

UNITED STATES COURT OF INTERNATIONAL TRADE

KWO LEE, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Before: Donald C. Pogue,  
Senior Judge

Court No. 14-00212

OPINION

[Negative bonding sufficiency determination sustained.]

Dated: June 12, 2015

Robert T. Hume, Hume & Associates, LLC, of Ojai, CA,  
for Plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial  
Litigation Branch, Civil Division, U.S. Department of Justice,  
of Washington, DC, for Defendant. With her on the brief were  
Joyce R. Branda, Acting Assistant Attorney General, Jeanne E.  
Davidson, Director, and Patricia M. McCarthy, Assistant  
Director. Of counsel was Chi S. Choy, Senior Attorney, Office  
of Chief Counsel, U.S. Customs and Border Protection, of New  
York, NY.

**Pogue, Senior Judge:** In this action, Plaintiff,  
importer Kwo Lee, Inc., challenges the negative bond sufficiency  
determination made by U.S. Customs and Border Protection  
("Customs" or "CBP") on certain entries of fresh garlic from the

People's Republic of China ("PRC").<sup>1</sup> Am. Compl., ECF No. 19, at ¶1. Specifically, Customs has determined that Plaintiff must post a single transaction bond for each such entry so that Plaintiff's total security is equal to Plaintiff's potential antidumping ("AD") duty liability as calculated at the PRC-wide rate (376.67 percent),<sup>2</sup> rather than the substantially lower combination rate (32.78 percent)<sup>3</sup> otherwise applicable to Plaintiff's putative exporter and producer, Qingdao Tiantaixing Foods Co., Ltd. ("QTF"). Id. According to Customs, this enhanced bonding is required because Plaintiff's entry documents displayed a pattern of omissions and possible discrepancies that made it impossible to verify the identity of the producer, and therefore impossible to verify Plaintiff's eligibility for QTF's special rate. Def.'s Resp. to Pl.'s Mot. for J. on the Admin. R., ECF No. 56 ("Def.'s Resp."), at 11-12. Plaintiff argues that Customs' determination is invalid because it is not in accordance with law, is arbitrary and capricious, and is the

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<sup>1</sup> Plaintiff's entries are subject to the 20-year-old antidumping duty order on fresh garlic from the PRC (A-570-831). Fresh Garlic from the [PRC], 59 Fed. Reg. 59,209 (Dep't Commerce Nov. 16, 1994) (antidumping duty order) ("Garlic AD Duty Order").

<sup>2</sup> See Garlic AD Duty Order, 59 Fed. Reg. at 59,210 (setting the PRC-wide rate).

<sup>3</sup> See Fresh Garlic from the [PRC], 73 Fed. Reg. 56,550, 56,552 (Dep't Commerce Sept. 29, 2008) (final results and rescission, in part, of twelfth new shipper reviews) ("Twelfth NSR") (assigning QTF a producer/exporter combination rate).

result of inadequate process. Mem. in Supp. of Pl.'s Rule 56.1 Mot. for J. upon the Agency R., ECF No. 55 ("Pl.'s Br."), at 4-6.

As explained below, because Customs' determination was in accordance with law, and neither arbitrary and capricious nor an abuse of discretion, it is sustained.

#### **BACKGROUND**

This action has its roots in the 1994 AD duty order on fresh garlic from the PRC (A-570-831). Garlic AD Duty Order, 59 Fed. Reg. at 59,209. There, the U.S. Department of Commerce ("Commerce" or "the Department") set the PRC-wide rate at 376.67 percent. Id. at 59,210. This rate is still in use today. See Undated Port of San Francisco Information Notice, reproduced in Apps. to Accompany [Pl.'s Br.] ("Apps. to Pl.'s Br."), ECF No. 55-1 at app. 1 ("Information Notice").

In 2006, QTF began shipping fresh garlic to the United States. QTF requested and, following investigation, Commerce granted QTF a new shipper rate ("NSR") of 32.78 percent. Twelfth NSR, 73 Fed. Reg. at 56,552. This NSR was a "combination rate," in that it only applies where QTF is both the producer and exporter. Id. When QTF is only the exporter, the PRC-wide rate applies. Id. at 56,552-53.

Following the Twelfth NSR, QTF did not ship garlic to the United States again until 2014,<sup>4</sup> with Plaintiff as importer. Decl. of Steven [Li] (Owner of Kwo Lee, Inc.), reproduced in Pl.'s Appl. for a TRO & Mot. for a Prelim. Inj., ECF No. 7-2 at ex. 5, at ¶¶4-5. These entries declared the garlic as subject to the antidumping duty order on fresh garlic from the PRC, A-570-831, with QTF as both the producer and exporter. Decl. of Brian Pilipavicius, Supervisory Imp. Specialist, Area Port of San Francisco, CBP, reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-1 at tab 1 ("Pilipavicius Decl."), at ¶6. This made the entries subject to the QTF NSR rate of 32.78 percent. Id.; Twelfth NSR, 73 Fed. Reg. at 56,552. However, because of a

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<sup>4</sup> For administrative reviews in which QTF timely certified it had no shipments during the period of review, see Fresh Garlic from the [PRC], Issues & Decision Mem., A-570-831, ARP 07-08 (June 14, 2010) (adopted in 75 Fed. Reg. 34,976, 34,980 (Dep't Commerce June 21, 2010) (final results and partial rescission of the 14th antidumping duty administrative review)) Issue 3 at 11 n.7 (noting that Customs issued a no-shipment inquiry for QTF, and will only do so when the company has submitted a timely and properly filed no shipment certification); Fresh Garlic from the [PRC], 76 Fed. Reg. 37,321, 37,323 (Dep't Commerce June 27, 2011) (final results and final rescission, in part, of the 2008-2009 antidumping duty administrative review); Fresh Garlic from the [PRC], 77 Fed. Reg. 11,486, 11,489 (Dep't Commerce February 27, 2012) (partial final results and partial final rescission of the 2009-2010 administrative review); Fresh Garlic from the [PRC], 78 Fed. Reg. 36,168, 36,170 (Dep't Commerce June 17, 2013) (final results of antidumping administrative review; 2010-2011); and, Fresh Garlic from the [PRC], 79 Fed. Reg. 36,721, 36,724 (Dep't Commerce June 30, 2014) (final results and partial rescission of the 18th antidumping duty administrative review; 2011-2012).

pattern of missing and possibly discrepant information, Customs was unable to determine whether QTF was the producer.

Pilipavicius Decl., ECF No. 56-1 at tab 1, at ¶¶6-10; Decl. of Frank Djeng, Senior Imp. Specialist, Area Port of San Francisco, CBP, reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-1 at tab 2 ("Djeng Decl."), at ¶¶3-8; Decl. of Richard Edert, Int'l Trade Specialist, Nat'l Targeting & Analysis Grp., Office of Int'l Trade, CBP, reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-1 at tab 3 ("Edert Decl."), at ¶¶8-10. Customs requested further documentation from Plaintiff to verify, by other means, the identity of the producer, and Plaintiff complied. E-mail from Nick Hong, Customs Broker, to Marc Dolor, Senior Imp. Specialist, Area Port of San Francisco, CBP, and Frank Djeng (Aug. 22, 2014, 02:25PM), reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-1 at tab 5 ("E-mail from Hong to Dolor & Djeng"), at AR-000007-08 (e-mail), AR-0000012 (attachment list); E-mail from Nick Hong to Frank Djeng (Aug. 25, 2014, 08:01AM), reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tab 7, at AR-000170. Review of the responsive documents, however, suggested to Customs that QTF did not have the ability to produce all of the garlic at issue. Edert Decl., ECF No. 56-1 at tab 3, at ¶7.<sup>5</sup>

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<sup>5</sup> See also QTF Production Records, reproduced in [Con.] App. to  
(footnote continued)

Unable to ascertain the identity of the producer, Customs applied the AD duty rate for QTF as exporter with another or an unknown producer, that is, the PRC-wide rate. Customs denied entry pending the posting of additional security, in the form of a series of single transaction bonds ("STBs"), equal to this potential AD duty liability. CBP Form 4647, reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tabs 11 & 14 ("CBP Form 4647"), at AR-000187-88, AR-000199-200; Undated Port of San Francisco Information Notice, reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tabs 11 & 14 ("Information Notice"), at AR-000189, AR-000201.<sup>6</sup>

Plaintiff sought to preliminarily enjoin Customs from requiring additional bonding. Pl.'s Appl. for a TRO & Mot. for a Prelim. Inj., ECF No. 7, at 1. Because Plaintiff showed likely

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[Def.'s Resp.], ECF Nos. 56-1 & 56-2 at tab 6, at AR-000014-15 (questionnaire completed by Plaintiff), AR-000016-127 (raw garlic purchase invoice and weighing slips), AR-000128-29 (process flow chart for fresh garlic and peeled garlic), AR-000130 (list of machines and equipment used), AR-000131-42 (purchase invoices for machines and equipment used), AR-000143-46 (sample electricity invoices, July 2014), AR-000147-56 (sample invoices for packing material), AR-000157-69 (payroll lists for May, June, and July 2014); Kwo Lee Payroll List July 2014, reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tab 8, at AR-000173-78; Kwo Lee Payroll List June 2014, reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tab 9, at AR-000179-82; Kwo Lee Payroll List May 2014, reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tab 10, at AR-000183-85.

<sup>6</sup> See also Information Notice, ECF No. 55-1, at app. 1 (providing the same document as reproduced in the Plaintiff's appendices).

irreparable harm and raised serious and substantial questions as to the merits, with the balance of the equities and the public interest in his favor, the court granted Plaintiff's motion. Kwo Lee, Inc. v. United States, \_\_\_ CIT \_\_\_, 24 F. Supp. 3d 1322 (2014). Instead of the STBs required by Customs, the court required Plaintiff to provide security in the amount of one million dollars (\$1,000,000.00) held by the court. Id. at 1332.

Plaintiff now moves for judgment on the agency record pursuant to USCIT Rule 56.1. Mot. of Pl. Kwo Lee, Inc. for J. upon the Agency R., ECF No. 55.

#### **STANDARD OF REVIEW**

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (2012) and will therefore uphold Customs' enhanced bonding determination unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).<sup>7</sup>

#### **DISCUSSION**

##### I. Customs' Determination Was Within Its Statutory Authority

###### *A. Customs' Statutory Authority to Make Bond Sufficiency Determinations and Require Additional Bonding*

Customs has broad statutory authority to protect the revenue of the United States through the imposition of bonding

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<sup>7</sup> See 28 U.S.C. § 2640(e) (Actions brought under § 1581(i) are reviewed "as provided in section 706 of title 5.").

requirements on imports. See 19 U.S.C. §§ 66, 1623.<sup>8</sup> Pursuant to this authority, Customs has promulgated extensive regulations, see Customs Bond Structure; Revision, 49 Fed. Reg. at 41,152 (amending Customs regulations "to revise the Customs bond structure by consolidating and reducing the number of bond forms in use"), in an effort to specify and structure the bonding application, approval, and execution process. 19 C.F.R. § 113.0 (2014).

The statute specifically provides that even where a "bond or other security is not specifically required by law," Customs may "by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which [Customs] may be authorized to enforce." 19 U.S.C. § 1623(a).<sup>9</sup> Under the

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<sup>8</sup> A bond is generally required as part of the entry documentation. The bond ensures "that proper entry summary with payment of estimated duties and taxes when due, will be made for imported merchandise and that any additional duties and taxes subsequently found to be due will be paid." Customs Bond Structure; Revision, 49 Fed. Reg. 41,152, 41,152 (Dep't Treasury Oct. 19, 1984).

<sup>9</sup> See also 19 U.S.C. § 66 ("[Customs] shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall  
(footnote continued)

corresponding Customs' regulations, port directors are instructed to determine whether a bond "is in proper form and provides adequate security" for the entries at issue. 19 C.F.R. § 113.11.<sup>10</sup> If he or she, or the drawback office, "believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations," he or she may "require additional security." 19 C.F.R. § 113.13(d).

Because "the statute is silent on the specific method," and "expressly delegate[s] broad authority to Customs to prescribe all regulations necessary," these resultant regulations are entitled to "controlling weight," Chrysler Corp. v. United States, 592 F.3d 1330, 1335-36 (Fed. Cir. 2010), and will be sustained so long as they are "reasonably related to the purposes of the enabling legislation." Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356, 369 (1973) (quoting Thorpe v.

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give such directions to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.").

<sup>10</sup> See also 19 C.F.R. § 113.1 ("[T]he Commissioner of Customs . . . may by regulation or specific instruction require, or authorize the port director to require, such bonds or other security considered necessary for the protection of the revenue or to assure compliance with any pertinent law, regulation, or instruction.").

Hous. Auth. of City of Durham, 393 U.S. 268, 280-81 (1969))  
(internal quotation marks omitted).<sup>11</sup>

The statute allows for such bonds as "deem[ed] necessary for the protection of the revenue" of the United States or "to assure compliance with any provision of law." 19 U.S.C. § 1623(a). This is reflected in the language of the regulation, which provides that "if a port director or drawback office believes" that the current level of bonding "would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations," additional bonding may be required. 19 C.F.R. § 113.13(d). Because the regulation is derived from the language of its enabling statute, it is reasonably related to it.<sup>12</sup> Customs' authority to make bond sufficiency determinations and require additional bonding is therefore sustained.<sup>13</sup>

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<sup>11</sup> See also Yangzhou Bestpak Gifts & Crafts Co. v. United States, 716 F.3d 1370, 1377 (Fed. Cir. 2013) ("If the statute does not clearly answer the relevant question, then the court must . . . decide whether the agency's interpretation amounts to a reasonable construction of the statute.") (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

<sup>12</sup> Cf. Yangzhou Bestpak, 716 F.3d 1370, 1378 (holding that a methodology derived from the relevant statutory language is a reasonable reading of that statute).

<sup>13</sup> Cf. Carolina Tobacco Co. v. Bureau of Customs & Border Prot., 402 F.3d 1345 (Fed. Cir. 2005) (affirming Custom's decision to require either an increased continuous bond or single transaction bond of comparable amount from plaintiff); Hera  
(footnote continued)

*B. Customs' Ministerial Role in the Administration of  
Antidumping Duty Laws*

Customs' statutory authority to make bond sufficiency determinations and require additional bonding is limited by the agency's purely ministerial role in the enforcement of AD duty laws and determinations. Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273, 69,274-75 (Dec. 3, 1979) (announcing transfer from Customs to Commerce of, *inter alia*, all substantive functions under 19 U.S.C. §§ 1671 *et seq.*), effective under Exec. Order No. 12,188 of January 2, 1980, 45 Fed. Reg. 989, 993 (Jan. 4, 1980). In application, this means that, while Customs may consider potential AD duty liability in determining whether an entry is sufficiently bonded, it may not usurp Commerce's authority and make a substantive AD duty determination, whether outright or in effect, through a bond sufficiency determination.<sup>14</sup>

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Shipping, Inc. v. Carnes, 10 CIT 493, 640 F. Supp. 266 (1986) (affirming Custom's decision to require increased bonding from plaintiff).

<sup>14</sup> See Mitsubishi Elecs. Am., Inc. v. United States, 44 F.3d 973, 977 (Fed. Cir. 1994) ("Customs merely follows Commerce's instructions in assessing and collecting duties. Customs does not determine the 'rate and amount' of antidumping duties under 19 U.S.C. § 1514(a)(2). Customs only applies antidumping rates determined by Commerce."); Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot., 33 CIT 1137, 1160, 637 F. Supp. 2d 1270, 1291-92 (2009) (holding that Customs is not precluded by statute from securing "potential [AD] duty liability when a determination of bond sufficiency is made" but  
(footnote continued)

Here, contrary to Plaintiff's arguments, Customs' bond sufficiency determination was ministerial, not a substantive AD duty determination. Plaintiff argues that by making a bond sufficiency determination and requiring additional bonding at the PRC-wide rate, Customs effectively "conduct[ed] its own antidumping investigation and [] substitute[d] its judgment regarding the antidumping law," - i.e., assigned to QTF, unjustifiably, the PRC-wide rate. Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R., ECF Nos. 60 (con. ver.) & 61 (pub. ver.) ("Pl.'s Reply"), at 5. However, Customs did not purport to assign QTF produced and exported garlic the PRC-wide rate. It made no determination, nor did it need to, regarding Chinese government control or the applicability of the PRC-wide rate to QTF. Customs only determined that it could not, with any certainty, identify the producer of the garlic at issue. Pilipavicius Decl., ECF No. 56-1 at tab 1, at ¶11. While QTF does have an NSR, it is a combination rate and only applies where QTF is both the producer and exporter. Twelfth NSR, 73 Fed. Reg. at 56,552; see also 19 C.F.R. § 351.107(b)(1). Otherwise, the PRC-wide rate applies. See Twelfth NSR, 73 Fed.

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that such a determination is limited by Customs' ministerial role under the AD laws).

Reg. at 56,552-53.<sup>15</sup> Customs, in the absence of evidence establishing producer identity, applied the QTF/unknown producer rate (the PRC-wide rate).<sup>16</sup> Accordingly, Custom's decision to require bonding equal to Plaintiff's potential antidumping duty liability, as determined by Commerce, was not beyond its authority and was therefore in accordance with law.

## II. Customs' Determination Was Not Arbitrary and Capricious.

A bond sufficiency determination, however in accordance with law, cannot be arbitrary and capricious. The agency's decision must be "based on a consideration of the

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<sup>15</sup> Plaintiff argues that "Customs adopted the PRC-wide rate as the default" when "there is no showing that Commerce ever directed Customs to use this default rate, or under what circumstances." Pl.'s Br., ECF No. 55, at 18. However, this is contradicted by the plain language of the pertinent antidumping determination, where Commerce instructed that "for subject merchandise exported by QTF . . . but not manufactured by QTF . . . the cash deposit rate will continue to be the PRC-wide rate (i.e., 376.67 percent)." Twelfth NSR, 73 Fed. Reg. at 56,552-53.

<sup>16</sup> Plaintiff also argues that because the AFA rate itself is invalid and not in accordance with law, Customs' decision to require enhanced bonding to that amount is not in accordance with law. Pl.'s Br., ECF No. 55, at 9-11, 18-19. This argument is misaddressed. As Plaintiff points out, Customs' role is purely ministerial, such that it has no authority to calculate or recalculate an AD duty rate. It simply applies the rate as determined by Commerce. See Shinyei Corp. of Am. v. United States, Slip Op. 11-69, 2011 WL 2421227, \*2 (CIT June 15, 2011) ("Customs must interpret Commerce's instructions precisely as Customs' role in the process should be ministerial: Customs should do no more than enact the intentions of Commerce.") (citation omitted).

relevant factors," without "a clear error of judgment." Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted). This requires that Customs explain the available evidence and articulate a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)) (internal quotation marks omitted). While the court "may not supply a reasoned basis for the agency's action that the agency itself has not given," a decision of "less than ideal clarity" may be upheld "if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974). In the context of a bond sufficiency determination, this means that a negative finding must be "based on a reasonable belief as to the existence of the necessary justifying conditions," and the resultant increase in bonding must be reasonable "in relation to the objectives sought to be secured." Hera Shipping, 10 CIT at 497, 640 F. Supp. at 269.

Here, Customs reasonably determined<sup>17</sup> that it could not verify that QTF was the producer because: (1) the phytosanitary

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<sup>17</sup> This rationale was not provided to Plaintiff by Customs in its CBP Form 4647 or Information Notice. But, while these provide insufficient basis for judicial review, see Kwo Lee, \_\_\_ CIT at (footnote continued)

certificates<sup>18</sup> that Plaintiff submitted with his entries were all either incomplete or contained seemingly discrepant information, preventing Customs from verifying that QTF was the producer;<sup>19</sup> and (2) the supplemental documentation requested by Customs and provided by Plaintiff, in order to identify the producer, could reasonably be read to further undermined the claim that QTF was the producer.<sup>20</sup> From these factual findings, Customs reasonably

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\_\_\_, 24 F. Supp. 3d at 1330-31 (finding that the Information Notice alone was insufficient for judicial review), the court may consider affidavits from the agency to obtain "such additional explanation of the reasons for the agency decision as may prove necessary." Camp v. Pitts, 411 U.S. 138, 143 (1973). The Defendant has provided such affidavits here. See also infra note 24 (discussing the admissibility of Plaintiff's similar affidavit).

<sup>18</sup> According to Customs, phytosanitary certificates are issued by the Chinese government at the production site prior to export. Pilipavicius Decl., ECF No. 56-1 at tab 1, at ¶7. A certificate should "indicate[] the originating province, registered production site, name of producer and production date," acting as a "'birth certificate' of sorts" and is "the only way to trace and identify the producer of the garlic, the facility in which it was produced, and when it was produced." Id. at ¶8; see also Djeng Decl., ECF No. 56-1 at tab 2, at ¶¶3-6.

<sup>19</sup> The certificates either "contained no [China Inspection and Quarantine ("CIQ")] code, production lot number, and production date, or the CIQ code was discrepant and belonged to a different producer" (each producer is registered with the Chinese government and has its own CIQ code). Pilipavicius Decl., ECF No. 56-1 at tab 1, at ¶¶6, 8; see also Djeng Decl., ECF No. 56-1 at tab 2, at ¶¶6-8.

<sup>20</sup> See Edert Decl., ECF No. 56-1 at tab 3, at ¶7 (noting, *inter alia*, that QTF never previously produced and exported such a large quantity of garlic to the United States, and that, based on documents provided by Plaintiff, it was unlikely that QTF had  
(footnote continued)

concluded that it could not reliably identify the producer, and that, without evidence establishing that QTF was the producer, the QTF NSR did not apply. Pilipavicius Decl., ECF No. 56-1 at tab 1, at ¶¶6, 10-11; see also E-mail from Brian Pilipavicius to Ted Hume, Counsel for Plaintiff (Sept. 3, 2014, 09:46AM), reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tab 15 ("E-mail from Pilipavicius to Hume"), at AR-000202. Customs instead applied the appropriate rate for QTF exports with an unknown producer, the PRC-wide rate, and reasonably sought additional bonding in that amount. Id.<sup>21</sup>

Plaintiff has raised questions about the reliability of phytosanitary certificates as a basis for producer identification<sup>22</sup> and has provided alternative explanations from

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sufficient employees and facilities to process all the garlic it claimed to have produced).

<sup>21</sup> Customs further supported its decision by contextualizing the instant entries: Customs has had tremendous difficulty collecting duties owed on fresh garlic from the PRC, and the fact pattern here (a small importer with a minimal continuous bond enters a large quantity of garlic) is common and often ends in "uncollectable [duties] because the importers are no longer active and cannot be found." See Edert Decl., ECF No. 56-1 at tab 3, at ¶¶3-5.

<sup>22</sup> Plaintiff argues that phytosanitary certificates, as issued by the Chinese government, are an unreliable means of establishing producer identity, being routinely imperfect and incomplete, and, when complete, being indicative of storage location and inspection site, not producer. See Pl.'s Br., ECF No. 55, at 14-15 (arguing that phytosanitary certificates are unreliable evidence); Decl. of Zhao Zhenqing, Manager of QTF, reproduced in Apps. to Pl.'s Br., ECF No. 55-1 at app. 2 ("Zhao Decl."), at ¶1  
(footnote continued)

the seeming discrepancies and flaws in its documentation.<sup>23</sup> See Kwo Lee, \_\_\_ CIT at \_\_\_, 24 F. Supp. 3d at 1328-31. But this is not sufficient to establish that Customs' decision was arbitrary and capricious.<sup>24</sup> Customs considered the relevant factors - the

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(phytosanitary certificates are provided post-inspection to indicate that the produce is pest-free, not to establish producer identity), ¶¶2-4 (phytosanitary certificates indicate storage and inspection site, not producer identity), ¶¶5-6 (phytosanitary certificates are often incomplete); Pl.'s Reply, ECF No. 61, at 6-7 (arguing that it is logistically feasible that phytosanitary certificates indicate storage and inspection site rather than producer).

<sup>23</sup> See Pl.'s Br., ECF No. 55, at 15-16 (asserting that Plaintiff's sudden high volume of garlic imports was not indicative of planned antidumping duty fraud, but quick action on a perceived business opportunity after an increase in the antidumping duty rates for other garlic importers made importation of QTF-produced garlic financially reasonable), 16 (arguing that QTF did have the facilities to produce the entered amount of garlic because it was produced during the garlic harvest season and employees work long shifts during this period); Pl.'s Reply, ECF No. 61, at 8-9 (asserting that QTF did have the requisite production capacity for the type of garlic at issue).

<sup>24</sup> Plaintiff presents some of its evidence through affidavit. See Zhou Decl., ECF No. 55-1 at app. 2. Defendant argues that the information in the Zhou Declaration "was not presented to CBP at entry, nor did CBP have the opportunity to consider this evidence in reaching its decision," and Plaintiff "should not be permitted to attack CBP's actions on a basis never presented to the agency." Def.'s Resp., ECF No. 56, at 20 (quoting 28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."); United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) ("[O]bjections to the proceedings of an administrative agency [must] be made while it has opportunity for correction in order to raise issues reviewable by the courts.")). While it is true that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court,"

(footnote continued)

discrepancies and omissions in QTF's documentation and the absence of any other evidence to adequately fill those gaps - and, without a clear error in judgment, concluded that it could not verify that QTF was the producer. See Overton Park, 401 U.S. at 416. Under the arbitrary and capricious standard, "[t]he court is not empowered to substitute its judgment for that of the agency." Id. Customs has explained the evidence and made a "rational connection between the facts found and the choice made." Burlington Truck Lines, 371 U.S. at 168. Accordingly, Custom's decision was not arbitrary and capricious.<sup>25</sup>

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Camp, 411 U.S. at 142, the record may be supplemented if to do otherwise would "frustrate effective judicial review," id. 142-43; Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (internal citation and quotation marks omitted) (The existing record should be supplemented only where it "is insufficient to permit meaningful review consistent with the APA."). Here, without the Zhao Declaration, it would be impossible to determine whether Customs' decision was arbitrary and capricious for having "entirely failed to consider an important aspect of the problem" before it: the reliability of phytosanitary certificates as evidence. State Farm, 463 U.S. at 43; see also 28 U.S.C. § 2640(e) (actions brought under § 1581(i) are reviewed under 5 U.S.C. § 706); 5 U.S.C. § 706(2)(A) (providing for arbitrary and capricious review). Accordingly, consideration of the declaration is appropriate.

<sup>25</sup> Plaintiff also argues that Customs' decision was arbitrary and capricious because it was discriminatory. Pl.'s Br., ECF No. 55, at 5, 15; see also SKF USA Inc. v. United States, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.") (alteration, quotation marks and citation omitted). Plaintiff claims that other companies have incomplete phytosanitary certificates, see TRO Hr'g Tr., ECF No. 40, at 36:4-9; Zhao Decl., ECF No. 55-1 at app. 2, at ¶¶2-5;

(footnote continued)

III. Plaintiff was Afforded Adequate Process.<sup>26</sup>

Customs is tasked with making bond sufficiency determinations, but in doing so, it cannot "ignore the required procedures of decisionmaking." Bennett v. Spear, 520 U.S. 154,

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Attach. 1 to Decl. Zhao Zhenqing, ECF No. 31-1 (providing a sampling of incomplete and imperfect phytosanitary certificates from Zhengzhou Harmoni Spice Co. ("Harmoni") and Hebei Golden Bird Trading Co., Ltd. ("Golden Bird"), but have not been subject to the same bond sufficiency determination as QTF. Pl.'s Reply, ECF No. 61, at 10-11 n.11. However, even if Harmoni and Golden Bird have comparable incomplete phytosanitary certificates, see Def.'s Resp., ECF No. 56, at 23 (noting that the provenance of competitors' phytosanitary certificates offered into evidence is unestablished), this is not enough to show that Customs acted arbitrarily, because the companies are not similarly situated to QTF. Neither Harmoni nor Golden Bird has a producer-specific combination rate. See Fresh Garlic from the [PRC], 71 Fed. Reg. 26,329, 26,332 (Dep't Commerce May 4, 2006) (final results and partial rescission of antidumping duty administrative review and final results of new shipper reviews) (setting Harmoni's rate at 0.00 percent irrespective of producer); Fresh Garlic from the [PRC], 79 Fed. Reg. 36,721, 36,723 (Dep't Commerce June 30, 2014) (final results and partial rescission of the 18th antidumping duty administrative review; 2011-2012) (setting Golden Bird's rate at the PRC-wide rate, irrespective of producer). Unlike QTF, Customs would not need to determine their producer to know the appropriate cash deposit rate. Errors and omissions in their phytosanitary certificates would not trigger a bond sufficiency determination because the information contained (or not) therein, has no effect on their rate.

<sup>26</sup> Defendant argues that Plaintiff has waived his argument that Customs afforded him inadequate process because he has "dedicate[d] one sentence in [his] brief to challenging the adequacy of the written notice of the STB requirement," without any elaboration to the "factual or legal basis for [his] argument." Def.'s Resp., ECF No. 56, at 26-27 (citing United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)). However, this is incorrect. Defendant cites only to Pl.'s Br., ECF No. 55, at 4-5 (Plaintiff's summary of argument) while ignoring the same filing at 16-17 (Plaintiff's actual argument).

172 (1997) (citation omitted). Because there is no protected interest in importing to the United States, an enhanced bonding determination does not trigger Constitutional due process concerns. See Bd. of Trustees of Univ. of Illinois v. United States, 289 U.S. 48, 57 (1933) (holding that there is no protected property interest in importing to the United States).<sup>27</sup> The statute provides only that Customs may require additional bonding as "deem[ed] necessary." 19 U.S.C. § 1623(a). The regulation is similarly lacking in procedural requirements. See 19 C.F.R. § 113.13(d).<sup>28</sup>

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<sup>27</sup> See also Hera Shipping, 10 CIT at 496, 640 F. Supp. at 269 ("[T]he amount of a bond does not appear to be as significant in the scale of values as the interests for which full due process rights have been found," and "the business person's right to have a bond remain unchanged is not the sort of property right which is of such fundamental importance that it must remain in place, unmolested, until good cause to change it is developed in a hearing.") (citation omitted).

<sup>28</sup> Customs has circulated and published notice of an informal guidance memorandum on bond sufficiency determinations undertaken "when the port has developed a reasonable belief that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy because of Anti-dumping/Countervailing Duty (AD/CVD) concerns." Mem. from Exe. Dir., Trade Policy and Programs Div., Office of Int'l Trade, CBP, to Dirs. of Field Operations and Assistant Dirs. of Trade and Field Operations, Office of Field Operations, CBP, on the Use of Single Transaction Bonds as Additional Security for Antidumping and Countervailing Concerns, Public Distribution of Information on Use of Single Transaction Bonds as Additional Security for Anti-Dumping and Countervailing Duties (June 13, 2012) reproduced in App. to Mem. in Supp. of Def.'s Opp'n to Pl.['s] Appl[.] for TRO & Mot[.] for Prelim. Inj., ECF No. 25-1 ("STB Mem."), at A7-8. But there is nothing in this informal guidance  
(footnote continued)

Accordingly, further elaboration of the appropriate procedure remains generally within the Customs' discretion.

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that binds the agency to particular procedures. While "[i]t is a familiar rule of administrative law that an agency must abide by its own regulations," Fort Stewart Sch. v. Fed. Labor Relations Auth., 495 U.S. 641, 654 (1990) (citations omitted), "[t]he general consensus is that an agency statement, not issued as a formal regulation, binds the agency only if the agency intended the statement to be binding." Farrell v. Dep't of Interior, 314 F.3d 584, 590 (Fed. Cir. 2002) (citations omitted). "The primary consideration in determining the agency's intent is whether the text of the agency statement indicates that it was designed to be binding on the agency." Id. at 591. Custom's public notice contains nothing to suggest that the memorandum was considered binding; rather it was meant to provide "guidance" to ensure "the appropriate use of the port's authority to require additional bonding in a uniform manner." STB Mem., ECF No. 25-1, at A7.

Further, the record indicates that Customs abided by this guidance in making Kwo Lee's bond sufficiency determination. The notice states, *inter alia*, that: (1) "[e]ach transaction will be judged on its own merits," and "[o]nly on a case-by-case basis will the STB be required"; (2) "[i]mporters/brokers will be provided [with] written notice of the STB requirement," and "[t]he notice will include[] [t]he amount of the STB [and] the general reason why the STB is being required"; and (3) the amount of the STB "in general, will be based on the value of the merchandise times the AD/CVD rate that would apply if the goods were subject to [the given] AD/CVD rate." Id. Here, (1) the determination made was specific to Kwo Lee, see Pilipavicius Decl., ECF No. 56-1 at tab 1, at ¶¶6-11; Djeng Decl., ECF No. 56-1 at tab 2, at ¶¶3, 7-10; Edert Decl., ECF No. 56-1 at tab 3, at ¶7; (2) Kwo Lee's broker was provided with written notice of the amount of the required additional bonding, see CBP Form 4647, ECF No. 56-2 at tabs 11 & 14, at AR-000187-88, AR-000199-200, and a statement of the general reasons why STBs were required for the entries, Information Notice, ECF No. 56-2 at tabs 11 & 14, at AR-000189, AR-000201; and (3) the amount of additional bonding was calculated to increase the total bonding to equal the potential antidumping duty liability for the QTF exporter/unknown producer rate, Pilipavicius Decl., ECF No. 56-1 at tab 1, at ¶11.

Absent "an erroneous interpretation of the law" or "clearly erroneous factual underpinnings," a discretionary decision can be set aside only if it "represents an unreasonable judgment in weighing relevant factors," A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1039 (Fed. Cir. 1992) (citations omitted), or if Customs fails to provide "sufficient information as to the basis for the change [in bonding requirement] to allow it to be challenged in court," Hera Shipping, 10 CIT at 496, 640 F. Supp. at 269.<sup>29</sup> Outside this, the court will defer to the agency "regarding the development of the agency record." Dongtai Peak Honey Indus. Co. v. United States, 777 F.3d 1343, 1351 (Fed. Cir. 2015) (internal quotation marks and citation omitted).<sup>30</sup>

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<sup>29</sup> See also Nat'l Fisheries, 33 CIT at 1151-52, 637 F. Supp. 2d at 1284-85.

<sup>30</sup> Indeed, "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) (quotation marks and citation omitted); see also Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.' To do otherwise would violate 'the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'" (quoting Vermont Yankee, 435 U.S. at 549, 544) (alteration in original).

It is true that here the written notice Customs provided Plaintiff was a generalized statement, the same as that provided to the industry as a whole several months earlier.<sup>31</sup> It indicated only that heightened bonding was required "[d]ue to discrepancies found with entry documents, concerns with bond sufficiency and the financial risk associated with the entry of fresh garlic from the PRC." Information Notice, ECF No. 56-2 at tabs 11 & 14, at AR-000189, AR-000201; Information Notice, ECF No. 55-1 at app. 1 (same). It did not indicate, as Customs had decided, that because Plaintiff failed to produce documentation to establish the identity of its producer, Customs, in accordance with Commerce's instructions, required bonding equal to the rate assigned to entries from QTF as exporter with an unknown producer - the PRC-wide rate. See Twelfth NSR, 73 Fed. Reg. at 56,552-53. In this respect it was deficient. However, concurrent and subsequent communications between Plaintiff and Customs<sup>32</sup> as well as affidavits, documentation, and briefing

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<sup>31</sup> Compare Port of San Francisco Information Notice (June 9, 2014), reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tab 23, at AR-001060, with Information Notice, ECF No. 55-1 at app. 1.

<sup>32</sup> See, e.g., E-mail from Pilipavicius to Hume, ECF No. 56-2 at tab 15, at AR-000202-03 (explaining that Customs was requiring additional bonding pursuant to 19 C.F.R. § 113.13(d) because all of Plaintiff's phytosanitary certificates were "incomplete or discrepant," leaving the producer of the garlic in question); E-mail from Frank Djeng to Ted Hume (Sept. 4, 2014, 01:58PM),  
(footnote continued)

provided in the course of this action,<sup>33</sup> have served to cure the deficiency. See Hera Shipping, 10 CIT at 497, 640 F. Supp. at 269; cf. Jennings v. Mahoney, 404 U.S. 25, 26 (1971). Plaintiff was made aware of Customs' decision and reasoning and has been given opportunity to challenge it, before both before Customs and this Court. Plaintiff was, therefore, accorded adequate process.

### CONCLUSION

Customs' bond sufficiency determination, and the resultant additional bonding requirement imposed on Plaintiff, is sustained as in accordance with law, not arbitrary and capricious, and not an abuse of discretion.

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reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tab 18, at AR-000208 (confirming teleconference, as requested by Plaintiff, to discuss the use and meaning of the phytosanitary certificates); see also E-mail from Hong to Dolor & Djeng, ECF No. 56-1 at tab 5, at AR-000007-11 (requesting further documentation to "verify the manufacturer/shipper of the instant shipment"); E-mail from Frank Djeng to Nick Hong (Aug. 28, 2014, 02:56PM), reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tab 11, at AR-000186 (providing Plaintiff with CBP Form 4647 and Information Notice); E-mail from Frank Djeng to Richard Edert and others (Aug. 28, 2014, 06:42PM), reproduced in [Con.] App. to [Def.'s Resp.], ECF No. 56-2 at tab 12, at AR-000190 (summarizing conversation with Plaintiff's counsel, stating that they were waiting for "more information to prove that he does represent the importer[]" and that the Customs officers "did not reveal anything except giving him a history of the garlic duty evasion to support why we're asking for STB (revenue risk, bond saturation, [number] of shipments)").

<sup>33</sup> Pilipivicius Decl., ECF No. 56-1 at tab 1; Djeng Decl., ECF No. 56-1 at tab 2; Edert Decl., ECF No. 56-1 at tab 3; Def.'s Resp., ECF No. 56; App. to [Def.'s Resp.], ECF Nos. 56-1 & 56-2.

Entry of judgment is stayed pending the final determination in the Twentieth Administrative Review of the Antidumping Duty Order on Fresh Garlic from the PRC,<sup>34</sup> which will decisively establish Plaintiff's antidumping duty liability.

/s/ Donald C. Pogue  
Donald C. Pogue, Senior Judge

Dated: June 12, 2015  
New York, NY

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<sup>34</sup> See Petitioner's Request for Admin. Rev., A-570-831, ARP 13-14 (Dec. 1, 2014), reproduced in Apps. to Pl.'s Br., ECF No. 55-1 at app. 4.