Slip Op. 11–1

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

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

[United States Department of Commerce's Final Results of Redetermination, as supplemented, are sustained in part and remanded.]

Dated: January 4, 2011

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Wiley Rein LLP (Timothy C. Brightbill), for defendant-intervenor.

OPINION AND ORDER

Eaton, Judge:

INTRODUCTION

At issue in this action are the United States Department of Commerce's ("Commerce" or the "Department") final results of the thirteenth administrative review of four antidumping duty orders applicable to imports into the United States of heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC"). *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 54,897 (Dep't of Commerce Sept. 19, 2005) (final Results of antidumping duty administrative reviews) (the "Final Results"); *see also* HFHTs, Finished or Unfinished, With or Without Handles From the PRC, 56 Fed. Reg. 6,622 (Dep't of Commerce Feb. 19, 1991) (notice of antidumping duty orders) (covering axes/adzes, bars/wedges, hammers/sledges and picks/mattocks) (the "HFHTs Orders"). In *Tianjin Machinery Import & Export Corp. v. United States,* 31 CIT 1416 (2007) (not reported in the Federal Supplement) *("Tianjin I"),* the court sustained certain aspects of the Final Results and remanded several issues to the Department.

Subsequently, the court also ordered the Department to reopen the record as to one of those issues and to address the merits of plaintiffs' chart submissions, which purportedly demonstrated "that TMC and

Huarong's steel type and the steel surrogate values differed in recent reviews . . . and . . . that these differences significantly impacted the resulting margins relied upon by Commerce in its AFA anaylsis." *Tianjin Machinery Import & Export Corp. v. United States,* Ct. No. 05–00522, Order at 4 (June 8, 2009) (directing Commerce to place plaintiffs' charts on the record and to offer a response to them) ("*Tianjin II*").

Now before the court are Commerce's Final Results of Redetermination as supplemented. *See* Final Results of Redetermination (Dep't of Commerce Mar. II, 2008) (the "First Remand Results"); Final Results of Redetermination Pursuant to Court Order (Dep't of Commerce Sept. 16, 2009) (the "Supplemental Remand Results") (collectively, the "Remand Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a) (2) (B) (iii). For the following reasons, the Remand Results are sustained, in part, and remanded.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b) (1) (B) (I).

DISCUSSION

I. Legal Framework for Adverse Facts Available Rates

When periodically reviewing antidumping duties for an uncooperative party, Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). While the court has previously sustained[1] Commerce's threshold decision to use Adverse Facts Available[2] ("AFA"), questions remain about the manner in which the ad-

[1] The court sustained the application of AFA to TMC's and Huarong's sales of bars/wedges: "[A]s this Court has previously held, plaintiffs' 'failure initially to provide the relevant information with respect to their invoicing arrangement, information that was fully within their command, justified Commerce's application of AFA' to plaintiffs' claimed 'agent' sales." *Tianjin I,* 31 CIT at 1424 (quoting *Shandong Huarong Mach. Co. v. United States,* 30 CIT 1269, 1278, 435 F. Supp. 2d 1261, 1270 (2006)). As to TMC's sales of picks/mattocks, the court found that "based on the company's failure to have available for inspection at verification its sole supplier's factors of production data," "Commerce's application of AFA [was] supported by the record." *Tianjin I,* 31 CIT at 1437, 1432 (citation omitted).

[2] Pursuant to 19 U.S.C. § 1677e(a), if:

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this subtitle, verse inferences, arising from that decision, were used "in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). In particular, plaintiffs contest the Department's application of adverse inferences when choosing from the facts otherwise available to select their individual AFA rates.

II. AFA Rate for TMC's and Huarong's Sales of Bars/Wedges

In *Tianjin I*, the court found that Commerce did not present substantial evidence to justify its decision to assign an AFA rate of 139.31 percent to Tianjin Machinery Import & Export Corp.'s ("TMC") and Shandong Huarong Machinery Co., Ltd.'s ("Huarong" and, collectively, "plaintiffs") for their sales of bars/wedges. This rate had been calculated for TMC in the eighth administrative review of the HFHTs Orders and is the highest calculated rate under the Orders. *See Tianjin I*, 31 CIT at 1434. On remand, the court directed the Department to either "explain . . . how the 139.31 percent rate applied to TMC's and Huarong's sales of bars/wedges is a reasonably accurate estimate of TMC's actual rate with a built-in increase to deter noncompliance . . . and . . . [to] explain in detail how any rate assigned to Huarong is reliable and bears a rational relationship to the company itself" or "reopen the record and calculate an AFA rate to be applied to Huarong's and TMC's sales of bars/wedges, with an additional amount to deter future non-compliance." *Id.* at 1435.

In the First Remand Results, Commerce did not change the 139.31 percent rate for TMC's and Huarong's sales of bars/wedges, nor did it formally reopen the record, as permitted by the court, to calculate new AFA rates. Instead, the Department insisted that it complied with the court's remand instructions by further explaining the applicability of the 139.31 percent rate to TMC and Huarong, and providing additional factual support for this determination. *See* First Remand Results at 2, 6.

Responding to the First Remand Results, plaintiffs claimed that Commerce's new justifications were based on information not on the

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, . . .

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified . . . ,

the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

If Commerce determines that the above criteria are met, and makes the separate subjective determination that the respondent has "failed to cooperate by not acting to the best of its ability to comply with a request for information," then, under 19 U.S.C. § 1677e(b), the agency "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

record. *Tianjin II,* Ct. No. 05–00522, at 4. In making their argument, plaintiffs primarily objected to Commerce's reliance on newly produced data from United States Customs and Border Protection. *Id.* at 3–4. As a result, they sought an opportunity to put on the record information of their own, consisting of several charts purportedly demonstrating "that TMC['s] and Huarong's steel type and the steel surrogate values differed in recent reviews [ ] . . . and . . . these differences significantly impacted the resulting margins relied upon by Commerce in its AFA analysis." *Id.* at 4.

The court agreed with plaintiffs that Commerce had "independently accessed Customs data to substantiate its results." *Id.* at 5. Likewise, the court also agreed that the plaintiffs' charts were "relevant to the probative value of Commerce's weighted-average unit value analysis" and that the information "should be fully vetted by the Department at the administrative level." *Id.* at 5–6. As a result, the court remanded the matter again, and ordered Commerce to "address the impact of plaintiffs' charts . . to their selection of AFA rates for TMC['s] and Huarong's sales of bars/wedges." *Id.* at 6.

In the Supplemental Remand Results, Commerce retained its initial rates, finding that plaintiffs' charts and arguments did not "provide [ ] information or argument sufficient to change the Department's selection of 139.31 percent rate for either TMC's or Huarong's sales of bars/wedges." Supplemental Remand Results at 2.

A. TMC

In *Tianjin I,* the court concluded that the 139.31 percent rate did not bear a rational relationship to TMC's sales of bars/wedges during the period of review ("POR"), i.e., February 1, 2003 to January 31, 2004. *Tianjin I,* 31 CIT at 1434–35. In reaching this conclusion, the court found that Commerce could not rely on TMC's rate from the eighth administrative review of the HFHTs Orders (covering the POR February 1, 1998 to January 31, 1999) without explaining its relevance to the thirteenth administrative review, which took place some five years later.

On remand, Commerce has chosen to comply with *Tianjin I*'s directives by seeking "additional information to determine whether TMC's sales during the eighth administrative review continue [ ] to reflect TMC's commercial activity during the [POR] for the thirteenth review." *See* Def.'s Resp. to Comments Regarding the Remand Redetermination 5 (citing First Remand Results at 2) . In order to demonstrate how the 139.31 percent rate is reflective of TMC's recent commercial activity, Commerce cites the following additional factual support:

> The Department obtained information from the Automated Commercial System (ACS) of U.S. Customs and Border Protection (CBP) regarding sales values of TMC's merchandise classifiable under harmonized tariff schedule subheading 8205.59.30, the subheading applicable to the merchandise subject to the bars/wedges order. The Department specifically queried the two review periods at issue: February 1, 1998, through January 31, 1999 [the eighth review], and February I, 2003, through January 31, 2004 [the thirteenth review]. Using this information, the Department calculated a weighted-average unit value (AUV) for each period for TMC's sales of merchandise subject to the bars/wedges order. The Department compared the AUV from each period and found that TMC's AUV for the subject merchandise declined. from the earlier to the later period. This change in TMC's AUVs contrast[s] with little to no change in the production process used by the PRC industry to produce bars/wedges over the last five years, as demonstrated by respondent questionnaire responses and verifications from multiple administrative proceedings. Thus, because the production process of the industry has generally stayed constant, while TMC's U.S. sales values have declined, the Department concludes that this information further substantiates the relevance of the 139.31 percent margin as AFA for TMC's sales of merchandise under the bars/wedges order.

First Remand Results at 6–7 (citations omitted). Thus, Commerce insists that a steep decline[3] in the price at which the merchandise was sold into the United States, while the production process used to make the bars/wedges stayed constant, is "probative evidence of TMC's continued dumping of hand tools on the United States market." Def.'s Resp. To Court's Letter Dated June 11, 2010 3 (emphasis removed) . In other words, for Commerce the price decline from the eighth review to the thirteenth review, during which period nothing changed in the way the merchandise was made, indicates that not only did TMC continue to dump its products, but that the dumping margin, if anything, had increased.

Next, the Department points to, what it calls, the volatility of TMC's margins in past reviews as further evidence of the relevance of the 139.31 percent rate. Specifically, Commerce notes that: (1) in the seventh review, it assigned TMC an AFA rate of 47.88 percent; (2) in the eighth review, it calculated the 139.31 percent rate (an increase of

[3] TMC's AUV "declined by 34.33 percent from the earlier [eighth review] to the later period [thirteenth review] ." First Remand Results at 7.

ninety-two percentage points); (3) in the ninth review, it calculated a 0.56 percent rate (a 248-fold decrease); (4) in the tenth review, it calculated a 0.48 percent rate (a de minimus change from the ninth review); and, (5) in the twelfth review, sustained by the court in *Shandong Huarong Machinery Co., Ltd. v. United States,* 31 CIT 1815, 1820 (2007) (not reported in the Federal Supplement) ("*Shandong*"), Commerce, using AFA, assigned the 139.31 percent rate calculated in the eighth review. *See* First Remand Results at 7–8. Accordingly, for Commerce, the "wide swings" experienced by TMC in its prior administrative reviews of bars/wedges demonstrates the continued reliability of the 139.31 percent rate. *Id.* at 8; *see also id.* at 7 ("[AJ review of the volatility of TMC's margins in past reviews provides further factual support for the relevance of the 139.31 percent rate."). Thus, Commerce asserts that the 139.31 percent rate is consistent with TMC's varying rate history.

As to why the 139.31 percent rate is more accurate than more recent lower rates calculated for TMC, the Department argues:

> Because TMC's sales of bars/wedges are receiving total adverse facts available[4] due to its involvement in the "agent" sales scheme, we do not find that using one of TMC's prior lower rates would be appropriate as an AFA rate. In administrative reviews where TMC received lower rates, not only did TMC fully participate in those proceedings, but TMC did not receive total AFA. As a result, it would be difficult to reconcile applying a lower rate to TMC as AFA in this review when those lower rates were not calculated based on AFA.

First Remand Results at 9.

With respect to the steel valuation charts plaintiffs have now placed on the record, Commerce maintains that it "cannot compare the steel used for TMC or Huarong in the [thirteenth] administrative review with the [eighth] administrative review" because the Department believes, based on the companies' participation in the fraudulent invoicing scheme that the new data, like all of the companies' questionnaire responses, is not reliable. Supplemental Remand Results at 8. "As such, the Department has no reliable information upon which to conclude that the steel surrogate values would be different-or how they would be different-than the surrogate values applied in the 8th

[4] While the phrase "total adverse facts available" is not referenced in either the statute or the agency's regulations, it can be understood, within the context of this case, as referring to Commerce's application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e after rejecting as untrustworthy all information submitted by respondents in this review.

administrative review." *Id.* Put another way, because of the plaintiffs' failure to disclose their true business relationship,[5] Commerce has concluded that it cannot trust any of the steel valuation data they have offered.

Further, Commerce contends that, even if it did consider the explanatory charts, they would not be sufficient to explain why the margin for the thirteenth review would not be the same as or higher than the eighth. *Id.* In making this argument, the Department stresses that the dumping margin is not derived solely on the surrogate steel value, but is based on several factors of production. *See id.* at 9 ("Plaintiffs' argument examines only one component of the normal value . . . . Without considering the differences in consumption rates for all [factors of production] (e.g., material inputs, energy and labor) between segments, we cannot assume, as plaintiffs argue, that the difference in margins would simply be due to a change in the surrogate values for steel."). Commerce also notes the margin is sensitive to the U.S. price. *See id.* at 8–9 ("While plaintiffs seem to claim that the surrogate values that would have been used in the 13th administrative review would have been lower than the surrogate value for steel used in the 8th administrative review, U.S. prices at least for TMC's bars/wedges also declined."). Thus even if normal value did decrease between the eighth and thirteenth reviews, Commerce argues that the margin would not necessarily be smaller, because the U.S. price also declined.

Finally, the Department claims that plaintiffs' charts themselves undermine their theory of a direct correlation between steel values and margins. Specifically regarding TMC, Commerce notes that the company's margin declined at a much steeper rate than its steel surrogate value did from the eighth to the ninth to the tenth administrative review. *See id.* at 10 ("While the surrogate value of steel declined from the 8th administrative review value of 37.52 Rs/kg to a range of values between 5.43 Rs/kg and 9.327 Rs/kg, the [calculated] margins declined at a much steeper rate: from [a calculated rate of] 139.31 percent in the 8th administrative review to [calculated rates of] 0.56 percent and 0.48 percent in the 9th and 10th administrative

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[5] As explained in *Tianjin I*:

> Plaintiffs fail to acknowledge . . . that Commerce discovered, after the issuance of several supplemental questionnaires, that the business relationship between Huarong and TMC was nothing more than a scheme apparently directed toward circumventing the antidumping duties applicable to Huarong's HFHTs sales to the United States. [T]he mere statement that sales were made through an agent when, in reality, the agent's role was simply to provide the principal with blank invoices, is not enough to preclude Commerce from resorting to facts otherwise available.

31 CIT at 1423.

reviews, respectively.”). As a result, the Department contends that something other than the surrogate values for steel alone influenced the size of TMC’s margin.

In support of its challenge to the Remand Results, TMC states that the Department’s 139.31 percent rate is unreliable because Commerce “merely selected data to support that conclusion without meaningful and required corroboration.” Comments on the Department of Commerce’s Final Results of Redetermination Pursuant to Court Remand (“Pls.’ Supplemental Comments”) 5. Central to TMC’s various claims is its contention that Commerce refuses to acknowledge “how important it is to match the input steel surrogate values with reasonable margins.” Pls.’ Supplemental Comments 10.

TMC relies heavily on its contention that the steel surrogate value chosen for the eighth administrative review was “aberrational in comparison to all other input steel surrogate values.” Pls.’ Supplemental Comments 8. In other words, the company claims that the steel surrogate value used for the eighth review was markedly more expensive than in other years, because in the eighth review Commerce chose a specific Indian surrogate steel value it had not used before, and that it has not used since. According to TMC, this surrogate value choice resulted in a much higher antidumping margin in the eighth review than in subsequent reviews. To support their argument, plaintiffs present the two charts, described *supra,* purporting to demonstrate “that the calculated margins for TMC and Huarong during the [eighth through thirteenth reviews] varied in direct proportion to the steel input surrogate value.” Pls.’ Supplemental Comments 9.

Commerce’s selection of the 139.31 percent rate for TMC’s sales of bars/wedges during the POR is sustained. In reaching this decision, the court notes that many of the arguments made in this case were made in the earlier *Shandong* case, where this Court sustained the 139.31 percent rate for TMC’s sales of bars/wedges in the twelfth administrative review. In that case, the Court stressed that all of TMC’s proffered sales data were tainted by the company’s participation in the fraudulent invoicing scheme. *See Shandong,* 31 CIT at 1819–20 (“Because of TMC’s participation in the invoicing scheme, all of its sales data was necessarily tainted . . . . Accordingly, despite plaintiffs’ insistence that Commerce should calculate a rate for TMC’s bars/wedges, Commerce had no reliable information from which to do so.”).

As an initial matter, Commerce’s AUV analysis tends to support its contention that “TMC’s declining United States sales values (without commensurate production process changes) constituted probative evidence of TMC's continued dumping of hand tools on the United States market." Def.'s Resp. to Court's Letter Dated June 11, 2010 3 (emphasis removed). As the Department explains:

> A direct relationship exists between an industry's production process and the subject merchandise's cost of production because significant changes in the production process, such as the introduction of new technology, can affect the cost of production. Hypothetically, if the cost of production decreases because of new technologies or efficiencies, such cost decreases could be reflected in declining United States sales values. If no such changes occurred, however, this would be some indication that costs may have remained steady, corroborating, to the extent practicable the selected facts available dumping margin because declining sales values reflected continued dumping. Accordingly Commerce in this case examined whether changes in the industry's production process might have explained some of the decline in U.S. sales values, and found that there were no significant changes in the production process of the industry. Therefore, Commerce reasonably determined that any change in the cost of production for the subject merchandise and the United States sales values was not attributable to changes in the production process of the industry.

Def.'s Resp. to Court's Letter Dated June 11, 2010 1–2. While the analysis does not take into account any changes in the surrogate cost of manufacturing inputs, it is, as Commerce puts it, "some indication" that TMC's manufacturing costs remained steady while its U.S. price declined, thus eliminating production changes as a cause of the change in price.

Moreover, TMC has a history of significant rate changes among reviews. That is, the company has received calculated rates that vary from 139.31 percent in the eighth, to 0.48 percent in the tenth review. Thus, while TMC's more recent rates have been dramatically lower, the calculated rate of 139.31 percent tends to confirm the Department's finding that assigning this rate in this thirteenth review is not inconsistent with TMC's calculated rate history. *See Shandong,* 31 CIT at 1820.

TMC's primary objection to Commerce's analysis is that the Department has failed to recognize the significance of differences, across reviews, of the steel surrogate value to the resulting margin. At the outset, it must be noted that Commerce's claim that it can ignore plaintiff's charts based on the use of total AFA overstates the uses of

19 U.S.C. § 1677e(b). *See, e.g., Gerber Food (Yunnan) Co., Ltd. v. United States*, 29 CIT 753, 771, 387 F. Supp. 2d 1270,1286–87 (2005) ("Commerce failed to provide a rational explanation of how Green Fresh's participation in the export agency agreement, and the circumstances surrounding its reporting of that agreement, affected the unrelated information needed to calculate an antidumping duty rate for application to all shipments by Green Fresh of mushrooms subject to the administrative review.") Put another way, the use of AFA resulting from the fraudulent invoicing scheme may taint TMC's pricing information, but cannot be used as an excuse to disregard unrelated information. *See* 19 U.S.C. § 1677e(b).

TMC's arguments about the differences in the type of steel used as an input in various reviews and hence its cost, however, are not persuasive. The data found in plaintiffs' charts only considers one component of the normal value calculation, i.e., the input for steel. Without looking at all the factors of production together, e.g., the cost of labor, the court has no way to discover if the reduction in the cost of the steel surrogate value would have reduced TMC's margin. In addition, while the cost of producing the merchandise may have decreased from review to review, so did the U.S. price. Thus, it is not at all clear that TMC's margin between the eighth and the thirteenth review would have decreased based solely on a reduction in the surrogate value of the steel inputs.[6]

Next, an examination of TMC's charts reveals that they do no show a direct correlation between the steel surrogate value and antidumping margin. According to the charts, TMC's margin decline was much more exaggerated than the decline in its steel surrogate values between the eighth, ninth, and tenth reviews. Therefore, the data suggests that factors other than the cost of the steel input were at work and resulted in declining prices.

Here, the Department has chosen a rate calculated for TMC in a prior review. Reliance on a previously calculated rate for the company itself was reasonable because, although the Department had no reliable pricing information for the POR, it was able to look to a rate arrived at using TMC's own verified data in an earlier review. *See Shandong,* 31 CIT at 1820. The Department then took steps to demonstrate that the data remained relevant to the "commercial reality" of TMC during the thirteenth administrative review. *Gallant Ocean (Thailand) Co., Ltd. v. United States,* 602 F.3d 1319, 1324 (Fed. Cir. 2010) ("*Gallant Ocean* "); *see also KYD, Inc. v. United States,* 607 F.3d

[6] "While plaintiffs seem to claim that the surrogate values that would have been used in the 13th administrative review would have been lower than the surrogate value for steel used in the 8th administrative review, U.S. prices at least for TMC's bars/wedges also declined." Supplemental Remand Results at 8–9.

760, 767 (Fed. Cir. 2010) (reaffirming *Gallant Ocean's*"commercial reality" test) *("KYD")*.

Specifically, Commerce (1) engaged in an AUV analysis to demonstrate that a rate calculated using TMC's data from the thirteenth review could have been as high or higher than 139.31 percent, and (2) employed a volatility analysis to show that TMC's rates have varied greatly in past reviews, and that the 139.31 percent rate, though high, is consistent with TMC's rate history. In the AFA context, Commerce is permitted to add a "built-in increase intended as a deterrent to non-compliance," as long as that increase does not become "punitive, aberrational, or uncorroborated." *F. lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000) *("De Cecco")*. By using a previously calculated rate for TMC itself and justifying the rate with substantial evidence, it is apparent that Commerce has not selected an "unreasonably high rate[ ] having no relationship to the respondent's actual dumping margin." *Gallant Ocean,* 602 F.3d at 1323. Thus, Commerce has satisfied the instructions in *Tianjin I* to "explain . . . how the 139.31 percent rate applied to TMC's . . . sales of bars/wedges is a reasonably accurate estimate of TMC's actual rate with a built-in increase to deter non-compliance . . . ." *Tianjin I*, 31 CIT at 1435. While hardly overwhelming, taken as a whole, the Department has martialed sufficient substantial evidence to support the rate. *See Shandong Huarong Gen. Corp. v. United States,* 25 CIT 834, 842, 159 F. Supp. 2d 714, 722–23 (2001). Accordingly, the court finds that Commerce's weighing of the evidence and deriving inferences therefrom was not unreasonable and sustains the Department's application of the 139.31 percent rate to TMC's sales of bars/wedges in this thirteenth administrative review.

B. Huarong

In *Tianjin I,* the court found that in applying TMC's 139.31 percent rate from the eighth review to Huarong, the Department did not "articulate[] how the 139.31 percent rate is a reasonable estimate of what Huarong's rate would have been had it complied together with a built-in increase as a deterrent," and, therefore, directed Commerce to "explain in detail how any rate assigned to Huarong is reliable and bears a rational relationship to the company itself." 31 CIT at 1435.

On remand, the Department insists that the volatility of Huarong's margins in past reviews provides factual support for the relevance of the 139.31 percent rate to the company. First Remand Results at 11; Supplemental Remand Results at 11.

Specifically, the Remand Results state that: (1) in the sixth review, Huarong received a calculated rate of 34.00 percent; (2) in the seventh review, a calculated rate of 1.27 percent; (3) in the eighth review, a calculated rate of 27.28 percent; (4) in the ninth review, an assigned AFA rate of 47.88 percent; (5) in the tenth review, a calculated rate of 18.99 percent; (6) in the eleventh review, a calculated rate of 30.02 percent; and, (7) in the twelfth review, Huarong was assigned the 139.31 percent AFA rate.[7] *See* First Remand Results at 11. For Commerce, these "wide swings" justified the continued relevance of the 139.31 percent rate to Huarong. First Remand Results at 11. The Department maintains this position even though Huarong has never had a calculated rate higher than 30.02 percent.

In addition, the Department examined Huarong's sales data from the eleventh review (in which the company cooperated and received its highest calculated rate of 30.02 percent) in order to demonstrate the relevance of the 139.31 percent to Huarong's sales during this PORe First Remand Results at 11–12; Supplement Remand Results at 11. In doing so, the Department noted that Huarong had some transaction-specific margins in the eleventh review that were nearly as high as 139.31 percent and claims that those transactions did "not appear to be aberrant or unusual in any way." First Remand Results at 12.[8] For the Department, these transactions were "representative of the margins [it] would have calculated for . . . [Huarong] in the thirteenth review (with a built-in incentive to encourage cooperation) had it not received total AFA." First Remand Results at 12. In other words, the Department claims that the 139.31 percent rate is shown to be relevant to Huarong's commercial activity during the POR by looking only at the high end of a selected group of sales for a time period two years removed from the POR. For Commerce, this analysis was significant because it not only relied upon Huarong's relatively recent data, but also served to support a rate high enough to deter future non-cooperation.

Finally, the Department asserts "that if an uncooperative respondent could have demonstrated that its dumping margin is lower than the highest prior margin[,] it would have provided information showing the margin to be less." First Remand Results at 12–13 (citation omitted). To justify this approach, the Department relies on the "common sense" presumption first confirmed by the Federal Circuit in

[7] Huarong's rate for the twelfth review was not judicially reviewed.

[8] The Department examined 447 transactions from the eleventh review. None were as high 139.31 percent, and only twelve, or roughly .03 percent of the transactions, were above 130 percent. In addition, only fifty-two of the sales, or approximately twelve percent of the sample, rose above one hundred percent. More than seventy-five percent of sales had less than a fifty percent margin. First Remand Results at App. 3.

Rhone Poulenc, Inc. v. United States, 899 F.2d 1185 (Fed. Cir. 1990) *("Rhone Poulenc"). See* First Remand Results at 12–13; *Rhone Poulenc,* 899 F.2d at 1190.

Huarong's arguments in response to Commerce's conclusions concerning Huarong are not entirely dissimilar to those made by TMC. Thus, the company asserts that there is a direct correlation between the surrogate steel values from its various reviews and its calculated antidumping margins. Pls. ' Supplemental Comments 9. Moreover, Huarong insists that Commerce did not comply with the court's remand instruction to explain how TMC's prior rate is rationally related to Huarong. The company argues that the Department's analysis was "inadequate and selective," and that Commerce "improperly used TMC's prior rate as a benchmark for Huarong." Comments on the Dept. of Commerce's Final Results of Redetermination Pursuant to Court Remand ("Pls.' First Comments") 25. Additionally, Huarong claims that Commerce's volatility analysis does not provide substantial evidence that Huarong should receive a 109.29 percentage point increase from its last calculated rate in the eleventh review. Pls.' First Comments 28. It also notes that this Court invalidated the 139.31 percent AFA rate for Huarong in the ninth review. Pls.' Supplemental Comments 14; *see also Shandong Huarong Gen. Grp. Corp. v. United States,* 29 CIT 1227, 1237 (2005) (not reported in the Federal Supplement) *("Huarong")* (characterizing the use of the 139.31 percent rate in the ninth review as "punitive in nature" based on Commerce's "strained efforts to demonstrate [its] validity").

Although the court finds Huarong's arguments concerning the correlation between steel surrogate values and its antidumping margins unconvincing for the same reasons set out in the TMC discussion *supra,* the question of Huarong's rate must again be remanded. First, the court is not persuaded by the Department's citation of *Rhone Poulenc* for the idea that the use of AFA dispenses with the Department's statutory mandate to corroborate secondary information. *See* 19 U.S.C. § 1677e(c). The *Rhone Poulenc* case is most often cited for its statement on the assignment of the highest prior margin to an uncooperative respondent: "[I]t reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less." *Rhone Poulenc,* 899 F.2d at 1190. In other words, the case stands for the proposition that a respondent can be assumed to make a rational decision to either respond or not respond to Commerce's questionnaires, based on which choice will result in the lower rate.

It is important to keep in mind, however, that *Rhone Poulenc* was a pre-Uruguay Round Agreements case. As a result it reflected the state of the law prior to the enactment of the Act[9] that implemented the Agreements' negotiated terms. *See generally Gerber Food (Yunnan) Co., Ltd. v. United States* 31 CIT 921, 947, 491 F. Supp. 2d 1326 1 1351 (2007) ("*Rhone Poulenc* . . . involved the application of the 'best information available standard under 19 U.S.C. § 1677e prior to the substantial amendment of that statutory provision by the Uruguay Round Agreements Act . . . ."). As part of the implementing legislation, however, Congress directed Commerce to make additional findings in AFA cases. *See* 19 U.S.C. § 1677e(c) ("When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission as the case may be shall to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal."). It appears that Commerce is now trying to dispense with this corroboration requirement by employing the *Rhone Poulenc* presumption. Because the case predated the Uruguay Round Agreements Act additions to § 1677e, however, it necessarily did not hold that the presumption could replace actual corroboration.

In addition, in the most recent cases where the presumption is mentioned, the Federal Circuit appears to restrict its use to situations where a respondent has not answered Commerce's questionnaire at all, rather than when the questionnaire responses were found wanting for one reason or another. In fact, in the most recent case citing the *Rhone Poulenc* presumption, the Federal Circuit paid particular attention to the fact that the exporter put nothing on the record. *See KYD,* 607 F.3d at 764 ("King Pac had elected not to cooperate at all in the review."); *see also id.* at 767 ("King Pac's failure to cooperate deprived Commerce of the most direct evidence of King Pac's actual dumping margin."). Thus, the *KYD* case seems to confirm that "common sense" restricts the *Rhone Poulenc* presumption to cases where a respondent can be assumed to have chosen not to respond to a questionnaire at all, in order to achieve a lower rate.

Furthermore, the Federal Circuit recently analyzed the outer limits of Commerce's discretion in assigning AFA rates. In *Gallant Ocean,* the plaintiff was a Thai exporter of shrimp that refused to participate in an administrative review. *Gallant Ocean,* 602 F.3d at 1321–22. Having no company-specific information to use, Commerce assigned

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[9] The Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4869 (1994), changed United States law to conform to the provisions agreed upon at the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade.

Gallant a 57.64 percent AFA rate, based on the petition rate. Commerce claimed that the rate was corroborated by transaction-specific margins for three other cooperating exporters. *Id.* at 1322. The rate, however, was ten times higher than the average rate for all cooperating respondents and five times higher than the highest rate calculated for any cooperating respondent. *Id.* at 1324. The Federal Circuit rejected Commerce's chosen rate because "nothing in the record tie[d] the . . . rate to Gallant," making the rate "unrelated to [Gallant's] commercial activity." *Id.* In addition, the *Gallant Ocean* Court characterized the rate as "'punitive, aberrational, or uncorroborated'" because of the large disparity between the assigned rate and the cooperative respondents' calculated dumping rates. *Id.* (quoting *De Cecco,* 216 F.3d at 1032). On remand, the Court instructed Commerce that it "must select secondary information [i.e., a rate] that has some grounding in [Gallant's] commercial reality." *Id.*

In the subsequent *KYD* case, the Federal Circuit reaffirmed the "commercial reality" requirement. *See KYD,* 607 F.3d at 767 ("Moreover, in *Gallant Ocean* this court concluded that the AFA margin that Commerce selected 'did not and does not represent commercial reality' and ruled that Commerce 'may not use the petition rate to establish the dumping margin when its own investigation revealed that the petition rate was not credible.'") . Thus, *KYD* and *Gallant Ocean,* taken together! confirm that an AFA rate must be shown by substantial evidence to have a rational relationship to the "commercial reality" of the respondent during the POR.

Other Federal Circuit AFA decisions bolster the conclusion that Commerce must establish the relevance of a chosen rate to the respondent. In *De Cecco,* the court stressed that Commerce's discretion is "not unbounded" and that "Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin." 216 F.3d at 1032. In particular, the *De Cecco* Court noted that "the statute has no requirement that Commerce is limited to the highest rate imposed on a cooperating company when selecting a rate for a non-cooperating respondent." *Id.*

The Federal Circuit did uphold an AFA rate corroborated by a small percentage of a company's transactions in *PAM, S.p.A. v. United States,* 582 F.3d 1336, 1340 (Fed. Cir. 2009) *("PAM").* The Court, however, discussed *PAM* in *Gallant Ocean,* noting that "[s]ubstantial evidence [still] requires Commerce to show some relationship between the AFA rate and the actual dumping margin" of the company being reviewed. *Gallant Ocean,* 602 F.3d at 1325. The *Gallant Ocean* Court emphasized that an analysis of selected transactions was not sufficient to constitute substantial evidence of what a calculated rate would be when "a large body of reliable information suggest[s] the application of a much lower margin." *Id.; see also id.* at 1324 ("Commerce used a very small percentage of the mandatory respondents' transactions as corroborative evidence even though most transactions during the period of review had significantly lower dumping margins.").

Here, Commerce's justifications recall the Department's reasoning in the litigation following the final determination in the ninth administrative review, where the Department also selected the 139.31 percent AFA rate for Huarong. *Huarong, 29* CIT at 1230. As in this case, in *Huarong,* Commerce relied on volatility and a limited number of transaction-specific margins to justify the same 139.31 percent rate. *Id.* at 1233–35. The *Huarong* Court noted, however, that "[w]hile changes in antidumping duty rates from one review to the next may be consistent with the 'volatile nature' of the rates for bars/wedges, Commerce has still failed to demonstrate the validity of such a large absolute increase." *Id.* at 1233. That is, the jump from calculated rates ranging from 1.27 percent to 34.00 percent to a 139.31 percent AFA rate needed a thorough explanation backed by substantial evidence. Thus, the *Huarong* Court concluded that "Commerce has failed to justify the 139.31% rate with substantial evidence" and found the rate to be "punitive in nature." *Id.* at 1237; *see also id.* ("[T]he court finds that Commerce has failed to justify the 139.31% rate assigned to the Companies, and further finds that the rate is punitive . . . ."). Since it had remanded the case twice, the Court directed Commerce "to no longer employ [the 139.31 percent] rate." *Id.* Commerce then selected a 47.88 percent rate on the third remand. The *Huarong* Court found that Commerce had finally "explained adequately the reliability and relevance of the . . . AFA rate" by selecting a rate that was 13.88 percent higher than Huarong's previous highest calculated rate in order to encourage future compliance. *Shandong Huarong Gen. Grp. Corp. v. United States,* 31 CIT 42, 45–46 (2007) (not reported in the Federal Supplement).

Based on the foregoing, it is clear that Commerce has again failed to support with substantial evidence the 139.31 percent rate for Huarong. In choosing an AFA rate on remand, Commerce must select one grounded in the "commercial reality" of the company under review during the POR. Commerce has failed to do so here. First, the volatility argument for Huarong is weak, considering that the company has never had a calculated rate anywhere near 139.31 percent. That is, Huarong's calculated rates in earlier reviews varied from

1.27 percent to 34.00 percent. Thus, while Huarong has had various calculated rates, none has approached the rate assigned by Commerce.

Moreover, considering the persuasive evidence represented by these lower calculated rates, Commerce's decision to look only at selected sales to justify a rate over one hundred points higher than Huarong's highest calculated rate does not constitute substantial evidence of what Huarong's calculated rate would have been. *See, e.g., Gallant Ocean,* 602 F.3d at 1325 (stating that "a small percentage of . . . transactions [does not] represent [ ] a reasonably accurate estimate of Gallant's actual dumping margin" when "a large body of reliable information suggest [ ] the application of a much lower margin."). This is particularly the case where an examination of Commerce's analysis reveals that the Department looked at 447 transactions, of which 395 (or roughly eighty-eight percent) had margins of less than one hundred percent, while over 75 percent of the sample had margins below fifty percent. First Remand Results at App. 3.

As this Court recently noted, to "avoid imposition of a punitive rate," the court must consider whether "the AFA rate [is] so far from what has been demonstrated by actual rates . . . that it must be rejected." *Qingdao Taifa Grp. Co. Ltd., v. United States,* 34 CIT ___ , ___ , Slip Op. 10–126 at 12, 11 (Nov. 12, 2010) . Furthermore, this Court has held that more than doubling a previously-determined AFA rate "must necessarily be punitive." *Shandong Mach. Imp. & Exp. Co. v. United States,* 34 CIT ___ , ___ , Slip Op. 10–88 at 10 (Aug. 11, 2010). Thus, a rate that is over one hundred percentage points higher and more than four times greater than Huarong's highest previously calculated rate, as well as a rate dramatically higher than the vast majority of specific transactions Commerce looked at, renders Commerce's choice "punitive in nature" based on Commerce's "strained efforts to demonstrate [its] validity." *Huarong,* 29 CIT at 1237. *See also* De *Cecco,* 216 F.3d at 1032 (affirming the rejection of a punitive AFA rate that "was many times higher than [the company's] actual dumping margin") .

Because the court finds that Commerce has failed to justify with substantial evidence the 139.31 percent rate after having had two previous opportunities to do so, and further finds that the rate is punitive, the Department is directed, on remand, to no longer employ this rate and to choose a lower rate. Therefore, Commerce shall choose and support, with substantial evidence, one of the following: (1) a calculated rate from a previous review, that reflects the actual rate during the POR, with a built-in increase to deter non-compliance; or (2) reopen the record and calculate a rate that accurately reflects what the rate would have been had Huarong cooperated, with a built-in increase as a deterrent to non-compliance.

II. AFA Rate for TMC's Sales of Picks/Mattocks

In *Tianjin I,* the court found unsupported by substantial evidence Commerce's selection, as the AFA rate for TMC's sales of picks/mattocks, a 98.77 percent rate calculated in the fifth review for a different respondent, Funjian Machinery Import and Export Corp. *("FMEC").* 31 CIT at 1437–38; Pls. First Comments 34. Commerce applied AFA to TMC's sales of picks/mattocks "based on the company's failure to have available for inspection at verification its sole supplier's factors of production data." *Id.* at 1437. The court found that Commerce's justification that the rate was "calculated for another respondent in a prior segment of these proceedings" was "not sufficient for the court to find that the selected rate was a reasonably accurate reflection of what TMC's actual rate would be during the POR," together with a built-in increase to deter non-compliance. *Id.* The court remanded the issue to the Department with instructions to:

> (1) explain (a) how the 98.77 percent rate for TMC's picks/maddocks is a reasonably accurate estimate of TMC's actual rate with a built-in increase to deter non-compliance; and (b) why it did not select as an AFA rate for TMC's sales of picks/mattocks one of the previously assigned lower rates, albeit with a built-in increase to deter future non-compliance; or (2) reopen the record and obtain evidence to support an actual calculated rate for TMC's sales of picks/mattocks.

Id. at 1438.

On remand, the Department claims that it did not reopen the record. Nonetheless, it did place on the record additional factual support in an effort to demonstrate that the 98.77 percent rate was relevant to TMC. Specifically, Commerce analyzed the company's sales in the twelfth review and found that TMC had transaction-specific margins in that review that were considerably above 98.77 percent.[10] First Remand Results at 14. The Department added:

> We also compared the [twelfth review] transactions that approximate the proposed AFA rate of 98.77 percent to other U.S. sales of [picks/mattocks] made by TMC. The U.S. transactions corroborating the AFA rate do not appear to be aberrant or unusual in any way. They appear to be made in commercial quantities. Because we are making an adverse inference with

[10] The First Remand Results cites two sales with a margin of 363.91 percent. First Remand Results at 14.

> regard to TMC, we regard these transactions as representative of the margins we would have calculated for this company in the thirteenth review (with a built-in incentive to encourage cooperation) had it not received total AFA.

Id.

In addition, as in its bars/wedges analysis, Commerce relies on the *Rhone Poulenc* presumption to corroborate the 98.77 percent rate. *Id.* at 15. Commerce argues that if TMC could have demonstrated that its rate would have been lower than the highest previous margin, it would have provided such information. Further, to explain why the Department did not select one of TMC's previously assigned lower rates as an AFA rate, the Department maintains that it has discretion to choose the information on which it relies. *Id.* at 15. ("Because TMC's sales of picks/mattocks are receiving total AFA because it could not provide factors of production information, we do not find that using one of TMC's prior rates would be appropriate as an AFA rate. In administrative reviews where TMC received calculated rates, TMC fully participated in those proceedings and received a calculated rate based on its own data. As a result, it would be inappropriate to apply a lower rate to TMC as AFA in this review.") .

For TMC, Commerce has still not demonstrated the reliability nor the relevance of the rate to the company. TMC argues that using a different company's rate from a review almost a decade removed from the POR is not reflective of TMC's commercial activity during the PORe Pls.' First Comments 35.

In addition, TMC claims that the Department has not adequately explained why it did not select one of TMC's previously assigned lower rates and add to it a built-in increase for non-compliance. More specifically, TMC notes that the highest prior margin for a review in which TMC fully participated was 4.76 percent, and that 4.76 percent should have been the starting point for a margin in this case, plus an addition to deter future non-compliance. *See* Pls.' First Comments 39.

The court is not persuaded that Commerce has supplied the substantial evidence to sustain the 98.77 percent AFA rate for TMC's sales of picks/mattocks. First, as TMC argues, "nothing in the record ties the . . . rate to" TMC, as Commerce chose a rate calculated for a different party in a completely different review. *See Gallant Ocean,* 602 F.3d at 1324. By not using a rate calculated for TMC, but rather one calculated for another company, Commerce must produce evidence that this rate is relevant to TMC. "Although Commerce has discretion in choosing from a list of secondary information to support its adverse inferences, Commerce must select secondary information that has some grounding in commercial reality." *Id.*

Second, Commerce's analysis of a small fraction of TMC's sales in a time period outside of the POR does not constitute substantial evidence that FMEC's rate from another POR was relevant to TMC during the POR. This is because the selected sales from the twelfth review simply do not corroborate a rate of 98.77 percent. Of the twenty-two sales Commerce examined, only two had a margin in excess of 98.77 percent, and those margins were for only one of the six products included in the analysis. Furthermore, fourteen of the twenty-two sales showed no dumping, and the six other sales had margins close to zero. First Remand Results at App. 4. Thus, the selected sales do not constitute substantial evidence, or indeed very much evidence at all, that TMC's margin during the POR was anything approaching 98.77 percent.

While the Department has been sustained in its use of a small number of sales to corroborate rates in the past, the manner in which these sales were used in this case distinguishes it from cases like *Ta Chen* and *PAM*. For instance, in *Ta Chen,* Commerce used the company's "sales data from the relevant review period." *Gallant Ocean,* 602 F.3d at 1324. Thus, the rate was corroborated by Ta Chen's own sales for the POR. Furthermore, as the Federal Circuit noted in *Gallant Ocean,*" [u]nlike *PAM,* Commerce in the present [*Gallant Ocean*] case did not show that a small percentage of the mandatory respondents' transactions represented a reasonably accurate estimate of Gallant's actual dumping margin." *Id.* at 1325. That is, in *PAM,* the Federal Circuit found that "in view of the entire record, . . . the transactions were reasonably tied to PAM's actual dumping margin." *Id.* Such is not the case here where the selected transactions point to a substantially lower rate than the one assigned.

Moreover, as TMC also emphasizes, there is an even wider gulf here than in *Gallant Ocean* between the AFA rate for this review and TMC's previous non-AFA rates. TMC's highest previous calculated rate was 4.76 percent. The rate chosen here is ninety-four percentage points greater than the highest calculated rate for TMC and almost twenty times greater than that rate. This disparity, together with Commerce's failure to cite any serious evidence corroborating it, is enough for the court to conclude that the 98.77 percent AFA rate chosen by Commerce is aberrational and punitive. *See id.* at 1324 (stressing the difference between cooperating respondents' actual dumping margins of 2.58 to 10.75 percent and Gallant's AFA rate of 57.64 percent). Although Commerce insists that it could not use one of TMC's previous rates as a baseline because none of them were AFA rates, that argument does not justify Commerce's selection of a punitive rate. *See also Huarong,* 29 CIT at 1237 (finding a 139.31 percent AFA rate punitive when the highest prior rate was 34.00 percent).

It is also worth noting that Commerce's reliance on *Rhone Poulenc* in this context continues to be misplaced. First, as noted, the *Rhone Poulenc* presumption does not excuse Commerce from corroborating secondary evidence as required by statute. Second, no common sense inference can be drawn from TMC's making the effort to answer Commerce's questionnaires and then being unable to produce its supplier's records at verification because they were seized by local authorities.

Because the court finds that Commerce has twice failed to produce substantial evidence demonstrating the relevance of the 98.77 percent rate to TMC during the POR, and because it further finds that the rate is punitive, Commerce is directed upon remand to no longer employ this rate and to choose a lower rate. On remand, Commerce must choose an AFA rate based on the "commercial reality" of TMC's sales of picks/mattocks. Therefore, Commerce shall choose and support, with substantial evidence, one of the following: (1) select a calculated rate from a previous review, that reflects TMC's actual rate during the POR, with a built-in increase to deter non-compliance; or (2) reopen the record and calculate a rate that accurately reflects what the rate would have been had TMC cooperated, with a built-in increase as a deterrent to non-compliance.

CONCLUSION

For the foregoing reasons, Commerce's First Remand Results and Supplemental Remand Results are sustained in part and remanded. The remand results shall be due on May 4, 2011; comments to the remand results shall be due on June 3, 2011; and replies to such comments shall be due on June 17, 2011.

Dated: January 4, 2011
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 11–7

FYH BEARING UNITS USA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 09–00170

[Judgment for defendant denying deemed liquidation relief.]

Dated: January 20, 2011

Baker & McKenzie, LLP (*Kevin M. O'Brien*, *Stuart P. Seidel*, and *Kevin J. Sullivan*) for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Justin R. Miller* and *Claudia R. Burke*); *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection; *Deborah R. King*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

OPINION

Restani, Judge:

INTRODUCTION

This matter is before the court on defendant the United States' (the "Government") motion for judgment on the pleadings and plaintiff FYH Bearing Units USA, Inc.'s ("FYH") motion to amend its complaint. The former is granted and the latter is denied as futile.[1]

BACKGROUND

This action concerns thirty-nine entries of ball bearings and parts thereof imported by FYH from Japan and entered from May 1, 1994, through April 30, 1995. Compl. ¶¶ 3, 5, 7 (Docket No. 5). The manufacturer/exporter of the ball bearings was Nippon Pillow Block Sales Co., Ltd. ("NPB"). Compl. ¶ 7. The merchandise was subject to an antidumping duty order. *Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan*, 54 Fed. Reg. 20,904 (Dep't Commerce May 15, 1989) (antidumping duty order). Compl. ¶ 6. FYH paid estimated antidumping duties on the entries at the cash deposit rate of 7.42% ad valorem. Compl. ¶ 7.

The United States Department of Commerce ("Commerce") conducted an administrative review of the antidumping duty order for the period of review from May 1, 1994, through April 30, 1995 (the sixth administrative review of the antidumping duty order). Compl. ¶¶ 6–8. During this administrative review, Commerce determined a rate for ball bearings produced or exported by NPB. *Id.* Commerce published the final results of the administrative review on January 15, 1997, in which it determined the final antidumping duty rate for ball bearings exported/produced by NPB to be 45.83% ad valorem. Compl. ¶¶ 8–9; *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan,*

[1] Defendant's motion to stay discovery is denied as moot.

Singapore, and the United Kingdom, 62 Fed. Reg. 2,081 (Dep't Commerce Jan. 15, 1997) (final results).

Multiple parties, including FYH and NPB, sought judicial review of the final results for the sixth administrative review. Compl. ¶¶ 9–12. FYH and NPB's court action, *Nippon Pillow Block Sales Co. and FYH Bearing Units USA, Inc. v. United States*, Ct. No. 97–00317 (CIT), was consolidated along with several others, under *NSK Ltd. and NSK Corp., et al. v. United States*, Consol. Ct. No. 97–00216 (CIT). Compl. ¶¶ 9–12. This consolidated action included an action brought by a domestic producer, the Torrington Company, *Torrington Co. v. United States*, Ct. No. 97–00310 (CIT). Compl. ¶¶ 9–12.

The court enjoined the liquidation of all of FYH's entries pursuant to two separate preliminary injunction orders. First, FYH's entries were subject to an injunction sought by FYH. Compl. ¶ 9. The injunction was granted in May 1997. App. to FYH Bearing Units, Inc.'s Opp. to Mot. for J. on the Pleadings, Ex. A ("Pl. App."). Second, FYH's entries were subject to a separate injunction sought by Torrington covering all the litigants and granted on April 28, 1997. Compl. ¶ 10; Pl. App., Ex. E. For both injunctions, the parties obtained the consent of the Government.

The court sustained Commerce's final results with respect to NPB and FYH and remanded the case for Commerce to consider certain issues unrelated to those two parties. *See NSK Ltd. and NSK Corp. v. United States*, 170 F. Supp. 2d 1280 (CIT 2001). On November 15, 2001, the court sustained Commerce's remand results and dismissed the consolidated action. *See NSK Ltd. and NSK Corp. v. United States*, 25 CIT 1251 (2001); Compl. ¶ 14. On December 5, 2001, the decision was published in the *Customs Bulletin and Decisions*, V. 35, No. 49, at 39. Compl. ¶ 23; Pl. App., Ex. B.

Although NPB and FYH did not appeal the decision and ended litigation as to their entries, three other parties to the consolidated action did appeal. Compl. ¶¶ 15–16, 23. Specifically, NTN Bearings filed a notice of appeal on January 11, 2002. Compl. ¶ 16; Pl. App., Ex. H. The appeal was docketed as Appeal No. 02–1171. Torrington filed a notice of appeal on January 14, 2002. Compl. ¶ 16; Pl. App., Ex. H. The appeal was docketed as Appeal No. 021172. NSK Corp. and NSK Ltd. (collectively "NSK") filed a notice of appeal on January 15, 2002. Compl. ¶ 16; Pl. App., Ex. H. The appeal was docketed as Appeal No. 02–1173.

Each appellant, however, ultimately voluntarily dismissed its appeal. Specifically, in January 2004, Torrington filed a motion to sever and dismiss Appeal No. 021172 and NSK filed a motion to voluntarily dismiss Appeal No. 02–1173. The Court of Appeals for the Federal Circuit granted both parties' motions, severing and dismissing the two appeals in the same order issued on February 17, 2004. *See NSK Ltd. and NSK Corp. v. United States*, 89 F. App'x 254 (Fed. Cir. 2004). NTN then filed a motion to dismiss its severed appeal in Appeal No. 02–1171, which the court granted on July 15, 2004. *See NSK Ltd. and NSK Corp. v. United States*, 103 F. App'x 398 (Fed. Cir. 2004).

On May 13, 2005, Commerce sent an e-mail to specific Customs employees alerting them that injunction of liquidation had expired and liquidation instructions would be forthcoming. *See* Pl. App., Ex. K.[2]

On June 14, 2005, Commerce published notice of the amended final results of the sixth administrative review. *Antifriction Bearings (Other than Tapered Roller Bearing) and Parts Thereof from Japan*, 70 Fed. Reg. 34,447 (Dep't Commerce June 14, 2005) (amended final results). This notice advised that the decision in *NSK Ltd.*, 25 CIT 1251 (2001), had become final and conclusive and recalculated NSK's margin pursuant to this Court's decision sustaining Commerce's final remand determination. *Id.*

On June 27, 2005, Commerce transmitted liquidation instructions for the sixth administrative review period (May 1, 1994 through April 30, 1995), including instructions for NPB and FYH, to U.S. Customs and Border Protection ("Customs") field offices in Message Number 5178204. Customs liquidated FYH's entries on either November 18 or 25, 2005, at the final results rate of 45.83%. Compl. ¶ 25.

FYH filed a protest and application for further review with Customs on January 9, 2006, claiming that the entries at issue were deemed liquidated at the lower cash deposit rate because Customs did not liquidate the entries within six months of November 15, 2001—the date on which the court issued its decision in *NSK Ltd.*, 25 CIT 1251. Compl. ¶ 26.

Customs denied the protest on December 3, 2008. Compl. ¶ 27. FYH commenced this action on April 24, 2009. Discovery ensued.

In its original complaint, FYH alleged only one count: that Customs' liquidation of FYH's entries at the rate of 45.83% was erroneous because its entries were deemed liquidated under 19 U.S.C. § 1504(d) at the original cash deposit rate of 7.42% six months after Customs

[2] The e-mail appears to be of a non-public nature. Plaintiff does not allege in its proposed amended complaint that it was public, does not assert it needs discovery on this point, and appears to rest on a legal argument that non-public notice will suffice. *See*, *infra*, discussion.

received notice of *NSK Ltd.*, 25 CIT 1251.[3] Compl. ¶ 29. That claim is preserved in Count II of the proposed amended complaint.[4] It is based on plaintiff's contention that the *Torrington* injunction of liquidation was ineffective because it allegedly was never served.

Plaintiff asserts that when claims relating to its entries were dismissed by the court and this judgment was not appealed, the only injunction in effect expired, notice to Customs was given, and the six-month period in which liquidation at the higher rate was possible began to run. According to plaintiff, this starting date would be in either November or December 2001, the dates of judgment of dismissal in this court and publication in the Customs Bulletin, respectively.[5]

Count III, alternatively, relies on the May 13, 2005, e-mail as the beginning of the six-month period in which Customs must liquidate entries to avoid deemed liquidation at the entered rate, even if the *Torrington* injunction was effective. The Government for its part alleges, *inter alia*, that the *Torrington* injunction was effective and that the earliest public notice of injunction expiration, which could begin the running of the six-month period, was publication of the amended final results on June 14, 2005.

DISCUSSION

Jurisdiction lies under 28 U.S.C. § 1581(a) (protest denial jurisdiction). The parties are in agreement as to the basic law governing the merits. 19 U.S.C. § 1504(d) provides:

> **(d) Removal of suspension**
>
> Except as provided in section 1675(a)(3) of this title, when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b) of this section, within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b) of this section) not liquidated by the Customs Service within 6 months

[3] Because this occurred so far in advance of liquidation, it does not matter if the FYH injunction ended by its terms when this decision resolved FYH's claims or when FYH's appeal time ran.

[4] New Count I has been abandoned. *See* Pl.'s Reply to Def.'s Opp. to Mot. for Leave to File Am. Comp. at 3 ("Pl. Reply").

[5] In *Travelers Indem. Co. v. United States*, 580 F. Supp. 2d 1330, 1331–32 (CIT 2008), the court did not accept the Customs Bulletin publication of a decision of the Federal Circuit as notice to Customs of lifting of the injunction. The court need not resolve whether such publication of a decision of this court is in a different posture because the court concludes injunction had not lifted at that time.

> after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record or (in the case of a drawback entry or claim) at the drawback amount asserted by the drawback claimant.

19 U.S.C. § 1504(d). Case law has made clear that there are two conditions which start the six-month time period in which liquidation at a rate other than the entered rate may occur: 1) The suspension or injunction of liquidation must be removed and, 2) Customs must receive notice of the removal. *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1377 (Fed. Cir. 2002); *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1275 (Fed. Cir. 2002).

The concept of notice has been further refined to require that the notice be unambiguous and public.[6] *See Cemex, S.A. v. United States*, 384 F.3d 1314, 1321 (Fed Cir. 2004) (citing *Int'l Trading*, 281 F.3d at 1275–76) ("Our case law further requires that, in addition to being unambiguous, the notice to Customs be public"). Assuming arguendo that the Federal Circuit had not made the public nature of the notice a requirement, the court would do so here. The sound policy advanced by the appellate court is to have a clean starting point for the six-month period. That is reflected in its preference for the ordinary legal notice provided by the Federal Register. *See Int'l Trading*, 281 F.3d at 1275 ("the date of [Federal Register] publication provides an unambiguous and public starting point for the six-month liquidation period"). *Compare Fujitsu*, 283 F.3d at 1380 (Federal Register publication is notice to Customs), *with Cemex*, 384 F.3d at 1321 (non-published e-mail is not notice to Customs).

With these precedents in mind, the court concludes that the May 13, 2005, e-mail, upon which plaintiff relies in proposed Count III, did not trigger the six-month liquidation period. As indicated, *supra*, in note 2, there is no allegation that what appears on its face to be a non-public e-mail was made public in May 2005. Plaintiff's argument, rather, is that publication is not required. *See* Pl. Reply at 8. The court disagrees, as indicated.

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[6] While *Cemex* may have overstated the holding of *Int'l Trading*, in rejecting non-published e-mail notice, it clearly stated that the non-statutory requirements of unambiguity and public notice were binding. *Cemex*, 384 F.3d at 1321 n.5. The court defers to the Federal Circuit's interpretation of its own precedents. *NEC Solutions (Am.) Inc. v. United States*, 411 F.3d 1340, 1345 (Fed. Cir. 2005) (finding published e-mail notice without duty rates unambiguous) does not reject that view. *Am. Int'l Chem., Inc.v. United States*, 387 F. Supp. 2d 1258, 1269 (CIT 2005) (stating "neither statute nor case law requires" publication) is distinguishable from the case at hand because notice there was public. The court was not required to confront the issue head on.

Thus, the crux of this case is the status of the *Torrington* injunction. If it was effective, it expired by its terms when litigation conclusively ended and notice of that event was published, at the earliest June 14, 2005. There is no evidence of or assertion that there was public notice to Customs prior to that date that the litigation covered by the *Torrington* injunction was concluded and injunction of liquidation had ended. Liquidations on November 25, 2005, are timely if the *Torrington* injunction was effective.

While the court's docket does not indicate that the *Torrington* injunction was served on Customs, somehow Customs knew of it because it acted as if the injunction was in place by sometime later instructing the ports that entries were not to liquidate. The instructions referred to the April 28, 1997, injunction. Compl.¶ 11. The injunction plaintiff, not Torrington, obtained, which likely dissolved without effect here, was issued in May, not April.

Thus, despite the search some dozen years later which revealed no proof of service, on Customs or Commerce, the court cannot conclude that there was no service. Assuming, arguendo, that service was not accomplished, the result would be the same, as will be discussed. Thus, the court need not resolve the factual issue or decide if plaintiff's complaint is adequate on this point.

Through more than a decade of litigation, all involved parties acted as if an injunction of liquidation were in place. Customs and the parties acted as they should have by not liquidating entries and continuing to litigate from the moment the injunction was signed.

The *Torrington* injunction was sought or consented to by the parties. Thus, it is the same type of injunction as was at issue in *Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187 (Fed. Cir. 2009). In that case, the court upheld an ex post facto amendment of a consent injunction of liquidation deleting a five-day waiting period. *Id.* at 1194. Entries had liquidated during the five-day period despite the desires of all concerned to prevent liquidation, but this court amended its injunction to make it effective without the waiting period and thereby rendered the waiting period liquidations ineffective.

Just as the five-day period could be deleted in *Agro Dutch* in the interest of justice and the intentions of the parties, as well as those of the court, so too requirements of a particular form of, or persons to receive, service may be deleted after the fact to fulfill the same interests and intentions.[7]

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[7] The service provision at issue provides as follows:

> [Liquidation is enjoined of covered entries that] remain unliquidated as of 5 o'clock p.m. on the first business day after the day on which copies of this ORDER are personally served by plaintiff, The Torrington Company, on the following individuals and received by them or their delegates:

The purpose of these types of injunctions is to preserve remedies by delaying unchallengeable liquidations, and to provide a way to correct inadvertent liquidations without excessive litigation.[8] Further, contempt is not an issue if government officials liquidate without notice of the injunction, or, liquidate inadvertently, even with notice. Thus, waiting periods and particular forms of service or service recipients are essentially unimportant.

The court does not find *Ames True Temper v. United States*, 700 F. Supp. 2d 1352 (CIT 2010) helpful here. While ostensibly that opinion limited *Agro Dutch* to the five-day waiting period provision, the court leaves to the Federal Circuit any such limitation of *Agro Dutch*. Of course, *Ames* is not binding, and it is distinguishable. *Ames* does not discuss if or how Ames came to rely on the injunction at issue there. Furthermore, prior to *Agro Dutch* and under another jurisdictional

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Pl. App., Ex. E. at 2–3.

[8] Deemed liquidation under 19 U.S.C. § 1504(d) fits poorly with international trade, as opposed to Customs classification and valuation, cases. Trade cases often take many years to litigate in various fora and are not decided by Customs. 19 U.S.C. § 1504(d) was intended to hurry Customs along so that importers would have finality. *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1560 (Fed. Cir. 1997). Injunctions of liquidation are virtually automatic in administrative review challenges such as that at issue here. Parties should not have to guess whether they litigate to no effect. Until statutory suspension of liquidation is extended to court action or deemed liquidation clearly is made inapplicable to trade cases, it behooves the court to recognize these injunctions to the maximum extent permissible, and it also behooves the parties to cease making consent injunctions dependent on particular forms of service or recipients thereof, and waiting periods, if indeed such provisions mean anything after *Agro Dutch*. Service requirements need not purport to condition the effective date of the injunction.

basis, Ames' claim had been rejected. *See Shandong Huarong Mach. Co. v. United States*, Slip Op. 08–135, 2008 WL 5159774, *4–5 (CIT Dec. 10, 2008).

Rather, a case more on point is *Clearon Corp. v. United States*, 717 F. Supp. 2d 1366 (CIT 2010)[9] in which, post-*Agro Dutch*, the court deleted the specific service requirements of the liquidation injunction at issue there in order to effectuate the intentions of the parties. *Id.* at 1373. Similarly, in order to fulfill the intentions of the parties and to preserve the efforts of all concerned, including the courts, if the prohibition of liquidation were currently in effect, the court would amend the *Torrington* injunction to make its status express, i.e., that it was effective upon signing.

CONCLUSION

Plaintiff's motion for leave to amend the complaint is denied. Defendant's motion for judgment on the pleadings is granted.

Dated: This 20th day of January, 2011.
New York, New York.

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

Slip Op. 11–8

XEROX CORPORATION, PLAINTIFF, v. UNITED STATES, DEFENDANT.

Before: Gregory W. Carman, Judge
Court No. 07–00337

[*Defendant's motion to dismiss is denied. Customs' final determination is remanded for further action consistent with this Opinion and Order.*]

Dated: January 24, 2011

Neville Peterson LLP (*John M. Petersvon*, *Michael T. Cone*), for Plaintiff.

Tony West, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Saul Davis*, *Aimee Lee*); *Chi S. Choy*, of counsel, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, U.S. Department of Homeland Security, for Defendant.

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[9] The court refers the reader to this case for a full discussion of the statutory scheme and background matter.

Opinion & Order

CARMAN, JUDGE:

Introduction

Plaintiff Xerox Corporation ("Plaintiff" or "Xerox") has brought this action pursuant to 28 U.S.C. § 1581(e) to challenge a final determination issued by Customs and Border Protection ("Customs" or "CBP") relating to the country of origin of certain laser printer toner cartridges for purposes of government procurement. This is the first case brought in the U.S. Court of International Trade pursuant to 28 U.S.C. § 1581(e). Defendant United States ("Defendant," "United States" or the "government") has moved to dismiss under USCIT Rule 12(b)(1), alleging that the particular determination Customs actually made in this instance is not the type of determination this court has jurisdiction to review, and that this case does not present a justiciable controversy. For the reasons set forth below, Defendant's motion is denied.

BACKGROUND

I. Statutory Context of Jurisdictional Questions

When Congress passed the Trade Agreements Act of 1979 ("TAA"), it conferred upon the Customs Court, and subsequently upon the U.S. Court of International Trade,[1] "exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979." 28 U.S.C. § 1581(e). Section 305(b)(1) of the TAA, codified at 19 U.S.C. § 2515(b)(1), states that the Secretary of the Treasury (or Customs, the Secretary's designee[2]) "shall provide for the prompt issuance of advisory rulings and final determinations on whether . . . an article is or would be a product of a foreign country or instrumentality designated" by a separate statute as eligible for certain benefits described below. 19 U.S.C. § 2515(b)(1). The TAA establishes a rule of origin for CBP to apply in making these determinations, set out in 19 U.S.C. § 2518(4)(B), and also sets out criteria for how a foreign country or instrumentality becomes "designated," 19 U.S.C. § 2511(b).

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[1] Section 1001(b)(4)(B) of the TAA amended former 28 U.S.C. § 1582 (1976) on July 26, 1979, conferring jurisdiction on the Customs Court to exercise judicial review over these final determinations. Pursuant to the Customs Courts Act of 1980, jurisdiction was reassigned to the Court of International Trade, effective November 1, 1980, and codified at 28 U.S.C. § 1581(e).

[2] For more on the transfer of functions from the Secretary of the Treasury to the Secretary of Homeland Security, see the note "Transfer of Functions" following 28 U.S.C. § 2631.

To understand the purpose of a final determination made under § 2515(b)(1) (a "Section 305(b)(1) final determination"), and the role of this Court in reviewing these final determinations pursuant to § 1581(e), one must first have a broad view of the statutes and regulations pertaining to country of origin in government procurement.

When purchasing goods for its own use, the federal government has long had a preference for domestically manufactured products. This preference was established in 1933 by the Buy American Act (41 U.S.C. §§ 10a–10d) ("BAA"), which remains in effect today, and has recently been described as "the immovable object" of U.S. government procurement law.[3] The BAA does not *mandate* that the government make purchases of domestic goods, but rather establishes a domestic *preference*. This preference is implemented by regulations which require that, when both foreign and domestic offers have been received for a particular procurement contract, the contracting officer must add a margin to the foreign offer, typically of 6, 12 or 50 percent, before comparing the bids and awarding the contract. 48 C.F.R. §§ 25.105(b), 225.105(b).

While the Buy American Act remains a significant part of the government procurement landscape, its effect was dramatically altered by the Trade Agreements Act of 1979, which permits the domestic preference of the BAA to be waived under certain conditions. Title III of the TAA implements the Agreement on Government Procurement ("GPA"), which is a plurilateral agreement developed during the Tokyo Round for the purpose of creating and protecting international reciprocity in government procurement. S. REP. NO. 96–249, at 128 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 514. When a party to the GPA is procuring products above a certain price threshold, that party agrees to treat products from other GPA parties no less favorably than it treats domestic products. Through the TAA, the United States has also extended this benefit of no–less–favorable treatment to countries that extend reciprocal government procurement opportunities to the U.S. (even if such countries are not parties to the GPA), and to least developed countries (without demand for reciprocity). Collectively, parties to the GPA, countries extending GPA–equivalent opportunities to the U.S. and least developed countries are referred to as designated foreign countries and instrumentalities ("DFCIs"). *See* 19 U.S.C. § 2511(b)(1)–(4). Additionally, as an incentive to encourage adoption of the GPA by other foreign countries, the TAA allows the U.S. to prohibit procurement of otherwise eligible products from for-

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[3] John A. Howell, *The Trade Agreements Act of 1979 versus The Buy American Act: The Irresistible Force Meets The Immovable Object*, 35 Pub. Cont. L. J. 495 (Spring 2006).

eign countries that are not a DFCI. 19 U.S.C. § 2512. The net effect of the TAA is that for procurement offers above the price threshold, the domestic preference imposed by the BAA is *waived* for all articles that are "products of" a designated foreign country or instrumentality. *See* 19 U.S.C. § 2511(a).

II. The Section 305(b)(1) Final Determination

The final determination of whether an article "is . . . a product of" a DFCI is the determination that this Court has jurisdiction to review. 28 U.S.C. § 1581(e); *see also* 19 U.S.C. § 2515(b)(1). Customs has promulgated regulations to establish the procedures through which it would issue Section 305(b)(1) advisory rulings and final determinations. *See* 19 C.F.R. Part 177, Subpart B. These regulations implement various aspects of the TAA, including the applicable rule of origin (*compare* 19 U.S.C. § 2518(4)(B), *with* 19 C.F.R. § 177.22(a)), and the definition of who qualifies as a party-at-interest with the right to request a country-of-origin determination or to seek its judicial review (*compare* 28 U.S.C. § 2631(e), (k)(2),[4] *with* 19 C.F.R. §§ 177.22(d), 177.23, 177.30).

Over the three decades that the TAA has been in effect, Customs has rendered final determinations pursuant to Section 305(b)(1) that, while consistent with the statute, are arguably more specific than minimally statutorily required. The statute provides for the issuance of final determinations as to whether "an article is or would be a product of a foreign country or instrumentality designated pursuant to 19 U.S.C. § 2511(b)"—a question that could be answered accurately, if somewhat narrowly, with a "yes" or a "no." *See* 19 U.S.C. § 2515(b)(1). The phrase "country of origin determination" does not appear in Section 305(b) of the TAA, and nothing in the statute compels Customs to make formal pronouncement about what the country of origin is for a given article—only whether it is a product of a DFCI. And yet, Customs has chosen to implement this statute via regulations requiring itself to produce full blown "country-of-origin determinations" in virtually every case where a Section 305(b)(1) final determination has been requested. *See* 19 C.F.R. § 177.21 (explaining that "[t]his subpart applies to the issuance of **country-of-origin . . . final determinations**"), *and* § 177.23 (explaining who may request a "**country-of-origin . . . final determination**") (emphases added).

[4] The party-at-interest language was originally included in Section 1001 of the TAA, which assigned jurisdiction to judicially review these determinations to the Customs Court. The Customs Courts Act of 1980 removed the party-at-interest language from the jurisdictional statute (newly created 28 U.S.C. § 1581), and placed it in 28 U.S.C. § 2631.

Customs' regulatory construal of Section 305(b)(1) is not inconsistent with the statute, because when the country of origin of an article has been identified, it is self-evident whether that country is a DFCI. When issuing final determinations pursuant to this subpart, Customs routinely frames the issue presented as "what is the **country-of-origin** of [Product X] for the purpose of U.S. government procurement?" Customs then typically issues its ruling in the form: "the **country of origin** of [Product X] for the purpose of U.S. government procurement is [Country Y]." Because Country Y either is or is not a DFCI, Customs' ruling therefore satisfies the requirement of Section 305(b)(1). Moreover, the notion that Section 305(b)(1) should be implemented with a country-of-origin determination has its roots in the legislative history of the TAA, and has been consistently applied by Customs for over thirty years. The first reference to the Section 305(b)(1) final determination as identifying "the **country of origin** of specified products" is found in the Senate Report to the TAA. 1979 U.S.C.C.A.N. at 523 (emphasis added). And from the first proposed draft (published April 9, 1981) to the current heading of 19 C.F.R. Part 177, Subpart B, Customs has consistently referred to the Section 305(b)(1) final determination as a "**country-of-origin determination.**" *See* 46 Fed. Reg. 21,194–01; *see also* 19 C.F.R. Part 177, Subpart B (2010).

It bears noting—for reasons that will become clear upon hearing Defendant's contentions in this case—that the statute does not mandate any specific outcome of a Section 305(b)(1) final determination, and is indifferent to which particular outcome the party requesting the ruling is hoping to obtain. As long as Customs' ruling makes clear whether or not the article in question "is or would be a product of" a designated foreign country or instrumentality, it has conformed with the statutory requirement. *See* 19 U.S.C. § 2515(b). In fact, the statutory scheme seems designed to produce rulings sought by parties whose economic incentive is to obtain a "negative" ruling. The remarkably broad party-at-interest standards crafted by Congress not only permit rulings to be issued to parties that wish to qualify their own product as TAA waiver-eligible, but also to parties hoping for a ruling that a competitor's product is *not* from a DFCI, and therefore *not* waiver-eligible. *See* 28 U.S.C. 2631(e), (k)(2); 19 C.F.R. §§ 177.22(d), 177.23.

In other words, the Section 305(b)(1) final determination is highly mechanical. Any party-at-interest can request a final determination about any article for which they qualify as a party-at-interest. So long as that party complies with the regulatory requirements for requesting a ruling, and provides enough information for Customs to reach a conclusion, a final determination will issue. *See* 19 C.F.R. § 177.23-.28

(specifying, *inter alia*, who may request a Section 305(b)(1) determination; the form and contents of that request; how, where and by whom it is to be filed; how to request oral discussion of the issues; and that Customs, upon receipt of a properly made request, "will promptly issue a final determination."). By issuing the final determination in the format Customs prefers ("the country of origin of [Product X] . . . is [Country Y]"), all parties-at-interest are left with an outcome that both answers the central question posed by the statute, and complies with the regulatory requirement to issue a country-of-origin determination, thereby providing valuable additional specificity. Once issued, the determination comes with no strings attached; these parties-at-interest are free to use a Section 305(b)(1) final determination for whatever purpose they see fit.

III. Rules of Origin Under the TAA and BAA

While Customs' regulations spell out the conditions under which determinations can be obtained, the substance of the Section 305(b)(1) final determination is found in the application of a rule of origin, set out in the TAA, to the facts of a particular product's manufacture. *See* 19 U.S.C. §§ 2515(b)(1), 2518(4)(B). Under the TAA rule of origin,

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, **it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.**

19 U.S.C. § 2518(4)(B) (emphasis added). Disputes under part (i) of this rule of origin would be rare. Consequently, in the context of a Section 305(b)(1) final determination, conflicts regarding the country of origin typically hinge on where a particular article is found to have been substantially transformed.[5] While this is the first 28 U.S.C. § 1581(e) case brought at the U.S.C.I.T., the court has frequently dealt with similar substantial transformation issues in the context of reviewing other types of country of origin determinations. *See, e.g.*, *Ugine and ALZ Belgium, N.V. v. U.S.*, 31 CIT 1536, 1541–43, 517 F. Supp. 2d 1333, 1337–38 (2007) (noting the substantial transformation determinations made by both Customs and the U.S. Department of Commerce in the context of a countervailing duty proceeding),

[5] For ease of reference, the court will refer to this rule of origin from the TAA simply as a "substantial transformation" rule of origin.

Torrington Co. v. U.S., 8 CIT 150, 596 F. Supp. 1083 (1984) (making a substantial transformation determination in the context 28 U.S.C. § 1581(a)).

The substantial transformation rule of origin stands in contrast to the rule of origin that applies under the Buy American Act. In order for a good to be considered a "domestic end product," procurable under the BAA, it must be manufactured in the United States "substantially all from articles, materials, or supplies mined, produced, or manufactured . . . in the United States." 41 U.S.C. § 10a(a). By executive order, "substantially all" has been clarified to mean greater than 50% domestic content. Exec. Order No. 10,582, 19 Fed. Reg. 8,723 (Dec. 17, 1954), *reprinted as amended after* 41 U.S.C. § 10d at 346–47 (2006).

The disparity between the applicable rules of origin under the TAA and the BAA is not without consequence. As originally implemented, this incongruity threatened to effect a *dis*advantage for certain goods manufactured in the U.S., that was nothing short of ironic. While the purpose of the TAA had been to extend no-less-favorable treatment to products from preferred trading partners than was given to domestic products, it soon became clear that certain foreign goods might be treated *more* favorably than goods comparably produced in the United States. Specifically, there was uncertainty as to the procurement eligibility of goods substantially transformed in the United States from mostly foreign components.

These so-called "U.S.-made end products" cannot receive the BAA's domestic procurement preference, because they are distinct from domestic end products, which meet the 50% domestic content requirement of the BAA. However, they were not automatically guaranteed to fare better under the TAA. Because U.S.-made end products are not substantially transformed in a designated *foreign* country or instrumentality, they were thought not to be eligible for a TAA waiver of BAA requirements. *See generally* 19 U.S.C. § 2511. But at the same time, while U.S.-made end products did not appear to qualify for preferential treatment under the BAA or the TAA, the TAA does not permit their procurement to be prohibited. The prohibition provision of the TAA only applies to goods substantially transformed in *foreign* countries that are not a DFCI. *See* 19 U.S.C. § 2512. The consequence of the bare overlay of the rules of origin in the BAA and the TAA was the peculiar, and politically unpalatable prospect that a good substantially transformed in a DFCI—say, Canada—from entirely foreign components, could be preferred in U.S. government procurement over an identical product substantially transformed in the U.S. from the *same* foreign components. Fortunately, as will be explained below, administrative action has spared U.S.-made end products from such an ignominious fate.

IV. The Section 305(b)(1) Final Determination at Issue in This Case

Xerox challenges a final determination issued in ruling letter HQ H009107 on August 2, 2007 to Nukote International—a company that is not a party to this action. (*See* Compl., Ex. A.) Nukote had sought a Section 305(b)(1) final determination regarding the country-of-origin of its refurbished laser printer toner cartridges. (*Id.*) Customs was presented with three different manufacturing scenarios, and was asked to determine the country-of-origin for the printer cartridges in each. Customs framed the issue as "[w]hat is the country of origin of the subject laser printer cartridge models for the purpose of U.S. Government procurement?" (*Id.*) Customs' holding in HQ H009107 was that the merchandise in question was not substantially transformed in the United States. (*Id.* at 3.) Customs did not articulate *where* the goods were substantially transformed, and therefore did not positively identify the country of origin. (*See id.*) Moreover, Customs' ruling did not otherwise establish whether or not the articles in question were products of a designated foreign country or instrumentality. (*See generally*, *id.*)

Xerox has brought this case seeking a determination from the Court that Customs erred, because the processing of Nukote's goods in the United States was sufficient to effect substantial transformation, and that the country of origin for purposes of government procurement is therefore the United States. (Compl. ¶¶ 21–42.) While the Court was not provided with a copy of Nukote's original request that precipitated this ruling letter, based on the way Customs framed its holding, it appears that Nukote presented the question to Customs in essentially the same way–seeking a determination of whether or not its goods had been substantially transformed in the United States.

PARTIES' CONTENTIONS

I. Defendant's Contentions

Defendant advances two central arguments in its motion to dismiss: (1) that the determination issued by Customs is not a final determination described in Section 305(b)(1), and the Court therefore lacks jurisdiction to review it, and (2) that even a favorable ruling from the Court is incapable of providing meaningful relief to Xerox, and as such this case raises no justiciable controversy. (Mem. In Supp. Of Def.'s Mot. To Dismiss This Action ("Def.'s Mot.") 1–3, 9–21.)

In making its first argument, Defendant points out that 28 U.S.C. § 1581(e) jurisdiction is only available to review a final determination issued pursuant to Section 305(b)(1) of the TAA. Quoting the language of Section 305(b)(1), Defendant argues that in the present case "Customs **never** made a determination on whether the products in question were, or were not,[6] a product of a designated foreign country or instrumentality," and that therefore, "conspicuously absent is a decision by Customs that is reviewable by the Court pursuant to section 1581(e)." (*Id.* at 13 (internal quotation omitted) (emphasis in original).) Instead, Defendant argues that Customs decided whether or not Nukote's toner cartridges were products of the United States, a final determination it believes falls outside the scope of Section 305(b)(1). (*Id.* at 12–13.) Defendant offers no theory as to why its client—Customs—issued a ruling that it now claims was without statutory authorization.

The government evinces its belief that the only reason Nukote and Xerox could have possibly wanted a determination that the goods in question were substantially transformed in the United States would be to qualify these goods for procurement under the Buy American Act. Defendant points out that this would not work. Citing the "different criteria for the determination of country of origin" under the BAA and TAA, Defendant points out—correctly—that "the criteria for one cannot be substituted for the other." (*Id.* at 13.) A ruling that Nukote's goods were substantially transformed in the U.S. would not address whether they met the 50% domestic content requirement of the BAA. Defendant can imagine no other purpose for which Nukote or Xerox could have wanted the requested ruling.

Defendant's second argument—that this case lacks a justiciable controversy—is built on its belief that the ruling sought by Nukote and Xerox would be useless. Because the government believes that "the only relief that would be meaningful to Xerox" would be a determination that its goods qualify for U.S. government procurement under the BAA, and because HQ H009107 only addresses itself to the issue of substantial transformation, Defendant claims that a determination by the Court that Plaintiff's goods were substantially transformed in the U.S. would be worthless. In addition to assailing the

[6] In its reply, Defendant actually takes this argument a step further, claiming that under Section 305(b)(1) and 19 C.F.R. § 177.21, Customs is "only permit[ted] to make rulings *related to products of foreign designated countries and instrumentalities*." (Def.'s Reply to Pl.'s Opp'n. to Def.'s Mot. to Dismiss this Action ("Def.'s Reply.") 12 (emphasis added).)

If Customs' decision making ability during a Section 305(b)(1) final determination was constrained as suggested by Defendant, Customs would be prohibited from issuing a determination about any product which it might conclude was not a product of a designated foreign country or instrumentality. Clearly, as negative determinations are fully contemplated by the statute, Defendant's view is unduly restrictive.

"meaningful[ness]" of any relief the Court could provide, Defendant also characterizes such relief as not "effectual," not "consequential", not "concrete", not "specific", not "conclusive", and with "no practical application." (Def.'s Mot. 17–20.)

II. Plaintiff's Contentions

Xerox responds to the motion to dismiss primarily by asserting that Defendant's arguments evince a misunderstanding of the status of the U.S.-made end product in government procurement. (Mem. in Opp'n. to Def.'s Mot. to Dismiss ("Pl.'s Resp.") 12-19.) According to Xerox, Nukote's ruling request (and Xerox's case) are not misguided attempts to qualify the goods in question for government procurement under the BAA, nor did they need to be, because "at all times relevant to this litigation," federal regulations establish that U.S.-made end products were eligible for government procurement in their own right. (*Id.* at 16 (*citing* 48 C.F.R. §§ 25.003, 25.403.)

Plaintiff devotes virtually all of the argument in its response brief to demonstrating that Defendant's understanding of government procurement law is considerably out of date. (*Id.* at 12–19.) Plaintiff cites a 1990 decision by the General Services Administration Board of Contract Appeals ("GSBCA") in which this "federal tribunal" addressed the conundrum created by the overlapping rules of origin between the BAA and TAA, described above. (*Id.* at 12–16); *see also supra* at 9–12. In *Protest of International Business Machines Corporation*, 90–2 B.C.A. (CCH) P22,824, 1990 GSBCA LEXIS 213 (May 18, 1990), IBM had offered certain computers for sale to the U.S. government that had been substantially transformed in the United States but that did not contain more than 50% domestic content. *Id.* at *10–11. By operation of a federal acquisition regulation in effect at the time, IBM's offer was rejected: the computers did not qualify as designated country end products under the TAA, and did not qualify as domestic end products under the BAA. *Id.* The GSBCA reviewed the regulation that had led to the exclusion of IBM's U.S.-made end products in the government procurement bidding process, and held that it was inconsistent with 19 U.S.C. § 2512, which only permits the exclusion of products from foreign countries that have not been designated. *Id.* at *17–21. The GSBCA found that goods like IBM's could not be excluded from government procurement by virtue of the TAA. *Id.* As a result, the General Services Administration, which was bound by the GSBCA determination, created a special category of procurable goods it denoted "U.S.-made end products." *General Services Administration Acquisition Regulation*, 55 Fed. Reg. 46,068–01 (temporary rule Nov. 1, 1990); 57 Fed. Reg. 42,708–01 (final rule Sep.

16, 1992). Over the following decade or so, the U.S.-made end product came to be viewed as a sensible component of government procurement law, and exceptions were created for it by the heads of individual agencies, and eventually in the general federal acquisition regulations and defense federal acquisition regulations. (Pl.'s Resp. at 16–19); *see also Defense Federal Acquisition Regulation Supplement*, 62 Fed. Reg. 47,407–01 (proposed rule Sep. 9, 1997) (waiving the restrictions of the BAA for Defense Department acquisition of certain information technology products), *Federal Acquisition Regulation; Foreign Acquisition (Part 25 Rewrite)*, 64 Fed.Reg. 72,416–01, 72,422 (final rule Dec. 27, 1999) (creating a category for U.S.-made end products in the general Federal Acquisition Regulations). As a result of these and other changes to the government procurement landscape, it has been the case for many years, and at all times relevant to this litigation, that products substantially transformed in the U.S. are highly eligible for government procurement.

While Plaintiff therefore responds to Defendant's second argument in great detail, it devotes considerably less attention to Plaintiff's first argument – that the determination issued by Customs in this case is not a Section 305(b)(1) determination. On that point, Plaintiff simply points out that HQ H009107 was "rendered pursuant to Section 305(b)(1) of the Trade Agreements Act of 1979." (Pl.'s Resp. at 8.) Plaintiff does not address the apparent disparity identified by Defendant: how a final determination as to whether the goods in question were substantially transformed in the United States satisfies the requirement of Section 305(b)(1) that Customs decide whether the articles are products of "a foreign country or instrumentality designated" pursuant to the TAA. 19 U.S.C. § 2515(b).

ANALYSIS

I. This Case Presents a Justiciable Controversy

Defendant's argument that this case lacks a justiciable controversy, because even a favorable ruling on Xerox's claims could not provide Plaintiff with meaningful relief, is without merit. The relief sought by Xerox in its Complaint is an order that would "set aside the final determination of Customs as unlawful," and "such further and additional relief as this Court may deem proper." (Compl. at 14.) Defendant does not argue that this relief is fundamentally unavailable, but rather claims that Plaintiff will not be able to turn such a judgment into something with real utility or economic value. That concern does not raise a problem of justiciability. Moreover, given the status of the U.S.-made end product in government procurement, it appears that, should Xerox prevail in this case, it would have no trouble extracting utility out of a favorable judgment.

This case is justiciable because it presents an appropriate occasion for judicial action. *See* 13 Wright & Miller § 3529. Namely, it presents "a real and substantial controversy" between Xerox and the government, which the Court may resolve by providing "specific relief through a decree of conclusive character." *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 241 (1937). Contrary to Defendant's assertions, this case will not require the court to stray "into a prediction of future events," nor does it involve "uncertain or contingent future events" at all. (*See* Def.'s Mot. at 16 (citations omitted).) Namely, it is *possible* the Court could determine that the goods described in the ruling letter were substantially transformed in the United States, or in some other country, and reverse the determination made by Customs. Plaintiff faces no more of a challenge in rendering economic value from such a favorable judgment than a plaintiff in any civil case. It is always incumbent on a plaintiff to know why it seeks a particular ruling, and the fact that the Defendant is puzzled by Plaintiff's motivation does not raise a problem of justiciability. As noted above, the right to obtain a Section 305(b)(1) final determination (or to obtain judicial review of it) is unaffected by the motivation of the party requesting the determination, and the consequences that flow from it. *See supra* at 7–8.

Moreover, Defendant's qualms about a potential judgment lacking meaning stem from a radical misapprehension of the state of government procurement law. As Xerox has compellingly demonstrated, the U.S.-made end product has been highly procurable for quite some time. Accordingly, a ruling that a particular article has been substantially transformed in the U.S. has great potential value. Nukote and Xerox are by no means the only parties to have seen economic value in this type of ruling. The Court's review of relevant legal databases reveals that no less than half of the Section 305(b)(1) final determinations issued by Customs over the last 30 plus years have dealt squarely with the issue of whether a given article was substantially transformed in the United States. Therefore, hearing no persuasive argument to the contrary, the Court finds that this case presents a justiciable controversy.

II. HQ H009107 Contains a Section 305(b)(1) Final Determination

The government's remaining argument—that the Court lacks jurisdiction because the final determination issued by Customs in HQ H009107 is not a Section 305(b)(1) determination—is also unavailing. The ruling letter states that it is issued "[p]ursuant to Subpart B of

Part 177, 19 CFR [§] 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq.*)[.]" It could scarcely be clearer. When Customs issued this ruling, it did so pursuant to its authority conferred by Title III of the TAA. The document Customs produced indicates that the agency issued what it believed to be a Section 305(b)(1) final determination. Moreover, under 28 U.S.C. § 1581(e), this court has exclusive jurisdiction to review "**any** final determination . . . under section 305(b)(1)." 28 U.S.C. § 1581(e) (emphasis added). Even if the decision actually rendered contains shortcomings, HQ H009107 is clearly *a* final determination under Section 305(b)(1) and as such, the court has jurisdiction to review it.

It must be noted that Customs flirted briefly with the theory here advanced by its attorneys, but ultimately chose the analysis advocated by Plaintiff. In the first Section 305(b)(1) final determination issued after the GSBCA's decision in *IBM,* HQ 734977, Customs explained that, on advice of the U.S. Trade Representative, it believed it was "not authorized to render final determinations concerning whether an article is a product of the U.S. for purposes of Title III of the Trade Agreements Act," because Section 305(b)(1) final determinations may only be made about products of designated foreign countries, a category that necessarily excludes the United States. *Final Determination -U.S. Government Procurement*, 1993 U.S. Custom HQ Lexis 2084 at *3–*4. (April 2, 1993); *see also* Gary H. Sampliner & Brian J. O'Shea, *Rules of Origin for Foreign Acquisitons Under the Trade Agreements Act of 1979*, *NAFTA*, *and the New GATT Accords*, 23 Pub. Cont. L.J. 207, 220–21 (1994). However, Customs quickly abandoned this position without apparent explanation. In the very next Section 305(b)(1) final determination issued by the agency (HQ 735346), Customs proceeded *without objection* to determine that the country of origin of some articles in question was the United States. *U.S. Government Procurement; Final Determination* ; 1995 U.S. Custom HQ Lexis 243 at *9, *18–*19 (Feb. 23, 1995).[7] No rationale was provided for this change in the ruling letter, and the Court has located no final determination in which Customs has revisited the issue since. Over the following fifteen years, Customs has repeatedly issued determinations that various products were or were not substantially transformed in the United States, without once claiming that it lacked statutory authority to do so.

Defendant, though, has raised an interesting point. What if its client, Customs, has been issuing final determinations pursuant to

[7] The Court notes that both of these ruling letters were issued by the same Customs official, Harvey B. Fox, then the Director of the Office of Regulations and Rulings.

Section 305(b)(1) that are beyond the scope of that statute? As noted above, the nature of the ruling issued to Nukote was not unusual; more than half of the purported Section 305(b)(1) final determinations ever issued by Customs have addressed whether the articles in question were products of the United States. If the theory advanced by Defendant is correct, Customs has flagrantly spurned the requirements of the statute and engaged in an unchecked pattern of *ultra vires* activity. Fortunately, Defendant is wrong.

When issuing a Section 305(b)(1) final determination, as long as Customs actually determines the country of origin (or rules that the country of origin is indeterminate under the facts of the case), it complies with the requirements of 19 U.S.C. § 2515(b)(1) and 19 C.F.R. § 177 Subpart B. As explained above, from the moment Customs makes its pronouncement regarding country of origin, whether the "article is or would be a product of a foreign country or instrumentality designated pursuant to" the TAA becomes self-evident. *See id.* This conclusion follows whether Customs rules that the article has been substantially transformed in Canada, North Korea, the United States, or any other country or instrumentality. Additionally, a final determination that although sufficient facts have been presented, it cannot be determined where the product was substantially transformed, is also consistent with the statute. Nothing in the statute would require Customs to make a speculative final determination upon insufficient facts. Such a ruling would have the same practical effect as a negative Section 305(b)(1) final determination—a finding that the articles in question do not qualify as products of any DFCI.

III. HQ H009107 is Incomplete, and Warrants a Remand

While nothing about the inquiry *undertaken* in HQ H009107 was fundamentally inconsistent with Section 305(b)(1), Customs left the job unfinished. As the final determination now stands, it fails to indicate whether Nukote's goods are or are not products of a DFCI. As such, the Court finds that a remand is appropriate. Customs adequately framed the issue in HQ H009107 as "[w]hat is the country of origin of the subject laser printer cartridge models for the purpose of U.S. Government procurement?" (Compl. Ex. A.) But, Customs held that "[t]he operations performed at Nukote's Rochester, New York facility do not result in a substantial transformation of the cartridges. Therefore, the cartridges will not be considered to be products of the United States." (Pl.'s Resp. at 6.) The problem with this holding is that Customs fails to establish *where* the goods have been substantially transformed, or even *if* they have been substantially transformed.

It is possible, given the facts in this case, that substantial transformation occurred in one of any number of countries, or that the country of origin is indeterminate. In the final determination, Customs explains that Nukote's printer cartridges are recycled from empty toner cartridges that have been collected "in the United States and, to a substantially lesser extent, in Canada, Singapore, the United Kingdom, Hong Kong and China." (*Id.* at 2.) The empty cartridges are sorted in an unnamed "foreign location," and certain manufacturing processes take place in an unnamed "second foreign location," before final processes are undertaken in the United States. (*Id.* at 5.) It is appropriate for Customs to first address whether any of these processes substantially transformed Nukote's goods before the Court reaches the merits of this case.

In the context of reviewing administrative action, the Supreme Court has stated that a court cannot "be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.*, 332 U.S. 194, 197 (1947). When an agency violates a statutory obligation to provide a clear decision, the court must remand the decision to the agency for clarification, so that the court does not "propel [itself] into the domain which Congress has set aside exclusively for the administrative agency." *Id.* at 196. Moreover, this Court has explicit statutory authority to "order any . . . form of relief that is appropriate in a civil action, including . . . orders of remand." 28 U.S.C. § 2643(c)(1).[8] Customs must remedy the shortcomings in HQ H009107 by taking action consistent with Section 305(b)(1) of the TAA, consistent with its regulations set out in 19 C.F.R. Part 177, Subpart B which require the issuance of a country of origin determination, and consistent with its 30 year practice of issuing complete country of origin determinations. On remand, Customs must identify the country of origin of Nukote's printer cartridges for purposes of government procurement, or, alternatively, make an explicit final determination that the country of origin cannot be determined. For the foregoing reasons, Defendant's motion to dismiss is therefore denied, and this case is remanded to Customs.

ORDER

Upon consideration of Defendant's motion to dismiss, Plaintiff's response thereto, and Defendant's reply, and upon due deliberation, it is hereby

ORDERED that Defendant's motion to dismiss is hereby DENIED, and it is further

[8] Additionally, the Court notes that Plaintiff has requested a remand in its prayer for relief. (Compl. 14.)

ORDERED that no later than **Tuesday, February 8, 2011,** Customs shall file with the Court a final determination upon remand that is consistent with this Opinion and Order, and it is further

ORDERED that on remand, Customs must identify the country of origin of Nukote's printer cartridges for purposes of government procurement, or, alternatively, make an explicit final determination that the country of origin cannot be determined, and it is further

ORDERED that the parties shall submit to the Court no later than **Tuesday, February 15, 2011** a joint proposed scheduling order governing the balance of this case.

Dated: January 24, 2011
New York, NY

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

Slip Op. 11–9

SHANDONG TTCA BIOCHEMISTRY CO., LTD., et al. Plaintiffs, v. UNITED STATES, Defendant, and CARGILL INCORPORATED, et al. Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No.: 09–00241

ORDER

Plaintiffs Shandong TTCA Biochemistry Co. Ltd., *et al.*, have filed a Consent Motion for *In Camera* Oral Argument ("Plaintiffs' Motion"). Plaintiffs' Motion is DENIED.

The practice of the court is, and should be, to avoid confidential proceedings when possible. As early as the 17th century, "the concept of a public trial was firmly established under the common law." *Gannett Co. v. DePasquale*, 443 U.S. 368, 420, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) (Blackmun, J., concurring in part and dissenting in part). In fact, "there is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history. Apparently not even the Court of Star Chamber, the name of which has been linked with secrecy, conducted hearings in private." *Id.*

Openness is, of course, not absolute; however, whenever it is reasonably possible judicial proceedings should remain public. *See Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. Pa. 1984) ("[T]o limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is *no less restrictive way* to serve that governmental interest.") (emphasis added) (citing *Globe Newspaper Co. v. Superior Court*, 457

U.S. 596, 606–07 (1982); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (6th Cir. 1983)).

Plaintiffs assert that "an *in camera* oral argument is necessary in this case due to the nature of the issues presented in this action, and the extensive amount of proprietary information contained in the record of the U.S. International Trade Commission's proceeding below." Plaintiffs' Motion at 1. However, there are other, more limited ways to avoid exposure of proprietary information. If parties need to discuss a particular confidential fact at oral argument, they can move during the proceedings to exclude from the courtroom all persons unbound by the Protective Order (and not otherwise admitted by the court).[1] In this argument, parties are to reference confidential information only when necessary and, to the extent possible, limit the occasions when closure is requested. The court will then clear the courtroom as necessary and appropriate.

It is unnecessary, and therefore inappropriate, to close the entire proceeding.[2]

For the above stated reasons, it is hereby ORDERED that Plaintiffs' Consent Motion for *In Camera* Oral Argument is DENIED.
Dated: January 25, 2011
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 11–10

ESSAR STEEL LIMITED, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Court No. 09–00197

[The court sustains the U.S. Department of Commerce's Final Results of Redetermination.]

Dated: January 25, 2011

Arent Fox LLP (*Mark P. Lunn*, *Kay C. Georgi* and *Diana Dimitriuc Quaia*), for Plaintiff Essar Steel Limited.

[1] Which is to say court personnel, to whom the Protective Order is inapplicable.

[2] At least one other judge of this court has taken a similar position. *See PSC VSMPO-AVISMA Corp. v. United States*, Court No. 09–00349 (Order dated Sept. 17, 2010) (Restani, J.) ("If the parties wish to discuss confidential information during oral argument, they should restrict this information to one part of the argument, and the court will clear the courtroom of persons not covered by the applicable confidentiality order.").

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David D'Alessandris*), for Defendant United States; *Deborah R. King*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

Skadden Arps Slate Meagher & Flom, LLP (*Robert E. Lighthizer*, *Jeffrey D. Gerrish* and *Nathaniel B. Bolin*), for Defendant-Intervenor United States Steel Corporation.

OPINION

Barzilay, Judge:

I. Introduction

This matter returns to the court following the remand of the U.S. Department of Commerce's ("Commerce") final results of the fifth administrative review of the countervailing duty order on certain hot-rolled carbon steel flat products from India. *See Essar Steel Ltd. v. United States*, 34 CIT __, 721 F. Supp. 2d 1285 (2010) ("*Essar I* "); *Certain Hot-Rolled Carbon Steel Flat Products from India*, 74 Fed. Reg. 20,923 (Dep't of Commerce May 6, 2009) (final admin. review). In relevant part, the court's previous opinion questioned Commerce's determination that Plaintiff Essar Steel Limited ("Plaintiff") benefitted from the Chhattisgarh Industrial Policy ("the Policy") during the period of review, January 1, 2007 to December 31, 2007. *Essar I*, 34 CIT at __, 721 F. Supp. 2d at 1300–01. Specifically, the court could not discern how Commerce reconciled its finding in the fourth administrative review that Plaintiff could not benefit from the Policy from 2004 through 2009 with its application in this administrative review of an adverse facts available 54.69 per cent *ad valorem* rate against Plaintiff for benefits allegedly received from the same program. *Id.* Consequently, the court ordered Commerce to reopen and place on the administrative record documents from the previous administrative review, Admin. R. Conf. Doc. 1229 Ex. 4 and 1193 Ex. 9 ("the Documents"), and to consider them in its reassessment of whether Plaintiff benefitted from the Policy. *Essar I*, 34 CIT at __, 721 F. Supp. 2d at 1301. In its remand determination, Commerce found that Plaintiff did not benefit from the Policy. *Redetermination Pursuant to Court Remand*, C-533–821, at 5 (Dep't of Commerce Oct. 28, 2010) (final results) ("*Redetermination* "). The court sustains the *Redetermination* for the reasons below.

II. Standard of Review

The Court will hold as unlawful any Commerce determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

III. Discussion

Defendant-Intervenor United States Steel Corporation ("U.S. Steel") now challenges Commerce's determination that Plaintiff did not benefit from the Policy on two grounds. U.S. Steel first claims that the Documents underscore the need for Commerce to apply adverse facts available because they show that Plaintiff did not act to the best of its ability during the administrative review. Def.-Intervenor Br. 3–7. This contention lacks merit. The Documents, provided by the State Government of Chhattisgarh, verify that Plaintiff did not benefit from the Policy during the period of review because Plaintiff was not eligible to receive benefits from 2004 through 2009. *See Redetermination* at 4; Admin. R. Conf. Doc. 1229 Ex. 4 and 1193 Ex. 9. Commerce therefore reasonably supported its finding that Plaintiff did not benefit from the Policy with substantial evidence.

Second, U.S. Steel insists that the court should not have ordered Commerce to consider the documents on remand. Def.-Intervenor Br. 7–9. Although U.S. Steel could have raised this contention in a motion for reconsideration within 30 days of the filing of *Essar I*, *see* USCIT R. 59(b), that time has passed, and the issue is not properly before the court. *See Former Emps. of Quality Fabricating, Inc. v. United States*, 28 CIT 1061, 1070, 353 F. Supp. 2d 1284, 1292 (2003) ("Pursuant to the law of the case doctrine, when a court decides upon a rule of law, that decision continues to govern the same issues in subsequent phases of the case . . . . If Defendant had wished to challenge that finding, a motion for reconsideration would have been the appropriate motion.") (citing *Arizona v. California*, 460 U.S. 605, 618 (1983) (internal citation omitted)). The court nevertheless wishes to reiterate that in *Essar I*, the court found that the stark contrast between Commerce's finding in the fourth administrative review that Plaintiff could not have benefitted from the Policy between 2004 and 2009 and its assessment of a 54.69 per cent *ad valorem* duty for benefits received from the same program during the fifth administrative review constituted an exceptional case that warranted the reopening of the administrative record. *Essar I*, 34 CIT at __, 721 F. Supp. 2d at 1300–01; *see Home Prods. Int'l, Inc. v. United States*, 33 CIT __, __, 675 F. Supp. 2d 1192, 1199 (2009). As the Federal Circuit has held, "Congress' desire for speedy determinations . . . should not be interpreted as authorizing proceedings that are based on inaccurate data," and when new facts emerge "between the date of an agency . . . decision and the date of decision on appeal," a court may properly rely upon those new facts and direct the agency to consider them upon remand. *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937, 939 (Fed. Cir. 1990) (citation omitted); *see Anshan Iron & Steel Co. v. United States*, 28 CIT 1728, 1736–37, 358 F. Supp. 2d 1236, 1243 (2004). *See genearlly Borlem S.A.-Empreedimentos Industriais*, 913 F.2d at 937–41.

IV. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Commerce's determination that Plaintiff did not benefit from the Chhattisgarh Industrial Policy is **SUSTAINED** ; and it is further

ORDERED that Commerce's *Redetermination* is **SUSTAINED**.

Dated: January 25, 2011
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE