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Changzhou Hawd Flooring Co. Ltd., et al. v. United States
Court No. 12-00020 (February 15, 2017)
FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT ORDER

I. SUMMARY

The U.S. Department of Commerce (the Department) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the Court or CIT) in *Changzhou Hawd VII*.[1] This litigation pertains to the *Amended Final Determination* in the less-than-fair-value (LTFV) investigation of multilayered wood flooring (MLWF) from the People's Republic of China (PRC) and corresponding *Order*.[2]

For the purposes of this final remand redetermination, the Department is relying on the guidance provided in section 735(c)(5)(B) of the Tariff Act of 1930, as amended (the Act) in assigning a rate to the following separate rate respondents: Changzhou Hawd Flooring Co. (Changzhou Hawd); Dunhua City Jisen Wood Industry Co, Ltd.; Dunhua City Dexin Wood Industry Co., Ltd.; Dalian Huilong Wooden Products Co., Ltd.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; Karly Wood Product Limited; Fine Furniture (Shanghai) Limited; and Armstrong Wood Products (Kunshan) Co., Ltd. (hereinafter, the separate rate plaintiffs). In

[1] *See Changzhou Hawd Flooring Co. v. United States*, Court No. 12-00020, CM/ECF Doc. No. 152 (February 15, 2017) (*Changzhou Hawd VII*).
[2] *See Multilayered Wood Flooring From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 76 FR 76690 (December 8, 2011) (*Amended Final Determination and Order*). *See also* Issues and Decision Memorandum (IDM).

particular, the Department is applying the "expected method"[3] under the SAA and assigning a rate to the separate rate plaintiffs based on the weighted average of the individually-investigated respondents'[4] zero and *de minimis* dumping margins. As discussed further below, the Department is not revising the cash deposit rate for these companies, because each of these companies has received a revised cash deposit rate in subsequent administrative reviews. In addition, the Department is not excluding these companies from the *Order*. A complete analysis of the remanded issue is included in section II, below.

The Department released draft remand results on June 29, 2017, and solicited comments from interested parties.[5] We received comments from multiple interested parties, which are addressed below in the section entitled "Comments on Draft Results of Redetermination."[6]

II. REMANDED ISSUE

1. The Rate to Assign To The Separate Rate Plaintiffs

A. Background

The Department assigned a rate of 3.30 percent to all separate rate respondents in the *Amended Final Determination and Order*.[7] The Department derived this rate by averaging the rates of the two individually investigated respondents with weighted-average margins above *de*

[3] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, at 873 (1994) (SAA), reprinted in 1994 U.S.C.C.A.N. 4040, 4201.
[4] The individually-investigated respondents in the investigation were Zhejiang Yuhua Timber Co., Ltd. (Yuhua); Zhejiang Layo Wood Industry Co., Ltd. (Layo Wood); and Riverside Plywood Corporation, Samling Elegant Living Trading (Labuan) Limited, Samling Global USA, Inc., Samling Riverside Co., Ltd. and Suzhou Times Flooring (collectively, the Samling Group).
[5] Draft Results of Redetermination Pursuant to Court Order (June 29, 2017) (Draft Remand Redetermination).
[6] We received comments from the following interested parties: Coalition for American Hardwood Parity (CAHP); Armstrong Wood Products (Kunshan) Co. Ltd. (Armstrong); Fine Furniture (Shanghai) Limited (Fine Furniture); Lumber Liquidators Services LLC (Lumber Liquidators); Changzhou Hawd Flooring Co., Dunhua City Jisen Wood Industry Co, Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Dalian Huilong Wooden Products Co., Ltd., Kunshan Yingyi-Nature Wood Industry Co., Ltd., Karly Wood Product Limited (referred to collectively as Changzhou Hawd *et al.*).
[7] *See Amended Final Determination and Order*, 79 FR at 76692.

minimis (*i.e.*, Layo Wood and Samling Group), using section 735(c)(5)(A) of the Act as guidance.[8]

Layo Wood, Samling Group, and certain separate rate respondents, appealed the *Amended Final Determination and Order*. In its first remand order, the Court directed the Department to reconsider or further explain certain of its surrogate value selections, as well as its targeted dumping analysis.[9] Upon reconsidering these issues in the First Remand Redetermination, the Department made certain changes and calculated zero or *de minimis* margins for Layo Wood and Samling Group.[10]

Because all of the individually-investigated respondents now had margins that were zero or *de minimis*, the guidance in section 735(c)(5)(A) of the Act no longer applied to the Department's separate rate calculation. The Department, thus, pursuant to the guidance in section 735(c)(5)(B) of the Act, selected another "reasonable method" to establish rates for the separate rate plaintiffs. In particular, the Department assigned to the separate rate plaintiffs the simple average of the 25.62 percent rate of the PRC-wide entity[11] and the zero percent or *de minimis* weighted-average calculated rates for each of the three mandatory respondents.[12]

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[8] In the amended final determination, Layo Wood and Samling Group received margins above *de minimis*. Yuhua received a zero percent margin. *See id.* The statute and the Department's regulations do not address the establishment of a separate rate to be applied to respondents not selected for individual examination when the Department limits its examination pursuant to section 777A(c)(2) of the Act. In assigning separate rates in the context of non-market economy cases, the Department generally looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation. *See* IDM at 51.

[9] *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 925 F. Supp. 2d 1332, 1351 (Ct. Int'l Trade 2013) (*Changzhou Hawd I*).

[10] *See* Final Results of Redetermination Pursuant to Court Order, *Baroque Timber Industries (Zhongshan) Company, Limited, et al. v. United States*, dated November 14, 2013 (First Remand Redetermination), at 2-3.

[11] Because of the changes to the individually investigated respondents' rates, the Department reconsidered the margin for the PRC-wide entity in the First Remand Redetermination. In particular, the Department based the PRC-wide rate on the highest transaction-specific margin calculated for an individually investigated respondent in the First Remand Redetermination (*i.e.*, 25.62 percent). *See* First Remand Redetermination at 27.

[12] *See* First Remand Redetermination at 27.

In *Changzhou Hawd II*, the CIT affirmed the First Remand Redetermination as it pertained to Layo Wood and Samling Group.[13] In addition, the CIT found that the Department's determination to simple-average the rates assigned to the individually-investigated respondents with the PRC-wide rate was not, *per se,* unreasonable.[14] The CIT, nonetheless, found that the Department's determination was not supported by substantial evidence, because it had not shown how the chosen rate related to the "economic reality" of the separate rate plaintiffs.[15] The CIT, thus, remanded the case, so that the Department could provide the required rationale.

In the Second Remand Redetermination,[16] the Department inferred that the margins of the separate rate plaintiffs were above *de minimis*. The Department based this inference on two primary considerations. First, the Department observed that 110 companies did not respond to the quantity and value questionnaire, that certain of those companies could have been selected as mandatory respondents, and that it is reasonable to infer those companies would have received above-*de minimis* rates. Second, the Department corroborated this inference using the intervening results of the first administrative review, where the Department found continued dumping, notwithstanding that the imposition of an order normally dampens dumping.[17]

The Department had assigned updated dumping margins to seven of the eight separate rate plaintiffs in the first administrative review of the order, and these margins were the basis for

[13] *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 971 F. Supp. 2d 1333, 1341 (Ct. Int'l Trade 2014) (*Changzhou Hawd II*). As a result, the Department revised the margins for Layo Wood and Samling Group to zero or *de minimis* in an amended final determination and ordered U.S. Customs and Border Protection (CBP) to terminate the suspension of liquidation for shipments of subject merchandise by Layo Wood and Samling Group. *See Multilayered Wood Flooring from the People's Republic of China: Notice of Court Decision Not in Harmony With the Final Determination and Amended Final Determination of the Antidumping Duty Investigation*, 79 FR 25109 (May 2, 2014).
[14] *Changzhou Hawd II*, 971 F. Supp. 2d at 1341.
[15] *Id.* at 1345.
[16] *See* Final Results of Redetermination Pursuant to Court Order, *Baroque Timber Industries (Zhongshan) Company, Limited, et al. v. United States*, dated May 30, 2014 (Second Remand Redetermination).
[17] *See* Second Remand Redetermination at 2-7.

the assessment of antidumping duties covered by the period of review.[18] The Department, thus, concluded that it would be an unnecessary use of administrative and judicial resources to determine a precise rate that had been superseded by the cash deposit rates determined in the first administrative review, and that would not be used for assessment purposes. For the remaining separate rate plaintiff (Changzhou Hawd), which had no shipments during the first review period, the Department found that it could not determine a margin specific to Changzhou Hawd's economic reality without individually investigating the company.[19]

The Department subsequently sought, and received, a voluntary remand to consider the possibility of conducting a limited investigation of the eight separate rate plaintiffs.[20] Although the Department gave the parties an opportunity to suggest how a limited investigation might be conducted, the Department ultimately determined that it could not find a method that would satisfy the requirements of the statute and regulations.[21] Thus, the Department returned to the Second Remand Redetermination, and assigned seven of the eight separate rate plaintiffs an unspecified above-*de minimis* rate and stated that it still intended to investigate Changzhou Hawd fully.[22]

The CIT sustained the Department's decision to assign seven of the separate rate plaintiffs an unspecified above-*de minimis* rate.[23] In particular, the CIT found that the Department had appropriately corroborated the rate with the results of the first administrative review, finding that the results of the first administrative review "serves to confirm that the

[18] *See* Second Remand Redetermination at 7-8; *see also* section 751(a)(2)(C) of the Act.
[19] *See* Second Remand Redetermination at 8-9.
[20] *See Changzhou Hawd Flooring Co. v. United States*, 6 F. Supp. 3d 1358, 1362 (Ct. Int'l Trade 2014) (*Changzhou Hawd III*); *see also* Final Results of Redetermination Pursuant to Court Order, *Changzhou Hawd Flooring Co., Ltd., et al. v. United States*, dated October 16, 2014 (Third Remand Redetermination).
[21] *See* Third Remand Redetermination at 16-17.
[22] *Id.*
[23] *Changzhou Hawd Flooring Co., Ltd. v. United States*, 44 F. Supp. 3d 1376 (Ct. Int'l Trade 2015) (*Changzhou Hawd IV*).

separate rate respondents' economic reality is more varied and complicated than the mandatory respondents' *de minimis* rates here suggest."[24] The CIT also sustained the Department's decision not to calculate a specific rate that would be "without use and without effect."[25]

However, the CIT found that the Department's decision to conduct a full investigation of Changzhou Hawd "at such a late date" was "arbitrary and capricious," considering the Department's prior finding that it did not have the resources to accept voluntary respondents.[26] Therefore, upon reconsidering this issue in the Fourth Remand Redetermination, the Department assigned Changzhou Hawd a cash deposit rate consistent with the other separate rate plaintiffs, until Changzhou Hawd's new cash deposit and assessment rate was established in the final results of the second administrative review.[27] The CIT sustained this determination and entered judgment accordingly.[28] Each of the separate rate plaintiffs appealed to the United States Court of Appeals for the Federal Circuit (Federal Circuit).

In *Changzhou Hawd VI*, as discussed in further detail below, the Federal Circuit vacated the CIT's judgment and remanded back to the CIT with instructions to remand to the Department for reconsideration.[29] On May 19, 2017, the CIT remanded the case back to the Department "for further proceedings in conformity with the Federal Circuit's decision."[30]

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[24] *Id.* at 1387.
[25] *Id.* at 1388.
[26] *Id.* at 1390.
[27] *See* Final Results of Redetermination Pursuant to Court Order, *Changzhou Hawd Flooring Co., Ltd., et al. v. United States*, dated March 24, 2015 (Fourth Remand Redetermination).
[28] *Changzhou Hawd Flooring Co. v. United States*, 77 F. Supp. 3d 1351 (Ct. Int'l Trade 2015) (*Changzhou Hawd V*). As a result, the Department revised the cash deposit rate for the PRC-wide entity. *See Multilayered Wood Flooring from the People's Republic of China: Notice of Court Decision Not in Harmony With the Final Determination and Amended Final Determination of the Antidumping Duty Investigation*, 80 FR 44029 (July 24, 2015). In addition, the Department did not revise the cash deposit rate for the separate rate plaintiffs as a result of the litigation because each had received updated cash deposit rates in subsequent administrative reviews. *Id.*
[29] *See Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1013 (Fed. Cir. 2017) (*Changzhou Hawd VI*).
[30] *See Changzhou Hawd VII.*

B. Analysis

In *Changzhou Hawd VI*, the Federal Circuit first recognized that the Department has relied on section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance in establishing the separate rate in non-market economy cases when the Department limits its examination pursuant to section 777A(c)(2) of the Act.[31] In addition, the Federal Circuit found that in determining "any reasonable method" under section 735(c)(5)(B) of the Act in proceedings where all margins calculated for individually investigated respondents are zero or *de minimis*, the Department must follow the "expected method" under the SAA in assigning rates to separate rate respondents, unless the Department concludes that this method "is not feasible" or would result "in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers."[32] The Federal Circuit found that Congress' preference for the expected method is rooted in the presumed "representativeness" of individually investigated exporters, and that deviation from the expected method is permitted only where the Department has found "based on substantial evidence that there is a reasonable basis for concluding that the separate rate respondents' dumping is different."[33]

The Federal Circuit found that the Department's justification for assigning above-*de minimis* rates to the separate rate plaintiffs was not supported by substantial evidence. As explained above, the Department justified its decision to assign above *de minimis* rates to the separate rate plaintiffs, in large part, on the fact that 110 companies did not respond to the quantity and value questionnaire, that certain of those companies could have been selected as

[31] *See Changzhou Hawd VI*, 848 F.3d at 1011 (citing *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1348 (Fed. Cir. 2016) (*Albemarle*)).
[32] *Id.* (quoting SAA at 873).
[33] *Id.* at 1012.

mandatory respondents, and that it was reasonable to infer those companies would have received above-*de minimis* rates. The Court held that the Department's rationale was based upon the behavior of firms that did not respond to the quantity and value questionnaires, which "does not suggest the needed inference about the separate-rate firms, all of which did respondent to the questionnaire responses."[34] Instead, the Court held that, "under {the Department's} reasoning, the separate-rate firms' decisions to respond to the questionnaires might suggest that they are more similar to other firms, like the mandatory respondents, that responded."[35]

In light of the Court's holding, and upon review of the record on remand, the Department continues to rely on section 735(c)(5)(B) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance in establishing the rate for the separate rate plaintiffs for purposes of this final remand redetermination. In particular, the Department concludes that it is unable to identify substantial evidence on the record "that there is a reasonable basis for concluding that the separate rate respondents' dumping is different."[36] Therefore, following the Court's reasoning, in determining "any reasonable method" under section 735(c)(5)(B) of the Act, the Department is applying the expected method under the SAA and assigning as the rate to the separate rate plaintiffs the weighted average of the individually investigated respondents' weighted-average dumping margins, which is zero.

If this final remand redetermination is sustained by the CIT, the Department intends to publish a notice of amended final determination which will notify the public of the revised rates for the separate rate plaintiffs. However, the Department does not intend to alter the cash deposit

[34] *Id.*
[35] *Id.*
[36] *Id.* (citing *Albemarle*, 821 F.3d at 1353).

rate for the separate rate plaintiffs or exclude the separate rate plaintiffs from the *Order* as a result of this litigation, as discussed below.

In an investigation, the rates assigned in the final determination (or in any amended final determination) will be used as the basis for the collection of cash deposits, unless and until superseded in an intervening administrative review.[37] In contrast to administrative reviews, the rates established during an investigation will not be used for assessment purposes,[38] except that during the provisional measures period, the amount of duties that may be assessed is "capped" by the rates the Department determined in the preliminary and final determinations.[39] The provisional measures cap is established by the amount of security collected during the provisional measures period, and is not revisited where (as here) the Department makes methodological changes as a result of a redetermination.[40] Thus, in litigation involving revised dumping margins in investigations, the Department only will alter cash deposit rates (which is done on a prospective basis), if there has been no revised cash deposit rate established in a subsequent administrative review.[41] Here, because each of the separate rate plaintiffs have had their respective cash deposit rates revised in subsequent administrative reviews,[42] the Department

[37] After publication of an order, the Department instructs CBP to require the posting of cash deposits at the rates established in the final determination of the investigation. *See* section 736(a)(3) of the Act. However, if an exporter is assigned a new rate in an administrative review, that rate "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." *See* section 751(a)(2)(C) of the Act.

[38] The amounts deposited will serve as the basis for liquidation only where no review has been requested of a company, which does not apply to the eight separate rate plaintiffs. *See* 19 CFR 351.212(c)(1).

[39] *See* 19 CFR 351.212(d).

[40] *See* Second Remand Redetermination at 7-8; *see also Changhou Hawd IV*, 44 F. Supp. 3d 1388 (sustaining this finding). No parties contested that finding before the Federal Circuit.

[41] *See* section 751(a)(2)(C) of the Act.

[42] *See Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46899 (July 19, 2016); *see also Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Final Partial Rescission of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 25766 (June 5, 2017). As a result of these reviews, all of the separate rate plaintiffs (with the exception of Armstrong Wood Products (Kunshan) Co., Ltd.) currently has a cash deposit rate of zero percent.

is not revising their respective cash deposit rates for purposes of any forthcoming amended final determination as a result of this litigation. The Department made a similar determination in the second and fourth remand redeterminations, that, because all rates had been superseded by the time of the second administrative review final results, the cash deposit rates of the separate rate plaintiffs would not be revised.[43] The CIT sustained this, and no parties contested this finding before the Federal Circuit.[44]

In addition, section 735(a)(4) of the Act provides that in making a final determination in a less-than-fair-value investigation, the Department "shall disregard any weighted average dumping margin that is *de minimis* as defined in section 733(b)(3)."[45] The SAA provides further clarification on this provision, stating that "{e}xporters or producers with *de minimis* margins will be excluded from any affirmative determination."[46] The statute defines "weighted average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."[47] The Federal Circuit, in sustaining the underlying trial court decision, affirmed that "the law {is} clear that Commerce could exclude a party from an AD order only if the producer's *dumping margin* is less than two percent or *de minimis*….Otherwise, the party must be included in an affirmative final determination of sales at LTFV."[48]

Separately, as discussed above, the Department has relied on the guidance provided in section 735(c)(5) of the Act in determining the rate for the separate rate plaintiffs for purposes of

[43] *See* Second Remand Redetermination at 7-8; Fourth Remand Redetermination at 5-6.
[44] *Changzhou Hawd IV*, 44 F. Supp. 3d at 1388; *Changzhou Hawd V*, 77 F. Supp. 3d at 1360.
[45] The countervailing (CVD) statute contains similar language. *See* section 705(a)(3).
[46] *See* SAA at 844.
[47] *See* section 771(35)(B) of the Act
[48] *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1216 (Fed. Cir. 2005) (*Dupont*) (emphasis added) (quoting *Dupont Teijin Films USA, LP v. United States*, 273 F.Supp.2d 1347, 1348 (Ct. Int'l Trade 2003)).

this final remand redetermination, when the Department limits its examination pursuant to section 777A(c)(2) of the Act. Section 777A(c)(2) of the Act provides that, if it is not practicable for the Department to determine "individual weighted average dumping margins" for each known exporter or producer under section 777A(c)(1) of the Act, then the Department may limit its examination to a reasonable number of exporters or producers. Under such circumstances (*i.e.*, when individual examination has been limited pursuant to section 777A(c)(2) of the Act), section 735(c)(5)(A) of the Act provides that "the all others rate will be equal to the weighted-average of individual dumping margins calculated for those exporters and producers that are individually investigated, exclusive of any zero and *de minimis* margins, and any margins determined entirely on the basis of the facts available."[49] Under the exception in section 735(c)(5)(B) of the Act, if all such individual dumping margins are zero, *de minimis*, or determined entirely on the basis of facts available, the Department may rely on any reasonable method, with the "expected method in such cases … to weight average the zero and *de minimis* margins and margins determined pursuant to the facts available{.}"[50]

Thus, we find that there is generally a key distinction in the statutory scheme between: (1) producers or exporters who have been individually investigated and which receive individual weighted average dumping margins that are zero or *de minimis*; and (2) producers or exporters who have not been individually investigated, and are, therefore, subject to the all others rate, which is based upon the individual weighted-average dumping margins which are zero or *de minimis*: the former will be excluded from an affirmative antidumping duty (AD) order, while the later remain subject to the affirmative order. Here, as discussed above, on remand, the Department has determined the rate for the separate rate plaintiffs based on the weighted average

[49] *See* SAA at 873.
[50] *Id.*

of the individually investigated respondents' weighted-average dumping margins, which is zero; however, in light of the statutory scheme, the separate rate plaintiffs will not be excluded from the *Order*.

This is consistent with the Department's past practice and current regulation. The Department's practice prior to the Uruguay Round Agreements Act (URAA) (under which current section 735(a)(4) of the Act was established) was to exclude only those companies that were individually examined and received a zero or *de minimis* margin. For instance, in *SBTS from Taiwan*, the Department determined an individual dumping margin of zero percent for a respondent, and applied that zero percent margin as the "all-others" rate.[51] However, only the respondent with the zero percent margin was excluded from the order:

> {T}he Department has determined that SBTS from Taiwan are being, or are likely to be, sold in the United States at less than fair value. The only company excluded from this determination is SMS. Therefore, all companies subject to the "All Others" rate are covered by the Department's affirmative determination, but will be subject to a cash deposit of 0.00%.[52]

This determination was affirmed by the CIT and the Federal Circuit.[53]

In its rulemaking pursuant to the URAA, the Department made certain clarifying edits to its existing regulations which pertained to exclusions. The Department promulgated a regulation, 19 CFR 351.204(e)(1), that extends this benefit only to companies that receive "individual" margins of zero or *de minimis*.[54] In promulgating this regulation, the Department further confirmed that under 19 CFR 351.204(e)(1), "any exporter or producer that is

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[51] *Certain Small Business Telephone Systems and Subassemblies Thereof from Taiwan*, 54 FR 42543 (October 17, 1989) (*SBTS from Taiwan*).
[52] *Id.* at 42549-50.
[53] *Auto Telecom Co., Ltd. v. United States*, 765 F. Supp. 1094, 1096-98 (Ct. Int'l Trade 1991) (*Auto Telecom*), *aff'd Bitronic Telecoms Co., Ltd., v. United States*, 954 F.2d 733 (Table) (Fed. Cir. 1992) (per curiam).
[54] 19 CFR 351.204(e)(1) ("The Secretary will exclude from an affirmative final determination under section 705(a) or section 735(a) of the Act or an order under section 706(a) or section 736(a) of the Act, any exporter or producer for which the Secretary determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis*.").

individually examined and that receives an individual weighted-average dumping margin or countervailable subsidy rate of zero or *de minimis* will be excluded from an order."[55] The Department also recognized, in adopting the regulation, that "decisions on exclusions will be based on a firm's *actual* behavior{,}" and that the revised statutory language and regulations allowed for companies that were not selected for individual examination to request participation as voluntary respondents.[56]

This limitation, which is fully contemplated by the statutory scheme as discussed above, reflects that exclusion from the discipline of an order is an extraordinary measure, and one that should only be available in limited circumstances to companies that have been subject to individual investigation and all that entails (*i.e.*, providing full and complete questionnaire responses, cooperating with the Department, subject to verification, etc.).

After considering the statutory and regulatory language and history above, we conclude that companies that have not been individually examined will not be eligible for exclusion from an AD order. In other words, a separate rate respondent that is assigned a rate of zero in litigation based on the margins calculated for individually-investigated respondents will not itself be excluded from an order; rather, that company will only receive the benefit of a zero cash deposit rate unless and until that rate is superseded by the final results of an intervening administrative review. In light of this, the Department, therefore, has excluded companies that were subject to individual investigation that received zero or *de minimis* margins, such as Layo Wood and the Samling Group.[57] However, although the separate rate plaintiffs are receiving a

[55] *See Antidumping Duties; Countervailing Duties: Proposed Rulemaking*, 61 FR 7308, 7315 (February 27, 1996) (emphasis added).
[56] *Id.*
[57] *See Multilayered Wood Flooring from the People's Republic of China: Notice of Court Decision Not in Harmony With the Final Determination and Amended Final Determination of the Antidumping Duty Investigation*, 79 FR 25109 (May 2, 2014).

rate of zero or *de minimis* in this final remand redetermination, because they have not been individually investigated, we are not excluding them from the *Order*. As discussed above, the Department's interpretation in this regard is grounded in the plain language of the statute, its regulation, and prior practice.

For these reasons, in these final remand redetermination, we have assigned a rate of zero to the separate rate plaintiffs;[58] however, we have determined not to exclude these companies from the *Order*. Further, because the rates determined for each of these companies in the investigation have been superseded by intervening administrative reviews, and because the provisional measures deposit cap is not subject to change, the Department does not intend to issue any further instructions to CBP if the results of this remand redetermination are sustained by the Court in final and conclusive litigation.

III. COMMENTS ON DRAFT RESULTS OF REDETERMINATION

Comment 1: Whether the Department correctly assigned a separate rate of zero to the separate rate plaintiffs in the Draft Remand Redetermination

Armstrong Comments

- Following the instructions from the Federal Circuit, the Department applied the "expected method" under the SAA and assigned as the rate to the separate rate plaintiffs the weighted average of the individually investigated respondents' weighted-average dumping margins, which is zero.
- Armstrong supports this determination, as no other outcome is permissible under the law of this case.

CAHP Comments

- CAHP supports the Draft Redetermination and submits that it is fully responsive and consistent with the direction of the Federal Circuit. The Department applied the expected method to assign a rate to the separate rate plaintiffs.

[58] Changzhou Hawd Flooring Co.; Dunhua City Jisen Wood Industry Co, Ltd.; Dunhua City Dexin Wood Industry Co., Ltd.; Dalian Huilong Wooden Products Co., Ltd.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; Karly Wood Product Limited; Fine Furniture (Shanghai) Limited; and Armstrong Wood Products (Kunshan) Co., Ltd.

Department's Position:

In the absence of any arguments otherwise, the Department has made no changes to its analysis with respect to this issue.

Comment 2: Whether the law requires the exclusion of the separate rate plaintiffs from the *Order*

Changzhou Hawd *et al.* Comments

- Section 735(a)(4) of the Act provides that the Department shall disregard any weighted-average dumping margin that is *de minimis* as defined in section 733(b)(3) of the Act. The plain meaning of the statute requires that the Department exclude all respondents with a *de minimis* margin.
- The Department has determined that the dumping behavior of the separate rate appellants is the same as that of the mandatory respondents for whom the Department calculated dumping margins of zero or *de minimis* and yet denied the separate rate appellants the statutory mandate to exclude them from the AD order by distinguishing between individually investigated respondents and "all others," whose dumping margin is calculated as the weighted average of the individually investigated respondents' weighted-average dumping margins.
- Where the individual investigation of all respondents is not feasible, the Department chooses the largest exporters of subject merchandise for individual investigation under the assumption that these exporters would be representative of all exporters.
- The Department's reliance on an interpretation of its regulations is not valid if the regulation directly contradicts the statute. Insofar as the Department's regulation could be interpreted to mean that the exclusion benefit does not extend to separate rate respondents found to conform to the same exporting practice as the representative *de minimis* mandatory respondents, the statute must trump these regulations. The Department's interpretation of its regulation cannot create ambiguity in the statute where none exists.[59]
- The Department states there is a key distinction in the statutory scheme between "(1) producers or exporters which receive weighted average dumping margins that are zero or *de minimis*; and (2) producers or exporters subject to the all others rate, which is based upon the weighted-average dumping margins which are zero and *de minimis*: the former will be excluded from an affirmative AD order, while the later remain subject to the affirmative order." The Department provides no logical bridge from its description of the relevant statute and regulation and its conclusions. The Department provided no valid interpretation of U.S. antidumping law that could excuse it from following the clear language of the law and excluding the separate rate appellants from the *Order*.

[59] *See MacLean-Fogg Co. v. United States*, 753 F.3d 1237, 1244 (Fed. Cir. 2014).

Fine Furniture Comments

- As the first flawed basis for its determination not to exclude Fine Furniture from the *Order*, the Department engages in a selective, distorted reading of the statute and regulations. The Department conflates exclusion from the *Order* with assessment and cash deposit rates. The issue is not the proper assessment or cash deposit rate, the issue is whether Fine Furniture must be excluded from the *Order* given that its separate rate was determined to be zero or*de minimis*.
- The statute states that, in making a determination as to "whether the subject merchandise is being, or is likely to be, sold in the United States at less than fair value," the Department "shall disregard any weighted average dumping margin that is *de minimis*."[60]
- The Department has assigned Fine Furniture a zero margin in the investigation. Under the plain meaning of the statute, the Department cannot make an affirmative finding of dumping as to Fine Furniture. A negative determination of dumping must mean exclusion from the *Order* because there can be no affirmative determination as to a company that has a zero dumping margin from an investigation.
- The regulations support the conclusion that Fine Furniture must be excluded from the *Order*. Under the plain meaning of the regulations, the Department is required to exclude an exporter or producer (like Fine Furniture) for which it has "determined" an individual weighted-average dumping margin of zero or *de minimis*. [61]
- The CIT has interpreted the prior version of this regulation and found in *Chang Tieh* that "whenever a company is investigated and receives a zero margin, it should thus be excluded from the antidumping order pursuant to 19 CFR 355.21(c)."[62] The Court rejected the Department's attempts to put conditions on exclusion for a company (like Fine Furniture) that was investigated and determined to have a *de minimis* rate.
- Here, the Department has "determined" a dumping margin of zero for Fine Furniture and 19 CFR 351.204(e) requires the Department to exclude Fine Furniture from the *Order*.
- The language cited by the Department does not indicate that separate rate respondents are never entitled to exclusion. Rather, this language suggest that the Department must look to actual evidence to determine whether to exclude a company from an AD order.
- The Department ignores that Fine Furniture's full questionnaire responses are on the record and it requested to be a voluntary respondent. Thus, the Department's claim that 19 CFR 351.204(e) should not be applied to separate rate respondents because decisions shall be based on the "firm's actual behavior" and such companies can always "request participation as voluntary respondents" carries no water with respect to Fine Furniture, whose actual behavior is on the record of this review.
- The Federal Circuit's recent decisions in *Albemarle* and *Changzhou Hawd VI* held that "the mandatory respondents in this matter are assumed to be representative."[63] Given that mandatory respondents are assumed to be representative, the Department may not employ a categorical policy of not excluding separate rate companies who receive a *de minimis* margin because those companies are presumed not to be dumping. The Department may not divorce these zero dumping margins from the "behavior" that

[60] *See* section 735(a)(1) of the Act; *see also* section 736(a)(1) of the Act.
[61] 19 CFR 351.204(e).
[62] *See Chang Tieh Indus. Co. v. United States*, 840 F. Supp. 148 (CIT 1993) (*Chang Tieh*).
[63] *See Changzhou VI*, 848 F. 3d at 1012.

generated them. The Department identifies no evidence that Fine Furniture's behavior would not have earned an exclusion. To the contrary, the record contains unrebutted evidence that Fine Furniture was not dumping.

- As the second basis for its refusal to exclude Fine Furniture from the *Order*, the Department appears to be employing a policy that it has never once raised in this litigation, devoid of support in the regulations or statute: "in litigation involving revised dumping margins in investigations, the Department only will alter cash deposit rates (which is done on a prospective basis), if there has been no revised cash deposit rate established in a subsequent administrative review."
- The Department fails to note a source for this policy, and if anything, this new "policy" is no different than the previous "above-*de minimis*" finding in the prior remand that the Federal Circuit rejected.
- Third, the Department fails to provide a source for its interpretation that producers or exporters that receive weighted-average dumping margins that are zero or *de minimis* are entitled to exclusion, but producers or exporters subject to the all others rate are not. Nothing in the statute or the Department's regulations supports such a policy.
- Because the mandatory respondents are representative of Fine Furniture under the Federal Circuit's decisions in *Albemarle* and *Changzhou Hawd*, Fine Furniture's treatment should be the same under the statute.
- Finally, the Department's decision not to exclude Fine Furniture from the *Order* is inconsistent with the United States' World Trade Organization (WTO) obligations. Article 5.8 of the Antidumping Agreement requires that "{t}here shall be immediate termination in cases where the authorities determine the margin of dumping is *de minimis* or that the volume of dumped imports, actual or potential, or the injury is negligible."[64] The United States is obligated under the WTO Agreement to exclude Fine Furniture from the *Order*.

Lumber Liquidators Comments

- All of the separate rate respondents are not just entitled to a fair recalculation of the separate rate; as the rate is zero, they are also entitled to an exclusion from the *Order*. Had the Department correctly calculated the antidumping margins as zero or *de minimis*, there would have been no basis for the *Order* and there would not have been subsequent administrative reviews.
- The Department cannot avoid this exclusion by making assumptions on subsequent proceedings. In investigations, the Department is instructed by statute to disregard any weighted-average dumping margin that is zero or *de minimis*[65]
- There is no statutory authority to include an exporter under an AD order because it may have "received a revised cash deposit rate in subsequent administrative reviews" when its dumping margin in the investigation is zero or *de minimis*.
- The record is devoid of any evidence, let alone substantial evidence, of dumping during the original investigation. Since there is no evidence of dumping in the investigation, the

[64] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art 5.8.
[65] *See* section 735(a)(4) of the Act.

Order itself must be terminated. An *Order* predicated on an investigation in which no company has been found to have dumped is not supported by substantial evidence.

Armstrong Comments

- Exclusion is the mandatory legal consequence of the Department's decision that Armstrong and the other separate rate respondents did not dump during the original investigation. Section 735(a)(4) of the Act requires that the Department disregard *de minimis* margins. The SAA provides further clarification that exporters/producers with *de minimis* margins will be excluded from any affirmative determination. The Federal Circuit has agreed that there is no ambiguity in these provisions that permits an interpretive exercise under step two of *Chevron*.[66]
- The fact that the permissible methods of determining the margin differ as between individually investigated respondents and separate rate respondents does not in any way detract or alter the fact that these entities were ultimately assigned a zero margin of dumping under the statute.
- The difference in methodology applied to determine the margin is not because separate rate respondents are being held to a different standard for exclusion or hold a different status under the statute in terms of the eligibility for exclusions. Rather, the difference in methodology applied is solely a function of the fact that the Department for its own administrative convenience chose to limit its individual examinations to three companies.
- The Department has stated that 19 CFR 351.204(e)(1) extends the benefit of exclusion only to companies that receive "individual" margins of zero or *de minimis*. However, the extent that the regulation is applied in a manner that contravenes the statute, it carries no force of law.
- Furthermore, the regulation speaks to determining an individual weighted-average dumping margin; it does not mention individually examining any specific data from the respondents, or applying any particular methodology in arriving at the individual margin. In this case, the Department has, in fact, assigned individual exporter and producer-specific combination margins to each of the specific, individually-identified, separate rate respondents that participate in the investigation (including Armstrong). They are individual margins, arrived at through a different methodology.
- Although, the Department argues that its refusal to follow the statute in this case is justified because exclusion from an order is an extraordinary measure, that is not how the law is written.
- Exporters for whom the Department has determined a zero margin in an investigation are required to be excluded from the order. This is an ordinary and logical application of the law. The fact that the Department views it as extraordinary that a company that did not dump subject merchandise should be excluded from an AD order reveals an apparent bias or proclivity in the Department's approach.
- The facts are straightforward; mandatory respondents were selected from a pool of exporters that includes the separate rate respondents. All of these entities, whether or not selected for individual examination, cooperated fully with the Department and provided all information requested of them. Solely because the Department lacked the resources to

[66] *See Dupont*, 407 F.3d at 1215.

accept all of the respondents as mandatory respondents, the separate rate respondents were not individually examined and had their margin of dumping determined in a different manner. However, the Department cannot reasonably punish the separate rate respondents because the Department made a decision for its own administrative ease.
- Finally, the position advocated by the Department is arbitrary and capricious because it automatically and permanently deprives separate rate respondents of any opportunity to be excluded from an AD order.

CAHP Comments

- With regard to the exclusion question, the separate rate plaintiffs should not be excluded from the *Order*. The separate rate plaintiffs are not producers that were "individually examined:" section 735(c)(5)(A) of the Act states that "the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated." Companies that fall under "all-others," including separate rate applicants in antidumping investigations involving non-market economies (such as the separate rate plaintiffs here) are not "individually investigated."
- Since exclusion from an order applies only to any producer/exporter that is individually examined (per 19 CFR 351.204(e)(1) and the Department's clarification under the URAA) and since the separate rate plaintiffs were not "individually investigated," the Department is correct in not excluding the separate rate plaintiffs from the discipline of the *Order*.
- It is a well-established rule of statutory construction that the same word or term appearing in the same statute or regulation is to be interpreted in the same manner.[67] If the separate rate plaintiffs were not individually investigated, then they are not eligible for the exclusion; opened only to producers who were individually examined.
- If the Department were to exclude the separate rate plaintiffs here, it would be in contravention of the controlling law and regulations. For a separate rate applicant, the foreign producer needs only to demonstrate that it operates independent of *de jure* or *de facto* control by the Government of China. The Department's questionnaire for separate rate applicants requires no information regarding the prices or the pricing practices or even the factors of production of these companies.

Department's Position:

We disagree with the separate rate plaintiffs and Lumber Liquidators, each of whom commented on this issue, as noted above, regarding whether exclusion is appropriate in this case.

As an initial matter, as the Department has demonstrated, we disagree with the separate rate plaintiffs' claim that the plain meaning of the statute unambiguously requires exclusion. As

[67] *See* U.S. Congressional Research Service, Statutory Interpretation: General Principles and Recent Trends (Report 97-589; December 19, 2011), by Larry M. Eig at 14-15, citing to *Ratzlag v. United States*, 510 U.S. 135, 143 (1994).

the Department explains above, section 735(a)(4) of the Act provides that in making a final determination in a LTFV investigation, the Department "shall disregard any weighted average dumping margin that is *de minimis* as defined in section 733(b)(3)." A "weighted-average dumping margin" is defined by statute as "the percentage determined by dividing the aggregate dumping margins determined *for a specific exporter* or producer by the aggregate export prices and constructed export prices *of such exporter or producer*."[68] The SAA provides additional context that "{e}xporters or producers with *de minimis* margins will be excluded from any affirmative determination."[69] The Federal Circuit, in sustaining the underlying trial court decision, affirmed that "the law {is} clear that Commerce could exclude a party from an AD order only if the producer's *dumping margin* is less than two percent or *de minimis*….Otherwise, the party must be included in an affirmative final determination of sales at LTFV."[70]

Moreover, additional provisions in the statute described above (*i.e.*, sections 777A(c)(2) and 735(c)(5) of the Act) generally provide a key distinction in the statutory scheme between: (1) producers or exporters who have been individually investigated and which receive individual weighted-average dumping margins that are zero or *de minimis*; and (2) producers or exporters who have not been individually investigated, and are therefore subject to the all others rate, which is based upon the individual weighted-average dumping margins which are zero or *de minimis*. Thus, contrary to the arguments of the separate rate plaintiffs, these provisions taken together demonstrate that the statute is clear that the only dumping margins that shall be "disregarded" pursuant to section 735(a)(4) of the Act are those weighted-average dumping margins calculated for a specific exporter or producer, *i.e.*, those individually investigated

[68] *See* section 771(35)(B) of the Act (emphasis added).
[69] *See* SAA at 844.
[70] *Dupont*, 407 F.3d at 1216 (emphasis added) (quoting *Dupont Teijin Films USA, LP v. United States*, 273 F.Supp.2d 1347, 1348 (Ct. Int'l Trade 2003)).

exporters or producers, which are zero or *de minimis*. Rates assigned using the all-others rate methodology in section 735(c)(5) of the Act do not satisfy the definition. Rather, as discussed above, the rate assigned to separate rate plaintiffs in this remand proceeding is based on the weighted average of the individually investigated respondents' weighted-average dumping margins; it is not *itself* a "weighted-average dumping margin" as that term is defined in section 771(35)(B) of the Act. Therefore, under a *Chevron*[71] step one analysis, the Department's determination above is in accordance with the plain language of the statute.

Armstrong claims that "{t}he mere fact that the permissible methods of determining the margin differ as between individually investigated respondents and separate rate respondents does not in any way detract from, or alter the fact that, these entities were ultimately assigned a zero 'margin of dumping' under the statute."[72] But as the Department has established above, the entire statutory scheme recognizes the key distinction between individually investigated weighted-average dumping margins and the all others rate, which is based on such individually investigated weighted-average dumping margins. Moreover, section 735(a)(4) of the Act turns on whether the margin to be disregarded is a "weighted-average dumping margin that is *de minimis*," *i.e.*, one that is determined for an individually investigated producer or exporter. Therefore, we disagree with Armstrong that the difference in calculation methods is irrelevant under the statutory scheme.

To the extent there is any ambiguity in the statute, 19 CFR 351.204(e)(1) constitutes a permissible construction of the statute that is entitled deference under a *Chevron* step two analysis,[73] and makes clear that exclusions apply only to individually investigated

[71] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*).
[72] *See* Armstrong Case Br. at 4.
[73] *Chevron*, 467 U.S. at 843; *see also Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000) ("In *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous

producers/exporters. In particular, 19 CFR 351.204(e)(1) provides that the Department will "exclude from an affirmative final determination . . . or an order . . . any exporter or producer for which the {Department} determines an *individual* weighted-average dumping margin . . . ." (emphasis added). In promulgating this regulation, the Department indicated that the word "individual" is meant to refer to "any exporter or producer *that is individually examined* and that receives an individual weighted-average dumping margin or countervailable subsidy rate of zero or *de minimis* will be excluded from an order."[74] The Department also recognized, in adopting the regulation, that "decisions on exclusions will be based on a firm's *actual* behavior{,}" and that the revised statutory language and regulations allowed for companies that were not selected for individual examination to request participation as voluntary respondents and potentially be excluded through that statutory mechanism.[75]

Armstrong argues that separate rate respondents are assigned margins that are "in every rational sense of the word, 'individual' margins."[76] But this position disregards that the preamble to the proposed rulemaking states that the word "individual" refers to companies that are "individually examined."[77] Phrases like "individual examination" and "individual investigation" are used in the Act, regulations, and in practice to refer to companies that are selected as either mandatory or voluntary respondents and are assigned margins based on their

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statute."). Armstrong asserts that the Federal Circuit found in *Dupont* that there is no ambiguity in section 735(a)(4) of the Act that permits an interpretive exercise under *Chevron*. *See* Armstrong Case Br. at 4 (citing *Dupont*, 407 F.3d at 1216). However, *Dupont* did not involve the question now before the Department. Rather, the relevant question there was whether the statute permitted the Department to exclude an individually examined exporter/producer with a *de minimis* cash deposit rate and an above-*de minimis* dumping margin. *Dupont*, 407 F.3d at 1216. If anything, *Dupont* stands for the proposition that exclusions are permissible in only very limited circumstances and section 735(a)(4) of the Act must be carefully construed.

[74] *See Antidumping Duties; Countervailing Duties: Proposed Rulemaking*, 61 FR 7308, 7315 (February 27, 1996) (emphasis added).

[75] *Id.*

[76] *See* Armstrong Case Br. at 6.

[77] *See Antidumping Duties; Countervailing Duties: Proposed Rulemaking*, 61 FR 7308, 7315 (February 27, 1996) (emphasis added).

own behavior.[78] Separate rate respondents are not "individually" investigated or examined and, thus, do not fall within the purview of 19 CFR 351.204(e)(1). We, therefore, agree with CAHP that a well-established rule of statutory construction requires that the same word or term appearing in the same statute or regulations must be interpreted in the same manner.[79]

We also disagree with the separate rate plaintiffs' claim that the regulation directly contradicts the statute and is otherwise impermissible. As demonstrated above, the regulations are consistent the with the statutory scheme, as they are consistent with the plain language of the relevant statutory provisions and are otherwise an appropriate exercise of the Department's discretion. Further, we disagree with Changzhou Hawd *et al.* that the Department has provided "no logical bridge" from the law to its conclusions, and Fine Furniture that the Department "fails to provide a source for its interpretation."[80] These arguments ignore the analysis above and otherwise fail to meaningfully engage with the Department's determination.

Fine Furniture argues that the preamble to the proposed rulemaking must be read in conjunction with case law that has developed since its promulgation.[81] In particular, Fine Furniture argues that *Albemarle* and *Changzhou Hawd VI* clarify that mandatory respondents are presumed representative and the Department "may not employ a categorical policy of not

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[78] *See, e.g.*, section 777A(c)(1) of the Act (establishing as a general rule that the Department shall "make *individual* weighted average dumping margin determinations" for all known exporters/producers, but that it may limit its individual examination to a reasonable number of exporters or producers (emphasis added)); section 735(c)(5)(A) of the Act (establishing all-others rate based on the margins "established for exporters and producers *individually investigated* . . ." (emphasis added)); 19 CFR 351.204(d)(1) (establishing mechanism for companies to seek voluntary respondent treatment where the Department "limits the number of exporters or producer to be *individually* examined" (emphasis added)); *Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 82 FR 28639 (June 23, 2017) (identifying ten companies that "were not selected for individual examination," but that nonetheless "are eligible for a separate rate").

[79] *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1381-82 (Fed. Cir. 2001) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Sorenson v. Treasury*, 475 U.S. 851, 860 (1986)).

[80] *See* Changzhou Hawd *et al.* Case Brief at 6.

[81] Fine Furniture also argues that the unambiguous language of 19 CFR 351.204(e)(1) compels exclusion. *See* Fine Furniture Case Br. at 6. However, Fine Furniture's analysis omits any discussion of the meaning of the word "individual," which is a key part of the Department's interpretation of 19 CFR 351.204(e)(1).

excluding separate rate companies who receive a *de minimis* margin."[82] Changzhou Hawd *et al.* raise similar arguments. We disagree that *Albemarle* and *Changzhou Hawd VI* provide any guidance in interpreting statutory and regulatory provisions related to company exclusions from AD orders. Rather, those cases address the distinct issue of the particular rate to assign to non individually examined separate rate companies under the exception in section 735(c)(5)(B) of the Act.[83]

We likewise disagree with Fine Furniture that exclusion determinations for separate rate respondents must be made by examination of the record evidence, which Fine Furniture claims shows that it was not dumping during the period of investigation. As set forth above, the Act and the Department's regulations establish that companies that have not been individually examined are not eligible for exclusion from an AD order. Although Fine Furniture requested voluntary respondent treatment, Fine Furniture was never individually examined as a voluntary respondent and that decision was not challenged by Fine Furniture.[84] Fine Furniture is, thus, not eligible for exclusion. In any event, there is not "unrebutted evidence confirming that Fine Furniture's behavior, and actual dumping margin would also have resulted in a *de minimis* margin and exclusion."[85] Because we have not analyzed Fine Furniture's full questionnaire response, issued

[82] *See* Fine Furniture Case Br. at 8; *see also* Changzhou Hawd *et al.* p. 5.
[83] We also disagree with Fine Furniture that the Court's decision in *Chiang Tieh* is relevant. In addition to the fact that the case involved a prior version of the Department's regulations, the plaintiff in that case was an individually-examined respondent. *See Chang Tieh Indus. Co. v. United States*, 840 F. Supp. 141, 143-44 (CIT 1993). As a result, the Court's analysis does not inform the question before the Department (which relates to the status of a non-individually examined respondent).
[84] In fact, when the Department solicited comments from parties during the Third Remand Redetermination regarding the feasibility of a limited investigation of the separate rate plaintiffs, Fine Furniture rejected any efforts to conduct a complete, individual investigation of Fine Furniture. Instead, "Fine Furniture argued that verification of its data is not warranted in this case because the company was already verified in the companion countervailing duty investigation and because the Department has recently stated that it is operating under resource constraints." *See* Third Remand Redetermination at 6 (summarizing Fine Furniture's arguments). Furthermore, the Court in this case found that it would be "arbitrary and capricious" to attempt to individually examine a company during the remand redetermination stage, because the Department had previously found that it lacked the resources to do so. *Changzhou Hawd IV*. 44 F. Supp. 3d at 1390.
[85] *See* Fine Furniture Case Br. at 9.

supplemental questionnaires, or verified its data, we are unable to confirm the accuracy of Fine Furniture's submitted data, including its average unit values and especially its own calculated *de minimis* margin.

Armstrong argues that the Department's position must be rejected on policy grounds because it penalizes parties for the Department's decision to conduct respondent selection (which resulted in them not being individually examined).[86] However, the Department is permitted by statute to limit its individual examination to the largest exporters by volume.[87] The Department is likewise authorized to exclude from any resulting AD order only companies that have been individually examined and found to have not been dumping. In sum, the Department's position is fully consistent with the relevant legal framework; policy considerations cannot overcome this clear legal directive. And in any event, as explained above, policy considerations weigh in favor of treating exclusion as an extraordinary measure, and one that should only be available in limited circumstances to companies that have been subject to individual investigation and all that entails (*i.e.*, providing full and complete questionnaire responses, cooperating with the Department, subject to verification, etc.).

We find the parties' remaining arguments unpersuasive.

As discussed further below under Comment 5, we note that there appears to be some confusion regarding the Department's basis for determining that the separate rate plaintiffs should not be excluded from the *Order*. In particular, Fine Furniture contends that the Department's analysis conflated assessment and cash deposit rates with exclusion from the

[86] *See* Armstrong Br. at 7.
[87] *See* section 777A(c)(2) of the Act. Any question of whether the Department appropriately exercised its discretion in conducting respondent selection was separately challengeable; no parties have challenged it and it is not before the Court.

Order.[88] Fine Furniture also claims that the Department, as a basis for not excluding Fine Furniture from the *Order*, cited its policy of only updating cash deposit rates that had not been superseded by intervening administrative reviews.[89] Similarly, Lumber Liquidators argues that the Department's determination not to exclude the separate rate plaintiffs was based on the revised cash deposit rates in subsequent administrative reviews.[90] Both parties have misinterpreted the Department's analysis, as we touch on again under Comment 5 below. The Department's discussion of assessment and cash deposit rates is separate and distinct from its decision that the separate rate plaintiffs should not be excluded from the *Order*; that discussion was intended only to explain why the Department was not sending updated cash deposit or assessment instructions as a result of its determination to assign a zero percent rate to the separate rate plaintiffs. Thus, the Department did not conflate these issues in its analysis.

Lumber Liquidators argues that the Department must terminate the *Order* altogether because, as a result of this remand redetermination, there is no evidence of dumping in the investigation. However, Lumber Liquidators does not acknowledge that 110 companies failed to respond to the Department's quantity and value questionnaire, and these companies were determined to be part of a non-cooperating PRC-wide entity that was ultimately assigned an above *de minimis* rate in the final determination.[91] Lumber Liquidators does not explain why the PRC-wide rate should be disregarded in determining whether there was dumping during the

[88] Fine Furniture Br. at 4.
[89] Fine Furniture Br. at 9. Fine Furniture claims that the Department fails to cite any authority for its "new" policy of only updating cash deposit rates that have not been superseded in intervening reviews. However, the Department's practice in this regard is rooted in the statute. *See* section 751(a)(2)(C) of the Act (providing that if an exporter is assigned a new rate in an administrative review, that rate "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties"). Regardless, we agree that cash deposit questions are irrelevant to the distinct exclusion question.
[90] *See* Lumber Liquidators Case Br. at 11.
[91] *See Amended Final Determination and Order*, 76 FR at 76692. In the first Remand Redetermination, the Department revised the PRC-wide rate to 25.62 percent, which remains above *de minimis. See* First Remand Redetermination at 27.

investigation (and, thus, a basis for continued imposition of the *Order*). In addition, Lumber Liquidators argues that all of the separate rate respondents are entitled to exclusion. For the reasons discussed above, we disagree.

Finally, we disagree with Fine Furniture that the Department's remand redetermination is inconsistent with Article 5.8 of the AD Agreement as interpreted by the Appellate Body in *Mexico- AD Measures on Rice*. U.S. law is consistent with the United States' international obligations, and, as discussed above, the Department has acted in accordance with U.S. law. Therefore, we have made no changes from our Draft Remand Redetermination with respect to this issue.

Comment 3: Whether "past practice" and case law support the Draft Remand Redetermination

Changzhou Hawd *et al.* Comments

- The Department maintains that its decision in *SBTS from Taiwan* governs its decision in this case. However, the Department ignores critical differences between the facts.
- In that case, the Department selected one mandatory respondent representing over 60 percent of the exports of the subject merchandise. This respondent failed to cooperate and was given an antidumping margin based on facts available. The zero deposit rate awarded to the "all other" respondents was based on one small Taiwanese producer, who the Department selected as a voluntary respondent. The Department determined that the "all other" producers remained subject to the antidumping order, even though they were given a zero deposit rate because the record evidence showed that the mandatory respondent was dumping.[92]
- In this instance, all three mandatory respondents received a zero or *de minimis* margin. The Federal Circuit found no evidence or reasoning to indicate that the mandatory respondents in this case were not representative.
- The Department also forgot to consider its practice as articulated in another case which closely mirrors the facts in the MLWF litigation. In that case, the Court held that it was appropriate to include in the all others rate firms that have zero or *de minimis* margins and that "{u}nder these circumstances, there is no basis in law or fact to assume that a non-participating company is dumping."[93]
- The Department's *Order* is not based on the record evidence of dumping from the participating mandatory respondents or the separate rate respondents. The dumping

[92] *See Auto Telecom*, 765 F. Supp. 1094-97.
[93] *See Serampore Industries Pvt. Ltd. v. U.S. Dep't of Commerce*, 12 CIT 828 (1988).

margins found for non-participating companies result from the assumption that all Chinese companies are part of the "PRC-wide entity" unless proven otherwise.
- The Department's antidumping rates and margins that form the basis of the *Order* have no relation to the separate rate plaintiffs. The Department should reverse its decision in its Draft Remand Redetermination and assign *de minimis* margins to the separate rate appellants and exclude them from the *Order* and all subsequent AD reviews.

Fine Furniture Comments

- The Department cites *SBTS from Taiwan*, an almost thirty-year-old case, wherein it declined to exclude a company subject to the "all others" rate from the antidumping order but, instead, determined a cash deposit rate of zero.
- The Department fails to mention that the Department had determined a "best information available" margin for one of the mandatory respondents and a zero for the other. Here by contrast, all mandatory respondent, whose behavior the Department has found to be representative of Fine Furniture's experience, have a zero margin. In this instant, no mandatory respondent was found to be dumping. There is no legal basis to support the Department's refusal to exclude Fine Furniture from the *Order*.
- The Department also argues that, in *SBTS from Taiwan,* the determination was appealed and affirmed by the courts. However, the Department fails to add that the CIT expressly noted in its decision that no respondent had requested exclusion from the order. Here, Fine Furniture has been requesting its own rate and exclusion from the *Order* since the outset of the case. For an equal amount of time, the Department has been refusing to look at Fine Furniture's voluntary response, additional evidence supporting a zero percent dumping margin for Fine Furniture, and the submission of a SAS calculation confirming that Fine Furniture would have received a zero margin had the Department not employed the respondent selection provision of the statute.
- Furthermore, *SBTS from Taiwan* was decided years before the Federal Circuit held in *Albemarle* and *Changzhou Hawd VI* that the mandatory respondents are deemed representative of the separate rate respondents. The citation to *SBTS from Taiwan*, therefore, is wholly insufficient to support a significant departure from the statute, regulations, and the Federal Circuit's recent determinations.

Armstrong Comments

- *SBTS from Taiwan* is both wrongly decided and distinguishable. *SBTS from Taiwan* and the appeals affirming that determination were made under the pre-URAA law. The "all others" provision, section 735(c)(5) of the Act, was added to the statute in 1994. Under this old version of the statute, the Department would have been required to include rates determined based on AFA in the "all others" rate (something that is no longer the case).
- Furthermore, in *SBTS from Taiwan*, one of the mandatory respondents failed to cooperate and was assigned an above-*de minimis* margin on the basis of best information available (the precursor to adverse facts available). The Department believed that the AFA rate was not representative of the other unnamed Taiwanese manufactures and exercised its discretion to not include the AFA rate in the all-others cash deposit rate.

- In contrast, in this case, every mandatory respondent, as well as the separate rate respondents, have received zero margins. There is no basis on the record of the investigation, or in the Department's revised margin findings, upon which to conclude that Armstrong and/or the other separate rate respondents dumped subject merchandise during the investigation.

Department's Position:

We disagree with Armstrong, Fine Furniture, and Changzhou Hawd *et al.* that the Department improperly relied on *SBTS from Taiwan* to support its determination not to exclude the separate rate plaintiffs from the *Order*. As an initial matter, the Department did not rely on *SBTS from Taiwan* as the sole basis for its decision. The Department's remand redetermination is primarily grounded in the statute and regulations, detailed above, which reflect the current, post-URAA statutory scheme. Nonetheless, *SBTS from Taiwan* is relevant insofar as it as an example of another proceeding where the Department found that assignment of a zero percent rate to non-individually investigated companies during an investigation did not by necessity result in their exclusion from the *Order*. Any factual dissimilarities between this case and *SBTS from Taiwan* do not detract from this basic point.

Finally, the discussion in *Serampore Industries* is not to the contrary. In that case, the Court evaluated a claim that the Department had an inconsistent methodology for calculating the all others rate because the Department sometimes included companies with *de minimis* margins and on other occasions excluded such margins and included only above-*de minimis* margins. The Department attributed its different methodologies to the method of respondent selection. In particular, the Department explained that it included zero and *de minimis* margins in cases where the Department investigated companies using a sampling methodology and reviewed companies accounting for less than 60 percent of all shipments to the United States. In those circumstances, the Department found that it was "appropriate to include in the all others rate firms that have

zero or *de minimis* margins," because "{u}nder these circumstances, there is no basis in law or fact to assume that a non-participating company is dumping."[94] It is unclear how the analysis in that case is relevant to the question presented here. The question here is not what rate applies to the separate rate plaintiffs (we found in this final remand redetermination that the rate is zero); the question, rather, is whether separate rate plaintiffs should be excluded from the *Order*. The Court in *Serampore* did not speak to this issue.

Comment 4: Whether the Department is precluded from finding that the separate rate plaintiffs are not entitled to exclusion from the *Order*

Changzhou Hawd *et al.* Comments

- The Federal Circuit found that the separate rate appellants continued to suffer harm caused by the assignment of an above-*de minimis* rate. The Federal Circuit also noted that the Department does not disagree that appellants have a stake in challenging the above-*de minimis* rate. The Department's objections to excluding the separate rate respondents are untimely and denote a lack of respect for the appeal process in antidumping proceedings.
- The Department cannot maintain that its Draft Remand Redetermination connotes a clear and unambiguous interpretation of U.S. antidumping law and the Departments never once in five years of litigation raised the argument that separate rate respondents were not eligible for exclusion from dumping orders.
- The intention of the separate rate appellants in pursuing the litigation was ultimately to be excluded from the *Order*. The Department never disagreed that the consequence of awarding *de minimis* rates to the separate rate plaintiffs would be exclusion from the *Order* and the Department never suggested otherwise. The Department's proposed arguments are now barred on the principles of exhaustion of administrative and judicial remedies and also on the principles of waiver.[95]

Fine Furniture Comments

- The Department failed to follow the CIT's direction or the holding of the Federal Circuit in *Changzhou Hawd VI*; the Department is seeking to apply a meaningless separate rate to Fine Furniture, which is, in effect, is no different from the "above-*de minimis*" rate that was already overruled by the Federal Circuit.
- Fine Furniture and the other separate rate plaintiffs have been seeking a zero/*de minimis* antidumping margin and exclusion from the *Order*, and have continually raised the issue of exclusion from the *Order* throughout this litigation and its remands and during oral argument at the Federal Circuit.

[94] *See Serampore Industries*, 12 CIT at 827.
[95] *See Calgon Carbon Corp. v. United States*, 145 F. Supp. 3d 1312, 1322 (CIT 2016) (*Calgon Carbon*).

- Over the last five years, the Department never raised any objection to Fine Furniture's and the other separate rate plaintiffs' repeated arguments seeking exclusion from the order on the basis of a separate rate of zero or *de minimis* or provide any reason for the litigants or the courts to believe that a separate rate of zero or *de minimis* would not mean exclusion.
- If the Department had no intent to ever exclude the separate rate respondents from the *Order*, they had an obligation to raise that issue with the courts and the parties to save the judiciary and the parties years of litigation.
- The Department has, therefore, waived its right to raise the argument in an attempt to hold Fine Furniture to the *Order*.

Lumber Liquidators Comments

- In its fifth draft remand redetermination, the Department, for the first time, argues that the law does not allow it to exclude "all others" from the *Order,* even if the "all others" receive zero rates. This argument has been waived because the Department did not raise it in the numerous prior opportunities related to this appeal.
- The Department deprived parties to this appeal of the opportunity to make arguments on this newly raised claim. It is "a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."[96]
- Here the Department deprived parties to this appeal and, consequently, waived its opportunity to now make this argument years later. The failure of the Department to present these arguments in a timely fashion at any point during this appeal, including in previous remand redeterminations at the agency level and comments before the courts, prevents it from now raising the issue.[97]
- The Department's administrative procedures for challenging an antidumping duty determination requires parties, including the U.S. government, to submit a case brief that "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."[98]
- The CIT has noted the requirement to present all relevant arguments means that arguments that are omitted before the agency cannot be argued on appeal.
- Until this fifth remand redetermination, the Department did not mention that it must include "all others" in the *Order* even if they receive zero rates. It is prejudicial to only now provide the other parties with notice of this argument. To permit the Department to now include this argument after years of litigation would amount to a double-standard for the Department, allowing the Department to abuse the system.
- The fact that the Department may have raised general issues regarding the "all others" rate is not adequate to apprise the other parties of this specific claim the Department is now raising.[99]

[96] *See United States v. L. A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952)).
[97] *See Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 342 F. Supp, 2d 1191, 1205 (CIT 2004),
[98] *See* 19 CFR 351.309(c)(2); *see also Nakornthai Strip Mill Pub. Co. v. United States*, 558 F. Supp. 2d 1319, 1329 (CIT 2008).
[99] *See Paul Muller Industrie Gmbh & Co. v. United States*, 502 F. Supp. 2d 1271, 1275 (CIT 2007).

Armstrong Comments

- The claim for exclusion from the *Order* has been raised by the separate rate plaintiffs from the very beginning of the litigation. The Department had ample opportunities to raise a defense to exclusion. By failing to raise the issue in a timely manner, the Department has waived this defense and is precluded from raising it now.

Department's Position:

We disagree. As an initial matter, the Department's analysis above is consistent with the Federal Circuit's opinion in *Changzhou Hawd VI* and with the subsequent remand order of the CIT in *Changzhou Hawd VII*. In that litigation, the question presented was whether the Department made the findings necessary to justify use of a method other than the "expected method" under the SAA in assigning a rate to separate rate plaintiffs, and that was the basis upon which the case was decided.[100] On remand, as discussed above, the Department complied with the Federal Circuit's order and reasoning and explained that it was unable to make the findings necessary to justify departure from the expected method. As a result, the Department assigned to the separate rate plaintiffs a zero percent margin.

This finding on remand required that the Department address, for the first time, the question of the legal consequences flowing from a determination that a separate rate respondent is entitled to a zero percent rate in an investigation. This question was simply never before the CIT or the Federal Circuit in this litigation, and waiver principles do not preclude the Department from addressing it here.[101] We also disagree with Changzhou Hawd *et al.* that the

[100] *Changzhou Hawd VI*, 848 F.3d at 1008, 1013.

[101] We disagree with Changzhou Hawd *et al.* that the Court's opinion in *Calgon Carbon* is probative. In that case, plaintiff argued that the United States waived any defense to plaintiff's claim that the presumption of state control was unsupported by substantial evidence by choosing to present only an exhaustion defense. *See Calgon Carbon*, 145 F. Supp. 3d at 1321-22. In addition to the fact that *Calgon Carbon* is not binding on the Court in this case, *cf. Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989) (finding that individual judges on the CIT are not bound by the decisions of another), the facts are materially different here. Unlike in *Calgon Carbon*, the exclusion question was not ripe for the Court's adjudication until the instant remand. The Department did not waive defenses to issues that were not live before the Court. *See Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 954 (Fed.

Federal Circuit's references in the background section of *Changzhou Hawd VII* can be construed as a finding on this issue. In that section, the Federal Circuit summarized the separate rate appellants' contention that assignment of a zero percent margin would remove them from the purview of the *Order*. The Federal Circuit did not, itself, adjudge the merits of that claim. Furthermore, although the Federal Circuit notes that the Department "does not disagree that appellants have a stake in challenging the above-*de minimis* rate,"[102] this cannot be construed as concession of a question that had not yet been before the agency (*i.e.*, whether exclusion is the appropriate consequence of a finding that separate rate companies are entitled to zero percent margins).[103]

Finally, Lumber Liquidators is incorrect that the principle of administrative exhaustion applies to the Department. "Exhaustion is meant to 'protect[ ] administrative agency authority,' by 'ensur[ing] Commerce has the opportunity to consider arguments during agency proceedings, and before a judge intervenes on appeal.'"[104] That purpose is not implicated here, nor is there any reason to extend the exhaustion requirement to the very agency the requirement is intended to protect.

For similar reasons, Lumber Liquidators' citation to 19 CFR 351.309(c)(2) is misguided. That provision permits any interested party or U.S. government agency to submit a case brief, and requires that the case brief present all relevant arguments for consideration in the

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Cir. 1997) (finding that a defendant did not waive right to raise alternative defenses where they "were neither themselves on appeal nor relevant to the sole question that was," and were moot at the time of the original appeal).

[102] *Changzhou Hawd VI*, 848 F.3d at 1011.

[103] We note that the exclusion question was not meaningfully briefed before the Federal Circuit. This language from *Changzhou Hawd VI* appears to be based on limited discussions during oral argument regarding separate rate appellants' continuing stake in the litigation. The bulk of this discussion, including appellants' representations regarding the consequences of a zero percent rate, occurred during Fine Furniture's rebuttal comments (to which the United States had no opportunity to respond).

[104] *See Ceramark Tech., Inc. v. United States*, 61 F. Supp. 3d 1371, (CIT 2015) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

Department's final results. That provision was clearly not intended to impose obligations on the Department, as Lumber Liquidators appears to suggest. To interpret the provision otherwise would be to, in effect, find that the Department must submit a case brief to itself for consideration in its final results.

Comment 5: Whether the Department improperly relied on the results of subsequent administrative reviews to support the Draft Remand Redetermination

Fine Furniture Comments

- The Department's reliance on the subsequent administrative reviews as a basis not to revise the cash deposit rate is contrary to court precedent and the agency's policy of treating each review as a distinct proceeding requiring fresh analysis.
- It is the Department's policy that "the Department must base its decisions on the record of the administrative proceeding before it in each review.[105] The Department has stated it "has consistently taken the position that each administrative review stands alone."[106]
- The Department has affirmed this position before the courts.[107] The Federal Circuit noted this policy in *Albemarle* that each "administrative review is a separate exercise of the Department's authority that allows for a different conclusion based on different facts in the record."
- The Department has ignored this well-established, court-approved principle by attempting to use the first review final results to support evidence that the separate rate respondents were not entitled to a revised cash deposit rate/exclusion from the *Order*.
- The Court has upheld the Department's rejection of outdated data in favor of contemporaneous information.[108] Here, the Department takes the opposite view, seeking to rely on non-period of investigation data; this is illogical and directly contradicts its approach in other administrative cases.
- That the investigation and subsequent reviews should be treated as separate proceedings in this case is illustrated by the entirely different surrogate value data used in the investigation and first review. It is wrong, therefore, for the Department to make any assumptions about the separate rate in the investigation by looking to the results of a subsequent administrative review. The Department's attempt to use subsequent reviews as a basis not to exclude Fine Furniture or to avoid adjusting its cash deposit rate has already been rejected by the Court in *Changzhou Hawd VI*.
- The argument that subsequent administrative reviews support the Department's decision not to revise the cash deposit rate for or exclude Fine Furniture from the *Order* is circular. Fine Furniture's separate rate in the investigation, and its cash deposit rate

[105] *See Diamond Sawblades and Parts Thereof From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 2010-2011*, 78 FR 36524 (June 18, 2013).
[106] *See Hand Trucks and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review 2010-2011*, 78 FR 28801 (May 16, 2013).
[107] *See Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (2005).
[108] *See Home Meridian Int'l v. United States*, 772 F.3d 1289, 1296 (Fed. Cir. 2014).

eligibility rate/eligibility for exclusion from the *Order*, must be based on the investigation record alone and not a subsequent review, because, if the Department had properly conducted the investigation in the first place to apply a *de minimis* rate for Fine Furniture, there would be no valid final results in any subsequent review.

- The Department's reliance on subsequent reviews would moot all investigations results and provide petitioners with a path to a second bite at the apple merely by litigating investigations.
- The Department's reliance on the results of subsequent reviews in order to avoid excluding Fine Furniture from the antidumping order is all the more absurd because those final results are potentially invalid because Fine Furniture and other parties have appealed those results to the CIT.
- The Department does not cite to any precedent that supports the use of a future administrative review to bolster a determination in an earlier segment of a proceeding.
- Furthermore, Layo Wood is an example of why first review final results should have no bearing on the investigation. In the first review, the Department determined a preliminary antidumping margin for Layo Wood, but ultimately excluded that company from the *Order* because of the first redetermination in this case. Even though Layo Wood was ultimately excluded from the *Order* based on a *de minimis* rate in the course of the appeal of the investigation, the preliminary results of the first review indicated that Layo Wood was dumping. However, Layo Wood was eliminated from the case entirely based on the investigation results and without consideration given to the first review results.
- If the Department acted reasonably and in accordance with law, there would be no antidumping rate assigned to Fine Furniture an any future review, because the *Order* would be revoked as to Fine Furniture. The only reason any administrative review results are available at all is because of the lengthy litigation in this matter that has resulted in the issuance of several subsequent reviews before the original investigation could be completed.
- If the Department were to adopt a policy that no separate rate respondent can be excluded from an order if a subsequent review finds an above-*de minimis* margin, even if the original investigation has been appealed, petitioners would have the incentive to appeal a company-specific exclusion in an investigation, and to delay that litigation just to try and find dumping in a subsequent review.
- In this case, through years of delay, the Department has delayed this litigation to such an extent that there have been multiple reviews based on an original unlawful final determination. Those subsequent reviews based on an unlawful original determination cannot form the basis for a decision to refuse exclusion from the *Order* despite the plain meaning of the statute and the Department's own regulations.

Lumber Liquidators Comments

- Each stage of the proceeding must stand alone and it is incumbent on the Department to calculate antidumping rates as accurately as possibly for each proceeding independently. It is unlawful for the Department to link rates from subsequent reviews to the original investigation.

- Antidumping rates change from period to period; it is wrong, therefore, to make any rate assumptions for the investigation by looking to the results of entirely separate proceedings.
- The Department is obligated to determine a specific rate for each responding exporter in the case; the Department cannot simply elect to avoid this statutory obligation, and, by so doing so, giving primacy to subsequent review results over investigation results. In this sense, the Draft Remand Redetermination is contrary to law.

Department's Position:

There appears to be a good deal of confusion regarding the Department's findings in the Draft Remand Redetermination. To be clear, the Department in no way based its finding that the separate rate plaintiffs are ineligible for exclusion from the *Order* on the results of subsequent administrative reviews.

The only reason that the Department discussed subsequent administrative reviews at all was to explain why it was not updating the separate rate plaintiffs' cash deposit rates as a result of its finding that the separate rate plaintiffs should be assigned zero percent rates for the period of investigation. To the extent parties argue that it is necessary to update cash deposit rates, we disagree. Four administrative reviews have been completed over this period and all of the separate rate plaintiffs' cash deposit rates have been superseded by subsequent reviews. Indeed, by operation of law, if an exporter is assigned a new rate in an administrative review, that rate "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties."[109] To replace the existing cash deposit rates with margins calculated in prior segments of the proceeding would

[109] *See* section 751(a)(2)(C) of the Act. We note that with the exception of Armstrong, all separate rate plaintiffs already currently have a cash deposit rate of zero percent as a result of the fourth administrative review.

not be consistent with the statute, with the Court's prior holdings in this case (which were not contested before the Federal Circuit),[110] or with the Department's practice.[111]

Comment 6: Whether the Department must redetermine a rate for all respondents that received a separate rate during the investigation

Lumber Liquidators Comments

- In the Draft Remand Redetermination, the Department recalculated the separate rate only for the separate rate appellants.
- However, the Department's Draft Remand Redetermination fails to consider a recalculation of the rate for all the separate rate respondents in the investigation. Nothing in the remand instructions issued by the Federal Circuit limits the recalculation to only some separate rate respondents.
- All three mandatory respondents in the original investigation received zero or *de minimis* margins and were excluded from the *Order*. These mandatory respondents serve as proxies for all, not just some, separate rate companies. As these mandatory respondents were all excluded from the *Order*, the Department must apply the "expected method" under section 735(c)(5)(B) of the Act to also recalculate and zero rates to non-examined cooperative separate rate exporters by averaging the mandatory respondents' rates. This recalculation will thus be consistent with the decision by the Federal Circuit in *Albemarle*.
- In the fourth administrative review of the *Order*, the Department cited to Albemarle in calculating the separate rate based on the "expected method." The Department did not selectively apply the antidumping rate of zero to some separate rate companies, rather, the Department applied it to all 72 non-examined separate rate companies. The expected method does not differentiate between non-examined separate rate entities; it is applied consistently to all of them.

Department's Position:

The Department disagrees that the zero separate rate margin assigned in this remand redetermination must be applied to all separate rate companies and not just the separate rate plaintiffs. As an initial matter, Lumber Liquidators has not alleged that it imported from all of

[110] *Changzhou Hawd IV*, 44 F. Supp. 3d at 1388; *Changzhou Hawd V*, 77 F. Supp. 3d at 1360; *see also Torrington Co. v. United States*, 44 F.3d 1572, 1577 (Fed. Cir. 1995) (recognizing mootness concerns where intervening final results, and revised cash deposit rates, have published, but invoking exception to mootness doctrine to hear claim).
[111] *See, e.g.*, *Certain Activated Carbon From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Results of Administrative Review and Notice of Amended Final Results With Respect to Ningxia Huahui Activated Carbon Company, Ltd.*, 82 FR 21977 (May 11, 2017) ("Because there have been subsequent administrative reviews for Huahui, the cash deposit rate for Huahui will remain the rate established in the recently-completed AR8 Final Results, which is $1.36/kg.").

the separate rate companies during the period of investigation. To the extent Lumber Liquidators seeks relief on behalf of separate rate companies from which it did not import during the period of investigation, Lumber Liquidators lacks standing to raise these claims.[112] Furthermore, the remaining separate rate companies are not parties to this litigation and are not covered by any injunctions enjoining liquidation of their entries. They are, thus, not entitled to the retrospective benefit of the changes made in this litigation.[113]

This procedural posture distinguishes this case from the fourth administrative review of this *Order*, upon which Lumber Liquidators relies for support. In that review, the Department found that certain exporters established their eligibility for a separate rate and assigned the same rate to all of those companies using section 735(c)(5) of the Act.[114] But the Department's findings in the fourth administrative review are irrelevant to evaluating the distinct question of whether non-parties can receive the benefit of any relief afforded to parties in litigation.

Further, although Lumber Liquidators asserts that a recalculation for *all* separate rate respondents will be consistent with *Albemarle*, the Department did not revise the rates for all separate rate respondents in the review at issue in *Albemarle*. To the contrary, consistent with its approach here, the Department amended its final results only with respect to companies that challenged the separate rate before the CIT and the Federal Circuit.[115] Thus, consistent with

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[112] *See Heveafil Sdn. Bhd. v. United States*, 22 CIT 806, 808 (1998) (finding that although a party had "standing to litigate Commerce's liquidation instructions with regard to those subject entries *for which it is the importer of record*, it has no standing to litigate the instructions as they pertain to entries of subject merchandise made through importers other than {itself}." (emphasis added)); *see also Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008) ("As a general rule, a plaintiff may only assert his own injury in fact and 'cannot rest his claim to relief on the legal rights or interests of third parties.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)).

[113] *See, e.g.*, *Snap-On, Inc. v. United States*, 949 F. Supp. 2d 1346, 1354 (CIT 2013); *Capella Sales & Services Ltd. v. United States*, 180 F. Supp. 3d 1293, 1303-04 (CIT 2016).

[114] *Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Final Partial Rescission of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 25766 (June 5, 2017), and accompanying Issues and Decision Memorandum at Comment 3.

[115] *Compare Certain Activated Carbon From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Results of Administrative Review and Notice of Amended Final Results of Antidumping Duty*

Department practice, we will amend the final determinations with respect to the plaintiffs that were party to litigation only.[116]

Comment 7: Whether the Department provided adequate time for interested parties to comment

Armstrong Comments

- This matter was remanded to the Department for reconsideration on May 19, 2017, with a deadline of July 12, 2017. The Department was granted 54 days to conduct this proceeding, but choose to wait to release its Draft Remand Redetermination to the parties until 13 days before the deadline. Furthermore, the Department offered parties just four business days (spanning the Fourth of July holiday) to prepare and submit comments.
- Armstrong objects to the Department's tardiness in issuing its remand determination and allowing a limited amount of time for comment over a major national holiday.

Lumber Liquidators

- Lumber Liquidators objects to the short period of time that the Department provided for parties to review and comment on the Draft Remand Redetermination.

Department's Position:

The Department must conduct remand proceedings in accordance with deadlines that are set by the Court. The Department issued its Draft Remand Redetermination on June 29, 2017, and invited parties to comment on the Department's preliminary analysis. Because the remand was due to the Court by July 12, 2017, the Department evaluated its resources and gave parties until July 5, 2017, to provide comments on the Draft Remand Redetermination, noting that it would "consider requests for extension of this deadline in light of the deadline to submit our final

Administrative Review; 2009-2010, 79 FR 72165 (December 5, 2014) (amending final results for certain litigants), *and Certain Activated Carbon From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Results of Administrative Review and Notice of Amended Final Results With Respect to Ningxia Huahui Activated Carbon Company, Ltd.*, 82 FR 21977 (May 11, 2017) (amending final results for remaining litigant), *with Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 76 FR 67142 (October 31, 2011) (reflecting additional separate rate companies whose rates were not changed after *Albemarle*).

[116] *See, e.g.*, *Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Court Decision Not in Harmony With the Final Determination and Amended Final Determination of the Antidumping Duty Investigation*, 79 FR 13038 (March 7, 2016); *see also Brake Rotors from the People's Republic of China: Notice of Amended Final Results of Administrative Review Pursuant to Court Decision*, 74 FR 15253 (April 3, 2009).

remand redetermination with the Court, July 12, 2017, and may consider seeking an extension from the Court for this deadline, as appropriate."[117] The Department subsequently extended the time to comment by one day, until July 6, 2017.

Although Armstrong and Lumber Liquidators object to the length of time provided for responses to remand comments, both Armstrong and Lumber Liquidators opposed the United States' motion for an extension of time within which to complete the remand. One of the stated reasons for seeking the extension was to ensure that parties had sufficient time to comment on the Draft Remand Redetermination. Regardless, both Armstrong and Lumber Liquidators submitted substantive comments on the Draft Remand Redetermination, which the Department has addressed in these final results of redetermination. As a result, neither Armstrong nor Lumber Liquidators can claim that they have been substantially prejudiced by the comment deadline established by the Department.

IV. FINAL RESULTS OF REDETERMINATION

As described above, in accordance with the Court's order remanding this case for further proceedings in conformity with *Changzhou Hawd VI*, for purposes of this final remand redetermination, the Department is relying on the guidance provided in section 735(c)(5)(B) of the Act in assigning a rate to the following separate rate respondents: Changzhou Hawd Flooring Co.; Dunhua City Jisen Wood Industry Co, Ltd.; Dunhua City Dexin Wood Industry Co., Ltd.; Dalian Huilong Wooden Products Co., Ltd.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; Karly Wood Product Limited; Fine Furniture (Shanghai) Limited; and Armstrong Wood Products (Kunshan) Co., Ltd. In particular, the Department is applying the "expected method" under the SAA and assigning a rate to the separate rate plaintiffs based on the weighted

[117] Draft Remand Redetermination at 13.

average of the individually-investigated respondents' zero and *de minimis* dumping margins. In the event that the final remand redetermination is sustained by the CIT, the Department intends to publish a notice of amended final determination which will notify the public of the revised rates for the separate rate plaintiffs. However, the Department does not intend to alter the cash deposit rate for the separate rate plaintiffs or exclude the separate rate plaintiffs from the *Order* as a result of this litigation, as discussed above.

7/20/2017

X 

Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance