U.S. Customs and Border Protection

CORRECTED

Slip Op. 14–7

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN HOME ASSURANCE CO., Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 10–00185

[Plaintiff's motion for summary judgment is granted in part, denied in part. Defendant's cross-motion for summary judgment is granted in part, denied in part.]

Dated: January 23, 2014

Edward F. Kenny, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for plaintiff. With him on the brief were *Stuart F. Delery*, Principal Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge of International Trade Field Office. Of counsel on the brief was *Beth C. Brotman*, Attorney, Office of Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC.

Herbert C. Shelley, Steptoe & Johnson LLP, of Washington, DC, argued for defendant. On the brief were *Taylor Pillsbury*, Meeks, Sheppard, Leo & Pillsbury, of Newport Beach, CA, and *Ralph Sheppard*, Meeks, Sheppard, Leo & Pillsbury, of Fairfield, CT.

OPINION

Goldberg, Senior Judge:

This case is before the court on competing cross-motions for summary judgment. In this action on a bond, Plaintiff, the United States ("United States" or "the Government"), seeks recovery of unpaid antidumping duties from surety Defendant American Home Assurance Company ("AHAC"). The parties dispute (1) whether AHAC is liable for the unpaid duties as the surety on a continuous bond, and (2) assuming AHAC is liable, whether AHAC owes the Government both prejudgment interest in the form of equitable interest and interest pursuant to 19 U.S.C. § 580 (2006). For reasons set forth below, the court finds that AHAC is liable under the bond, but that the Government is only entitled to equitable prejudgment interest. Accordingly, summary judgment as to the United States is granted in part and denied in part, and summary judgment as to AHAC is granted in part and denied in part.

SUBJECT MATTER JURISDICTION AND STANDARD OF REVIEW

In 2001, AHAC entered into a continuous bond with importer JCOF (USA) International, Inc. ("JCOF"). The Government now seeks recovery on the bond for unpaid antidumping duties. Thus, jurisdiction is proper pursuant to 28 U.S.C. § 1582(2).

Both parties have moved for summary judgment. Summary judgment is available when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). To make the requisite showing, the movant must cite "particular parts of materials in the record" and "show[] that the materials cited do not establish the absence or presence of a genuine dispute." USCIT R. 56(c). A fact is material if it could affect the outcome of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute as to a material factexists if, based on the evidence, a reasonable factfinder could return a verdict for the nonmoving party. *Id.*

UNDISPUTED FACTS

Importers must generally post security before U.S. Customs and Border Protection ("Customs") will release imported merchandise from its custody. *Hartford Fire Ins. Co. v. United States*, 648 F.3d 1371, 1372 (Fed. Cir. 2011). Importers often use surety companies to post the required security. *Id*. A "surety bond creates a three-party relationship, in which the surety becomes liable for the principal's debt or duty to the third party obligee." *Ins. Co. of the W. v. United States*, 243 F.3d 1367, 1370 (Fed. Cir. 2001).

AHAC is a surety company authorized to issue surety bonds. Pl.'s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried, ECF No. 27 ("Pl.'s Facts") ¶ 1; Def.'s Resp. to Pl.'s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried, ECF No. 30 ("Def.'s Resp.") ¶ 1. AHAC issued the surety bond at issue in this case pursuant to an arrangement with U.S. importer JCOF. Pl.'s Facts ¶ 2; Def.'s Resp. ¶ 2. The bond, on which JCOF and AHAC were jointly and severally obligated, had a limit of liability of $600,000 per bond period. Pl.'s Facts ¶ 3; Def.'s Resp. ¶ 3.[1]

During the period covered by the continuous bond, JCOF imported two entries of crawfish tail meat from Yangzhou Lakebest Foods Company, Ltd. ("Yangzhou Lakebest")—a Chinese exporter. Pl.'s Mot.

[1] This bond is called a continuous bond, and it "cover[s] liabilities resulting from multiple import transactions over a period of time, such as one year." *Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 30 CIT 1838, 1839, 465 F. Supp. 2d 1300, 1302 (2006).

& Mem. in Supp. of Mot. for Summ. J., ECF No. 27 ("Pl.'s Br."), at Ex. D, Resp. 4. The entries occurred on November 1, 2001 and November 2, 2001 and were identified as entry numbers M42–1164064–2 and M42–1164065–9, respectively. Pl.'s Facts ¶¶ 4– 5; Def.'s Resp. ¶¶ 4–5. JCOF declared a zero percent *ad valorem* antidumping duty rate for both entries at importation. Pl.'s Br. at Ex. D, Resp. 4.

On February 13, 2004, the U.S. Department of Commerce ("Commerce") published the final results of an administrative review of the order on crawfish tail meat from the People's Republic of China. *Freshwater Crawfish Tail Meat from the People's Republic of China*,69 Fed. Reg. 7193 (Dep't Commerce Feb. 13, 2004) ("*Final Results*"). In those results, Commerce assigned Yangzhou Lakebest an antidumping duty rate of 223.01% *ad valorem*. *Id.* at 7197. The review period spanned from September 1, 2001 to August 31, 2002. *Id.* at 7194.

On May 12, 2004, Commerce directed Customs to liquidate entries of the subject crawfish meat at the rates set forth in its *Final Results*.[2] Pl.'s Facts ¶ 9; Def.'s Resp. ¶ 9. Because Commerce's review period included November 2001, JCOF's two entries were subject to Yangzhou Lakebest's 223.01% *ad valorem* antidumping duty rate plus interest. *See* Pl.'s Facts ¶ 6; Def.'s Resp. ¶ 6. On June 25, 2004, Customs liquidated the entries accordingly ("June 2004 liquidations"). *See* Pl.'s Facts ¶ 11; Def.'s Resp. ¶ 11. When JCOF did not timely pay the duties, Customs made a formal demand on AHAC. Pl.'s Br. at Ex. G. AHAC then filed Protest Number 2704–04–102655. Pl.'s Facts ¶ 12; Def.'s Facts ¶ 12. Customs denied that protest on July 8, 2005, and AHAC did not institute litigation challenging the protest denial. *See* Pl.'s Facts ¶ 15; Def.'s Facts ¶ 15.

Much of the confusion in this case stems from litigation that an exporter other than Yangzhou Lakebest instituted in response to the *Final Results*. Due to the pendency of litigation, the court preliminarily enjoined the Government from liquidating entries exported by Shanghai Taoen International Trading Co., Ltd ("Shanghai Taoen") during the period of review. Pl.'s Facts ¶ 8; Def.'s Facts ¶ 8. The preliminary injunction did not affect JCOF's imports, as the imports came from Yangzhou Lakebest and Yangzhou Lakebest was not a

[2] "Liquidation means the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1 (2013). In antidumping duty cases, liquidation is suspended "until such time as a party may request an administrative review, and during the pendency of any such review." *Decca Hospitality Furnishings, LLC v. United States*, 30 CIT 357, 360, 427 F. Supp. 2d 1249, 1252 (2006). Liquidation of the entries at issue here had been suspended pending issuance of the *Final Results*. Def.'s Facts ¶¶ 1–2; Pl.'s Resp. ¶¶ 1–2.

party to the pending litigation. *See* Def.'s Statement of Add'l Material Facts as to Which There Are No Genuine Issues to Be Tried, ECF No. 30 ("Def.'s Facts") ¶ 3; Pl.'s Resp. to Def.'s Statement of Add'l Facts as to Which There Are No Genuine Issues to Be Tried, ECF No. 37 ("Pl.'s Resp.") ¶ 3. Nonetheless, when the Shanghai Taoen litigation concluded, Customs reliquidated JCOF's two entries on June 3, 2005 ("June 2005 reliquidations"). *See* Pl.'s Facts ¶ 14; Def.'s Resp. ¶ 14. The June 2005 reliquidations resulted in new bills with a total bill amount $51,997.31 greater than the bills associated with the June 2004 liquidations. *See* Pl.'s Br. at Exs. G, H.[3] After Customs made a second demand on AHAC, AHAC filed protest number 2704–05–102579. *See* Pl.'s Facts ¶ 16; Def.'s Resp. ¶ 16. Again, AHAC did not institute litigation when Customs denied the protest.

Customs sent AHAC a demand letter on February 9, 2007, seeking total payment of $1,157,898.22 for unpaid duties plus interest in connection with JCOF's two entries. Pl.'s Facts ¶ 18; Def.'s Facts ¶ 18. AHAC denied liability on grounds unrelated to those it raises in the instant action. Pl.'s Facts ¶ 19; Def.'s Facts ¶ 19; Pl.'s Br. at Ex. K. The Government then instituted this action on a bond on June 21, 2010. Summons & Compl., ECF Nos. 1–2. In its answer, AHAC asserts multiple affirmative defenses hinging on its belief that JCOF's two entries were deemed liquidated at the rate in effect at the time of entry—i.e., zero percent. *See* Answer to Compl., ECF No. 8. AHAC, thus, believes it is not liable under the surety bond.

DISCUSSION

The parties raise two issues in their summary judgment briefing. First, AHAC argues that the bills underlying the Government's collection action "are legally void" and that AHAC is not obligated to pay under continuous bond number 270114235. *See* Def.'s Cross-Mot. & Mem. in Supp. of Summ. J. & in Opp'n to Pl.'s Mot. for Summ. J., ECF No. 30 ("Def.'s Br."), at 5. Second, the parties dispute whether the Government is entitled to equitable and statutory interest on any recovery. *Id.* at 9. As set forth below, the court finds that the Government is entitled to recovery on the bond and awards equitable interest, but not statutory interest.

[3] The parties apparently dispute the composition of the enlarged figure. The Government avers that any increase in the amount of the bills is due exclusively to interest accruing between October 2004 and October 2005. *See* Pl.'s Resp. ¶ 7. AHAC asserts that the increased bill amount represents a combination of increased principal and interest. *See* Def.'s Facts ¶ 7. Any dispute on this issue is not material for purposes of this case.

I. AHAC is legally obligated to pay under continuous bond number 270114235

The first issue in this case turns on the parties' divergent interpretations of the legal effect of the June 2005 reliquidations. AHAC essentially argues that the untimely June 2005 reliquidations superseded and canceled the timely June 2004 liquidations. Def.'s Br. at 6–7 (citing *Mitsubishi Elecs. Am., Inc. v. United States*, 18 CIT 929, 931, 865 F. Supp. 877, 879 (1994)). Because the reliquidations occurred more than ninety days after the June 2004 liquidations, AHAC further avers that the June 2005 voluntary reliquidations were invalid under 19 U.S.C. § 1501. Def.'s Br. at 7. As a result, AHAC believes there were no valid liquidations.

Without any valid liquidations, AHAC asserts that the entries were deemed liquidated by operation of law at the rate asserted by the importer of record. *Id.* at 8 (citing 19 U.S.C. § 1504(d)). 19 U.S.C. § 1504(d) compels Commerce to liquidate previously suspended entries "within 6 months after receiving notice of the removal [of the suspension] from the Department of Commerce." For purposes of this case, the six-month clock began running when Commerce published its *Final Results* on February 13, 2004. Def.'s Br. at 8 (citing *Int'l Trading Co. v. United States*, 412 F.3d 1303, 1313 (Fed. Cir. 2005)). The entries, thus, purportedly liquidated by operation of law at zero percent *ad valorem* —the rate JCOF asserted at the time of entry. *Id.*

According to AHAC, it did not need to challenge the June 2005 reliquidations in this Court because they were void at their inception and not merely voidable. Generally, "all liquidations, whether legal or not, are subject to [19 U.S.C. § 1514's] timely protest requirement" and become final and conclusive unless an authorized party files a protest or commences a civil action contesting the denial of a protest. *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995). However, relying on the Federal Circuit's holding in *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1560 (Fed. Cir. 1997), AHAC argues that the June 2005 reliquidations were legally void because they occurred after a final, deemed liquidation. Def.'s Br. 9. AHAC therefore asserts that it was not subject to the timely protest requirement. *Id.*

AHAC's arguments are unpersuasive. The court agrees that Customs' untimely reliquidations vacated and "substituted for the collector's original liquidation." *Mitsubishi*, 18 CIT at 931, 865 F. Supp. at 879. Nonetheless, the court finds that the timely protest requirement applied because the entries at issue were not deemed liquidated by operation of law and because the reliquidations occurred before the June 2004 liquidations became final. Thus, the June 2005

reliquidations—"whether legal or not"—became final and conclusive against AHAC when AHAC did not institute litigation challenging them. *See Juice Farms*, 68 F.3d at 1346; *accord Philip Morris U.S.A. v. United States*, No. 89–1712, 1990 WL 79000, at *2 (Fed. Cir. June 13, 1990) ("[A]n unlawful reliquidation is not void, but is merely voidable.").

A review of relevant case law is instructive. In *Juice Farms*, Customs erroneously liquidated entries subject to a suspension order. 68 F.3d at 1345. The importer did not recognize the error until the administrative review concluded, at which point the importer attempted to protest the liquidations. *Id.* Customs denied the protest as untimely, and the importer filed suit in this Court. *Id.* In affirming the court's dismissal of the action for lack of jurisdiction, the Federal Circuit found that even inadvertent, unlawful liquidations are subject to the timely protest requirement. *Id.* at 1346.

In *Cherry Hill*, the Federal Circuit concluded that the timely protest requirement applied with equal force in government collection actions. 112 F.3d at 1557. Nonetheless, based on the facts of the case, the court identified an exception to this general rule. *Id.* at 1558. In *Cherry Hill*, Customs delayed more than thirteen months before liquidating certain entries as dutiable that had previously entered duty-free. *Id.* at 1551. In the intervening period between entry and liquidation, though, a liquidation had already taken effect by operation of law under the deemed liquidation statute. *Id.* at 1559 (citing 19 U.S.C. § 1504(a)).

The surety in *Cherry Hill* did not protest the belated liquidation, but raised the deemed liquidation issue in a subsequent government enforcement action. *Id.* at 1558. The Federal Circuit found that the surety was not barred from launching this collateral attack. *Id.* Because a previous, deemed liquidation had already become final, the court found that the new liquidation "ha[d] no legal effect" and could not increase the surety's liability. *Id.* at 1560. In other words, once a final and conclusive liquidation occurs (and the Government's cause of action expires), "Customs cannot breathe new life into it merely by liquidating the entry anew." *Id.*

Unlike in *Cherry Hill*, there were no final and conclusive liquidations in this case when the June 2005 reliquidations occurred. First, the June 2004 liquidations were not yet final under 19 U.S.C. § 1514 because AHAC's protest was still pending on June 3, 2005. *See* 19 U.S.C. § 1514(a) (providing that liquidations become "final and conclusive upon all persons (including the United States and any officer

thereof) *unless* a protest is filed in accordance with this section" (emphasis added)). Second, despite AHAC's contrary assertions, the entries were not deemed liquidated by operation of law under 19 U.S.C. § 1504(d).

On its face, 19 U.S.C. § 1504(d) applies when an entry is "not liquidated by [Customs] within 6 months after receiving" notice of the removal of a suspension of liquidation. *See also Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002). Customs' June 2004 liquidations occurred within six months of the February 13, 2004 publication of the *Final Results*, which constituted notice for the purpose of 19 U.S.C. § 1504(d) that the suspension of liquidation had been removed. *See Int'l Trading*, 412 F.3d at 1313. Therefore, no deemed liquidation occurred under 19 U.S.C. § 1504(d).

AHAC has not convinced the court that a contrary conclusion is warranted. Indeed, adopting AHAC's interpretation would set untenable precedent. Logically extended, AHAC's argument would mean that any reliquidation after six months could result in a retroactive deemed liquidation, as the reliquidation would supersede the original, timely liquidation. AHAC's argument also fails if it hinges on the belief that the June 2005 reliquidations were invalid because they violated 19 U.S.C. § 1501. Though the reliquidations occurred more than ninety days following notice of the original liquidation, such belated reliquidations are still subject to the timely protest requirement. *See Philip Morris*, 1990 WL 79000, at *2; *Mitsubishi*, 18 CIT at 931, 865 F. Supp. at 879. Further, AHAC cannot reasonably argue that the June 2005 reliquidations are simultaneously valid for purposes of creating deemed liquidations by replacing the original liquidations and void *ab initio* such that they need not be challenged under the procedures for protesting reliquidations and contesting protest denials in this Court.

AHAC's interpretation also does little to advance the purposes of the deemed liquidation statute. 19 U.S.C. § 1504 was designed to "'eliminate unanticipated requests for additional duties coming years after the original entry.'" *Cherry Hill*, 112 F.3d at 1559 (quoting *Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 and H.R. 8222 Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 95th Cong. 56 (1977) (statement of Robert E. Chasen, Comm'r of Customs)); S. Rep. No. 95–778, at 31–32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2211, 2243 ("Under the present law, an importer may learn years after goods have been imported and sold that additional duties are due . . . ."). An erroneous reliquidation occurring before a timely liquidation had even become final does not fall within the statute's intended reach.

In sum, the facts of *Cherry Hill* are distinguishable from those in the instant case; accordingly, a different result obtains. AHAC bore the burden of timely challenging the admittedly erroneous reliquidations before this court. Because it did not, and because no exception to the timely protest requirement applies, AHAC has not preserved its challenge and is liable as a surety under the continuous bond. [4]*See Juice Farms*, 68 F.3d at 1346.

II. The Government is entitled to equitable interest, but not 19 U.S.C. § 580 interest

The court must next determine the amount of money due to the Government. The importer's total liability for the two entries exceeds AHAC's $600,000 bond limit. *See* Pl.'s Facts ¶ 11; Def.'s Resp. ¶ 11. Therefore, if AHAC owes anything over the bond limit, it will come exclusively as damages in the form of interest for its own default. The Government seeks two types of interest in this case—statutory interest under 19 U.S.C. § 580 and equitable interest. As explained below, the court rejects the Government's claim for § 580 interest, but awards equitable interest.

A. Statutory interest under 19 U.S.C. § 580 is not available when the bond secures antidumping duties

19 U.S.C. § 580 provides that "[u]pon all bonds, on which suits are brought for the recovery of *duties*, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due." (emphasis added). The Government asserts that the statute's plain language compels an award of interest in this case. Pl.'s Br. 21–22; *see also United States v. Fed. Ins. Co.*, 857 F.2d 1457, 1459 (Fed. Cir. 1988) (finding in a case involving ordinary customs duties that, "[a]s a matter of law, whenever a court awards unpaid import duties in a suit upon a bond, interest must be attached pursuant to

[4] The same logic applies to an alternative argument AHAC first raised at oral argument. Specifically, AHAC asserted that Customs ignored Commerce's June 1, 2004 instructions when it liquidated the entries in question on June 25, 2004 and that Customs' action rendered the June 2004 liquidations void. Transcript of Oral Argument 22–24, ECF No. 49. AHAC's argument centers on instructions Commerce issued to Customs on June 1, 2004 in response to the *Shanghai Taoen* injunction. Those instructions directed Customs not to liquidate entries of subject merchandise exported by Shanghai Taoen or imported by an importer other than JCOF, and further ordered Customs to "[c]ontinue to suspend liquidation of *other entries* until liquidation instructions are provided." Pl.'s Br. at Ex. I (emphasis added). Because AHAC concedes that the injunction itself did not cover JCOF's entries, *see* Def.'s Facts ¶ 3, it was incumbent on AHAC to pursue any concerns regarding the legalityof the June 2004 liquidations through normal protest avenues. By twice abandoning its protests, AHAC may not now attack the legitimacy of the June 2004 liquidations. *See Juice Farms*, 68 F.3d at 1346.

section 580"). In other words, because the instant action is a suit for the recovery of antidumping "duties," the Government submits that interest "shall be allowed." *See* 19 U.S.C. § 580.

The historical context of 19 U.S.C. § 580 complicates the matter. Congress enacted § 580 in 1799, and the statute applied at its inception to bonds securing payment of then-existing customs duties. Antidumping duties did not arise until 1921. Antidumping Act of 1921, Pub. L. No. 67–10, 42 Stat. 11. Aside from codifying the statute and moving it from Title 28 of the U.S. Code (pertaining to Judiciary and Judicial Procedure) to Title 19 of the U.S. Code (pertaining to Customs Duties), Congress has not substantively updated § 580 or otherwise signaled whether the statute applies to antidumping duties. [5] Further, no court has ruled on whether § 580's reference to "duties" contemplates antidumping duties.

Against this backdrop, both sides advance divergent interpretations of 19 U.S.C. § 580 and its application in this case. According to the Government, several reasons support extending the statute to bonds securing antidumping duties. Initially, the Government notes that early customs duties—like antidumping duties—were at least partially rooted in protectionist principles. Pl.'s Mem. in Supp. of Summ. J. & Opp'n to Def.'s Cross-Mot. for Summ. J., ECF No. 37 ("Pl.'s Resp. Br."), at 8. Moreover, modern Congress has used the word duties to refer collectively to customs duties and antidumping duties. *See id.* at 9–11. Thus, the Government asserts that Congress has extended § 580's reach by retaining its unqualified language even as new duties emerged. *See* Pl.'s Br. 22.

AHAC counters that revenue generation was the overriding purpose of early customs duties and that antidumping duties are imposed for distinct, remedial reasons. *See* Def.'s Reply to Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. & in Opp'n to Pl.'s Mot. for Summ. J., ECF No. 42 ("Def.'s Resp. Br."), at 9. AHAC asserts that the disparate purposes underlying duties implementing trade remedies and customs duties preclude interpreting "duties" in § 580 to cover antidumping duties. Def.'s Br. 12. AHAC also notes that courts have distin-

[5] The precursor to 19 U.S.C. § 580 originally provided as follows: "[O]n all bonds upon which suits shall be commenced, an interest shall be allowed at the rate of six per cent. per annum, from the time when said bonds become due, until the payment thereof." *See* Act of Mar. 2, 1799, ch 22, § 65, 1 Stat. 627, 677. The language changed to what it is now when the statute was first codified in the Revised Statutes. *See* 1 Rev. Stat. 181, § 963 (1875). Section 580 was then later reclassified in the U.S. Code as 28 U.S.C. § 787, before being moved to Title 19in 1948. *See* 28 U.S.C. § 787 (1946); 19 U.S.C. § 580 (1952). However, these minor editorial changes neither substantively altered the provision nor resulted from subsequent congressional action. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 625 (1979) (noting the Revised Statutes were not intended to alter existing law).

guished between duties implementing trade remedies and customs duties, and in some instances have interpreted the word "duties" to exclude antidumping duties. *Id.* (citing *Dynacraft Indus. v. United States*, 24 CIT 987, 992, 118 F. Supp. 2d 1286, 1291 (2000); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007)). For these reasons, Congress' failure to clarify § 580's reach supposedly forecloses its application in this context.

i. *Legal framework*

Supreme Court precedent teaches that the meaning of statutory language can expand over time. *See West v. Gibson*, 527 U.S. 212, 218 (1999) ("Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances . . . ."). A "statute is presumed to speak from the time of its enactment" and to "embrace[] all such . . . things as subsequently fall within its scope." *De Lima v. Bidwell*, 182 U.S. 1, 197 (1901). As a result, general, prospective statutes apply to later-created concepts so long as the "language fairly and clearly includes them." *Newman v. Arthur*, 109 U.S. 132, 138 (1883); *accord Cain v. Bowlby*, 114 F.2d 519, 522 (10th Cir. 1940). The court looks to the meaning and intent of the original statute to determine whether that statute fairly and clearly includes a new concept. *See Jerome H. Remick & Co. v. Am. Auto. Accessories Co.*, 5 F.2d 411, 411 (6th Cir. 1925) (cited approvingly in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158 (1975)).

For example, in *Cain*, a widow instituted litigation against a truck driver who fatally struck her husband on a highway. 114 F.2d at 521. The statute underlying the widow's action applied to the negligence of "driver[s] of any stage coach or other public conveyance." *Id.* The court addressed whether the words "other public conveyance" fairly included a truck driver operating as a common carrier even though trucks did not exist at the statute's enactment. *Id.* at 522. In its analysis, the court examined the historical purpose of stage coaches—to transport passengers and property—and concluded that truck drivers engaged as common carriers did not differ in any meaningful way. *Id.* at 523. Thus, the court extended the statute to cover truck drivers engaged as common carriers. *Id.*

Other courts have used reasoning similar to that found in *Cain*. For instance, in *Jerome H. Remick & Co.*, another court interpreted a Copyright Act provision to apply to radio broadcasts, even though radios did not exist at the Copyright Act's inception. 5 F.2d at 411–12. In *In re Fox Film Corp.*, 145 A. 514 (Pa. 1929), a Pennsylvania court interpreted a statute requiring pre-approval before publicly presenting "films" to include subsequently-created sound films. Specifically,

the court found that sound films were not "so distinctly and intrinsically separate and apart from the" original meaning of the word film (i.e., silent films) as to be a "fundamentally . . . new creation." *Id.* at 516–17.

ii. *19 U.S.C. § 580 does not apply to later-created antidumping duties serving a fundamentally different purpose than historical customs duties*

In light of that background, this court must decide whether "duties" in § 580 (and the meaning assigned to it in 1799) "fairly and clearly includes" modern remedial duties like antidumping duties. *See Newman*, 109 U.S. at 138. Because neither Customs nor any other agency has been charged with administering § 580, the court construes the statute without deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (requiring deference to an agency's reasonable "construction of a statutory scheme *it is entrusted to administer*" (emphasis added)).

In 1799, Congress used the word "duties" to describe the duty assessment scheme that it had established for imported merchandise, similar to the modern customs duty regime. At first glance, it might appear reasonable to read § 580 to cover all subsequently-created import duties. But the court declines to reach that conclusion because in the period since the statute's enactment over 200 years ago, Congress, courts, and the Government itself have counseled that antidumping duties are not comparable to normal customs duties in function, purpose, and character. *See, e.g.*, *Dynacraft*, 24 CIT at 992–93, 118 F. Supp. 2d at 1291–92 (cataloging disparate treatment); *Wheatland*, 495 F.3d at 1361–63 (same).

Initially, the court notes that different entities administer antidumping duty law and customs law. Congress itself sets customs duty rates, while an administrative agency (Commerce) sets antidumping duty rates. Although Customs implements the regime that Congress has established, it does not have discretion regarding the rates of duty or whether to collect customs duties at all. Commerce, however, is authorized to investigate alleged dumping and set antidumping duty rates on its own. *See, e.g.*, 19 U.S.C. §§ 1673, 1675. The two duty regimes are also applied differently. "Regular" customs duties are assessable on all imports of particular merchandise and are permanent unless modified by Congress. *Wheatland*, 495 F.3d at 1362; *Int'l Forwarding Co. v. United States*, 6 Cust. Ct. 881, 882, R.D. 5197 (1941). "Special" antidumping duties are levied against only certain imports, are subject to administrative review annually, and terminate

after five years unless Commerce and the U.S. International Trade Commission respectively determine that revocation would lead to continuation or recurrence of dumping and material injury. *See* 19 U.S.C. § 1675(a), (d)(2); *Wheatland*, 495 F.3d at 1362; *Int'l Forwarding*, 6 Cust. Ct. at 882.

Moreover, ordinary customs duties and antidumping duties serve fundamentally different purposes. The court accepts that the nation's first customs duties were rooted in some muted protectionist principles. *See* Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24 (1789) (creating duties "for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures"). Nonetheless, the critical purpose of early duties was to generate revenue for the nascent country—a purpose that is still reflected in modern customs duties. *See, e.g.*, *United States v. Laurenti*, 581 F.2d 37, 41 n.12 (2d Cir. 1978) (noting that customs duties were a principal source of early federal revenue).[6] Antidumping duties, in contrast, are not intended as revenue-generating devices. *See Canadian Wheat Bd. v. United States*, 641 F.3d 1344, 1351 (Fed. Cir. 2011). Antidumping duties serve the distinct purpose of remedying the effect of unfair trade practices resulting in actual or threatened injury to domestic like-product producers. *See id.* Specifically, antidumping duties are "intended to raise the United States market price for the subject merchandise and thereby increase sales and profits of domestic producers." *Wheatland*, 495 F.3d at 1364.

Due to the well-documented differences between antidumping and customs duties, the court has previously interpreted the word "duties" in an interest statute to encompass only ordinary customs duties. *Dynacraft*, 24 CIT at 993, 118 F. Supp. 2d at 1292. In *Dynacraft*, an importer deposited estimated duties after an affirmative preliminary determination in an antidumping duty investigation. *Id.* at 989–90, 118 F. Supp. 2d at 1288–89. The International Trade Commission ultimately reached a negative injury determination, and an antidumping duty order never went into effect. *Id.* at 989, 118 F. Supp. 2d at 1288. The parties disputed whether interest accrued on the importer's duty overpayment. *Id.* at 990, 118 F. Supp. 2d at 1289.

[6] The Second Circuit has even opined that Congress enacted statutes like § 580 because customs duties were so critical to early revenue. *See Laurenti*, 581 F.2d at 41 n.12. In *Laurenti*, the Second Circuit catalogued instances where early Congress used the words "without delay" in connection with the collection of customs duties. *Id.* The court ultimately concluded that Congress used that language because swift collection of duties was essential to government function. *Id.* Notably, the section of the Act of March 2, 1799 establishing § 580 provided that customs collectors should "*forthwith and without delay*, cause a prosecution to be commenced for the recovery" of unpaid duties. Act of Mar. 2, 1799, ch 22, § 65, 1 Stat. 627, 676 (emphasis added). This suggests that Congress may have passed § 580, at least in part, out of concern for the steady flow of revenue.

On this point, two statutes conflicted. 19 U.S.C. § 1677g provided that overpayment interest would not begin accruing until after publication of an antidumping or countervailing duty order. 19 U.S.C. § 1505(c), by contrast, provided that interest would accrue from whenever the importer was required to deposit "estimated *duties*, fees, and interest." (emphasis added). The importer argued that it was entitled to § 1505(c) interest on the overpayment even though § 1677g interest was unavailable. In effect, the importer asserted that "any antidumping duty is a 'duty' within the scope of" 19 U.S.C. § 1505(b) and (c). *Dynacraft*, 24 CIT at 992, 118 F. Supp. 2d at 1291.

The court disagreed, equating the word "duties" in 19 U.S.C. § 1505(c) with customs duties and finding no interest due to the importer. *Id.* at 993, 118 F. Supp. 2d at 1292. In partial support of this finding, the court traced the disparate treatment of antidumping and customs duties both pre- and post-Uruguay Rounds Agreement Act ("URAA"). For instance, before the URAA, the Customs Court considered "regular" duties to be customs duties and "special" duties to include antidumping duties. *Id.* at 992, 118 F. Supp. 2d at 1291 (citing *Int'l Forwarding*, 6 Cust. Ct. at 882). Congress maintained a similar distinction, referring to antidumping duties as "special duties" and countervailing duties as "additional duties." *Id.*, 118 F. Supp. 2d at 1291 (citing 19 U.S.C. § 1516(a) (Supp. V. 1975)); *see also* S. Rep. No. 67–16, at 1 (1921) (establishing a "special dumping duty" to be imposed "in addition to the duties imposed . . . by law"). The URAA statutory scheme continued to separate the two types of duties, placing antidumping duties in a separate subtitle from other duties and referring to antidumping duties as "additional duties." 24 CIT at 992–93, 118 F. Supp. 2d at 1292 (citing URAA, Pub. L. No. 103465, 108 Stat. 4809 (1994)). Based on its examination, the *Dynacraft* court concluded that "antidumping and countervailing duties were never intended to be regular or general duties." *Id.* at 992, 118 F. Supp. 2d at 1291.

In a different context, the Government itself has advocated an approach similar to that of the *Dynacraft* court. *See Wheatland*, 495 F.3d at 1361–63. In *Wheatland*, the Federal Circuit considered whether safeguard duties were "United States import duties" for purposes of 19 U.S.C.§ 1677a(c)(2)(A) calculations. Because safeguard duties did not exist at § 1677a(c)(2)(A)'s original enactment, there was no congressional guidance on the disposition of those particular duties. *Id.* at 1362. The Government averred that Congress did not intend for all duties to be "United States import duties" and that "special" duties like antidumping duties "should be distinguished

from ordinary customs duties." *Id.* at 1361. The Government likened safeguard duties to special antidumping duties in purpose and function and reasoned that those duties were, thus, not "United States import duties" under § 1677a(c)(2)(A). *Id.* at 1361–62. The Federal Circuit upheld the Government's interpretation as "clearly reasonable." *Id.* at 1366.

This court finds the reasoning in *Dynacraft* and *Wheatland* instructive in this case. Here, like in those cases, the court is asked to construe the open-ended word "duties" to include all types of duties. However, the *Dynacraft* and *Wheatland* cases counsel that the meaning of "duties" is not necessarily so expansive and that it may be appropriate to distinguish between duties. Such a distinction is necessary here. Antidumping duties were created over 120 years after § 580's enactment, are meaningfully different from the customs duties existing in 1799, and have long been treated as meaningfully different by Congress, courts, and the Government.[7] For these reasons, the court cannot conclude that Congress in 1799 clearly would have intended § 580 to extend to all duties, no matter how distinct. *See Newman*, 109 U.S. at 138. Accordingly, § 580 interest is not available to the Government in this action.

B. The Government is entitled to equitable interest

Although the Government cannot receive interest under § 580, the Government is entitled to equitable prejudgment interest. Prejudgment interest is premised on the idea that it is "inequitable and unfair for the government to make an interest-free loan . . . from the date of final demand to the date of judgment." *United States v. Imperial Food Imps.*, 834 F.2d 1013, 1016 (Fed. Cir. 1987); *see also West Virginia v. United States*, 479 U.S. 305, 310–11 n.2 (1987) (affirming award "to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered"). Therefore, the "principle of full compensation" underlies prejudgment

[7] Despite these well-established differences, the Government would have the court read § 580 to apply to antidumping duties by implication. In other words, because Congress has sometimes used the word "duties" to refer to all types of duties, the Government asserts that § 580's language should similarly apply to all duties. *See* Pl.'s Resp. Br. 9–11. In the Government's view, Congress could have repealed § 580 or exempted duties from its coverage had it intended a different result, but it did not. Pl.'s Br. 22.

The court disagrees. Initially, the Government's argument is undercut by its own assertion in *Wheatland* that "duties" does not necessarily mean all duties. Moreover, the Government's argument relies on congressional *inaction* —a particularly weak tool for ascertaining congressional intent. *See Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1342 (Fed. Cir. 2003). Lastly, the court is not asked to decide whether Congress has ever used the word "duties" to refer to all types of duties. Rather, the court must decide whether to interpret § 580 beyond its initial reach absent persuasive indication that Congress clearly would have intended that result.

interest awards. *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1368 (Fed. Cir. 2005); *accord City of Milwaukee v. Nat'l Gypsum Co.*, 515 U.S. 189, 195 (1995).

An award of equitable interest in this case raises two primary issues: (1) whether interest may accrue against AHAC absent a showing of bad faith or dilatory conduct, and (2) whether the court must balance relative equities before awarding interest. For the following reasons, the court finds that AHAC did not need to exhibit bad faith to be liable for equitable interest beyond its bond limit. The court also finds that equity favors awarding the Government prejudgment interest from the due date of the second demand on AHAC.

i. *AHAC is liable for equitable prejudgment interest in excess of its bond limit*

Regarding the first issue, sureties are normally liable only for duties, fees, and interest up to the bond limit. *See United States v. Wash. Int'l Ins. Co.*, 25 CIT 1239, 1241–42, 177 F. Supp. 2d 1313, 1316 (2001). However, sureties may be answerable for interest beyond that limit for "their own default in *unjustly* withholding payment after being notified of the default of the principal." *United States v. U.S. Fid. & Guar. Co.*, 236 U.S. 512, 530–31 (1915) (emphasis added); *accord Ins. Co. of N. Am. v. United States*, 951 F.2d 1244, 1246 (Fed Cir. 1991).

The parties disagree about when a surety's failure to pay becomes unjust. AHAC argues that equitable interest beyond the bond limit is available only when the surety exhibits bad faith or dilatory conduct. Def.'s Br. 13–14 (citing *Wash. Int'l*, 25 CIT at 1243, 177 F. Supp. 2d at 1318). The Government maintains that misconduct is not a precondition to an award of equitable interest here. *See* Pl.'s Resp. Br. 15–17 (citing *United States v. Canex Int'l Lumber Sales Ltd.*, Slip Op. 11–98, 2011 WL 3438870 (CIT Aug. 5, 2011); *United States v. Millenium Lumber Distrib. Co.*, 37 CIT __, 887 F. Supp. 2d 1369 (2013)).

When addressing the accrual of prejudgment interest in excess of a surety's bond limit, the Federal Circuit has held that "if a surety delays payment beyond proper notification of liability, interest accrues on the debt." *Ins. Co. of N. Am.*, 951 F.2d at 1246 (interpreting the "unjustly withholding" language from *U.S. Fid. & Guar. Co.*). As a result, the court finds that AHAC need not have exhibited bad faith to be liable for interest beyond its bond limit. Rather, the dispositive fact here is that AHAC did not pay following the Government's proper demand on the continuous bond, thereby depriving the Government of the ability to use the withheld funds. That failure exposes AHAC to potential interest liability in excess of its bond limit.

ii. *The court finds that an award of prejudgment interest is warranted here*

However, case law is less clear regarding whether prejudgment interest should be awarded *automatically* after a surety's default or whether the court must first balance equities. *See Princess Cruises, Inc.*, 397 F.3d at 1368 ("The degree to which the trial court is to balance equitable factors to determine whether to award prejudgment interest is not easy to discern from the case law."). Earlier Supreme Court case law suggested that prejudgment interest turned on a balancing of relative equities. For instance, in *Blau v. Lehman*, 368 U.S. 403, 414 (1962), the Supreme Court noted that "'interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.'" (quoting *Bd. of Comm'rs of Jackson Cty. v. United States*, 308 U.S. 343, 352 (1939)).

However, in the years since *Blau*, the Supreme Court has moved towards a "general rule" that prejudgment interest is available "subject to a limited exception for 'peculiar' or 'exceptional' circumstances." *Nat'l Gypsum Co.*, 515 U.S. at 195 (noting, in a maritime case, that full compensation is the "essential rationale" for awarding prejudgment interest). Indeed, in a case involving a contractual dispute between West Virginia and the Federal Government, the Court explicitly rejected a balancing of the equities approach when awarding prejudgment interest to the Government. *West Virginia*, 479 U.S. at 311 n.3. The Court did note, though, that other equitable considerations like laches might bar a valid claim for interest. *Id.* In *Kansas v. Colorado*, 533 U.S. 1, 13–14 (2001), the Court similarly suggested that prejudgment interest is now "imposed as a matter of course" without balancing the equities.

Although case law diverges on what equitable factors the Court should consider in awarding prejudgment interest, it is clear that full compensation should be the court's overriding concern. It appears that not awarding equitable prejudgment interest would be aberrational and due to exceptional circumstances. In this case, AHAC believes that such exceptional circumstances exist because (1) the Government delayed in bringing suit, (2) AHAC raised good faith defenses to liability, and (3) Customs did not timely liquidate the subject entries. Def.'s Br. 15–17; Def.'s Resp. Br. 5–8. But those reasons do not demonstrate that equitable interest is inappropriate here.

While the Government's delay in bringing suit may justify limiting or declining to award interest, the Government did not excessively

delay instituting the instant action. *See United States v. Reul*, 959 F.2d 1572, 1578–79 (Fed. Cir. 1992) (noting that the Government's "laxness" in bringing an action may factor into an equity analysis); *West Virginia*, 479 U.S. at 311 n.3 (citing doctrine of laches). Although the Government waited until close to the expiration of the statute of limitations, AHAC had no reason to believe that the Government had abandoned its claim, nor does it pinpoint any prejudice that it suffered as a result of the delay. AHAC does not argue, for instance, that it was unable to successfully defend itself in the Government's action.

The fact that AHAC raised good-faith defenses to liability also does not constitute "an extraordinary circumstance that can justify denying prejudgment interest." *See Nat'l Gypsum Co.*, 515 U.S. at 198. As the Supreme Court noted in a maritime case, "the existence of a legitimate difference of opinion on the issue of liability is merely a characteristic of most ordinary lawsuits." *Id.* at 198. Indeed, if the court were to award prejudgment interest only when confronted with bad faith claims, the prevailing party would rarely be fully compensated.

Finally, the court likewise disagrees that Customs' erroneous reliquidations bar equitable interest, even though the court generally should "refrain from action which unnecessarily countenances regulatory breaches." *See United States v. Angelakos*, 12 CIT 515, 518, 688 F. Supp. 636, 639 (1988). The Government only seeks interest from the second Formal Demand on the Surety, which AHAC received after the erroneous June 2005 reliquidations. *See* Transcript of Oral Argument 6, ECF No. 49. This actually benefits AHAC because AHAC's bond limit was already exhausted after the June 2004 reliquidations, and AHAC ultimately could have been liable for prejudgment interest accruing after the first Formal Demand on the Surety pursuant to the June 2004 liquidations. Thus, the court finds that commencing interest after the second Formal Demand on the Surety became due strikes a fair balance between the parties.

In sum, equity favors awarding the Government interest in this action. The court, thus, awards prejudgment interest at a rate set forth in 26 U.S.C. § 6621, commencing from the due date of the second Formal Demand on the Surety. The court also awards postjudgment interest at a rate set forth in 28 U.S.C. § 1961 "based on the same considerations of equity and fairness." *United States v. C.H. Robinson Co.*, 36 CIT __, __, 880 F. Supp. 2d 1335, 1348 (2012); *see also United States v. Great Am. Ins. Co. of New York*, Nos. 2012–1462, 2012–1473, 2013 WL 6820678, at *3 (CAFC Dec. 27, 2013) (extending 28 U.S.C. § 1961 to this Court even though it is expressly applicable to only district courts).

CONCLUSION

For the foregoing reasons, the court grants in part and denies in part the Government's motion for summary judgment. The Government's motion is granted with respect to the issue of AHAC's liability under continuous bond number 270114235. Regarding the Government's interest claims, the court grants the Government's claim for equitable pre- and post-judgment interest, but denies the claim for statutory interest under 19 U.S.C. § 580. Judgment will enter accordingly.

Dated: January 23, 2014
New York, New York

/s/ Richard W. Goldberg
Richard W. Goldberg
SENIOR JUDGE

Slip Op. 14–13

JTEKT CORP., Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN CO., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 06–00250

[Granting partial relief from a prior order issued in litigation contesting a determination that concluded administrative reviews of antidumping duty orders on ball bearings and parts thereof]

Dated: February 10, 2014

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Diane A. MacDonald, *Kevin M. O'Brien*, *Christine M. Streatfeild*, and *Sonal Majmudar*, Baker & McKenzie, LLP, of Chicago, IL, for plaintiffs FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd.

Diane A. MacDonald, *Kevin M. O'Brien*, and *Christine M. Streatfeild*, Baker & McKenzie, LLP, of Chicago, IL, for plaintiffs and defendant-intervenor, American NTN Bearing Manufacturing Corporation, NTN Bearing Corporation of America, NTN-Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation.

Greyson L. Bryan and *Nausheen Hassan*, O'Melveny & Myers, LLP, of Washington D.C., for plaintiffs Nachi Technology, Inc., Nachi-Fujikoshi Corporation, and Nachi America, Inc.

Robert A. Lipstein and *Alexander H. Schaefer*, Crowell & Moring, LLP for plaintiffs NSK Corporation, NSK Ltd., and NSK Precision America, Inc.

L. Misha Preheim, Trial Attorney, Civil Division, Commercial Litigation Branch and *Claudia Burke*, Assistant Director, U.S. Department of Justice, for defendant. With them on the brief were *Tony West*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief were *Deborah R. King* and *Shana Ann Hofstetter*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce.

Geert M. De Prest and *Terence P. Stewart*, Stewart and Stewart, of Washington D.C., for plaintiff and defendant-intervenor, The Timken Company. With them on the brief was *Lane S. Hurewitz*.

OPINION AND ORDER

Stanceu, Judge:

Before the court are two motions which seek, *inter alia*, partial relief from the July 29, 2011 Opinion and Order (the "Second Remand Order") issued in *JTEKT Corp. v. United States*, 35 CIT __, 780 F. Supp. 2d 1357 (2011) ("*JTEKT II*"). Def.'s Mot. for Expedited Recons. or Relief from J. 7 (Aug. 12, 2011), ECF No. 173 ("Def.'s Mot."); The Timken Co.'s Mot. for Recons. or Relief from J. 5 (Aug. 10, 2011), ECF No. 171 ("Timken's Mot."). The court grants these motions in part. Also before the court is a motion seeking deconsolidation, dismissal of various claims, and entry of a scheduling order, which the court grants in part. The Timken Co.'s Mot. for Deconsolidation & Dismissal & for Entry of Scheduling Order, ECF No. 196 ("Timken's Mot. for Dismissal").

I. BACKGROUND

In this consolidated case,[1] several plaintiffs contested a final antidumping determination (the "Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to conclude the sixteenth administrative reviews of antidumping duty orders on ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom. *See JTEKT Corp. v. United States*, 33 CIT 1797, 1798–1799, 675 F. Supp. 2d 1206, 1213 (2009) ("*JTEKT I*"); *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews*, 71 Fed. Reg. 40,064, 40,065 (July 14, 2006) ("*Final Results*"). The sixteenth administrative reviews cover entries of subject merchandise made from May 1, 2004 through April 30, 2005. *Final Results*, 71 Fed. Reg. at 40,064.

Plaintiffs in this consolidated case are JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT"); FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"); NSK Corporation, NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK"); Nachi Technology, Inc., Nachi-Fujikoshi

[1] Six actions are consolidated under Consolidated Court Number 06–00250: Nippon Pillow Block Co. Ltd. v. United States (Ct. No. 06–00258); Timken US Corp. v. United States (Ct. No. 06–00271); NSK Ltd. v. United States (Ct. No. 06–00272); NTN Corp. v. United States (Ct. No. 06–00274); and Nachi-Fujikoshi Corp. v. United States (Ct. No. 06–00275). Order Granting Mot. to Consol. Cases (Oct. 2, 2006), ECF No. 17.

Corporation, and Nachi America, Inc. (collectively, "Nachi"); and American NTN Bearing Manufacturing Corporation, NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN"), which is both a plaintiff and a defendant-intervenor, as is the Timken Company ("Timken").[2]

The court's prior opinions provide detailed background information concerning this case, which concerns the review of the antidumping duty order on ball bearings and parts thereof from Japan. *See JTEKT I*, 33 CIT at 1799–1805, 1864–65, 675 F. Supp. 2d at 1213–18, 1263–64; *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1361; Stay Order 1 (June 4, 2012), ECF No. 185.

Plaintiffs JTEKT, NTN, NPB, and Nachi, challenged, *inter alia*, the Department's use of the "zeroing" methodology in calculating antidumping margins in the sixteenth administrative reviews. According to this methodology, Commerce assigns to U.S. sales made above normal value a dumping margin of zero, rather than a negative margin, when calculating weighted-average dumping margins. *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1360. Those plaintiffs argued generally that zeroing violates domestic antidumping laws and is inconsistent with international obligations of the United States. *JTEKT I*, 33 CIT at 1801–02, 675 F. Supp. 2d at 1214–15.

In *JTEKT I*, the court ordered Commerce to reconsider various aspects of the Final Results but, according to the law governing at that time, affirmed the Department's use of zeroing in the sixteenth administrative reviews. *Id.*, 33 CIT at 1864–65, 675 F. Supp. 2d at 1263–64. After Commerce submitted, in response to *JTEKT I*, its first remand redetermination and after plaintiffs filed their comments thereon, plaintiff NTN moved to stay this action, citing the Department's plans to modify the method for calculating weighted-average dumping margins to eliminate the future use of zeroing. Pl.'s Mot. to Stay Further Proceedings Pending the Finality of New Antidumping Margin Methodology or, in the Alt., Mot. to Allow Further Briefing 2, 5–9 (Jan. 28, 2011), ECF No. 159 (*citing Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin & Assessment Rate in Certain Antidumping Duty Proceedings,* 75 Fed. Reg. 81,533, 81,534–35 (Dec. 28, 2010)). In the alternative, NTN requested an opportunity to submit additional briefing on the zeroing issue. *Id.* at 2.

In *JTEKT II*, the court construed NTN's motion for a stay as a

[2] American NTN Bearing Manufacturing Corporation, NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN") are defendant-intervenors in Timken US Corporation v. United States (Ct. No. 06–00271), which is consolidated in this action.

motion for reconsideration of the court's decision in *JTEKT I* to uphold the Department's use of zeroing in the Final Results when determining the margins for NTN, JTEKT, Nachi, and NPB. *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1363. In the Second Remand Order, the court sustained in part and remanded in part the Department's first remand redetermination, finding that the redetermination complied in part with the court's order in *JTEKT I* and with the applicable law. *Id.*, 35 CIT at __, 780 F. Supp. 2d at 1371. The court directed Commerce to reconsider the use of zeroing in light of two intervening decisions of the Court of Appeals for the Federal Circuit ("Court of Appeals") that called into question the Department's use of zeroing in administrative reviews.[3] *Id.* The court also instructed Commerce on remand to "set forth an explanation of how the language of 19 U.S.C. § 1677(35) as applied to the zeroing issue permissibly may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews." *Id*. Finally, the court ordered Commerce to reconsider the Department's decision to reject NTN's proposal that Commerce incorporate additional design type categories into the "model-match" methodology. *Id.* at __, 780 F. Supp. 2d at 1363.

Timken and defendant each filed a motion, on August 10, 2011 and August 12, 2011, respectively, requesting that the court uphold the Department's use of zeroing in the sixteenth administrative reviews and either reconsider or grant relief from the court's Second Remand Order as it pertains to zeroing. Timken's Mot. 4–5; Def.'s Mot. 7. Defendant also requested an extension of time to file the second remand redetermination after the court decides the motions for reconsideration or relief. Def.'s Mot. for Enlargement of Time to File Remand Redetermination (Sept. 21, 2011), ECF No. 177 ("Def.'s Extension of Time Mot.").

Before the court responded to the motions for reconsideration or relief, several plaintiffs moved to stay this action pending the final disposition of *Union Steel v. United States*, CAFC Ct. No. 2012–1248, a case then pending before the Court of Appeals that involved the permissibility of the Department's use of zeroing in an administrative review despite the Department's having discontinued the methodology in antidumping investigations. *See* Joint Mot. for Stay of Proceedings Pending Appeal in *Union Steel v. United States* (May 4,

[3] The Court of Appeals for the Federal Circuit ("Court of Appeals") held that Commerce had not provided a satisfactory explanation for the Department's different interpretation of 19 U.S.C. § 1677(35) in the antidumping administrative review and investigation contexts. *See JTEKT Corp. v. United States,* 642 F.3d 1378, 1384–85 (Fed. Cir. 2011); *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1372–73 (Fed. Cir. 2011).

2012), ECF No. 182 ("Pls.' Mot. to Stay Pending *Union Steel*"). On June 4, 2012, the court stayed further proceedings in this action until thirty days after the final resolution of all appellate proceedings in *Union Steel*. *See* Stay Order 1. The Court of Appeals issued its opinion on April 16, 2013, *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013) ("*Union Steel*"), and issued its mandate on June 10, 2013. The parties' time for filing a petition for writ of *certiorari* expired on July 15, 2013. By the court's order, the stay in this action expired on August 14, 2013.

After the stay pending *Union Steel* expired, several plaintiffs and defendant each filed status reports on August 8, 2013 and August 9, 2013, respectively. Pls.' Status Report, ECF No. 191 ("Pls.' Status Report"); Def.'s Status Report & Notice of Supplemental Authority 2, ECF No. 192 ("Def.'s Status Report"). On January 31, 2014, Timken filed an additional motion requesting deconsolidation, a scheduling order for the remand proceeding addressing one claim, and dismissal of the remaining claims. Timken's Mot. for Dismissal 1.

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), pursuant to which the court reviews actions commenced under Section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting the final results of an administrative review that Commerce issues under Section 751 of the Tariff Act, 19 U.S.C. § 1675(a).[4]

As discussed below, the court relieves Commerce of the directive concerning zeroing in the Second Remand Order based on the intervening decision of the Court of Appeals in *Union Steel*. The court, however, does not adopt the additional measures sought in Timken's second motion. *See* Timken's Mot. for Dismissal 1. The court maintains the directive in the Second Remand Order as to the claim brought by NTN pertaining to additional design types in the Department's model-match methodology. *See JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1371–72.

A. Motions for Reconsideration or Relief from Judgment

Pursuant to 28 U.S.C. § 2646 and USCIT Rule 59(a)(1)(B), the court may, on a party's motion or *sua sponte*, grant rehearing. On a party's motion, the court may grant rehearing "for any reason for which a rehearing has heretofore been granted in a suit in equity in federal

[4] Unless otherwise indicated, all statutory citations herein are to the 2006 edition of the U.S. Code.

court." USCIT R. 59(a)(1)(B).[5] The court may also grant a timely motion for rehearing "for a reason not stated in the motion" or on its own initiative "[a]fter giving the parties notice and an opportunity to be heard." *Id.* R. 59(d). It is within the court's discretion to grant or deny relief under Rule 59 and in doing so, the court may exercise "all the powers in law and equity of . . . a district court of the United States," 28 U.S.C. § 1585. *See Nan Ya Plastics Corp., Am. v. United States*, 37 CIT __, __, 916 F. Supp. 2d 1376, 1378 (2013).

Defendant and Timken request that: (1) the court provide them with relief from the directive concerning zeroing contained in the Second Remand Order; and (2) the court affirm the *Final Results* with respect to zeroing. Timken's Mot. 4–5; Def.'s Mot. 7.

1. The Court Relieves Defendant from the Directive Concerning Zeroing Contained in the Second Remand Order

In light of the intervening decision by the Court of Appeals in *Union Steel*, the court relieves defendant from the directive concerning zeroing contained in the Second Remand Order. In *Union Steel*, the Court of Appeals affirmed a decision of this Court that held reasonable the Department's explanation for the continued use of zeroing in administrative reviews despite the Department's having eliminated the methodology in antidumping investigations. *Union Steel*, 713 F.3d at 1103. As defendant notes in its status report following the decision in *Union Steel*, that decision effected an intervening change in the controlling law. Def.'s Status Report 2. Based on the decision in *Union Steel*, the court concludes that defendant and Timken are entitled to relief from the court's Second Remand Order under USCIT Rule 59(d) for reasons not stated in the parties' motions.[6] The court therefore relieves defendant from the instructions in the Second Re-

[5] The moving parties also requested relief under USCIT Rule 60, a rule inapplicable because the court's July 29, 2011 decision was not a "final judgment, order, or proceeding" as required for relief under that rule. *See Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 406 (Fed. Cir. 1989) (noting that relief under Rule 60(b) is available only after the court "has entered a final judgment or issued a final order"); *Badger-Powhatan v. United States*, 808 F.2d 823, 825 (Fed. Cir. 1986) (determining that a remand order is not a final appealable decision).

[6] Defendant and Timken asserted that they are entitled to relief because at the time the *Final Results* were published, Commerce could not have explained the Department's policy of distinguishing between antidumping investigations and administrative reviews because it had not yet adopted the policy. Def.'s Mot. for Expedited Recons. or Relief from J. 1–2, 5–7 (Aug. 12, 2011), ECF No. 173 ("Def.'s Mot."); The Timken Co.'s Mot. for Recons. or Relief from J. 3–4 (Aug. 10, 2011), ECF No. 171. Defendant also argued that due to Court of Appeals precedents upholding zeroing when Commerce used the methodology in both investigations and administrative reviews, the court was required to sustain the use of zeroing when ruling on the first remand redetermination Commerce issued in this litigation. Def.'s Mot. 6.

mand Order such that Commerce will not be required, at least at this time, to reconsider or provide an explanation of the use of zeroing in the sixteenth administrative reviews.

2. The Court Declines to Affirm the Final Results as to Zeroing at this Time

Because it appears that the claims challenging zeroing in this case are indistinguishable from those rejected in *Union Steel*, in which the Court of Appeals affirmed the Department's use of zeroing, the court is considering whether to affirm the *Final Results* as to zeroing. The court, however, will hold in abeyance any ruling on whether to affirm the *Final Results* with respect to zeroing until the parties have had "an opportunity to be heard" in accordance with the notice requirement of USCIT Rule 59(d). The court will allow the parties the opportunity to submit, within thirty days, supplemental briefing on the narrow question of whether the holding of *Union Steel* is dispositive of plaintiffs' zeroing claims, and if not, what further action the court should take to resolve those claims. Any such submission is voluntarily.

B. Timken's Motion for Deconsolidation and Dismissal

Timken's motion for deconsolidation and dismissal is in a large part repetitive of Timken's earlier motion for reconsideration or relief. The later motion differs from the earlier motion only in that the later motion seeks deconsolidation and dismissal of various claims. *See* Timken's Mot. for Dismissal 3. The court's decision on Timken's earlier motion addresses the issue Timken raises in the later motion concerning the effect of the decision of the Court of Appeals in *Union Steel*.

As to the additional requests in Timken's second motion (*i.e.*, for deconsolidation and dismissal of claims), the court views these requests as premature and better resolved when the court reviews the second remand redetermination that Commerce issues in accordance with this Opinion and Order. By requesting dismissal of various claims, Timken seeks a final determination or judgment as to some, but not all, claims in this consolidated case. Under USCIT Rule 54(b), entering a partial judgment concerning only some of the claims in a case is appropriate only where "there is no just reason for delay." USCIT R. 54(b). The court does not conclude that "there is no just reason for delay" so as to justify piecemeal adjudication of this case, especially because plaintiffs have not yet had the opportunity, following *Union Steel*, to be heard on whether the court should affirm the

Final Results as to zeroing. The court therefore declines, at this time, to dismiss any claims in this case.

C. NTN's Proposed Design Type Categories

The court's Second Remand Order instructed Commerce to reconsider NTN's proposal that Commerce incorporate additional design type categories in applying the model-match methodology "to the extent necessary to correct any errors revealed by the Department's review of the record evidence." *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1371–72. Defendant and Timken did not seek relief from this aspect of the court's Second Remand Order. Therefore, the directive to Commerce concerning NTN's proposed design type categories, as set forth in the court's Second Remand Order, remains in effect. *See id.*

D. Defendant's Motion for Extension of Time

Due to changes in the scope of the court's Second Remand Order announced herein and the time that has passed since the court's decision in *JTEKT II*, the court deems it appropriate to grant defendant's request for an extension of time for the filing of a second remand redetermination, to which no party objected. *See* Def.'s Extension of Time Mot. 1. The court allows, per that request and the parties' proposed schedule, ninety days from the date on which the court issues this Opinion and Order. Def.'s Status Report 1; Pls.' Status Report 6; Timken's Mot. for Dismissal 2.

III. CONCLUSION AND ORDER

Therefore, upon consideration of defendant's Motion for Expedited Reconsideration or Relief from Judgment, Timken's Motion for Reconsideration or Relief from Judgment, defendant's Motion for Extension of Time, Timken's Motion for Deconsolidation and Dismissal and for Entry of Scheduling Order, plaintiffs' responses thereto, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the U.S. Department of Commerce ("Commerce" or the "Department") is relieved from the directive in the July 29, 2011 Opinion and Order issued in *JTEKT Corp. v. United States*, 35 CIT __,__, 780 F. Supp. 2d 1357, 1371 (2011) ("*JTEKT II*"), instructing Commerce to reconsider its decision to use zeroing during the sixteenth administrative reviews and either alter that decision or set forth an explanation of how the language of 19 U.S.C. § 1677(35) permissibly may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews; it is further

ORDERED that Commerce shall comply with the Opinion and Order in *JTEKT II*, 35 CIT at __, 780 F. Supp. 2d at 1371, with respect to NTN's proposal to incorporate additional bearing design types in the Department's model-match methodology and redetermine, as appropriate, the weighted-average dumping margin applied to NTN; it is further

ORDERED that Timken's motion to deconsolidate this case and dismiss certain claims is denied and that Timken's request that the court enter a scheduling order is granted; it is further

ORDERED that any party may submit, within thirty (30) days from the date of this Opinion and Order, a brief on the question of whether *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013), is dispositive of the zeroing claims in this case and, if not, what further action the court should take to resolve those claims; it is further

ORDERED that Commerce shall file its second remand redetermination within ninety (90) days of the date of this Opinion and Order; it is further

ORDERED that parties may file comments to the second remand redetermination within thirty (30) days of the date on which such redetermination is filed; and it is further

ORDERED that defendant may file responses to the comments within thirty (30) days of the date on which the last such comment is filed.

Dated: February 10, 2014
New York, New York

/s Timothy C. Stanceu
TIMOTHY C. STANCEU
JUDGE

Slip Op. 14–14

TIANJIN WANHUA CO., LTD., Plaintiff, SICHUAN DONGFANG INSULATING MATERIAL CO., LTD. and FUWEI FILMS (SHANDONG) CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, MITSUBISHI POLYESTER FILM, INC. and SKC, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 12–00095

[Plaintiffs' motion for judgment on the agency record in antidumping case denied. Defendant's motion to dismiss for failure to state a claim granted.]

Dated: February 12, 2014

David J. Craven, *David A. Riggle*, and *Saichang Xu*, Riggle & Craven, of Chicago, IL, for plaintiff and consolidated plaintiffs.

Loren M. Preheim, Senior Trial Counsel, and *David F. D'Alessandris*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With them on the brief were *Jane C. Dempsey*, Trial Attorney, *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Michael T. Gagain*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Ronald I. Meltzer, *Patrick J. McClain*, *David M. Horn*, and *Jeffrey I. Kessler*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, DC, for defendant-intervenors.

OPINION

Restani, Judge:

Before the court is the motion for judgment upon the agency record pursuant to U.S. Court of International Trade Rule 56.2 filed by plaintiff Tianjin Wanhua Co., Ltd. and consolidated plaintiffs Sichuan Dongfang Insulating Material Co., Ltd. and Fuwei Films (Shandong) Co., Ltd. (collectively "plaintiffs"), seeking remand to the U.S. Department of Commerce ("Commerce") with instructions to preclude Commerce from using zeroing in the antidumping administrative review at issue. *See* Pl.'s Rule 56.2 Mot. for J. upon the Agency R., ECF No. 41. Any other claims raised by the complaints are waived for failure to present them in briefing before the court. *See* USCIT R. 56.2(c).[1] In response, defendant United States ("the Government") filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to U.S. Court of International Trade Rule 12(b)(5). *See* Def.'s Mot. to Dismiss, ECF No. 45.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006). Commerce's determinations, findings, and conclusions will be upheld unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

The crux of plaintiffs' argument is that Commerce inadequately explained how 19 U.S.C. § 1677(35) permits an interpretation that allows for differing applications of zeroing in antidumping investigations and reviews, citing *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) and *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011). The issue of law now before the court is no different from that presented to the Court of Appeals for the Federal Circuit ("Federal Circuit") in *Union Steel v. United States*, 713 F.3d 1101

[1] Remaining defendant-intervenors Mitsubishi Polyester Film, Inc. and SKC, Inc. have filed no motions seeking any relief.

(Fed. Cir. 2013) ("*Union Steel*"). In that case, Commerce explained that its differing applications of zeroing[2] are due to the contextual differences between antidumping investigations and administrative reviews, as well as Commerce's discretion to take necessary and statutorily permitted measures to meet international obligations. *See id.* at 1108–10. The Federal Circuit found Commerce's explanation adequate and, as a result, upheld Commerce's use of zeroing in administrative reviews. *See id.* at 1111.

Plaintiffs have failed to put forth an argument distinguishing this case from *Union Steel*, and, in fact, concede that this court is bound by *Union Steel*. *See* Pls.' Combined Resp. & Reply, ECF No. 50. Accordingly, the court grants the Government's motion to dismiss for failure to state a claim and denies plaintiffs' motion for judgment on the agency record. Judgment will enter accordingly.

Dated: February 12, 2014
New York, New York

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

Slip Op. 14–15

PEER BEARING COMPANY-CHANGSHAN, Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 10–00013

[Responding to defendant's motion seeking clarification of court's order of remand and setting new due date for submission of remand redetermination]

Dated: February 13, 2014

John M. Gurley and *Diana Dimitriuc Quaia*, Arent Fox LLP, of Washington, DC, argued for plaintiff. With them on the brief was *Matthew L. Kanna*.

L.Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Joanna V. Theiss*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

William A. Fennell and *Terence P. Stewart*, Stewart and Stewart, of Washington, DC, argued for defendant-intervenor. With them on the brief was *Stephanie R. Manaker*.

[2] For a detailed explanation of the zeroing practice and its history, *see Union Steel v. United States*, 823 F. Supp. 2d 1346 (CIT 2012).

OPINION AND ORDER

Stanceu, Judge:

Defendant United States moves for clarification of a portion of a June 6, 2013 order that the court issued in *Peer Bearing Co.-Changshan v. United States*, 37 CIT __, 914 F. Supp. 2d 1343 (2013) ("*Peer Bearing*"). Def.'s Mot. for Clarification 1 (June 13, 2013), ECF No. 131 ("Def.'s Mot.").[1] Additionally, defendant requests an extension of time, until forty-five days from the court's decision on the motion for clarification, for the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to file the remand redetermination required by *Peer Bearing*. *Id.* at 3.

In this Opinion and Order, the court directs attention to certain aspects of *Peer Bearing* that address the question defendant raises in its motion for clarification. The court declines to modify the substance of its previous ruling and concludes that clarification of *Peer Bearing* beyond what is set forth in this Opinion and Order is unnecessary. As requested by defendant, *id.* at 3, the court extends the period in which Commerce shall submit the required remand redetermination, allowing forty-five days from the date of this Opinion and Order.

I. DISCUSSION

A. Defendant's Motion for Clarification

Defendant directs its motion for clarification to the third of six directives in the order set forth in *Peer Bearing*. This directive resulted from plaintiff's contesting the Department's ultimate finding, reached in the first remand redetermination, that certain tapered roller bearings ("TRBs") that had undergone processing in both the People's Republic of China ("China" or the "PRC") and Thailand were of Chinese origin and therefore within the scope of an antidumping duty order on TRBs and parts thereof from China. The court stated this directive as follows:

> Commerce shall submit to the court a second Remand Redetermination in which it redetermines, in accordance with the requirements of this Opinion and Order, the country of origin of certain tapered roller bearings ("TRBs") that underwent further processing in Thailand consisting of grinding and honing (finishing) of cups and cones, and assembly; . . . .

[1] Plaintiff Peer Bearing Company-Changshan and the Timken Company, a plaintiff and defendant-intervenor, did not expressly consent to, but did not oppose, defendant's motion for clarification. Neither party served a response within the fourteen-day deadline imposed by USCIT Rule 7(d).

Peer Bearing, 37 CIT at __, 914 F. Supp. 2d at 1357.

In its motion, defendant requests that the court clarify "whether the Court's Order *requires* Commerce to find that the TRBs were substantially transformed in Thailand and are thus of Thai origin, or whether the order permits Commerce to make new findings under each of the six criteria and make a determination based on these new findings." Def.'s Mot. 2 (emphasis in original). In positing these alternatives, defendant's request for clarification incorrectly interprets the court's Opinion and Order in *Peer Bearing*. With respect to the first alternative, defendant's formulation too broadly describes the court's holding. In stating its second alternative, defendant incorrectly presumes that *Peer Bearing* "permits Commerce to make new findings under each of the six criteria . . . ." *Id.* at 2. The court addresses each of these points below.

1. Defendant Construes Too Broadly the Holding in Peer Bearing

Rather than direct Commerce to find that the TRBs were substantially transformed in Thailand, the directive at issue requires Commerce to reconsider the country of origin of those TRBs "in accordance with the requirements of this Opinion and Order." *Peer Bearing*, 37 CIT at __, 914 F. Supp. 2d at 1357. As *Peer Bearing* explained, "the record in this case lacks substantial evidence to support the Department's current determination that the TRBs processed in Thailand were products of China for purposes of the antidumping duty order." *Id.*, 37 CIT at __, 914 F. Supp. 2d at 1356. The court ruled solely on "the Department's current determination," not on any future finding in a second remand redetermination, and grounded its ruling in the standard of review. *Id.*; *see* 19 U.S.C. § 1516a(b)(1)(B)(i). In doing so, the court held, *inter alia*, that a number of the factual findings upon which Commerce based its ultimate finding that the TRBs processed in Thailand were of Chinese origin were not based on substantial record evidence. *Peer Bearing*, 37 CIT at __, 914 F. Supp. 2d at 1352–56. Defendant's motion recognizes this point. Def.'s Mot. 2 (" . . . the Court ruled that substantial evidence does not support certain findings by Commerce . . . .").

The court did not reach the question of whether Commerce, in the second remand redetermination, is required to arrive at an ultimate finding that the TRBs in question are of Thai origin. Instead, the court left it to Commerce to decide, in the first instance, whether it is possible to reach an ultimate finding of Chinese origin in the second remand redetermination. The court did not presume or decide that an ultimate finding of Chinese origin in the second remand redetermi-

nation could be sustained. Such an ultimate finding may or may not be feasible, for it would have to contend with record evidence to the contrary and recognize the significance of the court's having disallowed a number of findings that were critical to the country of origin determination. Some examples of the findings held in *Peer Bearing* to be unsupported by substantial evidence suffice to clarify this point.

For instance, the court concluded that the record lacked substantial evidence to support the Department's finding that the processing performed in Thailand on the two major components of the TRBs (cups and cones) imparted no substantial changes to the physical and mechanical properties of the subject merchandise. *Peer Bearing*, 37 CIT at __, 914 F. Supp. 2d at 1352–53. The court also found unsupported by substantial evidence the Department's finding that the processing in Thailand did not impart a substantial change to the essential character of the subject merchandise. *Id.* This finding ignored the evidence demonstrating that no single component made in China imparted the essential character to the finished TRBs. *Id.* Also lacking was substantial evidence that the nature, extent, and sophistication of the processing performed in Thailand were not significant. *Id.*, 37 CIT at __, 914 F. Supp. 2d at 1353–54. Similarly, the court concluded that the record evidence did not support the finding that investment in the equipment in Thailand was not "significant" in comparison to investment in the equipment in China. *Id.* at 1354.

Because of the various flaws that *Peer Bearing* identified, the court could not sustain the Department's country of origin determination in the first remand redetermination. Any ultimate country of origin finding Commerce reaches in its second remand redetermination must rest on findings of fact that are supported by substantial evidence on the record and also must comply with the other requirements of the court's Opinion and Order in *Peer Bearing*.[2]

2. The Court Did Not Sustain All of the Department's "Substantial Transformation" Criteria

Defendant's second alternative, Def.'s Mot. 2 ("whether the order permits Commerce to make new findings under each of the six criteria and make a determination based on these new findings"), rests on an assumption that the court affirmed the criteria Commerce used to determine the country of origin for the subject merchandise in the first remand redetermination. In fact, the court did not do so.

[2] In its Opinion and Order, the court did not preclude Commerce from reopening the record to obtain and admit additional record evidence to support new findings of fact, instead deferring to the general principle that the decision of whether or not to reopen the record upon remand is a matter for an agency to decide. *Peer Bearing Co.-Changshan v. United States*, 37 CIT __, 914 F. Supp. 2d 1343 (2013).

The court found fault with the first and fifth criteria that Commerce applied to conclude that no substantial transformation occurred. The first criterion considers whether both the finished good and the finished and unfinished parts within the class or kind of merchandise are subject to the order. The court questioned the Department's conclusion as to the first criterion that "'[t]he fact that both the finished and unfinished products are within the scope of the order suggests that the TRBs are not substantially transformed in Thailand'" and noted that "the Remand Redetermination offers no reasoning in support of this conclusion." *Peer Bearing*, 37 CIT at __, 914 F. Supp. 2d at 1352 (quoting *Final Results of Redetermination Pursuant to Court Remand 8* (Apr. 11, 2012), ECF No. 107). The court explained that Commerce, in reaching the unsupported conclusion, had misstated the question presented, which was whether the finished and unfinished parts sent from China to Thailand were substantially transformed when undergoing processing in Thailand resulting in finished TRBs. *Id.* As the court reasoned, the hypothetical issue of whether "the Chinese-origin parts would have been considered subject merchandise had they been exported to the United States" has no apparent relevance to that question. *Id.*

As to the fifth criterion (ultimate use), the court found multiple flaws in the Department's analysis. Among those flaws was the erroneous finding that the inclusion of finished and unfinished parts within the scope of the Order "indicates that both finished and unfinished TRBs are intended for the same ultimate end-use, that is, a finished TRB that can ultimately be used in a downstream product." *Id.*, 37 CIT at __, 914 F. Supp. 2d at 1355. This finding erred in presuming that unfinished TRBs are at issue in this case and that the scope of the Order is relevant to the question of ultimate end use, which is an issue of fact. *Id.* The court also found flawed the Department's finding that the expected use of the unfinished TRB components is the same use as that of finished TRBs. *Id.*

B. The Court Grants Additional Time for Submission of the Second Remand Redetermination

In light of the above discussion, the court grants defendant's request that Commerce be allowed forty-five days from the date of this Opinion and Order to file the second remand redetermination.

II. CONCLUSION AND ORDER

Upon consideration of the court's Opinion and Order dated June 6, 2013, defendant's Motion for Clarification, and all other papers and proceedings had herein, it is hereby

ORDERED that the International Trade Administration, U.S. Department of Commerce shall submit its second remand redetermination within forty-five (45) days from the date of this Opinion and Order; it is further

ORDERED that Peer Bearing Company-Changshan ("CPZ") and The Timken Company ("Timken") shall have thirty (30) days from defendant's filing of the second remand redetermination to file any comments thereon; and it is further

ORDERED that defendant shall have fifteen (15) days from the filing of CPZ's or Timken's comments, whichever is later, in which to file any response to such comments.

Dated: February 13, 2014
New York, New York

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

Slip Op. 14–16

NETCHEM, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 12–00123

[Defendant's Motion to Dismiss for Lack of Jurisdiction is granted.]

Dated: February 14, 2014

Charles A. Zdebski, Eckert Seamans Cherin & Mellott, LLC, of Washington, DC, for plaintiff. With him on the brief was *Candace Lynn Bell*.

Saul Davis, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Amy M. Rubin*, Acting Assistant Director, International Trade Field Office.

OPINION

Goldberg, Senior Judge:

This suit challenges Customs and Border Protection's decision to apply a 3.7% *ad valorem* tariff rate to plaintiff Netchem, Inc.'s lanthanum oxide imports. In its complaint, Netchem invoked the court's jurisdiction under 28 U.S.C. § 1581(a) (2006). Defendant the United States (the "Government") now moves to dismiss the lawsuit for lack of jurisdiction under USCIT Rule 12(b)(1).

"Jurisdiction is . . . the authority conferred by Congress to decide a given type of case one way or the other." *Hagans v. Lavine*, 415 U.S. 528, 538 (1974). Without jurisdiction a court cannot hear a case, no

matter how persuasive the plaintiff's substantive arguments. *See Schick v. United States*, 31 CIT 2017, 2020, 533 F. Supp. 2d 1276, 1281 (2007) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

These rules compel the court to dismiss Netchem's action in its entirety. The court finds that Netchem's lanthanum oxide shipments or "entries" were untimely liquidated, untimely paid, or protested at the wrong port, depriving the court of authority to adjudicate Netchem's claims.

FACTUAL BACKGROUND

The facts that follow are uncontested.

Netchem, Inc., a Canadian corporation, imports chemicals into the United States. Compl., ECF No. 5, ¶ 1. Between June and December 2011, Netchem entered forty-three shipments of lanthanum oxide at three U.S. ports: Detroit, Port Huron, and Newark, NJ/New York, NY. *See* Summons, ECF No. 1, Schedule 1. Netchem initially classified these shipments under U.S. Harmonized Tariff Schedule ("HTSUS") subheading 2846.90.2010, which covers "rare-earth oxides except cerium oxide." Compl. ¶ 9–13. Items imported under this subheading enter the country duty free.

Then, in October 2011, U.S. Customs and Border Protection ("CBP") reclassified Netchem's lanthanum oxide shipments under HTSUS 2846.90.8000. Pl.'s Supp. Br., ECF No. 43 ("Pl.'s Second Supp. Br."), Ex. 1 (listing entry number 38 as "Original Tariff Code Correction Entry"). This subheading covers "other" compounds or mixtures of rare-earth metals and levies a 3.7% *ad valorem* tariff rate. Following CBP's reclassification, eighteen of Netchem's shipments fell subject to the 3.7% rate at entry. Twenty-five shipments that were initially classified as duty free were also charged 3.7% upon liquidation. The company paid $1,539,882.97 in duties for the forty-three entries contested in this case.*See id.*

Netchem protested CBP's classification decision in a document date-stamped March 19, 2012. Filed at the Port of Buffalo, the document petitioned CBP to reclassify not only the forty-three entries at issue here, but also thirteen lanthanum oxide entries made at Buffalo during the same period. Pl.'s Supp. Br., ECF No. 38 ("Pl.'s First Supp. Br."), App. A. Of these fifty-six entries, only twenty-six had been liquidated—with final duty liability fully ascertained—when Netchem filed the protest document. Pl.'s Second Supp. Br. Ex. 1; *see* 19 C.F.R. § 159.1 (2013) (defining liquidation). The remaining thirty entries, including all thirteen of Netchem's entries to Buffalo, were liquidated after March 19, 2012. Pl.'s Second Supp. Br. Ex. 1.

Buffalo's port director wholly refused to rule on Netchem's claims. The director instead returned the protest document to Netchem after number-stamping the first page. *See* Pl.'s First Supp. Br. App. A; Def.'s Reply Br., ECF No. 33 ("Reply"), 3–4. According to CBP officer Elise Morris, the director rejected the document because it included "entries filed at other ports and not at Buffalo." Reply Ex. A ¶ 5. The director would also have sent Netchem "written advice that [the document] was sent to the wrong port." *Id.* ¶ 8.

Netchem nevertheless assumed that its petition was "deemed denied" when CBP failed to decide the document's merits within thirty days. *See* Compl. ¶ 4; *see also* 19 U.S.C. § 1515(b) (outlining procedure for accelerated disposition of protests). Netchem filed this action with the Court of International Trade on May 4, 2012, listing in the summons its forty-three entries to Detroit, Port Huron, and New York. *See* Summons 2, Schedule 1. As of May 4, Netchem had paid liquidated duties on eighteen of these forty-three entries. *See* Pl.'s Second Supp. Br. Ex. 1. The remaining entries were paid sometime between May 9 and July 30, 2012. *See id.*; Reply 12.

Only one entry—UPS 3811755–6 from the Port of Detroit—was protested following liquidation and fully paid when the case began. *See* Reply 5, 11; Pl.'s Second Supp. Br. Ex. 1.

STANDARD OF REVIEW

The court reviews the Government's jurisdictional arguments in two steps.

To begin, the court must decide whether the statutory provisions invoked to dismiss Netchem's entries are indeed jurisdictional. The Supreme Court calls a statutory precondition to a suit "jurisdictional" only if "the Legislature clearly states that [the] threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006). A statutory limitation is not jurisdictional, however, "when Congress does not rank [the] statutory limitation . . . as jurisdictional." *Id.* at 516. The court may consider a provision's text, context, and historical treatment in this inquiry. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010); *Ford Motor Co. v. United States*, 635 F.3d 550, 555 (Fed. Cir. 2011); *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1300, 1305 (2012).

The court must then decide whether the facts satisfy these jurisdictional prerequisites. In its analysis, the court may look beyond the facts alleged in the complaint and consider evidence extrinsic to the

pleadings. *Shoshone Indian Tribe of Wind River Reservation v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012). Only uncontroverted factual allegations are accepted as true for the purposes of the motion. *Id.* If the court finds these uncontested facts do not establish jurisdiction over a given claim, the court must dismiss that claim. *See Schick*, 31 CIT at 2020, 533 F. Supp. 2d at 1281. Plaintiff bears the burden to prove jurisdictional facts by a preponderance of the evidence. *See McNutt*, 298 U.S. at 189.

The court finally observes, as a legal matter, that statutory provisions granting jurisdiction over denied protests "operate[] as a waiver of [the government's] sovereign immunity." *AutoAlliance Int'l, Inc. v. United States*, 357 F.3d 1290, 1293 (Fed. Cir. 2004). As such, jurisdictional conditions "must be strictly observed and are not subject to implied exceptions." *NEC Corp. v. United States*, 806 F.2d 247, 249 (Fed. Cir. 1986). The court will thus construe any ambiguity in the statute's jurisdictional language in favor of the Government. *Int'l Custom Prods., Inc. v. United States*, 37 CIT __, __, 931 F. Supp. 2d 1338, 1341 (2013).

DISCUSSION

The court now confronts the central question posed in the Government's motion to dismiss: Does the court have jurisdiction to determine the classification of the forty-three entries listed in Netchem's summons? The court holds, for all forty-three of the entries, that the answer is "no." Seventeen of Netchem's entries were not liquidated before being protested, divesting the court of authority to decide them. Another twenty-five entries were unpaid when Netchem filed this action, again depriving the court of jurisdiction. And although one entry—UPS 3811755–6—was timely liquidated and paid, the court cannot adjudicate it because it was protested at the wrong port. The court thus dismisses Netchem's case in its entirety.

I. Seventeen of Netchem's Entries Were Not Timely Liquidated

The Government argues the court lacks jurisdiction over seventeen entries that were untimely liquidated. Def.'s Supp. Resp. Pursuant to Order of Nov. 18, 2013, ECF No. 42 ("Def.'s Second Supp. Br."), 3–4. Under the statute, importers must lodge protests with CBP within 180 days following the liquidation of contested entries. 19 U.S.C. § 1514(c)(3)(A) (the "timeliness rule"). An importer must not file a protest before the entries disputed in that protest are liquidated. Here, the Government alleges a number of entries were liquidated after Netchem protested CBP's classification decision, thus violating the statute's timeliness rule.

The court first finds that this rule is jurisdictional. Congress granted the Court exclusive jurisdiction over a number of trade-related cases—including actions "to contest the denial of a protest . . . under section 515 of the Tariff Act of 1930"—in 28 U.S.C. § 1581. 28 U.S.C. § 1581(a). Section 515 of the Tariff Act of 1930, now codified at 19 U.S.C. § 1515, permits CBP to review protests "filed in accordance with" section 19 U.S.C. § 1514. 19 U.S.C. § 1515(a)–(b). Section 1514(c)(3)(A), in turn, says protests "shall be filed with [CBP] within 180 days after but not before . . . [the] date of liquidation." Through this stream of authority—flowing from the jurisdictional wellspring at 28 U.S.C. § 1581(a) to the timeliness rule at 19 U.S.C. § 1514(c)(3)(A)—Congress "clearly stat[ed] that [this] threshold limitation on [the] statute's scope [is] jurisdictional." *Arbaugh*, 546 U.S. at 515; *see also Reed Elsevier*, 559 U.S. at 163–65 (examining text to discern whether statute jurisdictional).

Furthermore, Federal Circuit decisions have long treated the timeliness rule as jurisdictional. *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1373 (Fed. Cir. 2002); *United States v. Reliable Chem. Co.*, 66 CCPA 123, 127–28, 605 F.2d 1179, 1183 (1979)[1]; *see also Chrysal USA, Inc. v. United States*, 36 CIT __, __, 853 F. Supp. 2d 1314, 1331 (2012). These cases are binding on the court, even if their holdings merit reconsideration in light of subsequent Supreme Court precedents. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1373–74 (Fed. Cir. 2001); *Baroque Timber*, 36 CIT at __, 865 F. Supp. 2d at 1308. Because the Federal Circuit has consistently treated the timeliness rule as jurisdictional in the past, the court treats the provision as jurisdictional now.

This legal finding compels the court to reject seventeen of Netchem's entries. As discussed above, the statute prohibits importers from filing protests before protested entries are liquidated. 19 U.S.C. § 1514(c)(3)(A). Yet according to the parties' supplemental briefing, seventeen of Netchem's entries were liquidated in September and October 2012, long after Netchem submitted its March 19, 2012 protest. Pl.'s Second Supp. Br. Ex. 1; Def.'s Second Supp. Br. 3–4. Because these entries were protested contrary to statute, the court dismisses them for want of jurisdiction.[2]

II. Twenty-five of Netchem's Entries Were Not Timely Paid

The Government also argues the court lacks jurisdiction over twenty-five entries that were fully paid after this action began. Def.'s Second Supp. Br. 1–3; Reply 11–13. Under 28 U.S.C. § 2637(a), an importer may challenge a denied protest before this Court "only if all

liquidated duties, charges, or exactions have been paid at the time the action is commenced." Recent Federal Circuit precedent treats this provision as jurisdictional. *See Heartland By-Prods., Inc. v. United States*, 568 F.3d 1360, 1363 n.3 (Fed. Cir. 2009) ("To obtain § 1581(a) jurisdiction, an importer must pay the duties as to which a protest has been denied."); *see also Epoch Design LLC v. United States*, 36 CIT __, __, 810 F. Supp. 2d 1366, 1371 (2012). This court follows suit.

Accordingly, the court dismisses the majority of Netchem's entries as untimely paid. The summons indicates that Netchem filed this case on May 4, 2012. Summons 2. But the undisputed facts show Netchem finished paying liquidated duties for twenty-five entries well after that date. *See* Pl.'s Second Supp. Br. Ex. 1 (showing Netchem began paying duties on May 9, 2012); Reply 12 (showing Netchem finished paying duties on July 30, 2012). The court thus lacks jurisdiction over those entries.[3]

III. The Court Lacks Jurisdiction over UPS 3811755–6 Because the Protest Was Not Filed in Accordance with Regulations

And then there was one. As held above, the court lacks jurisdiction over Netchem's forty-two entries that were either untimely liquidated or untimely paid. That leaves the court to consider the last entry remaining of the original forty-three: UPS 3811755–6.

The Government contends the court cannot decide Netchem's entries—including UPS 3811755–6—because "there was no validly filed and denied protest contested in this action." Reply 11. The logic proceeds as follows. Under the statute, protests must "be filed in writing . . . in accordance with regulations prescribed by the Secretary." 19 U.S.C. § 1514(c)(1) (the "statutory filing rule").[4] The regulations dictate that "[p]rotests shall be filed with the port director whose decision is protested." 19 C.F.R. § 174.12(d) (the "place-of-filing regulation"). According to the Government, Netchem violated 19 C.F.R. § 174.12(d) by protesting entries from Detroit, Port Huron, and New York at the Port of Buffalo. *See* Reply 10–11. And by disobeying this place-of-filing regulation, Netchem did not file its protest "in accordance with regulations prescribed by the Secretary." *See* 19 U.S.C. § 1514(c)(1). Hence the court lacks jurisdiction over the entries in Netchem's improperly filed protest.[5]

A. The Statutory Filing Rule Delimits Jurisdiction

The court agrees with the Government and holds that the statutory filing rule is jurisdictional. Like the rule mandating that protests be filed following liquidation and not before, *see* 19 U.S.C. § 1514(c)(3), an unbroken chain of authority links the court's jurisdictional grant

in 28 U.S.C. § 1581(a) to the filing rule in 19 U.S.C. § 1514(c)(1). The jurisdictional grant incorporates 19 U.S.C. § 1515 by reference. Section 1515, in turn, requires importers to lodge protests in compliance with § 1514, which sets forth the filing rule. This textual progression evinces Congress's intent to make the statutory filing rule a jurisdictional prerequisite.[6]

The filing rule's context and history also attest to the provision's jurisdictional nature. In the Customs Courts Act of 1970 (the "1970 Act"), a newly revised jurisdictional grant prohibited the Customs Court from claiming jurisdiction "unless . . . a protest ha[d] been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended." 28 U.S.C. § 1582(c) (1970) (repealed 1980). Section 514, for its part, mandated that protests be filed "in writing with the appropriate customs officer designated in regulations prescribed by the Secretary." 19 U.S.C. § 1514(b) (1970) (redesignated subsection (c) by Act of July 26, 1979, Pub. L. 96–39, § 1001(b)(3)(C), 93 Stat. 144, 305). The House Report accompanying the 1970 Act labeled compliance with these rules a jurisdictional must. H.R. Rep. No. 91–1067, at 16 (1970) ("The requirement in section 1582(c)(1) that the importer shall have exhausted his administrative remedies before the court can take jurisdiction of his case is a basic principle of administrative law and one that has been followed in customs cases. The provision, therefore, is a restatement of existing law.").

Then, in 1980, Congress passed another Customs Courts Act (the "1980 Act"). Pub. L. No. 96–417, 94 Stat. 1727. The 1980 Act replaced the jurisdictional grant from the 1970 Act with the language now found in 28 U.S.C. § 1581(a). *Id.* § 201, 94 Stat. at 1728. The 1980 Act also retained the requirement that protests be filed in accordance with the Secretary's regulations. 19 U.S.C. § 1514(c)(1) (1982) (amended 1993). In the accompanying House Report, the Committee on the Judiciary explained that the "new [jurisdictional] subsection *substantially restates* the courts' authority as presently set forth in 28 U.S.C. § 1582(a)." H.R. Rep. No. 961235, at 44 (1980) (emphasis added). The Committee also said that "the filing and denial of a protest *will continue as prerequisites* to the commencement of a civil action brought pursuant to proposed section 1581(a)." *Id.* (emphasis added). In short, Congress upheld compliance with the statutory filing rule as a jurisdictional prerequisite.

Although Congress altered the statute again in 1993, these amendments did not diminish the filing rule's jurisdictional status. *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, § 645, 107 Stat. 2057, 2206–07 (1993). From §

1514(c)(1), Congress deleted the reference to "the appropriate customs officer" and added language about filing protests electronically. *See id.* § 645, 107 Stat. at 2206. Congress retained the rule, however, that requires protests to "be filed in writing . . . in accordance with regulations prescribed by the Secretary." *Id.* And the rule remains intact today. This legislative history— stretching from 1970 to the present—confirms that the statutory filing rule is jurisdictional.

Lastly, the court notes that the statutory filing rule has received jurisdictional recognition in the case law. *Po-Chien, Inc. v. United States*, 3 CIT 17, 18 (1982), *United Flowers, Inc. v. United States*, 69 Cust. Ct. 25, 25–26 (1972), and *United China & Glass Co. v. United States*, 53 Cust. Ct. 68, 70 (1964), all affirm the filing rule's jurisdictional character. *Cf. Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908 (Fed. Cir. 1999) (recognizing jurisdictional nature of protest content rules in 19 U.S.C. § 1514(c)(1)(A)–(D)). Moreover, while *Avecia, Inc. v. United States*, 31 CIT 399, 483 F. Supp. 2d 1251 (2007), appears to hold that the filing rule is not jurisdictional, the case stops short of that conclusion. *Avecia* held only that 19 C.F.R. § 174.12(d), the place-of-filing regulation, is not jurisdictional in and of itself. *Id.* at 401–02, 483 F. Supp. 2d at 1254. *Avecia* never directly questioned whether jurisdiction hinges generally on compliance with 19 U.S.C. § 1514(c)(1). *See id.* (citing § 1514 as provision defining "metes and bounds" of court's subject matter jurisdiction). Consequently, the court finds that the statutory filing rule is a jurisdictional precondition to suing on a denied protest.

B. Netchem's Protest of UPS 3811755–6 Violated the Statutory Filing Rule

Netchem's claim to jurisdiction unravels in the wake of this legal finding. Under the regulations, "[p]rotests shall be filed with the port director whose decision is protested." 19 C.F.R. § 174.12(d). Yet the undisputed facts show that Netchem entered UPS 3811755–6 at Detroit but protested the entry in Buffalo. Pl.'s Second Supp. Br. Ex. 1; Pl.'s First Supp. Br. App. A. In brief, the port director who received Netchem's protest and the port director who classified the entry were not the same officer. *See* Westlaw, *Customs Law & Administration* § 5:67 (3d ed. 2013) (explaining that import specialists generally classify merchandise with port director's approval). This violated the plain language of not only the place-of-filing regulation, but also the statutory filing rule, which obliges importers to obey the regulations when filing protests. The court thus lacks jurisdiction over UPS 3811755–6.

Netchem cites *Avecia* to show that jurisdiction does not hinge on compliance with the place-of-filing regulation. Pl.'s Resp. Br., ECF

No. 36 ("Resp."), 6. The comparison, however, is inapt. In *Avecia*, plaintiff sent a single protest regarding entries from Philadelphia and other ports to Philadelphia's port director. 31 CIT at 399, 483 F. Supp. 2d at 1252. The director denied the protest in full, including the entries to ports other than Philadelphia. *Avecia, Inc. v. United States*, 30 CIT 1956, 1971, 469 F. Supp. 2d 1269, 1283 (2006). On appeal, the court found that plaintiff's disregard for the place-of-filing regulation in 19 C.F.R. § 174.12(d) did not defeat jurisdiction. By denying the entire protest—including entries from ports other than Philadelphia—the port director waived "compliance with regulatory filing requirements promulgated by [the] agency." 31 CIT at 403, 483 F. Supp. 2d at 1255. Plaintiff's case could proceed because the agency had temporarily relaxed its place-of-filing rule for entries to the other ports. *Id.* at 399, 483 F. Supp. 2d at 1252–53.

There was no such waiver of the regulations here, however. The protest that Netchem sent to Buffalo included fifty-six entries, only thirteen of which were from Buffalo. Pl.'s First Supp. Br. App. A. When the protest reached Buffalo, the port director number-stamped the first page of the document and returned it to Netchem. *See id.* Nothing in the returned protest suggested the director had decided the merits of Netchem's claims. Furthermore, according to CBP officer Elise Morris, the director sent Netchem written advice explaining that the protest was filed at the wrong port. Reply Ex. A ¶ 8. None of this evidence indicates that Buffalo's port director relaxed the place-of-filing regulation to accommodate entries from other ports. *See* 31 CIT at 399, 483 F. Supp. 2d at 1252–53. Because Netchem failed to lodge its protest "in accordance with regulations," the court lacks jurisdiction over UPS 3811755–6. *See* 19 U.S.C. § 1514(c)(1).

Netchem ventures another argument to prove jurisdiction, but it too fails. Under 19 C.F.R. § 174.13(b), importers may file "[a] single protest . . . with respect to more than one entry at any port." Netchem claims this regulation permits an importer to file a protest covering entries from multiple ports with a single port director, so long as those entries involve the same protesting party, the same categories of merchandise, and a decision common to all entries. Resp. 6. But the Government does not read the regulation that way. It notes that § 174.13 outlines the contents of a protest, not how protests must be filed. Reply 10 n.7. It also observes that § 174.13(b), if read as Netchem argues, would conflict with § 174.12(d): By definition, an entry protested at a place other than its port of entry is not reviewed by "the port director whose decision is protested." *See* 19 C.F.R. §§ 174.12(d). Finally, the Government proposes an alternative interpretation of the regulation that seems reasonable: "[A]t any port, a single

protest may be filed with multiple entries." Reply 10 n.7. Having weighed these arguments, the court defers to the agency's interpretation of its own regulation. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding agency's interpretation of its own regulations controls unless plainly erroneous); *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009) (same).

CONCLUSION

Seventeen of Netchem's entries were liquidated too late. Another twenty-five entries were paid too late. And the one entry remaining that was both timely liquidated and paid was not protested in accordance with relevant regulations. These deficiencies deprive the court of jurisdiction over Netchem's entries. The Government's motion to dismiss is granted and judgment will enter accordingly.

Dated: February 14, 2014
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 14–17

XINJIAMEI FURNITURE (ZHANGZHOU) CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 11–00456

[The Department of Commerce's Final Results of Redetermination in this New Shipper Review are Sustained.]

Dated: February 18, 2014

Kutak Rock LLP (*Lizbeth R. Levinson* and *Ronald M. Wisla*), for plaintiff.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White*, Assistant Director, *Douglas G. Edelschick*, Trial Attorney, Civil Division, Commercial Litigation Branch, United States Department of Justice; Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Joanna V. Theiss*), of counsel, for defendant.

OPINION

Eaton, Judge:

Before the court are the Department of Commerce's ("the Department" or "defendant") Final Results of Redetermination Pursuant to Court Remand in this New Shipper Review. Final Results of Redetermination Pursuant to Court Remand (ECF Dkt. No. 32–1) ("Re-

mand Results"). At issue is whether the Department complied with the court's remand order instructing it to "provide an adequate explanation, supported by substantial evidence, as to why [the data set relied upon in the Final Results to calculate the surrogate value for cold-rolled steel coil is] reliable and non-aberrational." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 37 CIT __, __, Slip Op. 13–30, 16 (2013).

Plaintiff Xinjiamei Furniture (Zhangzhou) Co., Ltd. ("plaintiff" or "Xinjiamei") objects to Commerce's continued use of import data from Indian HTS category 7211.2990 ("Indian Import Data"), as reported in the Global Trade Atlas ("GTA"), including questioning the Department's use of new data placed on the record during the remand to show that the GTA Indian Import Data does not yield an aberrational average unit value ("AUV"). *See* Cmts. on Remand Results 2–3 (ECF Dkt. No. 34) ("Pl.'s Cmts.").

Defendant argues that the court should not entertain plaintiff's objections because "Xinjiamei failed to exhaust its administrative remedies" when it did not comment on the Draft Results of Redetermination Pursuant to Court Remand ("Draft Results"). Def.'s Reply to Pl.'s Cmts. Regarding the Remand Redetermination 2 (ECF Dkt. No. 35) ("Def.'s Reply"). Defendant continues that the Remand Results comply with the court's instructions in *Xinjiamei* and its determination is supported by substantial evidence and in accordance with law.

It is undisputed that plaintiff failed to raise any of the arguments it raises here when given an opportunity to comment on the Draft Results during the proceedings on remand. Draft Results at 15 (ECF Dkt. No. 38–11) ("Interested parties will have an opportunity to comment on these draft remand results. Interested parties may submit comments to the Department by close of-business on May 31, 2013. Any comments will be addressed in our final remand results."). Because plaintiff did not exhaust its administrative remedies, the court will not consider the arguments it makes here for the first time. Accordingly, and because the Department has complied with the court's instructions in *Xinjiamei* and its conclusions are supported by substantial evidence on the record, the 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) (2006). The results of a redetermination pursuant to court remand are also reviewed "for compliance with the court's

remand order." *Nakornthai Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008).

DISCUSSION

I. Background

On July 29, 2010, at Xinjiamei's request, Commerce initiated a new shipper review, covering a period of review ("POR") from June 1, 2009 through May 31, 2010. Folding Metal Tables and Chairs From the People's Republic of China ("PRC"), 75 Fed. Reg. 44,767 (Dep't of Commerce July 29, 2010) (initiation of the new shipper review); Folding Metal Tables and Chairs from the PRC, 67 Fed. Reg. 43,277 (Dep't of Commerce June 27, 2002) (antidumping duty order). During the initial administrative proceedings, the Department selected India as the surrogate country, placed the GTA Indian Import Data on the record, and used it to generate a surrogate value for cold-rolled steel coil. *Xinjiamei* at __, Slip Op. 13–30, at 4. As an alternative value, plaintiff placed on the record before Commerce advertising data from one of the largest Indian steel producers, JSW Steel Limited ("JSW"). To support its alternative value, plaintiff also submitted sales data from JSW and data taken from the metals.com website showing monthly cold-rolled steel prices from Brazil ("metalprices.com Brazilian Data"), "ex factory cold-rolled steel prices from Northern Europe," and "world export market benchmark prices." *Id*. at __, Slip Op. 13–30, at 5–6 (internal quotation marks omitted). Plaintiff argued that the Department should have used the JSW advertising data as the best available information[1] on the record because (1) the JSW advertising data was supported by the other information plaintiff provided, and (2) because of the small quantity of imports it represented, the GTA Indian Import Data yielded an aberrational surrogate value. *Id*. at __, Slip Op. 13–30, at 4–6.

In the Final Results, Commerce continued to use the GTA Indian Import Data, arguing that it was within its discretion to select data based on a small quantity of imports as the best available information, so long as other evidence before the Department showed the resulting per unit values derived from GTA Indian Import Data were within a "reasonable range." *Id*. at __, Slip Op. 13–30, at 6; *See* Folding Metal Tables and Chairs from the PRC, 76 Fed. Reg. 66,036 (Dep't of Commerce Oct. 25, 2011) (final results of antidumping review and new shipper review) ("Final Results"), and accompanying Issues and Decision Memorandum for the Annual 2009–2010 New

[1] 19 U.S.C. § 1677b(c)(1) directs the Department to value factors of production "based on the best available information regarding the values of such factors in a market economy country or countries considered [by the Department] to be appropriate."

Shipper Review of the Antidumping Duty Order on Folding Metal Tables and Chairs from the PRC (Dep't of Commerce Oct. 18, 2011) ("Issues & Dec. Mem."). The Department also found that the data placed on the record by plaintiff failed to show the GTA Indian Import Data to be aberrational. *Xinjiamei* at __, Slip Op. 13–30, at 7. Moreover, Commerce rejected the use of the JSW advertised prices as the best available information because the data represented offers, rather than sales, and came from only one company. *Id*. The Department, however, neither expressly evaluated whether the GTA Indian Import Data yielded an aberrational AUV nor compared the AUV yielded by the GTA Indian Import Data to other market prices. *Id*. Rather than comparing the GTA Indian Import Data with the other evidence placed on the record by plaintiff, the Department discounted the other data sets and concluded that the GTA Indian Import Data was superior by process of elimination.

In *Xinjiamei*, the court remanded the Final Results, "conclud[ing] that Commerce ha[d] failed to provide a rational explanation for its selection of the GTA [Indian Import D]ata as the best available information on the record." *Id*. at __, Slip Op. 13–30, at 10. Because the Department did not assess whether the GTA Indian Import Data met the Department's own standards for reliability, the court found that Commerce had "skip[ped] a critical analytical step by failing to question the use of the GTA [Indian Import D]ata when other evidence on the record cast[] doubt on the reliability of its choice." *Id*. (internal quotation marks omitted). The court held that "questionable data may not be chosen 'only on the claim that the data selected was better than other data' on the record" and that "'Commerce's analysis must do more than simply identify flaws in the data sets it rejects.'" *Id.* (quoting *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1135, 502 F. Supp. 2d 1295, 1308 (2007), and *Guangdong Chem. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1417, 460 F. Supp. 2d 1365, 1369 (2006)). Accordingly, the court remanded the case for the Department to more thoroughly explain why, in light of all of the record evidence, its selection of the GTA Indian Import Data as the best available information was supported by substantial evidence.

On remand, the court instructed that:

> [S]hould Commerce continue using the GTA [Indian D]ata, it must provide an adequate explanation, supported by substantial evidence, as to why that data is reliable and non-aberrational. . . . Commerce must take into account the Brazilian data, the Northern European data, the Benchmark data, the JSW advertised data, and the JSW price data. . . . [Commerce] shall determine a surrogate value for cold-rolled steel coil based

> on the best available information standard. . . [and] expressly compare the merits of any acceptable data sets on the record.

Xinjiamei, at __, Slip Op. 13–30, at 16. The court permitted the Department to "reopen the record to solicit any information it determines to be necessary to make its determination." *Id*.

Prior to issuing the Draft Results, the Department reopened the record and added: "(1) GTA [Indian] import data from the other potential surrogate countries covering the POR; (2) Brazilian GTA export data for cold-rolled steel coil during the POR; (3) Brazilian GTA export data" covering the same period reflected in plaintiff's metalprices.com Brazilian data. Draft Results at 3. For its part, "Xinjiamei placed on the record a chart obtained from London Metal Exchange Free Data Service [("London Metal Exchange data")] showing prices for steel billet in the Far East market during the POR" which it "claimed . . . further supports using the JSW [sales] prices." Draft Results at 3. In its submission, Xinjiamei raised no arguments other than to claim that the London Metal Exchange data supported its proposed AUV and undermined the AUV calculated from the GTA Indian Import Data. *See* Letter from Lizbeth R. Levinson and Ronald M. Wisla, Kutak Rock LLP, to Sec'y of Commerce at 1–2, PD 10 at bar code 313052901 (Apr. 17, 2013), ECF Dkt. No. 38–10 ("London Metal Exchange Letter").

In the Draft Results, the Department "continue[d] to find that the GTA Indian import data are the best available information for valuing Xinjiamei's cold-rolled steel coil and that the data are reliable and non-aberrational." Draft Results at 3–4. Conceding that the HTS categories were not identical for each country at the eight-digit level used for this comparison,[2] the Department nonetheless found that the $2.01/kg AUV for the GTA Indian Import Data that it used in the Final Results fell within a reasonable range. This was because "the GTA import AUVs covering the POR for the HTS category of cold-rolled steel that is most specific to Xinjiamei's inputs from" Indonesia,

[2] The tariff schedules of signatories to the Harmonized System Convention are required to have tariff categories "harmonized with the internationally-developed HS nomenclature up to the six-digit level, *i.e.*, to the two-digit 'chapter,' the four-digit 'heading,' and the six-digit 'subheading' levels." *Victoria's Secret Direct, LLC v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1332, 1345 (2013) (citing Investigation with Respect to the Operation of the Harmonized System Subtitle of the Omnibus Trade and Competitiveness Act of 1988 at 1 (USITC Pub. No. 2296) (June 1990)). Beyond the six-digit level each individual nation may further subdivide its tariff schedule in a manner that is not harmonized with the other signatories. The eight-digit headings that cover cold-rolled steel coil are not identical across all of the potential surrogate countries. As part of its analysis, the Department identified and compared the eight-digit headings that cover cold-rolled steel coil, even though the language and scope of those headings is not exactly the same.

Peru, Thailand, and Ukraine, yielded a range of $1.22/kg to $8.26/kg.[3] Draft Results 4–5. The Department also found that the volume of imports underlying the GTA Indian Import Data, 716,835 kg, also represented "significant quantities of imports" because it "is within" the 57,070 kg to 2,301,882 kg range of import quantities imported into Indonesia, Peru, Thailand, and Ukraine. Draft Results at 5.

To further support its selection, the Department also compared the GTA Indian Import Data with "import data from the POR for HTS category 7211.29, 'Flat-Rolled Iron Or Nonalloy Steel Products Nesoi, Under 600 Mm Wide, Hot-Rolled, Not Clad, Plated Or Coated, Under 4.75 Mm Thick'" which covered cold-rolled steel from India and the other potential surrogate countries (Indonesia, Peru, the Philippines, Thailand, and Ukraine). Draft Results at 5–6. While noting that this information "is less specific than both the eight-digit HTS category used in the Final Results and the" eight-digit data used for the first comparison in the Draft Results, the Department found that this "data set is helpful because HTS category 7211.29 is harmonized at [the] six-digit level" across all of the potential surrogate countries. Draft Results at 6. Thus, to balance out its comparison across the eight-digit tariff subheadings, which were not harmonized across all of the surrogate countries, the Department also compared its selected value to the AUVs derived from the data of the six-digit subheadings, which, although less specific, are harmonized across all of the surrogate countries.

Commerce concluded that a comparison with this data set also showed that the GTA Indian Import Data fell within a reasonable range because the $2.01/kg AUV was within the range of $1.56/kg to $2.95/kg AUVs for the other potential surrogate countries. Draft Results at 6. The Department also found that the volume of imports under the GTA Indian Import Data (716,882 kg) was not aberrational because it was within the 2,808 kg to 11,500,005 kg range of import quantities for the other surrogate countries. Draft Results at 6. In other words, the Department found that the GTA Indian Import Data's volume and AUV were not aberrational because they were comparable to the volumes and AUVs yielded by examining imports into the other surrogate countries.

As directed by the court, the Department also specifically addressed the reliability of the JSW advertised prices. It found that the JSW advertised prices "are not the best available information because the data are less specific than GTA Indian import data and do not rep-

[3] It is worth noting that, because of its small volume, the Department excluded data from the fifth potential surrogate country, the Philippines, from the eight-digit level comparison. Had that data been included, however, the GTA Indian Import Data's AUV would still fall within the range of all six potential surrogate countries. *See* Draft Results at 5.

resent a broad industry-average price." Draft Results at 6. Regarding specificity, the Department concluded that the JSW advertised data does not "specify the width of the cold-rolled steel coil it sells." Draft Results at 6. By contrast, the GTA Indian Import Data "specifies the width of the cold-rolled steel coil it covers" and the covered range encompasses the width of cold-rolled steel coil Xinjiamei "used to produce subject merchandise." Draft Results at 7. Moreover, the Department concluded that the GTA Indian Import Data represented a "broad industry-average" because that data was "collected from an official government source" and "reflect[s] numerous transactions between many buyers and sellers," and that the JSW advertised data did not represent a broad industry-average because it was "based on the price from a single factory." Draft Results at 7.

Commerce added that it found the JSW advertised data to be less reliable than the GTA Indian Import Data. According to the Department, the only record evidence that supported the JSW advertised data was from the Philippines. The Department concluded, however, that the Philippine data was too small to be reliable because "the import quantity is only 2,100 kg." Draft Results 5. The Department thus concluded that the GTA Indian Import Data was more reliable because it was supported by record evidence from five of the other potential surrogate countries while the JSW advertised data was only supported by one, unreliable data set. Draft Results at 6, 7.

The Department also examined the JSW sales data. It determined that it could not rely on that data as it "may be distortive because the sales quantity covers all cold-rolled steel coil and sheets," which includes products that could fall under twelve different tariff headings. Draft Results at 8. Put another way, the JSW sales data was not specific to the type of input used by plaintiff and represented sales of many different kinds of cold-rolled steel coil and sheets. The Department also faulted the JSW sales data because the AUV it yields falls outside the range of AUVs from all other potential surrogate countries except for the Philippines. As noted, Commerce concluded the Philippine sata was derived from an aberrationally small number of imports. Draft Results at 8.

Also, as instructed by the court, the Department expressly considered the metalprices.com Brazilian data placed on the record by Xinjiamei prior to the issuance of the Final Results. Commerce then compared that data with the two sets of Brazilian GTA export data that the Department placed on the record on remand. Draft Results at 9. Xinjiamei's Brazilian data from metalprices.com (which reflected nine-months that were not identical with the POR) yielded an AUV of $0.59/kg, while Commerce's Brazilian GTA data yielded an

AUV of $2.10/kg during the POR and an AUV of $2.05 during the same period as the Brazilian data from metalprices.com. Draft Results at 9. The Department found that the Brazilian GTA export data was more reliable because that data was "derived from official government statistics" and the record contained no evidence as to how the metalprices.com Brazilian data was gathered. Draft Results at 9. The Department also concluded that the Brazilian data from metalprices.com was not the best available evidence when compared to the GTA Indian Import Data "because the data are from Brazil, not India" and India was the primary surrogate country. Draft Results at 10.

Further, in accordance with the remand instructions, the Department also considered the Northern Europe and World Export Market Benchmark data placed on the record by Xinjiamei. The Department determined that it could not rely on those prices because "[r]ecord evidence does not explain how metalprices.com compiles its pricing data[,] . . . whether the prices are based on commercial and actual transactions between unaffiliated buyers and sellers[,] . . . and whether the[] quantities are commercially significant." Draft Results at 11. The Department also reiterated its reasoning in the Final Results that the Northern Europe and World Export Market Benchmark data "are not suitable because neither of the data sets covers any portion of the POR[,] . . . export prices . . . are not representative of the domestic or import prices paid by producers of the like product in India[,] . . . [and] the Department is unable to compare and verify the export prices and quantities using other sources because the descriptions 'Northern Europe' and 'world export market' are vague and undefined." Draft Results 11–12.

Commerce also concluded that the Northern Europe and World Export Market Benchmark data were "not the best available information on the record to value cold-rolled steel coil because" the AUVs derived from those data sets ($0.62 and $0.71) "are not within the range of AUVs for the other potential surrogate countries" for which reliable data was on the record. Draft Results 12. Thus, the Department found that these data sets were less reliable than the GTA Indian Import Data because the GTA Indian Import Data was better supported by other record evidence.

The Department also addressed the new London Metal Exchange data placed on the record by Xinjiamei during the remand proceedings. According to Commerce, that data represented "the cash buyer price of steel billet,[4] not cold-rolled steel coil, in Far East markets

[4] Steel billet is "[a] semi-finished hot rolled product, usually of square section with radiused corners, produced by the hot rolling of blooms. . . . Billets are further processed by hot rolling into bar stock." DICTIONARY OF MATERIALS AND MANUFACTURING 37 (Vernon John ed. 1990). By contrast, cold-rolled steel coil is a "finished steel product such as

during the POR." Draft Results at 12. The Department rejected Xinjaimei's claim that "steel billet [was] the type of steel used to fabricate cold-rolled steel sheet used to produce the subject merchandise" because plaintiff provided "no explanation (*e.g.*, width, thickness, carbon level content, and processing method of the steel billet) supported by evidence to substantiate this claim." London Metal Exchange Letter 1; Draft Results at 13. The Department then compared the London Metal Exchange AUV ($0.47/kg) to the AUV from the GTA Indian Import Data and the GTA data from the other potential surrogate countries, finding the London Metal Exchange data to be aberrational because its AUV "is not within the range of AUVs for India and the other potential surrogate countries." Draft Results at 13. Specifically, the $0.47/kg AUV of the London Metal Exchange data is not within the $1.22/kg to $8.26/kg AUV range. Draft Results at 13. The Department further found the London Metal Exchange data unreliable because "even if Xinjiamei's explanation" that the steel billet was used to create the cold-rolled steel sheets used by plaintiff to manufacture the subject merchandise "is correct, the prices for steel billet should be lower [that those for cold-rolled steel sheet] because [they do] not account for the additional processing necessary to produce cold-rolled steel sheets." Draft Results at 13.

Commerce also identified several other bases for rejecting the London Metal Exchange prices as a benchmark. For example, the Department stated that it could not verify the price with "other sources because the data do not identify which countries London Metal Exchange considers to be a part of the Far East Region and the data do not include export quantities"; the Department could not determine if the data was "based on commercially significant quantities"; and "steel billet is not the input used by Xinjiamei." Draft Results at 13. Thus, the Department concluded that the London Metal Exchange data was not the best available information on the record because it is less reliable "and may be aberrational in comparison to GTA Indian import data under HTS 7211.29.90, which is corroborated by record evidence." Draft Results at 14.

After all of the foregoing comparisons, the Department confirmed its finding in the Final Results that the GTA Indian Import Data was the best available information on the record. Commerce found that the GTA Indian Import Data was more reliable than the JSW advertising data and JSW sales data because it was supported by the GTA data from the other potential surrogate countries and the JSW sales

strip or sheet that has been wound or coiled after rolling." *See, A Guide to the Language of Steel: Coil*, ARCELORMITTAL, http://corporate.arcelormittal.com/news-and-media/factfile/steel-terminology (last visited Jan. 21, 2014).

data and JSW advertised data "are not corroborated by reliable values and quantities." Draft Results at 15.

The Department then provided interested parties a week to comment on the Draft Results. Draft Results at 15; Letter from Charles Riggle, Dep't of Commerce, to Ronald M. Wisla, Kutak Rock LLP, at 1, PD 11 at bar code 3137194–01 (May 24, 2013), ECF Dkt. No. 38–11. Plaintiff filed no comments on the Draft Results and requested no extension of time to do so.

On June 14, 2013, the Department issued the Remand Results. In the Remand Results, the Department observed that "Xinjiamei provided no comments to our Draft Results. As such, we have determined not to alter the conclusions of our Draft Results and continue to find that the GTA Indian import data are the best available information for valuing Xinjiamei's cold-rolled steel coil and that the data are reliable and non-aberrational." Remand Results 1–2. The Department then went on to repeat its conclusions and analysis from the Draft Results nearly verbatim.

Despite the Remand Results' express reference to Xinjiamei's failure to comment on the Drat Results, plaintiff makes no mention of its decision not to do so in its submissions before the court. Rather, in its five-page brief, Xinjiamei argues that the Remand Results remain unsupported by substantial evidence because (1) the Department did not expressly "take into account the sample size of the [GTA Indian Import] data . . . and compare it with the sales volume of the Indian domestic price data," (2) the Department did not compare like tariff headings to like tariff headings, (3) the volume of imports under several of the GTA headings in other potential surrogate countries was smaller than the volume of imports under the GTA Indian Court No. 11–00456 Page 14 Import Data, (4) the aggregate volume of all of the sales under all of the tariff headings in the other potential surrogate countries is "only 0.12% of JSW's annual production and 0.012% of Indian production of cold-rolled steel sheet and coil," and (5) the range of AUVs generated by the list of potential other surrogate countries "is so large that it is virtually meaningless." Pl.'s Cmts. 2–5.

Based on these objections, Xinjiamei argues that substantial evidence could not have supported the Department's continued use of the GTA Indian Import Data as the best available information and asks the court to "remand the case to Commerce a second time and instruct Commerce to use the POR average of JSW Steel retail prices as the surrogate value for cold rolled steel coil." Pl.'s Cmts. 5. Notably, plaintiff's comments make no mention of its submission of the London Metal Exchange data.

II. Xinjimei Failed to Exhaust its Administrative Remedies by Declining to Comment on the Draft Remand Results

"[W]here appropriate" the court shall "require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013). "'The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court.'" *Shandong Huarong Machinery Co. v. United States*, 30 CIT 1269, 1305, 435 F. Supp. 2d 1261, 1292 (2006) (quoting *Ingman v. U.S. Sec'y of Agric.*, 29 CIT 1123 (2005)). "This court has discretion to determine when it will require the exhaustion of administrative remedies." *Blue Field (Sichuan) Food Indus. Co., Ltd. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1311, 1321 (2013).

Requiring exhaustion is appropriate where doing so "can protect administrative agency authority and promote judicial efficiency." *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (citation omitted). Exhaustion can "serve judicial efficiency . . . by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution." *Id*. Thus, "[i]n litigation contesting antidumping determinations, the exhaustion requirement applies to a situation such as that existing in this case, in which the Department invited a party to submit comments on draft remand results." *Carpenter Tech. Corp. v. United States*, 35 CIT __, __, 774 F. Supp. 2d 1343, 1349 (2011).

Plaintiff has attempted to make no response to the Department's arguments that it has failed to exhaust its administrative remedies. Xinjiamei makes no mention in its papers of any response it made to the Draft Results or of any communications with the Department that would presage the objections raised here for the first time. Indeed, plaintiff also appears to have nothing further to add to counter the Department's position. In support of its motion to cancel oral argument, Xinjiamei stated that the issues before the court had been "adequately addressed by the parties through comment." Unopposed Mot. to Cancel Oral Arg. 1 (ECF Dkt. No. 39). Accordingly, it is clear from the record that plaintiff failed to exhaust its administrative remedy by declining make its objections before the Department when it had the opportunity to do so in the first instance during the proceedings on remand. Nevertheless, because failure to exhaust administrative remedies is not always fatal to a party's objections to administrative action, the court will consider the two common exceptions to the exhaustion requirement, futility and "pure question of

law." In addition, the court will address whether plaintiff had an adequate opportunity to respond to the Draft Results.

The futility exception applies where a party "would be required to go through obviously useless motions in order to preserve their rights." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (citations and internal quotation marks omitted). A showing of futility requires more than "the mere fact that an adverse decision may have been likely." *Id*. The factual circumstances in which the futility exception applies generally require that the plaintiff have already "put its argument on the record before Commerce" in such a manner that the agency "had heard everything on the issue that [the party] had to say." *Itochu*, 733 F.3d at 1146, 1147 (finding futility applied where, prior to the preliminary results, the party had "set forth its position in comments, met with eight department officials to discuss the issue, and submitted legal support for its position"). In other words, futility can excuse a party from additional practice before the agency when it has already fully presented its arguments to the Department in some form and had those arguments rejected, but not where it declines to present the arguments at all because it believes the agency will be unlikely to accept them.

The futility exception is inapplicable here. Xinjiamei's arguments presented before the court attack the Department's use of the GTA data from the other potential surrogate countries to explain why the volume of the GTA Indian Import data is not aberrationally small. The data that plaintiff questions, however, was not placed on the record until the proceedings on remand. Thus, Xinjiamei's first opportunity to respond to it was during the remand proceedings. The record is clear that plaintiff never raised any of its arguments questioning the use of this data before the Department. The only submission plaintiff made to the Department as part of the remand proceedings was to supplement the record with the London Metal Exchange data. As noted, Commerce's rejection of that evidence is an issue plaintiff does not raise before the court.

Accordingly, this is not an instance where a plaintiff has fully made their case before the Department and additional practice before the agency would have served no purpose. At a minimum, responding to the Draft Results would have permitted the Department to clarify its position by filling in any claimed explanatory gaps (e.g., the size difference between the aggregated volume of imports under all of the GTA import data sets and the JSW sales data, whether the range of AUVs yielded by the GTA import data is too large to be meaningful, and whether the Department's comparison between the eight-digit tariff heading used for the GTA Indian Import Data and six-digit

tariff headings for all of the potential surrogate countries was impermissible). Because no argument can be made that raising these issues would have been a "useless motion," the futility exception is not available to plaintiff.

The "pure question of law" exception applies only where the issue "can be addressed without further factual development or further agency exercise of discretion." *Itochu*, 733 F.3d at 1146 (citing *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007)). Put another way, "[s]tatutory construction alone [must be] sufficient to resolve [the] case." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003). Moreover, even where the question is one of statutory construction, exhaustion may be required if the Department's interpretation would be entitled to *Chevron* deference[5] and the Department's position was not made clear on the administrative record. *Fuwei Films (Shandong) Co. v. United States*, 35 CIT __, __, 791 F. Supp. 2d 1381, 1384 (2011) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)) ("[I]t is always preferable to have the agency's interpretation of the statute it is entrusted to administer set forth on the administrative record.").

Plaintiff's objections are not pure questions of law. Indeed, no question of statutory interpretation is at issue here. Each of Xinjiamei's objections bear on factual questions regarding whether the data relied upon by the Department was sufficiently substantial to support its determinations. Accordingly, plaintiff cannot rely on the "pure question of law" exception.

Finally, this is not a case where the plaintiff "did not have a fair opportunity to challenge these issues at the administrative level." *Qingdao Taifa Group Co. v. United States*, 33 CIT 1090, 1093, 637 F. Supp. 2d 1231, 1237 (2009). The Department discussed fully the new evidence in the Draft Results and its position in the Draft Results was identical to the position it took in the Remand Results. The Department's reliance on the new evidence is what plaintiff now challenges before the court. Thus, it is apparent that the arguments made in plaintiff's five-page brief submitted to the court could have been made in the week-long comment period provided by the Department. Moreover, had plaintiff believed that it needed additional time to fully frame its objections to the Draft Results, it could have made a request for an extension of time to the Department for that purpose.

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[5] The *Chevron* line of cases requires the courts to defer to the Department of Commerce's reasonable interpretation of certain ambiguous statutory provisions. *See United States v. Eurodif S.A.*, 555 U.S. 305, 315–17 (2009).

III. The Department Has Complied with the Court's Instructions on Remand

The court instructed the Department on remand to "expressly compare the merits of any acceptable data sets on the record" and "provide an adequate explanation, supported by substantial evidence, as to why th[e] data [it selects as the best available evidence] is reliable and non-aberrational." *Xinjiamei*, 36 CIT at __, Slip Op. 13–30, at 16. The Department has done so here. In selecting the GTA Indian Import Data, the Department compared the AUV generated from that data to the AUVs of the same inputs if valued from other potential surrogate countries and reasonably concluded that the similarities in the values demonstrated that the $2.01 AUV was not aberrational. The Department also reasonably concluded that the GTA Indian Import Data's volume was not aberrational by comparing it to that of the other potential surrogate countries and finding the respective import volumes to be similar. As instructed, the Department also expressly considered each other data set on the record, compared each set to the GTA Indian Import Data, and explained in each instance why it found the GTA Indian Import Data to be the best available information when compared with that data set.

As noted in *Xinjiamei*, in reviewing whether the Department's selection of evidence used to calculated a surrogate value is the best available information, the "court determines not whether 'the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.'" *Xinjiamei*, 36 CIT at __, Slip Op. 13–30, at 9 (quoting *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011)). However, "[t]o support a surrogate value with substantial evidence, Commerce 'must do more than simply identify flaws in the data sets it rejects.'" *Xiamen Int'l Trade and Indus. Co. v. United States*, 37 CIT __, Slip Op. 13–152, at 11 (2013) (quoting *Guangdong*, 30 CIT at 1417, 460 F. Supp. 2d. at 1369). The Department must also "evaluate the reliability of its own choice" and explain why that choice does not yield an aberrational AUV. *Shanghai Foreign Trade Enters. v. United States*, 28 CIT 480, 495, 318 F. Supp. 2d 1339, 1352 (2004).

The Department's selection of the GTA Indian Import Data is supported by substantial evidence. Here, the Department has selected evidence that meets its "preference for data from a single surrogate country, [that is] publically available, represent[s] a broad market average, [is] contemporaneous with the POR, [is] tax exclusive, and [is] the most specific HTS category to the [input] used by Xinjiamei to produce" the subject merchandise. Remand Results at 15. Unlike in

Xinjiamei, the Department has sufficiently explained why the GTA Indian Import Data does not yield an aberrational AUV. To demonstrate that the GTA Indian Import data's AUV falls within a reasonable range, the Department compared it to the import data from the other potential surrogate countries. After finding the AUVs to be comparable in terms of both price and quantity, the Department also explained why it found that the GTA Indian Import Data is preferable to the JSW advertising data argued for by the plaintiff. The explanation for the Department's choice, that the JSW advertising data is not comparable to the values in the import data from the other surrogate countries and is less specific to the input used by Xinjiamei, is reasonable.

Accordingly, the Department has adequately explained its selection of the GTA Indian Import Data as the best available information for Xinjiamei's cold-rolled steel coil input and supported that conclusion with substantial evidence, in compliance with the court's instructions.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Department of Commerce's Final Results of Redetermination Pursuant to Court Remand are sustained.

Dated: February 18, 2014
New York, New York

/*s*/*Richard K. Eaton*
RICHARD K. EATON

Slip Op. 14–18

BEIHAI ZHENGWU INDUSTRY CO., LTD., ET AL., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 05–00182

JUDGMENT

Before the court are the Final Results of Redetermination Pursuant to Court Remand (Sept. 27, 2013), ECF No. 47 ("Remand Results"), which the International Trade Administration, United States Department of Commerce, filed in response to the court's Order (Aug; 13, 2013), ECF No. 46. No party to this action filed comments on the Remand Results. Therefore, upon consideration of the Remand Results, to which no party objected, and all papers and proceedings had herein, and upon due deliberation, is hereby

ORDERED that the Remand Results be, and hereby are, affirmed; and it is further

ORDERED that entries of merchandise that are affected by the Remand Results shall be liquidated in accordance with the final court decision in this action.

Dated: February 18, 2014
New York, New York

/S/ Timothy C. Stanceu
JUDGE

Slip Op. 14–19

ZHAOQING NEW ZHONGYA ALUMINUM CO., LTD. AND ZHONGYA SHAPED ALUMINUM (HK) HOLDING LTD., Plaintiffs, and EVERGREEN SOLAR, INC., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Donald C. Pogue, Chief Judge
Court No. 11–00181

[Department of Commerce's Remand Results are AFFIRMED]

Dated: February 19, 2014

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs was *Joanna Theiss*, Attorney, Office of the Chief Counsel for the Import Trade Administration, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, *Derick G. Holt*, *Laura El-Sabaawi*, *Maureen E. Thorson*, *Robert E. DeFrancesco*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor, Aluminum Extrusions Fair Trade Committee.

OPINION

Pogue, Chief Judge:

This case returns to court following a remand ordered by *Zhaoqing New Zhongya Aluminum Co. v. United States*, __ CIT ___,929 F. Supp. 2d 1324 (2013)("*Zhaoqing Remand*"). The Zhaoqing Remand required the Department of Commerce ("Commerce" or "the Department") to review the proper benchmark for measuring the value of the subsidy provided to New Zhongya Aluminum Company, Ltd. and its affiliates (collectively "New Zhongya") in the form of land use rights in the Zhaoqing High-Technology Industry Development Zone ("ZHTIDZ") in China. The Department responded to the *Zhaoqing Remand* by issuing *Final Results of Redetermination Pursuant to Court Remand*,

ECF No. 75 (Aug. 21, 2013) ("*Remand Results*").

In the *Remand Results*, Commerce revised its initial determination to use the price of developed industrial land in Thailand as a benchmark for valuing New Zhongya's subsidy and accepted instead the indicative price of land in the Subic Bay Freeport Zone in the Philippines ("Subic Bay") as reported by the private firm Coldwell Banker Richard Ellis. *Remand Results* at 7.

Defendant-Intervenor, the Aluminum Extrusions Fair Trade Committee ("AEFTC") now raises two challenges to the determination in the *Remand Results*.[1] AEFTC first claims that the use of property in the Philippines as a benchmark for the subsidy received by New Zhongya is contrary to the Department's practice and precedent. AEFTC's second claim is that there is insufficient record evidence on the Philippines to support the use of Subic Bay as a benchmark, and that Commerce must therefore reopen the administrative record in order to reasonably support its selection.

As explained below, the selection of lower infrastructure properties in Subic Bay as a land value benchmark is a reasonable response to the *Zhaoqing Remand*. While the Department selected Subic Bay without reference to the full range of evidence used in some prior comparable cases, its decision is neither inconsistent with the Department's precedent and practice nor unreasonable.

The second objection raised by AEFTC also fails. While additional record evidence regarding either Subic Bay or comparably undeveloped Thai land could produce a more accurate estimate of the New Zhongya subsidy, the facts in this case do not show that Department's refusal to accept such evidence was an abuse of discretion.

The court continues to hold jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c).

BACKGROUND

As part of its investigation of certain aluminum extrusions from the People's Republic of China ("China" or the "PRC"), the Department concluded, *inter alia*, that countervailing duties were appropriate to offset the subsidy given to New Zhongya in the form of reduced costs for land use rights in the ZHTIDZ. *See Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (affirmative countervailing duty determination) and accompanying Issues & Decision Mem., C-570–968 (Mar. 28, 2011) ("*I&D Memo*") at cmt. 23. Based on the impossibility of finding an adequate domestic or international market price with which to compare

[1] Neither Plaintiffs Zhaoqing New Zhongya Aluminum Co. and Zhongya Shaped Aluminum Holding, nor Plaintiff-Intervenor Evergreen Solar have challenged the Remand Results.

ZHTIDZ land use rights, Commerce determined that it was appropriate to employ a "third tier" method and calculate the subsidy value by comparing the price that New Zhongya paid for its land use rights with market-based prices for comparable land in a country at a similar level of economic development and in reasonable proximity to the PRC.[2] *Remand Results* at 2. For this comparison, the Department selected "indicative land values" from a fully developed industrial park in Bangkok, Thailand, as a benchmark. *I & D Memo* at cmt. 24. These indicative values were taken from a Coldwell Banker Richard Ellis (CBRE) Industrial Property Guide, part of a series of industry reports produced by a commercial real estate services firm operating across Asia.[3] *Id.*

New Zhongya challenged the use of the Thai benchmark during the administrative review and on appeal to this court. New Zhongya argued that the benchmark Thai industrial land was not comparable to the sites made available in the ZHTIDZ as required by 19 U.S.C. § 1677 and 19 C.F.R. § 351.511(a). Pl. Mot. for Judgment on the Agency Record ECF No. 44 ("Pl's Mot.") at 4. New Zhongya claimed that several differences precluded any valid comparison between these sites. The most significant of these differences was the highly developed state of physical infrastructure available at the Bangkok site compared to the ZHTIDZ. *Id.* at 5. To correct this alleged error in the Department's analysis, New Zhongya advocated either the use of indicative industrial land prices from the Subic Bay Freeport development site in the Philippines or a downward adjustment to the indicative prices for the Thai sites. Confidential Response in opposition to motion for judgment on the agency record ECF No. 55 at 8. The dispute over this determination centered on the evidence used by the Department to evaluate the infrastructure available at the ZHTIDZ site when taken over by New Zhongya.

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[2] Commerce had earlier determined that the provision of land use rights of this type constitutes a countervailable subsidy and developed its justification for using a third country comparison to estimate the size of the subsidy in accordance with § 771(5) of The Tariff Act of 1930, 19 U.S.C. § 1677(5) (all further references to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2006 edition) and 19 C.F.R. § 351.511. *See Laminated Woven Sacks From the People's Republic of China*, 72 Fed. Reg. 67,893 (Dec. 3, 2007) (Preliminary Affirmative Determination) ("*LWS from the PRC*") at 67,905, affirmed in *Laminated Woven Sacks From the People's Republic of China*, 73 Fed. Reg. 35,639 (Jun. 24, 2008) (Final Affirmative Determination) at cmt. 11.

[3] A description of CBRE and the range of commercial real estate services they provide to investors throughout Asia appears at *CBRE Industrial MarketView 2Q 2007*, ECF No. 82–2 at 69. Commerce has relied upon CBRE reports for land value questions in previous cases. *LWS from the PRC* at 67,908–09.

The *Zhaoqing Remand* ordered reconsideration or further explanation of the Department's rationale for using the indicative values given in the CBRE Reports for Thai industrial land. *See Zhaoqing Remand*, 929 F. Supp. 2d at 1327–29. The record evidence did not adequately support the Department's use of industrial real estate in Thailand that was already equipped with extensive physical and logistical infrastructure as a benchmark for comparison with land in the ZHTIDZ that required extensive improvement by New Zhongya before productive use. Specifically, the court ruled that the Department's determination was unreasonable in its reliance on two pieces of relatively ambiguous evidence – a promotional web site and a series of photographs the provenance of which could not be established – when this evidence was contradicted by substantial other material on the record.[4] *Id.* at 1328–29.

In its *Remand Results*, the Department declined to further analyze or adjust the Thai benchmark, and instead elected to use indicative values for land in Subic Bay as a more appropriate benchmark for the value of New Zhongya's land use subsidy. *Remand Results* at 11. In doing so, the Department selected indicative values from the *CBRE Report* for Subic Bay sites that offered no specific information on levels of infrastructure.[5] The subsidy and the appropriate countervailing duty were then recalculated using this benchmark.

Responding to comments from the parties, the Department determined that its decision to use the Philippines rather than Thailand as an appropriate benchmark country for comparison with China was case-specific and that Thailand would continue to be used as the default national comparison for the reasons explained in *LWS from the PRC*. *Id.* at 9. In addition, the Department rejected the Defendant-Intervenor's requests that it reopen the administrative record and gather either additional information on sites in Thailand or macroeconomic and demographic data that would support the use of the Philippines with data comparable to that gathered before

[4] The ruling highlighted the unreasonable reliance on the claims of a promotional web site, and a series of photographs that could not be precisely dated, to indicate a high level of infrastructure development for ZHTIDZ land when considered in light of the extensive record submissions demonstrating a lower level of infrastructure in place when New Zhongya began its lease of the property in 2006. *Zhaoqing Remand*, 929 F. Supp. 2d. at 1327–28 (citing *Pl's Mot.* at 5 and *Zhongya Supplemental Questionnaire Resp.* at 297).

[5] This decision was based on the fact that the CBRE reports listed two types of industrial land. One of these types was labeled "infrastructure in place," while the other had no information on level of industrial amenities or development at all. *Remand Results* at 6. The Department inferred that the lack of a label could be taken as evidence that these sites had a lower level of infrastructure and were therefore more comparable to the ZHTIDZ land acquired by New Zhongya. *Id.*

selecting Thailand as the default comparison country in *LWS from the PRC*. *Id.* at 7, 9.

AEFTC now challenges the Department's determination on remand, claiming first that *LWS from the PRC* established a procedure for selecting an appropriate third country for comparison with China in less than adequate remuneration ("LTAR") subsidy cases. Defendant-Intervenor argues that, as a controlling practice or precedent, *LWS from the PRC* requires Commerce to re-open the administrative record and develop additional data to justify the selection of benchmark land values from the Philippines. Comments of the AEFTC on the Department of Commerce's Final Results of Redetermination, ECF No. 77 ("AEFTC Comments") at 5.

AEFTC's second claim is that the inadequacy of the record data on the Subic Bay site prevents the Department from making a reasonably accurate estimate of the ZHTIDZ land value subsidy. This inadequacy, AEFTC alleges, can only be dealt with by reopening the administrative record and accepting additional submissions that would improve the accuracy of the benchmark, specifically information on inflation rates in the Philippines during the period. *Id.* at 6–7.

STANDARD OF REVIEW

"The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). Accordingly, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). In doing so, the court must consider any fact that "fairly detracts from [the agency conclusion's] weight." *Universal Camera Corp.*, 340 U.S. at 488. As importantly, a reviewing court may not "displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Id.*

DISCUSSION

I. *The Selection of the Philippines as a Benchmark Country*

The first of AEFTC's claims is unpersuasive. AEFTC argues that the use of the Philippines for comparison with the PRC is unreasonable because the Philippines was not selected through the same process and in consideration of the same factors that were used in *LWS from the PRC* to identify Thailand as an appropriate benchmark country. *AEFTC Comments* at 4.

Invoking the principle articulated in *Hussey Copper, Ltd. v. United States*, 17 C.I.T. 993, 997, 834 F. Supp. 413, 418 (1993), that agencies deviating from their own established practices must offer an adequate explanation for treating similar situations differently,[6] AEFTC argues that the selection of the Philippines benchmark for industrial land values can only be justified by the same process of investigation and in consideration of the same factors used to identify Thailand as a valid comparison country in *LWS from the PRC*. *AEFTC Comments* at 4–5. In support of this claim, AEFTC points out that the Department intends to use the Philippines as a benchmark only in this case and that the Department retains a preference for Thai comparisons. *Id.* at 4 (citing *Remand Results* at 7–8). The Department's intention, AEFTC suggests, indicates clearly that the Department itself lacks confidence in the validity of the Philippines as a comparable market for industrial land. *Id.* at 5.

To correct this alleged error, AEFTC argues that the Department must either conduct a more detailed investigation of the Philippines to justify its use as a benchmark for Chinese industrial land values or gather more information on industrial properties in Thailand that lack significant infrastructure and therefore meet the requirements of the remand. *Id.* at 5, 6.

The Department acknowledges that the Philippines was not chosen through a process of investigation as rigorous or detailed as that used in *LWS from the PRC* and that record evidence on the Philippines is

[6] *Hussey Copper*, quoting *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988), articulated the "general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure." AEFTC neglects the context of this citation, which continues directly: "[t]his rule is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to insure consistency in an agency's administration of a statute." *Id.* The court in *Hussey Copper* elaborated further, emphasizing the Department's "broad discretion in its selection of methodology to implement the statute" so long as this discretion is not abused or employed in an arbitrary manner. *Id.* Thus *Hussey Copper* supports, rather than limits, reasonable consideration of the facts in each case to inform the Department's reasonable methodological choices.

limited. *Remand Results* at 7; Def.'s Response to Comments Regarding the Remand Redetermination, ECF No. 80 ("Def.'s Response") at 7. The Department argues, however, that it is not compelled to follow the *LWS from the PRC* process in selecting comparable countries for comparison. Commerce specifically notes that *LWS from the PRC* reserves the Department's prerogative to make future determinations based on a range of factors appropriate to each case, including the availability of data. *Remand Results* at 7–8; *Def.'s Response* at 8.

Electing not to gather additional data, the Department argues that the only information presently on the record that offers price data on land not specifically known to be developed for industrial use comes from the 2007 *CBRE Report* and that such data is only available for Subic Bay in the Philippines. *Remand Results* at 7–8. Since the remand found the Department's use of prices for developed industrial land with significant existing infrastructure to be unjustified, the Department argues that the selection of the Philippines is reasonable. *Id.*

The Department is correct. While not as well grounded in record evidence as the selection of Thailand in *LWS from the* PRC, the Department's selection of the Philippines as a comparison country is not contrary to the Department's practice and precedent. In *LWS from the PRC*, the Department examined several factors before reaching the conclusion that Thailand provided the best benchmark for the subsidies provided by LTAR land programs, including relative wealth, (represented by gross national income per capita), population density, industrial density, and the perceptions of foreign investors (represented by reports from the Japan External Trade Organization as well as the private firm CBRE). *LWS from the PRC* at 67,909.

While the procedures used in this determination have continued to guide the Department in some proceedings,[7] they were clearly not intended to establish a general policy for all land LTAR investigations. Rather, the choice of Thailand in *LWS from the PRC* was at least in part driven by its economic similarity to China's Shandong Province where the firms under investigation had received their land use subsidies. This indicated that the selection of Thailand was not intended to set a new departmental policy for all LTAR calculations involving any Chinese industrial land, but was instead tailored to the facts of the *LWS from the PRC* case.[8] *Id.* To clarify this, the determi-

[7] *See, e.g., Citric Acid and Certain Citrate Salts From the People's Republic of China*, 79 Fed Reg. 108 (Dep't of Commerce Jan. 2, 2014) (final results of administrative review, 2011) and accompanying Issues & Decision Mem., A-570–937 (Dec. 26, 2013) at 28, n. 168.

[8] Shandong's GNI per capita and population density, both significantly above the Chinese national average, were found to be nearer to the Thai levels and therefore to make Thailand a better comparison. *Id.* The land at issue in the instant aluminum extrusions investigation

nation in *LWS from the PRC* also emphasized both that the Department might choose to rely upon other factors in future decisions regarding LTAR land value comparisons and that the process of developing a general policy to account for such land subsidies was ongoing. *Id.*

Relying on such other factors is exactly what the Department has done in this case. Specifically, in adopting Subic Bay as a benchmark in response to the *Zhaoqing Remand*, the Department relied on the inclusion of the Philippines in the *CBRE Report* to determine that the country is sufficiently comparable to China for this purpose without prejudicing its decisions in the future.[9] *Remand Results* at 9. Though the criticisms raised by the AEFTC are not unreasonable, nothing in *LWS from the PRC* requires a different result.

II. *The Department's Refusal to Reopen the Administrative Record to Improve the Accuracy of the LTAR Benchmark*

AEFTC also objects to the adequacy of information available on the record about the Philippines as a basis for comparison with ZHTIDZ. *AEFTC Comments* at 6.[10] AEFTC makes both the general argument that the lack of record data prevents the Department from making a reasonably accurate estimate of the ZHTIDZ land value subsidy and the specific argument that inflation data on the Philippines must be collected in order to establish a subsidy estimate as accurate as the

is in Guangdong Province near Hong Kong. *I & D Memo* at cmt. 13. The emphasis on this regional difference undermines the presumption that the Thai comparison developed by the Department for *LWS from the PRC* should by default be applied here, *Id.* at cmt. 24, and contradicts AEFTC's claim that the department has a general "stated policy to use Thai benchmarks to value PRC land LTAR programs" that is here being disregarded. *AEFTC Comments* at 6.

[9] In the linked antidumping investigation, the Department found the Philippines to be comparable to China in its level of economic development as part of a review required to establish surrogate values for factors of production under 19 U.S.C. §1677b(c)(4)(B). *See Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 18,524 (Dep't Commerce Apr. 4,2011) (final determination of sales at less than fair value) and accompanying Issues & Decision Memorandum, A-570–967 (Apr. 4,2011) at cmt. 1(F) (defending the use of the Philippines as one of several surrogate countries to establish a market economy wage rate). This finding of economic comparability has been relied upon both in other investigations, e.g. *Certain Steel Threaded Rod from the People's Republic of China*, 77 Fed. Reg. 27,022 (May 8, 2012) (preliminary results of administrative review) at 27,025, and in the most recent administrative review of the Aluminum Extrusions case. *Aluminum Extrusions from the People's Republic of China*, 79 Fed. Reg. 96, (Dep't Commerce Jan. 2, 2014) (final results of antidumping duty administrative review and rescission) and accompanying Issues & Decision Mem., A-570–967 (Dec. 26, 2013) at cmt. 1. These findings demonstrate that Commerce generally considers the national economy of the Philippines to be similar to that of China, supporting the reasonableness of Commerce's choice here to use Philippines data as a benchmark for estimating the value of the subsidy provide by the LTAR program.

[10] In its redetermination, Commerce found that the Subic Bay sites had a level of infrastructure lower than the Thai sites. *Remand Results* at 7. No party challenges this finding.

Thai benchmark that would normally be used. To accomplish this, AEFTC argues that the Department should be required to reopen the administrative record in order to provide the foundation for a more precise valuation. *Id.* AEFTC notes that the Department may reopen the record in response to a remand and argues that it would be appropriate to do so in this case to advance the purpose of the remand. *Thai Plastic Bags Indus. Co. v. United States*, __ CIT ___, 895 F. Supp. 2d 1337, 1346 (Ct. Int'l Trade 2013); *Qingdao Sea-Line Trading Co., Ltd. v. United States*, Slip Op. 13–102 (CIT Aug. 8, 2013). The Defendant's response, in contrast, emphasizes that the Department has the *discretion* to reopen the record and that the determination of when it is appropriate to do so is properly left to the Department. *Def.'s Response* at 7, citing *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 33 C.I.T. 695, 625 F. Supp. 2d 1339, 1356 n. 18 (2009).

AEFTC's most specific argument for compelling the Department to reopen the record is the lack of any data that would allow the Department to apply an appropriate discount for Philippine inflation to the *CBRE Report's* indicative values for Subic Bay properties. In setting out their case, however, AEFTC goes beyond the issue of accurately accounting for inflation and cites three admissions by the Department that adequate data on investor perceptions and Philippine demography are not available to conduct an investigation of the Philippines comparable to that conducted of Thailand in *LWS from the PRC*.[11] AEFTC Comments at 6. Though not clearly stated, the argument suggests that it is impossible to establish an accurate benchmark for the ZHTIDZ land use subsidy without these data and that the only way to deal with this problem is to reopen the administrative record and gather sufficient information to conduct an investigation of the Philippines comparable to *LWS from the PRC*.

No party contests the Department's finding that the Subic Bay benchmark has a lower level of infrastructure in place than the Thai properties originally used and is therefore more comparable to ZHTIDZ. *See supra* n. 9. It follows that we must reject AEFTC's argument. Because the Department is not compelled by its own procedures or the demands of substantial evidence to conduct a study of the Philippines comparable to *LWS from the PRC*, the information on investor perceptions and Philippine demography highlighted by

[11] AEFTC correctly identifies the three types of evidence used by Commerce in *LWS from the PRC* that established Thailand as an adequate benchmark in that case – macroeconomic data, demographic information, and a study of the perceptions of foreign investors.

AEFTC is not necessary. It would be illogical to remand based on the failure to collect information that the Department has demonstrated it does not need.

This leaves AEFTC's specific objection to the Department's failure to correct the Philippines price data provided in the CBRE Report for inflation. AEFTC argues that the lack of data on inflation of the Philippine peso prevents the Department from discounting the Subic Bay land values for the period that separates the *CBRE Report* estimates of 2007 from the 2006 acquisition of the ZHTIDZ land by New Zhongya. *AEFTC Comments* at 7. Since the Thai land prices were so discounted in response to criticism, AEFTC argues that failing to reopen the record in order to discount Philippine price data is not reasonable. *Id.*, citing *I & D Memo* at cmt. 24.

The Department's defense of its decision not to discount for inflation rests on the relatively short time separating New Zhongya's acquisition of land use rights in June and October of 2006 and the second quarter of 2007 from which the indicative values in the *CBRE Report* were drawn.[12] *Remand Results* at 10; *Def's Response* at 9.

Again the Department is correct. Neither the Department's failure to discount Philippine prices for inflation over a period of between eight months and one year, nor its refusal to reopen the record to gather such information, can be considered unreasonable.

Three factors support the conclusion that Commerce is operating within the bounds of its discretion. First, though the Department did discount the Thai benchmark real estate prices for inflation in its original determination, AEFTC does not allege that the Department has violated an established methodology or practice by failing to do so here. *I & D Memo* at cmt. 24.

Second, the Department's decision to discount Thai property values in the Final Determination is differentiable from the decision not to do so for the Philippines along precisely the lines invoked by the Department. The Thai land values used in the Final Determination are drawn from a CBRE Report citing prices in the first quarter of 2008 rather than the second quarter of 2007. *Id.* This is entirely consistent with the Department's explanation that the shorter time period justifies a different decision.

Third, if the Department had determined that discounting for Philippine inflation were appropriate, evidence presently on the record could provide a basis for doing so. The *CBRE Report* from which the Subic Bay indicative values were drawn provides an inflation rate of

[12] The specific table in the CBRE Report from which the indicative values for Subic Bay properties are taken labels these as prices at the close of the second quarter of 2007. *CBRE Report* at 12, ECF No. 82–2 at 66.

2.4% for the Philippine peso as of May 2007.[13] *CBRE Report* at 1, ECF No. 82–2 at 55. While it is unclear from the Department's submissions why it would be inappropriate to use this number to discount the Subic Bay values, its presence on the record invalidates AEFTC's claim that reopening the record would be the only way to address the inaccuracy introduced into the subsidy estimate by inflation.

Taken together, these factors undermine AEFTC's argument that the Department should be compelled to reopen the administrative record to account for inflation. Since Commerce's benchmark selection was not unreasonable, the Department's failure to reopen the record was not an abuse of discretion. *Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1182 (Fed. Cir. 1994) (quoting *Gerritsen v. Shirai*, 979 F.2d 1524, 1529 (Fed. Cir. 1992)) (stating that an agency abuses discretion, *inter alia*, when its determination "follows from a record that contains no evidence on which the [agency] could rationally base its decision." (alteration in original)) *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012)(emphasizing the high threshold for overturning the Department's decisions regarding the collection of record evidence).

CONCLUSION

For the foregoing reasons, the Department's selection of the Subic Bay indicative land value as a benchmark for estimating the subsidy provided to New Zhongya by land use rights in the ZHTIDZ is affirmed. Judgment shall be issued accordingly.

It is so ORDERED.

Dated: February 19, 2014
New York, NY

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

Slip Op. 14–20

MERIDIAN PRODUCTS LLC, Plaintiff, and WHIRLPOOL CORPORATION, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 13–00246

[13] The *CBRE Report* provides both the headline inflation rate of 2.4% and a core inflation rate of 2.6%. It also presents an explanation for the divergence between core and headline figures based on recent tax changes as part of its general discussion of the investment environment of the Philippines. It is puzzling that neither party addresses the existence of these numbers on page 1 of the CBRE Report before moving on to arguments over the necessity of reopening the administrative record to collect inflation data.

[Denying plaintiff's motion seeking a remand to the U.S. Department of Commerce of an administrative decision construing the scope of an antidumping duty order]

Dated: February 19, 2014

Daniel Cannistra, Crowell & Moring LLP, of Washington, DC for plaintiff.

Donald Harrison, Gibson, Dunn & Crutcher LLP, of Washington, DC for plaintiff-intervenor. With him on the brief were *J. Christopher Wood*, *Ran Yan*, and *DeLisa Lay* of Washington, D.C.

Tara Hogan, Senior Trial Counsel, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, U.S. Department of Justice. Of counsel on the brief was *Jessica M. Forton*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Robert E. DeFrancesco, III, *Alan H. Price*, Wiley Rine, LLP, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

In this action, plaintiff Meridian Products LLC ("Meridian") contests a final scope ruling issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"). *See Final Scope Ruling on Meridian Kitchen Appliance Door Handles* (June 21, 2013), ECF No. 25–1 ("*Final Scope Ruling*"). Before the court is plaintiff's motion seeking a remand of the contested administrative determination prior to briefing on the substantive issues in the case. Meridian's Mot. for Remand 1 (Sept. 23, 2013), ECF No. 29 ("Pls.'s Mot."). The court denies the motion and orders the parties to consult with one another regarding a scheduling order, in accordance with USCIT Rule 56.2(a).

I. BACKGROUND

Commerce issued an antidumping duty order and a countervailing duty order (collectively, the "Orders") on aluminum extrusions from the People's Republic of China ("China or the "PRC") on May 26, 2011. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (May 26, 2011); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (May 26, 2011). On January 11, 2013, Meridian filed a letter ("Scope Ruling Request") seeking a ruling that certain kitchen appliance door handles are outside the scope of the Orders. *Letter from Meridian to Secretary of Commerce Requesting a Scope Ruling on the Antidumping Duty Order on Aluminum Extrusions from China Regarding Certain Kitchen Appliance Door Handles* (Jan. 11, 2013) ("*Scope Ruling Request*"). On June 21, 2013, Commerce issued its final scope ruling in response to Meridian's request.

Final Scope Ruling 1. Plaintiffs then commenced this action on July 10, 2013. Summons, ECF No. 1; Compl., ECF No. 4.

Due to disagreements concerning plaintiff's motion for remand, the parties were unable to agree to a scheduling order to govern these proceedings. Joint Status Report (Sept. 17, 2013), ECF No. 28. Plaintiff filed its motion for a remand on September 23, 2013, before the parties submitted any briefing on the merits in this litigation. Pls.'s Mot. 1.

In the motion for remand, which plaintiff-intervenor Whirlpool Corporation supports, Resp. of Whirlpool Corp. to Meridian Products' Mot. for Remand (Oct. 30, 2013), ECF No. 31, plaintiff requests that the court remand the Final Scope Ruling to Commerce. Pls.'s Mot. 1. Both defendant and defendant-intervenor oppose the motion. Def.-Int.'s Resp. to Pl.'s Mot. for Remand (Oct. 31, 2013), ECF No. 32 ("Def.-intervenor's Resp."); Def.'s Opp'n to Pl.'s Mot. for Remand, &, in the Alt., Def.'s Mot. for Extension of Time (Oct. 31, 2013), ECF No. 33 ("Def.'s Opp'n").

II. DISCUSSION

In its motion for a remand, plaintiff argues on several grounds that the Final Scope Ruling is contrary to law and must be remanded to the Department for reconsideration. Plaintiff argues, *inter alia*, that the analysis Commerce employed in the Final Scope Ruling is impermissible according to principles the United States Court of Appeals for the Federal Circuit ("Court of Appeals") established in *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295 (Fed. Cir. 2013) ("*Mid Continent*").

Plaintiff submits that a remand is appropriate at this early stage of the case because a remand "would afford Commerce the opportunity to correct its own mistakes without the assistance of the Court and would therefore promote judicial efficiency." Mem. of P. & A. in Supp. of Meridian's Mot. for Remand 11 (Sept. 23, 2013), ECF No. 29. According to plaintiff, "[a]llowing this case to be considered on the merits without remand would require extensive briefing as to the validity and application of an interpretation that the Federal Circuit has squarely rejected" in *Mid Continent* and "would unnecessarily burden the Court and the parties." *Id.* at 11–12. Plaintiff argues that allowing the case to proceed without a remand at this stage "would frustrate the Court's efficient administration of justice." *Id.* at 12.

Plaintiff's motion asks the court to deviate from the ordinary procedures prescribed by USCIT Rule 56.2(a) for cases brought to contest an administrative determination made by an agency charged with responsibilities under the antidumping and countervailing duty laws.

Rule 56.2(a) provides for detailed procedures, including a "proposed briefing schedule," that apply generally to such challenges. USCIT R. 56.2(a). The rule provides that a "judge may modify the following procedures as appropriate in the circumstances of the action, or the parties may suggest modification of these procedures." *Id.*

Both defendant and defendant-intervenor oppose plaintiff's motion on the ground, *inter alia*, that allowing a remand at this point would be procedurally unfair. Def.'s Opp'n 8–9; Def.-intervenor's Resp. 3. In opposing plaintiff's motion for a remand, defendant and defendant-intervenor rebut certain legal arguments plaintiff makes in its motion. Def.'s Opp'n 4–8; Def.-intervenor's Resp. 3–10. Defendant argues, nevertheless, that it has not had the benefit of the ordinary sixty-day period that Rule 56.2(d) provides for submitting a brief on the merits in response to plaintiff's claim. Def.'s Opp'n 8–9.

In adjudicating plaintiff's motion, the court applies the principles of USCIT Rule 1, which provides that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." *Id.* In considering these guiding principles, the court notes that plaintiff has not given the court a convincing reason why the other parties to this proceeding should not be provided the benefit of the sixty-day period that Rule 56.2(d) ordinarily affords opposing parties to respond to a motion for judgment on the agency record. Plaintiff grounds its motion in the merits of its arguments rather than in a compelling reason to expedite the litigation. Absent such a reason, the court concludes that conducting an expedited proceeding over the objections of the opposing parties would be unfairly prejudicial. Accordingly, the court concludes that this case should proceed according to a schedule for a motion for judgment on the agency record and responsive briefing that follows generally the time requirements set forth in USCIT Rule 56.2. The court therefore deems it appropriate to deny plaintiff's motion and to direct the parties to consult on a briefing schedule to govern this proceeding in accordance with USCIT Rule 56.2(a).

III. ORDER

Upon consideration of Meridian's Motion for Remand (Sept. 23, 2013), ECF No. 29, upon consideration of all papers submitted and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's motion for remand be, and hereby is, denied without prejudice to plaintiff's opportunity to seek a remedy at a later time; and it is further

ORDERED that counsel for plaintiff shall consult with counsel for the other parties and, by March 7, 2014, submit an agreed-upon schedule for briefing that follows generally the procedures of USCIT

Rule 56.2 or, in the event that the parties cannot reach an agreement on a schedule, a request for a scheduling conference.

Dated: February 19, 2014
New York, New York

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