U.S. Court of International Trade

Slip Op. 15–63

BEST KEY TEXTILES CO. LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00367

[Plaintiff's revived motion to transfer denied; matter re-dismissed again, *per* appellate instruction.]

Dated: June 18, 2015

John M. Peterson, *Maria E. Celis*, *Russell A. Semmel*, *Richard F. O'Neill*, and *Elyssa R. Emsellem*, Neville Peterson LLP of New York, NY, for the plaintiff.

Marcella Powell and *Beverly A. Farrell*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the defendant. With them on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director, International Trade Field Office. Of counsel on the brief was *Paula S. Smith*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Musgrave, Senior Judge:

The Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit") having agreed with the defendant's argument that "this action should be dismissed for lack of jurisdiction", *see* Br. for Def.-Appellee United States, CAFC 2014–1327, at 14 & 47, but in lieu thereof [1] having curiously remanded "with instructions to dismiss" [2] for lack of jurisdiction yet again, the plaintiff has thus been presented opportunity to revive its motion, previously denied as moot, to transfer this action to the United States District Court for the District Columbia. *See* USCIT Rule 7(b); 28 U.S.C. § 1631 ("transfer statute").

[1] *Cf.*, *e.g.*, *Veltmann-Barragan v. Holder*, 717 F.3d 1086 (9th Cir. 2013) (vacated and dismissed); *County of Sonoma v. Federal Housing Finance Agency*, 710 F.3d 987 (9th Cir. 2013) (vacated and dismissed); *Physician Hospitals of America v. Sebelius*, 691 F.3d 649 (5th Cir. 2012) (vacated and dismissed); *US Ecology, Inc. v. U.S. Dept. of Interior*, 231 F.3d 20 (D.C. Cir. 2000) (vacated and dismissed). *Cf. Ad Hoc Shrimp Trade Action Committee v. United States*, 35 CIT ___, Slip Op. 11–71 (June 21, 2011).

[2] 777 F.3d at 1357.

Familiarity with prior proceedings is presumed. *See* Slip Op. 13–148 (Dec. 13, 2013), Slip. Op. 14–22 (Feb. 25, 2014), *vacated and remanded*, 777 F.3d 1356 (Fed. Cir. 2015). As part of its appeal to the Federal Circuit of those dismissal(s) of its claims, the plaintiff did not raise (as it should have, in order to air) this court's earlier denial of its motion to transfer, nor did it raise the issue of transfer in responding to the defendant's appeal of this court's earlier reconsideration of subject matter jurisdiction, nor did it otherwise raise the matter of transfer with the appellate panel. Nonetheless, the plaintiff now revives its assertion, to wit that if this court does not have jurisdiction under 28 U.S.C. §1581(i) to review the plaintiff's claim, then the District Court for the District of Columbia is one that does.

Transfer pursuant to 28 U.S.C. §1631 is warranted if (a) transfer is "in the interest of justice," and (b) the action "could have been brought" in the District Court for the District of Columbia. *See Butler v. United States*, 30 CIT 832, 837, 442 F. Supp. 2d 1311, 1317 (2006) (citation omitted). The plaintiff argues that transfer is in the interests of justice because it is "an aggrieved party with standing to challenge the Revocation Ruling under the [Administrative Procedure Act] and therefore should be afforded the opportunity to have its claims heard before a District Court." Pl's Br. on Renewed Mot. to Transfer at 8, ECF No. 90 (Mar. 27, 2015). It also asserts that the action could have been brought in the U.S. District Court for the District of Columbia because that court "can provide complete relief" since "it has original jurisdiction over APA claims, which present Federal questions." Pl's Mot. Br. at 10, referencing 28 U.S.C. § 1331 ("[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

On whether transfer is in the interest of justice, if the plaintiff is not implicitly arguing that the court should disregard the Federal Circuit mandate's explicit instructions, it is explicitly arguing that the mandate is limited and does not address the matter of transfer under the transfer statute. Determining the law of the case, therefore, is necessary to considering the plaintiff's revived motion.

The plaintiff's own arguments answer that question. At oral argument, the plaintiff cleverly contended that even though it did not raise the issue of transfer during appeal, it did not "waive" pressing the "right" to transfer because a court has an "independent duty to consider transfer where it's been found without subject matter jurisdiction".[3] That knife cuts both ways, however.

[3] Transcript of Oral Argument of May 28, 2015 ("Tr.") at 5–6, ECF No. 97 (June 11, 2015). "The [transfer] statute confers on the Federal Circuit authority to make a single decision upon concluding that it lacks jurisdiction -- whether to dismiss the case or, 'in the interest of justice,' to transfer it to a court of appeals that has jurisdiction." *Christianson v. Colt*

The mandate rule is that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court". *Briggs v. Pa. R. Co.*, 334 U.S. 304, 306 (1948). Upon receipt, the lower court "cannot vary it or examine it for any other purpose than execution." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). By contrast, the law of the case governs what issues were "actually decided, either explicitly or by necessary implication." *Toro Co. v. White Consol. Indus., Inc.*, 383 F.3d 1326, 1335 (Fed. Cir. 2004).

Consistent therewith, and given the argument that transfer is a court's independent duty to consider, this court may not presume that the appellate court did not implicitly consider the question of transfer on appeal when it explicitly remanded only "with instructions to dismiss the case." The Federal Circuit could have remanded with instructions to consider whether to transfer to another district court. *Cf. Schick v. United States*, 554 F.3d 992, 993, 996 (Fed. Cir. 2009) (remanding "with instructions that his complaint be dismissed" but "[i]n light of our holding regarding jurisdiction, the Court of International Trade should consider the applicability of the transfer statute"). It did not do so. Because the mandate expresses the law of the case, it must be read literally (and according to the maxim *expressio unius est exclusio alterius*) as an address of the relief the plaintiff would here seek. This court is bound not to deviate therefrom.

Even if that were not the case, and the appellate mandate could be interpreted as extending latitude for this court to consider whether the Distinct Court for the District of Columbia could even entertain jurisdiction, this court remains unpersuaded that jurisdiction over this matter would be proper in that district court, because the defendant is correct that the Court of International Trade is the court vested with *exclusive* jurisdiction over the *res* of the type of matter about which the plaintiff fundamentally complains, namely, the issuance of a pre-importation classification ruling and the proper tariff classification of imported goods. *Cf.* 28 U.S.C. §1581(h). Whatever benefit the plaintiff believes accrued to it as a result of that pre-importation ruling, the foreign business harm that it alleges it suffered as a result of the Revocation Ruling is beyond the type of harm encompassed by the APA claim that the plaintiff would assert, which can theoretically only find expression via 28 U.S.C. §1581(i), because "engaging in foreign commerce is not a fundamental right protected by notions of substantive due process." *NEC Corp. v. United States*,

Industries Operating Corp. 486 U.S. 800, 818 (1988), quoting 28 U.S.C. § 1631. *See Boultinghouse v. Lappin*, 816 F. Supp. 2d 107, 112–13 (D.D.C. 2011) (quoted by plaintiff; *see* Tr. at 4), quoting *Tootle v. Secretary of Navy*, 446 F.3d 167, 173 (D.C. Cir. 2006), quoting *Christianson*.

151 F.3d 1361, 1369 (1998), citing *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904).

The appellate mandate must be fulfilled. The renewed motion to transfer must therefore be denied. An amended judgment in conformity with the mandate will be issued separately.

Dated: June 18, 2015
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 15–64

LDA INCORPORADO, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 12–00349

[Upon submission of Joint Stipulation of Undisputed Facts and Proposed Conclusions of Law, in lieu of trial, judgment is granted in favor of Plaintiff.]

Dated: June 19, 2015

Ronald M. Wisla, *Lizbeth R. Levinson*, Kutak Rock LLP, of Washington, DC, for Plaintiff.

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director.

OPINION

Kelly, Judge:

Before the court is the parties' Joint Stipulation of Undisputed Facts and Proposed Conclusions of Law, which was submitted in lieu of trial. *See* Joint Stipulation Undisputed Facts Proposed Conclusions of Law, May 8, 2015, ECF No. 49 (separately "JSUF," "Pl.'s PCL." and "Def.'s PCL").[1] Familiarity with the case is presumed, however, the court provides a brief recitation of the procedural history of the case following the court's earlier denial of Defendant United States' ("Defendant" or "United States") motion to dismiss for lack of subject-matter jurisdiction.

On May 13, 2014, this court denied Defendant's motion to dismiss for lack of subject-matter jurisdiction. *See LDA Incorporado v. United States*, 38 CIT __, __, 978 F. Supp. 2d 1359 (2014). Thereafter, Defen-

[1] The parties filed a single document including their joint submission of undisputed facts and their separate proposed conclusions of law.

dant submitted its answer to Plaintiff LDA Incorporado's ("Plaintiff" or "LDA") complaint, and the court entered a scheduling order governing discovery and other trial related matters. *See* Answer, June 26, 2014, ECF No. 34; Scheduling Order, July 2, 2014, ECF No. 36.

On March 13, 2015, LDA, with Defendant's consent, moved "to submit a joint stipulation of agreed upon facts in lieu of trial . . . ." Pl.'s Consent Mot. Permit Parties Submit Joint Stipulation Agreed Upon Facts in Lieu of Trial, Mar. 13, 2015, ECF No. 39. After conferring with the parties, the court granted LDA's consent motion and ordered the parties to submit a "joint stipulation of undisputed facts and proposed conclusions of law . . . ." Order, Mar. 16, 2015, ECF No. 41. The parties submitted their Joint Stipulation of Undisputed Facts and Proposed Conclusions of Law on May 8, 2015, and the court deemed the matter submitted for resolution. As the parties have stipulated to the facts and only continue to disagree about whether jurisdiction exists, a legal issue already decided by the court, the court finds that based on the undisputed facts, LDA's protest was erroneously denied and will enter judgment accordingly.

UNDISPUTED FACTS

The following facts are undisputed.[2]

1. LDA "is a Puerto Rican corporation located in Guaynabo, Puerto Rico. Plaintiff is an importer and reseller of electrical infrastructure products, including galvanized electrical rigid steel conduit, for use in the construction industries. Plaintiff represents foreign manufacturers in the local Puerto Rico market." JSUF ¶ 1 (citing Compl. ¶ 8, Apr. 16, 2013, ECF No. 5; Pl.'s Resp. Def.'s Mot. Dismiss 2, Dec. 24, 2013, ECF No. 17 ("Pl.'s Resp.")).

2. LDA's "customers are electrical material distributors that operate in both Puerto Rico and the United States." *Id.* ¶ 2 (citing Compl. ¶ 8; Pl.'s Resp. 2, Ex. 1 at Attach. 8).

3. "LDA does not undertake any finishing or further processing operations prior to the resale of its imports." *Id.* ¶ 3 (citing Compl. ¶ 8; Pl.'s Resp. 2).

4. "On July 22, 2008, the U.S. Department of Commerce ("Commerce") issued antidumping and countervailing duty orders covering circular welded carbon quality steel pipe

[2] In the stipulated facts, the parties cite to the record as filed with the court without objection. In lieu of trial, the court considers the undisputed facts before it as contained in the stipulation and in the record.

from the People's Republic of China." *Id.*¶ 4 (citing *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,545 (Dep't Commerce July 22, 2008) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order) ("CVD Order"); *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,547 (Dep't Commerce July 22, 2008) (notice of antidumping duty order) ("ADD Order") (collectively "the Orders")).

5. "The express language of the AD and CVD orders specifically excluded 'finished electrical conduit' from their scope." *Id.*¶ 5. The language of the Orders provide that

> [t]he scope of this order does not include: (a) pipe suitable for use in boilers, superheaters, heat exchangers, condensers, refining furnaces and feedwater heaters. whether or not cold drawn; (b) mechanical tubing, whether or not cold-drawn; (c) finished electrical conduit; (d) finished scaffolding; (e) tube and pipe hollows for redrawing; (f) oil country tubular goods produced to API specifications; and (g) line pipe produced to only API specifications.
>
> CVD Order at 42,546 (cited in JSUF ¶ 5).[3]

6. Both before and after Commerce issued the Orders, "Plaintiff purchased rigid steel conduit manufactured by Guangdong Walsall Steel Pipe Industrial Co., Ltd. ("Walsall"), a Chinese manufacturer." JSUF ¶ 6 (citing Pl.'s Resp. 3). Walsall galvanizes the product "through a hot dipped process." *Id.* (citing Compl. ¶ 10; Pl.'s Resp. Ex. 4 at 2).

7. "On July 22, 2010, Plaintiff imported into the United States at the Port of San Juan[,]Puerto Rico a single entry (Entry No. 438–0698613–9) of galvanized rigid steel conduit from China." *Id.*¶ 7 (citing Pl.'s Resp. Ex. 1 at Attach. 1 at 1). Plaintiff entered the merchandise "as a Type I entry, not subject to the AD and CVD orders." *Id.* (citing Pl.'s Resp. Ex. 1 at Attach. 1 at 1).

8. Upon import, Plaintiff's "galvanized electrical conduit was both internally and externally coated with a non-electrically insulating material (zinc) and was suitable for electrical use in accordance with Underwriters Laboratories Inc. ("UL")

[3] The scope of the CVD Order and the ADD Order use nearly identical language.

standard UL-6 for 'electrical rigid ferrous metal conduit' and American National Standard Institute ("ANSI") standard C80.1–2005 for 'electrical rigid steel conduit.'" *Id.* ¶ 8 (citing Pl.'s Resp. Ex. 1 at Attachs. 3, 6).

9. "The commercial invoice associated with Entry No. 438–0698613–9 describes the merchandise as '9134 pcs of rigid conduit galvanized rigid conduit with stantdards (sic) compliance of ANSI C80–1 and Underwriters Laboratories UL-6 with a standard length of 10 feet, coupling included.'" *Id.* ¶ 9 (citing Commercial Invoice in Court file.). "Other entry documents, including the packing list, mill report, and bill of lading, all reference the UL6 or ANSI C.80–1 standards." *Id.* (citing Court file).

10. The U.S. Customs and Border Protection ("CBP" or "Customs") conducted laboratory inspections of the imported merchandise after its entry and "[t]he CBP laboratory issued seven laboratory reports (one for each of the diameter sizes contained in the shipment). Each of the laboratory reports described the sample as 'galvanized conduit' and concluded that 'the pipe is composed of zinc-galvanized low carbon non-alloy steel'. Each of the laboratory reports also contained the following conclusion: 'In our opinion, the sample is not internally coated with a non-conducting liner.'" *Id.* ¶ 10 (citing Pl.'s Resp. Ex. 1 at Attach. 1 at 5–18).

11. "On January 10, 2011, CBP issued a Notice of Action notifying Plaintiff that CBP was assessing antidumping and countervailing duties on the subject merchandise." *Id.* ¶ 11 (citing Pl.'s Resp. Ex. 1 at Attach. 1 at 3; Court file). "Plaintiff was required to file a revised entry form reflecting the assessment of antidumping and countervailing duty deposits." *Id.* (citing Pl.'s Resp. Ex. 1 at Attach. 1 at 2; Court file). "The Notice of Action did not state the reasons for the rate advance, but during telephone conferences and a face-to-face meeting on January 26, 2011, CBP advised LDA that the laboratory inspections indicated that the subject merchandise was not internally galvanized and was thus unfinished conduit subject to the antidumping and countervailing duty orders." *Id.* (citing Pl.'s Resp. 4–5).

12. "By letter dated January 28, 2011, Plaintiff provided CBP with additional information to establish that the subject merchandise was both externally and internally coated

with zinc." *Id.*¶ 12 (citing Pl.'s Resp. Ex. 4). "The documents included proof of Walsall compliance with ANSI C.80 [sic] and UL-6 standards; resubmission to CBP of the purchase/entry documents including the commercial invoice, packing list bill of lading, mill certificate and certificate of origin, all stating compliance with ANSI and UL standards; and the pro forma invoice (purchase order) and letter of credit showing merchandise in compliance with ANSA [sic] and UL standards." *Id.*(citing Pl.'s Resp. Ex. 1 at Attach. 5 at 1–3, 7–8, Attach. 6 at 1–2, Ex. 3 at 2–6). "Further, Plaintiff explained to CBP that Walsall galvanized the purchased conduit using the 'hot dipped galvanized' process, which internally and externally galvanizes the product." *Id.* (citing Pl.'s Resp. Ex. 4 at 2).

13. On February 28, 2011, CBP released reports of the results of its laboratory inspections to Plaintiff in response to a Freedom of Information Act Request. *Id.*¶ 13 (citing Pl.'s Resp. Ex. 1 at Attach. 1 at 4). "The reports stated: '[i]n our opinion, the sample is not internally coated with a non-conducting liner.'" *Id.* (citing Pl.'s Resp. Ex. 1 at Attach. 1 at 5–18). "Plaintiff responded to these reports by telling CBP that the absence of a 'non-conducting liner' does not refer to zinc, a metal coating that *conducts* electricity, but refers to an internal lining of materials that *do not conduct* electricity, such as rubber or plastic." *Id.*(citing Pl.'s Resp. 6).

14. "In early March 2011, Plaintiff and CBP had another meeting. CBP advised Plaintiff that CBP now understood that the Plaintiff's conduit was both internally and externally galvanized, but CBP continued to determine that that [sic] the subject merchandise was unfinished conduit and was not suitable for electrical use because it was not internally coated with a non-conducting liner." *Id.*¶ 14 (citing Pl.'s Resp. 6–7).

15. "Plaintiff provided additional product samples to CBP for further testing. Each physical sample was marked with an adhesive label that identified Walsall as the manufacturer, China as the country of origin, and contained the UL trademark identifying the conduit as a UL listed 'electrical rigid metal conduit' product. Each conduit piece was also stenciled with permanent ink identifying the product dimension, the Chinese country of origin and the UL 6 designa-

tion as electrical rigid steel conduit ("RSC")." *Id.*¶ 15 (citing Pl.'s Resp. Ex. 1 at Attach. 4).

16. "Plaintiff provided to CBP the Scope of the ANSI Standard C80.1–2005. The ANSI standard specifies that conduit with a galvanized (i.e., zinc) interior and exterior coating is 'finished' conduit. There is no additional requirement that a finished conduit include an electrically insulating interior coating. The ANSI standard states:

    1. Scope

    This standard covers the requirements for electrical rigid steel conduit for use as a raceway for wires or cables of an electrical system. ***Finished conduit*** is produced in nominal 10 ft. (3.05m) lengths, threaded on each end with one coupling attached. It is protected on the exterior surface with a metallic zinc coating or alternate corrosion protection coating (as specified in the 13th edition of UL 6 in Clauses 5.3.3, 6.2.4, 7.8 and 7.9) and on the interior surface with a zinc or organic coating."

    Id.¶ 16 (citing Pl.'s Resp. Ex. 1 at Attach. 9).

17. Plaintiff also gave CBP material from the product brochure of a domestic competitor, Wheatland Tube, "for metal conduit. The electrical conduit products offered by Wheatland Tube were similarly subject to the ANSI C 80.1 and UL6 standards, were internally and externally coated with zinc, and did not have interior coatings of electrically insulating materials." *Id.*¶ 17 (citing Pl.'s Resp. Ex. 1 at Attach. 10); *See also* Pl.'s Resp. 8.

18. "As a result of these meetings, CBP advised Plaintiff that the case would be referred to CBP headquarters for further review." JSUF ¶ 18 (citing Pl.'s Resp. 9). "On April 26, 2011, Plaintiff received a communication from CBP via electronic mail stating that personnel from CBP Headquarters had been consulted and that CBP Headquarters advised CBP Puerto Rico that Plaintiff should request a scope ruling from Commerce to determine whether or not the subject merchandise was subject to antidumping and countervailing duties." *Id.* (citing Pl.'s Resp. Ex. 5).

19. "On January 4, 2012 Customs issued a second notice of action concerning Entry No. 438–0698613–9." *Id.* ¶ 19 (citing Compl. ¶ 18; Court file).

20. "On January 27, 2012, CBP liquidated Plaintiff's entry subject to antidumping and countervailing duties." *Id.*¶ 20 (citing Compl. ¶ 19; Answer ¶ 19; Pl.'s Resp. 10).

21. "On February 22, 2012, Plaintiff filed expedited antidumping and countervailing duty scope inquiry requests with Commerce regarding the subject merchandise." *Id.*¶ 21 (citing Pl.'s Resp. Ex. 1 at Attach. 11). "In connection with these requests, Plaintiff presented substantially similar documentation to Commerce as that provided to CBP." *Id.* (citing Pl.'s Resp. Ex. 1 at Attach. 11).

22. "On April 26, 2012, Plaintiff filed a protest with CBP regarding the liquidation of the entry of the subject merchandise. The protest stated that 'Importer is on (sic) the process of a scope ruling in order to proof (sic) that ADD/CVD does not apply to cargo.'" Id. ¶ 22 (citing Pl.'s Resp. Ex. 6 at 1).

23. "CBP Denied Plaintiff's protest on May 12, 2012." *Id.*¶ 23 (citing Pl.'s Resp. Ex. 6 at 2).

24. "On July 2, 2012, Commerce issued a final scope ruling to Plaintiff. Commerce determined that the electrical rigid metal conduit imported by Plaintiff was, in fact, finished electrical conduit and therefore outside the scope of the antidumping and countervailing duty orders." *Id.*¶ 24 (citing Pl.'s Resp. Ex. 2). "Commerce held that 'based on record evidence, we have determined that the electrical rigid steel conduit imported by LDA Inc. falls under the Department's exclusion for finished electrical conduit because it meets the definition of electrical rigid steel conduit.'" *Id.* (citing Pl.'s Resp. Ex. 2 at 8).

25. "Commerce's final scope ruling to Plaintiff acknowledged that '[o]n May 21, 2012, the Department, in its final scope ruling regarding finished electrical conduits imported by All Tools, Inc., defined 'finished electrical conduit.'" *Id.*¶ 25 (citing Pl.'s Resp. Ex. 2 at 2).

26. "'In the All Tools' Scope Ruling, the Department noted that the exclusion for 'finished electrical conduit' was not defined, and therefore solicited comments from interested parties for the purpose of defining the 'finished electrical conduit' exclusion in the CWP [(circular welded pipe)] Or-

ders.'" *Id.*¶ 26 (citing Pl.'s Resp. Ex. 2 at 6). "Plaintiff did not participate during the comment period associated with the All Tools' Scope Ruling." *Id.* (citing Pl.'s Resp. Ex. 2).

27. "In connection with the All Tools Ruling, Commerce determined that 'finished electrical conduits,' which are the subject of the exclusion to the CVD and AD Orders, are Electrical Rigid Steel Conduit, Finished Electrical Metallic Tubing, and Intermediate Metal Conduit." *Id.*¶ 27 (citing Pl.'s Resp. Ex. 2 at 6).

28. "In connection with the All Tools Ruling, Commerce defined Electrical Rigid Steel Conduit as:

    - a threadable steel raceway of circular cross-section designed for the physical protection and routing of conductors and as an equipment grounding conductor;
    - in nominal 10 ft (3. 05 m) lengths [citing ANSI C80.1];
    - threaded on each end with one coupling attached;
    - protected on the exterior surface with a metallic zinc coating or alternate corrosion protection [citing UL 6] coating, and on the interior surface with a zinc or organic coating;
    - with the interior surface free from injurious defects;
    - made to (1) American National Standard ("ANSI") CS0.1–2005 [sic] specification for electrical rigid steel conduit and marked along each length with 'Rigid Steel Conduit' or (2) Underwriters Laboratories Inc. ("UL") UL-6 specification for electrical rigid metal conduit-steel and marked along each length with 'Electrical Rigid Metal Conduit' or 'ERMC-S'; and
    - marked with the manufacturer's name, trade name, or trademark or other descriptive marking by which the organization responsible for the product can be identified."

    Id.¶ 28 (citing Pl.'s Resp. Ex. 2 at 6–7).

29. "Commerce's final scope ruling specifically rejected CBP's contention that galvanized electrical conduit had to have an internal lining of non-electrically conducting material in order to be considered finished electrical conduit. Commerce stated:

> CBP inspected LDA Inc.'s products and determined that the products are subject to the CWP [(circular welded pipe)] Orders because, according to its laboratory results, '... the sample is not internally coated with a non-conducting liner.' According to the Department's definition of finished electrical conduit, a 'non-conducting liner' is not a necessary component of finished electrical conduit, and in the All Tools" [sic] Scope Ruling the Department determined that similar non-electrically insulated conduit was within the exclusion for finished electrical conduit."

Id.¶ 29 (citing Pl.'s Resp. Ex. 2 at 8–9).

STANDARD OF REVIEW

The court reviews denied protests de novo "upon the basis of the record made before the court." *See* 28 U.S.C. § 2640(a)(1) (2012).[4] Thus, while the question before the court is the same as the one that faced CBP, the record before the court may, and in this case does, include different information. Moreover, CBP's factual determinations are presumed to be correct and the burden is on Plaintiff to rebut those presumptions. *See* 28 U.S.C. § 2639(a)(1).

CONCLUSIONS OF LAW

As the court has explained in its prior slip opinion, the court has jurisdiction over Plaintiff's "civil action commenced to contest the denial of [its] protest . . . under [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a); *see also LDA Incorporado*, 978 F. Supp. 2d at 1370; *Xerox Corp. v. United States*, 289 F.3d 792, 793 (Fed. Cir. 2002). CBP made a protestable decision as to the application of the Orders to Plaintiff's entry. *LDA Incorporado*, 978 F. Supp. 2d at 1369–70. CBP's application of the Orders to Plaintiff's merchandise did not become "final and conclusive" because Plaintiff filed a timely protest contesting CBP's decision. *See* 19 U.S.C. § 1514(a)(2). The court's role here is defined by the nature of its jurisdiction in this instance. The court is not reviewing what Commerce has done, as it would if this case involved a challenge to a scope ruling under § 1581(c). The court exercises jurisdiction under § 1581(a) to review whether Customs' decision to apply the Orders to Plaintiff's merchandise was in error. Thus, the question for both Customs below, and the court here, is whether Plaintiff's merchandise is "finished electrical conduit." The undisputed facts show Plaintiff's merchandise is "finished electrical conduit" and is therefore specifically excluded from the Orders.

[4] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

The scope of the court's review is a function of its jurisdiction and therefore it is necessary to once again carefully distinguish Customs' and Commerce's role with respect to the entry of the merchandise in this case. The court reviews those decisions properly within the province of Customs, *i.e.*, factual decisions regarding the merchandise and the decision to apply the order to the merchandise. While Congress gave the role of determining the scope of an order to Commerce, *see* 19 U.S.C. § 1516a(a)(2)(B)(vi); 19 U.S.C. § 1677(25); 19 C.F.R. § 351.225, Customs, incident to its "ministerial" function of fixing the amount of duties chargeable, must make factual findings to determine "what the merchandise is, and whether it is described in an order" and must decide whether to apply the order to the merchandise. *See Xerox*, 289 F.3d at 794–95 (citations omitted).

The court understands the U.S. Court of Appeals for the Federal Circuit in *Xerox* to have used the term "ministerial" to refer to Customs' tasks in that they cannot affect the scope of the order and the resulting duty owed. As the Court of Appeals has held, Customs undeniably must act in both ministerial and non-ministerial capacities to correctly process entries of goods subject to antidumping and countervailing duties.[5] *See Xerox*, 289 F.3d at 794. In *Xerox*, the plaintiff's imported goods were paper feed belts for electrostatic photocopiers. Customs assessed antidumping duties based on its determination that the belts were covered by an antidumping duty order. *Xerox Corp. v. United States*, 24 CIT 1145, 1145, 118 F. Supp. 2d 1354, 1354 (2000), *rev'd* 289 F.3d 792 (2002). The importer argued that the goods were clearly outside the scope of the order and that Customs had made a mistake of fact. Customs denied the protest and the importer sought judicial review. *Xerox*, 24 CIT at 1145, 118 F. Supp. 2d at 1354. The United States Court of International Trade held that it did not have jurisdiction under 28 U.S.C. § 1581(a) to hear the case because the importer should have requested a scope ruling from

[5] It seems contradictory to say that Customs is charged with finding facts and ascertaining whether the merchandise is "described in the order," but is nonetheless acting in a ministerial capacity. Typically one thinks of ministerial acts as passive or involving no analysis or discretion. *See Marbury v. Madison*, 5 U.S. 137, 151 (1803) (explaining a ministerial officer exercises no discretion). When Customs discerns facts and then applies those facts to the scope provided by Commerce, it is conducting analysis to some degree. However, the Reorganization Plan of 1979 made clear, and the Courts have repeatedly affirmed, that Customs' role is "ministerial" as to the rate and amount of duties chargeable in antidumping and countervailing duty cases. *See Reorganization Plan No. 3 of 1979*, §§ 5(a)(1), 93 Stat. 1381, 44 Fed. Reg. 69,273, 69,274–75 (Dec. 3, 1979), *effective under* Exec. Order No. 12, 188 of January 2, 1980, 45 Fed. Reg. 989, 993 (1980); *see also Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994). Thus, even though Customs makes decisions as to the facts and the application of the order, Customs acts in a ministerial capacity because it cannot change the rate and amount of antidumping or countervailing duties chargeable.

Commerce. *Xerox*, 24 CIT at 1146–47, 118 F. Supp. 2d at 1355. The Court of Appeals, reversing the Court of International Trade, found that the goods "were not used for power transmission and were not constructed with the materials listed in the order . . ." and therefore were not covered by the order. *Xerox*, 289 F.3d at 795.

The Court of Appeals thus held that Customs' decision was a protestable error. The Court of Appeals in *Xerox* explained that:

> Customs is charged with the ministerial function of fixing "the amount of duty to be paid" on subject merchandise. When merchandise may be subject to an antidumping duty order, Customs makes factual findings to ascertain what the merchandise is, and whether it is described in an order. If applicable, Customs then assesses the appropriate antidumping duty. Such findings of Customs as to "the classification and rate and amount of duties chargeable" are protestable to Customs under 19 U.S.C. § 1514(a)(2).

Id. at 794 (internal citations omitted). Incident to performing its function of assessing duties on entries of goods that may or may not be subject to antidumping or countervailing duty orders, Customs must make factual findings to determine the nature of the merchandise. Additionally, *Xerox* provides that Customs must read the language of the order to determine whether or not the goods in question fall under that description. The factual analysis and application of the scope to the goods in question are decisions of Customs. Customs' function, while involving discretion as to the facts and the application of the facts to the scope, cannot affect the scope of the order. Although Customs' role as to the scope of the order is ministerial (*i.e.*, it can do nothing to change the scope), in applying that scope it has made a protestable decision. Under *Xerox*, errors made by Customs in deciding whether the order applies to the goods are protestable. *See id.* at 795.

The holding in *Xerox* is consistent with the statutory scheme. The statute in § 1514(a) provides that

> [e]xcept as provided in subsection (b) of this section, . . . any clerical error, mistake of fact, or other inadvertence . . . adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> . . .
>
> (2) the classification and rate and amount of duties chargeable, are final and conclusive unless a protest with Customs is timely filed or the denial of such protest is challenged at the Court of International

Trade. 19 U.S.C. § 1514(a)(2).[6] Clerical errors, mistakes of fact and other inadvertent mistakes made by Customs are protestable under § 1514(a). Additionally, the statute provides that the legality and findings forming the basis of a decision by Customs regarding the classification, rate, and amount of duties chargeable for an entry of goods are also protestable decisions. Therefore, as *Xerox* holds, the misapplication of the scope of an order by Customs requires Customs to both determine what the merchandise is and then apply the scope of the order to the merchandise in question. Per the statute, both the legality of Customs' decision, as well as the findings forming the basis of that decision, are protestable and are the focus of the court's review in this case. Thus, here the court reviews de novo whether Customs erred either in its factual analysis of the merchandise or in its decision to apply the Orders, as written by Commerce, to the merchandise. The Orders specifically exclude finished electrical conduit. *See*¶ 5.[7] Therefore, the court must determine whether the merchandise was finished electrical conduit.

Here, undisputed evidence makes clear Plaintiff's merchandise was "finished electrical conduit." The scope of the ANSI Standard C80.1–2005 provides:

> Finished conduit is produced in nominal 10 ft. (3.05m) lengths, threaded on each end with one coupling attached. It is protected on the exterior surface with a metallic zinc coating or alternate corrosion protection coating (as specified in the 13th edition of UL 6 in Clauses 5.3.3, 6.2.4, 7.8, and 7.9) and on the interior surface with a zinc or organic coating.

¶ 16. It is undisputed that Plaintiff's "galvanized electrical conduit was both internally and externally coated with a non-electrically insulating material (zinc) and was suitable for electrical use in accordance with . . . UL-6 for 'electrical rigid ferrous metal conduit' and . . . ANSI[] standard C80.1–2005 for 'electrical rigid steel conduit.'" ¶ 8 (citing Pl.'s Resp. Ex. 1 at Attachs. 3, 6).[8] Defendant provides no evidence that LDA's merchandise was not "finished electrical con-

[6] The decisions covered in § 1514(b) refer to "determinations made under . . . subtitle IV of this chapter [(19 U.S.C. §§ 1671–1677n, the countervailing and antidumping duty laws)] which are reviewable under section 1516a of this title . . . ." 19 U.S.C. § 1514(b). The clarification of the scope of an order by virtue of a scope ruling would be reviewable under 19 U.S.C. § 1516a, and would not be protestable.

[7] All citations to a paragraph number, without more, are to the court's numbered findings of fact herein.

[8] The parties have stipulated that Plaintiff provided Customs with information establishing that Walsall, the foreign exporter from whom Plaintiff purchased the rigid steel conduit, complied with the ANSI C80.1 and UL-6 standards. *See*¶¶ 9, 12, 15.

duit."[9] Nowhere in its papers does Defendant dispute that Plaintiff's merchandise was finished electrical conduit.[10] Thus, as a matter of law the undisputed facts show that Plaintiff's merchandise was "finished electrical conduit."

As in *Xerox*, Customs here made a decision as to whether the goods were covered by the Orders. In *Xerox*, Customs erred when it included the plaintiff's paper feed belts for electrostatic photocopiers in the order on industrial belts used for power transmission because the plaintiff's goods were undisputedly outside the scope of the order. It is not clear to the court whether in *Xerox* Customs made any specific factual findings, or simply concluded, wrongly, that the goods fell within the scope of the order. *See Xerox Corp. v. United States*, Ct. No. 97–435-TJA, Def.'s Reply 2 (filed May 21, 1999). *See also Xerox*, 24 CIT at 1145, 118 (explaining that Customs denied the protest for lack of documentation). Here, Customs initially made a pure factual mistake in its determination that the merchandise was not internally galvanized. ¶¶ 11–14. Ultimately, while Customs acknowledged that Plaintiff's goods were in fact internally galvanized, ¶ 14, Customs included the goods within the scope of the Orders because it believed that finished electrical conduit must be internally coated with a non-conducting liner. ¶ 14. Customs' belief was in error. Although not a purely factual error, the "misapplication of the order by Customs is properly the subject of a protest under 19 U.S.C. § 1514(a)(2)."[11] *Xerox*, 289 F.3d at 795.

In Defendant's proposed conclusions of law, it does not dispute that the merchandise is finished electrical conduit. Instead, Defendant claims "Plaintiff's actual dispute is with the scope of the CVD and AD Orders applied to its merchandise by CBP." Def.'s PCL ¶ 1. This statement is incorrect. Plaintiff challenges Customs' decision in ap-

[9] Below, Customs mistakenly believed "the subject merchandise was not internally galvanized and was thus unfinished conduit subject to the antidumping and countervailing duty orders." ¶¶ 11–14. However, as Plaintiff explained, its merchandise was, in fact, internally galvanized. Changing course, Customs then asserted "that the subject merchandise was unfinished conduit and was not suitable for electrical use because it was not internally coated with a non-conducting liner." ¶ 14. As Plaintiff points out, the ANSI C80.1–2005 and UL-6 standards for finished metal conduit do not require an internal coating with a non-conducting liner. The court is unaware of why Customs thought a nonconducting liner was required. Defendant presents no evidence speaking to this point.

[10] Defendant does contend in its Proposed Conclusions of Law that "[t]he phrase 'finished electrical conduit' was not defined in the CVD Order and AD Order at issue," and that the fact that Commerce issued a scope ruling in response to an importer's request "reveals that CVD Order and AD Order were not 'unambiguous.'" Def.'s PCL ¶ 8 (citing *Xerox*, 289 F.3d at 792).

[11] The misapplication of the order by Customs is a protestable decision. Customs has the duty to discern facts so that it may properly apply countervailing and antidumping duty orders. Its job in that regard is not ministerial. Customs must also apply the order to the

plying the Orders to its merchandise. The scope specifically excludes "finished electrical conduit." Plaintiff does not challenge the reach of the scope. Plaintiff merely claims that its merchandise is, and always has been, finished electrical conduit.

Defendant's argument raises a separate problem. At first, Defendant's statement that "Plaintiff's actual dispute is with the scope of the CVD and AD Orders applied to its merchandise by CBP" suggests that the scope of the Orders was clear, requiring Plaintiff to seek a scope ruling from Commerce if it disagreed with the clear meaning of the Orders. However, Defendant also seeks to distinguish *Xerox* by stating that the phrase "finished electrical conduit" was ambiguous, noting that Commerce defined the phrase in the All Tools Ruling. Def.'s PCL ¶¶ 7–9 (internal citations omitted). If Defendant is arguing that the scope was unclear, then by placing the goods within the scope of the Orders prior to a clarification by Commerce, Customs would have been interpreting the Orders, which it is not allowed to do. As discussed above, this is the province of Commerce, not Customs.[12] *See* Reorganization Plan No. 3 of 1979 at § 5(a)(1)(C).

facts. In many cases, it is clear that the order in question applies to particular entries of goods, and Customs applies the order in a ministerial fashion. If it is wrong then it has made a ministerial error.

[12] As discussed above, Customs finds facts regarding what the product is, reads the order, and applies the order to the facts if appropriate. If Customs makes a mistake in these two tasks, as it has done here, that is a protestable decision. However, Defendant's argument about the need to clarify the scope of the Orders would, if true, raise bigger problems for Customs in this case. If Customs believes the scope truly needs clarification, Commerce should be consulted. Congress's Reorganization Plan did not envision that Customs would have a role in clarifying the order. *See* Reorganization Plan No. 3 of 1979 at § 5(a)(1)(C) (stating that the administration of antidumping and countervailing duties shall be transferred to the Commerce Department except that Customs "shall accept such deposits, bonds, or other security as deemed appropriate by the Secretary, shall assess and collect such duties as may be directed by the Secretary . . . .").

It may be that in some cases there is a concern regarding the clarity of an order and the question then becomes who should shoulder the burden of consulting Commerce. In an ideal world, Customs would have a mechanism for seeking Commerce's guidance and suspending liquidation while doing so. However, there seems to be no regulatory provision mandating such a course. As a result, it appears that sometimes Customs tells the importer to request a scope ruling if it does not want its goods to be covered by the order. *See* 19 C.F.R. §§ 351.225(c), (e). The importer can request that CBP extend the time for liquidation if there is good cause. 19 C.F.R. § 159.12(a)(1)(ii). Sometimes it may be the case that the importer is familiar with the underlying investigation and the resulting order, and indeed may be more familiar with the order than Customs. The importer may feel certain that the scope does not cover its product. In such a case, the importer maybe reluctant to expend the time and resources to seek a scope ruling when it believes the scope clearly does not cover its product. If the importer fails to request a scope ruling and Customs applies the order to the goods, then Customs will necessarily have exercised discretion as to what the order means. Such a result might not seem unfair since the importer could have (and perhaps should have) sought a scope ruling. Fair or not, it is simply not the scheme envisioned by Congress, and it is not the scheme so often cited by the Courts. *See Cemex, S.A. v. United States*, 384

Moreover, the Orders here were clear and there is not even a plausible argument in this case that any ambiguity could have supported Customs' inclusion of the goods in the scope. It is always possible to find something the order did not say. Orders are written in general terms. However, Customs has pointed to nothing in the scope language here that could have indicated to Customs that the presence of a non-conducting liner was necessary for a product to be classified as finished electrical conduit. The undisputed facts before Customs, and before this Court, lead to the conclusion that the subject merchandise was finished electrical conduit.

CONCLUSION

The court finds that Plaintiff's merchandise was finished electrical conduit and, therefore, specifically excluded from the Orders. Plaintiff's Entry No. 438–0698613–9 was not covered by the Orders and was not subject to any corresponding antidumping or countervailing duties. CBP thus incorrectly liquidated Plaintiff's merchandise, charging additional duties that were not owed. CBP shall reliquidate Entry No. 438–0698613–9, and refund all antidumping and countervailing duties paid on the entries with interest as provided by law.

Dated: June 19, 2015
New York, New York

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

F.3d 1314, 1324 (Fed. Cir. 2004); *see also Xerox Corp.*, 289 F.3d at 794; *see also Mitsubishi Elec. Am., Inc.*, 44 F.3d at 976–77. If it were the case, as Defendant suggests, that Customs believed that these Orders truly needed clarification, then Customs would have been acting beyond its authority in, nonetheless, assessing antidumping and countervailing duties on Plaintiff's merchandise.

In this case, the scope of the Orders did not reach the product at issue because the product at issue was clearly "finished electrical conduit" which is excluded from the Orders. There is no argument before the court, even from Defendant, that Plaintiff's goods are not finished electrical conduit. If there were any arguments that the Orders could have been interpreted to reach Plaintiff's merchandise, then such a task was for Commerce, not Customs.

Slip Op. 15–65

UNITED STATES, Plaintiff, v. NYCC 1959 INC., Defendant.

Before: Donald C. Pogue,
Senior Judge
Court No. 14–00045

[granting plaintiff's motion for default judgment]

Dated: June 19, 2015

Zachary J. Sullivan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Plaintiff. Also on the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Brian J. Redar*, Staff Attorney, U.S. Customs and Border Protection, of Long Beach, CA.

OPINION

Pogue, Senior Judge:

The United States brings this action to recover a civil penalty as permitted by Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012) ("Section 592").[1] The Government claims that Defendant NYCC 1959 Inc. ("NYCC"), an importer of candles from the People's Republic of China ("China"), unlawfully attempted to enter merchandise into the commerce of the United States by means of materially false information, in violation of 19 U.S.C. § 1592(a)(1)(A)(i).[2] Because NYCC failed to timely appear, plead, or otherwise defend, default was entered against it.[3] The Government now moves for default judgment pursuant to USCIT Rule 55(b).[4]

The court has jurisdiction pursuant to 28 U.S.C. § 1582(1) (2012).

[1] Compl., ECF No. 3, at ¶ 1. Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[2] Compl., ECF No. 3, at ¶¶ 3–8, 17, 21. The Government claims that NYCC acted with gross negligence (count I), *id*. at ¶ 17, or, in the alternative, negligence (count II), *id*. at ¶ 21.

[3] Entry of Default, ECF No. 7.

[4] Pl.'s Corrected Mot. for Default J., ECF No. 13 ("Pl.'s Br."). In prior proceedings, this Court granted the Government's motion for default judgment, relying on the well-pleaded complaint and supporting evidence contained in the Declaration of Robert P. Thierry (Director of the Office of Fines, Penalties and Forfeitures, U.S. Customs and Border Protection, for the Los Angeles, California area), ECF No. 8–1 ("*1st Thierry Decl.*"). *See United States v. NYCC 1959 Inc.*, __ CIT __, 46 F. Supp. 3d 1389(2015) ("*NYCC I*"). Thereafter, however, Government counsel discovered inaccuracies contained in portions of the *1st Thierry Declaration* that were quoted in the court's opinion, and accordingly Plaintiff moved to set aside the default judgment, reopen this action, and file a corrected motion for default judgment. *See NYCC I*, __ CIT at __, 46 F. Supp. 3d at 1392 (quoting *1st Thierry Decl.*, ECF No. 8–1, at ¶ 8 (incorrectly stating that, on two prior occasions, NYCC paid rate advances in connection with attempted entries of the same merchandise without payment of antidumping duties)); Pl.'s Mot. to Set Aside Default J., Reopen This Action, & Grant Leave for Pl. to

As further explained below, because the Government's well-pleaded complaint and supporting evidence adequately establish the defaulting Defendant's liability for a grossly negligent violation of Section 592 as a matter of law, Plaintiff's motion for a default judgment is granted. In addition, because the Government's claim is for a civil penalty amount within the statutory limit for such violations, judgment shall be entered for the Plaintiff accordingly.

DISCUSSION

Here, Defendant NYCC has defaulted by not appearing. Entry of Default, ECF No. 7. Because a defendant who defaults thereby admits all well-pleaded factual allegations contained in the complaint,[5] the court must enter judgment against NYCC if (1) "the plaintiff's allegations establish the defendant's liability as a matter of law,"[6] and (2) "the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation." USCIT R. 55(b).[7]

I. Admitted as True, the Government's Factual Allegations Establish NYCC's Liability as a Matter of Law.

Section 592 prohibits attempts to "enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false," if the responsible person acted with "fraud, gross negligence, or negligence." 19

File Corrected Mot. for Default J., ECF No. 11, at 5 (explaining that, "contrary to the [*1st Thierry Decl.*, ECF No. 8–1, at ¶ 8], in both [of these prior instances], NYCC failed to pay the rate advances issued by [U.S. Customs and Border Protection].") (citing Decl. of Senior Import Specialist Elena Pietron, ECF No. 13 (appended to Pl.'s Br., ECF No. 13) ("*Pietron Decl.*")). The court granted Plaintiff's motion, the prior judgment and slip opinion were consequently vacated and withdrawn, and the Government's corrected motion and additional supporting evidence were accepted for filing and are now before the court. Order Mar. 25, 2015, ECF No. 12; Order May 7, 2015, ECF No. 15.

[5] *E.g., City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114,137 (2d Cir. 2011) ("It is an ancient common law axiom that a defendant who defaults thereby admits all well-pleaded factual allegations contained in the complaint.") (quotation marks and citation omitted).

[6] *Id*. (alterations, quotation marks, citation and footnote omitted); *United States v. Freight Forwarder Int'l, Inc.*, __ CIT __, 44 F. Supp. 3d 1359, 1362 (2015) (relying on *Mickalis Pawn Shop*, 645 F.3d at 137).

[7] USCIT Rule 55(b) provides that "[w]hen the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation, the court – on the plaintiff's request with an affidavit showing the amount due – must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person." Plaintiff's complaint alleges that NYCC is a corporation, not a minor or an incompetent person. *See* Compl., ECF No. 3, at ¶ 3(averring that, "[u]pon information and belief," Defendant NYCC is "a New York corporation . . . engaged in the importation of candles").

U.S.C. § 1592(a)(1)(A)(i). Here, the Government adequately alleges that NYCC submitted entry documents to U.S. Customs and Border Protection ("Customs") that falsely indicated that the merchandise in question was not subject to any antidumping duties.[8] In fact (accepting, as necessary in cases of default, the truth of the Plaintiff's factual allegations[9]), the merchandise NYCC attempted to enter – candles from China wholly composed of petroleum wax – was covered by an antidumping duty order.[10] Because the false entry information was material to Customs' evaluation of NYCC's duty liability for the attempted entry,[11] the Government's factual allegations, deemed admitted by the defaulting Defendant, establish that NYCC attempted to enter merchandise into the commerce of the United States by means of information that was both material and false.

In the absence of any defense by the Defendant, these factual allegations are sufficient to establish NYCC's liability under Section 592 for a monetary penalty based on negligence.[12] The next inquiry, therefore, concerns the Government's alternative claim to a monetary penalty based on gross negligence.[13]

"Gross negligence, for purposes of [S]ection 592, is behavior that is willful, wanton, or reckless, or demonstrates an 'utter lack of care.'"[14]

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[8] Compl., ECF No. 3, at ¶¶ 4–7; [2d] Decl. of Robert P. Thierry (Director of the Office of Fines, Penalties and Forfeitures, U.S.Customs and Border Protection, for the Los Angeles, California area), ECF No. 13 (appended to Pl.'s Br., ECF No. 13) ("*2d Thierry Decl.*") at ¶¶ 2–3, 5–7.

[9] *See Mickalis Pawn Shop*, 645 F.3d at 137.

[10] Compl., ECF No. 3, at ¶¶ 4, 7 (citing *Petroleum Wax Candles from [China]*, 51 Fed. Reg. 30,686 (Dep't Commerce Aug. 28, 1986) (antidumping duty order)); *2d Thierry Decl.*, ECF No. 13, at ¶ 5–6.

[11] Compl., ECF No. 3, at ¶¶ 6, 8. "Material" in the context of 19 U.S.C. § 1592(a)(1) means information that "has the potential to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty." *United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) (quoting 19 C.F.R. App. B to Pt. 171 (1984)); *see also id*. ("[T]he measurement of the materiality of the false statement [as contemplated by 19 U.S.C. § 1592(a)(1)] is its potential impact upon Customs[']' determination of the correct duty for the imported merchandise.") (citation omitted).

[12] *See* 19 U.S.C. § 1592(e)(4) ("Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under [Section 592] . . . if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.").

[13] *See id*. at § 1592(e)(3) ("[I]f the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation[.]").

[14] *United States v. Lafidale, Inc.*, __ CIT __, 942 F. Supp. 2d 1362,1365 (2013) (quoting *United States v. Ford Motor Co.*, 29 CIT 827, 845, 395 F. Supp. 2d 1190, 1206 (2005), *aff'd in part, rev'd in part on other grounds*, 463 F.3d 1267 (Fed. Cir. 2006)).

Here the Government alleges that, prior to the entry attempt in question, NYCC had "twice attempted to enter Chinese candles from the same manufacturer without payment of antidumping duties,"[15] and that in both prior instances Customs had tested the merchandise and determined it to be subject to the antidumping duty order covering petroleum wax candles from China.[16] In both prior instances, Customs issued to NYCC a rate advance for the antidumping duties, the first of which was paid by NYCC's surety and the other of which remains outstanding.[17] These undenied allegations establish sufficient prior knowledge by NYCC to constitute a complete lack of care, demonstrating that when NYCC falsely indicated to Customs that the merchandise covered by this attempted entry was not subject to antidumping duties, it did so "with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for its obligation to file the entry as subject to antidumping duties."[18]

Thus the Government has met its burden to establish NYCC's liability for a grossly negligent violation of Section 592. The remaining question before the court is the claimed penalty amount.

II. The Penalty Amount

Section 592 also provides for the civil penalty amount to be assessed for gross negligence.[19] Where (as here) the material misrepresentation that forms the basis of the grossly negligent violation concerned the assessment of duties, the amount of the penalty may not exceed the lesser of "the domestic value of the merchandise" or "four times the lawful duties, taxes, and fees of which the United States is or may be deprived."[20] The Government alleges that the attempted entry in question consisted of 1160 cartons of candles, with an "entered value"

[15] Compl., ECF No. 3, at ¶ 9.

[16] *Pietron Decl.*, ECF No. 13, at ¶ 4.

[17] *Id.*; *see also 1st Thierry Decl.*, ECF No. 8–1, at ¶ 8 (stating that NYCC protested the rate advance in the second (but not the first) instance, that Customs denied that protest, and that NYCC did not further litigate the matter).

[18] Compl., ECF No. 3, at ¶ 17.

[19] 19 U.S.C. § 1592(c)(2).

[20] *See id*. at § 1592(c)(2)(A). The Government's explanation that the penalty amount assessed for NYCC's grossly negligent violation of Section 592 "represented 40 percent of the dutiable value of the merchandise," Compl., ECF No. 3, at ¶ 12, suggests that Customs was applying 19 U.S.C. § 1592(c)(2)(B) ("[I]f the [grossly negligent] violation [of Section 592] did *not* affect the assessment of duties, [the civil penalty amount may not exceed] 40 percent of the dutiable value of the merchandise.") (emphasis added). But because the false information provided by NYCC – i.e., that the merchandise in question was not covered by an antidumping duty order – was material precisely because it had the potential to affect the importer's duty liability, the applicable statutory cap on the civil penalty is in fact found in 19 U.S.C. § 1592(c)(2)(A) ("A grossly negligent violation of [Section 592] is punishable by a

of $33,396.00,[21] a "dutiable value" determined by Customs to be $38,275.20,[22] and a "domestic value"[23] calculated by Customs to be $101,759.59.[24] This attempted false entry is alleged to have "resulted

civil penalty in an amount not to exceed . . . the lesser of – (i) the domestic value of the merchandise, or (ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived[.]"). *See* Pl.'s Br., ECF No. 13, at 7 (relying on 19 U.S.C. § 1592(c)(2)(A)); *id*. at 7 n.2 ("Customs exercised its discretion in assessing a penalty in an amount that equaled only forty percent of the dutiable value of the merchandise as calculated by Customs . . . in part because the entry was ultimately canceled and the goods were abandoned. Although Customs utilized the maximum for a gross negligence penalty when the violation does not affect the assessment of duties, 19 U.S.C. § 1592(c)(2)(B), we note that the violation here did in fact affect the assessment of duties, and thus a higher penalty was available."). Subsection 1592(c)(2)(A) generally sets the statutory limit for penalties based on grossly negligent violations of Section 592, except "if the violation did not affect the assessment of duties," in which case the alternative limit provided by subsection 1592(c)(2)(B) applies. 19 U.S.C. § 1592(c). Although the phrase "affect the assessment of duties" is not entirely devoid of ambiguity, the focus of the distinction between the two statutory limits on penalties for grossly negligent violations appears to concern the nature of the violation – i.e., was the misinformation constituting the violation directly material to duty assessment, or did the misinformation concern some other aspect of the entry process? *Cf. United States v. Inner Beauty Int'l (USA) Ltd.*, Slip Op. 11–148, 2011 WL 6009239 (CIT Dec. 2, 2011) (applying subsection 1592(c)(2)(B) as the appropriate cap for a penalty based on a "non-revenue-loss" violation of Section 592, where the misinformation in question was material to the classification of the merchandise for purposes of an import quota). Here, the violation was directly material to Customs' duty assessment, because the misinformation provided by NYCC concerned the applicable antidumping duties. Accordingly, the general cap set by 19 U.S.C. § 1592(c)(2)(A) applies.

[21] Compl., ECF No. 3, at ¶ 4; *2d Thierry Decl.*, ECF No. 13, at ¶¶ 2–3.

[22] Compl., ECF No. 3, at ¶ 12; *2d Thierry Decl.*, ECF No. 13, at ¶ 4;

[23] *Cf. United States v. Pan Pac. Textile Grp., Inc.*, 30 CIT 138, 140 n.2 (2006) (not reported in the Federal Supplement) ("Domestic value is defined as the 'price at which such or similar property is freely offered for sale at the time and place of appraisement.' 'Freight, profit and duty are therefore included. In contrast, transaction value is the general standard for determining the dutiable value of imported merchandise. Transaction value is defined as 'the price actually paid or payable for the merchandise when sold for exportation to the United States plus certain additional costs. The 'price actually paid or payable' is defined as 'the total payment . . . made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.'") (quoting and/or citing 19 C.F.R. § 162.43(a)(2005); *United States v. Quintin*, 7 CIT 153, 158 n.3 (1984) (not reported in the Federal Supplement); and 19 U.S.C. §§ 1401a(a)(1)(A) (1999), 1401a(b)(1), and 1401a(b)(4)(A)) (alterations omitted).

[24] Decl. of Irma Harvin (Customs Import Specialist for the Los Angeles, California area), ECF No. 16 ("*Harvin Decl.*") at ¶ 5. *But see 2d Thierry Decl.*, ECF No. 13, at ¶ 12 ("[Customs] calculated the domestic value of the merchandise at $346,290.29."); Pl.'s Mot. for Leave to File Additional Evidence in Supp. of its Corrected Mot. for Default J., ECF No. 14 ("Pl.'s Mot. to Supplement Evidence") at 3 (referring to the "domestic value" of the merchandise as $346,290.29). Plaintiff explains that the $101,759.59 value was the result of a "second appraisal conducted in 2015 after the Court's original opinion [in *NYCC I*]," Pl.'s Mot. to Supplement Evidence, ECF No. 14, at 4, and speculates that "[g]iven the large difference between the two dollar amounts, . . . the [original] appraisal [i.e., $346,290.29] may have contained a typographical or mathematical error in the underlying calculations and may [or may not] have been the result of different appraisal standards and methods." *Id*. at 4 n.3;

in a potential loss of antidumping duties of $41,452.04,"[25] based on a 108.3 percent *ad valorem* antidumping duty rate applicable to petroleum wax candles imported from China.[26] Customs assessed a penalty of $15,310.08 — which is alleged to represent 40 percent of the calculated dutiable value of the merchandise — for NYCC's grossly negligent violation of Section 592.[27] NYCC has not paid any part of this penalty.[28]

Although the Government's presentation of its case has not always been precise,[29] the facts alleged are sufficient to establish that the amount of the claimed penalty – $15,310.08 – falls within the statutory cap set by the lesser of either the merchandise's domestic value or four times the potential duty loss.[30] NYCC itself entered the value of the merchandise as $33,396.00,[31] and at an *ad valorem* antidumping duty rate of 108.3 percent the duties owed on such merchandise would non-controversially exceed the claimed penalty amount.[32] Ac-

see also id. at 4 n.4 (noting that "[t]he import specialist making the second appraisal was involved in the first appraisal, but the import specialist with primary responsibility for the first appraisal is no longer at [Customs]"). Plaintiff argues that "regardless of whether the 2015 appraisal of domestic value is also considered, the penalty did not exceed the domestic value calculated by [Customs] originally or in2015 ($346,290.29 [or] $101,759.59) or four times the antidumping duties ($165,808.16)." *Id*. at 4.

[25] *2d Thierry Decl.*, ECF No. 13, at ¶ 9.

[26] *See* Compl., ECF No. 3, at ¶ 7; *2d Thierry Decl.*, ECF No. 13, at ¶ 6; *Harvin Decl.*, ECF No. 16, at ¶ 3. Using the "entered" value – the lowest alleged amount - the applicable duties, based on the 108.3 percent *ad valorem* antidumping duty rate, would have been $36,167.87.

[27] Compl., ECF No. 3, at ¶¶ 12–13, 18; *2d Thierry Decl.*, ECF No. 13, at ¶¶ 11, 16, 18.

[28] Compl., ECF No. 3, at ¶¶ 15, 19; *2d Thierry Decl.*, ECF No. 13, at ¶¶ 18, 23. The Government states that "[a]ll administrative notices, petitions for relief and demands for payment were processed in accordance with applicable laws and procedures." Compl., ECF No. 3, at ¶ 14; *see also id*. at ¶¶ 12–13 (describing the penalty notices issued to NYCC in connection with this violation); 19 U.S.C. § 1592(b) (providing the procedures that Customs must follow when assessing penalties for violations of Section 592). In the absence of any challenge from the defense, no procedural defect is apparent in this regard.

[29] *See supra* note 24.

[30] *See* 19 U.S.C. § 1592(c)(2)(A).

[31] Compl., ECF No. 3, at ¶ 4.

[32] *See supra* note 26 (computing potential duty loss using the "entered value"). *Compare* Compl., ECF No. 3, at ¶ 4 ("NYCC, as importer of record, caused to be filed . . . [an] entry for 1160 cartons of candles from [China] with an entered value of $33,396.00."); id. at ¶ 12 ("The amount of the penalty represented 40 percent of the dutiable value of the merchandise, which [Customs] determined was $38,275.20."), *with United States v. Callanish Ltd*., Slip Op. 10–124, 2010 WL 4340463, at *4 & n.3 (CITNov. 2, 2010) (denying without prejudice the Government's motion for default judgment because "it appear[ed] that the amount of the 'domestic value' [of the merchandise] was derived by doubling the amounts for entered value as set forth on entry summaries for the importations that are the subject of this action") (citation omitted). Here, rather than doubling the entered value of the merchandise to assess the penalty amount, Customs assessed an amount comprising a fraction of that value.

cordingly, the Government's assessed penalty amount in this case is within the scope of authority provided by 19 U.S.C. § 1592(c)(2)(A).

CONCLUSION

For all of the foregoing reasons, the Government's motion for default judgment against NYCC for a grossly negligent violation of 19 U.S.C. § 1592(a) is granted. As the claimed penalty amount falls well within the statutory limit, and as the record presents no reason to alter it, judgment shall be entered in the amount of the outstanding penalty assessed against NYCC for this violation, $15,310.08, plus post-judgment interest, computed in accordance with 28 U.S.C. §§ 1961(a)-(b).[33]

Dated: June 19, 2015
New York, NY

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

Slip Op. 15–66

HUSTEEL COMPANY, LTD., Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 13–00243

[Affirming the final results of an administrative review issued by the International Trade Administration, U.S. Department of Commerce]

Dated: June 23, 2015

Donald B. Cameron and *Brady W. Mills*, Morris, Manning & Martin, LLP, of Washington, DC, argued for plaintiff and consolidated defendant-intervenor Husteel Co., Ltd. With them on the brief were *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, and *Sarah S. Sprinkle*.

Daniel L. Schneiderman, King & Spalding LLP, of Washington, DC, argued for defendant-intervenor and consolidated plaintiff Wheatland Tube Co. With him on the brief were *Gilbert B. Kaplan* and *Joshua M. Snead*.

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[33] The Government additionally requested pre-judgment interest, Compl., ECF No. 3, at ¶ 19, but pre-judgment interest is unavailable for penalties assessed pursuant to 19 U.S.C. § 1592(c). *United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1369–70 (Fed. Cir. 2008) ("Our precedent is clear that prejudgment interest may not be awarded on punitive damages, and, in our view, . . . the damages authorized by [19 U.S.C.] § 1592(c) are punitive.") (alteration, quotation marks, and citations omitted); *United States v. Country Flavor Corp.*, __ CIT __, 825 F. Supp. 2d 1296, 1301 n.6 (2012) ("Prejudgment interest is not awarded on civil penalties imposed pursuant to 19 U.S.C. § 1592([c]).") (citing *Nat'l Semiconductor Corp.*, 547 F.3d at 1369–71); *Inner Beauty*, 2011 WL 6009239 at *6 n.5 (same).

Robert E. Lighthizer and *Jeffrey D. Gerrish*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, for defendant-intervenor and consolidated plaintiff-intervenor United States Steel Corp.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant United States. With him on the briefs were *Claudia Burke*, Assistant Director, *Jeanne E. Davidson*, Director, and *Stuart F. Delery*, Assistant Attorney General. Of counsel on the briefs were *David W. Richardson*, Senior Counsel, and *Daniel J. Calhoun*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Stanceu, Chief Judge:

This consolidated action arose from a final determination (the "Final Results") that the U.S. Department of Commerce ("Commerce" or the "Department") issued in June 2013 to conclude the nineteenth periodic administrative review of an antidumping duty ("AD") order on circular welded non-alloy steel pipe ("subject merchandise") from the Republic of Korea ("Korea").[1] *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 35,248 (Int'l Trade Admin. June 12, 2013) ("*Final Results*"). The nineteenth review affected entries of subject merchandise made between November 1, 2010 and October 31, 2011 ("period of review" or "POR"). *Id.*

Before the court are two motions for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiff Husteel Co., Ltd. ("Husteel"), a Korean producer and exporter of subject merchandise, claims the Final Results are affected by errors that were present in a version of the database of its home market sales that Husteel submitted to Commerce. Mot. of Pl. Husteel Co., Ltd. for J. upon the Agency R. (Dec. 23, 2013), ECF No. 36 ("Husteel's Mot."). According to Husteel, Commerce was required, but refused, to issue amended final results based on a corrected version of the home-market-sales database that Husteel had submitted during the review, despite Husteel's bringing the errors to the Department's attention in "ministerial error comments" submitted after publication of the Final Results in accordance with the Department's regulations. Consolidated plaintiff Wheatland Tube Co. ("Wheatland"), a domestic steel pipe producer, claims that Commerce unlawfully failed to respond to a notice of supplemental authority Wheatland filed with Commerce during the administrative review that pertained to the Department's decision not to apply a "targeted dumping" analysis to Husteel during the review. Mot. for J.

[1] Consolidated under Husteel Co., Ltd. v. United States (Ct. No. 13–00243) is Wheatland Tube Co. v. United States (Ct. No. 13–00249). Order (Oct. 1, 2013), ECF No. 31.

on the Agency R. (Dec. 23, 2013), ECF No. 38 ("Wheatland's Mot."). Wheatland also claims that Commerce, when calculating Husteel's margin, failed to correct erroneous weight conversion factors affecting the comparison between Husteel's home market and U.S. sales.

For the reasons discussed in this Opinion, the court denies relief on the claims brought by Husteel and Wheatland in this action and affirms the Final Results.

I. BACKGROUND

A. The Administrative Proceeding before Commerce

On December 30, 2011, Commerce initiated the nineteenth administrative review of the antidumping duty order on circular welded non-alloy steel pipe from Korea. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 Fed. Reg. 82,268 (Int'l Trade Admin. Dec. 30, 2011). Commerce selected for individual examination as "mandatory respondents" two Korean exporter/producers of subject merchandise, Husteel and Hyundai HYSCO ("HYSCO").[2] *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2010–2011*, 77 Fed. Reg. 73,015, 73,015 (Int'l Trade Admin. Dec. 7, 2012) ("*Prelim. Results*"); *Resp't Selection Mem.* 1 (Jan. 31, 2012) (Public Admin.R.Doc. No. 22) (*Resp't Selection Mem.*).

Commerce issued the preliminary results of the review ("Preliminary Results") on December 7, 2012, preliminarily assigning dumping margins of 6.54% to Husteel and zero to HYSCO. *Prelim. Results*, 77 Fed. Reg. at 73,016; *Prelim. Decision Mem. for the Admin. Review of the Antidumping Duty Order on Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, A-580–809, ARP 10–11, at 2 (Dec. 3, 2012) (Public Admin.R.Doc. No. 135), *available at* http://enforcement.trade.gov/frn/summary/KOREA-SOUTH/2012–29635–1.pdf (last visited June 17, 2015) ("*Prelim. Decision Mem.*").

In the Final Results, published on June 12, 2013, Commerce assigned margins of 3.99% to Husteel and 0.80% to HYSCO. *Final Results*, 78 Fed. Reg. at 35,249. On the same day, Husteel filed its ministerial error comments, alleging that Commerce erroneously

[2] Commerce initiated reviews of seven other Korean exporters/producers but rescinded the review as to these seven other exporter/producers in the preliminary results of the administrative review. *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2010–2011*, 77 Fed. Reg. 73,015, 73,015 (Int'l Trade Admin. Dec. 7, 2012).

failed to use a revised database on Husteel's home market sales that Husteel had submitted as an attachment to its Third Supplemental Questionnaire Response. *Certain Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Ministerial Error Comments* (June 12, 2013), ECF No. 41–19 (Public Admin.R.Doc. No. 189) ("*Husteel's Ministerial Error Comments*"). U.S. Steel Corp. filed rebuttal comments, arguing that Commerce should not amend the Final Results. *U.S. Steel Corp. Rebuttal Ministerial Error Comments* (June 17, 2013) (Public Admin.R.Doc. No. 205). Commerce issued a response to Husteel's ministerial error comments on June 26, 2013, concluding that no amendment to the Final Results was warranted. *Antidumping Duty Admin. Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Ministerial Error Comments Regarding Husteel Co., Ltd.* (June 26, 2013) (Public Admin.R.Doc. No. 207) ("*Dep't's Ministerial Error Resp.*").

B. Procedural History before the Court

Husteel initiated this action challenging the Final Results by filing a summons and a complaint on July 8, 2013. Summons, ECF No. 1; Compl., ECF No. 6. Wheatland, a petitioner in the administrative review, initiated a separate action challenging the Final Results by filing a summons on July 11, 2013 and a complaint on August 7, 2013. Summons, ECF No. 1 (Ct. No. 13–00249); Compl. ¶¶ 2, 4, ECF No. 10 (Ct. No. 13–00249); *Resp't Selection Mem.* 1.

On August 22, 2013, the court granted a consent motion by United States Steel Corp. ("U.S. Steel Corp."), a domestic steel pipe producer and petitioner in the administrative review, to intervene as a plaintiff in Wheatland's action. Consent Mot. to Intervene as of Right as Pl.-Intervenor ¶ 2, ECF No. 15 (Court No. 13–00249); Order, ECF No. 21 (Court No. 13–00249) (granting motion); *Resp't Selection Mem.* 1. The court granted consent motions by Wheatland and U.S. Steel Corp. to intervene as defendants in Husteel's action. Order (July 12, 2013), ECF No. 18; Order (Aug. 6, 2013), ECF No. 24. The court also granted a consent motion by Husteel to intervene as a defendant in Wheatland's action. Order (Aug. 22, 2013), ECF No. 20 (Ct. No. 13–00249).

Husteel and Wheatland filed their motions for judgment on the agency record on December 23, 2013. Husteel's Mot. 1; Br. of Pl. Husteel Co., Ltd. in Supp. of its Mot. for J. upon the Agency R., ECF No. 36–1 ("Husteel's Br."); Wheatland's Mot. 1; Rule 56.2 Br. of Wheatland Tube Co. in Supp. of its Mot. for J. on the Agency R., ECF No. 38–1 ("Wheatland's Br."). Husteel and Wheatland filed responses opposing each other's motions. Resp. Br. of Pl. Husteel Co., Ltd. in

Opp'n to Def.-Intervenor Wheatland Tube Co.'s Mot. for J. upon the Agency R. (Apr. 29, 2014), ECF No. 50; Resp. Br. of Wheatland Tube Co. in Opp'n to Husteel Co., Ltd.'s Mot. for J. on the Agency R. (Apr. 29, 2014), ECF No. 54. Defendant United States opposed both motions. Def.'s Resp. to Pls.' R. 56.2 Mots. for J. (Apr. 29, 2014), ECF No. 52. Husteel and Wheatland each filed a reply. Reply Br. of Pl. Husteel Co., Ltd. in Supp. of its Mot. for J. upon the Agency R. (June 24, 2014), ECF No. 63; Reply Br. of Wheatland Tube Co. in Supp. of its Mot. for J. on the Agency R. (June 24, 2014), ECF No. 64. Since intervening in this action, U.S. Steel Corp. has filed no motions or replies.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c), under which the U.S. Court of International Trade is granted exclusive jurisdiction over actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a.[3] In reviewing the Department's decisions in antidumping reviews, the court will hold unlawful determinations that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). In deciding whether Commerce has acted lawfully, the court must examine the whole of the record and evaluate "whether the evidence and reasonable inferences from the record support" the Department's findings. *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (internal quotation marks and citation omitted).

B. Husteel's Challenge to the Rejection of the Ministerial Error Comments

Husteel's claim, in essence, is that: (1) the Final Results erroneously overstated Husteel's antidumping duty margin because Commerce used an uncorrected database that Husteel submitted on November 16, 2012 to report the sales of its merchandise in its home market; and (2) following Husteel's submission of ministerial error comments on June 12, 2013, Commerce should have issued amended final results assigning Husteel a margin based on a corrected home market database that Husteel submitted to Commerce on January 9, 2013 as a substitute for the November 16, 2012 database. Husteel maintains that its margin would have been reduced from the 3.99%

[3] Unless otherwise noted, all statutory citations that follow are to the 2012 edition of the United States Code and all citations to regulations are to the 2012 edition of the Code of Federal Regulations.

rate in the Final Results to a rate below 1% had Commerce used the corrected database. Husteel's Br. 7 n.2.

In its written decision of June 26, 2013, Commerce rejected the ministerial error comments on various grounds without deciding whether the Final Results actually were affected by errors as Husteel alleged. *Dep't's Ministerial Error Resp.* 1, 3. Among those grounds were that Husteel, during the review, failed to bring the alleged ministerial error to the Department's attention in accordance with the Department's regulations and otherwise failed to do so in a way that reasonably gave Commerce notice of the alleged problem. *Id.* at 3. The court denies relief on Husteel's claim because, as discussed below, Commerce acted within its discretion in refusing to issue amended final results in response to Husteel's ministerial error comments.

In subsection (h) of section 1675 of title 19, United States Code, which governs administrative reviews of antidumping duty orders, Commerce is directed to "establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section." 19 U.S.C. § 1675(h). The statute provides that "[s]uch procedures shall ensure opportunity for interested parties to present their views regarding any such errors" and further provides that "the term 'ministerial error' includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which [Commerce] considers ministerial." *Id*.

To implement § 1675(h), Commerce has promulgated regulations under which it makes "disclosures" of "the details of its antidumping and countervailing duty calculations," 19 C.F.R. § 351.224(a), including its calculations for preliminary and final results of an administrative review of an antidumping duty order, *id*. § 351.224(b). In the nineteenth review, Commerce disclosed a "Final Calculation Memorandum" for Husteel that presented the overall margin calculation and attached various, more detailed, documents.[4] *Final Calculation Mem. for Husteel* (June 5, 2013) (Public Admin.R.Doc. No. 185) (Conf. Admin.R.Doc. No. 130).

[4] These documents were: *Cost of Prod. & Constructed Value Calculation Adjustments for the Final Results-Husteel* (June 5, 2013) (Public Admin.R.Doc. No. 186) (Conf. Admin.R.Doc. No. 131); *Final Draft Liquidation Instructions* (June 9, 2013) (Public Admin.R.Doc. No. 187) (Conf. Admin.R.Doc. No. 132); *Final Comparison Market Program Log* (June 9, 2013) (Conf. Admin.R.Doc. No. 133); *Final Comparison Market Program Output* (June 9, 2013) (Conf. Admin.R.Doc. No. 134); *Final Margin Program Log* (June 9, 2013) (Conf. Admin.R.Doc. No. 135); *Final Margin Program Output* (June 9, 2013) (Conf. Admin.R.Doc. No. 136); *Final Analysis of Comparison-Market Sales* (June 9, 2013) (Conf. Admin.R.Doc. No. 137); *Final*

According to the Department's regulations, "[a] party to the proceeding to whom the Secretary has disclosed calculations performed in connection with a final determination or the final results of a review may submit comments concerning any ministerial error in such calculations." 19 C.F.R. § 351.224(c). In the ministerial error comments it filed on June 12, 2013, Husteel stated that it "has identified an error in the Department's Final Results that significantly overstates Husteel's final dumping margin." *Husteel's Ministerial Error Comments* 1. Husteel asserted that "the Final Results are not based on the final home market sales database ("hsthm04") submitted to the Department on January 9, 2013" and that the alleged error affected three-digit codes assigned to individual products identified by control number ("CONNUM") in the earlier-submitted database. *Id*. at 1–2. Husteel informed Commerce that, in the course of preparing its January 9, 2013 response to the Department's December 23, 2012 Third Supplemental Questionnaire, "Husteel discovered an error in the three digit code in field CONNUMH in the home market sales database"—"[s]pecifically, the code reported in the filed CONNUMH did not correspond to the same products in the U.S. and cost file." *Id.* at 2 (footnote omitted). Husteel added that "[t]he revised database Husteel submitted with the January [9] Supplemental Response corrected that error." *Id*. The significance of the use of the uncorrected database, according to Husteel's ministerial error comments, is that "[t]he use of the November 16, 2012 database has resulted in erroneous matches between the home market sales database and the U.S. sales and cost databases due to the error in the CONNUMH field." *Id*. at 3.

Neither the statute, in 19 U.S.C. § 1675(h), nor the implementing regulations, in 19 C.F.R. § 351.224, require Commerce to take corrective action in response to every ministerial error allegation. Nor is Commerce invariably required to take corrective action where a ministerial error is shown to affect the published decision. Instead, the statute requires Commerce to "establish procedures for the correction of ministerial errors in final determinations within a reasonable time

Analysis of U.S. Sales (June 9, 2013) (Conf. Admin.R.Doc. No. 138).

Commerce also disclosed various documents related to the preliminary calculation of Husteel's margin for the preliminary results of the review: *Prelim. Results of the Antidumping Duty Admin. Review* (Dec. 4, 2012) (Public Admin.R.Doc. No. 134); *Prelim. Decision Mem.* (Dec. 3, 2012) (Public Admin.R.Doc. No. 135); *Prelim. Results Calculation Mem. for Husteel* (Dec. 3, 2012) (Public Admin.R.Doc. No. 136) (Conf. Admin.R.Doc. No. 103); *Cost of Prod. & Constructed Value Calculation Adjustments for the Prelim. Results—Husteel* (Dec. 3, 2012) (Public Admin.R.Doc. No. 137) (Conf. Admin.R.Doc. No. 104); *Prelim. Analysis of Comparison-Market Sales Program Log* (Dec. 5, 2012) (Conf. Admin.R.Doc. No. 106); *Prelim. Analysis of U.S. Sales Program Log* (Dec. 5, 2012) (Conf. Admin.R.Doc. No. 105).

after the determinations are issued." 19 U.S.C. § 1675(h). Congress thereby delegated broad rulemaking authority under which Commerce may place reasonable restrictions on, for example, how and when a party may raise a ministerial error allegation for the Department's consideration. Thus, the Department's regulations provide that "[t]he Secretary will analyze any comments received and, *if appropriate*, correct . . . any ministerial error by amending the final determination or the final results of review . . . ." 19 C.F.R. § 351.224(e) (emphasis added).

In § 351.224(c), the Department's regulations governing ministerial error allegations further provide that "[c]omments concerning ministerial errors made in the preliminary results of a review should be included in a party's case brief." 19 C.F.R. § 351.224(c). A related but more general provision in the Department's regulations, § 351.309(c)(2), addresses the contents of the case brief, which a party to an administrative review files with Commerce following publication of the preliminary results of the review. 19 C.F.R. § 351.309(c)(2). This latter provision directs that "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results." *Id*.

In ruling on Husteel's ministerial error comments, Commerce concluded, *inter alia*, that Husteel had waived its argument that Commerce should have used the January 9, 2013 database in the Final Results instead of the database used for the Preliminary Results, which was the database Husteel submitted to Commerce on November 16, 2012. *Dep't's Ministerial Error Resp.* 3. Commerce found that Husteel had failed to raise the issue in its case brief as provided in 19 C.F.R. § 351.309(c)(2). *Id*. Based on record evidence, the effect of the Department's regulations addressing the content of a party's case brief, 19 C.F.R. § 351.309(c)(2) and the related provision, 19 C.F.R. § 351.224(e), and the way in which Husteel addressed the substitute database in its January 9, 2013 submission, the court concludes that Commerce acted within its discretion in refusing to issue amended final results in response to Husteel's ministerial error comments.

Record evidence supports the finding that Husteel did not raise the home market database issue in the case brief it filed with Commerce following the Preliminary Results of the review. Husteel does not dispute this finding but insists that it did not waive any argument or fail to comply with the Department's regulations. According to Husteel, "it was only in the *Final Results* that Husteel became aware that Commerce was not using the revised January 9 database that it

submitted in response to Commerce's supplemental questionnaire issued after the preliminary results." Husteel's Br. 20. Husteel asserts that "[p]rior to the *Final Results*, Husteel had no reason to believe that there was any issue with respect to Commerce['s] using the revised database in the *Final Results* because Commerce accepted the response and never raised any issues regarding the timeliness of the submission." *Id*. In Husteel's view, the Department's use of the earlier database in the Preliminary Results was no longer an issue at the time Husteel filed its case brief (on February 19, 2013), due to Husteel's earlier filing of the corrected database (on January 9, 2013) and the lack of any response by Commerce in the interim: "Had Commerce indicated that the January 9 database was untimely submitted new factual information that it was rejecting at the time it was submitted, then Husteel would have raised the issue in its case brief, which was filed 40 days after the January 9 supplemental response." *Id*.

Husteel is correct that Commerce never raised an issue as to the untimeliness of Husteel's January 9, 2013 submission of the corrected database during the administrative review. The first time that Commerce characterized that submission as untimely-submitted new factual information was in its decision on Husteel's ministerial error comments, which Commerce issued after publishing the Final Results.[5] *Dep't's Ministerial Error Resp.* 3. Nevertheless, Husteel is incorrect in arguing that the pertinent regulations did not require it

[5] The full text of the rationale Commerce provided for its rejection of Husteel's ministerial error comments is as follows:

> The Department's use of hsthm03 instead of hsthm04 was intential [*sic*] and does not constitute a ministerial error. Husteel's Januay [*sic*] 9, 2013 responses to the Department's specific questions in the supplemental questionnaire would not have changed the data used to calculate the weighted average dumping margin for Husteel from the preliminary results. Any other changes made are considered new factual information, and the deadline for the submission of new factual information had passed at the time of this submission and were thus not properly on the record. We note that the only reference to the other changes was in a footnote to an answer to a question unrelated to those other changes provided by Husteel. Moreover, the footnote reference inadequately explained what changes were made to the newly submitted database. In addition, Husteel did not clearly identify the information as new factual information nor request that the Commerce accept the new information after the deadline for submission of factual information has long passed.
>
> Furthermore, any issues regarding using a new database submitted after the preliminary results should have been included in Husteel's brief. No arguments were made regarding using a different database than those used in the preliminary results. Parties are required to address all issues in their administratrive [*sic*] case briefs or they are deemed to have waived them. 19 CFR 351.309(c)(2). The Courts have held that a party's case brief "must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results." 19 CFR 351.309(c)(2);

to identify in its case brief the issue presented by the Department's use of the earlier database in preparing the Preliminary Results.

Husteel submitted the earlier database to Commerce on November 16, 2012, and Commerce published the Preliminary Results on December 7, 2012. Between the dates Husteel submitted the revised database, on January 9, 2013, and filed its case brief, on February 19, 2013, Commerce neither acknowledged receipt of the revised database nor notified Husteel that it would take any action in response. It was unreasonable for Husteel to presume, based on nothing more than the Department's silence, that at or before the time Husteel filed its case brief Commerce already had decided to make the substitution.

Pointing to the Department's regulations, 19 C.F.R. § 351.302(d), Husteel suggests that Commerce may not retain untimely-filed new factual information on the record unless Commerce extends the time period for filing. Husteel's Br. 18. Husteel argues that during the review Commerce acted contrary to the regulations in failing to notify the parties that it had deemed the information untimely and in failing to remove the information from the record. *Id*. This argument is not convincing.

Under the Department's regulations, the Secretary may extend filing deadlines to accept untimely-filed information but "will not consider or retain in the official record of the proceeding . . . [u]ntimely filed factual information, written argument, or other material that the Secretary rejects," and the Secretary is directed not to consider or retain "unsolicited questionnaire responses . . . ." 19 C.F.R. § 351.302(d). But the court cannot conclude that the regulations required Commerce, during the time between Husteel's January 9, 2013 submission of the questionnaire response and Husteel's February 19, 2013 filing of the case brief, to rule on the question of whether the revised home market database was properly part of the record.

Two considerations guide the court. First, Husteel submitted the revised database as unsolicited, non-germane information in response to a questionnaire, a method of submission the regulations did

see also Dorbest Ltd v. United States, 604 F.3d 1363, 1375 (Fed. Cir. 2010) ("Commerce regulations require the presentation of all issues and arguments in a party's administrative case brief"); *Pakfood Pub. Co. v. United States*, 724 F. Supp. 2d 1327, 1350 (CIT 2010) ("Generally, the 'prescribed remedy' for a party in disagreement with Commerce's Preliminary Results is to file a case brief . . . and that 'case brief must present *all* arguments that *continue* in the submitter's view to be relevant to {Commerce}'s final determination or final results . . . .") (internal citations omitted and emphasis in original).

Antidumping Duty Admin. Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Ministerial Error Comments Regarding Husteel Co., Ltd. 3 (June 26, 2013) (Public Admin.R.Doc. No. 207) ("*Dep't's Ministerial Error Resp.*").

not permit. *See* 19 C.F.R. § 351.302(d). Second, as the record evidence demonstrates and as Commerce suggested in its written decision rejecting Husteel's ministerial error comments, Husteel's January 9, 2013 questionnaire response was inadequate to place Commerce on notice of the need for Commerce to make the substitution Husteel identifies. *Dep't's Ministerial Error Resp.* 3.

Husteel provided Commerce the revised database as part of a response to the sixth question in the Department's Third Supplemental Questionnaire. That question was as follows:

> Using the information reported in the home market sales file the Department calculated the theoretical weight for selected sales. In several instances where the reported nominal pipe size ("NPS") was identical to the reported outside diameter ("OD"), the calculated theoretical weight did not match the reported theoretical weight. The following table demonstrates the Department's calculations. Please explain these discrepancies.

Third Supplemental Questionnaire to Husteel 3 (Dec. 12, 2012) (Public Admin.R.Doc. No. 144) ("*Third Supplemental Questionnaire*").[6] Question six sought only an explanation, not the submission of new or corrected information. In response, Husteel provided the following explanation:

> The Department is correct that Husteel mistakenly reported the NPS as the outside diameter in these limited instances. We apologize for the confusion but note that it does not affect the margin analysis as the CONNUM and the reported theoretical weight for each sale are correct. The field reporting the outside diameter was included for reference only. Nonetheless, this error has been corrected in the revised home market sales database provided in **Exhibit B-25**.[14] The following is the calculation of weight for these three transactions using the correct outside diameter.

Husteel's Third Supplemental Questionnaire Resp. 11–12 (Jan. 9, 2013) (Public Admin.R.Doc. No. 153) (bold in original).[7] Husteel's footnote 14 stated as follows:

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[6] The table listed three control numbers ("CONNUMs") for pipe configurations for which Commerce found discrepancies between calculated and reported theoretical weight. The table is not reproduced here because it contains confidential data not necessary to the court's discussion of this issue.

[7] Here also, the table is not reproduced here because it contains confidential data not necessary to the court's discussion of this issue.

> The revised home market database also corrects the reported CONNUMH (the three digit code). Husteel discovered that there were instances in which the CONNUMH did not correspond to the same product in the U.S. and cost file. There are no changes to the physical characteristics or to the concatenated CONNUM code in field CONNUMHI used for matching purposes.

Id. at 12 n.14. The first two sentences in Husteel's response to question six informed Commerce that the three errors Commerce identified did in fact exist in the reported information but that the errors had no effect on the margin calculation because the information items necessary to that calculation (the CONNUM and the reported theoretical weight for the sales in question) were correct as reported. From these two sentences Commerce reasonably could conclude that it had no need to take further action concerning the subject about which it had inquired in question six. Husteel's explanation in the third sentence, that it had included the outer diameter dimension "for reference only," *id*. at 11, reinforced this point, and the remainder of the text described Husteel's submission of corrections to the unnecessary information on outside diameter. Read in context, the fourth sentence ("*Nonetheless*, this error has been corrected in the revised home market sales database provided in **Exhibit B-25)**", *id.* at 11–12 (italic emphasis added, bold in original), further suggested that the corrections made in the substituted database were unnecessary to the margin calculation. For these reasons, and because Husteel's response to question six was self-explanatory, Commerce justifiably could presume that Husteel's footnote 14 required no action or response by the Department. Moreover, Husteel's footnote did not request that Commerce substitute in the record the revised database included as Exhibit B-25 for the version of the database used in the Preliminary Results and did not inform Commerce of the significance of the corrected information. In short, neither the text in the body of the questionnaire response nor the text in the footnote adequately informed Commerce of the need to substitute the database in order to achieve a correct margin in the final phase of the review.

The court considers the Department's regulations sufficient to instruct a party not to wait until receiving the final calculation memoranda before bringing to the Department's attention an error affecting the preliminary results of the proceeding. In the situation this case presents, Husteel could not preserve the issue of which database Commerce should use in preparing the Final Results without timely raising that issue. According to its own statement on the record,

Husteel discovered the error while preparing its response to the Third Supplemental Questionnaire, i.e., between December 12, 2012 and January 9, 2013. *Husteel's Ministerial Error Comments* 2. Not only did Husteel fail to raise the issue in the case brief it filed on February 19, 2013, it also failed to notify Commerce of the issue, in any other prompt and reasonable way, at any time before Husteel filed ministerial error comments at the conclusion of the review.

In support of its Rule 56.2 motion, Husteel argues that Commerce erred in concluding that the use of the earlier-submitted database in the Final Results was intentional and therefore not a ministerial error. Husteel's Br. 13, 19 ("Commerce . . . cannot claim that it 'intentionally' calculated Husteel's dumping margin in the *Final Results* using the CONNUMH that it was told by Husteel five-months earlier contained an error."); *see Dep't's Ministerial Error Resp.* 3 ("The Department's use of hsthm03 instead of hsthm04 was intential [*sic*] and does not constitute a ministerial error."). In the context of the entire response to the Husteel's ministerial error comments, the court construes the Department's statement that the use of the earlier database was intentional to mean that Commerce considered the error Husteel alleged not to qualify as "ministerial" within the meaning of 19 U.S.C. § 1675(h) because the alleged error was made by Husteel, not Commerce, and was not made apparent to the Department during the review.[8] On the record of this case, it is unwarranted to construe the statement in question (as Husteel apparently does) to mean that Commerce, during the review, intentionally used a database it knew to contain errors.

The Court of Appeals for the Federal Circuit ("Court of Appeals") has opined that an error existing in information submitted by a party to a proceeding and relied upon by Commerce potentially could qualify as a "ministerial" error within the meaning of § 1675(h) if the error was, or should have been, apparent to Commerce. *Alloy Piping Prods. v. Kanzen Tetzu Sdn. Bhd.*, 334 F.3d 1284, 1292–93 (Fed. Cir. 2003) ("*Alloy Piping*"). The Department's decision on Husteel's ministerial error comments indicates to the court that Commerce considered Husteel's January 9, 2013 response to the Third Supplemental Questionnaire insufficient to make the alleged errors apparent. Commerce concluded that "Husteel's January 9, 2013 responses to the Department's specific questions in the supplemental questionnaire would not have changed the data used to calculate the weighted-

[8] The ministerial error response states in its opening summary that "[w]e recommend finding that the alleged error does not constitute a ministerial error under section 751(h) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.224(f)." *Dep't's Ministerial Error Resp.* 3.

average dumping margin for Husteel from the preliminary results" and that "the footnote reference inadequately explained what changes were made to the newly submitted database." *Dep't's Ministerial Error Resp.* 3.

In addition to concluding that the alleged error was not "ministerial" within the meaning of the statute or its regulations, Commerce also concluded that Husteel had not raised its ministerial error allegation in accordance with the regulations. *Id*. As the court discussed previously, Commerce was justified in refusing to act favorably on Husteel's ministerial error comments because of the improper and unsatisfactory way Husteel brought the allegedly erroneous CONNUMH entries to the Department's attention. For this reason, it does not matter whether Commerce was correct or incorrect in concluding that the error Husteel alleged did not qualify as "ministerial" under the statute, and the court need not decide that question in order to rule on Husteel's claim. Here, it is sufficient for the court to conclude, as it does, that Commerce acted within its discretion in refusing to issue amended final results in response to Husteel's ministerial error comments. Husteel advances several arguments to the contrary, which do not persuade the court.

Husteel takes issue with the Department's reasoning that the substitute database Husteel submitted on January 9, 2013 was untimely-submitted new factual information. Husteel's Br. 14. Husteel argues that "[u]nder the facts of this case, Commerce's belated claim of untimeliness is nothing more than a *post-hoc* justification for its failure to use the final revised database that is not supported by the record or the law." *Id.* Specifically, Husteel submits that ". . . the record provides no support for Commerce's claim that the failure to use the January 9 database was intentional, let alone that Commerce had determined that submission contained untimely new factual information." *Id.* The court does not find merit in this argument. Although Commerce stated, in its response to Husteel's ministerial error comments, a conclusion that the January 9, 2013 submission of the substitute database constituted untimely-submitted new factual information, Commerce did not say it had reached that conclusion previously, i.e., during the review, and the record does not support an inference that Commerce did so. Stating its conclusion of untimeliness in the ministerial error response, Commerce found that Husteel neither identified the revised database clearly in its January 9, 2013 submission as new information nor requested that Commerce accept that database for the record despite expiration of the time for submission of new factual information. *Dep't's Ministerial Error Resp.* 3. The text of Husteel's response to question six of the Third Supple-

mental Questionnaire, which the court discussed above, supports the Department's decision. The inclusion of the revised database as non-germane information in the questionnaire response was neither permitted by the regulations nor adequately presented to Commerce as a proposed substitution essential to an accurately determined margin in the final phase of the review.

Husteel further argues that, if Commerce rejected the revised database submitted with the January 9, 2013 questionnaire response from the administrative record as untimely-filed new factual information, then Commerce violated its obligation under 19 U.S.C. § 1677m(f) to provide a written explanation for the rejection, and under 19 U.S.C. § 1677m(d), which required Commerce, "to the extent practicable", to notify Husteel of any deficiencies in its questionnaire response. Husteel's Br. 16–17. This argument fails because Commerce found no deficiency in the way Husteel responded to the Department's inquiry in the supplemental questionnaire, which did not seek resubmission of the database. *See Third Supplemental Questionnaire* 3 ("In several instances . . . the calculated theoretical weight did not match the reported theoretical weight. . . . Please explain these discrepancies."); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1338 (Fed. Cir. 2002) (stating that 19 U.S.C. § 1677m "only applies when a 'response to a request' is deemed to not comply."). Husteel has not shown that Commerce failed to meet an obligation arising from § 1677m(d) or § 1677m(f).

Husteel notes that Commerce stated in the issues and decision memorandum accompanying the Final Results (the "Decision Memorandum") that Husteel's response to the supplemental questionnaire had been timely submitted. Husteel argues that the Department's statement in Decision Memorandum contradicts the Department's reasoning that the January 9, 2013 database was untimely-filed new information. Husteel's Br. 15–16 (citing *Issues & Decision Mem. for the 2010–2011 Admin. Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, A-570–904, ARP 10–11, at 2 (June 5, 2013) (Public Admin.R.Doc. No. 208), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2013–13989–1.pdf (last visited June 17, 2015)) ("*Final Decision Mem.*"). This view is incorrect. Contrary to Husteel's characterization, the Department found timely the questionnaire response, not the non-germane corrections in the revised database. *See Final Decision Mem.* 2.

Husteel argues that Commerce was required to use the corrected database, citing *Alloy Piping*, 334 F.3d at 1292–93. Husteel's Br. 19. Relying on *Borlem S.A.-Empreedimentos Industriais v. United States*,

913 F.2d 933, 937 (Fed. Cir. 1990) ("*Borlem*"), Husteel also argues that the court should not defer to a decision made by an administrative agency based on incorrect data. *Id.* at 19–20. Considering a situation in which an error was present in information reported to Commerce, the Court of Appeals opined in *Alloy Piping* that "in some instances, a respondent's error will be apparent from the face of Commerce's own final decision or from the calculations underlying that decision." *Alloy Piping*, 334 F.3d at 1292. In such circumstances the "error, in effect, becomes a government error and, hence, a 'ministerial' error, and the government is required to correct it." *Id.* at 1293. In *Alloy Piping*, the Court of Appeals held that such a situation did not exist, concluding that the error in question was not apparent to Commerce during the administrative proceeding. *Id.* As discussed earlier in this Opinion, the court does not reach the question of whether the alleged error was, or was not, sufficiently apparent to qualify as a ministerial error under 19 U.S.C. § 1675(h) because Commerce, in either event, did not exceed its discretion in refusing to issue amended final results. As the court also discussed, Commerce was not properly or adequately informed during the review of the issue posed by the use of the home market database submitted in November 2012, which alone was a sufficient ground for the Department's decision not to act favorably on Husteel's ministerial error comments. *Alloy Piping*, therefore, does not establish a principle under which Husteel qualifies for a remedy on its ministerial error claim. Husteel's reliance on *Borlem* is also misplaced. In *Borlem*, the Court of Appeals considered decisive that the International Trade Commission reached a final determination in reliance on erroneous data that the Commission itself generated and acknowledged to be incorrect. *Borlem*, 913 F.2d at 937. That situation is not present in this case.

Citing certain decisions of this Court and noting that neither Commerce nor the petitioners objected to the submission of the revised database during the review, Husteel argues that it was not until filing its ministerial error comments that it had a full and fair opportunity to raise the issue addressed in the ministerial error comments. Husteel's Br. 21–23 (citing *Calgon Carbon Corp. v. United States*, 35 CIT __, __, Slip Op. 11–0021 at *11 (Feb. 17, 2011); *LTV Steel Co. v. United States*, 21 CIT 838, 868–69; 985 F. Supp. 95, 120 (1997); *Qingdao Taifa Group Co. v. United States*, 33 CIT 1090, 1093, 637 F. Supp. 2d 1231, 1237 (2009); *Saha Thai Steel Pipe Co. v. United States*, 17 CIT 727, 729–30, 828 F. Supp. 57, 59–60 (1993)). But by no later than January 9, 2013, Husteel was aware of the issue posed by the Department's use of the November 16, 2012 database in the Preliminary

Results. Husteel, therefore, had a full and fair opportunity to raise the issue, either in its case brief, which is the method of informing Commerce required by the regulations in such a circumstance, or in some other way that Commerce arguably could have found to suffice.

Citing *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1348 (Fed. Cir. 2006) ("*Timken U.S.*"), and *NTN Bearing Corp. v. United States,* 74 F.3d 1204 (Fed. Cir. 1995) ("*NTN*"), Husteel also argues that Commerce, failing to satisfy its obligation to calculate Husteel's margin as accurately as possible, abused its discretion in basing the Final Results on a database it knew to contain clerical errors. Husteel's Br. 24. This argument fails in two respects. First, as discussed previously, the court does not construe the Department's response to Husteel's ministerial error comments to mean that Commerce based the Final Results on a database it knew to contain clerical errors. Second, these cases are inapposite. In *NTN* and in *Timken U.S.*, a respondent alerted Commerce to clerical errors during the review and made Commerce aware during the review that action on the part of Commerce was necessary to achieve a correct final result. *NTN*, 74 F.3d at 1205, 1208; *Timken U.S.*, 434 F.3d at 1347–48. In such a circumstance, Commerce may be required to correct an error even though the information necessary to do so may not have been timely submitted. In contrast, Husteel's argument relies on its January 9, 2013 submission and, in particular, the aforementioned footnote 14. For the reasons the court has discussed, however, the January 9, 2013 submission did not reasonably place Commerce on notice of the need to make a correction.

Husteel is correct that, as the Court of Appeals stated in *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990), Commerce has an overriding obligation to calculate antidumping duty margins as accurately as possible. Husteel's Br. 26, 29 (citing *id.* at 1191). In some circumstances, that obligation may require Commerce to waive its regulatory requirements on the timely submission of information. The difficulty in this case is that Husteel did not bring the alleged clerical errors to the Department's attention in any reasonable or permissible way during the review despite having had an adequate opportunity to do so. In directing Commerce to establish procedures for the correction of ministerial errors after issuance of the final results of an investigation or review, Congress established an exception to the general principle of finality. *See* 19 U.S.C. § 1675(h). In implementing this directive, Commerce placed reasonable regulations on the time and manner in which a party that is aware of a ministerial or other error affecting the preliminary results of a review must bring the error to the Department's attention in order to

obtain remedial action. While Commerce has a general obligation to ensure the most accurate margin possible, it does not follow that a party failing to comply with regulations may obtain in any circumstance a ministerial error correction after a review is completed. Here, Husteel did not fulfill its own obligation to act promptly and reasonably to bring to the Department's attention a matter Husteel believed would affect the accuracy of the final margin.

Finally, Husteel argues that even absent the January 9, 2013 database, Commerce had a "readily available alternative" of using certain record information in the November 16, 2012 database, which Husteel had placed on the record prior to the Preliminary Results, to calculate an accurate margin. Husteel's Br. 29 (arguing that Commerce could have used "the CONNUM1H for purposes of matching Husteel's home market sales to the CONNUM1U and CONNUM1 reported in the U.S. and cost files, respectively"). This argument seems directed to a claim other than the one Husteel has brought in this case, which challenges the Department's rejection of Husteel's ministerial error comment submission. *See* Husteel's Br. 1. Husteel's ministerial error comment submission alleges as a ministerial error the Department's basing "the final results on Husteel's database ('hsthm 03') submitted on November 16, 2012" instead of the home market database (identified in the submission as "hsthm 04") Husteel submitted on January 9, 2013. *Husteel's Ministerial Error Comments* 2. Husteel's ministerial error comments do not discuss the alternative Husteel identifies in its argument before the court. The claim Husteel has placed before the court requires the court to decide whether or not Commerce exceeded its discretion in refusing to act on the ministerial error comments Husteel actually submitted. Husteel's Br. 1. Concluding that Commerce did not exceed its discretion, the court does not reach the issue of whether Commerce, had it chosen to do so, could have corrected the alleged clerical errors, either by using the January 9, 2013 database or through some other method not identified in Husteel's ministerial error comments.

C. Wheatland's Challenges to the Final Results

Wheatland challenges two aspects of the Final Results. First, Wheatland alleges that during the review Commerce impermissibly failed to respond to a submission that Wheatland filed to address the issue of "targeted dumping." Wheatland's Br. 5–6. Second, Wheatland contests the Department's decision to adopt certain "weight conversion factors" to convert the weight of merchandise as recorded in Husteel's cost database to the unit of measurement used to record weights in Husteel's home-market sales database. Wheatland's Br. 2.

As discussed below, the court must reject both of Wheatland's claims and affirm the Department's determinations.

1. Wheatland's Claim that Commerce Improperly Failed to Address Wheatland's Notice of Supplemental Authority

Wheatland claims that Commerce unlawfully issued the Final Results without responding to a submission Wheatland made to Commerce during the administrative review proceeding. Wheatland's Br. 5–6. Wheatland directed that submission, which consisted of a March 18, 2013 letter that Wheatland titled a "Notice of Supplemental Authority," to its allegation that the two mandatory respondents engaged in "targeted dumping." *See Notice of Supplemental Authority* 1–2 (Public Admin.R.Doc. No. 179) ("*Notice of Supplemental Authority*"). In the submission, Wheatland urged Commerce to apply a new methodology (the "differential pricing" methodology) to determine whether to calculate the respondents' margins on an "average-to-transaction" basis rather than according to the ordinary method, which determines a margin on an "average-to-average" basis.[9] *Id*. at 2. Wheatland characterized the new methodology as a "change in the law that occurred after the briefing concluded in this case." *Id*. at 1.

Without responding to the Notice of Supplemental Authority and without applying the new differential pricing methodology to which Wheatland referred in its submission, Commerce calculated Husteel's

[9] For antidumping investigations, section 777A(d)(1)(B) of the Tariff Act authorizes Commerce to use the "average-to-transaction" method of comparing normal value to export price or constructed export price where Commerce finds there is a "pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time . . . ," 19 U.S.C. § 1677f-1(d)(1)(B)(i), i.e., "targeted dumping," and if Commerce "explains why such differences cannot be taken into account" using average-to-average or individual-to-individual transaction comparisons, 19 U.S.C. § 1677f-1(d)(1)(B)(ii).

The Department's regulations provide that Commerce ordinarily will determine whether subject merchandise is being sold at less than fair value by comparing the weighted average of normal values of subject merchandise with the weighted average of export prices (or constructed export prices) for comparable merchandise, i.e., the "average-to-average" method. 19 C.F.R. § 351.414(b)(1),(c)(1). Commerce, however, will compare the weighted average of normal values to export prices (or constructed export prices) of individual transactions for comparable merchandise (the average-to-transaction method) if the "Secretary determines another method is appropriate in a particular case." *Id.*§ 351.414(c)(1). In the Decision Memorandum, Commerce explained that "[a]lthough section 777A(d)(1)(B) of the [Tariff] Act does not strictly govern our examination of this question in the context of an administrative review, we nevertheless find that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is, in fact, analogous to the issue in investigations." *Issues & Decision Mem. for the 2010–2011 Admin. Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, A-570–904, ARP 10–11, at 6 (June 5, 2013) (Public Admin.R.Doc. No. 208), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2013–13989–1.pdf (last visited June 17, 2015)) ("*Final Decision Mem.*").

final margin using the usual average-to-average method.[10] *See Final Decision Mem.* 11–12, 22–23. Wheatland argues that Commerce overlooked the Notice of Supplemental Authority and unlawfully failed to explain its decision not to apply the new differential pricing methodology in determining Husteel's margin. Wheatland's Br. 5–6. Wheatland argues, further, that "[b]ecause Commerce made no factual findings in support of its decision and provided no reasons justifying its decision, that decision is unsupported by substantial record evidence and is not in accordance with law." *Id.* at 6. The court rejects Wheatland's arguments. Wheatland is unable to show either that the development it described in the Notice of Supplemental Authority constituted a change in law or that Commerce was under any obligation to respond specifically to Wheatland's submission. Moreover, Commerce explained in the Decision Memorandum its decision to determine a margin for Husteel on the average-to-average basis.

The background surrounding Wheatland's filing of the Notice of Supplemental Authority demonstrates the lack of merit in the claim Wheatland bases on that submission. During the nineteenth administrative review proceeding, Wheatland alleged targeted dumping and argued that Commerce should determine Husteel's and HYSCO's dumping margins using the average-to-transaction method rather than the normal average-to-average method. *Wheatland Targeted Dumping Allegation* (June 6, 2012) (Public Admin.R.Doc. No. 74). In the Preliminary Results, Commerce preliminarily determined that it would calculate both respondents' dumping margins using the average-to-average method after finding "that the pattern of [constructed export prices] for comparable merchandise that differ significantly among purchasers, regions or time periods does not exist for both HYSCO and Husteel . . . ." *Prelim. Decision Mem.* 5. In a case brief responding to the Preliminary Results, submitted on February 19, 2013, Wheatland objected to the Department's targeted dumping analysis in the Preliminary Results, alleging that Commerce had not found targeted dumping "because the Department did not conduct its analysis by state." *Case Br. of Wheatland Tube Co. re: Husteel Co., Ltd.* 11 (Public Admin.R.Doc. No. 165) (footnote omitted).

[10] In the Final Results, Commerce calculated a weighted-average dumping margin for HYSCO using the average-to-transaction method. *Final Decision Mem.* 23. Wheatland's challenge on this issue before the court is limited to the Department's calculation of Husteel's dumping margin. Rule 56.2 Br. of Wheatland Tube Co. in Supp. of its Mot. for J. on the Agency R. 5–6, ECF No. 38–1 ("Wheatland's Br.") ("Commerce overlooked the argument and continued, without explanation, to evaluate 'targeted dumping' by Husteel under the former test used in *Nails from China.*").

In its Notice of Supplemental Authority, submitted to Commerce after the case briefs, Wheatland stated that "[a]s the Department is aware, Wheatland has argued that the Department should find targeted dumping (based on the then-existing *Nails* test) by the Korean respondents in this case and apply the alternative 'average-to-transaction' margin calculation methodology."[11] *Notice of Supplemental Authority* 1 (footnote omitted). Wheatland further stated that "the Department should employ the new standard enunciated in" a March 4, 2013 memorandum (the "*Xanthan Gum*" memorandum) that Commerce issued in a separate administrative proceeding. *Id.* at 1–2 (citing *Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China (A-570–985): Post-Prelim. Analysis & Calculation Mem. for Neimenggu Fufeng Biotechnologies, Co., Ltd. & Shandong Fufeng Fermentation Co., Ltd.* (Mar. 4, 2013) (IAACCESS #3122156–01)). Other than characterizing the *Xanthan Gum* memorandum as establishing a change in controlling law, Wheatland advanced no argument as to why Commerce must, or should, alter its methodology for identifying targeted dumping in the Final Results.

In the Final Results, Commerce again found an absence of a pattern of sales that indicated targeted dumping for Husteel despite having reassessed the targeted dumping allegation based on the specific U.S. states as urged by Wheatland in its targeted dumping allegation.[12] *Final Decision Mem.* 23. Commerce decided to continue using the average-to-average method to determine Husteel's dumping margin. *Id.* Commerce did not respond to Wheatland's Notice of Supplemental Authority in the Final Results or in the accompanying Decision Memorandum.

Because the *Xanthan Gum* memorandum has not been placed on the administrative record, the court will draw no conclusions from any content therein. And because the memorandum is not a final agency decision issued in conjunction with published results of an administrative proceeding, it is not a document of which the court will consider taking judicial notice. At the same time, the fact that the *Xanthan Gum* memorandum is not a final decision of the Department to apply the differential pricing analysis—a fact apparent from the citation to the memorandum in the Notice of Supplemental Authority—also demonstrates that Wheatland may not rely on the

[11] In its brief before the court, Wheatland cites, with respect to the *Nails* test, *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (Int'l Trade Admin. June 16, 2008). *See* Wheatland's Br. 6.

[12] Commerce did find that such a pattern existed for HYSCO and, as noted above, applied the average-to-transaction method to HYSCO. *Final Decision Mem.* 23.

Xanthan Gum memorandum for its claim that the memorandum established a change in the controlling law obligating Commerce to take action in the nineteenth review.

At oral argument, Wheatland also argued that a remand is appropriate because the Department's lack of response to or formal rejection of the Notice of Supplemental Authority violated the Department's obligation under 19 C.F.R. § 351.302(d)(2) to respond to or formally reject a submission of untimely argument. Oral Arg. Tr. 112 (Nov. 3, 2014), ECF No. 78–2. This argument is not properly before the court because Wheatland did not raise it in its Rule 56.2 brief. Regardless, the court sees no merit in the argument. The regulatory provision in question is addressed to "[u]ntimely filed factual information, written argument, or other material that the Secretary rejects . . ." and to [u]nsolicited questionnaire responses . . . ." 19 C.F.R. § 351.302(d)(1)(i), (ii). The Notice of Supplemental Authority is not described by any of these categories. Wheatland submitted this document (albeit mistakenly) as a notice of a change in existing law, not as a "written argument" filed with leave for acceptance by Commerce after the close of the period for the filing of case briefs. Under the regulation, "*certain* untimely filed or unsolicited material will be rejected together with an explanation of the reasons for the rejection of such material." 19 C.F.R. § 351.302(a) (emphasis added). Commerce, therefore, was not under the requirement of § 351.302(d)(2) to "reject such information, argument, or other material . . . with, to the extent practicable, written notice stating the reasons for rejection."

2. Wheatland's Claim Challenging the Use of Husteel's Weight Conversion Factors

Wheatland claims that Commerce, when calculating Husteel's margin, erred in relying on certain "actual weight to theoretical weight conversion factors" that Husteel provided during the administrative review for individual products it produced and sold during the POR (identified by "control number," or "CONNUM"). Wheatland's Br. 2. Wheatland alleges that these weight conversion factors were "unreliable and distortive" and argues that Commerce instead should have used "facts otherwise available," *see*19 U.S.C. § 1677e, as a substitute for the weight conversion factors. *Id*. Wheatland argues, further, that it appears that Husteel, in providing the conversion factors, attempted to manipulate its dumping margin. *Id*. at 7. The court finds no merit in Wheatland's claim.

According to Wheatland's argument, the weight conversion factors Husteel provided understated the cost of production for steel pipe

Husteel sold in the home market of Korea and thereby reduced Husteel's dumping margin by preventing certain home market sales from being excluded from the home market sales database.[13] *Id*.

In deciding to use the conversion factors over objections Wheatland made during the review, Commerce reached several findings based on evidence in the administrative record. Wheatland advances a general argument that Commerce failed to address these objections adequately and failed to "support its decision with record evidence." *Id*. at 6–7. Contrary to Wheatland's argument, the court concludes that the record evidence supports the specific findings upon which Commerce concluded that the conversion factors were not distortive.

Commerce found that quantities in Husteel's home market sales database were recorded in units of "theoretical" metric tons while quantities reported in Husteel's cost-of-production database were recorded in units of "actual" metric tons.[14] *Final Decision Mem.* 35–36. Commerce concluded that "a comparison of the sales and cost figures unadjusted for these differences would not provide for a meaningful or accurate analysis" and that "the sales and cost data must be stated on a consistent basis of measurement." *Id.* at 35. Commerce concluded, further, that "the record evidence supports the continued use of the reported conversion factors to accommodate the comparison of Husteel's sales and cost data on a comparable basis." *Id*. The court has considered, and affirms, the specific findings upon which Commerce reached those conclusions.

As a threshold consideration, Commerce noted that Husteel's sales files were based on theoretical metric tons determined according to a formula Husteel described as an industry standard formula.[15] *Id*. Wheatland did not contest this fact or the theoretical weight formula before Commerce, nor does Wheatland do so before the court.

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[13] In determining a dumping margin, Commerce compares the export price (or constructed export price) of the sale of the subject merchandise with the normal value of that merchandise, which ordinarily is determined according to the price of the foreign like product when sold in a respondent's comparison market (in this case, the home market of Korea). 19 U.S.C. §§ 1675(a)(2)(A), 1677b(a)(1)(B). In certain circumstances, Commerce, when determining normal value, may disregard comparison market sales of foreign like products that were made below the cost of production. 19 U.S.C. §§ 1677b(b)(1), (c)(2)(D).

[14] Husteel derived the actual weights by weighing a sample unfinished pipe and subtracting the weight of scrap removed during Husteel's finishing process. *See* Resp. Br. of Pl. Husteel Co., Ltd. in Opp'n to Def.-Intervenor Wheatland Tube Co.'s Mot. for J. upon the Agency R. 4–5 (Apr. 29, 2014), ECF. No. 50; *Husteel Resp. to Third Supplementary Questionnaire* 7–8 (Jan. 9, 2013) (Public Admin.R.Doc. No. 153). Husteel calculated "theoretical" weights according to an industry standard formula. *Final Decision Mem.* 35.

[15] That formula is: (outside diameter less theoretical wall thickness) * theoretical wall thickness * 0.02466 [density factor]* length/1000. *Final Decision Mem.* 35; Def.'s Resp. to Pls.' Rule 56.2 Mot's for J. 8 (Apr. 29, 2014), ECF No. 52.

As to the cost data, Commerce found that "Husteel describes a system whereby the actual quantities reflect the actual measured weight of the input hot-rolled coil less the scrap generated during production." *Id*. at 36 (footnote omitted). Commerce added that "Husteel weighs samples of each type of pipe from each production run" and that "[t]he extension of the sample weights and number of pipes produced is compared to the input hot-rolled coil less scrap weight and any significant differences result in an adjustment in the recorded 'actual' weight." *Id*. (footnote omitted). Commerce also found that Husteel itself relied on the "actual weights" determined according to this method for the cost accounting system by which it allocated costs to products. *Id*. Wheatland does not specifically contest any of the Department's findings related to Husteel's method of determining "actual" weights as recorded in Husteel's books and records.

Commerce next found that, based on the record evidence, "the pipe weights reported to the Department were taken directly from Husteel's normal production and cost accounting records." *Id*. Upon tracing the reported costs and quantities for selected products to Husteel's production and cost accounting records, Commerce found "no evidence to support that the actual weights reported to the Department were manipulated in order to shift costs between products" and "no inconsistencies in the manner in which the product weights were determined or in how costs were allocated between products." *Id*. Finally, Commerce found "no evidence to suggest that the company's normal books and records were manipulated to shift costs between products for the purpose of reporting to the Department." *Id.*

Commerce next considered Husteel's conversion factor formula, which Commerce described as "a ratio of the actual to theoretical POR production run weights for each CONNUM." *Id*. at 37 (footnote omitted). Commerce explained that Husteel had originally submitted a conversion factor formula with a numerator that "approximated but did not match the per-actual weight costs it was intended to convert" but that the conversion factors used in the Final Results have "a numerator that reflects the actual production run quantities used to calculate the per-unit costs and a denominator that reflects the theoretical quantities for those production runs."[16] *Id*. (footnotes omitted).

[16] On October 24, 2012, Commerce issued a supplemental questionnaire to Husteel noting inconsistencies in the conversion factors that Husteel had provided in an initial questionnaire response and requesting an explanation. *See Second Supplemental Questionnaire to Husteel* 4 (Public Admin.R.Doc. No. 116). In response to this questionnaire and after consultation with Commerce on November 8, 2012, Husteel provided the CONNUM-specific conversion factors that Commerce used for the Final Results and that Wheatland contests in this action. *Final Decision Mem.* 34, 37; *Husteel's Second Supplemental Questionnaire Resp.* 1–2 (Nov. 16, 2012) (Public Admin.R.Doc. No. 129).

Commerce found that the theoretical quantities in the denominator of the formula "were calculated using the same formula that was used to calculate theoretical quantities in the sales files." *Id*. In support of its conclusion that "the record evidence supports the continued use of the reported conversion factors to accommodate the comparison of Husteel's sales and cost data on a comparable basis," *id*. at 35, Commerce found that "the revised conversion factors reflect a more appropriate and accurate methodology for converting the per-actual weight costs to per-theoretical weight costs," *id*. at 37.

Before Commerce, Wheatland argued, *inter alia*, that Husteel's weighted-average conversion factor for matching CONNUMs is significantly lower that the weighted-average conversion factor for all CONNUMs, that "the only reason why certain CONNUMs have lower conversion factors is because they are matching CONNUMs," and that, therefore, "Husteel's proposed conversion factors represent an attempt" by Husteel "to manipulate its dumping margin." *Final Decision Mem*. 33. Wheatland advances essentially the same argument before the court. *See* Wheatland's Br. 7–8. In doing so, Wheatland contests the Department's ultimate decision to adopt Husteel's revised conversion factors without demonstrating that any of the specific factual findings upon which Commerce reached that decision were unsupported by substantial evidence. Rather than attempt to do so, Wheatland grounds its argument on a contention that during the review "Commerce failed to address Wheatland's argument" and that this failure "was not based on substantial evidence and not in accordance with law." *Id*. at 9. This contention is unfounded. Commerce addressed, and rejected, Wheatland's "manipulation" argument by finding that the actual and theoretical pipe weights reported by Husteel to Commerce were "consistently determined for all products," were "consistently applied in allocating costs to products," and "were taken directly from Husteel's normal production and cost accounting records." *Final Decision Mem*. 36. Commerce proceeded from these findings to conclude that the record evidence failed to support a finding that either the actual weights reported by Husteel or the company's normal books and records were manipulated in order to shift costs between products. *Id*. Commerce did not take issue with Wheatland's contention that Husteel's weighted-average conversion factor for matching CONNUMs was significantly lower that the weighted-average conversion factor for all CONNUMs, but it concluded, based on specific and supported findings, that this contention alone was insufficient to establish that Husteel either misreported

data in its business records or designed conversion factors to manipulate its margin. The court finds no flaw in the Department's reasoning.

Wheatland next complains that Commerce "misstated Wheatland's argument" that "Commerce should have rejected reported actual weights altogether and relied instead on '*theoretical weight* as the actual weight.'" Wheatland's Br. 8 (emphasis in original) (citation omitted). Wheatland takes issue with the Department's statement in the Decision Memorandum that "Wheatland's suggestion to disregard the conversion factors since they are based on unreliable actual weights fails to address the fact that the per-unit costs reported to the Department which Wheatland requests that the Department rely on unadjusted were also based on these same actual weights." *Id*. (citing *Final Decision Mem*. 38). Wheatland's argument is misguided. The salient point is that Commerce found ample reason to employ Husteel's revised conversion factors, noting correctly that "the quantities and per-unit figures reported in the sales files are on a different basis of measurement than the quantities and per-unit figures reported in the cost file" and concluding that comparison of the unadjusted weights "would not provide for a meaningful or accurate analysis." *Final Decision Mem*. 35. Having rejected Wheatland's contentions that the conversion factors were unreliable and an attempt by Husteel to manipulate the dumping margin, Commerce reasonably declined to accept Wheatland's argument that it should employ a method that did not involve a conversion of sales data and cost data to the same unit of measurement for product weight.

III. CONCLUSION

The court will affirm the Final Results and the Department's decision not to amend those results in response to Husteel's ministerial error comments. Judgment will enter accordingly.

Dated: June 23, 2015
New York, NY

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

Slip Op. 15–67

MERIDIAN PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00018

[Granting plaintiff's motion for reconsideration, vacating judgment, and remanding to Commerce a third time.]

Dated: June 23, 2015

Daniel J. Cannistra and *Richard P. Massony*, Crowell & Moring LLP, of Washington DC, for the plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. With her on the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington DC.

OPINION AND ORDER

Musgrave, Senior Judge:

Pursuant to USCIT Rules 46 and 59(b), the plaintiff Meridian Products LLC ("Meridian"), a U.S. importer, moves for reconsideration of the court's decision in *Meridian Products, LLC v. United States*, 38 CIT ___, 37 F. Supp. 3d 1342 (2014) ("*Meridian III*"). *See* Pl's Mot. for Reconsideration of the Court's Order in Slip Opinion 14–158, PDoc 50 (Jan. 28, 2015) ("Pl's Mot."). Familiarity with prior proceedings and *Meridian III*, which sustained the *Final Results of Redetermination Pursuant to Court Remand, Meridian Products, LLC v. United States*, Court No. 13–0018, PDoc 29 (June 17, 2014) ("Second Remand"), is presumed. *See Meridian III; see also Meridian Products, LLC v. United States*, 38 CIT ___, 971 F. Supp. 2d 1259 (2014) ("*Meridian II*"); *Meridian Products, LLC v. United States*, 37 CIT ___, Slip Op. 13–75 (June 17, 2013) ("*Meridian I*").

Conducted by the International Trade Administration of the U.S. Department of Commerce ("Commerce"), the matter concerns a scope ruling under the antidumping and countervailing duty orders ("*Orders*") on aluminum extrusions from the People's Republic of China ("PRC"),[1] on the plaintiff's imported refrigerator/freezer trim kits ("Trim Kits") from the PRC. The plaintiff's precise motion asks for

[1] *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30650 (May 26, 2011) & *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30653 (May 26, 2011) (collectively, "*Orders*").

reconsideration of the exhaustion question that decided *Meridian III*, arguing that it "had no opportunity" to raise before the agency the issue here, that exhaustion of administrative remedies was a useless formality, and that the issue is "a pure question of law" not requiring further factual development. Pl's Mot. at 6–11. The defendant United States asks the court to uphold *Meridian III*, countering that the plaintiff fails to identify any factual or legal error in the prior decision on the exhaustion question. *See* Def's Resp. to Pl's Mot. for Reconsideration, PDoc51 (Mar. 4, 2015) ("Def's Resp.").

After considering the plaintiff's motion, the court reconsiders its prior decision, vacates judgment, and remands the case back to Commerce again for application of the proper definition of the "finished goods kit" exclusion, in compliance with the language of those *Orders*, and for redetermination of whether the Trim Kits fall within the scope of those *Orders*.

I. *Background*

Brief background is here outlined for ease of understanding. After reviewing the findings of Commerce's First Remand,[2] the court remanded to Commerce a second time, directing it to "proceed from a clean slate on the question of whether the Trim Kits fall within the scope of the *Orders*, fully taking into account the prior relevant scope rulings." *See Meridian II*, *supra*, 971 F. Supp. 2d at 1271.

Commerce's draft remand, issued Wednesday May 14, 2014, found that an "exception to the 'finished goods kit' exclusion" exists, to wit that "an imported product will not be considered a 'finished goods kit' . . . merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusions product", that a product may not consist entirely of aluminum extrusions and be excluded as a "finished goods kit", and that the plaintiff's Trim Kits, which consist entirely of subject aluminum extrusions, fasteners, and "extraneous" materials, do not satisfy the "finished goods kit" exclusion to the *Orders*.[3] It also applied the analysis in the *Drapery Rail Kits Remand*

[2] *Final Results of the Redetermination Pursuant to Court Remand, Meridian Products, LLC v. United States*, Ct. No. 13–00018, Slip Op. 13–75, PDoc17 (Aug. 15, 2013) ("First Remand").

[3] *See* Draft Results of Redetermination Pursuant to Court Remand, *Meridian Products, LLC v. United States*, Ct. No. 13–00018, PDoc 40–1, Slip Op. 14–32 ("Draft Remand") at 12–14 (May 14, 2014), referencing Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Final Scope Ruling on J.A. Hancock, Inc.'s Geodesic Structures" (July 17, 2012) ("*Geodesic Domes Scope Ruling*") at 7 and Letter from Daniel Cannistra, Crowell & Moring LLP, to the Secretary of Commerce, Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Request for Scope Ruling for Refrigerator/Freezer Trim Kits (Nov. 13, 2012) ("Scope Ruling Request") at 5–2, and *Orders*.

and the *Solar Panel Mounting Systems Ruling* to the Trim Kits,[4] and continued to find that the kits were not analogous to the goods in those rulings and were within the scope of the *Orders.* Draft Remand at 14–19. Commerce then gave interested parties a mere five days to comment on the Draft Remand. *See id.* at 19.

Meridian's comments on the Draft Remand addressed Commerce's analysis of the applicability of the *Drapery Rail Kits Remand* and *Solar Panel Mounting Systems Ruling* to the Trim Kits, and noted that its comments were abbreviated in light of the limited time Commerce provided. Meridian did not, however, comment on the portion of Commerce's analysis in which Commerce determined that the "finished goods kit" exclusion language, *see infra*, meant that Meridian's Trim Kits, which Commerce found consisted entirely of aluminum extrusions, fasteners and "extraneous" materials, did not qualify for the exclusion. *See generally* Meridian's Cmts. on the Draft Remand, PDoc 40–2 (May 19, 2014). In the Second Remand, Commerce continued to find that "kits [that] consist only of aluminum extrusions, fasteners, and extraneous materials do not meet the exclusion criteria for 'finished goods kits'" and that Meridian's Trim Kits do not qualify as "finished goods kits", "because they consist entirely of aluminum extrusions, fasteners and extraneous materials", further that in its comments on remand Meridian did not challenge or dispute this finding. Second Remand at 12–14 and 23–25. Meridian previously sought to challenge this part of Commerce's analysis before the court. Meridian's Motion for Remand, PDoc 35 (July 15, 2014), ECF No. 35. However, the court sustained the Second Remand results, finding that the plaintiff had failed to exhaust its administrative remedies by not raising or incorporating by reference those arguments before Commerce. *See Meridian III*, *supra*, 37 F. Supp. 3d at 1342–54.

A. Request for Reconsideration:
"Pure Issue of Law" Exception to Exhaustion

"The major grounds justifying a grant of a motion to reconsider a judgment are an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal

[4] *See Final Results of Redetermination Pursuant to Court Remand, Rowley Co. v. United States*, Ct. No. 12–00055 (Feb. 28, 2013) ("*Drapery Rail Kits Remand*"); *see also* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Final Scope Ruling on Clenergy (Xiamen) Technology's Solar Panel Mounting Systems" (Oct. 31, 2012) ("*Solar Panel Mounting Systems Ruling*").

error, or the need to prevent manifest injustice." *Ford Motor Co. v. United States*, 30 CIT 1587, 1588 (2006) (internal citation omitted).[5] Through its arguments, Meridian asks for relief from *Meridian III*, contending that three of these exceptions apply.

While "[t]he exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court", *Shangdong Huarong Machinery Co., Ltd. v. United States*, 30 CIT 1269, 1305, 435 F. Supp. 2d 1261, 1292 (2006) (internal citations omitted), and the court tends to take a strict stance on exhaustion, the requirement that a party exhaust its administrative remedies has been excused in trade cases "where exhaustion would be 'a useless formality,' intervening legal authority 'might have materially affected the agency's actions,' the issue involves 'a pure question of law not requiring further factual development,' where 'clearly applicable precedent' should have bound the agency, or where the party 'had no opportunity' to raise the issue before the agency." *See SeAH Steel Corp. v. United States*, 35 CIT ___, ___, 764 F. Supp. 2d 1322, 1325–26 (2011), referencing *Jiaxing Brother Fastener Co., Ltd. v. United States*, 34 CIT 1455, 1466, 751 F. Supp. 2d 1345, 1355–56 (2010) (internal citations omitted).

Meridian claims, fundamentally, that it should be excused from exhausting its administrative remedies because (1) it "had no opportunity" to raise the issue before the agency, (2) re-iterating points it had already made to Commerce would have been a useless formality in "Commerce's informal redetermination procedures", and (3) the issue was "a pure question of law'. *See* Pl's Mot. at 2–11. In its response, the defendant maintains that Meridian not only failed to exhaust administrative remedy concerning Commerce's "aluminum content" analysis for the "finished goods kit" exclusion but also effectively failed to exhaust its arguments that those exceptions to exhaustion apply. The defendant avers that instead of seeking leave from the court to respond to Commerce's exhaustion argument, which

[5] "[A] motion for reconsideration serves as 'a mechanism to correct a significant flaw in the original judgment' by directing the Court to review material points of law or fact previously overlooked." *RHI Refractories Liaoning Co., Ltd. v. United States*, 35 CIT ___, ___, 752 F. Supp. 2d 1377, 1380 (2011) ("*RHI Refractories*"), quoting *United States v. UPS Customshouse Brokerage, Inc.*, 34 CIT 745, 748, 714 F. Supp. 2d 1296, 1301 (2010). Although a court may exercise its "discretion to rectify a significant flaw in the conduct of the original proceeding, . . . a court should not disturb its prior decision unless it is manifestly erroneous." *See Marvin Furniture (Shanghai) Co. Ltd. v. United States*, 37 CIT ___, ___, 899 F. Supp. 2d 1352, 1353 (2013) (internal citations and quotations omitted). The court further "will not grant such a motion merely to give a losing party another chance to re-litigate the case or present arguments it previously raised." *Totes-Isotoner Corp. v. United States*, 32 CIT 1172, 1173, 580 F. Supp. 2d 1371, 1374 (2008) (internal citation and quotations omitted).

was initially raised in Commerce's response to the plaintiff's comments on remand, Meridian has here first responded to the arguments after judgment was entered, and that as a result the court should dismiss Meridian's motion for reconsideration.[6]

"[P]arties cannot use a motion for reconsideration to raise new legal arguments that could have been raised before a judgment was issued." *Bank of Ann Arbor v. Everest Nat. Ins. Co.*, 563 F. App'x 473, 476 (6th Cir. 2014), referencing *Roger Miller Music, Inc. v. Sony/ATV Publ'g*, 477 F.3d 383, 395 (6th Cir. 2007). However, section 2637(d) of Title 28, United States Code, provides that "the Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies [pursuant to Rule 59]" (court's italics), and granting a motion for reconsideration, likewise, rests within the discretion of the court. *See Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007) ("*Agro Dutch*"), quoting *Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007).

In this matter, the need to prevent manifest injustice favors ruling for the plaintiff. The fundamental question here, of whether a good consisting entirely of aluminum extrusions, fasteners, and extraneous materials does not qualify for the "finished goods kit" exclusion, depends entirely upon the proper reading of the scope language, which is a question of law. Although Commerce is entitled to "substantial deference with regard to its interpretation of its own antidumping duty orders," *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) ("*King Supply*") (citation omitted), Commerce may not "'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citation omitted). Parties are generally required to exhaust administrative remedies to aid Commerce in interpretation, but just as determining the proper reading of a statute presents a "pure" legal question that can be addressed despite a party's failure to raise such an argument in the proceedings before Commerce,[7] the language of the scope itself can present a "pure" question of law to the extent the language is not susceptible to interpretation. *See* 19 C.F.R. §351.225(c)(1); *see*, *e.g.*, *Duferco Steel,*

[6] *See* Def's Resp. at 7, referencing, *e.g.*, *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) and Defendant's Resp. to Cmts. Regarding the Second Remand Redetermination, PDoc 38 at 13–18 (Aug. 8, 2014) ("Def's Resp. to Cmts.").

[7] *See Agro Dutch*, *supra*, 508 F.3d at 1029 ("the proper interpretation of [19 U.S.C.] §1675(a)(4) presents a 'pure question of law' that can be addressed on appeal despite [a party's] failure to raise such an argument in the proceedings before Commerce"); *compare id. with Consolidated Bearings v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003)

Inc. v. United States, 296 F.3d 1087, 1089 (Fed. Cir. 2002) ("*Duferco*") ("[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it"). Because the scope language here speaks for itself, it is alone sufficient to resolve the exhaustion issue (*see infra*) as a "pure" question of law; therefore that exception to exhaustion (that the plaintiff has now directed the court to review) is applicable here.[8] Accordingly, Meridian's arguments on the "finished goods kit" exclusion in the scope language, and the merits of Meridian's claim, can and must be addressed despite its failure to forcefully raise the arguments in the proceedings before Commerce.[9]

B. Commerce's Interpretation of the "Finished Goods Kit" Exclusion to the Orders

When determining the scope of an antidumping and/or countervailing duty order, Commerce applies a three-step approach established

("*Consolidated Bearings*") (where additional development of a factual record was required to adequately address the plaintiff's claims, and accordingly it was not appropriate to apply the "pure legal question" exception).

[8] *See Consolidated Bearings*, 348 F.3d at 1003 (*ibid*); *see also Hormel v. Helvering*, 312 U.S. 552, 558 (1941) (exhaustion is not required "where the obvious result would be a plain miscarriage of justice"); *Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1144–45, 724 F. Supp. 2d 1327, 1350 (2010) (exhaustion is not required "where the benefits of exhaustion are inapplicable or outweighed by other concerns") (internal citations omitted).

[9] *See RHI Refractories*, *supra*, 35 CIT at ___, 752 F. Supp. 2d at 1380; *see also NSK Corp. v. United States*, 32 CIT 1497, 1501 (2008) ("a clear legal error will not require a court to grant a motion for reconsideration where that error does not affect the result reached in the first instance"), quoting *Ford Motor Co. v. United States*, 30 CIT 1587, 1588 (2006). Contrary to plaintiff's assertions, the court did not decide the substantive issue in the first two determinations. *Cf.* Pl's Mot. at 10–11 *with Meridian I* at 1–6 (remanding for consideration of the finished goods scope exclusion under the *Auto Parts Remand*, *Drapery Rail Kits Remand*, and *Side Mount Valve Controls Scope Ruling*, which were unaddressed in the underlying scope ruling); *see also Meridian II*, *supra*, 971 F.Supp. 2d at 1268–71 (remanding for a further explanation of why the Trim Kits "are not intended to 'display' an appliance or 'work with removable or replaceable components'"). As discussed, *supra*, the court need not address at this time the plaintiff's other arguments on exhaustion, as the "pure question of law" ground is sufficient to exempt that requirement. *See* Pl's Mot. 2–11; *see also* USCIT Rule 46. Nevertheless, the court notes that *Meridian III* directed Commerce to "proceed from a clean slate on the question of whether the Trim Kits fall within the scope of the *Orders*, fully taking into account the prior relevant scope rulings", *Meridian III*, *supra* 37 F. Supp. 3d at 1271, that the plaintiff was invited to comment on the Draft Remand in which Commerce included an analysis evaluating if a good consisting entirely of aluminum extrusions, fasteners, and "extraneous" materials could qualify for the "finished goods kit" exclusion, and admonishes the plaintiff that, generally speaking, "[i]n litigation contesting antidumping determinations, the exhaustion requirement applies to a situation . . . in which the Department invited a party to submit comments on draft remand results." *Carpenter Tech. Corp. v. United States*, 35 CIT ___, ___, 774 F. Supp. 2d 1343, 1349 (2011) (internal citation omitted).

by the appellate court in *Duerfco*.[10] The first step of this approach is to determine if the governing language is ambiguous. If the language is ambiguous, an analysis of the 19 C.F.R. §351.225 subsections (k)(1) and (k)(2) factors is required.[11] If it is not ambiguous, "the plain meaning of the language governs", *ArcelorMittal*, *supra*, 694 F.3d 82, 87 (Fed. Cir. 2012), and "[t]here is nothing more to interpret". *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 845, 342 F. Supp. 2d 1172, 1185 (2004) ("*Allegheny Bradford*").[12]

The relevant scope language governing the matter at bar is as follows:

> Subject aluminum extrusions may be described at the time of importation *as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls or furniture*. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.* by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandised unless imported as part of the *finished goods 'kit'* defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.
>
> Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks . . . . Such goods are subject merchan-

[10] *A.L. Patterson, Inc. v. U.S.*, 36 CIT ___ , Court No. 11–00192, Slip. Op. 12–103 (2012) at 8, referencing, *ArcelorMittal Stainless Belgium N.V. v. United States*, 35 CIT___, Court No. 08 00434, Slip. Op. 11–82 (2011) ("*ArcelorMittal*") at 6 (citing *Duferco*, *supra*, 296 F.3d at 1096–97 and *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005)).

[11] If upon examination Commerce finds the scope language ambiguous, it evaluates the language pursuant to the subsection (k)(1) considerations of 19 C.F.R. §351.225. If that analysis is not dispositive, then Commerce further analyzes the product under subsection (k)(2) of that regulation. *See* 19 C.F.R. §351.225(k)(1)&(2); *see also Laminated Woven Sacks Comm. v. United States*, 34 CIT ___, ___, 716 F. Supp. 2d 1316, 1321–22 (2010) (internal citations omitted).

[12] *See Duferco*, *supra*, 296 F.3d at 1097 (stating that the scope language of the order is "the cornerstone" of a scope analysis); *see also Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302–04 (Fed. Cir. 2013) (internal citations omitted) ("*Mid Continent*") (stating that the scope language of the order is "the predicate for the interpretive process" by which Commerce must first examine in any scope determination to decide whether merchandise falls within the scope of an antidumping duty order); *see also Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010) ("*Walgreen*") ("it is the language of Commerce's final order that defines the scope of the order albeit 'with the aid of the antidumping petition, the factual findings and legal conclusions adduced from the administrative investigations, and the preliminary order'") (quoting *Duferco* at *id*., quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990)).

> dise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

76 Fed. Reg. at 30650–51 and 30654 (court's italics). The scope language provides for two exclusions:

> The scope . . . excludes *finished merchandise* containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished *windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels*. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "*finished goods kit.*" A *finished goods kit* is understood to mean a packaged combination of parts that contains, at the time of importation, *all of the necessary parts* to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product.

Id. (court's italics). The scope language also clarifies the "finished goods kit" exclusion stating,

> An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the [*Orders*] merely by including fasteners such as screws, bolts, *etc*. in the packaging with an aluminum extrusion product.

Id. (court's italics and bracketing).

As mentioned, although Commerce "enjoys substantial freedom to interpret and clarify its . . . orders" by way of its scope rulings,[13] and its interpretations are entitled to "significant deference" if reasonable and supported by substantial evidence, antidumping and countervailing duty orders "may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, *supra*, 296 F.3d at 1089. As explained in *Allegheny Bradford*, Commerce must only meet

> a low threshold to show that it justifiably found an ambiguity in scope language . . . but it is not justifiable to identify an ambiguity where none exists. . . . Commerce cannot make a scope determination that conflicts with an order's terms, nor can it interpret an order in a way that changes the order's scope.

[13] *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995).

Allegheny Bradford, *supra*, 28 CIT at 843, 342 F. Supp. 2d at 1184, referencing *Novosteel SA v. United States*, 284 F.3d 1261, 1272 (Fed. Cir. 2002) and *Duferco*, *supra*, 296 F.3d at 1087, 1094–95.

In the Second Remand, Commerce found that the brackets, screws, and hinge covers in Meridian's Trim Kits were "fasteners", that the wrench and installation kit were "extraneous materials", and that these parts did not qualify the Trim Kits (the rest of which were made up of unassembled aluminum extrusions, *i.e.*, "finished parts")[14], as a "finished goods kit" because while the Trim Kits "might otherwise meet the definition", under the scope language "kits which consist only of aluminum extrusions, fasteners and extraneous materials do not meet the exclusion criteria for 'finished goods kits'". Second Remand at 13–14, 23–24, referencing *Geodesic Domes Scope Ruling* at 6–7. To support "interpreting" the exclusionary language, Commerce relied on the "clarification" in the scope language of the exclusion that provides as follows: "[a]n imported product will not be considered a 'finished goods kit' and therefore excluded from the scope of the investigation *merely* by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product" (court's italics). *See id.* at 12–14, 23–25; *see also Orders*.

Context renders unreasonable Commerce's reading of the exclusionary language of the scope, and its application of the scope language to the Trim Kits is in conflict with the *Orders*' terms. The reason for that holding is as follows. The specific governing language[15] of the *Orders* unambiguously lists the requirements a kit must meet in order to be excluded from the scope as a "finished goods kit". The kit must be (1) an unassembled combination of parts that (2) includes at the time of importation *all* of the necessary parts to fully assemble a final finished good, with no further finishing or fabrication (such as cutting or punching), and (3) be capable of assembly "as is" into a finished product. *See Orders*. The inclusion of "fasteners" or "extraneous materials" is not determinative when qualifying a kit

[14] *See* Def's Resp. to Cmts. at 6–7; *see also* Second Remand at 5 ("Trim kits are sold as a package of finished parts which, when assembled, will make up a customized frame around a single freezer unit or a single refrigerator unit. Each trim kit consists of extruded aluminum forms, made from aluminum alloy. The trim kits also include a customer installation kit, hexagonal tool, fasteners, and a plastic hinge cover, which is not assembled into the trim.") and at 7.

[15] *Legacy Classic Furniture, Inc. v. United States*, 36 CIT ___,___, 867 F. Supp. 2d 1321, 1329–30 (2012) (noting that specific exclusions are intentionally carved out of general scope inclusions with the purpose of narrowing the expanse of the general scope, and these specific exclusions "should trump the general"), referencing *Wheatland Tube v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998) (noting that "to 'allow Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation' would frustrate the purpose of the antidumping laws.") (citing 19 U.S.C. §1673).

consisting of multiple parts which otherwise meets the exclusionary requirements, as a "finished goods kit". Likewise, there is nothing in the language that indicates that the parts in an otherwise qualifying kit cannot consist entirely of aluminum extrusions. For example, an imported disassembled model Eiffel Tower kit made up entirely of aluminum extrusions with snap-fit joints, which when fully assembled forms that iconic shape, does not need "fasteners" in the sense contemplated by the "finished goods kit" exclusion "clarification", and would apparently qualify for the "finished goods kit" exclusion if it otherwise met the scope-exclusion requirements. Alternatively, if the Eiffel Tower kit did require fasteners to connect the entirely aluminum extrusion parts, but otherwise met the scope-exclusion criteria, it would still apparently qualify for the exclusion. In other words, the exclusionary language does not bar an unassembled "combination of parts" consisting solely of aluminum extrusions, or aluminum extrusions, "fasteners", and "extraneous materials" from qualifying for the exclusion if the combination includes all of the parts necessary for forming a complete finished good.

This reasoning is supported by the scope language itself, in particular at the point where the exclusionary language defining a "finished goods kit" (which requires that "*all of the necessary parts* to *fully assemble* a final finished good" be present at importation) is read in conjunction with the inclusionary scope language (which states that "[s]ubject aluminum extrusions may be described at the time of importation *as parts for final finished products* that are assembled after importation"). By this language, it is clear that in order to qualify as a "finished goods kit", a kit must contain *every* part required to assemble the final finished good, and it logically follows that if a kit is imported with *all* of the parts necessary to fully assemble the kit into its final finished form, then obviously (and necessarily) some of those "parts" may be fasteners.

The "clarification" language does not support Commerce's reading of the language, but is instead simply an attempt to prevent the circumvention of the scope of the *Orders* by ensuring that the "mere" inclusion of fasteners in a packaged aluminum extrusion product, that does not otherwise meet the scope-exclusion requirements, will not qualify it as a "combination of parts" for the "finished goods kit" exclusion. The record shows that Commerce unreasonably ignored the scope definition of what constitutes a "finished goods kit" by expanding the "clarification" language to exclude the Trim Kits, when that language plainly does not disqualify the plaintiffs's Trim Kits from the exclusion. Commerce accepted the plaintiff's description of the product as consisting of a package of multiple unassembled alu-

minum "finished parts" with fasteners, a hexagonal tool for fitting said fasteners, a plastic hinge cover, and a booklet instructing how to assemble the parts into a final finished customized frame,[16] but unreasonably found that the presence of the "fasteners", the assembly tool, the plastic hinge cover, and the assembly instruction booklet were "extraneous" in this kit and were, in and of themselves, sufficient to remove the plaintiff's product from the exclusion to the scope of the *Orders*.[17] And although Commerce claims its exclusion of the Trim Kits was "consistent with the scope of the *Orders*, which includes products such as window frames, door frames and picture frames, and only excludes products that contain additional, non-aluminum extrusion products (*i.e.*, windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material)",[18] Commerce's reading impermissibly imposes the requirements of the "finished merchandise" exclusion — which has no dependant bearing on the "finished goods kit" exclusion — into the requirements of the "finished goods kit" exclusion.[19]

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[16] Second Remand at 5, referencing Scope Ruling Request at 1–2.

[17] Commerce uses the term "extraneous" to define the wrench and installation kit as parts that "entered with the trim kits but that were not part of the final product" but it has effectively applied that term to all non-aluminum parts of the kit, discounting their importance to the final finished product as a whole, and their respective roles in the assembly thereof. *See* Second Remand at 14; *see also* Def's Resp. to Cmts. at 2 (noting that "Commerce determined that the brackets, screws, and hinge covers in Meridian's trim kits were akin to fasteners and, thus, did not qualify the trim kits, *i.e.*, an aluminum extrusion product, for the "finished goods kit" exclusion. In addition, Commerce determined that the wrench and installation kit accompanying the trim kits were extraneous materials that were not part of the final product, and thus also did not qualify the trim kits for the "finished goods kit" exclusion.").

[18] Second Remand at 13–14, referencing Draft Remand at 13.

[19] As the court in *Meridian III* (and Commerce itself) pointed out, the scope language lays out two *separate* exclusions for finished goods, the "finished merchandise" and the "finished goods kit" exclusion, each of which contain independent requirements that a good must meet to qualify. *See Meridian III*, *supra*, 37 F. Supp.3d at 1346 fn.7 and 1353; *see also* Def's Resp. to Cmts. at 12 fn. 7 ("Meridian's comments refer to both exclusions as a single 'finished goods exclusion.' The orders identify the finished goods kit exclusion and the finished merchandise exclusion as two separate exclusions."). Commerce also apparently relies on the interpretive canon *expressio unius est exclusio alterius* for its argument. However, the plain language of the "finished goods kit" exclusion clearly addresses what is required for a good to qualify: the listing of "window frames, door frames and picture frames" as items of subject merchandise included in the *Orders,* and the listing of "windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material" as excluded "finished merchandise", does not imply that only goods that contain some non-aluminum part may qualify for the "finished goods kit" exclusion. Application of the cannon was not only unnecessary, it was applied incorrectly. *Cf. Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) (finding the canon a "feeble helper in an administrative setting").

Commerce's reliance on the *Geodesic Domes Scope Ruling* to support its conclusion is also misplaced. While the "petition, factual findings, legal conclusions and preliminary orders" may aid in Commerce's analysis, "they cannot substitute for the language of the order itself", *Walgreen*, *supra*, 620 F.3d at 1357, which in this instance is clear on its face. If "Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping duty orders," *King Supply*, *supra*, 674 F.3d at 1348 (citation omitted), that still presupposes language susceptible to interpretation. Here, like the "irreconcilability of the Order's beveling sentence with the edging characteristics of [the] fittings" considered in *Allegheny Bradford*, *supra*, 28 CIT at 845, 342 F. Supp. 2d at 1185, "[t]here is nothing more to interpret" from the language of the *Orders* as to their applicability to the completeness of the Trim Kits, and no need to evaluate the *Geodesic Domes Scope Ruling*. *Id.* In any event, Commerce has simply grafted the same flawed reasoning it employed in the *Geodesic Domes Scope Ruling* into the Second Remand result.[20]

II. *Conclusion*

While Commerce's interpretation is to be sustained so long as it reasonably clarifies the scope, the court here concludes that Commerce's interpretation in the Second Remand has impermissibly expanded the scope language by placing a restriction on the "finished goods kit" exclusion that is not supported by the plain language of the scope of the *Orders*. *See*, *e.g.*, *Sandvik Steel Co.*, *supra*, 164 F.3d at 600 ("the order's meaning and scope are issues particularly within the expertise of [Commerce]"). As a result, Commerce's reliance on this interpretation to disqualify the plaintiff's Trim Kits, which "might otherwise meet the definition for a 'finished goods kit' pursuant to the scope of the *Orders*", is not in accordance with law and not supported by substantial evidence. *See* Second Remand at 23–24. Based upon the foregoing, the prior judgment must be, and it hereby is, vacated, and the case must be, and it hereby is, remanded to Commerce a third time, with instructions to provide an interpreta-

[20] In the *Geodesic Domes Scope Ruling*, Commerce found that while a kit containing unassembled parts in the form of aluminum extrusions, screws and assembly instructions "met the initial requirements for inclusion into the "finished goods kit" exclusion" because it contained all of the parts required to fully assemble a final finished good, an "exception to the 'finished goods kit' exclusion" disqualified the geodesic domes from the exclusion, *i.e.*, "an imported product will not be considered a 'finished goods kit' . . . merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusions product". Second Remand at 13, referencing Draft Remand at 12, citing *Geodesic Domes Scope Ruling* at 7 and the *Orders*.

tion of the "finished goods kit" exclusion to the *Orders* that complies with the scope language and to evaluate the plaintiff's Trim Kits under that interpretation.

Results of redetermination shall be due August 24, 2015. Within ten (10) days of the docketing of those results, the parties shall confer and submit a joint proposed scheduling order or separate proposed scheduling orders governing further proceedings on this matter.

It is so ordered.

Dated: June 23, 2015
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE