 2012

Arthur K. Purcell, Sandler, Travis & Rosenberg, PA, of New York, NY, argued for plaintiff. With him on the brief were *Donna L. Bade*, *Mark R. Ludwikowski*, and *Mark J. Segrist*.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Matthew D. Walden*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Christopher T. Cloutier, *Joseph W. Dorn*, *Prentiss Lee Smith*, and *J. Michael Taylor*, King & Spalding, LLP, of Washington, DC for intervenor defendants.

OPINION AND ORDER

Restani, Judge:

This matter is before the court on plaintiff OTR Wheel Engineering, Inc.'s ("OTR Wheel" or "Plaintiff") motion for judgment upon the agency record pursuant to USCIT Rule 56.2. Plaintiff, an importer of certain pneumatic off-the-road ("OTR") tires from the People's Republic of China ("PRC"), challenges the U.S. Department of Commerce's ("Commerce" or "Secretary") final scope ruling regarding an antidumping ("AD") duty order and countervailing duty order covering certain pneumatic OTR tires from the PRC. Antidumping Duty and Countervailing Duty Orders ("CVD") on Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Scope Ruling – OTR Wheel Engineering, Inc., *available at* Pl.'s Rule 56.2(c)(3) App. of Admin. R. ("Pl.'s App."), Ex. F (Apr. 26, 2011) ("Final Scope Ruling"). For the reasons stated below, the court remands Commerce's findings for further proceedings consistent with this opinion.

BACKGROUND

In September 2008, Commerce placed antidumping and countervailing duty orders on certain new pneumatic OTR tires from the

PRC.[1] *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Countervailing Duty Order*, 73 Fed. Reg. 51,627, 51,627 (Dep't Commerce Sept. 4, 2008) ("*CVD Order*"); *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Antidumping Duty Order: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624, 51,624 (Dep't Commerce Sept. 4, 2008) ("*AD Order*") (collectively "the orders"). The scope of these orders[2] was stated as follows:

> The products covered by the order are new pneumatic tires designed for off-the-road (OTR) and off-highway use, subject to exceptions identified below. Certain OTR tires are generally designed, manufactured and offered for sale for use on off-road or off-highway surfaces, including but not limited to, agricultural fields, forests, construction sites, factory and warehouse interiors, airport tarmacs, ports and harbors, mines, quarries, gravel yards, and steel mills. The vehicles and equipment for which certain OTR tires are designed for use include, but are not limited to: (1) Agricultural and forestry vehicles and equipment, including agricultural tractors, combine harvesters, agricultural high clearance sprayers, industrial tractors, log-skidders, agricultural implements, highway-towed implements, agricultural logging, and agricultural, industrial, skid-steers/mini-loaders; (2) construction vehicles and equipment, including earthmover articulated dump products, rigid frame haul trucks, front end loaders, dozers, lift trucks, straddle carriers, graders, mobile cranes, compactors; and (3) industrial vehicles and equipment, including smooth floor, industrial, mining, counterbalanced lift trucks, industrial and mining vehicles other than smooth floor, skid-steers/mini-loaders, and smooth floor off-the-road counterbalanced lift trucks. The foregoing list of vehicles and equipment generally have in common that they are used for hauling, towing, lifting, and/or loading a wide variety of equipment and materials in agricultural, construction and industrial

[1] "Generally, whenever domestic producers of a particular product believe that imports of certain competing goods are being sold in the United States at less than fair market value (i.e., being 'dumped'), they may petition Commerce to impose antidumping duties on the imports of the goods." *King Supply Co. v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012). After investigations by Commerce and the U.S. International Trade Commission ("ITC"), Commerce may issue "an AD order imposing antidumping duties on the appropriate imported merchandise." *Id.* (citing 19 U.S.C. § 1673d(c)(2)). "After an AD order is issued, Commerce is often called upon to issue 'scope rulings' to clarify the scope of the AD order and determine whether particular products are included within its scope." *Id.*

[2] Although the *AD Order* and *CVD Order* differ in some respects, the two orders are identical for the purpose of defining the scope of the orders.

> settings. Such vehicles and equipment, and the descriptions contained in the footnotes are illustrative of the types of vehicles and equipment that use certain OTR tires, but are not necessarily all-inclusive. While the physical characteristics of certain OTR tires will vary depending on the specific applications and conditions for which the tires are designed (e.g., tread pattern and depth), all of the tires within the scope have in common that they are designed for off-road and off-highway use. Except as discussed below, OTR tires included in the scope of the order range in size (rim diameter) generally but not exclusively from 8 inches to 54 inches. The tires may be either tube-type or tubeless, radial or non-radial, and intended for sale either to original equipment manufacturers or the replacement market. The subject merchandise is currently classifiable under Harmonized Tariff Schedule of the United States ("HTSUS") subheadings: 4011.20.10.25, 4011.20.10.35, 4011.20.50.30, 4011.20.50.50, 4011.61.00.00, 4011.62.00.00, 4011.63.00.00, 4011.69.00.00, 4011.92.00.00, 4011.93.40.00, 4011.93.80.00, 4011.94.40.00, and 4011.94.80.00. While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

AD Order, 73 Fed. Reg. at 51,624–25 (footnotes with definitions omitted). The orders also listed types of tires which were excluded from the scope:

> [P]neumatic tires that are not new, including recycled or retreaded tires and used tires; non-pneumatic tires, including solid rubber tires; tires of a kind designed for use on aircraft, all-terrain vehicles, and vehicles for turf, lawn and garden, golf and trailer applications. Also excluded from the scope are radial and bias tires of a kind designed for use in mining and construction vehicles and equipment that have a rim diameter equal to or exceeding 39 inches. Such tires may be distinguished from other tires of similar size by the number of plies that the construction and mining tires contain (minimum of 16) and the weight of such tires (minimum 1500 pounds).

Id. at 51,625. In February 2011, OTR Wheel filed a scope ruling request, asking that Commerce find Trac Master and Traction Master tires imported by OTR Wheel fall within the scope exclusion for "tires of a kind used on . . . vehicles for turf, lawn and garden . . . applications." Scope Ruling Request: OTR Wheel Engineering, Inc. – Lawn & Garden Tires, *available at* Pl.'s App., Ex. A, at 4 (Feb. 11, 2011) (quoting *AD Order*, 73 Fed. Reg. at 51,625). OTR Wheel argued that the plain language of the scope was dispositive in excluding OTR Wheel's Trac Master and Traction Master tires. *Id.* Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC (collectively "Bridgestone") filed comments opposing OTR Wheel's exclusion request.

In April 2011, Commerce released its Final Scope Ruling, finding that the tires were not excluded from the orders. Final Scope Ruling at 8. Pursuant to 19 C.F.R. § 351.225(k)(1), Commerce stated that it found the description of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary of Commerce and the ITC to be dispositive. *Id.* at 6. By drafting the scope orders during the original investigation to replace the word "use" with the phrase "designed for use," Commerce made clear that end-use was not determinative. *Id.* Commerce then looked at data from the Tire and Rim Association ("TRA") and the ITC's injury determinations to determine the general purpose of the tires. Commerce found that tires with R-1 and R-4 type treads were used for farming, light industrial service, and highway mowing. *Id.* at 7. Because the tires in question had R-1 and R-4 type treads, Commerce determined that such tires were not excluded from the scope of the order. *Id.* at 7–8. Commerce found it unnecessary to conduct a formal proceeding to consider the additional factors contained in 19 C.F.R. § 351.225(k)(2). *Id.* at 5.[3] For its part, OTR Wheel does not argue that its tires fall outside the general scope of the orders, merely that they are within an exclusion for turf, lawn, and garden applications.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2). Commerce's final scope determination is upheld unless it is 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).

DISCUSSION

In determining if a product is within the scope of an order, "'the scope of a final order may be clarified, [but] it can not be changed in a way contrary to its terms.'" *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)). "[B]ecause the descriptions of subject merchandise contained in [Commerce's] deter-

[3] Although Bridgestone participated in the proceedings before Commerce, Bridgestone has chosen not to file briefs, appear at oral argument, or otherwise participate in the proceedings before this court.

minations must be written in general terms," it is often difficult to determine "whether a particular product is included within the scope of an antidumping or countervailing duty order." 19 C.F.R. § 351.225(a); *see also Duferco Steel*, 296 F.3d at 1096.

OTR Wheel argues that if the exclusionary language in the orders does not clearly exclude its merchandise, it is at least ambiguous as to whether it excludes OTR Wheel's Trac Master and Traction Master tires from the scope.[4] It argues further that Commerce improperly determined that the tires were not excluded based on industry descriptions of tires, which Commerce found dispositive under 19 C.F.R. § 351.225(k)(1). Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Mot.") 11. Specifically, OTR Wheel argues that Commerce erred because it gave improper weight to tread type, failed to consider tire size, and took statements made in the ITC injury determinations out of context. *Id.* at 11–14.

Pursuant to 19 C.F.R. § 351.225(d),[5] "in considering whether a particular product is included within the scope of an order or a suspended investigation, [Commerce] will take into account . . . [t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC]." 19 C.F.R. § 351.225(k)(1). Only "[w]hen the above criteria are not dispositive . . . will [Commerce] further consider: (i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

In its Final Scope Ruling, Commerce determined that the record evidence demonstrated that OTR Wheel's Trac Master and Traction Master tires were not specifically designed for turf, lawn, and garden applications because of the tread types of the tires. Final Scope Ruling at 7. All OTR Wheel tires at issue have R-1 and R-4 type treads.[6] Commerce reviewed the "TRA's 2011 Yearbook regarding

[4] The Government contends that although the plain scope language itself is not dispositive, when understood in the context of the controlling documents it becomes clear that the merchandise is not excluded.

[5] Section 351.225(d) states that:

> If the Secretary can determine, based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of this section, whether a product is included within the scope of an order or a suspended investigation, the Secretary will issue a final ruling as to whether the product is included within the order or suspended investigation.

19 C.F.R. § 351.225(d).

[6] OTR Wheel's tires were classified under HTSUS 4011.61.0000: "Other, having a 'herring-bone' or similar tread: Of a kind used on agricultural or forestry vehicles and machines."

agricultural and industrial tires, and lawn and garden tires, and found no instance where the TRA designated R-1 and R-4 [tread type] tires for service for lawn and garden applications." *Id.* After noting that the orders covered tires ranging from eight to fifty-four inches in rim diameter and that the tires at issue were from eight to twelve inches in rim diameter, Commerce turned to the ITC's Preliminary Injury Determination Pricing Data, which referenced Hi-Traction Lug R-1 tread type tires stating:

R-1 tires are identified as:

> . . . a typical farm tractor rear wheel having a regular depth 'lug-type' R-1 tread used for general farming, as defined by the Tire Rim Association 'TRA.' A farm tractor tire of this nature would typically have a herringbone (criss-cross) tread design of medium depth. The tread types for rear wheels of agricultural tractors are variable by the industry as 'lug' or 'bar tread.' The 'bar tread' is a lug tread usually running at an approximate 23 degree angle around the tire [sic] directional circumference which helps power the equipment through the soil.

Final Scope Ruling at 7 (quoting Certain Off-the-Road Tires From China, USITC Pub. No. 3943, Inv. Nos. 701-TA-448, 731-TA-117 (Aug. 2007) at V-3, *available at* http://www.usitc.gov/publications/701_731/pub3943.pdf (last visited June 19, 2012) ("Preliminary Injury Determination")).[7] As to ITC's statements about Industrial Tractor Lug R-4 tread type tires in ITC's pricing data Commerce noted:

With respect to R-4 tire types, the ITC stated:

> An R-4 herringbone-type lug tread has an intermediate tread depth. Tires of this type are commonly found on the rear wheel of 'backhoe loaders' which, for example, may be used in a stationary, braced position to dig holes and trenches with the backhoe; for example, to tie into an underground water main or power supply in light construction areas. The front blade attach-

This subheading is mentioned in the orders. OTR Wheel proposed HTSUS 4011.69.00: "New pneumatic tires, of rubber: Other, having a 'herring-bone' or similar tread: Other." This subheading is also mentioned in the orders.

[7] Commerce in the Final Scope Ruling claims that the Preliminary Injury Determination was "unchanged in final determination." Final Scope Ruling at 7 n.38. This is incorrect. Although the Final Injury Determination references some of the same types of tires, the Final Injury Determination does not contain the two footnotes explaining the use of the R-1 and R-4 tread type tires referenced there, upon which Commerce relied in its Final Scope Ruling. *See* Certain Off-The-Road Tires From China, USITC Pub. No. 4031, Inv. Nos. 701-TA-448, 731TA-1117 (Aug. 2008) at V-4, *available at* http://www.usitc.gov/publications/701_731/pub4031.pdf (last visited June 19, 2012) ("Final Injury Determination").

> ment may be used to scoop up and lift dirt. TRA recommends this type tire for light industrial service and highway mowing.

Final Scope Ruling at 7 (quoting Preliminary Injury Determination at V-3). OTR Wheel states that "R-4 tires are traditionally, but not universally, designed for use on tractors, light industrial equipment or on vehicles with highway mowing capabilities," Pl.'s Mot. 3–4, 17, but Commerce discounted OTR Wheel's evidence that its products are advertised for use on lawn and garden vehicles as relevant to end-use, not design.[8] The petition was not included in the record before Commerce or the record before this court. Commerce did not provide an analysis of descriptions of merchandise in the petition[9] or of other statements in the determinations of the Secretary or the ITC.[10]

"If the determination can be made based on section (k)(1), a scope ruling will issue without a full evaluation of the criteria in (k)(2)." *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005). For a (k)(1) determination to be dispositive, the permissible sources examined by Commerce "must be controlling of the scope inquiry in the sense that they definitively answer the scope question." *Sango Int'l L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007) (internal quotation marks omitted). "[A]ntidumping and countervailing duty orders are specific to a particular kind or class of merchandise and, therefore, unless otherwise specified, they must necessarily be interpreted in the context of the industry in which the merchandise at issue is manufactured, bought and sold." *Arcelormittal Stainless Belg. N.V. v. United States*, Slip Op. 11–82, 2011 WL 2713872, at *1 (CIT July 12, 2011) (finding that "4.75 mm" is not one definite measurement because, in the context of the industry, purchasers routinely accept variance in measurement).[11] Because the exclusionary

[8] As the Government concedes, evidence of end-use is relevant to the general inquiry into what the product is designed for. Ultimate use is to be considered under 19 C.F.R. § 351.225(k)(2). End-use, however, is not dispositive unless scope is clearly limited by end-use. *King Supply Co.*, 674 F.3d at 1348–49 (finding that when Commerce intends to impose an end-use exception it uses the terms "only" or "solely").

[9] Additionally, no party contends that the petition contains information defining the exclusion clause in the order. The court notes that 19 C.F.R. § 351.225(k)(1) requires Commerce to consider the petition. Here, Commerce made no reference to the petition in its Final Scope Ruling, except for a formulaic mention of it.

[10] The court also notes that in a limited inquiry under 19 C.F.R. § 351.225(k)(1) Commerce may not rely on Bridgestone's ex-petition comments regarding usage of R-1 and R-4 tread type tires. *See* Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. Upon the Admin. R. and App. ("Def.'s Resp.") at 13. In such a limited inquiry Commerce may decline to review newly submitted advertising materials, such as that of OTR Wheel.

[11] The Government relies on this case to expand its ability to look beyond (k)(1) criteria or to avoid formal proceedings, but it is one thing to look at accepted industry understandings

provision of the orders does not unambiguously define "tires of a kind designed for use on . . . vehicles for turf, lawn and garden . . . applications," *AD Order*, 73 Fed. Reg. at 51,625, Commerce relied on external documents to try to determine if OTR Wheel products were excluded, but it did not limit itself to the documents listed in 19 C.F.R. § 351.225(k)(1). Neither did Commerce formally reach the 19 C.F.R. § 351.225(k)(2) factors. In any case, the documents Commerce cited do not provide substantial evidence for its scope determination.

Both parties rely on the TRA 2011 Yearbook, yet it is unclear what it says about industry understanding of the tires at issue. OTR Wheel identifies evidence in the TRA 2011 Yearbook as an indication that "Trac Master and Traction Master tires are tires of a kind designed for use on vehicles with turf, lawn and garden applications." Pl.'s Mot. at 11 (internal quotation marks omitted). OTR Wheel alleges that its tires fall within the size of "Lawn and Garden" tires in TRA 2011 Yearbook Section 6 ("Industrial Section") and are smaller than some of the tires in TRA 2011 Yearbook Section 5 ("Agricultural Section"). *Id.* at 11 (citing Pl.'s App. Ex. E at 6–24–6–31). OTR Wheel contends that Commerce "inexplicably disregarded or ignored" this evidence, and "accord[ed] disproportionate weight to the fact that Plaintiff's tires happen to share a common 'R-1'and 'R-4' tread type with some of the tires covered by the" orders. Pl.'s Mot. at 11, 13, 16–18. The Industrial Section of the TRA 2011 Yearbook contains a sub-section defining "Tires for Utility Vehicles and Lawn and Garden Tractors." All of OTR Wheel's tires fall within the tire size designations of this section,[12] but the sub-section does not specify whether tires under this section contain either an R-1 or R-4 type tread. Pl.'s App. Ex. E, at 6–24–27.

The Agricultural Section of the TRA 2011 Yearbook does not contain a subsection on lawn and garden tires and, unlike the Industrial Section, which does not address tire tread type, lists R-1 or R-4 tread type tires as for service on "agricultural tractor[s]," combine harvester[s]," "agricultural high clearance sprayer[s]," and "industrial tractor[s]." Pl.'s App. Ex. E, at 5–01. Although the TRA 2011 Yearbook might support a conclusion that some tires containing R-1 and R-4 tread types have been designed for use on other than turf, lawn and

of particular terms used in an order. It is another matter to look at industry publications to determine if particular products fit within undefined terms.

[12] OTR Wheel alleges that all its tires fall within the tire size designations of this section. OTR Wheel's tires range from 16 inches (nominal overall diameter) by 7.50 inches (nominal section width) to 26 inches by 12.00 inches. Pl.'s Mot. at 11. Tires under the "Utility Vehicles and Lawn and Garden Tractors" sub-section range from 11 inches by 4.00 inches to 27 inches by 12 inches. Pl.'s App. Ex. E, at 6–24–31. Thus, OTR Wheel's tires all fall within the tire size designations of the "Tires for Utility Vehicles and Lawn and Garden Tractors" section.

garden vehicles, the Yearbook also provides some evidence that tires of the size (and possibly the tread type) created by OTR Wheel are designed for use on turf, lawn, and garden vehicles. Taken as a whole and without further context, the TRA 2011 Yearbook does not provide substantial support for a scope decision as to OTR Wheel's tires.

OTR Wheel contends that "Commerce's reference to the *ITC Final [Injury Determination]* is misleading because that particular ITC reference to tread types was taken entirely out of context."[13] Pl.'s Mot. at 14. OTR Wheel asserts that the ITC's discussion focused on the pricing of in-scope product categories to the exclusion of product categories excluded from the scope. Pl.'s Mot. at 14–15. Commerce counters that the ITC references are merely descriptions of R-1 and R-4 tread type tires generally and that such definitions were not limited to certain R-1 and R-4 tread type tires included within the scope of the orders. Def.'s Resp. at 17.

Preliminarily, Commerce has not explained if the absence of the explanatory footnotes regarding R-1 and R-4 tread type tires from the Final Injury Determination has any significance. Next, the Preliminary Injury Determination focuses on "Hi-Traction Lug R-1" and "Industrial Tractor Lug R-4" tires of certain sizes. Preliminary Injury Determination at V-3. The referenced "Industrial Tractor Lug R-4" size tire does not seem consistent with the dimensions of OTR Wheel's tires. That is, the descriptions of these tires seem applicable to tires of specific usage, size, and tread type, rather than generally fitting to all R-1 and R-4 tread type tires. Thus, the materials cited from ITC's injury investigation fail to provide useful evidence that all R-1 and R-4 tread type tires of a size imported by OTR Wheel are not excluded from the scope of the orders by the turf, lawn, and garden exception.[14]

It is not enough that OTR Wheel's tires are agricultural or industrial tires generally within the scope of the order: OTR Wheel's tires must not be designed for use on turf, lawn, and garden vehicles in order to be included. Although evidence cited by Commerce may indicate that some tires containing R-1 and R-4 tread types are

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[13] The ITC Final Injury Determination at V-4 lists some specific R-1 and R-4 tires, without definition. As noted by OTR Wheel, these lists are in the pricing section of the Final Injury Determination, as they were in the Preliminary. It is unclear what the ITC determinations add to the inquiry.

[14] Commerce argues that OTR Wheel "has not provided information to substantiate that claim [that OTR Wheel's Trac Master and Traction Master tires are specifically designed for use on vehicles with turf, lawn, and garden applications] (*e.g.*, designs, schematics, internal memoranda, *etc.*)." Final Scope Ruling at 8; *see* Def.'s Resp. at 14. Such documents are typically evidence of the physical characteristics of the product, which are considered by Commerce as part of its formal 19 C.F.R. § 351.225(k)(2) analysis. Normally, Commerce cannot consider these types of materials under a (k)(1) analysis, no matter who submits them. The issue here is whether a full inquiry should be undertaken.

designed for general agricultural and industrial use, Commerce's evidence does not indicate that other R-1 and R-4 tread type tires are not designed more specifically for use on turf, lawn, and garden vehicles. Commerce's determination lacks substantial evidence that all tires with R-1 and R-4 tread types are included within the scope of the order. The sources used by Commerce under its purported (k)(1) analysis are not "'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Sango Int'l*, 484 F.3d at 1379. The industry standards and ITC injury investigation materials relied upon by Commerce do not provide substantial support for determining whether tires of this particular size and tread type are excluded as turf, lawn, or garden tires.[15] It seems quite unlikely that Commerce can confine itself to a limited § 351.225(k)(1) analysis here and reach a supported conclusion for the question of whether Plaintiff's products are designed for use in vehicles for turf, lawn, or garden applications. What are turf, lawn, and garden applications? How does the industry view tires that are relatively small, but have somewhat aggressive treads? These seem to be the types of questions that require a more reaching (k)(2) analysis. Thus, unless there is some dispositive feature of the petition and prior determinations that were overlooked by Commerce, it shall proceed with a full inquiry.[16]

CONCLUSION

Although OTR Wheel has asked this court to "remand this matter to Commerce with instructions to exclude Plaintiff's 'Trac Master' and 'Traction Master' tires from the scope of the subject *Tires Orders*," Pl.'s Mot. 24, Commerce has not yet properly completed its analysis under 19 C.F.R. § 351.225(k). The court hereby remands the matter to Commerce for further evaluation pursuant to the procedures set forth in 19 C.F.R. § 351.225(k).

Dated: This 27th day of June, 2012.
New York, New York.

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

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[15] As the documents Commerce relied on do not clarify scope, we need not analyze all the documents that Commerce may consider at the (k)(1) stage in order to determine if the materials Commerce did consider were somehow incorporated into permitted documents.

[16] The Government contends that OTR Wheel has not exhausted its administrative remedies as to § 351.225(k)(2) because it initially contended that either the plain scope language or the § 351.225(k)(1) materials were dispositive of the issue in its favor. If Commerce's conclusion, which is properly before this court, is not supported by substantial evidence, the Government may not prevail. That OTR Wheel properly challenged Commerce's § 351.225(k)(1) analysis is sufficient. If Commerce cannot make a proper (k)(1) decision, it must proceed with a (k)(2) analysis and permit the parties to submit the full range of evidence. What it may not do is reject (k)(2) evidence from one party and accept it from another.

Slip Op. 12–90

BAROQUE TIMBER INDUSTRIES (ZHONGSHAN) COMPANY, LIMITED, et. al, Plaintiffs, v. UNITED STATES, Defendant, and ZHEJIANG LAYO WOOD INDUSTRY COMPANY, LIMITED, et al., Defendant-Intervenors.

Before: Donald C. Pogue, Chief Judge
Consol. Court No. 12–000071[1]

[ordering further briefing with regard to Defendant's Motion to Dismiss]

Dated: June 27, 2012

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[1] This action was consolidated with Court Nos. 11–00452, 12–00013, and 12–00020. Order at 1, May 31, 2012, ECF No. 37.

OPINION AND ORDER

Pogue, Chief Judge

This is a consolidated action seeking review of determinations made by the Department of Commerce ("the Department" or "Commerce") in the antidumping duty investigation of multilayered wood flooring from the People's Republic of China ("China").[2] Currently before the court is Defendant's Motion to Dismiss the Complaint filed by Consolidated Plaintiff the Coalition for American Hardwood Parity ("CAHP").

In its Motion to Dismiss, ECF No. 52 (docketed under Ct. No. 11–00452), Defendant alleges that CAHP's Complaint fails to comply with jurisdictional requirements established by Section 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2),[3] because CAHP filed its summons in advance of Commerce's publication, in the Federal Register, of the antidumping order.

As explained below, the court agrees that CAHP's filing fails to comply with the statutory provisions governing the time for filing. However, in light of recent decisions by the Supreme Court and the Court of Appeals for the Federal Circuit, this court is not yet persuaded that such failure to timely file requires dismissal for lack of jurisdiction. Because the parties did not fully brief the question of whether the relevant statutes are jurisdictional requisites – as opposed to claim processing rules subject to equitable tolling – the court will reserve judgment and order further briefing on this issue.

Background

This case arises from Commerce's initiation, on November 18, 2010, of an antidumping duty investigation of multilayered wood flooring from China. *Multilayered Wood Flooring from the People's Republic of China*, 75 Fed. Reg. 70,714 (Dep't Commerce Nov. 18, 2010) (initiation of antidumping duty investigation) ("*Initiation Notice*"). Following the investigation, on October 18, 2011, Commerce published its *Final Determination*, finding that the subject merchandise was being sold at less than fair value in the United States, i.e., dumped. *Final*

[2] *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 64,318 (Dep't Commerce Oct. 18, 2011) (final determination of sales at less than fair value) ("*Final Determination*") and accompanying Issues & Decision Memorandum, A570–970, POI Apr. 1, 2010 - Sept. 30, 2010 (Oct. 11, 2011) Admin. R. Pt. 2 Pub. Doc. 31, 32, available at http://ia.ita.doc.gov/frn/summary/PRC/2011–26932–1.pdf ("*I & D Mem.*") (adopted in *Final Determination*, 76 Fed. Reg. at 64,318).

[3] All subsequent citations to the Tariff Act of 1930 will be to Title 19 of the U.S. Code, 2006 edition, unless otherwise noted.

Determination, 76 Fed. Reg. at 64,323–24. In the *Final Determination*, Commerce calculated a zero margin for one mandatory respondent, Zhejiang Yuhua Timber Co., Ltd. ("Yuhua"). *Id.* at 64,323. On December 8, 2011, Commerce published its antidumping duty order. *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 76,690 (Dep't Commerce Dec. 8, 2011) (amended final determination of sales at less than fair value and antidumping duty order) ("*Antidumping Duty Order*"). Yuhua, having received a zero rate in the *Final Determination*, was excluded from the order. *Id.*

Following publication of the *Final Determination*, but prior to publication of the *Antidumping Duty Order*, CAHP filed a summons giving notice that it would challenge various aspects of Commerce's *Final Determination*. Summons, Nov. 17, 2011, ECF No. 1 (docketed under Ct. No. 11–00452). Among the issues identified for challenge in the Summons were "certain aspects of the affirmative final determination of sales at less than normal value including the exclusion of one producer/exporter[, Yuhua] . . . ." Summons at 1.

Discussion

I. CAHP's Summons Was Untimely Filed

The statute states specific timing requirements that a prospective plaintiff must follow when seeking review of Commerce's determinations in an antidumping duty investigation. The Motion to Dismiss turns on the proper interpretation of these statutory provisions, found at 19 U.S.C. § 1516a(a)(2), which are as follows:

> (A) In general
>
> Within thirty days after —
>
> (i) the date of publication in the Federal Register of —
>
> (I) notice of any determination described in clause (ii) . . . of subparagraph (B), [or]
>
> (II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B) . . .
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint. . . .
>
> (B) Reviewable determinations
> The determinations which may be contested under subparagraph (A) are as follows:
>
> (i) Final affirmative determinations by [Commerce] and by the Commission under section 1671d or 1673d of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).

> (ii) A final negative determination by [Commerce] or the Commission under section 1671d or 1673d of this title, including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.

Commerce interprets this statute to have, depending on the nature of the complaint, two potential filing dates for a challenge to the exclusion of a company. If the sole challenge plaintiff brings addresses the exclusion of a company, then, according to Commerce, plaintiff may file within thirty days of publication of the affirmative determination, pursuant to § 1516a(a)(2)(A)(i)(I). Mot. to Dismiss at 6. If, however, plaintiff challenges both the exclusion of a company and other aspects of an affirmative determination, then Commerce interprets the statute to require that the summons be filed within thirty days of publication of the order, pursuant to § 1516a(a)(2)(A)(i)(II). Mot. to Dismiss at 6–7.

CAHP, in contrast, interprets § 1516a(a)(2)(B)(ii) to require a plaintiff to challenge the exclusion of a company by filing within thirty days of publication of the affirmative determination. Pl.'s Opposition to Def.'s Mot to Dismiss at 6–9, ECF No. 62 (docketed under Ct. No. 11–00452) ("Pl.'s Resp. Br."). Therefore, under CAHP's interpretation, any action that includes the exclusion of a company must be filed within thirty days of publication of the affirmative determination.

On first read, the language of the statute may seem ambiguous. On the one hand, § 1516a(a)(2)(B)(i) appears to preclude challenges to exclusion of companies from its purview. By defining challenges to an affirmative determination to include all challenges to any negative part of the affirmative determination "other than a [negative part of an affirmative determination] referred to in clause (ii)," § 1516a(a)(2)(B)(i), challenges to the exclusion of a company, appear relegated to § 1516a(a)(2)(B)(ii). On the other hand, the language in § 1516a(a)(2)(B)(ii) does not unequivocally support such a reading. Rather, § 1516a(a)(2)(B)(ii) permits filing a challenge to the exclusion of a company within thirty days of the publication of the affirmative determination "at the option of the appellant." If filing on the § 1516a(a)(2)(A)(i)(I) timeline (within thirty days of publication of the affirmative determination) is "at the option of the appellant," then the appellant must have other filing options, i.e., there must be at least one other timeline for filing a challenge to the exclusion of a company.

Commerce argues that this ambiguity has been resolved by the Court of Appeals' opinion in *Bethlehem Steel Corp. v. United States*, 742 F.2d 1405 (Fed. Cir. 1984). In *Bethlehem Steel*, the plaintiff challenged Commerce's negative finding that an export rebate program was not a countervailable subsidy – and this challenge was in the context of an otherwise affirmative countervailing duty determination, i.e., plaintiff filed a challenge to a negative part of an affirmative determination. *Id.* at 1407–08. The plaintiff's summons was filed within thirty days of publication of the countervailing duty order but beyond thirty days from the publication of the affirmative determination. *Id.* at 1408. This Court held that the challenged finding was a negative determination, and therefore, the complaint was untimely pursuant to § 1516a(a)(2)(A)(i) and § 1516a(a)(2)(B)(ii) because it was filed more than thirty days after the publication of the final determination. *Id.* The Court of Appeals reversed, holding that the challenged finding was only a negative part or aspect of an affirmative determination, and, because it is only the whole determination that is appealable, any challenge to a negative part or aspect of an affirmative determination is subject to the time limits for challenges to affirmative determinations. *Id.* at 1410–11.

Contrary to Commerce's assertion, *Bethlehem Steel* does not resolve the issue because the Court of Appeals was reviewing an earlier version of 19 U.S.C. § 1516a(a)(2)(B). When the Court of Appeals rendered its decision in *Bethlehem Steel*, the relevant provision of the statute read as follows:

> (B) Reviewable determinations
> The determinations which may be contested under subparagraph (A) are as follows:
>
> (i) Final affirmative determinations by the Secretary and by the Commission under section 1 303 of this title, or by [Commerce] and by the Commission under section 1671d or 1673d of this title.
>
> (ii) A final negative determination by the Secretary, the administering authority, or the Commission under section 1303, 1671d, or 1673d of this title.

19 U.S.C. § 1516a(a)(2)(B) (1982). The Court of Appeals' holding in *Bethlehem Steel* fit well with the structure of the statute then in force. As the statute was cleanly divided between affirmative and negative determinations, the Court of Appeals held that it was the nature of the determination as a whole that governed which timing requirements applied.

However, amendments to § 1516a(a)(2)(B) in the Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 623, 98 Stat. 2948, 3040,[4] inserted the language establishing the unique character of challenges to the exclusion of a company. Thus, while the Court Appeals' holding in *Bethlehem Steel* — that the character of the challenged determination as a whole decides which timing requirements apply — remains good

[4] The Trade and Tariff Act of 1984 became law on October 30,1984, two months after the decision in *Bethlehem Steel* was issued. Trade and Tariff Act of 1984, 98 Stat. at 2948.

law, it does not resolve the question of how challenges to the exclusion of a company are to be characterized. Rather, the provision for challenging the exclusion of a company may elude the clear division of determinations into the affirmative and negative categories recognized in *Bethlehem Steel*. Instead of easily resolving into one of the two *Bethlehem Steel* categories, the determination to exclude a company is capable of being either a negative part of an affirmative determination or a negative determination. How it is characterized is, pursuant to the statute, at the option of the appellant. Thus, a plaintiff challenging the determination may either bring the challenge as challenge to a negative determination, filing pursuant to the timing requirements of § 1516a(a)(2)(A)(i)(I), or as a challenge to a negative part of an affirmative determination, filing pursuant to the timing requirements of § 1516a(a)(2)(A)(i)(II).

This is consistent with a reading of the text that gives effect to all parts of the statute. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quoting *Wash. Market Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) (internal quotation marks omitted)); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statutes as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." (citations omitted) (internal quotation marks omitted)).

CAHP reads the parenthetical in § 1516a(a)(2)(B)(i) as an exception that excludes "a part referred to in clause (ii)" from the universe of negative parts of affirmative determinations. Therefore, in CAHP's view the exclusion of a company, which is referred to in § 1516a(a)(2)(B)(ii), is categorically excluded from § 1516a(a)(2)(B)(i), and a challenge to such a determination must be filed pursuant to § 1516a(a)(2)(A)(i)(I). But this reading of the statute ignores the language in § 1516a(a)(2)(B)(ii) that permits such a filing "at the option of the appellant." Thus, an interpretation of the statute that gives effect to all its parts must read the parenthetical of § 1516a(a)(2)(B)(i) together with § 1516a(a)(2)(B)(ii) to permit the appellant to characterize the exclusion of a company as either a negative part of an affirmative determination or as a negative determination and to file accordingly.[5]

The legislative history of the Trade and Tariff Act of 1984 further supports the interpretation that an appellant has the option to characterize a challenge to the exclusion of a company as either a negative

[5] An appellant's choice in this matter is not without limits, as is discussed below in Part II.

part of an affirmative determination or as a negative determination. The Conference Report for the Trade and Tariff Act of 1984 states that the bill

> [c]larifies when negative portions of affirmative determinations may be reviewed: any part of a final affirmative determination by the administering authority which specifically excludes any company or product may, at the option of the appellant, be treated as a final negative determination and may be subject to appeal within 30 days of publication; other negative aspects of an affirmative determination would be appealable within 30 days after publication of a final order, and if an appellant so chooses, appeal of those portions of an affirmative finding which exclude a product or a company may also be appealed within 30 days of publication of a final order, instead of within 30 days of the determination.

H.R. Rep. No. 98–1156, at 179 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5296. Thus, according to the Conference Report, the amendments to § 1516a(a)(2)(B) were intended to give the appellant flexibility to challenge the exclusion of a company either as a negative determination pursuant to the timing requirements of § 1516a(a)(2)(A)(i)(I) or as a negative part of an affirmative determination pursuant to § 1516a(a)(2)(A)(i)(II). This is further supported by the House Report. In addition to stating the reasoning that appears in the Conference Report, the House Report explains that "[t]he purpose of clarifying when negative portions of an affirmative determination may be reviewed is to permit appeals of determinations which exclude entire companies or products on the timetable most acceptable to the appealing party." H.R. Rep. No. 98–725, at 47 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5174.

It follows that CAHP's interpretation is incorrect, and, as a result, its summons was untimely filed. This is because CAHP also seeks to challenge other aspects of Commerce's affirmative determination; such a challenge must be filed within the thirty day period following the publication of the order. Importantly, CAHP incorrectly believed that it was required to file its challenge to the exclusion of Yuhua within thirty days of the affirmative determination — before the order was issued — or lose the opportunity to bring that challenge. On the contrary, however, the "at the option of the appellant" language in § 1516a(a)(2)(B)(ii) would have permitted CAHP to file that aspect of the challenge under the timing rules of § 1516a(a)(2)(B)(i) and § 1516a(a)(2)(A)(i)(II). But no such flexibility exists for the remainder of CAHP's Complaint. *See Horner v. Andrzjewski*, 811 F.2d 571, 575 (Fed. Cir. 1987) ("[A]s a general rule of statutory construction, the expression of one exception indicates that no other exceptions apply."). Therefore, all of the challenges brought by CAHP, excepting the challenge to Yuhua's exclusion, are untimely pursuant to § 1516a(a)(2)(B)(i) and § 1516a(a)(2)(A)(i)(II), as well as the Court of Appeals' holding in *Bethlehem Steel*. CAHP cannot bootstrap these untimely challenges alongside its challenge to the exclusion of Yuhua because that challenge could have been timely filed within thirty days after publication of the order along with all other challenges to the affirmative determination.

Correctly read, § 1516a(a)(2) permits the filing of a challenge to an affirmative determination within thirty days of the order. It permits the filing of a challenge to a negative determination within thirty days of the final determination. And it permits a challenge to the exclusion of a company from the order to be filed, at the option of the complaining party, either with a challenge to an affirmative determination or as a challenge to a negative determination. As explained below, however, the statute does not permit piecemeal litigation; therefore, CAHP's summons was untimely filed.

II. The Challenge to the Exclusion of Yuhua is Not Severable from the Remainder of the Complaint

Determining the proper interpretation of § 1516a(a)(2)(B) does not fully resolve the Motion to Dismiss. In its Reply Brief, Commerce suggests that the complaint may be severed, arguing that "the Court should dismiss all parts of [CAHP's] complaint that do not specifically relate to Yuhua." Def.'s Reply in Supp. of Its Mot. to Dismiss at 4, ECF No. 38 ("Def.'s Reply Br."). Commerce is correct that, in light of the foregoing analysis, CAHP properly filed the summons challenging the exclusion of Yuhua within thirty days of publication of the determination. However, because CAHP also untimely challenged other aspects of the affirmative determination prior to publication of the *Antidumping Duty Order*, the court must determine whether the challenge to the exclusion of Yuhua can be severed from the remaining counts of the Complaint or if the Complaint must be dismissed in full.

Because severing the Complaint would create the possibility of piecemeal litigation, such severance is not consistent with the statute. In the House Report pertaining to the Trade and Tariff Act of 1984, the Ways and Means Committee stated that

> the Committee is aware of the decision of the CIT in *Bethlehem Steel Corp. v. United States* (Slip Op. 8397),[[6]] in which the court refused to permit an appeal of certain negative findings (with respect to certain products or companies) that were part of an overall affirmative determination in accordance with the timetable for appeal of affirmative determinations. The court recognized that its ruling might lead to "undesirable piecemeal" litigation, but said that the corrections must be made by "legislative fiat." The purpose of the Committee's change is to permit an election by appellants of when to appeal such determinations and thereby to prevent piecemeal litigation.

H.R. Rep. No. 98–725, at 47, 1984 U.S.C.C.A.N. at 5175. To read the statute as permitting severability in this case would be to reintroduce the possibility of piecemeal litigation under the guise of the appellant's option when that option was intended to correct the very problem of piecemeal litigation. Given the Committee's clear rejection of piecemeal litigation in the House Report, it makes more sense to read the statute as permitting the appellant to choose between challenging the exclusion of a company as a negative determination, if this is the only challenge appellant is making, or as a negative part of an affirmative determination, if the appellant is challenging other aspects of the affirmative determination. Otherwise, the appellant could choose to challenge the exclusion of a company within thirty days of the publication of the affirmative determination and then file a subsequent suit within thirty days of the publication of the order challenging other aspects of the affirmative determination. Not only would this create piecemeal litigation, but it runs afoul of the Court of Appeals' statement in *Bethlehem Steel* that "under our reading of the statute Congress did not normally contemplate such a proliferation (and perhaps duplication) of appeals." *Bethlehem Steel*, 742 F.2d at 1411. While the statute has changed since the Court of Appeals made that statement, it is not necessary to read the statute as creating multiple opportunities for appeal of the same determination in order to read the statute coherently.

Nor does the Court of Appeals' suggestion in *Bethlehem Steel* that severability might be an option in limited cases support severability in this case. In *Bethlehem Steel*, the Court of Appeals noted in dicta that

> we leave open the question whether there may possibly be occasions on which a negative subsidy finding can be severed from

[6] *Bethlehem Steel Corp. v. United States*, 6 CIT 164, 571 F.Supp. 1265 (1983), *rev'd*, 742 F.2d 1405 (Fed. Cir. 1984).

> affirmative subsidy findings respecting the same product, and then judicially challenged on a separate "interlocutory" basis. We do decide, however, that if such an earlier appeal is ever permissible, it could be taken only on the ground that Congress gave for specifically providing interlocutory appeals in the Trade Agreements Act of 1979 . . . .

Id. at 1411. However, the Trade and Tariff Act of 1984 struck the interlocutory appeal provisions from § 1516a. *Compare* 19 U.S.C. § 1516a(a)(1) (1982), *with* 19 U.S.C. § 1516a(a)(1) (2006); *see also* H.R. Rep. No. 98–1156, at 178, 1984 U.S.C.C.A.N. at 5295 ("Eliminates all interlocutory judicial reviews by the U.S. Court of International Trade during the course of CVD and AD investigations."). Thus, the basis upon which the Court of Appeals considered severability a possibility was subsequently stricken from the statute.

Because permitting severability in this case would endorse the possibility of piecemeal legislation, which is both undesirable and contrary to the statutory provision, the court finds that severability is not an option.[7]

III. Further Briefing Is Necessary on the Issues of Jurisdictionand Equitable Tolling

In prior opinions both the Court of Appeals and this Court have treated the timing requirements of § 1516a(a)(2) as conditions of the government's waiver of sovereign immunity and, therefore, as jurisdictional requisites. *See NEC Corp. v. United States*, 806 F.2d 247, 248–49 (Fed. Cir. 1986); *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986); *Advanced Tech. & Materials Co. v. United States*, 33 CIT __, Slip Op. 09–115, at *4–5 (Oct. 15, 2009); *Allegheny Ludlum Steel Corp. v. United States*, 7 CIT 56, 61 (1984); *British Steel Corp. v. United States*, 6 CIT 200, 202–04, 573 F. Supp. 1145, 1147–49 (1983). Furthermore, the Court of Appeals has interpreted these timing requirements strictly, thereby precluding equitable tolling, by this Court, of these provisions. *See NEC Corp.*, 806 F.2d at 249; *Georgetown Steel*, 801 F.2d at 1312.

However, intervening case law from both the Supreme Court and the Court of Appeals has called these holdings into question. *See Ocean Duke Corp. v. United States*, 35 CIT __, 781 F. Supp. 2d 1374, 1379 n.4 (2011) (noting that "[a] recent dearth of clarity in the holdings of relevant Supreme Court and Federal Circuit precedents" pre-

[7] Should the court find that the timing requirements of § 1516a(a)(2) are jurisdictional requisites, *see infra* Part III, CAHP may seek a voluntary dismissal of the untimely portion of its complaint pursuant to USCIT R. 41(a)(2).

vented the court from assuming a statute of limitations was jurisdictional). In a recent line of cases, the Supreme Court has begun to question the strict, jurisdictional construal of timing requirements. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010); *Bowles v. Russell*, 551 U.S. 205 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Furthermore, in a recent opinion, the Court of Appeals held that the 28 U.S.C. § 2636(d) bar to an untimely filed challenge to a trade adjustment assistance determination was subject to equitable tolling. *Former Emps. of Sonoco v. Chao*, 372 F.3d 1291, 1298 (Fed. Cir. 2004). This holding calls into question whether the 28 U.S.C. § 2636(c) bar to challenges filed out of time pursuant to 19 U.S.C. § 1516a(a)(2) could also be equitably tolled.

In light of these recent developments, the continued viability of the prior opinions from the Court of Appeals and this Court – holding the § 1516a(a)(2) timing requirements to be strict jurisdictional requisites – may be in question. Because the parties did not address these issues in their initial briefs,[8] the court will order a second round of briefing.

Conclusion

The court finds that CAHP's summons should have been filed within thirty days following the publication in the Federal Register of the *Antidumping Duty Order*. Because it was filed prior to publication of the *Antidumping Duty Order*, the summons was untimely. However because questions remain regarding the jurisdictional nature of the timing requirements found at 19 U.S.C. § 1516a(a)(2) and the possibility of equitable tolling, and because the parties did not address these issues in their prior briefs, the court orders additional briefing to address these issues. In particular, the court directs that the parties address the following questions:

(1) Are the timing requirements of 19 U.S.C. § 1516a(a)(2) jurisdictional requisites or claim processing rules when considered in light of the Supreme Court's decisions in *Henderson*, *et al.*, and any other relevant law?

(2) Are the timing requirements of 19 U.S.C. § 1516a(a)(2) subject to equitable tolling in light of the Court of Appeals' decision regarding 28 U.S.C. § 2636(d) in *Former Emps. of Sonoco* or any other relevant law? Does the statutory struc-

[8] The court acknowledges that Commerce argued for the jurisdictional nature of the § 1516a(a)(2) timing requirements in its Motion to Dismiss. However, because Commerce did not address the recent developments in the law, the court is not yet persuaded by Commerce's position.

ture of 19 U.S.C. § 1516a in relation to 28 U.S.C. § 2636(c) differ sufficiently to distinguish it from 19 U.S.C. §§ 2273, 2341 & 2371 as they relate to 28 U.S.C. § 2636(d)?

(3) Assuming, *arguendo*, that *Former Emps. of Sonoco* supports the possibility of equitable tolling in this case, do equitable grounds exist for the court to permit CAHP's untimely filed summons and complaint?

All parties will have until July 12, 2012 to file initial briefs on these issues. Parties shall then have until July 20, 2012 to file a response brief. Initial briefs shall be limited to fifteen pages. Response briefs shall be limited to ten pages.

It is SO ORDERED.

Dated: June 27, 2012
New York, New York

/s/ *Donald C. Pogue*
DONALD C. POGUE, CHIEF JUDGE