U.S. Customs and Border Protection

Slip Op. 13–134

DOWNHOLE PIPE & EQUIPMENT, LP, AND DP-MASTER MANUFACTURING CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and VAM DRILLING USA, TEXAS STEEL CONVERSION, INC., ROTARY DRILLING TOOLS, TMK IPSCO, AND U.S. STEEL CORP., Defendant-Intervenors.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 11–00081

[The Department of Commerce's remand determination is sustained]

Dated: November 4, 2013

Mark B. Lehnardt, Lehnardt & Lehnardt, LLC, of Liberty, MO, and *Irene H. Chen*, Chen Law Group LLC, of Rockville, MD, for plaintiffs.

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Todd M. Hughes*, Deputy Director. Of counsel on the brief was *Nathaniel J. Halvorson*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Roger B. Schagrin and *John W. Bohn*, Schagrin Associates, of Washington, DC, for VAM Drilling USA, Texas Steel Conversion, Inc., Rotary Drilling Tools, and TMK IPSCO.

OPINION

TSOUCALAS, Senior Judge:

This matter is before the court following remand to the Department of Commerce ("Commerce") in *Downhole Pipe & Equip. LP v. United States*, 36 CIT __, 887 F. Supp. 2d 1311 (2012) ("*Downhole I*"). Commerce issued its remand redetermination in May 2013. *See Final Results of Redetermination Pursuant to Court Remand* (May 13, 2013), ECF No. 94 ("*Remand Results*"). Plaintiffs Downhole Pipe & Equipment, LP, and DP-Master Manufacturing Co., Ltd. ("DP-Master" and, collectively, "Plaintiffs"), contest the *Remand Results*. For the reasons discussed below, the court sustains the *Remand Results*.

BACKGROUND

The relevant facts and procedural history of this case are set forth in *Downhole I*, 36 CIT at __, 887 F. Supp. 2d at 1315–18, and are summarized briefly herein. Drill pipes are "specialized high-strength iron alloy tube[s]" used in oil drilling applications alongside other so-called oil country tubular goods ("OCTG"). *Id.* at __, 887 F. Supp. 2d at 1315. In the original proceeding, Commerce determined that "drill pipe from the [People's Republic of China ("PRC")] is being, or is likely to be, sold in the United States at [less than fair value ("LTFV")]". *Drill Pipe From the PRC: Final Determination of Sales at LTFV and Critical Circumstances*, 76 Fed. Reg. 1966, 1966 (Jan. 11, 2011) ("*Final Determination*").

The *Final Determination* specifically targeted drill pipe green tubes ("DPGT"), an input for drill pipe defined as "seamless tubes with an outer diameter of less than or equal to 6 5/8 inches[,] . . . containing between 0.16 and 0.75 percent molybdenum, and containing between 0.75 and 1.45 percent chromium." *Id.* at 1967. Commerce determined the surrogate value for DPGT using import data for Indian Harmonized Tariff Schedule ("IHTS") categories 7304.23 and 7304.29. *See Drill Pipe from the PRC: Issues and Decision Memorandum for the Final Determination* at 31–32 (Jan. 3, 2011), A-570–965.

In *Downhole I*, the Court remanded the *Final Determination* to Commerce with instructions to reconsider the surrogate values for DPGT and the labor wage rate.[1] *Downhole I*, 36 CIT at __, 887 F. Supp. 2d at 1330. The Court held that Commerce failed to address Infodrive data contradicting its finding that DPGT entered India under IHTS 7304.23 and 7304.29 during the period of investigation. *Id.* at __, 887 F. Supp. 2d at 1324–25. The Court acknowledged that the IHTS subheadings may in fact be the best available information, but it could not affirm the *Final Determination* on the basis of the explanation Commerce provided. *Id.* at __, 887 F. Supp. 2d at 1325.

On remand, Commerce examined a number of potential surrogate values for DPGT, including: import data for IHTS 7304.23, 7304.29, and 7304.59; price data on P1110 and J/K 55 tubes from *Metal Bulletin Research*; and adjusted values for alloy steel billets and seamless tubes. *See Draft Results of Redetermination Pursuant to Remand* at 4 (Apr. 5, 2013), ECF No. 119–2 ("*Draft Results*"). Commerce initially selected price data for imports under IHTS 7304.59.10 and

[1] On remand, Commerce selected data from "Chapter 6A: Labor Cost in Manufacturing" in the ILO Yearbook for India as the surrogate value for the labor wage rate. *Remand Results* at 18. Plaintiffs do not allege error in their submission to the court. *See* Pls.' Comments on Remand Redetermination ("Pls.' Cmts.").

7304.59.20, "circular, seamless, alloy" classifications covering "products which are not properly classified as drill pipe, OCTG, or a number of other clearly-delineated types of tubes."[2] *Id.* at 15. Commerce found that the IHTS 7304.59 data was most representative of DPGT, contemporaneous with the period of investigation, duty and tax exclusive, publicly available, and represented a broad market average. *See id.* at 15–16. Commerce "confirmed" its analysis with a National Import Specialist at United States Customs and Border Protection ("CPB"). Memorandum from Toni Datch, re: Remand Redetermination in the Investigation of Drill Pipe from the PRC at 1 (Mar. 26, 2013), A-570–965 ("NIS Memo").

For the final results, Commerce selected import data from IHTS 7304.59.20 alone to value DPGT. *See* Remand Results at 14–18. Commerce concluded that Infodrive data Plaintiffs placed on the record conclusively demonstrated that DPGT did not enter India under IHTS 7304.59.10, but did not foreclose the possibility that DPGT entered under IHTS 7304.59.20. *Id.* at 14. Commerce continued to find that import data for IHTS 7304.59.20 best met its preferences for surrogate values. *Id.*

Plaintiffs filed comments alleging that the *Remand Results* were unsupported by substantial evidence and otherwise not in accordance with law. *See* Pls.' Cmts. at 7–23. Plaintiffs ask the court to remand again with guidance on an acceptable range of surrogate values for DPGT. *See id.* at 23–25.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and section 516A(a)(2)(B)(i) of the Tariff Act of 1930,[3] as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2006).

The court will uphold Commerce's remand redetermination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "'Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Goldlink Indus. Co. v. United States*, 30 CIT 616, 618, 431 F. Supp. 2d 1323, 1326 (2006) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). Under this standard, "an agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"

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[2] IHTS 7304.59.10 and 7304.59.20 differ only in terms of the size of the tubes they cover: IHTS 7304.59.10 covers tubes with diameters up to 114.3 mm, while IHTS 7304.59.20 covers tubes with diameters between 114.3 mm and 219.1 mm. Remand Results at 5.

[3] All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

Gerber Food (Yunnan) Co. v. United States, 31 CIT 921, 926, 491 F. Supp. 2d 1326, 1333 (2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). Nevertheless, "the possibility of drawing two inconsistent conclusions from the evidence does not invalidate Commerce's conclusion as long as it remains supported by substantial evidence." *Zhaoqing New Zhongya Aluminum Co. v. United States*, 36 CIT __, __, 887 F. Supp. 2d 1301, 1305 (2012) (citing *Universal Camera*, 340 U.S. at 488).

DISCUSSION

Commerce determines the normal value of subject merchandise produced in a non-market economy ("NME") "on the basis of the value of the factors of production utilized in producing the merchandise" in a comparable market economy. 19 U.S.C. § 1677b(c)(1). In selecting these surrogate values, Commerce must use the "best available information." *Id.* Commerce "normally will use publicly available information" from a single country, 19 C.F.R. § 351.408(c)(1), (2) (2013), and it "prefers data that reflects a broad market average, is . . . contemporaneous with the period of review, specific to the input in question, and exclusive of taxes on exports." *Fuwei Films (Shandong) Co. v. United States*, 36 CIT __, __, 837 F. Supp. 2d 1347, 1350–51 (2012).

"[T]he process of constructing foreign market value for a producer in a [NME] country is difficult and necessarily imprecise." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (internal quotation marks omitted). Commerce has "broad discretion to determine the best available information," *Goldlink*, 30 CIT at 619, 431 F. Supp. 2d at 1327 (internal quotation marks omitted), and "[i]f Commerce's determination of what constitutes the best available information is reasonable, then the Court must defer to Commerce." *Id.*, 431 F. Supp. 2d at 1327.

Plaintiffs argue that Commerce erroneously determined that IHTS 7304.59.20 was the best available information because IHTS 7304.59.20 is not representative of DPGT and Commerce did not provide adequate justification for rejecting non-IHTS alternative values on the record. *See* Pls.' Cmts. at 8–23.

I. Commerce Reasonably Concluded that IHTS 7304.59.20 Best Represented DPGT

Plaintiffs argue that Commerce erred in finding that IHTS 7304.59.20 was representative of DPGT because: (1) Commerce's analysis of Indian tariff classifications was inadequate; (2) Commerce failed to address Infodrive data indicating that IHTS 7304.59.20 was not representative of DPGT or DP-Master's merchandise; (3) Com-

merce ignored evidence indicating that the average unit value ("AUV") of entries under IHTS 7304.59.20 was "aberrantly high;" and (4) Commerce improperly relied on the NIS Memo. *See* Pls.' Cmts. at 8–21.

A. Analysis of Indian Tariff Classifications

Plaintiffs argue that "Commerce's legal analysis of tariff classifications was inadequate" because Commerce dismissed alternative IHTS subheadings without considering "legal principles" such as General Rule of Interpretation 2(a).[4] Pls.' Cmts. at 13. Plaintiffs insist further analysis was necessary given Commerce's change in position from the *Final Determination* and record evidence indicating that petitioners classified DPGT under subheadings other than 7304.59. *Id.* at 13–15.

Plaintiffs fail to demonstrate that Commerce's IHTS analysis was inadequate. First, Plaintiffs do not cite any legal authority demonstrating that Commerce must conduct a full classification analysis when considering import data from a particular foreign tariff heading as a surrogate value.[5] Second, Plaintiffs provide virtually no legal analysis contravening Commerce's selection. This court has ruled that Commerce should not rely on a basket tariff category if a more representative surrogate value is available. *See Arch Chems., Inc. v. United States*, 33 CIT 954, 972 (2009) (not reported in the Federal Supplement) (citing *Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT 1418, 1444 (2005) (not reported in the Federal Supplement)). Here, Commerce reasonably concluded that IHTS 7304.59.20 was more representative of DPGT than the alternative IHTS categories on the record. *See Draft Results* at 5–6, 15–16; Remand Results at 14–18. Commerce concluded that IHTS 7304.23 was not representative of DPGT because it captured processed semi-finished drill pipe. *See Draft Results* at 5 (unchanged in *Remand Results*). Similarly, Commerce concluded that IHTS 7304.29 was not representative of DPGT because it captured "semi-finished [OCTG] casing and tubing," which is not an input for drill pipe. *Id.* (unchanged in *Remand Results*). In contrast, Commerce found that IHTS 7304.59.20 better represented DPGT because it was a "circular, seamless, alloy category cover[ing] products which are not properly classified as drill pipe,

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[4] GRI 2(a) reads: "Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article."

[5] Plaintiffs also fail to provide guidance on why CBP regulations should apply to the classification of DPGT under IHTS categories over Indian laws and regulations. The court need not address this matter because Commerce's selection of IHTS 7304.59.20 was reasonable on the basis of the record as a whole.

OCTG, or a number of other clearly-delineated types of tubes." *Id.* at 15 (unchanged in *Remand Results*). Commerce "confirmed" its analysis with the professional opinion of a CPB official. *See* NIS Memo at 1. Accordingly, Commerce's classification analysis was reasonable. *See Gerber Food*, 31 CIT at 926, 491 F. Supp. 2d at 1333 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

B. Infodrive Data

Plaintiffs also argue that Infodrive data demonstrates that 7304.59.20 is not representative of DPGT generally, or DPMaster's DPGT. *See* Pls.' Cmts. at 16–18. Plaintiffs cite Infodrive data indicating that there were no entries of DPGT in at least 60% of the entries under IHTS 7304.59.20 during the period of investigation. *See id.* at 16. In light of this evidence and Infodrive data indicating that DPGT did not enter under IHTS 7304.59.10 at all, Plaintiffs conclude that Commerce erroneously selected IHTS 7304.59.20 data to value DPGT. *See id.* at 17–18.

Plaintiffs essentially compare Commerce's selection of IHTS 7304.59.20 to the surrogate value for DPGT that the Court remanded in Downhole I. *See id.* at 17. In that opinion, the Court recognized Infodrive's "utility . . . as a supplement to aggregated IHTS data," but also noted that "Commerce need not rely on Infodrive data that is incomplete or demonstrably inaccurate." *Downhole I*, 36 CIT at __, 887 F. Supp. 2d at 1323. The Court also acknowledged that "Commerce is obliged to address Infodrive data offered in rebuttal if it specifies a 'definite and substantial percentage' of imports under a particular IHTS category." *Id.*, 887 F. Supp. 2d at 1323 (quoting *Calgon Carbon Corp. v. United States*, 35 CIT __, __, Slip Op. 11–21 at 17 (Feb. 17, 2011) (not reported in Federal Supplement)). The Court remanded Commerce's IHTS classification because Commerce failed to explain contradictory Infodrive data. *Id.* at __, 887 F. Supp. 2d at 1325. It also noted that IHTS 7304.23 and 7304.29 might be the best available information, but Commerce had to substantially support its selection in light of the Infodrive data. *Id.*, 887 F. Supp. 2d at 1325. *See also Calgon*, 35 CIT at __, Slip Op. 11–21 at 17–18 (remanding where Commerce failed to substantially support its tariff classification while taking into account incomplete but contradictory Infodrive data).

In contrast to the facts in *Downhole I*, here Commerce explained why its decision retained substantial record support in light of the Infodrive data. *See* Remand Results at 16–17. As noted above, Commerce selected IHTS 7304.59.20 based on its own analysis of the IHTS and the professional opinion of a CBP official. *See Draft Results*

at 5–6, 15–16; *Remand Results* at 14–16. With specific regard to the Infodrive data, Commerce noted that IHTS 7304.59.20 was not limited to DPGT as it is "a basket category covering multiple types of seamless alloy tubes that could not be classified elsewhere." *Id.* at 16–17. Additionally, given that the other IHTS subheadings did not capture DPGT, and "without information corroborating what the remainder of the overall imports consist[ed] of," Commerce concluded that IHTS 7304.59.20 was still most representative of DPGT. *See id.* at 17. Because it addressed the Infodrive data in compliance with the requirements articulated in *Downhole I* and *Calgon*, Commerce's analysis was reasonable. *See Downhole I*, 36 CIT at __, 887 F. Supp. 2d at 1325; *Calgon*, 35 CIT at __, Slip Op. 11–21 at 17–18.

Plaintiffs also argue that the Infodrive data established that IHTS 7304.59.20 was not representative of DP-Master's DPGT. Pls.' Br. at 17. According to Plaintiffs, 70% of DP-Master's DPGT was of the diameter covered by IHTS 7304.59.10. *Id.* As Infodrive data indicated that DPGT did not enter India under IHTS 7304.59.10, and IHTS 7304.59.20 does not correspond to 70% of DP-Master's merchandise, Plaintiffs insist that the surrogate value should not apply to that merchandise. *See* Pls.' Br. at 17–18.

This argument is unconvincing. As noted above, determining a surrogate value is "difficult and necessarily imprecise." *Nation Ford Chem. Co.*, 166 F.3d at 1377. Although IHTS 7304.59.20 does not perfectly cover DP-Master's DPGT, Commerce's decision was reasonable nonetheless given the record support for IHTS 7304.59.20 and the relative weakness of the alternative values. *See QVD Food Co. v. United States*, 34 CIT __, __, 721 F. Supp. 2d 1311, 1318 (2010) (when considering "imperfect alternatives" for a surrogate value, Commerce's selection is reasonable if supported with substantial evidence in the record), *aff'd* 658 F.3d 1318 (Fed. Cir. 2011).

C. AUV of Entries Under IHTS 7304.59.20

Third, Plaintiffs argue that Commerce failed to address its claim that the $4,978.08/MT AUV of IHTS 7304.59.20 entries was "aberrantly high." *See* Pls.' Cmts. at 18. According to Plaintiffs, record evidence demonstrated that DPGT comprises approximately 30% of the value of finished drill pipe. *Id.* at 20. Because the AUV for IHTS 7304.59.20 entries is nearly double the $2,511.67/MT AUV for entries of finished and semi-finished drill pipe under IHTS 7304.23, Plaintiffs insist that "no reasonable mind could accept this value." *Id.* at 18.

"'[W]hen confronted with a colorable claim that the data that Commerce is considering is aberrational, Commerce must examine the data and provide a reasoned explanation as to why the data it chooses

is reliable and non-distortive.'" *See Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 37 CIT __, __, Slip Op. 13–30 at 10 (Mar. 11, 2013) (quoting *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1135, 502 F. Supp. 2d 1295, 1308 (2007)). "In such a case, it is not enough for Commerce to 'summarily discard the alternatives as flawed,' Commerce must also 'evaluate the reliability of its own choice.'" *Id.*, Slip Op 13–30 at 10 (quoting *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 495, 318 F. Supp. 2d 1339, 1352 (2004)).

Commerce clearly addressed this argument in the *Remand Results*, finding that Plaintiffs' "previous arguments indicate that [IHTS 7304.23] is much broader than finished drill pipe, and is not a reliable indicator of the value of finished drill pipe." *Remand Results* at 14. Specifically, Commerce noted that Plaintiffs "previously explained that some line items under [IHTS] category 7304.23.90 may be of drill pipe tools, other drill pipe products, or inputs of either." *Id.* at 14–15 (internal quotation marks omitted). Additionally, the Court acknowledged in *Downhole I* that IHTS 7304.23.90 contains entries of "seamless pipe" and other products. *See Downhole I*, 33 CIT at __, 887 F. Supp. 2d at 1324 & n.11. Simply put, there was no verifiable "benchmark" for drill pipe from which Commerce could value DPGT. And, as noted above, Commerce provided a reasonable explanation for its selection of IHTS 7304.59.20. Accordingly, Commerce reasonably rejected Plaintiffs' argument. *See Gerber Food*, 31 CIT at 926, 491 F. Supp. 2d at 1333 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

D. The NIS Memo

Plaintiffs argue that Commerce's determination was unreasonable because the NIS Memo was the "sole factual justification." Pls.' Cmts. at 8. The NIS Memo reads: "During the week of January 7, 2013, [Commerce] contacted Mary Ellen Laker, [CBP] National Import Specialist, regarding the HTS classification of [DPGT], as described in the scope of the *Order*. She confirmed that [DPGT] would be categorized under HTS 7304.59."[6] NIS Memo at NIS Memo at 1 (internal footnote omitted). Plaintiffs allege that the NIS Memo is unreliable as evidence because it does not explain whether the contact with the CPB official was casual or formal, whether Commerce provided the scope language to the CBP official, whether the CBP official knew the Indian tariff categories as well as the U.S. categories, whether the CBP official considered alternative IHTS categories, or whether the

[6] The "*Order*" Commerce referred to is *Drill Pipe From the PRC: Antidumping Duty Order*, 76 Fed. Reg. 11,757 (Mar. 3, 2011), which is based, in part, on the *Final Determination*.

CBP official considered the scope language. *See* Pls.' Cmts. at 9–12. Accordingly, Plaintiffs argue that the NIS Memo "fails to provide even the proverbial scintilla" of evidence. *Id.* at 13 (internal quotation marks omitted).

Plaintiffs' argument is unconvincing. First, contrary to Plaintiffs' insistence, Commerce did not rely solely on the NIS Memo in its analysis. As noted above, Commerce fell back on IHTS 7304.59.20 after reasonably concluding that it was more representative of DPGT than the other IHTS classifications on the record. *See Draft Results* at 5–6, 15–16; *Remand Results* at 14–18. With specific regard to the NIS Memo, Commerce explained that it "confirmed" this analysis with the CPB official. *See* NIS Memo at 1; *Remand Results* at 15–16.

Second, Plaintiffs' argument is entirely conjectural. Plaintiffs insist that the NIS Memo contains several possible flaws, but fail to identify any evidence in the record supporting their assertions. *See* Pls.' Cmts. at 9–12. Accordingly, their argument simply invites the court to reweigh evidence. However, "[t]he court's role is not to reweigh evidence," *Fedmet Res. Corp. v. United States*, 37 CIT __, __, 911 F. Supp. 2d 1348, 1355 (2013) (Tsoucalas, J.) (citing *Laminated Woven Sacks Comm. v. United States*, 34 CIT __, __, 716 F. Supp. 2d 1316, 1328 (2010) (Tsoucalas, J)), and it declines to do so here.

II. Commerce Reasonably Rejected the Alternative Surrogate Values on the Record

Finally, Plaintiffs argue that Commerce "wrongly dismissed" the other alternative surrogate values on the record. Pls.' Cmts. at 21. Incorporating by reference their pre-draft remand comments, Plaintiffs insist that the price data for P1110 and J/K 55, as well as the adjusted values for alloyed steel billets and seamless tubes, are all superior to the data Commerce selected. *Id.* at 21–23. Plaintiffs add that, contrary to Commerce's findings, the data from these sources would require little if any adjustment to calculate a surrogate value for DPGT. *See id.* at 23.

As noted above, when selecting a surrogate value, Commerce "normally will use publicly available information" from a single country, *see* 19 C.F.R. § 351.408(c)(1), (2), and it "prefers data that reflects a broad market average, is . . . contemporaneous with the period of review, specific to the input in question, and exclusive of taxes on exports." *Fuwei Films*, 36 CIT at __, 837 F. Supp. 2d at 1350–51. Here, Commerce reasonably determined that IHTS 7304.59.20 import data satisfied more of its selection criteria than the flawed alternatives on the record.

Commerce rejected *Metal Bulletin Research* price data for J/K 55 because J/K 55 is not an input for drill pipe and was "at best compa-

rable" to DPGT. *Draft Results* at 8 (unchanged in *Remand Results*). Moreover, the J/K 55 data did not reflect actual sales prices, was not contemporaneous with the period of investigation, and covered only one month of prices. *Id.* (unchanged in *Remand Results*). Therefore, Commerce reasonably concluded that J/K 55 data did not satisfy its selection criteria. *See Fuwei Films*, 36 CIT at __, 837 F. Supp. 2d at 1350–51.

Commerce rejected the P1110 price data for similar reasons, finding that P1110 is not representative of DPGT because it is a "finished OCTG product" that cannot be used as an input for drill pipe. *Draft Results* at 9 (unchanged in *Remand Results*). Additionally, the P1110 data was based on offers and only covered one month of price information. *Id.* at 9 (unchanged in *Remand Results*). Accordingly, Commerce reasonably determined that the P1110 data was not the best available information. *See Fuwei Films*, 36 CIT at __, 837 F. Supp. 2d at 1350–51.

Commerce also rejected adjusted values for alloy steel billets and seamless tubes, finding that the record lacked sufficient information to adjust the values for the required alloying costs and that calculating such adjustments required proprietary information. *See Draft Results* at 9–12 (unchanged in *Remand Results*). Plaintiffs contest this finding, arguing that the cost of alloying elements for steel billets and seamless tubes is minimal and therefore the values for these products are the most accurate on the record. *See* Pls.' Cmts. at 22–23. Plaintiffs fail to address Commerce's finding that these adjustments, however small, require proprietary information. *See* Remand Results at 17. Because its regulations direct it to use "publicly available information," 19 C.F.R. § 351.408(c)(1), Commerce reasonably rejected these adjusted values.

In contrast, Commerce found that the IHTS 7304.59.20 data is "contemporaneous with the [period of investigation], represent[s] a broad market average, [is] tax and duty exclusive, and [is] publicly available, thus comporting with [its] selection criteria." *Draft Results* at 16; *see alsoRemand Results* at 14. And, as noted above, Commerce determined that IHTS 7304.59.20 was the surrogate value most representative of DPGT. *See Draft Results* at 5–6, 15–16; *Remand Results* at 14–18. Accordingly, Commerce reasonably concluded that IHTS 7304.59.20 was the best available information on the record. *See* 19 C.F.R. § 351.408(c)(1), (2); *Fuwei Films*, 36 CIT at __, 837 F. Supp. 2d at 1350–51.

CONCLUSION

For the foregoing reasons, Commerce's remand redetermination is sustained in its entirety. Judgment will be entered accordingly.
Dated: November 2, 2013
New York, NY

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 13–135

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

Before: Claire R. Kelly, Judge
Court No. 13–00268

[Granting Plaintiff's Motion for Entry of Judgment and ordering the sixty-day notice period for the effective date of Customs Ruling HQ H202560 to run from October 17, 2013.]

Dated: November 4, 2013

John M. Peterson, *Maria E. Celis*, *Richard F. O'Neill*, Neville Peterson LLP of New York, NY, for plaintiff Best Key Textiles Co. Ltd.

Marcella Powell, *Beverly A. Farrell*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief were *Claudia Burke*, and *Tara K. Hogan*, Department of Justice, and *Paula S. Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection of New York, NY.

OPINION

Kelly, Judge:

Plaintiff filed this action on August 1, 2013 seeking "to compel agency action unlawfully withheld or unreasonably delayed." Pl.'s Compl. ¶ 1, Aug. 1, 2013, ECF No. 2. In particular, plaintiff sought to compel United States Customs and Border Protection ("CBP" or "Customs") "to complete consideration of a proposal to revoke a Customs ruling pursuant to Section 625 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1625." Pl.'s Compl. ¶ 1. The defendant sought to dismiss this case for failure to state a cause of action and lack of jurisdiction under 28 U.S.C. § 1581(h).[1] Def.'s Mot. Dismiss for Lack of Jurisd. and for Failure to State a Claim upon which Relief Can Be Granted,

[1] Although plaintiff alleged jurisdiction under 28 U.S.C. § 1581(i) in its complaint, defendant failed to address § 1581(i) jurisdiction in its Motion to Dismiss. The defendant only

Aug. 21, 2013, ECF No. 26 ("Defendant's Motion to Dismiss"). Upon the completion of the revocation of New York Customs Ruling N187601, entitled HQ H202560 ("Revocation Letter"), the defendant argued for the dismissal of this action as moot. Def.'s Resp. to Pl.'s Mot. for Decl. J., Oct. 25, 2013, ECF No.'s 49–50 ("Defendant's Response"). Plaintiff asks this court to enter a judgment deeming the § 1625(c) sixty-day notice period for the Revocation Letter as running from October 17, 2013. Pl.'s Mot. Entry J. Order. 1, Oct. 18, 2013, ECF No. 45 ("Plaintiff's Motion"). For the reasons set forth below, Plaintiff's Motion is granted, defendant's motion to dismiss for lack of jurisdiction is denied, and the defendant's motion to dismiss for failure to state a claim is denied as moot.

Background

Plaintiff sought to compel CBP to complete consideration of a proposal to revoke New York Customs Ruling N187601 pursuant to 19 U.S.C. § 1625.

Section 1625 provides:

> (c) Modification and revocation
>
> A proposed interpretive ruling or decision which would—
>
> (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
>
> (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
>
> shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

Tariff Act of 1930, § 625, 19 U.S.C. § 1625(c)(2006).[2]

briefed the court's § 1581(h) jurisdiction. *See* Defendant's Motion to Dismiss. Despite the defendant's failure to brief all asserted avenues of jurisdiction, this court must determine for itself that it has subject matter jurisdiction over the plaintiff's cause of action.

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

Seventy days after the close of the comment period, plaintiff brought this action and sought expedited review. On August 7, 2013, the court ordered an expedited briefing schedule. Order, Aug. 7, 2013, ECF No. 20.[3] On September 20, 2013, the defendant informed the court that CBP had completed its consideration of the ruling request and that the Revocation Letter would appear in either the October 2, 2013 or October 9, 2013 *Customs Bulletin*. Def.'s Notice to Ct. and Req. for Status Conf. 1, Sept. 20, 2013, ECF No. 34 ("Defendant's Req. for Status Conf."). Plaintiff asked for an advance copy of the Revocation Letter and the defendant declined to provide one. Plaintiff then moved for an order directing the defendant to file a copy with the court. Pl.'s Mot. in Limine for an Order Dir. Def. to File Agency Det. with Ct. 1, Sept. 24, 2013, ECF No. 37 ("Pl.'s Mot. in Limine"). On October 1, 2013, the court ordered the defendant to file an advance copy of the ruling. Order, Oct. 1, 2013, ECF No. 39 ("Order to File").

However, on September 30, 2013, the Department of Justice ("Justice") requested a stay in the event of a lapse in appropriations. Dep't Justice Req. for Stay in Event of Lapse in Appropriations, Sept. 30, 2013 ("Request for Stay"). In its Request for Stay, Justice sought "a stay of all cases with deadlines between October 1, 2013, and the end of any lapse in appropriations to the Department of Justice." *Id.* at 2. On October 1, 2013, there was a lapse in Federal appropriations and parts of the Federal government shut down and did not reopen until October 17, 2013. Many government employees were prohibited from working, with limited exceptions for certain essential functions. *See* Anti-Deficiency Act, 31 U.S.C. § 1342 (2006). In response to Justice's Request for Stay, the Chief Judge of this Court entered consecutive Orders, each applicable to all actions in which the government was a party, each tolling the period for responses to Court orders during the shutdown. *See* Order re Ext. of Filing Due Dates Occurring during Lapse in Federal Appropriation, Oct. 1, 2013; Order re Ext. of Filing Due Dates Occurring during Lapse in Federal Appropriation, Oct. 11, 2013.

The government shutdown ended on October 17, 2013. Subsequently, the Revocation Letter became available through the Govern-

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[3] Pursuant to that briefing schedule, the plaintiff responded to Defendant's Motion to Dismiss but also moved to convert Defendant's Motion to Dismiss to a motion for judgment. Pl.'s Cross-Mot. J. Agency R., Sept. 5, 2013, ECF No. 29. Thereafter, the defendant moved to strike the plaintiff's motion to convert. Def.'s Mot. Strike Pl.'s Cross-Mot. for J. Agency R. and Reply Mem. in Further Supp. of Def.'s Mot. Dismiss for Lack of Jurisd. and for Failure to State a Claim upon which Relief Can Be Granted, Sept. 19, 2013, ECF No. 33. At that point the defendant informed the court that the Revocation Letter had been completed. On October 23, 2013, the court ordered the defendant to file an answer along with its response to Plaintiff's Motion and it did so on October 25, 2013. *See* Order, Oct. 23, 2013, ECF No. 47; Def.'s Answer, Oct. 25, 2013, ECF No. 48; Defendant's Response.

ment Printing Office ("GPO") website and on October 18, 2013, pursuant to the Order to File, the defendant filed under seal an advance copy of the Revocation Letter. That same day plaintiff filed Plaintiff's Motion.[4]

On October 21, 2013, the court held a telephone conference in which it asked the parties to consult with their clients and each other and to report back to the court on whether a joint application for judgment could be made. After consultation, the parties informed the court that they could not reach an agreement as to when the sixty-day notice period should begin to run. On October 23, 2013, the court issued a scheduling order for the parties to submit briefs on Plaintiff's Motion.

Discussion

Jurisdiction

This court had uncontested § 1581(i) jurisdiction[5] over the plaintiff's claim that CBP had unlawfully withheld or unreasonably delayed agency action. 28 U.S.C. § 1581(i) (2006).[6] However, in order to address the court's jurisdiction over Plaintiff's Motion it is necessary to construe the plaintiff's complaint. The plaintiff sought a "final determination regarding the proposed revocation of the Yarn Ruling, New York Customs Ruling N187601." Pl.'s Compl. ¶ 32. Plaintiff claimed that CBP had unlawfully withheld or unreasonably delayed agency action in violation of section 706(1) of the Administrative Procedure Act ("APA"). Pl.'s Compl. ¶ 1.

Plaintiff's prayer for relief adds,

> Wherefore, plaintiff Best Key Textiles Ltd. respectfully prays that this Court enter judgment in its favor, and enter an order setting a reasonable deadline for Customs to issue its final action under 19 U.S.C. § 1625 determination regarding the proposed revocation of the Yarn Ruling, *New York Customs Ruling N187601 of October 25, 2011*; and providing plaintiff with such further and additional relief as the Court may deem just.

Pl.'s Compl. 12. Defendant argues that as CBP has published its ruling there is no longer any live case or controversy and thus the court is required to deny the motion and dismiss the case as moot. Defendant's Response 1.

[4] Although the defendant filed a copy of the Revocation Letter with the court on October 18, 2013, as required by the court's Order to File, the plaintiff has conceded that the document was available to the public on October 17, 2013, when the government shutdown ended and the GPO reopened its online store for publications.

[5] *See supra* note 1.

[6] Further citation to Title 28 of the U.S. Code is to the 2006 edition.

The court has an obligation to construe the pleadings so as to do justice. *See* USCIT Rs. 1 and 8(f). One could take a narrow view of the plaintiff's complaint and find that all the plaintiff asked for was "a ruling" and not a ruling that provided the notice guaranteed by the statute and this Court. *See Am. Bayridge Corp. v. United States*, 22 CIT 1129, 1152, 35 F. Supp. 2d 922, 941 (1998) (finding that § 1625(c) notice requirements were mandatory), *vacated in part on other grounds Am. Bayridge Corp. v. United States*, 217 F.3d 857 (Fed. Cir. 1999). Plaintiff would then be forced to bring a new case before this Court seeking injunctive and declaratory relief as to when the statutorily required sixty-day notice period began to run. Doing so would be an injustice given the facts of this case and extraordinary events of the government shutdown. Alternatively, the court can, and will, construe the plaintiff's complaint broadly as including a challenge to CBP's administration of the ruling revocation process of 19 U.S.C. § 1625(c) in so far as it is inconsistent with the APA.

This court has all the powers in law and equity. *See* 28 U.S.C. § 1585. As an equitable matter, no prejudice accrues to the defendant from construing the plaintiff's claim broadly. *See Foman v. Davis*, 371 U.S. 178, 181–82 (1962). It is reasonable to expect that the defendant understood the plaintiff to have been asking not only for a § 1625 ruling *within* the time frame set by Congress, but one that also complied with congressionally-mandated period for notice. *See Am. Bayridge Corp.*, 22 CIT at 1152. *See also Former Emp. of Quality Fabricating, Inc. v. United States Dep't of Labor*, 28 CIT 679, 343 F. Supp. 2d 1272, 1285–86 (2004) (stating that "[w]hen the court sits in equity it is not limited solely to the language of the pleadings, especially when the pleadings contain prayers in the alternative."). More importantly, the defendant has made no claim that the sixty-day notice is not required, only that it has been met. In fact, the defendant in its papers referenced and relied upon these very requirements. *See* Def.'s Resp. to Pl.'s Mot. in Limine 3–4, Sept. 30, 2013, ECF No. 38 (arguing that "because a final ruling or decision pursuant to section 1625(c) only becomes effective 60 days after the date of publication, [plaintiff had] no need for an advance copy. Customs' final determination has no legal status for the purposes of section 1625(c) until publication, and that is why the agency does not typically release that determination until a publication date is known.").

Construing the plaintiff's claim as including a claim that CBP comply with all the time frames contained in the statute is reasonable. One of the purposes of § 1625 was to "provide assurances of transparency concerning Customs rulings and policy directives through publication in the Customs Bulletin or other easily accessible

source." H.R. Rep. No. 103–361, at 124 (1993), *reprinted in* U.S.C.C.A.N. 2552, 2674. Moreover, the plaintiff has aggressively sought to enforce the time frames set forth in the statute. After quickly obtaining a protective order with the defendant's assistance, it brought suit to compel CBP to issue the contested ruling approximately forty days after the decision was due. *See* Pl.'s Compl. ¶ 27 (stating that seventy days had passed since the comments period closed). It sought expedited review. Pl.'s Appl. Order Dir. Def. to Show Cause 2, Aug. 2, 2013, ECF No. 10. After the defendant timely and appropriately informed the court and the plaintiff that the ruling had been completed, the plaintiff moved to *see* it. *See* In court teleconference, Sept. 23, 2013, ECF No. 35; *see also* Pl.'s Mot. in Limine 1. One cannot complain that the plaintiff has sat on its hands. Although the unique circumstance that the government shutdown would coincide with the date of the *Customs Bulletin* could not have been anticipated by the defendant, it certainly could not have been anticipated by the plaintiff either. Thus, the court will construe the pleadings to do justice in accordance with USCIT R. 8(f) and determine that those pleadings include a claim that the defendant must give the statutorily required notice.

While the plaintiff's claim that CBP has unlawfully withheld or unreasonably delayed agency action has been mooted by the issuance of the Revocation Letter, plaintiff's claim that the Revocation Letter fails to meet the statutory notice requirements survives. The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(4) to hear this claim.

Section 1581(i) provides:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(i). Where plaintiff alleges jurisdiction pursuant to § 1581(i), the Court of Appeals for the Federal Circuit has held the plaintiff must also demonstrate the unavailability of all other jurisdictional provisions of § 1581(a)–(h), or that the remedies provided thereby are manifestly inadequate. *See, e.g.*, *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983) (*citing to United States v. Uniroyal, Inc.*, 69 CCPA 179, 182–3, 687 F.2d 467, 471 (1982)). *See also Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041, (1988). Another § 1581 basis of jurisdiction is not "unavailable" when a plaintiff could have successfully invoked jurisdiction on those grounds but merely failed to do so. *Miller & Co.*, 824 F.2d at 963. Here, no other basis of jurisdiction is available to the plaintiff.

Section 1625(c) provides Customs with a procedure to follow when it proposes interpretive rulings or decisions that would effectively modify or revoke a prior interpretive ruling or decision. The procedure is as follows: (1) the Secretary shall give interested parties an opportunity to submit comments on the correctness of the proposed ruling during a period of not less than 30 days after the date of publication of the proposed modification or revocation; (2) after considering the comments received, the Secretary shall publish a final ruling or decision in the *Customs Bulletin* within 30 days after closing of the comment period; and (3) the final ruling or decision shall become effective sixty days after the date of its publication. *See* 19 U.S.C. § 1625.

Section 1581(i) is the proper basis to challenge CBP's failure to comply with § 1625's requirements. No other subsection of § 1581 allows for such a challenge. The failure to comply with the procedural requirements of § 1625 is not a protestable decision that would sup-

port jurisdiction under subsection (a). *See* 19 U.S.C. § 1514(a).[7] While the underlying ruling may involve the classification of merchandise, the "decision" to publish that ruling is ministerial. No discretion is afforded to Customs. It must publish the decision so as to give sixty days notice. *See Am. Bayridge Corp.*, 22 CIT at 1152. A ministerial task is not a protestable decision. Moreover, in determining jurisdiction the court must look to the true nature of the claim. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed.Cir.2006) (noting that courts must therefore "look to the true nature of the action" in determining jurisdiction (*quoting Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed.Cir.1986))) (internal quotation marks omitted). Here, from the beginning, plaintiff has challenged CBP's failure to comply with § 1625's procedural requirements, not the underlying decision. In these circumstances, § 1625 is legally enforceable through the APA because CBP has acted "without observance of procedure required by law . . . . " 5 U.S.C. § 706(2)(d) (2006). Therefore while the plaintiff's claim that CBP must issue a ruling is now moot, plaintiff's claim that the Revocation Letter comport with statutory time frames with respect to notice is not, and this court has jurisdiction to decide it.

The Notice Period Began to Run on October 17, 2013

The court must determine what notice § 1625 requires. Section 1625(c) provides that, "the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period," and the effective date of such final ruling or decision is "60 days after the date of its publication." 19 U.S.C. § 1625(c). Therefore, CBP must allow sixty days notice after "publication." The court must determine what constitutes publication for the purposes of § 1625.

Fortunately, Congress made clear its intentions regarding "publication" under § 1625. Both the relevant Senate and House Reports to § 1625 provide that in order for the statute to be satisfied notice must remain publicly available in a retrievable format. "It is the Commit-

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[7] Protestable decisions include challenges to

> decisions of the Customs Service . . . as to—(1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title; (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 or section 1504 of this title; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title . . . .

19 U.S.C. § 1514(a).

tee's intent that the Customs Service will be deemed to have met its publication requirements under this section if it disseminates such information through the Customs Service electronic bulletin board if such information *remains publicly available in an accessible, retrievable format*." S. Rep. No. 103–189, at 76 (1993) (emphasis added). *See also* H.R. Rep. No. 103–361, at 124.

Here, the defendant contends that disclosure to the public was accomplished by circulating the *Customs Bulletin and Decisions*, Vol. 47, No. 41 dated October 2, 2013 ("CBP's Decision") to the U.S. Court of International Trade, the U.S. Court of Appeals for the Federal Circuit, and other destinations. *See* Defendant's Response 5. Further, the defendant maintains that a back ordered copy of CBP's Decision could have been sought by the plaintiff on September 28, 2013, on the GPO website. *See id.* Thus, the defendant argues that CBP's Decision was published for purposes of § 1625 on October 2, 2013 in the normal course.

Unfortunately, nothing about the publication of this decision was normal. While it may be the case that some members of the public who had previously subscribed to the *Customs Bulletin* would have had their issues mailed to them by a private contractor who was not affected by the government shutdown, real and continual access by the public was not available until October 17, 2013. On October 2, 2013, if a member of the public sought to access the GPO website to obtain a copy it could not. *See* App. to Def.'s Resp. Attach. 2, Oct. 25, 2013, ECF No. 50–1. The GPO website did not function in a manner that would allow a member of the public to retrieve the Revocation Letter during the shutdown. *See id.* A member of the public might have guessed that it could try to reach court libraries to obtain a copy but imposing such a burden on the public to speculate on how and where they might search out a copy of a ruling would distort the very purpose of the notice requirement, *i.e.*, easy and continuing access to information. Imposing such a burden would run afoul of Congress's desire that information "*remain[] publicly available in an accessible, retrievable format*." S. Rep. No. 103–189, at 76. *See also* H.R. Rep. No. 103–361, at 124. Ruling otherwise would not only conflict with congressional intent on the continuing accessibility of notice but it would lead to the anachronistic and inefficient result of requiring prospective importers to maintain paper subscriptions to government publications just in case the government shuts down.

This Court has all the powers in law and equity. *See* 28 U.S.C. § 1585; *see also* 28 U.S.C. § 2643(c)(1) (providing that the court "may order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, order of remand,

injunctions and writs of mandamus and prohibition”). It would be inequitable to allow the government to shorten the Congressionally-imposed notice obligations because of such an unusual set of circumstances *i.e.*, a government shutdown.

Defendant raises the valid concern that ordering the date of the *Customs Bulletin* to be other than October 2, 2013 could have effects reaching beyond the instant case and parties. *See* Defendant’s Response 13. However, the court is not holding that the *Customs Bulletin* was published on any particular date. It is only holding that the sixty-day notice period required by Congress for the Revocation Letter runs from October 17, 2013 despite the date printed on the *Customs Bulletin* in which the Revocation Letter is contained.

Conclusion

For the foregoing reasons, the Plaintiff’s Motion is granted such that the sixty-day notice period required by Congress in 19 U.S.C. § 1625(c) for the New York Customs Ruling N187601, entitled HQ H202560, must run from October 17, 2013 despite the publication date printed on the Customs Bulletin in which it is contained; defendant’s motion to dismiss for lack of jurisdiction is denied; and, the defendant’s motion to dismiss for failure to state a claim is denied as moot.

Dated: November 4, 2013
New York, New York

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